RESOLVING THE CONFLICTS IN NIGERIA'S OIL INDUSTRY - A CRITICAL ANALYSIS OF THE ROLE OF PUBLIC PARTICIPATION

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RESOLVING THE CONFLICTS IN NIGERIA'S OIL INDUSTRY: THE CRITICAL ROLE OF PUBLIC PARTICIPATION

By

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ABSTRACT

This study examines the role that law plays in producing and exacerbating instability in the Nigerian oil-industry, and how it might serve as a veritable tool in the quest for the restoration of order and legitimate authority, sustainable peace and development in the Niger Delta region that hosts it. The central thesis is that the regulatory framework which governs the oil industry overwhelmingly bestows ownership and control of that strategic sector on the federal government in ways that alienate host oil communities and frustrates these communities from any meaningful participation in the industry. At the same time, traditional subsistence opportunities are foreclosed by the environmental consequences of long years of oil production activities. These situations, in turn, are precipitating the worst kinds of community anomie and disorders as well as a regime of state repression in the Niger Delta.

The study utilises the environmental justice theory to analyze Nigeria's oil-industry's regulatory framework; particularly those that implicate ownership and management of oil (including the distribution of oil revenues), landholding and environmental protection. A major finding of the study is that these legal provisions not only contribute to the erosion of public trust but also undermine host-communities' rights to participate actively in the management of the oil-industry. It suggests that attempts to resolve the on-going conflicts have failed, for the most part, due to neglect of the rights-based context in which host-communities are now demanding greater participation and ownership. In essence, notions of 'recognition' and 'distribution' are central to the resolution of the crisis. It concludes by recommending that environmental human rights should be constitutionally recognized as the foundation for other requisite public participation initiatives.

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TABLE OF CONTENTS

Abstract..... ii

Acknowledgements.....iii

Dedication.....v

Table of Content.....vi

Table of Cases.....xii

Table of Statutes.....xv

CHAPTER 1: OVERVIEW.....1

1.1 Background to the Study.....1

1.2 Statement of the Problem.....6

1.3 Objectives of the Study.....15

1.4 Justifications of the Study.....16

1.5 Organization of the Study.....24

1.6 Methodology.....25

CHAPTER 2: THE THEORETICAL FRAMEWORK: AN ENVIRONMENTAL JUSTICE PARADIGM.....28

2.1 Environmental Justice Theory: An Introduction.....28

2.2 Environmental Justice: Defining the Paradigm.....29

2.3 Historical Development of Environmental Justice.....34

2.4 Philosophical Underpinnings of Environmental Justice.....38

2.4.1 The Philosophy of Justice.....39

2.4.2 Critique of Rawls and Construction of an Environmental Justice Theory.....42

2.4.3 The Absence of Political and Economic Power Model.....52

CHAPTER 3: NIGERIA'S OIL-INDUSTRY.....56

3.1 Introduction.....56

3.2 Definition of the Niger Delta.....57

3.2.1 Defining the term 'Niger Delta'.....57

3.2.2 The Environmental Qualities of the Niger Delta.....59

3.3 Nigeria's Oil-Industry.....61

3.3.1 The Development of the Nigerian Oil-Industry.....62

3.3.2 The Structure of Nigeria's Oil Industry.....65

3.4 The Significance of Oil in Nigeria.....66

3.4.1 The Politics of Oil in Nigeria.....67

3.4.2 Oil and the Nigerian Economy.....73

3.4.2.1 The Positive Impacts of Oil on the Economy.....73

3.4.2.2 The Negative Impacts of Oil on the Economy.....77

3.4.3 The Socio-Environmental Impacts of the Oil on Host-Communities.....84

3.4.3.1 The Environmental Impact of Oil on the Host-Communities.....85

3.4.3.2 The Social Impacts of Oil on the Host-Communities.....93

3.4.4 Historical Context of Conflicts in the Niger Delta.....99

CHAPTER 4: SUSTAINABLE DEVELOPMENT, ENVIRONMENTAL HUMAN RIGHTS AND PUBLIC PARTICIPATION.....105

4.1 Introduction..... 105

4.2 Sustainable Development.....105

4.2.1 Historical Background of the Concept of Sustainable Development.....106

4.2.2 Defining Sustainable Development.....110

4.2.2.1.1 The 'Sectoral' Approach to Defining Sustainable Development.114

4.2.2.1.2 The 'Holistic' Approach to Defining Sustainable Development.119

4.2.2.1.3 Sustainable Development: A Working Definition.....125

4.3 Environmental Human Rights.....126

4.3.1 Definition of Environmental Human Rights.....127

4.3.2 The Nature of Environmental Human Rights.....130

4.3.2.1 The Environmental Approach.....130

4.3.2.2 Human Rights Approach.....131

4.3.2.3 New Rights?.....134

4.3.2.4 No Rights?.....135

4.3.2.4 Observations on the Nature of Environmental Human Rights.....136

4.3.3 Substantive Environmental Rights.....136

4.3.4 Procedural Rights.....142

4.3.4.1 The Right to Environmental Information.....144

4.3.4.2 The Right to Act to Protect the Environment.....146

4.3.4.3 Access to Justice.....148

4.4 Public Participation.....151

CHAPTER 5: THE LEGAL FRAMEWORK REGULATING THE NIGERIAN OIL-INDUSTRY.....158

5.1 Introduction.....158

5.2 The National Policy on the Environment.....159

5.3 The Legal Framework Regulating Nigeria's Oil-Industry.....165

5.3.1 Ownership and Control of Oil Resources.....166

5.3.2 Laws Regulating the Allocation of Oil Revenues.....169

5.3.3 Laws Regulating Landholding.....175

5.3.4 The Compensation Regime.....181

5.3.4.1 The Statutory Regime Regulating Compensation.....182

5.3.4.2 Common Law Principles.....186

5.3.4.2.1 Nuisance.....187

5.3.4.2.2 Negligence.....189

5.3.4.2.3 The Rule in *Rylands v Fletcher*.....193

5.3.4.2.4 Commentary.....196

5.3.5 Laws Regulating Environmental Protection.....198

5.3.5.1 The Petroleum Laws.....198

5.3.5.2 Environmental Regulation.....202

5.3.5.2.1 Environmental Impact Assessment Act.....204

5.4 Conclusion.....208

CHAPTER 6: RESPONSES TO THE LEGAL REGIME: THE PERPETUATION OF VIOLENCE.....211

6.1 Introduction.....211

6.2 The Eras of Response.....212

6.2.1 Pre-Independence – 1978.....213

6.2.2 1978-1990.....221

6.2.3 1990-1999.....226

6.2.4 1999-2007.....238

6.2.4.1 Host Community and State Responses.....239

6.2.4.2 Federal Government Responses.....243

6.2.4.3 Oil-Companies' Responses.....250

6.3 Concluding Observations.....257

CHAPTER 7: PUBLIC PARTICIPATION IN THE NIGERIAN OIL INDUSTRY: PROSPECTS AND PROBLEMS.....262

7.1 Introduction.....262

7.2 The Argument against Increased Derivation and Resource Control.....262

7.3 The Imperative of Public Participation in Nigeria's oil-Industry.....271

7.3.1 Substantive Environmental Rights in Nigeria's Oil-Industry.....275

7.3.1.1 Gbemre's Case.....276

7.3.1.2 Substantive Rights to a Healthy Environment and the Constitution..283

7.3.2 The Role of Procedural Rights.....289

7.3.2.1 The Right to Information.....290

7.3.2.2 The Right to Participate in the Decision-Making.....294

7.3.2.3 Access to Justice.....297

7.4 Conclusion.....303

CHAPTER 8: CONCLUSIONS: INTEGRATING ENVIRONMENTAL HUMAN RIGHTS IN NIGERIA - THE WAY FORWARD.....306

8.1 Integrating Environmental Human Rights in Nigeria - The Way Forward.....306

8.2 Conclusion.....315

BIBLIOGRAPHY.....318

TABLE OF CASES

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CHAPTER ONE: OVERVIEW

1.1 Background to the Study

The oil rich Niger Delta region of Nigeria is well known for its vast oil reserves that have created immense wealth for the nation and the companies that exploit the natural resource. However, the region remains otherwise undeveloped and barely reflects any positive development index as measured under the sustainable development paradigm. Development under this paradigm refers to the qualitative improvement in the standard of living of human beings rather than a quantitative increase.[1] In essence, development is now measured in terms relative to access to economic, social and environmental factors necessary to improve living standards rather than narrow economic growth indicators as was previously the norm. Ironically, the presence of the oil-industry in Nigeria's Delta region has contributed to the regions state of underdevelopment.[2] The environment has been polluted by oil exploration and production activities and the right to public participation of the host-communities in the industry they host has been hindered over the years. Moreover, the region's inhabitants have not received adequate benefits from the industry they host. This above state of affairs has pitted the host-communities against the oil-industry personified by the Federal Government and the oil-multinationals that it partners in exploiting the resource via joint-venture agreements and production-sharing contracts.

The Niger Delta region in this thesis refers generally to Nigeria's oil-bearing states. These include Abia, Akwa-Ibom, Bayelsa, Cross River, Delta, Edo, Imo, Ondo and Rivers States.

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[1] J Harris, 'Basic Principles of Sustainable Development', (Global Development and Environment Institute Working Paper 00-04 2000) <http://ideas.repec.org/p/wpa/wuwpdc/0106006.html> accessed 12 May 2005.

[2] See generally, D Omoweh, *Shell, the State and Underdevelopment of the Niger Delta: A Study in Environmental Degradation* (African World Press, Trenton, NJ 2001).

Geographically, the region is one of the largest deltas in the world and is made up of a complex system of wetlands and drylands. As is characteristic of vast swamp and forest areas, it is rich in biodiversity with many unique species of plants and animals.[3] Before the discovery of crude-oil, the region sold rubber and palm produce from its vast plantations to British traders. With the discovery of oil in commercial quantities in the late 1950s and the consequent revenue that accrued, attention shifted from agricultural produce to the exploitation of crude-oil with the Federal Government taking an interest in the developing industry. However, despite the abundance of natural and human resources in the region, it has one of the lowest development indices in the country. The region's Gross National Product (GNP) per capita is below the estimated national average of $260 and it is even lower in the riverine and coastal areas.[4] The level of education is below the declining national average. Although approximately three-quarters of Nigerian children attend primary school, attendance at primary schools in the Niger Delta region has dropped to less than a third and illiteracy is presumably correspondingly higher compared to the level on attainment of independence in 1960.[5] In Ogoni-land for example, only a few households have electricity, there is one doctor per 100,000 people and child mortality rates are the highest in the nation. Unemployment in that area is about 85% with close to half the youth population having migrated away in search of work. Life expectancy is barely 50 years, substantially below the national average.[6] The above statistics are quite typical of the other Delta communities, though they may be worse still in some instances. In Oloibiri where oil was first discovered

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[3] Human Rights Watch, *The Price of Oil: Corporate Social Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities* (Human Rights Watch/Africa, Washington D.C. 1999), 53.

[4] *Human Rights Watch* (n 3) 155.

[5] *Human Rights Watch* (n 3) 155.

[6] M Watts, 'Petro-Violence: Some Thoughts on Community, Extraction and Political Ecology', Workshop on Environment and Violence, University of California, Berkeley, September 24-26, 1988, 15.

in commercial quantities, there is not a single kilometre of all-season road and the community remains 'one of the most backward in the country'.[7]

The environmental conditions of the region have deteriorated since the commencement of commercial exploitation of oil in the area. Despite claims by the oil-companies operating in the region that their activities are not the main cause of the manifest environmental devastation, these operations have evidently contributed immensely to the worsening state of the environment. The contribution of oil spills and gas flares to the pollution of the environment in the region is indeed significant. According to official estimates from the Nigerian National Petroleum Corporation (NNPC), based on the quantities reported by the oil-companies, approximately 2,300 cubic metres of oil are spilled in 300 separate incidents annually. Statistics from the Department of Petroleum Resources (DPR)[8] indicate that between 1976 and 1996 a total of 4,835 incidents resulted in the spillage of at least 2,446,322 barrels of which an estimated 1,896,930 barrels (about 77 percent) were lost into the environment.[9] With regards to gas flaring, about 2.2 billion cubic feet of associated gas is flared everyday making Nigeria the 'world's biggest flarer of gas in absolute and proportionate terms.'[10] Oil has also impacted negatively on the social existence of the region.

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[7] T Furro, 'Federalism and the Politics of Revenue Allocation in Nigeria' (PhD thesis, Clark Atlanta University 1992), 282 cited in M Watts, 'Petro-Violence: Some Thoughts on Community, Extraction and Political Ecology', Workshop on Environment and Violence, University of California, Berkeley, September 24-26, 1988, 15.

[8] The DPR is the government body that is tasked with supervisory roles over Nigeria's oil industry.

[9] Environmental Resources Managers Ltd., 'Niger Delta Environmental Survey Final Report, Phase1, Volume 1' (Environmental Resources Managers Ltd., Lagos 1997) 249.

[10] Environmental Rights Action (ERA), *Gas Flaring in Nigeria: A Human Rights, Environmental and Economic Monstrosity* (ERA, Netherlands 2005), 13.

Principally in this regard are the human rights violations of region's inhabitants that occur during the cycle of events premeditated to promote the unhindered exploration and production of oil.[11]

The enormity of the adverse impacts of the oil-industry lends some credence to the assertion from the host-communities that oil-multinationals operating in Nigeria perform below internationally accepted standards that they adhere to in other jurisdictions; particularly in the developed countries. Initially, these communities expressed their discontent with the oil-industry through political representations to the government and the oil-companies, non-violent demonstrations and litigation but these representations did not yield the positive outcomes they anticipated.[12] Consequently, they began to engage in militant actions including the seizure of oil-company staff, property and installations. The early stages of this militancy were localized as actions were often taken at the community level involving a few villages at most. The response from the oil-industry was repressive as the State's security personnel were invited to quell restiveness directed at it. The frequent clashes between the host-communities and the security forces transformed the Niger Delta into a theatre of repeated violence. In many instances, the resultant violence obscured the cause of violence. The situation was no different when the protests are directed against the State to gain attention towards their sufferings as the government's policy is geared towards the unperturbed

[11] Though a large number of human rights abuse cases are published, there are considerably a lot more that are unreported.

[12] C Ukeje, 'Oil Capital, Ethnic Nationalism and Civil Conflicts in the Niger Delta of Nigeria', (PhD thesis, Obafemi Awolowo University 2005), 2.

production of oil.[13] However, the belief among the host-communities is that 'the politics of minority suffocation' is responsible for their marginalization from federal politics in general and the oil-industry they host in particular.[14]

The impoverished state of these communities is a wide contrast to neighbouring ultra-modern and opulent facilities that the oil-companies occupy within the region and the capital city of Abuja built with oil-revenues. It is revealing to note that youths from the Niger Delta actually visited the capital city on the invitation of the then Head of State, General Abacha to participate in his 'Million-Man March' orchestrated as part of his plans to perpetuate himself in power. The youths were astonished at the opulence of the capital city known to be built upon oil-revenues and rather than participate in the planned march, they staged a protest of their own demanding that they be allowed to control the wealth produced from their land.[15] This episode contributed to the youths' belief that the elders of the region who had been at the forefront of early protests against the oil-industry, had compromised the region's interests. The youths have since then taken over the gauntlet of the struggle that became more aggressive and offensive.

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[13] B Ransome-Kuti, 'The Niger Delta and Nigeria's Future' <www.humanrights.de/doc_en/countries/nigeria/background/niger_delta_crisis.html> accessed 15 January 2006.

[14] C Ikporukpo, 'Federalism, Political Power and the Economic Power Game: Control Over Access to Petroleum Resources in Nigeria' (1996) 14 *Environment and Planning C: Government and Policy* 2, 171.

[15] A Usen, 'Obasanjo and Resource Control' <www.nigerdeltacongress.com/oarticles/obasanio%20and%20resource%20control.html> accessed 21 January 2006.

The violence associated with oil-related conflicts has now risen to a crescendo that portends grave consequences for the oil-industry, the Federal Government and global economics. While the oil-companies and the Federal Government have both recorded substantial losses in revenue, the resultant increase in global oil-prices have contributed to rising prices of goods and commodities globally. Consequently, the mode, dimensions and frequency of oil-induced violence in Nigeria can no longer be ignored nor can previously half-hearted measures be assumed to be adequate to resolve the complexity of issues that underlie the persistent agitation. It is therefore important that a holistic strategy towards conflict resolution, effective relationship management and sustainable development be considered to quell the rising insurgency in the region.

1.2 Statement of the Problem

Oil-induced violence in the Niger Delta region has escalated to a point where it can no longer be ignored or regarded as a local problem. From scattered street protests that characterized the restiveness in the region up till about 1990, the agitation to secure a better deal from the oil-industry has since gained proactive dimensions. With the youths now at the forefront of the struggle and the proliferation of arms in the region, the violence has become an international focal point both in the study of global conflicts and international economics.[16] While the impacts of the conflict on the local population have been compared with those in Chechnya, it has adversely affected local and global economies.[17] As the threats of conflicts

[16] See for instance, B Adetoun, 'The Role and Function of Research in a Divided Society: A Case Study of the Niger Delta Region of Nigeria' in E Porter et al. (eds.) *Researching Conflict in Africa: Insights and Experiences* (United Nations University Press, Tokyo 2005) 47-55.

[17] See generally, O Ayadi, Oil Price Fluctuations and the Nigerian Economy' (2005) 29 *OPEC Review* 3, 199-217. See also, R Looney, 'Oil Prices and Globalization; Is there a Connection' (2002) 26 *OPEC Review* 3, 235-259.

and conflicts manifest in the region, the global oil market responds negatively with prices rising in response. Although there are other factors that contribute to oil-price fluctuations; particularly China's growing demand for oil, the market's response to the instability in the Niger Delta reveals that there is a correlation between the threats and actual incidence of violence and price rises. It is important to note at this point that not all violence in the region is 'emancipation-oriented' as there are multifarious reasons for the violence in the region. As Ukeje noted quoting an opinion quoted in the *Today Newspaper*:

> To most Nigerians and indeed the world, the Niger-Delta has become a veritable hotbed of discontent and violence, to others, it represents a bold question mark on our fiscal federal structure and revenue allocation principles. To others still, the Niger-Delta provides a vulnerable angle where mischief-makers reap from massive exploitation under an atmosphere of persistent acrimony.[18]

However, this thesis concentrates on conflicts that are directly induced by the oil-industry. Particularly, it engages with those conflicts that are directly instigated or exacerbated by the legal framework that regulates the Nigerian oil-industry.

The level of these oil-related conflicts has been on the rise especially since the Movement for the Emancipation of the Niger Delta (MEND) joined the fray of youth organizations fighting to achieve what they regard as their 'rights' to participate actively in the oil-industry hosted by their communities. Although the organization has remained 'faceless', it has gained prominence both locally and internationally as its activities have been characterized by precise planning and action. They have claimed responsibility for several devastating actions against the oil-industry including the recent attack on Shell's 'Bonga' offshore facilities.[19] The attack on Bonga is significant for two major reasons. The first is that it is the first time an

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[18] *C Ukeje* (n 12) 298.

[19] Bonga was attacked by MEND on June 19, 2008. See generally, BBC, 'Nigerian attack closes oilfield', 20 June 2008 < http://news.bbc.co.uk/go/pr/fr/-/1/hi/world/africa/7463288.stm> accessed 20 June 2008.

offshore facility had been affected in an oil-related protest action. The general perception in the oil industry before this attack was that deep offshore facilities were too far away from restive communities and thus were safe from 'inland' agitation. In fact, industry operators had begun to express their preference to engage in more offshore operations to avoid the menace of communal agitation that affected their on-shore exploration and production activities. Secondly, the disruption to national output was quite significant as the attack on the facility was on one of Nigeria's prime offshore oil facilities. The attack forced its operator, Shell Nigeria Exploration Petroleum Company[20] to shut the 225,000 barrels per day facility.[21] Although MEND's activities are not novel in the Delta region that now has innumerable militant groups, the role of the group in contemporary struggles aimed against the oil-industry cannot be overstated. While the government and oil-companies claim that they will pursue saboteurs making profit from kidnapping of oil-workers, the group has maintained that it does not profit from such activities. Notable in this regard is that an American oil-worker kidnapped during the attack on Bonga was released without ransom. In several other kidnap cases, the captives were reportedly released without ransom payments thereby tending to confirm that securing ransom payments is not the primary aim of the group as alleged by the Federal Government and oil-companies.[22]

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[20] SNEPCO is a subsidiary of the Shell Petroleum and Development Company (SPDC).

