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**LEGAL ASPECTS OF ENVIRONMENTAL ISSUES
AND
EQUITY CONSIDERATIONS
IN
THE EXPLOITATION OF OIL IN NIGERIA'S NIGER DELTA**

BY

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LL.B (Hons.) (PORT HARCOURT)
LL.M (LSE, LONDON)**

*A Thesis Submitted to Kent Law School (Faculty of Social Sciences)
in fulfilment of the Requirements for the Degree of Doctor of
Philosophy in Environmental Law and Conservation
University of Kent at Canterbury, UK*

**Kent Law School
University of Kent at Canterbury
England, UK
September 2002**

ABSTRACT

This thesis examines the legal aspects of environmental and equity issues relating to oil operations in Nigeria's Niger Delta. Oil is Nigeria's chief foreign exchange earner since the early 1970s, accounting for over 90 per cent of her yearly revenue. This natural resource is presently found only in the Niger Delta region of the country, inhabited by indigenous people. The exploitation of this resource is carried on by the Nigerian State in collaboration with oil multi-national companies (MNCs), both of which reap huge revenue and profits, respectively, from the business. On the other hand, oil operations have their negative aspects: adverse environmental and social impacts, and these affect the region (and its biodiversity) and the local inhabitants.

Over the last few years, the Niger Delta people have been embarking on frequent protests against oil operations in their region, and are demanding equity. Although previous studies have examined this situation, there has been no systematic study of the environmental and equity issues of the operations, particularly from the perspective of the collective rights of the Niger Delta indigenous people. This thesis is an attempt to fill this gap. Hence, the central question of this thesis is: What is the cause (s) of the present oil-related protests in the Niger Delta? Other research questions include: What is the legal status of the inhabitants of the Niger Delta region? What are the environmental impacts of oil operations in the Niger Delta? And how beneficial have oil operations been to the region and its inhabitants? These will be considered from the perspective of international law relating to indigenous and other collective rights as well as from a socio-legal perspective.

Essentially, the thesis argues that contrary to previous studies oil-related environment protection statutes in Nigeria are defective in some respects. However,

the major reason for the persistence of oil-related adverse environmental and social impacts is the non-enforcement of relevant laws. Further, it is argued that the operations are inequitable to the Niger Delta people and contrary to their indigenous and other group rights. Lastly, it is argued that the solution to the demands of the people does not lie in token responses, such as the recent establishment of the Niger Delta Development Commission, but in addressing their demands substantively and consistent with fairness and justice, right to development and the recognized and emerging rights of the indigenous people under international law.

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Abbreviations

CCC	Compensation Claims Court
CBD	Convention on Biological Diversity
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
CSCE	Conference on Security and Co-operation in Europe
DPR	Department of Petroleum Resources
ECOSOC	United Nations Economic and Social Council
EIA	Environmental Impact Assessment
EMIROAF	Ethnic Minorities Rights Organization of Africa
HRLRA	Human Rights Law Reports of Africa
HRVIC	Human Rights Violation Investigation Commission
HRW	Human Rights Watch
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ILM	International Legal materials
ILO	International Labour Organization
IUCN	International Union for the Conservation of Nature (or World Conservation Union)
IYC	Ijaw Youth Council
LUA	Land Use Act
MNE	Multi-national Enterprises
MORETO	Movement for Reparation to Ogbia (Oloibiri)

MOSIEND	Movement for the Survival of Ijaw Ethnic Nationality in the Delta
MOSOP	Movement for the Survival of Ogoni People
MRG	Minority Rights Group
NWLR	Nigerian Weekly Law Reports
NIEO	New International Economic Order
NDDC	Niger Delta Development Commission
NNPC	Nigerian National Petroleum Corporation
OBR	Ogoni Bill of Rights
OECD	Organization for Economic Cooperation and Development
OMPADEC	Oil Mineral Producing Areas Development Commission
OSCE	Organization on Security and Cooperation in Europe
PCIJ	Permanent Court of International Justice
SPDC	Shell Petroleum Development Company of Nigeria Limited
TNC	Transnational Corporations
UN	United Nations
UNCED	United Nations Conference on Environment and Development
UNCTC	United Nations Commission on Transnational Corporations
UNEP	United Nations Environment Programme
UKTS	United Kingdom Treaty Series
UNTS	United Nations treaty Series
WCC	World Council of Churches
WCED	World Commission on Environment and Development
WGIP	(UN) Working Group on Indigenous Populations

INTRODUCTION

A. Introductory Remarks

The purpose of this introductory section is to appraise the reader from the outset with the issues to be investigated in this thesis, to indicate the methodology and to justify the research. The latter will be largely achieved by literature review. Additionally, this introductory part will explain the organization of the thesis. It is hoped that all these will help to define the direction and scope of this thesis from an early stage.

B. Research Questions

Samuel has rightly pointed out that ‘a piece of research has as its objective the discovery of knowledge. This can be achieved only through the posing of a question...[The] best way of beginning a piece of research in Social Science [such as law] consists in striving to set out the project in the form of an originating question’.¹ In other words, ‘research presupposes the existence of something to know’.² This research is focused on the Niger Delta region of Nigeria, where reports have suggested that there are prevailing and frequent protests against oil companies’ activities in the region.³ According to the reported accounts, the protests have brought about a state of tension and near-crisis in the region. Frequently, access roads to oil installations are blockaded by rampaging youths, properties belonging to oil companies (such as cars) are seized, and sometimes oil company staff are taken hostage. It is remarkable that the Nigerian economy relies virtually exclusively on receipts (revenue) from oil exploitation; so that the protests are against the livewire of the Nigerian State. For one thing, the protests may disrupt production and cause a

¹ See Samuel (2000).

² Samuel (2000).

³ Reports can be obtained from various sources in the following website: <http://www.nigeriaworld.com>

reduction in the barrels of oil produced, with the concomitant effect of reduction in oil revenue. Undoubtedly, the protests must be caused by something; but what is that 'something'? Accordingly, the originating question of this thesis is: '*What is the cause(s) of the present oil-related protests in the Niger Delta?*'. This question itself generates other major questions:

- Who are the inhabitants of the Niger Delta area, and what is their status in the Nigerian State?
- Is there any (particularly environmental) impact of oil exploitation activities in the Niger Delta? If so, how is this being addressed? How effective are the measures?
- How beneficial have oil operations been to the region and its inhabitants. Are the protesters making any demands?
- How have the protests and demands (if any), been handled by the Nigerian State? How rational, fair and effective?
- Is there a better and more effective way of dealing with the situation?

C. Significance of the Research and Methodology

The significance of this research lies in the different approach it adopts in the investigation of oil operations issues concerning the Niger Delta people of Nigeria. Compared with previous researches, as will be seen in the section on literature review below, this research adopts a combination of an international law and a socio-legal approach. The international law approach views the focal issues of this thesis from the perspective of relevant international law by utilizing relevant international instruments for the analysis. With regard to the socio-legal approach, it is designed as a tool to explore the antecedents and also to obtain relevant data directly from the

people affected by the thesis, for the purposes of analysis, which is not possible from the international law approach. As Hutter has rightly observed, 'the socio-legal focus is upon the law in context, most especially the law in social context'.⁴ More specifically, the socio-legal approach allows an excursus into the social, economic and political past of the region and its inhabitants in order to lay foundation for understanding the present situation of things presented subsequently. Furthermore, by this approach, necessary information on some aspects of the subject matter of this thesis is obtained by way of personal interviews with the local people.

It is notable that the preferred approach for this thesis is adopted for two reasons. Firstly, apart from the fact that environmental law is often and better studied from socio-legal perspective,⁵ social-legal inquiry and international law are compatible. And, as already indicated, the issues here cannot properly be dealt with conclusively by international law approach alone, which is the major approach of this research (the socio-legal approach plays a complementary role). Secondly, previous researches which had dealt with issues similar to the subject matter of this thesis, and which had adopted various approaches – such as economic, socio-legal or human rights approach – have failed to adequately and comprehensively address the issues involved. There is, therefore, a need for a brand new approach, especially as the African Commission on Human and Peoples' Rights has recently suggested that the Niger Delta people (Ogoni people of the Niger Delta region of Nigeria, to be specific) are 'people' within the meaning of the African Charter on Human and Peoples' Rights.⁶ Although the Charter is a regional/international *Human Rights* instrument (and not an exclusive *Indigenous Rights* instrument), the recognition of the 'Niger

⁴ Hutter (1999: 3).

⁵ See Hutter (1999: 3).

Delta' people as a 'people' is significant for two reasons.⁷ Firstly, because of the denial of most African countries that indigenous peoples exist in their territory. Secondly, because that decision marks a departure from international Human Rights instruments, which are often regarded as being concerned with individual, and not collective rights.⁸

Another reason for adopting an international law approach is the promise it holds to all humanity, especially those in developing countries such as Nigeria, with an unstable political system.⁹ As Franck has pertinently observed:

We are witnessing a sea change in international law, as a result of which the legitimacy of each government someday will be measured definitely by international rules and processes. We are not quite there, but we can see the outlines of this new world in which the citizens of each State will look to international law and organization to guarantee their democratic entitlement. For some States, that process will merely embellish rights already protected by their existing domestic constitutional order. For others [such as Nigeria], it could be the realization of a cherished dream.¹⁰

This thesis emphasizes the need to address the identified problems/issues in the light of accepted and emerging rights of indigenous peoples (and minorities) under international instruments. As already adumbrated, this approach is favoured because it has the capacity of focusing world attention to the region, much better than any other

⁶ See the Commissions decision on *Communication 155/96 The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights / Nigeria* (done at the 30th Ordinary Session, held in Banjul, The Gambia from 13th to 27th October 2001).

⁷ The decision, which was against the Nigerian State, probably serves as a warning to African States that minorities and indigenous peoples cannot be wished away, and that in their own interest and in the interests of international peace, they need to grapple realistically with the problems of such groups in their territory.

⁸ See Thornberry (1991: 395). On the inadequacy of universal (individual) rights to issues affecting indigenous peoples, Thornberry (1991: 395) has observed that 'many of these groups have little conception of individual rights, in land ownership or other legal institutions'. He further argued that 'without a focus on vulnerable groups [such as minorities and indigenous peoples] and a practical effort to ameliorate their position, "universal" human rights can become merely vacuous, benefiting everyone in general but no one in particular' (1991: 387).

⁹ States can hardly ignore the pressure of international opinion, especially as the world moves towards a global village. As has been rightly observed: 'Increasingly, governments recognize that their legitimacy depends on meeting a normative expectation of the community of States' (Franck, 1992: 46).

¹⁰ See Franck (1992: 50).

approach (such as human rights approach). As has been observed, 'experience has shown that the special problems facing indigenous populations cannot be adequately solved by existing international norms of human rights'.¹¹ More significantly, no previous research has addressed the subject matter of this thesis from the perspective of rights of indigenous peoples/rural communities under international law.

D. Oil in Nigeria: Literature Review

There is an extensive literature on Nigerian oil, the oil industry and oil operations in Nigeria's Niger Delta. This is probably because of the strategic importance of oil in the Nigerian economy as well as the importance of oil in world politics. However, only a few of the most important ones are reviewed here, principally because of the constraints of space. As will be seen shortly, these studies have adopted various methodologies or approaches, such as economic, socio-economic, legal, socio-legal or human rights. Even so, and quite significantly, there is yet no systematic legal study of the subject with regard to the relation of oil operations to the environment and the inhabitants of the region, particularly from the perspective of international law. This is the lacuna which this research aims to fill.

Based on available evidence, it seems the first major work on the Nigerian oil industry was Schatzl's book, which was published in 1969 – that is, 13 years after the discovery of oil in Nigeria.¹² Essentially, the study was focused on the economic exploitation of oil and gas in Nigeria. It examined the roles played by multinational oil companies, especially Shell-BP Development Company of Nigeria Limited, in the discovery and exploitation of oil in Nigeria. Moreover, the book gives a detailed account of the importance of oil in the Nigerian economy as well as the position of

¹¹ This was the observation of Norway at the fourth session of the Working Group on Indigenous

petroleum (oil) and natural gas in relation to other sources of energy in Nigeria. Perhaps as a result of its economics focus, coupled with the fact that the oil industry was relatively young at the time of its publication, the book did not discuss issues such as the environmental and social impacts of oil operations. Even so, this is a significant weakness of the book, although it may be that these issues did not arise at that time.

Schatzl's book was closely followed in 1970 by Scott Pearson's book entitled *Petroleum and the Nigerian Economy*, whose central concern was with the impact of oil on the Nigerian economy. It is a purely economic analysis of the role of oil in the Nigerian economy. In the words of the author, 'the analysis of this study is economic in nature' (p. 137). The book discusses, *inter alia*, the operations of foreign-owned companies in the Nigerian oil sector as well as their financial arrangements with the Federal Government of Nigeria, the growth of the Nigerian oil industry, and the contributions of foreign direct investment (FDI) to the Nigerian economy through oil extraction business. As already indicated, the focus of the study was economic, and not, for instance, environment. In the result, while the book shows the economic benefits of oil operations, there is no mention of the environmental and social costs of the operations. Further, although Chapter Nine deals with 'the politics of Nigerian oil' (only as a foundation for a discussion of the implications of the economic analysis of oil in Nigeria for future policy decisions), the discussion was largely centred on the distribution of oil-derived revenue between the Nigerian State and the constituent States of the Federation; the politico-legal aspect of how this distribution affects the oil-bearing communities is ignored. This important issue will be examined in the present thesis.

Peoples. See also Barsh (1986: 378).

There were a number of other (economic) studies in the 1970s and beyond. For example, Emembolu (1975), Turner (1977), and Odofin (1979). Whilst Emembolu and Odofin concentrated on the business aspects of oil operations and the impact of the oil sector on the Nigerian economy, Turner investigated the political economy of oil *simpliciter*. Further, Ihonvbere and Shaw (1988) was similarly concerned with the political economy of oil in Nigeria. More recently, Onosode (1998) focused on the 'direct and indirect effects of the oil industry on the economic development in Nigeria' in the period 1960 and 1995. Using an analysis based on the 'Dutch disease' (also called 'de-industrialization') model (an economic concept used to analyse the extent to which a boom in a particular natural resource sector – such as oil – affects the rest of the economy), he examined the impacts of the oil industry on economic development in Nigeria within the period indicated above. The main thrust of the work is the economic benefits of oil to the growth of the Nigerian economy. He concluded that 'on balance, it cannot be said that oil has completely been a curse or a blessing to Nigeria' as an entity (p. 259). His work briefly considered the 'environmental effects' of the oil industry. On this, he rightly noted that 'there is a link between economic activity and environmental degradation' (p. 54). However, there is no real attempt to explore the environmental impacts of oil extraction on the area of operations (the Niger Delta) and the link between this and the local economy of the inhabitants of the area. This is probably because the work is focused on the national economy. Even so, it leaves an important gap in respect of the effects of the Nigerian oil industry on the local economy and environment, which this thesis will attempt to fill.

¹² Oil was discovered in Nigeria in 1956.

In fact, there seems to be much interest in the political economy of oil in Nigeria, probably because of the strategic importance of oil to the world economy as well as the Nigerian economy. Amongst all, however, the recent study of Sarah Ahmed Khan, entitled *Nigeria: The Political Economy of Oil* (1994), is perhaps the most far-reaching to-date. As the title indicates, this is a study of the political economy of Nigerian oil. Interestingly, the avowed reasons for the study include the 'critical role' Nigeria has played in the 'international petroleum market on more than one occasion' (including her role during the 1990 Gulf crisis), the fact that, unlike most OPEC producers, the Nigerian oil industry has relied from the beginning on foreign direct investment (FDI), and the central role which oil plays in the Nigerian economy (pp. 1 and 2). The issues considered in this book include the role of oil in the Nigerian economy; the role of politics in oil operations; the oil-related issue of associated-gas production; and the contractual arrangements for oil operations.

On the importance of oil to the Nigerian economy, the book shows that Nigeria is dependent oil revenue. As the author puts it, oil revenue constitutes the 'backbone' of the Nigerian economy. However, while the author argues that the 'history of oil in Nigeria is one of missed opportunities, administrative disorganization, and resource mismanagement', she did not bother with the issue of how this affects the area and inhabitants of the region of operations. Regarding the role of politics in oil operations, the author discussed various political developments in Nigeria since the discovery of oil and concluded that crude oil production has largely remained unaffected by the developments, with the exception of Nigeria-Biafra civil war which caused some reduction in the level of production. However, there is no mention of the political, oil-related protests (which increasingly involves the kidnapping of oil company staff and the closure of production lines) that have

become rampant in the Niger Delta region of the country since 1990. In the result, the impacts of these in oil production as well as political stability in the country were ignored.

In the case of associated gas production, it is claimed that Nigeria has been flaring associated gas since oil exploitation began in the country. Significantly, the study notes that the phenomenon of gas flaring in Nigeria has important implications for global warming: it has caused huge damage. Never the less, there is no consideration of the implications of gas flaring for the region (Niger Delta) where the flare stacks are located. Lastly, while Khan's work discussed the contractual arrangements for oil operations between the Nigerian State and oil multinational companies (including the sharing of revenue) there is no discussion of the environmental standards for the operations. Thus, Khan's study is simply an economic, profit-oriented study of oil operations in Nigeria. This thesis will attempt to fill the gaps identified in Khan's work.

From the socio-anthropological perspective, Deborah Robinson (1996) studied the impact of oil on the Ogoni community of the Niger Delta. In fact, the research was a case study of the social and political impacts of oil operations on the community, although set in the context of the larger Nigerian State. Issues examined include the intersection of the Nigerian economy, oil revenue allocation and minority status. On this, the author found that Nigeria is 'totally dependent' upon oil revenues, which are controlled by the majority ethnic groups of the country and not used for the benefit of the Ogoni people (who are minorities in the country). While the study shows that gas flare adversely affects the community's environment, environmental issues are not central to this study. While detailing the political violence and repression that had attended protests by the Ogoni people against oil companies and the Federal

Government of Nigeria, there was no systematic attempt to deal with the causes of the protests. More significantly, apart from the fact that it is a restricted study, one other major weakness of Robinson's research lies in the fact that it is concerned largely with individual rights as against collective rights of the Ogoni people, which are arguably more important than individual rights. This is obviously the result of the methodology adopted by the author, which relies on minority rights. Unlike Robinson's work, this thesis adopts the methodology of collective rights in the study of the impacts of oil operations in the entire Niger Delta (including the Ogoni community).

Further, Ikein (1990) studied the impact of oil on a developing country, with emphasis on Nigeria. His work, which adopted socio-economic and anthropological approaches, was not exclusively devoted to the study of oil operations in the Niger Delta, although that was the focus. The work contains a discussion of the impact of extractive economies around the world. With specific regard to the Niger Delta, the author was concerned with the social and economic impacts of oil on the region and its indigenous populations; there was only a passing reference to environmental issues.

From the legal perspective, there have been a number of studies touching on the oil industry in Nigeria as well as oil-industry-related environmental issues. However, there is yet no systematic study of the environmental impact of oil operations on the Niger Delta region and the Niger Delta people, particularly from the standpoint of the collective rights of the people. A few examples will suffice.

Etikerentse (1985) studied the Nigerian Petroleum industry from a strictly legal perspective. The book focused on Nigerian statutory provisions relating to the operation of the industry, such as the issuance of licences and leases to oil companies,

the laws relating to the acquisition of surface rights by the oil companies and the prevention of oil pollution and fiscal aspects of the oil industry operations from a legal perspective. With specific regard to the prevention of oil pollution, there is no discussion of the causes of oil pollution nor are the relevant statutory provisions discussed in any detail. More specifically, there was no concern with issues of sustainable development. In the result, his book leaves a lot of gaps, particularly as respects the impact of oil operations on the environment and the issue of sustainable development. Similarly, Olisa (1987) studied the substantive law on the business operations of the oil companies, from a strictly legal perspective – analyzing relevant domestic legal provisions dealing with the business aspects of oil operations. Like Etikerentse' book, his book is not about environmental issues.

In contrast, Okorodudu-Fabara's monumental work of 1998 focused on environmental issues in Nigeria, including oil-related environmental problems. To-date, this is the most detailed legal study of environmental issues in Nigeria. However, probably because of its general outlook, environmental issues concerning the Niger Delta people did not get any specific treatment. The main thrust of the work was the treatment of legal measures for the protection of the three environmental media, viz.: air, land and water. In the same vein, there are a few legal studies on oil-related environmental problems, such as Adewale's paper entitled 'The Federal Environmental Protection Agency Decree and the Petroleum Industry' (1992). In all cases, however, the methodology adopted for the work did not permit an analysis beyond the bare legal provisions. Specifically, none of these works has examined the role of communities in environmental management.

There are quite a few socio-legal studies by non-lawyers. For example, Frynas (2000) studied conflict and litigation between oil companies and village communities

in the Niger Delta. The author explored the causes of conflicts between oil companies and village communities in the region by analysing a number of judicial decisions. He also obtained data for his analysis by interviewing a number of Nigerian lawyers. Issues treated include the working of the Nigerian legal system, with particular regard to oil-related litigation, attitude of Nigerian judges to oil-related environmental damage (on which he concluded that Nigerian Judges have a changing attitude towards this issue – they now tend to sympathize with the victims of environmental damage from oil operations, unlike hitherto (a debatable conclusion)), and the disposition of the Nigerian State towards oil companies (concluding that there is an alliance between the Nigerian State and oil companies which operates against the interests of village communities). However, although his work concerns village communities, he did not interview the people directly (and he acknowledges this himself, suggesting a need for such an approach – p. 229). Moreover, and more importantly, his study relates to individual members of the communities, and not the communities as an entity. Hence, there is no discussion of issues such as participation of the communities in oil operations and environmental management. This is obviously the weakness of his chosen methodology.

Besides, there are also few articles and papers by legal scholars from the socio-legal perspective of oil operations in the Niger Delta. A notable work is Adewale (1990). However, without exception, these works are barely concerned with legal rights of the inhabitants of the region in relation to oil operations – for example, compensation for damage.

Furthermore, there is a host of literature on oil operations from the perspective of universal human rights. Such studies include *The Price of Oil* (1999) by the Human Rights Watch, and the annual reports of Nigerian-based non-governmental

organizations (such as Civil Liberties Organization (CLO) and Environmental Rights Action (ERA)). The focus of these studies and reports is the repression or violation of universal (individual) human rights by the Nigerian State in pursuit of avowed protection of oil installations. Significantly, these studies adopt or allude to international standards for the protection of human rights in their analysis. Never the less, their focus is on individual, and not collective rights, since universal human rights protect individual and not group rights. However, especially in light of the increasing international interest in indigenous rights, a collective/group rights approach may be a better way of studying the relationship between oil operations and the inhabitants of the region and, as already indicated, this is the approach adopted in this thesis.

Most recently, Okonta and Douglas (2001) have added to the growing body of literature on issues relating to the exploitation of oil in Nigeria's Niger Delta. Beginning from the title of their book, the authors derogatorily describe the operations of oil multinationals (particularly Shell) in the Niger Delta as 'where vultures feast'. Among others, the book explored issues relating to the development of the Niger Delta region and human rights violations. Like other works before it, it found that the Niger Delta is undeveloped and the local inhabitants poor, despite enormous revenues which oil operations yield to the Federal Government of Nigeria and the huge profits that Shell oil company makes from the operations. The authors suggested that multinational oil companies (such as Shell) have a role to play in the development of the area of their operations. However, the book is not concerned with the environmental impacts of oil operations and issues of compliance with environmental standards by oil companies. These issues were only barely considered in an appendix to the book. Besides, like some previous studies (such as Frynas (2000)) this work

found that there is an alliance between the Nigerian State and the oil companies operating in the Niger Delta, which enables the companies to pursue oil exploitation from a purely economic approach. Further, from the perspective of human rights, the authors suggested that oil exploitation in the Niger Delta has resulted in gross violations of human rights by the Nigerian State, with the active support of the oil companies (particularly, Shell).

Overall, although Okonta and Douglas's book is concerned with the rights of the Niger Delta people with regard to oil operations, this is essentially seen from the perspective of individual rights. Indeed, this book may be characterized as a socio-economic and human rights study of oil operations in Nigeria, specifically from the individual perspective. In essence, apart from providing recent insights on the situation of human rights and socio-economic conditions of the local inhabitants of the Niger Delta, this book is hardly different from previous studies, for example, *The Price of Oil*, published two years earlier by the Human Rights Watch (see above).

It is remarkable that whilst these various studies have shed enormous light on aspects of oil operations in the Niger Delta, as already stated, there is a lack of systematic treatment of environmental and equity issues involved in the operations, particularly from the perspective of the collective rights of the inhabitants of the region – that is, the Niger Delta people. So that, overall, apart from Frynas's recent work, the present literature on oil in Nigeria basically deals with business, economic and human (individual) rights issues of oil operations in Nigeria, and does not address issues relating to field operations of the oil companies (such as environmental impacts of oil operations and equity aspects of oil exploitation in the home areas of indigenous people/rural communities); even Frynas's work has its limitations as indicated above. As previously indicated, the objective of this thesis is to fill the yawning gap in

literature as regards environmental and equity issues, and specifically from the perspective of collective rights. To achieve this, a new approach – a combination of an international law and a social-legal approach (see above) – will be adopted. Unlike previous methodologies on the subject matter, this double-decker approach will allow the analysis of the subject matter from the angle of field operations and in relation to the collective rights of the rural communities where the operations take place.

E. Organization of the Thesis

As already indicated, this thesis is concerned with an analysis of legal issues relating to oil exploitation in the Niger Delta as well as equity aspects of the operations in rural communities. In order to ensure a coherent analysis and presentation, this thesis is organized in Chapters, and there are six Chapters. In Chapter 1, recognizing that the focal issues of the study are intertwined with the history of the region and its inhabitants, this thesis examines the antecedents of the Niger Delta region and its inhabitants, including how the region became part of the Nigerian State. Specifically, the idea is to determine whether the Niger Delta people are indigenous people in Nigeria, as they appear to be claiming and as recently suggested by a decision of the African Commission on Human and Peoples' Rights. Overall, it is hoped to find a basis on which an international law-based analysis will ensue.

Since oil is the central issue of this thesis, Chapter 2 starts with an historical account of the evolution of oil in Nigeria, as well as data showing the centrality of oil in the Nigerian economy. The Chapter also examines the issue of ownership of oil in Nigeria and the question whether Nigerian law is in conformity with established and emerging rights of indigenous people under international law, as the investigation in Chapter 1 concluded that the Niger Delta People are indigenous people in Nigeria.

This is important in order to determine whether Nigerian domestic law plays any role in the prevalent oil-related protests in the region. Moreover, this Chapter lays foundation for the subsequent analysis of the environmental and equity aspects of oil operations in the Niger Delta region.

Chapter 3 investigates the adverse environmental and socio-economic impacts of oil operations in the Niger Delta region. Here, following a socio-legal approach, the results of field survey by the author are presented alongside findings in existing literature. The Chapter concludes with case studies of the adverse impacts of oil operations, utilizing judicially decided cases for the analysis. In essence, this Chapter demonstrates the hazardous nature of oil operations and the environmental and social consequences of oil operations in the Niger Delta region. More importantly, the germ of the prevalent oil-related protests in the region may be discovered in this Chapter, which further lays foundation for analysing the equity aspects of oil operations in the Niger Delta.

A discussion of the adverse environmental and socio-economic impacts of oil operations in the region prepares the ground for the consideration of Nigerian environmental protection statutes in Chapter 4. The Chapter discusses issues such as Nigerian National Policy on the Environment, oil-related environmental protection statutes, the role of oil companies in environmental protection, and the enforcement of oil-related environmental standards in Nigeria. This discourse is necessary in order to evaluate the intensity of the adverse environmental and socio-economic impacts discovered in Chapter 3. Like Chapter 3, this Chapter also serves as a background for the next Chapter – that is, Chapter 5, which deals with the issues of equity in oil operations in the Niger Delta. Essentially, ‘equity issues’ here are concerned with the investigation of the beneficial aspects of oil operations to the Niger Delta region and

the Niger Delta people, and involve the analysis of certain indicators – such as compensation, development and employment. At the end, it is hoped that the relation of environmental aspects of oil operations to the issues of equity in the operations among rural communities will finally provide the answer to the originating question of this thesis.

Chapter 6 is the concluding Chapter, and it contains the findings of the study, recommendations for tackling problems identified in the study, a discussion of the future of the Niger Delta region and the people as well as directions for future research.

CHAPTER 1

NIGER DELTA, THE PEOPLE AND THE NIGERIAN STATE

Year after year we were clenched in tyrannical chains and led through a dark alley of perpetual political and social deprivation. Strangers in our own country! Inevitably, therefore, the day would have come for us to fight for our long denied right to self-determination.

- Isaac Boro: *The Twelve-Day Revolution*¹

*[It] was through British colonisation that the Ijaw nation [Niger Delta] was forcibly put under the Nigerian State...[But] for the economic interests of the imperialists, the Ijaw ethnic nationality would have evolved as a distinct and separate sovereign nation, enjoying undiluted political, economic, social, and cultural Autonomy.*²

- Kaiama Declaration, 11 December 1998

I.1. Introduction

This thesis is concerned with environmental and equity issues relating to the exploitation of oil resource in the Niger Delta region of Nigeria. These issues appear to be intertwined with the history of the people of the Region and their status.³ Hence, in this first Chapter, the primary concern is to isolate this region in the Nigerian

¹ Quoted in the Annual Report of the Civil Liberties Organization (CLO) (1998: 199). This was the statement of Isaac Boro, the first revolutionist in the Niger Delta, who declared a short-lived 'Niger Delta Peoples Republic' in 1966. For an account of this, see Dappa-Biriye (1995: Appendix 3).

² Made by Ijaw Youths of the Niger Delta (with the support of their elders). The Ijaw ethnic group is the single largest ethnic group in the Niger Delta and may well be considered in some respects to be speaking for the region. What is more, there is evidence of general acceptance of the Declaration to all the ethnic groups and interests within the region. See Annual Reports of the Civil Liberties Organisation, especially 1999. See also < <http://www.africapolicy.org/docs99/odi9912.htm> > (Visited 03/09/01), where the Ikwerre Solidarity Congress, Niger Delta Women For Justice, Bayelsa Youth Development Foundation (BSYDF), *inter alia*, endorsed it.

³ As has been rightly observed: '[T]he crises in the Niger Delta...have their root in the historical political alienation, economic deprivation, environmental devastation, physical brutalisation and psychological traumatising of the people by an oppressive Nigerian State and exploitative multinational Oil Corporations'- Statement issued by a coalition of Non-governmental Human Rights Groups operating in Nigeria (See < <http://www.africapolicy.org/docs99/odi9912.htm> - Visited 03/09/01).

context and to study the ethnic characteristics and the politico-legal status of its people. In this regard, the inquiry will range from the pre- to the post-colonial times. Specifically, this Chapter would consider the following issues: formation of the Nigerian State (to show how the Niger Delta became a part of the country); definition of the Niger Delta; ethnic composition of the Niger Delta; pre-colonial socio-political organisation of the Niger Delta people; pre-independence fears of the Niger Delta people and the response of the British colonialists; post-independence developments (including the present legal-politico status of the Niger Delta people). The issue of the present status of the Niger Delta people will address the question whether they are minorities and/or indigenous people in Nigeria, as the African Commission on Human and Peoples' Rights had recently suggested.⁴ This would properly and invariably entail an excursion into International Law. Remarkably, the findings of this Chapter will provide the background and context for the exploration of the focal issues of this thesis.

1.2. Birth of Nigeria: A Brief Historical Account

Like many States in Africa, Nigeria was a British creation. According to historical accounts, the British and other European colonial powers were originally attracted to the area now constituting Nigeria and other parts of West Africa by the prospect of trade.⁵ As one commentator could say, the history of modern West Africa is largely the history of five centuries of trade with European nations; 'commerce was the

⁴ See *Communication 155/96 The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights / Nigeria* (Done at the 30th Ordinary Session, held in Banjul, The Gambia from 13th to 27th October 2001). In its decision in this communication (case), the Commission observed: 'Clearly, collective rights, environmental rights, and economic and social rights are essential elements of human rights in Africa' (at Para. 68). (I am extremely grateful to my supervisor, Wade Mansell, for drawing my attention to this landmark decision and making the transcript available to me).

⁵ Niven (1952: 136 – 142).

fundamental relationship that bound Africa to Europe'.⁶ The earliest trading contact was between the 15th and 16th centuries and at that time the predominant trade was in pepper, gold, ivory and palm oil. During the 17th and 18th centuries, slave trade predominated (Dike, 1956: 1). In early 19th century, slave trade was made illegal by various European powers⁷ and this led to a return to the so-called legitimate trade of the earlier years.

Prior to the abolition of slave trade, the British and other European traders did not get involved in the political life of the people; their contact with them was merely occasional. However, it appears the need to enforce the abolition of slave trade and explore better trading strategy dictated a change in policy towards a more permanent contact. Onwuamaegbu points out that the the most significant landmark in the attempt to establish a more permanent contact were in:

- (i) 1849, when an English trader, John Beecroft, was appointed consul for the Bights of Benin and Biafra with headquarters at Fernando Po – an Island south of Nigeria;
- (ii) 1862, when Lagos was annexed as “colony and settlement of the Crown”; and
- (iii) 1891, when effective steps were taken for the establishment of a system of government over the coastal districts extending from the west of the Niger Delta to the Cameroons.⁸

Before its annexation in 1862, Lagos had been ‘ceded’ to the Crown in 1861. It was established as a British colony in 1866. By 1897, the whole of the Yoruba-land had been annexed to Lagos as its Protectorate. Sources indicate that the coastal

⁶ Dike (1956: 1). A British author also made the point well, when he wrote: ‘The British Empire was founded first of all upon trade...It was trade, first and foremost, that took Englishmen to West Indies, to Africa, to India, and Malaya and the Far East. This is a fact, not open to debate, and it is in my view very foolish of Englishmen to feel in any way ashamed of it’ (Simmons, 1952 – quoted in Dike, 1956: 1).

⁷ For example, slave trade was declared illegal by Denmark in 1802. In 1807 an Act of the British Parliament was passed, prohibiting the carriage of slaves in British ships and the landing of ships carrying slaves in British colonies. A further British Act of 1811 made slave trade a crime, and it was declared a piracy and abolished in British West Indies in 1834. See Niven (1952: 143). See also Burns (1948: Chapter VI); Lady Lugard (1905: 222- 355).

⁸ Onwuamaegbu (1975: 340 - 341).

districts of the country now known as 'Nigeria' were declared 'Oil Rivers Protectorate'⁹ (i.e. the present Niger Delta region) in 1886 (Ekundare, 1973),¹⁰ and by an Order-in-Council of 1893 this Protectorate was extended to the hinterland and renamed 'Niger Coast Protectorate'.¹¹ In the same year, a number of British companies around the Niger River had amalgamated into the Royal Niger Company,¹² and had received a Charter, which empowered them to 'administer, make treaties, levy customs duties and trade in all territories in the basin of the Niger and its affluent'. The immediate effect of this was to bring the northern territories of the 'country' under the influence of British traders (Ekundare, 1973: 12). Recognising the potential problems of administering people of different cultures together, the Charter provided:

Careful regard shall always be had to the customs and laws of the class, tribe, or nation to which the parties respectively belong, especially with respect to the holding, possession, transfer, and dispossession of lands and goods, and testate or intestate and other rights of property and personal rights.¹³

As time went by, numerous 'treaties' were concluded with the Kings, Chiefs and other local leaders of the nation-states, either on behalf of the Crown or on behalf of the Company. Sources indicate that in some cases, the Kings or Chiefs were coerced to enter into 'treaties' after they had been defeated in a war of resistance to British incursion into their Kingdoms. In late 1899, the British government revoked

⁹ The oil referred to here was palm oil, and not crude oil, which had not been discovered then. Palm oil was an important item of trade then between the Niger Delta people and European buyers. See Dike (1956).

¹⁰ Contrary to this, Burns (1948: 145) claims that the 'British claim to Nigeria was recognized by the [Berlin] Conference [of 1885], and a notification was accordingly published in the London Gazette of the 5th of June 1885, declaring the establishment of a protectorate [ie the Oil Rivers Protectorate] over the "Niger Districts".' According to him, 'for the next six years the Oil Rivers Protectorate existed only on paper; nothing being done to make it really effective...' To the present author, it is not material whether the Oil Rivers Protectorate was established in 1885 or 1886; for the present purpose, at least, what is important is the fact that it was the act of British colonialists.

¹¹ Onwuamaegbu (1975: 341).

¹² Formerly called National African Company Limited.

the Charter of the Royal Niger Company, proclaimed the area the 'Protectorate of Northern Nigeria',¹⁴ and assumed direct control and administration thereof.¹⁵ At the same time the 'protectorate of Southern Nigeria' was created to replace the Niger Coast Protectorate.¹⁶ Regarding the name 'Nigeria', there is evidence¹⁷ to indicate that it was first suggested by a newspaper correspondence, thus:¹⁸

It may be permissible to coin a shorter title for the agglomeration of pagan and Mohamedan States which have been brought by the exertions of the Royal Niger Company within the confines of the British protectorate and thus for the first time in their history be described as an entity...The name 'Nigeria' applying to no other portion of Africa may, without offence to any neighbours, be accepted as co-extensive with the territories over which the Royal Niger Company has extended British influence, and may serve to differentiate them from the British colony of Lagos and the Niger protectorate on the coast and from the French territories of the Upper Niger.¹⁹

The expression 'and may serve to differentiate them from the British colony of Lagos and the Niger protectorate on the coast' clearly indicates that the suggestion was limited to the tribes outside the colony of Lagos and the Niger protectorate, i.e. the northern parts of the present day Nigeria. However, as the proclamation of 1899 shows, the British did not only accept the suggested name, they applied it to all its possession comprising the present-day Nigeria, only differentiating them according to whether they were in the southern or northern part.²⁰ Yet the Nigerian State was not born at this stage. In 1906, the Colony and Protectorate of Lagos were amalgamated with the Protectorate of Southern Nigeria to form a new Protectorate of Southern

¹³ Quoted in Onwuamaegbu (1975: 341, footnote 10).

¹⁴ See Order-in-Council of 27th December 1899.

¹⁵ The new administration commenced on 1 January 1900.

¹⁶ Ekundare (1973: 12).

¹⁷ Meek (1957: 7).

¹⁸ Miss Flora Shaw who later became Lady Lugard. Frederick Lugard was the first governor of Northern Nigeria and, later, of Nigeria.

¹⁹ *The Times*, Friday 8th January 1897, page 6 para. 3.

²⁰ That is Northern Nigeria and Southern Nigeria.

Nigeria. And in 1914, the Northern and Southern Protectorates were amalgamated to become Nigeria (Ekundare, 1973: 12).

Omoruyi has pointed out that the plan to amalgamate the two protectorates to become the Nigerian State was hatched in London, without consulting the rulers and peoples in the two territories.²¹ He cited the (in) famous after dinner speech of Lord Harcourt (made on 17 June 1913 in London) in support of his conclusion:²² ‘We have released Northern Nigeria from the leading strings of the treasury. The promising and well-conducted youth...is about to effect an alliance with a southern lady of means...I have issued the special license and Sir Frederick Lugard will be performing the ceremony. May the union be fruitful’.²³

From the foregoing piecemeal process, it is clear that the Nigerian State is a conglomeration of several ethnic groups. As one observer has rightly said:

It should be remembered that no such entity as ‘Nigeria’ existed until 1914. It was the creation of the British government, partly inspired by the desire to save expense. The peoples who inhabited the region now known as Nigeria had always lived in separate and often contentious societies.²⁴

The author further made the following important observation:

[W]hen, late in the nineteenth century, the British claimed suzerainty over those lands which now comprise Nigeria, they were not annexing

²¹ This point is borne out by the following statements, made by some important leaders of the majority ethnic groups in Nigeria: (1) ‘Nigeria is not a nation; it is a mere geographical expression. There are no “Nigerians” in the same sense as there are “English”, “Welsh”, or “French”. The Word “Nigeria” is merely a distinctive appellation to distinguish those who live within the boundaries of Nigeria from those who do not’ (Awolowo, 1947: 47 - 48); (2) ‘[Since amalgamation]..in 1914, Nigeria has existed as one country only on paper...[I]t is still far from being united. Nigerian unity is only a British intention for it’ (Balewa, 1947: 208); (3) ‘The mistake of 1914 has now come to light’ (Bello, 1953). These quotes appear in Olukoju (1997: 12; Okpu, 1977: 19). Apart from indicating the non-consultation of the people before the merger, the statements also demonstrate the degree of resentment of the various peoples to the merger. Whilst there is evidence that the Niger Delta people still resent the merger, it is doubtful if the majority ethnic groups still consider the merger as a ‘mistake’, since oil resource of the minority Niger Delta people sustains the country.

²² Omoruyi (1996: 6).

²³ Cited in Kirk-Greene (1968: 30).

²⁴ Hatch (1971: 12). See also, Okafor (1997: 1), where the author stated: ‘Before 1914, there was no entity known as Nigeria. The various ethnic and cultural groups that now make up Nigeria existed [for centuries] as autonomous political entities, having their own political systems, social and religious values. Nigeria is thus an amalgam of many ethnic nations’.

a 'country', a 'nation' or a 'state'. Britain negotiated with the French and Germans certain colonial frontiers; within this area lived many different societies, speaking no common language, following no common religion, and sharing no common culture. Britain imposed her authority over them, creating certain administrative institutions to exact that authority. In 1914 all these varied societies were declared by Britain to be members of a single state named 'Nigeria'.²⁵

As could have been observed, the Niger Delta people were among the ethnic nations included in the British-created Nigerian State. It was this agglomeration of over 250 ethnic groups,²⁶ dominated by three major ethnic groups (the Hausa/Fulani in the North, the Yoruba in the West, and the Ibo in the East) which was granted independence in 1960,²⁷ without due regard to the separate and pre-colonial independent existence of the various ethnic groups/nation-states. This fact, in addition to other factors including regionalization policy and the attitude of members of the majority ethnic groups, created ethnic minority problems in the country and instilled fears in the minority ethnic groups. As it happened, the Niger Delta people became one of the ethnic minority groups in the new country. The process of 'minorisation' is interesting and would be briefly explored later in this Chapter. Meanwhile, the next section shall be concerned with the location and the ethnic composition of the Niger Delta in the Nigerian State.²⁸

²⁵ Hatch (1971: 14).

²⁶ Tamuno (1970: 564).

²⁷ Mutua argues that in this situation, self-determination was exercised, not by the victim of colonisation but by the coloniser. See

²⁸ On the geographical location of Nigeria and its total land mass, a recent World Bank report states: 'Nigeria is situated in West Africa bordering the Sahel desert in the north and the bight of Benin in the South...The total land area is about 91.1 million hectares...' (World Bank, 1990: 11). Nigeria is the most populous African country, and its population is presently estimated at 120 million. Population census has always been a contentious issue in the country since independence in 1960. The last census was conducted in 1991.

1.3. Niger Delta: The Area and the People

The concern of this section is with the description of the Niger Delta and its people. The importance of this lies in the fact that the subject matter of this thesis affects both the area and its People. Yet, as will be seen below, the constituent parts of this Region have become a subject of debate in recent times. In this situation, it is difficult to identify the people involved, especially, for the purposes of the determination of their status in the Nigerian State. Hence, it is important to pinpoint the exact area within the purview of this thesis. Besides, it is important to show from the outset that the scope of this thesis is beyond Ogoniland, which is popularly, but erroneously, regarded as synonymous with the Niger Delta.²⁹ In order to achieve the objective of this section, the following issues will be discussed: the geographical definition of the Niger Delta, other definitions of the Region, and, lastly, its ethnic composition. These shall be considered seriatim.

1.3.1. Geographical Definition of the Niger Delta

It should not be difficult to define the location of the Niger Delta. However, as will be seen shortly, perhaps due to political and economic reasons, there is some dispute as to the limits of the Niger Delta. This sub-paragraph outlines the geographical definition of this area as accepted by many, especially the Niger Delta people.

According to available geographical statistics, the Niger Delta has its apex at a place called Aboh.³⁰ It is below this point that River Niger bifurcates into its two main distributaries, that is, Rivers Nun and the Forcados. Available evidence also indicates that the southernmost tip of the Delta is at palm point, south of Akassa, and at the

²⁹ Most previous research on the Niger Delta centred on Ogoniland, and most authors have erroneously equated this to the Niger Delta. This section will show that the Ogoni people are only a part of the Niger Delta.

³⁰ See Niger Delta Environmental Survey (1997), Vol. 1, 4 (hereinafter NDES, 1997).

estuary of River Nun.³¹ The entire Region extends from the Benin River in the west to Imo River in the East.³² In other words, the Niger Delta may be described as a lowland located at the southern part of Nigeria. Dike accurately and vividly described the location of the region thus:

From Lagos to the Cameroons lies the low country of the Nigerian coastal plain. The Niger Delta occupies the greater part of this lowland belt and may be described as the region bounded by the Benin river on the west and the Cross river [and Imo river] in the east, including the coastal area where the Cameroon mountain dip into the sea.³³

Similarly, in one of the most recent studies of Nigeria, the Niger Delta is described as a triangle with its apex between Ndoni and Aboh, descending eastwards to Qua Iboe River³⁴ at Eket and westwards to the Benin River with its base along the Atlantic coast between the bights of Benin and Biafra.³⁵

It is notable that a conspicuous feature of the Niger Delta is its network of Rivers. It has been described as a floodplain built up by the accumulation of sedimentary deposits washed down Rivers Niger and Benue, some 40-50 million years ago.³⁶ The major River of the Region is the Niger, which has two main distributaries, viz. Rivers Nun and Forcados, and a myriad of smaller and shallower distributaries which end up in creeks and estuaries, characteristic of the tidal flood plain and coastal front of the delta.³⁷ The hinterland of this Region is drained mainly by the Ase and Ethiopie River Basins in the west and the Orashi *and* Sombreiro River

³¹ NDES (1997: 4).

³² NDES (1997: 4).

³³ Dike (1956: 19).

³⁴ Qua Iboe River is actually the Cross River; the change in description of this River might have been the result of the creation of Akwa Ibom State in 1991, from the Cross River State.

³⁵ See International IDEA (2000: 142).

³⁶ NDES (1997:4).

³⁷ NDES (1997: 22).

Basins in the east.³⁸ There are other river systems (running more or less parallel to River Niger), which drain the coastal plains to the west and east of the Niger Delta, and link the network of distributaries, creeks, streams, and estuaries, that make up the Niger Delta. In terms of landmass, the total land area of the Region is approximately 25, 900 Km or approximately 2.8 per cent of Nigeria's total land area.³⁹

1.3.2. Other Definitions of the Niger Delta

In recent times, other definitions of the Niger Delta have emerged and this appears to be largely the result of the importance which the natural resources (especially oil) of the region have acquired in the Nigerian economy. According to a recent study, political and economic considerations have interjected to raise what is otherwise a mundane question:⁴⁰ 'what are the constituent parts of the Niger Delta?' The controversy is such that a recent report surmises: '[T]here is no consensus on the definition of the Niger Delta, even among the recognised spokesmen of the region'.⁴¹ There is some evidence that this is the by-product of the politics of oil revenue.⁴² A few of the divergent views on the question are briefly stated here.

Some people define the Niger Delta as the six states of the so-called south-south zone of Nigeria, namely Akwa Ibom, Bayelsa, Cross River, Delta, Edo, and Rivers States. This generally coincides with the geographical definition of the region. Others make a distinction between the 'core' and the 'peripheral' Niger Delta. The 'core' Niger Delta are said to be, in order of importance, Rivers, Delta, Bayelsa, and,

³⁸ World Bank (1995: vi).

³⁹ NDES (1997: 4).

⁴⁰ NDES (1997: 7).

⁴¹ International IDEA (2000: 142).

⁴² In most recent time, the Niger Delta people made this point in the memorandum they submitted to the Commission set up by President Obasanjo's government (Oputa Commission/Panel) to investigate human rights abuses in the country from 1966 to 1999. (See Chapter 5 for the other claims made by the people before the Commission). The politics of oil revenue is considered in Chapter 5.

to some extent, Akwa Ibom, States; the periphery comprises Ondo, Anambra, Edo, Cross River, and Imo, States.⁴³ Against these views, there is an elastic school, which contends that all the groups in both the 'core' and 'peripheral' areas belong to the Niger Delta Region.⁴⁴ All these views have been described as political (and economic) definitions of the Niger Delta. Commenting on such definitions, a recent report pertinently said:

In recent decades, the definition of the Niger Delta has been bedevilled by politics. This was not so before the ascendancy of crude oil in the Nigerian economy. In the colonial and early independence periods, the Niger Delta was more or less coterminous with Ahoada, Degema, Opobo, Ogoni, Brass, Western Ijaw and Warri Divisions.⁴⁵ The agitation during and after the colonial era had always been for the creation of a distinct political region in this area in order to allay the fears of ethnic domination by more populous ethnic groups. But, since the oil boom era of the early 1970s, the definition of the Niger Delta, which has tended to connote some proprietary rights over the oil wealth, has become highly politicised. Political boundaries suddenly have assumed great significance because of their importance in determining which States and local government fall among the 'oil producing areas' of Nigeria with all its implications for revenue sharing. At various times in the recent political history of Nigeria, squabbles over the oil wealth have led to agitation for boundary adjustments between States and for the creation of local governments even within the States in the Delta region.⁴⁶

Another variant of the political definitions is even more sweeping, as it considers the Niger Delta to be synonymous with oil-producing areas. By this definition, the boundaries of this region may be described as indeterminate,⁴⁷ and appears to extend laterally along the coast to include the coastal creeks and lagoon zones to the west and east of the delta where there are oil and gas producing fields

⁴³ There are presently 36 States in the Federation of Nigeria, viz.: Abia, Adamawa, Akwa-Ibom, Anambra, Bauchi, Bayelsa, Benue, Borno, Cross River, Delta, Ebonyi, Edo, Ekiti, Enugu, Gombo, Imo, Jigawa, Kaduna, Kano, Katsina, Kebbi, Kogi, Kwara, Lagos, Nasarawa, Niger, Ogun, Ondo, Osun, Oyo, Plateau, Rivers, Sokoto, Taraba, Yobe, and Zamfara.

⁴⁴ For these conflicting views, see International IDEA (2000: 142). See also, NDES (1997: 7).

⁴⁵ There was no dispute over the extent or definition of the Niger Delta before the Willink Commission that enquired into the fears of Nigeria's minorities in 1957-58. See the *Report of the Commission Appointed to Enquire into the fears of Minorities and means of Allaying them* (Cmnd. 505, 1958).

⁴⁶ NDES (1997: 7).

(both offshore and onshore).⁴⁸ This view probably influenced the debate on the recently enacted Niger Delta Development Commission (Establishment, Etc.) Act 2000 (NDDC Act) , and possibly shaped the final 'definition' of the Niger Delta under the Act.

At the stage of Bill, the NDDC Act was called *Niger Delta and Oil Minerals Producing Areas Commission*. At that stage, 'Niger Delta' was defined to mean, 'the States covered by the delta formed by the River Niger and its branches as it enters into the Atlantic Ocean, presently comprising Akwa Ibom, Bayelsa, Delta, and Rivers States'.⁴⁹ In the same Bill, the expression 'Member States of the Commission' was defined to 'include' Abia, Akwa-Ibom, Bayelsa, Cross River, Delta, Edo, Imo, Ondo, and Rivers states.⁵⁰ This suggests a distinction between the 'Niger Delta' and 'Oil Mineral Producing Areas', although, as could be observed, the latter includes the former.⁵¹ It is important to observe that the definition of 'Niger Delta' under this Bill accords with one of the views stated above. However, the final law, which eventually emerged as the NDDC Act 2000, excised the definition of the Niger Delta from the original document and did not replace it with another. But it retains the definition of 'Member States of the Commission' as stated above, with a modification that says 'and any other oil producing State'.⁵² The implication appears to be that the Niger Delta is synonymous with oil producing areas/States. Also, it can be said that by the modification the boundaries of the Niger Delta are indeterminate. In the result, the meaning of 'Niger Delta' under the NDDC Act is the latest illustration of political definition of this region.

⁴⁷ NDES (1997:7).

⁴⁸ NDES (1997:7-8).

⁴⁹ NDDC Bill, Section 30.

⁵⁰ NDDC Act, Section 30.

⁵¹ There was no express definition of 'oil mineral producing areas' in the bill.

⁵² NDDC Act, Section 30.

According to a recent study of the Niger Delta, the problem with political definitions such as this is that it can complicate issues by creating social and political problems, just as indeterminate boundaries can complicate environmental management schemes.⁵³ On the contrary, geological and geographical definitions of the Niger Delta are very useful for environmental monitoring purposes. 'This is because environmental processes do not obey political or artificial boundaries but rather, they operate within well-defined natural units or geological units'.⁵⁴ For the present purposes, the 'Niger Delta' is the region covered by Rivers, Delta, and Bayelsa States, and its people are the indigenous inhabitants of these States. This is in accord with both the geography of the region and the history of the people.⁵⁵

1.3.3. Ethnic Composition of the Niger Delta

There is abundant evidence that the Niger Delta people are not a homogenous entity, although they have common interests and problems; there are different ethnic groups within the region. According to one writer, an 'ethnic group' is a 'communal entity which possesses certain common objective factors such as name, language, myth of common descent, culture, socio-political organisation, and a "homeland", all of which provide the basis for a subjective separatist definition as an in-group vis-à-vis an out-group (the "us" and "them" subjective distinction)' (Osaghae, 1986: 151). From this definition, the differentiating features of ethnic groups can be identified thus: name, myth of common descent, culture, socio-political organisation, a 'home-land', and language. Of all, it seems language is the most important. According to one observer:

Members of any speech community that share one language usually have a feeling of belonging to a particular ethnic group, and all other

⁵³ NDES (1997: 7).

⁵⁴ NDES (1997: 7).

⁵⁵ For the history of the Niger Delta people, see Dike (1956). See also Ikime (1968).

speech communities with which direct linguistic communication is impossible are automatically regarded as alien. It may, in fact, be the case that the 'aliens' have many non-linguistic features in common with the group, but once they are separated by language, other similarities are almost obliterated. *Language, then, is a magnetic force, binding a speech community together, since it provides a means of identifying its members as belonging to a specific group.*⁵⁶ (Italics mine).

Admittedly there are conceptual difficulties in using language as a sole criterion in differentiating ethnic groups. For example, as Osaghae points out, most language groups are amalgamations of numerous dialects, which make it difficult which language (dialect or generic) actually constitutes the ethnic group. Besides, even where two languages are similar the peoples may have different cultural practices and myths of common descent, which could make them, consider themselves different (Osaghae, 1986: 152).⁵⁷ Nevertheless, scholars seem to agree that, to-date, language remains the single most important variable in the differentiating features of ethnic groups.⁵⁸ Thus the ethnic composition of the Niger Delta shall be considered here from the linguistic viewpoint.

Like the 'Niger Delta region', there is no agreement on the ethnic composition or characteristics of the 'Niger Delta'. Some people see the Niger Delta as a rainbow coalition of numerous ethnic nationalities. Others have argued that there are three aboriginal groups, namely the Ijaw, a number of 'Edoid' groups and the Ibibio, with the rest made up of protestants and refugees fleeing from the harsh rule of the Benin kingdom. These two views are reflected in a recent report touching on the Niger Delta area.⁵⁹ What emerges from the contending views is that the Niger Delta region is not

⁵⁶ Quoted in Osaghae (1986: 152).

⁵⁷ Osaghae suggests that one way of overcoming the conceptual difficulties involved in using the language criterion alone is to consider the myth of common descent in addition. (Osaghae, 1986: 152).

⁵⁸ See Osaghae (1985). See generally, NDES (1997:143).

⁵⁹ International IDEA (2000: 142-3).

made up of a homogenous set of people. This conclusion finds support in the following observation:

The people of the Niger Delta are currently identified under five major linguistic categories: Ijoid, Yoruboid, Edoid, Iboid, and Delta Cross. *Each of these categories embraces a large number of ethnic/linguistic communities, most of which extend beyond the boundaries of the Niger Delta.*⁶⁰ (Italics mine).

It is quite simplistic to assert that the Niger Delta is a poly-ethnic region; some identification of the various peoples is important, at least to illustrate the diversity. In order to identify some of the ethnic groups that make up the Niger Delta, it is proposed to briefly examine each of the five linguistic groups mentioned above.

(a). Ijoid

The *Ijoid* group is the Ijaw-speaking people (ethnic community) of the Niger Delta. Sources suggest that they were the earliest settlers in the area. Analysis of their oral traditions of origin indicates that they believe Benin to have been their ancestral habitat (Dike, 1956: 21). Significantly, some authors have successfully traced the Benin origin of some Ijaw towns, and therefore largely confirmed this belief.⁶¹ However, Talbot (one of the greatest authorities on the history of the Niger Delta Peoples) appears to dispute this claim. To him, the Ijaws were driven to their present home by the 'coastward-moving Ibos'. But he frankly admits that apart from this 'conjecture' their origin is wrapped in mystery: 'The Niger Delta, therefore, is, with the exception of a few small tribes, occupied by these strange people (the Ijaw) – a survival from the dim past, beyond the dawn of history – whose language and customs are distinct from those of their neighbours (the Ibos) and without trace of any

⁶⁰ NDES (1997: 143).

⁶¹ Leonard (1906: 17 – 47); Hubbard (1953).

tradition of a time before they were driven southward into those regions of sombre mangrove.’⁶²

Talbot’s views came under attack by a scholar who condemns him for neglecting to trace Benin sources for the origin of the Ijaw People: ‘Dr. Talbot, whose contributions to Delta studies are indisputably great, strangely overlooked the fact that the clue to the early Ijaw migrations might be sought for, not only among the Ibos – with whom they appear to have had a little relation until about the middle of the sixteenth century – but also in the kingdom of Benin’ (Dike, 1956: 23). It is arguably difficult to say with certainty the exact place of origin of the Ijaws (and for that matter, many other ethnic groups in the world); members of an ethnic group could have come from different places at different points in time. In the case at hand, there is evidence of pre-fifteenth century migrations from Benin and post-fifteenth century migrations, possibly from other places: ‘The most important movement of populations occurred between 1450 and 1800. This second wave of migration followed the development of the slave trade and involved all the tribes to the Delta hinterland; it was a movement in which the Ibos, being numerically superior, were predominant’ (Dike, 1956: 24).

One of the most recent studies on the Niger Delta people appears to recognise the difficulty of being exact on the origin of the Ijaw people (by far the largest ethnic community in the Niger Delta). It concludes that the Ijaw-speaking people (Ijoid) are presumed to have separated from the *Yoruboid* (Yoruba-speaking people), the *Edoid* (Edo-speaking people), and the *Igboid* (the Ibo-speaking people), and to have moved

⁶² Talbot (1932: 5). Cf. Talbot (1926), esp. Vols. II & I. It is curious that, whereas Talbot recorded Ijaw oral traditions in these earlier works, he did not make use of them in his later work of 1932. Moreover, he also ignored the earlier work of Leonard published in 1906, which also contains the oral history of the Ijaws.

into the Niger Delta over 7,000 years ago by aquatic routes, possibly down the Niger.⁶³

Available evidence indicates that there is a clear linguistic distinction between the *Ijoid* and their neighbours, and this is probably the result of the antiquity of their settlement, in relative isolation from other Nigerian ethnic groups.⁶⁴ Even within Ijaw-land, there is an internal division of the *Ijoid* into four dialect clusters, viz.: Eastern Ijo, Nembe-Akassa, Izon, and Inland Ijo. Further, there is a sub-division of the Ijaw ethnic group into more than forty distinct ethnic/linguistic communities, which has occurred over the years. According to one source, 'the sub-division of the Ijoid into the four major constituent linguistic clusters and their movement into separate parts of the Niger Delta may have taken place in the past 2,000 years'.⁶⁵ On the whole, however, the Ijoid (Ijaws) are fairly more homogenous than the other ethnic communities in the Niger Delta. Today, the highest concentration of the Ijaws appears to be in Bayelsa State, which is an 'all-Ijaw' State.⁶⁶

(b). Yoruboid

There are three main Yoruba ethnic/linguistic groups in the Niger Delta. These are the Ilaje and Ikale of Ondo State and the Itsekiri people of the present Delta State.⁶⁷ Some scholars claim that these three groups probably moved into the Niger Delta about 2,000 years ago. While there is no evidence on the origin of the Ilaje and Ikale peoples, with regard to the Itsekiri (Itshekiri) people, it has been suggested that although they are regarded as Yoruba ethnic/linguistic community, their oral tradition

⁶³ NDES (1997: 144).

⁶⁴ The antiquity of human settlement in the Niger Delta is attested to by glottochronology (study of time taken for changes in sounds and languages to evolve), and palynology (study of pollen in connection with plant geography and dating of fossils). For example, analysis of a deep core from near Nembe in the present Bayelsa State suggests that the vegetation conditions, including oil palm vegeculture, existed about 3,000 years ago and this is evidence of human settlement. (See NDES (1997: 144)).

⁶⁵ NDES (1997: 144).

⁶⁶ In the sense that there is no other ethnic community in the state.

relate more closely to the Edo (Benin) Kingdom. The following epic illustrates this point:

According to tradition the kings of Benin had become absolute and oppressive at the time of the first migration [into the Delta]. For example, Prince Ginuwa, son of Oba (King) Olua and heir to the throne, was popularly believed to be the power behind the Oba and the instigator of many acts of cruelty visited by his father on the people. Led by the *Iyase* (Prime Minister) Ogbue, the nobility joined forces with the common people and resolved that the wicked Prince must be bared from the succession. So unanimous was the opposition that the King advised his son to flee. Followed by his admirers, mainly young hot-heads, and powerfully aided by his father with arms and men, Prince Ginuwa secretly left Benin by night and taking the direction of the sea, finally settled at Warri and founded the Itsekiri Kingdom.⁶⁸

However, Dike has warned that the claim of origin from Benin Kingdom should be taken with some reservation. 'The persistence and universality of the claims to Benin origin in Delta traditions is evidence, at the least, of the powerful influence which this Kingdom exerted over the imagination of her neighbours, particularly in south-eastern Nigeria, where her military power was felt by Ibos and Ibo-speaking peoples east of the Niger' (Dike, 1956: 21).⁶⁹

(c). **Edoid**

The *Edoid* groups are the Edo-speaking group of the Niger Delta. They are scattered in different parts of the Region. They are found in Delta State (Southwest Edoid) and Rivers State (Southeast Edoid). The Southwest Edoid comprises communities in the Southwestern part of the Niger Delta, and includes the following: Urhobo, Isoko, Erohwa, Okpe, and Uvbie/Effurun. The Southeast Edoid includes the peoples of Degema, Engenni, and Epie-Atissa. Their linguistic affiliation provides evidence of the southward direction of their primary migration into the Niger Delta; they are

⁶⁷ If the Niger Delta is interpreted to extend to Ondo State.

⁶⁸ Dike (1956: 21-22).

⁶⁹ As regards location, the Itsekiris inhabit the north-western extremity of the Niger Delta. See Ikime (1968: 1).

generally thought to have moved southwards from the Edo hinterlands of the present Edo State (though not necessarily from Benin).

(d). Igboid

The *Igboid* (Ibo-speaking) ethnic/linguistic communities of the Niger Delta traverse four States of Nigeria: (1) Rivers States – *Ekpeye, Ogba, Ikwerre, Egbema, and Ndoni* communities; (2) Delta – *Aboh, Ika and Ukwuani* communities; (3) Abia – *Asa* community; and (4) Imo – *Ohaji and Oguta* communities.⁷⁰ Some historical accounts claim that they moved southwards from their original homes to the north. However some groups among them forcefully claim Benin origin. This claim is supported by Dike: ‘The tradition of these seventeenth century migrants, which is closely related to that of Benin, shows that although they are Ibo-speaking, they were not originally Ibos’ (Dike, 1956: 26). Moreover, unlike the Ibos east of the Niger, it has been observed that the Ibo-speaking people west of the Niger have a society patterned after the semi-divine kingship of the Benin Kingdom. There is also a long-standing support for this claim from a European traveller who, in 1832, observed of an Abo (Aboh) King: ‘From his fondness for coral ornaments, I should imagine him to be of Benin extraction’.⁷¹

(e). Delta Cross

The Delta-Cross ethnic/linguistic group consists of the central Delta (Abua, Odual, Ogoni, etc.), and the Lower-Cross of Rivers and Akwa-Ibom States. There is evidence to suggest that they migrated into the Niger Delta about 2,000 years ago from the east, in the Cross River valley and beyond.⁷²

⁷⁰ NDES (1997: 145) as indicated above, some people contend that Abia State and Imo State are, at best, only peripheral parts of the Niger Delta.

⁷¹ See Laird and Oldfield, (1837: 101).

⁷² NDES (1997: 145).

1.4. Pre-Colonial Political Organisation and Socio-Economic Life

Prior to colonialism, the various peoples of the Niger Delta were politically, socially and economically organised for a least four centuries. Politically, each of them was independent of the others and had all the apparatus of government which enabled it to maintain law and order, administer justice, make war and peace, and organise and prosecute peaceful commerce. In modern times they would be described as States; in fact, they have been described as 'city-states' (Dike, 1956: 30).⁷³ Their political system of governments divides broadly into monarchies and republics.⁷⁴

With regard to their economic life, there is abundant evidence that the various people are from the beginning traditionally farmers and fishermen. However, not all the communities engage in these two occupations at the same time; there is evidence of some specialisation, sometime dictated by environmental factors. Speaking of the Itsekiri people, Ikime says:

The mode of life of the Itsekiri people has been determined by their environment. The Itsekiri are primarily fishermen and like their Ijo neighbours, are known as suppliers of fish and 'crayfish' to the peoples of the hinterland...The Itsekiri have never been farmers to any great extent, their land being unsuited to agriculture. They have therefore been dependent for their agricultural products on the farming folks to the hinterland, especially the Urhobo.⁷⁵

Apart from farming and fishing, records indicate that some of the communities also engaged in salt-making and other hand works like the manufacture of earthenware. Salt was obtained by the evaporation of seawater or by burning the shoots, roots, and leaves of mangrove trees. In the case of the later process, a solution

⁷³ Dike argues that the term 'city-state' as applied to the Delta communities embraces not only the settlements on the coast but also their extensions in the interior. According to him, 'this is in line with the Greek idea of city which means a community of people rather than an area or territory' Dike, 1956: 31).

⁷⁴ For detailed information on the political systems adopted by the various peoples of the Region, see Dike (1956: 30 *et seq.*).

⁷⁵ Ikime (1968: 1-2). See also NDES (1997: 153).

of the ashes was filtered and then evaporated. In fact, salt-making appears to be widespread amongst the various peoples of the region. Of all, however, the greatest salt producers were the *Gbaramatu Ijo* of Western Delta, the *Bassan* of the central Delta and the *Nembe* of the Eastern Delta.⁷⁶ With respect to pot-making (earthenware), evidence suggests that virtually all the ethnic groups engaged in some pot-making; but the Itsekiris were the most distinguished pot makers of the Delta.⁷⁷ The success of the Itsekiris has been attributed to the availability of the right kind of clay in the area.⁷⁸

It is important to mention that apart from their traditional economic activities, the Niger Delta people were also distinguished middlemen traders. From the 15th century until the imposition of colonialism in late 19th century the people had trading contacts with Europeans. The earliest European traders in the Niger Delta were the Portuguese. Trade with Europeans fluctuated in accordance with European policies and interests. Between the 15th and 16th centuries gold was the main quest; in the 17th and 18th centuries, slave trade predominated. When slave trade was abolished in early 19th century, interest shifted to cotton, industrial raw materials, palm oil and palm kernel (Dike, 1956: 41). It was from the palm oil trade that the Niger Delta got its original name of 'Oil Rivers'.

1.5. Niger Delta People after 1914: Genesis of Minorities Status/ Problems

After the creation of Nigeria in 1914, the various ethnic groups, which had been merged together, largely retained their independence under a native administration

⁷⁶ NDES (1997: 152-153).

⁷⁷ NDES (1997: 153).

⁷⁸ NDES (1997: 153). Early European visitors to the Niger Delta observed the presence of different types of earthenware in Itsekiri-land, including water jars, tobacco grinders, and eating utensils (NDES, 1997: 153).

system,⁷⁹ which ensured that the people governed themselves. In the result, there was no distinction of the various peoples into majorities and minorities. This position remained until regionalisation process began in the 1940s. In other words, 'ethnic minorities' 'did not become a part of the political vocabulary in Nigeria until after the process of regionalisation was begun in the mid-1940s.'⁸⁰

It is not clear why the British colonial authorities changed the policy of indirect rule (native administration system), as part of the initial British plan was to fortify local autonomy. This plan was clearly stated in 1920 by the then colonial governor of Nigeria, Sir Hugh Clifford: 'It is the consistent policy of the government of Nigeria to maintain and support the local tribal institutions and the indigenous forms of government...I am entirely convinced of the right, for example, of the people of England...of any of the great Emirates of the North...to maintain that each one of them is, in a very real sense, a nation...It is the task of the government of Nigeria to fortify these national institutions'.⁸¹ It has been argued that 'if this policy had been retained and not replaced by that of regionalization, the majority-minority group distinction would probably not have arisen, because what later became known as majority groups were actually disparate groups which spoke dialects of the same generic language and had similar cultures' (Osaghae, 1991:238). Within the context of the regions, the erstwhile disparate groups easily got on together, largely because of the realisation that political power in the Region lay in the force of number.⁸² The regionalization policy, which started with the setting up of regional legislatures under the 1946 constitution, was finally institutionalised by the adoption of a federal constitution in 1954. Under the new constitutional and administrative arrangement,

⁷⁹ Popularly known as indirect rule system or policy.

⁸⁰ Okpu (1977: Chapter 2).

⁸¹ Quoted in Coleman (1958: 194).

three regions were created, viz.: Northern, Eastern, and Western Regions. In the context of this regional arrangement, the Niger Delta people were arbitrarily split and became minorities both in the Eastern and Western Regions.

Although minority problems originated from the time regions were created,⁸³ it has been rightly pointed out that the regionalization policy *per se* did not generate minority problems. 'It was the ethnic nationalism instigated by the elites in the majority groups, more than the mere fact of lumping together unequal groups, that brought about the problem of minorities' (Osaghae, 1991: 239).⁸⁴ As it relates to the Niger Delta People, the elites of the majority ethnic groups employed the instrumentality of cultural organisations such as *Egbe Omo Oduduwa* for the Yorubas in the Western Region and the Ibo State Union for the Ibos in the Eastern Region,⁸⁵ to 'sharpen the "us" [majority] versus "them" [minority] dichotomy and propelled the latter into largely "protective" political minority movement', which agitated for separate regions (Osaghae, 1991: 239). As Coleman puts it, 'the promotion of cultural nationalism among tribal and nationality groups also led to political minority movements', which agitated for separate regions (Coleman, 1958: 38). The agitation became accentuated as independence approached and this led the British Government to agree to set up a Minorities Commission to inquire into the fears of Nigeria's minorities and recommend ways of allaying them. Based on available evidence, the Niger Delta people were the minority groups who appeared before that Commission, both in the Western and Eastern Regions, and presented their case – the basis for their

⁸² Osaghae (1991: 238). Because of the way the ethnic majority groups emerged, a scholar has described them as 'emergent social formations, which evolved under colonial rule' (Ekeh, 1983).

⁸³ See Osaghae (1991:239).

⁸⁴ In addition to the ethnic nationalism, there was a real threat that the majority ethnic groups would take complete control of power in the regions and at the centre. According to Osaghae, 'this "big group chauvinism" was consistent with the assumptions of the "capture theory", and it saw the relegation of the minorities in the power matrix both in the regions and at the centre. See Osaghae (1991: 240). Simply stated, the 'capture theory' holds that exceptionally large area and population lead major groups to seek to dominate political power. See Kasfir (1976: 156 – 158).

demand for a separate region (Mid-West State in the Western Region and Rivers State in the Eastern Region). Their case before the Commission will be the subject of the next section.

1.6. Pre-Independence Fears of the Niger Delta People and the Willink Commission

1.6.1. Introductory: Appointment of the Commission

The decision that Nigeria should be a federation of three regions (with enormous residual powers) was reached at the London Constitutional Conference of 1953.⁸⁶ Among others, the three major political parties in Nigeria then, namely the Northern Peoples Congress (NPC), the Action Group (AG), and the National Council for Nigeria and the Cameroons (NCNC),⁸⁷ attended the Conference. Although the NCNC had previously argued for a strong centre with a large number of constituent States, it had to 'reluctantly acquiesce' to the contrary wish of the others, 'when it became clear that continued disagreement would bar advance towards independence'.⁸⁸

There is ample evidence to suggest that the federation produced by the 1953 Constitutional Conference was of unusual composition, in that the Northern Region was slightly larger in population and landmass than the other two put together. Moreover, in each of the three Regions, it was possible to distinguish between a majority group of about 2/3 of the population and minority groups amounting to about 1/3. In these circumstances, when the Conference resumed in 1954, certain minority groups (including the Niger Delta People) expressed fears about their future in regions

⁸⁵ The main cultural organisation in the Northern region was the *Jamiyyar Mutanen Arewa*.

⁸⁶ That decision could be said to have formalised the quasi-federal arrangement under the regionalisation policy begun in 1946.

⁸⁷ Later called the National Council of Nigerian Citizens when the Cameroons ceased to be associated with Nigeria.

⁸⁸ Willink Commission (1958: 1).

of this kind and demanded recognition as separate States.⁸⁹ However, their demands could not be considered because, as was claimed, it was not in the agenda for that Conference.⁹⁰

The next conference held in 1957, during which a considerable number of claims by various minorities groups (including the Niger Delta people) were presented. At the end, the Conference decided to invite the Secretary of State for the Colonies to appoint a Commission of Enquiry into the fears of the Minorities and to settle its terms of reference. The Commission was duly appointed on 26 September 1957 with the following terms of reference:

- (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 the purpose in the constitution of Nigeria.
- (3). If, but only if, no other solution seems to meet the case, then 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;
 - (b). To recommend the Governmental and administrative structure most appropriate for it; and
 - (c). To assess whether any new State recommended would be viable from an economic and administrative point of view and what the effect of its creation would be on the Region or Regions from which it would be created and on the Federation.
- (4). To report its findings and recommendations to the Secretary of State for the Colonies.⁹¹

Members of the Commission (headed by Henry Willink as Chairman) were exclusively British and were appointed in London.⁹² They arrived Nigeria on 23

⁸⁹ There is evidence of a clear intention by the majority ethnic tribes to dominate the minorities, particularly the Niger Delta people. For instance, in his presidential address to the Ibo State Assembly at Aba in 1949 (an Assembly of the Ibo State Union formed in December 1948), Nnamdi Azikiwe described the Ibos as 'the redeemers of Africa', and envisioned the rise of a 'mighty nation' in west Africa, which the Ibos will rule, as 'the God of Africa has willed it' (Azikiwe, 1961: 249).

⁹⁰ Willink Commission (1958: 1).

⁹¹ Willink Commission (1958: 1 – 2, Para. 5).

November 1957 and between that date and 12 April 1958, they held public sittings and had private meetings and discussions in each of the three regions, in the Federal Capital Territory of Lagos, and in the Southern Cameroons⁹³ (Willink Commission, 1958: iii). As previously stated, the Niger Delta People were amongst the minority groups that presented their cases before the Commission. They asked for a Mid-West State in the Western Region and a Rivers State in the Eastern Region. Significantly, as will be seen, these demands suggest that the Niger Delta people have historically regarded themselves as a distinct set of people from the other peoples of Nigeria. These two demands are briefly considered here in turn.⁹⁴

1.6.2. Demand for Mid-West State

The Western Region was made up of six Provinces, including Benin and Delta Provinces. Of these – Benin and Delta Provinces – together called the ‘Mid-West’ – the Niger Delta People belonged to the Delta Province (otherwise known as Western Niger Delta, and includes the Western Ijaw Division). Compared with the Yoruba ethnic group in the region, the Mid-West people were a non-dominant group (minorities). The Willink Commission noted this point thus: ‘From our point of view, the outstanding feature of the Western Region is that rather more than two-thirds of the population are Yoruba...This population is divided on fairly clear-cut territorial lines between six Provinces in which most of the people are Yorubas and two in

⁹² Other members were: Gordon Hadow, Philip Mason, and J.B. Shearer (hereinafter referred to as ‘the Commission’ or ‘Willink Commission’).

⁹³ Lagos was, until 1990, the capital of Nigeria. Since 1990, Nigeria’s new Capital is Abuja. It should also be noted that the Cameroons were a Trust Territory, administered in trust for the United Nations - Southern Cameroons was a separate territory included in then Federation of Nigeria, with quasi-regional status whilst the Northern Cameroons was administered as part of the Northern Region until 1959 when the people elected by a referendum to join the French Cameroons.

⁹⁴ For details, See Willink Commission (1958); and for interesting academic comment, See Rothchild (1963).

which there are very few. It is with these two, the Benin and Delta Provinces,⁹⁵ that we are particularly concerned'.⁹⁶

The area claimed for the proposed Mid-West State basically covered the existing Benin and Delta Provinces. Apart from the Western Ijaw people who opted to join their kith and kin in a proposed Rivers State (see below), it was generally believed that in a Mid-West State the Niger Delta People will not be a minority ethnic group. In support of their demand for this State, the proponents expressed fears of political domination (colonization) by the Yoruba ethnic group. They pointed out that the party in power in the Region (Action Group) 'was based on a secure Yoruba majority' and that 'there was therefore no prospect of a change' (Willink Commission, 1958: 13). Moreover, they accused the Western Regional Government of taking certain actions 'with the deliberate intention to obliterate the separate language, culture, and institutions of the Mid-West or at least – on the most favourable interpretation – of fostering tendencies which would have this result'.⁹⁷

There were also allegations of marginalization/domination, discrimination, and neglect in the economic and social fields and also in the field of appointment into public offices. As regards discrimination in the economic field, it was claimed that the Regional Government concentrated its economic activities in the Yoruba Provinces, whilst neglecting the Delta province.⁹⁸ In the case of Social discrimination and neglect, it was alleged that the Delta Province was deliberately neglected in the provision of roads, water supplies,⁹⁹ hospitals, and schools (Willink Commission,

⁹⁵ The Commission stated that 'for the sake of convenience we shall refer to the two Provinces as mid-West Provinces' (Willink Commission, 1958: 6).

⁹⁶ Willink Commission (1958: 6).

⁹⁷ Willink Commission (1958: 13).

⁹⁸ Willink Commission (1958:17).

⁹⁹ In the case of the Benin area of the Mid-West, a witness who said he was the Chairman of the Benin-City Council since 1955 testified that Yoruba areas received preferential treatment from the Regional Government in the granting of loans for water supply. See Minutes of Proceedings of the Willink Commission of 12 December 1957, 5.

1958: 18). Lastly, with regard to discrimination in appointment into public offices, it was claimed that all statutory boards (including the Scholarship Board, the Public Service Commission, and the Local Government Service Board) and other public boards and offices were dominated by Yorubas, who also practised discrimination in their operations (Willink Commission, 1958: 14). To end all these, they demanded the creation of a separate State (Mid-West State) for them; they did not believe that any other safeguards could adequately deal with the situation.

The Commission considered each of the allegations made by the people and concluded that they were all without merit. They found that ‘the allegations were usually vague and generalised, and where they were at all specific, exaggerated, while the Government’s reply were factual and to the purpose’.¹⁰⁰ Yet a further statement by the Commission suggests that the allegation of neglect in the provision of roads was indeed factual:

In both Provinces [Benin and Delta Provinces], but particularly in the Delta, expenditure on roads will not produce as much for the same money as in the Yoruba territory. The rainfall is heavy in both Provinces, and in a great part of the Delta Province the very low lying nature of the country and the rapid rise and fall of the rivers and creeks puts up the costs of building roads out of all proportion to the expense in areas which are better drained. In addition, there is no stone in the Delta Province and hard core and ballast must be brought from elsewhere. We have good evidence at first hand of the difficulties of road construction in these low lying areas, even in the course of our travels, which were necessarily confined to the more important roads (Willink Commission, 1958: 18).¹⁰¹

It is arguable that the above statement would not be necessary if the allegation of neglect were not grounded in fact. Support for this argument can be further found in another statement of the Commission: “[I]n the Delta province and the Western

¹⁰⁰ Willink Commission (1958: 18).

¹⁰¹ In so far as there was no evidence from the Government that efforts were made to construct roads at the Delta but were hampered by the difficult terrain of the area, this finding can be regarded as utterly perverse.

Ijaw Division the nature of the country makes development expensive and in some cases impossible'. Like the former, this statement implies that the Niger Delta Province was neglected because of financial implications of road construction and other developments.

Having dismissed the case for the creation of Mid-West State, the Commission was 'clear all the same that even when allowance had been made for some exaggeration, there remained a body of genuine fears and that the future was regarded with real appreciations'.¹⁰² To deal with this, the Commission made 'Special Recommendation' for the People, which will be considered below after dealing with the demand for the creation of Rivers State.

1.6.3. Demand for Rivers State

As was the case in the Western Region where the Commission observed the dominance of one ethnic group, the Commission observed that the preponderant ethnic group in the Eastern Region was the Ibo: 'More than 98 per cent of the people who inhabit this area are Ibo and speak one language, though of course with certain differences of dialect.'¹⁰³ There are nearly five million of them and they are too many for the soil to support...The Region is thus in one respect similar to the Western Region. One tribal group is outstandingly the largest and includes two-thirds of the population' (Willink Commission, 1958: 34).¹⁰⁴

As much as four different proposals for States were brought before the Commission in the Eastern Region, namely: Ogoja State (comprising the former Ogoja Province, i.e. the north-eastern corner of the Region); Cross River State (which

¹⁰² Willink Commission (1958: 87).

¹⁰³ Ezera made the same point when he said: 'It would be a mistake to think that the Ibos are a strictly homogeneous unit. Though, indeed, they speak a common language and occupy a contiguous territory, there are marked dialectical and cultural variations between their sub-divisions' (Ezera, 1957: 15).

would include the Calabar Province and part of the Ogoja Province); Calabar- Ogoja-Rivers (COR) State (Comprising Calabar, Ogoja and Rivers Provinces); and Rivers State (which would consist of the Rivers Province with certain small additions).¹⁰⁵ It is with this last demand that this thesis is concerned with. Located in the south-western side of the Region, the predominant tribal group is that of the Ijaws 'who number about a quarter of a million'.¹⁰⁶ It was this group, in addition to some 80,000 Ijaws in the Western Region and other smaller ethnic groups in the Rivers Province that demanded the creation of Rivers State. The combined population of the proposed State was over 900,000.¹⁰⁷

There is evidence to indicate that the movement for the creation of Rivers State began after the London Constitutional Conference of 1953,¹⁰⁸ when the Council of Rivers Chiefs prepared a memorandum for the resumed Conference of 1954.¹⁰⁹ However, the memorandum was not considered at the 1954 Conference 'because the issue raised was not in the agenda'; it was postponed for consideration at the 1957 Conference. At the 1957 Constitutional Conference, a special representative of Rivers State Movement (now re-named as the Rivers Chiefs and Peoples Conference) was present and presented the case for the creation of Rivers State. The arguments were

¹⁰⁴ The Commission also found that 'the Ibos are a singularly homogeneous and closely knit people'.

¹⁰⁵ Willink Commission (1958: 36).

¹⁰⁶ Willink Commission (1958: 34).

¹⁰⁷ Willink Commission (1958: 50).

¹⁰⁸ At this Conference, minority leaders had argued for a strong central government as a guarantee and security for minority groups, but their argument was drowned by the wish of the majority ethnic groups who wanted greater regional autonomy. Commenting on the outcome of the Conference, the leader of the National Independence Party (NIP) (a minority party), Dr. Udo Udoma, wrote: 'At the plenary session, the Northern Peoples Congress and the National Independence Party put forward...progressive proposals...To the utter surprise of everyone, it was Awolowo and Dr. Azikiwe who vehemently opposed them. In vain it was argued that in the present circumstances of Nigeria, with its multiplicity and diversity of cultural and ethnic groups, it was necessary to have a strong and independent central government whose authority and prestige would give confidence and guarantee security to minority groups within the federation and at the same time command international respect.' See *Daily Times*, August 26, 1953. See also Old Calabar and Ogoja Provincial Communities, *Minorities, States and Nigerian Unity*, Lagos, 1967, 6: 'Arguments of national prestige and the need for a sense of security for the minorities were brushed aside. National interest and welfare consideration of the minorities were submerged under the avalanche of the regional struggle for total autonomy'.

based on historical and legal issues as well as on what may be described as 'special issue'. The same arguments were presented before the Willink Commission later in 1957 and in 1958.

On the historical and legal issues, the proponents contended that when the British came to their area they made treaties of trade and protection with the local chiefs. They argued that the treaties were of a special nature and significantly differed from the treaties made with other Chiefs in the hinterland. According to them, the British Crown undertook to provide protection and to deal with foreign powers, "but the treaties did not provide that the Chiefs should surrender to the British Government a sovereignty which could be transferred to any other authority" (Willink Commission, 1958: 50). They argued, 'if Her Majesty's Government saw fit to end the treaties, then the Chiefs of this area were morally¹¹⁰ entitled to revert to their original status'.¹¹¹

As regards the 'special issue' argument, the delegates pointed out that the people of the area proposed to be formed into Rivers State 'shared a common way of life dictated by the physical circumstances of the country in which they lived, and that they were united by fear of neglect at the hands of a government who did not understand their needs and who in any case put the needs of the interior first'.¹¹² On the grounds of the issues canvassed they demanded the creation of Rivers State for them. In supporting this State and expressing their 'main desire' to be part of it, the Western Ijaws had also alleged neglect of their area and discrimination against them

¹⁰⁹ Willink Commission (1958: 50).

¹¹⁰ Presumably, they meant to say 'legally'.

¹¹¹ Willink Commission (1958: 50).

¹¹² Willink Commission (1958: 50).

in the economic, social and other fields by the Western Region Government.¹¹³ They also argued for the need to be united with their kith and kin in the Eastern Region from whom they had been separated by 'arbitrary boundaries'.¹¹⁴ In summary, it could be said that the demand for the creation of Rivers state was based on a claim for self-determination and the need to end the status of minority group, with its concomitant effect of domination, discrimination and neglect.

In considering this case, the Commission 'was impressed by the arguments indicating that the needs of those who live in the creeks and swamps of the Niger Delta are very different from those of the interior'.¹¹⁵ They held that 'it is not easy for a Government or a Legislature operating from far inland to concern itself, or even fully to understand, the problems of a territory where communications are so scanty'.¹¹⁶ Notwithstanding the 'sympathy' expressed for the Niger Delta people, the Commission concluded that 'a separate State was not the best means of attaining the ends desired by the people of the creeks'. The Commission believed that the solution lies in constitutional provisions to safeguard minority interests and special actions targeted at their development. Accordingly, the Commission rejected the demand for the creation of Rivers State¹¹⁷ and made special recommendation for the development of the area, which is outlined in the next section.

¹¹³ See Minutes of Proceedings of the Willink Commission of 30th November 1957, 2. The witness who appeared before the Commission specifically stated that they lacked health and communication facilities, among others.

¹¹⁴ Minutes of Proceedings of the Willink Commission of 30th November 1957, 2.

¹¹⁵ Willink Commission (1958: 50).

¹¹⁶ Willink Commission (1958: 50 – 51).

¹¹⁷ There is evidence to indicate that the proposal for the creation of Rivers State had already been rejected well before it was presented before the Commission. The records of a private meeting held on 8th November 1957 at which Sir H. Willink (Commission Chairman), other Members of the Commission, and Sir Kenneth Roberts-Wray were present contains the following extract: '*Sir Kenneth Roberts-Wray met the Commission. Answering questions about his memorandum on the Rivers Treaties, he said that the Rivers Chiefs wanted special treatment and were trying to use the Treaties as a lever to get it. The Chiefs were pursuing contradictory claims; they wanted to remain within the federation, yet at the same time to be protected against federal control. Sir H. Willink thought that the legal niceties of the Treaties might be held to fall outside the Commission's terms of reference. It was agreed that the Commission might take this line if faced with argument based on the Treaties.*' See

1.6.4. Special Recommendations of the Commission for the Niger Delta People

As indicated earlier, although the Willink Commission dismissed the proposals for the creation of Mid-West and Rivers States,¹¹⁸ it held that 'there remained a body of genuine fears and that the future was regarded with real apprehension'.¹¹⁹ In making recommendations for the special treatment of the Niger Delta people, the Commission pertinently observed:

In the case of the Rivers Province, we felt that real difficulties existed for any government. Communications are very difficult in an area divided by creeks and rivers, in which there is a tidal rise and fall and a more considerable seasonal rise and fall owing to the fluctuations of the Niger, which rises by as much as 30ft. at certain times of the year. Such an area requires expenditure not so much on roads and bridges as on the prevention of erosion, on clearing snags and other obstacles from waterways, and on constant dredging. Building is very expensive and we were told that in the creek area a 40-bed hospital which might have cost £1,000 a bed had cost £69,000...Behind the examples given us of special problems of this kind lay a deep-rooted conviction that the difficulties of this difficult stretch of country were not understood at the headquarters of the government; this was voiced by the Western Ijaws as well as by their fellow tribesmen in the East; one Ijaw witness described to us the mocking response which a complaint of his had

Note of Meeting in Mr. Eastwood's Room on Friday, 8th Nov. 1957 (G.B. Colonial Office, London). True to agreement, the Commission held the issue of the Treaties to be outside their terms of reference. Yet the Treaties could be said to be of first importance as they appeared to touch on the issue of self-determination of the people, whether within or outside the 'new' Nigerian state, and therefore properly within the commission's terms of reference.

¹¹⁸ The Commission did not recommend the creation of any new State for any of the minority groups that had asked for a State. Indeed, it seems this outcome had been pre-determined, even as could be gleaned from the Commission's terms of reference: '*If, but only if, no other solution seems to meet the case, then as a last resort, to make detailed recommendations for the creation of one or more new States...*' (See text above). In fact, Britain has been specifically accused of opposing the creation of any new State. As a State Movement group put it: 'For reasons best known to the Colonial Office, Britain did not favour the creation of more States in Nigeria, probably because it knew that it was the only way of evolving a less fractious and more united country' (Old Calabar and Ogoja Provincial Communities, 1967: 8). (See also Okpu, 1977: 74). Besides Britain, there is also evidence of behind the scene pressures on the Commission against the creation of any new State. One of the most prominent opponents of new States was the Prime Minister of Nigeria at the time, Sir Abubakar Tafawa Belewa. In a private meeting with the Commission, he stringently argued against new States thus: 'It seems to me wrong that when Britain has done so much to create Nigeria as a country, she should, just before giving us independence, cut the country into little bits. There are countless tribes, and it is impossible to find any area which is homogeneous. If there is to be a new Region, this will be a very difficult task over the setting of policy: there would always be groups which would be a minority. There would be a great trouble and bloodshed and it would postpone independence for 7 years. *I am all against additional Regions; none of those proposed is satisfactory...Some have advised me not to make contact with the Commission; but I think it is my duty to do so and I shall*' (Italics mine). See "[Note of] Chairman's Meeting with Prime Minister on 26th Nov. 1957" (G.B. Colonial Office, London).

¹¹⁹ Willink Commission (1958: 87).

received in the Western House of Assembly, and we had no doubt that a feeling of neglect and of lack of understanding was widespread among the Ijaws in both Regions. *We consider that a case has been made out for special treatment of this area...*¹²⁰ (Italics mine).

Two different special recommendations were made for the Western and Eastern Niger Delta People, respectively. For the Western Niger Delta People, the Commission recommended the establishment of an Advisory Council, along the line of an existing one initiated by the Western Regional Government (though not fully functional then). While commending the initiative of the Western Regional Government in establishing the body, it considered that certain modifications were necessary in its composition. They suggested that “the Council should be made more representative of opinion in the area with which it is concerned” (Willink Commission, 1958: 96).

The Commission argued that it was not enough that the Government should nominate persons from the area; “they must include men who are ready to criticise” and also ‘an element in the Council should be elected or nominated by local bodies in the area’.¹²¹

The Western-Region-initiated body was called Mid-West Advisory Council, and was headed by the ‘Minister of Mid-West Affairs’. But, as a consequence of its overall recommendations on this issue, the Commission suggested that its recommended body should be called ‘Edo Council’ and headed by a Minister to be called ‘Minister of Edo Affairs’. Essentially, the Council was to have advisory responsibility for the development and welfare of the Edo-speaking Peoples “and in particular the preservation of Edo cultures”.¹²² It was required to produce annual

¹²⁰ Willink Commission (1958: 41 – 42, Para. 18).

¹²¹ Willink Commission (1958: 96).

¹²² Willink Commission (1958: 96).

reports, which was to be debated in the Western Region House of Assembly and also in the Federal House of Representatives.¹²³

In the case of the Eastern Niger Delta, the Commission recommended the establishment of a special (statutory) 'Federal Board', 'appointed to consider the problems of the area of the Niger Delta' (Willink Commission, 1958: 94¹²⁴). It argued that: 'this is a matter which requires a special effort and co-operation of the Federal, Eastern and Western Region Governments; it does not concern one Region only. Not only because the area involves two Regions, but because it is poor, backward and neglected, the whole of Nigeria is concerned'.

In terms of composition, the Commission suggested that the Federal Board should consist of a Chairman and Vice-Chairman appointed by the Federal Government, one representative of the Eastern Region Government and one of the Western Region Government, preferably Ijaws, together with four representatives of the People of the areas who might conveniently be one from the Western Ijaws and three from the Eastern Ijaws, who would be chosen by local bodies. (Willink Commission, 1958: 94). Those appointed were to serve for five years in the first instance. As regards its function, the body was 'to direct the development of these areas into channels which would meet their peculiar problems'.¹²⁵ The Commission even went on to suggest its *modus operandi*:

Its first task would be to conduct a survey of the entire area which would be carried out by a doctor, an agriculturalist, an educationist, an expert on communications and such other experts as are required. Statutory provision should be made enabling the Board to call on the Federal Government, the Eastern Regional Government and the Western Regional Government for the staff and finance for this operation. It would be on the receipt of the detailed information that would arise from this survey that the Board would decide how to plan its operations; it may be that little

¹²³ For the justification of laying the Council's Annual Report before the Federal Parliament, see Willink Commission (1958: 96, para. 34).

¹²⁴ Para. 27.

¹²⁵ See Willink Commission (1958: 94-95, Para. 28).

permanent staff would be required once the survey was complete, though it would require to be brought up to date periodically. On the basis of the survey, the Board would draw up its recommendations for special schemes to supplement or extend existing plans for development; such schemes would be financed exclusively from Federal funds if they concerned Federal subjects, such as ports or major waterways; if, however, they concerned Regional subjects, we propose that they would be financed by the Regional Government (or if both Regional Governments are concerned, by both, in proportion to the population involved) with a Federal contribution of one-third of the capital cost plus one-third of the recurrent expenditure for a period which might extend to ten years.¹²⁶

The Board would be required to produce and submit annual reports (including reports on actual progress) to each of the three Governments involved, which would be laid before their respective legislature for consideration (Willink Commission, 1958: 95). Yet, the board was conceived as merely a recommendatory body with no power of implementation. The Commission did not 'contemplate that the Board should carry out the work which it recommends: this would be left to the Regional Government (except in the case of exclusively Federal schemes)'. Moreover, the board would be *ad hoc*, not permanent. The Commission recommended that the Board should conclude its work within ten or twelve years 'when provision for development had gone far enough to make it possible for this arrangement to be abandoned'.¹²⁷

On the whole, it would appear that the emphasis was on the physical development of the 'Ijaw country',¹²⁸ and the Board was not concerned with the general welfare of the people (including the issue of discrimination in appointment into public offices). This contrasts somewhat with the recommendation for the Western Ijaw People, as noted above. Perhaps it could be said that the commission

¹²⁶ Willink Commission (1958: 95, Para. 28).

¹²⁷ Willink Commission (1958: 95).

¹²⁸ As the Commission put it: 'The declaration of the Ijaw country [Niger Delta] as a Special Area would direct public attention to a neglected tract and give the Ijaws an opportunity of putting forward plans of their own for improvement. It would be difficult for either government to justify to the electorate either a blank refusal to accept a plan recommended by the Board or a failure to implement an accepted plan...'. See Willink Commission (1958: 95, para. 30). It may be pointed out that this

believed that their recommendation for the inclusion of Bill of Rights in the constitution would take care of the other complaints.

The report of the Commission, which was published in 1958, expectedly received mixed reactions. Some condemned it as a disappointment to the minorities,¹²⁹ while others commended it.¹³⁰ Overall, it would appear that the report received more condemnation than praise. One of the most recurrent criticisms of the report was the 'refusal' of the Commission to recommend the creation of States.¹³¹ As one critic has argued, 'there seems little reason to doubt that a scheme along these lines [creation of States] is likely to be a more effective guarantee than the others such as bill of rights' (Rothchild, 1963: 48). According to this critic:

The appeal of the separate State solution lies in its assumed effectiveness. Peoples in the newly independent States place little faith in such guarantees as a bill of rights, reforms in the administration of justice and commissions on discriminatory legislation, for the usefulness of these depends upon such factors as the community's sense of fair play and its willingness to abide by the spirit of the law. Separate regions are demanded because they will change the power relationships within the regions, thereby affording minorities a more reliable basis for security. Spokesmen for the various minorities interests seek to bring about a change in the existing constitutional machinery so that the will of each of their peoples will become the paramount, majority will within the confines of each newly created region. Then the recognised channels will operate to favour their group's interest if a conflict with another people should arise.¹³²

It is difficult to fault critics who say the creation of more States was the best solution in the circumstances of the time. At least it would have partially restored the pre-colonial independence of the Niger Delta People and probably laid a foundation

statement further indicates that the Commission found, as a fact, that the Niger Delta was actually neglected by the majority-controlled Regional Governments.

¹²⁹ For example, Awolowo denounced it as 'a bad and astonishing document'. See *Daily Times*, Lagos, 20 August 1958, 2-3. See also, Awolowo (1960: 196).

¹³⁰ Dr. Nnamdi Azikiwe hailed the report as 'objective in its approach...scientific in its analysis...constructive in its recommendations...' See *Daily Times*, Lagos, 9 August 1958, 1.

¹³¹ The Commission's recommendations were described as 'ineffective palliatives' by a minorities group. See *Old Calabar and Ogoja Communities* (1967: 8).

¹³² Rothchild (1963: 48).

for compromise and co-operation with other ethnic groups within an independent Nigerian State. Given the intensity and bitterness¹³³ of the struggle for a separate State, it seems axiomatic that it will continue after independence. As Rothchild points out, 'the tangled minorities question, created in part by earlier British policy was thus thrown back for Nigerians to solve on their own'¹³⁴ (Rothchild, 1963: 39). Similarly, Ken Saro-Wiwa (a leading Niger Delta States protagonist) has noted that 'this manifest injustice [refusal to create States as demanded] was due to be contested and the British knew it'.¹³⁵ The next section would be concerned with the developments after independence.

1.7. Niger Delta in Post-independence Nigeria

1.7.1. Political Developments and the Rise of Economic Nationalism

Nigeria attained independence in 1960, with the area constituting the Niger Delta as part of its territory. Yet, it did not seem to the Niger Delta people that colonialism had ended. Indeed, evidence indicates that to the people of the region, it seems the British

¹³³ For example, shortly before the publication of the report, leaders of one of the separate State movements in the Eastern Region had threatened to proclaim a State on their own if the commission failed to do so. See Rothchild (1963: 39).

¹³⁴ It was also predicted that 'the minorities question would continue to darken Nigeria's political horizon in the period after independence' (Rothchild, 1963: 41).

¹³⁵ Saro-Wiwa (1989: 4).

colonisers were replaced by ethnic-majority-based (Nigerian) colonisers.¹³⁶ In other words, it appeared 'external colonialism' was replaced by 'internal colonialism'.¹³⁷

This feeling appeared to have been accentuated by two factors. First, none of the 'special bodies' recommended by Willink Commission ever became effectively functional (though a Niger Delta Development Board was established by the Federal Government in 1961).¹³⁸ Second, although Bill of Rights provisions were included in the 1959 Constitution of Nigeria (and retained in the 1960 Independence Constitution) as recommended by Willink, evidence indicates that they did prove effective in any way in dealing with the complaints brought by the Niger Delta people before the Commission.

Because their fears have not been allayed, the people continued with their agitation for statehood, and in 1963 the Federal Government of Nigeria created the Mid-Western State as the fourth Region of Nigeria. However, it must be mentioned that the action appeared to have been influenced more by 'political conspiracy' between the Northern Peoples Congress (NPC) and the National Council of Nigerian

¹³⁶ In the sense that the Britain handed over power to the dominant majority ethnic groups in the country (i.e. Hausa/Fulani, Yoruba, and Ibo): the Governor-General, later President, of the Federation was Dr. Nnamdi Azikiwe (Ibo), the Prime Minister of the Federation was Abubakar Tafawa Bewewa (Hausa/Fulani), and the Leader of Opposition in the Federal Parliament was Chief Obafemi Awolowo (Yoruba). The same was true at the regional level. In fact, the majority ethnic groups dominated the entire Cabinet, at both the Federal and Regional levels. In this regard, Brownlie had commented (explaining the increasing use of the term 'indigenous peoples'): '*[I]n the era of decolonisation it was found useful to have a term for certain groups ['indigenous peoples'] who remained vulnerable after decolonisation had transferred power to the dominant group in the territory concerned*' (Brownlie, 1991: 56). There is evidence that the domination of political powers by the majority ethnic groups in Nigeria is not restricted to civilian regimes. See Okere (1997: 253).

¹³⁷ 'External colonialism' is also called 'salt-water colonialism'. This refers to the colonialism practised by the European powers, notably Britain, France, and Spain, especially during the 19th century expansionism. On the contrary, 'internal colonialism' means the oppression of one group by another within the same State. For this distinction, see Thornberry (1980: 452, footnote 132).

¹³⁸ See generally Dappa-Biriye (1995: 45 – 46). There is also evidence that a proposal for the establishment of a Minority Area for the Mid-West Area of the Western Region and Mid-West Minority Council was laid on the table of the legislature of Western Nigeria in 1960: See Sessional Paper No. 14 of 1960.

Citizens (NCNC) against the Action Group (AG)¹³⁹ than by the desire to respond to the wish of the Western Niger Delta People.¹⁴⁰ In any case, it represents a victory for the people.

Further struggle to have Rivers State created did not yield result until the demise of the First Republic in January 1966 as a result of military coup. Following a counter coup in July 1966 and the pogrom perpetrated against the Ibos in the northern parts of the country,¹⁴¹ the Ibo-dominated Eastern Region announced its decision to secede from the Republic of Nigeria to become the Republic of Biafra, and this included the Eastern Niger Delta People and other minorities of the Eastern Region who had long been struggling to attain Statehood in order to end Ibo domination.

Perhaps in anticipation of the secession move, the Military Head of State who assumed power after the counter coup, Lt. Col. Gowon, deftly moved to woo the long crying minorities of the Region. In May 1967, shortly before the Military Governor of Eastern Region, Lt. Col. Ojukwu, announced the secession of the Eastern Region from Nigeria, the new Head of State had announced the creation of twelve States in Nigeria to replace the old Regions, and these included Rivers State. This ensured support for the Federal Government when the secession was announced. In the entire circumstances, a belligerency situation developed, which blossomed into a full-scale civil war in June 1967. The war ended in 1970 with the defeat of the seceding Eastern Region (Republic of Biafra), and it might have been thought that the Niger Delta People had got what they had wanted all these years – self-determination (with the

¹³⁹ Among others, the object was to reduce the sphere of influence of the AG (Action Group – Western Region-based Political Party) and make it difficult for it to win Federal elections. See Okpu (1977: 86 – 91).

¹⁴⁰ See Osaghae (1991: 243).

¹⁴¹ See Osaghae (1991: 247). See also Robinson (1996: 15): 'From June through September 1966, there was continued persecution of the Igbo particularly in the Northern region and they felt insecure in the Western region. Thousands of Igbo troops and civilians in the north were massacred by predominantly Hausa troops. More than 1.5 million Ibos fled *en masse* from these regions and returned to the Eastern region during this period.'

creation of Mid-West State and Rivers State). But it was soon discovered that it was not yet *uhuru*.¹⁴²

It would be remembered that the avowed enemy of the Niger Delta People and other minorities in the country were the Regional Governments, and not the Federal/Central Government. The Niger Delta People, like other minorities, had argued for a strong Central Government, which they believed, would act as a safeguard for their interests. As one of their leaders put it: "...it was necessary to have a strong and independent central government whose authority and prestige would give confidence and guarantee security to minority groups within the Federation..."¹⁴³ The Willink Commission also noted the point that the minorities were not against the Federal Government:

Our first task...was to enquire into the fears of minorities and these were all expressed in regard to the Regional Governments, who in each Region were thought of as a majority group. No minority expressed fears of the Federal Government, partly no doubt because the Regional Governments deal with matters which affect most people much more closely than those which fall within the Federal sphere, but also because the Federal Government [was] pictured not as one group which will try to arrogate all powers to itself but as a group of interests between which compromise is essential.¹⁴⁴

It seems clear that this 'picture' of the Federal Government did not anticipate a seizure of power by an authoritarian 'Military Government', which would arrogate all powers to itself and/or, indeed, be a source of insecurity and fear to the Niger Delta People.¹⁴⁵ However, it would appear that that was what eventually happened. As evidence makes clear, the 'Military Boys' who seized power in 1966 continued to rule

¹⁴² This is a Swahilian word, which means 'victory'. It was made popular by President Jomo Kenyatta of Kenya.

¹⁴³ Part of a statement made by Udo Udoma after the 1953 Constitutional Conference – quoted in *Old Calabar and Ogoja Provincial Communities* (1967: 6).

¹⁴⁴ Willink Commission (1958: 2).

the country after the civil war, and, in the process, virtually centralized all the powers of the Nigerian State. The most important manifestation of this, for the purposes of the present study, was the promulgation of the Petroleum Decree in 1969 (re-enacting a colonial legislation) and the Land Use Act in 1978. Both laws vest oil resources and land resources, respectively, in the State.¹⁴⁶ They affect the Niger Delta People in important ways because they concern the ownership, control and exploitation of natural resources, which are located in the Niger Delta.

As would be seen in Chapter 2, oil is presently the single most important natural resource to the Nigerian economy, and is found mainly¹⁴⁷ in the Niger Delta area.¹⁴⁸ Since the early 1970s (unlike the case before independence and up until the end of the First Republic¹⁴⁹) the Nigerian State has been sustained by oil revenue, which has been used to develop parts of the country. However, there is no evidence that the Niger Delta and the indigenous people of the area have felt the positive impacts of oil exploitation, despite bearing environmental and social costs.¹⁵⁰

To be sure, the ownership of oil is statutorily vested in the Federal Government (see Chapter 2), and this carries the right, to the exclusion of the constituent units (particularly the Niger Delta People), to receive the revenue from its exploitation and/or to determine its utilization. In this connexion, the question that arises is this: 'By demanding separate States for themselves and asking for a strong

¹⁴⁵ Even the Willink Commission assumed (in making their recommendations) 'a desire to continue with democratic institutions' (Willink Commission, 1958: 95, para. 30).

¹⁴⁶ See Chapter 2.

¹⁴⁷ Other areas where oil is found in Nigeria are the southern fringes of the Niger Delta; that is, what some have described as the peripheral areas of the Niger Delta - i.e. some communities in Abia, Akwa Ibom, Imo and Ondo States.

¹⁴⁸ Nigeria is blessed with other natural resources like gas (also found mainly in the Niger Delta), coal, tin ore, iron ore, phosphate and columbite. But as Iwaloye and Ibeanu have rightly noted, 'the most intriguing is crude oil and gas... that is concentrated (sic) mainly in the deltaic area of Nigeria, an area settled by the delta ethnic minorities...' (Iwaloye and Ibeanu, 1997: 62).

¹⁴⁹ After independence in 1960, Nigeria became a Republic in 1963. The First Republic was from October 1963 to January 1966.

¹⁵⁰ See Chapters 3 and 5.

centre, did the Niger Delta People imply that they would be content with 'political independence', without 'economic independence'?' Osaghae thinks the answer is in the negative. He argues that although, historically, minorities in Nigeria have advocated a strong-centre federation, 'but certainly not the kind that takes away all sources of revenue from the constituent units or denies them any real power'.¹⁵¹ Few will doubt that political power without economic power is unreal.

As the foregoing discussion reveals, the demand for the creation of States in the 1950s and 1960s was seen as a means of solving minority problems. However, according to sources, from 1970 it came to be seen as a 'vehicle for economic development'. This was probably the direct result of a Revenue Allocation Decree (all federal legislation by successive Federal Military Governments were called Decrees¹⁵²), promulgated by the Federal Military Government in 1970, which prescribed that half of the total revenue in the Distributable Pool Account (DPA) (on which the constituent States were - and still are - heavily dependent) should be shared equally among the constituent States, and the other half on the basis of their relative population.¹⁵³ This linkage between the status of Statehood and economic development predictably gave rise to a surge in the demand for the creation of States.

As Keith Panter-Brick observes, the 1970 Decree:

[I]mmediately put a premium on further devolution, especially in those parts of the country where the demand for services of one kind or another was more intense. A greater share of the federally distributed revenues could be obtained simply by multiplying the number of units of government, each of which could then claim its equal share of the national cake.¹⁵⁴

¹⁵¹ Osaghae (1998: 12).

¹⁵² The legislative acts of the government of a State under the military dispensations in Nigeria were called 'Edicts'.

¹⁵³ See S. E. Oyovbaire (1985: 167). Subsequent reforms of the revenue sharing formula did not change the basic policy implemented in this Decree. (See Osaghae, 1991: 500).

¹⁵⁴ Panter-Brick (1978: 5). Graf (1988: 139) maintains that this position continued into Nigeria's Second Republic. He argued: 'State-Federal relations in the Second Republic were essentially determined by the restructured federal system implemented by the military government and controlled by the political parties. This system, which developed in the context of the oil boom of the 1970s, in a

This political development appears to have been accentuated by the application of the 'federal character' principle, which became a key constitutional principle since 1979.¹⁵⁵ This principle enjoins the representation of every State in important Federal Government offices and institutions.¹⁵⁶ Significantly, because of the linkage between Statehood and economic interests, the agitation for the creation of States is now championed by the majority ethnic groups, and not by the minority groups. As Obi Wali observed in the Constituent Assembly¹⁵⁷ in 1978: "The creation of States has ceased to be solely a response to minority problem and has become a means of the majority groups trying to adjust again in order to square up".¹⁵⁸

Between 1976 and 1996, 24 more States were created in Nigeria, bringing the total number of States in the country to 36 - out of which the Niger Delta 'gained' only two States, i.e. Delta State (created in 1991¹⁵⁹-from the former Mid-West/Bendel State) and Bayelsa State, created in 1996. There is abundant evidence that the Niger Delta people are unhappy with the proliferation of States for the economic interests of

sense also unified the national economy inasmuch as all the States' individual dependencies on their own products - groundnuts, cotton, cocoa, palm oil, etc. - were replaced by a common dependence on oil revenues. This dependence has been consciously fostered by the central government, first, by the political and administrative erosion of most independent regional powers, and second, by federal revenue distribution via the Distributable Pool Account which provided and provides some 70% of States revenues, half allocated to the States on the basis of population, the other half as an equal lump-sum payment to every State (thus also generating a strong incentive toward State formation)...

¹⁵⁵ See s 14 (3) of the 1979 (now s 14 (3) of the 1999) Constitution of Nigeria: 'The composition of the Federation or any of its agencies and the conduct of its affairs shall be carried out in such a manner as to reflect the federal character of Nigeria and the need to promote national unity, and also to command national loyalty, thereby, ensuring that there shall be no predominance of persons from a few States or from a few ethnic or other sectional groups in that government or in any of its agencies.' A similar provision is also made in respect of State and Local Governments (Section 14(4)). See also Sections 153(1) and 154(1).

¹⁵⁶ The Constitution also prescribes important roles for States in the election of the president of the Federation. In addition to having the majority of the votes cast at the election, the candidate must achieve 'not less than one-quarter of the votes cast at the election in each of at least two-thirds of all the States in the Federation and the Federal Capital Territory, Abuja.' See Sections 133 and 134.