[21] K. Ebiri, 'Why attack on Bonga field was easy, by oil firms' chiefs', The Guardian Newspaper (Lagos 24 June 2008) <http://www.guardiannewsngr.com/news/article03//indexn2_html?pdate=240608&ptitle=Why> accessed; 24 June 2008.

[22] -- 'Militant attack closes Shell oil facility', <http://edition.cnn.com/2008/WORLD/africa/06/19/nigeria.oil/index.html> accessed; 26 June 2008. See also, T Ashby, 'Analysis: Niger Delta militants evolve to greater threats', (Reuters 20 January 2006) <http://www.alertnet.org/thenews/newsdesk/L19304609.htm> accessed 08 March 2006.

The history of the agitation for fair treatment of the Niger Delta region, which MEND claims is its main purpose, predates Nigeria's political independence and the commercial exploitation of oil. In 1957, three years before Nigeria gained her independence, the representatives of the Ijaws[23] expressed their fears of domination by and exclusion from the three major regions of the country to the Willink Commission of Inquiry into Minority Fears. According to the Ijaw representatives, the peculiar problems of those living in the creeks and swamps of the delta were not understood and indeed deliberately neglected by both the federal and regional governments who they claimed were marginalizing them at the time and would eventually dominate them after independence.[24] Though the Willink Commission recognized their fears as genuine, it denied the request made by the region that it be granted administrative autonomy by way of state creation but rather recommended that constitutional guarantees be provided to grant them equality and that a special board be created to develop the region amongst others. The later discovery and exploitation of oil from the region accelerated the manifestation of these fears as the region was gradually excluded from its active participation in the lucrative industry it hosted. The Federal Government neglected other sectors of the economy and concentrated on the exploitation of oil on which it is now primarily reliant. To safeguard its financial and economic interests, the Federal Government's policy became geared towards exerting total ownership and control of oil resources and revenues. The oil-dependency position cannot be overstated. In the year 2000, for instance, the country received 99.6 percent of its export income from oil making it the world's most oil-dependent country.[25]

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[23] The Ijaws are indigenous to the Niger Delta region and are the fourth largest nationality in Nigeria.

[24] Willink Commission Report (1958), chapter 6, paragraph 18 and chapter 7, paragraphs 14 - 19.

[25] M Ross, 'Nigeria's Oil Sector and the Poor' Paper prepared for the UK Department for International Development "Nigeria: Drivers of Challenge" Programme, (2003), 1.

However, it is important to recognise that the Federal Government's intent to own and control the oil-industry to the exclusion of the host-communities is not the sole basis for the friction against the industry. Perhaps equally controversial is the seemingly oblivious attitude of the industry towards the adverse effects that exploring and producing oil has on the Niger Delta communities.[26] While the Federal Government has used the law to gain control of the oil-industry, it has resorted to the use of force to maintain that control. The legal framework regulating the oil-industry reasserts the Federal Government's absolute ownership of oil resources. In the same vein, these laws have eroded the host-communities' rights to participate in the oil-industry; particularly with regard to the environment. Specifically, Nigeria's contemporary oil-related legislation unequivocally wrests the right to active participation from its host-communities. It is suggested that these laws have redefined the relationships that existed between the oil-industry and host-communities during the early periods of oil exploration and production and have contributed to the violent conflicts in the Niger Delta region.

For instance, prior to the promulgation of the Land Use Decree of 1978,[27] the community held title to land in the Niger Delta region (like other parts of Nigeria). Oil-companies at this time were thus legally obliged to consult with the traditional authorities that held the land on behalf of the family or community after they had received operational licences from the Federal Government. In essence, a tripartite relationship existed between the Federal Government, the oil-companies and the host-communities. While the Federal Government as the legal owner of oil resources issued licenses to oil-companies to explore and produce the

[26] Amnesty International (AI), Nigeria: *Claiming Rights and Resources Injustice, Oil and Violence in Nigeria*, (AI International Publications, London 2005) 5.

[27] Refer to section 5.3.3 below for a full discussion on the Land Use Act.

resource, the companies had to negotiate with the communities (through their representatives) as the legal landholders in the area. Thus issues relating to the use of land, compensation, community involvement and other relationships were discussed prior to the commencement of oil operations. However as the income from oil burgeoned, the government began to systematically institutionalize the exclusion of the host-communities from active involvement in the operation of the industry. While the Land Use Decree endowed the State with the legal ownership of land hitherto held by the communities, other laws reduced the share of oil revenues paid to the region and their involvement in the other related matters such as the environmental impacts of the industry. This thesis argues that the lopsided legal framework regulating Nigeria's oil-industry is a fundamental cause of the prevalent violent conflicts that besets the region and the lack of sustainable development of its resources.

It should be noted that most of the laws regulating Nigeria's oil-industry were made whilst the country was under military dictatorships. Thus, they were made without the participation of the populace or represented electives. The Constitutional Rights Project (CRP)[28] observed in this regards that:

> [The] growing incidents of unrest and disturbances in the Niger Delta are the result of lack of democracy and good governance. Democracy would have assured the participation of the people in determining how they are governed, and good governance would have ensured that the huge wealth derived from oil was deployed towards developing the area and preventing the current unrest now threatening peace and economic activities, including oil operations in the Niger Delta.[29]

[28] The Constitutional Rights Project is a Non-Governmental Organization active in the promotion and protection of human rights in Nigeria.

[29] Constitutional Rights Project, *Land, Oil and Human Rights in Nigeria's Delta Region* (Constitutional Rights Project, Lagos 1999) 36-37.

While democratic governance provides ample opportunity to promote active public participation, it is argued that this will occur only as far as all sections of the country are recognized as equal. In Nigeria's case, it appears that the minority status of the Niger Delta has become its albatross as the region has repeatedly failed to achieve any progress in bargaining to get a fair deal since the Willink's Commission denied it the status of an independent region at the time. In 2005 for instance, the Federal Government convoked the National Political Reforms Conference as a forum to discuss and make recommendations on issues of national importance including the Niger Delta question. The representatives of the states that comprise the Niger Delta had two main objectives at the conference. The first was to persuade the Conference to recommend the percentage the region received from oil revenues from 'up to 13 per cent' to 50 per cent and the second was to secure review of legislation regulating the oil-industry. They were unable to achieve either of these due to their low numerical representation at the conference and their inability to garner the required support from other sectors of the country. Vexed at the turn out of events, they staged a walk-out towards the end of the proceedings. The President commenting on the 'success' of the Conference later declared that if a small percentage of conference delegates were not satisfied with the results of the proceedings and staged a walk-out, it was not enough to label the conference a failure.[30]

This statement is reminiscent of a similar statement credited to Chief Phillip Asiodu in 1984 regarding the minority status of the Niger Delta, the growing oil-induced resentment and threat to stability. According to him, given 'the small size and population (of oil-producing communities) it is not cynical to observe that even if the resentment…continue[s] they cannot

[30] -- 'Obasanjo, Tobi, declare confab a success', (article posted on the NPRC website on July 25 2005); online <http://www.nprc-online.org/ab_8900136.html> accessed 20 February 2006.

threaten the stability of the country nor affect its continued economic development'.[31] However, events in the region reveal that despite the Niger Delta's minority status, militant actions of its inhabitants can, and have, affected both national and global affairs. Nigeria's oil production has dropped and due to regular interruptions, Angola toppled Nigeria for the second consecutive month in April 2008 as Africa's biggest oil producer. Nigeria is producing about 1.89 million barrels per day (bpd) from an installed capacity to produce 3 million bpd.[32] Nigeria's power sector has been adversely affected and businesses now rely more on private power generating sets for electricity supply.[33] With the constantly rising oil prices (and consequently fuel prices), operating costs of these sets continue to soar and the burden is passed on to consumers. The situation is not different globally as international oil prices tend to reach a new 'global height' on a weekly basis. For instance the *Daily Express* newspaper of June 18, 2008, declared that 'oil prices have jumped to a new record high near US$140 a barrel'[34] but a week later, prices had gone over US$140 to set a 'new record' amidst warnings from the President of the Organization of the Petroleum Exporting Countries (OPEC) and Algerian Energy Minister Chakib Khelil that oil prices will probably rise to between US$ 150 to US$170 this summer.[35] These impacts account for the continued prevalence of militant activities in the region. Since the representatives of the region have

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[31] V Isumonah, 'Oil and Minority Ethnic Nationalism in Nigeria: The Case of the Ogoni', (PhD thesis University of Ibadan 1997), 10.

[32] H Igbikiowubo, 'Angola: Oil Production - Country Beats Nigeria Again', *Vanguard* (Lagos 16 June 2008) <http://allafrica.com/stories/200806161464.html> accessed 22 June 2008.

[33] -- 'Militants give 4 conditions to free hostages', *Thisday* (Lagos) 06 March 2006).

[34] -- 'Oil prices it a new record high' *Daily Express* 16 June 2008 <http://www.express.co.uk/posts/view/48581/Oil-prices-hit-a-new-record-high> accessed 26 June 2008.

[35] -- 'Oil prices top record 142 dollars' Yahoo! News 27 June 2008 <http://news.yahoo.com/s/afp/commoditiesenergyoilprice> accessed 28 June 2008.

remained unable to influence the Federal Government to recognize them as active stakeholders in the oil-industry through socio-political processes, their aim is to achieve their aim by disrupting oil activities till they are reckoned with. The main objectives of the disruptors include the review of the legal framework to recognize them as active stakeholders of the oil-industry and to grant them benefits therefrom.

This thesis focuses on environmental-related legislation that regulates Nigeria's oil-industry. These laws, like many others in countries with emerging economies, suffer the deficiencies of being either weak, and/or, inadequately enforced.[36] In other words, they are mainly ineffective to protect the environment and the population that rely on environmental resources for their socio-economic sustenance and traditional relevance. As noted earlier, the contention is that the host-communities do not receive adequate benefits from the oil-industry and this is a fundamental cause of violent conflicts emanating from the area.[37] However, the 'adequacy' of benefits the host-communities receive from the oil industry falls outside the purview of this thesis. That notwithstanding, the thesis discuses issues of increased derivation and resource control to argue that the adoption of these initiatives in the absence of integrated public participation in environmental issues is more likely to exacerbate the prevalent violence in the region.[38] In essence, the thesis argues that the recognition and enforcement of environmental human rights principles (both substantive and procedural) is a prerequisite for sustainable peace and development in the region that hosts most of Nigeria's oil-activities.

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[36] A Wawryk, 'International Environmental Standards in the Oil Industry: Improving of Transnational Oil Companies in Emerging Economies' (2003) 1 *OGELI* 1, 1.

[37] R Ako, 'Resource Control or Revenue Allocation: the Path to Sustainable Development in the Nigerian Oil Producing Communities', 35th Annual Conference of the Nigerian Society of International Law - Global Energy Investments and Host Minority Interests – June 23–25 2005.

[38] Refer to section 7.2 below.

The argument is that Nigeria's extant laws do not promote the recognition of rights that are fundamental to active participation in the oil-industry. While the laws do not promote the free flow of environmental information or the involvement of the relevant 'public' to be involved in environmental decision-making, access to justice is hindered essentially by the attitude of Nigerian judges. While Nigerian judges are perceived to be biased in promoting the unhindered exploitation of oil, other factors that hinder access to justice include undue delay in proceedings and the interference with judicial processes by the State and oil-companies.[39] The Institute for Democracy and Electoral Assistance succinctly sums up the situation in the Niger Delta as the result of the 'cumulative acts of exclusion, deprivation and ecocide' sponsored by the oil-industry which 'profoundly undermined lives and livelihoods and set the stage for a decade of crisis in the Niger Delta.'[40] It is evident that the prevalent crisis bedevilling Nigeria's oil-industry needs to be urgently resolved to promote the sustainable development of the region and its resources, particularly noting its effects on both national and global stability and security.

1.3 Objectives of the Study

The broad objectives of this study are to determine the role of the extant legal framework regulating Nigeria's oil-industry in the prevalent violent conflicts that currently besiege it and how contemporary principles of law may be applied to resolve those conflicts.

The specific objectives are to:

1. Critically analyze the extant legal framework regulating Nigeria's oil industry;

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[39] See generally, A Adedeji and R Ako, 'Hindrances to Effective Legal Response to the Problem of Oil Pollution in the Niger Delta', (2005) 5 *UNIZIK Law Journal* 1, 415-439.

[40] Institute for Democracy and Electoral Assistance (IDEA), *Democracy in Nigeria: Continuing Dialogue(s) for National Building* (IDEA, Stockholm 2000) 246.

2. Examine how this framework has contributed to violent conflicts; and
3. Identify how the legal recognition of the sustainable development paradigm and; particularly, the role of environmental human rights may be applied to resolve the conflicts and maintain sustainable peace in the Niger Delta.

1.4 Justification for the Study

The Niger Delta region that hosts most of Nigeria's oil exploration and production activities has become embroiled in violent conflicts of increasing magnitude. The impacts of instability in Nigeria's oil-industry are felt both nationally and globally. The reduction in production is tantamount to losses in oil revenues to the State and the oil-companies. Globally, the instability contributes to the increasing oil prices that have led to international inflationary trends. Since the escalation of the crisis in the Niger Delta, the Federal Government has not done anything significantly different. Rather, it has continued to rely on its 'carrot and stick' method of setting up development boards[41] while relying extensively on its security apparatus to quell any opposition to the unhindered exploration and production of oil. The persistent state of violent conflicts is evidence that these initiatives have failed to adequately address the cause of the conflicts. Thus a new and effective strategy is required to promote peace.[42] The inability of the State to resolve the long-standing conflict has contributed to its escalation, with national and global consequences. The present conflicts are 'definitely an escalation' on previous disturbances in the region even though it is argued that they have not yet developed

[41] There are three main development boards that have been created by different regimes including the Niger Delta Development Board (NDDB); the Oil Minerals Producing Areas Development Commission (OMPADEC); and, the Niger Delta Development Commission (NDDC).

[42] O Bassey, 'Niger Delta: Senate President demands new strategy' *Thisday* (Lagos) 10 February 2006 <www.thisdayonline.com> accessed 10 February 2006.

to a 'full-blown rebellion yet'.[43] While the scale and range of recent attacks against the oil-industry reveal a high level of sophistication, there are indications that there may be worse to come in the nearest future. Indeed, the signs of the present stage of instability were ominous. For instance, Claude Ake warned in 1996 that the situation in the Delta would worsen in the coming years. According to him there is (was) a 'bizarre and frightening ...accumulation of terror' within the oil region that is fast threatening to completely rupture the fragility of the Nigerian state and from the present outlook, there are strong indications that there is worse to come, especially as 'Shell remains unrepentant and belligerent. At the same time, consciousness and resentment (grow?) in the oil producing communities... Unless something gives, there will be more strife and they will be far more catastrophic'.[44] Similarly, the report of a government fact-finding ministerial committee set up to look in to the problems of the Niger Delta region arrived at similar conclusions. According to the report:

> A new and increasingly dangerous awareness and sensitivity is sweeping through the oil producing communities across the country. It is in the interest of the oil industry and the nation that urgent and lasting solutions should be put in place to prevent the situation from getting worse.[45]

More recently, following a wave of attacks by MEND, it was observed that 'the main puzzle about the latest wave of attacks and kidnappings to sweep the Niger Delta is why it took so long this time. Local leaders had been predicting big trouble for the past six months.'[46]

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[43] Statement credited to Tom Cargill, Africa analyst at the Royal Institute for International Affairs in London. See T Ashby, 'Analysis: Niger Delta militants evolve to greater threats', (Reuters 20 January 2006) <http://www.alertnet.org/thenews/newsdesk/L19304609.htm> accessed 08 March 2006.

[44] C Ake, *Tell Magazine* (Lagos 29 January 1996) 34.

[45] Report of a ministerial Fact-finding Team on the Problems of the Niger Delta set up under the despotic regime of General Sani Abacha cited in ERAction: Newsletter of the Environmental Rights Action, (January-March, 1999) 8.

[46] -- 'Nigeria: A New Year Offensive' (2006) 47 *Africa Confidential* 2 <www.africa-confidential.com> accessed 06 February 2006.

One of the major reasons why the State remained ineffective in response to the agitation in the Niger Delta region against the oil-industry is that the inhabitants of the region lacked consistency in the movement for a fairer deal from the oil-industry. Things changed in the 1990s with the formation of the Movement for the Survival of the Ogoni People (MOSOP). The organization was able to pursue its demands based on human rights ideology understood and appreciated internationally. The State responded in its usual repressive and arrested and tried the MOSOP leaders in what was adjudged by international observers to be an unfair trial and sentenced them to death by hanging.[47] This action increased the resolve of the host-communities in agitation to obtain a fairer deal from the oil-industry activities they host. In a bid to appease the host-communities, successive governments set up development agencies and increased derivation payments to the Niger Delta states to speed up the 'development' of the area. These moves did not succeed in appeasing the Niger Delta who maintained their insistence on participating actively in the operations of the industry they host.

It is suggested that the State must adopt a different strategy to effectuate a lasting solution to the crisis. Interestingly, a past Senate President in Nigeria's Third Republic noted in this regards that:

> In resolving these problems, the paradigm of development which seeks to involve human beings and sees them as the central factor in the development process must be upheld. We must, as a deliberate policy, get the Niger Delta people actively involved

[47] Saro-Wiwa was a human rights and environmental activist. His activities in the Delta region precipitated an awakening of the region's inhabitants to their rights and for the first time, there was an organized platform to articulate the demands of the region. His activities were deemed to be overly antagonistic of the federal government and Shell in particular. In a bid to get rid of him, he was accused along with eight other members of the Movement for the Organization of the Ogoni People (MOSOP) were accused of murdering some chiefs and were arraigned before a special military tribunal. The tribunal found them all guilty and sentenced them to death by hanging. Despite international outcry and pleas for clemency, the sentence was carried out.

> in defining their own development. This is the only way that we can guarantee sustainable development in the area.[48]

Indeed, public participation of the host communities in the industry is not only desirable but as this thesis posited, is a prerequisite for sustainable peace that is a major hindrance to the sustainable development of the region and its resources. Engaging active public participation in the oil-industry requires the restructuring of the legal relationships between the stakeholders of the industry. While this presupposes a wide range of reforms that will include the amendment the country's federal and fiscal relationships, this thesis limits its discussions to purely legal dimension. In other words, issues that are more in the realm of politics; especially the much criticized lopsided federal structure that accounts for the Federal Government's virtual exclusive ownership and control of the oil-industry, are not core issues for discussion. Rather, the focus was on the application of contemporary international environmental law principles; particularly environmental human rights, to regulate the oil-industry to promote the peaceful relationship among the industry's stakeholders.

Despite a wide ranging variety of extant literature on Nigeria's oil-industry, the importance of this study is that it seeks to address a dearth in literature focusing on the legal analysis of the causes of the conflict. This study aims to bridge the gap in existing literature and knowledge in understanding the role of the legal framework regulating Nigeria's oil-industry in instigating, or, and exacerbating violent conflicts and its possible role in managing these violent conflicts. It hopes to achieve this by revealing how the Federal Government effectively dominates the oil-industry through the promulgation of laws which the host-communities consistently oppose because they are inimical to their interests. It also proposes

[48] *O Bassey* (n 42).

that active public participation in environmental issues can form the basis for the resolution of disputes and management of conflicts in Nigeria's oil-industry.

The timing of this research is also important because the impacts of the instability in the Niger Delta has become manifest on all its stakeholders. While the industry (the State and the oil-companies) have recorded losses in revenue, the international community is faced with increasing oil-prices and rising costs of goods and services as a result. The Nigerian government reportedly loses about $84 million daily due to the protracted crisis in the Niger Delta.[49] The damage done to the host-communities in terms of loss of lives, abuse of human rights and disruption to socio-economic lifestyle has been rife and cannot be quantified monetarily. The prevalent state of insecurity in the region amidst threats of continued attacks on oil installations makes it imperative that lasting solutions be found.[50] The oil-industry is likely to suffer more losses in the coming years should a viable resolution of the issues at stake not be reached[51] and as a study commissioned by Shell suggests, the company may be forced to leave the region.[52] With the recent withdrawal of the company's concession in Ogoniland due its inability to operate oil-fields due to festering conflicts with the host-

[49] S Nkwazema and F Okwuonu, 'Nigeria: Concern mounts over attack on oil platforms', *Thisday* (Lagos) 23 June 2008 <http://www.thisdayonline.com/nview.php?id=114909> accessed 17 October 2007.

[50] -- 'Nigerian militants threaten to halve oil outputs by halve', Financial Times (06 March 2006) <http://www.financialexpress.com/latest_full_story.php?content_id=119617> accessed 10 March 2006.