¹⁵⁷ This was the Assembly that considered and adopted a Draft Constitution, which became the 1979 Constitution of Nigeria.

¹⁵⁸ Constituent Assembly Debates, 16 March 1978, col.6764.

¹⁵⁹ The State was based on the old Delta Province. In demanding for the creation of this State, the people denounced the neglect, exploitation and devastation of the oil-rich Niger Delta. They argued that 'their economy will be developed more rapidly if and only if a Government that has to attend to the

the majority ethnic groups.¹⁶⁰ For example, the Ogoni Community criticised the exercise, thus:

The split of the country into 30 States and 600 local governments in 1991 is a waste of resources, a veritable exercise in futility. It is a further attempt to transfer the seized resources of the Ogoni and other minority groups in the Delta to the majority ethnic groups of the country. Without oil, these States and local governments will not exist for one day longer. The import of the creation of these States is that the Ogoni and other minority groups will continue to be slaves of the majority ethnic groups. It is a gross abuse of human rights, a notable undemocratic act which flies in the face of modern history. The Ogoni People are right to reject it. While they are willing, for the reasons of Africa, to share their resources with other Africans, they insist that it must be on the principles of mutuality, of fairness, of equity and justice.¹⁶¹

In a similar statement, one of the leaders of the Niger Delta people has poignantly said:

The way and manner in which the States and local governments were created were an affront to truth and civility, a slap in the face of modern history; it was robbery with violence. What Babangida [Military Head of State] was doing was transferring the resources of the delta, of the Ogoni and other ethnic minorities to the ethnic majorities – Hausa-Fulani, the Igbo and the Yoruba – since most of the new states and local governments were created in the homes of these three. None of the local governments or States so created was viable: they all depended on oil revenues which were to be shared by the States and local governments according to the most outrageous of criteria...¹⁶²

More significantly, the above statements further suggest that the Niger Delta People are not satisfied with the present (particularly economic) arrangement in the

unique economic problems of the area is in control of our affairs'. See Delta State Movement, *Request for Creation of Delta State*, (Warri, 1980), 21.

¹⁶⁰ On this issue, it has been rightly noted: 'The number of States have proliferated due to political factors and economic reasons, particularly given State access to a percentage of revenue generated from the oil industry. These proceeds by and large profit the majority groups in the non-oil-producing areas, to the disadvantage of minorities in the in the oil-producing areas' (Robinson (1996: 18).

¹⁶¹ See Forward to the Ogoni Bill of Rights by Ken Saro-Wiwa (1992).

Nigerian State, especially as it relates to income derived from oil resource exploited from their region; they appear to feel dominated by the majority ethnic group.¹⁶³ Support for this view can also be found in their description of the situation as 'indigenous colonialism'.¹⁶⁴ Further, various 'Declarations of Rights'¹⁶⁵ and protests indicate that the 'new struggle' of the people is for 'economic self-determination'¹⁶⁶ or 'new national economic order': '*A new order in Nigeria; an order in which each ethnic group will have full responsibility for its own affairs and competition between the various peoples of Nigeria will be fair...*' (MOSOP, 1992)¹⁶⁷ Specifically, it would appear that they are challenging the present legal regime relating to the exploitation of oil, which is presently found in their region only. For example, their Declarations make clear that they do not derive equitable benefit from the exploitation of oil resources, but they suffer the adverse (particularly environmental) impact of the exploitation activities.¹⁶⁸

It is important to note that the present struggle of the Niger Delta people against the Federal Government of Nigeria, raises the question of their present status

¹⁶² See Ken Saro-Wiwa (1995: 99 – 100).

¹⁶³ A submission made by the International Indian Treaty Council to the UN Working Group on Indigenous Populations suggests that the feeling of domination is widespread among minorities and indigenous peoples in independent countries worldwide. In the submission, indigenous populations are described as being subject to 'an alien economic and/or political and/or social domination which is alien and colonial or neo-colonial in nature'. See UN Doc E/CN.4/Sub.2/A.C4/1983/5/Add.2, 3-4.

¹⁶⁴ MOSOP (1992).

¹⁶⁵ E.g. Ogoni Bill of Rights, Kaiama Declaration, Ikwerrri Rescue Charter, Aklaka Declaration for Egi, and Urhobo Economic Summit Resolution.

¹⁶⁶ See generally, Muchlinski (1983: 73 – 86).

¹⁶⁷ This recalls the agitation of 'emergent States' in the 1970s for a 'new international economic order' (NIEO). The newly independent States had found, rather disappointingly, that political independence or self-determination did not necessarily imply economic independence or self-determination. As Mansell and Scott (1994: 172) explained, 'it was the recognition that economic self-determination was unattainable under extant international system which led to new formulation of rights in early 1970s in the United Nations in what came to be known as...new international economic order (NIEO). In essence, what this NIEO implied was a fundamental restructuring of trade, trans-national corporations, aid, and international institutions'. For the chequered history of the NIEO movement, see Mansell and Scott (1994: 172 –173); Waelde (1995: 1301). It is notable, as Muchlinski points out, that 'issues of equity and distributive justice...lay at the heart of the NIEO'. See Muchlinski (1998: 429).

¹⁶⁸ See, by example, the Ogoni Bill of Rights, which partly states: '[N]eglectful environmental pollution laws and substandard inspection techniques of the federal authorities have led to the complete

in Nigeria. The question is: ‘Given the abolition of Regions on which the issue of their minority status arose and the creation of States for them, are they still “minorities”?’ A related question, which also arises from the history of how they became part of Nigeria and from their various Declarations of Rights, is whether they are ‘indigenous people’ in Nigeria. The status of ‘minorities’ and ‘indigenous people’ are not necessarily the same, although they may coincide. Since some of the claims¹⁶⁹ made by the Niger Delta People in their new struggle appear to be based on minority rights and/or rights of indigenous people, and having regard to the recent suggestion of the African Commission on Human and Peoples’ Rights on this question, it is important to this thesis to investigate the present status of this people. This is the task set for the next section.

1.7.2. The Present Status of the Niger Delta People

1.7.2.1. Definitional and Terminological issues

As previously stated, recent Declarations of Rights by the various Peoples of the Niger Delta suggest that they are minorities and/or indigenous peoples in Nigeria, and claim the associated rights. In this, they seem to enjoy the support of the African Commission on Human and Peoples’ Rights, which made similar suggestion in a recent decision. Nevertheless, it is a notorious fact, at least presently, that under international law minority rights and the rights of indigenous peoples (such as the right to self-determination) are claimable only by claimants who enjoy such status.¹⁷⁰ This raises the question of definition of indigenous people. As the Canadian Supreme Court has pertinently observed: ‘International law grants the right to self-

degradation of the...environment, turning our homeland into ecological disaster...[It] is intolerable that... the richest [area] of Nigeria should wallow in abject poverty and destitution’ (Paras. 16 and 18).
¹⁶⁹ See below.

determination to “peoples”. Accordingly, access to the right requires the threshold step of characterizing as a people the group seeking self-determination’.¹⁷¹ Similarly, Brownlie has justified the need for the definition of indigenous people, thus:

The legal ramifications of indigeneity remains to be teased out. The lawyer must first call up a definition of the beneficiaries. At this point the non-lawyer grows impatient. Lawyers sometimes seem like the lady who did not know what an elephant was until she was told it was a herbivorous pachyderm. Moreover, in the case of indigenous peoples there is the feeling that the only acceptable procedure is that of self-identification. However, *definition is not simply the satisfying of arid formalism but helps to round up certain difficult questions of purpose...In this context the purpose, whatever it may be, in identifying the beneficiaries of any special legal regime which may be required, must be to link the entitlements with the beneficiaries*¹⁷² (Italics mine).

In view of this, it is of the first importance to examine the definition of minorities and indigenous peoples, especially as different rights accrue in each case. As Marquardt points out, ‘the fact that the rights of minorities and the rights of indigenous peoples are the object of separate international documents strongly suggests that under international law – at least *de lege ferenda* - indigenous peoples are to be distinguished from minorities’.¹⁷³ He further asserts that ‘from a legal point of view, this position can further be supported with reference to the different types of rights pertaining to minorities and indigenous peoples respectively, as illustrated by the applicable international instruments’.¹⁷⁴ For convenience and clarity, it is proposed to examine the definition of these two concepts separately, the findings of which would be used in determining the status of the Niger Delta People.

¹⁷⁰ The view is still widely held that ‘minorities’ are different from ‘indigenous peoples’, although the two statuses may coincide in some cases.

¹⁷¹ *Reference re Secession of Quebec* [1998] 2 S.C.R.217, at 281.

¹⁷² Brownlie (1992: 58).

¹⁷³ Marquardt (1995: 70).

¹⁷⁴ Marquardt (1995: 70). It should, however, be noted that the 1993 World Conference on Human Rights (Vienna Declaration) refers to ‘indigenous peoples’ under the heading ‘persons belonging to national or ethnic, religious and linguistic minorities’. See United Nations Doc. A/CONF. 157/24, 13 October 1993, Part 1, Para. 35.

1.7.2.1. (a). Definition of Minorities

Akande (1995: 204) has rightly observed that 'if minorities are to be treated as distinct entities then the problem of identification immediately arises'. According to this author, 'a precise definition may serve to minimize controversy by drawing the bounds in a clear fashion, thus fitting the relevant rights to undeniable claimants'.¹⁷⁵ Yet there are few concepts in law that have eluded precise definition than the concept of 'minorities'; over the years several unsuccessful attempts have been made to define the concept. Perhaps it can be said that each attempt is remembered more for its controversy than for its break-through.

Some authors have suggested that this state of affairs is probably the consequence of the attitude of States towards the concept and the absence of an international consensus on the issue.¹⁷⁶ As one commentator puts it: 'The presence of minorities in the territory of a State is often disputed, especially by spokesmen of the "countries of immigration" who sometimes define them out of existence, attempting perhaps to deflect the gaze of the international community from the treatment of their populations.'¹⁷⁷ Such practices are encouraged, though not justified, by the absence of an agreed international definition of "minority".¹⁷⁸ Remarkably, this attitude is still reflected in recent international instruments for the protection of minorities, by failure to define the concept.¹⁷⁹

¹⁷⁵ Akande (1995: 204). See also Brownlie (1992: 58).

¹⁷⁶ In a recent work, Symonides observed that: 'The analysis of international standards concerning minorities leads to the conclusion that their beneficiaries are not identical. This difference is especially evident between universal normative instruments adopted by the United Nations and regional ones by the CSCE and the Council of Europe...[and] *this difference is partially due to the absence of one universally recognised definition of "minority".*' (Symonides, 1996: 319) (Italics mine).

¹⁷⁷ Thornberry (1991: 3) submits that 'it may be asserted with confidence that while any and every State in the world may not contain minority groups – ethnic, religious, and linguistic – almost all States do'.

¹⁷⁸ Thornberry (1980: 422).

¹⁷⁹ The Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (adopted on 18 December 1992 by the United Nations General Assembly, by its Resolution 47/135) does not define 'minorities'. Similarly, neither the Copenhagen Document 1990 (see 29 ILM

Strangely, the denial of the existence of minorities appears to be more vigorously pursued by Latin American and African countries, which were the victims of colonialism. Representatives of Latin American countries have often claimed that the problem of minorities does not arise on the American continent;¹⁸⁰ and many African States¹⁸¹ hold that 'minorities problem' is 'essentially European'.¹⁸² Yet, it is a notorious fact that some of these 'states' (like Nigeria) were the creation of the colonists who drew boundaries 'with little regard for the distribution patterns of racial, ethnic or tribal groups' (Thornberry, 1991: 424). Maybe the attitude of these States is influenced by the view that: 'Affording protection to a minority as a group suggests the possibility of privilege, perhaps even secession, and endangers a nation's unity'.¹⁸³ The truth, however, is that the existence or status of minorities is not (and ought not to be) dependent upon recognition by States. In this thesis, only a few of the attempted definitions of 'minorities' will be stated.

One of the earliest attempts at the definition of minorities can be found in the decisions of the Permanent Court of International Justice (PCIJ). In an Advisory Opinion relating to the situation of minorities in neighbouring Balkan states after World War I, the court defined 'community' as 'a group of persons having a race, religion, language and traditions of their own and united by this identity in a

1990, at 1305) nor the legally binding Framework Convention on the Protection of National Minorities (adopted on 10 November 1994 by the Committee of Ministers of the Council of Europe – See 34 ILM 1995, at 351) define the terms 'minority' or 'national minority'.

¹⁸⁰ See Thornberry (1980: 422, at footnote 3). See also, Thornberry (1991: 3, at footnote 9).

¹⁸¹ In Europe, Poland had denied the existence of 'minorities' in its territory until democratic transformation in the country began in 1989. See Mikolajczyk (1997: 84). This article admirably demonstrates that Polish law and policy now conforms to international standards of minorities' protection.

¹⁸² See OAU DOC CAB/LEG/67/3/Rev.5, reprinted in the Report of the Secretary-General of the OAU on the Draft African Charter on Human and Peoples' Rights, OAU DOC CM/1149 (XXXVII), Annex II; ILM, 21 (1982), 58; EHRR, 4 (1982), 417. For interesting academic reviews of the African Charter, see Gittleman (1982: 667); Umozurike (1983: 902); Kiwanuka (1988: 80). See further Thornberry (1991: 20 – 21).

¹⁸³ See UN Doc E/CN.4/Sub.2/1985/31, para. 51 (Study by Deschenes).

sentiment of solidarity, with a view to preserving these traditions'.¹⁸⁴ Further, in another case, commenting on the system of minorities protection under the League of Nations,¹⁸⁵ the court described 'minorities' as 'certain elements incorporated in a State, the population of which differs from [the others]' and who are desirous of 'preserving the characteristics which distinguish them from the majority'.¹⁸⁶

In another early attempt, the Sub-Commission on the Prevention of Discrimination and Protection of Minorities¹⁸⁷ (a Sub-Commission of the Human Rights Commission of ECOSOC) recommended the adoption of the following definition in January 1950: 'The term minority includes only those non-dominant groups in a population which possess and wish to preserve stable ethnic, religious or linguistic traditions or characteristics markedly different from those of the rest of the population; such minorities should properly include a number of persons sufficient by themselves to develop such characteristics; and the members of such minorities must be loyal to the State of which they are nationals'.¹⁸⁸

Overall, it seems the most widely accepted definition of 'minority' is that proposed by Special Rapporteur Capotorti. In his Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities,¹⁸⁹ he defined 'minority' as follows:

A group numerically inferior to the rest of the population of a State, in a non-dominant position whose members – being nationals of the State – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense

¹⁸⁴ *Interpretation of the Convention between Greece and Bulgaria Respecting Reciprocal Immigration (question of the 'communities')*, Series B No. 17 (1930), 21.

¹⁸⁵ For details on this, see Thornberry (1980: 428 et seq).

¹⁸⁶ *Minority Schools in Albania*, [1935] P.C.I.J., ser. A/B, No. 64, at 17. See also, *Rights of Minorities in Upper Silesia (Minority Schools)*, [1928] P.C.I.J., Ser. A, No. 15, at 32-33.

¹⁸⁷ The Sub-Commission was established in 1947.

¹⁸⁸ UN Doc. E/CN.4/358.

¹⁸⁹ UN Doc. E/CN.4/Sub.2/384/Rev.1 (1979).

of solidarity, directed towards preserving their culture, traditions, religion or language.¹⁹⁰

Thornberry rightly points out that ‘this definition, though not yet a part of any international legal instrument, certainly identifies those groups of likely concern to the international community (numerically inferior, non-dominant), and neatly combines the objective criteria (possession of distinct characteristics) with the subjective criteria (the wish to preserve these characteristics) that constitute a minority in fact’ (Thornberry, 1980: 423). Yet this definition is not infallible. For example, it does not cover what one author has termed ‘minorities by force’ (groups desiring assimilation into the majority community but prevented by that community from achieving it) - as distinct from ‘minorities by will’ (groups wishing to remain different), which it depicts.¹⁹¹ Perhaps it can be said that groups desiring assimilation are properly excluded from Capotorti’s definition because they do not need any special protection beyond the catalogue of human rights guaranteed to all citizens of a State on the basis of equality and non-discrimination.

Capotorti’s definition was reviewed and refined by Deschenes in 1985, who proposed the following formulation:

A group of citizens of a State, constituting a numerical minority and in a non-dominant position in that State, endowed with ethnic, religious or linguistic characteristics which differ from those of the majority of the population, having a sense of solidarity with one another, motivated, if only implicitly, by a collective will to survive and whose aim is to achieve equality with the majority in fact and in law.¹⁹²

¹⁹⁰ Although this definition was drawn up with particular reference to Article 27 of the ICCPR, Thornberry (1991: 6) argues that it can serve a more general purpose, and has, in fact been widely cited in recent legal literature.

¹⁹¹ See Laponce (1960: 5 – 2).

Few differences in this definition from Capotorti's are noticeable. Firstly, Deschenes replaces 'numerically inferior to the rest of the population of a State' by 'constituting a numerical minority'. Thornberry argues that 'this is more than *elegantia juris*: the term "inferior" is avoided, even though in Capotorti it clearly refers to a number and is not a cultural value-judgement' (Thornberry, 1991: 7). Secondly, the word 'citizens' is preferred to the word 'nationals' (of a State), and this avoids a seeming vagueness of the Capotorti expression. Thirdly, 'equality in fact and in law' is explicit in Deschenes' definition, while it is implicit in Capotorti's. In terms of similarity, it has been pointed out that 'both formulae perhaps carry an incorrect implication through contrasting "the rest of the population" (Capotorti) and "the majority" (Deschenes) with minorities, as if the majority were a monolithic cultural block in opposition to the minority, which is not the case in many States'.¹⁹³ For example, in Nigeria there are three different blocks of majorities as noted above. In the result, it would appear that there is not much to choose between these two definitions.

A further attempt to define 'minority' was undertaken by the Parliamentary Assembly of the Council of Europe in 1993. In its Recommendation 1201 of 1993 (on an additional Protocol on the rights of National Minorities to the European Convention on Human Rights) it formulated a definition which regards 'national minorities' as a 'group of persons' (citizens) in an existing State, exhibiting distinctive ethnic, cultural religious or linguistic characteristics and a will to maintain

¹⁹² Proposal Concerning a Definition of the term 'Minority' by Mr Jules Deschenes, a Canadian member of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities (UN Doc. E/CN.4/Sub.2/1985/31/, Para. 181).

¹⁹³ Thornberry (1991: 7).

and perpetuate their identity and characteristics. The definition underscores the fact that such a group is smaller than the rest of the population of that State.¹⁹⁴

Finally, it is interesting to note the definition offered in 1993 by Asbjorn Eide - a leading international lawyer - in his report on possible ways and means of facilitating the peaceful and constructive solution of problems involving minorities. According to him, a 'minority' is a group of persons in an independent State, who constitute less than half of the population of the State, members of which share certain common and distinctive characteristics (such as ethnicity, language or religion).¹⁹⁵

On the whole, certain recurrent features are discernable from the various definitions stated above, which distinguish a 'minority group' from a 'majority group' in a State, viz.: numerical inferiority; non-dominant position in the State; a cultural, ethnic, religious or linguistic identity different from the rest of the population; and a sense of solidarity or will to safeguard their identity.¹⁹⁶ These will be the guiding criteria for determining the status of the Niger Delta people in the Nigerian State.

1.7.2.1 (b). Definition of Indigenous Peoples

Some scholars have suggested that there is an overlap between the general case of minorities and the specific case of indigenous peoples.¹⁹⁷ Yet most indigenous peoples often claim to be different from minorities. As one indigenous group put it: 'The ultimate goal of their colonisers would be achieved by referring to indigenous peoples as minorities'.¹⁹⁸ In the same vein, it has been argued by one observer that:

¹⁹⁴ See Symonides (1996: 321). See further, the definition of the European Commission for Democracy Through Law (Quoted in Symonides, 1996: 321).

¹⁹⁵ See UN Doc. E/CN.4/Sub.2/1993/34.

¹⁹⁶ See Symonides (1996: 320).

¹⁹⁷ See, by example, Thornberry (1991: 331).

¹⁹⁸ This was the view of a representative of the International Indian Treaty Council before the UN Working Group on Indigenous Populations, as cited in UN Doc. E/CN.4/L.1540. See also, Deschenes, 'Proposals Concerning a Definition of the Term 'Minority' (UN Doc. E/CN.4/Sub.2/1885/31, paras. 24-38).

‘Classification of indigenous peoples as minorities...does not appear to be compatible with the collective character of a number of their rights, especially in view of the fact that under present international law, minority rights are only protected as individual rights’.¹⁹⁹ This author later concluded: ‘From a legal point of view, “indigenous peoples” should be strictly distinguished from minorities’.²⁰⁰

These kinds of arguments make the need for a definition of ‘indigenous peoples’ compelling. However, definitional issue has proved contentious over the years at different international *fora*. For example, there is evidence that the most recent debate on this issue took place during the Second and Third Sessions of the UN Working Group on Indigenous Peoples (WGIP).²⁰¹ One of the questions raised was whether ‘indigenous peoples’ is a global phenomenon. Some countries (such as El Salvador,²⁰² China, the Russian Federation (part of the former USSR), India, and Bangladesh) deny that there are indigenous peoples within their territories, and sought to restrict any definition of the concept to the Western Hemisphere and Australia. The denial of Bangladesh is both illuminating and illustrative. Its delegates maintained: “[I]ndigenous” refers only to those countries where racially distinct people coming from overseas established colonies and subjugated the indigenous populations. The entire population of Bangladesh was autochthonous and all co-existed prior to the formentation of ethnic divisions by British administrators’.²⁰³

¹⁹⁹ Marquardt (1995: 70-1). This contracts with another view, which states: ‘There is no authoritative definition of “peoples” with criteria for distinguishing them from a minority. Although indigenous groups believe that they must be distinguished from minorities, the relevant international instruments do not make this distinction clearly’. See *Mana Tangata: Draft Declaration on the Rights of Indigenous Peoples – Background and Discussion on key issues* (Consultation Document issued by the Government of New Zealand in 1993), at 11 (hereinafter, Government of New Zealand, 1993).

²⁰⁰ Marquardt (1995: 71).

²⁰¹ Originally called the Working Group on Indigenous Populations.

²⁰² See ILO Summary of Reports of Ratified Conventions, Report III (1), International Labour Conference, 45th Session (1961), 196. See also Swepston (1978: 715).

²⁰³ Thornberry (1991: 378, footnote 19).

Another source of controversy on the question of definition of indigenous peoples is the concept of 'self-determination'. In international law, 'self-determination' is a right of 'all peoples',²⁰⁴ and the term 'peoples' has come to acquire a special meaning in international law. 'It implies that those covered by the term enjoy the right of self-determination'.²⁰⁵ Essentially, this is the right of 'all peoples' to 'independence'.²⁰⁶ From all indications, it is an important right, as it can be found in several 'soft law' (non-binding) as well as 'hard law' (binding) international instruments.²⁰⁷ For example, it is referred to in Art.1, para.2 and Art.55 of the UN Charter (where it is described as a principle),²⁰⁸ and in Art.1 para.1 of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).²⁰⁹ It is also contained in para.2 of the Declaration on the Granting of Independence to Colonial Countries and Peoples,²¹⁰ Principle VII of the Helsinki Final Act,²¹¹ and in Art.20 para.1 of the African Charter on Human and Peoples' Rights.²¹²

²⁰⁴ See Thornberry (1991: 379).

²⁰⁵ Government of New Zealand (1993: 11).

²⁰⁶ It has been argued that the right (to self-determination) has become so established in international law that it has acquired a status beyond 'Convention', and can now be considered a general principle of international law. See Cassese (1995: 171 – 2).

²⁰⁷ Doehring (1994: 60) points out that 'the sheer number of resolutions concerning the right of self-determination makes their enumeration impossible'.

²⁰⁸ Art. 1(2) of the UN Charter states one of the purposes of the organisation thus: '*To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace*'. Similarly, Art. 55 states that the UN shall promote goals such as higher standards of living, full employment and human rights '*with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples*'.

²⁰⁹ See 999 UNTS 171 (ICCPR) and 993 UNTS (ICESCR), respectively. These two Covenants (sometimes called the 1966 Covenants) were adopted by the UNGA as an annex to resolution 2200 (XXI) of 16 December 1966. Joint Art. 1 of these Covenants provides: '*All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development*'.

²¹⁰ UNGA Resolution 1514(XV) of 14 December 1960, UNGA OR 15, Suppl. No. 16, 66-67.

²¹¹ Final Act of the Helsinki Conference on Security and Cooperation in Europe – reproduced in: 14 ILM (1975), 1292: 'The participating States will respect the equal rights of peoples and their right to self-determination, acting at all times in conformity with the purposes and principles of the Charter of the United Nations and with the relevant norms of international law, including those relating to

Probably because the right to self-determination is taken to imply the right to secession,²¹³ many States (contrary to the claim of indigenous peoples²¹⁴) contend that indigenous peoples are not 'peoples' as understood in international law.²¹⁵ The proponents of this view prefer the singular term 'people',²¹⁶ or the term 'populations'. It is contended that the term 'people' (as in 'indigenous people') refers to individual persons rather than groups.²¹⁷ With regard to 'populations', there is no indication that it has any hard-core or technical connotation in international law. These two terms, it has been suggested, differ from the term 'peoples' (or 'people' in its collective sense)

territorial integrity of States'. See also UNGA resolution 2625 (XXIV) – the 'Friendly Relations Declaration' of 24 October 1970 (adopted without a vote), UNGA OR 25, Suppl. No.28, 121.

²¹² See ILM 21 (1982), 58.

²¹³ New Zealand Government appears to support the view held in some quarters that the right to self-determination is relevant only in the colonial context; 'it implies the right to secession from colonial rule...[and]...is counterbalanced by the principle of territorial integrity, which provides that the boundaries of a State should be protected, in the interests of political unity and stability. It is vitally important for governments that the principle of territorial integrity should not be undermined'. See Government of New Zealand (1993: 11). This was the argument of the government in opposing the inclusion of the right to self-determination in any United Nations Declaration on the Rights of Indigenous Peoples.

²¹⁴ Marquardt notes that 'most of the indigenous participants in the WGIP sessions have consistently based their claims for political independence and autonomy on the right to self-determination of peoples as contained in various international instruments' (Marquardt, 1995: 62). Indeed, the 'Declaration of Principles' adopted by the Indigenous Peoples' Preparatory Meeting prior to the 5th session of the WGIP states as follows: 'All indigenous nations and peoples have the right to self-determination, by virtue of which they have the right to whatever degree of autonomy or self-government they choose'. See WGIP Report, 1987, Annex V. See further WGIP Report, 1991- UN Doc.E/CN.4/Sub.2/1991/40/Rev. 1, 3 October 1991, para.80; WGIP Report, 1989 – UN Doc. E/CN.4/Sub.2/1989/36, 25 August 1989, para.56.

²¹⁵ In his recent study of international law affecting indigenous peoples, Marquardt observes that 'during the WGIP's sessions, the question of the right to self-determination of peoples was often linked to the notion [of] "indigenous peoples". In the opinion of several governmental observers, this implied that the right to self-determination was applicable to them and that they could in principle claim independence from their respective State' (Marquardt, 1995: 52). He later argued, rightly in this author's view, that 'a right to self-determination of indigenous peoples...does not automatically entail a right to secession or independence, as feared by a number of States. In post-colonial era, this right may be interpreted with regard to indigenous peoples as a right to *internal* self-determination, i.e. a right to self-government or autonomy within the States in which they live'. By way of example, he noted that the Indian nations of Canada only claim self-determination within the Canadian federal system.. (Marquardt, 1995: 65). Even in Nigeria, the claim of the Niger Delta people is expressly limited to internal self-determination. See further UN Doc E/CN.4/Sub.2/A.C.4/1983/5/Add.2, 3-4, where the International Indian Treaty Council stated (in their submission to the UN Working Group on Indigenous Populations) that self-determination also involves 'internal self-determination, which includes control over economic, social, and cultural development in accordance with their traditions...'

²¹⁶ In *Reference re Secession of Quebec* [1998] 2 S.C.R. 271, the Supreme Court of Canada observed: '...as the right to self-determination has developed by virtue of combination of international agreements and conventions, coupled with State practice, with little formal elaboration of the definition of "peoples", the result has been that the precise meaning of the term "people" remains somewhat uncertain'. cf. the view of the Government of New Zealand (1993: 11) (stated above).

which has been defined as ‘a specific type of community sharing a common desire to establish an entity capable of functioning to ensure a common future’.²¹⁸ And, by another author, as ‘a social entity having a manifest identity and its own characteristics, a relationship to a specific territory and which is to be distinguished from ethnic, religious or linguistic minorities as referred to in Art.27 of the ICCPR’.²¹⁹ Even so, there is no evidence that these are generally agreed meanings in international law.²²⁰

It is notable that notwithstanding the terminological obstacles, some attempts have been made to define the concept of ‘indigenous peoples’.²²¹ One of the most notable definitions is the ‘working definition’ furnished by Special Rapporteur Martinez-Cobo in his report submitted in 1984 to the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities. He stated:

Indigenous populations are composed of the existing descendants of the peoples who inhabited the present territory of a country wholly or partially at the time when persons of a different culture or ethnic origin arrived there from other parts of the world, overcame them and, by conquest, settlement or other means reduced them to a non-dominant or colonial condition; who today live more in conformity with their particular social, economic and cultural customs and traditions than with the institutions of the country of which they now form part, under a State structure which incorporates mainly the national, social and cultural characteristics of other sections of the populations which are predominant.²²²

²¹⁷ See Marquardt (1995: 66).

²¹⁸ See Gros-Espiell, *The Right to Self-Determination – Implementation of United Nation Resolutions*, UN Doc. E/CN.4/Sub.2/405/Rev.1 (1979), para.56.

²¹⁹ See A. Cristescu, *Study of the Right to self-Determination – Historic and Present Development on the basis of United Nations instruments*, UN Doc. E/CN/Sub.2/404/Rev.1 (1981), para.279.

²²⁰ This thesis uses the expression ‘indigenous people’ or ‘indigenous peoples’ interchangeably to refer to a group of people (a collectivity) and not (except where expressly so stated) individual members of a group.

²²¹ For an account of the initial difficulties of defining indigenous peoples, see Thornberry (1991: 334 et. Seq.).

²²² Martinez-Cobo, UN Doc E/CN.4/Sub.2/L.556.

It is not difficult to see the similarity between this definition and that proposed by Capotorti for minorities. Commenting on this point, Thornberry notes that ‘the reference to “non-dominant” elements in the population recalls Capotorti. The reference to a ‘colonial condition’ is an echo of the vocabulary of self-determination; it suggests the relevance of the norms of self-determination to indigenous peoples...There is no reference to any numerical requirement like that in the Capotorti definition, stating a minority is numerically inferior to the rest of the State’s population. In theory, therefore, an indigenous group could constitute a majority in the State although this is not normally the case’.²²³ Martinez-Cobo later produced a ‘definition of indigenous populations from the international point of view’. He noted that the suggested principles ‘are for use as a point of departure and for criticism and modification in the approach to a more precise draft definition of the concept of indigenous populations’. The definition goes thus:

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.²²⁴

It would appear that the most popular (and perhaps the most acceptable) definition of ‘indigenous peoples’ is that contained in the Indigenous and Tribal Peoples Convention of the International Labour Organisation (ILO) - Convention

²²³ Thornberry (1991: 342).

²²⁴ See UN Doc E/CN.4/Sub.2/1982/2/Add.6, para.1.

169²²⁵ (which is a partial revision of ILO Convention 107²²⁶). Art. 1(1) thereof defines 'indigenous peoples' as:²²⁷

- (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 populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present State boundaries and who, irrespective of their status, retain some or all of their own social, economic cultural and political institutions.²²⁸

Apart from the above, a notable aspect of the ILO definition of indigenous peoples is the provision which states that 'self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply'.²²⁹ Article 8 of the Draft Universal Declaration on Indigenous Rights, agreed by the WGIP in 1992, also contains a similar provision: 'Indigenous peoples have the collective and individual right to maintain and develop their distinct identities and characteristics, including the right to identify themselves as indigenous and to be identified as such'.

Although there are some critics of a definition based on self-identification, there is evidence of support for it. For example, the government of New Zealand agrees with it, and had argued for the inclusion of a definition in the Draft Declaration (which presently has no definition): 'The term has not been defined in the general

²²⁵ Adopted in 1989; came into force in 1991.

²²⁶ Indigenous and Tribal Populations Convention, 1957 (Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries).

²²⁷ Thornberry suggests that ILO definitions (and other definitions) of indigenous peoples were influenced by an earlier 'guide to the identification of indigenous groups in independent countries', given in a study published in 1953. See Thornberry (1991: 335 – 336).

²²⁸ Compare Art. 1(1) of Convention No. 107, 1957. It can be observed that, unlike the other definitions stated in the text above, this definition does not mention the numerical standing of indigenous peoples to the rest of the people of the State; but it has all the trappings of 'peoples' as defined above. So that, arguably, 'indigenous peoples' is encapsulated in the concept of 'peoples', which appears broader.

United Nations context. The inclusion of such a definition would make the scope of the Declaration apparent to all. It would also stop any country from being able to deny the existence of an indigenous people within its borders'.²³⁰

Most recently, the World Bank has furnished a definition of indigenous people which appeals more to the essence of the matter than the form: 'The terms "indigenous peoples", "indigenous ethnic minorities", "tribal groups", and "scheduled tribes" describe social groups with a social and cultural identity distinct from the dominant society that makes them vulnerable to being disadvantaged in the development process. For the purposes of this directive, "indigenous peoples" is the term that will be used to refer to these group'.²³¹ From this, the genesis of a people is not material; what matters is the fact that they are distinct, weaker and vulnerable members of the State where they are found. Perhaps it should be mentioned that the World Bank's interest in indigenous peoples stems from a desire to deal with vitriolic criticisms which suggest that its operations in the past adversely affect indigenous and other weak members of the society.

Interestingly, the World Bank's view on indigenous peoples is similar to that of an author who has argued: '[W]hen we ask who indigenous peoples are, we may not have a formal definition but we do have a concept. They are the peoples of the world who still face the risk of being displaced from their traditional and ancestral homelands. They are the peoples of the world whose cultural and traditional practices may be eroded because of forced displacement of their population'.²³² This is perhaps the best way to view the issue, except that, without more, it may be difficult to

²²⁹ Art. 1(2).

²³⁰ Government of New Zealand (1993).

²³¹ See World Bank, *Indigenous Peoples* (OD 4.20, September 1991), para. 3.

²³² Dias, A.K. 'International Standard-setting on the Rights of Indigenous Peoples: Implications for Mineral Development in Africa' (available at: <http://www.dundee.ac.uk/cepmlp/journal/html/article7-3.html>).

distinguish indigenous peoples from minorities (as insisted by indigenous organisations).

In summary, notwithstanding the clamour for a formal definition of 'indigenous people' by some people, there is yet no generally acceptable definition. In fact, probably because of political factors, the UN Draft Declaration on the Rights of Indigenous Peoples 1993 does not contain a definition of indigenous peoples.²³³ Similarly, the African Charter on Human and Peoples' Rights does not define the 'peoples' on whom it bestows very important rights.²³⁴ In the result, the ILO Convention 169²³⁵ (and Convention 107 for States that have ratified it but have not yet ratified Convention 169) remains the only legally binding international instruments with a definition of indigenous peoples.²³⁶ However, only 27 countries

²³³ The Chairperson-Rapporteur of the Working Group on Indigenous Peoples (WGIP), Erica-Irene Daes, has consistently opposed a formal definition of indigenous peoples. She reiterated her opposition at the fifteenth session of the Group held in July-August 1997. She has always maintained that no single definition can capture the diversity of indigenous peoples worldwide, and that it is neither possible nor desirable to arrive at a universal definition of the concept. See proceedings of the WGIP 1997.

²³⁴ According to the views of the Committee of Experts that drafted the Charter, the concept was deliberately left undefined in order to avoid ending up in 'difficult discussion'. See Report of O.A.U. Secretary-General on Draft African Charter on Human and Peoples' Rights (O.A.U. Doc. C. M. /1149, para. 13). Thornberry (1991: 21) argues that: 'There is little to suggest that "peoples" means anything other than the whole peoples of the States, and not ethnic or other groups'. This appears to be a rather restrictive view. It does not seem to take account, for example, of the *travaux preparatoire*. A better view has been expressed by Addo (1988: 186): ' "All peoples" is clearly intended to cover a different group and definitely a wider group of people than colonised and oppressed peoples...[It covers] not only colonial peoples but also peoples living in independent African countries'. This latter view finds support in a recent decision of the African Commission on Human and Peoples' Rights: *Communication 155/96 The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights / Nigeria* (Done at the 30th Ordinary Session, held in Banjul, The Gambia from 13th to 27th October 2001) (See below). See further Umozurike (1983: 902); Kiwanuka (1988: 80). Interestingly, Dias has pointed out that although there may be no formal definition of indigenous people yet, 'we do have a concept', and argued that 'we do not need a formal definition in order to articulate the interests that should be protected'. See Dias, A.K., 'International Standard-Setting on the Rights of Indigenous Peoples: Implications for Mineral Development in Africa' (available at: <http://www.dundee.ac.uk/cepmlp/journal/html/article7-3.html>). The author maintains that some African 'people' (such as the Niger Delta people of Nigeria) are indigenous people in the country where they exist. This contrasts with the view of Date-Bah (1998), who argues that 'most Africans do not fit into the category of indigenous people'. On the strength of arguments advanced in this Chapter, this author prefers the view of Dias.

²³⁵ Evidence of the sensibility of States with regard to the term 'peoples' can be found in Art. 1, para. 3 which states: 'The use of the term peoples in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law'.

²³⁶ By speaking of the 'collective rights' of Ogoni people and finding against the Nigerian State, the African Commission on Human and Peoples' Rights appears to have interpreted 'peoples' under the

ratified Convention 107, and to- date, only 14 countries have ratified Convention 169.²³⁷

More importantly, although the ILO Conventions are legally non-binding on non-party States (such as Nigeria), they are arguably politically binding on them (especially as they have been incorporated into the official policy of the World Bank, of which Nigeria is a member). As Plant (1994: 12) has argued, ‘an instrument like the ILO’s Convention No. 169 can have influence beyond ratifying States, if it is incorporated within the official policy of one of the major international financial institutions.’ Further, there is evidence that a non-legally but politically binding document is non-the-less useful amongst States.²³⁸ For example, the non-binding Copenhagen Document and Statements of Principle by the Council of Europe have been used by the OSCE High Commissioner for Minorities and other mediating bodies as a basis for compromise between contending forces (and this has influenced State practice)²³⁹ (Ghai, 2001: 8). Similarly, there is evidence that American courts have applied the non-binding Rio Declaration on Environment and Development in decisions relating to environmental violations. As Dias has noted, ‘in *Aguinda V Texaco*, the United States District Court concluded that, “although many [international agreements] are relevant, perhaps the most pertinent in the present case

African Charter on Human and Peoples’ Rights to include an ethnic group in an independent nation. See *Communication 155/96 The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights / Nigeria* (Done at the 30th Ordinary Session, held in Banjul, The Gambia from 13th to 27th October 2001). To the present writer, indigenous peoples may be said to be nationals of pre-colonial nations who are found in their present State as a result of colonial decisions made without their consent, or people of unique or peculiar way of life found in independent countries, both usually in a non-dominant position in their present State, and desirous of governing themselves and maintaining their traditional values.

²³⁷ No African country has ratified the ILO Convention No.169 (as of 4 September 2001), and only Ghana and Egypt ratified Convention No.107.

²³⁸ Commenting on the non-binding nature of the recommendations of the Inter-American Court for Human Rights’ (IACHR) and the importance of political pressure at the international arena, Kalas (2001: 219, footnote 116) argued: ‘The mobilization of political pressure on those who are violating recognized norms is one way of effecting a national government to implement environmentally favourable policies’.

²³⁹ See Bloed (1995).

is the Rio Declaration on Environment and Development”...Therefore, although the plaintiff had not alleged a violation of a treaty, the court was willing to cite the Rio Declaration as evidence of State practice in the United States’.²⁴⁰ Hence, there is nothing to hold the community of States from holding Nigeria politically accountable on the basis of the ILO instruments on indigenous peoples.²⁴¹ In the light of these, and for the purposes of this thesis, the status of the Niger Delta people will be determined by an analysis based on the ILO instruments (as well as the UN Draft Declaration on the Rights of Indigenous Peoples, which presently reflects emerging international standards on the rights of indigenous people).

1.8. Status of the Niger Delta People within the Nigerian State

As earlier stated, in recent times, the various peoples of the Niger Delta have issued several Declarations of Rights, which suggest that they are minorities and/or indigenous peoples in the Nigerian State. The documents also lay claims to rights associated with the status they claim. The aim of this section is to analyse relevant parts of the Declarations together with other relevant facts in order to determine whether they are minorities and/or indigenous peoples as defined above. Although several Declarations have been issued since 1990, for the present purposes, only two of them, namely the Ogoni Bill of Rights 1990 (and its addendum of 1991),²⁴² and the Kaiama Declaration 1998²⁴³ (for convenience, collectively called herein as ‘Niger

²⁴⁰ See Dias, A.K., ‘International Standard-Setting on the Rights of Indigenous Peoples: Implications for Mineral Developments in Africa’ at: <http://www.dundee.ac.uk/cepmlp/journal/html/article7-3.html> .

²⁴¹ It is argued in Chapter 2 that some aspects of the ILO Convention No. 169 as well as those of the UN Draft Declaration on the Rights of Indigenous Peoples have become customary international law, and therefore legally binding on the Nigerian State.

²⁴² For full text, see: <http://www.nigerianscholars.africanqucen.com/docum/ogoni.htm> (visited 08/06/02).

²⁴³ For full text, see: <http://www.essentialaction.org/shell/kaiama.html> (Visited 08/06/02).

Delta Declarations'²⁴⁴) will be mainly utilised here, especially as all of them are canvassing the same thing, and also having regard to the general and widespread acceptability of these two (original) documents²⁴⁵ in the Region.

On the question of minority status, the Niger Delta Declarations are replete with this claim. Few examples will suffice to illustrate this point. Firstly, in the Ogoni Bill of Rights, it is stated: 'The split of the country into 30 States and 600 local governments in 1991 [was] a waste of resources, a veritable exercise in futility. It is a further attempt to transfer the seized resources of...minority groups in the [Niger] Delta to the majority ethnic groups of the country'. Secondly, there is a claim that the majority ethnic groups of Nigeria 'have usurped the rights of the ethnic minority groups in the Niger Delta for the past thirty years'.²⁴⁶ Further, it is claimed that the Nigerian Constitution 'does not protect any of our rights whatsoever as an ethnic minority of 500,000 in a nation of about 100 million people' and 'that the voting power and military might of the majority ethnic groups have been used remorselessly against us at every point in time'.²⁴⁷ Similar claims are contained in the Kaiama Declaration: '[T]he division of the Southern Protectorate into East and West in 1939 by the British marked the beginning of the balkanisation of a hitherto territorially contiguous and culturally homogeneous...people into political and administrative units, much to our disadvantage. This trend is continuing in the balkanisation of the [Niger Delta people] into six States - Ondo, Edo, Delta, Bayelsa, Rivers and Akwa

²⁴⁴ There is a recent document with similar name, which adopts these two earlier documents, and which was issued on the fifth anniversary of the execution of the Ogoni human and environmental rights campaigner, Ken Saro-Wiwa, on 10 November 2000. See Declaration of Niger Delta Bill of Rights at: http://www.nigerdeltacongress.com/articles/declaration_of_niger_delta_bill.htm (visited 08/06/02).

²⁴⁵ As earlier mentioned, many of the other Declarations are simply an express adoption of these two important Declarations by other Niger Delta communities.

²⁴⁶ For these two claims, see Addendum to the Ogoni Bill of Rights 1991 (particularly Forward by Ken Saro-Wiwa).

²⁴⁷ See Addendum to the Ogoni Bill of Rights, 1991, para.3.

Ibom States,²⁴⁸ mostly as minorities who suffer socio-political, economic, cultural and psychological deprivations'.²⁴⁹

It might be observed here that the minority status claimed by the Declarations appears to be that of 'national minority', and not 'regional minority' as was the case before. This is the implication of the statement that compares the population of the Ogonis to that of the whole Nigerian State. If the comparison is correct (and there is no evidence to the contrary), this means Ogoni is a numerically inferior ethnic group in Nigeria. In fact, records show that the combined population of the 'Niger Delta States' (Rivers, Delta, and Bayelsa States) is 6,900,048 or 7.8 per cent of the entire Nigerian population of 88,992,220 (presently over 100 million²⁵⁰).²⁵¹ This position satisfies one of the criteria of minority status (numerical inferiority) as found above.

Further, the Declarations indicate that the Niger Delta people are non-dominant group in the Nigerian State; they are dominated by the majority ethnic groups (Hausa/Fulani, Yoruba, and Ibo). The Ogoni Bill of Rights bemoans the fact that successive Nigerian Governments since independence have been run by 'Nigerians of the majority ethnic groups'.²⁵² Indeed, there is ample evidence to show that since independence from Britain in 1960 the Nigerian State has been (and continues to be) ruled by successive military and 'civilian' governments dominated by the majority ethnic groups.²⁵³ Evidence also shows that several military governors

²⁴⁸ This claim relates specifically to the Ijaw ethnic group of the Niger Delta.

²⁴⁹ Kaiama Declaration, para. c.

²⁵⁰ See suggestions in various Nigerian Newspapers online.

²⁵¹ Computation of population figures of the 1991 (latest) population census. See National Population Commission, *Census 1991 (National Summary)*, Abuja, 1994.

²⁵² See Forward to the Ogoni Bill of Rights by Ken Saro-Wiwa (1992 publication).

²⁵³ At independence in 1960, Dr. Nnamdi Azikiwe (Ibo) was the Governor-General/President, while Abubakar Tafawa Bewawa (Hausa/Fulani) was the Prime Minister. They ruled from 1960 – 1966. The succeeding Heads of States were as follows: - Gen. Aguiyi-Ironsi (Ibo): January 1966 – July 1966; Lt. (later Gen.) Gowon (Northerner - installed by the Hausa/Fulani military officers): July 1966 – 1975; Gen. Mohammed (Hausa/Fulani): 1975 – Feb. 1976; Gen. Obasanjo (Yoruba): Feb. 1976 – 30 September 1979; Alhaji Shagari (Hausa/Fulani): 1979 - 1983; Gen. Mohammed Buhari (Hausa/Fulani) 1984 – 1985; Gen Ibrahim Babangida (Hausa/Fulani): 1985 – 1993; Chief Shonekan (Yoruba): August

who were not Niger Delta people had successively ruled the 'Niger Delta States' (i.e. Rivers, Bayelsa, and Delta States). The implication of this is that, though the Niger Delta people have States called their own, but they were not governing themselves. There is an indication that the Niger Delta people are still under domination up until this day. In fact, the current military-made constitution of Nigeria²⁵⁴ provides evidence of domination. For instance, the Constitution places the languages of the majority ethnic groups (Hausa/Fulani, Yoruba, and Ibo) above all others in the Federation. Section 55 of the Constitution provides: 'The business of the National Assembly shall be conducted in English, and in Hausa, Ibo and Yoruba when adequate arrangements have been made therefor.'²⁵⁵

As respects ethnic, cultural and religious issues, there is abundant evidence that the Niger Delta people are significantly different from the other peoples of Nigeria; even amongst them there are marked differences, as noted above. And as regards the desire to safeguard their identity, their Declarations of Rights give clear indication of this. For instance, the Ogoni Bill of Rights demands the right to use and develop the Ogoni languages and culture.²⁵⁶

– November 1993; Gen. Abacha (Hausa/Fulani): 1993 – 1998; Gen. Abubakar (Hausa/Fulani): June 1998 – 8 May 1999; Chief (Gen.) Olusegun Obasanjo (Yoruba): 1999 – the present. (As stated earlier, there are three majority ethnic groups in Nigeria: Hausa/Fulani, Yoruba, and Ibo). See Okere (1997: 252).

²⁵⁴ Constitution of the Federal Republic of Nigeria 1999.

²⁵⁵ This linguistic dominance may be said to be as old as Nigeria itself. For instance, in 1961 (one year after independence) Chief Enahoro (a representative of a Niger Delta constituency in the Federal Parliament) commented: '*The existing three Regions in this country are dominated by three cultural groups in the East, West, and Northern Region, and if you listen to the NBC [Nigerian Broadcasting Corporation] you will think there are only three languages in Nigeria – Ibo, Yoruba, and Hausa. Where are the rest of us? Certainly we want our languages to be heard and known.*' See Federal Parliament Debates, First Parliament, Second Session, 1961-62, House of Representatives, Vol. I, Lagos 1961, col. 766.

²⁵⁶ See Ogoni Bill of Rights, paras. d and e. In a statement annexed to the Ogoni Bill of Rights (addressed to the International Community) the MOSOP president (then, Dr. G.B Leton) stated, *inter alia*: 'Ogoni languages are dying; Ogoni culture is dying' (at para. 5).

In the result, the Niger Delta people appear to have satisfied all the elements of minority status and should therefore be properly regarded as a minority group in the Nigerian State.

With regard to the question of indigenous status, the Ogoni Bill of Rights significantly asserts: 'The Ogoni [Niger Delta] people, before the advent of British colonialism, were not conquered or colonized by any other ethnic group in present-day Nigeria'.²⁵⁷ Similarly, the Kaiama Declaration noted that 'it was through British colonisation that the Ijaw nation was forcibly put under the Nigerian State'; and points out that: '[B]ut for the economic interests of the imperialists, the Ijaw ethnic nationality would have evolved as a distinct and separate sovereign nation, enjoying undiluted political, economic, social, and cultural autonomy.'²⁵⁸

These statements suggest that the Niger Delta people were existing nations prior to colonialism,²⁵⁹ and therefore indigenous people in the area. This is also clearly stated in the preamble of the Kaiama Declaration, which declares that the essence of the meeting, which produced the Declaration, was 'to deliberate on the best way to ensure the continuous survival of the *indigenous peoples* of ...the Niger Delta within the Nigerian State'.²⁶⁰ Indeed, it has been suggested that the use of the word 'nation' in the Declarations to describe the group imply a claim to the status of 'people'. Commenting on the use of the term 'nationalities' by an organisation with the same goal as the Movement for the Survival of Ogoni People (MOSOP) and the Ijaw Youth Council (IYC),²⁶¹ an observer has pointedly said: 'The use of the term

²⁵⁷ Ogoni Bill of Rights, para. 1.

²⁵⁸ Paras. a and b.

²⁵⁹ Thornberry (1991: 332) observes that 'in a broad sense, the history of indigenous peoples is a history of colonialism'.

²⁶⁰ Italics mine.

²⁶¹ The Southern Minorities Movement (a coalition body formed in 1993).

“nationalities” is quite distinct and different from the term ethnic group or tribe. It is clearly in line with their stance on self-determination.²⁶²

More importantly, any doubt as to the status they are claiming is clearly laid to rest by the following statement of a sister organisation:²⁶³

Contrary to the belief that there are no indigenous people in black Africa, our research has shown that the fate of such groups as...Ogoni in Nigeria [is], in essence, no different from those of the aborigines of Australia, the Maori of New Zealand and the Indians of North and South America. Their common history is of the usurpation of their land and resources, the destruction of their culture and the eventual domination of the people. Indigenous people often do not realise what is happening to them until it is too late. More often than not, they are the victims of the actions of greedy outsiders. EMIROAF will continue to mobilise and represent the interest of all indigenous people on the African continent. It is in this regard that we have undertaken to publicise the fate of the Ogoni people in Nigeria.²⁶⁴

Further, support that the Niger Delta people are indigenous people (nations) prior to colonialism can also be found in the following statement of a British colonial officer²⁶⁵:

It is the consistent policy of the Government of Nigeria to maintain and support the local tribal institutions and the indigenous forms of government...I am entirely convinced of the right, for example, of the people of England...of any of the great Emirates of the North...to maintain that each one of them is, in a very real sense, a nation...It is the task of the government of Nigeria to fortify these national institutions.²⁶⁶

²⁶² Robinson(1996: 9).

²⁶³ Ethnic Minority Rights Organisation of Africa (EMIROAF).

²⁶⁴ Quoted in Saro-wiwa (1995: 130 – 131). The position of the Ethnic Minority Rights Organization of Africa (EMIROAF) here appears to be in agreement with the opinion expressed by African experts in 1986 during the meeting of experts leading to the partial review of ILO Convention 107. As reported by one observer: ‘All Africans, the experts from that region concurred, are both indigenous and tribal, but it remained true, as the FAO observer stressed, that larger ethnic groups had exploited smaller ones and that “these injustices did not end with the attainment of political freedom” but had been perpetrated through the use of State power’. See Barsh (1987: 760). The implication of this statement would appear to be that in the African context, ‘indigenous people’ refers to the weaker, minority elements in the society. So interpreted, it is in tandem with the definition of indigenous people by the World Bank: ‘The terms “indigenous peoples,” “indigenous ethnic minorities,” “tribal groups,” and “scheduled tribes” describe social groups with a social and cultural identity distinct from the dominant society that makes them vulnerable to being disadvantaged in the development process. For the purposes of this directive, “indigenous peoples” is the term that will be used to refer to these groups’ (World Bank, *Indigenous Peoples* (OD 4.20, September 1991), para. 3).

²⁶⁵ Sir Hugh Clifford (Colonial Governor of Nigeria at the time).

²⁶⁶ See Coleman (1958: 194).

Moreover, there is ample evidence that Britain signed a number of treaties with the Chiefs of the people, and this is another indication that they were considered as sovereign.²⁶⁷

Furthermore, sources suggest that the people are still largely governed by their native customs and institutions, and still cherish their ways of life (see above). In terms of economic life, there is also evidence that they are among the poorest peoples in Nigeria. Thus, the Niger Delta people would appear to fall within the two limbs of the definition of indigenous peoples under the ILO Convention 169: '(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 populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of the present State boundaries and who, irrespective of their status, retain some or all of their own social, economic, cultural and political institutions'.

Furthermore, the claim for the right to (internal) self-determination in the Niger Delta Declarations indicates that they identify themselves as indigenous people in Nigeria. Again, this satisfies the requirement of the ILO Convention 169.²⁶⁸ As Dias puts it, the Ogoni [Niger Delta] 'claim to have a distinct culture, language, history, political system and religion – a self-identification that would allow them to

²⁶⁷ In this regard, an authoritative British author has observed that the British Consul in the Oil Rivers Protectorate (Niger Delta) found that 'some of the chiefs were of such importance that the Consul was glad enough to make use of them in the government of the country. Such a chief was Nana of Benin river who, although merely the hereditary Governor of the Jekris [Itshekiris], and nominally a vassal of the King of Benin, was in point of fact practically an *independent sovereign*' (Burns, 1948: 146) (Italics mine).

be considered indigenous people',²⁶⁹ Perhaps it should be added that the analysis of the Declarations also bring the Niger Delta people within the purview of the World Bank definition of indigenous peoples (as stated above) – a non-dominant, vulnerable social group.

Overall, the Niger Delta people appear to satisfy the definition of 'national minorities' as well as 'indigenous people' in the Nigerian State.²⁷⁰

It is notable that the status of 'people' (as with that of 'minorities') need not coincide with the entire population of an existing State. This is the logical conclusion from the recent decision of the African Commission on Human and Peoples' Rights, where the Commission regarded the 'Ogoni People of the Niger Delta' as a 'people' distinct from the entire people of Nigeria,²⁷¹ thereby effectively ending the age-long claim by most African countries that 'all members of their population are indigenous and that there is no indigenous group as distinct from the entire population'. In this regard, the Canadian Supreme Court has aptly observed:

It is clear that 'a people' may include only a portion of the population of an existing State. The right to self-determination has developed largely as a human right, and is generally used in documents that simultaneously contain references to 'nation' and 'State'. The juxtaposition of these terms is indicative that the reference to 'people' does not necessarily mean the entirety of a State's population. To restrict the definition of the term to the population of existing States would render the granting of a right to self-determination largely

²⁶⁸ Art. 1 (2).

²⁶⁹ See Dias, A.K. 'International Standard-Setting on the Rights of Indigenous Peoples: Implications for Mineral Development in Africa' < <http://www.dundee.ac.uk/cepmlp/journal/html/article7-3.html> >

²⁷⁰ Survival-International – a UK-based NGO – lists the Niger Delta people as part of the indigenous/tribal peoples of Africa. See Survival, 'The tribal Peoples of Africa' (available at: < <http://www.survival.org.uk/africa.htm> > (visited 26/11/01).

²⁷¹ See *Communication 155/96 The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights / Nigeria* (Done at the 30th Ordinary Session, held in Banjul, The Gambia from 13 to 27 October 2001). In this matter, the Commission admitted a 'communication' (case/action) brought on behalf of the Ogoni (Niger Delta) people by two NGOs against the Nigerian State, and found Nigeria in violation of certain rights under the African Charter on Human and Peoples' Rights, which the Niger Delta people enjoy as 'collective rights'. The Commission observed that: 'Collective rights, environmental rights, and economic and social rights are essential elements of human rights in Africa' (at Para. 68). Although the Commission's decisions are recommendatory, and legally non-binding on States Parties, it is certainly entitled to authoritatively interpret the Charter provisions.

duplicative, given the parallel emphasis within the majority of the source documents on the need to protect the territorial integrity of existing States, and would frustrate its remedial purpose.²⁷²

Finally, it may be pointed out that the dual status of the Niger Delta people bears out the following observation of Thornberry: '[A]lthough many minorities may not satisfy the definition, if any, of indigenous, the converse is not the case. Most indigenous groups easily satisfy definitions of 'minority...'.²⁷³ In this situation, the indigenous group will be entitled to two sets of rights – one as an indigenous group, and the other as a minority group.²⁷⁴ (As previously indicated, under international law each of these statuses carries with it certain rights). In any case, for the purposes of this thesis, the status of indigenous people is the most important one.²⁷⁵

1.9. Conclusion

This Chapter has considered very important issues, which are foundational to this thesis. The Chapter set out to locate the Niger Delta region within the Nigerian State, and to study its people. As already stated, this is necessary because this thesis is about issues affecting the region and the people of the region. The investigation has revealed how the region became part of the Nigerian State, and it was found, most significantly, that the people of the region are both minorities and indigenous peoples in Nigeria. It was observed that they transformed from being regional to national minorities. Also, the investigation showed that the Niger Delta region was considered poor before oil assumed national importance, and was neglected by the Eastern and

²⁷² See *Reference re Secession of Quebec* [1998] 2 SCR 217, at 281.

²⁷³ Thornberry (1991: 331).

²⁷⁴ See Thornberry (1991: 342).

²⁷⁵ A discussion of the whole gamut of minorities and indigenous peoples rights is outside the purview of the present work; only those rights as are relevant for present purposes will be considered at the appropriate places. For interesting and penetrating discussion on the whole range of minorities and indigenous peoples rights, see Thornberry (1991: esp. at 331*et seq*). See further Thornberry (1991a).

Western Regional Governments in economic and social fields as well as in the field of personnel recruitment. In this regard, it is clear that the original struggle of the people was against Regional domination until political developments transformed their struggle to the present one against the Nigerian State. Lastly, the findings here have shown that the people are presently dissatisfied with the present economic arrangement in the Nigerian State – an arrangement sustained by revenue from oil resource, which is exploited in their area, and they are demanding the right to take ‘full responsibility’ for their own affairs. This demand, which is rooted in their status as indigenous people in Nigeria, sets the stage for subsequent analysis of the focal issues of this thesis from the perspective of international law (especially, as it relates to the rights of indigenous peoples).

CHAPTER 2

OIL, NIGERIAN STATE AND THE NIGER DELTA PEOPLE

*The Kingdom of Heaven runs on righteousness.
But the Kingdoms of the Earth run on oil.*

- Ernest Edwin (House of Commons Debate)

2.1. Introduction

The Niger Delta people have claimed in several declarations of rights that certain Nigerian legislation, such as the Petroleum Act and the Land Use Act, deprive them of their rights to land and other natural resources (particularly, oil).¹ And in Chapter 1 there is an indication that the people are unhappy with the Federal Government of Nigeria, which had made the laws. The implication of these is that the cause (s) of the prevailing tension in the region may be located within the relevant laws. Hence, the business of this Chapter is to investigate the twin issues of ownership of oil and land (in this context, the two are inseparable²), in order to test the merits of their claim. And as the Niger Delta people have been found to be indigenous people in Nigeria, and consistent with the avowed approach of this thesis, the international law regime on the rights of indigenous peoples (particularly in relation to the ownership of land and natural resources) will also be investigated. The essence of this is to determine whether Nigerian land tenure and natural resources laws are in conformity with established and emerging rights of indigenous peoples under international law. These investigations will be preceded by a brief historical account of the discovery of oil in Nigeria and an

¹ See, for example, the Kaiama Declaration 1998.

² In the sense that oil is entrapped in land and, therefore, its extraction will necessarily affect land.

overview of the contribution of oil to the Nigeria economy. The former would reveal the location of oil resource in Nigeria, whereas the latter would show the importance of oil to the Nigerian economy, and thereby lay foundation for subsequent investigation of issues relating to equity in the exploitation of oil.

2. 2. Discovery of oil in Nigeria

A German-owned company called Nigerian Bitumen Company started the search for oil in Nigeria sometime in 1908 when the company explored a certain location somewhere in the southwestern area of the present Nigerian State.³ That attempt was unsuccessful and the company was forced to abandon further search in 1914 following the outbreak of the First World War.⁴ As would be explained later, the German company did not return after the hostilities of the First World War. Meanwhile, the British colonial administration, believing that oil might be found in Nigeria, had promulgated the Mineral Oils Ordinance, 1914⁵ to 'regulate oil exploration and exploitation in the country'. Section 3 of this Ordinance provided: 'It shall not be lawful for any person to search or drill for or work mineral oils within or under any lands in Nigeria except under a license or lease granted by the minister under this Ordinance'.

³ For historical accounts of Nigeria's oil industry, see generally: Ajomo (1972: Chapter 8); Ajomo (1987: 84); Etikerentse (1985: Chapter 1); Momodu Kassim-Momodu (1986/87: 69); Omoregbe (1987: 273); L.H. Schatzal (1969: esp. pp.1-4).

⁴ The First World War was from 1914-1918, essentially between Britain and Germany.

⁵ No. 17 of 1914. See Cap. 120 of the Laws of the Federation of Nigeria 1958 edition (reproduced in *Basic Oil Laws and Concession Contracts, South and Central Africa*) (original text), Supplement Nos. 31-35.

In a discriminatory section, probably designed to exclude enemy countries and their nationals from doing business in a British territory,⁶ the law further provided as follows:

No lease or license shall be granted except to a British subject or to a British company registered in Great Britain or in a British colony, and having its principal place of business within Her Majesty's dominions, the chairman and the managing Director (if any) and the majority of the other directors of which are British subjects.⁷

The natural consequence of the above discriminatory clause was hardly surprising. As competition was discouraged, monopoly was fostered with all its limitations, including, in this context, lack of financial, human and material resources and expertise. This partly explains the long time it took to discover oil in Nigeria (see below), judging from the year of the first attempt.

The First World War ended in 1918, and the search for oil resumed some years thereafter. However, the trailblazer (Nigerian Bitumen Company) did not return to continue because it could not obtain license under the 1914 Mineral Oils Ordinance. As will be seen presently, a new company undertook the search for oil.

As to the exact year of resumption of oil exploration, conflicting years have been claimed. For example, Ajomo says, 'it was not until 1937 that the search for oil was revived'. According to him, Shell Oil Company obtained Oil

⁶ The territorial area of the present day Nigeria effectively became a British possession after the Berlin Conference of 1884-5, where European powers agreed on the partition of Africa.

⁷ Quoted in Momodu Kassim-Momodu (1986/87: 70-71).

Exploration License (OEL) from the colonial government in that year⁸. This view is shared by Etikerentse who writes:

Nigeria...being under the territorial control of the United Kingdom, and Germany losing the war, the Nigerian Bitumen Company's activities were not resumed at the end of the war. Instead, a consortium of Royal Dutch and Shell (Dutch and English interests) known as Shell D'Arcy Company emerged and began oil exploration operations in 1937 from its base in Owerri...⁹

Contrary to this, Atsegbua¹⁰ and Omoregbe¹¹, writing independently, claim that oil exploration activities after the First World War resumed in 1938, when Shell obtained an OEL from the British colonial government. Omoregbe puts her view thus: 'The first company ever to undertake exploration in Nigeria was the German Bitumen Company, in 1908, around what is now known as Ondo State. This effort was unsuccessful and the company terminated its operations following the outbreak of the First World War. *The next concession was given to Shell D'arcy Petroleum development company in 1938.*'¹²

Since the 1914 Mineral Oils Ordinance requires a company interested in the search for oil to obtain a license, it seems more plausible to say that interest in the search for oil in Nigeria revived in 1937 with the establishment of Shell D'Arcy, and that this company commenced search in 1938 after obtaining an OEL.¹³ At any event, there is evidence to suggest that between 1938 and 1939

⁸ Ajomo, (1987: 85).

⁹ Etikerentse (1985: 1). See also Kassim Momodu-Kassim (1986/87: at 71).

¹⁰ Atsegbua (1993: 6): 'In November 1938 Shell-BP received an Oil Exploration License covering the whole of Nigeria (357,000 square miles) from the British colonial government'.

¹¹ Omoregbe (1987: 273).

¹² Omoregbe (1987: 273, at 274) (*Italics mine*).

¹³ See Pearson (1970: 15). The OEL granted to Shell D'Arcy in 1938 covered the whole of Nigeria, thereby shutting out competitors. It was a 'life-time' opportunity, which Shell did not miss. Between 1938 and 1941 and 1946-51, Shell embarked upon intensive geological

Shell/D'Arcy made fruitless search for oil in Nigeria, and, like its predecessor in business, its search for oil in Nigeria suffered a setback in 1939 with the outbreak of the Second World War: its operations were interrupted by the war and the company did not resume operations until 1946, a year after the war had ended in 1945¹⁴. According to sources, vigorous search for oil yielded result only in 1956, when the company struck oil in commercial quantity at Oloibiri¹⁵ (in the then Yenagoa Province in the Niger Delta). And, later the same year, another discovery was made at a place called Afam¹⁶ (in the then Rivers Province, also in the Niger Delta).¹⁷ Judging from the year of commencement of search for oil (1908), it is clear that it took a long time to find oil in Nigeria. This may be

reconnaissance and geophysical surveys of Nigeria. Armed with reports of the surveys, Shell chose the juiciest parts- sites that the reports have shown to be most promising for the discovery of crude oil deposits. By 1957 Shell-BP had voluntarily reduced its acreage to 40,000 square miles of Oil Prospecting Licenses (OPLs). Of this acreage Shell-BP converted nearly 15,000 square miles into Oil Mining Leases (OMLs) in 1960 and 1962 and voluntarily returned the residual to the Nigerian government. (See Pearson, 1970: 15.) . This was how the foundation of Shell's predominance of Nigeria's oil industry was laid. Commenting on Shell's ' first mover advantage', Schatzal maintains that:

The opportunity of exercising an autonomous strategy throughout two decades in the realm of concession politics brought about the result that this company [Shell] to-day possesses the optimal concession sites in the country. Its monopolistic position in the past with respect to licence selection affords Shell-BP both now and in the future a position of dominance in the development of Nigerian oil industry.

See Schatzal (1969: 3). The discriminatory clause that gave Shell-BP the first mover advantage was repealed in 1958 (by section 2 of the Mineral oils (Amendment) Act 1958), thereby paving way for other companies to be admitted into the oil business in Nigeria. However, as Frynas has recently found, Shell remains the leading oil company in Nigeria today. See Frynas (2000: 11). In view of its predominance in the oil industry in Nigeria, Shell is almost synonymous with oil companies in Nigeria, and so much of the discussion in this thesis will cite Shell as a model.

¹⁴ Etikerentse (1985: 1); Ajomo (1987: 85-6). Compare Kassim Momodu-Kassim (1986/87: 71).

¹⁵ The name 'Oloibiri' is a corruption of 'Aleibiri'. See Annual Report of the Civil Liberties Organization (CLO), Lagos, 1997, 211. (A shoddy job was done by the binders/printers of this Report, as the pages do not follow serially). Other names in the Niger Delta which suffered corruption by the British colonialists include: 'Ehuda' (corrupted as 'Ahoada') and 'Ula-Upata' (once corrupted as 'Orupata').

¹⁶ Apart from having crude oil, Afam also hosts huge electricity installations, which supplies electricity to a number of communities in Nigeria quite removed from it. Yet for several years this community did not have electricity.

¹⁷ Ajomo (1987: 86). Compare Omoregbe (1987: at 274).

attributed partly to the interruptions caused by the First and Second World Wars, and partly to want of competition because of Shell's monopoly.¹⁸

The oil finds were rapidly developed and exploited and by 1958 production has reached 5,100 barrels per day and in that year the first shipment of crude oil was made to Europe, thereby launching Nigeria into the stage of oil producing and exporting country.¹⁹ As has been stated earlier, the two oil sites were found in the Niger Delta (in the southeastern area of Nigeria – specifically in the Eastern Region of Nigeria²⁰). When States were created in 1967 they became part of Rivers State. Today, following the creation of Bayelsa State in 1996, Oloibiri²¹ - which is an Ijaw community - is now part of Bayelsa State²² - one of the key States of the Niger Delta region.

¹⁸ Shell's monopoly was broken 'in order to increase the pace of exploration and avoid over-dependence on one company'. See Annual Report of the Mines Division, Ministry of Mines and Power, 1958/59, Federal Government Printer Lagos, 1960. Other oil companies that were admitted at the end of the monopoly included Gulf, Agip, Phillips, Safrap (now Elf) Esso Petroleum, and American Overseas.

¹⁹ Pearson (1969: 15).

²⁰ It is arguable that the potentials of oil had encouraged the Eastern Region to attempt secession from the Nigerian state in 1967. A civil war was fought from 1967-1970 between the Federal government and the seceding (Eastern) Region called the 'Republic of Biafra'. During the war the Niger Delta area was under the control of the Eastern Regional government (then called Biafra). The promulgation of the Petroleum Decree in 1969 (vesting the entire property in crude oil in the Federal government) suggests that the Federal government fought the war in order to regain control of oil resources, which it had since colonial days. For an account of the Nigerian civil war, see, for example, Forsyth (1969); Critchley (1969); Amadi (1973); Nzimiro (1984).

²¹ The oil discovered in Oloibiri earned Nigeria much money in foreign exchange. Sometime in the 1980s an oil museum was established in the community with funds received from public appeal. The civil Liberties Organization (CLO) reported in 1997 that on 16 August 1997 over 10,000 persons drawn from oil producing communities of the Niger Delta converged at Oloibiri (correct name is 'Aleibiri') to officially proclaim the 'Chicoco movement' – a coalition of several community pressure groups, whose central aim is to work together for what they consider a 'better deal' for oil-producing communities of the Niger Delta. The Chicoco Movement took its name from the soil found in the mangroves of the Niger Delta. Its malleability and toughness had endeared it to the people who use it to build houses and protective embankments to save the fast disappearing shoreline of the delta as well as reclaim degraded soil. See Annual Report of the CLO (1997: 211).

²² The Ijaw ethnic minority group is scattered in several parts of the Niger Delta and beyond. As indicated earlier, Bayelsa State is the only all-Ijaw or 'pure Ijaw, State in Nigeria today, as there is no other ethnic group in the state apart from Ijaw.

As of now, there is yet no evidence to show that oil can be found in any other place in Nigeria outside the Niger Delta.²³ The implication of this is that the Niger Delta has become a strategic area in Nigeria, as Nigeria is solely dependent on revenue from export of crude oil.²⁴ As will be seen in the next section, since the first shipment of oil to Europe in 1958, the oil resource of the Niger Delta has provided much revenue for Nigeria. However, there is a suggestion that the huge oil revenue has not benefited the Niger Delta region and its people. According to some claims, which would be examined later, oil revenue has been used to develop other areas of the country while the Niger Delta and its people are neglected. This is probably part of the background of the present 'war' over the control of oil resources (the revenue base of the country) between oil-bearing communities/States and the Federal Government of Nigeria.²⁵ As would be seen in the section on ownership of oil, since colonial days the entire property in oil resource has been statutorily (and constitutionally) vested in the State.

2.3. The place of oil in the Nigerian Economy

As earlier stated in Chapter 1, the Nigerian State was created by Britain in 1914, by a process of merger of different and erstwhile disparate ethnic groups. From

²³ Schatzal maintains that geological and geophysical surveys conducted in Nigeria has shown that the most favourable oil-yielding structures lay in the Niger Delta. See Schatzal (1969:1).

²⁴ The place of oil in the Nigerian economy is considered in the next section.

²⁵ There are several issues in contention about oil resources between the oil-producing States and the Federal government of Nigeria. In early 2001, the Federal government filed an action against the oil-producing states at the Nigerian Supreme Court (the highest court of the country), for a determination of whether or not the Federal government is absolutely entitled to off-shore oil revenue; the oil-producing states have been agitating for an end to the off-shore/on-shore dichotomy which they claim robs them of substantial revenue on the derivation principle constitutionally guaranteed to them. Although the case was recently determined in favour of the Federal Government (See *A.-G., Federation V. A.-G., Abia State & 35 Others* (No. 2) [2002] 6

that time till the end of colonialism in 1960 (and up to the end of the first decade after independence) the Nigerian economy was agro-based, and agriculture was the dominant occupation of the various native peoples. As one commentator puts it, 'during the colonial period (1914-1959),²⁶ Nigeria was exploited for its agricultural products'.²⁷ The key agricultural products were cocoa (produced in the West), groundnut and cotton (in the North), and palm oil (in the East, including the Niger Delta²⁸).²⁹ Although oil was discovered (and exploitation began) in Nigeria in 1956, there is evidence to indicate that it did not play any significant role in the Nigerian economy until the early 1970s. According to Robinson, 'in the early 1960s, revenue from oil accounted for less than 10 per cent of Nigeria's revenue base'.³⁰ For instance, in 1963 and 1964 oil revenue was only 4.1 per cent and 5.9 per cent, respectively, of the total revenue of the country.³¹ On the contrary, the bulk of the country's revenue at this period was

NWLR (Pt. 764) 542), yet the 'war' over the control of oil resource does not appear to be over. See Nigerian newspapers online at: < <http://nigeriaworld.com> >.

²⁶ It should be remembered that colonialism started well before the ultimate formation of the Nigerian state in 1914. See the section on the creation and constitution of the Nigerian State.

²⁷ Robinson (1996: 9).

²⁸ The Niger Delta was famous for its palm oil products.

²⁹ In a critical comment on the Nigerian colonial economy (as adumbrated by Robinson - see text above) Graf has said: 'Each region, according to its natural factoral endowments and/or convertibility to colonial purposes, produced crops or minerals of a greater or lesser exploitable value. The North's contributions were groundnuts, cotton and tin; the West produced huge quantities of cocoa, while that part of it which in 1963 became the Mid-West [including Western Niger Delta], produced rubber and rubber products; and the East was a large reservoir of palm oil products. Had they been integrated into a national economy geared to the needs of the Nigerian peoples, these products collectively would almost certainly have contributed towards the development of a symmetrical and well-balanced economic structure. But they were not. They were in fact developed for further processing and/or consumption in the colonizer's home economy. Thus the economy of each producing region was adapted and integrated, not with its adjacent producing economies, but with that of Great Britain and through this link, with the world capitalist economy. There was no plan for national integration, but many extractive regional "plans", centred around plantation or mining enclaves and aimed at enhancing the sponsor's own economy' (Graf, 1988: 9).

³⁰ Robinson (1996: 9).

³¹ Graf (1988: 218); Robinson (1996: 8).

from agriculture,³² and more than 70 per cent of the people were employed in this and related sector (Robinson, 1996: 9).³³

However, from the early 1970s the dominance of agriculture began to decline as the yield from oil began to soar. In what can be described as a classical illustration of the ‘Dutch disease’³⁴ syndrome, since the oil boom of the 1970s agricultural products have been neglected, with the result that the contribution of agriculture to the national revenue continues to dwindle yearly. This can be illustrated by figures showing the yearly contribution of oil revenue to the economy. Statistical records show that oil revenue as a percentage of the total revenue of Nigeria from 1970 to 2000 is as shown in Table 1.1 and other figures stated in the text below:³⁵

³² See Iwaloye and Ibeanu (1997: 62 – 63), in a section entitled *contemporary geoethnic patterns and resource allocation*, the authors have provided comparative figures of the relative contribution of agriculture and minerals to the Nigerian economy from 1960 (the year of Nigeria’s independence) up to the mid-1990s.

³³ Comparatively, the oil industry employs fewer people. According to one observer, ‘unlike agriculture...oil production employs a relatively small number of workers, and accounts for only 1.3 percent of the total modern sector employment in Nigeria’ (Ikein, 1990: 19-20). In the same vein, another author has noted that, ‘the [Nigerian] oil dominated economy is an enhanced enclave economy. Oil production is necessarily a high technology, capital-intensive enterprise that cannot generate either jobs or direct (“forward” and “backward”) linkages with the other sectors of the economy...’ (Graf, 1988: 221).

³⁴ According to Karl (1997: 5), ‘Dutch disease’ [named by economists after Dutch elm disease] is ‘a process whereby new discoveries or favourable price changes in one sector of the economy – for example, petroleum – cause distress in other areas – for example agriculture or manufacturing’.

³⁵ Unfortunately, the figures for some of the years within this period are unavailable. Never the less, the available figures indicate a consistent high percentage.

Table 2.1 Contribution of oil to Federal Government revenue, 1970- 1985

Year	Oil Revenue as % Of Total Revenue
1970	25.9%
1971	52.5%
1972	41.5%
1973	67.3%
1974	80.8%
1975	78.7%
1976	78.5%
1977	70.6%
1978	63.1%
1979	81.4%
1980	75.1%
1981	83.3%
1982	80.0%
1983	75.6%
1984	n/a
1985	84.0%

Source: Graf (1988: 219); Central Bank of Nigeria Annual Reports.

The above Table³⁶ eloquently demonstrates the overbearing importance of oil in the Nigerian economy (especially from 1973).³⁷ As a further demonstration

³⁶ There is no consistency in the statistical figures of Nigeria's revenue. As Graf notes, 'it is worth reiterating that virtually all statistics relating to Nigerian economic development are, for various

of this importance, there is evidence to indicate that crude oil income as a percentage of foreign-exchange earnings 'escalated from 2.5 per cent of all such revenue to 58.1 per cent in 1970, to 93.6 per cent in 1975, and to 98 per cent and more through the first half of the 1980s' (Graf, 1988: 219).³⁸ This trend has continued ever since. For instance, in 1997 oil revenue constituted 88 per cent of the government's foreign exchange earnings,³⁹ and 83.5 per cent of the total gross revenue for the year 2000.⁴⁰ In the result, it can be concluded that the Nigerian economy runs on oil. It would also follow that every aspect of Nigeria's development – physically, socially and otherwise – has been made possible by oil revenue. This immediately puts the revenue sharing formula in issue (raising issues of fairness, justice and equity), especially as the next section shows that oil is exclusively (statutorily and constitutionally) vested in the Federal Government,⁴¹ and also having regard to the environmental and ecological impact of oil extraction.⁴²

reasons [especially, corruption], tenuous, suspect and rarely reliable'; hence all figures given in the Table should be considered merely as illustrative and tendential. See Graf (1988: 245, footnote 1). Nevertheless, it should be pointed out that notwithstanding the variation in figures from various sources - see, for example, Watts (1984: 473) - the importance of oil to the Nigerian economy is not diminished. Overall, it seems beyond dispute that oil revenue in Nigeria presently accounts for over 90% of the Federal Government annual revenue. And as the constituent States of the Federation and Local Governments heavily depend on federally distributed revenue, it follows that oil revenue accounts in large measure for their income. According to Graf, oil revenue make up over 90% of the annual income of State and Local Governments. See Graf (1988: 224).

³⁷ See Khan, (1994: 183). See further, Frynas (1998). Both authors give figures, which suggest that Nigeria is a mono-mineral (oil) dependent economy.

³⁸ Graf's statistics relies on figures reproduced in Turner and Baker (1985: 25 – 28). In comparison with oil, the contribution of agriculture in 1970 was only 31.8%. See Iwaloye and Ibeanu (1997: 63).

³⁹ Information obtained from the 1998 Budget Briefing of the Nigerian Minister of Finance.

⁴⁰ See 'Nigeria earns N1.59 trillion from Oil' (*The Guardian*, 5 July 2001).



2.4. Ownership of Oil under Nigerian Law

As earlier stated, the search for oil in Nigeria started in the colonial days. Therefore it is useful to begin the search for the law relating to ownership of oil in Nigeria from the colonial era. As will be seen presently, the British colonial authorities of Nigeria made certain laws dealing with mineral oils, specifically, on the question of ownership. Thereafter, it will be logical to inquire into the fate of those laws after independence in 1960, and also examine post-independence oil-related legislation touching on the question of ownership of oil.

Historically, although there were pre-1914 statutes on mineral oils,⁴³ it seems generally agreed⁴⁴ that the major colonial statute on mineral oils was the 1914 Mineral Oils Ordinance.⁴⁵ This Ordinance was promulgated to 'regulate the right to search for, win and work mineral oils'.⁴⁶ However, there was no provision dealing with ownership of oil. This gap was filled by Section 3 (1) of the Minerals Ordinance 1916, replaced in 1945 by the Minerals Act. According to its recital, the Act was made 'to amend and consolidate the law relating to mines and minerals'. Section 3 (1) thereof (the Act came into operation on 25 February 1946) specifically vested mineral oils in the Crown. The section provided as follows:

The entire property in and control of all mineral oils, in, under or upon any lands in Nigeria, and of all rivers, streams and water courses throughout Nigeria is and shall be vested in the Crown [State], save in

⁴¹ Equity issues are specifically discussed in Chapter 5 of this thesis.

⁴² For the environmental and ecological impact of oil in the Niger Delta region, see Chapter 3.

⁴³ For example, the *Petroleum Ordinance* 1889; and the *Mineral Regulation (Oil) Ordinance* 1907.

⁴⁴ See Atsegbua (1993: 5, footnote. 18); Omoregbe (1987: 273, at 273).

⁴⁵ No.17 of 1914.

⁴⁶ See *Basic Oil Laws and Concession Contracts, South and Central Africa* (original text) 1959.

so far as such rights may in any case have been limited by any express grant made before the commencement of this Act.⁴⁷

However, the definition of 'mineral' in section 2 of this Act explicitly excludes 'mineral oils'. So that its provisions did not affect mineral oils beyond the provision of section 3 (1). This is probably because adequate provisions have been made for this under the Mineral Oils Ordinance.

The 1914 Mineral Oils Ordinance was amended in 1925,⁴⁸ 1950,⁴⁹ and 1959. Under section 2 of the 1925 amendment, 'mineral oil' was defined as including 'bitumen, asphalt and all other bituminous substances' with the exception of coal (which is covered by the 1945 Minerals Act). The 1950 amendment added a new section,⁵⁰ whereby the submarine areas of Nigeria's territorial waters were brought under the ambit of the 1914 Ordinance. And by the 1959 amendment, the legislative competence of Nigeria's Federal legislature (under the colonial constitution of 1959 Nigeria was a Federation with a centre and three Regions) was extended to cover the submarine areas of other waters on which the Federal legislature may make legislation in future – in matters relating to mines and minerals. This later amendment might have been made in exercise of

⁴⁷ The provision of the 1945 Act is similar to and may have been influenced by S.1 (1) of the Petroleum (Production) Act 1934 of Great Britain (parent State of Nigeria), which provides: 'Property in petroleum existing in its natural conditions in state in Great Britain is hereby vested in His Majesty, and His Majesty shall have the exclusive right of searching and boring for and getting such petroleum....' See also section 1(i) of the Continental Shelf Act of Britain.

⁴⁸ No. 1 of 1925.

⁴⁹ Mineral Oils (Amendment) Act 1950.

⁵⁰ S. 10.

the right recognized under Art. 2 of the Geneva Convention on the Continental Shelf.⁵¹

There is evidence to indicate that Nigerian nationalists were critical of Crown/State ownership of mineral oil resources.⁵² Yet, three years after independence, the same persons who had resented ownership of oil resource by the colonial State inserted a provision in the 1963 Republican constitution of Nigeria (made by themselves as successors of the colonialists, sitting in Parliament) vesting all previous Crown property (including the entire property in mineral oils) in the State. Section 158(1) of this constitution provided:

[A]ll property which, immediately before the date of the commencement of this constitution, was held by the Crown or by some other body or person (not being an authority of trust for the Crown) shall on that date, by virtue of this subsection and without further assurance, vest in the President and be held by him on behalf of or, as the case may be, on the like trust for the benefit of the government of the Federation; and all property which immediately before the date aforesaid, was held by an authority of the Federation on behalf of or in trust for the Crown shall be held by that authority on

⁵¹ This article did not create a new right; rather it recognizes and effectively codifies existing customary international law. In *North Sea Continental Shelf cases*, 1969 ICJ Reports 3, the International Court of Justice (I.C.J) made this point clear when commenting on the nature of State rights over continental shelf resource. The court said it:

[E]ntertains no doubt that the most fundamental of all the rules relating to the continental shelf is that enshrined in Article 2 of the 1958 Geneva Convention, though quite independent of it – namely that the rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land, and as an extension of it in exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources. In short, there is here an inherent right. In order to exercise it, no special legal process has to be gone through, nor have any special legal acts to be performed. Its existence can be declared (and many States have done this) but does not need to be constituted. Furthermore, the right does not depend on its being exercised. To echo the language of the Geneva Convention, it is “exclusive” in the sense that if the coastal State does not chose to explore or exploit it the areas of the shelf appertaining to it, that is its own affair, but no one else may do so without its express consent.

The 1982 Geneva Convention on the Law of the Sea retains the operative wording of Article 2 of the 1958 Convention on the Continental Shelf.

⁵² See Coleman (1958: 228); also <http://nigeriaworld.com/feature/publication/omoruji/oil.html>.

behalf of, or as the case may be, on the like trusts for the benefit of the government of the Federation.⁵³

The 1963 constitution was suspended in 1966, following a bloody coup and a takeover of government by some Nigerian army officers. This is not the place to consider the coup and its aftermath.⁵⁴ Suffice to say that the coup and its aftermath demonstrate the artificiality of the colonial construction called 'Nigeria' – as has already been noted, an involuntary union of different 'nations', of which the Hausa/Fulani, the Yoruba, and the Igbo, are the dominant ones.⁵⁵ Sources

⁵³ The constitution also vested the Federal government with exclusive power to legislate on mines and minerals in Nigeria, including oil fields, oil mining, geological surveys and natural gas. See Constitution of the Federal Republic of Nigeria 1963, S.6 (a), Part I item 25.

⁵⁴ As noted earlier, a lot has been written on the Nigerian civil war.

⁵⁵ As seen in Chapter 1, the Nigerian State is a coerced marriage of several previously independent and self-governing ethno-political nations, characterized by cultural, linguistic and religious differences. Severe cleavages in the country today appear to be the direct result of colonial rule and the imposition of the modern Nation-State at independence in 1960. Religious tensions, and their politicization, are the products of the proselytizing rivalries of Christianity and Islam. Today, in some northern States of Nigeria, Islamic legal system has been proclaimed – based on the Islamic religion – despite a constitutional provision (S. 10 of the 1999 Constitution of Nigeria), which forbids the proclamation of a State religion. (In contrast, 'Islam is the established religion of the Malaysian State and is entrenched in both the Federal and State Constitutions (see Article 3 of the Federal Constitution)' (Yusof, 1989: 105, footnote 191)). The southern States, predominantly populated by Christians, are opposed to this development and this is presently generating a lot of tension in the country. Similar situations abound in much of Africa, flowing from the artificiality of the States brought about by colonialism. Mazrui maintains that '[it] is arguable that Africa did not have religious wars before the arrival of Christianity and Islam' (Mazrui, 1991: 77). It is a notorious fact that, since becoming independent, most African States have been in turmoil. The nation-state idea appears to have failed in Africa, being distinctly artificial and not 'the visible expression of the age-long efforts of the [indigenous] peoples to achieve political adjustment between themselves and the physical conditions in which they live' (Anene (1970: 3) – quoting Moodie (1956). Mutua blames the colonialism of Africa and the imposition of the modern nation-state for interrupting historical and evolutionary process of the peoples of Africa. According to him, the colonial masters drew artificial boundaries and people of different cultural and linguistic interests and aspirations were forced to live together under one State. He maintains that since decolonialism, African States 'have attempted, often unsuccessfully, to live up to and within these new formulations, all too frequently the consequences have been disastrous' (Mutua, 1995: 1115). Similarly, Hatch argues that it has become a platitude to point out that the European Empires impressed on Africa during the nineteenth century were artificial creations superimposed on groups of varied ethnic communities. 'Their boundaries enclosed societies with few common characteristics, no lingua franca and many cultural contrasts. Yet those who sought to replace colonial rule by indigenous rule had to campaign to gain control over these haphazard polities, thereby tacitly conceding their validity. For the purpose of mobilization against imperial governance they raised the myth of national identity. Once they had succeeded and independence was gained it was assumed that the sovereign States that succeeded European colonial

indicate that following certain developments after the coup, an attempt by the Eastern Region (one of the four⁵⁶ Regions of the Federation of Nigeria at the time) to secede from Nigeria led to a civil war from 1967-70. Although the Federal Government insisted that the war was necessary 'in order to keep Nigeria one',⁵⁷ some critics have suggested that it was a cynical war for the control of mineral oils (located in the Niger Delta, within the geographical control of the 'Republic of Biafra' – new name of the seceding region).⁵⁸ Arguably, the Petroleum Act of 1969,⁵⁹ made by the Federal Military Government during the war, provides some support for the view of critics of the war. Section 1 of this Act⁶⁰ re-enacts the provisions of S.158 (1) of the suspended 1963 constitution in blunt terms. The section provides in part as follows:

- (1) The entire ownership and control of all petroleum in, under or upon any lands to which this section applies shall be vested in the State.
- (2) This section applies to all lands (including land covered by water) Which: -
 - (a) is in Nigeria; or
 - (b) is under the territorial waters of Nigeria; or
 - (c) forms part of the continental shelf.

administrative units would coincide with new nations. The assumption was soon proved false' (Hatch, 1971: 9-10). See also Ndulo (1999: 7-17). To avoid violent clashes and wars, Mutua has suggested a voluntary re-drawing of the map of Africa by the peoples of Africa (Mutua, 1995: 1115). Although controversial, Mutua's suggestion is not without some merits; at least it outlines facts that ought to be considered on the political table when certain decisions have to be taken by policy makers.

⁵⁶ Nigeria had three Regions at independence in 1960. A fourth Region, the Midwestern Region, was created in 1963.

⁵⁷ 'To keep Nigeria one is a task that must be done' was the popular slogan of the Federal Military Government during the civil war. Yet the same government was engaged in genocide, as found by an international body. See *Nigeria/ Biafra Conflict: An International commission of Jurists Find Prima Facie Evidence of Genocide* (n.d.) – held at the Library of the Institute of Advanced Legal Studies, University of London.

⁵⁸ See, for example, Robinson (1996: 28); Saro-wiwa (1989: 98).

⁵⁹ Cap 350, Laws of the Federation of Nigeria 1990 Edition (hereinafter, LFN 1990).

⁶⁰ The Act was originally called a 'Decree'. It was re-designated an 'Act' by virtue of the Adaptation of Laws (Re-designation of Decrees, Edicts) Order No.13 of 1980.

It is important to note that under this statute, 'petroleum' means mineral oil (or any related hydrocarbon) or natural gas as it exists in its natural state in strata, and does not include coal or bituminous shales or other stratified deposits from which oil can be extracted by distillation.⁶¹

This was the first post-colonial statute on mineral oils. It consolidates colonial statutes on mineral oils, and replaces them. The next important statute touching on the ownership of mineral oils is the Exclusive Economic Zone Decree⁶² (now redesignated 'Act'), which was made in 1978 by the same Military Government. This law vests in the Federal Republic of Nigeria sovereign and exclusive rights with respect to the exploitation of natural resources (including oil) of the seabed, the subsoil and superjacent waters of the Exclusive Economic Zone (EEZ). The extent of this right is delimited as 'an area extending from the external limits of the territorial miles from which the breadth of the territorial waters of Nigeria is measured.'⁶³ Although the 1982 United Nations Convention on the Law of the Sea now recognizes this right, there is evidence which indicates that the ownership of such resources remains contentious between the Federal Government and the littoral States of Nigeria. This dispute, which recently

⁶¹ S. 15. Compare Zambian Petroleum Act, Cap 435 of the Laws of Zambia 1995 Edition, where 'Petroleum' is defined to 'include the liquids commonly known as rock oil, ranson oil, Burma oil, Kerosene, Paraffin oil, Petrol, gasoline, bensoline, bensine, naphtha or any like inflammable liquid whether a natural product or that is made from Petroleum, coal, schist, shale, or any other bituminous substance, or from any products thereof.' This is just to show that the word 'petroleum' is not necessarily a word of art.

⁶² No. 28 of 1978, Cap.110, Laws of the Federation of Nigeria 1990 Edition.

⁶³ Section 1. Ajomo maintains that the provisions of the Petroleum Act combined with those of the EEZ Act invest in the Federal government a 'total' right of ownership over oil resources. Ajomo (1982: 334).

assumed dangerous political dimension, was recently litigated and decided by the Supreme Court of Nigeria.⁶⁴

Despite opposition from certain quarters (notably from the Niger Delta people), it would appear that the policy of State ownership of oil is not likely to be changed soon nor lightly reversed. In fact, there is ample evidence to indicate a desire (by the policy-makers, dominated by the ethnic majority groups of the country) to continue with the policy of State ownership of oil. A brief excursion into the constitutional charters of the country since the coup of 1966 suspended the 1963 constitution, will illustrate this point. First, a new constitution was made (engineered by the ethnic-majority dominated Federal Military Government, and with the active participation of the civilian population, mostly of the majority ethnic groups) to take effect from 1 October 1979, at the commencement of a new civilian administration.⁶⁵ Like the 1963 constitution before it, this constitution vested ownership of mineral oils in the State.⁶⁶ This policy was continued by another Military Government, which ousted the former and took over the reins of power on 31 December 1983.

The second constitutional charter after 1979 was the stillborn Constitution of the Federal Republic of Nigeria 1989.⁶⁷ Thereafter, there was a Draft

⁶⁴ See *A.-G., Federation V. A.-G., Abia State & 35 Others* [2001] 11 NWLR (Pt. 725) 689 (report of the ruling on preliminary objection to the hearing of the case); *A.-G., Federation V. A.-G., Abia State* (No. 2) [2002] 6 NWLR (Pt. 764) 542 (report of Judgment on the substantive matter).

⁶⁵ This was the Second Republic (1979 – 1983).

⁶⁶ S. 40 (3).

⁶⁷ Cap. 62, Laws of the Federation of Nigeria 1990 Edition. The constitution was promulgated into law and was scheduled to come into effect on 1 October 1992 with the termination of military rule, but it never did because of the desire of the military junta at the time to cling to political power; they put off the commencement date several times, without justification. In 1994, Gen. Abacha, who replaced Gen. Babangida as military leader of Nigeria in 1993, convened a purported Constitutional Conference (overlooking the 1989 constitution, of which he was a key player in its making under Gen. Babangida's Military Government) and mandated the so-called 'Constitutional

Constitution in 1995.⁶⁸ The last in the series is the present constitution – that is, the Constitution of the Federal Republic of Nigeria 1999⁶⁹ (also made by another military regime, and virtually a verbatim reproduction of the 1979 constitution). Significantly, like the 1979 constitution, each of these subsequent constitutions has an identical provision⁷⁰ reinforcing the provisions of the Petroleum Act and the EEZ Act, thereby giving State ownership of mineral oils constitutional protection, and putting this contentious issue beyond ordinary statutory amendment.⁷¹ The identical provision in the present constitution is contained in section 44 (3) which provides as follows:

Notwithstanding the foregoing provisions of this section [providing against compulsory acquisition of property without the payment of adequate compensation] the entire property in and control of all minerals, mineral oils and natural gas in, under or upon any land in Nigeria or in, under or upon the territorial waters and the Exclusive Economic Zone of Nigeria shall vest in the government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly.⁷²

As already indicated, this is perhaps the most contentious provision of the Nigerian constitution today, and the survival of the Nigerian State may well depend on how the issues it affects are handled in the nearest future. Protagonists

Conference' to produce a Draft Constitution, which they did in 1995. It was a time-buying strategy, as he never planned to leave political power, as evidenced by the fact that the Draft Constitution was never promulgated into law until his sudden demise in 1998, allegedly on the arms of international prostitutes. This account was taken from various international papers between 1987 and 1998.

⁶⁸ See Report of the Constitutional Conference containing the Draft Constitution, 1995, Volume 1.

⁶⁹ The constitution came into force on 29 May 1999, when the present civilian government of President Olusegun Obasanjo (himself a former military ruler of Nigeria who voluntarily handed over power to civilians in 1979) was inaugurated.

⁷⁰ 1989 constitution, S.42 (3); 1995 Draft Constitution, S.47 (3); 1999 constitution, S.44 (3).

⁷¹ Amendment of any aspect of the constitution involves some rigorous procedures and requires approval by special majorities, which will be difficult to achieve on politically divisive issues like the control of oil resources in Nigeria. See Section 9 of the 1999 constitution.

of this provision have argued that if those on whose land mineral resources (especially, oil) are found have private rights to mine and prospect to the exclusion of all others, there might not be a country like Nigeria today and if existing a lot of the places with no such resources will become derelict and uncatered for.⁷³ Arguing along this line of reasoning, one academic has said that the importance of oil in the Nigerian economy provides a 'compelling reason' for 'national control in order to achieve maximum utility'.⁷⁴ Similarly, another commentator has expressed his 'candid view' that 'State ownership should continue to be so as an eloquent witness to the desire of the Federal Government to strengthen the unity of the country and provide development for the benefit of all'⁷⁵ (meaning, presumably, those who have oil in their land and those who do not have).

It is interesting to observe that these protagonist arguments were advanced by members and scholars from the majority ethnic groups and represent or reflect the position of the majority ethnic groups, who have dominated political power at the centre (whether under Civilian or Military Governments) since independence and who do not have oil resource in their lands. Contrary to the position of the protagonists of State ownership of oil, there is abundant evidence that the Niger Delta people want the communities or component States of the Federation to own and control the resources found in their area. In the result, the ownership of oil is

⁷² Ajomo saw the identical provision of the 1979 constitution as a re-enactment of the Petroleum Act 1969. See Ajomo (1982: 334).

⁷³ Adigun (1991: 134).

⁷⁴ Fabunmi (1986: 40).

⁷⁵ Ajomo (1982: 340).

arguably one of the causes of the prevailing oil-related protests and tension in the Niger Delta region.

2.5. Ownership of Land in Nigeria

It is beyond dispute that oil is enclosed and supported by land; hence, land⁷⁶ acquisition is a necessary precondition for oil operations. Although lawyers (especially of the common law tradition) generally understand 'land' to include minerals enclosed in the land, rather unusually, Nigerian law excludes minerals from the meaning of land. According to section 18 of the Interpretation Act 1964, 'land' 'includes any building and any other thing attached to the earth or permanently fastened to anything so attached, but does not include minerals.' Hence it is important to understand the law relating to land and how it relates to oil operations.

According to available evidence, before 1978 Nigeria did not have a uniform land tenure system. In the northern parts of the country there was a system of 'public ownership' of land, right from the colonial days, which had replaced the pre-colonial indigenous land tenure systems.⁷⁷ This contrasts with the

⁷⁶ In a general legal sense, 'land' means much more than the earth surface; it includes the subsoil, all things naturally or artificially attached to it, and the air space immediately above it. See Nwabueze (1972: 3). This is the meaning of land in English law, as can be seen from the provision of section 206 (1) of the Law of Property Act 1925: 'Land' 'includes land of any tenure, and mines and minerals.' (Compare S. 18 of Nigeria's Interpretation Act 1964, Cap. 192 LFN 1990). This does not, however, preclude the State from reserving minerals to it. See S.1(1) of the Petroleum (Production) Act 1934 of Great Britain.

⁷⁷ The basic land policy was contained in the Land and Native Rights Proclamation of 1910, which declared all land in northern Nigeria as 'native land'. This law made all the rights exercisable in respect of native lands subject to the control and disposition of the colonial governor. The lands were held and administered for the use and common benefit of all the natives (people of northern Nigeria) only, and no valid title could be created without the consent of the governor. This proclamation was basically re-enacted by the Northern Region legislature as Land Tenure Law in 1962. See Adigun (1991: 122).

position in southern Nigeria where there was a dual system of land tenure, namely, customary land tenure systems and statutory land tenure system. The former was governed by various native laws and custom whereas the latter was regulated by English statutes of general application,⁷⁸ statutes enacted by local legislatures, and colonial statutes made expressly applicable to Nigeria. This latter system is regarded as the received English land law and is outside the purview of this work.⁷⁹

In 1978, the divergent systems of land tenure in the country were brought into parity by the enactment of the Land Use Act (LUA)⁸⁰. This Act is strikingly similar to the pre-existing Land Tenure Law of the northern states of Nigeria, and can be said to be an extension of the Land Tenure Law⁸¹ to the southern states of Nigeria. In fact, the Land Tenure Law has been aptly described as the precursor of the LUA.⁸² The result is that, whereas the LUA did not effect any real change in the land tenurial system of northern Nigeria, it seems to have effected 'volcanic changes', especially on the indigenous or customary land tenure systems of

⁷⁸ For the meaning of the expression 'statutes of general application', see Allot (1970).

⁷⁹ There is a voluminous literature on Nigerian land law, including the following standard works: Elias (1971); Nwabueze (1972); Olawoye (1974); Okany (1986); and Smith (1999).

⁸⁰ Cap. 202 LFN 1990. The Land Use Act was promulgated by a military government as Land Use Decree, No.6 of 1978. It was re-designated Land Use Act in 1980 by a civilian government in order to bring it into conformity with the terminologies of the civilian system of government. See Adaptation of Laws (Redesignation of Decrees, etc) Order 1980. Ibidapo-Obe disagrees with the idea of redesignating a Decree as an Act. Her view is that 'legislation should properly reflect the source (i.e. those who passed it) so as not to distort legal history. Using 'Act' for military legislation is a misnomer, as by legal custom it attaches to laws of a democratically elected body' (Ibidapo-Obe, 1990: 231, footnote 13). Surely the redesignation of a 'Decree' as an 'Act' is based on a fiction. But there is no reason why this cannot be done, especially where a competent authority (in this case the President of Federal Republic of Nigeria) that has the constitutional power to modify the law, had done it. (It is submitted that redesignation amounts to adoption or ratification of the act of the former 'legislature', and for all practical purposes the adopted act must be considered as the act of the ratifying authority (which must, for this purpose, be considered as the Federal legislature).

⁸¹ Cap. 59 of the Laws of Northern Nigeria 1963.

⁸² Adigun (1991: 123).

southern Nigeria [including the Niger Delta region]⁸³, and particularly in relation to exploitation of oil. This is the argument, which this sub-section would test. In order to achieve the objective, it is logical to start with the examination of the customary land tenure before 1978.

2.5.1. Customary Land Tenure System

The basic legal principle of customary land tenure⁸⁴ was stated by a witness before the West African Lands Committee in these words: 'I conceive land belongs to a vast family of which many are dead, few are living and countless members are still unborn.'⁸⁵ This basic principle was accepted by the Committee in its Report⁸⁶ and has received judicial approval in several cases.⁸⁷ For example, in the often-cited case of *Amodu Tijani V. Secretary, Southern Nigeria*,⁸⁸ the Judicial Committee of the Privy Council accepted as 'substantially true' the following statement of RAYNER, C.J. in the Report of Land Tenure in West Africa, 1898:

Land belongs to the community, the village or family, never to the individual. All members of the community, village or family have an equal right to the land, but in every case the chief or headman of the community or village, or head of the family, has charge of the land, and in loose mode of speech is sometimes called the owner. He is to

⁸³ Omotola (1984-7: 46). The learned author argued elsewhere that 'it cannot be doubted that the Land Use Act attempts a reversal of the culture of the people who are subject to customary law' (Omotola, 1982: 64).

⁸⁴ Although different laws and custom obtain in the various communities of southern Nigeria, evidence indicates that it is possible to discern some general principles of customary land tenure law. For authoritative and detailed discussion of customary land tenure system, see Elias (1971: Chapter 5); Ajisafe (1924); Meek (1957); Ward-Price (1939); Green (1941); Chubb (1961); Obi (1963); Lloyd (1962); Coker (1966); Rowling (1949).

⁸⁵ A Yoruba chief by name Gboteyi, the *Elesi* of Odogbolu.

⁸⁶ See Report of the Land Tenure in West Africa 1898.

⁸⁷ For example, *Amodu Tijani v. Secretary, Southern Nigeria* (1921) A.C.399; *Balogun & ors. V. Oshodi* (1931) 10 NLR 35.

⁸⁸ (1921) AC 339.

some extent in the position of a trustee, and as such holds the land for the use of the community or family. He has control of it, and any member who wants a piece of land to cultivate or build house upon, goes to him for it...This is a pure native custom along the whole length of this [West African] coast, and wherever we find, as in Lagos, individual owners, this is again due to the introduction of English ideas.⁸⁹

The above statement of principle is not without some dispute. For example, both Elias⁹⁰ and Coker⁹¹ contend that the basis of customary ownership of land is the family, not community. In his critique, Utuama maintains that the statement is incorrect in so far as it denies the existence of individual ownership of land.⁹² In *Balogun V. Oshodi*,⁹³ decided 10 years after *Amodu Tijani* case, WEBBER, J., pointed out that the notion that individual ownership is quite foreign to native ideas has disappeared with the process of time, due to the spread of English ideas.⁹⁴ It is not proposed to go into this debate here. Suffice to say there is no dispute that the traditional basis of customary land tenure is 'common ownership'⁹⁵ (in fee simple/ absolute title), whether it is within a family or a community. According to authorities, this is one of the distinctive features of indigenous land tenure system, even up till this day. Another distinctive feature lies in the role of management and control that is vested in the headman of the community/village or family head (in every case, usually, the eldest surviving

⁸⁹ Ibid., at 404.

⁹⁰ Elias (1971: 74).

⁹¹ Coker (1966: 29).

⁹² Utuama (1989: 6).

⁹³ (1931) 10 NLR 36, at 50.

⁹⁴ Even the notorious institution of communal or family ownership has not been spared the sledgehammer. In *Lewis V. Bankole* (1908) 1 NLR 82, at 84, SPEED, Ag. C.J., observed that 'the institution of communal ownership has been dead for many years and the institution of family ownership is a dying one.' However, in *Bujulaiye V. Akapo* (1938) 14 NLR 10, BUTLER

male member of the community/village or family). By this, he allots or allocates portions of the lands to members (or non-members in some cases, as customary tenants), for their individual use (mostly for subsistence farming or building residential houses).⁹⁶ In every case, however, the land remains community/ family land.⁹⁷

It has been pointed out that any money, whether arising from sale, compensation, rent, etc. received by the chief or headman of a community/family on behalf of a communal/family land must be shared within the community or family.⁹⁸ On the basis of available evidence, it seems this is the very idea of common ownership. According to some sources, it is not an idea peculiar to the people of Southern Nigeria or the west coast of Africa; it is, it has been suggested, an African idea. As one African scholar recently observed:

In the mind of early European colonialists, Africa was not only a lawless continent but its natural resources, such as land, were *res nullius*. This view, however, soon turned out to be a racial myth. Colonial society had to realize very early that, as in all parts of the world, access to land in Africa was regulated by a well-defined indigenous system of tenurial norms. But unlike the tenurial development of landed property in Europe since the middle ages, whereby under the free-hold system, land became the exclusive property of a few individuals, families or institutions, *land in Africa belonged to communities*.⁹⁹ (Italics mine).

LLOYD, J. rightly rejected this observation, stating that 'the institution of family ownership is still a very live force in native tenure in Lagos.'

⁹⁵ Omotola (1982: 56).

⁹⁶ See Elias (1971).

⁹⁷ Except where, under some custom, the land has been partitioned. In which case, the individual members become absolute owners of their allotted portions (i.e. exclusive of the community/family).

⁹⁸ Frynas (2000: 73).

⁹⁹ Hangula (1998: 85). See also Sarbah (1968). Interestingly, this is also the system of land-holding among the Maori indigenous people of New Zealand. (This information was kindly made

There is evidence to support the claim that the role (or right) of control and management vested in the community/family chief/headman ensures that, legally, nobody, not even a member of the community/family, can make use of the community/family land in any way whatsoever, without the consent or concurrence of the community/family headman/chief.¹⁰⁰ Some scholars maintain that before the enactment of the LUA this position was well respected by everybody, including the government, right from the colonial days. So that, with respect to oil operations, although oil resource was (and still is) vested in the State and the oil-bearing/landowning communities did not participate in farming out the resource to the oil companies, yet the oil prospecting and production companies entered upon the affected lands only after reaching an agreement with the land-owning communities on the amount of compensation (for any damage to surface rights) and compensation¹⁰¹ (annual rent¹⁰² for the use of the land in its intrinsic state or other corporeal hereditaments) to be paid to the communities¹⁰³ – a practice which has been described as a ‘triangular relationship’.¹⁰⁴

Further, another aspect of customary land tenure, which is important to the present interest, relates to the native conception of ownership of natural resources enclosed in a land. This raises the question whether the English principle of

available to me by my Supervisor, Wade Mansell (a New Zealander), during our meeting on 11/12/01).

¹⁰⁰ See Elias (1971).

¹⁰¹ Ajomo (1982: 338).

¹⁰² According to Ajomo, the payment of compensation (annual rent) ‘had from time belonged to individuals or communities, owners of land on which petroleum operations were being carried out’ (1982, 338).

¹⁰³ Ajomo (1982: 335).

¹⁰⁴ Ajomo (1982: 335).

*quicquid plantatur solo solo cedit*¹⁰⁵ is part of native land tenure system. Following this principle, minerals, buildings, trees, and other fixtures on land form part of the land and belong to the owner of the land (subject to any statutory or other exceptions). There is no agreement amongst scholars whether this principle is part of native land tenure system. While some scholars claim that it is a part of it, others have expressed doubt.¹⁰⁶ Nevertheless, it seems well settled (under customary land tenure system) that if a thing is affixed to the soil without expenditure of labour, it belongs to the owner of the land. For example, some sources claim that under customary land tenure system palm trees, iroko, kola plants that grow wild and *minerals in the ground*, belong to the owner of the land.¹⁰⁷ This claim is in accord with English common law, which recognizes the right of the owner of a parcel of land to all minerals below the surface of his land and his right to work them or lease them to another to work.¹⁰⁸ But unlike the common law that recognizes the right of the State to reserve mineral resources to herself or statutorily expropriate the same, there is no evidence of any principle of customary land law which authorizes any person or government to expropriate mineral resources enclosed in any land.¹⁰⁹ According to one authority, 'the

¹⁰⁵ A Latin expression, which translates as: 'whatever is fixed to the soil, belongs to the soil'.

¹⁰⁶ Coker categorically asserts that 'the maxim *quicquid plantatur solo cedit*, which is a maxim of most legal systems, is also part of Yoruba native law and custom' (Coker, 1966: 40). Onwuamaegbu disputes this claim. See Onwuamaegbu (1975: 352 – 354).

¹⁰⁷ Green (1941: 10). See also Onwuamaegbu (1975: 355); Elias (1971: 34). With specific reference to Yoruba custom, Ward-Price observes that 'minerals were owned by the owners of the land; but nothing except iron-ore was dug up for economic use' (*Land Tenure in the Yoruba Provinces of Nigeria*, para. 29).

¹⁰⁸ See *Bruce V. Erskine* (1716) Mor. 9642; *Mitchell V. Moseley* (1914) 1 Ch. 438, at 450 per COZENS-HARDY, M.R.