[51] Amnesty International, 'Nigeria: Ten Years On, Injustice and Violence Haunt the Niger Delta' (report) (2005) <http://web.amnesty.org/library/Index/ENGAFR440222005> accessed; 10 March 2006.

[52] WAC Global Services, 'Peace and Security in the Niger Delta: Conflict Expert Group Baseline Report', Working Paper for SPDC Lagos (December 2003). See also; -- 'Oil and ethics', Radio Netherlands online <www.radionetherlands.nl/currentaffairs/region/africalnig040614.html> accessed 03 February 2006; and, K Maier, 'Shell feeds Nigeria discord, may end onshore work' (Bloomberg 10 June 2004).

communities, it should not be a surprise that other communities may adopt similar strategies to frustrate companies that operate within their geographic territories without satisfying their demands.

The timing of this research is also important because it is relevant to promotion of the country's emergent democracy. The country returned to democratic governance in 1999 after over 15 years of continued military rule and it is imperative that the prevalent state of insecurity in the Niger Delta does not degenerate into a state of national chaos and provide the military with an excuse to return to power. Indeed since the first *coup d'etat* in 1966 when the mismanagement of oil resources and the corruption it bred were identified as key reasons for military involvement in governance,[53] oil has played a role in other (attempted) forceful changes in government.[54] Military involvement in the Niger Delta has also contributed to the rebellious tactics the host-communities have since adopted. The aggressive responses of these communities may be seen as the response to the coercive powers the military utilized to issue 'obnoxious decrees, arbitrary arrests and detentions' amongst other actions.[55] In addition to keeping the military away from political power, Nigeria's infant democracy presents a unique opportunity to explore democratic principles based on the rule of law, accountability and good governance and the principles of fairness and equity to determine issues of national

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[53] U.S. Library of Congress, 'Nigeria: Military Intervention and Rule' <http://countrystudies.us/nigeria/69.htm> accessed 11 March 2006.

[54] Great Ogboru, the alleged financier of the 22 April 1990 Gideon Orkar coup attempt for instance has been hailed for his 'vision in the botch coup was to liberate his fatherland from the clutches of evil military adventurers'. See generally, T Egbulefu, 'Triumphant return of Ogboru' (Article) (2000) <http://www.deltastate.com/articles/ogboru.asp> accessed 11 March 2006.

[55] See B Adele and A Oloruntele, 'Ethnic Agitation and Conflicts in Nigeria, 1999-2000' (2001) 13 *Development Policy Management Network Bulletin* 3, 35-36.

importance as presented by the Niger Delta conflict. It is in this wise that this thesis has examined the legal framework regulating the oil-industry to suggest its review to ensure that the relevant laws concord with democratic principles.

This study is also important because it suggests an alternative to the approaches that have been repeatedly pursued in past attempts to manage conflicts in the oil-industry. While military action has failed to subjugate the host-communities, the development boards and commissions set-up to 'speedily develop the region' have failed to placate the communities. In the interim, the communities have adopted a militant approach to disrupt oil exploration and production activities until the oil-industry; particularly the State, integrates them as active stakeholders in the oil industry.[56] There is the apparent danger that continued hostilities in the oil-rich region may degenerate to into full blown expression and exchange of hostilities that will have spiral effects on the African continent and the global community at large. First, the movement of migrating and displaced Nigerians – Africa's most populous nation - will pose a new wave of socio-economic crisis within the continent.[57] Secondly, Nigeria's position as a political motivating force towards resolving continental socio-political and economic

[56] See generally; -- 'Nigerian militants threaten to halve oil outputs by halve', *Financial Times* (06 March 2006) <http://www.financialexpress.com/latest_full_story.php?content_id=119617> accessed 10 March 2006. See also, E Harris, 'Nigerian militants foresee more violence', *The Washington Post* (February 27 2006) <http://www.washingtonpost.com/wp-dyn/content/article/2006/02/27/AR2006022700732.html> accessed 10 March 2006.

[57] Nigeria's population in 1991 according to the National Population Commission (NPC) stood at 88.9 million and it estimated that by 2003, her population would have grown to over 126 million. See NPC website <www.population.gov.ng/factsandfigures.htm> accessed 15 January 2006. It is estimated that Nigeria accounts for approximately one-quarter of West Africa's people. See, -- 'Nigeria, the Road North', < http://www.pbs.org/frontlineworld/stories/nigeria/facts.html> accessed 11 March 2006.

empowerment will be lost thereby leaving a vacuum in African development.[58] Thirdly, a break-out of war in Nigeria will lead to drastic dips in supply of oil to the international market already affected by the instability in the Middle East. Presently, despite increased output by Saudi Arabia, instability in the Niger Delta continues to contribute to rising oil prices.[59] Expectedly, the supply situation will worsen in the event of full-blown hostilities in Nigeria.[60]

The factors discussed above underlie the fundamental justifications for this study. It is important to state however that the international dimensions to the conflicts in the Niger Delta are recognized especially given the involvement of trans-national oil corporations and the planned involvement of foreign governments in conflict resolution.[61] This notwithstanding, conflict resolution in the area is first and foremost intra-national especially

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[58] Nigeria has played a 'big brother' role in Africa to promote peace, conflict resolution and democracy. Recent examples include the role of Nigeria in setting up and financing of the Economic Community of West African States (ECOWAS) Monitoring Group (ECOMOG) and her role in resolving the impasse in Liberia despite criticism from home ad abroad; especially tom the United States government See generally, -- 'Nigeria, My brother's keeper: Leading regional peacekeeping efforts', A Special International Report Prepared by the Washington Times Advertising Department – (30 September 1999) <http://www.internationalspecialreports.com/africa/99/nigerial7.html> accessed 16 January 2001. See also, J Andrews, 'Why Nigeria granted Taylor asylum - ECOWAS scribe', *Thisday* (Lagos) 01 May 2004.

[59] -- 'Oil prices rally after Jeddah meeting, militants' attack in Nigeria', *Guardian* (Lagos) 24 June 2008 <http://www.guardiannewsngr.com> accessed 24 June 2008.

[60] See generally, E Umezuruike, 'The Niger Delta Challenge: A Global Perspective', (Article) <http://www.thenigeriabusiness.com/column6.html> accessed 21 June 2008.

[61] O Onwuchekwa, 'Ijaws are still angry', *Sunday Champion* (Lagos 12 March 2006) <http://www.champion-newspapers.com/issue/teasers/> accessed 12 March 2006.

in the absence of an international law regulating trans-national companies[62] and the inadequacy of laws regulating the oil industry.[63] In other words, the resolution of the conflicts in Nigeria's oil industry lies within the restructuring of national priorities. As Kuti observed, the conflicts in the Niger Delta can be identified as an integral part of the Nigerian crises which includes the lack of an acceptable national constitution and absence of mass participation in governance.[64]

1.5 Organization of the Study

The current chapter has presented an introductory background to the study which included the statement of the problem, the objectives of the study and, the justifications for the study. Chapter two discusses the environmental justice paradigm that provides a theoretical basis for analysis of the legal framework regulating Nigeria's oil-industry. Chapter three is focussed on the role of oil in Nigeria and the Niger Delta in particular. Chapter four is devoted to the analysis of the relevant concepts of sustainable development, environmental human rights and public participation. Chapter five highlights the principal laws that regulate Nigeria's oil-industry. These include the laws that regulate the ownership and control of oil, allocation of oil-revenues, landholding, compensation and environmental protection. This chapter also highlights the reaction of the host-communities to the changes in the legal framework and

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[62] A Marchand, 'Impunity for Multinationals', Global Policy Forum (2002) <http://www.globalpolicy.org/socecon/tncs/2002/0911impunity.htm> accessed 12 March 2006.

[63] Though there is a plethora of laws regulating the oil industry, the position of this dissertation is that these laws are deficient in its public participation provisions which will be argued is the major cause of the conflicts that plague the industry.

[64] B. Ransome-Kuti, 'The Niger Delta and Nigeria's Future' (Article) <http://www.humanrights.de/doc_en/countries/nigeria/background/niger_delta_crisis.html> accessed 15 January 2006.

how this precipitated and/or exacerbated violence in the oil-rich Niger Delta region. Chapter six critiques the popular suggestion in Nigeria; particularly among the political elite from the Niger Delta region, that increased derivation to the region, or, and resource control will resolve the violent conflicts prevalent in the country. It argues instead that the recognition of environmental human rights as the foundation of active public participation in environmental matters is the bedrock for sustainable peace in Nigeria's oil-industry. Chapter seven suggests how, in view of current realities in oil-industry's regulatory framework, environmental human rights may be realized and concludes the thesis.

1.6 Methodology

This thesis relied on primary and secondary sources of information. The secondary sources of information included books, academic and professional journals, institutional publications as well as official government publications and documents. Newspapers, news magazines, and the internet provided up-to-date information on events in Nigeria's oil-industry that were still active and on-going. The primary sources included information gathered and direct observations from previous work experience as a legal officer in seismic company with contracts in several communities in the Niger delta region. The unhindered access to staff and contractors of the company who shared their experiences while 'on the field' and managers who controlled the affairs of the company proved invaluable while I wrote this thesis. I made subsequent personal visits to the region and to Ogoniland as part of a conference visitation team in March 2008. During the conference visit, the elders of the communities took the conference team on a community tours to experience the realities of the environmental and social impact of the oil-industry on the communal life. During the tour, the community elders gave personal insights into the impacts of the oil-industry on their communities and the development of their relationships with the State and oil-companies. Peter Roderick of the

Climate Justice Programme was a veritable source of information. He provided general information on the relationship between the oil-companies and their host-communities and kept me updated with information on relevant litigation his organization was involved with in the Niger Delta. Barrister Olagbaiye also provided me information on cases he had negotiated and/or litigated on behalf of several host-communities. Barrister Ashogbon, my colleague during my brief working stint in the oil-industry provided the necessary insight from the industry perspective without necessarily being pro-industry as is usually the case. I also got information from informal discussions with government officials, staff of oil-companies and the oil-service companies that preferred anonymity.

There were certain limitations in the research base. Institutional publications for instance tended to present the issues in a way that suited them. While the oil-companies' publications projected the companies as positive influences on their host-communities, publications from NGOs highlighted the negative impacts of oil operations on the communities to provide the basis for their advocacy and intervention. It was necessary to exercise caution in the interpretation of the substance of some of these materials. It is important to point out that this thesis focussed on the role of law in the initiation and/or exacerbation of environmental conflicts and contribute to violence in Nigeria's oil-industry. In the same vein, it is limited in suggesting viable legal options that would contribute to the resolution of conflicts and thus reduce the incidences of oil-related violence in the Niger Delta. Indeed, the factors that contribute to the violent conflicts in Nigeria's oil-industry are multi-dimensional and a strict legal approach is not likely to resolve all the issues. Rather, a holistic approach that integrates legal, political, environmental and socio-economic concerns is required to mitigate the myriad of conflicts and resultant violence. The thesis however posits the role of law in the resolution of the violent conflicts is fundamental. Indeed, one of the primary functions of the

law is to regulate society and ensure peace. In other words, an effective legal framework is prerequisite to other initiatives aimed at promoting sustainable peace in the Niger Delta. It is in this regards that this thesis concentrated on the examination of the role of law in contributing to the violent conflicts in Nigeria's oil-industry and the resolution of such conflicts.

CHAPTER TWO

THE THEORETICAL FRAMEWORK: AN ENVIRONMENTAL JUSTICE PARADIGM

2.1 Environmental Justice Theory: An Introduction

The concept of 'environmental justice' is presently without precise boundaries. The Sustainable Development Research Network observed in this regard that 'there is no definitive definition of environmental justice. It means different things to different people.'[1] The concept which grew from the 'movement to prevent people of colour from becoming victims of industrial pollution' has become very broad.[2] It is now applied to a widening spectrum of 'serious social concerns' particularly those related to communities that suffer from social inequity attributed to environmental inequalities.[3] That notwithstanding, the concept presents a new paradigm for achieving healthy and sustainable communities[4] and must be defined through an analysis of its philosophical underpinnings. Key definitions of the concept from different jurisdictions are examined in the next section. As revealed, the definitions capture the peculiar circumstances of the different jurisdictions while maintaining the general essence of the paradigm. The historical development of the concept is highlighted thereafter. It reveals the progress of the concept originally initiated and applied to protect the poor and minority groups in the United States of America from intentional environmental harm to its contemporary broad utilization.

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[1] Sustainable Development Research Network (SDRN), SDRN briefing two: Environment and Social Justice, 1.

[2] R Russo, 'Unheard Voices: Environmental Equity', Earth Day 2003, Issue 18 <http://egj.lib.uidaho.edu/current.html> accessed 14 September 2006.

[3] C Lee, 'Developing the Vision of Environmental Justice: A Paradigm for Achieving Healthy and Sustainable Communities' (1995) 14 *Virginia Environmental Law Journal* 4, 573.

[4] *C Lee* (n 3) 571.

The theoretical underpinnings of the concept of environmental justice are then considered and related to regulatory framework governing the Nigerian oil-industry. The responses of the oil industry's stakeholders to the regulatory framework are then considered in detail in the following chapters. This chapter also considers a few case-studies of other natural resource-rich areas that have applied an environmental justice paradigm as the prism to examine the legal relationships between stakeholders in their respective natural resource industries. It highlights how circumstances that are similar in several respects to the Nigerian situation have applied elements of environmental justice to avoid resort to violence with its attendant consequences as presently experienced in Nigeria. These consequences including economic subjugation, political instability and social restiveness obviate the achievement of the sustainable development goals of all the industry's stakeholders. Reference is made to these case studies in subsequent chapters to support the thesis' central argument that the recognition and enforcement of public participatory rights, particularly in environmental matters, is fundamental to restoring and maintaining peace in Nigeria's oil-industry. In other words, the thesis argues that where public participatory rights exist within the legal framework, they may be utilized to de-fuse conflict-prone situations and maintain a peaceful relationship between and among the stakeholders of the resource industry.

2.2 Environmental Justice: Defining the Paradigm

This section of the thesis examines formulations of 'environmental justice' from the United States where the concept originated, the United Kingdom and one African perspective to capture the diversity but yet common objective of the concept. The United States of America's (USA) Environmental Protection Agency (EPA) defines 'environmental justice' as 'the fair treatment and meaningful involvement of all people regardless of race, colour,

national origin, culture, education, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.'[5] The ambit of this definition encapsulates the wide diversity of citizenry constituted by different races, colours and cultures. The EPA clarifies the import of the term 'fair treatment' to mean; no group of people, including racial, ethnic, or socioeconomic groups, should bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state, local, and tribal environmental programs and policies.[6] Again, the diversity of the country's population is evident in the definition. 'Meaningful Involvement' according to the Agency means that:

> (1) potentially affected community residents have an appropriate opportunity to participate in decisions about a proposed activity that will affect their environment and/or health; (2) the public's contribution can influence the regulatory agency's decision; (3) the concerns of all participants involved will be considered in the decision-making process; and (4) the decision-makers seek out and facilitate the involvement of those potentially affected.[7]

The definition of the EPA is evidently wide enough to ensure that it protects its wide diversity of citizens through its strong procedural character, and promotes their 'active participation' in the formulation and execution of environmental laws, regulations, and policies. This concept that originally emanated from protecting the perceived inequities in the

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[5] United States Environmental Protection Agency (EPA) Environmental Justice Homepage <http://www.epa.gov/compliance/environmentaljustice/index.html> accessed 12 September 2007. See also Exec. Order No. 12898, 59 Fed. Reg. 7629 (Feb. 11, 1994).

[6] The National Environmental Justice Advisory Council Indigenous Peoples Subcommittee, *Meaningful Involvement and Fair Treatment by Tribal Environmental Regulatory Programs* (A Report of the National Environmental Justice Advisory Council, 2004), 5.

[7] *The National Environmental Justice Advisory Council Indigenous Peoples Subcommittee* (n 6).

distribution of environmental hazardous waste sites in that country[8] is now a central part of both its federal and state policies.

In the United Kingdom (UK) context, the Scottish Executive has defined environmental justice along two dimensions. The first is that deprived communities, which may be more vulnerable to the pressures of poor environmental conditions, should not bear a disproportionate burden of negative environmental impacts. Secondly, all communities should have access to the information and to the means to participate in decisions which affect the quality of their local environment.[9] The difference between the United Stated and the United Kingdom is that while the EPA's takes cognisance of, and emphasizes the different categories of ethnic and racial groups, the Scots definition is more concerned with protecting its 'deprived communities' and is also more substantive in nature. However, both the EPA and Scottish Executive capture the core essence of environmental justice which the EPA terms 'meaningful involvement'. Moving beyond 'official' definitions, Adebowale, employs the term 'environmental justice' to refer to (1) inequality in the distribution of the burdens and the benefits of environmental 'bads' and 'goods' and (2) the civil and political processes that allow for participation, and involvement in decision making.[10] Elsewhere, she adopts a broader definition that includes the right to enjoy (1) a fair share of natural resources; (2) the right not to suffer disproportionately from environmental policies, regulations or laws and (3) the right to environmental information, participation, and

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[8] R Bullard (ed.) *Confronting Environmental Racism: Voices from the Grassroots* (South End Press, Boston, MA. 1993).

[9] Scottish Executive (2004), <http://www.scotland.gov.uk/about/ERADEN/SCU/00017108/environjust.aspx> accessed 21 April 2006.

[10] M Adebowale, 'Using the Law: Access to Environmental Justice Barriers and Opportunities' (Capacity Global Ltd., London 2004) 10.

involvement in decision-making.[11] This formulation reflects the developing consensus that socio-economic and political issues are indispensable aspects of environmental justice.[12]

The scope of environmental justice in Africa where issues related to access to resources are a major component is quite different from both the USA and UK formulation. Beinart and McGregor aptly state that while some environmentalists use the environmental justice platform to emphasize the responsibility to future generations for the well-being of the planet, 'Africanists' by contrast, consider issues such as access to resources as the critical issue for communities.[13] Within the African context, environmental justice may be defined as the fair treatment of people of all races, cultures, and incomes with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.[14] In Obiora's opinion, environmental justice involves:

> [T]he equitable distribution of environmental amenities, the rectification and retribution of environmental abuses, the restoration of nature, and the fair exchange of resources. Its main insight challenges the uneven allocation of environmental risks as well as the benefits of environmental protection, industrial production, and economic growth. Given its structural focus, the environmental justice struggle could be seen, not simply as an attack against environmental discrimination, but as a movement to rein in and subject corporate and bureaucratic decision making, as well as relevant market processes, to democratic scrutiny and accountability.[15]

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[11] M Adebowale, Environmental Justice Review working paper (unpublished) quoted in the Sustainable Development Research Network (SDRN), SDRN briefing two: Environment and Social Justice (2003), 2.

[12] *M Adebowale* (n 11) 2.

[13] W Beinart and J McGregor (eds.) *Social History and African Environments* (James Currey, Oxford 2003) 2.

[14] See generally, G Mbamalu, C Mbamalu and D Durett, 'Environmental Justice Issues in Developing Countries and in the Niger Delta' International Conference on Infrastructure Development and the Environment, September 10-15, 2006, Abuja, Nigeria.

[15] L Obiora, 'Symbolic Episodes in the Quest for Environmental Justice' (1991) 21 *Human Rights Quarterly* 2, 477.

The salient points in this definition include the reference to the decision-making processes of corporations and governments, market dynamics as well as issues of accountability. This observation critically important to the argument of this thesis which analyzes how market dynamics have influenced the legal relationships between Federal Government of Nigeria (bureaucracy), the multinational oil-companies (corporations) and the host-communities particularly in respect of issues of democratic scrutiny and accountability. Mbamalu et al. further observe that, in the relationship between environmental injustices and the social injustices attributes of class, race, ethnicity, and tribalism are foci in the application of environmental justice to developing countries.[16] It is within this 'African' context that this thesis examines the role of law in the distribution of 'environmental' benefits and burdens of the Nigerian oil-industry. It argues that the uneven distribution of its benefits and burdens is a fundamental cause of the violent conflicts that besets the industry and region.

In conclusion, it is important to note that the consensus on the essence of environmental justice is that it seeks to affirm the right to protection, to prevent harm, shift the burden of proof, obviate the requirement to provide proof of intent to discriminate, and target resources to redress inequities.[17] In other words, the overall motive of the concept is to promote and protect equality and fairness in the distribution of environmental adversities.[18]

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[16] *G Mbamalu et al.* (n 14) 3.

[17] *R Bullard* (n 8).

[18] See generally, D Tarlock, 'City versus Countryside: Environmental Equity in Context' (1994) 21 *Fordham Urban Law Journal* 4, 461-494.