¹⁰⁹ Perhaps it is in recognition of this position that section 5(1) of the Minerals Act 1946 (Cap. 226 LFN 1990) provides as follows: 'Nothing in this Act contained shall be deemed to prevent any citizen of Nigeria from winning, subject to such conditions as may be prescribed, iron ore, salt, soda potash galena from lands (other than lands within the area of mining lease or mining right)

exclusive use and enjoyment of the land usually carried with it full right to its minerals, subject of course to the requirements of the prevailing custom and the relation of the particular occupier to the land; *land usually included minerals*'.¹¹⁰

Although some scholars have pointed out that the modern State enjoys 'eminent domain' – that is the power to seize private property for public use,¹¹¹ it must be recognized that this power is not derived from customary law but from the general law of the so-called civilized societies. As customary law is still part of Nigerian law,¹¹² it is possible to conclude that the provisions of the Minerals Act 1945, the Petroleum Act 1969, and all other statutes and constitutional provisions which vest ownership of all minerals in the State, and are arguably inconsistent with customary land tenure law, are expropriatory or confiscatory.

Although under the general law this conclusion cannot be sustained (as customary law must not be incompatible with any 'statute for the time being in force'¹¹³), this point is important to issues relating to the legitimacy of the modern (Nigerian) State, equity, minority and indigenous rights. As one observer has pertinently noted, '*the principal argument for boycotting the June 12[1993]*

from which it has been since before the material date the custom of members of the community to which he belongs to win the same.' (Italics mine). The important point here is the recognition of the customary rights (and the custom) of community landowners to the minerals/natural resources found on their lands. Elias notes that 'there is an abundant evidence of the mining, howbeit on a minor scale, of minerals like tin, iron-ore, salt, etc., by Africans in various districts of Nigeria before the advent of the British (Elias, 1971: 37, footnote 7)). See also Forde and Scott (1946: 79).

¹¹⁰Elias (1971: 34), italics mine.

¹¹¹ See generally Frynas (2000: 75).

¹¹² By various High Court Laws of the States of the Federation (with almost identical provisions), the courts '*shall observe and enforce the observance of every native law and custom which is applicable and is not repugnant to natural justice, equity, and good conscience, nor incompatible either directly or by implication with any law for the time being in force, and nothing in this Act shall deprive any person of the benefit of any such native law and custom.*' See, for example, section 22 (1) of the High Court Law of Eastern Nigeria (No.27 of 1955)- applicable to all the States of the Eastern Nigeria. See also section 14 (3) of the Evidence Act, Cap.112 LFN 1990, esp. the proviso thereto.

*presidential election in Nigeria was that Ogoni should not give legitimacy to a president who would swear to uphold a constitution that dispossessed Ogoni [Niger Delta] people of their natural rights’.*¹¹⁴ Obviously, the implication of this is that the constitution, which shields certain laws (particularly, the Petroleum Act, the EEZ Act, and the Land Use Act) (as noted above), is inconsistent with the customary rights of the Ogoni (Niger Delta) people. Strictly, it may not be a legally valid argument under Nigerian domestic law, but its political relevance cannot be in doubt; nor can its relevance in the context of indigenous land rights (see below) be questioned.

As previously stated, a major land tenure reform took place in Nigeria in 1978. Its impact on the pre-existing land tenure systems, particularly in relation to oil operations, is the concern of the next section.

2.5.2 Ownership of Land and the Land Use Act 1978

It would be recalled that the LUA was promulgated in 1978 under a Military government. By it, as has already been mentioned, the land tenure systems in the northern and southern parts of Nigeria have been brought into parity.¹¹⁵ Some sources suggest that prior to its enactment there was some disaffection with the

¹¹³ Section 22 (1) of the High Court Law of Eastern Nigeria, and equivalent provisions in the High Court Laws of Western and Northern Nigeria.

¹¹⁴ Naanen (1995: 70). It is an historical fact that under the umbrella of the Movement For the Survival of Ogoni People (MOSOP), the Ogoni people of the Niger Delta region boycotted Nigeria’s Presidential election held on 12 June 1993.

¹¹⁵ Similarly, ‘in Peninsular Malaysia, the laws relating to land, which formerly existed in forty three different types of legislation, both Federal and State, have been consolidated into one – the National Land Code (NLC) 1965, which was adopted by all the eleven States in Peninsular Malaysia in 1966’ (Yusof, 1989: 1). In other words, the NLC brought parity in the law relating to land in Malaysia. In general, the position of Malaysian citizens under the NLC is akin to that of Nigerians under the LUA. However, the author did not indicate whether the previous tenure

existing customary land tenure systems in southern Nigeria. Specifically, the communal system of land-holding was thought to be inefficient and inimical to rapid economic development.¹¹⁶ It was also claimed that the process of acquisition of land by governments, from communities and families, for developmental purposes, was cumbersome, clumsy and costly.¹¹⁷ It appears the situation was made worse by the activities of land speculators and profiteers. In this situation, and having regard to the need for rapid development, it seems the need for land reform legislation was inevitable. The Military Government at the time, headed by Gen. Olusegun Obasanjo, started the process of land reform¹¹⁸ by inaugurating

system was at any time based on custom. On the contrary, it would appear that the Malaysian land tenure system has always been based on Islamic laws.

¹¹⁶Adegboye (1967: 339-350).

¹¹⁷Famoriyo argues that *'the problems may be considered as institutional barriers to development and stem largely from the failure to intervene in order to direct and streamline the customary tenure system so that it could become more conducive to economic development. If there had been objective intervention the result could conceivably have been the existence today of a powerful, dynamic and flexible land tenure system making a positive contribution to Nigeria's agricultural development...The complexity of the land tenure system in Nigeria shows that it is a single aspect of Nigeria's agrarian structure. It clearly requires intervention at both state and local levels...'* (Famoriyo, 1973: 1-11). Before the LUA was promulgated in 1978, the need for land reform had also become part of the thinking in development planning circles, as evidenced by the Second and Third National Development Plans. The Second National Development Plan, 1970-74, states: *'The prevailing land tenure system in the country sometimes hinders agricultural development... If Nigeria's agriculture is then to develop very rapidly and have the desired impact on the standard of living, there must be reform in the system of land tenure'*. (See Report of the Federal Ministry of Economic Development, Lagos, 1970). In the case of the Third Development Plan, it is stated: *'The under-utilization of agricultural land is itself a function of some institutional constraints, in particular, the land tenure system and seasonal labour shortages. The land tenure system is mainly responsible for fragmentation of holdings and the difficulties in mechanization and modernization of agricultural production'* (Third National Development Plan, 1975-80, Federal Ministry of Economic Development, Lagos, 1975, Vol. 1, 63). However, it should be noted that neither plan made any concrete proposals for reform. Further, it should be observed that the pre-occupation of these plans was with agricultural development. Furthermore, it is notable that before the promulgation of the LUA, there is no evidence whatsoever of any difficulties in the acquisition of land, under customary land tenure system, for the purposes of oil operations. Clearly, therefore, it can be concluded that the customary system relating to the acquisition of land for oil operations (see text above) did not contribute to the need for the 1978 land law reform in Nigeria.

¹¹⁸ It appears the idea of a uniform policy of land nationalization was first suggested to the then military government by an Anti- inflation Task Force appointed by its predecessor. Although the government did not accept the body's recommendation that all land be vested in the State and future transactions should require the approval of the respective State government, it accepted in principle the recommendation of a subsequent inquiry that urban land be subject to such

a Land Use Panel to study the situation and make recommendations on the way forward. At the inaugural ceremony the government stated the ‘mischief’ to be arrested thus:

The Federal Military Government is fully aware of the land racketeering, the pernicious role of middlemen in land speculation and in sometimes bitter and unending litigation in land transactions in the country. At present it is not only the individual who wants to build his or her house that is facing difficulties in finding suitable land; *the local, State and Federal Governments are also inhibited by problems placed in their way in acquiring land for development.*¹¹⁹

The Report of the Panel indicates that the panelists were not unanimous in their recommendations – there was a majority report as well as a minority report.¹²⁰ The majority report was unequivocally against either the nationalization of land or the extension of the prevailing land tenure system of the northern States to the country as a whole. On the contrary, the minority report, characterizing the authors of the majority report as ‘protectors of vested interests militating against the rational socio-economic use of land’, advocated land ‘nationalization’.¹²¹ In a rather strange move, the Military Government endorsed the recommendations of the minority report,¹²² stating that: ‘*The idea of government being the custodian of*

restrictions, and this was followed by the appointment of the Land Use Panel to advise on future Land Policy. See *First Report of the Anti-inflation Task Force, 1975* (Ministry of Information, Lagos); *The Attack on Inflation: Government Views on the First Report of the Anti-inflation Task Force, 1975* (Ministry of Information, Lagos); *Federal Military Government Views on the Report of the Rent Panel, 1976* (Ministry of Information, Lagos).

¹¹⁹ See *Report of the Land Use Panel, 1977, 5*. (Emphasis added).

¹²⁰ See further, Francis (1984).

¹²¹ This recommendation is an adoption of the academic view of one commentator who had asked that ‘the Lands and Native Rights Ordinance of 1910 which made acquisition of land for agricultural and other economic purposes possible in northern Nigeria could be extended to the south, thereby putting all unoccupied lands within the reach and disposal of the government’ Adegboye (1967, 348-9).

¹²² The chairman of the panel, an eminent jurist of the Supreme Court, Justice C. IDIGBE, had endorsed the majority report.

*land in the northern states is germane and should remain as an acceptable base for land use.*¹²³

There is evidence which indicates that the ‘mischief’ of the customary land tenure system had also been judicially noticed before the enactment of the LUA. In *Obikoya & Sons V. Governor of Lagos State & Anor.*,¹²⁴ NNAEMEKA-AGU, JCA (as he then was) made the following observation:

It is necessary, I believe, to remember that one of the main reasons why the idea of the Act [LUA] was conceived was the debilitating contradictions between our indigenous systems of land tenure wherein land belonged to the community – family, kindred, village or quarter (sic), as the case may be – and was not readily available for exploitation and development on the one hand, and the impact and pressure of commercialization, urbanization and development on the other.¹²⁵

Since its enactment, the LUA has remained the subject of much debate in the country. It has been variously described as revolutionary,¹²⁶ reformative, controversial,¹²⁷ and impactful.¹²⁸ It is certainly a complex piece of legislation,

¹²³ See *Federal Government White Paper on the Report and Recommendations of the Land Use Panel, Federal Ministry of Information, Lagos, 1978*, at 1-5.

¹²⁴ (1987) 1 NWLR (Pt. 50) 413.

¹²⁵ At 438.

¹²⁶ In *L.S.D.P.C. V. Foreign Finance Corporation* (1987) 1 NWLR (Pt.50) 413, at 460, KOLAWOLE, J.C.A. observed: ‘The Land Use Act 1978 has revolutionized the land tenure system in Southern States of this country. The law has evoked a lot of litigations along the length and breathes of this part of the country. The Land Use Act has armed the government with far-reaching powers to not only expropriate land from people, but to control landed properties through considerable executive and administrative powers.’ See also *Savannah Bank (Nig.) Ltd. V. Ajilo* (1989) 1 NWLR (Part 97) 305, at 315 per OBASEKI, J.S.C. This is also the view of Aguda: ‘The Land Use Act has effected a complete revolution in the law relating to land in the Southern States’. See Aguda (1982: 249).

¹²⁷ In the words of a scholar, the Land Use Act is “one of the most far-reaching and controversial pieces of legislation on land in Nigeria.” Ajomo (1982: 330). This is also the extra-judicial view of Hon. Justice S.F. Adeloje. See Adeloje (1982: 312, at 314). See also *L.S.D.P.C. V. Foreign Finance Corporation* (cited above), at 444, per ADEMOLA, J.C.A.

¹²⁸ In *Nkwocha V. Governor of Anambra State* (1984) 6 SC 362, at 363, IRIKEFE, J.S.C. observed as follows: ‘The Land Use Decree (No.6 of 29th March 1978) is indisputably the most *impactful* of all legislation touching upon the land tenurial systems of this country before and after full nationhood.’ (Italics mine).

with far-reaching consequences. As an author has argued, 'except those within the inner caucus of the ruling military junta at the time no one would ever be able to fully explain the real motives for the sweeping measures contained in the Act'¹²⁹. Significantly, it seems in no area is the complexity of the Act more pronounced than on the issue of ownership of land under the Act. This is the area that has generated much of the controversy and the focus of the present inquiry. It is therefore important to briefly consider some of the contending views on the issue.¹³⁰ And as the various views have been based on Section 1 of the Act,¹³¹ it is important to reproduce its provision here:

*Subject to the provisions of this Act, all land comprised in the territory of each State of the Federation are hereby vested in the governor of the State and such land shall be held in trust and administered for the use and common benefit of all Nigerians in accordance with the provisions of this Act.*¹³²

Having regard to the pre-existing customary land tenure regime, the important question arising from this provision is this: 'who now owns land in Nigeria?' As will be seen presently, there is yet no settled answer to this question. A few examples will illustrate the varied views on the question.

Firstly, a scholar has expressed the view that by the provisions of the LUA, individuals and communities have been divested of their ownership rights over land without transferring it to anyone, save that the governor is made trustee

¹²⁹ Emiola (1984: 169).

¹³⁰ There is a voluminous literature on the Land Use Act. See, for example: Omotola (1980). Omotola (ed.) (1982); Adigun (ed.) (1991); James (1987); Osipitan (1991).

¹³¹ The Land Use Act came into force on 29 March 1978.

¹³² This provision may be contrasted with the recommendation of Special Rapporteur Martinez-Cobo on the land rights of indigenous peoples: 'No intermediary institution of any kind should be created or appointed to hold the lands of indigenous peoples on their behalf' (UN Doc. E/CN.4/Sub.2/1983/21/Add. 8, para. 524 (and E/CN. 4/Sub. 2/1986/7/Add. 4)).

of it. As he puts it, 'one now finds it difficult to know where ownership of land lies or whether there is now any kind of ownership of land still existing.'¹³³ This can be contrasted with the view expressed by another scholar: 'Section 1 of the Act takes away absolute ownership of land from the citizens and vests it in the governor'.¹³⁴ However, both views appear to agree on one point: that customary land-owners have lost their pre-existing rights by the enactment of the Act.

As shall be seen presently, there is some measure of support for these divergent views,¹³⁵ even in judicial decisions, particularly for the second one. Nevertheless, one commentator has obliquely attacked the second view. He argues that the 'vesting provision' (Section 1 of the LUA) is ineffective without first divesting existing owners of their absolute title.¹³⁶ Relying on the authority of the decision in *Sir Adetokunbo Ademola V. John Ammo*,¹³⁷ where the court held that no certificate of occupancy can validly be issued in respect of a land which is in the possession of another without first revoking the right of the original occupier, he forcefully argued that no property in land in a citizen can be transferred to another without first divesting the owner of his title. The implication of this argument is that customary owners are still holding land under

¹³³ Ajomo (1982:340). The author, answering the question 'who now owns land in Nigeria', concluded: 'It would appear that the intention of the Act is to abolish the concept of ownership altogether and replace it with that of use and occupation' (*Idem*).

¹³⁴ Omotola (1982: 57). It appears this author later changed his view. See Omotola (1985:1). For a serious attack on the later view, see Umezulike (1986: 61).

¹³⁵ The divergence of views is virtually on every provision of the Act. For example, in *Nkwocha V. Governor of Anambra State*, IRIKFE, J.S.C., observed that there are 'numerous divergent decisions of several courts in this country on whether the civilian governor under the 1979 constitution can be said to be a successor to the Military Governor appearing in Section 1 of the Land Use Act.' In this case (among others) the Supreme Court had decided that civilian governors succeeded military governors for all purposes, including the execution of the LUA.

¹³⁶ Emiola (1984: 169-170).

¹³⁷ (1982) Suit No. AB/8/81 of 2 August 1982 (unreported).

customary land tenure system.¹³⁸ Judicial support for this view can be found in the observation of FAKAYODE, C.J. in *Aina Co. Ltd. V. Commissioner for Lands and Housing, Oyo State*.¹³⁹ After rejecting the contention of a State Counsel that the land in dispute had become vested in the State by virtue of the provisions of the Land Use Act, the learned judge observed:

The fact that the defendants [Oyo State Government] are now showing an intention to acquire plaintiff company's land by means of [Notice of Acquisition] shows beyond reasonable doubt that the property in dispute was not vested in the Governor...Since 1st October 1979 we had returned to the land tenures that obtained in Oyo state prior to the enactment of the Land Use Act; only we were slow to realize that fact.¹⁴⁰

However, there is a line of judicial decisions which go contrary to Fakayode's view, and support the view that State Governors are now the new owners of land. To take two examples: (1) *Akinloye V. Oyejide*;¹⁴¹ and (2) *L.S.D.P.C. V. Foreign Finance Corp.*¹⁴² In the first case, OGUNDARE, J. (as he then was) made the following observation on the effect of Section 1 of the LUA on customary land tenure:

In my humble opinion... the use of the word "vested" in Section 1 of the Land Use Act 1978 has the effect of transferring to the Governor of a State the ownership of all land in that State...On the literal reading of the Land Use Act 1978, I am of the view, and I so hold, that the intelligible result is to deprive citizens of this country of their ownership in land and vest same in the respective governors. The presumption that the law maker does not desire to confiscate the

¹³⁸Oshio (1990: 91) argues that 'the institution of family property with its incidents under customary law largely survived the Land Use Act, 1978.'

¹³⁹ 7, University of Ife Law Report 337.

¹⁴⁰ At 346.

¹⁴¹ Suit No.HCJ/9A/81 of 17/7/81; Omotola (1983: 146). This case was cited with approval by ESO, J.S.C. in *Nkwocha V. Governor of Anambra State*.

¹⁴² See text and accompanying footnote above.

property, or to encroach upon the right of persons is, in my view, rebutted on the clear and unambiguous provision of the Act.¹⁴³

The second case was decided by the Court of Appeal, and has something rather curious in it. The central issue raised in the case was the validity of a purported revocation of a right of occupancy (interest recognized by the LUA) by the Lagos State Government. The court found that the purported revocation did not comply with the provisions of the LUA. The issue of ownership of land, whether under customary law or under the LUA, did not arise in this case, yet the court devoted some time to consider the effect of the LUA on customary land tenure system. Moreover, although the court adopted Fakayode's view on one aspect of his decision in *Aina's case*, it did not say anything on his view touching on the effect of the LUA on customary land tenure. Instead it proceeded to express a contrary opinion thus:

The ownership and title to lands in Nigeria is now vested in the Governors of the various States of the Federation for the benefit of all Nigerians as a whole. *Communal and individual title ownership (sic) to land is now a thing of the past. The conception of land being in the family for the past, present and future members of it is no longer valid...The freedom of alienation and dealing with the land which was vested in the heads of the family or traditional authorities is now vested in the government...*¹⁴⁴

It is important to note that the judicial decisions so far considered are decisions of High courts and the Court of Appeal. In the Nigerian judicial hierarchy, the Supreme Court is the highest court of the land; the Court of Appeal (with a country-wide appellate jurisdiction on all issues like the Supreme Court) is

¹⁴³ Above, at 149-150.

the intermediate court between the High courts (States and Federal) and the Supreme Court. Together these courts constitute the superior courts of Nigeria.

In view of the conflicting decisions of the lower courts on the effect of the LUA on customary land tenure, it is obvious that a pronouncement of the Supreme Court is inevitable. Although there is no evidence that any of the decisions so far considered went to the Supreme Court, there are several other cases touching on the impact of the LUA on the pre-existing customary land tenure, which had gone to the court.¹⁴⁵ An analysis of these cases will reveal some inconsistencies, but it is not useful to consider the conflicts here. Suffice to say that in a recent case the Supreme Court had moved to 'reconcile' all the conflicting cases. This was in the case of *Abioye V. Yakubu*.¹⁴⁶

The central question in that case was '*whether, having regard to the provisions of the Land Use Act 1978, customary owners are entitled to be granted declaration of title to a parcel of land against their customary tenants.*'¹⁴⁷ Considering the importance of this question and the need to bring sanity into the 'chaotic' situation seen above, the court invited the Attorney-Generals of all the States of the Federation and some Senior Advocates of Nigeria (equivalent of

¹⁴⁴ At 444. (Italics mine). Adeoye disagrees with justice Ademola's view, and suggests the 'need to be cautious in awarding the Land Use Act a sweeping effect'. See Adeoye (1991: 114).

¹⁴⁵ For example: *Onwuka V. Ediala* (1989) 1 NWLR (Part 96) 182; *Ogunola V. Eiyekole* (1990) 4 NWLR (Pt. 146) 632; *Ogunleye V. Oni* (1990) 4 NWLR (Pt. 146) 745.

¹⁴⁶ [1991] 5 NWLR (Pt. 190) 130.

¹⁴⁷ Per BELLO, C.J.N., at 184. A 'customary tenant' is a tenant from year to year liable under customary law to pay *rents* or *tribute* to the landlord for the use of the land and barred from alienating the land or disputing the title of the landlord without consent. He cannot be in possession if his landlord is out of possession; the possession he enjoys is that given by the landlord ([1991] 5 NWLR (Pt. 190), at 225).

Queens Counsel in England) to appear before it as *amici curiae*. After elaborate proceedings, the court held, *inter alia*, as follows:¹⁴⁸

- (1). That the Land Use Act has removed the radical title in land from individual Nigerians, families, and communities and vested the same in the Governor of each State of the Federation in trust for the use and benefit of all Nigerians (leaving individuals, etc., with “rights of occupancy”); and
- (2). That the Act has also removed the control and management of lands from family and community heads/chiefs and vested the same in the governors of each State of the Federation (in the case of urban lands) and in the appropriate Local Government (in the case of rural lands).¹⁴⁹

It may be observed that this decision is in agreement with the Court of Appeal decision in *L.S.D.P.C. V. Foreign Finance Corporation*, earlier considered here, and also with an earlier decision of the Supreme Court where the court had observed as follows:

This appeal deals with the interpretation and application of some of the provisions of the Land Use Act 1978. Since the promulgation of the Act by the military administration of General Obasanjo in 1978, the vast majority of Nigerians have been unaware that the Act swept away all the unlimited rights and interests they had in their lands and substituted them with very limited rights and rigid control of the use of their limited rights by the...governors...*This appeal...will bring the revolutionary effect of the Act to the deep and painful awareness of many...Section 1 of the Act has made no secret of the intention and purpose of the law. It declared land in each State of the Federation shall be vested in the... Governor of each State...*¹⁵⁰

¹⁴⁸ *Abioye V. Yakubu* [1991] 5 NWLR (Part 190) 130, especially at 223.

¹⁴⁹ This conclusion was based on section 2 (1) of the LUA which explicitly provides: ‘As from the commencement of this Act- (a) all land in urban areas shall be under the control and management of the Military Governor [now interpreted to include civilian governors] of each state; and (b) all other land shall, subject to this Decree [Act], be under the control and management of the Local Government within the area of jurisdiction of which the land is situated.’ Under section 50(1) of the Act ‘urban area’ means ‘such area of the State as may be designated as such by the Governor pursuant to section 3 of the Act’.

¹⁵⁰ *Savannah Bank (Nig.) Ltd. V. Ajilo* (1989) 1 NWLR (part 97) 305, at 314, per OBASEKI, J.S.C. (Italics mine). The level of confusion about the effect of the Act can further be appreciated by comparing the following observation of this judge in an earlier case- *Ojemen V. Momodu II* (1983) 3 SC 173. After rejecting the appellants counsel’s submission that since the Land Use Act vested all lands in the State in the Governor of the State from 29 March 1978, the Irrua community

It will be recalled that absolute ownership of land and a headman's right of management and control are the hallmarks of customary land tenure systems. The above Supreme Court decisions indicate that these features have been destroyed by the LUA.¹⁵¹ In essence, it could be said that customary land owners have lost their title to land by nationalization.¹⁵² As one scholar has argued:

By the Land Use Decree [Act] 1978 all lands comprised in the territory of each State, with the exception of land belonging to the Federal Government or its agencies at the commencement of the Act, are vested in the Governor of the State. *The meaning and effect of vesting all lands in the government is that private ownership [in whatever form - community, village, family or individual] is hereby abolished and the title of the former private owners transferred to the government.*¹⁵³ (Italics mine).

In fact, it would appear that section 29 (3) of the LUA confirms the view that the Governor of a State (in effect the Nigerian State) is the new owner and

(respondents) from that date ceased to have interest in the land in dispute, he said: 'As the Irrua community is entitled to *own property* [land], there is nothing in the [Land Use Act] to prevent the community from applying for the issue of a certificate of occupancy by the appropriate authority-statutory or customary right of occupancy- to the piece or parcel of land the subject matter of the proceedings...' (at 214) (Italics mine). It should be pointed out that the State title under the LUA is not comparable to 'residual land rights' under the English land tenure system. As could be observed from the discussion in the text above, what the State has under the LUA is the original and radical title.

¹⁵¹ Apparently lamenting this situation, a learned commentator has said: 'The chief who under customary law (in accordance with which the right is said to be held) was the person who could grant communal land or consent to the grant thereof appears to have lost all his powers' (Omotola, 1982: 58). Note that sections 21 and 22 of the LUA prohibit the alienation of customary or statutory right of occupancy (new interests recognized under the Act) by any 'holder' without the consent of the Governor of the State where the land is situate or an appropriate local government, as the case may be. This appears to reinforce the argument that the 'State' is now the new owner of land in Nigeria.

¹⁵² Similarly, all land in Peninsular Malaysia 'is vested in the State' under the National Land Code of 1965 (Yusof, 1989: 4). However, there is no suggestion that the effect of this is similar to the situation in Nigeria.

¹⁵³ Nwabueze (1984). Earlier, in an *obiter dictum* in *Nkwocha V. Governor of Anambra State* (1884) 6 SC 362, ESO, J.S.C., had expressed the same view thus: 'The tenor of the Land Use Act as a single piece of legislation is the nationalization of all lands in the country by the vesting of its ownership in the State, leaving the private individual with an interest in land which is a mere right of occupancy' (at 404).

manager of all lands comprised in the territory of the State. Quoted *in extenso*, this Section provides as follows:

If the *holder* [not owner] entitled to compensation under this Section is a community the governor may direct that any compensation payable to it shall be paid-

- (1). to the community; or
- (2). to the chief or leader of the community to be disposed of by him for the benefit of the community in accordance with the applicable customary law; or
- (3). into some fund specified by the Governor for the purpose of being utilized or applied for the benefit of the community.

It is important to observe that this provision relates, *inter alia*, to the revocation of a statutory or customary right of occupancy (new rights recognized under the LUA) for 'overriding public interest' – in that it is required for *mining purposes* or *oil pipelines* or for any purpose connected therewith.¹⁵⁴ The implication of this provision is that a State Governor has discretion on how the compensation can be utilized. However, a scholar has argued that the Governor cannot appropriate the money and use it for a purpose remote from the interest of the community.¹⁵⁵ In other words, the Governor can be said to be a 'trustee' of the money for the benefit of the community. Forceful as this argument may appear, there is evidence to indicate that State Governors now cite this provision as authority to receive such compensation (presumably, on behalf of the State).¹⁵⁶

¹⁵⁴ S. 28 (2) and (3).

¹⁵⁵ Ajomo (1982: 339).

¹⁵⁶ Ajomo (1982: 338) notes that '*compensation, sometimes called rent by the recipients, had from time belonged to individuals or communities, owners of land on which petroleum operations were being carried out. But because the LUA has vested the management and control of land in the Governor, he now feels that it is to him that the compensation should be paid rather than the community or the families who owned the land before the Act came into force...Recently some Governors have cited the LUA as justifying this right being claimed by them*'.

It is important to note that evidence indicates that prior to the enactment of the LUA, compulsory acquisition of land for the purposes stated Section 28 of the Act (mining, etc.) were done under the Public Lands Acquisition Act,¹⁵⁷ which required the payment of adequate compensation to the communities directly, both for the land acquisition and for any resultant damage to land and surface rights. To recapitulate, prior to the enactment of the LUA there was a 'triangular arrangement', which ensured that after the Federal Government had granted an OPL or OML to an oil company, the company approached the land-owning/oil-bearing families/communities for a right of access into the land, subject to the payment of adequate compensation. In effect, this appeared to give the land-owning/oil-bearing families/communities some sense of participation in oil operations and a feeling of some respect for their rights, especially having regard to the fact that they do not participate in the decision or process of granting the relevant oil operations license or lease.

However, since the enactment of the LUA it does appear that the oil companies no longer need to consult the communities for a right of access to land for oil operations, nor do they pay compensation any more for any damage to land in its intrinsic State.¹⁵⁸ In fact there is evidence to indicate that the LUA has affected the prior practice of land acquisition for oil operations in a significant way. In this situation, it is difficult to resist the conclusion that with respect to oil operations the impact of the LUA on oil-bearing communities is akin to a

¹⁵⁷ Cap.167, Laws of the Federation of Nigeria 1958 Edition (and equivalent State laws). The British colonists originally made the Act in 1917.

¹⁵⁸ For a detailed discussion of the question of compensation, see Chapter 5.

‘volcanic eruption’.¹⁵⁹ Maybe this is an aspect of the ‘deep and painful awareness’ of ‘the revolutionary effect of the Act’, which the Supreme Court alluded to in *L.S.D.P.C. V. Foreign Finance Corporation*.

2.6. International law and ownership of Indigenous Land and Natural Resources

2. 6. 1. Introductory Remarks

The foregoing exposition may well be the position of Nigerian domestic law on the ownership of land and natural resources. But whether it is consistent with international law is another issue altogether, especially because of the people it concerns (the Niger Delta indigenous people of Nigeria) and the subject matters in question – land and natural resources. As has been observed, ‘the right to own land is one of the most important rights for indigenous groups’, since ‘land is an economic and frequently a cultural necessity’.¹⁶⁰ In view of this, having considered the position of Nigerian domestic law on the question of ownership of land and natural resources, it is important to inquire into the international law position on the issues of indigenous lands and natural resources, since the Niger

¹⁵⁹ Omotola (1984 – 1987). Maybe the impact of the LUA is not as devastating on the general aspects of customary land tenure. Speaking with particular reference to the incidents of ‘customary tenancy’, BELGORE, J.S.C. said: ‘As a result of this decision [saying the LUA did not abolish the institution of customary tenancy, so that customary overlords are still entitled to *tributes* from their customary tenants], the Act which appeared like a volcanic eruption [an oblique critique of Omotola’s view] is no more than a slight tremor’ (See *Abioye V. Yakubu*). Maybe this is what Frynas means when he asserts that ‘in terms of customary law, the Act has changed little’ (Frynas, 2000: 78).

¹⁶⁰ Thornberry (1991: 362). The spiritual and material importance of land to indigenous peoples is aptly illustrated in the Australian Aboriginal Paper on Land Rights, which stated: ‘Land to...Aboriginals is the life and the continuation of that life forever. Land...is religiously observed by our people in our myths, legends and laws...it provided all that was necessary to sustain life’. See International NGO Conference on Indigenous Peoples and the Land, Geneva, September 1981, organized by the Sub-Committee on Racism, Racial Discrimination, Apartheid and Decolonization of the Special NGO Committee on Human Rights (Geneva).

Delta people, who have been found to have the international status of minorities and indigenous people, claim that Nigerian law violates their rights to land and natural resources. As earlier stated, the object of this inquiry is to determine whether Nigeria's domestic laws on the issues are in conformity with the relevant international law. To achieve this, the position of international law on the issues will first be considered and this will be compared afterwards with the Nigerian domestic law.

2. 6. 2. Ownership of Indigenous Lands and Natural Resources

In relation to the question of land and resource rights of indigenous peoples under international law, a commentator has pertinently observed:

Since the early 1980s land rights have received considerable attention in the standard-setting activities of the UN and some UN specialized agencies [especially aid agencies, e.g. the World Bank], and also in national constitutions. The main focus has been on the land and resource rights of indigenous and tribal peoples. An instrument of fundamental importance is the Indigenous and Tribal Peoples Convention, No. 169, adopted by the International Labour Organization (ILO) in 1989...The UN has meanwhile been moving steadily towards the adoption of a Declaration on Indigenous Rights, which attaches similar importance to land rights.¹⁶¹

Interestingly, the African continent also has a regional instrument, which also protects the land rights and resources of indigenous people. Article 21 (1) of the African Charter on Human and Peoples' Rights provides that 'all peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.' And under Article 21 (2), where any people have been disposed of their land or

their land is spoiled by human activities (such as oil exploitation), they are entitled to recovery of their 'property as well as to adequate compensation'.

From the above, it follows that the position of international law on the question of ownership of indigenous lands and resources can be found in the following sources:¹⁶² ILO Convention, No. 169 (and No. 107), activities of some specialized agencies of the UN, national constitutions (to the extent that they reflect international standards), the UN actions towards the adoption of a Declaration on Indigenous Rights (which has already resulted in the production of a Draft Declaration on the Rights of Indigenous Peoples in 1993) and the African Charter on Human and Peoples' Rights.¹⁶³ Apart from the 'general' provision of Section 21 of the African Charter on Human and Peoples' Rights, to-date the ILO Conventions are the only 'specialized' and legally binding instruments on the subject. Nevertheless, the other sources arguably provide, at least, evidence of international thinking on the subject; hence, they deserve some investigation. It is proposed to consider these various sources here (with the exception of the African Charter on Human and Peoples' Rights, which has been stated above) under the following heads: Declaration of the World Conference to Combat Racism and Racial Discrimination, ILO Conventions (Nos. 107 and 169), UN Draft Declaration on the Rights of Indigenous Peoples, International Aid Agencies and Indigenous Rights, and International Standards on Indigenous Rights and State Practice. These will be considered seriatim.

¹⁶¹ Plant (1994: 7).

¹⁶² For an instructive discussion of the rights of indigenous peoples to land and natural resources, see Schrijver (1997: 314 – 319).

2. 6. 2. 1. Declaration of the World Conference to Combat Racism and Racial Discrimination, 1983

The Second World Conference to Combat Racism and Racial Discrimination was held in 1983.¹⁶⁴ Attended by 128 States, the Conference issued a Declaration, which has been described as an ‘official document’, ‘representing primarily the views of governments, and therefore a possible signpost to future developments’ (Thornberry, 1991: 338). Thornberry has also rightly pointed out that ‘while the general thrust of the Declaration is aimed, as the title of the Conference suggests, at racial discrimination, the Conference makes specific mention of minorities and cultural diversity at a number of points, alluding both to groups and individuals’.¹⁶⁵ This is true both at the preamble and in the operative part of the document. For example, the preamble to the Declaration states that ‘the United Nations initiatives in respect of the rights of persons belonging to minorities and indigenous populations merit the widest support’. In its operative part, paragraph 22 expresses current concern with the rights of indigenous populations (including land rights). It states:

The rights of indigenous populations to maintain their traditional economic, social and cultural structures, to pursue their own economic, social and cultural development and to use and further develop their own language, their special relationship to their land and its natural resources should not be taken away from them; the need for consultation with indigenous populations as regards proposals which concern them should be fully observed.¹⁶⁶

¹⁶³ However, it must be pointed out that this is not a closed list of sources. For example, the position of international law on these questions can also be gleaned from the Declaration of the Second World Conference to Combat Racism and Racial Discrimination.

¹⁶⁴ See A/CONF. 119/26 (Thornberry, 1991: 338). The most recent World Conference on Racism was held in the Republic of South Africa in August 2001.

¹⁶⁵ Thornberry (1991: 338).

¹⁶⁶ The Conference specifically welcomes the establishment of the Working Group on Indigenous Populations, and it is remarkable that participants at the Conference included most of the Latin

Probably as a demonstration of the importance which the Participating States attach to the Declaration, it was complemented by a 'Programme of Action', which restates and elaborates its provisions. On the whole, the 'Programme of Action' indicates that, while some indigenous groups make maximum demands (up to secession), the Participating States are prepared to accommodate a variety of modest demands,¹⁶⁷ and recognize the following as the basic rights of indigenous groups: to call themselves by their proper name and to express freely their own identity; to have official status and representative organizations; to maintain a traditional way of life in the areas where they live, which should not affect their right to participate on an equal basis in the development of the State; to maintain and use their own language, 'wherever possible'; to enjoy freedom of religion or belief; *to have access to land and its natural resources*; and to 'structure, conduct and control their own educational systems' (Italics mine).¹⁶⁸ Moreover, the Programme of Action stresses the need for States to consult indigenous groups in matters that concern them, promotion and facilitation of self-management by indigenous groups, special measures to remedy past discrimination, and support for the efforts of the United Nations.

It has been suggested that the Declaration (and the accompanying 'Programme of Action') 'reflects in good measure the state of international and indigenous group [s] opinion, marking the conceptual changes therein beyond the prescriptions of International Labour Organization Convention 107 [of 1957]'

American States with large indigenous populations, including Bolivia, Columbia, Brazil, and Peru. For a list of the participants, see pp. 4 – 5 of the document (A/CONF. 119/26).

¹⁶⁷ Thornberry (1991: 390-1).

¹⁶⁸ Para. 34 of the Programme of Action.

(Thornberry, 1991: 390). Similarly, another author has observed that the decision of ILO to review ILO Convention 107 (which follows closely on the heels of the decision by the United Nations Commission on Human Rights to authorize the drafting of a declaration on the rights of indigenous peoples), ‘reflects growing international awareness of the special character and assertiveness of indigenous organizations, as well as the increasing recognition of collective human rights in international law’¹⁶⁹. The truth and consistency of these assertions can be verified by examining later developments on the issues in the international arena – the first of which is the efforts of the ILO.

2. 6. 2. 2. ILO Conventions (Nos. 107 and 169)

As previously stated, the ILO Conventions (Nos. 107¹⁷⁰ and 169¹⁷¹) are, to-date, the only specialized and legally binding international instruments on the subject of indigenous peoples’ (land) rights.¹⁷² The first of these (Convention No. 107), which was adopted in 1957, contains four articles dealing with indigenous land rights, whereas Convention No. 169 (adopted in 1989, and which is a partial revision of Convention No. 107) contains seven articles on indigenous land rights. Notably, although Convention No. 107 has been ‘replaced’ by Convention No.

¹⁶⁹ Barsh (1987: 756).

¹⁷⁰ Concerning the Protection and Integration of Indigenous and Other Tribal and semi-Tribal Populations in Independent Countries (adopted on 16 June 1957). Also adopted at the same Session was Recommendation 104, which bears the same title as the Convention. Essentially, Recommendation 104 elaborates the provisions of Convention No. 107.

¹⁷¹ Concerning Indigenous and Tribal Peoples in Independent Countries (adopted on 27 June 1989).

¹⁷² These Conventions are primarily binding on State parties. But as will be seen in the text below, some of its provisions have passed into customary international law, and have thus become binding on non-party States as well. Moreover, as will be seen in the text below, some of the provisions have been officially adopted and incorporated into the policies of major international

169, it is still useful to examine the former, for two reasons. Firstly, it was the first ever international standard on indigenous rights, and is still subsisting and binding on States which ratified it but have not yet ratified Convention No. 169.¹⁷³ Secondly, an examination of Convention No. 107 will aid the appreciation of the changes effected by Convention No. 169. Hence, the discussion here commences with a brief examination of the provisions of Convention No. 107.

The relevant provisions of this Convention (Convention No. 107) are contained in articles 11, 12, 13, and 14, which are reproduced in Appendix I to this thesis. For the purposes of the present interest, it is notable that this Convention recognizes communal ownership of indigenous lands as well as customary land tenure systems, and provides for the payment of compensation in the case of land acquired by the national or central government for development purposes. As one commentator puts it, the Convention 'also recognizes their [indigenous peoples'] customary laws regarding land use and inheritance, and their right to be compensated in money or in kind for lands appropriated by the national government for development purposes'.¹⁷⁴ The general position on the provisions has been summarized thus:

Article 11 [which recognizes the land rights of indigenous peoples] provides a right in this Convention which is delineated in a 'strong' manner; Article 12 [which forbids removal of indigenous peoples from their habitual territories without their consent, except in exceptional cases, and provides (inter alia) for the payment of compensation where removal was inevitable] is not quite as categorical, but it none-the-less contains important constraints on the

financial (and development) aids institutions, thereby making their influence to be felt beyond ratifying States.

¹⁷³ This is expressly so stated in Convention No. 169.

¹⁷⁴ Barsh (1986: 370). See also Article 21 (2) of the African Charter on Human and Peoples' Rights.

State Parties' freedom of action...; Article 13 relates back to the general question of indigenous laws and customs in the context of land rights...; [And] Article 14...is equality provision...¹⁷⁵

However, it must be remarked that the purport of the entire Convention was the integration of indigenous groups,¹⁷⁶ and this appears to be its undoing, as it exposed it to much criticism and necessitated its revision. For instance, at the First Congress of Indian Movements in South America,¹⁷⁷ the Indian Council of South America sharply attacked the Convention when it declared its belief that 'elaborated by oppressive governments', the Convention 'was meant to legalize the colonial oppression of the Indian [indigenous] peoples...' Among others, the Council criticized the 'integrationist' and 'assimilationist' aim of the Convention, which it considers as bordering on 'total lack of respect for the dignity of every people and its right to freedom'.¹⁷⁸ Evidence of its integrative intention can even be found in the above-stated provisions, which are not strong enough for the needs of indigenous peoples. As one writer puts it:

On the crucial issue of land rights, the original Convention [Convention 107] did relatively little to restrict State power. Indigenous groups' "ownership, collective or individual, over the lands which [they] traditionally occupy" was recognized [Art. 11], but so, too, was States' power to resettle communities "in the interest of national economic development" [Art. 12 (1)]. Convention No. 107's chief safeguard against the widespread destruction of indigenous communities was the requirement that States provide displaced peoples with substitute lands of "at least equal [quality] suitable to provide for their present needs and future development" [Art. 12 (2)]

¹⁷⁵ Thornberry (1991: 356).

¹⁷⁶ As stated in its preamble, Convention 107 aimed at 'facilitating' indigenous populations' 'progressive integration into their respective national communities.'

¹⁷⁷ Held at Ollantaytambo (Cuzco, Peru, Feb. – March 1980), cited in Martinez-Cobo, UN Doc. E/CN.4/Sub.2/476/Add.5, 54 and *ibid.*, Annex 5.

¹⁷⁸ UN Doc. E/CN.4/Sub.2/476/Add.5, 54 and *ibid.*, Annex 5, para. 2.

The impossibility of so doing in industrializing, heavily populated States was ignored.¹⁷⁹

As earlier indicated, ILO Convention No. 107 was partially revised in 1989 by ILO Convention No. 169. According to documentary evidence, the partial revision of the Convention was geared towards removing the weaknesses identified in it. In the words of the experts¹⁸⁰ that considered the case for its revision, 'the Convention's integrationist approach is inadequate and no longer reflects current thinking'. Noting that 'the indigenous representatives present unanimously stressed the importance of self-determination in economic, social and cultural affairs as a right,' the experts recommended in their report that the revision should assure indigenous and tribal peoples 'as much control as possible over their own economic, social and cultural development.'¹⁸¹ On the specific issue of land, it is remarkable that 'there was general agreement [among the experts] that "land" should include water and the use of the sea, as well as controlling access to – if not actual ownership of – the subsoil [minerals]'.¹⁸² The important question is: 'how far were these laudable objectives reflected in Convention No. 169 ?'

Unlike the original Convention which it partially revised, Convention No. 169 has seven articles dealing with the land rights of indigenous peoples (see Appendix I to this thesis). Most significantly, on examination of the new provisions, it is not difficult to see that some important improvements have been

¹⁷⁹ Barsh (1987: 757).

¹⁸⁰ Appointed by the General Body of the ILO. The group of 15 experts included Africans and representatives of two indigenous groups. In fact, indigenous organizations were freely permitted to participate in the meetings of the group of experts.

made compared with the original Convention (ILO Convention 107). Apart from the revision of the diction of some of the rights provided in Convention No. 107 (to remove their integrationist slant), the new Convention contains important new rights, the greatest of which is the right to natural resources, which is provided for in Article 15. This right includes the 'right to participate in the management and conservation of these resources'.¹⁸³ Further, it is provided that 'in cases where the State retains the ownership of mineral or sub-surface resources', the State has a duty to consult the people prior to any exploration or exploitation activities on their lands, 'with a view to ascertaining whether and to what degree their interests would be prejudiced'.¹⁸⁴ This may be described as the 'right to consultation' (which is an aspect of the right to participation¹⁸⁵). Moreover, the Convention enjoins the payment of 'fair compensation' to indigenous peoples who sustain damages 'as a result of such [exploration and exploitation] activities'.¹⁸⁶ Although not couched in strong enough terms, Article 15 must be recognized as a

¹⁸¹ ILO Doc. APPL/MER/107/1986/d.7, at 32.

¹⁸² See Barsh (1987: 761, footnote 22).

¹⁸³ Article 15 (1).

¹⁸⁴ Article 15 (2).

¹⁸⁵ On the right to participation, see Ghai (2001: 3). Throughout this (Minority Rights-Group-commissioned) report, as indicated by the author, the term 'minority' is used broadly to include indigenous peoples, where applicable (Ibid., at 27, footnote 1). In fact, an early indication that the report is concerned with both 'minorities' and 'indigenous peoples' can be found in the preface to the report, where Mark Lattimer, the Director of Minority Rights Group (MRG), pertinently observed: 'Participation emerges time and again as a key issue in the context of minority and indigenous peoples' rights... Minorities and indigenous peoples increasingly recognize that, besides recognition of their right to a distinctive group identity, they are entitled to, and need, participation in the political, cultural, social and economic life of the countries in which they live. Members of majority communities who are concerned about the long-term equity, stability and peace of their societies accept this equally. The lack of genuine participation can be seen all too often when minorities and indigenous peoples are excluded from political, social and economic decisions that have major repercussions on their lives. The price that a society pays when it fails to consult and involve can often be enormously high, in terms of economic cost, missed opportunities, violent conflict and ruined lives' (Ibid., at 3).

¹⁸⁶ Article 15 (2).

significant improvement upon the previous standard.¹⁸⁷ And with regard to the revision of existing rights, it needs to be said that Articles 14, 16 and 17 strengthens the rights of indigenous peoples to the ownership of their lands, to unwarranted and unjust removal, and to respect for their customary land tenure systems, respectively.

None-the-less, the new Convention appears not to be the dream of indigenous peoples. According to Ghai, 'although an advance on the 1957 Convention, it has been criticized for being "paternalistic",¹⁸⁸ and its negotiations involved a limited participation by indigenous peoples'.¹⁸⁹ Similarly, Thornberry has argued: 'These revisions may be welcomed, but they are some way from rights claimed by the [indigenous] groups, including "the right to continue peacefully in the use, enjoyment and occupation of ancestral lands without intrusion, supervision or development", and broad claims to resources'.¹⁹⁰ The implication of these criticisms is that, there is room for further improvements in standard-setting. As Ghai points out, 'these deficiencies were meant to be addressed in another exercise in standard-setting, the Draft UN Declaration on the rights of Indigenous Peoples',¹⁹¹ which is the next source of inquiry here.

¹⁸⁷ Thornberry (1991: 382) appears to hold a contrary view when he writes: 'The revision affirms the right of the peoples to surface resources, including the right to participate in their management and conservation. The right is not extended to sub-surface resources; instead, governments are required, in a rather weak formulation, to "seek to obtain" the agreement of peoples to exploitation, whose participation is to be secured "wherever possible".' However, it should be observed that this view was expressed when the revision was still in draft. It is doubtful if he will maintain this view in the face of the present provision.

¹⁸⁸ On this description, see Netteim (1992: 25).

¹⁸⁹ Ghai (2001: 9).

¹⁹⁰ Thornberry (1991: 382). For the claims of indigenous peoples, see Four Directions Council, UN Docs. E/CN.4/Sub.2/AC.4/1984/NGO/1 and E/CN.4/Sub.2/1984/NGO/3. See further Indian Law Resource Centre, UN Doc. E/CN.4/Sub.2/AC.4/1982/R.1; World Council of Indigenous Peoples, UN Doc E/CN.4/Sub.2/AC.4/1983/5, 15.

¹⁹¹ Ghai (2001: 9).

2. 6. 2. 3. The UN Draft Declaration on the Rights of Indigenous Peoples

It is clear from the discussion of the pioneering works of the ILO on indigenous rights that indigenous peoples are not quite satisfied with the provisions of the ILO standards on indigenous rights. Besides, it may be observed that although ILO is part of the UN family, it is not primarily concerned with the indigenous issues. Perhaps it was these, probably coupled with other reasons, and the persistent pressure of indigenous organizations that compelled the United Nations to initiate the process of further standard-setting on indigenous rights. This subsection shall be concerned with a discussion of the UN standards on indigenous rights, which is presently at the stage of a 'Draft Declaration'. The discussion will be prefaced with a brief discussion of the process that produced the Draft Declaration.

The UN Draft Declaration on the Rights of Indigenous Peoples was the product of over ten years collaborative work by the Working Group on Indigenous Populations (WGIP), representatives of indigenous organizations, governments and other stakeholders.¹⁹² The UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities set up the WGIP in May 1982. This followed the recommendation of a Special Rapporteur, Martinez-Cobo, in his preliminary report on the 'Study on the Problem of Discrimination Against Indigenous Populations'¹⁹³ (authorized by the Economic and Social Council (ECOSOC) in May 1971¹⁹⁴).¹⁹⁵

¹⁹² The most prominent of which is Non-governmental organizations (NGOs).

¹⁹³ UN Doc E/CN.4/Sub.2/L566, paras. 1 – 11.

¹⁹⁴ The study was authorised by Resolution 1589 (L) of May 1971. Following the Resolution, the Sub-Commission on Prevention of Discrimination and Protection of Minorities appointed

Originally, the Working Group's mandate consisted of two parts, namely:

(1) 'to review developments pertaining to the promotion and protection of the human rights and fundamental freedoms of indigenous populations, ...to analyze such materials, and to submit its conclusions to the Sub-Commission'; and (2) to 'give special attention to the evolution of standards concerning the rights of indigenous populations, taking account of both the similarities and differences in the situations and aspirations of indigenous populations throughout the world.'¹⁹⁶

Viewed from the standpoint of the present interest, the second mandate may be said to be the most important one. Yet it has been suggested that at the commencement of the Group's work no one was quite certain how the second mandate was to be executed – i.e. 'whether the Working Group was to draft an instrument for consideration by the General Assembly, or was simply to develop a body of principles for its own use as a data-gathering body'.¹⁹⁷ According to Barsh (1986: 372), on the suggestion of Eide (the Working Group's Chairman), governments agreed to shelve a discussion of standard-setting on the ground that it was premature.

Mexican Ambassador, Jose R. Martinez-Cobo, as the Special Rapporteur 'to conduct a thorough study of discrimination against indigenous populations'. The final report of the study, which was completed only in 1983 (see UN Doc. E/CN.4/Sub.2/1983/21/Add.8), was accepted by the Sub-Commission as 'authoritative', and has been described as 'a reference work of definitive usefulness'. (See Sub-Commission on Prevention of discrimination and Protection of Minorities Resolution 1984/35A, 4th preambular paragraph (30 August 1984). In 1985, the Sub-Commission directed the WGIP to rely on this report in setting standards. (See Sub-Commission Resolution 1985/22, para. 4 (a) (29 August 1985)). This whole process may have been set in motion by a report received in 1969 by the Sub-Commission, entitled 'Special Study on Racial Discrimination in the Political, Economic, social and Cultural Spheres', which included a chapter on measures to protect indigenous Populations. (See UN Sales No. 71.XIV.2 (updated edition is UN Sales No. 76.XIV.2). see also UN Doc E/CN.4/Sub.2/L.655, para. 1 – 11).

¹⁹⁵ The establishment of the WGIP was proposed by the Sub-Commission on the Prevention of Discrimination and Protection of Minorities in its Resolution 2 (XXXIV) of 8 September 1981, approved by the Commission on Human Rights in Resolution 1982/19 of 10 March 1982, and authorized by ECOSOC in Resolution 1982/34 of 7 May 1982.

However, it appears not all governments were in agreement with the 'agreed approach'. Evidence indicates that in 1984, Australia, Canada and several indigenous organizations expressed disaffection with the approach of the Working Group and accused it of 'merely compiling data uncritically'.¹⁹⁸ In the result, the Sub-Commission 'request[ed] the Working Group henceforth to focus its attention on the preparation of standards on the rights of indigenous populations', and accordingly 'to consider in 1985, the drafting of a body of principles on individual rights based on relevant national legislation, international instruments and other juridical criteria.'¹⁹⁹ Evidence shows that the Commission on Human Rights approved this 'new' emphasis in the Working Group's assignment in its Resolution 1985/21 of 11 March 1985. In it, the Working Group was urged 'to intensify its efforts to develop international standards based on a continued and comprehensive review of developments...and of the situations and aspirations of indigenous populations throughout the world.' Later in the same year, a further refinement was made when the Sub-Commission:

Endors[ed] the Plan of Action adopted by the Working Group for its future work...as well as its decision to emphasize in its forthcoming sessions the part of its mandate related to standard-setting activities, with the aim of producing, in due course, a draft declaration on indigenous rights which may be proclaimed by the General Assembly.²⁰⁰

¹⁹⁶ Quoted in Barsh (1986: 372).

¹⁹⁷ Barsh (1986: 372).

¹⁹⁸ Barsh (1986: 372).

¹⁹⁹ Sub-Commission Resolution 1984/35B (27 August 1984). The 'new' focus of the Group's assignment was noted by Plant (1994: 11), thus: 'Since 1985 the UN Working Group has emphasized the preparation of a Draft Declaration of principles on indigenous rights as the first step towards a new UN Convention.'

²⁰⁰ Sub-Commission Resolution 1985/22 (29 August 1985). Commenting on this 'new' direction, Barsh (1986: 373) notes: 'It is now clear that the Working Group's immediate goal will be a declaration, and that the group will become more like a drafting committee, its data-gathering function serving as an aid to drafting rather than an end in itself.' In the same vein, Thornberry

As indicated above, after over ten years of collaborative work, the Working Group produced a Draft UN Declaration on the Rights of Indigenous Peoples,²⁰¹ which has already been approved by the Sub-Commission and is presently being considered by the Commission on Human Rights.²⁰² Already the Draft is generally available and has been the subject of much academic and general debate.²⁰³ However, this thesis is concerned only with its provisions dealing with land rights and resources. These are contained in Articles 26, 27, 28, 30 and 31²⁰⁴ (reproduced in Appendix I to this thesis).

Compared with the provisions of ILO Convention (No. 169) in this regard, it is not difficult to see that, essentially, apart from drafting style, the instruments are the same in effect. As Plant could say, ‘the substantive provisions concerning land rights appear not to be significantly different from those in the ILO’s Convention No. 169’. In the same vein, Hitchcock observes that ‘some of the

(1991: 377) has pointed out that by its various activities in this context, the United Nations is ‘moving from the age of “consciousness raising” to that of “standard setting”.’

²⁰¹ See UN Doc. E/CN.4/Sub.2/1993/29/Annex I (1994), reprinted in 31 I.L.M. 541 (1995).

²⁰² In its Resolution 1995/32 of 3 March 1995, the Commission on Human Rights decided to establish an Open-ended Inter-Sessional Working Group of the Commission on Human Rights to ‘elaborate a draft declaration, considering the Draft contained in the annex to Resolution 1994/45 of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, entitled “Draft United Nations Declaration on the Rights of Indigenous Peoples”.’ In the same Resolution, the Secretary-General of the United Nations was requested to ‘invite governments, intergovernmental organizations, non-governmental organizations in consultative status with the Economic and Social Council and organizations of indigenous peoples authorized to participate, to submit for consideration by the Working Group, comments on the Draft Declaration submitted by the Sub-Commission.’ The Economic and Social Council authorized the establishment of the Inter-Sessional Working Group in its Resolution 1995/32 of 25 July 1995.

²⁰³ For academic discussion of the Draft declaration, see by example, Plant (1994, esp. 10 – 11); Ghai (2001, esp. 8 – 9). With respect to general debate, the views of various governments, indigenous organizations and NGOs can be found in submissions made to the Open-ended Inter-Sessional Working Group set up in 1995 by the Commission on Human Rights to consider the Draft Declaration (available at the website of the Centre for World Indigenous Studies – www.cwis.org).

²⁰⁴ See also Article 29: ‘Indigenous peoples are entitled to the recognition of the full ownership, control and protection of their cultural and intellectual property. They have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations,

principles of Convention No. 169 were incorporated into the [D]raft Universal Declaration of the Rights of Indigenous Peoples' which was drawn up by the various members of the Working Group on Indigenous Populations in the late 1980s and early 1990s'.²⁰⁵

However, the major difference lies in the fact that, unlike the ILO Convention (No. 169), the Draft Declaration suggests that the rights of indigenous peoples stem from their 'right to self-determination': 'Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.'²⁰⁶ And 'as a specific form of exercising their right to self-determination, [indigenous peoples] have the right to autonomy or self-government in matters relating to their internal and local affairs, including...land and resources management...'²⁰⁷ Hence, Hitchcock has rightly asserted: 'This new document [UN Draft Declaration on the Rights of Indigenous Peoples] is a far-reaching statement of both the collective and individual rights of indigenous peoples. Self-determination is a key principle in the Draft Declaration, as is the right to full recognition of their own laws and customs, land tenure systems, and institutions for the management of land and natural resources...The document

including human and other genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs and visual and performing arts.'

²⁰⁵ See Hitchcock (1994:7).

²⁰⁶ Art. 3.

²⁰⁷ Art. 31. From the point of view of indigenous peoples, the recognition of the right to self-determination represents a significant improvement on the state of existing international standards on the rights of indigenous peoples.

also stresses the significance of indigenous peoples' land rights and ownership and control of natural resources'.²⁰⁸

Remarkably, there is ample evidence to suggest that indigenous organizations worldwide welcome the provisions of the Draft Declaration, as the following statement illustrates:

IITC [International Indian Treaty Council] congratulates and thanks members of the United Nations Working Group on Indigenous Populations and the hundreds of indigenous peoples who participated in the process for their many years of hard work resulting in the Draft Declaration on the rights of indigenous peoples. The document does contain recognition of many essential rights and freedoms vital to the interests and survival of indigenous peoples in many regions of the world. Again, these fundamental rights and freedoms have existed since time immemorial. Those who have been deprived of those fundamental rights and freedoms are only too well aware of their denial as well as the need for their recognition and promotion.²⁰⁹

On the specific issue of land rights, IITC says: 'The issue of land is critical to the right to self-determination as indigenous peoples continue to be denied their means of subsistence as peoples, denied their traditional values, their cultures, religion and spiritual practices, their social systems and traditional knowledge, and institutions. Without their traditional lands they are denied their very identity as peoples'.²¹⁰ On their part, the Saami Council has observed: 'From our point of view there are two fundamental aspects of the right to self-determination: the political and economic aspects. The political aspect recognizes the rights of

²⁰⁸ Hitchcock (1994: 7).

²⁰⁹ Extract from document submitted to the Inter-Sessional Working Group on the Draft Declaration (reproduced in the website of the Centre for World Indigenous Studies - www.cwis.org).

²¹⁰ Extract from document submitted to the Inter-Sessional Working Group on the Draft Declaration (reproduced in the website of the Centre for World Indigenous Studies - www.cwis.org).

indigenous peoples to determine their own political status; the economic aspect recognizes the right to control their land and natural resources'.²¹¹

To sum up, it may be said that the Draft Declaration is a re-statement and a strengthening of existing international standards in the wider UN sense. As has been seen, the Draft Declaration recognizes the rights of indigenous peoples to their lands and resources. With specific regard to land, it recognizes their right to own land under their customary laws. And as respects resources (specifically, sub-soil resources – e.g. oil), it guarantees their right to participation and compensation for any resultant damage in the exploitation of the resources.²¹²

As indicated above, it has been suggested that the international standards on indigenous rights may have influenced the policies of other intergovernmental institutions whose activities touch or are likely to touch on the interests of indigenous peoples, for example, international financial institutions. It is therefore useful to briefly examine the policies of some of these bodies; and this will be the subject of the next sub-section.

2. 6. 2. 4. International Aid Agencies and Indigenous Peoples

There is an indication that the activities of several international and intergovernmental bodies or institutions affect the lives of indigenous peoples in

²¹¹ Extract from document submitted to the Inter-Sessional Working Group on the Draft Declaration (reproduced in the website of the Centre for World Indigenous Studies - www.cwis.org). The IITC and the Saami Council are indigenous organizations; there are lots more, established world-wide, since the 1980s.

²¹² For an informative account of the recent debate on the provisions of the UN Draft Declaration on the Rights of Indigenous People, see Kingsbury (2001: 93 – 100, esp. 93 – 97) (Suggesting that 'the number of State governments accepting principles for relationships with indigenous peoples that incorporate elements of self-determination has gradually increased.'). See further Dodson (1998: 64).

many ways. One of such bodies is financial institutions, which give 'development' aids to many States, particularly developing countries, where the problems of indigenous peoples are most acute. In the past, some of the so-called development aids had adversely affected indigenous groups. As one author put it:

The experience of indigenous populations from the mid-1980s was such that the international development programmes were seen as a means of depriving them of their lands and natural resources. This was particularly true of large-scale hydroelectric projects, agricultural programmes, mining and petroleum extraction activities, and development programmes aimed at assisting non-indigenous peoples to settle in the territories of indigenous peoples...Many indigenous groups felt themselves to be essentially "victims of progress", because the majority of development projects appeared to be in the interests of governments, international agencies, and non-local people.²¹³

Interestingly, 'the growing international momentum for the protection of indigenous and tribal land rights has had an impact on the policies of the international financial institutions, whose past approaches to infrastructural development have been widely criticized for their devastating impact on traditional land security.'²¹⁴ This sub-section discusses how the policies of these bodies have been affected or influenced by international standards on indigenous rights. For this purpose, it is sufficient to outline the policies of the World Bank (a UN agency and major international development aid institution), the Inter-American Development Bank and the Asian Development Bank.

Firstly, the World Bank. In early 1980s the World Bank issued an Operational Manual Statement (OMS 2: 34, 1982). The Statement concerned tribal peoples affected by its projects. As a general policy, it is stated that the

²¹³ Hitchcock (1994: 6).

²¹⁴ Plant (1994: 11).

Bank would not assist 'projects that knowingly involved encroachment on traditional territories used or occupied by tribal people unless adequate safeguards were provided'. In the case of projects which concern areas inhabited by indigenous peoples, a tribal component or parallel programme (including the recognition, demarcation and protection of tribal areas containing the resources required to sustain the tribal people's traditional livelihood) was required.

In 1991, a new Operative Directive on Indigenous Peoples (No. 4.20, September 1991) was issued by the World Bank, which defines indigenous peoples in broader terms than the 1982 document.²¹⁵ Among other policy measures, the new directive declares that: (1) 'The Bank's broad objective towards indigenous people, as for all the people in its member countries, is to ensure that the development process fosters full respect for their dignity, human rights, and cultural uniqueness. More specifically, the objective at the centre of this directive is to ensure that indigenous peoples do not suffer adverse effects during the development process, particularly from Bank-financed projects, and that they receive culturally compatible social and economic benefits'; and (2) 'The Bank's policy is that the strategy for addressing the issues pertaining to indigenous peoples must be based on the informed participation of the indigenous peoples themselves. Thus, identifying local preferences through direct consultation, incorporation of indigenous knowledge into project approaches, and appropriate early use of experienced specialists are core activities for any project

²¹⁵ For the definition, see Chapter 1.

that affects indigenous peoples and their rights to natural and economic resources'.²¹⁶

The main strategy for implementing this new Policy Directive is the requirement for 'indigenous peoples' development plan', which must be prepared with the active participation of indigenous peoples affected by the project. The contents of the plan include land tenure issues, stated thusly: 'When local legislation needs strengthening, the Bank should offer to advise and assist the borrower in establishing legal recognition of the customary or traditional land tenure systems of indigenous peoples. Where the traditional lands of indigenous peoples have been brought by law into the domain of the State and where it is inappropriate to convert traditional rights into those of legal ownership, alternative arrangements should be implemented to grant long-term, renewable rights of custodianship and use to indigenous peoples'.²¹⁷ Significantly, it is required that these steps should be taken before the initiation of other planning steps that may be contingent on recognized land titles.²¹⁸

In the case of the other development agencies, there is evidence to indicate that the guidelines and policies adopted, for instance, by the Inter-American and Asian Development Banks are largely similar to those of the World Bank. For

²¹⁶ See paragraphs 6 and 8.

²¹⁷ Paragraph 15 (c).

²¹⁸ Ibid. Notwithstanding this Directive, it has been insisted that the bank 'does not seem concerned about local/indigenous peoples and their rights regarding land tenure'. As a result of this criticism, the Bank is currently formulating a Revised Policy on Indigenous Peoples 'which will address land tenure and other rights unique to indigenous peoples', but 'in the meantime, all the [bank] projects must continue to comply with the current version of World Bank OD 4. 20' (See: < <http://www.ifc.org/enviro/EnvSoc/Safeguard/Indigenous/Indigenous.htm> > (visited 28/11/2001)).

example, a 1990 'Strategy Document' of the Inter-American Development Bank states that the Bank recognizes the –

Principle that in general the IDB will not support projects that involve unnecessary or avoidable encroachment onto the territories used or occupied by tribal groups or projects affecting tribal lands, unless the tribal society is in agreement, and unless it is assured that the executing agencies have the capabilities of implementing effective measures to safeguard tribal populations and their lands.²¹⁹

Like the World Bank policy document, it insists on measures to protect indigenous territories, including demarcation and titling of tribal lands. Perhaps as an extension or expression of its indigenous-friendly policies, there is evidence that since 1991 the IDB has taken a leading role in setting up a regional fund for the development of indigenous peoples of the Amazon, a major priority of which is to be 'land titling' and demarcation programmes.²²⁰

In the case of the Asian Development Bank, new 'Guidelines for Social Analysis of Development Projects' were also issued in 1991. They contain a specific section on 'ethnic minorities' where it is observed that the interaction between ethnic majorities and minorities has frequently seen the systematic impoverishment of the latter. Then it is declared that the Bank recognizes 'its own responsibility in ensuring that its investment funds do not become the unintended vehicle for the infringement of basic human rights', and, more significantly, it 'accepts the standards as laid down by appropriate international bodies (with particular reference to the ILO's Convention No. 169)'.²²¹

²¹⁹ Quoted in Plant (1994: 12).

²²⁰ Plant (1994: 12).

²²¹ Asian Development Bank, *Guidelines for Social Analysis of Development Projects*, Manila, June 1991. The use of the word 'minorities' instead of 'indigenous' or 'tribal' appears to be a

The paradigm change, represented by the new policies of development aid agencies towards the rights of indigenous peoples, has led Plant to rightly conclude that ‘an instrument like the ILO’s Convention No. 169 can have influence beyond ratifying States alone, if it is incorporated within the official policy of one of the major international financial institutions’.²²²

The next issue to examine is national constitutions, laws and policies – to determine, to what extent, if at all, the international standards identified here are being implemented. The value of this lies in the fact that widespread State practice on an issue grounds rules of customary international law (which are binding on all States, even without being parties to Conventions).

2. 6. 2. 5. International standards on Indigenous Rights and State Practice

This sub-section will examine national constitutions, domestic laws and policies with a view to determining whether, and to what extent, the international standards on the rights of indigenous peoples, specifically as regards land rights and resources, have been adopted and incorporated into the State Constitutions, national laws, and/or policies. As earlier stated, the ultimate object of this is to determine whether the Conventional standards have become rules of customary international law. For this purpose, a number of national constitutions, laws and

reflection of the controversial nature of indigenous/tribal terminology in the Asian region. Yet, it is clear that it covers ‘indigenous peoples’.

²²² Plant (1994: 12).

policies, selected mainly from regions of high concentration of indigenous peoples, will be examined.²²³

Although the ILO Conventions do not enjoy extensive ratifications,²²⁴ there is ample evidence that its provisions have been accepted and incorporated into the constitutions, laws and policies of several States, including non-party States. A few examples will illustrate this point.

In Brazil, the country's constitution of 1988 includes a chapter on Indian rights, 'for the first time in Brazilian constitutional history, the effects of which will gradually work through domestic law'.²²⁵ The central provision of the chapter is Article 266, which provides: 'The social organization, customs, and languages, beliefs and traditions of the Indians are recognized, as well as their aboriginal rights to the lands they traditionally occupy, it being within the competence of the union to demarcate them, protect and guarantee respect for all of their estate'.²²⁶ It is remarkable that this represents a significant change of attitude on the part of Brazil, which hitherto had insisted on integration of its indigenous groups.

In most recent time, the 1994 constitutional reform of Argentina deserves special mention, as it appears to have incorporated the basic demands of indigenous peoples on the issue of land and natural resources rights. In a submission to the Inter-Sessional Working Group on the Draft United Nations

²²³ A notable region of high concentration of indigenous peoples is the (Latin) America. Evidence of this can be found in General Assembly Resolution 275 (III), entitled 'Study of the Social Problems of the Aboriginal Populations and other Underdeveloped Social Groups of the American Continent' (GAOR, 3rd Session, pt II, 208th plenary meeting, 349). In the preambular part, the Resolution notes, *inter alia*, the existence on the American continent of 'a large aboriginal [indigenous] population and other underdeveloped social groups which face peculiar social problems...'

²²⁴ Only few States have ratified the conventions.

²²⁵ Thornberry (1991: 354, footnote 120).

Declaration on the Rights of indigenous peoples, the government of Argentina stated in part:

In the first place, it should be pointed out that many of the principles envisioned by the draft have already been incorporated both into legislation and into the constitutional law of several provinces and of the State. In particular, the constitutional reform of August 1994, in enumerating the powers of the Argentine Congress, expressly recognizes the ethnic and cultural pre-existence of the Argentine indigenous peoples and guarantees respect for their identity and the right to a bilingual and intercultural education; it also recognizes the legal personality of their communities and the community ownership and possession of the lands they traditionally occupy, with the legislative branch being empowered to regulate the handing over of other lands suitable for human development, and establishes that none of those lands shall be alienable, transferable or subject to charges or seizure. The same provision states that their participation in the management of their natural resources and other matters that may affect their interests must be ensured, and adds that the powers enumerated therein may be exercised concurrently by the provinces.²²⁷

Similarly, the government of Finland has reported of 'new developments in the field of the legal protection of the indigenous Sami people in Finland': 'On 1 August 1995, a new chapter II of the Finnish constitution Act entered into force. According to new section 14, paragraph 3, of the constitution Act, the Sami as an indigenous people shall have the right to maintain and develop their own language and culture. The provision also constitutionally ensures that the right of the Sami to use the Sami language before the authorities shall be prescribed by an Act of Parliament'.²²⁸ Although not explicitly stated, there can be little doubt that cultural right include land rights.

²²⁶ Quoted in Thornberry (1991: 354, footnote 120).

²²⁷ E/CN.4/1995/WG.15/2.

²²⁸ E/CN.4/1995/WG.15/2.

During the course of the ‘Study of Discrimination against Indigenous Populations’,²²⁹ a number of States submitted information to the Special Rapporteur, Ambassador Jose R. Martinez-Cobo, on ‘the fundamental policy of the State in relation to indigenous populations’. As shall be seen presently, the reports further demonstrate the widespread acceptance of the principles and rights enunciated in ILO Convention, No. 107. The cases mentioned here are only illustrative.²³⁰

One of the countries that made submissions was Guatemala; it reported that ‘a positive change in the attitude of the State is apparent at present... Cultural pluralism is now recognized as essential to the formation of genuine Guatemalan nationhood’.²³¹ On its part, Mexico claims that its indigenous policy ‘is regarded as a necessity’, and ‘is based on the tenet that the strengthening of the national consciousness will be achieved in respecting ethnic pluralism’.²³² Similar reports were made by New Zealand, Australia and Canada. The government of New Zealand stated that its policy has now ‘recognized the fact that New Zealand society embraces more than one culture in one citizenship’: the Maori is recognized as a full citizen of the State, but one who is “entitled” to retain his social and cultural institutions, which other citizens should know and respect’.²³³

²²⁹ Commissioned in 1971 by the Sub-Commission on Prevention of Discrimination and Protection of Minorities.

²³⁰ For details of the submissions, see UN Doc. E/CN.4/Sub.2/1983/21/Add.8.

²³¹ Ibid., para. 102. More recently, in a statement made in 1998 at the Commission on Human Rights’ Inter-Sessional Working Group on the Draft Declaration, ‘the government of Guatemala, formally committed to implementing provisions on land rights, local self-government and national participation in the 1995 Mexico City peace agreement on Identity and Rights of Indigenous Peoples, has taken the position internationally that self-determination of indigenous peoples is possible without threatening national unity’ (Kingsbury, 2001: 97).

²³² Ibid., para. 114.

²³³ Ibid., para. 115.

Like New Zealand, Australia favours full citizenship, allied with recognition of distinctive aboriginal qualities, which are described as 'living elements in the diverse culture of Australian society'. It is significant that its report refers to taking into account 'the expressed wishes of Aboriginal Australians themselves'.²³⁴ This is in accord with the ILO Conventions' right to consultation. And, lastly, Canada reported that it allows its Indian (indigenous) peoples 'free choice' in relation to any development programmes for their benefit, and describes them as 'citizens plus'.²³⁵

As evidence of the consistency of the various governments on the issue of indigenous rights, it has been pointed out that 'several governments took advantage of the [Working Group on Indigenous Populations'] third and fourth sessions to unveil recent initiatives in promoting indigenous land rights and cultural development'.²³⁶ According to Barsh (1986: 369-70), 'Australia committed itself to observing "five principles" in recognizing indigenous land rights at the third session and reaffirmed them, under fire from aboriginal groups, at the fourth. Canada asserted its willingness to negotiate the terms of Indian self-government at both sessions. Argentina used the fourth session to announce new land claims and social welfare legislation, and New Zealand to explain proposals to constitutionalize its 1840 treaty with the Maoris'. It is by now well-known that indigenous (or aboriginal) peoples in Australia, Canada, and New Zealand enjoy enormous rights more than ever before, especially in respect of their

²³⁴ Ibid., para. 108.

²³⁵ Ibid., para. 109.

²³⁶ Barsh (1986: 369).

distinctiveness (autonomy), lands and natural resources. As one commentator puts it:

Canada is...now coming to terms with First Nations' sovereignty, granting autonomy and land rights to First Nations, and with significant participation in boards, committees and other parts of the administrative machinery...In New Zealand progress has been achieved through resuscitation of the Waitangi Treaty, signed in 1840 between Maori Chiefs and representatives of the British Crown... In recent years courts have drawn various implications from its general provisions for the partnership between the Maori and the government. The two parties should behave reasonably and in good faith to each other and negotiate to solve disputes that arise out of treaty provisions. The Canadian courts have enunciated a similar principle of good faith negotiations. Both in New Zealand and Canada this approach has given indigenous peoples significant participation in law, in regulations and contracts over natural resources and in the development of traditional lands...In Australia there have also been some moves towards self-government, the most obvious example being the Aboriginal and Torres Straits Islands Commission.²³⁷

All these have led Thornberry to conclude that there is 'some evidence' 'at the level of government formulation of fundamental policy for indigenous groups, that their distinctive character is being more fully recognized'.²³⁸ But, as has been seen here, it is not only their distinctive character that has been recognized, their rights (including land and resources rights) are also increasingly being recognized and guaranteed.²³⁹

It bears emphasizing that the recognition of indigenous rights has come even from states that are not parties to the ILO Convention. As the ILO has stated: 'Although most North American, Australian and European States have not ratified Convention No. 107, some of the recent initiatives taken in these States illustrate

²³⁷ Ghai (2001: 9).

²³⁸ Thornberry (1991: 355).

²³⁹ For an account of the most recent progress in this regard, see Kingsbury (2001: 97).

new approaches to indigenous participation in development and have major implications for the revision of Convention No. 107'.²⁴⁰ These initiatives are probably the product of negotiations between indigenous peoples and the States in which they live. As Ghai could say: 'These ideas [ILO Conventional provisions and the provisions of the UN Draft Declaration on the Rights of Indigenous Peoples] have already formed the basis of negotiations between indigenous peoples and the States in which they live, giving recognition not only to their land rights (as in Australia and New Zealand) but also to forms of autonomy (as in Canada)'.²⁴¹ It remains to inquire whether all these have crystallized into customary international law and this will be done presently.

Naturally, the first question should be 'what is customary international law?' The answer to this can be located in Article 38 of the Statute of the International Court of Justice, which directs the Court to apply, in deciding international disputes brought before it, *inter alia*: 'international custom, as evidence of a general practice accepted as law'.²⁴² Without elaboration, this provision does not seem to disclose much. Essentially, it does not answer the

²⁴⁰ Partial Revision, Report VI (1), 21.

²⁴¹ (2001: 9).

²⁴² Churchill and Lowe argue that 'this formula is, however, in some ways misleading', and contend that a better formulation should read, 'international custom, as evidenced by a practice generally accepted as law' (Churchill and Lowe, 1999: 7). This view has recently found support in the observation of the International Law Association Committee on the Formation of Customary (General) International Law. Commenting on the provision of Article 38 (1) of the Statute of the International Court of Justice, with particular regard to 'international custom' as a source of international law, the Committee stated: '[T]he Statute of the International Court of Justice would have been very helpful were the relevant provision [Article 38 (1)] not so laconic and...badly drafted'. See Final Report of the Committee entitled: *Statement of Principles Applicable to the Formation of General Customary International Law* (Introduction). The Principles were adopted at the London Conference of the Association in 2000. Professor M.H. Mendelson, Q.C. (UK), was the Chairman of the Committee (hereinafter, the Report will be referred to as 'Mendelson Committee Report'). This report can be found at the website of ILA: <http://www.ila-hq.org/>. Compare Oppenheim (1992: 26, footnote 5 and accompanying text).

crucial question ‘how can the existence of a rule of customary international law be established?’ On this, Churchill and Lowe have expressed the view that:

Orthodox legal theory requires proof of two elements in order to establish the existence of a rule of customary international law. The first is a general and consistent practice adopted by States [the ‘objective’ or ‘material’ element]. This practice need not be universally adopted, and in assessing its generality special weight will be given to the practice of States most directly concerned – for example, the practice of coastal States in the case of claims to maritime zones, or of the major shipping States in claims to jurisdiction over merchant ships [or, as in the present inquiry, the practice of States with obvious and undisputed indigenous groups within them]. The second element is the so-called *opinio juris* – the conviction that the practice is one which is either required or allowed by customary international law, or more generally that the practice concerns a matter which is the subject of legal regulation and is consistent with international law [the “subjective” element].²⁴³

However, in a recent statement of principles applicable to the formation of (general) customary international law, the International Law Association (ILA) did not emphasize the second element. On the contrary, the Association argued that ‘it is not *usually* necessary to demonstrate the existence of the subjective element before a customary rule can be said to have come into being’.²⁴⁴ In any case, the ILA recognizes that there are circumstances where the subjective element ‘is necessary’. (This is, in fact, implicit, in their argument, which employs the word ‘usually’).²⁴⁵

²⁴³ Churchill and Lowe (1999: 7). The International Court of Justice has outlined the necessity of these two elements in several cases: See, for example, *North Sea Continental Shelf Cases*, I.C.J. Rep. 1969, 3, at 44 (Para. 77); *Continental Shelf (Libya V. Malta) case*, I.C.J. Rep. 1985, 13, at 29 – 30, where the court said: ‘It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States...’

²⁴⁴ See Mendelson Committee Report (2000: Para. 1 (b) (4)). The ILA believes that pronouncements of the I.C.J. on the elements necessary for the formation of customary international law, which some cite as authority for the view that two elements are required, ‘have been taken out of context’. See Mendelson Committee Report (2000: Introduction, Para. 10 (a)).

²⁴⁵ *Ibid.*

In their exposition, Churchill and Lowe cited the example of the formation of customary international law on the rights of coastal States in the continental shelf. According to them, the combination of the two elements in the formation of customary law could be seen in the emergence of continental shelf as a legal concept. In their words: ‘In 1945 President Truman claimed for the United States ownership of the resources of the sea bed adjacent to the coast of the United States, and this was followed by similar claims by many other States. These claims, coupled with the belief that they were permissible in international law, provided the basis of a customary rule, recognizing coastal State’s ownership of continental shelf resources, which emerged by the late 1950s. This example has an added interest because these rights were, in 1958, set out in articles 1 – 3 of the Continental Shelf Convention; and in the *North Sea Continental Shelf cases* (1969) the International Court of Justice regarded those articles in the 1958 Convention as “reflecting, or as crystallizing, received or at least emergent rules of customary international law”.²⁴⁶

Notwithstanding disagreements on the actual requirements for the formation of customary international law,²⁴⁷ there is a unanimous agreement that ‘conventional provisions or acts of State practice having, a ‘norm-creating’ character – that is, provisions purporting to lay down rules of law of general applicability, rather than merely settling issues between the particular States parties on the basis of expediency – may arise from or pass into customary law (as the above example illustrates), and so become binding upon States not party to the

²⁴⁶ Churchill and Lowe (1999: 7).

²⁴⁷ See, for example, Mendelson Committee Report (2000: Introduction, Para. 10).

Convention'²⁴⁸ or who had not contributed to its formation. As Churchill and Lowe have pointed out, 'there is nothing mystical about this transformation. Customary law requires only practice coupled with *opinio juris*. The practice may be prompted by and crystallize around a provision set out in a treaty in the same way as it may do so in relation to a putative rule of law stated anywhere else. If there is a sufficiently general acceptance of treaty rules by non-parties, coupled with the necessary *opinio juris* [in cases where this – the subjective element – is necessary²⁴⁹] or by parties acting in a manner evidencing a belief that the treaty rules represent not merely treaty obligations but also customary law, those rules may become binding as a matter of customary law'.²⁵⁰

Although there is no unanimous agreement on the above views of the learned authors,²⁵¹ it seems the preponderant of opinion is in favour of their views.²⁵² From the perspective of most writers, their view contains a complete checklist of relevant issues to consider in determining whether a rule of customary

²⁴⁸ Churchill and Lowe (1999: 7 – 8).

²⁴⁹ The ILA emphasizes the need to distinguish between different stages in the life of a customary rule. It argues that 'once a customary rule has become established, States will naturally have a belief in its existence: but this does not *necessarily* prove that the subjective element need to be present during the *formation* of the rule' (Mendelson Committee Report, 2000: Introduction, Para. 10 (b)). For interesting and innovative analysis of the process of formation of customary international law, see Byers (1999).

²⁵⁰ Churchill and Lowe (1999: 8). See also Malanczuk (1997: 39-45); O'Connell (1970: 22 – 25).

²⁵¹ As the Mendelson Committee observed, 'given that the text of [the Statement of Principles Applicable to the Formation of Customary International Law] and accompanying commentary has been drafted by a Committee, it is not to be expected that every word fully reflects the views of each and every member – and *a fortiori* those of each and every member of the Association...' (Mendelson Committee, 2000: Introduction, Para. 4).

²⁵² The authors' views have the support of many authoritative authors on international law. See, for example, O'Connell (1970: 15 – 19); Oppenheim (1992: 25 – 31); Higgins (1994: 29 – 32); Brownlie (1998: 5 – 11).

international law has emerged.²⁵³ In any case, for the purposes of the present inquiry, their views are adopted.

Applying the above process of formation of customary international law to the present case, the facts clearly show that the provisions of the ILO Conventions on indigenous rights as well as those of the UN Draft Declaration on the Rights of Indigenous Peoples have become generally and consistently adopted and implemented by several States,²⁵⁴ some of which are non-party States to the Conventions. Moreover, the facts show that Australia, Brazil, Canada and New Zealand, which admittedly and undoubtedly harbour indigenous peoples, are among the States²⁵⁵ that have adopted and incorporated the Conventional provisions into their domestic laws and national constitutions.²⁵⁶ As has been seen above, evidence of this State practice can be found in their respective national constitutions, legislation as well as the declarations of their officials before

²⁵³ Mendelson Committee Report, 2000: Introduction, Para. 10 (b).

²⁵⁴ It needs to be emphasized that the practice need not have involved a great number of States, nor need it to have lasted for a long time. As one author could say where there is no practice which goes against an alleged rule of customary international law, it seems that a very small amount of practice is sufficient to create a customary rule, even though the practice involves only a small number of States and has lasted for only a short time' (Malanczuk, 1997: 42). See also Akehurst (1974-5: 12-21). However, the small number of States must be 'qualitatively' sufficient (in the sense that they are the States mostly interested). Given this, it has been argued that 'in the case...of customary regulation of a completely new situation [such as the one presently being considered]...a very short and scarce practice may suffice...' (See Mendelson Committee Report, 2000: Footnote 64). Compare the *Asylum Case* (1950) ICJ Report 266, at 276-7 (and see comments by Malanczuk (1997: 41).

²⁵⁵ Apart from Brazil, none of these four is a party to the ILO Conventions.

²⁵⁶ According to the ILA, 'provided that participation is sufficiently representative, it is not normally necessary for even a majority of States to have engaged in the practice...[I]t is not simply a question of how many States participate in the practice, but which States. In the words of the court in the North Sea Continental Shelf cases, the practice must "include that of States [in this case, such as Australia, Canada, and New Zealand] whose interests are specially affected".' See Mendelson Committee Report, 2000: Introduction, Para. 14 (d) and (e)).

international bodies and meetings.²⁵⁷ These are established means of proving

State practice. As Churchill and Lowe put it:

Evidence of State practice, sought in connection with the proof of customary law, can be found in many places, including States' legislation, the decisions of their courts, and the statements of their official government and diplomatic representatives. Sometimes requests for statements of practice emanating from international organizations or conferences produce replies containing comprehensive statements of practice upon a particular point. Accordingly, national statute books, law reports, parliamentary debates, collections of diplomatic material, and the records of international conferences [or meetings] will yield evidence of practice.²⁵⁸

With respect to the second element – *opinio juris* – there is no evidence that the States concerned are recognizing and implementing indigenous rights out of courtesy. On the contrary, their various statements and actions clearly indicate that they, particularly the non-party States, are convinced that the recognition of indigenous rights is a practice required or allowed by customary international law. In any event, it has been suggested that 'the modern tendency is not to look for direct evidence of a State's psychological convictions, but to infer *opinio iuris* indirectly from the actual behaviour of States' (Malanczuk, 1997: 44).²⁵⁹

In the result, most of the provisions of the ILO Conventions as well as the UN Draft Declaration on the Rights of indigenous Peoples (especially those relating to autonomy, lands and natural resources) have arguably passed into

²⁵⁷ Also, proof of 'verbal acts, and not only physical acts, of States count as State practice' (Mendelson Committee Report, 2000: Part II, Section 4).

²⁵⁸ (1999: 11). See further O'Connell (1970: 28); Oppenheim (1992: 19). Another source of evidence of State practice is newspaper reports. See Malanczuk (1997: 39).

²⁵⁹ This view is generally in agreement with the position of the ILA. See Mendelson Committee Report, 2000. Compare Brownlie (1998: 7-11, esp. at 7).

customary international law,²⁶⁰ and have become binding on all States (State Parties and non-Party States alike). As Churchill and Lowe have rightly pointed out, ‘the primary function of proof of a “general practice accepted as law” is to create a *presumption* that all States, whether or not they have contributed to that practice, are bound by the resultant rule. They are presumed to have assented to that to which States in general have assented. In this sense, States are bound by customary rules even if they have not specifically assented to them’.²⁶¹ Similarly, the influential ILA has recently suggested that, subject to the rules of ‘persistent objection’, ‘for a State to be bound by a rule of general customary international law it is not necessary to prove that it participated actively in the practice or deliberately acquiesced in it’.²⁶² Therefore, although it has not been shown that Nigeria contributed to the State practice of recognition, respect, and implementation of indigenous rights, she is non-the-less bound by the resultant customary international law to recognize, respect and implement those rights, particularly, rights to lands and natural resources.²⁶³

²⁶⁰ This conclusion is strengthened by the policies of international organizations, such as the World Bank, on the rights of indigenous peoples (see text above), as well as by the declarations/resolutions of the World Conference on Racism (see text above). As has been argued, ‘subjects of international law other than States can contribute to the formation of customary law: for instance, international organizations’. See Mendelson Committee Report (2000: Section 1, Para. (b) (2)). See also Section 33 (for the contribution of resolutions of international conferences to the formation of customary international law).

²⁶¹ Churchill and Lowe (1999: 9). However, this is subject to the rule of ‘persistent objection’. According to Churchill and Lowe, ‘this presumption is liable to be rebutted by proof of persistent objection, which may have prevented a State from becoming bound by the obligations contained in those rules’ (ibid). Yet, it has been argued that absence of protest is only of relative value. For explanation, see O’Connell (1970: 18).

²⁶² See Mendelson Committee Report (2000: Section 14 (ii)). In the same vein, O’Connell has authoritatively argued that ‘the law is dependent, not upon unanimity, but only upon generality of will. The dissenting minority of States are as much bound by the formulated rule as those who actively participated in its creation, the source of their obligation residing in the moral necessity which underlies observance of all law’ (O’Connell, 1970: 15 – 16).

²⁶³ The rights would have been opposable to Nigeria if she has been a ‘persistent objector’ to them, but there is no evidence that she ever opposed (not to talk about being ‘persistently opposed to’)

In summary, it can be seen from the above exposition of international law relating to indigenous rights that indigenous land rights and resources are now arguably established in international instruments, policies of international financial institutions, and, most importantly, in customary international law. In brief, the relevant international law recognizes the rights of indigenous peoples to own their lands and resources (under customary land tenure system). And in the case where the State retains right to sub-surface resources, it guarantees them the right of participation and compensation for any damage suffered as a result of extraction activities.²⁶⁴ In a recent analysis of the relevant instruments and documents on the issue of indigenous rights, an author similarly concluded thus:

Government statements to the U.N. Working Group on Indigenous Populations and other international bodies confirm general acceptance of at least the core aspects of the land rights norms expressed in Convention No. 169. The statements tell of worldwide initiatives to secure indigenous possessory and use rights over land and to redress historical claims. And discussions over language for the U.N. indigenous rights declaration have included efforts to build on the already recognized rights. The acceptance of indigenous land rights is further evident in the preparatory work for the proposed OAS juridical

any of the rights. It is established rule of international law that States will not be permitted to acquiesce in rules of law and later claim exemption from them at will. On the issue of opposability, the International Court of Justice in the *Anglo-Norwegian Fisheries Case* (1951) ICJ Rep. 116, at 131, after finding that the United Kingdom failed to prove sufficient generality in the practice of adopting a ten-mile limit to establish it as a rule of customary law, added: 'In any event the ten-mile rule would appear to be inapplicable as against Norway inasmuch as she has always opposed any attempt to apply it to the Norwegian coast.' It should be remembered that it had earlier been argued that although Nigeria is not a State-Party to the ILO Conventions, the Conventions are arguably politically binding on her. Now, with the finding that she is also legally bound by much of the conventional rules that have passed into customary international law, it follows that Nigeria's obligations to her indigenous populations arise both from political and legal angles.

²⁶⁴ Interestingly, it may be observed that this position is generally in accord with the recommendation of Special Rapporteur Martinez-Cobo: '...the resources of the subsoil of indigenous land also must be regarded as the exclusive property of indigenous communities. Where this is rendered impossible by the fact that the deposits in the subsoil are the preserve of the State, the State must...allow full participation by indigenous communities in respect of: the granting of exploration and exploitation licenses; the profits generated by such operations; and procedures for determining damage caused and compensation payable'. See UN Doc. E/CN. 4/Sub. 2/1983/21/Add. 8, para. 543 (and E/CN. 4/Sub. 2/1986/7/Add. 4).

instrument on indigenous peoples' rights, Chapter 26 of Agenda 21 adopted by U.N. Conference on Environment and Development, and the World Bank's Operational Directive 4.20 for bank-funded projects affecting indigenous peoples. *It is evident that certain minimum standards concerning indigenous land rights, rooted in otherwise accepted precepts of property, cultural integrity, and self-determination, have made their way not just into conventional law but also into customary law* (Italics added).²⁶⁵

In comparison, juxtaposing this international law position with the position of Nigerian domestic law, it can be seen that Nigerian law appears to violate every grain of the rights of the Niger Delta indigenous people of the country – to their land and resources. Specifically, the combined provisions of the Petroleum Act and the EEZ Act (reinforced by a constitutional provision), which exclusively vest ownership of oil and land in the State, as well as the LUA (which has 'destroyed' the pre-existing customary land tenure systems of the Niger Delta people and neither make room for their participation in the exploitation of oil nor for the payment of compensation directly to them) are clearly inconsistent with relevant international law as espoused above. Furthermore, Nigerian domestic law is inconsistent with Section 21 of the African Charter on Human and Peoples' Rights, as stated above.²⁶⁶ This is the only intelligent conclusion that can be reached in light of the foregoing exposition.

²⁶⁵ Anaya (2000: 107). See also, generally, Shelton (2001: 236 – 244).

²⁶⁶ This was the conclusion of the African Commission on Human and Peoples' Rights in a recent case (See Communication 155/96 *The Social and Economic Rights Action Centre and the Centre*

2.7. Conclusion

This chapter outlined the benefit of oil to the Nigerian State and examined the Nigerian land tenurial and natural resources law – specifically, on the question of ownership. Essentially, it serves as a starting point or basic background for the further investigation of the cause (s) of the prevailing oil-related protests or crisis in the Niger Delta. The investigation in this Chapter has shown that Nigerian statutory laws on the issues examined are in conflict with the customary laws of the Niger Delta people and may also be incompatible with international standards regarding indigenous land rights and resources (which enjoins respect for the customary rights and laws of indigenous peoples). More importantly, the findings suggest that Nigerian domestic laws and policies (which are arguably inconsistent with the people’s customary/indigenous – particularly, rights to land and natural resources) are the central cause (s) of the prevailing protests, as claimed by the people. However, the discussion in this Chapter cannot answer the question, in what specific ways Nigerian domestic laws relate to environmental and equity issues, which are the focal issues of this thesis. This question will be explored in Chapters 4 and 5, respectively. Meanwhile, Chapter 3 will focus on the impact of oil operations on the Niger Delta people and the environment (but not on environmental protection issues which will be the concern of Chapter 4).

for Economic and Social Rights / Nigeria – Done at the 30th Ordinary Session, held in Banjul, The Gambia, from 13 to 27 October 2001).

CHAPTER 3

IMPACT OF OIL OPERATIONS ON THE NIGER DELTA ENVIRONMENT AND THE PEOPLE

Environmentally, modern mining operations have been destructive. The removal of a non-renewable resource [such as oil] usually causes some environmental damage...For aboriginal peoples the effects on native fauna and flora, on which the subsistence component of their economy depends, are of grave concern. While catastrophic events such as the effects of the Exxon Valdez oil spill on wildlife of the Alaskan coast are widely publicised, smaller-scale problems of this type – the destruction of local fish stocks in small creeks near a mine [oil-field], etc. – occur more often (Italics mine).

(Elspeth Young, *Third World in the First*¹)

3.1. Introduction

Chapter 2 has shown that oil is of central importance to the Nigerian economy. Yet, oil operations can cause tremendous damage to the environment of the area from where it is extracted as well as to the inhabitants of the area. As one scholar has observed: ‘As minerals have been developed in increasingly remote parts of the world, their exploitation has had a growing impact on “indigenous”, “native” or “aboriginal” peoples, on groups which have had only limited contact with industrial society and which retain a significant part of their pre-industrial economic, social and cultural structures’ (O’Faircheallaigh (1991: 228)).² Hence, as O’Faircheallaigh has suggested, there is need to pay serious attention to ‘the impact of large mining projects [such as oil mining] on the areas in which they are actually located and on the people who live close to them’.³ Such impacts, which may be classified as environmental, social, cultural, and economic, are the costs of oil operations. In this

¹ Young (1995: 157).

² Previous studies have ignored the impact of oil operations in Nigeria’s Niger Delta from the perspective of the rights of indigenous peoples. As indicated in the text, this is the *lacunae* which the present study seeks to fill.

Chapter, it is proposed to investigate the costs of oil operations in the Niger Delta region of Nigeria. This is of crucial importance to the thrust of this thesis, because it would present the other side of the ledger, and thereby partly provide the necessary background for determining the cause (s) of the prevailing crisis in the region. For, as Frynas (2000: 149) puts it, ‘the adverse effects [of oil exploitation] can arguably be a source of conflict between oil companies and village communities’.

Although it has been rightly pointed out that ‘economic’, ‘social’, ‘cultural’ or ‘environmental’ impacts of industrial activities ‘are inextricably linked together’,⁴ for the purpose of convenience and clarity, this thesis would discuss the impacts of oil operations in the Niger Delta under two general headings: environmental impacts, and social impacts.⁵ However, greater emphasis will be laid here on the environmental impacts; and, in view of this, the business of this Chapter will commence with the definition of certain key words or expressions, which are central to its subject matter (namely, ‘environment’ and ‘environmental pollution’), and the examination of the environmental characteristics of the Niger Delta. Additionally, as part of the contextual foundation, the different stages of oil operations would be briefly considered.

Further, although Young (1995: 155) has suggested that ‘impacts’ could be positive or negative,⁶ it should be noted that this Chapter is concerned only with the negative impacts of oil operations; the positive impacts, if any, would be explored in

³ See O’Faircheallaigh (1991: 255).

⁴ O’Faircheallaigh (1991: 255).

⁵ O’Faircheallaigh (1991: 229) rightly points out that ‘such a division [into environmental, economic, social, etc.] is appropriate for analytical purposes, but it must be stressed that it makes little sense in the context of most indigenous societies, in which economic, social, cultural, and environmental factors are inextricably interwoven’.

⁶ Writing specifically on Nigeria, Frynas (2000: 149) observes: ‘Oil operations on the ground in Nigeria can have both a beneficial and an adverse impact on the well-being and property of village communities.’

Chapter 5 – dealing with equity issues (for example, the issue of employment and other economic benefits of oil operations).

Finally, it should also be mentioned that in addition to a review of research findings on the issues involved here, this Chapter shall incorporate the result of field surveys undertaken by the author in January 2002 and further consider the adverse impacts of oil operations by case-studies of particular incidents, as reported in judicially decided cases.

3. 2. Definitional and Foundational Issues

3. 2. 1. Definition And Meaning of Environment

Any major discussion of issues bordering on the ‘environment’ should properly take as its point of departure a consideration of the meaning of ‘environment’. At least, this will set the focus and determine the boundaries of the discourse. Accordingly, this Chapter commences with a brief examination of the meaning of ‘environment’.

Over the last few years, scholars, international bodies, statutory and treaty provisions, all over the world, have furnished several different definitions of ‘environment’. A few of these will suffice for the needs of the present purposes.

In the United Kingdom, it seems the most relevant statutory definition is that contained in the Environmental Protection Act 1990 where ‘environment’ is defined as consisting of ‘all, or any, of the following media, namely the air, water and land’.⁷ The sparseness of this definition may be contrasted with the elaborate definition under Section 2 (1) of the New Zealand Resource Management Act,⁸ where ‘environment’ is defined as including:

⁷ S. 1(2).

⁸ No. 69 Of 1991.

- (a) Ecosystems and their constituent parts, including people and communities;
- (b) All natural and physical resources; and
- (c) Amenity values; and
- (d) The social, economic and aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) of the definition or which are affected by those matters.

In the case of treaties, the *International Convention on Civil Liability for Environmental Damage*, for example, includes in its definition of 'environment' natural resources both 'biotic' and 'abiotic', thus covering not only the natural environment but also the man-made landscapes, buildings and objects which form part of man's natural heritage.⁹ Perhaps the simplest definition of 'environment' is the one which simply says that the 'environment' 'is where we all live'.¹⁰

In Nigeria, the concept of 'environment' is defined in a number of statutes. For example, in the Federal Environmental Protection Agency (FEPA) Act¹¹, 'environment' is defined as including 'water, air, land and all plants and human beings or animals living therein and the inter-relationships which exist among these or any of them'.¹² In other words, the 'environment' is composite in nature.¹³ Similarly, the Environmental Impact Assessment Decree 1992 defines 'environment' as 'the components of the earth', and includes:

- (a) land, water and air, including all layers of the atmosphere;
- (b) all organic and inorganic matter and living organisms; and
- (c) the interacting natural systems that include components referred to in paragraphs (a) and (b).

⁹ Quoted in Thornton and Beckwith (1997: 3).

¹⁰ WCED, *Our Common Future* (1987).

¹¹ Cap 131, LFN 1990.

¹² S. 38.

¹³ Ajomo (1989).

For the analytical purposes of this thesis, the Nigerian statutory provisions are sufficient, and are accordingly adopted as a 'working definition'. What, then, is 'environmental pollution'? This is the next inquiry.

3. 2. 2. Definition And Meaning of Environmental Pollution

Like the concept of 'environment', there are several definitions of 'environmental pollution' given by scholars, intergovernmental/international bodies, statutory and treaty provisions. However, for the present purpose, only a few will be considered here.

An instructive, and probably one of the earliest definitions of 'environmental pollution', was provided in 1965 by the US President's Science Advisory Committee:

Environmental pollution is the unfavourable alteration of our surroundings, wholly or largely as a by-product of man's actions, through direct or indirect effects of changes in energy patterns, radiation levels, chemical and physical constitution and abundances of organisms. These changes may affect man directly or through his supplies of water and of agricultural and other biological products, his physical objects or possessions, or his opportunities for recreation and appreciation of nature.¹⁴

A similar definition of 'pollution' was recently given by Holdgate as 'the introduction by man into the environment of substances or energy liable to cause hazards to human health, harm to living resources and ecological systems, damage to structures or amenity or interferences with legitimate uses of the environment' (Holdgate, 1979: 17).

In the UK, the Environmental Protection Act of 1990 defines 'pollution of the environment' as 'the release into any environmental medium from any process of

¹⁴ US President's Science Advisory Committee, Environmental Pollution Panel (1965) – Quoted in Hodges (1973: 1).

substances which are capable of causing harm to man or any other living organisms supported by the environment'.¹⁵ For the World Health Organisation (WHO), the 'the environment is considered polluted when it is altered in composition or condition directly or indirectly as a result of activities of man so that it becomes less suitable for some or all of the uses for which it would be suitable in its natural use.'¹⁶

Under Section 38 of Nigeria's FEPA Act, 'pollution' is defined as 'man-made or man-aided alteration of chemical, physical or biological quality of the environment to the extent that is detrimental to that environment or beyond acceptable limits'.¹⁷

It is important to observe that all of these definitions have one thing in common: they all emphasise the alteration of the (natural) environment as a result of man's activities. Never the less, it must not be supposed that natural events cannot alter the environment. Indeed, this sometimes happens; but the greatest source of environmental pollution appears to be man's activities. This explains the emphasis on human activities, especially as man's activities may precipitate or aggravate natural reactions.

On the whole, it seems the most elaborate and recent definition of 'environmental pollution' is that adopted by the E.C. in the Directive of Integrated Pollution Prevention and Control, where 'pollution of the environment' is defined as:

[T]he direct or indirect introduction as a result of human activity, of substances, vibrations, heat or noise into the air, water or land which may be harmful to health or the quality of the environment, result in damage to material, property, or impair or interfere with amenities and other legitimate uses of the environment.¹⁸

¹⁵ S. 1 (3).

¹⁶ Quoted in Ola (1984: 155).

¹⁷ The section further provides that ' "pollutant" shall be construed accordingly'.

¹⁸ E.C. Council Directive 96/61, 24 September 1996, Art. 2 (2). See also Art. 1 of the Long-Range Transboundary Air Pollution Treaty, which defines 'air pollution' as 'the introduction by man, directly or indirectly, of substances or energy into the air resulting in deleterious effects of such a nature as to

For the present purposes, this is the most suitable definition and is accordingly adopted as a 'working definition'.

3.2.3. Environmental characteristics of the Niger Delta

As has been seen, the environment is a composite concept. It includes natural systems (like rivers) and biological species. Hence, the environmental and other impacts of oil operations in the Niger Delta will be better appreciated if the environmental characteristics of the region are briefly explored. In this section, therefore, it is proposed to briefly consider two important environmental characteristics of the region, namely, ecological zones and its biological diversity. These shall be undertaken in turn.

3.2.3.1. Ecological Zones

In his work on the Niger Delta, Hutchful states that the Niger Delta consists of two distinct ecological zones: tropical rainforest in the northern reaches of the Delta, and to the south a coastal area of mangrove vegetation traversed by many rivers, tributaries and creeks. According to him, the coastal area can be further subdivided into two, viz. (a) salt-water riverine area immediately adjoining the coast where the Niger and its tributaries flow into the sea; and (b) further inland, a fresh-water riverine area.¹⁹ However, in a recent study of the region the World Bank identified four distinct ecological zones,²⁰ namely: mangroves, freshwater swamp forests, lowland rainforests, and barrier Island forests. On the whole, it would seem that there is no real conflict in these classifications: Hutchful's classification appears to be broad-based,

endanger human health, farm, living resources and ecosystems and natural property and impair or interfere with amenities and other legitimate uses of the environment.

¹⁹ Hutchful (1985: 114).

²⁰ See World Bank (1995, Volume 1: 24-7).

whereas the World Bank's is specific. Obviously there are reasons for the conflicting approaches. However, it is not intended to pursue their merits here. Suffice to say that this thesis will follow the World Bank's classification because it appears more helpful for the present purposes. Accordingly, each of the four zones is briefly considered below.

(i). **Mangroves:** Nigeria has the third largest mangrove forest in the world and the largest in Africa; the majority of it is found in the Niger Delta.²¹ It covers some 6,000 square kilometres in a swathe between 15 to 45 kilometres wide.²² It is defined by regular salt-water inundation. According to a 1979 land use survey of the delta by the Food And Agricultural Organization (FAO) of the UN, 30% of Rivers State is composed of mangrove forests.²³ It has also been stated that creeks, which are kept open by tidal action and flooding, flow throughout the forests.²⁴ Significantly, the mangrove swamps lie at the centre of a complex and sensitive ecosystem 'vital to the fishing industry and the local economy [of the Niger Delta people]' (Hutchful, 1985: 114).

(ii). **Freshwater Swamp Forests:** These forests cover 11,700 km of the entire Delta. In Rivers State, an official report indicates that they cover one third of the land area of the State.²⁵ According to the World Bank, the freshwater swamp forests are most extensive in the West and Central Delta; in the Eastern Delta, the freshwater forest band is much thinner because of the higher elevations. The dominant ecological influence in this zone is seasonal flooding; floodwaters collect in countless swamps

²¹ World Bank (1995: 24), citing some authorities.

²² See SPDC, "The Environment" (Visited 3 February 2002) <http://www.shellnigeria.com/info/info_display.asp?ld=135>.

²³ Cited in World Bank (1995: 24-25).

²⁴ Rivers Chiefs, 1992, 38.

²⁵ Forestry Department, Rivers State, 1994.

and ponds, saturating the soil for at least the rainy season.²⁶ The swamp forests zone can be sub-divided into two 'ecological groups': (a) riverbank levees which are rarely flooded and have been mostly converted to agriculture (but have the best conditions for tree growth); and (b) the back swamps which can be inundated with water for most part of the year.

(iii). **Lowland Rainforests:** This ecological zone covers about 7, 400 km of the Niger Delta. However, evidence suggests that very little lowland remains and only a few of the remainder are significant in size or species diversity (for example, Ebubu forest).²⁷ The Niger Delta Wetlands Centre has noted that no literature exists on the original forests.²⁸ Today most areas in this zone are in *swidden* agriculture systems that permit only oil palms and occasional mango trees to remain. For example, Hall suggests that Ogoniland used to be covered with a rainforest, but has been largely converted to degraded bush and farmland (Hall, 1994: 22). Generally this zone may be considered as being no longer viable.

(iv). **Barrier Island Forests:** This ecological zone (also called beach ridge Island) is the smallest in the Delta. They are freshwater forests found between the coastal beaches and the estuarine mangroves. Typically they contain a band of rainforest species growing on the inland side of the beach ridges and freshwater swamp forests created by the freshwater table. According to Hall, the forests are degraded in accessible areas, but large areas of high quality forest with high concentrations of biodiversity remain. A good example is the Andoni area, which is still relatively intact. As evidence shows, it has been proposed as a game reserve because of its remnant of elephants and hippopotami (Hall, 1994: 27).

²⁶ World Bank (1995, Volume I). There are two main seasons in Nigeria, namely 'dry season' and 'rainy season'.

²⁷ See, for example, World Bank (1995).

²⁸ NDWC (1995: 8).

As earlier indicated, within the different ecological zones, several biological species exist. And, as also previously stated, because these species are part of the environment it is possible that oil operations in the region will affect them in some way. In any case, in the perspective of sustainable development and conservation, it is useful to understand the biological characteristics of the region. This is the subject of the next section.

3. 2. 3. 2. Biological Diversity: Natural Resources of the Niger Delta

The expression ‘Biological Diversity’ (biodiversity) refers to the number, variety and variability of living organisms. In fact it is synonymous with the expression ‘life on earth’.²⁹ Scientifically, the biological diversity or biodiversity of an area can be assessed from *genetic*, *taxonomic*, or *ecosystem* perspectives. *Genetic diversity* represents the heritable variation within and between populations of organisms.³⁰ *Taxonomic diversity* is commonly understood to refer to diversity at the species or higher taxonomic level – the variety of life forms existing in an area.³¹ Sometimes this is also called species diversity. In the case of *ecosystem diversity*, it is the number of habits or ecological systems within a given geographic area.³² For the present purpose, the biodiversity of the Niger Delta will be assessed from taxonomic and ecosystems perspectives.

There is abundant data which indicates that the Niger Delta is greatly endowed with natural resources (both renewable and non-renewable), the most intriguing of which is crude oil, which, as previously seen, dominates the Nigerian economy.³³

²⁹ See Groombridge (1992).

³⁰ Groombridge (1992).

³¹ The number of endemic species in an area is another important way of determining taxonomic diversity.

³² Cf. Groombridge (ed.) (1992:)

³³ NDES (1997: 1).

Apart from crude oil, other non-renewable resources of the Niger Delta include natural gas,³⁴ fossil fuels, and construction materials such as gravel, sand, clay, and earth.³⁵ The major renewable resources include a network of water resources, a variety of economically important timber species (polewood, fuelwood, etc.), edible vegetables, fruits, nuts and seeds, medicinal plants, palm wine and other palm products, and tannin. Besides, there are bamboos and grasses which are useful for making a variety of products especially in local cottage industries.

More importantly, the various and extensive forests of the region harbour a wide variety of wildlife, including mammals, reptiles, birds, insects and invertebrates (a good number of which are endemic in the region). Moreover, the water resources hold a rich variety of aquatic life, including shell-fish, fin-fish and crustacea.³⁶ (See below for more information on the biodiversity). This probably explains why fishing is one of the principal occupations of the inhabitants of the region (see Chapter 1).

It is remarkable that the rich biodiversity of the Niger Delta raises the issue of conservation. (This will be discussed in Chapter 4). In a recent assessment of the coastal regions of eleven West African countries, the IUCN ranked the Niger Delta as one of the highest conservation priorities in the entire region and noted that it was virtually unprotected.³⁷ Even more recently, the World Bank has also emphasized the importance of the delta as habitat for a great variety of coastal and estuarine fauna and flora 'which lacks any marine or coastal protected area'.³⁸ Grubb has argued that the conservation significance of the Niger Delta is enhanced because it is a centre of

³⁴ The gas reserves of the Niger Delta promise to overtake crude oil in the nearest future as the greatest foreign exchange earner for Nigeria. The Nigerian Liquified Natural Gas (NNLG) Project at Bonny, Rivers State, which became functional in 2000 may be the beginning of the takeover.

³⁵ NDES (1997: 25).

³⁶ NDES (1997: 24-25).

³⁷ IUCN (1992: 95 & 100).

³⁸ World Bank (1995a).

endemism for Africa.³⁹ (As would be seen presently, the Niger Delta has a unique and highly diverse flora and fauna; no area of Nigeria compares with it). According to Ashton-Jones and Douglas, 'the Niger Delta and Cross River State region hold 60-80 per cent of all Nigerian plant and animal species'.⁴⁰ Also, it has been found that Nigeria has 205 endemic species, and the largest number of these are found in the Niger Delta.⁴¹ Commenting on the abundant resources of the region, the authors of a recent report significantly observed: 'The Niger Delta is the richest part of Nigeria in terms of natural resources. The area has large oil and gas deposits, as well as extensive forests, good agricultural land and abundant fish resources.'⁴² In fact, there is evidence to indicate that the biodiversity characteristic of the Niger Delta transcends national importance. 'Being the most extensive and complex lowland forest/aquatic ecosystem in West Africa, the biological diversity of the Niger Delta is of regional and global importance'.⁴³ In order to illustrate this national and global importance, it is proposed to briefly examine the biodiversity characteristics of the region in a little detail, and this will be achieved by a brief and specific consideration of its floral and faunal composition, to which this inquiry now moves.⁴⁴

(i). Flora

It has been observed that 'conservation and biodiversity assessments in the Niger Delta have generally overlooked floristic diversity. The Delta Region is cited as one of the most poorly collected areas of West Africa for plant specimens'.⁴⁵ Nevertheless, available data indicates high endemism compared with most of West

³⁹ Grubb (1990).

⁴⁰ See Ashton-Jones and Douglas (1994: 29).

⁴¹ Brennan (1992: 235).

⁴² Moffat and Linden (1995: 527).

⁴³ IUCN (1992: 95 & 100).

⁴⁴ For more detailed information, see the report of the Niger Delta Environmental Survey (NDES), Vol. 1, 1997.

⁴⁵ World Bank (1995: 38).

Africa.⁴⁶ A few examples will suffice. The mangrove forests of the region consists mostly of the red mangrove tree (*Rhizophora racemosa*) with its characteristic stilt or prop roots. Other trees include the smaller black mangrove and white mangrove. Ecologically, the mangrove floor is very important to a lot of smaller flora and fauna, and ultimately to the human food chain. Salt fern can be found in higher areas of the mangrove, while the exotic spiny false date (*nypa fruticans*) colonises cleared areas. Apart from these, there is also the freshwater raphia swamps, floodplain forest and upland rainforest.⁴⁷

(ii). Fauna

Perhaps due to the rigorous environment of this Region, its faunal resources were ignored until recently. As recent works show, the Delta contains distinct faunal zones, terrestrial and aquatic, and species new to Nigeria.⁴⁸ In fact, there is an indication that the full range of species in the Niger Delta are still unknown. A recent study by the World Bank surmises that 'the full significance of the Delta's biodiversity remains unknown because new ecological zones and species continue to be uncovered and major groups, such as higher plants and birds, remain unstudied in large areas'.⁴⁹

Naturally, faunal distribution depends on ecological characteristics. In the mangrove forests of the delta, species that occur include the mona monkey, Speckle-throated Otter, and Marsh Mongoose. There are also clawless Otters and new species of genets have been identified. The freshwater swamp forest harbours the black squirrel and antelopes,⁵⁰ and other species of monkeys and apes, including Chimpanzee. Elephants have also been found in this zone. The only mammal species

⁴⁶ See Campbell and Hammond (1989: 193).

⁴⁷ *Rahpia* produces palm-wine and serves a variety of uses, including mat-making.

⁴⁸ Until his death, much of the recent works have been done by Powell from his base at the Rivers State University of Science and Technology, Port Harcourt.

⁴⁹ World Bank (1995: 38). See also Moffat and Linden (1995: 531).

⁵⁰ See Moffat and Linden (1995: 531).

known to be endemic to Nigeria, Sclater's guenon (*Cercopithecus scateri*) lives only in the delta and Cross River ecosystems.⁵¹ On other large species, the World Bank Report notes that 'the status of many large species which were common in the Delta, but are now endangered is not known precisely. What is known is that all of them have fallen from being widely distributed in viable populations to becoming classified as vulnerable, threatened, or endangered'.⁵²

In his study of freshwater fish species, Powell concludes that the delta has more freshwater fish species (197) than any other coastal system in West Africa.⁵³ The Niger Delta Wetlands Centre has also found sixteen fish species which are endemic to the region and another 29 which are near endemic.⁵⁴ Moreover, of the 12 new species discovered in Nigeria since 1986, scientists have found 10 of them in the Niger Delta (Powell, 1993). Specifically, the various studies indicate that the commonest fish species in the delta include croakers, barracuda, shiny nose, and catfish; crustacean and molluscs are also found in abundance.

In terms of bird species, although no systematic bird census work has been conducted anywhere in the Niger Delta,⁵⁵ over 330 different species have been identified.⁵⁶ The delta boasts of parrots and the palm nut vulture. Also, some vulnerable species (such as the Hammerkop (*Scopus Umbretta*)) which are rare over much of their ranges remain abundant in the 'delta (Ashton-Jones and Douglas: 234;

⁵¹ See Happold (1987). See also Moffat and Linden (1995: 531).

⁵² World Bank (1995: 39).

⁵³ Powell (1993). See also World Bank (1995:38).

⁵⁴ NDWC (1995).

⁵⁵ Powell (1994).

⁵⁶ Global Environmental Facility (1992: 1).

Sayer, Harcourt and Collins, 1992: 232).⁵⁷ Moreover, the World Bank notes that 'the delta is also an important habitat for trans-hemispheric migratory bird species'.⁵⁸

To sum up, it has been seen that the Niger Delta is greatly rich in biodiversity. This diversity is naturally distributed in the different ecological zones, although the distribution is not evenly spread. According to a recent report, 'within the delta, biological diversity is concentrated in the freshwater and barrier Island ecological zones. The extreme hydrological conditions of the mangrove forests limit their biological richness'.⁵⁹ Evidence indicates that the lowland rainforests have also diminished in importance, although small areas of intact rainforest still contain important populations of rare and endangered species.⁶⁰

3. 2. 4. Stages of Oil Operations

Oil operations involve a number of stages, including exploration, production, and marketing. Of all, exploration and production activities appear to make the most impact on the immediate environment and on the inhabitants of the area. In the result, as a prelude to an analysis of the impact of oil operations, it is helpful to briefly outline what is involved in these two stages. This will serve as a background for the subsequent investigation of the impacts of oil operations.

Basically, exploration activities involve seismic surveys and drilling of exploratory wells, whereas production activities include construction of oil pipelines and installation of other facilities (like flow-stations and flow-lines), transportation of

⁵⁷ Reptiles such as Crocodiles, tortoises, and Monitor Lizards are also found in the Niger Delta.

⁵⁸ World Bank (1995: 38). However, the importance of the region for migratory songbirds and waterfowl has not been comprehensively studied, but it is believed that to be regionally and globally significant. See Global Environmental Facility (1992: 1).

⁵⁹ World Bank (1995: 38). At page 39 of this report it is stated: 'Since the barrier island and freshwater forests, as well as some rainforest fragments, have high floristic diversity, animal diversity is also concentrated in those areas.'

⁶⁰ World Bank (1995: 38).

oil through pipelines and gas flaring. In general, oil exploration aims at locating geological sites where oil might be trapped. This is mainly undertaken by three means: analysis of existing geological and other information, seismic surveys and drilling of exploratory wells; the last two means are the only concern here.

Firstly, oil companies conduct seismic surveys in order to gather geophysical data. The process involves sending sound waves into the earth's crust where they are reflected by different layers of rock. By this process, dynamites are detonated a few metres below the ground surface.⁶¹ In the process, the sound energy from a source on the surface bounces off the different rock layers and returns to the surface where it is recorded by a detector. According to one source, surveys are carried out by seismic parties (not company employees, but usually sub-contractors of oil companies⁶²). The seismic crew measures the time taken for the wave to return to the surface, and this will reveal the depth of the layers, and indicate what types of rock lie beneath the surface⁶³ (Hyne, 1995: 233-254). In practice, a seismic survey starts by 'line cutting' (called 'seismic lines') – i.e. clearing the land or water surface from any obstructions (particularly plants) in preparation for laying seismic cables. In Nigeria, lines are usually cut manually and in straight lines, using machetes, and are usually not less than one metre in width. SPDC states that over the past 30 years it has so far cut more than 120,000 kilometres of seismic lines in the mangrove forest of the Niger Delta. It acknowledges that some older lines are still visible today, but claims that 'new hand-

⁶¹ In the case of seismic surveys done at sea (offshore), the seismic parties use small boats or barges, equipped with air guns which release compressed air into the water surface. This equipment is towed in the water behind the boat or barge.

⁶² Shell also uses its sister company, Shell Nigeria Exploration and Production Company, for exploration purposes.

⁶³ Different rocks transmit sound at different rates.

cutting techniques introduced in the early 1990s mean that new lines are barely visible on the ground or by air after a few years'.⁶⁴

In the past, oil companies used 2-D survey techniques, but today a more sophisticated seismic survey technique (called 3-D seismic survey) is increasingly being used. Most importantly, a 3-D survey allows a much more accurate geophysical assessment and provides a much more reliable data than a 2-D survey. A 3-D survey provides the company with a three-dimensional seismic image of the subsurface, which is viewed in a computer from different directions. On land, many seismic cables are laid close to each other, forming a grid pattern, so as to obtain maximum information from the surveyed area. In the case of offshore seismic surveys, a single boat/barge is fitted with two arrays of air guns, which are towed behind. The information obtained by the surveys are later processed in a high-speed computer (Hyne, 1995: 251-252). Evidence shows that in 1997 SPDC (Shell) was the most active oil company in conducting seismic surveys in Nigeria, while Western Geophysical was the most important seismic contractor (Petroconsultants, 1998: 30).

It is important to note that seismic surveys require a large number of workers. As van Dessel (1995: 14-15) notes, 3-D surveys are particularly labour-intensive.⁶⁵ And since, in Nigeria, seismic parties usually carry all equipment by hand a single 3-D party may involve over 1,000 workers. The implication of this is that seismic surveys bring in large number of people at a time to the area being surveyed.

After the analysis of seismic survey data, it may be necessary to conduct a follow-up investigation of the surveyed area. This is done by the drilling of

⁶⁴ See SPDC, 'The Environment' (Visited 3 February 2002)
<http://www.shellnigeria.com/info/info_display.asp?Id=135>.

⁶⁵ Shell first employed 3-D survey in 1986 and this has virtually replaced 2-D surveys in its operations since then (van Dessel, 1995: 14-15). Most recently, 4-D seismic survey is being tried. It represents an improvement on 3-D surveys. But it will likely be some time before it will replace 3-D surveys.

'exploration wells'. Like seismic surveys, drilling of exploration wells begins by (manual) land clearance in order to construct 'access roads' or, in the case of wells located in waters, by the dredging of canals to give the company access to the well site. Wells are drilled with sophisticated equipment – rotary cutting tools with tough metal or diamond teeth 'that can bore through the hardest rock' (Frynas, 2000: 154). While in operation, these tools are suspended on a drilling string (so-called 'oil rig'). As the operation progresses, cuttings (called 'drill cuttings') are returned to the surface and these are examined to obtain data about the rock at various depths. This is recorded as 'sample' or lithographic log'. Apart from drill cuttings, a large quantity of other wastes are generated by the operation. As Shell puts it: 'Generally, waste materials from drilling...involve large quantities. A typical onshore drilling rig generates 500 to 1,000 tonnes of water-based mud, 100-300 cubic metres of low salinity brine and some 500 tonnes of dry cuttings, which is solid material excavated from the hole'.⁶⁶

Comparatively, drilling data is much more accurate than that collected from seismic survey, and, in fact, drilling is the only way to exactly determine whether there is oil under the surface in the area being explored.⁶⁷ However, because of the high costs of drilling, their number is limited compared to seismic surveys.⁶⁸ Where no oil is found in commercial quantity, the well is considered a 'dry well' and will be plugged and abandoned. However, if oil is discovered in commercial quantity in the

⁶⁶ See SPDC, 'The Environment' (Visited 3 February 2002) <http://www.shellnigeria.com/info/info_display.asp?Id=135>.

⁶⁷ As Schatzl (1969: 13) put it: 'Definite information as to whether crude oil is actually present in potentially productive geological formations cannot be obtained through geological and geophysical methods of investigation. *The evidence of oil accumulations can be obtained only through drilling operations*' (Italics added).

⁶⁸ In 1997, for instance, only 49 wells were drilled in Nigeria, out of which 32 were situated in Nigeria's continental shelf area (Petroconsultants, 1998: 38-39). The most active oil company that year in drilling was Mobil (with 14 wells), followed by Shell (with 7 wells) (Petroconsultants, 1998: 38-39). In any case, thousands of wells have been drilled in Nigeria to-date. For instance, van Dessel (1995:

exploration well the company proceeds to drill 'appraisal wells' in order to appraise the find, i.e. in order to determine the size of the oil field. If decision is taken by the company to commercially exploit the wells, some of the 'appraisal wells' may later be used as 'development wells' for oil production (Hyne, 1995: 255-389).

Like seismic operations, drilling operations involve a large number of oil company workers, using heavy-duty, specialised equipment, boats, road vehicles and helicopters. Invariably the operations are in rural communities and this involves contact with the indigenous residents – at their residential areas (many workers live locally), at their farmlands or at their fishing ports.

After seismic surveys and the drilling of exploration/appraisal wells, the next stage of oil operations is production. As indicated above, production is undertaken only when a company has adjudged a well to be commercially viable and had decided to exploit the oil trapped underneath. This operation brings a mixture of oil, gas and water to the surface, as these are all trapped together and it is not possible to pump out only crude oil. By itself, gas flows to the surface because it is very light. Oil can also flow to the surface by itself if there is enough pressure in the reservoir;⁶⁹ but where there is not enough pressure it can be brought to the surface artificially by means of pumps or other methods. And once the natural reservoir pressure has finished, water is injected into the earth's crust in order to force out the remaining oil to the surface (Hyne, 1995: 8-10).

The admixture of oil, gas and water drilled from the subsurface gets to the 'well head' on the surface from where it is transported through a pipeline (called 'flow-line) to a collection point (called 'flow-station' – so-called because it gathers oil

16) records that by 1995 1,300 wells were drilled in Shell's Eastern Division alone, out of which about half were still producing.

from a number of different wells). At that point, gas and liquids are separated. As is common in Nigeria, the gas component is flared,⁷⁰ while the remaining oil and water is transported via a pipeline to an export terminal on the coast, at which point oil and water are separated. At the terminal,⁷¹ the crude oil is loaded onto tankers and exported abroad, while the accompanying water is discharged into the rivers. On the whole, there are less than 20 oil loading terminals in Nigeria, unlike flow-stations which are so many in number (Frynas, 2000: 155).

To sum up, oil operations involve active and sustained human activities and a large amount of heavy-duty equipment. It also involves the construction of a good number of facilities (such as flow-lines and flow-stations – both using pipes) as well as a large number of work force. Notably, all the activities and facilities/installations are located in the Niger Delta region. Commenting on oil companies facilities in the region, an author could say: ‘The oil industry has criss-crossed the land with pipelines and divided it with canals’.⁷² How the various activities and facilities affect the environment, the inhabitants of the region, and, also, the Niger Delta wetlands, will be the concern of the subsequent sections.

⁶⁹ Most Nigerian oil reservoir have natural pressure, and so oil flows to the surface by itself. For instance, out of a total of 2,251 oil producing wells in 1997, oil was naturally flowing to the surface in 1,864 wells, with only 387 requiring artificial lift (*OPEC Annual Statistical Bulletin 1998*).

⁷⁰ Van Dessel (1995: 17).

⁷¹ An Oil terminal is strategically more important than a single flow-station, in that if a flow-station is disturbed, only the production from the connected wells will be stopped, whereas if a terminal is disturbed, oil export from all flow-stations in the area may be stopped. This was the experience of Shell during the Nigeria-Biafra civil war in the late 1960s, when Shell’s terminal, located at Bonny, was blockaded by the Biafran government and the company could not export any oil. See Forsyth (1969: 169).

⁷² Vidal (1995: T2) – Quoted in Eaton (1997: 266).

3. 3. Oil Operations and the Niger Delta Environment

*The threats of pollution are real. Their economic [environmental, social and cultural] consequences are real. Their health consequences are real. There are sufficient data to make strong cases based on fact - Melvin J. Josephs (1967).*⁷³

The extraction of oil is a major industrial activity which is inevitably bound to affect the environment.⁷⁴ As one observer puts it: 'The whole process of development is dependent on the environment, which in turn, provides the resource base for development. Similarly, *the [oil] development process has far-reaching impacts on the environment*'.⁷⁵ In the same vein, O'Faircheallaigh has pointed out that 'modern [oil] mining projects have the potential to create enormous environmental damage' (1991: 251). He adduced three reasons for this view. Firstly, many mining projects are on large scale, and consequently dispose of very large quantities of waste which cannot be profitably recovered. Secondly, much of the waste is highly toxic in character, containing substances which can be very destructive if released into the environment; even products recovered for sale (e.g. crude oil) can also be deleterious and cause enormous damage if lost (e.g. during shipping or as a result of leaks). Thirdly, the author maintains that 'while mining itself tends to be localised and to occupy relatively small areas of land, mineral exploration is land intensive, and so any damage caused by exploration may extend over large areas.'⁷⁶ If pollution from mining

⁷³ Quoted in Hodges (1973: vii).

⁷⁴ According to one commentator, 'pollution itself is an inherent part of economic operation' (Ikpah, 1981) – quoted in Ikein (1990: ..).

⁷⁵ See Puvimanasinghe (2000: 38).

⁷⁶ This point can be illustrated by Shell's claim of the size of its land use in the Niger Delta: 'SPDC [Shell Petroleum Development Company of Nigeria Limited] clears land for pipelines, flow-lines, flow-stations, camps, drilling rigs, seismic lines, terminals, and roads. All facilities, including flow-stations, offices, pipelines, flow-lines, use a total of only 220 square kilometres of the company's Delta oil mining lease area of more than 31,000 square kilometres – some 0.7 per cent. In terms of the entire Niger Delta area, this land use amounts to 0.3 per cent.' See SPDC, 'The Environment' (Visited 3 February 2002) <http://www.shellnigeria.com/info/info_display.asp?Id=135>. However, this extent does not indicate the amount of land used for oil exploration (specifically, seismic operations), which is likely to cover the whole Niger Delta region.

enters waterways, it too can be carried far from the original source of contamination'.⁷⁷

As will become clear shortly, the above statements apply with equal force to the extraction of oil in Nigeria. Hence, this thesis will investigate how oil exploitation affects the Niger Delta environment. For the present purposes, two of the major and well-known negative impacts of oil production operations on the environment – viz., the incidents of oil pollution and gas flare – will be studied.⁷⁸ The incident of oil pollution (oil spill) will be investigated in this section while the incident of gas flare will follow in another section. Subsequent sections of this Chapter will study the impact of other production and exploratory activities of the oil companies (such as seismic surveys, exploratory drillings and refinery operations) on the environment. (The social impacts of oil operations in the Niger Delta will be examined after this). As indicated earlier, by way of approach, the existing literature and survey results would first be reviewed, and these would be followed by case-studies of specific incidents and their impacts, as can be found in judicially decided and reported cases in the country,⁷⁹ to further illustrate the impacts. It remains to say that the selected impacts will be considered here in turn.

3. 3. 1. Environmental Impact of Oil Pollution: Introduction

Several authors have suggested that pollution is an inevitable aspect of any (major) industrial development, such as oil exploitation. Perhaps this is so. But it would appear that the level of pollution and its effects varies from country to country,

⁷⁷ O'Faircheallaigh (1991: 251).

⁷⁸ According to van Dessel (Shell's former head of environmental studies in Nigeria), 'the most serious environmental damage of oil exploitation in the Niger Delta is caused by: oil spills, gas flares, oily and other waste, land take and production/drainage of water'. See van Dessel (1995). It is significant to note that this former employee of Shell resigned from the company in protest against what he described as the company's poor environmental record in Nigeria.

depending on certain factors – including the status of the country (whether developed or developing country) and the nature of the industrial activity concerned. The concern of this section is to investigate the environmental impact of oil pollution on the Niger Delta (a region of Nigeria where oil is exploited). However, before embarking on this investigation it is instructive to briefly consider some definitional and foundational issues such as the meaning of ‘oil pollution’, the phenomenon of oil pollution, and the causes of oil pollution in the region. These will be examined seriatim.

3. 3. 1. (a). Meaning of Oil Pollution

Simply stated, oil pollution is pollution arising from ‘oil spill’ – that is discharge or release of oil accidentally or deliberately into the environment. This could be crude or refined petroleum oil, or even oil waste, and could occur in water or land.⁸⁰ According to Kupchella and Hyland, ‘as dramatic as major spills are, much of the oil pollution in the world’s [inland] waters results from routine operations, in which oil wastes are mixed with sea-water that had been taken on as ballast and dumped from oil tankers when the ships return to the sources of oil for refill’ (1993: 352). Oil pollution will also result where untreated water (sludge) separated from oil at oil terminals are released into water bodies.

3. 3. 1. (b). Phenomenon of Oil pollution: Oil Spill

Environmental pollution in the Niger Delta (as a result of oil spill) appears to be a frequent phenomenon. In the period 1976-1980, Awobajo found that there were ‘seven hundred and eighty-four (784) oil spill incidents’. He noted that ‘these resulted

⁷⁹ The case-studies, using decided cases, will be concerned mostly with the facts of the cases as produced in the reports than with the judicial verdict reached.

in the loss of 1,336,875 barrels of oil’ and that ‘in 1981 alone (January – May) 121 incidents of oil spills were reported”, resulting to another loss of 9,750 barrels of oil (Awobajo, 1981). Today there is accumulating evidence, which suggests that the incidence of oil spill (and the quantity of barrels spilled) is on the increase and occurs on the average of nearly 300 per year (See Table 3. 1).⁸¹

Table 3. 1. Oil Spills in Delta and Rivers States⁸² of Nigeria, 1991 – 1993

	Delta State		Rivers State			
	Number of Spills	Quantity Spilled (Barrels)	Number of Spills at Shell	Number of Spills	Quantity Spilled (Barrels)	Number of Spills at Shell
1991	78	950	50	98	5103	86
1992	129	12,232	55	223	21,480	153
1993	116	909	58	232	8,101	248 (Sic)
Average Per year	107	4,697	56	184	9,893	159

Source: World Bank (1995, Volume II, annex M); Frynas (2000: 165).

Apart from showing the frequency of spills, figure 3. 1 indicates that Shell’s share of the oil spill is above 75per cent. As Frynas (2000: 165) puts it, ‘the key oil polluter is Shell, accounting for over 75 % of the spills’.⁸³ Even oil companies’ figures on the frequency of spills, which, it has been suggested, are limited in truth,⁸⁴ lend credence to the growing body of evidence suggesting high frequency of oil spillage. For instance, Shell announced in 1998 that ‘since 1989, SPDC [Shell

⁸⁰ Wardley-Smith (1979: 13) notes that ‘pollution of the land by petroleum products can be...objectionable and it is more difficult to carry out clean up or remedial measures’.

⁸¹ According to the CLO, ‘recent records show that an average of three *major oil spills* are recorded in the Niger Delta every month’ (CLO, 1999: 28) (Italics mine).

⁸² Delta State (created in 1991 out of the former Bendel State) and Rivers State are the principal oil producing states in the Niger Delta. It should be emphasised that this figure excludes oil spills which occurred in the marginal areas of the Niger Delta (like Akwa Ibom State) where multinational oil companies also operate.

⁸³ The remaining percentage was contributed by the other oil companies operating in the region (Mobil, Agip, Elf, etc.).

⁸⁴ See Frynas (2000: 165).

Petroleum Development Company of Nigeria Limited] has recorded an average of 221 spills per year in its operational area [the Niger Delta], involving a total of 7,350 barrels of oil a year.⁸⁵ This translates to an average of 18.4 (19 approx.) spills per month. More recently, Shell's figures show that 'in 2000, a total of 340 oil spills were reported, accounting for 30,751 barrels of oil spilled'. According to the company, 'this represents a 7 per cent increase in the number of incidents over 1999 and a 32 per cent increase in the volume of spills'.⁸⁶ The implication of this is that the incidence of oil spill is increasingly high. As at yet, there is no evidence that this trend will decline. Moreover, evidence suggests that some of the spills are major, involving (contrary to the claims of oil companies) significant barrels of oil.⁸⁷

The economic loss involved in this kind of situation is obvious. What about the environmental and social effects? This question will be investigated below. But before going into the inquiry, it is instructive to inquire into the causes of this high incidence of oil spillage in the operational area of the oil companies. This is the business of the next section.

3. 3. 1. (c). Causes of Oil Pollution: Oil Spill

The high incidence of oil spill compels a search for the causes of the phenomenon, not least because of the economic implications of such a waste. As Awobajo rightly argues, the quantity of oil spilled represents a 'loss to the national economy' (Awobajo, 1981). Evidence from different sources suggest that the causes of oil spill in the Niger Delta include: corrosion of aging facilities (mainly pipelines/flow-lines), leading to leaks; operational error (i.e. equipment failure, engineering and human

⁸⁵ See SPDC, 'The Environment' (Visited 3 February 2002) <http://www.shellnigeria.com/info/info_display.asp?Id=135>.

⁸⁶ SPDC, *2000 Highlights* (Lagos, Nigeria, 2000).

⁸⁷ CLO (1999).

error); blow-out of oil wells; failure along pump discharge manifolds; hose failures on tanker loading systems; tank overflow due to excess pressure; and sabotage.⁸⁸ However, there is a dispute as to what is the major cause of the phenomenon. Specifically, contrary to the view of several researchers and the contention of victims, Shell (and indeed the other oil companies operating in the country) contends that sabotage is the single most important cause of oil pollution in the Niger Delta. This has been its long-standing position, although (as shall be seen presently) not in congruence with available data. Recently, in its 2000 Annual Report, the company restated this position thus:

In 2000, a total of 340 oil spills were reported, accounting for 30,751 barrels of oil spilled...Compared to 1999, the number of spills attributed to corrosion increased by 19 per cent to 57...Similarly, the number of spills due to operations (equipment failure, engineering and human error) increased by 20 per cent...Sabotage remains a significant problem and accounted for 40 per cent of the incidents and 57 per cent of the volume of oil spilled.⁸⁹

In view of the importance of the causes of the frequent oil spill (or oil spillage) to any programme of pollution control, and, most importantly to this thesis, to the question of equity in the distribution of the benefits of oil exploitation vis-à-vis the impacts of the operations, this section shall attempt to discover the major cause of oil spill by examining available records. This will involve analysis of the conflicting views.

In its 1995 study of environmental problems in the Niger Delta, the World Bank concluded that oil spills are mostly caused by the companies themselves, with corrosion being the most frequent cause (World Bank, Volume II, annex M).

⁸⁸ See Nwankwo et al (1981); Hutchful (1985: 115); Ikein (1990: 133); Frynas (2000: 165-6). See further SPDC, *2000 Highlights* (Lagos, Nigeria, 2000); SPDC, 'The Environment' (Visited 3 February 2002) <http://www.shellnigeria.com/info/info_display.asp?Id=135>.

⁸⁹ SPDC, *2000 Highlights* (Lagos, Nigeria, 2000).

Interestingly, this conclusion was reached with data supplied to the Bank by Shell, as shown below (See Table 3. 2):

Table 3. 2. Causes and Volume (in thousand barrels) of Shell’s Oil Spills in Delta State, 1991 – 1994

	1991		1992		1993		1994	
	No. of Spills	Volume	No. of Spills	Volume	No. of Spills	Volume	No. of Spills	Volume
Corrosion	17	266	24	183	26	131	25	124
Equipment Failure	22	178	20	126	17	275	15	89
Sabotage	7	26	9	642	13	161	13	235
Other	23	233	19	269	16	50	20	65
Total	69	705	72	1220	72	617	73	515

Source: World Bank (1995, Volume II, annex M); Frynas (2000: 166).

These figures clearly demonstrate that corrosion of aging equipment is the most significant cause of oil spill, at least for the period of the study. Significantly, at the material period of the World Bank’s study, Shell acknowledged the pre-eminence of corrosion thus:

Since 1989 SPDC has recorded an average of 221 spills per year in its operational area [Niger Delta], involving a total of some 7,350 barrels of oil a year...*Half of the volume spilled is due to corrosion of ageing facilities, mostly flow-lines.* Another 21 per cent happens (sic) in the course of operations to produce oil, while about 28 per cent is due to sabotage. The rest is due mainly to engineering and drilling activities⁹⁰ (Italics mine).

⁹⁰ See SPDC, ‘The Environment’ (Visited 3 February 2002) <http://www.shellnigeria.com/info/info_display.asp?Id=135>.

In fact, there is abundant evidence to support World Bank's conclusion that the incessant oil spills in the Niger Delta are due to the failings of the oil companies. For example, in an earlier study of the problem in the period 1976-1980, Awobajo found that equipment failure accounted for 50 per cent of all spills, followed by sabotage to flow-lines/pipelines. In fact, there is probably no better support for the view that equipment failure is the major cause of oil spills in the Niger Delta than Shell's response to a charge of environmental devastation:

The challenge that SPDC faces is that a major part of its infrastructure for many of its largest fields were built in the 1960s and 1970s, using the best oil industry practices available at the time. Many of them were due for refurbishment and upgrade in the mid 1980s to meet current standards. However, this coincided with the period of collapse in oil prices and revenues, and with the Government as 80% owner at the time, meeting the financial commitments to the venture was difficult. Although some maintenance programmes slipped then, the gap between previous standards and those of the present day are fully recognised. SPDC is addressing this through an upgrade programme of facilities – flow-lines, flow-stations and terminals.⁹¹

The implication of this is that most of the company's facilities are very old and therefore susceptible to oil leaks. Frynas made this point well when he said: 'Shell's own figures suggested that the age of pipelines and flow-lines largely determined the frequency of leaks. The older the flow-lines were, the more susceptible they were to leaks. Roughly 95 per cent of all leaks occurred in flow-lines 11 years or older' (Frynas, 2000: 166). Frynas also suggests that oil companies employ 'fictitious claims of sabotage to escape liability for compensation payments [for oil spill]' (Frynas: 2000: 166-7). This may well be so, but the merits of this will be considered in Chapter 5.

⁹¹ SPDC, 'Devastation?' (visited 23/02/02) < http://www.shellnigeria.com/shell/devastation_rhs.asp >.

In conclusion, it has been seen that oil spill pollution in the Niger Delta arises from a number of causes. Of all, equipment failure and sabotage are the leading causes. However, contrary to the claims of oil companies, the major cause of oil spill in the region is equipment failure – it usually accounts for at least 50 per cent of the yearly incidents. This leads to the next query: consideration of the environmental impacts of oil operations.

3. 3. 2. Impact of Oil Pollution on the Niger Delta Environment

The impact of oil pollution on the Niger Delta environment has been fairly documented in existing literature.⁹² Of all, the most insightful is, perhaps, the work of van Dessel (Shell's former head of environmental studies in Nigeria, who resigned in protest at the company's environmental record in the Niger Delta). As earlier indicated, this section (and subsequent ones in this Chapter) will draw from some of the published works and from the results of fieldwork which the author conducted in the Niger Delta region in January 2002.⁹³

In one of the most important studies of the problems of oil pollution in the region, Osibanjo recently found that 'incessant oil spills of various magnitudes and improper disposal of oil exploration and production wastes according to sound environmental principles have resulted in massive pollution of water and land; destruction of artisanal fishery; and generally adverse socio-economic consequences'.⁹⁴ Similar findings have been made by other researchers. Even oil companies acknowledge that 'oil spills'⁹⁵ can cause damage to the environment and

⁹² Mostly written by disinterested persons, ensuring a high level of objectivity.

⁹³ However, it bears repeating that this work is different from previous studies because of its emphasis on the (international) rights of indigenous peoples (the Niger Delta people); the impacts will (and should) be seen from this perspective.

⁹⁴ Osibanjo (1992: 97).

⁹⁵ 'Oil spills' are uncontrolled releases of crude or refined oil into the environment.

the inhabitants of the affected area. In the words of Shell Petroleum Development Company of Nigeria Limited (SPDC): 'Since 1989, SPDC has recorded an average of 221 spills per year in its operational area...SPDC...is committed to...paying compensation to affected communities.'⁹⁶ Obviously, the payment of compensation suggests that damage has been done by the oil spill.

With respect to land, it has been found that oil spills have had adverse effects on the availability and productivity of farmlands. Odu (1981) records that oil spill contamination of the top soil may render the soil unsuitable for plant growth by reducing the availability of essential nutrients (e.g. nitrogen), or by increasing toxic contents in the soil. He concluded that 'heavily contaminated soil may remain unusable for months or years until the oil has degraded to tolerable levels'. In fact, scientific studies following the 1972 major oil spill at Shell's Bomu-11 oil field (which affected 242.8 hectares of farmlands close to human settlements) indicate that whereas the less affected soils were returned to production in less than one and a half year, the heavily affected soils remained agriculturally unusable for several years.⁹⁷

In the case of the impact of oil spill on the ubiquitous water systems of the region, it has been pointed out that 'water pollution by petroleum products constitutes one of the most pressing problems in the Niger Delta region'.⁹⁸ And in a recent study, an environmental NGO surmised: 'In the Niger Delta area, where oil pollution of water is most serious, the effects have often been catastrophic.'⁹⁹ Its report noted that a film of oil has formed on many water bodies in the region, preventing natural

⁹⁶ See SPDC, 'The Environment' (Visited 3 February 2002) <http://www.shellnigeria.com/info/info_display.asp?Id=135>. There are suggestions that the incidence of oil spill is far higher than the 221 cases per year, as admitted by Shell. See Annual Reports of the Civil Liberties Organisation (CLO).

⁹⁷ Hutchful (1985: 118).

⁹⁸ Eaton (1997: 267).

⁹⁹ Nigerian Environmental Study/Action Team (NEST) (1991: 87).

aeration and thereby causing the death of marine life trapped below.¹⁰⁰ Moreover, the report notes, fish (which is a major source of subsistence/food for the people) ingest the oil and thereby become unpalatable or even poisonous when consumed.¹⁰¹ Even the peoples' sources of drinking water¹⁰² (including ground water aquifers) are not spared of the deleterious effects of oil pollution and other oil industry activities. This situation has been admirably summed up in the following words:

[S]pills of crude, dumping of by-products from exploration, exploitation and refining operations (often in fresh-water environments¹⁰³) and, overflowing of oily wastes in burrow pits during heavy rains has had deleterious effects on bodies of surface water used for drinking, fishing and other household and industrial purposes. The percolation of industrial wastes (drilling and production fluids, buried solid wastes, as well as spills of crude) into the soil contaminates ground-water aquifers.¹⁰⁴

Interestingly, this finding was recently confirmed by J.P. van Dessel (formerly Shell's head of environmental studies in Nigeria), who concluded that the 'burial of oily or chemical waste in the process of exploration and production [a common practise by oil multinationals operating in Nigeria (see below)] bears enormous

¹⁰⁰ Ibid, at 87 – 88. In Mexico, oil spill has also been found to have caused 'rapid depletion of fish stocks, worsened the economic condition of fishermen, and degraded the biomass'. See Ikein (1990: 132). Also, oil spill (oil pollution) has been found to cause the large-scale killing of seabirds. 'The oil apparently penetrates the feathers, displacing the air which is normally trapped in the feathers and which provides insulation and buoyancy. The birds become colder and more susceptible to diseases and experience difficulty flying' (Hodges, 1973: 165). Following the *Torrey Canyon* disaster of 18 March 1967 (when a Tanker carrying over 100,000 metric tons of oil ran aground, releasing most of its cargo into the water), it has been suggested that about 100,000 birds were killed, and about 100 birds survived out of the 5700 that were caught and cleaned off in an effort to save their lives. See Hodges (1973: 165). Although there is yet no record of the impact of oil spills on the bird species of the Niger Delta region, it is clear from this scientific finding that the life of the Niger Delta waterfowls are in danger from the frequent oil spills in the region.

¹⁰¹ At 88.

¹⁰² From the results of interviews conducted by the author in January 2002, it is a verifiable fact that in most areas of the Niger Delta drinking water is drawn straight from streams and creeks, with no alternative source open to the people. In this situation, according to one study, 'a spill can cause severe problems for the population dependent on the water source affected, even if it disperses rapidly and the water soon returns to its previous condition. This is especially so as 'crude oil contains thousands of different chemicals, many of them toxic and some known to be carcinogenic with no determined safe threshold for human exposure.' See Greenpeace U.K. (1993).

¹⁰³ On this, it has been significantly remarked: 'In Nigeria...it is common for oil companies to discharge their effluents directly into fresh-water bodies. Even where such direct disposal does not occur, the techniques adopted have not been pollution-proof' (Hutchful, 1985: 119).

¹⁰⁴ Hutchful (1985: 118), citing Oteri (1981), who also found that 'groundwater contamination resulting from hydrocarbon spills is a widespread phenomenon [in the Niger Delta]'.

ecological and health hazards as it can affect ground water, resurface during the rainy season or directly pollute the surrounding environment'.¹⁰⁵

The result of water pollution is that, absent pipe-borne water (which hardly exists or flows in the region), the people have no access to portable water within their locality;¹⁰⁶ they can only obtain this at great costs from distant locations.¹⁰⁷

Further adverse effects of oil pollution in the Niger Delta can be found in the biodiversity-rich mangrove forests (most spillages reportedly occurred in the Niger Delta forest zones¹⁰⁸). According to one study, 'mangroves and sheltered salt marshes exhibit the greatest sensitivity of all coastal environments to long-term danger from oil-spill pollution' (Gundlach, Hayes and Getter, 1981: 10). The study found that mangrove swamps constitute 'oil-trap' areas, retaining spilled oil for long periods and preventing easy clean-up. 'Defoliation and death of trees may occur within three months of the initial spill, either through "smothering" of "breathing" pores by heavy crude or by the toxic action of lighter crude. Recovery of dead mangroves may take decades if the substrate remains oiled. When the tree is not killed outright, sub-lethal effects may be noted on the tree¹⁰⁹ (bark fissuring and scarring, leaf deformities and so on) as well as associated organisms¹¹⁰ (such as death or reduction of tree crabs or snails)'.¹¹¹ Perhaps the enormity of this kind of impact led Angaye et al (1983) to conclude that 'the inhabitants of the ecological zones of the riverine areas of Nigeria

¹⁰⁵ van Dessel (1995).

¹⁰⁶ See Vidal (1995).

¹⁰⁷ NEST (1992: 170). Part of the complaints of the people of Ojobotown (a Niger Delta community) – contained in their placard – to a visiting National Emergency Relief Team in 1980 was that: '...oil has killed our fish. Our creeks are polluted. No improvement, *no water...*' (Italics added). See Ministry of Information, *Hazards of Oil Exploration in Bendel State* (Benin City, Nigeria, 1981: 14). Bendel State formerly encompassed the present Delta State. With the creation of Delta State in the 1990s, it is no longer a Niger Delta State as defined in this work. In fact, today, Ojobotown is part of Delta State.

¹⁰⁸ Hutchful (1985: 116).

¹⁰⁹ Some of the affected trees serve as medicinal plants for the indigenous (Niger Delta) people or economic trees.

[Niger Delta] where petroleum is produced are the most obvious victims of the environmental and socio-economic hardships that oil mining and spillage have produced in the country'.¹¹² (The specific impacts of oil operations in the Niger Delta forest zones (wetlands) will be further examined in section 3. 7). Interestingly, Angaye's conclusion appears to be supported by a recent journalistic account of the impact of a recent oil spill (from Shell's installations) at Sapele,¹¹³ in the Mid-western area of the Niger Delta:¹¹⁴

About ten persons have been admitted at various hospitals in Sapele, Delta State, as a result of the side-effects [of] crude oil spillage which occurred at Ugborikoko village, near Sapele. The oil spillage...occurred on Shell Petroleum Development Company (SPDC) facility located on the Mayuka Creek on the River Ethiope, adjacent to Sapele Gas station. The victims, our sources revealed, were rushed to hospitals, because of the complications arising from the consumption of polluted water from the adjoining rivers. Already, the accident had destroyed aquatic and other economic life of the people in [the]neighbourhood. Specifically, fishing activities had been paralysed in the entire Sapele and its environs as the spillage reportedly killed the fish in all the rivers in the areas. Our correspondent who visited the scene yesterday sighted condensed crude floating on the river and uncountable number of burnt shacks and dry trees. The *Vanguard* checks in the areas also revealed that the crude had spilled to over 35 kilometres on the river. The secretary, Sapele/Okpe community Mr. Onoriode Temiagin, who spoke with the *Vanguard*, confirmed the admission of ten of his kinsmen at various hospitals in Sapele. Temiagin, who claimed that the incident had brought untold hardship to his people, since they were predominantly fishermen, further lamented that "it has rendered us jobless, it is unfortunate to recall that nobody has caught fish here since the incident occurred." He said his people were considering alternative source of livelihood in order to make life meaningful for them...

This account also bears out an earlier finding of a Nigerian-based environmental NGO, which had found that in the Niger Delta region 'both water and

¹¹⁰ Similar finding has been recorded with respect to an oil spill incident in Mexico. According to one author: 'In one spill of...oil – by the tanker *Tampico Mara* in March 1957 at the mouth of a small cove in Mexico – almost the entire population of plants and animals was killed' (Holcomb, 1969: 205).

¹¹¹ Gundlach, Hayes and Getter (1981: 10 – 13) – noted in Hutchful (1985: 116).

¹¹² See *Proceedings of the 1983 International Seminar* (Lagos, Nigeria: NNPC, 1983) – quoted in Ikein (1990: 135).

¹¹³ Sapele is a city in Delta State.

soil have become so polluted with oil that fishing, forestry, and agriculture are no longer possible in large areas.¹¹⁵ And, specifically on the Ogoni community of the Niger Delta, it has been claimed: 'Ogoni people...have experienced some of the worst cases of ecological devastation caused by oil exploration, with agriculture and water-life virtually destroyed'.¹¹⁶ Similarly, it has also been claimed that 'Evidence of environmental disaster is conspicuous throughout Ogoni where vast areas of terrestrial and aquatic vegetation have been destroyed by oil spills. Marine life, for which the vegetation provided a life-support system, has largely disappeared with the vegetation'.¹¹⁷ It would seem also that the wildlife of the region are also affected by oil pollution.¹¹⁸

In terms of human health, the above journalistic account indicates that oil pollution can cause ill-health.¹¹⁹ In fact, Olusi (1981), drawing from epidemiological studies conducted in the United States found that there is a correlation between exposure to oil pollution and the development of cancer.¹²⁰ Additionally, he found that oil workers suffered abnormalities in blood counts, increased malaria outbreaks, respiratory tract infections, urethritis, conjunctivitis, dermatitis, and other symptoms. In view of these, he concluded that communities and oil workers who are exposed to oil pollution ought to be protected from associated health hazards. In confirmation of these health hazards, Osibanjo recently reported that the Niger Delta region has seen a

¹¹⁴ See 'Oil Spillage occurs in Sapele' (*Vanguard*, 18 January 2002).

¹¹⁵ NEST (1992: 170).

¹¹⁶ Osibanjo and Ajayi (1995: 740).

¹¹⁷ Greenpeace (London), *News Release*, 20 July 1993; *Cultural Survival Quarterly*, Summer 1993.

¹¹⁸ The vast amounts of petroleum which washed upon British and French beaches following the 1967 *Torrey Canyon* (oil spill) disaster were found to have destroyed wildlife and harmed marine ecosystems. See Hodges (1973: 164).

¹¹⁹ Hodges (1973: vii) points out that 'it should be recognised...that it is the health and environmental effects of pollution that are of most concern to mankind'.

¹²⁰ Although oil-pollution-related health problems in Nigeria have not been fully documented, Olusi's laboratory studies on rats suggest a potential for mutagenic and carcinogenic effects (noted in Ikein, 1990: 134). Also, carcinogenic hydrocarbons, such as 3,4-benzpyrene, have been reported in marine environment and 'they are occasionally concentrated by shellfish' (Hodges, 1973: 165). This could

'phenomenal increase in incidents of organic diseases such as cancer.'¹²¹ And in Ogoni-land (in the Niger Delta), one villager was reported to have remarked to a researcher: 'We have scratches on our body and rashes on our skin any time we go into the water.'¹²² Significantly, this was not the first time the people are making complaints about the health hazards of oil pollution. For instance, as early as 1980,¹²³ the people of Ojobo-town (a Niger Delta community) had protested to a visiting National Emergency Relief Team with a placard which partly read: 'Our lives are threatened by oil spillage.'¹²⁴ Even most recently, it has been claimed that children have died as a result of drinking polluted water¹²⁵, and that fish taste of paraffin (kerosene), indicating hydrocarbon contamination.¹²⁶

In summary, oil pollution (oil spill) has far-reaching impacts on the environment and the inhabitants of the Niger Delta region where it takes place. (The social impacts are further discussed below). This appears to have been assisted by the attitude of the oil companies towards environmental issues. It has been shown, to borrow the words of Josephs, that: 'The threats of pollution are real. Their economic

explain the high incidence of cancer in the Niger Delta region, which could have been contracted by eating affected shellfish (which is abundant in the region).

¹²¹ Osibanjo (1992: 95, 97).

¹²² Vidal (1995: at T3).

¹²³ Records show that 1980 was one of the worst years of oil spillage in the Niger Delta. See Ikein (1990: 41).

¹²⁴ Ministry of Information, *Hazards of Oil Exploration in Bendel State* (Benin City, Nigeria, 1981: 14). The placard said more: '...oil has killed our fish. Our creeks are polluted. No improvement, no water and lack of electricity'. The Ogoni people have also reeled out tales of woes as a result of oil operations in their area. In the words of a local spokesman:

The Ogoni case is that of genocide being committed in the dying years of the twentieth century by multinational oil companies under the supervision of the Government of the Federal Republic of Nigeria. The once beautiful Ogoni countryside is no more a source of fresh air and green vegetation. All one sees and feels around is death. Death is everywhere in Ogoni. Ogoni languages are dying; Ogoni culture is dying; Ogoni people, Ogoni animals, Ogoni fishes are dying because of [over] 33 years of hazardous environmental pollution and resulting food scarcity (G.B. Leton) – Quoted in Naanen (1995: 66).

¹²⁵ See *Shell V. Enock* [1992] 8 NWLR (Pt. 259) 335, where it was claimed that five children had died as result of drinking oil-polluted water.

¹²⁶ Human Rights Watch (1999: 67). In January 1998, a US-based Nigerian opposition Radio (Radio Kudirat Nigeria) reported that about one hundred villagers from communities affected by a major

[environmental, social and cultural] consequences are real. There are sufficient data to make strong cases based on facts'.¹²⁷ Most significantly, majority of the spills occurred in the swamp forests of the Delta, while much of the remainder occurred offshore. 'In other words, most spillage was located precisely where the greatest ecological damage might be inflicted' (Hutchful, 1985: 116). (Specific impacts of oil operations on the Niger Delta wetlands will be examined in 3. 7).

However, oil pollution is not the only environmental concern of the Niger Delta region. As indicated above, the flaring of associated gas is equally an important environmental concern in the region. Hence, the next session would examine the environmental impacts of gas flares in the region.

3. 4. Environmental Impact of Gas Flare

Another critical environmental problem and hazardous aspect of oil operations in the Niger Delta region relates to the flare of associated gas. Eaton aptly describes this phenomenon as 'tall flaming towers which burn off natural gas, a by-product of the [crude oil] refining process'.¹²⁸ Historically, gas flaring is as old as oil production in the country.¹²⁹ Available evidence suggests that most of the flare stacks/sites are located within human settlement areas. For instance, Hutchful records that in Rumuola (in the Port Harcourt (Capital) city of Rivers State) 'a Shell company gas flare is situated about 30 metres from the nearest dwelling [residential home]'.¹³⁰ That

Mobil oil spill of 12 January 1998 had been hospitalised as a result of drinking contaminated water. (Noted in Human Rights Watch (1999: 67)).

¹²⁷ Quoted in Hodges (1973: vii).

¹²⁸ Eaton (1997: 261, footnote 18). The flare stack is laid on the ground close to a 'flowstation' – a facility that gathers oil from a number of different oil wells (van Dessel, 1995: 17).

¹²⁹ Kassim-Momodu (1986: 75).

¹³⁰ In *Chinda V. Shell-BP* (1974) 2 RSLR 1, the affected community brought an action for 'nuisance and damage caused by heat, noise and vibration resulting from the defendant's [Shell's] oil [production]...directly from a [gas] flare at defendant's flare site known as "APARA" within a short distance of the plaintiffs' village'. The plaintiffs alleged damage to their farm crops, economic trees (raffia palms) and buildings. However, the trial court found that the alleged damages were not proved.

was in 1985. Today, although this flare stack/site has been relocated (only in 1995,¹³¹ having been there for several years), the investigation of this writer (in January 2002) reveals that other flare stacks/sites in the Niger Delta, perhaps due to population pressure, still exist in close proximity to peoples' homes.¹³² Indeed, this is a confirmation of recent claims by an international NGO (Human Rights Watch): 'In most cases, gas flares are very close to communities¹³³ [in the Niger Delta]'.¹³⁴ It is possible that the close proximity of flare stacks/sites to human abodes accounts for its adverse impacts (see below). However, even flare stacks/sites which are located outside human abodes – in the bush – are not less destructive, as available evidence indicates.

Commenting on the problem of gas flaring in the Niger Delta, an author has observed that 'gas flaring in the Niger Delta region has...led to significant environmental problems' (Eaton, 1997: 269). And, according to one scientific study: 'The continuous flaring of gas in the Niger Delta area over the last forty years or so has contributed significantly to the release of "Greenhouse gases" into the atmosphere and not surprisingly to "Acid Rain".'¹³⁵ On their part, Niger Delta communities

¹³¹See SPDC, 'The Environment' (Visited 3 February 2002)

<http://www.shellnigeria.com/info/info_display.asp?Id=135 >

¹³² As in one community in Ekpeye-land, where it is virtually in the midst of people's homes.

¹³³ It seems the location of flare stacks/ sites within or close to communities (and people's abodes) has judicial support. In *Chinda V. Shell-BP* (1974) 2 RSLR 1, where the plaintiffs prayed for an order of the court that 'defendants refrain from operating a similar flare stack within five miles of the plaintiffs village', the learned judge described the relief sought as 'an absurd and needlessly wide demand' (at 14).

¹³⁴ Human Rights Watch (1999: 74). Shell (and other oil companies operating in Nigeria) claims that it is the members of the oil-bearing communities who construct settlements around the flare stacks, and not that the stacks were originally constructed in their midst. (See HRW, 74). This may well be so, but it cannot be an argument for not relocating it, especially as population pressure is likely to be the reason for such action (assuming the claim is founded).

¹³⁵ Osibanjo (1992: 97) (Italics in the original). Shell disputes the claim that gas flare contributes to acid rain in the Niger Delta: 'Following widespread allegations that gas flaring by SPDC was contributing to acid rain in the Niger Delta, the company commissioned an independent study by consultants from the University of Calabar. The study found that acid rain was not widespread in the area. In fact, it occurred only during one month of the seven-month study. During that month there was no evidence that flaring was a major factor'. See SPDC, 'The Environment' (Visited 3 February 2002) <http://www.shellnigeria.com/info/info_display.asp?Id=135 >. However, the report of the Calabar University consultants/experts is disputed by other experts in the Rivers State University of Science

complain that 'gas flaring has destroyed plant and wildlife'.¹³⁶ They also claim to suffer from respiratory diseases and have 'become half-deaf from the incessant din of the gas flare'.¹³⁷ According to one Ogoni song, bemoaning the problem of gas flare: 'The flames of Shell are flames of Hell, we bask below their light, nought for us to serve the blight, of cursed neglect and cursed Shell'.¹³⁸ (These claims will be further pursued later, by considering facts presented in reported court cases between individuals and/or families/communities and the Oil Multinational companies (MNCs)).

It is notable that the leading oil company in Nigeria – Shell Petroleum Development Company of Nigeria Limited (SPDC or simply Shell)¹³⁹ – claims that when most of its facilities were built there was no significant market for Nigerian gas nationally or internationally. 'As a result, no system was built to collect associated gas which is produced along with the oil, as a by-product...[And], consequently, almost

and Technology, Port Harcourt, who dismissed it as the job of paid contractors: 'They simply produced what their hirers agreed with them. No truly independent research can produce such an awful result, in the face of stark facts...' (Interview with author on 21 January 2002). Significantly, this cynicism has also been expressed by a writer, thusly: 'Oil companies tend to imply that oil pollution does not degrade the environment to the extent popularly imagined. *Spill studies conducted by oil companies or their consultants attempt to minimize or deny the environmental and human impact of spills*' (Hutchful, 1985: 120) (Italics mine). There is also evidence that, for similar reasons as those of the cynics, some courts of law in Nigeria may not believe 'expert' witnesses called by oil companies. For example, in the recent case of *Shell V. Farah* [1995] 3 NWLR (Pt. 382) 148, at 184 the following observation was made: 'What did the defendant [Shell] do? They engaged the same man to go back to the area to re-assess the soil and the nature of the vegetation in the area. This is in effect asking the same expert to go back to the land and confirm that he actually did the job that he was commissioned to do some years ago. If I may ask, what kind of report do the defendant [sic] expect from Defence witness 2 [the expert]? The defendant has been sued because the land has not been rehabilitated, obviously the professor [expert witness] would not have come back with a report that the land has not been rehabilitated and that crops are not growing in the area that is said to be rehabilitated.' Perhaps a more damaging criticism of oil company-retained experts for the assessment of environmental issues is the attack on their quality. It has been claimed that the companies 'hired a string of local environmental consultants 'which have a generally low scientific level and little technical/industrial expertise' to write "lengthy" and "poorly constructed" assessments' (CLO Annual Report, 1998: 206).

¹³⁶ See Human Rights Watch/Africa, Nigeria (1995: 8).

¹³⁷ Ikein (1990: 269) – citing Rowell, 'Shell Shocked: The Environmental and Social Costs of Living with Shell in Nigeria' < <http://www.greenpeace.org/comms/ken/intro.html> > (which he visited on 16 January 1997).

¹³⁸ Reproduced in Ikein (1990: 262).

¹³⁹ In the company's own words: 'The Shell Petroleum Development Company of Nigeria Limited (SPDC) is the largest oil and gas company in Nigeria...' See SPDC, *2000 Highlights* (Lagos, Nigeria, 2000). See also Eaton (1997: 266, footnote 17).

all SPDC's associated gas is flared – some 1,000 million scf/d.¹⁴⁰ This figure of the quantity of gas flared daily may be contrasted with another given by the same company: 'The company has 106 flare stacks and flares around one billion standard cubic feet of gas a day.'¹⁴¹ It difficult to reconcile this difference, especially as they are contained in the same document – Shell's environment page web site. Perhaps the first figure refers to the quantity of gas flared per flare stack per day, whereas the second figure is the cumulative quantity of gas flared from all flare stacks per day.¹⁴² In any case, sources suggest that the quantity of gas flared is far greater than the highest figure which the company admits.¹⁴³ On the whole, it is certain that the quantity of gas flared is high.¹⁴⁴

Apart from the associated environmental problems noted above, it seems the high quantity and the nature of the gas flare (*its burning characteristics*) accounts for other environmental problems, some of which are noted below. Writing in the influential Magazine of the Royal Swedish Academy of Sciences (*Ambio*), two World Bank consultants described the situation thus:

As a by-product of oil production, Nigeria flares more gas than any other country in the world; most of it from the Niger Delta. About 88% of the associated gas is flared...¹⁴⁵ Considering the low combustion efficiency of

¹⁴⁰ See SPDC, 'The Environment' (Visited 3 February 2002)

<http://www.shellnigeria.com/info/info_display.asp?Id=135>.

¹⁴¹ See SPDC, 'The Environment' (Visited 3 February 2002)

<http://www.shellnigeria.com/info/info_display.asp?Id=135>.

¹⁴² Compare the following: 'In the 1970s when oil production hit 2 million barrels per day, about 2 billion cubic feet of associated natural gas was produced on a daily basis. That shows a very high gas/oil ratio of 1,000 standard cubic feet per barrel on the average. With the flaring of 90 per cent of that, Nigeria's flared gas at that rate of oil production is estimated at the equivalent of 300,000 barrels of oil per day' (Kassim-Momodu, 1986: 69 – Citing Amu, (not dated): 16).

¹⁴³ See, for example, Moffat and Linden (1995).

¹⁴⁴ According to official figures, Shell – the leading oil company in Nigeria – remains the greatest producer of gas emissions in Nigeria in absolute terms. However, other oil companies operating in the country (such as Chevron, Agip, Mobil, and Texaco) also make considerable contributions to gas emissions. As the following figures indicate, but for the size of its operations, Shell's proportion of gas flare is smaller than that of some companies. In 1997, Texaco flared 99.7% of its associated gas; Agip Energy flared 99.1%; Shell and Mobil reportedly flared 64.7% and 64.3% respectively – Reproduced in *Vanguard* (1 October 1998).

¹⁴⁵ This finding has support in an earlier research, where it was stated that: '...over 90% of Nigeria's associated gas production is flared, with less than 5 % being utilized for industrial and domestic

Nigerian flares (80 per cent) a large portion of the gas is vented mainly as methane...*Based on the much higher global warming potential of methane...the significance of the Nigerian gas flares is considerable.*¹⁴⁶ (Italics mine).

The implication of the above finding is that gas flares in the Niger Delta produces enormous heat.¹⁴⁷ As HOLDEN, C.J. has rightly observed, 'the more gas that is burnt, the more heat is generated. That is obvious.'¹⁴⁸ Indeed, notwithstanding its denial of the actual effects of gas flare on the environment,¹⁴⁹ the company seems to admit that gas flare is harmful to the environment,¹⁵⁰ and this could partly be as a result of the heat it generates. This indication can be found in the following statement: 'The company is conserving gas where possible and is selectively closing wells which produce a high proportion of gas. [It] is also fitting aspirated tips to flares to improve burning characteristics. In addition, flares are monitored for noise, radiation,¹⁵¹ smoke

purposes. Depending on the volume of oil production, total associated gas varies between 600 million and 1.5 billion cubic metres a month, or a maximum of 2 million cubic metres every hour...' (Hutchful, 1985: 117).

¹⁴⁶ Moffat and Linden (1995: 533). By way of comparison, the World Bank reports that in 1995, up to 76% of the associated gas from oil wells in Nigeria was flared, as compared with 0.6% in the United States and 4.3% in the United Kingdom. See World Bank (1995, Volume I: 59). This situation has led Frynas (2000: 178, footnote 378) to conclude that 'if judged by the example of gas flaring, it would appear that oil companies have taken environmental concerns in Nigeria less seriously than in other countries.'

¹⁴⁷ Frynas (2000: 163) claims that 'little is known about actual flame temperatures, which can range from 300 to 1400 C, and their effect'. In contrast, an academic engineer (with the Rivers State University of Science and Technology, Nigeria) has found that 'increased temperature in gas flared areas [in the Niger Delta] ranges from 1,300 C – 1,400 C', noting that 'this is considered very high for both plants and animal life, because they contain sulphides, carbonates, nitrates and so on, which are released into the atmosphere' (Idoniboye, K., *Lecture Notes*, 1998). There are other research results (see text below) which indicate the effects of gas flare heat on the environment.

¹⁴⁸ See *Chinda V. Shell-BP* (1974) 2 RSLR 1, at 13.

¹⁴⁹ For instance, as noted earlier, the company denies that gas flare contributes to acid rain in the region.

¹⁵⁰ The World Bank estimated that the total emission of coaldioxides from gas flaring in Nigeria in 1995 was 35 million tons per year, and the total emission of nitricoxides and sulphurdioxides in the same year was 210,000 and 40,000 tons per year respectively. See World Bank, 1995, Volume II. Annex I). Scientifically, these have the potential to cause damage to the environment.

¹⁵¹ In its broadest sense, 'radiation is energy being propagated from one place to another' (Hodges, 1973: 244). This kind of energy has long been found to be injurious to life. As one author puts it: 'Numerous writers, both in Europe and America, have published accounts of the injurious effects produced on the skin by a too prolonged exposure to the Roentgen rays [radiation], the symptoms varying in nature and intensity from "sunburn" to dermatitis, vesication, and ulceration. Loosing of the hair, sometimes carried so far as to result in baldness, was frequently observed' (Lancet, 1897: 752) – Quoted in Hodges (1973: 244). Hodges (1973: 245) points out that 'the radiation that is of concern as

and emissions^{152, 153} Apart from providing support for the claim of the inhabitants of the region that they have become 'half-deaf'¹⁵⁴ because of excessive noise emanating from gas flare (see above) and indicating other possible negative impacts of gas flare (e.g. radiation), this statement seems also to agree with the finding of the World Bank consultants on the poor burning characteristics of the Niger Delta gas flares.

Perhaps it is the intensity of heat produced by the gas flares, as suggested by the World Bank consultants (quoted above), that accounts for its local impact on plant life and farm yields. According to Robinson:

Gas flaring has been the most constant environmental damage because in many places [in the Niger Delta] it has been going on 24 hours a day for over 35 years. There are hundreds of gas flares throughout the Niger Delta. It affects plant life, pollutes the surface water and as it burns, it changes to other gases which are not very safe. It also results in acid rain. With the pullout of Shell from Ogoniland, gas flaring has stopped in 4 of the five flow-stations. Where the gas flaring has stopped, people were able to see a difference in their vegetation; farm yields are better than before. The people did not know what it was like to live without Shell. It is only now that the people in these areas can see what type of environmental devastation the gas flaring had been causing for the past 35 years...¹⁵⁵

In addition to its impact on plant life, it has also been suggested that gas flare affects wildlife.¹⁵⁶ As one observer puts it: 'Gas flaring has been associated with

pollution is ionising radiation, radiation of sufficiently great energy [such as that which can be produced by gas flare] to ionise atoms and molecules.' On the basis of this, it is not difficult to appreciate the environmental hazards of constant gas flare in the Niger Delta; hazards which the Ogoni community has generically described in their song as "hell".

¹⁵² The emissions (soot) from the gas flare stacks cause air pollution (resulting in respiratory disorder, as claimed by the people), and also water pollution when the fowled air is washed down to water bodies. See Ministry of Information, Bendel State (1981: 34).

¹⁵³ See SPDC, 'The Environment' (Visited 3 February 2002)

<http://www.shellnigeria.com/info/info_display.asp?Id=135>. It is submitted that the preventive and monitoring measures which the company claims it is implementing will not be necessary if the company is not convinced of the harmful effects of gas flare.

¹⁵⁴ Noise has been scientifically proven of being capable of causing deafness.

¹⁵⁵ Robinson (1996: 28).

¹⁵⁶ The bright light of gas flares scares wildlife, causing them to migrate. According to investigations by Human Rights Watch: "Villagers close to flares complain that nocturnal animals are disturbed by this light, and leave the area, making hunting more difficult". See Human Rights Watch (1999: 74). Similarly, oil spill has been found to affect wildlife. For instance, in an oil spill incident in Mexico it was found that 'almost the entire population of plants and animals was killed'. See Holcomb (1969: 206).

reduced crop yield and plant growth on nearby farms¹⁵⁷ [this is in agreement with Robinson's finding], as well as *disruption of wildlife in the immediate vicinity*' (Hutchful, 1985: 118).¹⁵⁸ Similarly, the Human Rights Watch notes that: 'The most noticeable yet generally unremarked effect of the flares is light pollution: across the oil producing regions (sic) [Niger Delta], the night sky is lit up by flare, that, in the rainy season, reflect luridly from the clouds. Villagers close to flares complain that nocturnal animals are disturbed by this light, and leave the area, making hunting more difficult'.¹⁵⁹

There is also evidence to indicate that the ubiquitous¹⁶⁰ gas flaring in the Niger Delta contributes to water pollution in the region. According to the officials of a Government Ministry: '...where the gas is flared, the soot in the atmosphere contaminates rain water, which is one of the sources of drinking water [in the region]. This disadvantage becomes strangulating if it is remembered that most drinking wells have been polluted [by oil spillage]'.¹⁶¹ Lastly, it was claimed, in a recent survey of the region by the author, that gas flare destroys (corrodes) steel roofing sheets of the resident indigenous people.¹⁶² A non-governmental organisation – the Environmental Rights Action (ERA) – made similar claim in its 1995 Annual Report.¹⁶³ This is probably the result of acidification caused by the flares.

¹⁵⁷ Similar findings of diminished farm yields as a result of mining operations have been reported in other parts of the world. For instance, Howard (1988: 126-68) reports that in small Pacific Islands such as Nauru and Ocean Island, where mining has been conducted for many decades, a large proportion of fertile land has been destroyed, and food production capacity has been almost entirely lost. (Noted in O'Fairchealleagh, 1991: 248).

¹⁵⁸ Italics mine.

¹⁵⁹ Human Rights watch (1999: 74).

¹⁶⁰ In Ogoniland alone (a small community of about 500,000 people), Shell has seven gas flare stacks/sites. See Vidal (1995: T2). On the whole, the company admits that it has '106 flare stacks' in the Niger Delta. See SPDC, 'The Environment' (Visited 3 February 2002)

<http://www.shellnigeria.com/info/info_display.asp?Id=135>.

¹⁶¹ Ministry of Information, Bendel State (1981: 34). The statement was the result of a scientific study.

¹⁶² Interviews with author on 14, 15, 21 and 22 January 2002.

¹⁶³ ERA (1995).

Notwithstanding the associated environmental problems, as identified here, there is an indication that gas flaring may have come to stay in the Niger Delta. According to a recent statement by SPDC, the company has 'developed plans that will stop all *unnecessary flaring* by 2008'¹⁶⁴ (Italics mine). This implies that gas will continue to be flared¹⁶⁵ where it is necessary;¹⁶⁶ yet there is no definition of what is 'necessary flaring'. Having regard to the opposition of the people to gas flare,¹⁶⁷ it is

¹⁶⁴ See SPDC, 'The Environment' (Visited 3 February 2002)

<http://www.shellnigeria.com/info/info_display.asp?Id=135>. Until recently, 2004 was the target year to end gas flaring in the Niger Delta; it was only recently changed to 2008 (apparently to meet the lobby of oil companies). See 'Govt Extends Zero Gas-Flaring Deadline to 2008' (*Vanguard*, 23 October 2001). This is not the first time a date for ending gas flares in Nigeria has been changed. In fact, there is evidence to suggest that the Federal Government is not serious with the issue of ending gas flaring. The first decision to end gas flaring was made in 1976 under the leadership of Lt. -Gen. Olusegun Obasanjo. Oil companies were invited by the government and informed of government's decision that gas flaring must stop by 1 January 1984. And after a series of meetings on the issue, a consent agreement was signed with the oil companies: gas was to be re-injected, and not flared. This was followed by the promulgation of the Associated Gas Re-injection Act in September 1979, which imposed a duty on every oil company in the country to submit detailed plans for gas utilization and re-injection by 1 April 1980. Section 3 (1) of the Act forbids the flaring of gas after 1 January 1984 (breach of which carries a penalty of forfeiture of concessions, *inter alia*). (For an account of the gas flare question before 1979, see Turner (1977: 174 & 176)). However, the government never enforced the provisions of this Act, perhaps for economic reasons. In November 1984, the Minister of Petroleum made the Associated Gas Re-injection (Continued Flaring of Gas) Regulations, whereby he can issue certificates for the continued flaring of gas. This effectively altered the intention of the Act. Later, in 1985, the Associated Gas Re-injection (Amendment) Act was made. The amendment permits an oil company to continue gas flaring on the penalty of payment of fine, as the Minister may fix for every 28.317 standard cubic metre (SCM) of gas flared (some have suggested that the amount fixed was ridiculous – 2 Kobo per 28.317 SCM of gas flared. For example, Frynas (2000: 88) argues: '...the fines for gas flaring were insignificant. It was often cheaper for oil companies to continue gas flaring than to invest in gas projects'). Yet, there is evidence that the government does not seriously enforce this penalty. According to Kassim-momodu (1986: 85), 'the Federal Government decided in 1986 to take "a relaxed attitude on the penalties" imposed by law on companies that flare gas'. That decision appears to be prevailing. (For an interesting account on the prefabrication of government on the issue of gas flaring in the Niger Delta, see Kassim-momodu (1986: 81-85). See also Akpan (1997)). On the 'ridiculous' fine of 2 kobo for gas flaring, the World Bank (1995, Volume II, annex J) argued that the fines 'proved to be too small an incentive to induce companies to reduce flaring'. However, in 1996, perhaps in response to criticisms, the fine was increased from 2 kobo to 50 kobo SCM (*Daily Times*, 20 July 1996) and was further increased to 10 Naira in 1998 (Oil & Gas Update, January 1998). According to Frynas (2000: 89), 'the increase...did little more than to offset inflation'. Even so, it arguably represents a significant increase, but the important point is that there is no evidence that the fine is being enforced.

¹⁶⁵ Notwithstanding the seeming decline in gas flaring in recent years (as a result of investments in gas-related projects in Nigeria), Frynas (2000: 178, footnote 378) asserts that 'continuation of gas flaring [is] likely to continue in the short-term and the medium-term'. Compare Frynas (2000: 89).

¹⁶⁶ May be this is due to the explanation that: 'Projects to conserve gas currently being flared are complex and expensive. They will take years to develop and depend on the creation of markets for gas. There are no instant solutions.' See SPDC, 'The Environment' (Visited 3 February 2002) <http://www.shellnigeria.com/info/info_display.asp?Id=135>.

¹⁶⁷ When the target year to end gas flare was changed from 2004 to 2008, the people of the region vehemently opposed it. For reports, see Nigerian newspapers online, particularly 2000 issues.

possible that the prospect of continuing and indefinite gas flaring is one of the causes of the prevailing crisis in the region.

In any case, it must not be supposed that oil pollution and gas flaring¹⁶⁸ are the only oil operations-related environmental concerns of the Niger Delta. Indeed there is evidence to suggest that apart from the phenomenon of oil pollution and the incidence of gas flaring, there are other production and exploratory activities of the oil companies which contribute to the adverse effects of oil operations in the region. The environmental impacts of some of these activities (mentioned above) are considered in the next section.

3. 5. Niger Delta Environment and Other Sources of Oil Industry Pollution

Apart from the environmental problems visited on the Niger Delta region by oil pollution and gas flare (caused by oil production activities), there is evidence to indicate that environmental problems also arise from other sources in the course of the operations of the oil multinationals in the region. As would be seen, this is probably a (further) reflection of the universal attitude of multinationals towards environmental matters in developing countries. As Young (1995: 156) has pertinently observed, the attitude of oil mining companies in developing countries towards environmental matters is unsustainable. '[B]ecause of the emphasis of the mining industry on extraction for greatest commercial benefit... [their attitude towards the environment] tend to be unsustainable if not openly destructive'.¹⁶⁹ He maintains that:

Environmentally...such destruction, and its secondary effects on water courses, soils and vegetation, demonstrates that this type of mining is not only an unsustainable form of land use in itself but that it also threatens the

¹⁶⁸ For a contrasting view on the environmental impact of gas flares, see World Bank (1995: 112).

¹⁶⁹ In the same vein, Frynas (2000: 179) suggests that the adverse impact of oil operations in the Niger Delta often appears as the result of careless operating practice: 'Oil companies in Nigeria could reduce the impact of oil operations in various ways. For instance, many oil spills could be either avoided or better contained'.

sustainability of other forms of land use. For aboriginal peoples [like the Niger Delta people] the effects on native fauna and flora, on which the subsistence component of their economy depends are of grave concern.¹⁷⁰

In this section, it is intended to explore how the activities of the oil multinationals operating in the Niger Delta further impact on the environment and the inhabitants of the region. For this purpose, three activities of the multinationals, namely: seismic surveys, refinery processes, and disposal of oil spill wastes, will be briefly considered.

In the case of seismic operations, the process of clearing land to lay seismic lines may produce long-term effects on the area, particularly in mangrove swamps. As Dessel (1995: 15) notes, it takes about 2 to 3 years for mangrove bushes to recover after their roots are cut into, and it may take more than 30 years for mangrove trees to fully recover from line cutting.¹⁷¹ In view of this, Shell's figures showing that 56.4 sq. km out of 91.4 sq. km of land cleared in its Eastern Division¹⁷² by 1995 was in mangrove areas,¹⁷³ suggests that enormous environmental damage has been inflicted on the area by seismic surveys. There is also evidence to suggest that the explosives used for seismic operations can be destructive to the environment (e.g. it can affect the soil structure) and to the buildings of the inhabitants of the area where it is shot. According to one study, 'if the holes for explosives are improperly drilled, a detonation can cause a crater' (Frynas, 2000: 158). And as regards damage to buildings, it has been claimed that it can cause cracks on the wall. According to a community leader, Chief Joel Egbufo: 'Explosives shot by seismic companies, which work as contractors to oil companies, have caused enormous damage to my community in recent years; many buildings close to the place of the shots have shown

¹⁷⁰ Young (1995: 157).

¹⁷¹ See Okonta and Douglas (2001: 216).

¹⁷² Perhaps for administrative convenience, Shell operates in two divisions in the Niger Delta, Viz.: Eastern Division and Western Division.

serious cracks...some of these buildings have existed for ages, and nothing of such was ever seen...Sometimes the affected persons have only been given a pittance by way of compensation, which cannot take care of the danger posed to human lives and property by those cracks...'¹⁷⁴

As respects seismic operations in the riverine areas of the region (where the explosives are shot into the water), there is yet no concrete evidence of its impact on the environment in its intrinsic nature. Frynas (2000: 158) claims that its impact is restricted to sea mammals, but does not disclose in what way they are affected. According to him, the release of chemicals during such surveys is thought to be insignificant. In any case, it is difficult to see how sea mammals can be affected in any way and other marine life will remain unaffected.¹⁷⁵

Significantly, it does not seem that the acknowledged impacts of seismic operations, as with gas flare, can ever be fully eliminated. As Dessel (former head of environmental studies in Shell-Nigeria) explained: 'Further reduction of the impact of seismic operations in the mangrove (further reduction of the line width) is not possible without jeopardising the safety of the crews or the quality of the data' (van Dessel, 1995: 19). This implies that some of the associated impacts of seismic surveys will continue as long as the search for oil continues in the Niger Delta. In all probability, this is one of the causes of the prevailing crisis in the region.

Besides seismic surveys, another oil exploratory activity which is known to adversely affect the environment is the drilling of exploratory and appraisal wells.

¹⁷³ See van Dessel (1995: 15).

¹⁷⁴ Interview with author at Imuogu, Rumuekpe in the Rivers State of Nigeria (21 January 2002). As we shall see later, the claim of injury (cracks) to buildings by seismic survey explosives has been the subject of several litigation between the victims and oil companies.

¹⁷⁵ This is an area where scientific research may be urgently needed.

Although the drilling of exploratory wells is not common (because of its high costs¹⁷⁶) as compared with seismic surveys, it would appear that its environmental impact is more far-reaching than seismic surveys. As indicated previously, exploratory wells involves clearance of land for access roads or the dredging of canals, depending on whether the well was to be on land or water. As the findings of van Dessel (Shell's former employee) indicates, clearance of vegetation for the construction of access roads can lead to long-lasting or permanent loss of vegetation, and dredging destroys vegetation and life, 'especially if the dredged material is washed back into the water leading to a reduction of living organisms'.

In all, however, it seems the most damaging effect of drilling is caused by the enormous amount of waste it generates. Describing drilling activities and its impact, Dessel writes: 'Drilling activities require a significant quantity of "mud" or drilling fluid. This is a special mixture of clay, various chemicals and water, which is constantly pumped down through the drill pipe and comes out through the nozzles in the cutting tool. The stream of mud returns upwards to the surface, carrying with it rock fragments cut away bit by bit'. He notes that enormous waste is generated in the process and the 'discharge of this waste into water leads to the degeneration of living organisms in the water' (van Dessel, 1995: 16 and 20-21).

As regards refinery processes in the Niger Delta, solid and liquid toxic wastes products (such as oil and grease, phenolic¹⁷⁷ compounds, cyanide, sulphide, suspended solids, chromium, and biological oxygen-demanding organic matter¹⁷⁸)

¹⁷⁶ Because of cost implications, only 49 exploratory wells were drilled in Nigeria in 1997 (out of which 32 were situated in the country's continental shelf). Records show that Mobile was the most active oil company in drilling that year, with 14 exploratory and appraisal wells drilled, as against Shell's 7. See Petroconsultants (1998: 38-39).

¹⁷⁷ In effect, '1 ppm phenol in water is lethal to some species of fish' (Hodges, 1973: 3).

¹⁷⁸ It has been claimed that these refinery effluents can pollute water bodies if not properly treated and they get into the water system. See NEST (1991: 87). Hodges describes the different types of pollutants produced by oil refineries and petrochemical plants as 'astounding', and lists other pollutants as including: hydrocarbons, acids, alkalis, numerous sodium salts, numerous inorganic and organic sulfur

either exit refineries through drainpipes which often lead directly into the environment, or are 'simply dumped where they immediately contaminate the water';¹⁷⁹ and it would appear that oil drilling wastes (which include drilling muds, salt-water brines pumped out of the well with the crude oil, and some oil as well¹⁸⁰) are handled the same way. In fact, Osibanjo suggests that the Nigerian oil industry 'effluents and emissions are continuously released raw, without treatment or in a few cases with partial, ineffective treatment, into water, land and air' (Osibanjo, 1992: 97). In his study, Osibanjo (an accomplished Nigerian scientific expert), found that petroleum refineries (and oil companies) in Nigeria have 'grossly inadequate', 'ineffective and inefficient' waste/antipollution facilities/devices.¹⁸¹

Remarkably, there is abundant evidence worldwide to suggest that where an untreated oil company/refinery's effluent is allowed (or accidentally or negligently enters) into water bodies, it may result in the pollution of freshwater, and the death of marine organisms.¹⁸² In 1968, for example, the largest single kill, over 4 million fish in a US river, came from chemicals released into a tributary stream when a petroleum refinery's lagoon overflowed into a pond whose walls broke.¹⁸³

Lastly, as was seen earlier, oil spill *per se* can cause enormous environmental damage. Yet, there is accumulating evidence showing that the handling of oil spill (called in industry practice 'clean-up') and disposal of oil spill waste (and even other oil company-generated wastes such as drilling mud) is another environmentally hazardous activity of oil companies in Nigeria. Based on available evidence, after an

compounds, and halogenated and nitrogenated hydrocarbons. 'Many of these compounds cause detectable tastes and odours at concentrations in the ppb range...' (Hodges, 1973: 168).

¹⁷⁹ Eaton (1997: 269).

¹⁸⁰ See Hodges (1973: 168).

¹⁸¹ Osibanjo (1992: 97).

¹⁸² See Hodges (1973: 168-9). Some of the water pollution cases affecting freshwater and causing the death of fish in the Niger Delta may have been caused by this.

¹⁸³ Hodges (1973: 169).

incident of oil spill, oil companies often negligently handle the containment of the spill or carelessly dispose the waste generated from the containment process. By experience, this causes or aggravates adverse environmental impact. According to Frynas (2000: 179), the adverse impact of oil operations often appears as a result of careless operating practices. He noted a case where Shell negligently failed to contain an oil spill.¹⁸⁴ Support for the view that wastes are improperly disposed by oil companies can be found in a tacit admission of Shell as contained in its statement: 'SPDC's environmental programme aims to progressively reduce emissions, effluents and discharges of waste materials which have a negative impact on the environment.'¹⁸⁵

Particularly in the case of disposal of oil spill waste, it seems the waste is often set on fire on the spot, 'without the use of a mobile incinerator in line with international practice'.¹⁸⁶ This point is exemplified by a recent incident at Oloibiri, Bayelsa State (proper name, Aleibiri), where 10 hectares of land were damaged by Shell's fire on oil contaminated waste (CLO Annual Report 1998: 207). Apart from damage to land and vegetation, such disposal practice can possibly cause air pollution (and consequently water pollution, where the polluted air is washed into water bodies). An equally hazardous practice is the digging of oil-waste pit ('a kind of [open]reservoir for oil-waste'). Evidence shows that the pit can get full and overflow (spilling oil) and oil can also escape as a result of rain. In *Umudje V. Shell-BP*¹⁸⁷, the plaintiffs successfully claimed compensation for damages caused to their property when Shell's waste pit became full and the oil escaped, 'spread all over the

¹⁸⁴ The incident was the subject of litigation in *Shell V. Isaiah* [1997] 6 NWLR (Pt. 508) 236 (considered later in this chapter).

¹⁸⁵ See SPDC, 'The Environment' (Visited 3 February 2002) <http://www.shellnigeria.com/info/info_display.asp?Id=135>.

¹⁸⁶ CLO Annual Report (1998: 207)

¹⁸⁷ (1975) 9-11 SC 155.

respondents' [plaintiffs'] farms and into their ponds and lakes on Unenurhie land, killing a large quantity of fishes therein'.¹⁸⁸

Another example of environmentally hazardous practice of waste disposal relates to the disposal of separated water ('waste water') at oil terminals. As noted above, oil and water are separated at oil terminals – while oil is loaded into tanker for export, the separated water (sludge) is disposed into water bodies. Several studies have found that the 'heavy hazardous sludge' is usually disposed into water bodies without effective treatment, with the result that high concentrations of oil exist in the discharged water – causing environmental pollution (World Bank, 1995: 48).

On the whole, the foregoing may be considered as general adverse impacts of oil operations in the Niger Delta.¹⁸⁹ Perhaps the adverse impacts may be better illustrated by a case-study of specific cases. In section 3. 7, attempt will be made to illustrate the general adverse impacts by case-studies of specific incidents as can be found in judicially decided and reported cases. However, before going into this, it is important to specifically consider the impact of oil operations on the Niger Delta wetlands.

3. 6. Environmental Impact of Oil Operations on the Niger Delta Wetlands

In addition to the effects of oil spill and gas flare on the flora and fauna of the Niger Delta wetlands (stated above), specific mention should be made to the environmental impacts of oil operations on the Niger Delta wetlands¹⁹⁰ (mangrove

¹⁸⁸ (1975) 9-11 SC 155, at 158, per IDIGBE, J.S.C.

¹⁸⁹ See generally Okorodudu-Fubara (1998: 247 – 248).

¹⁹⁰ A 'Wetland' has been described as 'a vegetated area of land that is flooded either permanently or seasonally'. See 'Government Agencies Worried About Environment Abuse' (*The Monitor*, Kampala, 2 February 2002). Section 1 of the Convention on Wetlands of International Importance (Ramsar Convention) defines 'wetlands' as 'areas of marsh, fen, peatland or water, whether natural or artificial, permanent or temporary, with water that is static or flowing, fresh, brackish or salt, including areas of marine water the depth of which at low tide does not exceed six metres.' See U.N.T.S. No. 14583, Vol. 996 (1976), P.243. The Convention was adopted at Ramsar, Iran, on 2 February 1971 and entered into

forests, swamp forests, etc.). As has been noted, the Niger Delta is the largest wetland in Africa and the third largest in the world, and is extremely biodiverse. Traditionally, the rural population in the region (over 90 per cent of the population of the region) are dependant on the resources of the wetlands for their sustenance¹⁹¹ – fishing, farming, salt production, hunting, building materials, etc.¹⁹² Elsewhere, wetlands also serve the similar purposes. For instance, in Uganda, it has been stated that: ‘For a long time now wetlands in Uganda have been put under various uses. There were fishing and hunting activities, rice growing, grazing, brick-making, and harvesting [of] raw materials for building purposes. Other related primary roles include sediment, nutrient and toxin retention, stabilisation of the hydrological cycle and microclimate. Wetlands have for long provided people with a way of livelihood. It is not easy to attach monetary value to all the activities that are carried out [there by the rural people]’.¹⁹³ Remarkably, there is abundant evidence to demonstrate that the Niger Delta people greatly value the Niger Delta wetlands and their resources.¹⁹⁴

Regarding the impact of oil operations on the Niger Delta wetlands, scientific studies have shown that the widespread canal projects in the region (especially in the mangrove forests) – designed, as has been noted, to gain access to oil installations – have substantial effects on water flow patterns and ecosystems.¹⁹⁵ Van Dessel and Omuku (1994: 442) note that oil companies have not conducted environmental impact

force on 21 December 1975. The mangrove forests, swamp forests, etc. in the Niger Delta (see text above) fit into this definition.

¹⁹¹ See Chapter 1.

¹⁹² The importance of wetlands was recognised by the Contracting Parties to the Ramsar Convention. In its preamble, it is provided in part: ‘Considering the fundamental ecological functions of wetlands as regulators of water regimes and as habitats supporting a characteristic flora and fauna...; being Convinced that wetlands constitute a resource of great economic, cultural scientific and recreational value, the loss of which would be irreparable...’ See further McBeth (1997: 203 – 207).

¹⁹³ See ‘Domestic Survival Depleting Wetlands’ (*The Monitor*, Kampala, 2 February 2002).

¹⁹⁴ See, for example, the Kaiama Declaration (11 December 1998).

¹⁹⁵ Similar problems also arise from the construction of ‘access roads’ to oil installations by oil companies. For example, the access roads have provided better access to loggers into the forests,

assessments of their canal projects, except for occasional drill slot EIAs. They argued that since slot and canal creations do not adequately consider the impact on local communities and ecosystems, environmental degradation and linked social problems are common. According to their findings, the environmental and social problems of canal and slot construction include: (i) destroyed fishing grounds and enclosure; (ii) changed salinity, leading to forest dieback; (iii) changed flow patterns, disrupting erosion and sediment deposition; (iv) temporarily increased turbidity and decreased dissolved oxygen from dredging organic soils which may reduce fish biomass; (v) dredge spoils – eroding during rains, increasing turbidity , and, potentially, acidity; (vi) temporarily increased biochemical oxygen demand (BOD) from dredged material and houseboat sewage; (vii) reduced farm yields because of dredge spoil run-off acidifying fields;¹⁹⁶ (viii) reduced farm yields because of water logging of fields; and (ix) destroyed mangroves and freshwater forests, including valuable timber and tree crop species. Powell, perhaps the greatest authority on Niger Delta environment issues, until his death recently, has found that long-term environmental problems from the changed hydrological regimes in the Delta are beginning to emerge. For instance, he found that the Apoi-Gbanraun canal flooded Gbanraun town, disrupting fishing and the sediment/erosion balance downstream (Powell, 1994: 92).¹⁹⁷

With specific regard to the mangrove forests, scientific studies have also found that oil operations have precipitated enormous environmental degradation. For

thereby contributing to the depletion of forest trees (some of which are of medicinal value to the indigenous residents of the region). See World Bank (1995: 34-5).

¹⁹⁶ A recent World Bank report notes that dredging of acid sulphate soils is common in the Niger Delta and this 'results in the sulfides being oxidized creating highly acidic areas along the canal banks, which plants are unable to colonise for many years' (World Bank, 1995: 35).

¹⁹⁷ He also found that after an oil company constructed a slot to an oil well near Okoroba in the freshwater swamp forest zone, mangroves have began encroaching on the freshwater swamp forests along the canal edge, possibly due to salinity changes. Moreover, he found that dredge spoil left on and near farms directly reduced the land available for cultivation and changed drainage patterns, causing water to log additional plots of land. Lastly, he found that fishing enclosures in the path of the dredgers were also destroyed.

example, it has been found that since its operations in the Niger Delta over 30 years ago, Shell has removed about 1 per cent of the mangrove forests in Rivers State, and maybe about the same percentage in Delta State (World Bank, 1995: 35). Van Dessel (1994) points out that mangrove clearing (e.g. for seismic surveys) is especially problematic because of the very slow regeneration rates. As previously stated, Shell admits that most seismic lines which were cut well over a decade ago are still visible by air. In addition to the problem of cleared mangroves, it has been found that a large number of mature *Rhizophora* trees near flow-stations are dead, probably due to oil leaks clogging the roots and suffocating the trees. Moreover, pipelines/flow-lines, and, to a little extent, seismic lines fragment forests and open them up for better access for hunters to poach animals. Further, drilling activities in the mangroves produce dredge spoils of acid which sulfate soil, because of its high acidity when dry, and this can decrease farm yields and severely disrupt natural regeneration of forest edges. A good example is freshwater tree species and mangroves which will not grove in the extremely acidic conditions (van Dessel and Omuku, 1994: 439).

To sum up, it can be seen that oil operations has unleashed serious damage to the Niger Delta wetlands, some of which are of long-term effects. These effects also affect the inhabitants of the region who depend on the wetlands' resources for their sustenance; they suffer various deprivations as a result. What is more, continuing oil operations in the region appear to pose a great danger to the wetlands.

3. 7. Impact of Oil Operations and Nigerian Courts: Case-Studies

The impacts of oil operations in the Niger Delta may be further investigated by a brief examination (case-studies) of factual situations presented in cases decided in Nigerian courts between individuals or communities (inhabitants of the region) and oil companies. Essentially, the idea is to discover the nature of claims made by

individuals and communities against oil companies or oil company contractors, relating to oil operations. Unlike the 'general' adverse impacts stated above, the court cases – largely used as factual evidence of the adverse impacts of oil operations – will provide specific instances in which the environment and the people had been adversely affected; and being the direct claim of the affected people, this will serve as verification of the findings of researchers (as distilled above) as well as indicate the thinking or position of the people on the adverse impacts of oil operations. Most significantly, investigation of the factual situation in the cases may provide further (and perhaps better) evidence of the causes of the prevailing crisis in the region.¹⁹⁸ A few reported cases will suffice for this purpose, and it is proposed to consider them under two sub-heads, viz.: Oil production-related cases and Oil exploration-related cases.

3. 7. 1. Oil Production –Related Cases

Oil production covers drilling operations, but this sub-section is concerned only with the consideration of cases dealing with oil spills and gas flare. In this regard, four cases have been selected. The first is the interesting case of *Shell V. Tiebo VII*.¹⁹⁹ In that case, the plaintiffs sued the defendants for compensation for damages suffered as a result of oil spillage. The defendant, an oil exploration and production company, had constructed oil pipelines, flow-stations, oil-wells and well heads with two gas flayers within the plaintiffs' community. On or about 16 January 1987, there was an extensive oil spillage from the installations of the company at the plaintiff's community. It was alleged that the spillage covered the whole of River Nun, a

¹⁹⁸ It has been forcefully argued that, unlike sociological field study which 'can be very subjective', 'data gained from court judgments is perhaps less subjective because judges are obliged to weigh the evidence of one party against that of the other' (Frynas, 2000: 149, footnote 312).

¹⁹⁹ [1996] 4 NWLR (Pt. 445) 657.

tributary of River Niger, which flows through the plaintiffs' community and thereby occasioned pollution of the community's source of drinking water. Further, it was claimed that the spillage covered the plaintiff's swampland, streams, and ponds, and desecrated their ancestral and juju shrines.

More specifically, it was claimed that apart from polluting their source of drinking water, the spillage killed all fishes in the swamps and 40 ponds belonging to the community, destroyed their economic trees (such as raffia palms), caused water-borne diseases for members of the community who drank the contaminated water,²⁰⁰ and generally paralysed the subsistence and economic life of members of the community who are predominantly fishermen. In short, the community claimed to have 'suffered environmentally,²⁰¹ socially, economically, and medically' as a result of that pollution. While not denying the fact of pollution and its possible impact on the environment, the defendant denied the extent of pollution and the degree of damage suffered; specifically, it claimed that the pollution affected only a smaller area of the plaintiffs' swamp and fish flats, and had offered a sum of money as a 'fair and adequate compensation', but this was unacceptable to the plaintiffs.²⁰² Both the trial court and the Court of Appeal found in favour of the plaintiffs and awarded substantial monetary compensation. In his judgment, the trial judge stated:

I have found in this case and as was admitted by the defendant, that crude oil applied or gushed or escaped from their Diebu Creek flow-station, Well 12T and flowed from the defendant's acquired land, onto the lands, waters, creeks and ponds of the plaintiffs and consequently the plaintiffs suffered general damages for the pollution...²⁰³

²⁰⁰ Perhaps to avoid further ill-health, members of the community were 'forced to buy [potable] drinking water' ([1996] 4 NWLR (Pt. 445) 567, at 674)).

²⁰¹ One of the important heads of claim was: 'Damage and hazards from pollution of the environment' ([1996] 4 NWLR (Pt. 445) 567, at 669).

²⁰² On the implication of the offer of monetary compensation to the plaintiffs by the defendant oil company, the trial judge pertinently said: 'I hold the view that the defendant would not have offered any amount to the plaintiffs as compensation if the plaintiffs did not suffer any damages as all the defence witnesses tried to establish, albeit unsuccessfully' ([1996] 4 NWLR (Pt. 445) 567, at 690).

²⁰³ [1996] 4 NWLR (Pt. 445) 567, at 689.

On the issue of water pollution, the trial court said in part:

I hold and find that the plaintiffs suffered general damages because their potable water was polluted. No community especially like the plaintiff (sic) who are a riverine community in the lower Niger Delta area of Nigeria can exist without water for their domestic and social needs especially drinking.²⁰⁴

In general, this case proves that oil spillage can cause (and has caused) environmental, economic, social and cultural damage, to the impacted area and its inhabitants. Support for this conclusion can also be found in the observation of ICHOKU, J. (as he then was) in *SPDC V. Enock*²⁰⁵ (while non-suiting the plaintiffs for misjoinder):

*It is clear here that the plaintiffs had shown that there was an explosion at the defendant's [Shell's] manifold and that there was crude oil spillage which was extensive as a result of that explosion. There were extensive damages to economic crops, farm lands, yams, cocoyams, and so on. There was evidence that no third party caused the explosion, and that no one in the community did it. This, therefore, placed on the defendant [Shell] [the burden] to explain out what the plaintiffs had alleged. They ought to lead evidence but they did not. They had, therefore, not discharged the onus on them. They had failed to do so and the plaintiffs, therefore, proved their case and had shown that the crude oil pipeline of the defendant exploded and it was for the defendant to show otherwise, that it did so by act of a third party. They, the defendant, had failed to discharge the burden on them in this regard.*²⁰⁶

The second case is the recent case of *Shell V. Isaiah*,²⁰⁷ where Shell was sued, *inter alia*, for 'N22 million as compensation for permanent damage and loss caused to the plaintiffs by reason of extensive oil spillage and pollution'. The plaintiffs' case

²⁰⁴ [1996] 4 NWLR (Pt. 445) 567, at 682.

²⁰⁵ [1992] 8 NWLR (Pt. 259) 335, at 341.

²⁰⁶ (Italics added). On appeal, the Court of Appeal approved this observation. The court said the observation 'indicates that the learned trial Judge found the plaintiffs' assertion of the fact of explosion and resultant damage proved and that the defendant who pleaded in their statement of defence that the explosion was caused by the act of ...third party...failed to discharge that burden' ([1992] 8 NWLR (Pt. 259) 335, at 341 per JACKS, J.C.A.). Concurring, EDOZIE, J.C.A. also stated: 'There was unchallenged and credible evidence that the appellant's [Shell's] oil pipeline exploded and the oil spillage therefrom caused extensive damage to the respondent community' ([1992] 8 NWLR (Pt. 259) 335, at 346).

was that about July 1988, an old tree fell on the defendant's oil pipeline and indented it. This pipeline, according to the plaintiffs, ran across their (plaintiffs') swamp-land and surrounding farmlands. They claimed that while the defendant was effecting repairs on the pipes (which involved disconnecting the dented pipes), noxious crude oil freely spilled into the plaintiffs' land for several hours, and polluted it. In consequence, all the uses to which they put the said land were permanently terminated. On its part, the defendant oil company contended that there was no oil spillage but 'minor splash of oil'. In their judgments, both the trial court and the Court of Appeal found that there was 'massive oil spillage', causing extensive damage to 'economic crops, economic trees...water resources and hunting amenities'.²⁰⁸

Thirdly, there was the celebrated case of *Shell V. Farah*.²⁰⁹ The case was brought by five families in K-Dere community (in Ogoniland) in Rivers State (plaintiffs) against Shell (defendant), for compensation for damage arising out of the defendant's oil production activities in K-Dere. As recounted by the Court of Appeal,²¹⁰ the case concerned an oil blow-out that occurred in July 1970 from an oil well known as Bomu well-11 and owned and operated by shell. The blow-out (regarded in oil industry circles as an operational accident) lasted for several weeks before it was brought under control, during which time crude hydrocarbon, sulphur and effluent toxic substances were violently emitted in dense fountains. The emissions allegedly formed a thick layer over the surface of the plaintiffs' adjoining land, destroying farmlands, crops and economic trees and natural vegetation of the impacted areas, with the resultant desertification of the impacted area of about 607 hectares. Before the incident, the plaintiffs used the land for farming, hunting, etc.

²⁰⁷ [1997] 6 NWLR (Pt. 508) 236.

²⁰⁸ *Shell V. Isaiah* [1997] 6 NWLR (Pt. 508) 236, at 252.

²⁰⁹ *Shell V. Farah* [1995] 3 NWLR (Pt. 382) 148.

²¹⁰ *Shell V. Farah* [1995] 3 NWLR (Pt. 382) 148, at 168-9.

And apart from asking for compensation for the damage suffered as a result of the incident, the plaintiffs also asked for the rehabilitation of their impacted land by the defendant.

Significantly, following the incident, the defendant accepted responsibility and paid compensation to the plaintiffs for the crops and economic trees destroyed at the time of the incident,²¹¹ but paid no compensation for the damages to their land which they 'took over' and undertook to rehabilitate and thereafter hand over the same to the plaintiffs.²¹² This case was filed 14 years after the incident,²¹³ when the plaintiffs became aware that the defendant has resiled from its promise to rehabilitate the affected land. At the trial, the court was confronted with two main issues: (1) whether the plaintiffs have been paid 'adequate compensation'; and (2) whether the land has been rehabilitated. However, the present investigation is concerned only with the issue of the impact of the incident on the environment, and this relates to the issue of rehabilitation. On this issue, the plaintiffs' expert witness,²¹⁴ who had studied the post incident impact on the plaintiffs' land, stated as follows:

1. The ...soil samples studied were very acidic, poor in total nitrogen, available phosphoric organic carbon and generally low levels of exchangeable cations and micronutrients, and the heavy metal are expected to be high, judging from the splash of drilling mud.
2. The soil's carbon/nitrogen ratios were high, so were the concentrations of hydrocarbon far in excess of biotic or natural levels, suggesting heavy petrogenic oil pollution effects.
3. The levels of Manganese in the soil are toxic to plant life. Associated with this is the low fertility of the soil, confirming the cover/effect of the subsurface formation and mud splash in the area.

²¹¹ The defendant claimed that 'in respect of damage to crops, economic trees and structures caused thereby it paid a total of £22,000.00 to all the individual claimants' (*Shell V. Farah* [1995] 3 NWLR (Pt. 382) 148, at 170).

²¹² The heavily polluted area to be rehabilitated was 13.245 hectares in size. For the purpose of the promised rehabilitation, the plaintiffs vacated the area and could neither farm, build nor put the land into any use. See *Shell V. Farah* [1995] 3 NWLR (Pt. 382) 148, at 169.

²¹³ The defendant's contention that the case was statute-barred was rejected by the court, based on the special facts of the case. See [1995] 3 NWLR (Pt. 382) 148, at 186-7.

²¹⁴ Dr Edward Obiozo, a Biochemistry teacher in the University of Port Harcourt, Nigeria, who holds a B.Sc degree in Biochemistry and a Ph.D degree in Toxicology.

4. The areas show randomly distributed patches of crude oil tar, balls, black viscous masses of crude oil and lumps of hardened clay which are unusual for the area and so are attributable to the drilling mud either thrown up or used for well-killing in the 1970 blow out.
5. On the average, 49-53% of the land area affected are completely bare i.e. still do not support plant growth, and where there are plants at all, these are stunted, pollution-resistant siam, weeds and guinea grass.
6. Agricultural crop productivity in the area was as patchy as other plants and very low. The land in its present condition cannot support any good crop growth.²¹⁵

At the end, the witness concluded that 'the area cannot be deemed to have been rehabilitated to its pre-impact conditions and cannot be so unless certain further actions are taken.'²¹⁶ Against this conclusion, an expert called by the defendant maintained that the land has been rehabilitated and concluded: 'Our study show that in this badly affected area where crop performance is poor, the surface soil had been removed as a result of erosion occasioned by poor management. Soils of the area are inherently poor in fertility and the badly affected area by virtue of its depressional position had all that physical impediment...We concluded that the poor performance of the crops in this area was not due to the pressure (presence) of crude oil...'²¹⁷

To resolve this conflict, the court appointed two independent experts, one each nominated by the plaintiffs and the defendant respectively. Their joint report to the court supported the findings of the plaintiffs' expert witness. The report stated in part:

Based on field and laboratory results...the following can be stated:

1. Zone 1 of the land, subject matter of this suit, contains mainly coarse-textured soils with little or no top soils. The soils of this zone are resistant to penetration by plant roots, have high bulk densities, low hydraulic conductivities and infiltration capacities and consequently *very poor* plant growth. Zone 2 of the area, though also of low fertility level, is much better than zone 1, since it contains an appreciable amount of top soil... (italics in the original).

²¹⁵ See *Shell V. Farah* [1995] 3 NWLR (Pt. 382) 148, at 181-2.

²¹⁶ *Shell V. Farah* [1995] 3 NWLR (Pt. 382) 148, at 182.

²¹⁷ *Shell V. Farah* [1995] 3 NWLR (Pt. 382) 148, at 180-1.

2. Crop yield, especially in zone 1 of the land...are very poor; so also are the vegetation covers in zone 1...
3. From the foregoing, there appears to be further need for rehabilitation of the polluted land...
4. The effect of heat retention by the exposed subsoil and top soil (where present) could be attributed to the presence of hydrocarbon or oil residues within these soils...²¹⁸

On the strength of the evidence before him, the learned trial judge accepted the expert evidence of the plaintiffs' witness, and rejected that of the defendant's, and concluded that the land needed rehabilitation.²¹⁹ This conclusion was supported by the Court of Appeal, which stated: '[T]he damage the respondents [plaintiffs] suffered went beyond a mere damage to crops and economic trees, for according to the experts called on both sides the respondents' [plaintiffs'] arable land was heavily polluted and rendered unproductive for many years'.²²⁰

This case thus establishes, using scientific evidence, that oil spillage can cause damage to farm crops and also result in low plant yields. The environmental and social implications of this are obvious. From the facts of this case, oil pollution has also been shown as having the potential of precipitating social dislocation or social unrest as a result of economic strangulation.

The fourth case is the interesting case of *Ogiale V. Shell*²²¹ (which cuts across production and exploration issues). In this case, the plaintiffs, natives and inhabitants of Olomoro community, Isoko in Delta State, sued Shell which has been carrying on oil operations in the area since 1962. They were claiming monetary compensation for damages allegedly suffered by them as a result of the defendant's (Shell's) operations in their area. A predominantly farming community, their allegation was that as a result of the activities of the defendant in the area, their land has been seriously and

²¹⁸ *Shell V. Farah* [1995] 3 NWLR (Pt. 382) 148, at 182-3.

²¹⁹ *Shell V. Farah* [1995] 3 NWLR (Pt. 382) 148, at 184.

²²⁰ *Shell V. Farah* [1995] 3 NWLR (Pt. 382) 148, at 176.

adversely impoverished. Specifically, they claimed that the defendant's oil exploration and exploitation activities (particularly the 'continuing and negligent gas flares'), have resulted in diminished farm yields on their farmland. To prove their case, they called five witnesses, three of which were expert witnesses whom they had earlier retained to study the impact of the defendant's activities on their land.

The case for the defendants was a denial of the plaintiffs' claim. Essentially, they maintained that their operations in the area have not affected Olomoro as a community. According to one of their witnesses: 'Olomoro as a community has never claimed any ownership of land or farms since our operations in the area. Olomoro community has never made a claim on our company since we started our operations...Most of the farms are individually owned. Most are owned by families. The oil palm trees which grow with wild timbers are claimed by quarters and the families; so also the fishing ponds. The Olomoro community has not put in any personal claim...'²²² With specific regard to the claim of diminished farm yields, the defendant's expert witness expressly stated: 'The operation of the defendant company has not affected plant growth and soil fertility in the area'.²²³

In his judgment the trial judge held that the plaintiffs failed to prove their case, and this was confirmed by the Court of Appeal, thus: 'The conclusion therefore is that the evidence given by the expert witnesses [called by the plaintiffs] did not pass the legal requirement of expert evidence. The result is that the learned trial judge was right in rejecting their evidence. Having rejecting (sic) the evidence, it means that the plaintiffs failed to prove the most important averment in their claim. The court was therefore right in dismissing their claim'.²²⁴

²²¹ [1997] 1 NWLR (Pt. 480) 148.

²²² [1997] 1 NWLR (Pt. 480) 148, at 160.

²²³ [1997] 1 NWLR (Pt. 480) 148, at 161.

²²⁴ [1997] 1 NWLR (Pt. 480) 148, at 167.

It is significant that notwithstanding the contention of the defendant in this case and the decision reached by the courts, there is evidence which suggests that both the defendant and the courts do not dispute that oil operations can adversely affect the environment and the inhabitants of the area. On the part of the defendant, one of its witnesses disclosed that between 1973 and 1980, the company had suffered five oil spills in the area for which it 'paid compensation to the people whose lands were affected'. As the witness puts it: 'Individual families and quarters who own lands affected by our operations were duly paid [compensation]'.²²⁵ In the case of the courts, it was 'found as a fact that whenever there was an oil spillage, the defendant [Shell or other oil company] [cleaned] up and paid compensation to the owners of the crops affected'.²²⁶ These are admissions of the adverse impacts of oil operations.²²⁷

Overall, this case shows that oil operations can cause damage to farmland (crops, etc.). Notwithstanding, to succeed, a plaintiff must prove that he has suffered the particular damage he alleges, and this must be by evidence given by 'people specially qualified in that particular field of science'.²²⁸ However, for the present purposes, it is sufficient that the case has shown, at least, that oil operations are environmentally and socially hazardous.²²⁹

In summary, these cases have illustrated the adverse impacts of oil production operations to the environment and ultimately to the inhabitants of the region. In effect, they have verified the findings of researchers in this regard as set out above.

²²⁵ [1997] 1 NWLR (Pt. 480) 148, at 160.

²²⁶ [1997] 1 NWLR (Pt. 480) 148, at 163.

²²⁷ See also *Umudje V. Shell-BP* (1975) 9-11 SC 155.

²²⁸ [1997] 1 NWLR (Pt. 480) 148, at 161.

²²⁹ See further *Mon V. Shell-BP Petroleum Development Co. of Nigeria Ltd.* (1972) 1 RSLR 71; *Nwadiaro V. Shell* [1990] 5 NWLR (Pt. 150) 332; *Olaye V. Nigerian Agip Oil Co. Ltd.* (1973) 2 RSLR96; *Shell V. Ambah* [1999] 3 NWLR (Pt. 593) 1 (Where the claim was for monetary compensation as a result of damage suffered by the plaintiff (and his family) when the defendant [Shell] covered the plaintiff's fish ponds, fish lakes, fish channels and creeks with dredging mud, thereby causing the plaintiff (and his family) the loss of their only means of livelihood. Although

3. 7. 2. Oil Exploration-related Cases

It has been observed that ‘the most serious damage occurs during oil production, but much environmental damage is also done by exploration, particularly if seismic surveys are carried out’ (Frynas, 2000: 158). Although seismic surveys are usually short-lived, but they can still occasion serious damages. As Frynas (2000: 158) could say, ‘a seismic crew may only stay in an area for a few days but the resulting damage may have long-lasting effects’. However, as at yet, there is no reported case where a victim had succeeded in court in establishing causality and consequential damage in cases relating to seismic survey. Yet, factual evidence indicates that environmentally, socially and economically, seismic operations can be damaging. As previously mentioned, the principal concern of this section is to investigate the factual claims and evidence, and not necessarily the legal outcome of the cases. On this premise, four cases have been selected for investigation.

Firstly it seems the first ever reported case on damage arising from seismic operations in the Niger Delta is the case of *Seismograph Service Ltd. V. Onokpasa*,²³⁰ where the plaintiff claimed as follows:

The plaintiff’s claim against the defendant is for the sum of £40,000 (forty thousand pounds) being special and general damages for damage caused by the defendant to the plaintiff’s eight college buildings, namely, one block of 12 class rooms, one block of 4 class rooms, one dormitory block, one assembly/dinning hall and kitchen block, the principal’s house, the principal’s kitchen, latrine building and one piggery house at Okwidiemo...when between may and June 1968, the defendant carried out seismic operations near the plaintiff’s aforesaid college buildings at Okwidiemo, which shook the said buildings to their very foundations and caused the said damage.²³¹

In his statement of claim, the plaintiff explained the basis of his claim thus:

successful in his action against Shell, the compensation awarded by the Supreme Court was very low as a result of what the court (wrongly) adjudged as deficiencies in his pleadings).

²³⁰ [1972] 1 All NLR 343.

²³¹ *Seismograph Service Ltd. V. Onokpasa* [1972] 1 All NLR 343, at 344.

11. Shooting [of explosives] exercise was carried on by the defendant's workers on several points...at various times during the months of May and June 1968. At each point several seismic shots were fired. They averaged five a day and lasted for about three weeks.

12. At each blast or shooting there were vibrations of the buildings and the ground around. During this period classes were disturbed by the boomings and vibrations which went to the very foundations of the buildings.

13. On one occasion the tremor caused by these heavy shootings were such that the beams carrying the roof of class V (that is the uncompleted 12 class-room block) were fractured in several places and a huge piece of the concrete broke away and fell down, narrowly missing a student's head.

14. So serious is the damage done to class V building (that is the uncompleted 12 class-room block) that the building has been declared dangerous and out of bounds to students...

15. The nature of damage done to all these buildings...by the defendant's aforesaid operations are vertical and horizontal cracks. These cracks occur to the walls without following the lines of mortar joints. The cracks cut across the blocks either horizontally or vertically and are at strategic points in the buildings. Where the cracks are neither vertical nor horizontal, they are scattered in all directions from a point on the wall. These are shattering cracks.²³²

At the trial, the plaintiff contended that: the cracks are dangerous in nature; they are symptoms of shock which affected the buildings right from the ground; the cracks to the walls indicate that the foundation concrete for the different buildings have been fractured by the shock and vibrations which emanated from the shooting operations at the various points mentioned; the buildings are now traps in their present condition and are no longer fit for human habitation; and that the buildings, though now still in position, will sooner or later collapse on their fractured foundations and must be rebuilt.²³³ On its part, the defendant did not deny carrying out seismic operations as stated by the plaintiff, but it contends that the seismic operations 'could not have any connection with the alleged damages or cracks' to the plaintiff's

²³² *Seismograph Service Ltd. V. Onokpasa* [1972] 1 All NLR 343, at 346-7.

²³³ Paragraph 16 of the statement of claim. See *Seismograph Service Ltd. V. Onokpasa* [1972] 1 All NLR 343, at 347.

buildings.²³⁴ The trial judge found for the plaintiff but this was overturned by the Supreme Court on appeal on the ground that 'the contention of each party is of a technical nature and therefore such evidence as could support it must necessarily be that of people specially qualified in the particular field of science which in this case comprised of the knowledge and practice of seismology and civil engineering'.²³⁵ The Supreme Court took the view that the only expert evidence before the trial court was that of the defendant, and the trial court should have followed it.

It is important to note that notwithstanding the Supreme Court's position on the evidence, there was no suggestion that seismic operations could not cause damage to buildings, of the nature claimed by the plaintiff. In fact, the defendant admits sending one of its officials to the plaintiff's premises prior to the seismic operations to 'check on the distance from the college premises to *any point that would be safe enough for the "shooting operations" that were to be carried out*' by it.²³⁶ According to its evidence, it 'required the information as it was in a position to know what distance is safe for any "shooting operations" using a particular type of explosive charge. After ascertaining this the defendant company then commenced its shooting operations'.²³⁷ On this premise, as can be seen in its pleading and evidence, the basis of the company's denial of liability was that its explosives were shot at 'points that were safe enough'; distances safe from harming the plaintiff's buildings. Be that as it may, the case establishes that seismic operations are harmful, at least, potentially harmful, to the inhabitants of the area concerned and the environment.

²³⁴ *Seismograph Service Ltd. V. Onokpasa* [1972] 1 All NLR343, at 348.

²³⁵ *Seismograph Service Ltd. V. Onokpasa* [1972] 1 All NLR 343, at 348-9.

²³⁶ *Seismograph Service Ltd. V. Onokpasa* [1972] 1 All NLR 343, at 345 (Italics mine). Contrary to the defendant's contention, the plaintiff contended that the defendant sent its officials to his premises, prior to and after the seismic operations, to inspect his premises, and that after the second inspection the defendant promised to make good all the damages to his buildings, but failed to do so.

²³⁷ *Seismograph Service Ltd. V. Onokpasa* [1972] 1 All NLR 343, at 345.