2.3 Historical Development of Environmental Justice

The concept of environmental justice emanated from the USA to tackle the perceived inequities in the distribution of environmental impacts arising from hazardous waste sites.[19] Early literature that contributed to the development of the concept[20] that has developed to become a central part of the USA's federal and state policy has, however, been challenged.[21] Bowen questions the availability of empirical evidence to support the 'dozens of published articles on environmental justice' that begin by stating that 'a large body of empirical research demonstrates that minorities, low income, and otherwise disadvantaged and susceptible neighbourhoods are disproportionately exposed to environmental hazards'.[22] He concludes by conceding that though exposure to pollutants and chemical wastes have long-term adverse effects on human health, 'very little can be said, however, on the basis of the current body of sound scientific research about location-specific spatial distributions of demographic and environmental variables associated with even relatively few environmental hazards'.[23] While the debate on the effectiveness of research quality on environmental justice

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[19] *R Bullard* (n 8).

[20] See for instance, C Lee (3); R Bullard, 'Solid Wastes Sites and the Black Houston Community' (1983) 53 *Sociological Inquiry* 3, 273–288; United Church of Christ (UCC), *Toxic Wastes and Race in the United States: A National Report on the Racial and Socio-Economic Characteristics with Hazardous Waste Sites* (United Church of Christ, Commission for Racial Justice, New York 1987); and, (United States General Accounting Office) *Siting of Hazardous Waste Landfills and their Correlation with Racial and Economic Status of Surrounding Communities* (United States General Accounting Office, Washington, DC. 1983).

[21] W Bowen, 'An Analytical Review of Environmental Justice Research: What Do We Really Know?' (2002) 29 *Environmental Management* 1, 3–15.

[22] *W Bowen* (n 21) 3.

[23] *W Bowen* (n 21) 12.

remains open, there seems to be more agreement on the origin of the paradigm which Lee claims developed nationally in three major phases.[24]

The first phase covered events that originated in Warren County, North Carolina and culminated in the release of the United Church of Christ Commission for Racial Justice report titled '*Toxic Wastes and Race in the United States*' released in 1987. The report highlighted the disproportionate level of environmental contamination in poor communities and communities of colour. The second phase covered events rooted in the communities of colour and culminated in the First National People of Colour Environmental Leadership Summit in 1991. The principles of the environmental justice movement in the United States were articulated by the delegates to this Summit.[25] Thereafter, community groups gathered momentum to articulate their cases against the location of environmental polluting facilities in, or, close to their communities.[26] The third phase which Lee suggests we are in now is 'characterized by a multiplicity of emphasis and tasks consonant with a movement that is blossoming on different levels'.[27] The 'multiplicity' of emphasis and tasks is evident in the wide spectrum of serious social ills that range from the link between the environmentally polluted communities and poor health, economic disinvestment, lack of opportunity in education and employment, destruction or eradication of cultural heritage and traditions and youth violence and destructive violence.[28] Indeed, this third phase is exemplified in several parts of the world including Nigeria where the adverse environmental effects of the oil

[24] *C Lee* (n 3) 572-573.

[25] United Church of Christ Commission for Racial Justice, *The First National People of Colour Environmental Leadership Summit: Program guide* (United Church of Christ, New York 1992).

[26] *R Russo* (n 2).

[27] *C Lee* (n 3) 573.

[28] *C Lee* (n 3) 573.

industry on the environment have been directly linked to the raging violence and its attendant social ills.

The development of the concept of environmental justice from the agitation of minority and deprived Americans has become the basis for challenges to alleged inequalities that transcend intra-national relationships. Environmental justice has now become the lens through which relationships between governments and their citizens, corporate entities and their stakeholders including inter-generational concerns are being examined. The concept is all the more attractive because the element of active public involvement in the decision-making process is compatible with the contemporary (sustainable) development model. Kals and Russell (also quoting other research results) note in this regards that procedural justice; that is, the recognition of all affected people and social groups as having equal opportunities to exert an influence in the decision-making process, is the main determinant of an environmentally just decision.[29] This is a major watershed in environmental protection movement because the present environmental protection paradigm is criticized for being prejudiced and inadequate to resolve global environmental challenges. Bullard notes in this regard that:

> [T]he current environmental protection paradigm has institutionalized unequal protection; traded human health for profit; placed the burden of proof on the "victims" rather than on the polluting industry; legitimated human exposure to harmful substances; promoted "risky" technologies such as incineration; exploited the

[29] E Kals and Y Russell, 'Individual Conceptions of Justice and Their Potential for Explaining Proenvironmental Decision Making' (2001) 14 *Social Justice Research* 4, 370. The authors cite other research publications including R Folger, 'Distributive and Procedural Justice: Multifaceted Meanings and Interrelations', (1996) 9 *Social Justice Research* 4, 395–416; A Lind and T Tyler, *The Social Psychology of Procedural Justice* (Plenum, New York 1988); O Renn, T Webler, and H Kastenholz, 'Procedural and Substantive Fairness in Landfill Siting: A Swiss Case Study' (1996) 7 *Risk Health Safety Environment* 2, 145–168; and J Thibaut and L Walker, *Procedural Justice: A Psychological Analysis* (Erlbaum, Hillsdale 1975).

> vulnerability of economically and politically disenfranchised communities; subsidized ecological destruction; created an industry around risk assessment; delayed cleanup actions; and failed to develop pollution prevention as the overarching and dominant strategy. [30]

A salient point in Bullard's criticism is that the present paradigm exploits the 'vulnerability of economically and politically disenfranchised communities' that are often subjected to environmentally unjust decisions and actions. This is more so where the country in question is rich in a natural resource located within the territories of such minority groups. Examples of such communities other than the Niger Delta include the oil-rich communities of the U'wa community of Colombia, the nomadic Warao Indians of Venezuela and the Kamoro and Amungme indigenous groups of Papua New Guinea that are rich in copper and gold. This list is by no means an exhaustive list but provides some comparative case-studies that inform the thesis on the application of the concept of environmental justice to impacts arising from natural resource industries.

It is important to draw a distinction between the application of environmental justice in its early stages of development in the United States of America and its present application. It posits that unlike the poor minority communities that alleged they were 'targets' of environmentally unjust activities; the Niger Delta communities are allegedly 'subjects' of an environmentally unjust legal framework. In other words, while the American communities were purposely targeted as locations for waste sites and landfills for example, the legal framework regulating the oil-industry located by nature in the Niger Delta region permits environmental unfriendly practices that have adverse socio-economic effects on its inhabitants. The parallel drawn is however evident in Bullard's condemnation of the present environmental protection paradigm that has 'institutionalized unequal protection' leaving the 'politically and economically disenfranchised' vulnerable and victims of polluting

[30] R Bullard, 'Overcoming Racism in Environmental Decision-making' (1994) 36 *Environment* 4, 11.

industries.[31] The next section discusses the philosophical underpinnings of the environmental justice theory with particular emphasis on the absence of economic and political power model that is applied to examine the role of public participation in the Nigerian oil-industry.

2.4 Philosophical Underpinnings of Environmental Justice

There are two issues that need to be clarified from the onset of this section. The first is that this thesis concentrates on the human causes and consequences of the distribution of 'environmental goods and bads'.[32] As noted previously, the aim of the thesis is to determine the role of law in regulating the relationship between the stakeholders of the Nigerian oil-industry, the violent conflicts that have emanated from it as well as promoting and sustaining peace in it and its host-communities. Consequently, the thesis makes a distinction between 'environmental justice' and 'ecological justice'. While 'environmental justice' refers particularly to the interaction and relationship of human beings with each other, 'ecological justice' refers to the relationship between human beings and the rest of the natural world.[33] Low and Gleeson note that notwithstanding the above observation, both environmental justice and ecological justice are 'really two aspects of the same relationship'.[34] Thus, it will also refer to the 'ecocentric' viewpoint that recognizes the ecosphere, rather than any individual organism (particularly mankind) as the source and support of all life.

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[31] *R Bullard* (n 30) 11.

[32] P Penz, 'Environmental Victims and State Sovereignty: A Normative Analysis' in C Williams (ed.) *Environmental Victim* (Earthscan, London 1998) 42.

[33] N Low and B Gleeson, *Justice, Society and Nature: An Exploration of Political Ecology* (Routledge, London 1998) 2. See also, A Ali, 'A Conceptual Framework for Environmental Justice Based on Shared but Differentiated Responsibilities', CSERGE Working Paper EDM 01-02, 1.

[34] *N Low and B Gleeson* (n 33) 2.

The second point to note is that given the objective of the thesis that is to determine the role of the law in the distribution of environmental (and other social) advantages and disadvantages originating from the lucrative oil-industry, emphasis will be placed on environmental justice as a central part of social justice.[35] In addition to the origins of environmental justice in civil rights and the social justice approach to environmental problems, it is suggested that a synergy of environmental and social justice has benefits.[36] The thesis posits that one of such benefits with reference to Nigeria's oil-industry is the maintenance of social order. However, one should aver to the warning that environmental justice is not a panacea for all social injustices and that environmental and social goals can be in conflict.[37] This section is divided in to two broad subsections. The first highlights the theoretical discourse of justice based on the work of Rawls. The second part discusses the critiques of Rawls' conceptualization of justice and constructs an environmental justice theory that is utilized as the theoretical basis to examine the laws regulating the Nigerian oil-industry.

2.4.1 The Philosophy of Justice

It is essential to engage with the general conception of 'justice' before determining the philosophical underpinnings that environmental justice that draws from the three broad categories of justice: distributional justice, procedural justice and entitlements.[38] Briefly,

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[35] 'Are there links between environmental problems and social injustices?' SEPAView vol. 15, <http://www.sepa.org.uk/publications/sepaview/html/15/environmental_justice.htm> accessed 09 January 2008.

[36] C Stephens, S Bullock and A Scott (eds.) *Environmental Justice: Rights and Means to a Healthy Environment for All* (ESRC Global Environmental Change programme Special Briefing No. 7, 2001) Introduction.

[37] *C Stephens et al* (n 36) 3.

[38] S Cutter, 'Race, Class and Environmental Justice' (1995) 19 *Progress in Human Geography* 1, 111-122; M Heiman, 'Race, Waste, and Class: New Perspectives on Environmental Justice' (1996) 28 *Antipode* 2, 111-121

'distributional justice' refers to the distribution of harms (and benefits) over a population and may be applied across groups within society and across time (intergenerational equity). 'Procedural justice' focuses on the process through which environmental decisions are made and as long as they are made through a fair and open process, they may be considered just regardless of their distributional impact. 'Entitlements' approaches seeks to ensure that individuals (and communities) have effective access to and control over environmental goods and services necessary to their well-being.[39] Rawls conception of justice is a central starting point in discussions relating to the philosophy of justice. His notions on the conception of justice are highlighted followed by critiques of these views towards a pragmatic construction of an environmental justice theory which this thesis applies to examine the laws regulating Nigeria's oil-industry.

Rawls in his seminal work *A Theory of Justice*[40] develops his principles of justice through what he refers to as the 'Original Position' where every 'person' decides principles of justice from behind a 'veil of ignorance'. The conception of the 'person' in the 'original position' according to Rawls 'on some occasions will mean human individuals, but in others it may refer to nations, provinces, business firms, churches, teams, and so on.[41] This point is noteworthy because this thesis analyzes the legal relationships between the stakeholders in Nigeria's oil-industry that includes individuals, communities, corporations and governments. The analyses aim to reveal if, why and how the laws that regulate their relationships are

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and N Low and B Gleeson, 'Situating Justice in the Environment: The Case of BHP at the Ok Tedi Copper Mine' (1998) 30 *Antipode* 3, 201-226.

[39] M Leach, R Mearns and I Scoones, 'Environmental Entitlements: Dynamics and Institutions in Community-Based Natural Resource Management' (1999) 27 *World Development* 2, 225-247.

[40] J Rawls, *A Theory of Justice* (Oxford University Press, Oxford 1971).

[41] J Rawls, 'Justice as Fairness' (1958) 67 *Philosophical Review* 2, 166.

considered 'unjust' and initiate or exacerbate in violent conflicts.[42] He describes the 'veil of ignorance' as a position where no one knows his place in society, his class position or social status, nor does anyone know his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like. A central claim in this proposition is that those in the 'original position' would all adopt a maximum strategy after satisfying requirements for basic liberties which would maximize the position of the least well-off. In essence, ignorance of the above stated details about oneself will lead to principles which are fair to all.

Two core themes may be noted regarding Rawls' conception of justice at this juncture. The first as he asserts in his article 'Justice as Fairness', is that 'the fundamental idea in the concept of justice is fairness'.[43] The second is the emphasis placed on distribution as the major determinant factor in defining 'justice'.[44] The latter point has been criticized on the argument that justice cannot and should not be reduced to distributional concept.[45] Before engaging in critiques of Rawls' conception, it is important to note that Rawls' conception of justice also considers inter-generational concerns under the 'just savings principle'. Though what exactly should be saved for future generations is impossible to determine in advance and in an abstract form, Rawls suggests that each generation puts itself in the place of the next, and asks what it could reasonably expect to receive. As Dobson pointed out, 'no theory of justice can henceforth be regarded as complete it if does not take into account the

[42] Chapter 5 below discusses the legal framework and highlights its role in the escalation of violence in the Niger Delta.

[43] *J Rawls* (n 41) 164.

[44] D Miller, P*rinciples of Social Justice* (Harvard University Press, Cambridge 1999) 1 and 232.

[45] D Schlosberg, 'Reconceiving Environmental Justice: Global Movements and Political Theories' (2004) 13 *Environmental Politics* 3, 517. Refer to the following section 4.4.2 for a discussion of this point.

possibility of extending the community of justice beyond the realm of present generation human beings.'[46]

2.4.2 Critique of Rawls and Construction of an Environmental Justice Theory

The major criticism of Rawls conception of justice by environmental justice theorists is that it overemphasises distribution. Young for instance argues that though distributional issues are essential components of social justice, 'it is a mistake to reduce social justice to distribution'.[47] She argues that while theories of distributive justice offer models and procedures by which distribution may be improved, none of them examines the social, cultural, symbolic and institutional conditions underlying poor distributions in the first place. She is critical of the way distributive theories of justice take goods as static, rather than as outcomes of various social and institutional relations.[48] According to her, injustice is not based solely on inequitable distribution but is also induced by lack of recognition of group difference. 'Recognition' refers to the existence of democratic institutions that convey a communal acknowledgement of equal individual worth.[49] Honneth theorising on 'recognition' observes that:

> What had previously only had the status of generalised empirical findings was raised to the level of a normatively substantive social theory: the basic concepts through which social justice comes to bear in a theory of society must be tailored to subjects' normative expectations regarding the social recognition of their personal integrity.[50]

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[46] A Dobson *Justice and the Environment* (Oxford University Press, Oxford 1998) 244-245.

[47] I Young, *Justice and the Politics of Difference* (Princeton University Press, Princeton, NJ. 1990) 1.

[48] *I Young* (n 47) 1.

[49] W Shutkin, 'The Concept of Environmental Justice and a Reconception of Democracy' (1995) 14 *Virginia Environmental Law Journal* 4, 585.

[50] A Honneth, 'Redistribution as Recognition: A Response to Nancy Fraser', in N Fraser and A Honneth (eds.) *Redistribution or Recognition? A Political-Philosophical Exchange* (Verso, London 2003) 133.

In essence, subjects have normative expectations of the social order including and above all things, recognition of their identity claims.[51] Lack of recognition is the foundation of distributive injustice and it is also an injustice because it constrains people and does them harm. Young opines that lack of recognition is demonstrated by various forms of insults, degradation and devaluation at both the individual and cultural level. It inflicts damage to both oppressed communities and the image of those communities in the larger cultural and political realm.[52] Fraser argues similarly that justice requires attention to both distribution and recognition and in this sense justice is 'bivalent'.[53] According to her, political demands for redistributive justice - that is, socio-economic reforms - are being displaced by identity-based struggles for cultural recognition - that is, demands to have certain types of cultural identity, such as indigenous ethnicity or gay identities, accorded appropriate respect and value.[54] Boucher notes in this regards that in the last 30 years, there has been a major change in the nature and aims of political struggles in the industrialized world and social conflicts are seen

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[51] *A Honneth* (n 50) 131.

[52] *D Schlosberg* (n 45) 519. It is perhaps not coincidental that this group are among the poorest people in Nigeria because environmental justice literature clearly demonstrates that the environmental costs of socioeconomic development tend to fall on poorer nations and poorer classes in society. See, S Clayton, 'Appeals to Justice in the Environmental Debate' (1994) 50 *Journal of Social Issues* 3, 13-28 and S Clayton, 'Models of Justice in the Environmental Debate' (2000) 56 *Journal of Social Issues* 3, 459-474.

[53] N Fraser, 'Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation' in N Fraser and A Honneth, *Redistribution or Recognition? A Political-Philosophical Exchange* (Verso, London 2003) 9.

[54] N Fraser quoted in G Boucher, 'The Struggle for Recognition', Lecture delivered at the Hegel and Ethical Politics Summer School (February 2004) <http://www.ethicalpolitics.org/geoff-boucher/2004/recognition.htm> accessed 09 January 2008.

as struggles for cultural recognition.[55] While it is agreed that there is a paradigm shift from demands for socio-economic reforms to claims regarding cultural identity, it is a fallacy to contend that this is taking place solely in the industrialized world. The conflict in Nigeria's oil-industry that this thesis focuses on is an example of a country outside the 'industrialized world' where conflicts have transcended from merely socio-economic reform basis to issues of cultural identity.

Boucher notes that 'Fraser's spectrum, ranging from redistribution to recognition, has become the landmark analysis in discussions about contemporary identity-based struggles.'[56] Simply put, economic class and social status are two analytically distinct, but factually intertwined, bases for injustice, whose remedy is always some combination of redistribution and recognition. Ong states that this viewpoint 'has significant implications for multicultural policy and in relation to social integration into multicultural and trans-national political communities.'[57] This observation is of importance to this thesis specifically because Nigeria is a large multicultural society and the oil-rich Delta communities are restive due to the manifestation of policies deemed unjust to them. They argue that this is because they are not integrated into the national political landscape controlled by other ethnic groups. It is important at this juncture to note Honneth's criticism of Fraser's conception of dual struggles for economic redistribution and cultural recognition. Though he is in agreement with Fraser

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[55] He argues that in the wake of economic globalization and the disintegration of Soviet Communism, a host of cultural conflicts have arisen, revolving upon sexual orientations, racial categories, national identities, ethnic group identifications and religious movements. See, *G Boucher* (n 54).

[56] *G Boucher* (n 54).

[57] A Ong, *Flexible Citizenship: The Cultural Logic of Transnationality* (Duke University Press, Durham, NC. 1999) quoted in *G Boucher* (n 54).

on the import of recognition,[58] he argues that Fraser's rigid distinction between cultural recognition and material redistribution leads to her overlooking 'legal recognition'.[59] In his opinion, the legal framework now permeates economics and culture and the main conflict dynamic of modern society is the interpretation of the scope and application of the principle of equality.[60] It is important to note some observations regarding Honneth's theory of justice.

First, as Boucher notes, Honneth does not take one side of the 'recognition debate' against the other but delves into the unified root of both demands for economic redistribution and claims for cultural recognition (and legal equality, and political representation, and so forth).[61] The second point is that the moral sources of the experience of social discontent are grounded in the forms of misrecognition: the violation of the body, the denial of respect and the denigration of forms of life. This, he asserts, is experienced as injustice in a precise sense: individuals affected regard institutional rules that disrespect them as in conflict with well-founded claims to recognition. The experience of social suffering has a normative core, then, because the experience of injustice happens when an institutional rule regulating asymmetrical recognition cannot be rationally justified.[62] Schlosberg argues similarly that there is a direct link between the lack of self respect and recognition and a decline in a person's membership and participation in the greater community, including the political and

[58] Honneth opines that: '[T]he conceptual framework of recognition is of central importance today not because it expresses the objectives of a new type of social movement, but because it has proven to be the appropriate tool for categorically unlocking social experiences of injustice as a whole'. See, *A Honneth* (n 50) 133.

[59] *A Honneth* (n 50) 136.

[60] *A Honneth* (n 50) 151-152.

[61] *G Boucher* (n 54).

[62] *A Honneth* (n 50) 131.

institutional order.[63] These elements; that is, democratic and participatory decision-making procedures according to Young are both an element of and a condition for, social justice.[64] One cannot but recount the relevance of this position to the core assertion of the oil-bearing communities of Nigeria. The communities contend that the regulatory framework of the oil-industry developed without their participation and issues of non-recognition both in the oil-industry and country's political processes generally, are primary causes of the conflicts in the industry.

Despite the limitations in applying general theories of procedural or distributive justice or fairness to environmental issues,[65] Paavola argues that the legitimacy of environmental decisions must rest in part on procedural justice.[66] Procedural justice can assure those whose interests are not endorsed by a particular environmental decision that those interests can count in other decisions. It also enables affected parties to express their dissent or consent and to maintain their dignity.[67] Literature on procedural justice reveals that its core concerns can be represented by the following three questions:

- Which parties and whose interests are recognized, and how, in the processes of environmental planning, decision-making and governance?

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[63] *D Schlosberg* (n 45) 519.

[64] *I Young* (n 47) 23.

[65] R Sacks, *Homo Geographicus* (Johns Hopkins Press, Baltimore 1997) quoted in G Syme and B Nancarrow, 'Social Justice and Environmental Management: An Introduction' (2001) 14 *Social Justice Research* 4, 345.

[66] J Paavola, 'Environmental Conflicts and Institutions as Conceptual Cornerstones of Environmental Governance Research', Centre for Social and Economic Research on the Global Environment (CSERGE) Working Paper EDM 05-01, 6-7.

[67] D Schlosberg, *Environmental Justice and the New Pluralism: The Challenge of Difference for Environmentalism* (Oxford University Press, Oxford 1999) 12-13.

- Which parties can participate in environmental planning, decision-making and governance, and how?
- What is the effective distribution of power in environmental planning, decision-making and governance?[68]

Each of the above questions contains key elements - recognition, participation and distribution – that are related but do not necessarily have priority over the others.

Fraser notes regarding these relationships that recognition is the foundation of procedural justice[69] while Fitzmaurice claims that participation requires recognition.[70] Paavola elucidates on the relationship between participation and distribution in the following terms:

> The solutions for participation, together with political-economic factors of predominantly distributive nature, generate a particular *distribution of power.* The relative power of involved parties determines to which extent they can make their interests to count in environmental planning, decision-making and governance.[71]

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[68] E Lind and T Tyler, *The Social Psychology of Procedural Justice* (Plenum Press, New York 1998); N Fraser, 'Recognition without Ethics?' (2001) 18 *Theory, Culture and Society* 3, 21-42; D Schlosberg, *Environmental Justice and the New Pluralism: The Challenge of Difference for Environmentalism* (Oxford University Press, Oxford 1999); and, K Shrader-Frechette, *Environmental Justice: Creating Equality, Reclaiming Democracy* (Oxford University Press, Oxford 2002).

[69] *N Fraser* (n 68) 21-42. Recognition does not however necessarily involve participation as Paavola reveals using President Clinton's Executive Order 12898 required federal agencies to identify and address the consequences of their programs, policies and actions to minority and low-income populations as an example. See, J Paavola, 'Interdependence, Pluralism and Globalisation: Implications for Environmental Governance' in J Paavola and I Lowe (eds.) *Environmental Values in a Globalising World: Nature, Justice and Governance* (Routledge, London 2005).

[70] M Fitzmaurice, 'Public Participation in the North American Agreement on Environmental Cooperation' (2003) 52 *International and Comparative Law Quarterly* 2, 339.

[71] *J Paavola* (n 66) 6.

Distributive and procedural justice according to Paavola, are tied together despite being separate fields of justice.[72] Distributive outcomes influence but do not necessarily determine recognition, participation and power in different spheres of action. In the same vein, recognition, participation and distribution of power influence plans and decisions, including their distributive implications. Consequently, legitimate environmental decisions have to reflect both distributive and procedural justice concerns particularly where people have broader concerns than their narrowly construed economic welfare.[73] Such is the case among the poor communities that host Nigeria's money-spinning oil-industry that allege the industry has adversely affected not only their economic well-being but also their social, health and spiritual welfare. Dilemmas of distributive justice such as those allegedly suffered in the Niger Delta region for example often occur within complex circumstances that make it difficult to resolve to everyone's satisfaction. In such circumstances, procedural justice plays an important role in justifying decisions to those who have to accept that their interests and values are sacrificed to realize some other interests and values.[74] In Ostrom's view, the solution does not lie simply in ownership arrangements but governance solutions that provide for participation in collective environmental decisions and make conflict resolution available for involved actors.[75] Ostrom's claim constitutes a fundamental process that this thesis posits will provide an avenue to resolve the conflicts (of recognition, participation and distribution) that plague Nigeria's oil-industry.

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[72] *J Paavola* (n 66) 6.

[73] *J Paavola* (n 66) 7.

[74] *J Paavola* (n 66) 7.

[75] E Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge University Press, Cambridge 1990) quoted in *J Paavola* (n 66) 7.

In essence, environmental justice is determined to a large extent by laws and policies.[76] It is best achieved by ensuring these contain procedural measures to ensure the recognition and participation of all stakeholders in the distribution of environmental benefits and burdens. Romm contends with regards to the role of law and policy in environmental justice that the unjust distribution of environmental benefits and burdens are caused by the interaction of environmental policies based on the territorial protection of resources and race-based limitations on social opportunities.[77] Shutkin avers in addition that the environment is about political and economic power: whose voice is heard and whose environment is protected.[78] In other words, those who lack political and economic power are subjected to bear disproportionate environmental burdens from legislative enactments and interpretation. This observation is crucial to this thesis because it adopts the Absence of Political and Economic Power model under the environmental justice theory to analyze the legal framework that regulates the oil-industry to determine the cause of violent conflicts that distorted the achievement of sustainable development goals of its stakeholders. Two observations may be offered at this juncture. The first is in regards the relationship between environmental justice and sustainable development that is also a recurring theme of this thesis. Both concepts are inexorably linked by common themes of environmental quality and social equity even though sustainable development is broader in terms of scope of policies, stakeholders, and

[76] L Cole, 'Expanding Civil Rights Protections in Contested Terrain: Using Title VI of the Civil Rights Act of 1964' in K Mutz, G Bryner and D Kenney, *Justice and Natural Resources: Concepts, Strategies and Applications* (Island Press, Washington 2001) 187-208. See also, L Cole and S Foster, *From the Ground up: Environmental Racism and the Rise of the Environmental Justice Movement* (New York University Press, New York 2001).

[77] J Romm, 'The Coincidental Order of Environmental Justice' in K Mutz, G Bryner and D Kenney (eds.) *Justice and Natural Resources* (Island Press, Washington, DC. 2002).

[78] *W Shuktin* (n 49) 584.

complexities involved.[79] The major objective of environmental justice is to promote the achievement of sustainable development goals. In essence, the establishment of environmental justice in Nigeria's oil-industry will enable the government, oil-industry and the host-communities achieve develop sustainably.

Secondly, it is acknowledged that there are also 'ecocentric' criticisms of Rawls conception of justice. In essence, notwithstanding the thesis' stated concentration on the anthropogenic 'environmental justice' as distinct from 'ecological justice', it appreciates ecocentric arguments. Also, it heeds to Ali's warning not to overemphasize the 'environmental justice', 'ecological justice' dichotomy too much because eventually, all environmental and ecological problems have their roots in social problems.[80] Felipe's criticism of Rawls' conception of justice is based on its 'limited possibility of a non-*speciesist* environmental justice.'[81] Felipe argues that:

> besides need for rational liberties and fair opportunity to conceive and follow *a rational plan of life*, reasonable subjects have to consider, behind the veil of ignorance, something more basic: their biological condition, even if their nature were not to be reduced to the fact of having got a body.[82]

Thus, rational subjects in the *original position* have to locate the *veil of ignorance* at a different point, maybe not merely in terms of anthropocentric interests, or at least, not just

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[79] J Ruhl, 'The Co-Evolution of Sustainable Development and Environmental Justice: Cooperation, then Competition, then Conflict' (1999) 9 *Duke Environmental Law and Policy* 2, 163.

[80] A Ali, 'A Conceptual Framework for Environmental Justice Based on Shared but Differentiated Responsibilities' in T Shallcross and J Robinson (eds.) *Global Citizenship and Environmental Justice* (Rodopi, Amsterdam 2006) 42.

[81] S Felipe, 'Rawls' Legacy: A Limited Possibility of a Non-*Speciesist* Environmental Justice' (2005) 4 *Florianópolis* 1, 23.

[82] *S Felipe* (n 81).

considering that humans have only rational interests and no bodily interests to be satisfied.[83] Felipe emphasizes further that it should be considered a moral and political duty to respect equally *basic needs* of humans, mammals, animals of all other kinds, plants and even the needs of the whole biological community of interacting organisms in their physical environment or ecosystems, imposes a revision of our anthropocentric point of view of ethics and justice.[84] In the author's opinion, man having the rational power to order the distribution of basic goods, but disrespecting the need to satisfy vital fundamental interests of other living beings, cannot claim to speak about a sense of justice.[85]

The next section examines the Absence of Political and Economic Power model used as the model to examine issues of recognition, participation and distribution in Nigeria's oil-industry. The general thrust of the thesis' argument is that the legislative framework regulating the Nigerian oil-industry, with particular reference to the environment, does not exhibit these principles of environmental justice and is a contributory cause of social upheavals in the industry and region. As Grass notes, social justice and environmental issues are inseparable, both conceptually and politically and the cost of ignoring these linkages can only aggravate the situation, both environmentally and socially.[86] Subsequent chapters will examine the veracity and practical realities of this statement with regards to the Nigerian oil-industry.

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[83] *S Felipe* (n 81) 24.

[84] *S Felipe* (n 81) 24.

[85] *S Felipe* (n 81) 24.

[86] R Grass, 'Environmental Education and Environmental Justice, A Three Circles Perspective' (1995) *Journal of Multicultural Environmental Education* quoted in A Ali (n 80) 49.

2.4.3 The Absence of Political and Economic Power Model

Mbamalu et al. identify three models of environmental justice theory including the Absence of Political and Economic Power model that is the lens through which this thesis examines the legal framework regulating the Nigerian oil-industry, the Eco-Racism and the Neighbourhood Transition model.[87] Briefly, The Neighbourhood Transition model argues based on peculiar migratory dynamics of communities in the United States that economics is the primary determinant for environmental injustices.[88] The Eco-Racism model argues that minority groups or countries are deliberately targeted for environmental injustices.[89] Though it may be argued that this is not the situation in the Niger Delta, because the locations of oil-related operations are determined, primarily, by geological factors, this model has been extended to apply to Nigeria's oil-industry. For instance, Gbadegeshin has argued that the chemical pollution and destruction of farmland and fishing creeks by oil-companies in the Niger Delta goes beyond (operational) recklessness and claims that (environmental) 'racism' is at the heart of the oil companies' *modus operandi*.[90] This 'racism' refers to the

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[87] *G Mbamalu et al.* (n 14) 5.

[88] *G Mbamalu et al.* (n 14) 5. See also, R Bullard, *Dumping in Dixie: Race Class, and Environmental Quality* (West view Press, Boulder CO. 1994).

[89] *R Bullard* (n 88) See also, *R Bullard* (n 20) 273–288; United Church of Christ), *Toxic Wastes and Race in the United States: A National Report on the Racial and Socio-economic Characteristics with Hazardous Waste Sites* (United Church of Christ, Commission for Racial Justice, New York 1987); and, M Ash and T Fetter, 'Who Lives on the Wrong Side of the Environmental Tracks? Evidence from the EPA's Risk-Screening Environmental Indicators Model' (2004) 85 *Social Science Quarterly* 2, 441–462.

[90] S Gbadegesin, 'Multinational Corporations, Developed Nations, and Environmental Racism: Toxic Waste, Exploration, and Eco-Catastrophe' in L Westra and B Lawson, (eds.) F*aces of Environmental Racism: Confronting Issues of Global Justice* (2nd edn Rowman and Littlefield Publishers, New York 2001) 195. See also, D Simon, 'Corporate Environmental Crimes and Social Inequality' (2000) 43 *American Behavioural Scientist* 4, 633-645.

discrimination in the mode of operations of these companies in the developed world and developing countries such as Nigeria. Turner identifies some of these operational lapses that amount to 'corporate economic and environmental racism' to include the companies' failures to provide life support to oil spill victims, long-term compensation and rehabilitation issues.[91]

Nonetheless, Guha and Martinez-Alier aver that there are similarities between the environmental justice movement in a country like the USA and other environmentally oriented protests and struggles in the developing world. The latter 'environmentalism of the poor' mostly concerned with 'nature/resource based conflicts' originates as a clash over productive resources: a third kind of class conflict, so to speak, but one with deep ecological implications. In contrast, the movement in the North originates outside the production process and is more of a single-issue movement, calling for a change in attitudes (towards the natural world) rather than a change in systems of social production or distribution.[92] A fundamental issue in this contrast is the radically different meaning ascribed to the 'environment'. For example, in the South, forests are not considered as wilderness areas but habitats for the poorest of the poor.[93] In these countries, environmental issues are complex and have highly social and political content than just aesthetic or technical matters of protecting and preserving the wild flora and fauna. Thus the Absence of Political and Economic Power

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[91] T Turner, 'The Land is Dead': Women's Rights as Human Rights: The Case of the Ogbodo Shell Petroleum Spill in Rivers State, Nigeria, (2001) <http://www.uoguelph.ca/~terisatu/ogbodospill.pdf> accessed; 04 August 2007.

[92] R Guha, and J Martinez-Alier, *Varieties of Environmentalism: Essays North and South* (Earthscan, London 1997) 18.

[93] The Centre for Science and Environment on Global Environmental Democracy, 'Statement on Global Environmental Democracy' (1992) 17 *Alternatives* 2, 265.

model is utilized to analyze issues of equity, access and distributional justice in Nigeria's oil-industry that are allegedly the fundamental causes of violent conflicts.[94]

This model posits that communities suffer from environmental inequities because they lack political and economic power.[95] Unequal access to political capital is tantamount to unequal access to natural capital defined as the stock of environmentally provided assets (such as soil, atmosphere, forests, water and wetlands) which provide a flow of useful goods or services which may be renewable or non-renewable, marketed and non-marketed.[96] Agbola and Alabi posit that this notion of access to political capital is a particular entry point for causal explanation of social and environmental injustice in Nigeria.[97] In their opinion, the social and environmental problems in the Niger Delta are directly linked to the unsustainable mode of petroleum resources extraction in Nigeria and to state policies and actions through which the major ethnic groups have made the Niger Delta an environmentally 'peripheral region'.[98]

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[94] See generally, *A Ali* (n 80).

[95] *G Mbamalu et al.* (n 14) 7.

[96] R Goodland, J Lemons and L Westra (eds.) *Ecological Sustainability and Integrity: Concepts and Approaches* (Kluwer Academic, Dordrecht 1998)73. 'Capital' is understood in a broad sense as any stock which is capable of being stored, accumulated, exchanged or depleted and which can be put to work to generate a flow of income or other benefits. Thus the political capital refers to stocks or reserve of power or private asset, describing the position of individuals or groups of social actors in relation to political institutions D. Booth, et al., *Participation and Combined Methods in African Poverty Assessment: Renewing the Agenda* (DFID, London 1998) 69.

[97] T Agbola and M Alabi, 'Political Economy of Petroleum Resources Development, Environmental Injustice and Selective Victimization: A Case Study of the Niger Delta Region of Nigeria' in J Agyeman, R Bullard and B Evans (eds.) *Just Sustainabilities: Development in an Unequal World* (MIT Press, Cambridge, MA. 2003) 277.

[98] *T Agbola and M Alabi* (n 97) 269-288.

Ikejiafor also argues that the development of resources, that is non-renewable capital, has been the responsibility of the dependent capitalist state of Nigeria whose dominant class is chosen among the major ethnic groups in the country.[99] Similarly, a report by the Institute for Democracy and Electoral Assistance (IDEA) asserts that '[The] cumulative acts of exclusion, deprivation and ecocide sponsored by the Nigerian state and petro-business profoundly undermined lives and livelihoods and set the stage for a decade of crisis in the Niger Delta.'[100]

Against the backdrop of these (among several other academic and communal) claims of alleged exclusion, non-recognition and marginalization, this thesis examines the level of participation permitted by the regulatory framework of the Nigerian oil-industry. It focuses on the oil-industry's regulatory framework to determine the veracity in the claims that the inhabitants of the region are denied active participatory roles and therefore bear the environmental burdens without commensurate economic benefits. It also examines the causal links between the alleged non-participation and violent conflicts that have become characteristic of the industry.

[99] For a full discussion on the role of the dominant ethnic groups in controlling the national economy, see U Ikejiafor, 'The God that failed: A Critique of Public Housing in Nigeria, 1975-1995' (1999) 23 *Habitat International* 2, 177-188.

[100] S Ramphal, *Democracy in Nigeria: Continuing Dialogue(s) for Nation-building* (International Institute for Democracy and Electoral Assistance / International IDEA, 2000).

CHAPTER THREE

NIGERIA'S OIL INDUSTRY

3.1 Introduction

This chapter seeks to provide a background to the Nigerian oil industry and the violent conflicts that have become characteristic of it. Broadly, it will define the Niger Delta; outline the development of the oil industry and discuss the effects of the industry with particular emphasis on exploration and production activities on the host-communities' environment. The term 'Niger Delta' is not synonymous with the oil-bearing communities of Nigeria. The term has several connotations and its meaning differs depending on the context in which it is applied. The area's characteristics are described with emphasis on its environmental and biodiversity to provide a background to appreciate the socio-economic and environmental costs of oil exploration and production. The development and structure of Nigeria's oil industry is discussed thereafter. Some significant periods in the historical development of the industry will be emphasized. The effects of the oil industry on the nation will be analyzed under two sub-headings. The first will reveal the economic importance of oil while the next highlights its political importance. These analyses reveal that oil is vital to Nigeria's economy and that the general attitude of the political class has been to gain control of oil-revenues to the detriment of sustainable development of the region's inhabitants and natural resources. The negative impacts of oil on the nation especially its economy is subsequently discussed.

The following section is devoted to the effects of the oil-industry particularly during oil exploitation on the host-communities. A combination of the issues discussed – the structure of the oil industry, effects of the resource on the political-economy of the nation and adverse environmental effects on the host-communities – all contribute to the restiveness in the region

that has now become manifest in varied forms of violent actions against government authorities and the oil-companies. The conflicts in the region are discussed within a historical context by highlighting the conflicts in the palm-oil era. The aim of this section is to reveal how the exclusion of host-communities from participating in the natural resource industry results in violent conflicts. Though the time period and resource in question vary, the principal actors that include government institutions, foreign capital and host-communities are identical. Also, the circumstances of public exclusion from participation in deriving benefits; particularly economic, of the resource is analogous.

3.2 Definition of the Niger Delta

The first part of this section examines the various connotations ascribed to the term 'Niger Delta' and defines the term as generally used in this thesis. The second section highlights the qualities of the region with emphasis on its environmental characteristics.

3.2.1 Defining the term 'Niger Delta'

The term 'Niger Delta' has three different connotations. These are the geographic, political and economic delineations. Geographically, it refers to the areas that make up Rivers, Bayelsa, and Delta states. The World WildLife Foundation (WWF) describes the area as contained in a triangle with the town of Aboh on the Niger River being the northernmost tip; the Benin River forming the western boundary of the eco-region where it merges into the Nigerian Lowland Forest and the Imo River forming the eastern side which merges into the practically vanished Cross-Niger Transition Forests eco-region.[1] Along its southern side, the Niger Delta Swamp Forests is separated from the Atlantic Ocean by a band of mangroves,

[1] World WildLife Foundation (WWF), 'Niger Delta Swamp Forests' <http://www.worldwildlife.org/wildworld/profiles/terrestrial/at/at0122_full.html> accessed 12 January 2007.

which can reach up to 10 km inland and in front of the mangrove belt and close to the sea are ephemeral coastal barrier islands often clothed in transitional vegetation.[2] Politically, the area refers to the south-south political zone of the country consisting 6 of Nigeria's 36 states. They include Akwa Ibom, Bayelsa, Cross River, Delta, Edo and Rivers.[3] This political classification of the country into 6 geo-political zones gained popularity especially with the return to democratic governance in 1999. It has since become the basis for general political planning and logistics including the allocation of federal political offices among politicians.

Economically, the 'Niger Delta' refers broadly to all the contiguous oil-bearing states in Nigeria. This definition is adopted by the Niger Delta Development Commission (NDDC) Act which defines the 'member states' of the Commission to include 'Abia, Akwa-Ibom, Bayelsa, Cross River, Delta, Edo, Imo, Ondo, Rivers State and any other oil producing State.'[4] This economic definition is generally adopted in this thesis. It is noteworthy that two sub-groups are identified under this delineation. The first refers to the 'core' Delta which includes Delta, Rivers and Bayelsa states and the 'peripheral' Delta made up of the six other states including Abia, Akwa-Ibom, Cross River, Edo, Imo and Ondo State. The 'core Niger Delta' refers to the geographic nomenclature of the region while the 'peripheral Niger Delta' is wider in scope and includes other oil-bearing states. The broad definition is adopted generally and whenever the limited description is used, it will be specifically mentioned.