The next case to examine is the case of *Seismograph Service V. Akporuovo*.²³⁸

The action was for 'damages for buildings and household goods allegedly destroyed as a result of seismic operations'. As stated in the plaintiff's writ of summons:

Plaintiff claims from the defendant the sum of £4,392 : 5s : 6d. (four thousand, three hundred and ninety-two pounds, five shillings and six pence) being compensation due plaintiff from the defendant for damage done by the defendant to plaintiff's property in Omolo Village...in the course of defendant's seismic operations...in 1966.²³⁹

For the present purposes, the following are the material parts of the plaintiff's pleading in the case:

7. Sometime...between 1965 and 1968 defendant carried out seismic operations at and through Umolo Village and did shootings at points near to plaintiff's buildings at Umolo..
8. Defendant's said shootings and seismic operations at Umolo Village shook the plaintiff's...buildings...and damaged the buildings.
9. Plaintiff's 8-room building and the outhouse comprising 4 room (sic) collapsed and fell from the shakes of the shooting.
10. Four out of the seven rooms in the second building collapsed and fell down too and the walls of the remaining three rooms thereof are so cracked that these rooms are now too dangerous to live in.
11. The third building and the second outhouse had their walls so badly cracked to the extent that these walls fall at unexpected intervals and so rendered unsafe and dangerous to live in.
12. The cracks on the buildings so described...are such that the buildings cannot be properly repaired to the point of being safe for occupation without the respective buildings being pulled down completely or almost completely pulled.
13. In the buildings, plaintiff had some movable property which were also damaged as a result of the defendant's shootings...
15. As a result of the damage aforesaid, plaintiff was obliged to find alternative accommodation for himself and his family at great cost...Plaintiff also incurred expenses in trying to reach settlement of the compensation due with the defendant.
16. The shaking from the shootings was such that some buildings lying farther away from the shotpoints behind plaintiff's buildings ...were cracked and damaged by the shootings. Evidence may be led at the hearing that compensation were paid by defendant to owners of buildings lying farther away from the shotpoint behind plaintiff's building for damages arising from the shooting...²⁴⁰

²³⁸ [1974] 1 All NLR 104.

²³⁹ *Seismograph Service V. Akporuovo* [1974] 1 All NLR 104, at 105.

²⁴⁰ *Seismograph Service V. Akporuovo* [1974] 1 All NLR 104, at 107-8.

The defendant denied the plaintiff's claim on the ground that 'the seismic operations by the defendant at Umolo between 1965 and 1968 cannot have any casual (sic) connection with the alleged damage to plaintiff's buildings and movable property at Umolo, having regard to weight of dynamites used and the distance between the shotpoints and the said buildings'.²⁴¹ The trial judge found in favour of the plaintiff but the Supreme Court reversed his decision on the ground that there was a conflict of evidence before him which he should have resolved by a visit to the *locus in quo*, which he failed to do. Yet there was an uncontradicted evidence that as a result of that operations the defendant had paid compensation to one John Dekuma (who was plaintiff's witness No. 1) and other claimants for damages done to their respective properties.²⁴² This evidence coupled with the defendant's admission that damage can result to buildings close to shotpoints, indicate the hazardous nature of seismic operations. This hazardous nature of seismic explosives was clearly stated in the testimony of the defendant's expert witness in the case next considered below.

The third case is the case of *Seismograph Service V. Ogbeni*,²⁴³ in which the plaintiff claimed damages for damage suffered as a result of the defendant's 'oil exploratory exercise of exploding oil testing chemicals around the region of plaintiff's building, which said explosion wrongfully caused or permitted excessive noise and vibrations which damaged plaintiff's building'. In his statement of claim he stated, *inter alia*, as follows:

5. The defendant...carried out the seismic operations...at a point very close to the plaintiff's premises...
6. The defendants in the course of carrying out their seismic operations...wrongfully caused the excessive noise and vibrations to come into the plaintiff's premises and affected the very foundation of the main building...

²⁴¹ *Seismograph Service V. Akporuovo* [1974] 1 All NLR 104, at 108.

²⁴² The evidence was led in support of the averment in paragraph 16 of the plaintiff's pleading (statement of claim). See *Seismograph Service V. Akporuovo* [1974] 1 All N.L.R. 104, at 109.

²⁴³ *Seismograph Service V. Ogbeni* (1976) 4 S.C. 85.

7. The plaintiff who was at home at this time with his family had to run away from the house and take refuge in a nearby bush for their dear lives.

8. At the end of the operations, the plaintiff...went back to his house only to discover that the house has been seriously damaged and rendered unfit and unsafe for human habitation.

9. The plaintiff, on inspection, found that the walls of the main building, the out house and the fence had been dangerously cracked from the foundation, the pillars cracked and broken and that it was impossible to close the doors because the walls of the building have partly caved in.

10. The plaintiff had no alternative than to pack out from the house and depend on... relations for accommodation...²⁴⁴

Relying on *Onokpasa's* case, the Supreme Court set aside the judgement of OGBOBINE, J. which was in favour of the plaintiff. In the words of the court: 'We are unable to agree with the learned trial Judge that the evidence of an expert is not absolutely necessary to prove damage alleged to be caused by vibrations radiating from seismic operations taking place within a reasonable distance from the property damaged. These are phenomena beyond the knowledge of the unscientific and untrained in seismology and civil engineering'.²⁴⁵ In any case, the interesting aspect of this case is the testimony of the defendant's employee (Alan Berger, a geophysicist), who was one of its witnesses in the case. On the effect of vibrations caused by various weights of dynamite shot into the ground, he stated as follows:

I am conversant with vibrations caused by dynamites underground. A dynamite of about 4 lbs weight which is shot into the ground to a depth of 30 yards would not cause any damage to any property within 10 yards of the shot point. A dynamite of about 10 lbs weight would not cause damage, but I would not try it. I would go about 100 yards from a house to shoot a 10 lbs dynamite into the ground at a depth of about 30 yards.²⁴⁶

The clear implication of this evidence is that the shooting of dynamites is a hazardous operation. The fact that the plaintiff did not succeed in his claim does not detract from this hazardous nature; nor does it necessarily mean that the damage

²⁴⁴ *Seismograph Service V. Ogbeni* (1976) 4 SC 85, at 88-9.

alleged did not occur. In fact, as could be observed, this case and the ones examined earlier were lost solely on the ground of legal technicality.²⁴⁷ However, this is not to suggest that the reasoning of the various judges was necessarily erroneous. On the contrary, it may be said that the cases had failed, notwithstanding their merits, because of the failure of the respective plaintiffs to prove the 'causal connection' between the alleged damage and the alleged cause of the damage. This is a familiar problem in a fault-based tortious liability system.²⁴⁸

Furthermore, it is not only on land that seismic operations have proved damaging to the inhabitants of the area of operation. The recent case of *Seismograph Service V. Mark*²⁴⁹ illustrates the hazardous nature of seismic operations done offshore. In that case, the plaintiff (a fisherman) had sued the defendants for compensation for damages arising from the destruction of his fishing nets by the defendants' vessel. He alleged that the defendants 'negligently tore through the nets and damaged them – some parts were lost and others were dragged away by the vessel'.²⁵⁰ The defendants denied negligence. The Court of Appeal, overturning the judgement of the trial judge, held that the plaintiff did not establish negligence as

²⁴⁵ *Seismograph Service V. Ogbeni* (1976) 4 SC 85, at 98-9.

²⁴⁶ *Seismograph Service V. Ogbeni* (1976) 4 SC 85, 94.

²⁴⁷ As has been observed elsewhere, 'many a time, a plaintiff victim [of oil pollution, etc.] is poor and ignorant and so he is not a match to the defendant who is often a big national or multi-national company. The result is that an otherwise good claim often fail as a result of failure to reach the required standard of proof [particularly, the production of expert evidence, which is costly to produce] (Ebeku, 1998: 68).

²⁴⁸ It is suggested that, with regard to environmental damage, tortious liability should be based on strict (absolute) liability principle. This approach has already been adopted by the Indian Supreme Court. See *Mehta V. Union of India* (1987) 1 SCR 819. (Note that the common law rule of strict liability, established in *Rylands V. Fletcher* (1868) L.R. 3. H.L. 330, has not proved helpful to victims of oil operations damage in Nigeria, and this is because of the requirements of the rule. (See generally, Ebeku, 1998). The advocated strict liability rule for environmental damage should not have any requirements. Nigerian courts may follow the Indian Supreme Court approach or the rule may be created by statute).

²⁴⁹ [1993] 7 NWLR (Pt. 304) 203.

²⁵⁰ In paragraph 36 of his statement of claim, the plaintiff asked for a stated sum of money 'being compensation due and payment to the plaintiff by the defendants as a result of damages arising from the loss of nets belonging to the plaintiff in course of the exploratory activities of the defendants in Akazat Fishing Waters...' (*Seismograph Service V. Mark* [1993] 7 NWLR (Pt. 304) 203, at 209).

required by law. This is another instance where a victim has lost because of legal technicality.²⁵¹ Yet this case shows that in riverine communities, seismic operations can cause damage to the fishing nets of the inhabitants who are predominantly fishermen.

In summary, the above four cases have shown, at least, that seismic operations are potentially hazardous, and could result in damage to buildings and the loss of means of livelihood. Although the plaintiffs failed to prove causality,²⁵² it is difficult to maintain that their actions were entirely frivolous. In fact, there are strong indications that they had a good arguable case. As already indicated, the failure of the respective plaintiffs might have been the likely consequence of a fault-based tortious liability system.

Lastly, although environmental, economic and social effects are usually integrated in situations of environmental damage, it is proposed to further and separately explore the social impacts of oil operations in the next section.

3. 8. Social Impacts of Oil Operations

It has been suggested that 'large mining projects [like oil mining] have severe and adverse social and cultural impacts on indigenous peoples', and 'in some cases these are so severe as to threaten social and cultural survival' (O'Faircheallaigh, 1991: 243). As one indigenous person affected by oil development had bemoaned: 'Our tribe of the Makha, the tribe of the Beaver, is at an end. Our tribe is at an end, as I know now, from the feeling of doom'.²⁵³ What is the situation in the Niger Delta? In this section,

²⁵¹ It seems the Court of Appeal considered that what happened was an accident, and not an act of negligence. See *Seismograph Service V. Mark* [1993] 7 NWLR (Pt. 304) 203, at 213-4.

²⁵² There is evidence to suggest that failure to prove causality (the courts require an expert witness to do this satisfactorily) is related to inability to pay the costs of producing expert evidence. See Ebeku (1998).

²⁵³ Aipin (1989: 138).

it is proposed to inquire into the social effects of oil operations amongst the Niger Delta indigenous people of Nigeria. However, it bears repeating that the social impacts/effects of oil operations do not occur in isolation from the environmental and economic impacts. Rather, as O'Faircheallaigh (1991:229) stresses, these impacts 'are inextricably interwoven', affecting one another, with, for example, the environmental effects of oil operations having economic and social consequences.²⁵⁴ In any case, as previously stated, for the purposes of convenience and clarity, the social impacts of oil operations are considered here as a separate category. Among others, there is evidence to suggest that the social impacts of oil operations in the Niger Delta includes: the social and cultural effects of loss of land and resources; impacts of immigrant population; loss of self esteem; and social dislocation and social disintegration. All these will be briefly considered here.

3.8.1. Loss of Land and Resources

It has been seen in Chapter 2 that land is of especial importance to indigenous peoples, like the Niger Delta people of Nigeria. Their whole life depends upon land and its resources. Specifically on the Niger Delta people, it has been seen that their subsistence economy is based on land and water resources; they are predominantly farmers and fishermen. (See Chapter 1). In this regard, any adverse impact on land is bound to affect them socially (and otherwise). According to O'Faircheallaigh (1991: 243): 'Such impacts arise partly because the damage to land often associated with mineral exploitation has profound social, cultural and spiritual ramifications. Land and the plants and animals it supports occupies a central position in the lives of all indigenous peoples, and is tied intimately to their social, cultural and spiritual well-

²⁵⁴ See Young (1995: 159).

being.’ This important link was aptly expressed by Brody in his study of Artic hunters thus:

Northern hunting societies’ ways of life exist with the land. Health is based on connections between social and cultural systems, between forms of authority, mobility, child-raising or language and meat, fish, trees, ice or the land itself. [From] Such connections...come individual strength, family happiness and the very issue of culture; and upon them depends the future.²⁵⁵

As has been seen above in discussing the environmental impacts of oil operations, the activities of oil companies in the Niger Delta have resulted in loss of land or land use: to oil spillage, soil infertility, acquisition of land for the construction of oil infrastructure (flow-stations, flow-lines, pipelines, etc.).

With regard to loss of land to oil companies facilities, Shell states that: ‘All facilities, including flow-stations, offices, pipelines, flow-lines, use a total of only 220 square kilometres of the company’s Delta oil mining lease area of more than 31,000 square kilometres – some 0.7 per cent. In terms of the entire Niger Delta area, this land use amounts to 0.3 per cent’.²⁵⁶ This suggests that the loss of land does not have any serious social impact on the Niger Delta people. However, as O’Faircheallaigh has rightly pointed out, ‘while the total amount of land lost to mining may not be large...individual communities can lose most or even all their land, the destruction of land is complete, and the impact on indigenous peoples who depend on subsistence farming is devastating’.²⁵⁷ The Ogoni community of the Niger Delta exemplifies this point. As one observer puts it:

While the environment was undergoing...steady degradation, substantial parts of the land were being gobbled up by pipelines, laid on the surface,

²⁵⁵ Brody (1987: 228-9).

²⁵⁶ SPDC, ‘The Environment’ (Visited 3 February 2002).

<http://www.shellnigeria.com/info/info_display.asp?Id=135>.

²⁵⁷ O’Faircheallaigh (1991: 229). Similar view has been expressed by the CLO: ‘The physical space occupied [by the oil companies] may appear small compared to the entire Niger Delta, but the impacts and ripples pervade the entire area and beyond’ (CLO, 1999: 13).

not buried. To appreciate the *social effect* on the area of this environmental degradation and land alienation one has to have some idea of the demography and economy of Ogoniland. With a mainly rural population of 500,000, concentrated within 404 square miles of territory, Ogoni's population density is exceptional. The population is densest in the Gokana area, precisely the area where oil exploitation has had the most damaging impact. *The population is historically depended on a peasant farming and fishing economy. The destruction of the aquatic culture and much of the limited farmland through oil spillage has caused grave economic distress. The most conspicuous aspects of life in contemporary Ogoni are poverty, malnutrition and disease. The death rate is high even by Third World standards*²⁵⁸ (Italics mine)

This point is further borne out by recent findings of the present author in the Niger Delta region. In a recent visit to the region, it was found that land loss has brought about very severe social consequences for the people. For example, it has led to hunger and starvation; it has resulted to the contraction of several diseases as a result of starvation, and it has resulted to school drop-outs (with consequent social or deviant behaviours). Most parents who were interviewed in Ekpeye-land, Ogba-land, Engenni-land, Ogoni-land, Umuechem community and in Yanagoa town, suggested that they are now unable to train some of their children in schools because low crop yields and low fish catch has made it impossible for them to sell some of their farm products/fish catch to raise money to train their children. A sudden increase in criminal and anti-social behaviours (such as stealing and indecent assaults) were also reported,²⁵⁹ and these were blamed on the fact that the youths involved were not in schools nor do they have jobs.²⁶⁰ Similar findings were reported by the Human Rights Watch in 1999, leading it to surmise:

²⁵⁸ Naanen (1995: 66).

²⁵⁹ The Inupiat people of Canada also attribute growing social problems and acceleration of cultural loss to the impact of oil development. See Kruse *et al* (1982: 104) [Cited in O'Faircheallaigh, 1991: 250].

²⁶⁰ Interviews with author on 14, 15, 21 and 22 January 2002 in the communities mentioned. Apart from Yenagoa Town (State Capital of Bayelsa State), the other communities are located in Rivers State (hereafter, *Interviews with author*).

Whatever the long-term impact on the environment, spills can be devastating for those directly affected, especially in the dry land or freshwater swamp areas where the effects are concentrated in particular locations. Oil leaks are usually from high pressure pipelines, and therefore spurt out over a wide area, destroying crops, artificial fishponds used for fish farming, 'economic trees' (that is economically valuable trees, including those growing 'wild' but owned by particular families) and other income-generating assets. *Even a small leak can thus wipe out a year's food supply for a family, with it wiping out income from products sold for cash. The consequences of such loss of livelihood can range from children missing school because their parents are unable to afford the fees, to virtual destitution.* Even if the land recovers for the following year, the spill has consequences over a much longer period for the families directly affected (Italics mine).²⁶¹

From all indications, it seems the social impact of land loss in the Niger Delta extends to the loss of flora and fauna supported by the land.²⁶² Most people interviewed complained about the scarcity of animals in the bush as well as the death of some trees (some of which serve as medicinal plants for them). According to one of them: 'My ancestors were hunters, and supported their families with hunting. I learned hunting from my father, and I had supported my family with it in the 1950s and 1960s. I also treat any sick one among them with medicine extracted from the back of some trees in the bush. But since Shell began to be active in my community, I can neither find the animals to hunt nor leaving trees to exploit...Shell has poured oil everywhere in the bush...the animals don't like Shell's bright lights [gas flares] and have left our area; the trees have died...we are dying...'²⁶³ The implication of this is

²⁶¹ Human Rights Watch (1999: 66).

²⁶² In Canada, aboriginals have expressed concern over the overall effect of mining activities on aboriginal subsistence base. As Young (1995: 166) notes, in the Fort Norman area, adjacent to the oil and gas development at Norman Wells, people commented that caribou and moose were now harder to find, and that there were severe problems in setting traplines because of the proliferation of roads, seismic lines and drilling sites. People were also worried that the inrush of large numbers of people with noisy technology might affect migrating wildlife. See also Berger (1977).

²⁶³ Elder Jamel Amadi of Umuechem community, Etche in Rivers State (interview with author on 22 January 2002). Similar complaints had been made by the Ogoni people. According to a local spokesman: 'The once beautiful Ogoni countryside is no more a source of fresh air and green vegetation. All one sees and feels around is death. Death is everywhere in Ogoni. Ogoni languages are dying; Ogoni culture is dying; Ogoni people, Ogoni animals, Ogoni fishes are dying because of [over]

that the people are unable to continue with their subsistence activities. As one commentator notes in relation to the Inuit, inability to continue traditional, subsistence activities has profound social and cultural consequences:

To give up hunting is to abandon the activity that supported one's forebears during the past millennium, is to deny in one essential way the living connection with one's ancestral roots...[Hunting] provides a focus for the ordering of social integration, political leadership, ceremonial activity, traditional education, personal values and Inuit identity.²⁶⁴

This may well be the feeling of the Niger Delta people.

Mention should also be made of the fact that the continuing threat to land and to flora and fauna by the activities of the oil companies – whether through acquisition of land for the construction of oil company facilities, or damage through oil spillage or gas flare – appear to cause great anguish and fear among the people. For example, in a recent declaration by Ijaw youths (generally accepted by the people of the region), it was stated, *inter alia*:

All land and natural resources (including mineral resources) within the Ijaw territory belong to Ijaw communities and are the basis of our survival. We cease to recognise all undemocratic decrees that rob our peoples/communities of the right to ownership and control of our lives and resources, which were enacted without our participation and consent. These include the Land Use Decree and the Petroleum Decree etc.²⁶⁵

As could be observed, the people consider land as their lives. This recalls a similar statement issued by the Bougainvilleans at the time of the Panguna development:

Land is our life. Land is our physical life – food and sustenance. Land is our social life; it is marriage; it is our only world. When you take our land, you cut away the very heart of our existence. We have little or no experience of social survival detached from land. For us to be completely

33 years of hazardous environmental pollution and resulting food scarcity' (G.B. Leton) – Quoted in Naanen (1995: 66).

²⁶⁴ Freeman (1985: 255, 257).

²⁶⁵ Kaiama Declaration, 11 December 1998, Paras. 1 & 2.

landless is a nightmare which no dollar in the pocket or dollar in the bank will allay; we are a threatened people²⁶⁶

Lastly, mineral exploitation may destroy places of cultural value on land, and this can precipitate social conflicts. For example, the Kimberley Argyle Diamond Mine in Australia which coincides with a Barramundi dreaming site of great spiritual significance to the resident aboriginals, has resulted in conflicts between the aboriginals and the mining company, some fifteen years after the mining began.²⁶⁷ In the Niger Delta, the destruction or desecration of juju²⁶⁸ shrines by oil company activities has been a source of constant conflicts between the resident indigenous people and the oil companies. Recently, for instance, a community sued Shell for the desecration of their ancestral and juju shrines.²⁶⁹ And even most recently, an NGO – the Constitutional Rights Projects (CLO) – found that the ‘greatest concern’ of the Yenezuagene people of Bayelsa State (in the Niger Delta) ‘was the fact that their spiritual link to the land [has been] broken’. According to their report, the people claimed that ‘since they have been prevented [by the activities of oil companies] from performing their annual fishing (religious) festival [in their forests], during which they appeased their gods, they have noticed strange and unusual phenomena, such as children suddenly dying while out in the bush without any apparent cause whatsoever’. The report rightly concluded that ‘whether one believed their metaphysical afflictions or not, the claims still demonstrate the depths of their grievances’ (CLO, 1999: 18).

²⁶⁶ Cited in Dove, Miriung and Togolo (1974: 182).

²⁶⁷ Young (1995: 158) suggests that the conflicts still fester.

²⁶⁸ Most of the rural dwellers worship juju and their ancestors, and value their shrines greatly.

3. 8. 2. Impact of In-migration

Over the years, studies world-wide have shown that mining projects inevitably attract population to the region of operation.²⁷⁰ In Nigeria, there is abundant evidence to suggest that the exploitation of oil in the Niger Delta has resulted in the influx of people from different parts of the country and abroad into the region. Some of these immigrants are oil company workers, while others have come in search of jobs. Co-existing in the same place, social intercourse is unavoidable. In the result, socio-cultural conflicts are inevitable. According to one writer, such influx of population has ‘obvious social consequences for the resident aboriginal [indigenous] population’ (Young, 1995: 177). He notes that:

The cultural and social characteristics of the newcomers, their lifestyles and expectations have generally been very different from those of aboriginal people and resultant misunderstandings have led to conflict initiated from both sides. Social problems for the aboriginal groups have also arisen because some of them, often the younger and more highly educated individuals, have wanted to adopt many of the practices and advantages which they perceive the newcomers to have, and this has disrupted traditional forms of social control.²⁷¹

Similarly, O’Faircheallaigh explains that:

Social and cultural problems also arise because of the large influx of outsiders associated with major mineral developments. Those involved usually speak a different language and come from a different culture, they earn much higher incomes than local people, and they often have very little understanding of, or sympathy towards, local culture, social conventions or spiritual beliefs. In many cases, they feel themselves part of a superior culture. In this situation indigenous people are in danger of being culturally “swamped”, or at the very least they face major problems in maintaining the integrity of their own society and culture...²⁷²

²⁶⁹ See *Shell v. Tiebo VII* [1996] 4 NWLR (Pt. 445) 657.

²⁷⁰ See, for example: Ekpenyong (1984); Jackson (1984); Aipin (1989); Pika and Prokhorov (1989); O’Faircheallaigh (1991); Young (1995).

²⁷¹ Young (1995: 177).

These statements were proved in a recent survey in the Niger Delta. In all the communities visited by the present author, there were complaints of the strong presence of 'foreigners',²⁷³ whose cultures and values are in conflict with those of the locals and tend to corrupt the young ones.²⁷⁴ It was pointed out that the consumption of alcohol and pre-marital sex have become widespread since the arrival of the 'visitors'. Instances were given of children born by oil company workers with young local women and abandoned when the company transfers them (the workers) to other locations. Such children, it was said, constitute financial burdens to the parents of the women, and some have grown up to be social miscreants and criminals. It was suggested that the women were allured by the opulent lifestyles of the immigrant oil company workers.²⁷⁵ Besides, it was stated that the traditional, spiritual and religious beliefs of the locals are often derided by some of the visitors. On the whole, the impression was given that this is a serious social problem.

Although a job or the prospect of job may be a good reason for immigration, it would appear that some of the immigrant population in the Niger Delta region are neither workers nor job-seekers, but outright criminals.²⁷⁶ In the course of the recent survey by the author in the region, it was pointed out by the resident indigenous people that prior to the influx of people into their communities they could afford to leave their doors open all-night (often, in order to receive fresh air as there is no

²⁷² O'Faircheallaigh (1991: 244), citing Macpherson (1978: 129-30); Jackson (1984: 15-16); Lazarin (1988: 21); Aipin (1989: 138); Howitt (1989: 163); Pika and Prokhorov (1989).

²⁷³ From the explanations of the interviewees, 'foreigners' include Nigerians from other (especially, majority) ethnic groups. O'Faircheallaigh (1991: 245) rightly makes the point that 'the arrival of indigenous peoples from other parts of a particular country may be feared just as much as that of non-indigenous people'. He noted that 'this has apparently been the case, for instance, in Papua New Guinea'.

²⁷⁴ Interviews with author on 14, 15, 21 and 22 January 2002.

²⁷⁵ Similar social problems have been reported in Canada and Australia. It has been claimed that the isolation of single mineworkers, mostly male, has inevitably led to liaisons with aboriginal women, and to an increase in the number of part-aboriginal children in local families. See Young (1995: 178-9). Tatz (1982) records concern by some aboriginal communities in Canada about what will happen to the

means to buy a cooling system, and this is particularly during the Dry Season/Summer, when it is very hot day and night) and would have no fear of any intruder coming in. But, since the arrival of non-indigenes in their communities, the incidence of armed robbery, never before known, has assumed a frightening dimension, and they now live in constant fear day and night. Several properties and human lives have allegedly been lost as a result of incessant armed robberies. It was mentioned that often the worst hit are the indigenous people who cannot afford private security protection as the oil company workers.²⁷⁷

Further, it seems the problem of immigrant population has another dimension. During the survey, it was observed that the immigrant population has so swelled the population of the region resulting in overcrowding and its attendant social and environmental problems: for example, an increase in human wastes and exposure to contagious diseases. As Hodges (1973: 17) could say, 'population growth clearly has a great deal to do with pollution growth and it causes a disproportionate negative impact on the environment'. With specific regard to Nigeria, it has been observed that 'increase in population exacerbates many of the environmental problems in Nigeria. It places increased demands on environmental resources for potable water and effective sewage disposal, and it places both intensive and extensive pressures on forest, wildlife, and land resources' (Okorodudu-Fubara, 1998: 255).

'Kids That Are Not True' – those that belong to two cultures but whose futures may inevitably restrict them to only one.

²⁷⁶ There was a suggestion that some frustrated job-seekers turn to robbery.

²⁷⁷ Interviews with author on 14, 15, 21 and 22 January 2002. The author also observed that a lot of money is spent by the local people, from their meagre income, to fix iron protectors in their houses. In some houses, every window and every door has a protector. On whether they are not bothered about the outbreak of fire, their response was that they only 'pray that such a thing does not happen'. Yet there has been cases of fire outbreak and people trapped in such 'heavily protected' houses, and some had lost their lives. What is more, the protectors have not always proved to be effective. It was mentioned that in some cases the criminals had ripped up the protectors with sharp cutters to gain entrance or had ordered and frightened inmates to open the entrance door peacefully or face instant execution if they (the robbers) forced it open. Sometimes, this order had been carried out. Probed on the function of the

In the course of field survey by the author, it was found that most families live up to 10 persons in a small room (some as tenants, some are relations from other places who have come in search of elusive jobs). Perhaps in order to meet the housing problems, there are several slum settlements in the region. (Some natives suggested that the slums are the commonest abodes of criminals who terrorise the people daily). One common feature of the slum settlements (which it shares with most of the other areas) is the lack of social facilities such as electricity, pipe-borne water, good roads, hospitals and schools. From investigation, it seems that government's defence for the neglect of such areas is that they are illegal developments (because the structures offend planning, health and other regulations). Definitely, the social and environmental problems associated with this development and situation must be considered as one of the fall-outs of oil operations in the region.

3. 8. 3. Loss of Self Esteem

From a social angle, self esteem is a very valuable personality attribute. A person without self esteem may well be a psychological wreck. Yet it has been found that in many cases the combination of loss of land and the influx of foreigners with scant respect for indigenous peoples and their culture, has served to undermine self-esteem at the level of the individual and the community.²⁷⁸ Available evidence suggests that both scholars and indigenous peoples themselves consider this as one of the most serious long-term effect of mineral development in indigenous homelands. For instance, on this issue, Thomas Berger, Chairman of the Mackenzie Valley Pipeline Inquiry, wrote:

Nigeria Police Force, the locals suggested that the Force is riddled with corruption, ill-trained and lacking in modern crime combat facilities, and therefore grossly ineffective.

²⁷⁸ O'Faircheallaigh (1991: 248).

I found that one of the most pervasive social problems in the North was the loss of self-esteem by many native people. It may be no exaggeration to speak at times of a despair that overwhelmed whole families, even whole villages (Berger, 1983: 24).

Similar sentiment was expressed by Anthony Stickel, a British Columbian Indian, thus:

[T]he loss of self-esteem is one of the most critical losses. To find oneself caught up in a rapidly developing community whose values are totally different from those according to which one has modelled one's life, leads to a devastating feeling of worthlessness (Stickel, 1983: 52).

From every indication, the feeling of 'worthlessness' is pervasive among the Niger Delta rural people (over 90 per cent of the people live in rural communities, and that is precisely where oil operations take place). Respondents to recent interviews in the region point to the contrasting social status of the locals and the immigrants: for example, whilst the locals remain in perpetual darkness and drink water from wells or streams (with all the risk of contracting water-borne diseases), the immigrant oil-company workers enjoy constant light, mostly generated from private electric generators and have water bore-holes that supply them with potable water. Further, while oil-company workers enjoy air-conditioners in their well-built and well-furnished concrete houses, offices and in their cars, the locals (indigenous residents) have no resources (money) to build a good concrete house or buy a car or an air-conditioner.²⁷⁹ For this reason, the indigenous residents consider the immigrants as 'Big Men' (wealthy men), whereas they are 'poor men'; and they would not dare to 'annoy' the 'Big Men', lest they get brutalised by the police at their instance.²⁸⁰

²⁷⁹ Being in the tropical region, the weather in the Niger Delta is very hot virtually all-year round and this makes air-conditioners essential possessions for residents of the region (just as heaters are essential possessions in England).

3. 8. 4. Social Dislocation and Social Disintegration

In many cases it has been found that the combined effect of land loss, immigrant population and loss of self-esteem create severe social dislocation. As one researcher has argued, 'this leads in turn to serious problems at the individual, family and community level associated with, for example, alcohol abuse, violence, sexual promiscuity, family break-ups, mental illness and suicide' (O'Faircheallaigh, 1991: 249). Already, there are visible signs in the Niger Delta of social dislocation and social disintegration. The author's recent survey found that what was described as traditional system of social control and discipline (through the institution of Family/Community Chiefs) was no longer effective. This was partly attributed to lack of respect for the traditional authorities as a result of loss of land rights (hitherto the traditional authorities wielded much power and had much respect from the people because of their traditional role of allocation of farmlands to members of the family/community), and partly to the 'emulation of bad behaviour from the foreigners in our midst, all in the name of civilization...They smoke cigarettes and "gay" [Indian Hemp/cannabis], and this turns their heads. Unlike before, now a youth can openly abuse an elder or the community head and get away with it; the traditional system of discipline through the Council of Elders/Chiefs has crumpled...anarchy now rains everywhere in our villages...'²⁸¹

Another important aspect of social dislocation and social disintegration is manifested in prevalent intra- and inter-communal conflicts. It was claimed that the oil companies employ divide and rule tactics within and between the communities, with the result that often disputes arise over alleged favours by the oil companies to

²⁸⁰ Interviews with author on 14, 15, 21 and 22 January 2002.

²⁸¹ Interviews with author on 14, 15, 21 and 22 January 2002. The words in quotes were spoken by Chief Mene Okpara-Ede of Idu-Ekpeye, Ekpeyeland on 22 January 2002. On the loss of traditional authority in Nigeria as a result of mining, see Ekpenyong (1984: 268-9).

some elements within the communities or to some communities, to the exclusion of others. Sometimes it may be due to the sharing formulae for compensation due to the communities/families, or over the issue whether or not oil operations should continue in its 'unsustainable' manner.²⁸² This situation is exemplified by the present division within the Movement For the Survival of Ogoni People (MOSOP) – a Socio-Cultural organisation which has been campaigning for environmental sanity, sustainable development and fairness in the Niger Delta (made popular by Ken Saro-wiwa, who was executed in 1995 by military rulers in Nigeria). It will be recalled that following disagreements and conflicts between Shell and the Ogoni community, Shell suspended its operations in Ogoniland in 1993. Two years thereafter the leader of the organisation, Ken Saro-wiwa and eight others of his kinsmen, were executed by the Federal Government on an allegation of murder.²⁸³ Shell was accused of complicity and this further strained its relationship with the Ogoni community, which resolved never to allow Shell into their community until certain demands are met. Presently, Shell is planning to resume operations in Ogoniland and this has caused division and conflicts within the organisation and Ogoni villages, as some people (accused by opponents of being 'settled' (bought over) by Shell are in favour of Shell's return whereas others are still vehemently opposed to shell's return, until their demands

²⁸² Similar disputes have occurred within certain aboriginal communities in Australia, between those keen to promote mining because of the cash it generates and those who oppose further mining because of its environmental and social impacts. See O'Faircheallaigh (1991: 247). From the author's interviews with the Niger Delta people, it seems the oil companies identify certain 'powerful' persons in the communities and favour them in the award of contracts or minor employments, with a view to having such persons on their side. Such practices have caused conflicts where such favoured persons pursue causes inimical to the communities, and in favour of the oil company. According to O'Faircheallaigh (1991: 247), 'those who gain substantially from mining may develop a strong interest in promoting the activity which generates benefits for them. Conflict may erupt between such people and those who either expect to gain little financially from mineral development or who feel that economic benefits will be outweighed by non-economic costs.'

²⁸³ The trial of Ken Saro-wiwa and eight others for murder elicited world-wide condemnation for failing to comply with universal standards of fairness and justice. Their execution, despite pleas from world leaders, led to the suspension of Nigeria from the Commonwealth (an association of ex-British colonies) for a period of time.

(contained in the Ogoni Bill of Rights, 1990) have been met. According to reports, the opposing camps have been visiting violence on each other.²⁸⁴

Similar dispute also arose between members of four Ijaw communities who had won a High Court action against Shell for oil spillage.²⁸⁵ The case lasted for 14 years and had cost the community a lot of money. However, Shell refused to pay the monetary award, opting to appeal the court's decision.²⁸⁶ According to sources, on 2 July 1997 the communities gave Shell a two-week ultimatum within which to pay the compensation awarded to them or stop further oil production in their area while the appeal is pending (their argument being that appeal was a usual tactic employed by Shell to delay or escape payment).²⁸⁷ Within this period, efforts were made by the Government of Delta State and some persons to settle the matter amicably. However, representatives of the communities alleged that a 'peace meeting' held on 28 July 1997 was dominated by Shell contractors (members of the communities who have been bought over by Shell, and are acting in the interest of Shell). According to a spokesman and representative of the communities:

It is disturbing that on getting there we met a different situation. Contractors to Shell, whose loyalty to Shell cannot be in any doubt, were hand-picked and brought to the venue by the firm to create confusion at the meeting. We condemn this fraudulent action as we believe that no justice can be done on the basis of deliberate deceit...There was a role call before the meeting. Let Shell tell the world if apart from me and the community youth leader, the other eight persons representing the communities are not their registered contractors. Those were the people who insisted that in the interest of peace, we should allow Shell to go on

²⁸⁴ Interviews with author on 14, 15, 21 and 22 January 2002.

²⁸⁵ For the account of this, see Civil Liberties Organisation (CLO), *Annual Report* (1997: 205-8).

²⁸⁶ An indication of Shell's arrogance and insensitivity to the adverse impacts of their operations was given when a BBC Correspondent in Nigeria asked its spokesman whether it was negotiating to pay the compensation awarded against it. The representative replied: *'If we were to pay we would not have appealed. The people took us to court. The judgment was given in their favour. So we appealed. We are not paying anything. If we want to pay we would not have appealed...We are not negotiating with anybody. Shell has not bowed to any whatever [sic] pressure. We are not paying anything to anybody. We have taken the matter to the Court of Appeal and that is where the matter lies'* (Quoted in CLO (1997: 206)).

²⁸⁷ See CLO (1997: 207-8).

appeal but the appeal should be given accelerated hearing. They are paid to come and weaken the case of the communities.²⁸⁸

There is no evidence that this intra-communal dispute has been settled in any way.

In conclusion, oil operations in the Niger Delta has precipitated a wide-range of social problems. Most of these problems are the direct result of environmental impacts of oil operations, demonstrating the link between environmental, socio-cultural and economic issues.²⁸⁹ On the whole, these impacts and the response of the people (as witness several litigations) appear to suggest a feeling of anger on the part of the inhabitants of the region against oil company activities in the region.

3. 9. Conclusion

This Chapter set out to investigate the adverse impacts of oil operations in the Niger Delta region of Nigeria. From the environmental and social angles, it has been found that oil operations have resulted in numerous environmental and social problems, including social dislocations. Interestingly, this is similar to the findings of other visitors to the region. For example, a team of US environmentalists who visited the region in 1998 summarised their finding thus:

Oil company pollution like oil spills, leaking pipelines and gas flaring harm the environment and wildlife of the Niger Delta. Shell's "clean-ups" are appalling: in Otuegwe, an underground Shell pipeline spilled as much as 800,000 barrels of oil in the area in 1998. This past summer a visiting activist met people who had been hired by Shell to clean up the spill using towels and buckets. Shell's indignities to the people of Nigeria are not limited to oil spills and acid rain. A community in Umuebulu explained how Shell acquired land in their community, promising to build living facilities for employees but instead dug a large pit and began dumping noxious, presumably toxic waste. Nearby residents are experiencing skin rashes and other health problems they blame on the dump. The effects of this pollution on local populations is shocking. Oil spills spread and acid rain damages food, crops, plants and animals vital to local people's

²⁸⁸ Quoted in CLO (1997: 207-8).

²⁸⁹ See 'Oil for nothing: Multinational Corporations, Environmental Destruction, Death and Impunity in the Niger Delta' – A U.S. Non-Governmental Delegation Trip Report, 6 – 20 September 1999.

survival. Time after time the delegation heard stories of reduced fishing stocks and cassava production after oil exploration began...²⁹⁰

Although the oil companies argue that their operations in the region 'do not add up to anything like devastation',²⁹¹ the findings here have clearly contradicted this argument, showing, in the words of the World Bank, that 'oil development can degrade the environment, impair human health and precipitate social disruption'²⁹². Indeed, any remaining doubts may have been finally laid to rest by the recent observation of the African Commission on Human and Peoples' Rights. In its words: 'The Commission conducted a mission to Nigeria from 7 – 14 March 1997 and

²⁹⁰ See 'Nigeria: Behind the Greenwash' (visited 18 February 2002).

<http://www.essentialaction.org/shell/efart2.html>>.

²⁹¹ The full statement, made by Shell, reads as follows: 'Allegations of environmental devastation in Ogoni, and elsewhere in our operating area [Niger Delta], are simply not true. We do have environmental problems but these do not add up to anything like devastation...*Any industrial enterprise, including oil operations, has an impact on the environment, and this is true in Ogoni [Niger Delta]...*' (Italics mine) – Quoted in Ikein (1990: 266), citing SPDC [Shell Petroleum Development Company of Nigeria], 'The Ogoni Issue' < <http://europe.shellnigeria.com:80/issues/ogoni.html.comp> > (which he visited on 16 January 1997). Shell is still making the same denial today, albeit in a slightly modified way: 'There have been claims that SPDC's operations have devastated the environment. *Indeed, there are undeniable environmental problems in the Niger Delta, and it is equally true that the oil industry has contributed to these.* But they do not add up to "environmental devastation". Since these allegations were first made, a number of independent respected journalists have visited the Niger Delta and have challenged claims that Shell Nigeria has devastated the environment in Ogoni land or elsewhere in the Delta...' (Italics mine). See SPDC, 'Devastation?' (Visited 3 February 20002) <<http://www.shellnigeria.com/frame.asp?page=Devastation>>. In comparison, this current statement differs from the earlier one (which appears evasive) because of its clear admission that oil operations in the Niger Delta contributes to the environmental problems of the region. The challenge of the of so-called 'independent respected journalists' to the claim of devastation of the environment (made by the people of the region and others, including scientists) appears suspect, given that the fellows (on their own account) were flown around parts of the region in Shell's helicopters and were apparently Shell's guests. (See 'Devastation?' web page for details). A similar argument which maintains that 'when assessing the impact of the oil industry on the environment of the Delta, it appears that oil pollution, itself, is only of moderate priority when compared with the full spectrum of environmental problems in the Niger Delta' (Moffat and Linden, 1995: 532), clearly fails to consider the link between the impact of oil industry activities and the other environmental problems of the region (such as flooding and population-related problems). As a recent report of the Human rights Watch points out: 'The overall impact of oil spills is, in any event, irrelevant in assessing the impact of individual spills or the effect on a community of discharges from a particular flow-station. Moreover...it is also the case that many of the other environmental problems of the Delta are due in whole or in part to the oil industry, and the distinction between hydrocarbon pollution and the other effects of oil operations and oil-led developments is largely meaningless for the local communities' (Human Rights Watch, 1999: 68).

²⁹² World Bank, (1995, Vol. 1: 81).

witnessed first hand the deplorable situation in Ogoni land [Niger Delta], including the environmental degradation'.²⁹³

Apart from the present environmental and social problems, one other important and critical environmental issue facing the region, as a result of oil operations, is the threat which oil operations pose to the region's wetlands (which is the largest in Africa and third largest in the world). As has been seen, the Niger Delta wetlands are very rich in biodiversity and the rural population (constituting over 90 per cent of the population of the region) is dependent on it for sustenance. In this regard, the issue of protecting the wetlands from environmental degradation (including the depletion of its resources) is very crucial. This issue will be addressed in the next Chapter, where the question of the legal measures designed to tackle the environmental impacts of oil operations in the Niger Delta will be considered.

²⁹³ See *Communication 155/96 The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights / Nigeria* (Done at the 30th Ordinary Session, held in Banjul, The Gambia from 13 to 27 October 2001), Para. 67. (See also Para. 58).

CHAPTER 4

OIL OPERATIONS AND PROTECTION OF THE NIGER DELTA ENVIRONMENT

Sustainable Development mandates a holistic approach to development, sensitive to the needs of human beings and the environment.

-Puvimanasinghe (2000: 37).

The objective of development is people. The process of development may be measured in economic aggregates or technological and physical achievements. But the human dimension of development is the only dimension of intrinsic worth.

- Jolly and Stewart (1986: 35-36).

4. 1. Introduction

The preceding Chapter explored the environmental and social impacts of oil operations in the Niger Delta region. In summary, it was found that, over the years, oil operations have adversely affected the Niger Delta environment as well as the inhabitants of the region (essentially, most of the social impacts result from the environmental impacts).¹ This immediately raises the issue of environmental protection. Until recently, both developed and developing countries viewed development (oil exploitation is a means towards development) from a purely economic perspective, so that environmental issues were not considered important. Today, however, it seems the folly of a purely economic approach to development has

¹ This point was recently acknowledged by the Government of the Federal Republic of Nigeria through one of its agencies – the Federal Environmental Protection Agency (FEPA) – in its 1997 report to the Fifth Session of the UN Commission on Sustainable Development, thusly: ‘The overall management of the country’s mineral [including mineral oil] and natural resources (sic) remains the primary assignment of the government through its various organs. Their development is, however, either by individuals, private corporations or government organizations. All these developmental activities impact on the state of the environment and have contributed to environmental deterioration.’ See UN, ‘Country Profile: Nigeria – Implementation of Agenda 21’ at: < <http://www.un.org/esa/earthsummit/nigeriac.htm> > (visited 13/04/02).

been realized, especially in developed countries, and environmental protection has become of tremendous importance.² So that, presently, there is some emphasis on 'sustainable development'³: simply stated, a development approach which considers environmental issues in the same balance sheet. Explaining this position in a recent work on Nigeria, Okorodudu-Fubara (1998: 39) points out that 'in line with global trends, emphasis has shifted beyond mere development to sustainable development'. According to the author, 'sustainable development entails national policies and development plans that look beyond the welfare of the present generation to that of the future generations, by ensuring the utilization of the land, water, forest, wildlife,

² It should be noted that the concept of 'sustainable development' (based on 'command and control' strategy for environmental protection) does not yet enjoy universal and unanimous acceptance. For conflicting views, see Berkerman (1994) and Jacobs (1995). Further, apart from some critics who outrightly reject the idea, there is evidence to show that even in countries (such as UK and USA) where the idea has been accepted in principle, it has often been overrun by economic issues/benefits. See Gormley (1998: 74). Moreover, it appears the term 'sustainable development' has been 'abused', in the sense that it has been used, for instance, to emphasize 'the protection of national economies and the multilateral trade regime rather than the persistence of natural resources and the integrity of crucial ecosystems [environment]' (Harrop, 2002). Perhaps more importantly, there seems to be a trend in some countries towards 'deregulation' and 'economic instruments' as a strategy for environmental protection. Yet, it has been pointed out, 'potential risks associated with the increased role of the market in environmental policy range from implementation and enforcement deficits to a complete failure of achieving, or even identifying, environmental objectives' (Bosselmann and Richardson, 1999: 1). Emphasizing the inherent weakness of employing market mechanism alone for environmental protection, the authors argued: 'In so far as the quest for environmental justice is a quest for environmental quality and social justice, there is a natural tension between environmental justice and market mechanisms. This does not mean that both are necessarily mutually exclusive. However, justice and the market are not easy to reconcile. In the absence of any example that could suggest that the market *per se* provided the mechanisms necessary for social justice, there is nothing to suggest that it could provide the mechanisms necessary for environmental justice. At best, the market may provide some support or prerequisites. It is for the State, as policy- and law-making institution, to determine the extent to which the mechanisms of the market can be employed as a means for achieving environmental ends' (Bosselmann and Richardson, 1999: 1). Similarly, Hilson (2000: 13) argues that 'there are those who, in answer to the question "who should regulate?" would answer "firms". Nevertheless, few would advocate self-regulation as a complete replacement for regulation in the context of pollution control: in a competitive environment, firms will simply not adopt expensive control measures voluntarily; regulation is needed to ensure a more level playing field. Instead, most see self-regulation as a valuable supplement to public regulating programmes.' In any case, it is notable that 'sustainable development' via 'command' and 'control' strategy is still the dominant concept for environmental protection in some parts of the world, including Nigeria. (In fact, the idea of market mechanisms for environmental protection is yet to take root in Nigeria). In this thesis, the expression 'sustainable development' is used in its 'original conception', which emphasizes the protection of the 'environment', and not the promotion of 'trade'.

³ The traditional and most popular definition of 'sustainable development' is that given by the World Commission on Environment and Development (WCED): 'Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs' (WCED, 1987: 43). Compare Bosselmann and Richardson (1999), suggesting a current

and air resources for the interests of the present and succeeding generations'. In the context of this thesis, this may be described as a holistic approach to oil exploitation – an approach that is sensitive to the environment and the needs of human beings (in recognition of the fact that the objective of development is people⁴).

From a legal perspective, environmental protection can be variously achieved through appropriate constitutional,⁵ statutory, and treaty⁶ provisions as well as by judicial decisions.⁷ Across the globe, a number of such provisions exist today with varying degrees of effectiveness.⁸ In essence, the laws set minimum standards for activities affecting the environment (described in environmental issues discourse as 'command' and 'control' or 'regulatory' strategy). In the case of Nigeria, as will be seen shortly, the relevant laws are scattered in several statutes, but not all are immediately important for the purposes of this thesis,⁹ which is concerned only with environmental issues arising from oil operations.¹⁰ Accordingly, this Chapter will

shift in emphasizes, in some places, from environmental protection to the promotion of trade. As earlier stated, this thesis employs the term 'sustainable development' in the sense of environmental protection.

⁴According to the WCED, 'the satisfaction of human needs and aspirations is the major objective of development' (WCED, 1987:43).

⁵ Well over forty national constitutions (and a significant number of the constitutions of the component states of the United States) contain provisions dealing with environmental rights and duties. For a survey, see Kiss (1991: 263, 266-7). See also Weiss (1989: 297 – 327); Okorodudu-Fubara (1998: 86-88); Shelton (1991: 103- 104, esp. footnote 5). An illustrative constitutional provision is Art. 91(c) of the 1990 constitution of Namibia which charges the Ombudsman appointed by the President to 'investigate complaints concerning the over-utilization of living natural resources, the irrational exploitation of non-renewable resources, the degradation and destruction of ecosystems and failure to protect the beauty of Namibia'. For the most recent work in this regard, see Final Report Prepared by Mrs. Fatma Zohra Ksentini (UN Doc. E/CN.4/Sub.2/1994/9 (1994), esp. Annex III.

⁶ Important environmental protection treaties include the Convention on International Trade on Endangered Species of Wild Fauna and Flora (CITES) and Convention on Biological Diversity (CBD) (see text below).

⁷ The Indian Supreme Court as well as the Supreme Court of the Philippines has given landmark decisions in favour of environmental protection issues (discussed in the text below).

⁸ Okorodudu-Fubara (1998: 39-40) claims that 'law and policy [in Nigeria] have made significant input towards [the] holistic objective of nature conservation and sustainable development'.

⁹ For an interesting discussion of Nigerian environmental protection statutes in general, see Okorodudu-Fubara (1996); Okorodudu-Fubara (1998). See also (for more restricted discussions): Ekpu (1995); Emole (1998); Nwosu (1998 – 1999); Adewale (1992 & 1993).

¹⁰ For example, Rivers State has Noise Control Edict, 1985 which deals only with the control of excessive noise from loudspeakers and cars in the Capital City (Port Harcourt metropolis). In this context, it should further be noted that environmental issues are 'incidental' matters to substantive subjects allocated by the Nigerian Federal Constitution to the different levels of government in the federation. Matters relating to mine and minerals, oil fields, oil pipelines, geological surveys and

only examine the oil-related environmental protection statutes.¹¹ Apart from considering the substantive aspects of the statutes, this Chapter will also examine the extent to which, if at all, the oil companies operating in the region comply with the relevant environment protection statutes as well as the issue of enforcement of the relevant statutes, with a view to determining the effectiveness of the relevant laws in protecting the Niger Delta environment. In this way, the veracity of the claim that Nigerian law and policy have made significant input towards nature conservation and sustainable development¹² will be tested.

Lastly, because of the status of the local inhabitants of the Niger Delta region (where oil operations take place in Nigeria) and the biodiversity profile of the region (See above), this Chapter will briefly examine the relevant international instruments relating to environmental protection (including biodiversity conservation) of areas inhabited by indigenous peoples. However, before going into a discussion of the various issues here, it is instructive to briefly consider the Nigerian National Policy on the Environment. This will serve as theoretical background information for the succeeding discussions.

natural gas are within the exclusive competence of the Federal Government. In the result, State Governments would appear to be incompetent to make any environment protection laws affecting these subjects. In *Odim V. Shell-BP* (1974) 2 R.S.L.R. 93, the plaintiff's action for compensation, which relied on the Rivers State Minimum Crop Compensation Rates Edict (No. 7 of 1973), failed on the ground, *inter alia*, that the purported Edict was incompetent, to the extent that it provides for matters incidental to oil operations (which is regarded as being within exclusive federal competence).

¹¹ For a concise discussion of the environmental regulation of the Nigerian mining sector (excluding oil mining), see Usman (2001: 230). See also, generally, Walde (1992: 327).

¹² Okorodudu-Fubara, (1998: 39-40).

4. 2. National Policy on the Environment

4. 2. 1. Historical Background

As adumbrated above, the concept of environmental protection is a relatively recent one. As evidence makes clear, as late as the 18th and 19th centuries,¹³ man was still pre-occupied with the desire to produce goods and services for his comfort and enjoyment on planet earth; there was no 'philosophy of environmental protection'.¹⁴ On the contrary, evidence suggests that both philosophy and positive law supported unrestricted freedom to exploit environmental resources. In fact, most commentators agree that it was not until the 1950s and 1960s that environmental consciousness began to emerge in the developed/industrialized countries.¹⁵ Even so, it would appear that the 1972 UN Conference on the Human Environment, which produced the now famous set of environmental protection principles (known as the 'Stockholm Declaration') represents the first formal sign of increasing international concern for environmental degradation on a global scale.¹⁶

Like other Third World countries, commentators agree that Nigeria had initially viewed the sudden emergence of the 'spirit of environmentalism'¹⁷ with great suspicion. Essentially, it was seen as a new strategy by the developed/advanced countries (from where the idea emerged) to perpetuate the dominance of developing countries or delay their development. As Mrs. Indira Ghandi, Prime Minister of India put it: 'Many of the advanced countries today have reached their present affluence by their domination over other races and countries, the exploitation of their own masses

¹³ The 19th century is remembered as the era of industrial revolution in England; a revolution that did not consider environmental issues.

¹⁴ Okorodudu-Fubara (1998: 77).

¹⁵ See Leonard and Morell (1981); Sinjela (1984).

¹⁶ Ever since, environmental issues appear to have become a permanent 'item' in world affairs. For example, an Earth Summit for the environment was held in Rio de Janeiro, Brazil, in 1992, where, *inter alia*, the now famous Rio Declaration on the Principles of Environment and Development and Agenda 21, were adopted. Most recently, a World Summit on Sustainable Development was held for ten days in Johannesburg, South Africa, in August/September 2002.

and their natural resources. They got a head start through sheer ruthlessness, undisturbed by feelings of compassion or by abstract theories of freedom, equality, or justice'.¹⁸

In its Fourth National Development Plan (1981-85), Nigeria acknowledged its neglect of environmental issues thus: '[T]his area [environmental protection] has in the past received little attention from government. A reason for this could be the overriding concern at the early stages of development for the quantitative aspects of human requirements, more food, more water, more energy, etc., as opposed to the qualitative aspects...'¹⁹ Yet, there is evidence to indicate that Nigeria was well aware of the adverse consequences of unsustainable development. For example, at a seminar on Environmental Awareness for National Policy Makers held in Lagos on 10-12 November 1982, Dr. Joseph Wayas (then Senate President) said:

It is hardly necessary for me to chronicle here the glaring evidence of the growing threat to our environment and hence to the quality of life of the people of our great nation. Nigeria's environmental problems are many and diverse. Indeed, not a single one of us here is unfamiliar with their ugly manifestations all around us...It is...true that the more recent process of rapid economic development and mineral resources exploration and exploitation...have contributed in no small way to these environmental problems...The lack of proper facilities for waste disposal, inadequate housing, the problem of refuse collection and disposal...To all these must be added the problem of...industrial pollution arising from improper disposal of industrial wastes, and oil pollution in the oil producing areas of the country. We owe it to ourselves and most especially to posterity to bend our every effort toward the arrest of environmental decline and the preservation of environmental sanctity and natural resources for a more abundant life for the future generations of Nigerians...It is my belief, therefore, that we need to assign greater priority to finding lasting solutions to the problems of this nature.²⁰

¹⁷ Okorodudu-Fubara (1998: 3).

¹⁸ See Development and Environment – Report submitted by a panel of experts convened by the Secretary-General of the U.N. Conference on the Human Environment, June 4 – 12, 1971 (U.N. doc. GE71 – 13738, 36). See also, Hargrove (ed.) (1971).

¹⁹ The Fourth National Development Plan may be regarded as the beginning of a new thinking in Nigeria on environmental issues. For the first time the need to consider environmental issues along-side development issues appears to be officially recognized.

²⁰ Quoted in Okorodudu-Fubara (1998: 7 - 8).

Nevertheless, by 1988 there is no evidence that environmental issues were accorded any priority in Nigeria. There was neither a national environment protection policy nor a comprehensive environment protection statute, although there were few scattered 'environment-protection-statutes' (including oil-related environment protection statutes and other statutes containing environment protection provisions) (see below). In other words, prior to 1988 there seems to be some apathy on environmental protection issues in Nigeria. According to Okorodudu-Fubara, 'it is now a well-chronicled history that the discovery of hazardous wastes surreptitiously dumped in parts of the country [in 1988] awakened the Nigerian public and the country's leadership from environmental inactivity to what has now become a sustained environmental consciousness in the country' (1998: 8– 9).²¹ This point is supported by a statement made by the Minister in charge of the Federal Ministry of Works and Housing in 1988, after the dumping incident,²² as follows:

The Federal...Government is aware of the fact that a clean and safe environment is one of the greatest legacies that a nation can bequeath to its unborn generations...The impression is often wrongly created and canvassed that environmental degradation is a problem of the developed world, associated with their higher level of industrialization, implying that a non-industrial country like Nigeria has nothing to fear. Nothing can be farther from the truth, as irreparable damage has been done, in many instances, to the Nigerian environment through activities such as...indiscriminate dumping of liquid and solid wastes, as well as discharge of untreated industrial wastes into streams...leading to intense pollution of both surface and ground water resources with the attendant hazards to the health of the populace...*Nigeria was rudely awakened from environmental inactivity by the well-publicized illegal dumping of toxic and hazardous wastes at Koko!...That singular event has, hopefully, opened the eyes of the nation to the dangers inherent in adopting a casual approach to the problems of environmental protection and should reinforce importance of the government's environmental sanitation programme. A new dawn has arisen. The government is now committed,*

²¹ Okorodudu-Fubara (1998: 205) rightly states that 'the year 1988 marked the watershed in clearly defined and more detailed legislative focus on the protection of [Nigeria's] environment'.

²² The incident was discovered in May 1988. It was found that the illegal 'cargo' had been discharged at Koko port (located in the Midwestern side of Nigeria) since August 1987 by some crooked Italian businessmen, acting in collusion with their Nigerian counterparts.

*more than ever before, to protect the nation's environment and preserve it as a heritage for future generations*²³ (Italics mine).

It is significant and interesting that following the toxic waste dump incident, the Federal Ministry of Works and Housing (Environmental Planning and Protection Division) in collaboration with the United Nations Environment Programme (UNEP) organized an International Workshop in September 1988 on the Goals and Guidelines of a National Environmental Policy for Nigeria, which eventually led to the adoption and publication of the National Policy on the Environment in 1989. According to one commentator, the International Workshop marked the first major step to readjust Nigeria's 'relationship with its environment based on the principle of sustainable development and proper management of the environment and its resources'.²⁴ At this point, the discussion moves to an outline of the National Environmental Policy and its goals.

4. 2. 2. National Policy on the Environment: A Nutshell

As previously stated, Nigeria's National Policy on the Environment was adopted only in 1989 after acknowledged damages had been done to its environment by various kinds of unsustainable socio-economic development. It is a wide-ranging policy document dealing with major environment issues such as: land use and soil conservation; water resources management; forestry, wildlife and protected natural areas; marine and coastal area resources; air pollution; noise pollution; sanitation and waste management; toxic and hazardous substances; occupational health and safety; mining and exploitation of mineral resources; energy production and use; public participation in environmental protection; and institutional and legal arrangements for

²³ See *The Nigerian Environment*, Vol. 1, No. 1, December 1988, 1.

²⁴ Okorodudu-Fubara (1998: 57).

environmental protection. For the present purposes, space will not permit nor is it useful to undertake a detailed consideration of the entire policy issues.²⁵ Accordingly, this thesis shall only focus (albeit in a nutshell) on some aspects, which are of immediate concern, and this includes the policy goal.

4. 2. 2. 1. Policy Goal

In enunciating a National Policy on the environment, Nigeria expressed commitment to ‘sustainable development based on proper management of the environment in order to meet the needs of the present and future generations’.²⁶ It was recognized that ‘this demands positive and realistic planning that balances human needs against the potential that the environment has for meeting them’. Significantly, it was noted that: ‘[T]his new thrust is based on fundamental re-thinking and a clearer appreciation of the interdependent linkages among development processes, environmental factors as well as human and natural resources’. Further, implicitly rejecting the previous (careless) approach to environmental issues, it was emphasized that ‘since development remains a national priority, the actions designed to increase the productivity of the society and to meet essential needs must be reconciled with the environmental issues that had hitherto been neglected or not given attention’.²⁷ On these premises, the ultimate goal of the National Policy on the Environment is stated to be the ‘achievement of sustainable development in Nigeria’, and, ‘in particular’, to:

- (a) Secure for all Nigerians a quality of environment adequate for their health and well being;
- (b) Conserve and use the environment and natural resources for the benefit of present and future generations;

²⁵ For an engaging discourse of the entire policy, see Okorodudu-Fubara (1998: Chapter 2).

²⁶ This is an adoption of the definition of sustainable development as contained in *Our Common Future* (Report of the WCED, 1987).

²⁷ See National Policy on the Environment (Introduction).

- (c) Restore, maintain and enhance the ecosystems and ecological processes essential for the functioning of the biosphere to preserve biological diversity and the principle of optimum sustainable yield in the use of living natural resources and ecosystems;
- (d) Raise public awareness and promote understanding of essential linkages between environment and development and to encourage individual and community participation in environmental improvement efforts; and
- (e) Cooperate in good faith with other countries, international organizations/agencies to achieve optimal use of transboundary natural resources and effective prevention or abatement of transboundary environmental pollution.²⁸

As can be seen, the central idea of the policy is the concept of 'sustainable development': development which meets the need of the present, without compromising the ability of future generations of Nigerians to meet their own needs; inter- and intra-generational equity; prudent/wise use of natural resources, and conservation of natural resources. How does the policy statements elaborate this? This is the concern of the next section.

4. 2. 2. 2. Selected Policy Statements and Implementation Strategies

As indicated earlier, only aspects of the National Policy on the Environment which are of immediate concern will be outlined here. To reiterate, apart from the problem of space, it is not useful for the present purposes to deal with all the policy issues contained therein. In view of this, the following aspects have been selected for general overview: water resources management; forestry, wildlife and protected natural areas; marine and coastal resources; mining and exploitation of mineral resources; energy production and use; public participation; and institutional and legal arrangements for environmental protection.

(i). **Water Resources Management:** Paragraph 3. 3 of the National Policy on the Environment declares: 'In the economic development effort, rational water resources

management will be pursued.’ Among the strategies stated for the implementation of this policy are the following: establishment of adequate controls and enforcement procedures to prevent contamination and depletion of water resources; improved water use technology, including safe disposal of waste water, waste water reuse and recycling; control of point and non-point sources of pollution; and conservation and improvement of water quality conditions and the ecological systems of water bodies (for fishes and other fauna and flora).

(ii). Forestry, Wildlife and Protected Natural Areas: The policy thrust in this key area is to secure economic development ‘while at the same time sustaining the productivity of the natural vegetation, protecting wildlife, maintaining genetic diversity and avoiding forest and soil destruction’.²⁹ To achieve these objectives, it is proposed to: strengthen forest protection programmes to ensure adequate vegetation cover in critical areas and *to discourage developments likely to cause harmful changes*;³⁰ assess the state of natural vegetation resources and *identify endangered sites and species for priority action*; protect flora and fauna in danger of extinction as well as forest reserves for scientific, recreational and other cultural purposes; and combine desirable features of traditional approach with modern scientific methods of conservation.

(iii). Marine and Coastal Resources: This aspect is of especial importance to the Niger Delta region because of its numerous water bodies and its biodiversity characteristics, and also considering the fact that oil operations take place there. Perhaps it is in recognition of the critical and strategic importance of this area that the National Environmental Policy states: ‘In order to maintain and improve the quality of the unique environmental resource endowment and physical characteristics of coastal areas, ecological master plans will be prepared to guide the use of coastal areas for

²⁸ See National Policy on the Environment (Paragraph 2).

diverse and often conflicting industrial and social activities, so that the continued viability of all aspects and ecosystems will be secured.’³¹ In consonance with this, it is proposed to embark on environmental and monitoring programmes which will be operated routinely to: sustain ecological diversity; provide data and operational standards for project planning and implementation – for example, in fishing, dredging, and mining; prepare master plans for the control of land, coastal and marine-based activities to minimise pollution and protect coastal and marine resources; *establish national and regional contingency plans for maritime tanker accidents and oil well blow-outs*; and *establish stringent standards for effluent discharge from mines, thermal and nuclear plants and oil exploration and production operations*.³²

(iv). Mining and Exploitation of Mineral Resources/Energy Production and Use: Like the preceding one, these aspects have important implications on the Niger Delta environment. Significantly, the National Environmental Policies on these issues contain a frank admission of the hazardous nature of minerals exploitation, resulting in extensive environmental degradation. It states: ‘Despite the tremendous importance of the mining sector [especially the oil mining sector] to the national economy, activities in the sector usually cause extensive degradation of the ecosystems’.³³ In view of this, the policy statement declares that ‘utmost care must be exercised to ensure that mining and associated activities proceed in an environmentally sound manner’.³⁴ Among other mechanisms designed to achieve this is the promotion and

²⁹ Paragraph 3. 4.

³⁰ Italics mine.

³¹ Paragraph 3. 5.

³² Italics mine.

³³ Specifically on energy production and use, the policy thrust is the reduction of the negative impact of energy production and use on the environment. See Paragraph 3. 10.

³⁴ See Paragraph 3. 8.

encouragement of prudent use of the nation's mineral resources through the adoption of rational conservation measures.³⁵

Allied to this is energy production and use, on which the implementation strategies are stated to include: promoting safe and pollution-free operations in energy production and use; monitoring oil spill contingency plans, including national, cooperative and company-level plans; ensuring effective monitoring and assessment of environmental protection programmes in upstream and downstream (exploration, production, refining, petrochemicals, transportation and marketing) activities in the petroleum industry; encouraging re-injection and utilization of produced gases to prevent the adverse environmental impact of gas flares; and licensing of energy waste disposal sites.³⁶

(v). Public participation: In pursuit of the goals and objectives of the environmental policy, it is recognized that public participation is important. However, the level of participation envisaged does not appear to include participation in the making of decisions on development projects with environmental implications, which affect the inhabitants of the target area, particularly indigenous people.³⁷

(vi). Institutional/Legal Arrangements: The National environmental policy recognizes the importance of the establishment of effective institutions within and among the various tiers and levels of government in Nigeria (Federal, State, and Local Governments) for its implementation.³⁸ Accordingly, it recommended the establishment of a Federal Environmental Protection Agency (FEPA), charged essentially with the responsibility

³⁵ It is not clear why mineral oil (petroleum) is not specifically featured in this paragraph/section (para. 3. 8), which dwells exclusively on other minerals such as coal, which are not of any significant importance to the national economy; and yet the other minerals are covered in the energy paragraph/section (para. 3. 10) together with mineral oil. The whole thing gives a false impression that oil is not a mineral resource, whereas oil is Nigeria's No. 1 mineral resource. Perhaps this should be blamed on inadvertence.

³⁶ These strategies are contained in Paragraph 3. 10 of the National Policy on the Environment.

³⁷ The closet strategy to achieving public participation is stated to be: 'Ensuring broad public participation in consensus-building towards defining environmental policy objectives'.

for environmental protection and management programmes.³⁹ Additionally, it also recommended the establishment of a consultative machinery, such as a National Council on Environment, at the Federal level and State Committees on Environment at State levels to (*inter alia*): advise the President/Governor on environmental issues; encourage the use of ecological information in the planning and development of resource-oriented projects; and support the activities of FEPA.

It was further recognized that in order to provide legal authority for the implementation and enforcement of the various policy issues, a legal framework is necessary. Accordingly, the government is required to take the following actions: promulgate a series of appropriate environmental protection laws; harmonise the various existing environmental protection legislation; make it a constitutional duty of governments – Federal, States and Local – to safeguard the environment and aspire to have a safe and healthy nation; encourage and institute incentive measures for installation and provision of anti-pollution equipment and devices; and stipulate procedures and regulations for implementing the national environmental policy.⁴⁰

In fairness, it may be said that the Nigerian *environment protection policies*⁴¹ reflect current international thinking on development-environment issues.⁴² However,

³⁸ Paragraph 5. 0.

³⁹ As will be noted later, this body was even established before the National Policy on the Environment was officially launched.

⁴⁰ Paragraph 6. 0.

⁴¹ The Nigerian National Policy on the Environment was recently revised. See FEPA, National Policy on the Environment (Revised Edition) 1999. The revision does not affect the discussion here. Among others, the revised policy was meant to ensure that environmental concerns are integrated into major economic decision-making processes, and that environmental remediation costs are built into major development projects (Para. 1 and Para. 4. 1, respectively).

⁴² Consistent with the National Environmental Policy, the Nigerian National Petroleum Corporation (NNPC) – the country's regulatory/supervisory agency for the petroleum industry, and itself a full-fledged oil company – recently published a National Petroleum Policy, with the following as part of its objectives: '(d) *Ensuring that petroleum exploration and development activities are conducted with due regard to adequate environmental protection.*' However, it is difficult to reconcile this objective with the pursuit of 'maximum economic benefit', as stated in para. (j) thereof: 'Maximizing benefits derivable from all forms of petroleum, including crude oil, natural gas and other derivatives.' The National Petroleum Policy was published on 11 August 2000. For full text, see NNPC, 'National

whether these policies have been incorporated into its statutes is another issue altogether. Also different is the question of effectiveness of the statutes, assuming they reflect the environmental policies. The succeeding section will focus on the first of these issues, that is, the legal framework for environmental protection in Nigeria; specifically, as it relates to the environmental concerns of the Niger Delta region arising from oil operations. Most importantly, the section will evaluate the substantive provisions of the relevant statutes to see whether they meet the case, and this should also reveal the extent to which the laws reflect the national environmental policies or its values. The question of the effectiveness of the laws will be investigated in a later section.

4. 3. Oil-Related Environmental Protection Statutes

As previously indicated, although 1988 marked the 'watershed in clearly defined and more detailed legislative focus on the protection of the nation's environment', there were pre-1988 statutes and statutory provisions dealing with environmental protection. Significantly, some of these statutes and provisions relate to oil operations or have some bearing thereto. In the circumstance, and in order to get a full picture of relevant environmental protection statutes, this section will consider both the pre- and post-1988 statutes.⁴³ For the present purposes, the most relevant of these statutes

Petroleum Policy' at: < http://www.nnpc-publicaffairs.com/industry/20000811_150437.htm >(visited 23/04/02).

⁴³ Virtually all the statutes were promulgated by successive military governments in Nigeria, and were called Decrees. However, during the Second Republic (1979-1983), existing Decrees were re-designated Acts by the President of the Federation, pursuant to constitutional powers. The essence was to bring them into conformity with the terminology of a civilian administration. Further, when the laws of Nigeria were revised in 1990, some existing Decrees were included therein as Acts (e.g. the Federal Environmental Protection Act, Cap 131). That was done during a military regime. However, in 1992 the Federal Military Government promulgated a Decree in which it was provided that all laws promulgated by the Military Government on or after 31 December 1983 (including those included in the revised edition of the laws of Nigeria 1990, shall continue to be referred to as Decrees. (See Revised Edition (Laws of the Federation of Nigeria) (Supplementary Provisions) Decree 1992 (No. 55 of 1992), Section 1(2) & (3)). This law may be justified at the time in view of the military

include the: Criminal Code; Petroleum Act (and the Petroleum (Drilling and Production) Regulations made thereunder; Oil in Navigable Waters Act; Associated Gas Re-Injection Act; Environmental Impact Assessment Decree; and the Federal Environmental Protection Agency Act (together with the National Environmental Protection (Effluent Limitation) Regulations, and the National Environmental Protection (Management of Solid and Hazardous Wastes) Regulations, made thereunder).⁴⁴ Other important legislation such as the Endangered Species (Control of International Trade and Traffic) Act will be examined in a separate section dealing with conservation of biological diversity. To emphasize, the discussions here will be in relation to oil operations: particularly, in relation to the issues of oil pollution, gas flare and other oil-operations-related environmental concerns identified in the last Chapter.

i). Criminal Code

The Criminal Code, 1916⁴⁵ has two important provisions concerning the protection of water quality and utility. The first is Section 234 (e) which provides that any person who deliberately diverts or obstructs the course of any navigable river so as to diminish its convenience for purposes of navigation is guilty of misdemeanour and is liable to imprisonment for two years.⁴⁶ The second, and more importantly for the present purposes, is Section 245 which prohibits water pollution: 'Any person who

constitutional principle, which places Decrees above the 'unsuspended' parts of the constitution and Acts of civilian governments. Although this law has not been repealed nor have Decrees been re-designated by the present civilian government, it is correct to say that the description of a law at the moment as a Decree is inconsistent with the present constitutional order. In any case, this thesis shall refer to all laws contained in the Revised Edition of the Laws of the Federation of Nigeria (notwithstanding the provision of Decree No. 55 of 1992) as Acts, and those outside, made by Military Governments, as Decrees.

⁴⁴ There are about 50 federal laws dealing with environmental protection, wholly or in part. For a list of these laws, see Ajomo (1994: 24 – 25). This is in addition to a good number of state laws. For example, Rivers State (Noise Control) Edict 1985; Rivers State Environmental Protection Edict 1994.

⁴⁵ Cap 77 LFN 1990.

corrupts or fouls the water of any spring, stream, well, tank, reservoir, or place so as to render it less fit for the purpose for which it is ordinarily used, is guilty of a misdemeanour, and is liable to imprisonment for six months'. There is an equally important provision against air pollution. Section 247 provides that any person who: '(a) vitiates the atmosphere in any place so as to make it noxious to the health of persons in general dwelling or carrying on business in the neighbourhood, or passing along the public highway; or (b) does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, whether human or animal, is guilty of a misdemeanour, and is liable to imprisonment for six months.'

Although not targeted against the activities of oil companies, these provisions have the potential for controlling oil pollution and gas flare.⁴⁷ However, there are difficulties in their application in this regard. Firstly, being criminal offences, the acts will be considered done against the State, and this implies that only the State can prosecute the offenders (a process which starts with arrest and investigation). Secondly, since the offences, in the case of oil pollution and gas flare, can be committed only by corporate entities, the penalty of imprisonment cannot apply.⁴⁸ Even if it can, the penalty of imprisonment for six months or one year can be considered an insufficient deterrent, and may not even be commensurate to the degree of damage that might have been wrought by the act in question. Thirdly, the interpretation of 'corruption of water', for example, may pose insurmountable problems to any prosecution under these provisions.⁴⁹ In the result, from the

⁴⁶ This is classified by the Act as one of the common nuisances.

⁴⁷ Compare Okorodudu-Fubara (1998: 398 – 400).

⁴⁸ For the difficulties of applying criminal sanctions to companies/corporations, see Fogam (1990: 87, 89-95).

⁴⁹ It may require the prosecution to produce scientific evidence in order to prove the charge beyond reasonable doubt, as required by the criminal justice system.

perspective of environmental protection, the Criminal Code provisions are arguably unhelpful.⁵⁰

(ii). Petroleum Act/ Petroleum Regulations

Primarily, the Petroleum Act 1969⁵¹ set out to regulate the exploitation of oil resources (from exploration to production) – that is, the granting of concessions, leases and licences, etc., and matters incidental thereto (including the payment of rents, royalties, premium, etc.); it is strictly not a pollution regulation statute.⁵² However, perhaps in recognition of the fact that oil exploitation is a major industrial activity which can cause environmental damage (and consistent with the concept of sustainable development), Section 9 (1) (b) (iii) and 9 (1) (c) of the Act provide that the Minister of Petroleum Resources *may*⁵³ make regulations in relation to licenses and leases granted under the Act and operations undertaken there-under, for the prevention of water pollution, atmospheric pollution and other environmental damage due to oil operations. In pursuant to this enabling power, the Minister of Petroleum Resources has made the *Petroleum (Drilling and Production) Regulations 1969* (hereinafter, the ‘Regulation’, except otherwise indicated) which contains important environmental protection provisions.

For example, Paragraph⁵⁴ 25 of the Regulations makes it mandatory for a licensee or lessee to ‘adopt all practicable precautions including the provision of up-

⁵⁰ There is no evidence of any prosecution under these provisions, particularly with regard to oil operations.

⁵¹ Cap 350 LFN 1990.

⁵² In its recital, the Petroleum Act is described as: ‘An Act to provide for the exploration of petroleum from the territorial waters and continental shelf of Nigeria and to vest the ownership of, and all on-shore and off-shore revenue from petroleum resources derivable therefrom in the Federal Government and for all other matter incidental thereto.’

⁵³ The use of this word indicates that what is given is a discretionary power, which may or may not be exercised.

⁵⁴ The term ‘Paragraph’ refers to an aspect of the Regulations. This is used interchangeably with the term ‘Regulation’ in some cases.

to-date equipment approved by the Director of Petroleum Resources, to prevent the pollution of inland waters, rivers, water courses, the territorial waters of Nigeria or the high seas by oil, mud or other fluids or substances which might contaminate the water, banks or shoreline or which might cause harm or destruction to fresh water or marine life.⁵⁵ And where such pollution occurs or has occurred, the licensee or lessee 'shall take prompt steps to control and if possible put an end to it'.⁵⁶ According to one writer, this Paragraph is 'designed to minimize pollution in the exploration and production stages' (Adeniji, 1975: 109).⁵⁷

Perhaps in recognition of the fact that oil pollution can occur because of equipment failure (see Chapter 3), Paragraph 36 enjoins oil companies operating in the country to keep their equipment in proper maintenance. The Paragraph provides: 'The licensee or lessee shall maintain all apparatus and appliances in use in his operations, and all boreholes and wells capable of producing petroleum, in good repair and conditions, and shall carry out all his operations in a proper and workmanlike manner in accordance with these and other relevant regulations and methods and practices accepted by the Director of Petroleum Resources as good oil

⁵⁵ A similar provision was contained in an earlier Regulation – Paragraph 56 of Schedule 11 to the Mineral Oils Regulations, 1914 made pursuant to the Mineral Oils Ordinance, 1914, which directed that:

In the exercise of the rights conferred by these rules, a worker [an oil company] shall not without the consent of the Commissioner of the District, pollute or permit to be polluted any water flowing through the land subject to his license or lease so as to render the same unfit for domestic or farming purposes or divert or permit any such flowing water.

The Regulation also forbade damage to timber and 'produce bearing trees', and interference with public roads (Paragraph 54).

⁵⁶ See also Para. 13 of the Petroleum Regulations 1967, which prohibits the discharge of petroleum into the waters of a port.

⁵⁷ Similar provision can be found in Paragraph 43 (3) of the Petroleum Refining Regulations, 1974, which provides: 'The Manager [of a Refinery] shall adopt all practicable precautions including the provision of up-to-date equipment as may be specified by the Director [of Petroleum Resources] from time to time, to prevent the pollution of the environment by petroleum or petroleum products; and where such pollution occurs the manager shall take prompt steps to control and, if possible, end it.' Under Paragraph 45 (1) of this Regulation, a contravention of this Regulation carries a penalty of N100 fine or imprisonment for a term of six months.

field practices.’⁵⁸ In addition, in what appears to be an elaboration of ‘good oil-field practices’,⁵⁹ the Paragraph further stipulates that the licensee or lessee must take all steps practicable to:

- (a). Control the flow and to prevent the escape or avoidable waste of petroleum discovered in or obtained from relevant areas;
- (b). Prevent damage to adjoining petroleum bearing strata;
- (c). Except for the purpose of secondary recovery as authorised by the Director of Petroleum Resources, to prevent the entrance of water through boreholes and wells to petroleum-bearing strata;
- (d). *Prevent the escape of petroleum into any water, well, spring, river, lake, reservoir, estuary or harbour; and*
- (e). *Cause as little damage⁶⁰ as possible to the surface of the relevant area and to the trees, crops, buildings, structures and other property thereon.*⁶¹

It is significant to note that sub-paragraphs (d) and (e) of Paragraph 36 are particularly important, in view of the environmental impacts of seismic operations (particularly to buildings and vegetation), and the impact of oil spill on mangrove trees. One commentator has argued that the concept of ‘good oil-field practice’⁶²

⁵⁸ This was made pursuant to Section 9 (1) (c) of the Petroleum Act, which provides that the Minister of Petroleum Resources may make Regulations ‘regulating the construction, maintenance and operation of installations used in pursuance of this Act’.

⁵⁹ Compare Adeniji (1975: 112); Saskatchewan Oil and Gas Conservation Regulations, 1969 (O.C.2272/68), Part VIII-X; Maryland Oil Pollution Prevention Regulations, 1974 (Regulation 0.8 05. 04.7) Para. C-I.

⁶⁰ It would seem that damage is inevitable in the course of oil operations. As Adewale (1987 & 1988: 47) points out, ‘it is an axiom that pollution [or damage] will occur during oil operations no matter how advanced the technology.’

⁶¹ A further protection of land resources can be found in Paragraph 15 (1) (f). Although this Paragraph recognizes a licensee’s/lessee’s right under the Petroleum Act as including the ‘right to search for, dig and get free of charge gravel, sand, clay and stone not subject to any license or lease within unoccupied land’, this is on the condition that ‘upon cessation or completion of work in the relevant area, all excavations shall be filled in or levelled out and left by the licensee or lessee as far as may be reasonably practicable and to the satisfaction of the Director of Petroleum Resources, in their original condition and, if so required by the Director of Petroleum Resources, fenced or otherwise safeguarded.’ See also Regulation 35.

⁶² The terms ‘businesslike manner’, ‘workmanlike manner’, and ‘good oilfield practice’, are not defined in the Regulation. This has given rise to different and divergent views on their meanings. For example, Adeniji (1975: 112) says that ‘the reference to “businesslike manner”, “good oilfield practice” and “workmanlike manner” obviously looks to an objective standard to determine what methods and precautions [apply]’. This may be contrasted with the view of Adewale (1987 & 1988: 49), who argues that ‘terms like “good oilfield practices” and “...workmanlike manner” are references

under this Paragraph (Paragraph 36) could enhance the goal and objective of prevention of oil pollution under Paragraph 25 if it is well observed.⁶³ This may well be so, but other clauses in Paragraph 25 would appear to attenuate the value of these provisions. For example, the stipulation for the adoption of ‘all practicable precautions’ may prove problematic to apply in practice. The difficulty here may hinge on the issue of ‘practicability’, which might invoke economic reasons to defeat environmental issues. Further, Paragraph 25 does not appear to enjoin the ending of pollution which has occurred; the affected company is only required to take ‘prompt steps’ where oil pollution has occurred and ‘if possible put an end to it’. It is arguable that if the containment of an oil spill will cost a lot of money, it is ‘not possible’ to end it. This is so because the interpretation of this stipulation seems to lie with the affected (private) oil company (and not with any regulating body or authority), which is likely to consider economic benefits over environmental concerns.⁶⁴

Another important provision of the Regulations is to be found in Paragraph 40, which requires the licensee or lessee to drain all waste oil, brine and sludge or refuse from all storage vessels, boreholes and wells into proper receptacles, constructed in compliance with safety regulations made under the enabling Act (that is, the Petroleum Act) or any other applicable regulations. In furtherance of its goal of

to technical feasibility and economic practicability in the course of determining environmental objectives. The terms are merely descriptive concept. Discretion will be used if they are applied. They are not operable terms under which factual situations can easily be subsumed’. A better view would appear to be that the regulations adopt both objective and subjective standards. Specifically on the subjective standard: this would apply when a practice has to be acceptable to the Director of Petroleum Resources (not based on any stated/objective guidelines) as ‘good oilfield practice’. See, for example, Paragraph 36 of the Regulation. Another interesting and contrasting opinion on these expressions was expressed by Ajomo (1994: 20), thus: ‘...the half-hearted admonition to petroleum operators to conduct their operations in a “proper and workmanlike manner” etc. has done no more than to merely import into the regulations the common law duty of care by general terms into petroleum operations’.

⁶³ Okorodudu-Fubara (1998: 647). In common with other Organization of Petroleum Exporting Countries (OPEC), holders of oil OEL or OML in Nigeria do undertake to operate in accordance with ‘good oilfield practice’, in a ‘workmanlike manner’ and with ‘approved equipment’.

⁶⁴ As has been rightly observed long time ago: ‘The reality of present day economic pressures is that other considerations all too frequently are given priority over ecological and environmental considerations’ (Gormley, 1976: 38) – quoted in Okorodudu-Fubara (1998: 74).

protecting the environment, this Paragraph further provides that the waste or effluent thereby collected must be disposed of in a manner approved by the Director of Petroleum Resources or as provided by any other applicable regulations.

Lastly, mention should also be made of Paragraph 17 of the Regulation which restricts a licensee's or lessee's rights in the area covered by his license or lease. Under this Paragraph (although not directly an environmental protection provision all through⁶⁵), a licensee or lessee may not enter upon or occupy for the purpose of exercising any of the rights and powers conferred by his license or lease, any area held to be sacred (the question whether any area is held to be sacred is decided by the State authority, whose decision is final), or any part actually under cultivation; nor can he enter any part consisting of private land (other than the previous two), unless and until permission in writing to do so has been obtained by him from the Minister, who may grant the permission if the licensee or lessee, *inter alia*, has paid or tendered to the persons in lawful occupation thereof and to the owner or owners of the land fair and adequate compensation for the said land.⁶⁶ The first and second aspects of this paragraph are important from the point of view of the protection of spiritual sites and the farms of indigenous peoples (in this case, the Niger Delta people), although leaving the final definition of what area is held sacred in the hands of a State authority appears to completely rob the provision of its value. In the case of the third aspect, there is an indication that it has been overtaken by the provisions of the Land Use Act (see Chapter 2).⁶⁷

⁶⁵ It deals with social and economic issues, but it is important because of the linkage between these issues and environmental issues, particularly in the context of oil operations on indigenous lands.

⁶⁶ See further, Paragraphs 18 and 21.

⁶⁷ Apart from the three restrictions mentioned here, there are other restrictions contained in this Paragraph.

The enforcement of these Regulations is the responsibility of the Department of Petroleum Resources (DPR) of the Federal Ministry of Petroleum Resources.⁶⁸ On the question of sanction for non-compliance with the provisions of the Regulations, it is provided that the Minister of Petroleum Resources may 'arrest without warrant any person whom he finds committing, or whom he reasonably suspects of having committed, any offence under the Act or Regulations made there-under.'⁶⁹ Such person shall be handed over to a police officer with as little delay as possible.⁷⁰ Further, the Minister is empowered to revoke any license or lease whose holder is not in his opinion conducting operations in 'businesslike manner' or in accordance with 'good oilfield practice'.⁷¹ However, in view of the *great economic importance of oil to the Nigerian economy*, revocation of license or lease seems to be an unlikely sanction to apply.⁷² In this situation, it would seem that the Regulations do not contain effective enforcement mechanisms. Commenting on this situation, an author has observed: 'The Department of Petroleum resources' enforcement powers against oil polluters is limited to arrest and to suspension or revocation orders. It can order neither compensation nor the removal of pollutants. The Petroleum engineer's difficulty in *Allar Irou's* case derived from the fact that neither the Petroleum Act nor the Regulations afforded a basis for effectively dealing with pollution incidents'

⁶⁸ The Federal Environmental Protection Agency (FEPA) – established in 1988, several years after DPR has been in existence – is, presently, Nigeria's environmental ombudsman, with responsibility for the management of all aspects of the country's environment. However, by virtue of Section 23 of the FEPA Act, FEPA is required to co-operate with DPR 'for the removal of oil related pollutants discharged into the Nigerian environment'. The result is that FEPA is now an additional enforcement agency for the Nigerian oil industry. Based on available evidence, there is a Memorandum of Understanding (MOU) between FEPA and DPR, by virtue of which the DPR is still (largely) monitoring oil-industry pollution and enforcing compliance with the relevant Regulations by the operators in the industry. See Okorodudu-Fubara (1998: 206-7).

⁶⁹ Petroleum Act, 1969, Section 8 (d).

⁷⁰ The person arrested may, presumably, be prosecuted. But the Act does not stipulate what penalty he may suffer if convicted.

⁷¹ See Paragraph 24 (1) (d) of the First Schedule to the Petroleum Act, 1969. See also Section 2 (3) of the Act.

⁷² See Adewale (1992: 19). See also Omorogbe (1992: 24).

(Adeniji, 1975: 113). In the same vein, Ajomo (1994: 20) described the anti-pollution provisions of these Regulations as 'rather anaemic'.

To sum up, the Petroleum (Drilling and Production) Regulations made pursuant to the Petroleum Act contain important provisions aimed at maintaining sound environmental quality (consistent with the National Environmental Policy) in the course of oil operations in the Niger Delta. However, certain substantive aspects of it and its enforcement mechanisms appear to rob it of some verve.

(iii). Oil Pipelines Act

Another important oil-related environmental protection legislation is the Oil Pipelines Act 1956.⁷³ According to its preamble, it is 'an Act to make provision for licenses to be granted for the establishment and maintenance of pipelines incidental and supplementary to oilfields and oil mining, and for purposes ancillary to such pipelines'. Under Section 11 (2) thereof, 'oil pipeline' is defined as 'a pipeline for the conveyance of mineral oils, natural gas, and any of their derivatives or components, and also any substance (including steam and water) used or intended to be used in the production or refining or conveying of mineral oils, natural gas, and any of their derivatives or components'.

In Chapter 3 it was found that oil companies have criss-crossed the Niger Delta (including residential areas) with oil pipelines, and some oil spills were as a result of burst pipelines. However, the Oil Pipelines Act is particularly concerned with the laying (establishment) of pipelines – the Act provides for the issuance of permits to survey⁷⁴ and oil pipeline licenses⁷⁵ and authorizes the holder of a permit to enter the

⁷³ Cap 338 LFN 1990.

⁷⁴ A permit to survey is issued in order to enable the holder to survey the route for an oil pipeline for the transport of mineral oil, natural gas, or any product of such oil or such gas to any point of destination to which such person requires such oil, gas or product to be transported for any purpose connected with petroleum trade or operations, and this entitles the holder to enter (together with his

land specified in the permit or any adjoining land thereto⁷⁶. Even so, there are a few environment protection-related provisions therein. For example, the holder of a survey permit is not entitled to enter any building or upon any enclosed court or building, without previously having given the owner or occupier at least fourteen days notice of his intention to do so; nor can he enter upon any cultivated land without proper notice to the owners.⁷⁷ Moreover, without the consent of the owners or occupiers, he has no authority to enter upon, or take possession or use any land occupied by any burial ground or any land containing any grave, grotto, area, tree or thing held to be sacred or the object of veneration.⁷⁸ Most importantly, the holder of a permit is required to take 'all reasonable steps to avoid unnecessary damage to any land entered upon and any buildings, crops or profitable trees thereon, and shall make compensation to the owners or occupiers for any damage done under such authority and not made good'.⁷⁹

Similarly, except with permission stated in the license, the holder of a license has no authority to 'make such alteration in the flow of water in any navigable waterway, or construct such works in, under or over any navigable waterway, as might obstruct or interfere with the free and safe passage of vessels, canoes or other craft'.⁸⁰ He is also not authorized, without permission, to 'construct such works in, under or over, or deposit such material in or make such alteration in the flow of water required for domestic, industrial or irrigational use as would diminish or restrict the quantity of water available for such purpose, or construct such works or make such

officers, agents, workmen, etc. and with any necessary equipment or vehicles) on any land upon the route specified in the permit or reasonably close to such route for the purpose of survey, etc. (Sections 4 (1) and 5 (1)).

⁷⁵ A pipeline license is issued to a holder of a survey permit who has completed the survey (Section 7).

⁷⁶ Section 5 (1).

⁷⁷ Section 6 (1).

⁷⁸ Section 15 (1). If there is any doubt as to whether any land falls within this restriction or as to the owners or occupiers thereof, the decision of a High court is final (Section 15 (2)). Compare Para. 17 of the Petroleum (Drilling and Production) Regulations.

⁷⁹ Section 6 (3).

⁸⁰ Section 14 (b).

deposit in any waterway as would cause flooding or erosion'.⁸¹ Additionally, the restriction of entry into burial ground or cemetery and sacred lands or areas (see above) equally applies to him.⁸²

In more specific terms, the Minister of Petroleum Resources is empowered to make regulation to prescribe measures, *inter alia*, in respect of the prevention of pollution of any land or water.⁸³ And in order to ensure compliance, the Act provides for the payment of compensation by the holders of survey permit or pipeline license for any damages to the property of individuals or groups.⁸⁴ It is thus clear that this Act contains important provisions which could contribute to the protection of the Niger Delta environment as well as the inhabitants of the region from the impacts of oil operations.

(iv). Oil in Navigable Waters Act

The Oil in Navigable Waters Act, 1968⁸⁵ (and the Regulations made thereunder) is a very elaborate anti-pollution (water pollution control) law. According to its recital, it is 'an Act to implement the terms of the International Convention for the Prevention of Pollution of the Sea by Oil 1954 to 1962 and to make provisions for such prevention in the navigable waters of Nigeria'.⁸⁶ Probably in view of this, Etikerentse (1985: 64), surmised that 'the primary aim of this legislation is to reduce the incidence of pollution of the World's High Seas generally and of Nigerian waters in particular'. Five pollution-related offences are created by the Act under sections 1, 3, 5, 7, and 10

⁸¹ Section 14 (c).

⁸² Section 11.

⁸³ Section 33 (c). So far, no regulation has been made. This is probably because of the anti-pollution regulations made under the Petroleum Act.

⁸⁴ Sections 6 (3) and 11 (5). See also Sections 19 – 23.

⁸⁵ Cap 337 LFN 1990.

⁸⁶ Nigeria acceded to the International Convention for the Prevention of Pollution of the Sea by Oil on 22 April 1968.

respectively.⁸⁷ Essentially, they relate to the prevention of pollution of water by sea-going vessels (ships), both Nigerian and foreign vessels, and this puts it strictly outside the purview of this thesis. However, certain aspects of the provision of Section 3 thereof are important here – as they bear on the protection of the Niger Delta environment against the impacts of oil operations. Accordingly, this section shall be the only focal point of discussion here.⁸⁸ The section provides:

(1) If any oil or mixture containing oil is discharged into waters to which this section applies from any vessel, or from any place on land, or from any apparatus [such as pumping stations and pipelines⁸⁹] used for transferring oil from or to any vessel (whether to or from a place on land or to or from another vessel), then subject to the provisions of this Act-

- (a) if the discharge is from a vessel, the owner or master of the vessel;
or
 - (b) if the discharge is from a place on land, the occupier of that place;
 - (c) if the discharge is from apparatus used for transferring oil from or to a vessel, the person in charge of the apparatus,
- shall be guilty of an offence under this section.

(2) This section applies to the following waters, that is to say –

- (a) the whole of the sea within the seaward limits of the territorial waters of Nigeria, and
- (b) all other waters (including inland waters) which are within those limits and are navigable by sea-going ships.

Under section 6 of the Act, any person who violates the provision of this section shall on conviction by a High Court or a superior court or on summary conviction by any court of inferior jurisdiction, be liable to an unspecified fine (except

⁸⁷ See also Section 9.

⁸⁸ For full discussions of the entire provisions of the Act, see Okorodudu-Fubara (1998: 623-645; Etikerentse (1985: 64-69).

⁸⁹ See Etikerentse (1985: 122, footnote 53). As already stated, under Section 11 (2) of the Oil Pipelines Act, 1956 (Cap 338 LFN 1990) an oil pipeline 'means a pipeline for the conveyance of mineral oils, natural gas and any of their derivatives or components, and also any substance (including steam and water) used or intended to be used in the production or refining or conveying of mineral oils, natural gas, and any of their derivatives or components'.

that a summary conviction by an inferior court shall carry a fine not exceeding ‘Two Thousand Naira’⁹⁰).

The most important aspect of this Section (Section 3), for the present purpose, is the proscription of discharge into the waters of Nigeria of ‘any oil or mixture containing oil from any place on land, or from any apparatus used for transferring oil from or to any vessel (whether to or from a place on land or to or from another vessel)’. Its importance lies in the fact that it covers cases of oil pollution arising, for instance, from oil pipelines, and, also, effluent discharges from oil refineries. Further, by virtue of Section 6 (1) of the Oil Terminal Dues Act, 1969,⁹¹ the provision of this Section is extended to ‘oil terminals’⁹² in Nigeria. Having regard to the causes of oil pollution and the impact of oil pollution on the Niger Delta environment (see Chapter 3), it appears this Section can be employed to protect the environment, consistent with the National Environmental Policy on water resources management.⁹³ However, a special statutory defence under section 4 (5) of the Act (Oil in Navigable Waters Act) would appear to have substantially robbed this Section of its efficacy.⁹⁴ According to this sub-section:

Where a person is charged with an offence under section 3 of this Act in respect of the discharge of a mixture containing oil from a place on land, it shall (without prejudice to any other defence under this Section) be a defence to prove –

- (a) that the oil was contained in an effluent produced by operations for the refining of oil;
- (b) that it was not reasonably practicable to dispose of the effluent otherwise than by discharging it into waters to which the preceding Section applies; and

⁹⁰ Proviso to section 6.

⁹¹ Cap 339 LFN 1990.

⁹² Under the Oil Terminal Dues Act, ‘oil terminal’ ‘means an oil-loading terminal, pumping or booster station, or other installation (or structure associated with a terminal, including its storage facilities), other than a terminal situated within “a port or any approaches thereto” within the meaning of the Ports Act’. See Section 7 (3) (a) and Section 11.

⁹³ See Para. 3. 3 of the National Environmental Policy.

⁹⁴ Section 6 (3) of the Oil Terminal Dues Act also extends the same defence to discharges from oil terminals.

(c) that all reasonably practicable steps had been taken for eliminating oil from the effluent.⁹⁵

There can be little doubt that this special defence has virtually jettisoned environmental issues in preference to economic considerations. Perhaps this partly explains why there is no record of any prosecutions under the Act.⁹⁶ By way of comparison, this kind of special defence is not available under the Canadian Arctic Waters Pollution Prevention Act⁹⁷ and the Canadian Shipping Act,⁹⁸ both of which impose absolute liability for oil spill/discharges. For example, a charge of discharging oil in a harbour contrary to the later Act did not fail, by the defendant showing that the discharge was the fault of a third party, and not that of a member of the crew, as a defective alarm failed to sound.⁹⁹

One interesting question which might arise when this defence is raised is whether it is consistent with Regulation 43 (1) of the Petroleum Refining Regulations, 1974,¹⁰⁰ which imposes a duty on the manager of a refinery to ensure that drainage and disposal of refinery effluent and drainage water conform to 'good refining practices', and requires him to approve the specification of the effluent and the mode of disposal. According to Regulation 54 (1) hereof, any person who contravenes this Regulation shall be guilty of an offence and liable on conviction to a fine of N100 or imprisonment for a term of six months.¹⁰¹ The question might be whether it is 'good

⁹⁵ This is subject to a proviso that a defence under this section shall not have effect if it is proved that, at a time to which the charge relates, the surface of the waters into which the mixture was discharged from the place in question, or land adjacent to those waters, was fouled by oil unless the court is satisfied that the fouling was not caused, or contributed to, by oil contained in any effluent discharged at or before that time from that place.

⁹⁶ See Adeniji (1975: 113).

⁹⁷ R.S.C. 1970, c. 2, 1st Supp. For comments on this law, see Thompson (1972: 431). See also Lewis (1972: 440).

⁹⁸ R.S.C. 1970, c. 27, 2nd Supp.

⁹⁹ See *Dilkara V. The Queen* (1974) 1 W.W.R. 258.

¹⁰⁰ Made under Section 9 of the Petroleum Act, 1969 (Cap 350 LFN 1990).

¹⁰¹ Omorogbe (1992: 24) describes the fine of N100 as 'laughable', which 'can deter only the very poor members of the population and certainly not an oil corporation'. This must be seen in the context of the

refining practices' (defined as practices conforming with international standards, as approved by the Director of Petroleum Resources¹⁰²) to dispose of refinery effluent into water bodies for any reason whatsoever (possibly short of cases of extreme emergency).

In any case, it has been suggested that the proposed National Guidelines and Standards for Waste Management in the Oil and Gas Sector (published by FEPA/DPR some time in the 1990s) will eventually overtake the special statutory defence under Section 4 (5) of the Oil in Navigable Waters Act.¹⁰³ According to the author, there are some stringent regulations contained therein which refineries in the country must comply with regarding the treatment and disposal of their wastes.¹⁰⁴ The courts, according to her, will likely consider whether all 'reasonably practicable steps' have been taken, by considering whether in that particular case the Best Practicable Technology (BPT) or the Best Available Technology (BAT) (as required by the Guidelines) had been employed.

The problem with this suggestion, however, is that it appears to confer legal status on the Guidelines. But Guidelines are not Regulations, which are made pursuant to a statutory power and thereby become subsidiary law. As Adewale authoritatively points out, '...guidelines...do not have a legal backing. At best, they

fact that the Nigerian Currency has lost much of its value over the years. In 1974 when the fine was stated, it was a lot of money. Today, in view of the prevailing situation on the value of the Naira (evidence suggests that the value of currency has terribly dipped), the penalty clause beckons for upward review.

¹⁰² See Petroleum Refining Regulations, 1974, Section 7.

¹⁰³ In the words of the author: 'In the light of the proposed National Guidelines and Standards for Waste Management in the Oil and Gas Sector, this should no longer be a serious defence to content (sic) with' (Okorodudu-Fubara, 1998: 631). The Guidelines were only launched by the Federal Government on 30 July 2002, 'six years behind schedule' (See 'Government Raises Toxic Alarm', *This Day*, Lagos, 31 July 2002).

¹⁰⁴ For example, Para. 2.6.4.6 thereof provides: 'The solid component (sludge, cake, unsolidified cuttings from water-based mud) shall be disposed of on land, by methods that shall not endanger life and living organisms and cause significant pollution to underground and surface waters...' Such approved methods are land farming, backfilling and landfilling and any other method (s) acceptable to the Director-General/Chief Executive of FEPA and the Director of any other relevant Agency (after an approval has been sought and given). See also Para. 2.6.4.10.

could be declared as government directives. To ensure appropriate legal backing, the provisions contained in the guidelines should be translated into regulation made under section 37 of the Federal Environmental Protection Agency Act'.¹⁰⁵ In the result, it would appear that unless, and until, the proposed Guidelines and Standards for Waste Management in the Oil and Gas Sector become Regulations in accordance with the FEPA Act, or other law is made to prevent pollution by refinery effluents, the special defence under section 4 (5) of the Oil in Navigable Waters Act will continue to avail polluters of the Niger Delta environment by untreated refinery effluents.

(v). Associated Gas Re-Injection Act

As previously mentioned, when oil is drilled from the earth's crust it comes out mixed with water and gas. The gas produced together with crude oil is called associated gas. As evidence shows, right from the start of oil production in Nigeria, the oil producing companies have largely flared associated gas. This practice has not only resulted in enormous economic loss to the nation,¹⁰⁶ it has also occasioned adverse environmental consequences in the Niger Delta region where oil operations take place.¹⁰⁷ The Associated Gas Re-Injection Act, 1979¹⁰⁸ (as amended¹⁰⁹) appears to be the statutory response to the environmental impacts of gas flare. In its recital, it is stated to be 'an Act 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'. Although pre-dating the publication of the National Environmental Policy, the provisions of the Act, as will be seen presently, are in consonance with one of the country's strategies for sustainable energy

¹⁰⁵ Adewale (1992a: 18).

¹⁰⁶ See 'Environmental Mismanagement: Nigeria Loses \$5bn Annually' (*ThisDay*, 15 July 2002).

¹⁰⁷ See Chapter 3.

¹⁰⁸ Cap. 26 LFN 1990.

production and use, which is: 'encouraging re-injection and utilization of produced gases to prevent the adverse environmental impacts of gas flares'.¹¹⁰

The Act is a short enactment of only eight sections. Under section 1 thereof a duty is imposed on every oil producing company to submit to the Minister charged with responsibilities for matters relating to petroleum (not later than 1 April, 1980), 'a preliminary programme for –

- '(a). Schemes for the viable utilization of all associated gas produced from a field or groups of fields;
- (b). Project or projects to re-inject all gas produced in association with oil but not utilized in an industrial project.'¹¹¹

In another Section, the Act further enjoins every oil company doing business in Nigeria to submit to the Minister (not later than 1 October 1980) detailed programmes and plans for either: the implementation of programmes relating to the re-injection of all produced associated gas or schemes for the viable utilization of all produced associated gas.¹¹² This duty and the preceding one must be complied with, notwithstanding that some of the produced associated gas has been earmarked for some alternative utilization.¹¹³

From the perspective of environmental protection, the most important provision of the Act would appear to be that contained in Section 3, which states:

¹⁰⁹ By Associated Gas Re-Injection (Amendment) Decree 1985 (No. 7 of 1985).

¹¹⁰ See Paragraph 3. 10 (h) of the National Environmental Policy, 1989.

¹¹¹ An earlier statutory provision regulating gas flaring in Nigeria is Regulation 42 of the Petroleum (Drilling and Production) Regulations, 1969, which provides: 'Not later than five months after the commencement of production from the relevant area, the licensee or lessee shall submit to the Minister any feasibility programme proposal that he may have for the utilisation of any natural gas, whether associated with oil or not, which has been discovered in the relevant area.' There was no Regulation prohibiting gas flaring nor was any sanction prescribed for non-compliance with the duty imposed by Regulation 42. Probably because of this, no oil company complied with the Regulation several years after the commencement of production. This explains why section 1 of the Associated Gas Re-Injection Act commenced as follows: 'Notwithstanding the provisions of Regulation 42 of the Petroleum (Drilling and Production) Regulations, 1969...'

¹¹² Section 2 (1).

¹¹³ Section 2 (2).

(1). Subject to subsection (2) of this section no company engaged in the production of oil or gas shall after 1st January, 1984 flare gas produced in association with oil without the permission in writing of the Minister.

(2). Where the Minister is satisfied after 1st January, 1984 that utilisation 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 respect to a company engaged in the production of oil or gas –

(a) Specifying such terms and conditions, as he may at his discretion choose to impose, for the continued flaring of gas in the particular field or fields; or

(b) Permitting the company to continue to flare gas in the particular field or fields if the company pays such sum as the Minister may from time to time prescribe for every 28. 317 *Standard cubic metre (SCM) of gas flared.*¹¹⁴

The sanction for non-compliance with section 3 is forfeiture of concessions granted to the offender in the particular field or fields in relation to which the offence was committed. In addition, the minister may order the withholding of all or any part of any entitlements of any offending person¹¹⁵ 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 oil field practice.¹¹⁶

Available evidence shows that close to the end of 1984, no oil company has complied with the provisions of this Act. One author suggests that this was probably because of the problem of who was to bear the cost of re-injection or how the cost was to be shared between the oil companies and the Nigerian National Petroleum Corporation (NNPC)¹¹⁷ – an oil company in its own right and also Nigerian Federal Government's agency responsible for oil industry matters. Even so, there is no evidence that the government made any effort to enforce the law, 'due to the adverse

¹¹⁴ A proviso thereto reads: 'Provided that any payment due under this paragraph shall be made in the same manner and be subject to the same procedure as for the payment of royalties to the Federal Government by companies engaged in the production of oil'.

¹¹⁵ The statute uses the word 'person' in this section instead of the word 'company' used in the other sections, yet there is no definition of the word 'person' in the statute. However, in the context of the whole statute, 'person' must be understood to mean 'corporate legal personality'.

¹¹⁶ Section 4.

¹¹⁷ Kassim-Momodu (1986/87: 82).

effects it could have on the nation's economy if its enforcement results in a halt to oil production operations'.¹¹⁸ Rather, in the face of non-compliance, the Associated Gas Re-Injection (Continued Flaring of Gas) Regulations, 1984 were made (pursuant to Section 5 of the Associated Gas Re-Injection Act) by the Minister of Petroleum Resources, setting out the conditions under which he may issue a certificate to an oil company for the continued flaring of gas. This suggests that the Minister was satisfied that 'the utilization or re-injection of the produced gas is not appropriate or feasible in a particular field or fields' (Section 3 (2)).¹¹⁹

Under the Regulations, which became effective from 1 January 1985, the issuance of certificate for continued flaring of gas is subject to any one or more of the following conditions:

- (a). Where more than seventy-five per cent of the produced gas is effectively utilized or conserved;
- (b). Where the produced gas contains more than fifteen per cent impurities...which render the gas unsuitable for industrial purposes;
- (c). Where an on-going utilization programme is interrupted by equipment failure:

Provided that such failures are not considered too frequent by the Minister and that the period of any one interruption is not more than three months;

- (d). Where the ratio of the volume of gas produced per day to the distance of the field from the nearest gas line or possible utilization point is less than 50,000 SCF/KM:

Provided that the gas to oil ratio of the field is less than 3,500 SCF/bbl, and that it is not technically advisable to re-inject the gas in that field;

- (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.¹²⁰

In practical terms, it would appear that this Regulation has reversed the original intention of the Associated Gas Re-Injection Act, which was to put an end to

¹¹⁸ Kassim-Momodu (1986/87: 83).

¹¹⁹ See Regulation 1.

¹²⁰ Regulation 1.

gas flaring as a measure for environmental protection (and, it would seem, the advancement of economic benefits from oil exploitation). As one observer puts it, ‘the effect of these Regulations is the possible exemption of over 50 per cent of the oil fields from the provisions of the Act’ (Kassim-Momodu, 1986/87: 84). This conclusion finds support in the provisions of the Associated Gas Re-Injection (Amendment) Decree, 1985¹²¹ (which was promulgated shortly after the Regulations were made and given a retrospective effect to 1 January 1985, when the Regulations came into effect). The amended law permits oil companies to continue flaring in particular field or fields, subject to payment of such sums as the Minister may from time to time prescribe for every 28.317 Standard Cubic Metre (SCM) of flared gas. On the monetary ‘penalty’¹²² for continued gas flaring, it has been argued that the amount fixed is so small and cannot be a deterrent to oil companies, which are continuing with gas flaring.¹²³ In effect, there is arguably, presently, no law protecting the Niger Delta environment against the impacts of gas flaring,¹²⁴. According to one observer, this situation is influenced by ‘national’ economic interests: ‘[F]or obvious reasons – take away the gas flares and the life wire of the nation’s economy is extinguished. The nation cannot afford this’ (Okorodudu-Fubara: 1998: 407).

¹²¹ Decree No. 7 of 1985.

¹²² Some prefer the expression ‘monetary charge’ to ‘monetary penalty’, arguing that the amount represents an economic measure, and not a penalty as such for defaulters. For instance, Okorodudu-Fubara (1998: 408) argues that the ‘prescribed charge for gas flared is often wrongly described as a penalty imposed on the oil producing companies. This is not the statutory intent. Gas flaring is declared an offence under Section 3 subsection 3 of [the Act]...*The prescribed charge...where gas flaring is permitted to continue is wielded as a fiscal policy measure by government to manage the incidence of gas flaring pending full realisation of the main objective of the law for cessation of wasteful gas flaring...*’ (Italics mine). Perhaps a better view is that the amount partakes of both worlds: while it may be a fiscal measure for the government, from the perspective oil companies it is most certainly a penalty.

¹²³ Kassim-Momodu (1986/87: 84 – 5).

(vi). Environmental Impact Assessment Decree, 1992

Before an examination of this important environmental protection legislation, it is useful to briefly consider the basic concept of 'environmental impact assessment' (EIA). This is important because of the especial importance of this concept as an instrument of sustainable development, and also because of the need to situate the analysis of the legislation against the background of its universal understanding. Accordingly, this paragraph departs from the approach so far followed in this section, by commencing with an introductory sub-paragraph.

(a). Introductory: The Basic Concept of EIA

Article 11 of the Convention on Biological Diversity (CBD) 1992 requires that 'each Contracting Party, as far as possible and as appropriate, shall –

- (a) Introduce appropriate procedures requiring environmental impact assessment of its proposed projects that are likely to have significant adverse effects on biological diversity with a view to avoiding or minimizing such effects and, where appropriate, allow for public participation in such procedures;
- (b) Introduce appropriate arrangements to ensure that environmental consequences of its programmes and policies that are likely to have significant adverse impacts on biological diversity are duly taken into account.¹²⁵

Similarly, Principle 17 of the Rio Declaration of 1992 (which emanated from the same conference that produced the CBD¹²⁶) urges that:

¹²⁴ Recently, an agreement was reached between the Federal Government of Nigeria and the oil producing companies in the country to end gas flaring by the year 2008. A similar agreement made in 1979 was not respected by the oil companies.

¹²⁵ Nigeria is one of the Contracting Parties to this Convention. See also Article 206 of the UN Convention on the Law of the Sea (UNCLOS) 1982 (obligation to conduct EIA in planned activities affecting the marine environment). (Nigeria is also a State party to UNCLOS 1982).

¹²⁶ The CBD and the Rio Declaration were some of the products of the UN Conference on Environment and Development (the Earth Summit) held in Rio de Janeiro, Brazil in June 1992. Nigeria was one of the country participants at the conference.

‘Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority’.