[2] *World WildLife Foundation* (n 1).

[3] The other political zones in the country include the southeast, the southwest, the northcentral, the northeast and the northwest.

[4] Section 30 of the NDDC Act, Cap. N86 of the Laws of the Federation of Nigeria 2004.

3.2.2 The Environmental Qualities of the Niger Delta

The Niger Delta region spans the area where the two great Rivers Niger and Benue discharge their waters into the Atlantic Ocean; an area with about six million people living in an estimated area of 70, 000 square kilometres.[5] Geographically, it consists of a complex system of wetlands and drylands. Despite variations in its exact description, it is one of the largest deltas in the world.[6] The delta is a vast floodplain built up by the accumulation of sedimentary deposits washed down the Niger and Benue rivers. The Niger River which has the ninth largest drainage area of the world's rivers and the third largest in Africa drains into the Niger Delta making the area one of the world's largest wetlands, encompassing over 20,000 Km^3 in southern Nigeria.[7] The area is composed of at least three ecological zones which include the sandy coastal area bordering the Atlantic made up largely of brackish saline mangrove; further north is the fresh water swamp area made up of permanent and seasonal swamp forests; and further north still, the dry land rain forests.[8] The mangrove forest

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[5] Shell Petroleum Development Company of Nigeria Ltd (SPDC), *Nigeria Brief: The Ogoni Issue*, (SPDC 1995), 1.

[6] -- 'Niger River Delta' <http://www.worldwildlife.org/wildworld/profiles/g200/g155.html> accessed 01 December 2007.

[7] R Rangley 'International River Basin Organization in Sub-Saharan Africa', Technical Paper 250 (World Bank, Washington D.C. 1994).

[8] Constitutional Rights Project (CRP), *Land, Oil and Human Rights in Nigeria's Delta Region* (CRP, Lagos 1999) 12. Nyananyo also identified three ecological zones in B Nyananyo, 'Vegetation', in E Alagoa (ed), *The Land and People of Bayelsa State: Central Niger Delta* (Onyoma Research Publications, Port Harcourt 1999) 44-51. In a different study, four zones were identified. See, N Nzewunwa, *The Niger Delta Pre-Historic Economic and Culture* (British Archaeological Reports, Oxford 1980) 1. The World Bank identified 5 zones including the coastal barrier islands, mangroves, freshwaters, swamp forests, and lowland rain forest. See, World Bank, *Defining an Environmental Development Strategy for the Niger Delta (Volume I and II)*, (World Bank Industry and Energy Operations Division, Washington D.C. 1995).

of Nigeria is the third largest in the world and the largest in Africa. About 6,000 Km^2 of this mangrove, which accounts for approximately 60 per cent of the Nigerian mangrove, is found in the Niger Delta. The fresh water swamp forests of the delta – about 11,700 Km^2 – are the most extensive in the west and central Africa.[9] It is expected that with the high rates of deforestation in the west of the country, the fresh water swamp forests will soon become the largest forest zone in Nigeria even though it is being threatened by commercial logging, agriculture and settlements.[10] Most areas of the lowland rain forest are derived Savannah with small areas of intact forest remaining, most of it having been cleared for agriculture. The barrier island forests are the smallest of the ecological zones in the delta.

The Niger Delta has the high biodiversity characteristic of extensive swamp and forests areas, with many unique species of plants and animals.[11] Ebeku identified some of the peculiar endowments of the region.[12] The mangrove forests contain the salt fern, spiny false date, red mangrove tree with its characteristic stilt or prop roots and the black mangrove and white mangrove trees.[13] Faunal species found in the mangrove include the Mona Monkey, Speckle-throated Otter and Marsh Mongoose and other species of genets.[14] The freshwater swamp forests provide habitat for the black squirrels and antelopes, monkeys, apes and elephants and

[9] D Moffat and O Linden, 'Perception and Reality: Assessing Priorities for Sustainable Development in the Niger River Delta' (1995) 24 *Ambio* 7-8.

[10] *D Moffat and O Linden* (n 9) 7-8.

[11] Human Rights Watch, *The Price of Oil: Corporate Social Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities* (Human Rights Watch/Africa, Washington D.C. 1999) 53.

[12] K Ebeku, 'Biodiversity Conservation in Nigeria: An Appraisal of the Legal Regime in Relation to the Niger Delta Area of the Country' (2004) 16 *Journal of Environmental Law* 3, 361-375

[13] *K Ebeku* (n 12) 363.

[14] *K Ebeku* (n 12) 364.

chimpanzee. The Slater's guenon, the only mammal endemic to Nigeria lives only in this region of the delta.[15] This region has more freshwater fish species than any other coastal system in West Africa.[16] While 16 fish species are reportedly endemic to the area, another 29 are near endemic[17] and 10 of 12 new species discovered in Nigeria since 1968 are found in the Niger Delta.[18] Although no systemic bird census has been conducted in the region, the area is believed to harbour over 330 different species and provide habitat for trans-hemispheric migratory bird species.[19] Clearly, the region is rich in natural resources other than its oil deposits that presently sustains the national economy, dictates its socio-political pulse and is the central cause of violent conflicts that erupt with increasing frequency. However, these species are vulnerable to the impacts of oil related activities.[20]

3.3 Nigeria's Oil Industry

This section examines the development of Nigeria's oil industry and highlights the current ownership structure of the industry.

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[15] *D Moffat and O Linden* (n 9) 531.

[16] World Bank, *Defining* (n 8) 38.

[17] Niger Delta Wetlands Centre, *Review of Initial Assessment of Environmental Issues in the Niger Delta and Niger Delta Biodiversity* (Port-Harcourt, 1995) quoted in *K Ebeku* (n 12) 364.

[18] K Ebeku, 'Legal Aspects of Environmental Issues and Equity Considerations in the Exploitation of Oil in Nigeria's Niger Delta' (PhD thesis, University of Kent 2002), 183

[19] Global Environmental Facility, Pamphlet (1992), 1 quoted in *K Ebeku* (n 12) 364.

[20] Refer to section 3.4.3.1 below.

3.3.1 The Development of the Nigerian Oil Industry

The origin of Nigeria's oil-industry is often traced to the activities of the Nigeria Bitumen Corporation (NBC) described as a German entity in 1908.[21] Steyn however reveals that the development of Nigeria's oil-industry began earlier in 1903 and that the NBC was a British registered company and its shares were traded on the stock exchange in London.[22] According to him, the Nigeria Properties (Limited) and the Nigeria and West African Development Syndicate (Limited) started exploration for bitumen, coal and petroleum in 1903.[23] The NBC was founded in 1905 with the aim to 'acquire and work the aforementioned exploration concessions of Nigeria Properties, and the Nigeria and West African Development Syndicate.'[24] NBC struck oil in November 1908 producing 2,000 barrels per day (bpd) by September 1909 but unable to exploit their find profitably, it ceased its operations in 1913 and liquidated in 1914.[25] The D'Arcy Exploration Corporation and the Whitehall Petroleum

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[21] A Aina, 'Impact of New Technologies on Nigeria's Oil Reserve' (1993) 12 *The Leading Edge* 938-940; J Frynas, *Oil in Nigeria: Conflict and Litigation between Oil Companies and Village Communities* (Transaction Publishers, Hamburg 2000) 9; S Pearson, *Petroleum and the Nigerian economy* (Stanford University Press, Stanford 1970) 15; and, T Falola and A Genova, *The Politics of the Global Oil Industry: An Introduction* (Praeger, Westport 2005) 199.

[22] P Steyn, 'Oil Exploration in Colonial Nigeria', XIV International Economic History Congress, Helsinki (2006), 5 <http://www.helsinki.fi/iehc2006/papers1/Steyn.pdf> accessed 15 December 2007.

[23] See *P Steyn* (n 22).

[24] *P Steyn* (n 22) 3.

[25] J Carland, *The Colonial Office and Nigeria, 1898-1914*, (The Macmillan Press, London 1985) 193-195. Though the company was not the only company engaged in oil exploration at the time, it was reportedly more successful than the others. the Colonial Office documentation reveal that enquiries about oil exploration licences were received from the British Colonial Petroleum Corporation (Limited), a Captain Barnett and Rosewarne (Limited). However, only the British Colonial Petroleum Corporation (Limited) proceeded with exploration activities. *P Steyn* (n 22) 6.

Corporation briefly revived commercial interest in the colony's oil possibilities between 1918 and 1923. However, Whitehall relinquished their rights under the concession in 1922. Shell d'Arcy (D'Arcy's progeny was incorporated by British Petroleum and the Royal Dutch/Shell Group) on the other hand maintained their presence in Nigeria and began exploration in 1937. The company was granted a monopoly to prospect for oil in 1937[26] in furtherance of British colonial policy and law.[27] Section 15 of the Oil Mineral Ordinance of 1907 made by the British colonial government stated:

> No license or lease shall be granted under the provisions of the Ordinance to any firm, syndicate, or company which is not British in its control and organization, and in the case of a company, all the directors shall be, and shall at all times continue to be, British subjects, and the company shall be registered in and subject to the laws of some country or places which is part of His Majesty's dominions, or in which His Majesty has jurisdiction.[28]

The company delineated the Niger Delta as the oil-bearing area of the country but could not begin exploration due to the outbreak of World War II in 1939. It resumed exploration activities in 1946 and struck oil in commercial quantities in 1956 in Oloibiri. Initial production rate was 5,100bpd and the first shipment was made in 1958.[29]

Nigeria gained political independence from the United Kingdom in 1960 and terminated Shell's monopoly of the industry in 1961.[30] Other oil multinationals including Mobil, Agip, Safrap (Elf), Tenneco and Amoseas (Texaco and Chevron) respectively joined Shell and by

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[26] D Omoweh, *Shell Petroleum Development Company, the State and Underdevelopment of Nigeria's Niger Delta: A Study in Environmental Degradation* (Africa World Press, Inc., Trenton 2005) 107.

[27] *P Steyn* (n 22) 6.

[28] This principle was retained in the 1914, 1925, 1950 and 1958 amendments to the Mineral Oils Ordinance.

[29] Nigerian National Petroleum Company (NNPC) website <http://www.nnpcgroup.com/history.htm> accessed 15 April 2007.

[30] Section 2 of the Mineral Oils (Amendment) Act, 1958 repealed 1914 Mineral Act that granted the company sole concessionary rights.

the mid-1960s, were actively involved in the Nigerian oil industry. The main intention of the Nigerian government at this time was to increase the pace of oil development. It achieved this aim as oil production rose to 2 million bpd in 1972 and 2.4 million bpd in 1979.[31] With these production levels, Nigeria had become the world's seventh largest oil producer by 1972 and is now Africa's biggest oil producer and within the top seven oil producing countries in the world. In 1968, all foreign companies were mandated under the Companies Act to re-register as Nigerian entities.[32] Subsequently, the Government introduced the indigenization policy to secure local control and direction of the Nigerian economy through acquisition, 'by law [and] if necessary, equity participation in a number of strategic industries'.[33] The intentions of the Government for adopting this policy included the promotion of indigenous ownership and control of strategic industrial sectors to maximize local retention of profit, increase the net industrial contribution to the national economy, and avoid explosive socio-political consequences that are bound to arise in future with foreign-absentee control of the nation's industrial sector.[34] It is doubtful that the last of these objectives has been met especially as the conflicts in the oil-industry are often linked to the *de-facto* foreign control of the industry. Nonetheless, the oil-industry was among the strategic industries the Government decided to hold at least 55 per cent equity interest.[35]

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[31] Nigerian National Petroleum Company (n 29).

[32] K Ekwueme, 'Nigeria's Principal Investment Laws in the Context of International Law and Practice' (2005) 49 *Journal of African Law* 2, 177–206.

[33] S Madujibeya, 'Oil and Nigeria's Economic Development' (1976) 75 *African Affairs* 300, 304.

[34] Nigeria, Second National Development Plan, 1970-74, 144.

[35] Others included the iron and steel, petrochemical complexes and fertilizer production. See, Nigerian Enterprises Promotion Decree (No. 4) 1972.

Another significant change occurred in the structure of the Nigerian oil-industry in 1971 when the country joined the Organization of Petroleum Exporting Countries (OPEC) which had been formed earlier in 1960 in Baghdad by Iran, Iraq, Kuwait, Saudi Arabia and Venezuela.[36] The main objectives of OPEC include: to co-ordinate and unify the petroleum policies of the Member Countries and to determine the best means for safeguarding their individual and collective interests; to seek ways and means of ensuring the stabilization of prices in international oil markets, with a view to eliminating harmful and unnecessary fluctuations; and, to provide an efficient economic and regular supply of petroleum to consuming nations and a fair return on capital to those investing in the petroleum industry. To achieve these aims, OPEC encouraged its members to play more prominent roles in the oil industry. This led to major restructuring of the oil-industry in the Member-States of the Organization including Nigeria and is discussed in the next section.

3.3.2 The Structure of Nigeria's Oil Industry

Nigeria's direct involvement in the oil-industry was instigated by OPECs encouragement that its Member-Countries play prominent roles in the oil-industry. Nigeria like other OPEC member-states, acquired equity shares in oil-multinationals operating within their territories through national oil companies.[37] The Nigerian National Oil Company (NNOC) was created to manage the Federal Government's initial 35 per cent equity stake acquired in 1971 and increased to 60 per cent in 1974. Management of this stake was transferred to the Nigerian National Petroleum Company in 1977[38] and subsequently transformed to an autonomous

[36] OPEC was registered with the United Nations Secretariat on November 6, 1962 (UN Resolution No 6363).

[37] E Walker, 'Structural Change, the Oil Boom and the Cocoa Economy of Southwestern Nigeria, 1973-1980s' (2000) 38 *Journal of Modern African Studies* 1, 73.

[38] Decree No. 33 of 1977.

commercial enterprise in 1992 renamed the Nigerian National Petroleum Corporation (NNPC). In 2007, the NNPC was 'unbundled' by the Federal Government with 5 commissions taking over its functions and those of its parent ministry.[39] As part of the major reforms the NNPC will be replaced by the National Oil Company. The change of name however 'will not affect the joint venture activities in the upstream and downstream oil sectors'.[40] In essence, the Federal Government remains the major partner in the joint-ventures holding an average 57 per cent stake with the major multinational petroleum exploration and production companies.

3.4 The Significance of Oil in Nigeria

This section discusses the economic, political, and socio-environmental significance of oil on Nigeria. The first part of the section highlights the role of oil in the political organization of the country. It reveals how the discovery of oil led to the over-centralization of power and exclusion of grassroots organizations in the management of oil resources and revenue. The next part analyses the economic impacts of oil on the nation. It reveals that while the resource benefited the nation positively by attracting foreign investment and revenues, it also contributed to the mismanagement of the national economy. The final section highlights the socio-environmental impacts of oil on the host-communities. It analyses how the exploration and production activities of the oil-industry have affected the social organization and physical environment of the host-communities.

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[39] Alexander Gas and Oil, 'Nigeria to break up NNPC into five sections' <http://www.gasandoil.com/goc/news/nta73963.htm> accessed 11 November 2007.

[40] H Muhammad and S Ojo 'Restructuring'll not affect our operations – NNPC', *Daily Trust* (Lagos) 31 August 2007 <http://www.legaloil.com/NewsItem.asp?DocumentIDX=1188859450&Category=news> accessed 10 November 2007.

3.4.1 The Politics of Oil in Nigeria

This section seeks to disclose how oil has shaped the political organization of the country with particular reference to the ownership, control and management of the resource and its accruing revenues. Gause examined the impact of oil on Nigeria's political organization; notably, the centralization of power in the central government. According to him, the extensive reliance of the government on oil revenues led to over-centralization of economic power in the Federal Government thereby making it solely responsible for the authoritative allocation of resources to the society[41] and encouraged rent-seeking.[42] Rent-seeking is a process where a government relies principally on the revenue that accrues from a natural resource such as oil-taxes. Its repercussions include the government's maintenance of its position as the dominant player in the domestic economy solely responsible for the authoritative allocation of resources to the society. According to Gause, the structure of the Nigerian oil-industry makes it easy for power and wealth to be concentrated in the hands of the government.[43]

The linkages between oil and dominant central governance were also investigated by Obi and Herbst. Herbst argued that oil revenue funneled through the State helped to strengthen the fiscal muscle of the government, while at the same time nurturing elaborate patron-client networks that led to intense, zero-sum, political competition.[44] Obi posited that oil provides

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[41] G Gause, *Oil Monarchies: Domestic and Security Challenges in the Arab Gulf States* (Council of Foreign Relations Press, New York 1994) 42-44.

[42] I Gray and T Karl, *Bottom of the Barrel: Africa's Oil Boom and the Poor* (Catholic Relief Services, 2003) 21-23.

[43] *G Gause* (n 41) 42-44. See also, T Turner, 'The Transfer of Oil Technology and the Nigerian State' (1976) 8*Development and Change* 4, 353-390; and, *Human Rights Watch* (n 11) 25-26.

[44] J Herbst, 'Is Nigeria a Viable State?'(1996) 19 *The Washington Quarterly* 2, 151-172.

the fiscal basis of the Nigerian State, and the 'allocative role' of the State has made it central to politics. [45] Thus, according to him, the State became not just a dispenser of huge oil revenues, but also 'a vortex site of struggles between social groups for the control of "oil power"'.[46] Simply put, oil-revenues helped strengthen the central government's position in the political organization of the country as it controlled the oil-revenues that it became absolutely reliant upon. The historical context of power accumulation by the Federal Government may be traced to Nigeria's Civil War[47] which several commentators have linked to the struggle to control the oil-wells located then in the Mid-west and Eastern Regions. Briefly, the Civil War was fought to re-integrate the Eastern region that seceded in 1967. According to Soremekun and Obi the Civil War was a 'struggle for the physical possession of the oil wealth in the Niger Delta between factions of the domestic ruling class on the one hand, and between the Eastern faction and the producing areas on the other hand'.[48] Okonta and Douglas similarly opine that the war was not so much a battle to maintain the unity and integrity of the country as a desperate gambit by the Federal Government to win back the oil fields of the Niger Delta from Biafra.[49]

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[45] C Obi, 'Globalization and Local Resistance: The Case of the Ogoni versus Shell' (1997) 2 *New Political Economy* 1, 137-148.

[46] *C Obi* (n 45) 11-12.

[47] The Nigerian Civil War covered the periods between July 1967 and January 1970.

[48] K Soremekun and C Obi, 'The Changing Pattern of Foreign Investment in the Nigerian Oil Industry' (1993) 18 *Africa Development* 3, 14.

[49] I Okonta and O Douglas, *Where Vultures Feast: Shell, Human Rights and Oil* (Verso, London 2003) 33.

One of the initiatives of the Federal Government to abate the war had been the political restructuring of the country into a federation of 12 states on 27 May 1967.[50] This initiative became a reality at the end of the war with military governors put in charge of the administration of each state. These positions, regarded as military postings, were subject to the whims of the Head of State whom they answered to in strict military fashion. Consequently, the central government exercised strict control over the federating states. The position though slightly relaxed under the democratic regime still exists due to the 'allocative role' of the central government. While the role of the military in Nigerian politics may seem innocuous, oil also had a role to play in its prolonged involvement. Factors responsible for protracted military rule include the Civil War, the role of Nigeria as a spoiler alongside Venezuela during the Arab oil embargo of 1973, the formation of the Organization of Petroleum Exporting Countries (OPEC) and the increasing radical host-community responses to oil exploration and production.[51] In Soremekun's words, 'the defining and definitive nature of oil … [and] the attendant revenues succeeded in impeding the consummation of the democratic ferment in Nigeria'.[52] For instance, though the return to military rule in 1983 was premised on the need to restructure the national economy following the effects of the 'resource curse', the military's 16-year fray into national politics did not yield apparent positive results.[53] Rather, the oil-industry was mismanaged and the seeds of discord that

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[50] A Atofarati, 'The Nigerian Civil War: Causes, Strategies, And Lessons Learnt' (Article) <http://www.globalsecurity.org/military/library/report/1992/index.html> accessed 14 June 2005.

[51] K Soremekun, 'Oil and the Military' in A Sanda, O Ojo, and V Ayeni (eds.) *The Impacts of Military Rule on Nigeria's Administration* (University of Ife, Ile-Ife 1987).

[52] K Soremekun, 'Oil and the Democratic imperative in Nigeria' in D Olowu, K Soremekun and A Williams, (eds.) *Governance and Democratization in Nigeria* (Spectrum Books, Ibadan 1995) 97-109.

[53] National Centre for Economic Management and Administration (NCEMA), 'Structural Adjustment Programme in Nigeria: Causes, Processes and Outcomes' Revised Technical Proposal submitted to Global

permeate the oil-industry were sown during the period especially influenced by the promulgation of military decrees that formed the basis of the oil industry's regulatory framework.[54]

These Decrees strategically altered the structure of ownership and management of oil and eroded participation of the host-communities in the industry.[55] With ownership and control vested in the Federal Military Government, oil revenues were arbitrarily (mis)managed. Vincent illustrates the arbitrariness with reference to the deduction of 'first line charges' made since 1989.[56] These charges which include deductions from federal revenue (the bulk of which is derived from oil) to service external debts, meet joint-venture cash calls, Nigeria National Petroleum Corporation priority projects, and excess crude oil earnings before sharing revenue with the federating units were (and remain) contrary to the provisions of the constitution on revenue allocation. The Supreme Court of Nigeria declared these first line charges illegal in *Attorney-General of the Federation v Attorney-General of Abia State and 35 others*.[57] The salient point to note from the case at this juncture is that it was instituted due to the agitation of the elected state governors. These governors are politically independent

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Development Network <www.gdnet.org/pdf/global_research_projects/understanding_reform/country_studies/proposals/Nigeria_proposal.pdf> accessed 19 April 2007.

[54] Chapter 5 below examines the legal framework that regulates the oil-industry and reveals the influence of military decrees.

[55] B Onimode, 'Fiscal Federalism in 21st Century: Options for Nigeria' International Conference on New Directions in Federalism in Africa, Abuja, March 15-17, 1999, 7.

[56] O Vincent, 'Fiscal Federalism: the Nigerian Experience' Fourth Public Lecture of the Nigerian Economic Society, Abuja, 11 December 2001.

[57] S.C. 28/2001. This case is discussed in more detail in section 6.2.4.2 below.

from the Federal Government and thus able to query federal actions deemed inimical to their states. As Vincent noted, the dictatorial practice of 'first charges' illustrates that the 'military were not interested in Nigeria operating federalism and its corollary, fiscal federalism.'[58] The characteristic arbitrary nature of military rule encouraged non-accountability to the public and 'cast a pale shadow on the country's oil industry just as on other sectors of the national economy.'[59] The military according to Oyebode turned the oil-industry into a 'bastion of patronage, filthy lucre and graft to the detriment of utilitarian ideals of governance which they usually liked to lay claim to justification of their assault on the ballot-box.'[60]

However, while Soremekun also castigates the military for their role in national politics, monopoly of power and increased hostilities by out-groups, he suggests that a better deal and improved climate should not be expected under a civilian dispensation.[61] He argues that the open-ended nature of civilian rule creates a 'profusion of triads' - comprising elements of the state comprador, Nigerian middlemen and representatives of foreign firms - that intensify the unwholesome practices in the oil industry.[62] However, he noted that the worst democratic regime was far better than the best authoritarian military rule because the centralization of power by the latter at the centre heightened instability in the polity.[63] While it is easy to

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[58] *O Vincent* (n 56). 14-15.

[59] A Oyebode, *Law and the Management of a Petroleum Economy: Revisiting the Nigerian Crisis* (Setop Arts Productions, Ikeja 2004) 4.

[60] A Oyebode (n 59) 4. See also, M Peel, 'Crisis in the Niger Delta: How Failures of Transparency and Accountability are Destroying the Region' (2005) AFP BP 05/02.

[61] *K Soremekun* (n 52) 97-109.

[62] *K Soremekun* (n 52) 97-109.

[63] *K Soremekun* (n 52) 101. This situation it seems benefitted the oil-companies that prefer operating under military regimes that provide 'political stability which multinational corporations like Shell needed to operate

identify with his latter submission, it is difficult to agree totally with the former. While the existence of the 'profusion of triads' is not disputed, democratic liberties absent in military dictatorships will promote increased levels of accountability in management of the oil industry and subsequently encourage transparency as exemplified in the judicial intervention in *Attorney-General of the Federation v Attorney-General of Abia State and 35 others.*[64] Indeed the main thrust of the argument of this thesis based on the recognition of rights would be unfeasible under military dispensations.

Clearly, oil plays a dominant role in Nigerian politics. The oil-multinationals however assert that they neither influence nor intervene in Nigeria's politics. For instance, a Shell statement released on November 8, 1995 stated that 'we believe that to interfere in the processes, either political or legal, here in Nigeria would be wrong. A large multinational company such as Shell cannot and must not interfere with the affairs of any sovereign state.'[65] Despite this denial, there is ample evidence of the close links between the government and the oil companies as well as instances of overbearing influence. An example is the security arrangements that exist between them, which have remained shrouded in secrecy. Cases brought under Aliens Tort Claimants Act (1789) in particular have revealed strong evidence that the oil-companies do influence, organize and take part in 'national affairs'. In *Wiwa v Royal Dutch Petroleum Co., et. al.*[66] an American District Court held that Royal Dutch/Shell

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profitably in developing countries.' See I Okonta, 'The Lingering Crisis in Nigeria's Niger Delta and Suggestions for a Peaceful Resolution' (Article) <http://www.cdd.org.uk/resources/workingpapers/niger_delta_eng.htm> accessed 01 May 2007

[64] *Attorney-General of the Federation's case* (n 57).

[65] Quoted in 'The Flames of Shell: Oil, Nigeria, and the Ogoni', <http://www.thirdworldtraveler.com/Boycotts/Flames_Shell.html> accessed 25 April, 2007.

[66] Case No.96 CIV 8386 (KMW) (S.D.N.Y. 2002).

participated in crimes against humanity, torture, summary execution, arbitrary detention, cruel, inhuman, and degrading treatment, and other violations of international law carried out by the Federal Military Government.[67] The court also found that the plaintiffs' Racketeer Influenced and Corrupt Organizations Act (1970) claims could proceed, because Royal Dutch/Shell's actions in concert with the Nigerian military satisfied the racketeering requirements of the Act, and because they engaged in these acts in part to facilitate the export of cheap oil to the United States. These examples reveal that the oil-multinationals take part, or, at least influence 'national' affairs particularly under military regimes that shaped the laws regulating the oil-industry. Whether or not and how these companies may have influenced the laws and policies that regulate them is beyond the scope of this thesis. Rather, it concentrates on how the legal framework regulating the oil-industry has eroded, or, and limited public involvement in the industry thereby initiating, or, and exacerbating violent conflicts. The following part examines the impacts of oil on the national economy.

3.4.2 Oil and the Nigerian Economy

The impacts of oil on the national economy are two-fold. The first part of this section highlights the positive contributions of the resource to the economy while the second part examines the negative impacts.

3.4.2.1 The Positive Impacts of Oil on the Economy

Nigeria's oil industry grew tremendously due to quantity and quality of oil as well as the country's proximity to markets in Western Europe, North and South America.[68] The potential

[67] See also, *Bowoto v. Chevron, No.* C99-02506SI, 2006 WL 2455752 (N.D. Cal. Aug. 22, 2006).

[68] International Management and Engineering Group of Britain, *Study of Potential Benefits to British Industry from Offshore Oil and Gas Developments* (HMSO, London 1972) 100.

of the industry encouraged several oil-related companies to venture in to the country and by 1974, there were 19 oil companies in operation.[69] Madujibeya examined the impacts of oil on the Nigerian economy within the first 15 years of its exploitation.[70] This period arguably represents era when the effects of the positive outcomes were felt more than the negative. According to Madujibeya, the contribution of oil to the national economy include the creation of employment opportunities; local expenditure on goods and services; contributions to government revenues, to gross domestic product, and to foreign exchange reserves; and the supply of energy to industry and commerce.[71]

The most significant impact of oil to Nigeria is perhaps the huge revenues it contributes to federal coffers. Revenue accrues from the Government's participation interests, sale of oil-blocs, concession rents, royalties and profit taxes amongst others. Oil revenues increased from merely 9.5 per cent in 1966[72] to 55 per cent in 1974 and 60 per cent by 1979.[73] In 1980, it contributed about 80 per cent of government earnings[74] and between January and June 2007, revenue from oil amounted to approximately N2.075 trillion or 92 per cent of the total federally collected revenue of N2.3trillion.[75] The resource constituted 95 per cent of Nigeria's

[69] S Madujibeya, 'Nigerian Oil: A Review of Nigeria's Petroleum Industry' (1975) *Standard and Chartered Review*, 2.

[70] S Madujibeya, 'Oil and Nigeria's Economic Development' (1976) 75 *African Affairs* 300, 284-316.

[71] *S Madujibeya* (n 70) 285.

[72] S Pearson, *Petroleum and the Nigerian Economy* (Stanford University Press, Stanford, Ca. 1970).

[73] J Onoh, *The Nigerian Oil Economy* (St. Martin's Press, New York 1983) 33-37.

[74] *Human Rights Watch* (n 11) 25.

[75] M Folaseyi, 'FG nets N2.075 trillion from crude oil sales', *The Punch* (Lagos) October 13 2005.

total exports in 1975, 98.5 per cent in 1985, and 97 per cent by 1990.[76] In 2000, Nigeria received 99.6 per cent of its export income from oil making it the world's most oil-dependent country.[77] Figures published from Nigeria's 'first-ever audit of income' revealed that between 2002 and 2004, the Federal Government 'earned $41 billion from taxes, royalties and the export of oil by state companies.[78] It is estimated that oil has generated approximately US$340 billion in over 40 years since its commercial discovery.[79] Oil also accounts for at least 70 per cent of budgetary expenditure.[80] Similarly, oil's contribution to Gross Domestic Product increased significantly since independence. From 0.3 per cent in 1960, it rose to 7.1 per cent in 1970, 22.0 per cent in 1980 and 47.5 per cent in 2000 but dropped in 2002 to 40.6 per cent.[81]

The large number of foreign and local oil companies (including support companies) operating in Nigeria has increased the employment opportunities available to its citizenry. Initially,

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[76] J Ihonvbere, *Nigeria: The Politics of Adjustment and Democracy* (Transaction Publishers, New Brunswick, NJ 1994) 22.

[77] M Ross, 'Nigeria's Oil Sector and the Poor', Paper prepared for the UK Department for International Development "Nigeria: Drivers of Challenge" Programme (2003) 1.

[78] R Eberlein, 'On the Road to the State's Perdition? Authority and Sovereignty in the Niger Delta, Nigeria' (2006) 44 *Journal of Modern African Studies* 4, 576.

[79] *I Gray and T Karl* (n 42) 25. Also, M Aluko, 'Nigeria and Her Membership of OPEC' <http://www.africaeconomicanalysis.org/articles/gen/opec.html> accessed 13 December 2007.

[80] J Udeh, 'Petroleum Revenue Management: The Nigerian Perspective at Oil', Gas, Mining and Chemicals Department of the WBG and ESMAP Workshop on Petroleum Revenue Management, Washington, DC, October 23-24, 2002.

[81] B Adedipe, 'The Impact of Oil on Nigeria's Economic Policy Formulation' Conference on Nigeria: Maximizing Pro-poor Growth: Regenerating the Socio-economic Database, City University, London, June 16-17 2004.

Nigerians were employed in non-basic activities such as building of roads and bridges, the clearing of drilling sites, transportation of materials and equipment and the building of staff housing and recreational facilities.[82] With time, they began to be employed in oil operations including seismic and drilling operations as well as in supervisory and managerial functions. This was accelerated by the Federal Government's policy of promoting a 'Nigeria quota system' in the industry.[83] Local expenditure on goods and services also increased with the advent and growth of the oil-industry. These include payment of salaries and wages, payments to local contractors, and local purchases of goods and services. Other expenditure includes payment of local rents, educational grants and scholarships, contributions to local causes such as arts, and sports. Oil is the major source of energy in the country. Nigeria's energy requirements are met through oil (64 per cent), natural gas (27 per cent), and hydro-electricity (8 per cent) with about 80 per cent of natural gas produced consumed annually by the national electricity company[84] and other Independent Power Plants.[85] It is important to note that the West Africa Gas Pipeline project is however expected to export gas to Benin, Togo and Ghana. Expectedly, the project will increase revenues and possibly reduce gas flaring. Clearly, oil exploited from the Niger Delta is the lifeline of the Nigerian economy and as Ross observed, it would be difficult to exaggerate the role of oil in the Nigerian

[82] *S Madujibeya* (n 70) 285.

[83] The policy makes it mandatory that a percentage of staff positions are held by Nigerians. This also includes oil-service companies.

[84] The Power Holding Company of Nigeria (PHCN) is responsible for generating national electricity. The company is one of the companies formed after the National Eclectic Power Authority (NEPA) was restructured in March 2005.

[85] Global Insight, 'Power sector to receive US$8 bil. investment in Nigeria' <http://www.globalinsight.com/SDA/SDADetail9904.htm> accessed; 15 December 2007.

economy.[86] However, it is evident that despite these positive outcomes of the oil-industry in Nigeria, the resource has also had grave impacts on the country including the recurrent spates of violence that continue to threaten the viability of the sustainable development of the resource and its host-communities. The negative impacts of oil on the economy are discussed in the following section.

3.4.2.2 The Negative Impacts of Oil on the Economy

Despite the benefits that oil has brought to Nigeria, it is believed to be the cause of its underdevelopment. Since oil became the mainstay of the Nigerian economy, the country has performed worse in terms of social indicators than most sub-Saharan Africa as a whole and much worse than other regions of the developing world. Karl describes the malady of Nigeria's economy as the 'paradox of plenty'.[87] The phrase explains the irony of the influx of revenue to a country without commensurate benefits to its citizenry.[88] Nigeria has received over US$300 billion in oil revenues in the last 25 years yet has per capita income of less than $1 a day.[89] Surveys conducted by Nigeria's Federal Office of Statistics (FOS) show that in a 16 year period that began in 1980 (the year the oil boom years of the 1970s began to go burst), the percentage of Nigerians living in poverty rose from 28 per cent to 66 per cent.

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[86] *M Ross* (n 77) 2.

[87] *I Gray and T Karl* (n 42) 5.

[88] *I Gray and T Karl* (n 42) 5.

[89] *I Gray and T Karl* (n 42) 5. See also, World Bank, 'Making Petroleum Revenue Management Work for the Poor: Transparency and Good Governance Dominate Discussion on Petroleum Revenue Management' press release, November 4, 2002. IRIN observed that Nigeria's pervasive poverty has occurred despite the fact that between 1970 and 1999, the country earned an estimated US$320 billion from the export of crude oil. See, IRIN, 'NIGERIA: Focus on the scourge of poverty', <www.irinnews.org/report.aspx?reportid=32448> accessed 06 June, 2007.

Within the same period the percentage of the rural poor increased from 29 per cent to 70 per cent percent, while the share of the poor in the urban areas rose from 18 per cent to 55 per cent.[90] World Bank figures quoted by the Report for Nigeria's gross national product per capita also confirm this trend. From US$780 in 1981, GDP fell to an all time low of US$220 in 1994 before inching upwards to US$310 in 1998.[91] The country's ranking under the United Nations Development Programme's Human Development Index (UNDP-HDI) in 1988 was 151 of the 174 countries assessed and in 2006, Nigeria's ranking had dropped to 159 of the 177 countries included in the UNDP-HDI.[92] In essence, the revenues that accrue to the nation have not reflected in the development of its citizenry.

The 'resource curse' syndrome captures the negative effects of oil on the Nigeria's economy.[93] It describes the negative development outcomes associated with the reliance on petroleum and other minerals.[94] Several studies from economists including Auty,[95] Gelb[96]

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[90] Quoted in *IRIN* (n 89).

[91] *IRIN* (n 89).

[92] UNDP, *Human Development Report, Beyond Scarcity: Power, Poverty and Global Water Crisis* <http://hdr.undp.org/hdr2006/statistics/indicators/5.html> accessed 26 May, 2007.

[93] S Usman, 'Nigeria – Lifting the Resource Curse', Lecture delivered at the London School of Economics and Political Science, 11 October, 2007. Also, P Lewis, Moving beyond the Resource Curse: Lessons from Nigeria and Indonesia' paper presented at the annual meeting of the American Political Science Association, Hilton Chicago and the Palmer House Hilton, Chicago, IL, Sep 02, 200, online: <www.allacademic.com/meta/p59564_index.html> accessed 25 November, 2007 and X. Sala-i-Martin and A Subramanian, 'Addressing the Natural Resource Curse: An Illustration from Nigeria' (July 2003). IMF Working Paper No. 03/139, <http://ssrn.com/abstract=879215> accessed 25 November 2007.

[94] R Auty, *Sustaining Development in Mineral Economies: The Resource Curse Thesis* (Routledge, London 1993).

and Sachs and Warner[97] have tendered empirical and analytical evidence to argue that countries rich in natural resources tend to perform worse economically than others. Gylfason highlights this point by examining the gross national product (GNP) per capita growth in OPEC countries in comparison with the rest of the developing world. His results showed that from 1965-1998, GNP per capita growth decreased on average by 1.3 per cent, while in the rest of the developing world, per capita growth was on average 2.2 per cent.[98] That notwithstanding, some countries with large extractive industries have recorded successes in avoiding the 'curse'. Stevens notes that even the Oxfam America report which is the most vociferous in its belief in 'resource curse', acknowledges that some countries including Botswana, Chile, Malaysia and Norway have overcome 'resource curse' and implemented sound pro-poor strategies.[99] Gary and Karl outline the symptoms of resource curse to include increased expectations and appetite for spending based on unrealistic revenue projections; decrease in the quality of spending; the encouragement of rent-seeking from the natural resource sector which hinders growth, distribution and poverty alleviation.[100] Others include,

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[95] R Auty, *Resource-Based Industrialization: Sowing the Oil in Eight Developing Countries* (Oxford University Press, New York 1990).

[96] A Gelb, *Windfall Gains: Blessing or Curse?* (Oxford University Press, New York 1988).

[97] J Sachs and A Warner, 'Natural Resource Abundance and Economic Growth', National Bureau of Economic Research Working paper No. 5398, (Cambridge, MA., 1999) and J Sachs and A Warner, 'The Big Push, Natural Resource Booms and Growth', (1999) 59 *Journal of Development Economics* 1, 43-76. See also, J Sachs and F Rodriguez, 'Why Do Resource-Abundant Economies Grow More Slowly?' (1999) 4 *Journal for Economic Growth* 3, 277- 303.

[98] T Gylfason, *Natural Resources, Education and Economic Development* CEPR Discussion Paper 2594 (2000).

[99] P Stevens, 'Resource Impact: A Curse or Blessing?' (2005) 13 *Centre for Energy Petroleum and Mineral Law and Policy Internet Journal* 14 <www.dundee.ac.uk/cepmlp/journal/html/Vol14/Vol14_1.pdf> accessed 14 March 2005.

[100] *I Gray and T Karl* (n 42) 21-23.

the loss of fiscal control resulting in inflation which further hampers growth, equity and the alleviation of poverty; the volatility of revenues from the natural resource sector, and government mismanagement, or political corruption, provoked by the inflows of easy windfalls from the resource sector and a decline in the competitiveness of other economic sectors caused by appreciation of the real exchange rate as resource revenues enter an economy referred to as the 'Dutch Disease'.[101] Sarraf and Jiwanji otherwise describe the 'Dutch Disease' as the '...failure of resource abundant economies to promote a competitive manufacturing sector'[102] while Karl describes it as 'a process whereby new discoveries or favorable price changes in one sector of the economy cause distress in other areas'.[103]

Since oil was discovered in commercial quantities, other sectors of Nigeria's economy have declined. Agriculture, was the dominant economic activity employing about 60 per cent of the country's rural population, has declined significantly.[104] Nigeria was the world's leading producer of palm oil and groundnuts, second leading producer of cocoa in the world, and was also a prominent exporter of rubber, cotton and hides.[105] These agricultural exports constituted about 85 per cent of total exports in 1960 dropped to about 5 per cent of total exports in the mid-seventies.[106] Its contribution to GDP also fell drastically from 70 per cent

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[101] *I Gray and T Karl* (n 42) 21-23.

[102] M Sarraf and M Jiwanji, 'Beating the Resource Curse: The Case of Botswana' (2001) *Environmental Economics Series*, Paper No.83, 3.

[103] T Karl, *The Paradox of Plenty: Oil Booms and Petro-States* (University of California Press, Berkeley 1997), 206-208.

[104] E Walker, 'Structural Change, the Oil Boom and the Cocoa Economy of Southwestern Nigeria, 1973-1980s' (2000) 38 *Journal of Modern African Studies* 1, 72.

[105] *E Walker* (n 104) 72.