From the foregoing, it can be deduced that ‘environmental impact assessment’ ‘involves the identification, prediction and evaluation of potential [adverse] environmental impacts associated with a specific development proposal, programme or policy’.¹²⁷ Another author defines it as:

A process which attempts to identify and predict the impact of legislative proposals, policies, programmes, projects and operational procedures on the biophysical environment and on human health and well-being. It also interprets and communicates information about those impacts and investigates...means for their management.¹²⁸

It need to be emphasised that the ‘assessment’ consists in the adoption of mainly scientific and economic procedures to evaluate the impact, on the specific and closely associated environment, of a particular proposal, programmes, project or activity, the undertaking or implementation of which is likely to compromise the ecological integrity of the affected area.¹²⁹ In other words, it is a site-specific process. As one author admirably puts it:¹³⁰ ‘[A]n EIA is not, and cannot be, a scientific treatise as to the specific effects of anthropogenic interference via the economic employment and use of environmental resources, and/or the introduction of man-made resources and energy into the natural environment for economic and developmental purposes. The process is limited to a fairly general probabilistic prediction of future

¹²⁷ IUCN, *Environmental Impact Assessment Pamphlet*, 1 – quoted in Ajai (1993-95: 13).

¹²⁸ Quoted in Ajai (1993-95: 13). Similarly, Kiss and Shelton (1999: 202) say: ‘Environmental impact assessment (EIA) is a procedure that seeks to ensure the acquisition of adequate and early information on likely environmental consequences of development projects, on possible alternatives, and on measures to mitigate harm. It is generally a prerequisite to decisions to undertake or to authorize designated construction, processes, or activities’.

¹²⁹ See Dzidzornu (2001: 16).

¹³⁰ Dzidzornu (2001: 16).

changes in the environment under consideration as a result of the activity in question taking place there...'¹³¹

What emerges from the foregoing is that environmental impact assessment is a sustainable development strategy, designed to take account of environmental issues in the consideration of development issues.¹³² In this sense, it can be regarded as central to the concept of sustainable development. Most significantly, if well-applied, it can compel the use of alternative mode of execution, or the use of alternative technology, or movement to a different location, or even the abandonment of a proposed project. So that environmental impact assessment may well be the instrument *par excellence* for environmental protection. But, as has been rightly pointed out, 'the EIA process is not an untrammelled objective one of balancing a range of alternative factual information, and then making the best dispassionate choice among them, with the aim of allowing only the minimal adverse impact on the environment. Rather, it is a socio-scientific, economic and political process...' (Dzidornu, 2001: 18).¹³³ More specifically, according to sources, the determination whether or not to allow a project to proceed after an EIA process is increasingly impelled more by socio-economic considerations than by the dictates of science and public views on environmental responsibility.¹³⁴ There is no evidence that Nigerian experience (under the Environmental Impact Assessment Decree 1992 (hereinafter, EIA Decree 1992)) constitutes any exception in this regard.

¹³¹ It is significant to note that environmental impact assessment also includes a prediction of the loss likely to be incurred by reason of the activity's compromising effect on the environment.

¹³² Wilson et al. (1995: 202) note that 'the EIA process constitutes the critical link between environment and development for it demands that the process of economic development takes into consideration the ecological perspective of socio-economic transformation'.

¹³³ For the limitations of EIA, see generally Dzidornu (2001: 16-17).

(b). EIA in Nigeria: The EIA Decree 1992

As a means of environmental protection, EIA did not become a legal requirement in Nigeria until 1992. Prior to that year, it had largely remained in the realm of policy and administrative issues. For example, in the 1981 – 86 National Development Plan, it was stated that ‘feasibility studies for all projects both private and public should be accompanied by environmental impact assessment’. Similarly, in the National Environmental Policy published in 1989 the ‘monitoring and evaluation of changes in the environment’, and ‘prior environmental assessment of proposed activities which may affect the environment or the use of a natural resource’ were stated as some of the strategies for the implementation of the policy.¹³⁵ Commenting on the scenario previous to the promulgation of the EIA Decree 1992, the Head of the Environmental Impact Assessment Division of FEPA, had observed:

[T]he EIA culture in the country has been most flimsy. Most project proponents who conducted EIA studies did so from parochial perspectives which were informed by the disciplines of the coordinators of the studies...Many developers who should have applied the process of EIA due to the nature of their activities avoided doing so since it was not legally a part of their project requirements.¹³⁶

Specifically in relation to oil industry activities, it has been pointed out that prior to the promulgation of the EIA Decree in 1992, ‘the Department of Petroleum Resources required operators in the oil and gas sector to carry out EIA under guidelines prepared by its Environment and Safety Section. These guidelines were, however, not binding but merely administrative codes of procedures’ (Ajai, 1993-95: 16).

In the end, the legal requirement of an EIA in Nigeria probably had its genesis in an address delivered in 1990 by the Minister charged with the responsibility for the

¹³⁴ See, for example, Dzirornu (2001: 19).

environment, to the Second Session of the National Council on the Environment, part of which reads:

Henceforth, Environmental Impact Assessment becomes a prerequisite for all new developmental projects, be it on housing estates, dam construction, highway construction, industrial development, or large-scale farming. By the same token, Environmental Auditing (that is, a means to evaluate on a systematic basis how management and equipment are performing to improve environmental conditions) must be integrated into all projects, old and new.¹³⁷

Consequent upon this 'Ministerial Declaration', the National Council on the Environment issued a communiqué at the end of its Second Session, reflecting the new approach to development projects, thusly:

(V) RECOGNIZED that environmental Impact Assessment (EIA) is an indispensable prerequisite for effective implementation of the National Policy on the Environment for sustainable development, and directed that with effect from March 1991, EIA becomes a prerequisite for all developmental projects in the country; that Environmental Auditing becomes mandatory for all existing industries; and therefore urged FEPA to establish without delay EIA guidelines and procedures for operation in all the States of the Federation and Abuja...¹³⁸

It has been suggested that these developments hastened the processes which culminated in the enactment of the EIA Decree (No. 86) of 1992,¹³⁹ the major provisions of which are now briefly considered below.

In the first place, following a similar Canadian statute,¹⁴⁰ Section 63 (1) of the EIA Decree defines 'environment' as: 'the components of the earth, and includes' –

- '(a) land, water and air, including all layers of the atmosphere;
- (b) all organic and inorganic matter and living organisms; and
- (c) the interacting natural systems that include components referred to in paragraphs (a) and (b)'.

¹³⁵ Paragraph 3.

¹³⁶ Ivbijaro (1994: 152 – 153).

¹³⁷ Quoted in Okorodudu-Fubara (1998: 187-8).

¹³⁸ Quoted in Okorodudu-Fubara (1998: 188).

¹³⁹ Okorodudu-Fubara (1998: 188). The Decree came into effect from 10 December 1992.

¹⁴⁰ Environmental Assessment Act, S.C. 1992, C. 37 (Section 2 (1)). Compare New Zealand Resource Management Act (No. 69) of 1991 (Section 2 (1)).

The Section further defines 'environmental assessment' to mean, 'in respect of a project, an assessment of the environmental effects of the project'; and 'environmental effect' of project means any change that the project may cause to the environment, whether within or outside Nigeria, and includes any effect of such change on health and socio-economic conditions. On the objective of an EIA, the Decree, albeit in 'very ungrammatical language',¹⁴¹ states that it is to incorporate environmental considerations in any proposed activity by any person or government, where such activity 'may likely or to significant extent affect the environment or have environmental effects', and also to 'encourage' the dissemination of information relating to likely environmental impacts/effects of proposed activities to interested parties (including foreign nations).¹⁴²

In consonance with its goal, Section 2 (1) thereof prohibits the 'public or private sector' from the commencement or authorisation of projects or activities 'without prior consideration, at an early stage, of their environmental effects'. In other words, environmental impact assessment (EIA) is a prerequisite to the commencement or authorisation of a project or activity. Under Section 4, the minimum content of an EIA are stated to include:

- (a) a description of the proposed activities;
- (b) a description of the potential affected environment including specific information necessary to identify and assess the environmental effect of the proposed activities;
- (c) a description of the practical activities, as appropriate;

¹⁴¹ Ajai (1993-95: 16). Several critics have so many things to quarrel with in the EIA Act, ranging from substantive inadequacies to ubiquitous grammatical inaccuracies. As Ajai (1993-95: 24) puts it: 'A badly drafted legislation may be worse than no legislation at all, either because it encourages undue litigation or because it unduly compels the court to embark on judicial legislation in order to ensure that effect is given to otherwise otiose and redundant provisions. The EIA Decree appears to have been drafted by laymen because of the unlaywerly style of language, vague, ambiguous and meaningless provisions...it contains. What is unpardonable is the very poor grammar used in many provisions...' Elsewhere he denounced it as 'the worst drafted piece of Nigerian legislation ever' (Ajai, 1995: 166).

¹⁴² See Section 1.

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

(e) an identification and description of measures available to mitigate adverse environmental impacts of proposed activity and assessment of those measures;

(f) an indication of gaps in knowledge and uncertainty which may be encouraged in computing the required information;

(g) an indication of whether the environment of any other State or Local Government or areas outside Nigeria is likely to be affected by the proposed activity or its alternatives;

(h) a brief and non-technical summary of the information provided under paragraphs (a) to (g) of this section.

It is notable that not every project or activity is to be affected by an EIA. This is made clear by Section 2 (2) which provides: 'Where the extent, nature or location of a proposed project or activity is such that is likely to *significantly affect the environment*, its environmental impact assessment shall be undertaken' in accordance with the provisions of the Decree.¹⁴³ More specifically, Section 14 lists a number of occasions when EIA will be required.¹⁴⁴ Besides, EIA will also be required where the proposed project is one of those listed in the Mandatory Study List¹⁴⁵ (set out in the schedule thereto), where the proposed project or activity is likely to have a trans-boundary effects,¹⁴⁶ and where FEPA (the executing authority of the statute) is of the

¹⁴³ The expression 'significantly affect the environment' is rather vague, as this can be positive or negative. However, the relevant decision-making criterion as revealed in Sections 26 and 40, for instance, indicates that the effect in question must be 'adverse'.

¹⁴⁴ For example, where the Federal, State or Local Government is itself the proponent of a project and does any act or thing to commit the government to carry out the project wholly or partly. See further, Section 2 (4).

¹⁴⁵ See Section 13. See also Section 23 and the schedule to the statute.

¹⁴⁶ Section 50 (1).

opinion that: (a) a project is likely to cause adverse environmental effects that may not be mitigable, or (b) where the public concerned demand that it be carried out.¹⁴⁷

Of particular and present interest to this research is the Mandatory Study List, which includes petroleum and waste management and disposal projects. Under the Petroleum projects, the following activities are listed:

- (a) Oil and gas fields development;
- (b) Construction of offshore pipelines in excess of 50 kilometres in length;
- (c) Construction of oil and gas separation, processing, handling, and storage facilities;
- (d) Construction of oil refineries;
- (e) 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.¹⁴⁸

With regard to waste management and treatment, the following items are listed under toxic and hazardous waste:¹⁴⁹ construction of incineration plant; construction of recovery plant (off-site); construction of waste water treatment plant (off-site); construction of secure landfill facility; and construction of storage facility (off-site).¹⁵⁰

¹⁴⁷ Section 51. At the opposite side, the law specifically excludes certain projects from the requirement of an EIA. To take one example: EIA is not required where 'the project is to be carried out during national emergency for which temporary measures have been taken by the government' (Section 15 (1) (b)).

¹⁴⁸ See Para. 12 of the schedule to the Decree.

¹⁴⁹ Under Section 20 (1) of the FEPA Act the discharge of 'hazardous substance' (a much wider term than 'hazardous waste') 'in such harmful quantities' into the air or upon the land and the waters of Nigeria or at the adjoining shorelines is generally prohibited, and offenders face heavy penalties (Section 20 (2) & (3)). This prohibition extends to oil industry activities. As Adewale (1992& 1993: 55) could say: 'There is no doubt that oil comes within the ambit of hazardous substance. Oil contains toxic cancer producing substances and can be long-lived environmental contaminant where it is spilled'. However, see Section 20 (5) of the FEPA Act, which requires FEPA to determine what hazardous substances are for the purposes of the Act.

¹⁵⁰ See Para. 18 (a) of the schedule to the Act. As with most of the previously considered environmental statutes, the EIA Act creates a criminal offence for non-compliance with its provisions. For individuals, on conviction, an offender shall be liable to a fine of N100, 000 or to five years imprisonment and in the case of a firm or corporation to a fine of not less than N50, 000 and not more than N1, 000,000 (Section 62).

The implication of all these is that most of the projects or activities of oil operations (including their location,¹⁵¹ for example, in the mangrove forests in the Niger Delta) are legally required to be preceded by an EIA; and under the Decree the executing authority (FEPA) is required to impartially examine the information provided by the EIA before taking a decision whether or not to allow it to commence.¹⁵² Moreover, before taking any decision on the information contained in the EIA, FEPA is required to 'give opportunity to government agencies, members of the public, experts in any relevant discipline and interested groups to make comment thereon.'¹⁵³ Having regard to the general tenor of the Decree, it seems clear that the requirement that FEPA shall act 'impartially' in the examination of the contents of an EIA means that environmentally unfriendly projects should be disallowed. In other words, the ultimate aim of the Decree is to ensure sustainable development.¹⁵⁴

However, it should be pointed out that the requirement of an EIA under the Decree is for future projects; there is no provision for 'environmental audit' (to examine facilities or projects that have been in place before the Decree came into effect on 10 December 1992). Yet, there is abundant evidence that most of the environmental impacts of oil operations in the Niger Delta are caused by facilities which had been constructed over three decades before the promulgation of the Decree.¹⁵⁵ In this situation, it is doubtful if the Decree actually protects the Niger Delta environment.

With regard to public participation by interested parties/groups, it has been suggested that the Decree 'rather commendably enshrines the principle of public

¹⁵¹ See Section 2 (2) of the EIA Act 1992.

¹⁵² Section 6.

¹⁵³ Section 7.

¹⁵⁴ Pursuant to its powers under Sections 60 and 61, FEPA has since issued sectoral guidelines for environmental impact assessment in the major industrial sectors.

¹⁵⁵ See Chapter 3.

participation in the environmental [impact assessment] process' (Ajai, 1993-95: 29). Sections 7, 8 and 9 enjoin FEPA to disseminate information about an environmental impact assessment of a proposed project. And under Section 59, there is a possibility of judicial review in connection with any matter under the Decree (this will include a dispute over the decision to authorize a project or activity).¹⁵⁶ In any case, this provision is also *in futuro*. Moreover, there is no indication that the participation envisaged under this Decree is within the requirement of international law on the rights of indigenous people (see Chapter 5).

(vii). Federal Environmental Protection Agency Act¹⁵⁷

To date, the Federal Environmental Protection Agency (FEPA) Act¹⁵⁸ is the most important, most detailed and non-sectoral or comprehensive environmental protection legislation in Nigeria. According to one observer, the promulgation of this Act 'marked the beginning of an important era in environmental issues in Nigeria. It is the first time that issues on the environment will be dealt with in such detail, at such length and on a national level' (Adewale, 1992 & 1993: 51). Although this Act was made before the country's National Policy on the Environment was published,¹⁵⁹ it has been suggested that one of its purposes is to provide a legal foundation for the National Policy on the Environment.¹⁶⁰ Indeed, the National Policy on the Environment (which had been prepared but yet to be launched at the time the FEPA Act was made) had recommended the establishment of FEPA as a 'viable national

¹⁵⁶ Compare the conception of 'participation' under the National Policy on the Environment, 1989.

¹⁵⁷ Cap 131 LFN 1990

¹⁵⁸ As amended by the FEPA Decree 1992 (No. 59 of 1992).

¹⁵⁹ The National Policy on the Environment was published in 1989, a year after FEPA Act had been made.

¹⁶⁰ Okorodudu-Fubara (1998: 168).

mechanism' and an 'effective institution' for the implementation of the National Policy on the Environment.¹⁶¹

In style, the Act contains some substantive provisions, but, as will be seen shortly, it gives power to the Agency it established to make much of the substantive and procedural regulations that will be needed for the proper protection of the Nigerian environment.¹⁶² In this thesis, space constraints will not permit a comprehensive examination of this statute, and this is apart from the fact that such an exercise will be incongruous in the present context. Hence, this thesis will study its provisions only in relation to the protection of the environment from oil-related environmental pollution.

One of the most important things to note about the FEPA Act is that, for the first time, it established an institution (called 'the Agency'),¹⁶³ charged with the responsibility for the protection and management of the Nigerian environment. Section 4 thereof (as amended) provides for the functions of the Agency as follows:

The Agency shall, subject to this Act, have responsibility for the protection and development of the environment and biodiversity conservation *and sustainable development of Nigeria's natural resources*¹⁶⁴ in general and environmental technology, including initiation of policy in relation to environmental research and technology; and without prejudice to the generality of the foregoing, it shall be the duty of the Agency to –

- (a) Prepare a comprehensive national policy for the protection of the environment and conservation of natural resources;

¹⁶¹ See Para. 5.0 of the National Policy on the Environment. Although FEPA Act is the most important environmental protection law in Nigeria today, it did not repeal the pre-existing sectoral laws discussed in the text above. In this regard, the suggestion that it is a 'consolidating legislation to the extent that it covers sectors whose laws were to be found in scattered enactments' (Ajomo, 1994: 18) is not quite accurate. In fact, it does not even purport to be a consolidating Act. This may be compared with the recent Singapore's Environment Pollution Control Act 1999 (Act 9 of 1999), which states in its preamble that it is 'An Act to consolidate the laws relating to environmental pollution...' Even so, it has been observed that 'it is still not a true "consolidation" of the pollution laws, despite its preamble. The laws relating to waste still remain under the Environmental Public Health Act...' (Heng, 2000: 29). For a critical study of the Singapore Act, see Heng (2000).

¹⁶² FEPA Act, Section 37.

¹⁶³ Section 1. According to this Section, the Agency is a body corporate with perpetual succession and a common seal, and it may sue and be sued in its corporate name.

¹⁶⁴ Added by the 1992 amendment, Section 5 (a).

- (b) prepare, in accordance with the National Policy on the Environment, periodic master plans for the development of environmental sciences and technology and advise the Federal Government on the financial requirements for the implementation of such plans;
- (c) advise –
 - (i) the Federal Government on the national environmental policies and priorities, the conservation of natural resources and sustainable development, and scientific and technological activities affecting the environment, and natural resources;
 - (ii) the President, Commander-in-Chief of the Armed Forces on the utilization of the 1 per cent Ecological Fund for the protection of the environment;
- (d) promote co-operation in environmental science and conservation technology with similar bodies in other countries and with international bodies connected with the protection of the environment and the conservation of natural resources;
- (e) co-operate with Federal and State Ministries, Local Governments, statutory bodies and research agencies on matters and facilities relating to the protection of the environment and the conservation of natural resources; and
- (f) carry out such other activities as are necessary or expedient for the full discharge of the functions of the Agency under this Decree.¹⁶⁵

Part II of the Act deals with national environmental standards. In different sections, the Agency is charged with the responsibility for establishing national standards for water quality, effluent limitations, and hazardous substances, etc.¹⁶⁶ One observer has suggested that the idea behind environmental standards is the need to regulate different sources of pollution to the environment, one of which is the activities of the petroleum industry.¹⁶⁷ For clarity, these various heads (listed above) are briefly and separately examined here in relation to oil operations.

¹⁶⁵ Paragraphs (a) to (e) were completely substituted by the 1992 amendment, Section 5 (b), and it seems they were designed to reflect Nigeria's obligations under the CBD, 1992.

¹⁶⁶ Other areas are air and atmospheric pollution (which may possibly tackle the problem of gas flare), ozone protection, and noise control. See Sections 17, 18 and 19 of the FEPA Act.

(1) Water Quality

In line with the goal of the National Environmental Policy to ensure the provision of water in adequate quantity and acceptable to meet domestic, industrial, agricultural and recreational needs as well as the specification of water quality criteria for different water uses, the FEPA Act enjoins the Agency to make recommendations for the purpose of establishing water quality standards for the inter-State waters of Nigeria, to protect the public health or welfare and enhance the quality of water.¹⁶⁸ In establishing such standards, the Agency is required to take into consideration the use and value for public water supplies, propagation of fish and wildlife, recreational purposes, agricultural, industrial and other legitimate uses.¹⁶⁹ Accordingly, the Agency is required to establish different water quality standards for different uses.¹⁷⁰

The expression 'waters of Nigeria' is defined under the Act to mean: 'All water sources in any form, including atmospheric, surface and sub-surface, and underground water resources where the water resources is inter-State, or in the Federal Capital Territory, Territorial Waters, Exclusive Economic Zone or in any other area under the jurisdiction of the Federal Republic of Nigeria'.¹⁷¹ There is evidence to suggest that this definition virtually covers all the water bodies in Nigeria.¹⁷² It will be recalled that water pollution is one of the prevalent impacts of oil operations in the Niger Delta (See Chapter 3). The establishment of effective water quality standards, therefore, could help to control this problem. In the words of a writer: 'In introducing water quality standards, the oil producing States [Niger Delta], many of which are riverine areas, will be greatly favoured'. This writer further

¹⁶⁷ Adewale (1992 & 1993: 52).

¹⁶⁸ Section 15 (1).

¹⁶⁹ Section 15 (2).

¹⁷⁰ Section 15 (3).

¹⁷¹ Section 38.

¹⁷² See Okorodudu-Fubara (1998: 656).

suggested that this may be the 'beginning of more careful operations by the oil companies, thus leading to cleaner environment' (Adewale, 1992 & 1993: 52). There is evidence that FEPA has already produced a Proposed National Water Quality Standards,¹⁷³ which is undergoing revision after public comments thereon.¹⁷⁴

(2) Effluent Limitations

This is a water-quality-related environmental standard. Section 38 of the FEPA Act defines 'effluent limitation' to mean 'any restriction established by the Agency of quantities, rates and concentration of chemical, physical, biological or other constituents which are discharged from point sources into the waters of Nigeria'. Under Section 16 of the Act, FEPA is required to establish effluent limitation for 'new point sources', which shall require application of the best control technology currently available and implementation of the best management practices.¹⁷⁵ For existing 'point sources', the Agency is enjoined to establish effluent limitations, which shall require the application of the best management practices 'under circumstances as determined by the Agency, and shall include schedules of compliance for installation and operation of the best practicable control technology as determined by the Agency'.¹⁷⁶

As has already been seen, effluent discharge from oil refineries is one of the sources of oil pollution in the Niger Delta. It is notable that in the discharge of its responsibility under this head (setting of effluent limitations), FEPA has already made National Environmental Protection (Effluent Limitations) Regulations,¹⁷⁷ with effect

¹⁷³ See FEPA, Proposed National Water Quality Standards, 1991.

¹⁷⁴ Under the Proposed National Water Quality Standards, 'water pollution' is defined as: 'Generally, the presence of matter or energy whose nature, location or quality produces undesired environmental effects'.

¹⁷⁵ Section 16 (1).

¹⁷⁶ Section 16 (2).

¹⁷⁷ Prior to this, FEPA had made Interim Effluent Limitations Guidelines and Standards for Environmental Pollution Control in Nigeria 1991.

from 15 August 1991.¹⁷⁸ Under these Regulations, an industry which discharges effluent is obliged to treat the effluent to a uniform level as specified in schedule 2 thereto, in order to ensure assimilation by the receiving water into which the effluent is discharged.¹⁷⁹ And in order to ensure effective monitoring and environmental audit, industries (including the oil industry) are required to furnish the nearest office of FEPA¹⁸⁰ from time to time with the composition of any effluent treated as specified in Paragraph 3 (1). Further, this Regulation imposes additional sectoral effluent limitations on certain industries (including petroleum refining companies) specified in column 1 of schedule 2 thereto.¹⁸¹ It is also notable that FEPA has already published a Proposed National Guidelines for Waste Management in the Oil and Gas sector, which contains some stringent regulations for the oil refineries to comply with, regarding the treatment and disposal of the wastes (effluents, etc.) they generate.¹⁸² Furthermore, Paragraph 15 (1) of the allied National Environmental Protection (Pollution Abatement in Industries and Facilities Generating Wastes) Regulations 1991¹⁸³ prohibits the discharge of effluents beyond permissible limits into public drains, rivers, lakes, sea or underground injection, without a permit issued by the Agency.

Lastly, it is notable that the Effluent Limitations Regulations require that every industry shall install anti-pollution equipment for the detoxification of effluent and chemical discharges from the industry. Most importantly, such installation is required

¹⁷⁸ The Regulations were made pursuant to Section 37 of the FEPA Act.

¹⁷⁹ Paragraph 3 (1).

¹⁸⁰ FEPA has a number of offices across the country, including one in Port Harcourt, River state.

¹⁸¹ Paragraph 4.

¹⁸² See Okorodudu-Fubara (1998: 631).

¹⁸³ This Regulation is further discussed in the text below.

to be based on the Best Available Technology (BAT), the Best Practicable Technology (BPT) or the Uniform Effluent Standards (UES).¹⁸⁴

It is important to observe that in setting these standards, FEPA appears to have acted pragmatically in not strictly following the technological specifics set out under Section 16 of the FEPA Act. In the Interim Guidelines published before the making of the Regulations, it explained the rationale for the deviation, thus:

Ideally, each pollution source should be detoxified with the installation of anti-pollution equipment based on the Best Practical Technology (BPT) and/or Best Available Technology (BAT). In consonance of the high cost of a BPT and BAT, and the non-availability of local environmental pollution technology, Uniform Effluent Standards (UES) is normally based on the pollution potential of effluent and/or the effectiveness of current treatment technology. This approach is easy to administer, but it can result in over-protection in some areas and under-protection in others. To overcome this problem, uniform effluent limitations based on the assimilative capacity of the receiving water have been drawn up for all categories of industrial effluents in Nigeria while additional sectoral effluent limitations have been provided for individual industries with certain peculiarities.¹⁸⁵

A person who contravenes any provision of the Regulations is guilty of an offence and liable on conviction to the penalty specified in section 35 or 36 of the Act.

(3) Hazardous Substances

Section 20 (1) of the FEPA Act prohibits the discharge in such harmful quantities of any hazardous substance into the air or upon the land and the waters of Nigeria or at the joining shorelines, 'except where such discharge is permitted or authorized under any law in force in Nigeria'. A violation of this provision is penalized, in the case of an individual, by the payment of a fine not exceeding N100, 000 or by imprisonment

¹⁸⁴ Paragraph 1 (1) & (2).

¹⁸⁵ Interim Guidelines and Standards for Environmental Pollution Control in Nigeria, 1991, 26. From a legal point of view, it is debatable whether FEPA has power to set standards inferior (or even superior) to that prescribed under the enabling Act.

for a term not exceeding 10 years or to both such fine and imprisonment.¹⁸⁶ And in the case of a body corporate, it shall on conviction be liable to a fine not exceeding N500, 000 and an additional fine of N1, 000 for every day the offence subsists.¹⁸⁷

However, the Act does not itself define what is 'hazardous substance' for the purposes of the Act. Instead, the Agency is given power to determine, for the purposes of the Act, what substances are hazardous substances and such hazardous substances the discharge of which shall be harmful under the circumstances to public health or welfare. And, in doing this, the Agency shall take into account such special circumstances including locations, quantity and climatic conditions relating to discharge as it may determine appropriate.¹⁸⁸ In cases where a hazardous substance constitutes harmful waste, the provisions of the Harmful Waste (Special Criminal Provisions, Etc.) Act 1988¹⁸⁹ shall apply. Under Section 15 of this Act, 'harmful waste' is defined to mean:

Any injurious, poisonous, toxic or noxious substance and, in particular, includes nuclear waste emitting any radioactive substance if the waste is of such quantity, whether with any other consignment of the same or of different substance, as to subject any person to the risk of death, fatal injury or incurable impairment of physical and mental health...

It is remarkable that in the discharge of its responsibility under Section 20 (5) and pursuant to its power to make regulations under Section 37 of the Act, the Agency has made the Environmental Protection (Pollution Abatement in Industries and Facilities Generating Wastes) Regulations, with effect from 15 August 1991.¹⁹⁰ Under this important Regulation, no industry or facility is allowed to release hazardous or toxic substances into the air, water or land of Nigeria's ecosystems beyond the limits

¹⁸⁶ Section 20 (2).

¹⁸⁷ Section 20 (3). See also Section 20 (4).

¹⁸⁸ Section 20 (5).

¹⁸⁹ Cap 165 LFN 1990.

¹⁹⁰ Hereinafter, Pollution Abatement Regulations.

approved by the Agency.¹⁹¹ Further, an industry is required to: (a) have a pollution monitoring unit within its premises; (b) have on site a pollution control equipment; or (c) assign the responsibility for pollution control to a person or body corporate accredited by the Agency.¹⁹² Specifically on the oil industry, it is provided that 'no oil, in any form, shall be discharged into public drains, rivers, sea, or underground injection without a permit issued by the Agency or any organization designated by the Agency'.¹⁹³ Although 'hazardous substance' is not defined anywhere under the FEPA Act and the Pollution Abatement Regulations made thereunder, it has been suggested that oil comes under the ambit of hazardous substances.¹⁹⁴

In omnibus terms, this Regulation further states that the Agency shall demand environmental audit from existing industries (and this includes the oil companies) and environmental impact assessment from new industries and major developmental projects and the industries shall comply within 90 days of the receipt of the demand.¹⁹⁵ This is particularly significant, having regard to the fact that under the Environmental Impact Assessment Decree 1992, there is no provision for environmental audit.

Non-compliance with any provisions of this Regulation is an offence, for which the offender may be liable on conviction to the penalty specified in Section 35 or 36 of the FEPA Act.¹⁹⁶ However, this (as is the case with a charge under Section 20

¹⁹¹ Paragraph 1.

¹⁹² Paragraph 2.

¹⁹³ Paragraph 15 (2). See also Paragraph 15 (1) (reproduced in text above).

¹⁹⁴ Adewale (1992 & 1993: 55). Omorogbe (1992: 25), relying on the definition of hazardous wastes under the *Harmful Waste Act*, also argues that 'oil is a hazardous substance and therefore comes under the ambit of the sections which prohibit the discharge of such substances'. In general, it has been suggested that environmentally hazardous substances are those 'which persist in the environment because they are not easily broken down by natural chemical or biological processes and/or which became widespread because of the physical or chemical properties and which present a damage to living organism either by their direct toxicity or by affecting the health or reproductive ability of organism' – quoted in Adewale (1992 & 1993: 55, footnote 22).

¹⁹⁵ Paragraph 21.

¹⁹⁶ Paragraph 22.

(1) of the Act) is subject to the defence provided by Section 20 (1) of the Act, which absolves persons or corporate bodies who discharge 'hazardous substances' under the authority of any law in force in Nigeria (that is, *where the discharge is permitted or authorized under any law in force in Nigeria*). In this regard, Section 4 (5) of the Oil in Navigable Waters Act, 1968 (which, as has been seen above, provides special defences for the discharge of refinery effluents) would avail offenders under this (FEPA) Act and Regulations.¹⁹⁷ In this circumstance, it has been rightly argued that Section 4 (5) of the Oil in Navigable Waters Act 'destroys the stringent deterrent...provided by section 20 of the Federal Environmental Protection Agency Act'.¹⁹⁸

It is notable that apart from criminal sanction for violation of Section 20, the FEPA Act blazed a trail in providing for spiller's liability (that is, the polluter pays principle) in addition. Section 21 provides that in addition to the penalty specified in Section 20, the offender 'shall in addition...be liable for' –

- (a) the cost of removal thereof, including any costs which may be incurred by any government body or agency in the restoration or replacement of natural resources damaged or destroyed as a result of the discharge; and
- (b) costs of third parties in the form of reparation, restoration, restitution or compensation as may be determined by the Agency from time to time.

An author has argued that 'if properly utilized, this singular provision may be the end of the hardship suffered by victims of oil pollution'. She further contends that by this provision the Agency can (administratively) determine the compensation to be paid to victims of oil pollution. In her words: 'This provision may be the sword that is

¹⁹⁷ Other defences available to offenders charged under Section 20 of the FEPA Act are: natural disaster, act of war or sabotage. An offender will not be guilty of the offence if he proves that the discharge was caused by any of these. See Section 21 (1). Adewale (1992 & 1993: 58) rightly considers these defences to be too wide. The author also thinks that the defence of sabotage is unjustifiable. See Adewale (1992 & 1993: 56-7).

¹⁹⁸ Adewale (1992 & 1993: 58).

required to fight a victorious battle for a fair and adequate compensation [for] victims of the oil industry' (Adewale, 1992 & 1993: 59-60).

It is difficult to fault these arguments. In any case, notwithstanding the above provisions, critics have expressed doubts whether the FEPA Act actually protects the Nigerian environment from oil-industry-related pollution. For example, it has been argued that Section 23 of the FEPA Act separates the oil industry from the purview of the Agency, and, as a result, the environmental standards set by the Agency may be inapplicable to the oil industry. The Section provides: 'The Agency shall co-operate with the Ministry of Petroleum Resources (Petroleum Resources Department) for the removal of oil related pollutants discharged into the Nigerian environment and play such supportive role as the Ministry of Petroleum Resources (Petroleum Resources Development) may from time to time request from the Agency'. In the words of this critic: 'The inclusion of Section 23 of the [Act] reveals that for matters of environmental law in the petroleum industry no change has been effected' (Adewale, 1992 & 1993: 63).

Before the enactment of the FEPA Act, the Department of Petroleum Resources (DPR) had been the regulatory authority for the activities of the petroleum/oil industry, and a number of environmental protection related guidelines and regulations had been made over the years. It is possible that the draftsmen of the FEPA Act were satisfied with the job of the DPR and would not want to disturb it.¹⁹⁹ However, in allowing the DPR to continue as an environmental management body, the FEPA Act, no doubt, could bring about competition between it and the Agency it established (for example, arising from the fact that both bodies have independent statutory powers of enforcement of environmental standards – arrest of offenders,

¹⁹⁹ Adewale (1992 & 1993: 62 – 63).

seizure of property, inspection of petroleum installations, etc.²⁰⁰).²⁰¹ In any case, it seems better to see the FEPA Act and the Regulations made thereunder as providing additional environmental standards for the oil industry, and the DPR as a specialist body compared to FEPA, which may be regarded as a generalist body. In practice, there is a suggestion (doubted by some) that the two bodies are actually co-operating to bring about environmental sanity in the operations of the oil companies in the Niger Delta.²⁰²

In summary, an exploration and critical examination of the Nigerian law of environmental protection (excluding, for the moment, laws relating to biodiversity conservation) reveal that there are several laws on the subject, and they are characteristically sectoral: that is, they variously deal with aspects of environmental pollution. The only exception is the FEPA Act, which is fairly comprehensive or non-sectoral. Even so, it is inaccurate to describe the FEPA Act as a consolidating legislation, as it does not repeal the pre-existing laws. The examination also reveals that, substantively, some of the laws are inadequate and/or defective in some respects. Perhaps the greatest example of this is the special defences under Section 4 (5) of the Oil in Navigable Waters Act. These special defences, whose application have been found to extend to the FEPA Act and Regulations made thereunder, seem to deal a

²⁰⁰ To take one example. Section 8 (c) of the Petroleum Act provides that the Head of the Department of Petroleum Resources 'shall have access at all times to the area covered by oil exploitation licenses, oil prospecting licenses and oil refineries and installation which are subject to this Act, for the purpose of inspecting the operations conducted therein and enforcing the provisions of this Act and any regulation made thereunder and the conditions of any license or leases granted under this Act or under any corresponding law, for the time being in force in Nigeria'. Similarly, Section 26 (1) (a) of the FEPA Act empowers any authorised officer of the Federal Environmental Protection Agency who has any reasonable grounds for believing that an offence has been committed against the FEPA Act or any regulations made thereunder, to enter, without a warrant, and 'search any land, building, vehicle, tent, vessel, floating craft or any inland water or other structure whatsoever, in which he has reason to believe that an offence against this Act or any regulations made thereunder has been committed'. The conflict here is manifest, and may raise the question: who inspects oil installations? See also, Section 8 (a) of the Petroleum Act (power of the Head of Petroleum Resources to exercise general supervision over oil operations and power to arrest offenders without warrant); Section 26 (c) (power of an officer of FEPA to cause the arrest of an offender).

²⁰¹ See Adewale (1992 & 1993: 61 – 64).

fatal blow to the efficacy of some aspects of the laws.²⁰³ Arguably, they are pro-pollution provisions.²⁰⁴ Hence, it is not quite accurate, as some commentators had previously concluded, that Nigerian environmental laws are comparable (in quality) to those of some advanced countries (such as USA and UK).²⁰⁵ Yet, overall, it is arguable that there are sufficient substantive and procedural aspects to ensure reasonable protection of the Niger Delta environment from the impacts of oil operations.²⁰⁶ In the light of this, it is difficult to understand why the impacts of oil operations in the Niger Delta region (as found in Chapter 3) should arise or persist to the extent they are. This compels an inquiry into the issue of compliance with the laws by the operators in the oil industry as well as the enforcement of the laws by the appropriate government agencies. Before this, however, it is important to remark that, so far, the discussion has not dwelt on the environmental issue of biodiversity conservation. This is deliberate, as it is considered convenient to deal with this issue in a separate section. Now, having considered the statutory provisions for the protection of the environment in a general sense, this thesis shall proceed to examine the specific issue of biodiversity conservation in the Niger Delta, with particular regard to oil operations.

²⁰² See Okorodudu-Fubara (1998: 206-7).

²⁰³ It is strongly recommended that the special defences be repealed, in the interest of sustainable development.

²⁰⁴ The defences are so wide and permissive that they tend to encourage pollution.

²⁰⁵ See, for example, HRW (1999: 54); Petroconsultants (1997) – cited by Shell oil company at: <http://www.shellnigeria.com/shell/environ_rhs.asp> (Visited 15/03/01).

²⁰⁶ Commenting on this point, the authors of a recent report on the Niger Delta have also argued that many of the Nigerian environmental laws 'have provisions sufficiently adequate to aid environmental protection' (NDES, 1997: 223). With particular regard to the Gas Re-Injection Act (as amended), it has been forcefully argued that, notwithstanding its apparent weakness, 'a strict enforcement of the law would have resulted in government receiving substantial additional revenue from flared gas'. Further, 'since it would be more economical for the big oil producing companies to utilize or re-inject the gas, they probably would have invested in gas re-injection or gas utilization' (Kassim-Momodu, 1986/87:

4. 4. Oil Operations and Biodiversity Conservation in the Niger Delta

Article 2 of the Convention on Biological Diversity (CBD) defines 'Biological Diversity' (Biodiversity) as 'the variability among living organisms from all sources including, *inter alia*, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part', and 'this includes diversity within species and of ecosystems'. In short, biodiversity means, in a broad sense, 'life on earth'. With regard to the concept of conservation, it has been pointed out that it means different things to different persons: to some, it means the protection of wild nature; to others, the sustained production of useful materials from the resources of the earth.²⁰⁷ However, it seems the most widely accepted definition of conservation is that furnished in 1980 in the *World Conservation Strategy*, by the International Union for the Conservation of Nature and Natural Resources (IUCN), to wit: 'The management of human use of the biosphere so that it may yield the greatest sustainable benefit while maintaining its potential to meet the needs and aspirations of future generations.' According to this important document, the objectives of the conservation of living resources include the maintenance of essential ecological processes and life-support systems, preservation of genetic diversity, and guarantee of the sustainable use of species and ecosystems.

The need for nature conservation can be found in the following words of an NGO – the Nigerian Conservation Foundation:

Nature conservation is the most important challenge of the present century. Nothing affects the quality of our lives quite like the welfare and state of nature and no future can be quite so bleak as one in which the living resources, such as plants and wildlife, which are very essential for human survival and development, are increasingly being destroyed or depleted by human carelessness. Put in another form, we all rely on nature for food, water, energy, clothing, shelter, minerals,

85). Significantly, in this latter situation, the object of the Act (the ending of gas flares) would have been ultimately achieved.

²⁰⁷ See generally, *The New Encyclopaedia Britannica* (1990: 663).

drugs and more. And we rely on millions of animals and plant species to keep the system that provides those needs in running order...The total disappearance of so many forms of wildlife would be a loss that we and our children would bitterly regret...This is not simply a matter of material possession; just as important is the question of environment...²⁰⁸

More recently, the Nigerian Government has noted that 'biodiversity being the economic and socio-cultural base of human systems, providing unquantifiable benefits to man and the environment including shelter, food, clothing, medicine, recreation and resources for the industry, need to be conserved and managed sustainably for the present and future generations'.²⁰⁹ In the same vein, the WCED has observed that 'conservation of living resources – plants, animals, and micro-organisms, and the non-living elements of the environment on which they depend – is crucial for development.'²¹⁰ Equally important to the issue of conservation is the vital life processes carried out by nature, such as stabilization of climate and water systems, protection of watersheds and soil, preservation of nurseries and breeding grounds, etc. Notably, 'conserving these processes cannot be divorced from conserving the individual species within natural ecosystems. Managing the species and ecosystems together is clearly the most rational way to approach the problem'.²¹¹

Significantly, available evidence suggests that unlike other environmental issues, biodiversity conservation is as old as the Nigerian State.²¹² Colonial statutes in this regard include the Wild Animals Preservation Act 1916 (Federal), Wild Animals Preservation Law (Western Nigeria) 1959; Forestry Act 1937²¹³ (Federal); Forest Law

²⁰⁸ Quoted in NEST (1991: 182).

²⁰⁹ See the Information Provided by the Government of Nigeria to the United Nations Commission on Sustainable Development (Fifth Session 7 – 25 April 1997, New York).

²¹⁰ WCED (1987: 147).

²¹¹ WCED (1987: 147 – 8).

²¹² See, for instance, Okorodudu-Fubara (1998: 331). For a penetrating analysis and critique of UK and EC biodiversity laws, see Harrop (1999).

²¹³ There was an earlier law: the Forestry Ordinance 1901. The 1937 Act has since become the law of the component States of Nigeria.

(Eastern Region) 1956²¹⁴; and Forestry Law (Western Region) 1958. In the post-colonial era, there has also been a number of legislation in this regard, both at the Federal and State levels, including: Wild Animals Law (Northern Nigeria) 1963; Wild Animals Law (Eastern Nigeria) 1965; Wild Animals Preservation Law (Lagos State) 1972; Wild Animals Law (Amendment) Edict (North-Eastern State) 1975; Wild Animals Law (Amendment) Edict (Kano State) 1978; Forestry Law (Northern Region) 1960; Forestry Law (Oyo State) 1978; Forestry Law (Lagos State)²¹⁵; and Forestry Law (Kano State)²¹⁶. It is remarkable that the laws enacted by most of the States which have replaced the former regions, are almost a verbatim reproduction of the former regional laws. For instance, the Forestry Law 1978 of Oyo State is largely a rehash of the former Western Region law (as amended in 1969 and 1973).

In most recent years, further conservation laws include: the National Parks Decree 1991²¹⁷; Endangered Species (Control of International Trade and Traffic) Act 1985²¹⁸ (made pursuant to Nigeria's obligation under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) 1973; the Natural Resources Conservation Council Decree 1989 (now repealed²¹⁹); and the Sea Fisheries Decree 1992. In terms of policy, both the Agricultural Policy of Nigeria 1988 and the National Policy on the Environment 1989 (as revised in 1999) contain

²¹⁴ Cap 55, Laws of Eastern Nigeria 1963.

²¹⁵ Cap 51, Revised Edition of the Laws of Lagos State 1994.

²¹⁶ Cap 48, Revised Edition of the Laws of Kano state 1981.

²¹⁷ No. 36 of 1991. This Decree established five national parks: the Chad Basin National Park; the Cross River National Park; the Gashaka-Gumti National Park; the Kainji Lake National park; and the Old Oyo National Park (Section 1). The Kainji Lake National Park Act (No. 46) of 1979 was repealed by this Decree and its assets and resources were vested in the National Parks Management Board established by the Decree (Section 36).

²¹⁸ Cap 109 LFN 1990.

²¹⁹ By Section 11 of the FEPA (Amendment) Act 1992, the effect of which was to merge the council with FEPA.

specific statements for conservation of forests. Moreover, there is an indication that a National Strategy and Action Plan for Biodiversity Conservation is being drafted.²²⁰

It is notable that the various Nigerian conservation laws adopt '*in-situ*' conservation strategy (that is, the conservation of ecosystems and natural habitats and the maintenance and recovery of viable populations of species in their natural surroundings²²¹).²²² The Forestry laws, Federal and States, protect the forests (and *a fortiori*, the flora and fauna therein), whereas the Wild Animals protection laws protect selected wild animals. The wild Animals laws protect the selected animals from poaching, excessive exploitation, etc. In the case of forests, the conservation mechanism is the reservation of certain areas as 'forest areas' and 'protected forests'. The various laws empower the Federal Government or the Governor of a State to constitute specific lands as forest reserves or protected forests.²²³ The laws prohibit certain human activities in the 'forest reserves' and 'protected forests', such as: burning, unlawful taking of forest products, uprooting or stripping off the bark or leaves from a tree. It is an offence for any one to do any of the prohibited acts. In effect, these laws protect the natural habitat of fauna and flora species. Section 39 of the Lagos State Forestry Law²²⁴ (Cap 51 of 1994) provides an illustration. It provides:

²²⁰ See the Information Provided by the Government of Nigeria to the United Nations Commission on Sustainable Development (Fifth Session 7 – 25 April 1997, New York). It would appear that this is a review of the 1985 National Conservation Strategy for Nigeria (perhaps in light of Agenda 21 and other recent environment-related developments at the international scene).

²²¹ See Art. 2 of the CBD. See also Art. 8.

²²² There is also evidence of *ex-situ* conservation in the country, as shown in the 1991 – 1992 country study on biological diversity: there are no less than 51 private wildlife sanctuaries, zoos/zoological gardens, etc. in Nigeria. In Art. 2 of the CBD, '*ex-situ* Conservation' is defined as 'the conservation of components of biological diversity outside their natural habitats'.

²²³ State laws also empower Local Governments, with the approval of the State Governor, to constitute forest reserves in its area of jurisdiction.

²²⁴ Under this law 'forest reserve' 'means any area constituted a forest reserve under this law' or under any other repealed enactment, which has not ceased to be a forest reserve under any other enactment. And 'protected forest' includes: '(a) any area declared to be, or constituted as protected forest under this law; (b) any area proposed to be reserved, the preliminary notice in regard to which has already been published'. See Section 2.

whoever in any forest reserve, except with the authority in writing of the prescribed officer²²⁵ –

- (a) takes any forest produce;
- (b) uproots, burns, stripes off the bark or leaves from, or otherwise damages any tree;
- (c) sets fire to any grass or herbage, or kindles fire without taking due precaution to prevent its spreading;
- (d) smokes or lights a fire in any part of a forest reserve within which, or at a time when, smoking or the lighting of fires is prohibited by an order of the State Commissioner or Local Government Council;
- (e) pastures cattle or permits cattle to trespass;
- (f) digs, cuts, turns or cultivates the soil or makes a farm or plantation;
- (g) trespasses in any part of a forest reserve in which trespass shall be prohibited by an order of the State Commissioner, or a Local Government Council;
- (h) constructs any dam or weir across any river or stream or otherwise obstructs the channel of any river or stream;
- (i) resides or erects any building;
- (j) hunts or fishes;
- (k) damages in any way or destroys any forest property,

shall be liable on summary conviction to fine of two hundred Naira or to imprisonment for twelve months or both.²²⁶

Similar provisions can be found in Section 27 (1) of the National Parks Decree. In addition, the Decree provides: any person who, unless authorised to do so under the Decree or the regulations made thereunder, *inter alia*:

- (g) introduces any chemical or otherwise causes any form of pollution;
- (l) drives, stampedes or in any way disturbs unnecessarily any animal;
- (m) carries out any undertaking connected with forestry, agriculture, grazing, mining, excavation or prospecting;
- (n) does any drilling, levelling of the ground or construction or any tending to alter the configuration of the soil or the character of the vegetation; or
- (o) does any act likely to harm or disturb the fauna, flora or animals, in the National Park,

is guilty of an offence under this Decree.

²²⁵ Similar provisions are made for protected forests. See Section 42.

²²⁶ See also Section 49 of the Oyo State Forestry Law, 1978; Section 50 of the Kano State Forestry Law (Cap 48 of 1981). With regard to the conservation of the fisheries stock, the Sea Fisheries Decree 1992 and the Regulations made thereunder, i.e. the Sea Fisheries (Licensing) Regulations 1992 and the Sea Fisheries (Fishing) Regulations 1992, prohibit environmentally unfriendly methods of exploitation of fisheries.

The penalty for a violation of this provision is a fine, not exceeding N1, 000.²²⁷

At the international plane, it is remarkable that Nigeria is a party to a number of international treaties on environmental conservation, such as: the African Convention on the conservation of Nature and Natural Resources 1968²²⁸; the Agreement on the Joint Regulation of Fauna and Flora on the Lake Chad Basin²²⁹; Convention on International Trade on Endangered Species of Wild Fauna and Flora (CITES)²³⁰; the Convention on Biological Diversity (CBD) 1992²³¹; and the Ramsar Convention 1971.²³² All these variously impose obligations on the country to embark on conservation programmes. For example, Article 6 (a) of the CBD requires each Contracting Party to 'develop national strategies, plans or programmes for the conservation and sustainable use of biological diversity, or adapt for this purpose existing strategies, plans or programmes which shall reflect, *inter alia*, the measures set out in this Convention relevant to the Contracting Party concerned'.

Remarkably, there is evidence to indicate that some of the recent national laws and policies on biodiversity conservation were made in fulfilment of Nigeria's obligations under the above treaties.²³³ For example, the preamble of the Endangered Species (Control of International Trade and Traffic) Act 1985 states that it is 'an Act to provide for the conservation and management of Nigeria's wild life and the protection of some of her endangered species in danger of extinction as a result of

²²⁷ Section 32 (b).

²²⁸ Signed by Nigeria on 15 September 1968.

²²⁹ Signed by Nigeria on 3 December 1977.

²³⁰ Signed by Nigeria on 11 February 1974.

²³¹ Signed by Nigeria on 13 June 1992.

²³² See U.N.T.S. No. 14583, Vol. 996 (1976) 243. The Convention was done at Ramsar in Iran on 2 February 1971. A Protocol of its amendment was done at Paris on 3 December 1982. Nigeria acceded to the Convention on 2 October 2000 (and the Convention came into effect for her on 2 February 2001, in accordance with the provisions of the Convention).

over-exploitation, *as required under certain international treaties to which Nigeria is a signatory*'.²³⁴ Perhaps in further fulfilment of its international treaty obligations, Nigeria undertook a countrywide study of biodiversity from 1991 – 1992, the result of which was published in 1992.²³⁵

In addition to national and international laws, there is also evidence that the indigenous people of the Niger Delta have customary laws which regulate 'the protection of forests in many ways, principal among which are the communal declaration of certain forests and groves as sacred; the delineation of forests as burial grounds for good and evil people (the bad bush practice); the recognition given to and observed in boundary forests between neighbouring communities, family heritage forests, forests of common use, and the essential habitat forests' (Okonta and Douglas, 2001: 215).

The above discourse was undertaken in order to determine the legal and theoretical status of biodiversity conservation in Nigeria. Overall, it would appear that there are important laws on the subject, although sources suggest that their coverage is not comprehensive.²³⁶ In any case, and more importantly for the present purposes, the greatest weakness of the various forestry laws as well as the National Parks Decree is that they protect only the affected areas.²³⁷ In other words, they are not general, but

²³³ For example, Art. 8 (k) of the CBD obligate Contracting Parties to 'develop or maintain necessary legislation and/or other regulatory provisions for the protection of the threatened species and populations'.

²³⁴ *Italics mine*. The explanatory note to the Decree (which, like the preamble, does not form part of the law) also states that its purpose is to enact a law as required under certain international treaties to which Nigeria is a signatory, to give municipal effect to each of these treaties and agreements.

²³⁵ See FEPA, *Biological Diversity of Nigeria*, Abuja, 1992.

²³⁶ See, by example, Okorodudu-Fubara (1998: 340 – 345).

²³⁷ The Wild Animals Preservation laws protected only selected animals. However, they are presently outdated, and it would appear that they have been implicitly (and *pro tanto*) repealed by Section 1 of the Endangered Species (Control of International Trade and Traffic) Decree 1985.

restricted laws.²³⁸ In the words of one scholar: ‘There is no legislation that directly protects species outside National Parks and Forests Reserves’ (Ajai, 1995: 167).²³⁹ Moreover, there is no evidence that any national park has been established in the Niger Delta region, pursuant to the provisions of the National Parks Decree.²⁴⁰ With respect to forest reserves, there is evidence that several important conservation sites in the region remain unprotected. In the result, the conservation programmes under the various national laws are presently inapplicable in the Niger Delta region.²⁴¹

It is remarkable that the non-establishment of national parks/forest reserves in the Niger Delta region (containing the largest wetlands in Africa and third largest in the world), is contrary to Nigeria’s obligation under Article 4 (1) of the Ramsar Convention,²⁴² which provides: ‘Each Contracting Party shall promote the conservation of wetlands...by establishing nature reserves on wetlands, whether they are included in the List [that is, List of Wetlands of International Importance²⁴³] or not, and provide adequately for their wardening.’²⁴⁴

²³⁸ This is, however, consistent with Art. 8 (a) of the CBD, which states that each Contracting Party ‘shall, as far as possible and as appropriate’, ‘establish a system of protected areas or areas where special measures need to be taken to conserve biological diversity’.

²³⁹ The same situation has also been condemned under UK and EC laws (as well as under international law), thus: ‘Biodiversity legislation in the United Kingdom and in Europe (and indeed at the international convention level) tends to be focused on preserving protected areas: pockets of (usually) declining habitats. Whilst legislation emphasises these pockets of land, commonplace ecosystems often in linear and scattered habitats, are often neglected’ (Harrop, 1999: 702). In order to effectively protect biodiversity and ecosystems, the learned author argues that: ‘[T]he law must reach a mere protected area. It must address the needs of species in a wider catchment area, often through a complex interlacing of linear habitats’ (Harrop, 1999: 703). See also the United Kingdom Sustainable Development Strategy 1994.

²⁴⁰ A number of sites of conservation interest in the Niger Delta have been identified and listed by the World Bank. See World Bank (1995). See also NDES (1997: 139–141).

²⁴¹ In any case, the laws do not outrightly ban the itemized acts; they are only forbidden if no authority has been obtained from the appropriate authority, which in the case of oil operations would most likely be given.

²⁴² It should, however, be noted that Nigeria became a Party (No. 123) to the Convention only on 2 October 2000, when she acceded to it, and the Convention came into effect for her even more recently – only on 2 February 2001.

²⁴³ A Bureau established under Article 8 of the Convention maintains this List.

²⁴⁴ See also Article 3 (1), which enjoins Contracting Parties to formulate and implement, as far as possible, ‘the wise use of wetlands in their territory’. Nigeria’s first and, to-date, the only Ramsar site is Nguru Lake (and Marma Channel) Complex (58,100 hectares), part of the Hadejia Nguru Wetlands located in the north-east of the country, straddling the border between Jigawa State and Yobe State in

It would also appear that the Endangered Species (Control of International Trade and Traffic) Act 1985 (hereinafter, Endangered Species Act) is equally unhelpful,²⁴⁵ despite the fact that some of the species listed therein occur in the region.²⁴⁶ Specifically, it has been rightly criticized for not addressing the problem of 'habitat'²⁴⁷ destruction by human activities,²⁴⁸ such as oil operations.²⁴⁹ As Dytham (2000: 315) argues, 'human activity is the primary agent of habitat destruction on Earth'. He further contends that 'humans destroy habitats both directly through forest

Nigeria. The designation was done pursuant to Article 2 (1) and Article 2 (4). Article 2 (1) states: 'Each Contracting Party shall designate suitable wetlands within its territory for inclusion in a List of Wetlands of International Importance...' According to Article 2 (4), each contracting Party is required to designate at least one wetland to be included in the List when signing the Convention or when depositing its instrument of ratification or accession. And under Article 2 (2) the criteria for selection of suitable wetlands is stated thus: 'Wetlands should be selected for the List on account of their international significance in terms of ecology, botany, zoology, limnology or hydrology. In the first instance wetlands of Importance to waterfowl at any season should be included'. As a guide to the implementation of Article 2 (1), the 4th, 6th, and 7th Meetings of the Conference of the Contracting Parties to the Convention adopted certain criteria for identifying wetlands of international importance. Although the Ramsar Convention Bureau has indicated that the Nguru Lake qualified for inclusion into the List under some of the criteria, it is unclear why the Nigerian Government did not first choose a site in the Niger Delta region, which is internationally recognized as holding the richest biodiversity of the country. It is possible that economic considerations might have influenced that decision (*no site in the biodiversity-rich Amazon region is included in the List* – Information obtained from Professor S.R. Harrop, in the course of discussion of the first draft of this Chapter). However, it may be too early to judge the country, seeing that it only recently acceded to the Convention. For the functions and definition of wetlands, see the preamble to the Convention and Article 1(1) thereof. See also Mcbeth (1997: 204 – 229).

²⁴⁵ It is doubtful if the EIA Decree seriously requires assessment of impacts on biodiversity.

²⁴⁶ In a recent report it was noted that the Niger Delta contains several species of high international interest (Sclater's Guenon, Delta Red Colobus, Crested Genet) as well as good populations of animals considered highly endangered in the rest of the nation (NDES, 1997: 138).

²⁴⁷ Defined in Article 1(1) (g) of the Bonn Convention on the Conservation of Migratory Species of Wild Animals as 'any area in the range of a migratory species which contains suitable living conditions for that species'. (Nigeria is a State Party to this convention, which entered into force for her on 1 January 1987). Under certain instruments, such as the Oslo Convention on Polar Bears ((15 November 1973), it could also include areas of hibernation and feeding, as well as migration routes.

²⁴⁸ This is contrary to one of the declared strategies of the National environmental Policy on forestry, wildlife and protected natural areas: 'to discourage developments likely to cause harmful changes'.

²⁴⁹ It will be recalled that most oil operations take place in the forest areas of the Niger Delta. The Nigerian government claims that it has put in place an Action Plan on Water Pollution Control and Biological Diversity conservation in the Niger Delta (See the Information Provided by the Government of Nigeria to the United Nations Commission on Sustainable Development (Fifth Session 7 – 25 April 1997, New York). However, there is no evidence of such a programme on the ground. In a recent paper entitled 'Strategies for Reducing the Economic Effect of Ecological Problems in Nigeria', Etim Amba of Nigeria's Federal Ministry of Environment asserted that: Nigeria's forests are being depleted at an estimated rate of 3.5 % annually, and between 1981 and 1994, the country has lost about 3.7 million hectares of forests. This is with a corresponding loss in biodiversity, including highly valued plant and animal species. About 484 plant species are threatened with extinction in Nigeria as a result of habitat destruction and deforestation' ('Environmental Mismanagement: Nigeria Loses \$5bn Annually', *THISDAY* online < <http://www.thisdayonline.com/buness/20020716est02.html> > (Visited 16/07/02)).

clearance [as is the case during seismic or oil drilling operations on land²⁵⁰ in the Niger Delta] or wetland drainage and indirectly through pollution...' Furthermore, he argues that 'species are being lost at an unprecedented rate and it must be accepted that the major cause of species extinctions is habitat destruction' (Dytham, 2000: 315).

In agreement with Dytham, a critic has forcefully argued that the omission of the Endangered Species Act to address the issue of habitat destruction, 'is a critical omission, in so far as the survival of these...species...largely depend on their natural habit, many of which are threatened by human activities such as bush burning, dredging, land reclamation, [oil operations], etc.'²⁵¹ Similarly, Ajai (1995: 167) notes that 'there is no legislation...that protects the habitat of protected species and prohibits or regulates processes and activities, such as polluting activities which may affect them'. In an important section, the author pointedly observed:

The processes that are most damaging to biodiversity conservation and sustainable use in Nigeria are pollution from oil spills, gas flaring, industrial waste [including oil industry wastes], public works, including housing construction, State sponsored and subsidised land clearing for agriculture, bush burning and impoundment of rivers...Also, the River Basin Development Authorities are by law empowered and encouraged to develop river basins for agriculture. This necessitates damming of rivers with the consequent destruction of ecosystems that are flooded and threats to those downstream. *Since crude oil is the lifeblood of the economy, political and administrative measures seem to ensure that exploration and production activities are screened from hostile public intervention*²⁵² (Italics mine).

²⁵⁰ Okonta and Douglas (2001: 216) assert that: 'In carrying out operations relating to exploration for oil, SPDC [Shell oil company] employs seismographic companies that cut seismic lines through rain forests, swamp forests, mangroves, and farmland. These lines are sometimes as wide as fifteen feet and run into hundreds of miles in length...In the process of constructing pipelines to transport crude from flow stations to the tank farms [located far away within the delta region]...Shell as a matter of routine cuts down thousands of acres of rain forests, mangrove forests, and forests in the barrier islands.'

²⁵¹ Okorodudu-Fubara (1998: 367). Another weakness of this Decree is that it did not provide for an implementing authority. Perhaps this will be the lot of Nigeria's environmental ombudsman (FEPA), and possibly such bodies as the Customs Department and the Nigeria Police.

²⁵² Ajai (1995: 168). See further, NEST (1991: 92 – 96).

This situation would appear to violate Article 7 (c) of the CBD, which requires a Contracting Party to 'identify processes and categories of activities which have or are likely to have significant adverse impacts on the conservation and sustainable use of biological diversity, and monitor their effects through sampling and other technologies'. In addition, the failure to regulate harmful processes or activities (like oil operations) is inconsistent with Article 8 (l), which provides that 'where a significant adverse effect on biological diversity has been determined pursuant to Article 7' a Contracting Party should 'regulate or manage the relevant processes and categories of activities'.²⁵³ More importantly, perhaps, the unregulated and unrestricted activities of the oil companies in the Niger Delta wetlands violate the customary laws of the people as well as Article 8 (j) of the CBD.

In sum, Nigeria has important biodiversity conservation legislation. Basically, these laws protect certain areas and species. However, there is an apparent lack of provisions against habitat destruction from certain activities, such as oil operations. Moreover, possibly because of the importance of oil to the national economy and a desire to avoid uninterrupted exploitation, the National Parks law and the Forest Reserve law (which prohibit certain activities in the affected areas) do not appear to be applicable in the Niger Delta region. Even so, the oil companies do not respect the various conservation practices of the indigenous people of the region in the course of their operations. In the event, all these probably account for the adverse impacts of oil operations on the rich biodiversity of the region and on its wetlands, as found in Chapter 3.

²⁵³ It should, however, be pointed out that most of the provisions of the CBD do not appear to be strong enough as to impose effective obligations on State Parties to it. Harrop (2002) describes the language and approach of this Convention as 'imprecise and precatory' and 'bordering on the apologetic'. In any case, Kiss and Shelton (2000: 327) have observed that 'different Conventions increasingly converge to protect endangered or vulnerable species by conserving their habitats, and thus prohibiting takings and

4. 5. Oil Companies and Protection of the Niger Delta Environment

As previously stated, oil operations in Nigeria's Niger Delta (as in other regions of most developing countries²⁵⁴) are undertaken by Multinational Companies/Corporations (MNCs) (also called Transnational Corporations (TNCs) or Multinational Enterprises (MNEs)²⁵⁵)²⁵⁶, that is, foreign companies, usually based in advanced countries (for example, USA, UK, the Netherlands, or Canada), and operating beyond their country.²⁵⁷ By this fact, and even from the express provisions of some of the environment protection statutes considered above,²⁵⁸ oil MNCs are obviously the addressees of the relevant environment protection statutes. The implication of this is that their compliance with the relevant statutes is crucial to any regime of environmental protection.

Perhaps in recognition of this fact and in acknowledgment of their obligations under the relevant statutes, some of these companies have published environmental protection policies (and other information) – sometimes described as company codes,

certain other human activities, including pollution'. They cited the example of Ramsar Convention 1971.

²⁵⁴ The expression 'Less Developed Countries (LDCs)' appears to be gaining currency.

²⁵⁵ All these will be used interchangeably in this thesis. For terminological debates on them, see Muchlinski (1999: 12 – 15).

²⁵⁶ The 1990 UN Draft Code of Conduct for TNCs defines TNCs as: 'Enterprises, irrespective of their country of origin and their ownership, including private, public or mixed, comprising entities in two or more countries, regardless of the legal form and fields of activity of these entities, which operate under a system of decision-making, permitting coherent policies and a common strategy through one or more decision-making centres, in which the entities are so linked, by ownership or otherwise, that one or more of them may be able to exercise a significant influence over the activities of others, and in particular, to share knowledge, resources and responsibilities with others' (Part 1 (a)). See also Para. 3 of the OECD Guidelines for Multinational Enterprises (27 June 2000 Revision), which says MNEs 'usually comprise companies or other entities established in more than one country and so linked that they may co-ordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another. Ownership may be private, State or mixed.' For the old (1991) version of this definition, see Muchlinski (1999: 13).

As stated in the text above, SPDC is the leading oil company in Niger Delta. Besides, there are other big oil companies operating in the Niger Delta, including Elf Nigeria Ltd; Mobile Unlimited; Agip Nigeria Ltd; and Chevron. Since 1971, Nigeria also has a State oil company called Nigerian National Petroleum Corporation (NNPC).

²⁵⁷ This may be explained by the fact that primary resource development or extractive business, such as oil exploitation, is a high technology and capital-intensive project, which are unavailable in developing countries. In other words, the technology and capital for oil operations belong to foreign investors. This probably explains the enormous powers which have been credited to these companies.

which suggest that they comply with the relevant statutes or are taking relevant steps towards compliance. For example, Shell Petroleum Development Company of Nigeria Limited (SPDC) – the leading oil multinational in the Niger Delta – claims that: ‘The environment, its care and rehabilitation are of great concern to shell. SPDC’s policy is that all activities are designed to minimize environmental impact. Like all Shell companies world-wide, SPDC operates within the Shell Group Statement of General Business Principles and the Policy Guidelines on Health, Safety and the Environment.’²⁵⁹ More specifically, the company claims to have ‘a systematic approach to Health, Safety and environment Management designed to ensure compliance with the law and to achieve continuous performance improvement’. With regard to environmental impact assessment (EIA), the company most recently claimed:

As part of its operations in the Niger Delta, Shell Petroleum Development Company of Nigeria Ltd. (SPDC) undertakes around 30 Environmental Impact Assessment (EIA) studies each year. These studies are intended to systematically assess the way in which various proposed projects such as pipelines, flow stations, rehabilitation or closure of existing facilities, new wells, etc. might impact upon the surrounding environment, specifically the natural and physical resource base and the local society. *The EIA process provides the opportunity to design out major negative impacts, to mitigate or enhance environmental and social consequences, to document the results for company decision-makers and to meet government regulatory requirements.* Together the environment, health and community development departments of SPDC are looking at ways to improve the efficiency and quality with which the EIAs are carried out. SPDC has recognized that changes in the system are required. It has therefore begun a process of dialogue within the company, with government regulators and other stakeholders from across the Niger Delta to include input from a

²⁵⁸ See, for example, the Associated Gas Re-injection Act.

²⁵⁹ See SPDC, ‘The Environment’ < http://www.shellnigeria.com/shell/environ_rhs.asp > (visited 15/03/01). This statement was later reviewed as follows: ‘SPDC’s policy is that all activities are planned and executed to minimize environmental impact. It strives for continuous environmental improvement and, like Shell companies world-wide, operates within the Royal Dutch Shell Group Statement of General Business Principles and the Policy Guidelines on Health, Safety and the Environment.’ See SPDC, ‘The Environment’ < http://www.shellnigeria.com/info_display.asp?Id=135 > (visited 03/02/02).

variety of sources. The aim is to improve all aspects of the EIA process including...the expansion of social impact assessment...²⁶⁰ (Italics added). There are also important policy statements with regard to oil spills and gas flare. On oil spills, the company claims that its policy is to: clean up all hydrocarbon and chemical spills emanating from the company's operations in timely and efficient manner; draw up contingency plans and provide resources for prevention and for timely response to spills; and effect clean up where the cause of the spill or the party responsible is known and seek to recoup costs for such activities.²⁶¹ The company's efforts towards combating oil pollution have also been stated. According to its '2000 Highlights', 'we have maintained and strengthened existing measures for oil spills prevention...[T]hese includes the upgrading of our facilities to reduce and prevent cases of corrosion and equipment failure...'²⁶². In the case of gas flare, it has been claimed that the company 'is committed to stopping routine flaring by 2008 through conserving, re-injecting, gathering and harnessing the gas...In the meantime, the company continued to reduce the amount of gas flared per barrel of oil produced...'²⁶³

Notwithstanding the above claims, critics have suggested that SPDC (and indeed other oil companies operating in the Niger Delta)²⁶⁴ do not comply with Nigerian environmental protection statutes and regulations, thereby devastating the Niger Delta environment. To most of these critics, Shell's environment policies and statements suggesting respect for environmental issues, is nothing more than public

²⁶⁰ SPDC, *2000 Highlights*, Lagos, Nigeria (This is a report of the company's activities as of the year 2000). This document was downloaded from the company's environment web page on 03/02/02.

²⁶¹ SPDC, 'Annual Report 1998: Environment Report' <http://www.shellnigeria.com/info/env_1998/envreport_t.htm > (visited 11/05/02).

²⁶² SPDC, *2000 Highlights*, Lagos, Nigeria.

²⁶³ SPDC, 'Annual Report 1998: Environment Report' <http://www.shellnigeria.com/info/env_1998/envreport_t.htm > (visited 11/05/02).

²⁶⁴ A Nigeria-based NGO has noted: 'Although most of the world's oil majors, including Shell, Mobile, Chevron, Agip, Elf, Texaco, Philips, BP and Statoil, operate in the area, Shell is by far the largest single operator, making the heaviest impact on the communities and the environment of the Niger Delta'. See Constitutional Rights Project (CRP) (1999: 12 – 13).

relations campaigns or false advertisements.²⁶⁵ For example, it has been argued: 'If the official claims made by oil companies, including Shell, are to be believed, every effort is made to mitigate the environmental impact of all oil activities, and for this reason, the Niger Delta could be presumed not to be under any threat from environmental degradation...[But], however impressive and re-assuring the claims on paper, the evidence on the ground is one of devastation, suggesting that much less care than is claimed is being actually taken by oil companies'.²⁶⁶ Most recently, Aston-Jones (a British environmentalist who visited the Niger Delta in June 2001²⁶⁷) has stated:

[M]y evidence suggests that oil pollution from poorly maintained well heads and pipelines is significantly worse. Shell remains characterized by a negative attitude towards its host communities; a lack of cultural and ecological awareness and sensitivity; a willingness to encourage armed attacks on defenceless communities and to resort to the repression of civil rights in preference to negotiations; poor maintenance of its extraction infrastructure and low engineering standards; ignorance of environmental and social impacts; a tendency to tolerate the inefficient management of its compensation and social programme processes; and to lie repeatedly when challenged until the evidence is irrefutable. Thus, *in terms of its respect for human rights, the environment and natural justice, Shell activities in Ogoni (and elsewhere in the Niger Delta) continue to be cynical and contemptible: especially, given a campaign that stresses its sensitivity to the environment. In the end, I cannot avoid the conclusion that Shell is badly managed and that its shareholders should be asking why its public statements do not match the facts of its field activities*²⁶⁸ (Italic added).

Furthermore, contrary to Shell's claims, another critic has suggested that:

'Several...practices allow petroleum products to enter and devastate the environment.

For example, an extensive network of oil pipelines transports crude oil from the wells

²⁶⁵ In the words of one critic: 'There is justifiable concern that companies use codes of conduct as a public relations instrument in dealing with accusations from environmental groups or when confronted with other forms of customer pressure'. See Irene, 'Codes of Conduct for Transnational Corporations: An Overview' (June 1998) <<http://www.cleanclothes.org/codes/overvieww.htm>> (visited 15/05/02).

²⁶⁶ CRP (1999: 16). The authors of this paper had visited the Niger Delta area in the course of their research, particularly the location of oil operations.

²⁶⁷ An author made these assertions recently. See O'Hara (2001: 305).

²⁶⁸ Quoted in O'Hara (2001: 305).

to the refineries for processing. These pipelines are poorly maintained and regularly spill large quantities of oil into the environment. SPDC spilt approximately 1.6 million gallons of oil in the Niger Delta region between 1982 – 1992. *These spills constituted forty percent of Shell's oil spills world-wide during the same period* (Eaton, 1997: 268).²⁶⁹ Most importantly, this critic further suggests that Shell's operations in the Niger Delta are environmentally reckless compared with its operations elsewhere²⁷⁰ (perhaps in advanced countries, as other authors have also suggested). In the same vein, Kalas (2001: 193 – 194) argues: 'Although industrialized nations establish stringent environmental regulations for corporations operating within their borders, these regulations do not apply extraterritorially to similar operations in foreign countries...In the absence of a universal code of conduct for international corporations, a double standard exists where industrialized-based companies can operate without regard to the standards imposed by their "home" countries with often devastating consequences'.

Lastly, it has been forcefully argued that given that the greatest number of spills is caused by equipment failures, 'it is more than evident' that the provision of the Petroleum (Drilling and Production) Regulations (specifically, on the duty to maintain pipelines) 'has not been strictly followed' by the oil companies.²⁷¹

Although Shell maintains that the impact of its activities in the Niger Delta 'do not add up to anything like devastation',²⁷² there is some evidence from Shell itself, suggesting that the claims of critics – of non-compliance with environment protection statutes – are arguably founded. For example, in one of its recent statements, the

²⁶⁹ In the same vein Ikein (1990: 42) has observed that 'oil companies rarely adhere to Industry Standards of Practice which would require them to employ up-to-date technology, and thereby minimize the likelihood of serious mishaps'.

²⁷⁰ Eaton (1997: 268).

²⁷¹ Ayodele (1985: 295) – cited in Ikein (1990: 42).

company has stated: 'The company recognizes the gap between its intentions and its current performance. It is working hard to renew aging facilities, reduce the number of oil spills in the course of its operations, the amount of gas that is flared, and to reduce waste products. Improvements are being made in all these areas. There are unique challenges to operating 86 flowstations and some 6,200 km of pipelines and flowlines in 31,000 square kilometres of the Niger Delta in a variety of extreme habitats including swamp forest, mangrove swamp, seasonally-flooded forest and the sea'.²⁷³

Even more significantly, the company recently reported the outcome of its Stakeholders Environmental Workshops held in 1998, thus: 'At the two Stakeholders Environmental Workshops held in 1998, the scope of EIAs/EERs [Environmental Impact Assessments and Environmental Evaluation Reports, respectively] was widely discussed by participants who asked for greater attention to items such as social impact assessment, biodiversity and natural resource management'.²⁷⁴ The implication of this is that Shell's claims on environmental protection (particularly its EIA practice), as stated above, are either not founded at all or are grossly exaggerated.²⁷⁵ This conclusion is made stronger by the fact that the participants at the Workshop

²⁷² SPDC, 'The Environment' < http://www.shellnigeria.com/info_display.asp?Id=135 > (visited 03/02/02).

²⁷³ SPDC, 'The Environment' < http://www.shellnigeria.com/info_display.asp?Id=135 > (visited 03/02/02).

²⁷⁴ In summary, it was stated that the participants in the Workshop 'identified the need for the company to: expand the scope of its environmental management role; take greater account of the receiving environment; and give a higher priority to nature conservation and ecological restoration'.

²⁷⁵ Perhaps the only exception to this is the claim on gas flaring. There is abundant evidence to show that Shell and some of the other oil majors in the Niger Delta have embarked upon large-scale gas utilization and conservation projects, the greatest of which is the Nigerian Liquified Gas Project, which recently commenced operations. Apart from earning revenue for the country, the various projects are likely to ultimately bring about the end of gas flaring in the region before long. For an account of some of the efforts in this regard, see Okorodudu-Fubara (1998: 410 – 414). See also SPDC, 'Annual Report 1998: Environment Report' < http://www.shellnigeria.com/info/env_1998/envreport.t.htm > (visited 11/05/02). In any case, it should be noted that what Shell has promised to end is 'unnecessary' gas flaring, suggesting that gas will continue to be flared as long as their operations last where it is necessary to do so (a definition of which has not yet been provided by the company).

included reputable international organizations.²⁷⁶ Moreover, the findings of Chapter 3 of this thesis further lends credence to this conclusion, as they are inconsistent with Shell's claims.²⁷⁷

Another interesting dimension to the issue of protection of the Niger Delta environment relates to the issue of international standards for the activities of MNCs. Shell claims that: 'In terms of standards, the Shell Group world-wide and SPDC in Nigeria consider national legislative and regulatory requirements as the minimum to be met. Although no internationally agreed body of standards exists, those applied elsewhere exceeding Nigerian requirements are also taken into account'.²⁷⁸ This suggests that the environmental standards of Shell in the Niger Delta are comparable to that obtainable elsewhere in the world (particularly the advanced countries in North America and Europe). However, according to one source, 'the activities of transnational corporations [such as SPDC] [in developing countries] have raised

²⁷⁶ Participants at the Workshop are listed to include: representatives from the communities and community-based organizations, Nigerian NGOs, International NGOs (International Conservation Union, the Worldwide Fund for Nature, the International Institute for the Environment and Development, and the Conservation Foundation), regulatory bodies, and SPDC personnel. SPDC, 'Annual Report 1998: Environment Report' at:
>http://www.shellnigeria.com/info/env_1998/envreport_t.htm > (visited 11/05/02).

²⁷⁷ In the course of the author's field survey of the Niger Delta in March 2002 (Phase II), a number of Oil Servicing Companies (i.e. companies providing servicing and subcontracting services to the oil majors – e.g. waste disposal companies) were visited. Confronted with questions on the state of the Niger Delta environment as a result of oil operations, these companies independently laboured to demonstrate that 'things are changing'; that important steps are being taken to protect the environment from the impacts of oil operations. A few of them showed the author-visitor some 'new' machines which have been recently acquired or fabricated for use, towards tackling the environmental problems associated with the oil industry. The potential workings of those machines were explained. Essentially, they are designed to serve future purposes; none was concerned with remediation programmes for past damages. At the end, what emerged may be described as a 'serious re-thinking' of environmental issues in the oil industry circles in the Niger Delta, particularly as it relates to future operations. However, the machines have not yet been installed for use, and it may be some years before their value would begin to be seen in the region. (The author would like to thank Engr. Pedro Egbe, the Chief Executive Officer of WELTEK (Nig.) Ltd, who took time off his tight schedules to take the author round the Oil Servicing Companies visited. As a well-known person in Nigeria, particularly in the oil business, his presence facilitated the entry of the author into those companies and indeed the interviews conducted with them).

²⁷⁸ The company also noted that Nigeria is party to all relevant international environmental conventions, with the exception of the Protocol Relating to the convention on Wetlands of International Importance. See SPDC, 'Annual Report 1998: Environment Report' <
http://www.shellnigeria.com/info/env_1998/envreport_t.htm > (visited 11/05/02).

widespread [environmental] concerns for more than two decades'.²⁷⁹ Eaton (1997: 263) argues that 'while some TNCs conduct responsible international business operations, others blatantly disregard human and environmental concerns in their countries of operations'. He further notes that 'the citizens of developed nations rarely hear of the environmental havoc many TNCs wreak in developing countries because only major disaster, such as that which occurred in Bhopal, are widely reported in the news'.²⁸⁰

There is evidence to indicate that the movement of emergent countries (that is, countries liberated from the shackles of colonialism) – today's developing countries or LDCs – after the Second War (more especially from the 1960s) towards a New International Economic Order (NIEO), prompted international-level discussions on corporate conduct from the early 1970s.²⁸¹ From the perspective of the LDCs, TNCs have become too powerful, threatening, *inter alia*, the sovereignty of the Nation-States and their activities ought to be regulated by international standards. According to sources, the UN Secretary- General was persuaded in 1972 by the Economic and Social Council of the UN, to commission a group of eminent persons to study the impact of TNCs on world development and international relations.²⁸² The group reported in 1974, recommending the setting up of a UN Commission on Transnational Corporations (UNCTC) to formulate a code of conduct for TNCs. After several years of negotiations and revisions, a revised draft was submitted to ECOSOC in 1990.²⁸³ The draft covers all aspects of business transactions, including political, economic

²⁷⁹ See Friends of the Earth, 'A History of Attempts to Control the Activities of Transnational Corporations: What Lessons Can Be learned?' < <http://www.foe.org/progressive-economy/history.html> > (visited 16/05/02).

²⁸⁰ Eaton (1997: 263).

²⁸¹ See Muchlinski (1999: 3 – 6). With particular reference to Nigeria, see Biersteker (1987); and (to a lesser extent) Sodipo and Fagbemi (1994).

²⁸² See Muchlinski (1999: 593).

²⁸³ See UN Doc. E/1990/94 of 12 June 1990. Also published as annex IV to the UNCTC, *Transnational Corporations, Services and the Uruguay Round* (1990, UN Doc. ST/CTC/103).

financial, social and environmental. For present purposes, only the environmental aspects are important and these are contained in the following three articles:

43. TNCs shall carry out their activities in accordance with national laws, regulations, established administrative practices and policies relating to the preservation of the environment of the countries in which they operate and with due regard to relevant international standards. TNCs should, in performing their activities, take steps to protect the environment and where damaged to rehabilitate it and should make efforts to develop and apply adequate technologies for this purpose.

44. TNCs shall, in respect of the products, processes and services they have introduced or propose to introduce in any country, supply to the competent authorities of that country on request or on a regular basis, as specified by these authorities all relevant information concerning: characteristics of these products, processes and other activities including experimental uses and related aspects which may harm the environment and the measures and costs necessary to avoid or at least to mitigate their harmful effects; prohibitions, restrictions, warnings and other public regulatory measures imposed in other countries on the grounds of protection of the environment on these products processes and services.

45. TNCs should be responsive to requests from governments of the countries in which they operate and be prepared where appropriate to co-operate with international organizations in their efforts to develop and promote national and international standards for the protection of the environment.

Of all, article 43 is of especial importance in the present discourse, as it obliges TNCs to operate with due regard to the local environment and comply with national environment protection legislation. *However, this instrument remains a draft, and it would appear that it might never be adopted.*²⁸⁴ Similar provisions can also be found in the OECD Guidelines for Multinational Enterprises, adopted by Governments of Member Countries²⁸⁵ in 1976, with the aim of ensuring 'that MNEs

²⁸⁴ Negotiation on the Draft was stalled by disagreements on its contents and status between the Group of 77 States and the developed countries. Hence, further negotiation was suspended in 1992. And, following certain developments since then, for example, the rise in bilateral investment treaties, it has been doubted whether the conclusion and adoption of a Code of Conduct by the UN should ever be revived. Indeed, it has been observed that 'the idea of a general UN Code, as an instrument for the preservation of LDC economic sovereignty, may be an approach that has had its day' (Muchlinski, 1999: 597).

²⁸⁵ Presently, the Organization of Economic Co-operation and Development (OECD) has 30 member countries, including: Australia, Canada, Germany, Netherlands, New Zealand, UK, and USA.

operate in harmony with the policies of the countries where they operate'. The Guidelines are reviewed from time to time, and the environmental aspects were introduced by the 1991 revision. Essentially, they 'recommend'²⁸⁶ that MNEs should 'take due account of the need to protect the environment and avoid creating environmentally related health problems'.

In the latest revision in 2000, it is provided: 'Enterprises should, 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'.²⁸⁷ In more particular terms, the instrument recommends, *inter alia*: (1) that MNEs should engage in adequate and timely communication and consultation with the communities directly affected by the environmental, health and safety policies of the enterprise and by their implementation; and (2) assess, and address in decision-making, the foreseeable environmental, health, and safety-related inputs associated with the processes, goods and services of the enterprise over their full life cycle, and where these proposed activities may have significant environmental, health, or safety impacts, and where they are subject to a decision of a competent authority, they are required to prepare an appropriate environmental impact assessment.²⁸⁸

In any case, these Guidelines are not binding but merely recommendatory. Moreover, even if they are binding, it does not seem that they will be useful to the affected people since under international law individuals and groups do not still have

²⁸⁶ The Guidelines are not legally binding; they are mere recommendations.

²⁸⁷ For the full text of the Guidelines, which is part of a broader OECD investment instrument, the *Declaration on International Investment and Multinational Enterprise*, see OECD web site at: <<http://www.org/daf/investment/guidelines/>>.

standing before international tribunals to enforce compliance with international obligations. As Kalas (2001: 192) summed it up: 'At present, there is a lack of standing for individuals [and groups] before international tribunals, as well as a lack of clear standards for determining liability and compensation for environmental harm'.

Lastly, it is important to note that although there is yet no binding international standards on the conduct of MNCs, yet the foregoing instruments appear to reflect the national standards of most advanced countries, and it would seem that Shell's claim of respect for international standards is referable to these standards.

In summary, the success of any domestic statutory provision or international regime for the protection of the Niger Delta environment depends largely on the profile of compliance by the addressees of the laws, namely, oil multinational companies. The foregoing discourse has shown that Shell (and the other oil companies operating in the Niger Delta) appear not to comply with required environmental standards. This contrasts with their posture in advanced countries in Europe and America (where they 'religiously' comply with very high environmental standards),²⁸⁹ and immediately raises the issue of enforcement of environmental protection laws in Nigeria, to which this research now turns.

²⁸⁸ See Part V, Para. 2 (2) (b) and 3 thereof.

²⁸⁹ This situation is contrary to the prescriptions of Agenda 21 (Programme of Action for Sustainable Development – agreed at the Earth Summit in 1992 in Rio de Janeiro, Brazil, and which arguably has become part of customary international law), which contains certain 'obligations' for MNEs in the field of environmental protection. For example, para. 20.29 provides that: 'Wherever they operate, transnational corporations and other large-scale enterprises should be encouraged to introduce policies and make commitments to adopt standards of operation with reference to hazardous waste generation and disposal that are equivalent to or no less stringent than standards in the country of origin...' Moreover, MNEs are 'required' to transfer environmentally useful technology to developing countries, such as Nigeria (para. 34.11), and to modify their practices in line with local ecological needs (para.

4. 6. Enforcement of Environment Protection Laws in Nigeria

Usually, enforcement of any statute is essentially an administrative issue by the competent administrative authorities. The role of individuals or groups in this regard (often through the institution of the court) is often treated as a separate subject. However, in this thesis, space will not permit such a cherished approach. Hence, this section is divided into two sub-sections to take care of these closely related, though separate, issues. In the result, only a brief study will be possible.

4. 6. 1. Administrative Enforcement

There is a wide-ranging agreement on the need to enforce the compliance of environmental protection statutes. For example, it has been observed that 'setting...[environmental] standards is 5 per cent of the job, ensuring compliance 95 per cent'.²⁹⁰ Similarly, Wilson, et al. (1995: 209) argue that: 'The seriousness with which a particular State views the environmental problems within its borders is demonstrated by the attention it gives to ensuring enforcement of the relevant laws. The number of prosecutions, amount of staff and financial resources dedicated to enforcement, and the types and level of penalties for violations are indications of that commitment'.

In the context of Nigeria, similar arguments have also been made. For instance, Okorodudu-Fubara has argued that although the real implementation of the vast array of existing laws on environment protection in Nigeria 'will ultimately depend on voluntary compliance with the statutory commands, there is no doubt that, given the circumstance of a country such as Nigeria where voluntary compliance is

30.29). For further information on this, see Muchlinski (1998: 437 – 442); United Nations Conference on Trade and Development (UNCTAD) (2001: 41- 50, esp. Box 8).

still far from the norm, compliance will have to be aided by a strong will power and steadfast determination by the enforcement agents' – to enforce the laws 'duly, without fear or favour' (Okorodudu-Fubara, 1999: 206). The author also agrees that financial viability is crucial to the enforcement of the relevant statutes.²⁹¹ She further notes (as already seen above) that there is a multiplicity of enforcement organs/institutions in Nigeria.²⁹² (Nevertheless, today, it would appear that FEPA acts as the only cross-sectoral enforcement institution).

With regard to enforcement mechanisms, it has been seen above that the various laws provide an array of enforcement strategies, including: arrest, prosecution, search of premises or facilities, and revocation of permit or license. Never the less, it has been observed that 'the enforcement of environmental laws in Nigeria has been problematic' (Obi, 1994: 67). Evidence from various sources suggests that the problems of enforcement relate to the following issues: financial viability of enforcement agencies, adequacy of sanctions, adequacy of manpower, corruption, institutional conflicts, and socio-economic-politico factor (issues similar to the indices for effective enforcement as identified by Wilson et al.). Accordingly, *this section* will explore the effectiveness of Nigeria's enforcement mechanisms and test the country's commitment to enforcement by briefly examining these issues.

(i). Financial Viability: As noted above, the effectiveness of statutory enforcement will ultimately depend on the availability of funds. Apart from the payment of staff and other administrative costs, money will be needed to buy adequate monitoring equipment. The Nigerian Government seems to be well aware of this, even before the establishment of FEPA. In a Workshop in 1988, the Federal Minister of State for

²⁹⁰ Quoted in Irene, 'Codes of Conduct for Transnational Corporations, etc.' <<http://www.cleanclothes.org/codes/overview.htm>> (visited 15/05/02).

²⁹¹ Okorodudu-Fubara (1998: 225).

Planning and Budget and Special Assistant to the President, presented an address entitled 'Considerations for an Effective Implementation of the Proposed National Environmental Protection Agency of Nigeria', where he observed:

[T]he task ahead of the proposed Environmental Protection Agency of Nigeria is enormous as it is expected to do battle with the entirety of Nigerian industry and agriculture as well as with Federal Agencies and powerful commercial interests. Experience of other countries with a history of an environmental protection agency has shown that a lack of adequate resources for the agency often led to over-cautious, hesitant, and timid behaviour by the agency implementing the provisions of the countries' national environmental legislation. In order, therefore, to ensure that the proposed Environmental Protection Agency of Nigeria performs its functions effectively, it is necessary to equip the Agency adequately, both in terms of finance and skilled manpower and clout.²⁹³

Under the FEPA Act, the sources of the Agency's finance are stated to be: 25 per cent Ecological Fund of the Federation Account; such sums as may, from time to time, be granted to the Agency by the Government of the Federation; all money raised for the purposes of the Agency by way of gifts, grants-in-aid, testamentary disposition and sale of publications; and subscriptions, fees and charges for services rendered by the Agency and all other sums that may accrue to the Agency from other sources.²⁹⁴ However, like several government institutions in Nigeria and elsewhere in the Third World, FEPA officials complain of inadequate funds for the implementation of their statutory functions. For example, it has been alleged, *inter alia*, that the institution has no money to buy modern monitoring equipments to test if the relevant limits set by it have not been exceeded by a particular industry (specifically, oil companies); nor are

²⁹² Okorodudu-Fubara (1998: 206).

²⁹³ Quoted in Okorodudu-Fubara (1998: 225). The need for enforcement to ensure compliance with relevant laws was also recognized by the government in the National Agricultural Policy, 1988, where it was stated thus: 'As a fishery industry matures into steady state of development, there is always the tendency of over-exploitation unless rules and regulations exist and are *effectively enforced* to prevent the depletion of the fish resources. In this regard, existing rules and regulations and the material and manpower resources to enforce them will be upgraded and made more effective' (Italics mine).

²⁹⁴ Section 12 (as amended in 1992).

they able to maintain serviceable vehicles for the purposes of their statutory duties.²⁹⁵ There is some evidence in support of this claim. As one observer puts it: 'Very often, funds are lacking for importation of inputs and sophisticated equipment needed for the monitoring of the environment. Where this [the equipment] exists, it cannot serve a wide area, thus hampering the monitoring process which is fundamental to enforcement' (Obi, 1994: 77 – 78).

(ii). Adequacy of Sanctions: To be effective, the sanction for contravention of a relevant statute should fit the bill. As has been noted at the relevant places above, while few of the sanctions provided for the violation of the statutes are quite adequate, most appear inappropriate (for example, imprisonment, where corporate entities are involved) or inadequate as a deterrent measure (as where a fine is grossly small). According to one commentator, 'the fines prescribed by law are usually low, making it atimes more economical for the polluter to pay the fine, rather than obey the laws'.²⁹⁶

(iii). Adequacy of Manpower: The role of personnel in the enforcement of environmental protection statutes, particularly in the field of oil operations, appears indispensable. As Wilson et al. have argued, the number and quality of staff is very important. There is evidence that both the Nigerian government and FEPA also recognize the need for 'skilled manpower'²⁹⁷ for the implementation of relevant environmental protection statutes. For example, the first Chief Executive of FEPA claimed in a Seminar/Workshop in 1992 that FEPA has: (1) established regular in-house training for FEPA staff on Basic Inspection and Enforcement Procedures, logistics of proper sampling, sample analysis, and sophisticated techniques; and (2)

²⁹⁵ Interview with author, March 2002 (Phase II).

²⁹⁶ See Obi (1994: 69).

²⁹⁷ See speech of the Minister of State for Planning and Budget quoted in the text above.

arranged overseas training in various aspects of environmental management and technology with the assistance of the United States of America, Japan, Australia, Canada, and UNEP for FEPA staff and others.²⁹⁸ However, it has been doubted if FEPA has adequate manpower.²⁹⁹ For example, the World Bank found that FEPA's Regional Office in Rivers State had only 25 staff in 1995, and this included 10 environmental professionals and among them only 3 were concerned with pollution. Presently, there is no evidence of any improvement in this situation,³⁰⁰ and the World Bank report suggests that a worse situation exists in other areas of the Niger Delta (World Bank, 1995: Volume II, annex J).

(iv). The Role of Corruption: Several individuals interviewed by the author during a field survey of the Niger Delta region, on why the environment remains degraded in the face of numerous environment protection laws and a dedicated Federal Government Enforcement Agency, fingered corruption as a key factor. In the case of oil-operations-related environmental problems, they alleged that the officials of FEPA are usually 'settled' (a term denoting 'bribery') by oil companies, as a result of which they are incapacitated in the discharge of their statutory functions against the companies. Whilst there is no objective confirmation of this allegation, the view is widely held, even in government circles, that the officials of FEPA are corrupt. It has also been contended by writers that 'corruption undermines enforcement [by FEPA], leading to further degradation of the environment' (Obi, 1994: 69; Frynas, 2000: 87).

(v). Institutional Conflicts: As noted above, the enforcement of environmental standards in the oil industry is the joint responsibility of both the DPR and FEPA. The

²⁹⁸ Aina (1992: 14).

²⁹⁹ See the view of Adewale (quoted in Obi, 1994: 69). However, the doubt was expressed earlier than the claim.

³⁰⁰ The present author visited the FEPA office in Port Harcourt, Rivers State on two occasions in January 2002. In both occasions, it was observed that the office was virtually empty.

practical position of this was recently stated by Shell oil company, thus: 'In Nigeria, Exploration and Production (EP) operations are subject to separate environmental permit and licensing procedures administered by two government organizations: the Federal Environmental Protection Agency (FEPA) and the Department of Petroleum Resources (DPR) of the Ministry of Petroleum Resources. FEPA as the environmental permitting authority for all industries, including the oil sector, is in charge of regulating industrial effluents and emissions, and the review and approval of environmental impact assessment (EIAs)...DPR is the licensing authority for EP operations, as well as the environmental permitting authority for EP activities in Nigeria'. It is notable that the statutory functions of these institutions are derived from separate and coordinate statutes,³⁰¹ and this is confirmed by section 23 of the FEPA Act, which enjoins FEPA to co-operate with the DPR. Sources suggest that this situation has led to institutional conflicts, especially as it relates to the enforcement of environmental standards. According to one authority, the question that arises is: 'Who inspects oil installations? [For the purposes of enforcement of environmental standards]. Is it the Agency, the Department of Petroleum Resources or both organizations?''³⁰² The effect of these institutional conflicts, according to one commentator, is the immense weakening of the enforcement process. A lot of energy is frittered away on bureaucratic wrangling while the polluters go on with 'business as usual'.³⁰³

(vi.) Socio-economic-politico Factor: A commentator has suggested that the problems that hinder the enforcement of environmental statutes in Nigeria are 'political, social and economic' (Obi, 1994: 67). Interestingly, there seems to be a

³⁰¹ The Petroleum Act and the FEPA Act, respectively.

³⁰² Adewale (1992 & 1993: 62).

³⁰³ Obi (1994: 77).

consensus on this point. With particular reference to the enforcement of oil-related environment protection statutes, it is interesting that the first Chief Executive of FEPA has argued that Nigeria being a mono-cultural, oil-driven economy 'with a narrow technological base and a heavy external debt burden, the pressures on the State to pursue unsustainable economic and socio-political development are high and irresistible'.³⁰⁴ In this context, Obi (1994: 76) has also noted: 'Under a climate of economic and a huge debt burden, the State has pursued policies directed at increasing foreign exchange earnings and promoting direct foreign investments. In this scenario, the immediate needs of economic survival take precedence over long-term environmental considerations'. Furthermore, Okorodudu-Fubara also appears to share this view when she stated (with particular reference to gas flare): 'Government has not demonstrated the will power to ...unequivocal and outright ban on gas flaring...for obvious reasons – take away the gas flares and the life-wire of the nation's economy is extinguished'.³⁰⁵

The same economic reason was further advanced by Kassim-Momodu as a possible reason for the non-enforcement of the Gas Re-Injection Act. According to him, government could not enforce the sanction of forfeiture of concession against violators 'due to the adverse effects it could have on the nation's economy if enforcement results in a halt to oil production operations' (Kassim-Momodu, 1986/87: 83).³⁰⁶ Furthermore, Ayodele (1985: 300) reached the same conclusion, when he observed: '[I]t may be plausibly speculated that the anxiety to increase oil production

³⁰⁴ Noted in Obi (1994: 77).

³⁰⁵ Okorodudu-Fubara (1998: 407).

³⁰⁶ Ikporukpo (1985: 204) has also observed that 'Given the importance of petroleum to the Nigerian economy, the laxity in enforcing the existing legislation may be due to a deliberate policy of not discouraging the operation of the oil producing companies'. Similarly, Kalas (2001: 193, footnote 4) has most recently argued that 'host countries often choose not to enforce their environmental regulations against TNCs because they are often working in tandem with the TNCs toward a profit motive'.

in order to take advantage of the increases in oil prices has led to the governments having given little or no attention to the environment as well as to the production technologies which could safeguard exposed inhabitants’.

Hence, Obi was right to surmise: ‘State-environment nexus is one in which the [Nigerian] State at the level of policy recognizes that development planning must include environmental considerations in order for it to be sustainable, but in the actual pursuit of development pays little attention to environmental protection’.³⁰⁷ Significantly, this situation illustrates the interpretation of the ‘right to development’ by some countries (especially less developed countries). As Orford notes:

It has become accepted by many States and some commentators that the right to development is a right of States to pursue a narrow economic model of development over the human rights of the people of the State invoking the right. The right to development is presented as allowing States where necessary to put the interests of investors over the interests of other human beings.³⁰⁸

Yet, as the author pointed out, this view is a mis-interpretation of the right to development as declared by the United Nations General Assembly in 1986.³⁰⁹

4. 6. 2. Nigerian Judiciary and Enforcement of Environment Standards

In some jurisdictions the judiciary has been very active in the protection of the environment through a favourable disposition towards individual or class/public interest actions for environmental protection. In India, for example, in the case of

³⁰⁷ Obi (1994: 75). Yet, as Eaton (1991: 508) has rightly argued: ‘Sustainable development implies that States, regardless of their state of development, must treat the conservation of natural resources and the environment as an integral part of the planning and implementation of development activities.’

³⁰⁸ Orford (2001: 135).

³⁰⁹ Ibid, at 135 – 145. The Declaration on the Right to Development was adopted by the UN General Assembly on 4 December 1986 (GA Res. 41/128 (Annex), UN GAOR, 41st Sess., Supp. No. 53, at 186, UN Doc. A/41/53 (1987)). This right has been re-affirmed in different international *fora* since then. For information on this and also on the history of the making of the right (some still doubt whether it has become an established human right) see Orford (2001: 129 – 135).

*M.C. Mehta V. Union of India*³¹⁰, the Supreme Court accepted an action for a writ of mandamus to restrain a series of tanneries from disposing effluents into the River Ganges. The court made an order for the closure of the tanneries until primary waste treatment systems have been installed, despite the fact that the court was aware that the order would cause economic hardship. The court noted Article 48-A of the Indian Constitution, which provides that the State shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country and Article 51-A, which imposes a fundamental duty on every citizen of the country to protect and improve the natural environment. Interestingly, the court also approvingly quoted the provisions of the 1972 legally non-binding Stockholm Declaration on the Human Environment.³¹¹

Similarly, in the celebrated Philippino case of *Antonio Oposa, et. al. V. The Honourable Secretary Fulgencio S. Factoran, Jr. and the Honourable Judge Eriberto U. Rosario*,³¹² 45 children, represented by their *guardians ad litem*, brought a representative action against the Department of Environment and Natural Resources to stop large-scale leasing of forests for timber, beyond their sustainable capacity. The action was brought for their generation and future generations. The court held that they had standing to bring the action. DAVIDE, J., writing for the Supreme Court, said: 'We find no difficulty in ruling that they [the children] can, for themselves, for others of their generation and for the succeeding generations, file a class suit. Their personality to sue on behalf of succeeding generations can only be based on the concept of inter-generational responsibility insofar as the right to a balanced and

³¹⁰ (1987) 1 SCR 819.

³¹¹ See also *D.D. Vyas V. Ghaziabad Development Authority* (noted in Wilson et al, 1995: 211).

³¹² Supreme Court of Philippines, G.R. No. 101083 of 30 June 1993 (The Children's Case). See also (1994) 33 ILM 173.

healthful ecology is concerned'.³¹³ Significantly, evidence indicates that since the decision was rendered the government has cancelled several leases affecting the said forests.³¹⁴

The situation in Nigeria would appear to be a lot different from the foregoing. With particular reference to the protection of the environment from oil operations damage, there is evidence to show that the courts, like the executive, follow the economic argument. For example, in *Allar Irou V. Shell-BP Development Company (Nig.) Ltd.*,³¹⁵ national economic interest was a major reason why the court denied a successful plaintiff an injunctive relief. The plaintiff had sued the defendant company for damages suffered as a result of oil spillage. Advancing reasons for refusing the relief of injunction, the trial judge stated:

Firstly, negligence or carelessness by the defendants' employees cannot be controlled by the defendants. To grant the order [of injunction] as prayed would amount to asking the defendants to stop operating in the area...It is needless to say that mineral oil is the main source of the country's revenue...

In his comments on this case, Ajomo (1994: 22) pertinently observed: 'In the oil sector where environmental degradation is most prevalent, the all-pervading influence of the oil companies and the paternalistic attitude of the judges towards them in matters relating to environmental hazards created by the companies have made the enforcement of environmental laws ineffective...What the judges fail to

³¹³ At 11 – 12.

³¹⁴ See Allen (1994: 718, footnote 28).

³¹⁵ Suit No. W/89/71 (unreported) High Court, Warri, 26 November 1973. In this case, the plaintiff had brought an action for damages arising from oil spillage and had relied on the doctrine of *res ipsa loquitur*. Finding for him, the trial judge said: 'In the instant case the oil installations were under the management of the defendants and there is no explanation from the defendants as to what caused the spillage, and it cannot be said that the facts are sufficiently known to remove the issue involved from the province of the doctrine of *res ipsa loquitur*'.

realize is that economic development can be compatible with environmental conservation.’

Another case that illustrates the patronizing attitude of Nigerian judges to the operations of oil companies is the case of *Chinda V. Shell-BP*,³¹⁶ where the plaintiff-family had complained of the adverse impact of gas flare on their buildings, farm crops and other plants, and prayed the court to restrain the defendant company (Shell-BP) from operating a flare stack within ‘five miles’ of the plaintiffs’ village. The judge refused to order as prayed, and described the relief sought as ‘an absurd and needlessly wide demand’.³¹⁷

Further, the analysis of various decided cases on compensation for damages arising from oil operations (see Chapter 3) further indicates that the Nigerian judiciary is not interested in the issue of environmental protection.³¹⁸ As was seen, virtually all the cases examined had failed on *technical grounds*: inability of the plaintiff to ‘scientifically’ prove that oil operations had caused the alleged (environmental) damage.³¹⁹ Even when a plaintiff is successful, the courts appear to be satisfied with awarding monetary damages (compensation) only.³²⁰ In the words of one observer, the courts appear to suggest that monetary compensation ‘adequately compensates for the ecological disaster wrought on the environment’ (Okorodudu-Fubara, 1998: 607).

There is no doubt that judges have an important role to play in the protection of the environment, by judicial enforcement of relevant national and international laws. As Klaus Toepfer (UNEP Executive Director) observed at the 2002

³¹⁶ (1974) 2 RSLR 1.

³¹⁷ *Ibid*, at 14.

³¹⁸ See Adewale (1989a).

Johannesburg Global Judges Symposium (held a week before the commencement of the 2002 Johannesburg Earth Summit³²¹):

We have over 500 international and regional agreements, treaties and deals covering everything from protection of the ozone layer to conservation of the oceans and seas...Almost all, if not all, countries have national environmental laws too. *But unless these are complied with, unless they are enforced, then they are little more than symbols, tokens, paper tigers* (Italics added).³²²

It is possible that the attitude of the Nigerian judiciary towards the protection of environment is informed by the fact that, unlike the case in some countries, there is no constitutional right to a healthy environment in Nigeria, nor is there any constitutional duty on the State to protect the environment.³²³ Some observers believe that this attitude might change in the nearest future.³²⁴ However, if oil remains the sole revenue earner for the country, it is doubtful if the courts will abandon the economic approach and move towards sustainable development approach.

With regard to international obligations, the African Charter on Human and Peoples Rights, to which Nigeria is a party, provides for right to a healthy ('satisfactory') environment,³²⁵ and, as has already been noted, Nigeria is party to a number of international environmental protection treaties. Yet, there is no evidence that the national courts have ever enforced any of them. This further suggests a clear

³¹⁹ Although this might have been the fault of the fault-based system, which requires proof of the 'causal connection' before a plaintiff can succeed, it is possible that an activist judiciary (such as the Indian Supreme Court) would have reached a different conclusion in the circumstances.

³²⁰ As indicated in *Allar Iruo V. Shell-BP Development Company (Nig.) Ltd.* (1973).

³²¹ Held 26 August – 4 September 2002 (Johannesburg, South Africa).

³²² See 'Summit: Judges Fortify Environmental Law Principles' (*Environmental News Service*, 28 August 2002) – available at: <http://ens-news.com/ens/aug2002/2002-08-27-01.asp>.

³²³ For an argument in favour of public interest litigation in Nigeria, see Ajai (1993-1995: 29 – 30). The African Charter on Human and Peoples' Rights appears to permit public interest litigation.

³²⁴ See, by example, Okorodudu-Fubara (1998: 607 – 609, esp. at 609).

³²⁵ Article 24.

non-challant attitude towards environmental issues,³²⁶ although some observers have suggested that similar attitude exists in other countries respecting enforcement of international environmental law. For example, Kalas has observed that 'while individual States may have quite extensive domestic environmental laws and regulations, international environmental law aspects are not...regarded and implemented by national courts'.³²⁷

Interestingly, there is an indication that the world (particularly Nigeria) may soon witness a pro-active or more pro-active judiciary in the field of environmental protection. At the recent 2002 World Summit on Sustainable Development, over 100 judges of the world's most senior judges (including a senior Judge of the United States Court of Appeals for the Ninth Circuit, Judge J. Clifford Wallace; Justice Charles Gonthier of the Supreme Court of Canada; the Chief Justice of India; and the Chief Justice of Nigeria) presented the Johannesburg Principles on the Role of Law and Sustainable Development. The Principles represent an 'action plan to strengthen the development, use and enforcement of environmentally related laws'. The Principles expressed the 'firm conviction' of the Judges that the framework of international and national laws that has evolved since the United Nations Conference on Human Environment held in Stockholm in 1972 – the forerunner of the

³²⁶ In the realm of human rights, there is evidence that the Nigerian courts have enforced the provisions of the African Charter on Human and Peoples' Rights on few occasions. See, for example, *Fawehinmi V. Abacha* [1998] 1 HRLRA 549 CA, where the Court of Appeal relied on the provisions of the Charter to release the applicant from unlawful detention. According to the court, 'the arrest and detention of the appellant on the facts adduced clearly breached the provisions of the Charter and can be enforced under the provisions of the Charter. The contracting States are bound to establish some machinery for the effective protection of the terms of the Charter...It is common place that no government will be allowed to contract out by local legislation, its international obligations' (at 590, per MUSDAPHER, J.C.A.). This decision was approved on appeal to the Supreme Court of Nigeria. See *Abacha V. Fawehinmi* (2000) 6 NWLR (Pt. 668) 228 SC. See also *Ogugu V. The State* (1998) 1 HRLRA 167.

³²⁷ Kalas (2001: 195).

Johannesburg Summit – provides ‘a sound basis for addressing the major environmental threats of the day.’³²⁸

In summary, an examination of various indicators of commitment to enforcement shows that there is presently no administrative commitment on the part of the Nigerian State to the enforcement of relevant oil-related environment protection statutes. Additionally, evidence indicates that various factors also impede enforcement. Of all, it seems that the critical factor affecting the enforcement of oil-related environment protection laws in the country is socio-economic and political factor: the perceived need for economic survival of the nation.³²⁹ Most probably, this singular factor has led to failure in the other indicators of commitment to enforcement, as identified by Wilson et al. Further, the need for economic survival seems to have permeated the judicial arm of government, as judges adopt economic and technical approaches in deciding cases of oil-related environmental damage, thereby suggesting want of concern for environmental protection. At the end, the non-enforcement of relevant environment protection statutes by the relevant agencies and organs of government (manned largely by members of the majority ethnic groups³³⁰), appears to partly explain why the oil MNCs do not comply with the statutes.

³²⁸ See ‘Summit: Judges Fortify Environmental Law Principles’ (*Environmental News Service*, 28 August 2002) – available at: <http://ens-news.com/ens/aug2002/2002-08-27-01.asp>. The Judges recommended the establishment of an ad hoc committee of judges, consisting of judges representing geographical regions, legal systems and international courts and tribunals and headed by the Chief Justice of South Africa, ‘that will keep under review and publicize the emerging environmental jurisprudence’.

³²⁹ It should be noted that FEPA is not an independent institution. In fact, by the 1992 amendment of the FEPA Act, it is part of the presidency (i.e. it is part of the offices of the President of the Federation of Nigeria).

4. 7. International Law and the Protection of Indigenous Peoples Environment

Another important issue on the question of the protection of the Niger Delta environment relates to the issue of international instruments for the protection of environments inhabited by indigenous peoples. As has already been found in this thesis, the Niger Delta people are indigenous people in Nigeria. Accordingly, this section shall explore the relevant international instruments for provisions relating to environmental protection, and these will be briefly compared with the relevant Nigerian statutory provisions to determine whether Nigerian law is in conformity with international law in this regard, and also if Nigeria is operating in compliance with its international law obligations.

As previously mentioned, the most important international instruments on the rights of indigenous peoples are the ILO Convention 169 and the UN Draft Declaration on the Rights of Indigenous Peoples. Significantly, both instruments have provisions dealing with the protection of indigenous peoples environment. Under Article 7 (3) of the ILO Convention, governments are enjoined to 'ensure that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities'. In large measure, it would appear that Nigeria's EIA Decree of 1992 is consistent with this provision, although evidence indicates that it is hardly or seriously implemented. In any case, this Convention is not legally binding on Nigeria, as she is not a party to it, and there

³³⁰ It was suggested to this author in the course of field survey in January 2002 that the enforcement agencies, like other employment sectors, are dominated by members of the majority ethnic groups in Nigeria.

is no evidence suggesting that the provision relating to environmental protection has become part of customary international law.³³¹

On its part, the UN Draft Declaration on the Rights of Indigenous Peoples provides in Article 28 that: 'Indigenous peoples have the right to the conservation, restoration and protection of the total environment and the productive capacity of their lands, territories and resources, as well as to assistance for this purpose from States and through international cooperation...States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands and territories of indigenous peoples'. In addition, under Article 30 it is further provided:

Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands, territories and other resources, including the right to require that States obtain their free and informed consent prior to the approval of any project affecting their lands, territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. Pursuant to agreement with the indigenous peoples concerned, just and fair compensation shall be provided for any such activities and measures taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.³³²

On comparison, these provisions represent a great improvement on those of ILO Convention No. 169. Most significantly, the provisions seem to require the participation of indigenous peoples, not only in the management of their environment, but also in the exploitation of natural resources found in their lands.³³³ Moreover, the right to environmental protection is explicitly guaranteed. As could be observed, all these are in sharp contrast with the position under Nigerian domestic laws, which vest

³³¹ This is unlike other provisions discussed in Chapter 2 of this thesis. (However, as previously argued, Nigeria is politically bound by the ILO Conventions). Perhaps it may be argued that environmental issues are incidental to land and natural resources rights that have become part of customary international law.

³³² See further Art. 31.

³³³ The ILO Convention also requires participation, but only on the issue of environmental management.

land and mineral resources (including oil) in the State and make no provision for the participation of the indigenous people in the exploitation of natural resources and the management of the environment. However, the Declaration is yet to be adopted.

Apart from the above 'specialist conventions',³³⁴ Article 24 of the African Charter on Human and Peoples' Rights guarantees 'all peoples' the right to a 'general satisfactory environment'. According to the African Commission on Human and Peoples' Rights, this right recognizes 'the importance of a clean and safe environment that is closely linked to economic and social rights in so far as the environment affects the quality of life and safety of the individual...The right to a general satisfactory environment, as guaranteed under Article 24 of the African Charter or the right to a healthy environment, as it is widely known...imposes clear obligations upon a government. It requires the State to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources'. Significantly, the Commission added, States Parties are obliged to involve the affected 'peoples' in the management of the environment.³³⁵

Besides, there are further treaty and soft-law provisions emphasizing the need for indigenous peoples participation in the management and protection of their environment. For example, Article 8 of the CBD provides that 'Each Contracting Party shall, as far as possible and as appropriate' –

(j) Subject to its national legislation, respect, preserve and maintain the knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for conservation and sustainable use of biodiversity and promote their wider application with the approval and involvement of the holders of such knowledge,

³³⁴ In the sense that they are exclusively dedicated to the rights of indigenous peoples.

³³⁵ See *Communication 155/96 The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights / Nigeria* (Done at the 30th Ordinary Session, held in Banjul, The Gambia from 13 to 27 October 2001), Paras. 51, 52 and 55. See also Article 16.

innovations and practices and encourage the equitable sharing of benefits arising from the utilization of such knowledge, innovations and practices.

Similarly, Principle 23 of the World Charter for Nature provides: 'All persons [including indigenous peoples], in accordance with their national legislation, shall have the opportunity to participate, individually or with others, in the formulation of decisions of direct concern to their environment, and shall have access to means of redress when their environment has suffered damage or degradation'.³³⁶ Though important, this provision is not binding on States, as the Charter is only a soft-law instrument. With regard to the CBD, it appears to be of limited importance because of its 'wishful' language: 'as far as possible and as appropriate'. Moreover, as the World Conservation Union (IUCN) observed in its *Explanatory Guide to the CBD* (in relation to indigenous peoples), the proviso of subjecting the international obligation of States in Article 8(j) to national legislation is unusual. 'The paragraph's objectives could be defeated, since the wording implies that all national legislation, including future rules, will take precedence' (IUCN, 1994: 48).

Finally, it is also notable that Principle 22 of the Rio Declaration as well as Agenda 21, which elaborates it, also contains useful provisions on the issue of protection of indigenous peoples environment. Principle 22 states: 'Indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.' In

³³⁶ See U.N.G.A. Res. 37/7 of 28/10/82.

Chapter 26 of Agenda 21,³³⁷ it is recommended (*inter alia*) that governments, in full partnership with indigenous people and their communities should, where appropriate:

Develop or strengthen national arrangements to consult with indigenous people and their communities with a view to reflecting their needs and incorporating their values and traditional and other knowledge and practices in national policies and programmes in the field of natural resource management and conservation and other development programmes affecting them.³³⁸

Although these 'Rio documents' are not legally binding, it has been pointed out that 'many nations involved in UNCED [United Nations Conference on Environment and Development] have undertaken to implement the action programmes' (Craig and Nava, 1995: 120). Remarkably, Nigeria is one of such nations.³³⁹

To sum up, there are important provisions in international instruments providing for the protection of indigenous peoples environment and their participation in the programmes. In this regard, Nigerian environmental laws are behind in most respects and would require appropriate adjustments. However, apart from Article 24 of the African charter on Human and Peoples' Rights, the relevant provisions are largely contained in soft-law (non-legally binding) instruments. Even so, it is arguable that the provisions reflect, at least, the current international thinking on the issues concerned,³⁴⁰ as exemplified in the following statement of the World Commission on Environment and Development (WCED):

³³⁷ The Chapter is appropriately entitled 'Recognizing and Strengthening of the Role of Indigenous Peoples and their Communities'.

³³⁸ Paragraph 26. 6 (a). See also the Declaration on the Principles for a Global Consensus on management, Conservation and Sustainable Development of All Types of Forests 1992 (part of the outcome of the Earth summit at Rio in 1992).

³³⁹ In 1997, Nigeria sent information to the UN Commission on Sustainable Development on her implementation of Agenda 21. This document has been referred to earlier in this Chapter.

³⁴⁰ Commenting on the status of the 1972 Stockholm Declaration on the Human Environment, Shutkin has argued that while the Declaration itself 'is not binding as international law, it does forcefully

Tribal and indigenous peoples will need special attention as the forces of economic development disrupt their traditional life-styles – lifestyles that can offer modern societies many lessons in the management of resources in complex forest, mountain, and dryland ecosystems. Some are threatened with virtual extinction by intensive development over which they have no control. Their traditional rights should be recognized and they should be given a decisive voice in formulating policies about resource development in their areas.³⁴¹

4. 8. Conclusion

This Chapter set out to explore the law relating to environmental protection in Nigeria, with particular reference to the protection of the environment of the Niger Delta region where oil operations take place in the country. It was found that there is no comprehensive anti-oil pollution legislation in the country. Rather, there are a good number of relevant laws scattered all over the statute-books. More importantly, some aspects of these laws are inadequate (for example, biodiversity laws) and/or defective (for example, providing wide defences which appear to encourage, instead of discourage, pollution).³⁴² In this regard, contrary to the conclusion of previous researchers, Nigerian domestic environmental protection laws (particularly with regard to oil-industry-associated environmental problems) are not qualitatively comparable to those of advanced/industrialized countries such as USA and UK.

With special regard to biodiversity conservation, there is virtually no law protecting the region's wildlife, notwithstanding the presence of important

present a new paradigm of international order' (Shutkin, 1991: 483, footnote 17). In fact, the soft-law instruments can be said to represent emerging rights of indigenous peoples.

³⁴¹ WCED (1987: 12). The Commission argued that the marginalization of indigenous peoples is a symptom of a style of development that tends to neglect both human and environmental considerations. It also argued that a more careful and sensitive consideration of the interests of indigenous peoples 'is a touchstone of a sustainable development policy' (WCED, 1987: 116).

conservation sites in the region (containing rare and endangered species). The country's biodiversity laws are defective in that, for example, they do not provide against human activities which can destroy wildlife habitats. In the result, the enthusiastic claim of Okorodudu-Fubara (1998: 39 – 40) that Nigerian 'law and policy have made significant input towards...nature conservation and sustainable development', has not been proved.

At the international level, it was found that, apart from Article 24 of the African Charter on Human and Peoples' Rights, there are other relevant international standards on the protection of indigenous peoples' environment: some are contained in soft-law (politically binding) instruments, while others, although contained in multilateral treaties, look more like discretionary provisions. Yet, overall, they represent established and/or emerging rights of indigenous peoples. However, there is presently no binding international code of conduct for multinational corporations who undertake the oil operations, and evidence indicates that the UN Draft Code of Conduct for TNCs might never be adopted. At any event, even with a binding international code of conduct, another problem is that under present international law individuals and groups still do not have 'standing' to enforce compliance.³⁴³

Overall, however, there seems to be a sufficient corpus of law (including treaty obligations) that could fairly protect the Niger Delta environment from oil-industry-related pollution.³⁴⁴ Never the less, largely for economic reasons,³⁴⁵ the

³⁴² See Ikein (1990: 42).

³⁴³ See Kalas (2001). Compare the African Charter on Human and Peoples' Rights.

³⁴⁴ In a recent decision rendered against the Nigerian State, the African Commission on Human and Peoples' Rights said: 'Government compliance with the spirit of Articles 16 and 24 of the African Charter must also include ordering or at least permitting independent scientific monitoring of threatened environments, requiring and publicising environmental and social impact studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities exposed to hazardous materials and activities meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities'. See *Communication 155/96 The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights / Nigeria* (Done at the 30th Ordinary Session, held in Banjul, The Gambia

relevant authorities (including the judiciary) do not enforce the laws, with the result that the addressees of the laws (that is, the oil companies) appear to honour the laws more in breach than in compliance. The consequence of this will probably be the continuing adverse impacts of oil operations on the Niger Delta environment, the people and on the region's wetlands.

To sum up, certain substantive aspects of the Nigerian environmental law are inadequate or defective and cannot provide proper protection for the Niger Delta environment. Even so, it would appear that the greatest problem affecting the protection of the Niger Delta environment is the non-enforcement of the relevant statutes/laws (including treaty obligations and other international commitments) by the appropriate bodies.³⁴⁶ (Obviously, Nigeria violates international law by non-enforcement of relevant treaty obligations). Having regard to the adverse impacts of

from 13 to 27 October 2001), Para. 53. In this case, the Commission found Nigeria in breach of its treaty obligations to protect the Niger Delta environment: '[T]he care that should have been taken...and which would have protected the rights of the victims of the violations complained of [Niger Delta people] was not taken' (See Para. 54). Among others, the Commission recommended that the Federal Republic of Nigeria should 'ensure protection of the environment, health and livelihood of the people of Ogoniland [Niger Delta]', and ensure 'that appropriate environmental and social impact assessments are prepared for any future oil development and that the safe operation of any further oil development is guaranteed through effective and independent oversight bodies for the petroleum industry'. Interestingly, this decision is in line with similar decisions of the Inter-American Commission on Human Rights. For example, see Case No. 7615, Inter-Am. C.H.R. 24, OEA/ser.L/V/11.66, doc. 10 rev. 1 (1985), where the Commission determined that ecological destruction of lands of the indigenous Yanomami Indians of Brazil violated their right to life under the American Convention on Human Rights, and recommended that the Brazilian Government should take preventive health measures, establish and consult with the indigenous people. Another example is a petition filed in 1990 on behalf of the Huarorani indigenous people of Ecuador. The petition, like that filed on behalf of the Niger Delta people before the African Commission on Human Rights, alleged violations of human rights under the American Convention on Human Rights as a result of oil operations. According to the petitioners, the violations included the contamination of water, soil and air. In its decision, the Inter-American Commission on Human Rights found the allegations proved, and stated that: 'Development must take place under conditions that respect and ensure the human rights of the individuals affected...Decontamination is needed to correct mistakes that ought never to have happened. Both the State and the companies conducting oil exploration activities are responsible for such anomalies and both should be responsible for correcting them. It is the duty of the State to ensure that they are corrected'. The commission further recommended that 'the Republic of Ecuador should implement measures to ensure full participation of all persons in decisions that directly affect them, and access to effective judicial response' (noted in Kalas, 2001: 219).

³⁴⁵ There is the fear that due enforcement may crumble the oil-based economy of the country.

³⁴⁶ As Ikein (1990: 42) observes: 'There is no doubt that Nigeria has guidelines for oil exploration [and exploitation] but fails to maintain effective enforcement and compliance'. See also the decision of the

oil operations in the region and the fact that the relevant enforcement bodies are controlled by the majority, non-indigenous elements of the country, it is possible that the non-enforcement may be seen in ethnic perspective; and this could, also, possibly be one of the causes of the incessant protests and prevailing tension in the region.

CHAPTER 5

OIL OPERATIONS AND EQUITY ISSUES

The Nigerian State benefits from oil royalties by permitting an exploitation of mineral resources that clearly results in pollution and the disruption and deprivation of farmlands and fishing ports...There is certainly a need to evaluate the national benefits of oil production against community concern and welfare

- Ikein (1990: 38)

[E]quity has become a central concern in sustainable development. Countries, local communities, private sector firms, non-governmental organizations, and consumers have all become concerned about how the costs and benefits of sustainable development will be allocated. For perhaps the first time, these constituencies all view environmental costs and benefits as central to the equity debate.

- Edith Brown Weiss (1995: 8)

5. 1. Introduction

It has been seen in Chapter 2 that oil is of central importance to the Nigerian economy. In the last two chapters, the environmental issues of oil operations were examined. Specifically, in brief, chapter 3 explored the environmental impacts (costs) of oil operations on the local (Niger Delta) environment and the inhabitants of the region. It was found that oil operations adversely affect the environment and the socio-economic life of the inhabitants of the region: most importantly, their pre-existing farming and fishing economy appears to have been destroyed. In Chapter 4, the legal provisions for the protection of the environment (and the inhabitants of the region) were considered. There, it was found that notwithstanding certain defective aspects, there are adequate national laws and treaties for environmental protection; however, they are poorly, if ever, enforced by the relevant authorities because of the perception that enforcement may result in adverse consequences to the oil-based

national economy. In the result, it seems the environment and the people of the region will continue to bear unmitigated costs of the oil operations. According to sources (including the Declarations of the Niger Delta people – see Chapter 2) the inhabitants of the region complain that what they get from oil operations is negative, and not, positive impacts of oil operations. In other words, serious issues of equity have been raised in relation to oil operations in the Niger Delta. Hence, the subject matter of this Chapter is to investigate the equity issues involved in oil operations in the region. In specific terms, the key questions to answer in this Chapter are: (1) In what ways, if any, have oil operations been beneficial to the Niger Delta region and its inhabitants? (2) Are there any complaints and/or equity demands by the inhabitants of the region in relation to oil operations? (3) If so, what is the response of the oil companies and/or the government? And (4) How effective is the response (s)?

To answer these questions, the following indicators of equity will be examined here: participation, compensation, employment, development, and revenue allocation.¹ Additionally, this Chapter will consider the issue of protests and demands of the people of the region, as adumbrated in Chapter 2, as well as the response of the oil companies and the Nigerian Government thereto. However, before embarking on these investigations, it is useful to briefly examine the concept of equity.

5. 2. Definition of Term: ‘Equity’

The word ‘equity’ has a long history. Most authorities agree that it has its origin in English law, at the time when the strictness of the common law was said to occasion injustice in many cases. So that equity developed to ameliorate the harshness of the

¹ Culled from the debates of the Nigerian 1994/1995 Constitutional Conference Debates (Vols. I – III), Abuja, Nigeria, 1995.

law and thereby assist the law to attain its ultimate goal: that is, justice.² This suggests that the aim of equity is the attainment of justice. Although over the years the term 'equity' has been employed for diverse purposes, in all cases, however, it would seem that its original meaning of 'fairness' and 'justice' remains. Recently, the Nigerian Court of Appeal re-stated the attributes of 'equity', thus:

[E]quity is a correction of the law in the part where it is defective. *Equity, as it were, favours true equality both of rights and liabilities – dividing the burden and benefits in equal shares.* Equity always inclines itself to conscience, reason and good faith...It does not envisage sharp practice and undue advantage of a situation and a refusal to honour reciprocal liability arising therefrom...It is because equity frowns at the unconscionable use of a person's rights that it generally acts on conscience.³ (Italics mine)

In its application in the adjudicatory process, this meaning of 'equity' is described as equity in the 'juristic sense'. This contrasts with equity in its 'popular sense', which means 'right doing, good faith and ethical dealings in transactions or relationships between man and man or whatever is right and just in all human transactions and relationships' (Jegade, 1981: 7). However, the underlining virtue in both senses is 'fairness' and 'justice.

It is notable that the principles of equity 'have long been considered to constitute a part of international law', and have often been applied by international tribunals.⁴ As Weiss (1995: 8) puts it, 'international law has a long tradition of invoking principles of equity to...reach just decisions'. Interestingly, the meaning of equity under domestic law (as stated above), coincides with its meaning under

²For the meaning and history of equity, see Salmond (1899); Maitland (1949); Jegede (1981).

³See *FDB Financial Services Ltd. V. Adesola* [2000] 8 NWLR (Pt. 668) 170, at 182, per ADEREMI, J.C.A. The case was an attempt by the defendant/appellant to deny liability by insisting on a strict application of the law.

⁴Per Judge Hudson in the *Meuse Case (Netherlands V Belgium)* (1937) PCIJ Ser. A/B No. 70.

international law.⁵ According to Dixon, ‘such principles, being general principles of fairness and justice, appear to be within the ambit of Art. 38 (1) (c) [of the Statute of the International Court of Justice]’ (Dixon, 2000: 40).⁶ The only difference is that equity under domestic law is applied between person and person (including between an individual or a group and the State), whereas under international law its application is between subjects of international law (e.g. sovereign states) as well as between States and their inhabitants. As Weiss has rightly observed:

Traditionally international law has focused primarily on relations between States, with little attention to what happens within States except in the area of human rights. However, this is changing as the international legal system is increasingly transformed into a model in which States, international organizations, non-governmental organizations, transnational business and industry associations, and transnational expert communities play important roles in formulating, implementing, and complying with international law. The international community has become increasingly interested in conditions within countries...⁷

As will be seen presently, one good example where international law is interested in domestic affairs is illustrated by the international human ‘right to development’.⁸ As Mansell and Scott have rightly observed, ‘an understanding of a right to development requires a recognition of its role not only in defining inter-state relations but also in regulating relationships between a State and its peoples’.⁹

⁵ As in domestic law, ‘the essential point is that the concept of equity is a source of international law in the sense that it may influence the manner in which more substantive rules are applied’ (Dixon, 2000: 40, and cases cited therein).

⁶ In *North Sea Continental Shelf Cases* (1969) I.C.J. Rep. 3, the court said: ‘Whatever the legal reasoning of a court of justice, its decisions must by definition be just, and therefore in that sense equitable.’

⁷ Weiss (1995: 12).

⁸ See the 1986 UN Declaration on the Right to Development, Article 2 (3) and Article 8. For the meaning of ‘development’ and the status of the right to development, see below.

⁹ Mansell and Scott (1994: 177).

In this thesis, and consistent with the foregoing, the term 'equity' is used to denote 'fairness' and 'justice'.¹⁰ More specifically, fairness in oil operations – specifically, in the distribution or 'division' of liabilities (costs) and benefits arising from oil operations in the Niger Delta region.¹¹ For, 'increasingly equity is being invoked to mean equitable standards for allocating and sharing resources and benefits'.¹² In particular, the international human right to development 'focuses on the right to equal access to the benefits of development' (Orford, 2001: 139). Accordingly, 'equity' is used here both in its domestic and its international ramifications (in the latter case, only in the sense of conditions within States).

5. 3. Indicators of Equity

5. 3. 1. Participation

The concept of 'participation' is a broad one, with different but rather complementary meanings. As Hitchcock has pertinently observed: 'The concept of participation is one that is not easy to define. It can mean the right to make decisions about development action. Participation can also mean the process whereby local communities and individuals take part in defining their own needs and coming up with solutions to meet those needs. In addition, participation can refer to situations in which local communities share in the benefits from development projects and are fully involved in generating those benefits. Rural development can be redefined to mean the enabling of poor rural women and men to demand and control more of the benefit of

¹⁰ This is the sense in which equity (intra - and inter-generational equity) is used in the concept of sustainable development.

¹¹ As has been observed, '[It is important] to know...how the benefits [of oil operations] are disposed of in the domestic economy, and especially how the rural majority fit into the scheme of things' (Quoted in Ikein, 1990: 49 – 50).

¹² Weiss (1995: 8).

development. Participation can thus be said to mean simply putting people first'.¹³ In this thesis, these different meanings of participation are considered useful and applicable.

Interestingly, it is remarkable that participation is increasingly being employed as a measure of fairness, especially in the context of minority rights and the rights of indigenous peoples.¹⁴ For example, Article 7 (1) of the ILO Convention 169 provides, in part, that indigenous peoples 'shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly'. Similarly, the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities¹⁵ places emphasis upon the right of minorities to 'participate effectively in cultural, religious, social, economic and public life' (Article 2 (2)).¹⁶ Most importantly, Article 15 (1) of the ILO Convention 169 states that the rights of indigenous peoples to the natural resources pertaining to their lands 'shall be specially safeguarded', and these include their right to 'participate in the use, management and conservation of these resources'. With particular regard to participation in environmental management, Principle 10 of the Rio Declaration partly declares as follows: 'Environmental issues are best handled with the participation of all concerned citizens, at the relevant level'.

¹³ Hitchcock, 'Seeking Sustainable Strategies: The Politics of Resource Rights Among the Central Kalahari San' (at: <http://kalaharipeoples.org/documents/Fpk-ckg.htm>).

¹⁴ In the words of a commentator, 'participation emerges time and again as a key issue in the context of minority and indigenous peoples' rights'. He also notes that 'members of majority communities who are concerned about the long-term equity, stability and peace of their societies' equally accept the need for participation of the minority or indigenous peoples in the political, social and economic decisions that have repercussions on their lives (See MRG, 2001: 3).

¹⁵ Adopted by the UN General Assembly in Resolution 47/135 of 18 December 1992.

¹⁶ See also Principle 23 of the World Charter for Nature 1982: 'All persons, in accordance with their national legislation, shall have the opportunity to participate, individually or with others, in the formulation of decisions of direct concern to their environment, and shall have access to means of redress when their environment has suffered damage or degradation.' (The realm of the Charter is the conservation of living natural resources); IUCN Draft Covenant on Environmental Conservation and Sustainable Use of Natural Resources, Art. 10 (U.N. Doc. A/CONF.151/PC/WG.III/4 (1991)).

For the moment, it should be noted that the issue is not necessarily, whether the above instruments are binding. On the contrary, it should be emphasized that the instruments illustrate the measure of equity, the need for inclusiveness, and the currency of international thinking. In other words, the instruments indicate a universal standard of fairness amongst all humanity; a standard intertwined with justice and fair-play. As Popovic (1993: 688) put it (with particular regard to the right to participate in decisions affecting the environment): ‘Although the...instruments do not purport to create enforceable obligations in the legal sense, they do provide valuable insight into the elements of an operational right to participation and they do reflect a degree of international consensus.’

Under Nigerian law, as previously found, the ownership of oil is constitutionally and statutorily vested in the State. By virtue of this, the State has the right to grant concessions, i.e. issue licenses and grant leases for oil operations, to oil MNCs. Moreover, by virtue of its exclusive ownership of oil, the State also has exclusive right to royalties¹⁷ and other revenues from oil operations.¹⁸ According to sources, before 1978, although the Federal Government did not consult the inhabitants of the region when granting concessions, the inhabitants somehow participated in oil operations, as the oil companies had to approach them for access to land (which customarily belonged to them).¹⁹ In the process, they concluded agreements for compensation (annual rent) for the use of the land²⁰ and for damage to any surface rights thereon (e.g. economic trees or medicinal plants) that will be affected by the

¹⁷ That is ‘payment (s) made to a landowner for the extraction of minerals from beneath his land’ (Hanson, 1986).

¹⁸ See Paras. 30 – 32 of the First Schedule to the Petroleum Act, 1969 (Cap 350 LFN 1990). In a recent report, this point was noted thus: ‘Since oil is Federal property, land occupiers are entitled to no royalties for oil extracted from their land’ (HRW, 1999: 77).

¹⁹ See, for example, Ajomo (1982: 335 and 339). See further the Petroleum (Drilling and Production) Regulations, Para. 17; Oil Pipelines Act, S. 15 (1).

²⁰ In a few cases, a piece of land may be purchased outrightly.

operations.²¹ Similarly, evidence suggests that if the government wanted any land for a ‘public purpose’,²² it pursued this under the Public Lands Acquisition Act,²³ under which adequate compensation was directly paid to the landowners (family or community).

However, there is a suggestion that since the Land Use Act of 1978 (hereafter, LUA) vested the ownership of lands in the State the oil companies no longer approach the people (i.e. land-owning families and communities) for a right of access to land nor does the government acquire land any more under the Public Lands Acquisition Act; land acquisitions are nowadays done under the Land Use Act,²⁴ under which the

²¹ Ajomo (1982: 338) described this practice as a ‘triangular relationship’: The oil companies go to the Federal Government to obtain licenses or leases and proceeded therefrom to the land-owning families/communities to negotiate and obtain access to the land.

²² Under the Public Lands Acquisition Act (Cap 167 LFN 1958) compulsory acquisition of land must be for a ‘public purpose’ – defined to include ‘the requirement of the land for exclusive government use or general public use; for and in connection with sanitary improvements of any land, including reclamation; for and in connection with the laying out of any township or government station; for obtaining control over land contiguous to any port; for obtaining control over land and the value of which will be enhanced by the construction of any railway, road, or other public work or convenience about to be undertaken or provided by the government and for obtaining control over land required for or in connection with planned rural development or settlement’ (Section 2). Acquisition must strictly be for a ‘public purpose’ as defined. Where the power was purportedly exercised for some purpose other than as defined, it was held ineffective to divest a landowner of his title. See *Chief Commissioner, Eastern Provinces V. S.N. Ononye & Others* (1944) 17 N.L.R. 142. According to the judge in this case, ‘by no stretch of imagination can I see how the grant of a lease to a commercial company could be brought within the range of the definition of “public purposes”, and no argument was attempted to show that this purpose is within the definition.’ More recently, in *Ereku V. Military Governor, Mid-Western State of Nigeria* (1974) 10 S.C. 59, the Supreme Court held that an acquisition by the government of Mid-Western State for the private need of a private company or person was unlawful, since by no stretch of imagination can one say that the enterprises of McDermott Overseas Inc. [a company which got a 99-year lease of the land from the government after it had been purportedly acquired for a public purpose, and whose business included fabrication of structures for oil industries], beneficial, though it might be, can be regarded as being for the public purpose of the State. As the court put it, ‘Section 2 of the Public Lands Acquisition Law clearly contemplates acquisition for the public purpose of the State and not any private enterprise that might incidentally be of benefit to the community or a section of it’ (at 66, per ELIAS, C.J.N.). See also Public Lands Acquisition (Miscellaneous Provisions) Act 1976 (No. 33 of 1976). Today, under the Land Use Act, compulsory acquisition is by revocation for ‘overriding public interest’, and the precedent of *Ereku’s case* would appear no longer applicable. See Frynas (2000: 77). Compare Ajomo (1982: 338) who argues that ‘the same result would be reached today unless it can be shown that McDermott’s activities were incidental to mining, oil pipelines or similar purpose.’ For an interesting discussion of ‘compulsory acquisition formula’ in Nigeria since 1917, see Utuama (1990-93: 28-41).

²³ Cap 167, Laws of the Federation of Nigeria 1958 (and equivalent State laws). The Act was originally made in 1917 by the British colonists.

²⁴ This is supported by Section 31 of the Land Use Act, which provides: ‘The provisions of the Public Lands Acquisition (Miscellaneous Provisions) Act shall not apply in respect of any land vested in, or taken over by, the Governor or any Local Government pursuant to this Act or the right of occupancy to

Governor of a State has a right to revoke any right of occupancy (a new right created by the Land Use Act) for 'overriding public interest' – including the requirement of the land for mining purposes or oil pipelines or for any purpose connected therewith.²⁵

The implication of this is that land can now be acquired for the purposes of oil operations without the knowledge or consent of the owner-occupiers.²⁶ In the result, the inhabitants of the Niger Delta region (i.e. Niger Delta indigenous people) are neither involved in the process of granting concessions nor in that of land acquisitions for oil operations. As they summarized this situation recently: 'We are not party to how our resources are exploited, we are not part of the production and we appear to be strangers in our own home'.²⁷

From available evidence, the people (rightly) regard this situation as inequitable, and are presently demanding the right to participate (especially, as was previously the case when agricultural products were the main-stay of the Nigerian economy). In their words: 'All we are saying is that let us be as stakeholders, participate in [the] generation [exploitation] and distribution of these [oil] resources, which are found in our own backyard...We want to be involved in the exploration, exploitation, production and marketing of our resources and this is exactly what happened in the First Republic whereby Western Nigeria, under the leadership of Awolowo, exploited, produced and marketed the cocoa crops which was the main economic stay of [the] Western Region and, similarly, the Northern Region equally exploited, produced and marketed the groundnut crops which formed the groundnut

which is revoked under the provisions of this Act but shall continue to apply in respect of land compulsorily acquired before the commencement of this Act.'

²⁵ Section 28 (2) (c).

²⁶ According to one observer, 'it is [now] possible for the government to acquire a vast area of land for petroleum purposes, i.e. granting the operator a lease over a large area, yet the villagers will know nothing about the acquisition' (Adewale, 1989: 95, footnote 31).

²⁷ See 'South-South Memorandum to Oputa Panel' <

http://www.nigerdeltacongress.com/sarticles/southsouth_memorandum_to_oputa_p.htm > (Visited 11/06/02).

pyramid of [the] Northern Region. The Federal Government was only entitled to 20 % of the revenue that...accrued from cocoa, groundnut, etc.’²⁸

From international human rights perspective, this demand is in accord with the human ‘right to development’.²⁹ As Orford points out, the UN Declaration on the ‘right to development’³⁰ ‘qualifies the legitimacy of State development policies by reference to participation’.³¹ Article 2 (3) of the Declaration provides:

²⁸ See ‘South-South Memorandum to Oputa Panel’ < http://www.nigerdeltacongress.com/sarticles/southsouth_memorandum_to_oputa_p.htm > (Visited 11/06/02). In the same vein, while contributing to a debate on legislative powers, a representative of Rivers State in the 1994 – 1995 Constitutional conference of Nigeria, Chief A.I. Uchendu, expressed the demand for participation thus:

There is no how mining and minerals should be the exclusive right of the Federal Government. I want the conference to take note of the fact that mining leaves on its trail a lot of devastation among some of the communities where these operations take place. It is very important that communities where these operations take place are allowed to make observations [i.e. to participate] on how they will live and survive. So, it is the State Governments in these areas that are in a better position to legislate on matters concerning such communities. For instance, as regards something like pollution, it will be very difficult for those at the centre to observe on a day-to-day basis the devastation that oil exploration has brought to the communities where these operations are taking place. Since the State Governments are...nearer these communities, they are in a position to legislate on such matters. Therefore, it will pay this country better dividend if mineral and mining are left in the Concurrent List [as originally proposed by the Committee on Legislature and Legislative Lists]. Let the State Governments and the Federal Government have equal opportunity of legislating on this matter.

See Constitutional Conference Debates (19 September – 21 November 1994), Volume II, 438, Para. 1715 – 1716. A nominated member of the Constitutional Conference, who hailed from the West, Chief Dayo Abatan, supported this view, thus: ‘I want to appeal to my fellow delegates to please bear in mind...that those minorities, the oil-producing people, who are demanding justice need our attention. They need our sympathy...because, let us face it, oil is a wasting asset. In 50 years time, the oil deposits in some of these places will dry up and we should put in place something that will enable their governments to take care of their people...[W]e should recognize the right of states to do justice to their people by having access to these things [oil resources]’ (at 473, Para. 1786). The thrust of his argument is that mineral resource-bearing communities ‘should have the right to mine or make arrangement thereof that will benefit [the] people’ (at page 473, Para. 1786). Similar concession can also be found in the contribution of another delegate at page 468, Para. 1775. Further, it has been observed that ‘it is one of the most repulsive ironies of Nigeria that petroleum products cost more in Bonny [in Rivers State], for example, where Nigerian Bonny crude is produced, than elsewhere in the country’ (See Report of the Political Bureau (Abuja, March 1987), 171, Para. 10.018. All these indicate, at least, a general agreement on the need for equity of participation.

²⁹ Declared in 1986 by the UN General Assembly. Article 22 of the 1981 African Charter on Human and Peoples’ Rights also provides for the right to development, thus: ‘(1) *All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind; (2) States shall have the duty, individually or collectively, to ensure the exercise of the right to development*’.

³⁰ Notwithstanding doubts by some authors, Orford (2001: 135) has rightly argued that the ‘right to development’ is ‘a secure part of the framework of international human rights at the turn of the century’. (See further Mansell and Scott, 1994: 175). Evens so, ‘debates over the right to development at the intergovernmental level have for the large part remained polarized along North/South axis’ (Orford, 2001: 128). However, this is not the place to engage in a discourse over the merits of the

States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom.

Significantly, the current demand of the Niger Delta people for participation in affairs that affect them is consistent with the demands of indigenous peoples elsewhere in the world. As one commentator observed recently:

With regard to aboriginal [indigenous] people's thrust towards a right to resources...it is important to realize that native groups do not just want access to and a fair share of the resources in question, but they also strive for participation in the management of these resources. They want to share in the power to make decisions about the fate of the land and the resources it supports...³²

More significantly, there is evidence of a universal support for indigenous peoples' right to participate in issues concerning the exploitation of their land and resources. For example, the World Commission on Environment and Development (WCED) argues that: 'The starting point for a just and humane policy for such groups is the recognition and protection of their traditional rights to land and the other resources that sustain their way of life...And this recognition must also give local communities a decisive voice in the decisions about resource use in their area'.³³ It is also remarkable that the non-participation of the Niger Delta people in the exploitation of oil found in their land, which they have traditionally occupied or otherwise used over the centuries, is inconsistent with ILO Convention 169³⁴ which requires a State (such as the Nigerian State) in which natural resources is vested to

opposing views. Essentially, States emphasize different aspects of the right according to what they perceive as their national interests. (For an introductory discussion on the debate, see Ghai (1994)). In this thesis, only aspects of the right that are immediately useful will be considered at the appropriate places.

³¹ Orford (2001: 138).

³² Notzke (1994: 3).

³³ WCED (1987: 115 – 116).

consult the inhabitants of the region. Under Article 15 (2) of this Convention it is provided that:

In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these [indigenous] peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands...

To the same effect, Article 30 of the UN Draft Declaration on the Rights of Indigenous Peoples guarantees the right of indigenous peoples to require that States obtain their free and informed consent prior to the approval of any project affecting their lands, territories, and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

It is significant to note that under these international instruments, indigenous lands are 'lands which indigenous peoples have traditionally owned or otherwise occupied or used',³⁵ which suggests that statutory provisions, such as the Land Use Act, which vest ownership of land in the State, are immaterial.

With specific regard to participation in environmental management, Principle 10 of the Rio Declaration of 1992 states in part: 'Environmental issues are best handled with the participation of all concerned citizens, at the relevant level...'

As previously argued, although the provisions of the ILO Convention, the Rio Declaration and the UN Draft Declaration on the Rights of Indigenous Peoples (with the exception of some already found to have become customary international law³⁶) are not legally binding on Nigeria, they are arguably politically binding on the country. In fact, Kiss (1994: 56) argues that although the Rio Declaration is not

³⁴ Article 15 (2).

³⁵ See Article 14 of ILO Convention 169; Article 25 of the UN Draft Declaration on the Rights of Indigenous Peoples.

legally binding, it is relevant for a number of reasons, including the fact that 'it formulates new principles which may be considered as emerging rules.' In any case, as a State Party to the African Charter on Human and Peoples' Rights, Nigeria is legally bound by its provisions.³⁷ In a recent decision (against Nigeria and in favour of the Niger Delta people), the African Commission on Human and Peoples' Rights pointedly declared: 'Government compliance with the spirit of Articles 16 and 24 of the African Charter must also include...providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities'.³⁸ Further, 'with regard to a collective group [such as the Niger Delta people], the resources belonging to it should be respected, as it has to use the same resources to satisfy its needs'.³⁹

Moreover, on the allegation that that the Nigerian State did not monitor the operations of the oil companies nor involve the Ogoni (Niger Delta) people in decisions relating to oil exploitation in the region, the Commission held: 'The destructive and selfish role played by oil development in Ogoniland (Niger Delta), closely tied with repressive tactics of the Nigerian Government, and the lack of material benefits accruing to the local population, may well be said to constitute a violation of Article 21 [of the African Charter]'.⁴⁰

³⁶ Including the right to natural resources in consideration here (see Chapter 2).

³⁷ The Charter was incorporated into Nigerian domestic law in 1983. See African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act 1983, Cap. 10 LFN 1990.

³⁸ See *Communication 155/96 The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights / Nigeria* (Done at the 30th Ordinary Session, held in Banjul, The Gambia from 13 to 27 October 2001), Para. 53. Article 16 provides for the 'right to enjoy the best attainable state of physical and mental health', while Article 24 provides that 'all peoples shall have the right to a general satisfactory environment favourable to their development'.

³⁹ See *Communication 155/96 The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights / Nigeria* (Done at the 30th Ordinary Session, held in Banjul, The Gambia from 13 to 27 October 2001), Para. 45.

⁴⁰ See *Communication 155/96 The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights / Nigeria* (Done at the 30th Ordinary Session, held in Banjul, The Gambia from 13 to 27 October 2001), Para. 55. Article 21 provides in part: '(1) All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the

5.3.2. Compensation

As has been seen above, compensation is closely associated with the issue of participation, and this is another important measure of equity or fairness. As a general, universal principle, compensation aims at making amends for any loss or injury suffered – that is, *restitutio in intergrum*. Some observers have suggested that because of the spiritual attachment of indigenous peoples to their lands, compensation for expropriation of land or damage to land may never be sufficient. However, it has been rightly pointed out that ‘this does not mean...that questions of compensation for damage to land are irrelevant; indeed in most cases they are extremely important. It is bad enough to lose one’s land, but to face the prospect of being without adequate material support makes matters worse; [financial compensation] will not remove the sense of loss, but it can at least help reduce anxiety at one level’ (O’Faircheallaigh, 1991: 244).

In Nigeria, there are both constitutional and statutory provisions for the payment of compensation in appropriate cases. Additionally, Article 21 (2) of the African Charter on Human and Peoples’ Rights (to which Nigeria is a State Party) enjoins that ‘all peoples’ who are disposed of their ‘wealth and natural resources’ ‘shall have the right to the lawful recovery of its property as well as to an adequate *compensation*’. However, with specific regard to oil operations, there is no comprehensive national legal regime for compensation, as a number of relevant statutes (some of which have been discussed in Chapters 3 and 4 above) have provisions for the payment of compensation to persons affected by oil operations.

It is notable that the need for compensation may arise as a result of compulsory acquisition of land for oil operations (and in recognition of customary

people. In no case shall a people be deprived of it; (2) In the case of spoliation the disposed peoples

ownership and/or occupation of land) or as a result of damage done in the course of oil operations (e.g., as a result of oil spill). In view of this, and for the sake of clarity, the question of compensation will be discussed here under these two separate heads.

5.3.2.1. Compensation for Land Acquisition

As previously mentioned, before 1978, compensation for land acquired for oil operations (a process which the oil companies call 'land take') did not seem to have raised any issue of equity.⁴¹ However, this issue appears to have arisen since 1978, with the promulgation of the LUA.⁴² Under this Act, land may be compulsorily acquired⁴³, among others, where it is required by the government of the Federation for the public purposes of the Federation⁴⁴ (which includes: for use by any body corporate directly established by law or by any body corporate registered under the Companies and Allied Matters Act⁴⁵ as respects which the Government owns share, stocks or debentures; for obtaining control over land required for or in connection with mining purposes; and for obtaining control over land required for or in connection with economic, industrial or agricultural development⁴⁶) or for mining purposes or oil pipelines or for any purpose connected therewith.⁴⁷

In the former case, the Act provides for the payment of compensation to the 'holder and the occupier' 'for the value at the date of [acquisition] of their

shall have the right to the lawful recovery of its property as well as to an adequate compensation'.

⁴¹ Acquisition of land was done under the Public Lands Acquisitions Act, which provided for the payment of compensation for the land acquired itself. Any dispute on compensation was determined by a court of law.

⁴² Adewale (1990: 7) observes: '[The] problem of land acquisition has been...compounded by the Land Use Act 1978. Before the advent of the [Act], land was capable of personal ownership. Communities or individuals sold land to the oil companies at good rates. Many had undeveloped land leased to the oil companies for a reasonable rent...However, by March 19, 1978, this was no longer the case as the Land Use Act had provided that all land in a State has been vested in the Governor of that State. Apart from that, when land is acquired, only the development on land can be compensated'.

⁴³ The general ground for compulsory acquisition of land under the LUA is 'overriding public interest'.

⁴⁴ Section 28 (2) (b).

⁴⁵ 1990 (Cap 59 LFN 1990).

unexhausted improvements' – that is, 'anything of any quality permanently attached to the land, directly resulting from the expenditure of capital or labour by an occupier or any person acting on his behalf, and increasing the productive capacity, the utility or the amenity thereof and includes buildings, plantations of long-lived crops or trees, fencing, wells, roads and irrigation or reclamation works, but does not include the result of ordinary cultivation other than growing produce' (LUA, Section 51 (1)). Where there is no improvement on the acquired land, as defined under the Act (as is almost invariably the case in local/remote farming communities where oil is found), no compensation is payable. As one scholar puts it: 'In many of these areas, the land is undeveloped and there are no structures on them, hence no compensation can be paid by the oil company to the villagers if such land is acquired' (Adewale, 1990: 7 – 8).

With regard to the latter case, the Act provides for compensation to be paid to the 'holder' and 'occupier' 'under the relevant provision of the Minerals Act⁴⁶ or the Mineral Oils Act (now Petroleum Act⁴⁹) or any legislation replacing the same'.⁵⁰ The relevant provision of the Minerals Act is Section 77 thereof, which provides that any person prospecting or mining shall pay to the 'holder or occupier'⁵¹ of private land:

Such sums as may be a fair and reasonable compensation for any disturbance of the surface rights of such owner or occupier and for any damage done to the surface of the land upon which his prospecting or mining is being or has been carried on and shall in addition pay to the owner of any crops, economic trees, buildings or works damaged, removed or destroyed by him or by any agent or servant of his compensation for such damage, removal or destruction.

⁴⁶ Section 51 (1) (b) (f) & (h).

⁴⁷ See Section 28 (2) (c). See also Section 28 (3) (b).

⁴⁸ Cap 226, LFN 1990

⁴⁹ Cap 350, LFN 1990.

⁵⁰ Section 29 (2).

⁵¹ Compare the LUA, which provides for the payment of compensation to the 'holder' and 'occupier'. It would appear that this Act, unlike the Minerals Act, envisages the payment of compensation to two classes of persons. Being a later legislation, it represents a modification of the earlier one.

It appears that the expression 'any disturbance of the surface rights of such owner or occupier' relates to the loss of use of the land,⁵² especially as it is further provided that compensation shall be paid for *damage* to the surface of the land and/or *damage* for surface rights on land.⁵³ On its part, the Petroleum Act provides for the payment of compensation under its First Schedule and under regulations made thereunder. For example, under Regulation 17 (c) (ii) of the Petroleum (Drilling and Production) Regulations – made pursuant to the Petroleum Act – oil companies (with relevant licence or lease) are not allowed to enter any part consisting of private land, unless and until the particular company has obtained permission from the Minister of Petroleum Resources, who may give such permission, *inter alia*, if the oil company (licensee or lessee) has 'paid or tendered to the persons in lawful occupation of and to the owner or owners of the land fair and adequate compensation therefor'. Available evidence indicates that this was part of the provisions which previously ensured some participation for the inhabitants of the region in oil exploitation.⁵⁴

Another relevant legislation in this regard is the Oil Pipelines Act, which also provides for the payment of compensation both in respect of surface rights and in respect of the loss of use of the land affected by a pipeline. The Act, which has been in effect since 1956, provides that the holder of a licence shall pay compensation:

- (a) to any person whose land or interest in land (whether or not it is land in respect of which the licence has been granted) is injuriously affected by the exercise of the rights conferred by the license, for any such injurious affection not otherwise made good; and
- (b) to any person suffering damage by reason of any neglect on the part of the holder or his agents, servants or workmen to protect, maintain or repair any work structure or thing executed under the license, for any such damage not otherwise made good; and

⁵² This view is encouraged by the proviso to Section 77, which states that 'the holder of a mining right or the lessee of a mining lease who is paying surface rent in respect of any private land included within the area of his right or lease shall not be liable to pay compensation...after the date on which surface rent began to be payable'.

⁵³ Such payments are a one-off event.

⁵⁴ Ajomo (1982: 335).

(c) to any person suffering damage (other than on account of his own default or on account of the malicious act of a third person) as a consequence of any breakage or leakage from the pipeline or an ancillary installation, for any such damage not otherwise made good.⁵⁵

Most significantly, it is provided in this Act that where the interests injuriously affected are those of a local community, compensation may be ordered by the court to be paid to any chief, headman, or member of that community on behalf of such community or that it be paid in accordance with some scheme approved by the court or into a fund to be administered by a person approved by the court 'on trust for the application to general, social or educational benefit and advancement of that community or any section thereof' (Section 23).

It is also notable that under both the Public Lands Acquisition Act and the Oil Pipelines Act, any dispute as to the right to or quantum of compensation or as to whom payable, was determined by a court of law,⁵⁶ which 'shall award such compensation as it considers just' – taking into account not only damage to buildings, crops and economic trees, but also damage caused by negligence or disturbance, and the loss in value of the land or interests in the land.⁵⁷ Moreover, in determining the loss in value of the land or interest in land of a claimant, the court is enjoined to 'assess the value of the land or the interests injuriously affected at the date immediately before the grant of the license and shall assess the residual value to the claimant of the same land or interests consequent upon and at the date of the grant of

⁵⁵ Section 11 (5).

⁵⁶ For example, Section 6 (4) of the Oil Pipelines Act provides that 'in the event of dispute as to the amount of compensation to be paid or as to whether or to whom any compensation shall be paid the provisions of Part IV of this Act shall apply'. Similarly, Section 11 (5) thereof provides that 'if the amount of compensation to be paid to a land owner is not agreed between him and an oil company, 'it shall be fixed by a court in accordance with Part IV of this Act'. Part IV of the Act deals with the jurisdiction of a court to award compensation, basis of compensation, etc. (The provisions of Sections 6 (4) and 11 (5) are repeated in Section 19, in an omnibus way). This position may be contrasted with Section 78 of the Minerals Act, which provides for administrative settlement of compensation disputes.

⁵⁷ See, for example, Oil Pipelines Act, S. 20 (2).

the licence and shall determine the loss suffered by the claimant as a difference between the values so found, if such residual value is a lesser sum'.⁵⁸

This position may be contrasted with the current position under the LUA. Under Section 30 of this Act, it is provided that 'where there arises any dispute as to the amount of compensation...such dispute shall be referred to the appropriate Land Use and Allocation Committee [an administrative body set up under the provisions of the LUA]'.⁵⁹ And, probably for the avoidance of doubt, Section 47 (2) thereof emphasizes that: 'No court shall have jurisdiction to inquire into any question concerning or pertaining to the amount or adequacy of any compensation paid or to be paid under this Act'. Administrative determination in this regard may not necessarily be bad. However, the problem with the LUA is that the administrative authorities do not appear to enjoy independence, which is crucial for any judicial or quasi-judicial determination such as is involved in the determination of a claim for compensation.⁶⁰ The Governor of a State is statutorily empowered to appoint members of such bodies, and they operate under his direction and control.⁶¹

There is evidence that suggests that administrative settlement and determination of compensation disputes may be problematic; it may result to inequity, especially in a case between unequal parties (e.g. between oil companies and native communities). This can be illustrated by the case of *Godspower Nweke V. Nigerian Agip Oil Co. Ltd.*⁶² In this case, the plaintiffs had sued the defendant oil company for compensation for damage done to their economic trees, ponds, lakes, fishing creeks

⁵⁸ Section 20 (3), Oil Pipelines Act.

⁵⁹ See also Section 2 (2) (c).

⁶⁰ There is no question that a claimant is entitled to legitimate expectation, and this imposes a duty of impartiality on the determining authority.

⁶¹ For example, Section 2 (4) provides: 'The Land Use and Allocation Committee shall be presided over by such one of its members as may be designated by the Governor and, subject to such directions as may be given in that regard by the Governor, shall have power to regulate its proceedings'. See also Sections 2 (2) and 2 (5).

⁶² (1976) 9& 10 SC 101.

and juju shrines in course of the defendant's oil operations on the plaintiff's land. Before the action was commenced, the defendant had admitted liability in a letter to the plaintiffs and their solicitor, and had offered the sum of £1, 373. 15p in full and final satisfaction of the plaintiffs' claims. However, the plaintiffs had rejected this monetary offer on the ground that it was an inadequate compensation for the damage done. At the trial, the Judge rejected the plaintiffs' case, because he regarded the sum offered as having been settled by agreement between the parties, and proceeded to enter judgment for the plaintiffs in the sum offered by the defendants. Plaintiffs' appeal to the Supreme Court was dismissed on the same ground. In fact, the Supreme Court thought that the trial Judge ought to have dismissed the plaintiffs' case in its entirety, since the plaintiffs have been offered a sum, and only reluctantly confirmed his judgement. Although not expressly so stated in the Supreme Court judgement in this case, it seems clear that the case was decided on the provisions of Section 78 of the Minerals Act, which provides that the amount of compensation payable under the provisions of the Minerals Act 'shall be determined by agreement between the parties or if the parties are unable to reach agreement, by the Local Government Chairman who shall as soon as possible assess and determine the amount of compensation...'⁶³, and that this determination is final.⁶⁴ The implication would appear to be that the court has no jurisdiction over compensation disputes in which an administrative body has a statutory power to determine, notwithstanding that some injustice or inequity may be involved in a determination.

Further, another important provision of the LUA is Section 29, which states:

(3) If the holder or the occupier entitled to compensation under this section is a community the Governor may direct that any compensation payable to it shall be paid—

⁶³ Section 78 (1).

⁶⁴ Section 78 (1) & (2). Compare Section 11 (5) of the Oil Pipelines Act, which provides that if the amount of compensation is not agreed by the parties, 'it shall be fixed by a court'.

- (a) to the community; or
- (b) to the chief or leader of the community to be disposed of by him for the benefit of the community in accordance with the applicable customary law; or
- (c) into some fund specified by the Governor for the purpose of being utilized or applied for the benefit of the community.

Apart from the apparent discretion of the Governor with regard to the disposition of compensation which legitimately belongs to a community – a position which appears to exclude the affected people from a decision on an issue affecting them, and which contrasts with Section 21 of the Oil Pipelines Act – there is evidence that State Governors now cite this provision as entitling them to receive such compensation⁶⁵ (presumably on behalf of the State). Research survey undertaken by the author for this work could not conclusively verify this issue, because of the difficulty of getting response from the State Governments. In any case, any such claim by State Governors would be inconsistent with the provision of the LUA which gives compensation to the ‘holder’ and occupier’ of the land acquired, and not to the Governor. Yet, where a Governor directs that compensation should be paid into ‘some fund for the purpose of being utilized or applied for the benefit of the community’,⁶⁶ it is possible that such compensation may not get to the people affected. As one author has observed: ‘Usually, the money is either not given to community or not given to them on time’ (Adewale, 1990: 8).⁶⁷

On the whole, the present position is that under the *LUA* no compensation will be paid for land acquired for the purposes of oil operations, where there is no improvement on the land acquired. And whenever compensation is payable to the

⁶⁵ Ajomo (1982: 338).

⁶⁶ Such a direction was made by Governor Okilo in 1981 on some portion of the compensation paid by Texaco oil company to the Government of Rivers State on behalf of several communities affected by the Funiwa-5 oil-blowout. See Hutchful (1985: 133 – 134).

⁶⁷ A good example of this was the compensation paid to the Government of Rivers State in 1981 on behalf of several communities affected by the Funiwa-5 oil blow-out of 1980 (one of Nigeria’s major oil spillage). The communities reportedly did not receive their due compensation, apart from the fact

affected people (that is, the Niger Delta indigenous people) for land compulsorily acquired for oil operations, the quantum is at the whims of administrative authorities, which may be hardly distinguishable from the State which is an interested party in the activities for which the land is being acquired – that is, oil operations. Besides, such compensation may not get to the people affected, as a State Governor has an absolute discretion on how it would be dispensed. In other words, the LUA arguably does not guarantee fair or any compensation at all to persons or community whose lands are compulsorily acquired for the purposes of oil operations.

To this extent, this is against the provision of the Nigerian Constitution which provides that ‘no moveable property or any interest in an immovable property [land] shall be taken possession of compulsorily and no right or interest in any such property shall be acquired compulsorily in any part of Nigeria except in a manner and for the purpose prescribed by a law that, among other things: (a) requires the prompt payment of compensation therefor; and (b) gives to any person claiming such compensation a right of access for the determination of his interest in the property and the amount of compensation to a court or tribunal or *body* having jurisdiction in that part of Nigeria’.⁶⁸ However, the LUA, which further provides that ‘this Act shall have effect notwithstanding anything to the contrary...in the Constitution of the Federal Republic of Nigeria’,⁶⁹ is expressly inserted in the Constitution which, on its part, also provides that ‘nothing in the constitution shall invalidate the LUA’⁷⁰ – implying that the constitution confirms the position under the LUA.⁷¹

that the oil company did not pay the compensation in time. See Hutchful (1985: 131 – 135). See also Adewale (1990: 8, footnote 32).

⁶⁸ Section 44(3). Having regard to the general tenor of the constitution as well as its letter and spirit, the expression ‘or body having jurisdiction in that part of Nigeria’ cannot conceivably mean an administrative, non-independent body, such as a Land Use and Allocation Committee.

⁶⁹ Section 47 (1).

⁷⁰ Section 315 (5) (d) of the 1999 Constitution (formerly Section 274 (5) of the 1979 Constitution). The Constitution further provides that the provisions of the LUA ‘*shall continue to apply and have full effect in accordance with their tenor* and to the like extent as any other provisions forming part of this

5.3.2.2. Compensation for Oil Operations Damage

As indicated above, there are several statutory provisions for the payment of compensation for damage done in the course of oil operations, including some of those stated above.⁷² In addition to the foregoing provisions, three further examples will suffice. Firstly, Section 2 (1) of the Petroleum Act provides that the Minister of Petroleum Resources may grant Oil Exploration License, Oil Prospecting License, and Oil Mining Lease, subject to the provisions of the First Schedule thereto.⁷³ Under the First Schedule thereto, the holder of such license or lease, is enjoined to pay 'fair and adequate compensation for the disturbance of surface or other rights' to the 'owner or occupier' of the licensed or leased lands.⁷⁴

Secondly, the petroleum (Drilling and Production) Regulations, made under the Petroleum Act, obligates a licensee or lessee (invariably, oil companies) to pay 'adequate compensation' to any person injured, where he 'unreasonably interferes' with the exercise of any fishing rights in the course of his operations.⁷⁵ Thirdly, under the FEPA Act, any person (particularly, an oil company) who contravenes the provision of Section 20 thereof (prohibiting the discharge of hazardous substances into air or upon the land and the waters of Nigeria) shall, in addition to the penalty specified in that Section, be liable for: (a) the cost of removal thereof, including any costs which may be incurred by any Government body or agency in the restoration or

Constitution and shall not be altered or repealed except in accordance with the provisions of Section 9 (2) of this Constitution' (Section 315) (*Italics mine*). See also Section 346 (5) of the 1995 Draft Constitution of Nigeria.

⁷¹ This was the interpretation that partly led the Ogoni people to boycott the 12 June 1993 Presidential election in Nigeria, which after all was annulled by the Military Head of State. According to one source, the Ogoni had boycotted that election on the argument that they should not vote for (give legitimacy to) a president who would swear to uphold a Nigerian constitution that dispossessed them of their natural rights. See Naanen (1995: 70).

⁷² Particularly, Section 77 of the Mineral Oils Act. See generally Adewale (1989).

⁷³ Section 2.

⁷⁴ Paragraph 36.

⁷⁵ Regulation 23. The expression 'unreasonably interferes' appears to imply that fishing rights may be interfered with as long as the interference is not unreasonable.

replacement of natural resources damaged or destroyed as a result of the discharge; and (b) 'costs of third parties in the form of reparation, restoration, restitution or compensation as may be determined by the Agency from time to time'. However, such a person shall not be liable if he proves that the discharge was caused solely by a natural disaster or an act of war or by sabotage.⁷⁶

Further, under Section 36 of the FEPA Act it seems that the liability of a company to pay compensation for oil operations damage has been widened. The Section provides that where any body corporate (for example, an oil company) contravenes any provisions of the Act or any Regulations made thereunder, every director or officer of that body corporate 'shall be directed to pay compensation' and to 'restore the polluted environmental area to an acceptable level as approved by the Agency', unless he proves to the satisfaction of the court that: (a) he used due diligence to secure compliance with the Act; and (b) such contravention was committed without his knowledge, consent or connivance. To be sure, it seems the idea behind this is to make oil company managers personally accountable for environmental degradation, and thereby encourage them to ensure compliance with relevant environment protection statutes. However, at the end of the day, it is likely that the financial burden will be borne by the company concerned.

It is remarkable that under the various laws compensation is payable both for damage to the land in its intrinsic nature and for any surface rights thereon. However, notwithstanding the foregoing legal regime, it would appear that victims of oil operations damage in the Niger Delta no longer receive compensation for damage done to the land in its intrinsic nature: indigenes have alleged that since the LUA was promulgated in 1978, oil companies no longer pay compensation, unlike hitherto, for

⁷⁶ Section 21 (1).

any damage done to the surface of the land as a result of oil operations (for example, loss of soil fertility as a result of oil spill).⁷⁷ According to one source, oil companies now claim that families/communities (which they previously recognized as land owners) 'own neither the surface nor what is beneath', and are accordingly not entitled to compensation for any damage to the land in its intrinsic nature; compensation is only payable for damage to surface rights.⁷⁸ Yet, it has been argued, 'the people would have suffered huge and untold losses. Apart from the health risks to which they are exposed by pollution, they suffer loss of economic activities...Farmers are dislodged from the soil they have been using for so many years and all these are not adequately addressed by either the compensation paid or the system of paying compensation'.⁷⁹ In response, Shell has explained that its position is in consonance with Nigerian law. It states: 'As a responsible Nigerian company SPDC obeys the laws of the country, one of which is the Land Use Act...Today we give compensation for the surface rights of all land acquired for our use and for damage [to personal property, such as farm crops and building]...from subsequent activity...'⁸⁰ For one thing, this bears out the claim of the indigenes that compensation is no longer paid for damage to the land in its intrinsic state.⁸¹

It has also been claimed that the compensation paid for surface rights (as is the case with land acquisition) is inadequate.⁸² Sources, including oil company

⁷⁷ See Constitutional Rights Projects (CRP) (1999: 15 – 16).

⁷⁸ CRP (1999: 16).

⁷⁹ CRP (1999: 16).

⁸⁰ Quoted in Robinson (1996: 37).

⁸¹ Robinson (1996: 37) states that it has been 'widely reported that when Shell acquired land in the Delta, it only paid people for the crops growing on the land, but not the land itself'.

⁸² The various statutes dealing with compensation do not define 'adequate compensation' or similar expression. But in *Shell Petroleum Development Co. V. Farah* [1995] 3 NWLR (Part 382) 148, after noting that the action was based on the Petroleum Act, which does not contain any principle of assessment of its compensation provision, the Court of Appeal stated that the underlying principle of compensation is 'to restore the person suffering the *damnum* [loss] as far as money can do that to the position he was before the *damnum* [injury] or would have been but for the *damnum* [injury]' (at 192, Per EDOZIE, J.C.A.).

sources, indicate that compensation is valued in accordance with government rates,⁸³ which vary according to whether land is cultivated, and what structures – fishponds, economic trees, etc. – are present.⁸⁴ As already adumbrated, it has been claimed that these rates are inadequate. For example, HRW (1999: 81) asserts that ‘compensation payments rarely reflect the value of the loss to the local community’. In the same vein, a local has specifically claimed that ‘the oil companies pay only 10 Naira for each cassava stem affected by a spill or acquisition of land for oil operations...But a cassava stem if allowed to mature to full yield can earn as much as 300 Naira when made into garri [a local staple food]...’⁸⁵ With little variation in amount, this agrees with a research finding, which states: ‘Shell’s compensation for a stem of cassava (the source of garri, Nigeria’s major staple food)...is N1.50 per stem. This is an extremely low and unfair price when one considers that the farmer not only loses the crop that year, but when the land is destroyed by an oil spill, the farmer also loses future revenue’ (Robinson, 1996: 39).

It is significant that these claims are in accord with World Bank’s 1995 estimate that the value of forest products in the Niger Delta was at least fifty times the government rate for compensation (World Bank, 1995: 93). More significantly, there is evidence that oil companies agree that government compensation rates are inadequate. In September 1997, oil companies operating in Nigeria announced that they were increasing the rates of compensation paid for land acquisition and damage caused by oil operations by over 100 per cent.⁸⁶ Their spokesman reportedly explained that ‘the decision was prompted by a realisation that adequate compensation of land owners would reduce if not eliminate strife in oil

⁸³ The Federal Government rates (applicable to the oil companies) are contained in the Public Lands Acquisition (Miscellaneous Provisions) Act 1976 (No. 33 of 1976).

⁸⁴ HRW (1999: 78) – citing Shell document.

⁸⁵ View expressed by a Niger Delta resident – quoted in CRP (1999: 28).

communities...If they are adequately compensated, people will no longer come for compensation [after payment]'.⁸⁷ Even so, it has been stated that 'when compensation is agreed in principle at oil company rates, compensation payments rarely reflect the true value of the loss to the local community' (HRW, 1999: 81).

With regard to the compensation scheme under the FEPA Act, some scholars believe that the provision, which empowers FEPA to order the payment of compensation, is an improvement on the pre-existing, oil-company-controlled scheme. For example, Adewale (1992 & 1993: 60) observes that the provision 'may be the sword that is required to fight a victorious battle for a fair and adequate compensation [for] victims of the oil industry'. This presupposes a determination to enforce the provision. However, there is no evidence that the provision has ever been implemented since the Act came into force in 1988. Perhaps this may also be explained by the reluctance of the government and its relevant agencies to enforce environmental protection statutes in order not to discourage oil companies.⁸⁸

Based on available evidence, it seems the most problematic aspect of compensation for oil operations damage relates to the denial of liability on the grounds of sabotage. Under Nigerian law, compensation is not payable for any damage (particularly oil spill damage) arising from sabotage,⁸⁹ - that is, 'any wilful act with intent to obstruct or prevent the production or distribution of petroleum products in any part of Nigeria';⁹⁰ or, simply, acts of vandalisms on oil installations by third parties.⁹¹ For instance, as stated above, under Section 21 of the FEPA Act, a

⁸⁶ *Reuters*, 2 September 1997.

⁸⁷ *The Guardian*, 2 September 1997; *Reuters*, 2 September 1997.

⁸⁸ There is abundant evidence that common-law-rules-based compensation claims (such as actions for negligence and nuisance) have also not been rewarding to litigants; several actions fail on mere technicalities. See Chapter 3. See also Adewale (1989a); Ebeku (1998).

⁸⁹ See Adewale (1990: 17).

⁹⁰ Section 1 (1) (a) of the Petroleum Production and Distribution (Anti-Sabotage) Act 1975 (Cap 353 LFN 1990).

⁹¹ Adewale (1990: 2).

polluter is not liable to pay compensation for any damage arising from the discharge of any hazardous substance (including oil) into the air, land or waters of Nigeria, as a result of sabotage.⁹² In fact, sabotage is a serious offence in Nigeria. Under Section 2 of the Petroleum Production and Distribution (Anti-Sabotage) Act 1975 the punishment for the offence of sabotage is death or imprisonment for a term not exceeding 21 years.⁹³ As already indicated, the offence of sabotage is defined in Section 1 thereof, and includes any wilful act with intent to obstruct or prevent the production or distribution of petroleum products in any part of Nigeria. Also, under the Criminal Justice (Miscellaneous Provisions) Act 1975, 'any person who wilfully and unlawfully destroys, damages or removes any oil pipeline or installation connected therewith', or 'otherwise prevents the flow of oil along any such pipeline or interferes with any installations connected therewith' is guilty of an offence, and may be punished by a fine and/or a term of imprisonment ranging from three years to ten years.⁹⁴

Most oil companies in Nigeria, particularly Shell, claim that sabotage accounts for most oil spillage in the Niger Delta,⁹⁵ 'despite the widespread awareness that no

⁹² This is generally consistent with the common law rule that damages cannot be claimed for the acts of third parties. See *Richards v. Lothian* (1913) A.C. 263; *Perry v. Kendricks Transport Ltd* (1956) 1 W.L.R. 85.

⁹³ The maximum penalty was reduced to life imprisonment by the Special Tribunal (Miscellaneous Offences) (Amendment) Decree No. 22 of 1986.

⁹⁴ Section 3 (1) & (2). See also Special Tribunal (Miscellaneous Offences) Act 1983 (Cap 410 LFN 1990), Section 3 (7): 'Any person who wilfully or maliciously: (a) breaks, damages, disconnects or otherwise tampers with any pipe or pipeline for the transportation of crude oil or refined oil or gas; or (b) obstructs, damages, destroys or otherwise tampers or interferes with the free flow of any crude oil or refined petroleum product through any oil pipeline, shall be guilty of an offence and liable on conviction to be sentenced to imprisonment for life'. There is no evidence that any person has ever been charged under any of the anti-sabotage legislation in Nigeria. Oil companies explain this to be due to the difficulties of obtaining direct evidence to secure conviction, and also because of their interest in good community relations, seeing the severity of the punishment. For this, see HRW (1999: 87).

⁹⁵ The only exception is Mobile Producing Nigeria unlimited, which has most of its operations offshore. The company stated this position in a letter to Human Rights Watch in 1998. See HRW (1999: 82, footnote 200).

compensation is paid in such cases'.⁹⁶ According to Shell's statistics, sabotage accounted for more than 60 per cent of all oil spilled at its facilities in Nigeria in 1996 and almost 80 per cent in 1997. More recently, the company claims that sabotage 'remains a significant problem and accounted for 40 per cent of the incidents and 57 per cent of the volume of oil spilled' in 2000.⁹⁷ On the proof of sabotage, Shell states that 'sabotage is usually easy to determine, since there is evidence of cleanly drilled holes, hacksaw cuts, cutting of protective cages to open valves, etc. In the few cases where the evidence is unclear, ultrasonic soundings are taken for further clarification'.⁹⁸

Besides the legal provisions outlawing sabotage, oil companies argue that to pay compensation for oil spill damages caused by acts of sabotage will create an incentive to damage oil installations,⁹⁹ as the saboteurs' central intention is to cause damage to their property and claim monetary compensation.¹⁰⁰ In *Atubui & others V. Shell-BP*¹⁰¹, in refusing a claim for compensation for damages to fishing ponds, stream, farmlands and economic trees by oil spillage, the trial Judge adopted the position of oil companies when he stated:

The hole in the pipe [oil pipe] was deliberately drilled... by an unknown mischievous person, over whom the defendant company had no control. Even if the oil spillage had caused damage to property or

⁹⁶ See SPDC, 'Annual Report 1998: Environment' < http://www.shellnigeria.com/info/env_1998/envreport_t.htm > (visited 11/05/02).

⁹⁷ SPDC, *2000 Highlights*. The company's figures also show that there was decline in alleged cases of sabotage in 1998, and this was attributed to the claim that 'fewer trunk and delivery lines – which carry significantly more volumes of oil than flowlines, and thus have the potential for greater spill volumes – were sabotaged in 1998, compared to 1997'. There is no suggestion of a consistent downward trend and, as has been noted, the company still claims that sabotage is still a significant factor in oil spill incidents.

⁹⁸ Shell International letter to Human Rights Watch, 13 February 1998. This is also the position of most of the other oil companies. For example, following a leakage in one of its pipelines in September 1997, Elf Oil Company issued a statement, where it stated: 'On careful examination, it was discovered that a hole of about 6mm diameter was carefully drilled on the pipe causing a small spill...' (Noted in CRP, 1999: 28).

⁹⁹ HRW (1999: 83); CRP (1999: 28). The companies also claim that although they do not pay compensation for oil spillages caused by sabotage, nevertheless they clean up the spill.

¹⁰⁰ See CRP (1999: 28).

¹⁰¹ Suit No. UCH/48/73 of 25 November 1974 (unreported Judgment of Ovie-Whiskey, J.).

fishing right of the plaintiff, in this case, the defendant could not be held liable for the damage which was caused by a mischievous third party in the absence of any negligence on their part.¹⁰²

On their part, the concerned communities contend that oil companies often allege sabotage in order to escape payment of compensation.¹⁰³ They point out that since compensation payments are usually paid late and are inadequate, there is little or nothing to gain from polluting their own drinking water, destroying their own crops, and generally causing damage to their means of livelihood and environment.¹⁰⁴ A typical argument of the communities is captured in the following statement (made by a retired Navy Lieutenant, Augustine Anthony, and a member of a Niger Delta community):

In the event of sabotage to oil installations, the only people that benefit are the Shell contractors who clean up such spillages. The people who are usually accused will not be paid, while their farmlands are devastated, their rivers and fishponds are polluted. So how can the people visit so much pain on themselves when they know they would not be paid any compensation if sabotage was (sic) proved against them?¹⁰⁵

Some researchers have also concluded that oil companies might have exaggerated the proportion of spillage attributed to sabotage. For example, Hutchful (1985: 123) states that: 'Considerable mileage is made of...sabotage by the oil

¹⁰² Quoted in Adewale (1990: 17). Compare *Okoroma V. Nigerian Agip Oil Co.*, Suit No. PHC/320/74 of 22 March 1976 (unreported) – noted in Adewale (1990: 14). For a suggestion that the judicial attitude is generally pro-oil companies in compensation cases, see Adewale (1989a).

¹⁰³ A former Governor of Rivers State also made this suggestion when he stated: 'When it [pollution] happens in the North Sea, it is not done [sic] by the people. When it happens in America it is not done [sic] by the people. But in Rivers State local people are blamed'. See *Daily Times*, 14 July 1981. More recently, in the Kaiama Declaration of 1998, Ijaw (Niger Delta) youths stated that they are tired of oil spillages and blowouts, and 'being labelled saboteurs and terrorists', and advised oil companies to stop production in their area (Para. 4).

¹⁰⁴ HRW (1999: 82 – 83); CRP (1999: 28).

¹⁰⁵ Quoted in Civil Liberties Organization (CLO), *Annual Report*, 1997, at 212.

companies. Nevertheless, the amount of damage resulting from such activities is almost certainly less than claimed by the oil companies'.¹⁰⁶

Overall, it seems futile to deny that sabotage of oil installations is one of the causes of oil spillage in the Niger Delta. Indeed, there is considerable evidence to suggest that oil spillage is sometimes caused by sabotage,¹⁰⁷ although it is difficult to objectively determine what percentage of spillage is attributable to sabotage.¹⁰⁸ In any event, contrary to the contention of the oil companies, statistics from the Department of Petroleum Resources (DPR) – one of the regulatory bodies of the oil industry in Nigeria – indicate that only 2 per cent of total oil spilled in Shell's Eastern Division of operations and less than 5 per cent in its Western Division between 1977 and 1979 could be attributed to sabotage.¹⁰⁹ Similarly, statistics from DPR show that only 4 per cent of all spills in Nigeria were caused by sabotage during the period 1976 to 1990.¹¹⁰

Surely, one difficulty in the non-payment of compensation for damage caused by alleged cases of sabotage relates to the possibility of inequity to innocent victims. It seems to be assumed that the saboteurs are those claiming compensation. This may not necessarily be so.¹¹¹ 'In many cases, it appears that sabotage is carried out by

¹⁰⁶ See also NDES (1997: 253).

¹⁰⁷ See Adewale (1990). The author argues that there are socio-economic and political considerations involved in acts of sabotage in the Niger Delta. See also Hutchful (1985: 123).

¹⁰⁸ In a recent report on the Niger Delta, the Human Rights Watch has observed: 'Part of the problem is that there is no independent confirmation that spillages have been caused by sabotage, although the Department of Petroleum Resources [which is very close to the oil companies] is supposed to confirm sabotage and community members may also be invited to inspect the damaged installation, often no genuinely independent experts are present' (1999: 83 – 84 and 115).

¹⁰⁹ See Awobajo (1981) – noted in Hutchful (1985: 123).

¹¹⁰ NDES (1997: 253).

¹¹¹ In a correspondence with Human Rights Watch in 1998, an oil company operating in Nigeria noted that 'while it is usually not too difficult to determine sabotage, there are often very few evidences to identify who is responsible'. See Chevron Nigeria Ltd. Letter to Human Rights Watch, 11 February 1998. In their recent report, Human Rights Watch described a case in January 1997, in Obuburu, Rivers State, where a landholder had suffered damages to his crops and fishponds, as a result of an incident of oil spillage, which occurred on 31 December 1996. Five members of his family were detained by the Police, on suspicion of sabotage and later released without charge. Yet he was denied compensation on the ground that the spillage was caused by sabotage, although there was no proof whatsoever that he

contractors likely to be paid to clean up the damage, sometimes with the connivance of oil company staff' (HRW, 1999: 83).¹¹² Commenting on the inequity in cases where innocent victims of alleged sabotage are denied compensation, Adewale (1990: 17) argued:

In cases where it has been proved [or successfully claimed] that the spillage arose as a result of sabotage, even if property was damaged, persons who are affected will not be entitled to any compensation. This may not be equitable. The usual assumption is that the saboteurs are those claiming compensation. The argument of some oil companies had been that the saboteurs will also be beneficiaries if compensation is paid. This is not always the case. *In such cases, it is unfair to the members of the community who have suffered a loss...* (Italics mine).

To summarise, in Nigeria, the inhabitants of the Niger Delta where oil operations take place can lose their land for the purposes of oil operations or suffer damage as a result of oil operations, yet compensation may or may not be payable. In cases where compensation is paid, this is often allegedly inadequate. Moreover, oil companies often deny liability to pay compensation by claiming that damages were due to acts of sabotage, for which, under Nigerian law and oil companies' policies, compensation is not payable, even to innocent victims. To be sure, to suffer a loss without compensation is inequitable, *more so as an innocent victim*.¹¹³

Significantly, the foregoing position sharply contrasts with the robust provisions for compensation for any loss (including 'expropriation') which the oil multinational companies (and foreign nationals who invest in Nigeria) are entitled to

was the saboteur. This is even made manifest in the company's document. In reply to his lawyer's letter, demanding compensation, the company stated: 'Investigations into the alleged spillage shows that *some unknown person(s)* cut and removed the nipple valve in the Surface Safety Valve (SSV) sensing line at the well head... Thus it is a case of established sabotage... We are therefore not liable to your clients in respect of their claim for compensation...' (Italics mine). See HRW (1999: 83 – 84; 155).

¹¹² See also Awobajo (1981: 11) – noted in Hutchful (1985: 123).

¹¹³ The non-payment or inadequate payment of compensation was recently held to be in violation of Nigeria's obligations under the African Charter on Human and Peoples' Rights. See *Communication 155/96 The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights / Nigeria* (Done at the 30th Ordinary Session, held in Banjul, The Gambia from 13 to 27 October 2001), Paras. 55 and 56.

under bilateral investment treaties (BITs)¹¹⁴ signed between their home countries and Nigeria. For example, under the terms of the *Agreement for the Promotion and Protection of Investments* made between the Federal Republic of Nigeria and the United Kingdom,¹¹⁵ ‘investments of nationals or companies of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party’.¹¹⁶ Under Article 4 thereof, nationals or companies of one Contracting Party whose investments in the host country suffer losses owing to a number of reasons (including a state of national emergency) shall be treated by the host government – as regards restitution, indemnification, compensation or other settlements – no less favourable than that which it accords its own nationals.¹¹⁷

Where the loss suffered by a foreign national (that is a national of one of the Contracting Parties) or multinational company (that is, under the Agreement, a company incorporated under the laws of a Contracting Party)¹¹⁸ arises as a result of requisitioning of his or its property or as a result of destruction by the forces or authorities of the host country (except caused in combat or warranted by the necessity of the situation), the foreign national or multinational company ‘shall be accorded restitution or adequate compensation’, and ‘resulting payments shall be freely transferable’.¹¹⁹ Moreover, expropriation of investments of foreign nationals or multinational companies is not allowed, except for a public purpose related to the

¹¹⁴ For interesting and instructive discussion of BITs, see Dolzer and Stevens (1995). See further Muchlinski (1999: Chapter 17).

¹¹⁵ Signed on 11 December 1990, and entered into force the same day according to the terms of Art. 13 thereof. For the full text of the Agreement, see United Kingdom Treaty Series No. 66 (1991). Similar Agreements were signed between Nigeria and France on 27 February 1990 (and entered into force on 19 August 1991), and between Nigeria and Netherlands on 2 November 1992 (and entered into force on 1 February 1994).

¹¹⁶ Article 2 (2).

¹¹⁷ Article 4 (1).

¹¹⁸ See Article 1 thereof.

¹¹⁹ Article 4 (2) (a) & (b).

internal policies of the host country on a non-discriminatory basis and against 'prompt, adequate and effective compensation'.¹²⁰

Interestingly, 'such compensation shall amount to the market value of the investment expropriated immediately before the expropriation...and shall include interest at the prevalent commercial rate until the date of payment, shall be made without delay, and shall be effectively realisable and be freely transferable'.¹²¹ Further, the foreign national or company affected has a right under the law of the host country to prompt review by a 'judicial or other independent authority' of his or its case and of the valuation of his or its investment in accordance with the above-stated principles.¹²² Where this does not resolve disputes between the parties within three months, either Contracting Party may submit the issue for settlement to the International Centre for the Settlement of Investment Disputes (ICSID) (an international/inter-governmental body that deals with the settlement of trade/investment disputes).¹²³

Similar provisions can be found in the *Nigerian Investment Promotion Decree 1995*,¹²⁴ which appears to be a domestic implementation of the provisions of the BITs.¹²⁵ Like the BITs, this Decree forbids the nationalization or expropriation of any 'enterprise',¹²⁶ (including a multinational oil company which operates a joint venture business with the Nigerian State,¹²⁷ such as Shell) and the acquisition of the interest of an investor (particularly a foreign investor),¹²⁸ except the acquisition is in the national

¹²⁰ Article 5 (1).

¹²¹ Article 5 (1).

¹²² Article 5 (1).

¹²³ Article 8 (1).

¹²⁴ No. 16 of 1995.

¹²⁵ The explanatory note of the Decree (which does not form part thereof) says in part that it is designed to 'create a conducive environment for investment in Nigeria'.

¹²⁶ See Section 32 for definition.

¹²⁷ See Section 32.

¹²⁸ Section 25 (1) (a) & (b).

interest and pursuant to a law which makes provision for: '(a) payment of fair and adequate compensation; and (b) a right of access to the courts for determination of the investor's interest or right and the amount of compensation to which he is entitled'.¹²⁹ Moreover, under section 25 (3), 'any compensation payable under this section shall be paid without undue delay, and authorization for its repatriation in convertible currency shall, where applicable, be issued'. And in the case of a dispute which is not 'amicably settled',¹³⁰ a foreign investor (including an oil MNE) has the option to submit his case for determination 'within the framework of any bilateral or multilateral agreement on investment protection to which the Federal Government and the country of which the investor is a national are parties',¹³¹ or 'in accordance with any other national or international machinery for the settlement of investment disputes agreed on by the parties'.¹³² In the case of disagreement on the method of dispute settlement to adopt, section 26 (3) provides for the application of the dispute settlement rules of the International Centre for the Settlement of Investment Disputes (ICSID).

In conclusion, it can be seen that compensation regime available to foreign oil companies operating in the Niger Delta in case of any loss or damage they may suffer is starkly different and by far better than the provisions made to compensate victims of oil operations damage. This is probably part of the inequity which the local people allude to when they allege inequity in the payment of compensation for oil operations damage.

¹²⁹ Section 25 (2) (a) & (b).

¹³⁰ Section 26 (2).

¹³¹ Section 26 (2) (b).

¹³² Section 26 (2) (c).

5.3.3. Employment

It has been observed that 'mineral exploitation has the potential to provide an important source of employment and income for indigenous peoples' (O'Faircheallaigh, 1991: 236). And in Australia and Canada, there is some evidence that the common arguments in favour of mining development in their remote areas was that the projects will generate significant employment for the existing resident population, particularly aboriginal/indigenous peoples.¹³³ Similar arguments would appear to apply to Nigeria. In fact, statutory provisions in the country recognize the need for oil operations to provide economic benefit, in terms of employment, to the people. Two examples will suffice. Firstly, under Paragraph 26 of the Petroleum (Drilling and Production) Regulations 1969 oil companies are obliged to recruit and train Nigerians. The Paragraph states:

(1) The licensee of an Oil Prospecting License shall within twelve months of the grant of his license, and the Lessee of an Oil Mining Lease shall on the grant of his lease, submit for the Minister's [Minister of Petroleum Resources] approval, a detailed programme for the recruitment and training of Nigerians.

(2) The programme shall provide the training of Nigerians in all phases of petroleum operations whether the phases are handled directly by the lessee or through agents and contractors.¹³⁴

Secondly, Paragraph 37 of the First Schedule to the Petroleum Act provides

that:

The holder of an Oil Mining Lease [oil companies] shall ensure that –

(a) within ten years from the grant of his lease –

(i) the number of citizens of Nigeria employed by him in connection with the lease in managerial, professional and supervisory grades (or any corresponding grades designated by him in a manner approved by the Minister) shall reach at least 75 per cent of the total number of persons employed in those grades; and

(ii) the number of citizens of Nigeria in any one such grade shall be not less than 60 per cent of the total;

¹³³ Until recently, most evidence suggests otherwise. See Young (1995: 167).

¹³⁴ Apart from providing employment, this obligation might have been designed to enable Nigerians to eventually take over the operations of the oil industry.

(b) all skilled, semi-skilled and unskilled workers are citizens of Nigeria.

Shell Oil Company has published statistics indicating compliance with the above statutory provisions. The company states that: 'Shell Nigeria employs over 4,000 people, 95 per cent of them are Nigerians and Nigerians hold over 50 per cent of the top managerial positions. It has 8,000 contract staff, again mostly Nigerians with an estimated 20,000 people employed by contractors working for the company. In addition there are over 100 Nigerians on overseas assignment in other Shell companies, as part of the company's skills broadening programme'.¹³⁵ To emphasize the economic benefit of employment in Shell, the company states that it 'offers very attractive and competitive service conditions and benefits [to its employees]'.¹³⁶

It is remarkable that the statutory provisions on employment of Nigerians by oil companies do not specify the employment of Nigerians from any particular area or region; specifically, there is no reference to the indigenous inhabitants of the areas of operations. This implies that Nigerians from any part of the country are eligible for employment in the oil companies in satisfaction of the requirements. Perhaps this explains why the above Shell's statistics does not disclose the number of Nigerians who hail from its area of operations in the Niger Delta. Yet there is evidence that Shell recognizes the need to employ local people in its area of operations. For instance, in a recent publication, the company states: 'SPDC has completed its 4-D seismic survey in Nigeria in the Nembe field. Contract for the survey, covering some 192 subsurface square kilometres was awarded in January 2001...Community people

¹³⁵ SPDC, 'Shell Recruitment Information' < http://www.shellnigeria.com/recruitment/recruitment_info.asp > (visited 03/06/02). There is evidence that all the other oil companies operating in the region make similar claims. See HRW (1999: 101 – 102).

¹³⁶ SPDC, 'Shell Recruitment Information' < http://www.shellnigeria.com/recruitment/recruitment_info.asp > (visited 03/06/02).

in the area of operation were involved in the execution of the project. Of the 1,500 staff involved in the project, 900 (60 per cent of the workforce) were indigenes of the communities'.¹³⁷

There is no evidence to contradict Shell on its claim of the number of Nigerians in its employ. However, it has been pointed out that most Nigerians in the employ of the oil companies are from areas outside the oil companies' areas of operations.¹³⁸ As a recent study of the Niger Delta, by some researchers of the International Institute for Democracy and Electoral Assistance (International IDEA) – an Inter-governmental body based in Stockholm, Sweden – indicates, youth unemployment (particularly in the oil companies) is 'estimated to be among the highest in the country'.¹³⁹ In fact, there is considerable evidence that non-employment of indigenes is one of the causes of protests by the indigenous people of the Niger Delta against oil companies.¹⁴⁰ For instance, in the Ogoni Bill of Rights (OBR), the people pointedly stated that 'Shell Petroleum Development Company of Nigeria Limited does not employ Ogoni [Niger Delta] people at a meaningful or any level at all, in defiance of the Federal Government regulations'.¹⁴¹ Similarly, it has been claimed that 'out of 38 top posts in Mobil [major oil company in Akwa Ibom¹⁴²], Yorubas [majority ethnic group members of the South-West] occupy 32, Ibos

¹³⁷ SPDC, 'First 4D Seismic Survey in Swamp' (published 18/03/02) < http://www.shellnigeria.com/info/news_display.asp?Id=265 > (visited 03/06/02).

¹³⁸ Naanen (1995: 50). Having regard to Para. 26 of the Petroleum (Drilling and Production) Regulations 1969, it seems clear that the non-possession of requisite qualifications can be no defence for the non-employment of the locals, as the law requires the companies to train them.

¹³⁹ See International IDEA (2000: 153).

¹⁴⁰ International IDEA's researchers explained that they 'encountered a young man who graduated from the university five years ago, but is yet to find a gainful employment. Another young man who graduated eight years ago confessed to a similar experience'. According to the researchers, 'many young people in the area are bitter about this' (International IDEA, 2000: 153). See also Hutchful (1985: 123 – 124). The oil companies often respond to charges of unemployment of locals that it is not possible to employ community members without appropriate qualifications (see HRW, 1999: 101). Although the finding of International IDEA does not disclose the qualifications of the unemployed graduates encountered, it seems the response of the oil companies is not plausible, especially having regard to their statutory obligation to 'employ and train Nigerians'.

¹⁴¹ Paragraph 14.

[majority ethnic group members of the South-East] occupy three, while people from Akwa Ibom State occupy three. Even menial positions are filled by non-indigenes...'¹⁴³

In Port Harcourt, the Capital City of Rivers State, it was recently found that unemployment 'is at least 30 percent' (HRW, 1999: 95). Perhaps this situation prompted the Rivers State Government to enact a law recently for the enforcement of the statutory provisions for employment of Nigerians (particularly, junior workers of Rivers State origin). Sections 1 and 2 of the law, entitled *Employment of Junior Workers (Enforcement) Law*,¹⁴⁴ provide:

1. As from the commencement of this Law all companies or persons having a place of business in Rivers State and having a total minimum staff of twenty persons shall employ indigenes of Rivers State into junior staff positions in such places of business.

2. A company in Rivers State shall within three months of the coming into force of this Law, or being a company established after the coming into force of this Law, within three months of its operational existence in the State, submit to the commissioner, a comprehensive and accurate list of its junior workers, which said list shall include the annual salaries, State of origin, job description and nationality of the junior workers.¹⁴⁵

¹⁴² Part of the Niger Delta, in a larger sense – See Chapter 1)

¹⁴³ See International IDEA (2000: 151). Apart from the core oil companies, there are also oil servicing companies in the Niger Delta, i.e. contractors to the core oil companies, which are also big companies, and also employ large number of people. Even these, it has been claimed, do not employ indigenes of the Niger Delta. As a local human rights organisation has claimed: 'The oil servicing companies owned by persons from outside the communities use their own people to handle their jobs. The local people feel cheated and are struggling to overthrow the aliens [i.e. Nigerians from outside the Niger Delta]. The people are alienated; they see the invaders as exploiters' (See International IDEA (2000: 151)).

¹⁴⁴ No. 2 of 2000. Its long title describes it as 'a law to make provisions for the employment of indigenes of Rivers State and other matters incidental thereto'. The State Governor assented to the Law on 23 March 2000. There is no indication of the date of its commencement; presumably, it was on the date of the Governor's assent. (Hon. (Barr.) Kennedy S.A. Ebeku was the Chairman of the Employment Committee of the Rivers State House of Assembly when the law was passed, and played very memorable and crucial role in its passage).

¹⁴⁵ Under the Law, 'Company' 'means any company corporate or incorporate registered under the Laws of the Federal Republic of Nigeria [including oil companies]...' The Law provides for a fine not exceeding N500, 000.00 for a company found to have violated its provisions (Section 4). There is no shred of evidence that this Law has made any positive impact on the level of unemployment in the State; nor, indeed, is there any evidence of its enforcement. In any case, it will be interesting to see how

Most recently, in a memorandum submitted to the Human Rights Violation Investigation Commission (HRVIC),¹⁴⁶ the Niger Delta people (under the umbrella of South-South Movement) stated: ‘When we talk of resource control we are not only talking of control of oil resources, it includes employment for our people and contract for our people from the oil companies...[T]he headquarters of the various oil companies are situated outside the Niger Delta area [in Lagos] and majority of their management staff come from outside the Niger Delta’.¹⁴⁷ In the latter case, it may be noted that, elsewhere, it has been found that the location of hiring offices (company headquarters) ‘outside the region in which mining occurs’ is a contributory factor which helps to explain ‘low indigenous employment levels’.¹⁴⁸ Moreover, it has been pointed out that ‘the location of headquarters is significant’ because oil companies pay taxes ‘to the area in which they are located’.¹⁴⁹

this Law will be enforced against oil companies, since ‘oil company matters’ appear to be considered to be outside the legislative realm of State Governments.

¹⁴⁶ Headed by Hon. Justice Chukwudifu Oputa, a retired Justice of the Supreme Court of Nigeria (hereinafter, ‘Oputa Panel’). The Commission was set up by President Obasanjo in 2000 to investigate human rights violations in Nigeria between 1966 and 1999. Its conception is akin to the South Africa’s Truth and Reconciliation Commission. In May 2002, the Commission submitted its report to the President.

¹⁴⁷ The concluding part of the memorandum, containing the information stated here, can be seen at: < http://www.nigerdeltacongress.com/sarticles/southsouth_memorandum_to_oputa_p.htm > (‘South-South Memorandum to Oputa Panel’) (Visited 11/06/02). The memorandum also contains statistics, showing that the Niger Delta people are disadvantaged in political appointments into the Governing Boards of Federal Government-owned oil-related companies/establishments, such as the Oil Refineries, Petrochemical Company, and the Nigerian National Petroleum Corporation (NNPC).

¹⁴⁸ O’Faicheallaigh (1991: 261, footnote 5). In the course of field survey for this work, it was explained that another means by which the Niger Delta people are kept out of the oil companies is through what was called National Youth Service Corps (NYSC) scheme – a programme by which fresh Bachelors degree graduates, under the age of 30, are compulsorily required to undertake one year paramilitary service for the nation. The graduates, both from local and foreign universities, are normally posted to States other than their own. It was claimed that by the time Niger Delta indigenes return to their States, the oil companies had concluded recruitments, thereby leaving qualified indigenes unemployed.

¹⁴⁹ International IDEA (2000: 151). Nevertheless, it seems the States of operation still get a little money, by virtue of the Offshore Oil Revenue (Registration of Grants) Act 1971 (Cap 336 LFN1990). Section 1 (1) thereof provides: ‘All registrable instruments relating to any lease, license, permit or right issued or granted to any person in respect of the territorial waters and the continental shelf of Nigeria shall, notwithstanding anything to the contrary in any enactment, continue to be registrable in the States of the Federation, respectively, which are contiguous to the said territorial waters and the continental shelf’. Registration fee of any registrable instrument in Nigeria is a generally low, one-off payment.

The Niger Delta indigenes further point out that oil operations adversely affect their environment and their means of livelihood,¹⁵⁰ thereby impoverishing them, and argue that it is unfair not to provide them with an alternative employment in the oil companies and/or equitable share of the revenue derived from oil.¹⁵¹ In a recent Declaration, this point was re-emphasized thus: '[I]n over 40 years of oil exploration, the Niger Delta nationalities [communities] have provided the Nigerian State with a total revenue estimated at over \$300 billion, but our people still live in abject poverty...[T]he people of the Niger Delta are faced with unbridled destitution, generational poverty, oil spillages, oil pipeline fire disasters, ecological degradation...and illiteracy, but no equitable remedy'.¹⁵² In the same vein, in their memorandum to the Oputa Panel, the people bemoaned: 'The wealth of our resources are now been concentrated in the hands of a few individuals from the north, south-east, and south-west [homelands of the ethnic majority tribes] to the exclusion of the Niger Delta people of the country'.¹⁵³

Furthermore, the people have pointed to the sharp contrasts between their socio-economic conditions and those of oil company staff. As one author has found, 'an issue raised in most oil producing areas' is that whereas most of the 'inhabitants dwell in poverty' (without potable water and electricity), nearby oil company staff-

¹⁵⁰ See Osaghae (1995: 325). In the OBR, the Ogoni people claimed that the search for oil has caused severe land scarcity and food shortages in the area, and stated that 'it is intolerable that one of the richest areas of Nigeria [in terms of natural resources endowment] should wallow in abject poverty and destitution' (Paras. 15 and 18). Further, in a statement accompanying the OBR, the first President of the Movement for the Survival of Ogoni People (MOSOP), Dr G.B. Leton, also made the same complaint.

¹⁵¹ See International IDEA (2000: 150 – 156). For a discussion of the issue of revenue sharing in the country, see below.

¹⁵² See Declaration of Niger Delta Bill of Rights, Paragraphs 8 and 11, respectively. The Declaration was made on 10/11/2000. For full text, see: <
http://www.nigerdeltacongress.com/darticles/declaration_of_niger-delta-bill_.htm > (Visited 11/06/02). See also International IDEA (2000: 151).

¹⁵³ See 'South-South Memorandum to Oputa Panel' <
http://www.nigerdeltacongress.com/sarticles/southsouth_memorandum_to_oputa_p.htm > (Visited 11/06/02). See also Ikein (1990: 39).

quarters 'are supplied with all infrastructure' (Adewale, 1995: 69). The same point was more graphically summarized by Hutchful (1985: 122), thus:

To the deteriorating conditions of his existence the peasant is able to contrast the privileges and luxury generated by the same [oil] industry for some social sectors. In both town and country the oil industry has spawned colonies of extremely privileged oil executives, technical personnel and skilled workers, both expatriate and Nigerian, living in segregated compounds furnished with electricity, clean water and a network of private roads, schools, medical centres and clubs, guarded by private security as well as detachments of Federal police. The so-called "shell-Camp" in Port Harcourt is the most conspicuous example of these oil colonies.

Several researchers have also concluded that oil operations have impoverished the local/indigenous communities by destroying their traditional economy (farming and fishing), without providing them with employment, with the result that, despite the enormous revenue derived from oil operations, the Niger Delta people are among the poorest peoples of Nigeria.¹⁵⁴ Significantly, Shell agrees that oil operations have not been of commensurate benefit to the Niger Delta people, having regard to the huge revenue which the operations have yielded to the Federal Government of Nigeria (and, it has been pointed out, the huge profits made by the oil companies¹⁵⁵) over the years.¹⁵⁶

Lastly, it is significant to note that the World Commission on Environment and Development (WCED) has recommended that 'special efforts should be made to ensure that the local community can derive the full benefit of [oil exploitation] projects, particularly through jobs'.¹⁵⁷ This implies that the non-employment of local peoples (as the Niger Delta people have claimed) is inequitable. Furthermore,

¹⁵⁴ See, by example, International IDEA (2000: 148 – 156). See further, Hutchful (1985); Osaghae (1995: 325).

¹⁵⁵ Osaghae (1995: 325).

¹⁵⁶ See sources cited in HRW (1999: 162).

¹⁵⁷ WCED (1987: 116).

'equality of opportunity for all in their access to employment' is an equitable aspect of the right to development under Article 8 of the Declaration on the right to development, and the oil multinationals and the Nigerian State may well be in breach of this article.

5. 3. 4. Development

In her Forward to the report of the WCED, the Chairman, Gro Harlem Bruntland, observed that 'environment is where we all live, and development is what we all do in attempting to improve our lot within that abode'.¹⁵⁸ In other words, 'development' may be defined as a planned process that 'involves a progressive transformation of economy and society'.¹⁵⁹ Adinkrah sees it as 'the conscious process of a country to seek a better life for its citizens'.¹⁶⁰ According to him, the process involves the steady expansion of a large number of non-revenue yielding services such as schools, hospitals, and communication systems, which are very important for long-run development. In the same vein, Seidman has opined that 'development' is the conscious process of a country to seek an improvement in the standard of living of its citizens.¹⁶¹ However, from a legal perspective, it has been observed that 'there is no universally accepted legal definition of development'.¹⁶² In any case, the preambular part of the 1986 UN Declaration on the Right to Development suggests that 'development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals *on the basis of their active, free and meaningful participation in*

¹⁵⁸ WCED (1987: xi).

¹⁵⁹ WCED (1987: 43).

¹⁶⁰ Adinkrah (1984: 67).

¹⁶¹ Seidman (1966: 999).

¹⁶² De Feyter (2001: 3).

development and in the fair distribution of benefits resulting therefrom'.¹⁶³ In all, this thesis considers the presence or availability of social infrastructure and facilities such as tarred roads, electricity, communication systems, potable water, hospitals, and schools, as the indicators of development.

There is abundant evidence that oil operations in the Niger Delta take place mostly in the rural (remote) areas,¹⁶⁴ populated by native people.¹⁶⁵ Yet, despite the fact that the operations have been going on for more than 40 years, and the admission that that it has yielded much revenue to the Federal Government of Nigeria as well as huge profits to oil companies, the Niger Delta people have frequently claimed that oil revenues have not been used to develop their areas (including their urban areas).¹⁶⁶ They allege that their region is undeveloped, whereas the revenues from oil are used to sustain the Nigerian State and develop other areas of the country – that is, the homelands of the majority ethnic groups who successively rule the country.¹⁶⁷ In the words of one researcher: 'Members of the [oil-bearing] communities have expressed the view that it is inequitable for the government to leave their communities undeveloped and utilize the proceeds of the oil extracted from their communities for the rapid development of other parts of the country' (Adewale, 1995: 69).¹⁶⁸ The

¹⁶³ At the end of the day, it seems 'development' is a subjective matter. For the difficulties of objective definition of 'development, see Mabogunje (1980: Chapter 1). See also De Feyter (2001: Chapter 1).

¹⁶⁴ Ajomo (1982: 336). See also Hutchful (1985); Naanen (1995: 66).

¹⁶⁵ The World Bank has estimated that about 70 percent out of a total population of about seven million (based on the 1991 census) in the Niger Delta live in rural areas (World Bank, 1995: 2).

¹⁶⁶ See Report of the Political Bureau (Abuja, March 1987), 171, Para. 10.018.

¹⁶⁷ This is the main thrust of the Niger Delta Declarations noted in the text above. There is also evidence that part of the oil revenue is used to finance trouble-shooting and economic assistance programmes in other countries, such as the ECOMOG operations in the West African sub-region (particularly in Liberia and Sierra Leone). Ikein (1990: 44) notes that 'the mining of oil in Nigeria strips the inhabitants of their wealth and uses it to better the socio-economic conditions of distant lands, while the mostly rural inhabitants of the oil areas remain, despite their endowment with such precious resource, in a state of abject poverty, neglect, and degradation'. During the field-work for this work, it emerged that lack of development is a key annoyance to the people of the region.

¹⁶⁸ This grouse is long-standing, as can be seen in the following observation, which was made in 1967: '[T]he Ibos are basing their economic future on the huge oil deposits of the Niger Delta...which are found for the most part in land belonging to the minorities who seethe with resentment at the small advantages that have come their way from the oil found on their land' (O'Connell, 'Nigeria: The

author further stated that the community leaders believe that development 'should start from the oil-producing area and spread to other parts of the country and not vice versa'.¹⁶⁹

These claims have been found to be true by several researchers.¹⁷⁰ For example, the World Bank recently reported that: 'Of the resources available in the Niger Delta, oil is by far the most valuable to the national economy. However, the benefits to the Niger Delta region are less obvious'.¹⁷¹ Similarly, Hutchful (1985: 121) states that 'little social or infrastructural development has been undertaken by the oil companies or the Federal and State Governments to compensate for the despoliation of the peasant's natural environment by oil production activities. The peasant communities bordering the oil facilities are deprived of the most basic social amenities...' While these may be general statements, other researchers are more specific. For example, in a research sponsored by the World Council of Churches (WCC), Geneva, it was found that:

It is clear that the oil boom financed numerous capital-intensive projects, the expansion of the network of roads, and of course the development of the new capital city: Abuja. Most of this development took place in the non-oil-producing areas. The oil-producing areas were, and still are, some of the least developed in the country. There is no electricity, running water, telephones, no good roads, poor health care facilities, etc. in Ogoniland, and other minority groups in the Niger Delta live in similar or even worse conditions. The revenues from oil bought incredible modernization and development to some regions of Nigeria, but have had little positive impact on the oil-producing areas.¹⁷²

Politics of Majorities and Minorities', *Nigerian Opinion*, III (July 1967), 218) – Quoted in Pearson (1970: 218, footnote 5).

¹⁶⁹ Adewale (1995: 69).

¹⁷⁰ See Ikein (1990: 39): oil-bearing areas and their inhabitants sink in poverty, 'as their wealth is ripped away to benefit other areas'. See also HRW (1999: 95): 'Despite the vast oil wealth of the oil producing areas, the Niger Delta region remains poor...'

¹⁷¹ World Bank (1995: 81). Similarly, the authors of a recent report on Nigeria have stated that 'in terms of infrastructure, the Niger Delta lags behind enormously' (*International IDEA*, 2000: 154).

¹⁷² Robinson (1996: 9 – 10). See also Naanen (1995: 65).

Interestingly, another Church body – the Catholic Church of Nigeria – has also recorded the same finding, thus:

The cause of serious concern now...is the privation, inhumanity, and suffering which Nigerians in Ogoniland [and elsewhere in the Niger Delta] have been tethered with since more than 30 years ago, by foreign oil companies – apparently ‘ex-gratia’ our complaisant governments. Try and empathize the abysmal plight of the Ogoni [Niger Delta] people. Not less than 200,000 barrels of best grade oil is lifted, every day, from their land which at \$18 per barrel, conservative rate, earns this country not less than \$36,000,000...every day. Yet they do not have electric light, no school – where large sums of money are provided for [northern] nomads who are, apparently, being forced to read; they have no hospital – they take their sick people to Port Harcourt, usually getting there with them as corpses or close to death because it is very far away and the road is miserably bad. They have no pipe-borne water, they have been denied most of their farms, and their river has been polluted and poisoned.¹⁷³

This poor socio-economic condition has further been recently confirmed by a study undertaken by the United Nations Development Programme (UNDP) (See Table 5.1). As can be seen from Table 5.1, the Niger Delta people have the lowest social conditions in the whole of the southern part of Nigeria.¹⁷⁴ Compared with the South-East and South-West Zones (populated by ethnic majority groups – that is, the Ibos and Yorubas, respectively), they have the lowest level of access to safe water, lowest level of access to electricity, and the highest number of human population per

¹⁷³ *Catholic Herald* (Lagos), 16 September 1993. The Roman Catholic Archbishop of Lagos, Olabunmi Okogie, had earlier issued a statement in which he described the ‘suffering’ of the Niger Delta people as ‘an international disgrace’, noting that the ‘people...have an inalienable right to make use of their land first for personal development before any other consideration’ (*Daily Times*, 3 July 1993). It is notable that the Ogoni community features prominently in the literature because it is the most researched. Otherwise, as Osaghae (1995: 333) rightly points out, ‘their situation is not the worst of the oil producing groups’. For example, the field survey conducted by the author revealed that some oil producing communities in Ekpeyeland, in Rivers State, are in a worse situation. So that the Ogoni case can be seen as a representative case only.

¹⁷⁴ It has been argued that this is also true in the context of entire Nigeria, having regard to the fact that the region contributes the bulk of government revenues. See International IDEA (2000: 152).

medical doctor.¹⁷⁵ Hence, it has been surmised that the Niger Delta is ‘poor, backward and neglected’.¹⁷⁶

Table 5.1: Some indicators of social conditions

		1993/94	1993/94	1991
Zone	States	Access to safe Water: % of households	Access to Electricity: % of households	Population per Doctor: Zone average
South-East	Abia Anambra Enugu Imo	35.95	38.43	6,380
South-West	Lagos Ogun Ondo Osun Oyo	44.36	66.7	5,898
South-South (including the Niger Delta)	Akwa-Ibom Cross River Delta Edo Rivers	30.7	35.06	81,800
Niger Delta	Delta Rivers Bayelsa+	26.97	30.2	132,601

Source: Adapted from United Nations Development Programme (UNDP), *Human Development Report: Nigeria, 1996*¹⁷⁷

+ The figures also include Akwa Ibom State.

Interestingly, as has already been indicated, there is evidence that the oil companies operating in the region agree that the Niger Delta region is poor and

¹⁷⁵ BBC News Online's Briony Hale recently reported: 'Some of Nigeria's poorest people live in the delta area' (http://news.bbc.co.uk/hi/english/business/newsid_1763000/1763464.stm - Visited 19/06/02).

¹⁷⁶ See International IDEA (2000: 151). The same conclusion was reached in 1958 by the Minorities Commission (Willink Commission, 1958: 94, Para. 27). And, most recently (following an incident of protest by some Ijaw women of the Niger Delta on 8 July and 17 July 2002), a BBC correspondent in Nigeria has made the same observation: 'The Delta region is poor despite oil wealth' (See < http://news.bbc.co.uk/hi/english/world/africa/newsid_2136000/2136509.stm > (Visited 19/06/02).

¹⁷⁷ The source also indicates that the national average (excluding the Federal Capital Territory) for the corresponding period is: 31.7, 33.63, and 39,455, respectively.

neglected.¹⁷⁸ For example, Brian Anderson, former Managing Director of Shell was quoted to have said that 'it is really essential that the government [of Nigeria] bring back some benefit to the [Niger] Delta'.¹⁷⁹ Moreover, and even of greater interest, there is a rare confession by a Nigerian Head of State that the situation in the Niger Delta is a 'sad condition'.¹⁸⁰ Additionally, the Nigerian State recently admitted the 'gravamen' of allegations of environmental degradation, neglect of the Niger Delta, and violations of human rights in the pursuit of 'protection' of oil installations before the African Commission on Human and Peoples' Rights. In a *Note Verbale* she submitted to the Commission,¹⁸¹ she further stated: 'There is no denying the fact that a lot of atrocities [for example, environmental degradation and its concomitants] were and are still being committed by the oil companies in Ogoniland and indeed in the Niger Delta area'.¹⁸²

In any case, it would appear that the prevailing socio-economic conditions in the region have some political undertones. Indeed, it has been suggested that the want of development of the region and the non-payment of compensation for loss suffered is discriminatory and directly related to the inferior political status of the people.

According to one author:

One cannot appreciate the immeasurable injustice being done to the people who live in the oil producing areas until one remembers that [it was revenue] from oil that was used to build the Kainji Dam [and to settle] permanently the people [who were] removed from their usual

¹⁷⁸ See HRW (1999: 159).

¹⁷⁹ Reuters, 13 May 1997. There is also evidence that Shell has made representations to the Federal Government of Nigeria, on the need for upward review of the revenue allocated to oil producing areas. See HRW (1999: 162).

¹⁸⁰ See the 1999 Federal Budget Address by Gen. Abdulsalami Abubakar.

¹⁸¹ The Note Verbale was dated 16 February 2000 and referenced 127/2000. It was submitted at the 28th session of the Commission held in Cotonou, Benin from 26 October to 6 November 2000.

¹⁸² See *Communication 115/96 The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights / Nigeria* (Done at the 30th Ordinary Session, held in Banjul, The Gambia from 13 to 27 October 2001), Para. 42. Even more recently, President Olusegun Obasanjo has frankly said that 'it is unfair for South-south [Niger Delta] States, the producers of the nation's wealth to languish in penury while the resources from their areas are used to develop other parts of the country' (See *ThisDay*, 10 September 2002).

homes; that [it] is the oil money that is being used to develop the Baklari farm project and [to pay] compensation that is running into millions of Naira to the people affected by the execution of that gigantic project...; that [it] is the same oil money that is being used to build a new Federal Capital at Abuja and [for the settlement of the people removed from the project [site] [and, more recently, to construct another National stadium at Abuja].¹⁸³

On the face of the foregoing socio-economic conditions in the Niger Delta, one important question arises: 'Whose duty is it to develop the oil-producing area? Is it the government's or the oil companies'? From available evidence, the Niger Delta people appear to hold the oil companies more responsible for the non-development of their region, probably because the oil companies are closer to them. This may be illustrated by the Umuechem incident of 1990, which led to the 'brutal' sacking of the community, the destruction of about 495 houses, and the killing of over 80 people (including the community head-chief) by security operatives invited by Shell.¹⁸⁴ According to sources, the community members claimed that they had obstructed Shell staff from operating in their community because the company had failed to honour an earlier promise to assist in the development of the community.¹⁸⁵

On their part, the oil companies argue that they pay royalties, rents, and taxes to the government, and that the primary responsibility for the development of the region lies with the government, and not them.¹⁸⁶ Interestingly, they have the support of a Presidential Commission on Revenue Allocation: 'The answer [the oil companies] give is plausible. The Federal Government has substantial equity in these companies. The oil companies have paid their rents, their royalties and their taxes to

¹⁸³ Simon Ebare, 'Oil Spillage Areas Deserve More Aid' (*Sunday Times*, 27 July 1980). Similarly, a northern member of the Constitutional Conference of 1994 – 1995 expressed the view that the Federal Government 'has not been able to actually use the oil wealth... to develop... the place from where the oil comes'. See Constitutional Conference Debates (19 September – 21 November 1994), Volume II, 468, Para. 1775 – 1776.

¹⁸⁴ HRW (1999: 123 – 4). The Ogoni uprising of the 1990s is another example.

¹⁸⁵ See, for example, HRW (1999: 123); Adewale (1995: 68, footnote 2).

the Federal government...Do you want the same oil companies to provide these amenities? The pressure should be at the ... governmental levels...'¹⁸⁷ Even more recently, the report of a Rivers State Government Judicial Commission of Inquiry argued in favour of Shell (oil companies): '[Shell] does not owe any legal obligation to the community to provide any socio-economic or social amenities...'¹⁸⁸

There is no question that the primary responsibility to develop the communities lies with the governments, particularly the Federal Government which receives the revenues from oil operations. However, it seems now well established that companies owe social responsibilities to the communities where they operate. As Holdsworth aptly put it:

Industry is not a separate entity which is somewhere apart generating its own activity...Industry is part of the community; it exists for the community and it is the community's right, not merely privilege, to require from industry what the community wants.¹⁸⁹

In any case, despite the claim of non-development, there is some evidence that Shell, and some of the other oil companies operating in the Niger Delta, have assisted the communities in the provision of some amenities,¹⁹⁰ such as schools, cottage hospitals, markets, water supply, and the construction of community halls. Also, there is evidence that some of the companies grant scholarships to some members of the communities where they operate.¹⁹¹ Nevertheless, critics have suggested that some

¹⁸⁶ See HRW (1999: 103); Adewale (1995: 68). A source indicates that Shell's official policy is that 'it is neither feasible nor proper for the company to take over the responsibilities of the Federal and State Governments in providing and maintaining social facilities' (*Newswatch*, 2 July 1990: 18).

¹⁸⁷ See Report of the Presidential Commission on Revenue Allocation (Okigbo Commission), 1980, Volume III, 277. Hutchful (1985: 122) argues that 'the peasantry has little interest in these fine distinctions, recognizing only the reality of a power structure that impoverishes them and enriches others'.

¹⁸⁸ Rivers State Government, *Report of the Judicial Commission of Inquiry into the Umuechem Disturbances* – quoted in HRW (1990: 102 – 103).

¹⁸⁹ Holdsworth (1970: 73). Similar view was expressed by Ikein (1990: 39), thus: 'Here it is not just a demand; it is the right of the oil producing areas to benefit from their own natural resource.'

¹⁹⁰ See Adewale (1995: 68).

¹⁹¹ For the catalogue of community assistance claims made by various oil companies operating in Niger Delta, see HRW (1999: 103 – 105).

claims of oil-company-assisted developments are exaggerated and, at any event, it would appear to be insufficient or inadequate.¹⁹² For example, Shell claims that its 'support for communities dates back to the 1950s and has increasingly focused on long term goals in partnership with the communities themselves. More emphasis is being given to community participation and direction...The objectives are to increase family incomes through business and credit support, and to improve welfare through services in health, education and agriculture'. Moreover, it claims that an audited survey reviewed all its recent community projects completed between 1992 and mid-1997 to assess the effectiveness of its recent community support, and found that 57 per cent of all projects – including classroom blocks, water projects, hospitals, agriculture schemes, roads and markets – are fully functional, and another 28 per cent partially functional.¹⁹³ The implication of these is that the company has engaged in sustained community development assistance schemes since the beginning of its operations in the Niger Delta. However, recent studies of the region, which show that the region is still undeveloped, confirm the position of critics that some of the claims are exaggerated.¹⁹⁴

The prevailing economic and social conditions in the Niger Delta may be compared with the position in Shetland Islands in Scotland.¹⁹⁵ These are remote

¹⁹² Some critics have argued that the community assistance claimed by the oil companies 'are achieved more on paper than in reality, and that much of the money supposedly spent in fact goes missing, leaving substandard facilities of little use to the communities, such as hospitals without water or electricity'. See Environmental Rights Action (ERA) (1998).

¹⁹³ SPDC, 'The Community' < http://www.shellnigeria.com/shell/community_rhs.asp > (Visited 03/06/02).

¹⁹⁴ See, for example, Frynas (2000); International IDEA (2000: 152 – 154). If Shell's claims were not exaggerated, then, arguably, the region will not be as undeveloped today as many researchers have recently found. The authors of International IDEA's recent report on Nigeria specifically stated that: 'Easily accessible drinking water is still a luxury in many communities...Many roads are not motorable as oil companies only construct roads that support their activities. The East-West road, which links the three oil-producing states of Delta, Bayelsa and Rivers, contrasts dismally with that which links Okene and Abuja [majority groups areas]' (2000: 154).

¹⁹⁵ The information contained here was largely obtained from a paper presented by Andrew Blackadder at a Conference of North Atlantic Islands held in Newfoundland in 2000. (The author, who is the

archipelago of over 100 Islands, 16 of which are inhabited, lying 60° N and are almost equidistant from the Faroe Islands to the North-west, Bergen to the east, and Aberdeen to the south. Oil was found in these Islands in the 1970s.¹⁹⁶ Before then, this community of about 17,000 people¹⁹⁷ depended primarily, like the Niger Delta people, on fishing and farming for their livelihood. Although the pre-oil economy was relatively buoyant, evidence suggests that ‘this would not have continued because the latter part of the 1970s saw a loss of fish processing markets, the collapse and closure of pelagic fishery’ and other economic reverses.¹⁹⁸ Unlike the Niger Delta people, however, there is abundant evidence that oil operations have brought both economic and social benefits to the people. These benefits have come through the provision of jobs,¹⁹⁹ additional income from wages and services, significant enhancement to infrastructure (airports, ferries, roads, water, sewage, schools, houses, etc), and revenue to the local authority – the latter of which has come in three main forms, as follows:

(a) *Rates*: this is the revenue from a local property tax which rose dramatically once the oil terminal was completed. In the early 1980s nearly 90 per cent of the locally generated revenue came from the oil industry.

(b) *Profit from running the Port of Sullom Voe*: this included the royalty of 1p per barrel and combined to provide income for the Reserve Fund that has been used to provide funds to support economic and business development. Over a ten-year period between 1983 and 93 around £30m was disbursed to local businesses.

Managing Director, AB Associates, Shetlands Islands, Scotland, claims that he had lived in Shetland for over twenty years, and that over this period he had closely monitored the activities of the oil industry as well as the State of the local economy. He had given similar paper in Nova Scotia in 1982 and in 1992 in Prince Edward). For the full text of the paper, see Blackadder, ‘Shetland and the Impact of Oil Development’ < <http://www.naf2000.org/presentation41.html> > (Visited 13/06/02).

¹⁹⁶ The oil is mined by the BP Exploration Operating Co. Ltd.

¹⁹⁷ This was the population in the 1970s, and there has been a little increase over the years. The 1999/2000 population was 22,300. See Blackadder, ‘Shetland and the Impact of Oil Development’ < <http://www.naf2000.org/presentation41.html> > (Visited 13/06/02).

¹⁹⁸ See Blackadder, ‘Shetland and the Impact of Oil Development’ < <http://www.naf2000.org/presentation41.html> > (Visited 13/06/02).

¹⁹⁹ The percentage of unemployed people is low – 2.6 % in 1999/2000.

(c) *Disturbance Payments*: an agreement was signed between the oil industry and the Council in 1975 before work started on the terminal to provide annual payments to compensate for the disruption of oil activity. This was paid into a Trust Fund which is now worth in the order of £200m. The revenue from this fund has been used to fund social, cultural and educational type projects. A subsidiary company was also set up to undertake property development and provide loans and equity to local businesses.²⁰⁰

There is also evidence that the revenue obtained from oil operations has been used to support a wide range of social, cultural, recreational and educational projects, including: a network of leisure centres and swimming pools; facilities for the elderly such as care centres, home improvements and pensioner's bonus; community facilities such as halls; and cultural projects involving music, arts and dialect (Blackadder, 2000).

Interestingly, all these benefits have come at little or no cost to the local environment. According to Blackadder, 'The negative environmental impact from the oil terminal and oil developments have been relatively minor due to precautions taken. There was a small spill of oil (1,174 tonnes) at the terminal in 1978 which resulted in more extensive management systems. The major oil pollution incident over the last ten years came from a passing tanker which had no connection to the oil activity on Shetland. This was the Braer which ran aground and spilled its whole cargo of 85,000 tonnes of oil'.

In summary, oil operations in the Niger Delta, unlike the case in some other regions of the world, such as Shetland, have not yet resulted in any appreciable benefits to the region and its inhabitants – the people are poor and have no jobs in the oil companies, notwithstanding that their local/traditional economy has been

²⁰⁰ See Blackadder, 'Shetland and the Impact of Oil Development' <<http://www.naf2000.org/presentation41.html>> (Visited 13/06/02).

adversely affected by oil operations; and they are lacking in modern facilities, such as tarred roads and hospitals. Yet, oil revenues have been used to finance modern economic and social projects and facilities in non-oil-producing areas of the country, and Nigerians from other regions get virtually all the jobs available in the oil companies, particularly at the most important levels. Significantly, this is arguably against article 2 (3) of the UN Declaration on the right to development which provides that States have the right and the duty to formulate appropriate national development policies that aim at the 'fair distribution of the benefits' resulting from development.

5.3.5. Distribution of Oil Revenue

As stated earlier, oil revenue accounts for over 90 per cent of Nigeria's foreign exchange earnings and over 95 per cent of government annual spending, at the Federal, State and Local Government levels. This situation means that an equitable and acceptable revenue sharing formula must be devised. However, there is evidence to indicate that over the years it has not been possible to devise a formula acceptable to all stakeholders. From available sources, the search for an acceptable revenue allocation formula has a long history, attested by the fact that several commissions/committees have addressed this issue over the years.²⁰¹ This point was well summarized in the report of the Revenue Allocation Committee of the country's Constitutional Conference of 1994-1995, thus:

Besides politics, revenue allocation is about the most contentious issue in Nigeria. Thus, every constitutional development has with it a new fiscal relationship. Also at several other times when there were no constitutional arrangement, some revenue sharing schemes have been recommended for the nation. Consequently, several Revenue Allocation Commissions and/or Committees have been appointed in addition to several decrees on revenue allocation. The number and

²⁰¹ Ikein (1990: 33) suggests that the reason is that 'policy-makers are steered more by regional or political interests than by objectivity'.

frequency of the commissions notwithstanding, no recommended formula met general acceptability. No sooner than some were recommended than they were found wanting.²⁰²

Earlier, in 1987, the Political Bureau set up by the Federal Government to 'conduct a national debate on the political future of Nigeria',²⁰³ had observed in its report:

Revenue allocation or the statutory distribution of revenue from the Federation Account among the different levels of government has been one of the most contentious and controversial issues in the nation's political life. So contentious has the matter been that none of the formula evolved at various times by a commission or by decree under different regimes since 1964 has gained general acceptability among the component units of the country. Indeed, the issue, like a recurring decimal, has painfully remained the first problem that nearly all incoming regime has had to grapple with since independence. In the process, as many as thirteen different attempts have been made at devising an acceptable revenue allocation formula, each of which is more remembered for the controversies it generated than issues settled.²⁰⁴

Evidence shows that over the years, the principles of revenue allocation in the country have vacillated greatly, mostly on the principle of derivation.²⁰⁵ As the Head of State noted in his inaugural address to the 1994 – 1995 Constitutional Conference: 'Since independence [in 1960], successive administrations have grappled with the question of an equitable statutory distribution of revenue from the Federation Account – the question was whether allocation should be based on derivation or on need'.²⁰⁶

Records show that in the 1950s, before the discovery and ascendancy of oil as the

²⁰² See Debates of the Constitutional Conference of 1994 –1995, Volume III (hereinafter, Constitutional Conference Debates) 121, Para. 2778.

²⁰³ See Report of the Political Bureau, March 1987, 3 and 11.

²⁰⁴ See Report of the Political Bureau, March 1987, 169, Para. 10.011.

²⁰⁵ The Revenue Allocation Committee of the Constitutional Conference of 1994 – 1995 noted that: 'The principle of derivation has been applied in Nigeria's past fiscal federalism. Sometimes it was the sole principle and at times it has been thrown to the background' See Constitutional Conference Debates, 123, Para. 2781. See further, generally, Nwabueze (1983: Chapter 11).

²⁰⁶ The whole address is reproduced in the Minutes of Proceedings of the 1994 – 1995 Constitutional Conference (see page 6, Para. 23 for this extract). See also Constitutional Conference Debates, Volume III, 121, Para. 2777. Apart from derivation and need, other principles that had been applied include

primary revenue earner of the Federation, derivation principle was emphasized, to the point that it was at a time 100 per cent.²⁰⁷ At that time, the country's revenue was from agricultural products – cotton and groundnuts from the north, cocoa and rubber from the west, and palm oil from the east.²⁰⁸ However, from the early 1970s, when oil became the major revenue earner for the Federation, the principle of derivation began to be de-emphasized. According to financial statistics of the country, before 1999 the percentage of revenue allocated on the basis of the derivation principle plummeted as follows:²⁰⁹ 100 per cent (1953), 50 per cent (1960), 45 per cent (1970), 20 per cent (1975), 2 per cent (1982), and 1.5 per cent (1984).²¹⁰

Explaining the possible reason for the 50 per cent reduction in the derivation principle in the 1960s, Naanen (1995: 56) states: 'One important feature of this period was the beginning of the rise of petroleum in the Nigerian economy. Mining rents and royalties, instead of going back to the region of origin as before, were now to be shared between the region of origin and the Federal Government and other regions, on a 50-50 basis'. Similarly, another commentator has observed: '[T]here has been disheartening contradictions and inconsistencies in Nigeria, a nation that recognized 100 per cent derivation as a basis for revenue allocation in 1950, but reduced it to 50 per cent at independence; to 45 per cent in 1970; 20 per cent in 1975; 1.5 per cent in

population, equality of States/Local Governments, internal revenue generation, landmass, and terrain. See Ikein (1990: 32).

²⁰⁷ That was between 1953 and 1959. See Naanen (1995: 56). See further Ikein (1990: 29 – 30); Kaiama Declaration 1998, Para. h.

²⁰⁸ On the benefits of the 100% derivation to the cocoa-producing west, it has been observed that it 'was placed in a uniquely advantageous position, which enabled the regional government to implement important social programmes, such as free primary education. This reinforced western educational advantage as well as its commanding lead in the bureaucracy and the professions' (Naanen, 1995: 56).

²⁰⁹ See Naanen (1995: 55 – 57); Pearson (1970: Chapter 9, esp. 142 – 145). See also Kaiama Declaration 1998, Para. h.

²¹⁰ There was a marginal increase to 3 % in 1992. Sources indicate that in 1979 the derivation principle was abandoned altogether in favour of a Special Account for mineral producing areas. See Oyovbaire (1978); Forrest (1995: 53).

1982 and 3 per cent in 1992, as crude oil, found in the Ijaw country [Niger Delta], became the main source of national revenue'.²¹¹

The Niger Delta people contend that the equitable principle of derivation was 'consciously and systematically obliterated'²¹² by successive governments because oil, found in their (minority) area, and not agricultural products of the majority ethnic tribes, is now the sole revenue earner of the Federation.²¹³ They suggest that this is possible because they are minorities in the Federation, with no political power to change things. In their view, they are under the yoke of internal colonialism.²¹⁴ As Ken Saro-Wiwa, a leading figure in the Niger Delta (until his 'unlawful execution' on 10 November 1995 by the Federal Military Government of Nigeria²¹⁵) puts it: 'If the oil had been in any of the majority areas, in Hausa/Fulani country or Yoruba country, the Federal Government would never have seized the royalties'.²¹⁶ This reasoning and argument finds support in the following observation:

²¹¹ See *National Concord*, 11 December 1992: B2).

²¹² See Kaiama Declaration, Para. h.

²¹³ In the words of a former Governor of Rivers State (Chief Melford Okilo): 'Derivation as a revenue allocation criterion is not new in this country. It featured prominently when cocoa, groundnuts, etc., were the main sources of revenue for Nigeria. But it has continued to be deliberately suppressed since crude oil became the mainstay of the country's wealth...simply because the main contributors of the oil wealth are the minorities' (Quoted in Suberu, 1996: 29). See also Kaiama Declaration 1998, Para. h.

²¹⁴ See Naanen (1995: 64). The majority ethnic groups/States insist on 'need' and 'population' as the major revenue allocation principles. However, it has been suggested that 'population' is an unfair revenue allocation principle in the context of Nigeria. According to Ikein (1990: 34) its unfairness lies in the fact that it works 'to the disadvantage of the minority groups in the mineral producing areas; their wealth does not necessarily enhance [their] fiscal capacity...because the State budgets depend on the population-based Federal allocation system'. The Political Bureau also noted in its report of 1987 that there is 'the general opinion that less emphasis should be placed on population as a criterion'. Further, it was stated that 'in fact, most contributors [to the political debate] feel that it is the linkage between revenue allocation and population that has usually led to the inflation of population figures by the States during census'. Moreover, the report suggested that 'it is reasonable to assume that the more populous States should be in a better position to generate more revenue internally'. See Report of the Political Bureau (Abuja, March 1987), 171, Para. 10. 017. The link between revenue allocation and State creation as well as the application of the Nigerian constitutional principle of federal character, has been noted in Chapter 2.

²¹⁵ This was the conclusion of one of Britain's eminent lawyers, Michael Birnbaum, QC, who observed the murder proceedings on behalf of ARTICLE 19 (The International Centre Against Censorship), the Bar Human Rights Committee of England and Wales and the Law Society of England and Wales. See Birnbaum (1995).

²¹⁶ Interview in *Tell*, 8 February, 1993, 31.

The oil producing areas of Nigeria are mostly inhabited by minority groups...These groups lack the power to make any political or economic decision in their favour. The balance of power in Nigeria is such that the national interest reigns supreme over local rights...There seems to be a direct relationship between revenue allocation and the exercise of political power; political decision-makers can apparently reverse at will the formula for sharing national wealth. For example, prior to the oil boom, ...the formulae for revenue allocation were based on the derivation principle, whereby the resource-producing region received the greatest share...²¹⁷

With specific regard to the question of equity to the oil-producing areas in the successive revenue allocation formula, this researcher argued: 'The method of revenue allocation that has been in force over the years has very little regard for the adverse consequences of the impact of the oil industry on the oil producing areas. Nigerian public policy toward the oil producing areas seems to support the questionable view that the national interest supersedes local rights' (Ikein, 1990: 38). In the same vein, a former Federal Minister and first president of the Movement for the Survival of Ogoni People (MOSOP), has noted that the Niger Delta people 'have not demanded the total proceeds from rent and royalties. They have always said that since they live in a Federation, they must be their brothers' keepers. An equitable portion of the proceeds is what they have always asked for'. He argued that, 'to deny them everything in the face of the massive pollution and degradation of their environment is totally inhuman'.²¹⁸

It is remarkable that there are signs of a new beginning. For the first time in many years, it seems the principle of derivation has been recognized again as an important and equitable principle of revenue allocation in the Federation. The Constitutional Conference of 1994 – 1995 recommended the adoption of 13 per cent derivation principle in any future revenue allocation formula in the country, and this

²¹⁷ Ikein (1990: 28 – 29).

was enacted in Section 162 of the 1999 Constitution of the Federal Republic of Nigeria,²¹⁹ The Section provides in part:

(1) The Federation shall maintain a special account to be called “the Federation Account” into which shall be paid all revenues collected by the Government of the Federation, except the proceeds from the personal income tax of the personnel of the armed forces of the Federation, the Nigeria Police Force, the Ministry or Department of Government charged with responsibility for Foreign Affairs and the residents of the Federal Capital Territory, Abuja.

(2) The President, upon the receipt of advice from the Revenue Mobilisation Allocation and Fiscal Commission, shall table before the National Assembly proposals for revenue allocation from the Federation Account, and in determining the formula, the National Assembly shall take into account, the allocation principles especially those of population, equality of States, internal revenue generation, land mass, terrain as well as population density.

Provided that the principle of derivation shall be constantly reflected in any approved formula as being not less than thirteen per cent of the revenue accruing to the Federation Account directly from any natural resource²²⁰ (Italics mine).

It is interesting to note that the recommendation of the Constitutional Conference (as contained in the above ‘new’²²¹ constitutional provision) was based on the adoption of the report of its Committee on Revenue Allocation, which had recommended it. In making the recommendation, the Committee had justified its position thus:²²²

²¹⁸ Leton (n.d) – quoted in Naanen (1995: 57).

²¹⁹ This is the current constitution of the country.

²²⁰ The original draft contained a further clause, which could have diminished this percentage, as the money needed to fund the Niger Delta Development Commission (NDDC) (see below) would have been part of it. The clause states: ‘So however, that the figure of the allocation for derivation shall be deemed to include any amount that may be set aside for funding any special authority or agency for the development of the State or States of derivation’ (Section 163 (2) of the 1995 Draft Constitution – Contained in Volume I of the Report of the Constitutional Conference 1995). See also Report of the Constitutional Conference, Volume II, Resolution 19 (on Revenue Allocation), 142. From every indication, this is a reflection of the arguments and wish of the majority-ethnic-group-dominated Constitutional Conference. See Volumes II and III of the Constitutional Conference Debates, 1994/95.

²²¹ In the sense that it was not contained in the 1979 Constitution of Nigeria, of which the current Constitution is almost a verbatim reproduction.

²²² Constitutional Conference Debates, 1994 – 1995, Vol. III, 123, Paras. 2781 – 2782. However, the Committee could not reach a consensus on the weight to be assigned to the principle. Suggestions ranged from 5 per cent to 15 per cent. It was only after much debate that the whole Constitutional

Derivation is a factor of fiscal federalism which ensures that each unit of government contributes to the national coffers and receives equitably in return through revenue allocation. Each unit is, therefore, encouraged to work hard in baking a larger national cake from which it receives in proportion to its contribution. Derivation is, therefore, basically a reward for noble efforts of revenue generation. However, that is not all, *derivation can also be seen as compensation for the loss in revenue or other economic activities through the utilization of the land of any unit of governments [or communities] for national resource generation. Still derivation can be utilized for upgrading and reclaiming land that has been degraded in the process of mineral exploitation and exploration. Derivation can also be put in place as payment usually in rent for the use of land and/or payment for exploiting mineral from the land – [that] is royalty...*²²³ (Italics mine).

Although the 13 per cent derivation represents a significant improvement over the years, it does not appear that the Niger Delta people are satisfied with it. There are suggestions that it is still grossly low, and has not *removed the inequity* of the previous years.²²⁴ In fact, there is abundant evidence that the people are presently asking for at least 50 per cent derivation on oil-generated revenue. For example, in their memorandum to the Oputa Panel, they demanded, ‘reparation calculated on the basis of 50 per cent derivation from 1967 to date’.²²⁵ More recently, it was reported that the ‘youths, elders and Government officials of the Niger Delta through the Committee on Special Security on Oil Producing Areas have submitted a demand to

Conference agreed that it should be 13 per cent. See Report of the Constitutional Conference, Volume II, 142.

²²³ Constitutional Conference Debates, 1994 – 1995, Vol. III, 123, Para. 2781. The Conference noted that: ‘The Committee on Revenue Allocation was of the conviction that the nation has to devise a less crisis-laden approach to the question of revenue allocation...The Committee...held that “allocation should be strictly based on equity and justice, and should serve as inducement to the federating units to achieve self-generating growth...; and since it is based on equity and justice, it breeds peace”.’ See Report of the Constitutional Conference, 1994 – 1995, Volume II, 139.

²²⁴ It seems that the practical calculation of 13 % derivation by the Federal Government produces a figure much lower than 13 % of the derivable revenue. All the Governors of the Niger Delta States have made such allegation. For evidence of this, see ‘South-South Memorandum to Oputa Panel’ < http://www.nigerdeltacongress.com/sarticles/southsouth_memorandum_to_oputa_p.htm > (Visited 11/06/02).

²²⁵ See ‘South-South Memorandum to Oputa Panel’ < http://www.nigerdeltacongress.com/sarticles/southsouth_memorandum_to_oputa_p.htm > (Visited 11/06/02). The memorandum was submitted to the Panel in 2001.

the Federal Government for an increase in derivation from 13 per cent to 50 per cent in order to ensure peace and stability in the region'.²²⁶

Closely associated with the question of derivation and the percentage or quantum of derivation is the issue of onshore-offshore dichotomy. This was a distinction introduced in 1971, whereby offshore oil revenue is excluded from the principle of derivation on the basis that such revenue exclusively belongs to the Federal Government under the International Law of the Sea. On this, the Niger Delta people have argued that it represents 'yet another clever political device to deprive the oil producing States of additional revenue'.²²⁷ To them, the dichotomy is 'unjust, the arguments about continental shelves notwithstanding'.²²⁸ These arguments were addressed to the Political Bureau, set up by a Military Government in 1986, which was persuaded to recommend its abolition. In their report, it was stated: 'The dichotomy between onshore and offshore in the allocation of revenue due to the oil producing States should be abolished, as it is oblivious of the tremendous hazards faced by the inhabitants of the areas where oil is produced offshore'.²²⁹ There is evidence that the Federal Government accepted this recommendation, and the dichotomy was abolished by the Federation Account (Amendment) Decree 1992,²³⁰ which provides:

For the avoidance of doubt, the distinction hitherto made between the on-shore oil and off-shore oil mineral revenue for the purpose of revenue sharing and the administration of the fund for the development of the oil producing areas is hereby abolished.

²²⁶ See 'Niger Delta Demands Increase in Derivation' (*Vanguard*, 2 Feb. 2002). The Committee was set up by the present civilian government of President Obasanjo in 2001 'to ensure the safety and security of oil installations in the area', following a spate of protests against oil company staff in the region. Apart from demanding an increase in the percentage of derivation, the report stated that the people further demanded the provision of facilities such as roads, hospitals, schools, and modern social amenities, training of youths in skills acquisition, and the movement of the headquarters of oil companies to the Niger Delta where they operate.

²²⁷ See Report of the Political Bureau (Abuja, March 1987), 170, Para. 10.012.

²²⁸ See Report of the Political Bureau (Abuja, March 1987), 171, Para. 10.018.

²²⁹ See Report of the Political Bureau (Abuja, March 1987), 172, Para. 10.022 (V).

²³⁰ No. 106 of 1992.

The Constitutional conference of 1994 –1995 did not see any need for the ‘re-introduction’ of the dichotomy. It was stated: ‘We have to avoid a situation where a wrong decision may hinder the exploration and exploitation [of oil] due to opposition by inhabitants of the areas where the...activities are taking place’.²³¹ However, this was not to last. Based on available evidence, the first attempt to officially reintroduce the dichotomy was contained in a letter, which President Obasanjo sent to the Senate during the process of the making of the Niger Delta Development Commission (Establishment, Etc.) Act.²³² In his letter to the Senate, objecting to a provision which requires oil companies to contribute 3 per cent of their respective total annual budget to the fund of the proposed Commission, without distinction as to whether the revenue was derived offshore or onshore,²³³ the president argued:

[T]he provision that Oil Companies operating onshore or offshore in the Niger Delta area should contribute 3 per cent of total annual budgets is on the high side...[The] contribution should relate only to onshore operations because international law will apply to offshore operations and if the entitlements of States were to be related to offshore operations, it will create problems of a monumental nature. *The amount which should be contributed by the Oil-Producing Companies should, therefore, be limited to two per cent of the on-shore annual budgets of the Oil-Producing companies.*²³⁴

However, this attempt failed, and the provision became law after the National Assembly had overridden the President’s veto of the bill.²³⁵ The next attempt was an action filed in early 2001 by the Federal Government against the littoral States of the

²³¹ Constitutional Conference Debates, 1994 – 1995, Vol. II, 292, Para.1423.

²³² No. 6 of 2000. The Act commenced on 12 July 2000.

²³³ The provision states: ‘There shall be paid and credited to the fund established pursuant to subsection (1) of this Section, 3 per cent of the total annual budget of any oil producing company operating onshore and off-shore, in the Niger Delta, including gas processing companies’. (Section 14 (2) (b)).

²³⁴ Emphasis by the author (President Obasanjo). The extract is from a letter entitled ‘Niger-Delta Development Commission (NDDC) Bill 1999’, dated 21 February 2000.

²³⁵ The 1999 Constitution of Nigeria allows the President of the Federation to withhold his assent a legislation (veto) with which he did not agree. However, if the same bill is passed again by the National Assembly with the required majority votes, the President’s assent, which is constitutionally necessary before a bill becomes law, will thereby be overridden, i.e. become unnecessary. The same is true of law-making in a State of the Federation.

Federation; specifically, against the Niger Delta States, in which the plaintiff (Federal Government) asked the Supreme Court of Nigeria to determine the seaward boundaries of the littoral States for the purposes of the application of the 13 per cent derivation principle (hereinafter, 'off-shore oil' case). The plaintiff pleaded and argued that: (i) The natural resources located within the boundaries of any State are deemed to be derived from that State; (ii) In the case of the littoral states comprised in the Federal Republic of Nigeria (that is, the States of Akwa-Ibom, Bayelsa, Cross River, Delta, Lagos, Ogun, Ondo and Rivers²³⁶) the seaward boundary of each of the said States is the low water mark of the land surface thereof or (if the case so requires) the seaward limit of inland waters within the State; (iii) The natural resources located within the territorial waters of Nigeria and the Federal Capital Territory are deemed to be derived from the Federation and not from any State; and (d) The natural resources located within the Exclusive Economic Zone and the Continental Shelf of Nigeria are subject to the provisions of any treaty or other written agreement between Nigeria and any neighbouring littoral foreign State, derived from the Federation and not from any State.²³⁷ Contrary to this, each of the littoral States (including the Niger Delta States) argued that its territory extends beyond the low-water mark onto the territorial waters and even unto the continental shelf and the Exclusive Economic Zone. Accordingly, they maintained that revenues derived from the exploitation of natural resources (specifically oil) located both onshore and offshore are derived from their respective territory, and are subject to the 13 per cent derivation principle.

²³⁶ Although all the littoral states as listed (as well as all the other States of the federation) were joined, it seemed clear that the action was essentially against the Niger Delta States. This is why the case is popularly referred to as 'resource control suit', after the demand of the people of the Niger Delta region.

²³⁷ Paragraph 8 (a – d) of the Statement of Claim. See *A.G., Federation V. A.-G., Abia and 35 others* [2001] 11 NWLR (Pt. 725) 689, at 695 – 6. Against these arguments, the Niger Delta States had maintained that there is no distinction between onshore and offshore oil revenues, and that both are derived from the State in which the oil exploitation took place.

The foregoing arguments were advanced at the hearing of the substantive suit. The court had earlier rejected a preliminary objection raised by the Niger Delta States against the hearing of the suit,²³⁸ and proceeded to hear and determine the suit on the merits.²³⁹ At the conclusion of hearing, the court held, in effect, that offshore oil revenues are not 'derived' from any littoral (component) State, but rather belongs to the Federal Government under the International Law of the Sea.²⁴⁰ In effect, therefore, the decision reintroduced the onshore-offshore dichotomy.²⁴¹

Perhaps expectedly, there is evidence that this decision has fuelled more protests and demands in the Niger Delta region.²⁴² More significantly, the offshore oil

²³⁸ See *A.G., Federation V. A.-G., Abia and 35 others* [2001] 11 NWLR (Pt. 725) 689. The objection was based on a number of grounds, including want of jurisdiction. (The ruling was given on 11 July 2001). Although the action was essentially against the littoral states (particularly, the Niger Delta States), the plaintiff joined all the remaining other States of the Federation on the argument (accepted by the Supreme Court) that the outcome of the case will affect every State of the Federation.

²³⁹ See *A.-G., Federation V. A.-G., Abia State and 35 others (No. 2)* [2002] 6 NWLR (Pt 764) 542. See also 'Revenue Allocation: The Supreme Court Judgment' < <http://www.thisdayonline.com/news/20020406sup01.html> > (Visited 08/04/02).

²⁴⁰ From a strictly legal point of view, the conclusion that offshore natural resources belong to the Nigerian State under international law seems to be unassailable. As one scholar has pointed out, 'international law recognizes the right of States with sea boundaries to all minerals in both the territorial sea and continental shelf of their littoral territory. In the eye of the international law only the Federal Government of Nigeria as a corporate entity has the personality recognized on the international plane. It is therefore the owner of waters and subsoil of our littoral territory and the resources in respect of them up to the limits prescribed by international law [of the sea]...None of the ...constituent units of the federation can lay a claim to any right respecting Nigeria's territorial waters or the continental shelf or the EEZ and the mineral resources in them' (Ajomo, 1983: 334). See also the UN Law of the Sea convention 1982; Ebeku, 'International Law and the Control of Offshore oil in Nigeria' (forthcoming article). A recent example of the exercise of continental shelf rights was the five-year sale of fishing rights by Mauritania to the European Union for £300m, without the consent or agreement of local fishermen. See 'EU deal lets Irish Fishermen off hook' (*Guardian Unlimited*, 20 February 2002). In any case, in the case of the Niger Delta people, a strict application of international law may produce injustice to the people living in the immediate vicinity of the sea. As has been seen in Chapter 3, the adverse impacts of oil operations, both offshore and onshore, affect the environment and the indigenes of the area of operations. This is probably one of the bases of the claims made by the littoral component States and the people.

²⁴¹ From the pleadings, evidence and arguments, this was the logical result of the court's declaration that 'the seaward boundary of a littoral State within the Federal Republic of Nigeria for the purpose of calculating the amount of revenue accruing to the Federation Account directly from any natural resources derived from that State pursuant to Section 162 (2) of the Constitution of the Federal Republic of Nigeria 1999, is the low-water mark of the land surface thereof or (if the case so requires...) the seaward limits of inland waters within the State'. See 'Revenue Allocation: The Supreme Court Judgment' < <http://www.thisdayonline.com/news/20020406sup01.html> > (Visited 08/04/02).

²⁴² For details, see 'Women Protesters Turn Down Pleas to vacate Oil Facility' (*Vanguard*, 15 July 2002); 'Women Storm Nigeria Oil Plant' (BBC Online 9 July 2002: < http://news.bbc.co.uk/hi/english/business/newsid_1763000/1763464.stm > (Visited 19/06/02); 'Nigeria

case raises the issue of 'equitable and fair access to the benefits'²⁴³ of development as an important aspect of the right to development. For example, Article 8 partly provides that States 'shall ensure...equality of opportunity for all...in their access to...the fair distribution of income'.²⁴⁴ In this regard, and having to the environmental and social impacts of oil exploration (see Chapter 3), the outcome of the offshore oil case may well amount to a violation of the international human right to development in relation to the Niger Delta people.

5. 4. Protests and Demands for Equity: Movements for Resource Control

There is considerable evidence that all over the Niger Delta there are protests against what is perceived as *injustice or inequity: among them, non-participation of the Niger Delta people in oil operations; non-payment of compensation or inadequate compensation for land acquired for oil operations or damages arising therefrom; unemployment (particularly in oil companies); undevelopment of the Niger Delta, despite the huge revenue oil contributes to the well being of the Nigerian nation; and inequitable revenue allocation formula in the country (including the reintroduction of the erstwhile onshore-offshore dichotomy).*²⁴⁵ According to a recent report, 'some of these protests are directed specifically at the behaviour of the oil company; some of them are directed rather at the government. Many have a mixture of motives' (HRW,

Women Storm new oil Plants' (BBC Online 17 July 2002: <
http://news.bbc.co.uk/1/hi/english/world/africa/newsid_2134000/2134165.stm > (Visited 19/06/02).

Interestingly, it seems President Obasanjo, who recently re-introduced the dichotomy, is caving in to political pressures which might soon result in the reversal of the Supreme Court's judgement. According to a recent newspaper report, he has sent a bill to the National Assembly, containing a provision to abolish the dichotomy. See 'Nigerians hail bill on Offshore Oil' (*The Guardian*, 6 September 2002).

²⁴³ This expression is from Orford (2001: 139).

²⁴⁴ See further Article 2 (3).

²⁴⁵ See Human Rights Watch (HRW) (1999: 160). It has also been found that some of the protests against oil companies 'concern claims that oil companies have not followed environmental standards' (HRW, 1999: 164).

1999: 166).²⁴⁶ In the course of debates in the Nigerian Constitutional Conference of 1994 – 1995, a representative of Rivers State, Dr. Martyns-Yellowe, summed up the situation thus:

I wish to [give] you a message from Rivers State [Niger Delta], which is that the people want their rights to the ownership of property and control over their resources recognized; and nothing short of that would appease them...[T] here are peaceful protest matches in Rivers State at the moment; people are asking for their rights...²⁴⁷

There is evidence that the protests are, at least, on a monthly basis, and it is not possible to recount these here.²⁴⁸ However, the frequency and character of the protests may be illustrated by the following incidents, which have been reported in national and international press:

- In September 1997, Shell's Diebu flow-station in Bayelsa State, which produces 10,000bpd, was closed for several weeks as a result of compensation dispute with the Peremabiri community. The protesting community members alleged that Shell had refused to pay compensation for fishing nets damaged by an oil spill in June 1997.²⁴⁹

²⁴⁶ Osaghae (1995: 325) notes that the grievances of the Niger Delta people 'have been directed against both the State and the oil companies which have been accused of contributing too little in return for the huge profits they get from oil exploration'. With specific regard to oil companies, it has been noted: 'The evidence in many of the cases suggests that companies benefit from non-enforcement of laws regulating the oil industry, in ways directly prejudicial to the resident population. Alternatively, the oil companies benefit from Federal [laws] that deprive local communities of rights in relation to the land they treat as theirs. Grievances with the oil companies centre on the appropriation or unremunerated use of community or family resources, health problems or damage to fishing, hunting or cultivation attributed to oil spills or gas flares, and other operations leading to a loss of livelihood; as well as oil company failure to employ sufficient local people in their operations or to generate benefits for local communities from the profits that they make' (HRW, 1999: 160). In character, some of the protests consisted of peaceful demonstrations at company property. In other cases, company installations have been occupied, especially flow-stations, causing a close down of production. In this regard, there have been reported cases of damage to company property (including oil installations). Further, some protests have reportedly involved taking some company staff, both Nigerians and expatriates, hostage. See (HRW, 1999: 166).

²⁴⁷ Constitutional Conference Debates, 1994 – 1995, Vol. III, 477, Para. 1804.

²⁴⁸ See, for example, *Annual Reports of the Civil Liberties Organization*. See also HRW (1999: 134 – 158).

²⁴⁹ *Reuters* 6 October 1997.

- In August 1998, the Iyokiri community in Rivers State blocked access to Shell's employees seeking to repair a leak. They were demanding that compensation be paid first, as liability may be denied after the repair.²⁵⁰ Earlier, in March 1997 protesting youths had captured a barge delivering goods to a Chevron installation, holding the crew (seventy Nigerians and twenty expatriates) hostage for three days. They were demanding jobs on the vessels.²⁵¹
- In October 1997, the Odeama flow-station in Bayelsa State was closed for several days by protesting youths, who were demanding employment by Shell.²⁵² Also in October 1997, in a village near Warri, Delta State, youths halted oil production, in protest against gas flare.²⁵³
- In late July and August 1998, a number of workers were held hostage for several weeks on two oil support vessels working for Texaco to repair oil wells 3,000 bpd at the Okubie platform, near Kolomo community. This was in connection with disputes over compensation payments for damages caused by a leakage, which affected the coastline of six communities.²⁵⁴

²⁵⁰ *Reuters*, 19 and 20 August 1997.

²⁵¹ *Reuters*, 14 March 1997.

²⁵² *Reuters*, 9 October 1997.

²⁵³ *Reuters* 21 October 1997.

²⁵⁴ *Lloyd's List*, 27 and 31 July 1998; *Reuters*, 23 and 24 July 1998; *Reuters*, 17, 21 and 24 August 1998.

- In November 1997, a community in Delta state forced the closure of a flow-station for several days, demanding compensation for land acquisition.²⁵⁵
- On 9 October 1998, about 400 youths occupied Shell's Forcados terminal for several hours. They were protesting non-payment of compensation for Mobil's oil spill in January.²⁵⁶
- From 12 to 18 November 1998 eight workers of Texaco oil company were held hostage by youths of Foropah community, near Warri, who were demanding the provision of social facilities in their community and compensation for a recent oil spill.²⁵⁷
- There were series of protests in 1999, following the Kaiama Declaration of 11 December 1998.²⁵⁸
- On 17 March 2000, it was reported that Ijaw youths stormed a Shell's gas plant in a town near Warri, Delta State, holding about 32 staff of the company hostage. They were demanding that Shell should improve a local/community road.²⁵⁹
- Most recently, from 8 July 2002, several protesting women²⁶⁰ (some of them with children strapped on their backs) of Ugborodo and other towns in Warri, Delta State, seized Escravos oil terminal of Chevron Texaco oil company (a major

²⁵⁵ Reuters, 12 and 14 November 1997.

²⁵⁶ Hilary Anderson, 'Nigerians turn to magic in fight against oil firms' (*Independent*, London, 7 November 1998; AFP, 11 October 1998).

²⁵⁷ AFP, 12 – 18 November 1998.

²⁵⁸ See archives of Nigerian newspapers online at: <http://www.nigeriaworld.com>

²⁵⁹ See BBC Online (http://news.bbc.co.uk/1/hi/english/world/africa/newsid_681000/681143.stm > ((Visited 19/06/02).

²⁶⁰ According to reports, they were over 300 in number.

oil terminal in Nigeria's Niger Delta), holding over 700 staff (including American and British citizens) of the company hostage. The unarmed women, supported by their men folk, have threatened that if the staff attempted to leave by force they will strip themselves naked in protest.²⁶¹ According to reports, the women are aggrieved that over 32 years of operations in their area, the company has not been beneficial to them in any way. They are demanding provision of social amenities and employment of their husbands and children in the oil company. More than two weeks after the protests began, reports say the women are still occupying the oil company's facilities, insisting that they will not leave until the company signs an *agreement* with them in response to their demands. (Already, the occupation of the oil facilities is costing the oil company and the Nigerian State huge monetary losses).²⁶²

- Other protests include the Umuechem protest of 1990, when community youths had obstructed Shell's staff from operating, as a means of realising their demand for the provision of roads,

²⁶¹ According to USA Today, 'most Nigerian tribes consider unwanted displays of nudity by wives, mothers or grandmothers as an extremely damning protest measure that can inspire a collective source of shame for those at whom the action is directed' (See report at: < <http://www.usatoday.com/news/world/2002/07/15/nigerian-women.thm> > (Visited 19/06/02).

²⁶² See 'Women Protesters Turn Down Pleas to vacate Oil Facility' (*Vanguard*, 15 July 2002); 'Women Storm Nigeria Oil Plant' (BBC Online 9 July 2002: < http://news.bbc.co.uk/hi/english/business/newsid_1763000/1763464.stm > (Visited 19/06/02).

Apparently in demonstration of their seriousness, the women seized additional facilities recently. See 'Nigeria Women Storm new oil Plants' (BBC Online 17 July 2002: < http://news.bbc.co.uk/hi/english/world/africa/newsid_2134000/2134165.stm > (Visited 19/06/02);

'Women Protesters give 36-point Demands' (*The Guardian* 19 July 2002 – online at: <http://odili.net/news/source/2002/jul/19/4.html> .

electricity, safe water, and other compensation for oil pollution,²⁶³

Apart from the foregoing isolated incidents, there is also evidence of organised and sustained protests and agitations by several local organizations. Although a number of such organizations in the Niger Delta have articulated and made public demands of their perceived rights, there is evidence that, overall, the demands speak in the same language; they ask for the same thing: resource control. Hence, no useful purpose will be served in discussing a large number of them here. In view of this, it is proposed to discuss this issue under three sub-heads, viz.: (i) Demands of the Movement for the Survival of Ogoni People (MOSOP); (ii) Demands of the Ijaw Youth Council (IYC); and (iii) Demands of other groups. For present purposes, these demands are only representative cases.²⁶⁴ Additionally, the variant of resource control advocated by Governors of the Niger Delta States will also be considered

5. 4. 1. Demands of the Movement for the Survival of Ogoni People (MOSOP)

The Movement for the Survival of the Ogoni People (MOSOP) is one of the most well known organizations in the Niger Delta, agitating for equity in oil operations in their area. The Ogonis are a minority group of about 500,000 people in Rivers State. Oil operations began in 1958 in this area. Evidence indicates that since then the Federal Government and the oil companies operating in the area have made a lot of money.²⁶⁵ Based on available evidence, oil operations in the area have caused much environmental and socio-economic damage;²⁶⁶ yet, as suggested above, there is no

²⁶³ See sources cited in HRW (1999).

²⁶⁴ Osaghae (1995: 340) points out that the demands of the Ogoni people are 'consistent with the demands oil-producing areas have made since the 1980s'.

²⁶⁵ Shell and Chevron, in partnership with the Nigerian National Petroleum Corporation (NNPC) as well as oil servicing companies (such as Wilbros) are the companies operating in Ogoniland.

²⁶⁶ See Chapter 3.

evidence of any tangible benefit to the people and the area. As one of their elites put it: 'Although the oil industry has had tremendous impact on the Nigerian economy...its advantages to Ogoni has been almost negative or at most minimal...Neither the Federal nor the State government has shown any desire to improve the area or the quality of the life of the people' (Loolo, 1981: 45).

The MOSOP was formed in 1990 to tackle the alleged inequities.²⁶⁷ In the same year, leaders of the organization and traditional rulers of the component clans of Ogoni presented the Ogoni Bill of Rights (OBR)²⁶⁸ to the Federal Government and the people of Nigeria. The bill consists of two parts. In the first part, the people made certain observations (stated therein to be facts), which include:

- (1) That oil was struck and produced in commercial quantities on our land in 1958...
- (2) That in over 30 years of oil mining, the Ogoni nationality has provided the Nigerian nation with a total revenue estimated at over 40 billion Naira or \$30 million.
- (3) That in return for the above contribution, the Ogoni people have received nothing.
- (4) That today, the Ogoni people have:
 - (i) No representation whatsoever in all institutions of the Federal Government of Nigeria
 - (ii) No pipe-borne water
 - (iii) No electricity
 - (iv) No job opportunities for the citizens...
 - (v) No social or economic projects of the Federal Government
- (5) That the search for oil has caused severe land and food shortages in Ogoni...
- (6) That neglectful environmental pollution laws and substandard inspection techniques of the Federal authorities have led to the complete degradation of the Ogoni environment...
- (7) That Ogoni people lack education, health and other social facilities.
- (8) That it is intolerable that one of the richest areas of Nigeria should wallow in abject poverty and destitution.

²⁶⁷ It has been alleged that prior to its formation, 'the Ogoni's pursuit of economic and political empowerment through the use of formal channels such as political parties (when these were allowed to exist), petitions to the military government, and agitation for a separate State, yielded little tangible benefit' (Naanen, 1995: 64).

²⁶⁸ The OBR was adopted by popular acclaim of the Ogoni people on 26 August 1990 at Bori, Rivers State. See Ogoni Bill of Rights, 1990.

In the second part, which is based on the first, the people demanded the right to self-determination within the Nigerian State, which guarantees them the following, *inter alia*:

- (1) The right to control and use of a fair proportion of Ogoni economic resources for Ogoni development.
- (2) The right to protect the Ogoni environment and ecology from further degradation.

The expression 'fair proportion of Ogoni economic resources' was later defined to mean 'at least fifty per cent of Ogoni economic resources'.²⁶⁹ Significantly, the bill stated that the demands were made 'in the knowledge that it does not deny any other ethnic group in the Nigerian Federation of their rights and that it can only conduce to peace, justice and fairplay and hence stability and progress in the Nigerian nation'. Furthermore, it was stated that the demands were based on the contribution of their oil resources to the Nigerian economy, and the 'right to expect full returns' for their contribution.

The OBR was presented to the Federal Government on 2 October 1990. For over one year, the Government did not respond beyond a mere acknowledgment of receipt. From available evidence, the organization utilized 1991 to publicise the people's case nationally, and on 26 August 1991, at Bori, a general assembly of the people authorised the leaders of the organization to extend their campaign to the international community.²⁷⁰ In December 1992, probably because the government did not address their demands, the organization wrote the three oil companies (including a Nigeria State-owned company) operating in their area, demanding: (1) payment of US\$6 billion as accumulated rents and royalties for oil exploration since 1958; (2) payment of US\$4 billion for damages and compensation for environmental pollution,

²⁶⁹ See Addendum to the OBR, 1991 (adopted 26 August 1991 at Bori, Rivers State).

devastation and ecological degradation; (3) immediate stoppage of environmental degradation (in particular, gas flaring); (4) immediate covering of all exposed high pressure oil pipelines; and (5) initiation of negotiations with Ogoni people 'with a view to reaching meaningful and acceptable terms for further and continued exploration and exploitation of oil from Ogoniland, and to agree on workable and effective plans for environmental protection of the Ogoni people'.²⁷¹

The companies were given 30 days to meet these demands or face a mass protest to disrupt their operations. According to sources, rather than respond to these demands, the companies simply tightened their security and the Federal Government sent in troops to protect oil installations.²⁷² Moreover, a law was made by the Federal Government, which declared demands for self-determination and disruption of oil operations as acts of treason, punishable by death. Nevertheless, at the expiration of the 30 days ultimatum, the people, in their homeland, staged a popular, well-organized and well-attended protest on 4 January 1993.²⁷³ The protest was continued in June, with the boycott of the 12 June Presidential election in Nigeria. According to Naanen (1995: 70), the principal argument for the boycott was that 'Ogoni should not give legitimacy to a President who would swear to uphold a constitution that dispossessed Ogoni people of their natural rights'. Evidence shows that since 1993, 4 January of every year has been marked by mass rally in Ogoniland as Ogoni Day. This is in addition to the fact that the organization now has branches in UK, US and Canada, which operate on a daily basis, in pursuit of the goal of the OBR.

There is evidence that the Nigerian State has responded repressively to the sustained protests and agitations of the people over the years, the high point of which

²⁷⁰ See Addendum to the OBR, 1991.

²⁷¹ For the contents of the letter, see 'Agony of Ogoni Country' (*The Guardian*, Lagos, 28 December 1992).

²⁷² See, by example, Osaghae (1995: 336).

was the 'unlawful' execution of the leader of the organization, Ken Saro-Wiwa, on 10 November 1995. Yet, as the leader declared in his dying declaration, there is abundant evidence that 'the struggle continues'.²⁷⁴

5. 4. 2. Demands of Ijaw Youths Council (IYC)

Like MOSOP, the IYC is another well known environmental justice and equity campaigner in the Niger Delta. However, unlike MOSOP, IYC is a coalition of several local organizations in Ijawland (the largest ethnic group in the Niger Delta). They had come together for the purpose of harmonization of their various demands and to pursue unity of purpose. On 11 December 1998 the Youths gathered at Kaiama, in Bayelsa State, for an all-Ijaw Conference, at the end of which they issued the now famous declaration known as the Kaiama Declaration.

The Declaration is divided into two parts. In the first part, the youths stated, *inter alia*, that: the Ijaw people were an existing nation before colonialism and that the Ijaw nation was forcibly put under the Nigerian State through British colonialism; the quality of Ijaw people is deteriorating as a result of utter neglect, suppression and marginalization visited on the Ijaws by the alliance of the Nigerian State and transnational oil companies; oil revenue accounts for over 80 per cent of GDP, 95 per cent of national budget and 90 per cent of foreign exchange earnings, out of which 65 per cent, 75 per cent and 70 per cent respectively are derived from within the Ijaw nation; notwithstanding the huge revenue contributions of the Ijaw nation, the people and the area get no reward, but suffer avoidable deaths as a result of ecological devastation and military repression; oil operations in Ijawland are reckless, resulting

²⁷³ To coincide with the occasion of the UN Year for Indigenous Peoples.

²⁷⁴ The full text of Ken Saro-Wiwa's Closing Statement to the Special Military Tribunal that tried him of murder charges, can be found at:

<http://www.moles.org/ProjectUnderground/motherlode/shell/kswstatement.html> .

in frequent oil spillages and the flaring of associated gas; and that certain Nigerian legislation, including the Land use Act, the petroleum Act and revenue allocation laws, rob the Ijaw people of their natural rights.

Based on these, the youths demanded self-determination (self-government) within the Nigerian State and the right to control their natural resources, particularly land and oil (popularly abbreviated as the demand for 'resource control'). They also demanded that the Nigerian Federation should be run on the basis of 'equality and social justice'.²⁷⁵ The resolution further contains a 30-day ultimatum, within which the Federal Government was to resolve the demand for resource control, otherwise the youths will take steps to reclaim their land and mineral resources. The ultimatum expired on 30 December 1998, without any specific response by the Federal Government. From available evidence, the youths embarked on protest shortly after the expiration of the ultimatum, and this was 'brutally' ended by the Federal government.²⁷⁶ Apart from the killing of several people, evidence further shows that Odi community in Bayelsa State was 'levelled' by combined troops of the Federal Government, in confrontations with the youths. Yet, it does not seem that the resolve of the youths (supported by their elders) for resource control has been killed.²⁷⁷ In fact, in late 1999, Ijaw youths issued a statement entitled 'Our resource, our life: 100 reasons why the Ijaw nation wants to control its resources', in which they re-affirmed the Kaiama declaration and further justified their demand for resource control.²⁷⁸ The currency and seriousness of the movement for resource control is probably best

²⁷⁵ See Kaiama Declaration 1998.

²⁷⁶ See archived reports of Nigerian newspapers online at: <http://www.nigeriaworld.com> . See also HRW (1999).

²⁷⁷ The demand for resource control as advocated in the Kaiama Declaration was recently reaffirmed in the memorandum of the Niger Delta people to the Oputa Panel. See "South-South Memorandum to Oputa Panel"< http://www.nigerdeltacongress.com/sarticles/southsouth_memorandum_to_oputa_p.htm > (Visited 11/06/02).

²⁷⁸ See archived news at: <http://www.nigeriaworld.com> .

attested by the fact that it appears to be the greatest political problem of Nigeria today. Like MOSOP, there is evidence that there are several Ijaw Youths Organisations worldwide campaigning for resource control on a daily basis.²⁷⁹

5. 4. 3. Demands of Other Groups

As earlier indicated, several other organizations in the Niger Delta have publicly demanded equitable treatment from both the Nigerian Government and the oil companies operating in their areas. In this sub-section, only two of these organizations will further be considered. Although their demands are essentially the same with those of MOSOP and the IYC, the idea of considering them is to demonstrate that the agitation for equity is ubiquitous or widespread in the region.

The first is the demands made by the Movement for the Survival of the Izon (Ijaw) Ethnic Nationality in the Niger Delta (MOSIEND). In October 1992 the organization presented an 'Izon People's Charter' to the 'government and people of Nigeria'. In it, they demanded, among others, compensation for oil revenue derived from their homeland. However, unlike the demand of the IYC, this group demanded 'political autonomy as a distinct and separate entity outside the Nigerian State', with rights to control and use their oil, gas, and other natural resources.²⁸⁰

Secondly, on 1 November 1992, Ogbia people (an Ijaw sub-group of the central Niger Delta, on whose land oil was first discovered in commercial quantities in Nigeria), published their 'Charter of Demands'.²⁸¹ The Charter was drafted by an organization called Movement for Reparation to Ogbia (Oloibiri) (MORETO). Among the demands made are: that the Federal Government should repeal the

²⁷⁹ One example is Ijaw National Congress, USA (INCUSA).

²⁸⁰ The Charter included an extensive discussion on State creation and revenue allocation since independence, showing how the Izon ethnic group has been allegedly marginalized over the years.

²⁸¹ The Charter was signed by over fifty traditional rulers of the people.

constitutional and statutory provisions giving exclusive ownership of oil to the Federal Government, and restore to them their 'rights to at least 50 per cent of oil exploited in our land'; the payment to the landlords of the area (communities) 'all rents and royalties from the revenue from our crude oil since 1956', which was conservatively estimated at £226.5 billion, and the payment of 'the sum of £35.5 billion for the restitution of our environment and devastated ecology and for our development and protection against future effects of oil exploitation'.²⁸²

Like MOSOP and IYC, there is evidence that the various groups (including the above two)²⁸³ are using every means within their disposal – such as press conferences, sabotage of oil installations and peaceful protests from time to time – to pursue their claims. From available evidence, most of the local organizations have become more vociferous since the return of Nigeria to civilian rule in May 1999.²⁸⁴

Lastly, it is important to underline the commonality in the meaning of 'resource control' in the various demands: resource control appears to mean much more than just oil and gas revenue. A cursory look at the details of the various demands suggests that 'resource control' includes the right to be involved in the exploitation of these resources and the management of the environment. Further, it includes rights to land, forests and water. Significantly, the demands are made primarily for the benefit of the 'local communities', and not the administrative entities generally called 'Niger Delta States'²⁸⁵ (although this will ultimately be the result).

²⁸² See Charter of Demands of Ogbia People 1992 (noted in HRW, 1999: 129 – 130).

²⁸³ Further demands include those of Urhobo people (in Delta State), Ikwerre people and Egi people (women group) (in Rivers State).

²⁸⁴ Evidence of this can easily be found in Nigerian newspapers online, such as *Vanguard* (which has a special section dedicated to Niger Delta News: http://www.vanguardngr.com/section/niger_delta.htm).

²⁸⁵ As stated earlier, that is Rivers, Bayelsa and Delta States.

5. 4. 4. Governors of Niger Delta States and Resource Control

Before 1999, the movement for resource control was the business of local communities and organizations. However, in recent years, particularly since the return of Nigeria to democracy in May 1999, governors of the Niger Delta States have joined the communities and groups in the region to agitate for 'resource control'.²⁸⁶ According to one source, there are four possible reasons for their involvement, three of which are: '(1) The dominant position and view in the delta when they arrived on 29 May 1999 was "resource control". To take a contrary view may probably have amounted to committing political suicide; (2) They came into office without an ideology or programme, and 'resource control' becomes a platform to forge one; and (3) It was a convenient issue the Governors could use to compel the Federal Government to implement constitutional provisions relating to revenue devolution or allocation, which the Federal Government was reluctant to let go.'²⁸⁷

Of all, the third reason appears to be the most important reason. Evidence makes clear that contrary to the demands of the local communities and organizations, the Governors' demand, at the lowest level, is for the increase in the percentage of revenue distributed on the principle of derivation; and, at the highest level, the replacement of 'Federal Government control/ownership' with 'State Government control/ownership'. They argue that this is consistent with 'true federalism'. There is no mention of land or forests in their demand, nor is there any evidence that they are seriously concerned with the adverse environmental and socio-economic impacts of oil operations in the local communities where the operations take place. In this regard, there is clearly a conflict between the demands of the people and the demands of the

²⁸⁶ Under the hierarchical command structure of previous regimes (military regimes), it seemed impossible for governors to join or sympathize with local organizations or communities on the issue.

political Governors of the region. At the end, the question is: which of these viewpoints will conduce more to equity and peace in the region. This will be addressed later in this thesis. Meanwhile, it is necessary to briefly consider how the Federal Government has responded towards meeting the demands of the people.

5. 5. Federal Government Response to the People's Demands

There is abundant evidence that the Federal Government's response to the protests and demands of the people is characterized by suppression and repression. In fact, some commentators have described the response as brutal and violative of the human rights of the Niger Delta people.²⁸⁸ However, there is also evidence that the Government has made and is making efforts towards addressing the demands. On the basis of evidence, the Government's strategy for dealing with the socio-economic situation in the region is the establishment of development bodies/institutions to tackle the problems of the region. Evidence indicates that a number of such bodies had been established or proposed over the years. However, only the most recent attempts will be considered here. These are: (1) the Oil Mineral Producing Areas Development Commission (OMPADEC), and (2) the Niger Delta Development Commission (NDDC),²⁸⁹ which recently replaced OMPADEC. These will be considered seriatim.

²⁸⁷ See Douglas, O., 'A Community Guide to Understanding Resource Control' – paper presented at the 4th Environmental Rights Action (ERA) Roundtable in Port Harcourt, Nigeria, 14 June 2001. The full text can be found online at: < <http://nigeriaworld.com/letters/2001/jul/101.html> > (Visited 24/06/02).

²⁸⁸ See, by example, HRW (1999); Frynas (2000: 54 – 57).

²⁸⁹ Established by the Niger Delta Development Commission (Establishment, ETC.) Act 2000 (No. 6 of 2000) (hereinafter, NDDC Act).

5. 5. 1. Oil Mineral Producing Areas Development Commission (OMPADEC)

There is evidence to suggest that OMPADEC was established in response to the complaints and protests of MOSOP (although not necessarily a direct response to the demands of the Ogoni people). Evidence indicates that following the publication of the OBR in 1990, the sustained agitation of the Ogoni people and the restiveness in other parts of the Niger Delta, the Federal (military) Government promulgated a Decree in 1992,²⁹⁰ establishing the Oil Mineral Producing Areas Development Commission (OMPADEC),²⁹¹ and increased the percentage of revenue distributed on the derivation principle from 1.5 per cent to 3.00 per cent.²⁹² The Commission, which had its headquarters in Port Harcourt, the Capital of Rivers State, was declared a body corporate with perpetual succession, which may sue and be sued in its corporate name (Section 1). The objectives or functions of the Commission as stated in Section 2 (1) thereof include:

- (a) to receive and administer the monthly sums from the allocation of the Federation Account in accordance with confirmed ratio of oil production in each State –
 - (i) for the rehabilitation and development of oil mineral producing areas;
 - (ii) for tackling ecological problems that have arisen from the exploration of minerals;
- (b) to determine and identify, through the Commission and the respective oil mineral producing States, the actual oil mineral producing areas and embark on the development of projects properly agreed upon with the local communities of the oil mineral producing areas;
- (c) to consult with the relevant Federal and State Government authorities on the control and effective methods of tackling the problem of oil pollution and spillages;
- (d) to liaise with the various oil companies on matters of pollution control;
- (e) to obtain from the Nigerian National Petroleum Corporation the proper formula for actual mineral production of each State, local

²⁹⁰ Oil Mineral Producing Areas Development Commission Decree 1992 (No. 23 of 1992).

²⁹¹ The action appears to follow the findings and recommendations of the Justice Alfa Belgore Commission of inquiry into the environmental and socio-economic conditions in the Niger Delta region in 1992. See Frynas (2000: 49).

²⁹² Frynas (2000: 48 – 53).

Government Area and community and to ensure the fair and equitable distribution of projects, services and employment of personnel in accordance with recognized percentage production;
(f) to consult with the Federal Government...and oil mineral producing communities regarding projects...

The ultimate aim of the OMPADEC law seems to be to douse growing tension in the region. The Commission consisted of a chairman and one (representative) member each from oil producing States, which were listed as: Rivers State, Delta State, Akwa-Ibom State, Imo State, Edo State, Ondo State, Abia State, and Cross River State. There was also provision for the appointment of other members (not exceeding two) to represent the non-oil producing areas/States (Section 3 (1)).²⁹³

From a close look, it seems the Commission had laudable objectives, although the law did not go far enough towards meeting some of the key demands of the people, such as the payment compensation for past damages suffered as a result of oil operations. Indeed some elements in the region criticized the Federal Government for doing too little to ameliorate the ecological and economic problems of the inhabitants of the region. At that time, these elements demanded an increase from 3 per cent derivation allocation (which the Commission receives monthly for its business) to 10 per cent.²⁹⁴ Other critics condemned the composition of the Commission. For instance, the Ijaw National Co-ordinating Committee argued that the composition excluded representatives of the people. Even more objectionable to some was the inclusion of persons from non-oil producing areas in the Commission. Further, some critics had criticised the mode of appointment of members of the Commission, which was by Presidential fiat. As Chief J.E. Otobo of Delta State argued, the method of

²⁹³ The Head of State made the appointments.

²⁹⁴ See *The Guardian*, 9 March 1993: 28.

appointment could reduce the Commission to a bureaucracy of 'government agents', who may be far removed from the plight of the region and the inhabitants.²⁹⁵

Of all, perhaps, the most damaging criticisms came from those who outrightly rejected the establishment of the Commission. A chief proponent of this view, Ken Saro-Wiwa, argued:

OMPADEC is illogical, an insult and an injury. If you have your own money, why should government set up a Commission to run your money? They are treating us like babies here...OMPADEC is [designed] to bait us and destroy our will to resist injustice.²⁹⁶

Overall, notwithstanding the laudable objectives of OMPADEC, some of the criticisms against it seem to be well-founded. To take one example, the method of appointment did not appear to give the people effective voice or representation in the Commission. There was nothing to suggest or ensure that the 'representative of an oil-producing State' is truly the representative of the people for whose benefit the Commission was established. This may be compared with the recommendation of Willink's Minorities Commission of 1958 *on the composition of a similar body*, that is, the Niger Delta Development Board,²⁹⁷ which clearly gave a place to local communities. According to this Commission:

We suggest that there should be a Federal Board appointed to consider the problems of the area of the Niger Delta...*We suggest that there should be a Chairman and Vice-Chairman appointed by the Federal Government, one representative of the Eastern Region and one of the Western Region Government, preferably Ijaws [as against other ethnic group members of the Region], together with four representatives of the people of the areas, who might conveniently be one from the Western Ijaws [Niger Delta] and three from the Eastern Ijaws, who would be chosen by local bodies [for example, Community Development Committees (CDCs)]...[The Board] should be concerned to direct the development of these areas into channels*

²⁹⁵ *The Guardian*, 9 March 1993: 28.

²⁹⁶ *The News*, 17 May 1993: 25.

²⁹⁷ The Board was established by the Niger Delta Development Act 1961, although, as indicated in Chapter 1, it was never effective, largely because of government's lack of commitment for its statutory assignment.

which would meet their peculiar problems...It should be set up by statute (Italics mine).²⁹⁸

The rationale for having some members of such body 'nominated' or 'elected' by the 'local people' lies in the need to 'include men who are ready to criticize' (Willink Commission, 1958: 96, Para. 32).

While some observers have argued that the performance of OMPADEC over the years was commendable,²⁹⁹ the majority has further criticized the Commission for poor performance. Members of the Commission were accused of high-level corruption, mostly perpetrated in the inflation of contract costs, which were largely paid upfront.³⁰⁰ Besides, the Commission was also criticized for not monitoring the performance of contractors, especially those they have paid 'mobilization fees', with the result that several projects were abandoned.³⁰¹ In fact, evidence suggests that the Commission failed to douse tension in the region, not necessarily because of substantive inadequacies of the establishing Act, but because of other factors, such as corruption and non-accountability, which led to its poor performance. In this situation, the Federal Government abolished the Commission and established a new body/institution (NDDC) in its stead in 2000. The next session will be concerned essentially with what is new in this 'new' body.

²⁹⁸ Willink Commission (1958: 94, Paras. 26 and 28).

²⁹⁹ For instance, Suberu (1996: 39) believes OMPADEC recorded 'impressive achievements'.

³⁰⁰ See Frynas (2000: 49 – 51). The Commission was disbanded in 1996 by the Federal Government, on allegations of corruption, and replaced with a Sole Administrator (Eric Opia), who was sacked in 1998, after he failed to account for the Commission's 6.7 billion Naira (about US\$80 million) (*PostExpress Wired*, 19 July 1998). Investigations were instituted into the alleged corruption, but there is no evidence that any reports have been published.

³⁰¹ To take one example, OMPADEC reportedly financed the construction of Eleme Gas Turbine in Rivers State at a cost of US\$20.7 million in 1993, and at the end of 1995, the project was still uncompleted, and reportedly needed more funds to complete (Frynas, 2000: 50, footnote 105 – citing Okonta and Douglas (2001)).

5. 5. 2. Niger Delta Development Commission (NDDC)

There is abundant evidence to suggest that the present civilian administration of Nigeria (which took office on 29 May 1999) came at a time when the tension in the Niger Delta region was at its apogee, on account of several reasons. Firstly, OMPADEC, with its dismal performance, was moribund. Secondly, the execution of Ken Saro-Wiwa – the leader of MOSOP – in 1995 by the Federal Government, on alleged charges of murder, appear to have given impetus – locally, regionally and internationally – to the struggle for justice and equity in the region. At the local level, several protests were staged, almost on a daily basis, against the Federal Government and oil companies, while at the international level, there was growing concern for the plight of the Niger Delta people and support for their cause, both from governmental and non-governmental bodies.³⁰² Thirdly, the Kaiama Declaration (discussed above) was made few months before the inauguration of the administration. So that the new administration inherited the aftermath of the Declaration. In the circumstance, it would appear, the Federal Government had no option but to intervene,³⁰³ and its solution was the establishment of a ‘new’ institution (NDDC) to replace OMPADEC.

The Act establishing this new ‘development body’ was made in 2000,³⁰⁴ and the new Commission was constituted and became functional in 2001. In its recital, it is described as ‘an Act to provide for the repeal of the Oil Minerals Producing Areas Decree...and among other things, establish a new Commission with a re-organized

³⁰² See Frynas (2000: 47). Countries such as South Africa and Canada as well as NGOs (such as Greenpeace, Amnesty International, Human Rights Watch and Minority Rights Group) obviously sympathise with the Niger Delta people and actively support their cause. From MOSOP sources, Canada granted asylum to several persons from Ogoni, especially after the execution of Ken Saro-Wiwa.

³⁰³ In 1999, following persistent protests, the Federal Government set up a body to investigate the cause of the protests – the Niger Delta Development Panel – headed by Major-General Oladayo Popoola, which found the conditions in the region appalling and made recommendations towards achieving equity and justice in the region. (See *The Guardian*, 28 April 1999). A Ministerial Fact-Finding Team, under the Oil Minister, had made similar recommendations in 1994.

management and administrative structure for more effectiveness; and for the use of the sums received from the allocation of the Federation Account for tackling ecological problems which arise from the exploration of oil minerals in the Niger Delta and for connected purposes'. The Commission derives its funds primarily from contributions from the Federal Government, Governments of oil producing/member States (altogether described as the Niger Delta States), and from oil companies. (The oil companies are statutorily required to contribute 3 per cent of their respective annual budget to the NDDC fund (Section 14 (2)).

In terms of composition, the new Commission was the same as that of OMPADEC, except that three persons, instead of two are now representing the non-oil producing States. Additionally, oil companies and the Ministries of Finance and Environment have one representative each. Other members are the Managing Director of the Commission and two Executive Directors.³⁰⁵ Like OMPADEC members, all the members of the NDDC are appointable by the President of the Federation, subject to the confirmation of the Senate, in consultation with the House of Representatives (Section 2 (a)).³⁰⁶ In the result, the criticism of OMPADEC in this regard equally applies to the NDDC.

With regard to functions, there is also no difference between the NDDC and OMPADEC, apart from drafting styles in some cases. Thus, there is arguably nothing 'new' about the new Commission, apart from the name.³⁰⁷ As a recent report found,

³⁰⁴ Niger Delta Development Commission (Establishment, ETC) Act 2000 (No. 6 of 2000) (NDDC Act 2000).

³⁰⁵ Section 2 (1).

³⁰⁶ The requirement of consultation reflects the change from military/autocratic governance to democratic governance. In practice, representatives of member States of the Commission are nominated by the Governor of the respective State and appointed by the President, after the confirmation of Senate. From inquiry amongst the local people of the area, there was no consultation whatsoever with them before the appointments were made in late 2000. The Commission is directly under the control and direction of the President of the Federation (Section 7 (3)).

³⁰⁷ One innovation, however, is the establishment of an Advisory Committee, consisting of the Governors of the member States and two other persons, appointed from time to time, by the President.

some critics of the Commission in the region have argued that NDDC 'is simply another aloof government agency, another cocoon for official corruption, like the Oil Mineral Producing Areas Development Commission, which the military created a few years ago'.³⁰⁸ This echoes the rejection of OMPADEC by some elements in the region, a view which was later vindicated. Furthermore, other critics have attacked the definition of 'Niger Delta' in the Act, which is synonymous with oil producing areas.³⁰⁹ They consider the definition dubious, and argue that by so defining the region, the Act glosses over the specific ecological and social problems of Niger Delta.³¹⁰

Although it may be too early to assess the performance of NDDC, there is nothing to give any indication that it will succeed where OMPADEC had failed. On the contrary, there is an indication that the old game of corruption is back. Oil companies have specifically made this allegation and have recently declared that they will no longer make their financial contribution unless, and until, they see what the Commission has done in concrete terms in the region with funds already made available to it.³¹¹ In fact, it would appear that the Commission started its failure with the exclusion of the 'real' representatives of the local people in its membership.

Overall, however, what is more important is the question whether NDDC is an effective response to the demands of the people as mentioned above. The indication is that the people do not consider the establishment of NDDC as anything near to their demand for resource control; not even as a solution to their complain of marginalization in employment in the oil companies. Although the functions of the

The Committee has the function of 'advising the Board and monitoring the activities of the Commission, with a view to achieving the objective of the Commission' (Section 11).

³⁰⁸ International IDEA (2000: 152).

³⁰⁹ See Chapter 2 for the various definitions of Niger Delta.

³¹⁰ See International IDEA (2000: 152). (This attack was recently repeated in the South-South Memorandum to the Oputa Panel).

NDDC includes the conception, planning and implementation of programmes for the sustainable development of the Niger Delta area in fields including employment,³¹² there is no indication that this involves the redressing of the lop-sided employment in the oil companies which the Niger Delta people have complained about. Furthermore, there is no specific provision for the remediation of damaged environment and ecosystems; the functions of the Commission appear to be prospective, regardless of previous damages. In addition, it would appear that the people are not carried along in the planning and implementation of development projects that concern them.³¹³ Significantly, this would appear to violate the people's right to development – with particular regard to the right to participate in development. As Orford could say, 'implicit in this aspect of the right to development is the recognition that peoples have the right to determine their model of development'.³¹⁴ Similarly, the Human Rights council of Australia has argued that participation as an aspect of the right to development means that 'people should have control over the direction of the development process, rather than simply being consulted about projects or policies that have already been decided upon'.³¹⁵

Finally, it seems axiomatic that any policy strategy to deal with the demands of the Niger Delta people (such as the NDDC) which does not incorporate plans to directly tackle the notoriously widespread poverty of the local inhabitants, particularly resulting from oil operations, is arguably doomed to fail, since this is one of the critical issues in the protests and demands of the people. The experience of Australia, where a similar scheme was administered, provides a useful lesson for the Nigerian

³¹¹ See 'Oil Firms and NDDC Funding' (*The Guardian*, 16 May 2002).

³¹² Section 7 (1) (b).

³¹³ An indication of this emerged from the fact that the officials of NDDC, without the participation of the people, commissioned the 'master plan' for the development of the region in London in late 2001.

³¹⁴ Orford (2001: 139).

³¹⁵ Human Rights Council of Australia Inc. (1995: esp. 118 – 121).

State. As Young (1995: 184) put it: 'The GNP [Good Neighbour Programme] communities have received new housing, new school and new clinic buildings, fencing and yards, water tanks and vehicles. All of these have been extremely useful. But these were not the only things that people needed. Measures designed to promote employment and training might well have been preferred. Furthermore, all these infrastructure, paid for through the GNP, has to be maintained, and there may well be problems with the funds for that in future'.

At least, so far, the existence of NDDC has failed to douse the tension in the region, which even appears to be growing by the day.³¹⁶ As one author has surmised, except an effective response is adopted, the protests and demands of the local people 'are unlikely to end in the foreseeable future' (Frynas, 2000: 48).

5. 6. Conclusion

This Chapter analysed the benefits of oil operations to the Niger Delta people and the region, with reference to certain indicators such as participation, employment, and development. The analysis was designed to determine how beneficial oil operations have been to the region and its local inhabitants. This is especially important because, in Chapter 3, it has been found that oil operations have tremendous adverse environmental and socio-economic impacts on the region and its inhabitants. The analysis in this Chapter has revealed that while the Niger Delta people bear all the detrimental impacts of oil operations, they receive virtually no benefits from the operations. Apart from the fact that there is no provision for them to participate in oil operations, they have been impoverished by oil operations, and they are largely unemployed, particularly in the oil companies. Moreover, despite the huge revenue

³¹⁶ See Vanguard online for daily reports.

made by the Federal Government and the huge profits made by oil companies from oil operations, the Niger Delta people are among the poorest in Nigeria and the region remains undeveloped. Remarkably, this situation is inconsistent with the rights of the people as indigenous people in Nigeria as well as with their international human right to development.

Unfortunately, previous attempts by the Federal Government to develop the region had failed, and there is a clear indication that the recent establishment of the NDDC is not the answer to the demands of the people, which range far beyond the statutory functions of NDDC. Furthermore, although there is a demand for an increase in the prevailing 13 per cent derivation from oil revenue, the people's definition of 'resource control' goes beyond this, and includes participation in the exploitation of oil and the management of the environment and development of the region. In the end, oil operations in the Niger Delta are arguably inequitable to the region and its inhabitants, and this largely explains the incessant protests and prevailing tension and crisis in the region.

CHAPTER 6

CONCLUSIONS AND RECOMMENDATIONS

6. 1. Summary of Findings and Conclusions

This thesis analysed the environmental and equity issues involved in the exploitation of oil in Nigeria's Niger Delta by a combination of international law and socio-legal approaches. The main thrust of the investigation is to determine the causes of the prevalent oil-related protests in the region, which has resulted in a state of crisis and tension in the region.

As a foundational point of departure, this thesis commenced with an inquiry into the characteristics of the Niger Delta region and its inhabitants. It was found that the inhabitants of the region are a minority group as well as indigenous people in the country, dominated and internally colonised by members of the majority ethnic groups who took over from the colonial masters. Before oil assumed national economic importance, agricultural products of the majority ethnic groups were the mainstay of the country's economy and the governments controlled by them used the revenue from these to develop their area, while the Niger Delta region was neglected. It was further found that the Niger Delta people are unhappy about the economic arrangements in the country since oil, found in their area, displaced agriculture as the mainstay of the country's economy. This finding is important in the context of the present oil-related protests of the Niger Delta people.

Another important finding of this thesis is that oil is of central importance to the Nigerian economy, but its exploitation is in conflict with both the customary laws of the Niger Delta people as well as their rights as indigenous peoples. Most importantly, in this regard, the ownership of oil is constitutionally, statutorily and exclusively vested in the Federal Government, with no room for the participation of

the indigenous people of the (Niger Delta) region where the exploitation takes place. To this extent, it was concluded that Nigerian domestic law is a major factor in the oil-related protests. Besides, and very importantly, this thesis found that oil operations in the Niger Delta have resulted in adverse environmental and socio-economic impacts, with serious consequences to the Niger Delta people and the region, and this provides a foundation for protests.

In view of the adverse impacts of oil operations, this thesis investigated statutory measures for environmental protection in Nigeria, with particular reference to oil-related environmental problems. In conclusion, it was discovered that the oil companies operating in the region are environmentally reckless and do not comply with relevant environmental standards. Additionally, it was found that some of Nigeria's oil-related environment protection laws are defective and/or inadequate in some respects, thereby permitting unsustainable oil operations. More than this, however, the Nigerian State (for avowed economic reasons) does not enforce the relevant laws that could have helped to control the adverse impacts of oil operations in the Niger Delta region.

Lastly, this thesis found that another cause of the oil-related protests in the Niger Delta is inequity, and this is directly linked to Nigeria's domestic laws. This has come about because, while oil has brought huge benefits to other areas of Nigeria and their people as well as to the oil MNCs, it has devastated the Niger Delta environment; yet the people and the region do not appreciably benefit from oil operations.

Overall, this thesis found that the prevailing protests and tension in the Niger Delta region is caused by a combination of factors, including legal provisions which deprive the people of their rights to land and natural resources, adverse environmental

and socio-economic impacts of oil operations, non-enforcement of relevant environmental protection statutes, and a combination of socio-political and legal factors which deprive the people of the benefits of oil operations (such as employment and infrastructural development) while they bear the adverse impacts of the operations. If a summary may be attempted, it seems the current protests in the Niger Delta are caused by oil-operations-related environmental devastation and inequity in the allocation of benefits of oil operations.

Besides, it can be said that this thesis has provided new insights on the nature of multi-national business in developing countries, and contributed to the debate on the role of multi-nationals in the field of corporate social responsibility. One of the key questions raised is whether multi-nationals should take the place of governments in setting development policy of the region in which they operate, particularly where the government fails to act (as the Nigerian government seems to have done in this case). It was suggested that multi-nationals are corporate citizens of the region of their operations and, therefore, cannot be aloof to the development needs of the local inhabitants. For example, a multi-national company should invest in social services for the community (including schools, hospitals, markets and cultural events). This is particularly significant because, as has been argued by an author, 'TNCs take on public responsibility for development where they enter into long-term investments in sectors of the economy that are essential to developing countries' interests [as the oil industry is in the Nigerian economy]¹, particularly when they have established joint ventures with the State (as is the case in Nigeria) for purposes of their operations.² In any event, while, on the one hand, there is need to avoid being involved in the domestic politics of their host State, MNEs/TNCs may use their influence on the host

¹ De Feyter (2001: 182).

State to bring about a positive impact in the field of development of the region and the inhabitants of the region of their operations.³

More significantly, this argument is particularly important with regard to the development needs of indigenous peoples in light of the fact that activities of MNEs/TNCs are increasingly taking place in the home areas of indigenous peoples globally. Interestingly, such a responsibility is also in the business interests of the MNEs/TNCs. As the current experience of Nigeria shows, 'in situations where the State appears to address only the interests of international economic institutions and corporate investors, the insecurity, vulnerability and frustration of people increases. Violent protests...and populist nationalism emerge as responses to governments that appear to be accountable only to foreign investors'.⁴

Allied to the foregoing is the issue of regulation of corporate activities, particularly in developing countries. It is arguable that given the conflict between economic survival and environmental protection, developing countries are unlikely to enforce high environmental standards that may result in divestment by MNEs/TNCs or discourage prospective foreign investors. On their part, MNEs/TNCs are unlikely to adopt and comply with voluntary codes of conduct that will affect their profit margin, given that their key motive of investment is to make profit.⁵ In the case of international standards, there is yet no binding standard on the issue, apart from the fact that such a standard may also prove ineffective as long as corporations and individuals remain non-subjects of international law. In the result, there is an urgent

² De Feyter (2001: 188).

³ De Feyter (2001: 187 – 188). Some of the MNEs (such as Shell International) are known to operate 'budgets that are more important than those of the most affluent developing countries' (De Feyter, 2001: 174), and accordingly have enormous influence over the governments of the countries where they operate.

⁴ Orford (2001: 154).

⁵ Moreover, as has been pointed out, 'the difficulty with self-regulation is that self-regulation is not law. Self-regulation depends on voluntary compliance, particularly when business principles are adopted at individual company level...' (De Feyter (2001: 190).

need for the best way of ensuring corporate accountability, particularly in the field of environmental protection. Perhaps the solution lies in the suggestion of De Feyter that 'an ideal regulatory system for TNCs would be hybrid in nature, requiring the participation in the standard-setting exercise of all relevant actors, including TNCs, home and host States, intergovernmental organizations, professional associations, and non-governmental and, where relevant, indigenous organizations'.⁶

Furthermore, the international law approach adopted by this thesis has revealed that international law, particularly as it relates to international standards on indigenous rights and the international human right to development, can provide an alternative framework to analyze the problems of indigenous peoples faced with oil operations in their home areas, which hitherto has been largely studied from the perspective of socio-economic, socio-legal and human rights, etc. More specifically, unlike economic, socio-legal and the other previous approaches, the international law approach adopted here allows a focus away from purely economic or human rights considerations in order to address the relationship of oil operations to the region of operations and its inhabitants, and especially from the perspective of collective rights. As indicated in the introduction to this thesis, the analysis here has been guided by a perception of lack of a study of issues relating to oil operations in Nigeria from the perspective of international law – specifically, from the perspective of collective rights. The systematic discussion of the equity aspects of oil operations in the Niger Delta has contributed to an understanding of a subject that has been largely ignored in academic writings, and filled a gap in the literature on oil operations in Nigeria. Significantly, this may serve as a starting point for future research on the impact of oil operations on the Niger Delta indigenous people of Nigeria.

⁶ De Feyter (2001: 191).

6. 2. Recommendations: *Towards Peace and Equity in the Niger Delta*

Ikein (1990: 179) rightly observed that ‘any research may be useful in providing new forms of enlightenment about the subject matter, but it would not be of real value without proposing specific ideas as solutions to the problems discussed’. This thesis investigated the causes of the oil-related protests and tension in the Niger Delta, and the analysis has revealed several problems. In keeping with the need to propose solutions to the identified problems, the following recommendations are made:

1. Provision for Participation and Control of Resources: As already stated, one of the important findings of this study is that ownership of natural resources (including oil) is constitutionally and statutorily vested in the State. The constitutional and statutory provisions (such as contained in the Petroleum Act and the Land use Act) result in a situation where the local/indigenous people of the region neither participate in the process of oil operations nor are they entitled to a share of the royalty paid for the exploitation. This situation, as has been seen, partly contributes to the protests by local people and the movement for resource control. While ownership may remain with the Federal Government, it is recommended that provision should be made for the participation of the Niger Delta indigenous people in the exploitation of oil resource, which is found in their homestead. Specifically, as recommended below, the people should be recognized as customary owners of the land as hitherto and should be consulted and carried along by the Federal Government when any decision is to be made concerning the exploitation of oil. Significantly, this will be in conformity with customary international law relating to the rights of indigenous peoples to land and natural resources, as found in Chapter 2, as well as in compliance

with Nigeria's obligations under the African Charter on Human and Peoples' Rights.⁷ Moreover, a provision for meaningful participation in the entirety of oil operations by the indigenous people of the Niger Delta will be in accord with the international human right to development.⁸

To be meaningful, apart from participation in the making of decisions concerning oil operations (which should include environmental management), participation should include the right to receive a certain percentage of royalties for oil operations. This will ensure that some cash is put directly into the hands of the local people, and this is important from the perspective of their personal interests and the elimination or alleviation of poverty. In this way, the people would have been given a measure of control over their resources, while the Federal Government retains ownership and some measure of control as well. This will entail constitutional and statutory amendments or new legal provisions, specifically, on the issue of exclusive ownership of oil. Significantly, this will be in line with recent developments elsewhere in the world. For example, there is evidence that most indigenous communities in Australia and Canada now receive royalties directly and individually for the exploitation of natural resources in their lands.⁹

There is no question that this recommendation conflicts with the campaign for 'resource control' as canvassed by the Governors of Niger Delta States. Notwithstanding, experience suggests that 'community control' is preferable to 'State Government control', and holds a better prospect for equity and peace in the region. As previously stated, essentially, the Governors are asking for the transfer of ownership of natural resources (particularly oil) from the Federal Government to the

⁷ See Article 21. See also *Communication 155/96 The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights / Nigeria* (Done at the 30th Ordinary Session, held in Banjul, The Gambia from 13 to 27 October 2001), Para. 55.

⁸ See Chapter 5.

States in which they are found; or, in the alternative, an increase of not less than 50 per cent in the derivable revenue. The States will then exploit oil and pay taxes to the Federal Government. According to them, this is consistent with what they call 'true federalism'. The argument in support of this demand is that they need money in order to tackle environmental and other impacts of oil operations as well as to provide social infrastructures for their people. However, experience has shown that the Governors do not use derivation funds for the avowed purposes. Faced with that argument, the Chairman of the Okigbo Revenue Allocation Commission of 1980 queried: 'The Rivers State Government has been receiving money under the principle of derivation. Can you show what you have done to provide these [social] amenities to the oil producing areas?'¹⁰

This query is still valid today. In fact, there is no evidence that the Governors have used the present 13 per cent derivation revenue for such purposes. On the contrary, there is abundant evidence indicating that there has been no positive impact of this whatsoever in the lives and status of the local people since the present civilian administration came into power in 1999. For example, the CNNWorld/Associated Press recently found: 'Despite an influx of millions of dollars from the national government [pursuant to the constitutionally prescribed derivation principle], poverty remains widespread in Bayelsa [State and elsewhere in the Niger Delta]. Half-finished building projects sit abandoned, teachers' salaries go unpaid and allegations of missing funds are widespread.'¹¹ Similarly, a Delta State group (known as the Derivation Front) have 'attributed the recent protest by Ijaw and Itsekiri women in the

⁹ See O'Faircheallaigh (1996); Young (1991).

¹⁰ Okigbo, 1980, Vol. 111, 277.

¹¹ See 'Nigerian State Struggles under civilian rule', available at: <http://www.cnn.com/2002/WORLD/africa/08/11/oil.utopia.ap/index.html> .

Niger Delta to the fact that the impact of the oil fund, which currently goes to the States, was not being felt by the [local] people'.¹²

In the result, although component States should continue to receive revenue from the principle of derivation (as recommended below), this should not be at the detriment of the local people, who should receive some revenue directly.¹³

2. Repeal of Obnoxious and Contentious Statutes: There is no question that certain oil-related statutes, especially the Land Use Act, have contributed immensely to the near-crisis situation in the Niger Delta region. Before its promulgation in 1978, there was no evidence of any serious protest against the government and oil company activities, notwithstanding that the Petroleum Act vested the entire ownership of oil in the Federal Government. As was found, the pre-existing land tenure (customary land law) enabled the local people to participate to a certain degree in oil operations. The Land Use Act ended this important position. More than this, the Act has brought about a denial of compensation to persons who suffer loss of their land for the purposes of oil operations or damage to their property as a result of oil operations. So that, the Act operates unfairly on the local people, compelling protests especially from persons who have lost their means of livelihood as a result of oil operations. Accordingly, in order to end the protests, it is highly advisable to repeal the Act which the people consider obnoxious and oppressive, and this is hereby recommended.

3. Employment of Local People by Oil Companies: The statutory provision for the employment of Nigerians in oil companies should be amended to provide positive discrimination in favour of the Niger Delta people. This is a recommendation for

¹² See 'Delta group seeks derivation fund for oil communities' (*The Guardian*, 13 August 2002). The group contends that the communities and not Niger Delta States Governors are the proper entities entitled to the 13% derivation fund from oil revenues. (Electronic version of the group's claims here is available at: <http://nigeriaworld.com/news/source/2002/aug/headlines/081310-news.html>).

¹³ See generally, 'Resource Control will ensure peace in Niger Delta, Say Youths' (*Vanguard*, 7 August 2002).

affirmative action in favour of minorities, which is not necessarily against national and international legal provisions of equality and non-discrimination.¹⁴ On the contrary, the idea is to give real equality to the minorities. The Nigerian State should not pretend that it is unaware that the minority status of the Niger Delta people is likely to affect, and indeed has affected their chances, in employment issues. The allegation that Nigerians from the majority ethnic groups in the country dominate employment in the oil companies has never been denied, either by the government or any of the oil companies. Since unemployment in the oil companies is one of the critical complaints of the people, it is important to address this issue by providing for the employment of a certain percentage of the local people at the different cadres of the oil companies.¹⁵ Moreover, employment of indigenous peoples is one of the 'emerging rights' of indigenous peoples under relevant international instruments,¹⁶ and is an important aspect of the human right to development.¹⁷

4. Revival of Agricultural Sector: As was found in Chapter 1, the local/traditional economy of the Niger Delta people was based on farming and fishing. That economy has been destroyed by the activities of oil operations, including the impacts of oil spillage and gas flare. So that most of the people have lost their means of livelihood and have no employment in the oil companies as an alternative means of livelihood. In any case, even with the implementation of a positive discrimination to favour their employment in the oil companies, the nature of the extractive industry (such as oil operations) – which is high-technology-based – is such that it cannot employ much people. The result will be that many people may remain unemployed, and this can

¹⁴ On constitutional provision against discrimination, see Section 42 of the Constitution of the Federal Republic of Nigeria 1999.

¹⁵ See generally, 'Clark Chides oil firms over excuses on 3 % NDDC dues' (*Vanguard*, 6 August 2002).

¹⁶ See, for example, ILO Convention No. 169 (Art. 20).

¹⁷ See Declaration on the Right to Development, Art. 8.

provide a germane ground for the continuation of protests. Hence, in order to avoid this likely situation, it is recommended that oil revenue should be made to have inter-sectoral impact which has hitherto not been the case; the Federal Government should invest in projects to revive the country's moribund agricultural sector which has been found capable of employing a large number of people. In Shetland Islands¹⁸ and Malaysia,¹⁹ the governments have successfully adopted this approach, to the benefit of the people. Moreover, it is remarkable that revival of the agricultural sector will involve certain actions beyond investments in agricultural projects; it will also involve the implementation of relevant statutes and policies to remediate degraded lands and protect it from future degradation.

5. Reform of Nigerian land Law: The distinction in Nigerian land law between land and sub-surface resources (that is, natural resources entrapped in land) is artificial and should be abolished. The law must first recognize that land includes natural resources entrapped and supported by land, while the State can reserve exclusive ownership of such resources to itself. Additionally, as recommended elsewhere in this Chapter, the State should de-nationalize land, and recognize that land belongs to the people who have traditionally occupied it. This will help to remove the feeling of 'internal colonialism' from the minds of the minority/indigenous and politically weak people of the Niger Delta, thus conducing to peace in the region, while the State can exercise power of eminent domain whenever the need arises (subject to the payment of adequate compensation). Significantly, this will bring Nigeria in conformity with customary international law, which guarantees indigenous peoples the right to land under their customary land tenure system.

¹⁸ See Chapter 5.

¹⁹ See Ikein (1990: 122 – 124).

6. Provision for the Payment of Adequate Compensation: Since acquisition of land for oil operations and damage arising from oil operations entail loss to local peoples, it is important that the governments and oil companies should take the payment of compensation very seriously. The present situation, characterized by non-payment of compensation or the payment of inadequate compensation, has largely contributed to the prevailing protests and should therefore be reformed. Consistent with the Nigerian Constitution and the principles of fairness and justice, there should be adequate statutory provisions for the payment of compensation, both for land acquired for oil operations and for damage arising from oil operations. The present statutes providing for the payment of compensation do not define 'adequate' or 'fair' compensation, and this has resulted in some difficulties (such as the arbitrary fixing of compensation rates). A statutory definition of 'adequate' or 'fair' compensation should be provided immediately,²⁰ and there should be no provision restricting the determination of disputes about entitlement or quantum of compensation to government-controlled administrative bodies (as is the case under the Land Use Act and the Minerals Act). In other words, the regular courts should be allowed to adjudicate on compensation disputes. And to avoid delay, which is endemic in the Nigerian legal system, a special court should be created to handle compensation claims (this can be called 'Compensation Claims Court' (CCC)), with a provision that its decision up to a certain amount of money is final; beyond that, an appeal will lie up to the Court of Appeal. The CCC should be established in as many areas in the region as necessary, and it should not be buoyed down by technical rules of procedures so as to enable illiterate people to present their case without difficulties. Further, where scientific evidence will be required to establish a claim, the court should appoint an expert in

²⁰ The definition should take account of loss of future earnings in the assessment of compensation

government employ to do that, at no cost to the plaintiff and at no extra cost to the State. Where no such expert exists in the civil service, the State should bear the cost of appointing a private expert. This will be a form of legal aid, probably with a provision for contribution by the plaintiff in appropriate cases.

The idea of non-payment of compensation for alleged cases of sabotage should be discarded, and supportive statutory provisions abolished. This is because, in cases where innocent victims are affected, it could lead them to acts of sabotage in retaliation for the damage they have suffered. While saboteurs should continue to be treated as criminals, victims of any oil operations damage should primarily be entitled to compensation, unless it is proved that they are responsible for the damage. The inability to catch saboteurs is a failing of law enforcement agencies, and this should not be visited on innocent persons. Moreover, the presumption of innocence under Nigerian criminal law (which is also constitutionally recognized²¹) should operate to pay compensations to all persons who have not been proved to be guilty of the alleged offence of sabotage.

Finally, to ensure prompt and adequate payment of compensation, a 'Compensation Fund' should be created (pursuant to legal provisions) by the oil companies, including the Nigerian-owned Nigerian National Petroleum Corporation (NNPC), into which the companies will contribute a certain percentage of their annual budget in order to defray large compensation claims that might arise in course of their operations; the minimum amount for the application of this fund should be fixed. This will assist quick response to urgent and large compensation claims, as a result of a large-scale damage (such as the Funiwa-5 oil blow-out of 1980 in Rivers State). Significantly, such a 'fund' will be in accord with Principle 13 of the 1992 Rio

payable.

Declaration on Environment and Development (the Declaration has arguably become part of customary international law²²), which states in part: 'States shall develop national law regarding liability and compensation for victims of pollution and other environmental damage'.

7. Recognition of Social Responsibilities by Oil Companies: Oil companies operate within communities and cannot afford to be aloof to the social needs of the people. Granted that it is the primary responsibility of governments to provide social infrastructure for the people, as 'corporate citizens' of the communities where they operate, companies should recognize the right of the local/indigenous people to development assistance from them. Apart from assisting in promoting cordial community relationship with the companies, this policy will assist to track down saboteurs of oil installations. Although oil companies operating in the Niger Delta have in the past assisted local communities in various ways, there is evidence that the claims of the oil companies in this regard are exaggerated and the assistance inadequate. Of importance also is the possibility that the project (s) received by some communities is not what the people really want. Hence, it is necessary that the communities should be allowed to provide a list of projects which they require and from which the companies will choose, having regard to the priorities set by particular communities. Moreover, in executing community-assistance projects, local people should be largely employed, particularly at the unskilled level. In addition, where there are competent local people to handle technical/skilled aspects, they should not lightly be disregarded.

²¹ Section 36 (5) of the Constitution of the Federal Republic of Nigeria 1999. See also Section 33 (5) of the 1979 constitution.

²² See generally, Final Report Prepared by Mrs. Fatma Zohra Ksentini, Special Rapporteur, U.N. Economic, Social and Cultural Rights Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities (U.N. Doc. E/CN.4/Sub.2/1994/9 (1994)).

8. Reform and Enforcement of Environmental Standards: The bane of the Niger Delta environment, as has been seen, is not necessarily the lack of environment protection statutes. Rather, the relevant statutes are inadequate in certain important respects (such as the special defence permitted under Section 4 (5) of the Oil in Navigable Waters Act) and, most importantly, the statutes are hardly, if ever, enforced. As long as such inadequacies, identified in this thesis, remain there is no likelihood of effective and proper all-round environmental protection, and this has the potential to generate protests in future. Moreover, the non-enforcement of the statutes for the purposes of protecting alleged 'national economic interests'²³ may be seen in ethnic perspective, thus leading to protests presently and in the future. Hence, it is highly recommended that inadequate or improper environment-related provision should be reformed (for example, by repeal) and the relevant authorities should be made to effectively enforce the relevant statutes.

In this context, particularly given the weakness of the Nigerian government in relation to the MNCs, it is important that diplomatic and other channels should be pursued to make MNCs accountable for their activities, particularly in the area of environmental protection and social responsibility. Perhaps one way of achieving this is to include appropriate clauses in BITs (for example, requiring MNCs to comply with environmental standards in their home countries).

9. Protection and Conservation of Biodiversity and Wetlands: The rich biodiversity and the wetlands of the Niger Delta region must not be allowed to be destroyed; already oil operations have adversely impacted on them. The protection of the biodiversity and the wetlands of the region is important for several reasons,

²³ National economic interests are undoubtedly important, but this should be carefully balanced against the interest of the individual or a group (excepting times of extreme national emergency). As Sax observed long ago, 'economic benefits are to be protected against certain kinds of public

including their importance to the local communities (for example, as a source of employment and food). Essentially, protection should involve statutory measures designed to prevent human activities (such as oil operations) from adversely affecting the wetlands or destroying habitats. Presently, the Nigerian law is deficient in this, as in many other, regard.

10. Development Agency and Government Responsibilities: The need for a development agency, such as the Niger Delta Development Commission (NDDC), cannot be denied; but whether it is the panacea to the development needs of the people is a different issue altogether. The importance of such an agency lies in the need for a specialized body to undertake development of the area, a role which may not properly be discharged by the people directly or by the respective State Governments.²⁴

However, this author believes that NDDC cannot provide all the development and other needs of the people.²⁵ The different levels of government – Local, State, and Federal – should not shirk their responsibility to the people in the provision of social infrastructure.²⁶ The agency should be seen as a strategy to more specifically address the developmental needs of the local people, particularly as a benefit of oil operations; it should not replace the responsibilities of governments. As Chief Edwin Clark recently argued: ‘The NDDC...cannot be a replacement of the Federal Government responsibilities towards the Niger Delta people, particularly in the field of road construction, bridges, major water projects and electricity which are annually budgeted for by the Federal Government; and...the Federal Government had budgeted

acquisitiveness, lest the cost of public progress be unfairly thrust upon certain individuals or groups instead of upon the general community which benefits from public enterprises’ (Sax, 1970: 479).

²⁴ In view of this, it is further recommended that part of the funds of the agency (NDDC) should come from a percentage of royalties due to the local people directly (as already recommended above).

²⁵ See the comments made on the limitations of NDDC in Chapter 5.

and executed...such projects in other parts of the country, ranging between N16 billion to N200 billion'.²⁷

11. Development Agency and Participation of the People: It is very important that the local people should have the right to participate in the activities of any agency, such as the NDDC, designed to bring development to them. To achieve this, a statutory amendment will be needed to provide for the oil-bearing communities to elect or select a person who will directly represent their interests in the Board of the Commission, as suggested by the Willink's Commission in 1958. It is improper and undemocratic for the President of the Federation (maybe with the input of the Governor of the relevant States) to appoint persons into such a body without consulting the people whose interests are to be served. Such exclusive appointees are likely to be seen as representing their 'masters' and not the people. Further, the people should also participate in the determination and execution of relevant projects. As suggested in the case of oil-company assisted community projects, the local people should be invited to submit a list of projects, in order of priority, from which development projects will be selected. In this way, there will be no accusation of execution of irrelevant projects. Moreover, the local people should be engaged in the execution of the projects, particularly at the unskilled level, while ensuring that qualified local people handle skilled jobs as well. Significantly, this will be in accord with the right to participation, which is an important aspect of the human right to development²⁸ as well as with emerging rights of indigenous peoples under ILO and UN instruments.

²⁶ In a similar situation in Australia, it was found that conventional government funding agencies 'deliberately reduced their own assistance to these groups' (Young, 1995: 184).

²⁷ See 'Clark chides oil firms over excuses on 3 % NDDC dues' (*Vanguard*, 6 August 2002).

²⁸ See Orford (2001: 138 – 139).

12. Revenue Allocation: Implementation of some of the foregoing recommendations might suggest that revenue allocation will no longer be a contentious issue in Nigeria. However, this will likely not be the case except the principle of derivation remains as an important constitutional principle of revenue allocation in the country. Moreover, the dichotomy between onshore and offshore revenue, which the recent Supreme Court decision has re-introduced, should be statutorily abolished immediately. Apart from being inequitable, it seems to have the potential to generate more protests in the future (especially as it ignores the impact of oil operations in the environment of the littoral States of the Federation), and this can have far-reaching implications for the Nigerian State.

Furthermore, having regard to the important functions that the component States perform, it is recommended that the allocation of revenue by the derivation principle should be raised to 50 per cent. This is not a benefit to the oil producing States, rather it is in the interest of Nigeria. Apart from providing reasonable revenue to the component States, this will encourage the States to exploit other sources of revenue and end the present over dependence on oil revenue, which produces conflicts between economic interests and environmental protection. More significantly, implementation of such a policy will be in accord with the 'right to fair distribution of income' under Article 8 of the Declaration on the Right to Development.

6. 3. The Future of the Niger Delta and its People

This thesis has revealed the pathetic situation of both the Niger Delta region of Nigeria and its people as a result of oil operations. They suffer unmitigated oil-operations-related environmental and socio-economic costs of oil operations,

including the destruction of their local economy and means of livelihood. Yet, they derive no appreciable benefit from the activities of oil companies, which has yielded huge revenue and profits to the Nigerian State and oil companies, respectively. Most seriously, oil operations appear to have increased the mortality rate in the region. As the first President of MOSOP had lamented:

The Ogoni [Niger Delta] case is [one] of genocide being committed...by multi-national oil companies under the supervision of the government of the Federal Republic of Nigeria. It is that of a distinct ethnic minority in Nigeria who feel so suffocated by existing political, economic and social conditions in Nigeria that they have no choice but to cry to out to the international community for salvation...*All one sees and feels around is death. Death is everywhere in [the Niger Delta]...[Niger Delta] people, [Niger Delta] animals [and] [Niger Delta] fishes are dying because of [over 40] years of hazardous environmental pollution and resulting food scarcity* (Italics mine).²⁹

With inadequate and the non-enforcement of environmental protection laws, there is a real likelihood that the situation in the Niger Delta will get to the worst in the near future. At such a stage, there are several possibilities. For example, the people and/or their 'culture'³⁰ may become extinct;³¹ or the current protests may degenerate into a civil conflict/war, which may eventually lead to the extinction of the people, as they have no political or military might at their disposal.³² This might well be a case of 'genocide' (or, at least, 'ethnocide'³³). As Gormley (1976: 19) has aptly pointed out: 'When evaluating the destruction of peoples, [that is] minority groups,

²⁹ Statement issued in 1992 by G.B. Leton < <http://www.mosopcanada.org/info/mosop0370.html> > (Visited 28/06/02). In their most recent complaint to the Oputa panel, the people stated that the existing situation in the region institutes 'inter-generational poverty'.

³⁰ According to one writer, ' "culture" can be defined broadly as the totality of knowledge and practices, intellectual and material, of any particular group within a society or State' (Eaton, 1991: 488, footnote 47).

³¹ According to Eaton (1991: 490), 'cultural extinction is a genuine possibility for indigenous communities threatened by environmental degradation.'

³² See Chapter 1, where it was suggested that the Niger Delta people are under 'internal colonialism' in the Nigerian State.

³³ That is 'the death of a culture in all but from physical form, i.e., a group stripped of its traditional habitat and ability to participate in customary practices' (Eaton, 1991: 489, footnote 51).

because of the destruction of their natural ecology, a new lesson is to be learned: [humans/Niger Delta people have] become the endangered species'. Yet, as one scholar has rightly argued, 'no nation should sacrifice its valuable [human] resources for the sake of short-term monetary benefits. By extracting oil without regard to the side effects or the quality of citizens' health and longevity, the nation does not improve either its social or its economic sector; instead, a declining trend will be onset' (Ikein, 1990: 232).

As respects the region's wetlands and biodiversity, it is clear that they are presently under threat of destruction by reckless and unpoliced oil companies' activities. The destruction of the wetlands will have serious hydrological, environmental and ecological implications, not only to the Niger Delta people but also to the nation and, indeed, all humanity. For example, the destruction of the wetlands and loss of biodiversity will be a great loss to the Niger Delta people, to whom the wetlands and biodiversity perform important functions – for example, in terms of being a source of food and medicinal supply. And, at the international level, the loss of the Niger Delta wetlands which have been scientifically found to be (and also contain species) of international importance will be a loss to all humanity.

In the result, in order to avoid a bleak future for the Niger Delta region (including its wetlands) and its inhabitants, the Federal Government of Nigeria must take steps to implement the recommendations made in this thesis. Although the implementation of the 13 per cent revenue derivation principle and the establishment of NDDC provide an indication that the government is ready to improve the lot of the region and its people, it has been argued above that these measures have not gone far enough to assure a better future for the people. To be sure, NDDC is but a token response to the demands of the people. The government must make an absolute

commitment to enforce environmental protection regulations and ensure that the region is provided with necessary social infrastructure, and the people have basic necessities of life. Only then can peace return to the Niger Delta, and, *a fortiori*, Nigeria. Meanwhile, there is every indication that the protests will continue and may become violent and militant in future, except steps are taken to deal with the substance of the people's demands as recommended here.

6. 4. Directions for Future Research

This thesis has adopted a combination of international law (specifically indigenous peoples' rights) and socio-legal approaches in the investigation of what has been described in various discourses as the 'Niger Delta Question'. In the course of investigations, it was found that the Niger Delta people entered into treaties with the British before colonisation. In 1957/1958, this issue was raised before the Willink's Commission on the fears of Minorities in Nigeria. More recently, both the Ogoni Bill of Rights of 1990 and the Kaiama Declaration of 1998 have alluded to the treaties. The possibility is that the current protests in the Niger Delta are a challenge to the legitimacy of the Nigerian State, although the protesters expressly state that they are seeking self-determination within the Nigerian State. In future, researchers may study the legal status and implications of those treaties, with a view to determining the future relationship of the Niger Delta people to the Nigerian State. This may provide an alternative means of ending the present cycle of protests and violence in the region.

Furthermore, indigenous or rural communities in some parts of the world, such as Australia and Canada, receive royalties for the exploitation of natural resources found in their territories.³⁴ A future researcher may consider a comparative study of

³⁴ See Chapter 5.

the conditions of indigenous/local peoples in these areas with those of Niger Delta people in Nigeria. It will be necessary to explore the factors that have produced the improved situation in those countries and the statutory provisions and policies that sustain them. This may yield some important lessons for tackling the Niger Delta situation in Nigeria.

APPENDIX I

International Instruments on the Rights of Indigenous Peoples

A. ILO Convention No. 107

Article 11 - The right of ownership, collective or individual, of the members of the populations concerned over the lands which these populations traditionally occupy shall be recognized.

Article 12 -

1. The populations concerned shall not be removed without their free consent from their habitual territories except in accordance with national laws and regulations for reasons relating to national security, or in the interest of national economic development or of the health of the said populations.

2. When in such cases removal of these populations is necessary as an exceptional measure, they shall be provided with lands of quality at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. In cases where chances of alternative employment exist and where the populations concerned prefer to have compensation in money or in kind, they shall be so compensated under appropriate guarantees.

3. Persons thus removed shall be fully compensated for any resulting loss or injury.

Article 13 -

1. Procedures for the transmission of rights of ownership and use of land which are established by the customs of the populations concerned shall be respected, within the framework of national laws and regulations, in so far as they satisfy the needs of these populations and do not hinder their economic and social development.

2. Arrangements shall be made to prevent persons who are not members of the populations concerned from taking advantage of these customs or of lack of understanding of the laws on the part of the members of these populations to secure the ownership or use of the lands belonging to such members.

Article 14 - National agrarian programmes shall secure to the populations concerned treatment equivalent to that accorded to other sections of the national community with regard to--

- (a) the provision of more land for these populations when they have not the area necessary for providing the essentials of a normal existence, or for any possible increase in their numbers;
- (b) the provision of the means required to promote the development of the lands which these populations already possess.

B. ILO Convention No. 169

Article 13 -

1. In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned

of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.

2. The use of the term "lands" in Articles 15 and 16 shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use.

Article 14-

1. The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.

2. Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.

3. Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned.

Article 15 -

1. The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.

2. In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.

Article 16 -

1. Subject to the following paragraphs of this Article, the peoples concerned shall not be removed from the lands which they occupy.

2. Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned.

3. Whenever possible, these peoples shall have the right to return to their traditional lands, as soon as the grounds for relocation cease to exist.

4. When such return is not possible, as determined by agreement or, in the absence of such agreement, through appropriate procedures, these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. Where the peoples concerned express a preference for compensation in money or in kind, they shall be so compensated under appropriate guarantees.

5. Persons thus relocated shall be fully compensated for any resulting loss or injury.

Article 17 -

1. Procedures established by the peoples concerned for the transmission of land rights among members of these peoples shall be respected.

2. The peoples concerned shall be consulted whenever consideration is being given to their capacity to alienate their lands or otherwise transmit their rights outside their own community.

3. Persons not belonging to these peoples shall be prevented from taking advantage of their customs or of lack of understanding of the laws on the part of their members to secure the ownership, possession or use of land belonging to them.

Article 18 -

Adequate penalties shall be established by law for unauthorised intrusion upon, or use of, the lands of the peoples concerned, and governments shall take measures to prevent such offences.

Article 19 - National agrarian programmes shall secure to the peoples concerned treatment equivalent to that accorded to other sectors of the population with regard to:

(a) The provision of more land for these peoples when they have not the area necessary for providing the essentials of a normal existence, or for any possible increase in their numbers;

(b) The provision of the means required to promote the development of the lands which these peoples already possess.

C. UN Draft Declaration on the Rights of Indigenous Peoples

Article 25 - Indigenous peoples have the right to maintain and strengthen their distinctive spiritual and material relationship with the lands, territories, waters and coastal seas and other resources which they have traditionally owned or otherwise occupied or used, and to uphold their responsibilities to future generations in this regard.

Article 26 - Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used. This includes the right to the full recognition of their laws, traditions and customs, land-tenure systems and institutions for the development and management of resources, and the right to effective measures by States to prevent any interference with, alienation of or encroachment upon these rights.

Article 27 - Indigenous peoples have the right to the restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, used or damaged without their free and informed consent. Where this is not possible, they have the right to just and fair compensation. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status.

Article 28 - Indigenous peoples have the right to the conservation, restoration and protection of the total environment and the productive capacity of their lands, territories and resources, as well as to assistance for this purpose from States and through international cooperation. Military activities shall not take place in the lands and territories of indigenous peoples, unless otherwise freely agreed upon by the peoples concerned.

States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands and territories of indigenous peoples.

States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

Article 30 - Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands, territories and other resources, including the right to require that States obtain their free and informed consent prior to the approval of any project affecting their lands, territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. Pursuant to agreement with the indigenous peoples concerned, just and fair compensation shall be provided for any such activities and measures taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Article 31- Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, environment and entry by non-members, as well as ways and means for financing these autonomous functions.

APPENDIX II

African [Banjul] Charter on Human and Peoples' Rights

adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982),
entered into force Oct. 21, 1986.

Preamble

The African States members of the Organization of African Unity, parties to the present convention entitled 'African Charter on Human and Peoples' Rights',

Recalling Decision 115 (XVI) of the Assembly of Heads of State and Government at its Sixteenth Ordinary Session held in Monrovia, Liberia, from 17 to 20 July 1979 on the preparation of a 'preliminary draft on an African Charter on Human and Peoples' Rights providing *inter alia* for the establishment of bodies to promote and protect human and peoples' rights';

Considering the Charter of the Organization of African Unity, which stipulates that 'freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples';

Reaffirming the pledge they solemnly made in Article 2 of the said Charter to eradicate all forms of colonialism from Africa, to coordinate and intensify their cooperation and efforts to achieve a better life for the peoples of Africa and to promote international cooperation having due regard to the Charter of the United Nations. and the Universal Declaration of Human Rights;

Taking into consideration the virtues of their historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples' rights;

Recognizing on the one hand, that fundamental human rights stem from the attributes of human beings which justifies their national and international protection and on the other hand that the reality and respect of peoples rights should necessarily guarantee human rights;

Considering that the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone;

Convinced that it is henceforth essential to pay a particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights ia a guarantee for the enjoyment of civil and political rights;

Conscious of their duty to achieve the total liberation of Africa, the peoples of which are still struggling for their dignity and genuine independence, and undertaking to

eliminate colonialism, neo-colonialism, apartheid, zionism and to dismantle aggressive foreign military bases and all forms of discrimination, particularly those based on race, ethnic group, colour, sex, language, religion or political opinions;

Reaffirming their adherence to the principles of human and people' rights and freedoms contained in the declarations, conventions and other instrument adopted by the Organization of African Unity, the Movement of Non-Aligned Countries and the United Nations;

Firmly convinced of their duty to promote and protect human and people' rights and freedoms taking into account the importance traditionally attached to these rights and freedoms in Africa;

Have agreed as follows:

Article 1

The Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Chapter and shall undertake to adopt legislative or other measures to give effect to them.

Article 16

1. Every individual shall have the right to enjoy the best attainable state of physical and mental health. 2. States parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

Article 19

All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.

Article 20

1. All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.

2. Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community.

3. All peoples shall have the right to the assistance of the States parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.

Article 21

1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.
2. In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.
3. The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law.
4. States parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity.
5. States parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practiced by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources.

Article 22

1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind. 2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development.

Article 24

All peoples shall have the right to a general satisfactory environment favourable to their development.

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