[106] S Olayide, *Economic Survey of Nigeria* (Aromolaran Publishing Co., Ibadan 1976) 2.

before the oil-boom to 25 per cent by 1980.[107] The defining moments in this gargantuan decline was the government's increase in its stakes in the oil-industry and the oil boom of the 1970s. These increased the revenues that accrued to the Government from oil-rents and reduced agricultural productivity. Presently, cocoa production, mostly from obsolete varieties and overage trees, is down from 300,000 tons to around 180,000 tons annually; poultry farming has dropped from 40 million birds annually to about 18 million, while the decline in groundnut and palm oil production is reportedly more dramatic.[108]

The effects of resource curse on government spending include huge expenditure on costly, and often inappropriate, infrastructure projects with questionable rates of return and sizable recurrent cost especially during the height of the oil-boom in the 1970s.[109] Alongside these 'white elephant' projects, there was a recorded growth in importation of non-essential goods and luxury items that did not contribute to economic development.[110] Gary and Karl noted that the decrease in quality of spending precipitated the government to steadily shore up its participation in the oil-industry by way of equity shares in the oil companies as well as increasing oil taxes and royalties to guarantee income to meet its intemperate spending. Data

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[107] N Adedipe, *Fluxes, forces and flash flosses in Nigerian Agriculture*, University of Agriculture, Abeokuta Alumni Association Lecture Series 1 (1999). It rose to about 40% in 1986 due to the impact of the Structural Adjustment Programme (SAP) and was about 37% in 1999.

[108] -- 'Nigeria: Economy' <http://www.historycentral.com/NationbyNation/Nigeria/Economy.html> accessed 15 April 2007.

[109] *National Centre for Economic Management and Administration* (n 53) 3.

[110] In mid-1975 for instance, 400 cargo ships - 250 of them carrying 1.5 million tons of cement - clogged the harbour of Lagos, which had been paralyzed for fifteen months with vessels waiting to be unloaded. See, A Nwabuzor, 'Corruption and Development: New Initiatives in Economic Openness and Strengthened Rule of Law' (2005) 59 *Journal of Business Ethics* 2, 121-138.

available from the Central Bank of Nigeria (CBN) reveals the remarkable increase in oil-revenues that accrued to the country during and after this period. According to the Bank, non-oil revenue contributed over 70 per cent of total revenue in 1970 but by 1981, oil-revenue contributed 56 per cent of total revenue, 63.3 per cent in 1997 and 77.8 per cent by 1999.[111]

The over-reliance on oil exports and its consequent negative impacts culminated in the economy spiraling out of control.[112] By 1982, the government implemented 'austerity measures' to tackle declining growth, increasing unemployment, galloping inflation, high incidence of poverty, worsening balance of payment conditions, debilitating debt burden and increasing unsustainable fiscal deficits amongst other economic maladies.[113] The failure of this initiative led to the implementation of an extensive structural adjustment programme in 1986. The programme sought to revive the national economy by restructuring and diversifying the productive base of the economy to reduce the dependency on the oil sector.[114] Though it recorded some positive effects on the national economy notably the reversal of the negative trend in GDP and other key sectors of the economy, it brought few tangible benefits to the people.[115] The standard and quality of life of the majority of Nigerians

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[111] Federal Ministry of Finance, CBN Annual Reports.

[112] *National Centre for Economic Management and Administration* (n 53) 6.

[113] M Okome, 'The Politics of Implementing the Structural Adjustment Program in Nigeria: State Repression, Coercion & Co-optation Versus Social Forces' Contestation, 1986-1993', (Article) <http://www.africaresource.com/content/view/62/68/> accessed 19 April 2007.

[114] Other objectives of the programme include increased emphasis on private sector participation in the national economy; promotion of commercialization and privatization of government-owned enterprises; reduction of dependency on imports; and promote non-inflationary economic growth amongst others. See, *National Centre for Economic Management and Administration* (n 53).

[115] *National Centre for Economic Management and Administration* (n 53).

deteriorated with the depreciation of the national currency.[116] The structural adjustment programme affected the inhabitants of the Niger Delta that were 'already impoverished and deprived of the basic necessities of life by successive governments...particularly keenly.'[117]

During the period, the region that is notably one of the poorest and most underdeveloped areas in the country[118] received less in oil derivation revenue that it, like the federation, had become almost totally reliant on. With scarce arable land and fisheries due in part to oil activities, the inhabitants became increasingly restive. In their perception, they were not deriving adequate benefits from the industry that had deprived them of their traditional means of livelihood. Social upheavals in other parts of the country caused by structural adjustment programme increased the agitation in the Delta region significantly.[119] As Okome observed, structural adjustment programme contributed to the 'considerable violence to the social fabric in Nigeria' as social cohesiveness was eroded thereby escalating several social problems that resulted in social upheaval as students and civil society engaged in civil disorder.'[120] Though the structural adjustment programme was subsequently scrapped, its manifestations, particularly in the Niger Delta, continue to plague the oil-industry, national and international socio-economic security. Militants operating in the area threaten continued violence until the demands of the communities are 'appropriately' addressed.[121] This thesis argues for the

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[116] *M Okome* (n 113).

[117] *I Okonta and O Douglas* (n 49) 32.

[118] BBC News, 'Nigeria militia storm oil station' 22 September 2005 <http://news.bbc.co.uk/1/hi/world/africa/4270582.stm> accessed 23 November 2007.

[119] *I Okonta and O Douglas* (n 49) 33.

[120] *M Okome* (n 113).

[121] -- 'Nigerian militants claim oil attack, threaten more', Reuters 08 December 2006 <http://www.alertnet.org/thenews/newsdesk/L08299971.htm> accessed 15 January 2007.

recognition of these host-communities' rights to participate in the industry they host as the fundamental means to curbing the restiveness in the area.

This section has attempted to link the economic impacts of oil to the conflicts that beset the oil-industry. It revealed that as oil production and revenues increased, other sectors of the economy were neglected as the nation relied predominantly on oil-rents. Mismanagement of the oil-revenues resulted in the resource curse syndrome which the Government attempted to control by introducing a structural adjustment programme following the failure of earlier austerity measures. One of the consequences of the programme however was the increase in economic hardship of the citizenry particularly in the Niger Delta that resulted in restiveness and violent conflicts. The following section examines the environmental and social impacts of oil on the host-communities. It aims to reveal how these factors contribute to the restiveness in the Niger Delta region.

3.4.3 The Socio-Environmental Impacts of the Oil on Host-Communities

This section is divided into two parts. The first highlights the environmental impacts of oil on the host-communities while the second examines the social impacts and draws the causal links between the environmental effects, social impacts and the conflicts. This approach; that is, linking the environmental and social factors provides the background necessary to appreciate the argument that environmental human rights in particular should be recognized and made enforceable in response to activities of Nigeria's oil-industry. The thesis argues that recognition and enforcement of this right (especially its procedural aspects) will contribute to curbing the current violence aimed against the oil-industry. It is acknowledged that the causes of these conflicts are multifarious and include issues unconnected with the environment such as alleged political inequity and inadequate revenue allocation to the region. Some of these

issues are however within the scope of public participation rights which the thesis posits is a prerequisite to ending the conflicts that besiege the Nigerian oil-industry.

3.4.3.1 The Environmental Impact of Oil on the Host-Communities

Oil exploitation activities adversely impact the Niger Delta's diverse and delicate physical environment that is the richest in Nigeria in terms of natural resources.[122] The area's resources include large oil and gas deposits, extensive forests, good agricultural land and abundant fish resources[123] that are of regional and global importance. While its oil deposits contribute significantly to satisfying global demand, its wetlands are valuable for the absorption of green house gases needed to control global warming. Incidentally, oil exploitation activities contribute to global warming. Simply, exploration and exploitation of oil involves its extraction from subsurface deposits which alters the delicate surface and subsurface of the physical environment.[124] That notwithstanding the primary cause of the manifest pollution of the Delta environment remains contradictory. While the host-communities supported by environmental and human rights NGOs allege oil operations are the main cause of pollution,[125] oil-companies argue otherwise. The companies maintain that

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[122] See section 3.2.2 above.

[123] *D Moffat and O Linden* (n 9) 527. Also, Niger Delta Environmental Survey (NDES), *Final Report Phase I: Environmental and Socio-Economic Characteristics, vol. 1* (NDES, Lagos 1997) 138.

[124] Board on Environmental Studies and Technology (BEST), *Cumulative Environmental Effects of Oil and Gas Activities on Alaska's North Slope* (The National Academy Press, Washington, D. C. 2003) 64.

[125] Most often quoted in this regard is the statement credited to Van Dessel who resigned his position as the Head of Environmental Studies for Shell Nigeria in December 1994. He asserted on British television in March 1996 that 'Shell was devastating the area' and he felt his professional and personal integrity was at stake. Quoted in 'The Flames of Shell: Oil, Nigeria, and the Ogoni', <http://www.thirdworldtraveler.com/Boycotts/Flames_Shell.html> accessed 25 April, 2007.

scientific evidence indicates that oil pollution is not of highest concern relative to other issues. The World Bank avers similarly that available scientific evidence indicates that oil pollution is not of highest concern relative to other issues. According to the World Bank, the timing of oil production and declines in fisheries and agriculture productivity 'may be largely coincidental' while 'factors such as population growth and migration, as well as the construction of upstream dams, are more likely to be the causes of productivity declines'.[126]

While the veracity of these opposing claims is not an immediate concern, it is imperative to note the reasons given by the World Bank amongst others are precipitated by the oil-industry. For instance, the oil-industry has contributed to population growth with the migration of workforce, contractors, suppliers etc into the region. Also, the industry's land requirements have contributed to land scarcity resulting in increased pressure on available land. This section however concentrates on the role of the oil-industry in environmental pollution. In this regard, two facts are indubitable. First is that an extensive network of pipelines, production, processing, and storage facilities have been built by the oil-companies during the 40 years of their operations in Nigeria. Secondly is that the oil exploration and production activities have consequences that include environmental damage of nearby regions, their economies and health.[127] The effects of the various stages of oil exploration and production on the environment are discussed forthwith.

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[126] World Bank, 'The Niger Delta: A Stakeholder Approach to Environmental Development', *Findings*, *Africa Region*, No. 53 December 1995, <http://www.worldbank.org/afr/findings/english/find53.pdf> accessed 03 December 2007

[127] Centre for Energy Economics (CEE), 'Environmental Catch-22 in Nigeria' <http://www.beg.utexas.edu/energyecon/new-era/case_studies/Environmental_Catch_22_in_Nigeria.pdf> accessed 18 June 2006.

The initial stage of oil exploration involves seismic surveys. Seismic surveys require vegetation to be cut back to ensure that the holes for the dynamite and receivers are sited in a straight line referred to as 'seismic lines'.[128] Although seismic lines are only needed temporarily and growth regenerates quickly in dry land and freshwater areas, mangrove forests have a very slow regeneration rate and may take up to 30 years to fully regenerate.[129] The soil, sediment and vegetation of this fragile zone has been significantly altered by seismic operations[130] that are believed to have contributed, at least in part, to the observed despoliation of some of the species found within the vicinities of the seismic lines and hydrocarbon percolation.[131] Also, seismic surveying activity causes destabilization of sedimentary materials which causes increment in turbidity, blockage of filter feeding apparatuses in benthic fauna, reduction of photosynthetic activity due to reduced light penetration etc.[132] Seismic crews also generate thousands of tons of waste, all disposed untreated directly into the ecosystem.[133] In essence, seismic operations affect the ecology of

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[128] Shell Publicity Booklet, 'Oil' (London: Shell International Ltd., 1990).

[129] J Frynas, 'A Socio-Legal Approach to Natural Resource Conflicts – Environmental Impact of Oil Operations on Village Communities in Nigeria'; African Environments: Past and Present Conference, University of Oxford, 5-8 July 1999.

[130] Shell estimated in 1993 that since it had started operations onshore, 60,000 Km of seismic lines had been cut, of which 39,000 Km was through mangrove and that in its (then) forthcoming three-dimensional surveys, the company would cut a further 31,380 Km, of which 17,400 Km were to be through mangrove. See SPDC, PAGE Fact Book 1993, Section 3.1.1.

[131] L Osuji, B Ndukwu, G Obute and I Agbagwa, 'Impact of Four-Dimensional Seismic and Production Activities on the Mangrove Systems of the Niger Delta, Nigeria' (2006) 22 *Chemistry and Ecology* 5, 415-424.

[132] *L Osuji et al* (n 131) 415-424.

[133] Federal Ministry of Environment, Abuja, Nigeria Conservation Foundation, Lagos, WWF UK, CEESP-IUCN Commission on Environmental, Economic, and Social Policy, *Niger Delta Natural Resource Damage Assessment and Restoration Project* (2006) 4.

the Delta, particularly the mangrove area that is the third largest in the world, the largest in Africa and provides a habitat for several unique plants and animals.[134] Other areas including the forest habitats - mangroves, lowland rainforests, swamp forests, and barrier island forests that are cleared or degraded by oil activities are among priority areas identified for restoration.[135]

The drilling stage follows the seismic surveys. It begins with clearing the vegetation and building access roads and canals to access initial exploratory wells. If drilling reveals that there is no oil in a commercial quantity, the so-called 'dry hole' is plugged and abandoned. If the field is to be commercially exploited, some of these appraisal wells may later be used as development wells for oil production.[136] Chemicals and sludge generated during this process include highly toxic oily residues, tank bottom sludge, and obsolete chemicals that potentially pollute the environment if not properly treated and disposed of. The construction of canals and causeways carried out mostly during this phase to facilitate transportation of men, goods and oil contribute to environmental pollution have created new conditions that have affected both flow patterns and the eco-system.[137] These include changed salinity leading to forest dieback; changed water flow patterns, disrupting erosion and sediment deposition; dredge spoils eroding during rains, increasing turbidity and, potentially, acidity; temporarily increased biochemical oxygen demand from dredged material and houseboat sewage; and

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[134] See section 3.2.2 above.

[135] *Federal Ministry of Environment* (n 133) 4.

[136] See N Hyne, *Nontechnical Guide to Petroleum Geology, Exploration, Drilling and Production* (Pennwell,Tulsa, Oklahoma 1995) 225-389.

[137] *World Bank* (n 8).

destroyed mangroves and freshwater forests.[138] These and other long-term problems from canals modifying the hydrological regimes are beginning to emerge in the area[139]and altering discharge distribution, causing flooding in some areas and depriving others areas of water.[140]

Oil production activities increase the risk of environmental pollution with attendant problems of oil spills and gas flares that are at the heart of ecological harms.[141] Despite unavailability of accurate statistics on oil spills, an estimated 1.5 million tons of oil, 50 times the pollution unleashed in the Exxon Valdez tanker disaster, has been spilt in the ecologically sensitive Niger Delta over the past 50 years.[142] Department of Petroleum Resources statistics indicate that between 1976 and 1996 a total of 4,835 incidents resulted in the spillage of at least 2,446,322 barrels of oil which an estimated 1,896,930 barrels (about 77 per cent) were lost to the environment.[143] Another estimate suggests that between 1986 and 2000 there were 3,854 oil spill incidents which resulted in the loss of 437,810 barrels of oil into the environment.[144]

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[138] T Abam, 'Regional Hydrological Research Perspectives in the Niger Delta' (2001) 46 *Hydrological Sciences Journal* 1, 23.

[139] C Powell, 'Wildlife Species Known/Suspected in Upper Orashi Forest Reserve, Threatened by the EU Sponsored RISONPALM Lowland Oil Palm Project', Unpublished Report (1995) quoted in *T Abam* (n 138) 23.

[140] *T Abam* (n 138) 23.

[141] M Watts, 'Petro-Violence: Some Thoughts on Community, Extraction and Political Economy', Workshop on Environment and Violence, University of California, Berkeley, September 24-26, 1998, online: www.globetrotter.berkeley.edu/EnvirPol/WP/01-Watts.pdf. Accessed; 14 March 2005.

[142] J Brown, 'Niger Delta bears brunt after 50 years of oil spills', The Independent, 26 October 2006, online: http://news.independent.co.uk/world/africa/article1930130.ece. Accessed; 05 December 2007.

[143] The DPR is the government agency responsible for supervising the oil companies.

[144] O Adeyemi, 'Oil Exploration and Environmental Degradation: the Nigerian Experience', *Environmental Informatics Archives (International Society for Environmental Information Sciences publication)* Volume 2 (2004), 389.

The Inspectorate Division of the Nigeria National Petroleum Corporation highlighted the perennial problem of oil spills in 1983 thus:

> We witnessed the slow poisoning of the waters of this country, and the destruction of vegetation, and agricultural land by oil spills which occur during petroleum operations. But since the inception of the oil industry in Nigeria more than twenty-five years ago, there has been no concerned and effective effort on the part of the Government, let alone the oil operators to control the environmental problems associated with the industry.[145]

Despite the complicity of the oil-companies and Government implied by the monitoring agency and voiced by the host-communities, both parties exonerate themselves on the grounds that most spills are caused by sabotage. The effects of these spills rather than the party responsible for them are of import at this juncture. Though the gaseous and liquid components of spilled oil evaporate, it still has adverse effects on the environment.[146] Such spills pollute drinking water, destroy farmlands, plants and animals in the estuarine zone; settles on beaches and kills organisms and marine animals like fishes, crabs and other crustaceans many of which are endemic to the region and important to its biodiversity.[147] Oil on the water surface also interferes with gaseous interchange at the sea surface and dissolved

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[145] H Dappa-Biriye, R Briggs, B Idoniboye-Obu and D Fubara, 'The Endangered Environment of the Niger Delta: Constraints and Strategies', an NGO Memorandum of the Rivers Chiefs and Peoples Conference, for the World Conference of Indigenous Peoples on Environment and Development and the United Nations Conference on Environment and Development, Rio de Janeiro, 1992, 2.

[146] E Akpofure, M Efere and P Ayawei, 'Oil Spillage in Nigeria's Niger Delta: Integrated Grass Root Post-Impact Assessment of Acute Damaging Effects of Continuous Oil Spills in the Niger Delta January 1998 - January 2000' (Article) <http://www.waado.org/Environment/PetrolPolution/OilSpills/OilSpills_AdverseEffects.html> accessed 28 November 2007.

[147] P Nwilo and O Badejo, 'Impacts of Oil Spills Along the Nigerian Coast', The Association for Environmental Health and Sciences (AEHS) Soil Sediment and Water Magazine (October 2001) <http://www.aehsmag.com/issues/2001/october/impacts.htm#top> accessed 26 November 2007.

oxygen levels will thereby be lowered thereby affecting the life span of marine animals. Although micro-organisms also degrade petroleum hydrocarbons after spillage,[148] the harm has already been caused and cannot be completely eliminated.

The level of gas flaring in Nigeria is notoriously high. On the basis of the Organization of Petroleum Exporting Countries' figures for 2001, Nigeria was the 'world's biggest flarer of gas in absolute and proportionate terms.'[149] Theoretically, if the combustion process during flaring is complete, the products include relatively innocuous gases such as carbon dioxide and water.[150] However, on average, gas flaring in the Niger Delta is 'incomplete combustion' resulting in huge volumes of greenhouse gases, carbon dioxide and methane expunged into the atmosphere, while sulphur dioxide emissions return as acid rain.[151] Acid rain, a mixture of rain and soot from the flares, contain harmful chemicals and that poison water courses, streams, creeks and agricultural land.[152] It also stunts crop growth,[153] corrodes roofs and

[148] *P Nwilo and O Badejo* (n 147).

[149] Nigeria was estimated to flare 16.8 billion cubic metres of the world's 84.87 billion cubic metres representing almost 20 per cent of the global amount. See, Environmental Rights Action, *Gas Flaring in Nigeria: A Human Rights, Environmental and Economic Monstrosity*, (Netherlands: ERA, 2005) 13.

[150] D Leahey, and K Preston, 'Theoretical and Observational Assessments of Flare Efficiencies' (2001) 51 *Journal of the Air and Waste Management Association* 12, 1610-1616.

[151] M Ishisone, 'Gas Flaring in the Niger Delta: the Potential Benefits of its Reduction on the Local Economy and Environment' (2004) < http://istsocrates.berkeley.edu/~es196/projects/2004final/Ishone.pdf> accessed 05 December 2007.

[152] K Saro-Wiwa, 'Shell in Ogoni and the Niger Delta', Ethnic Minority Rights Organization of Africa (EMIROAF, 1992) quoted in A Rowell, *Shell-Shocked the Environmental and Social Costs of Living with Shell in Nigeria* (Greenpeace International, Netherlands 1994).

[153] D Okezie, and A Okeke, 'Flaring of Associated Gas in Oil Industry: Impact on growth, Productivity, and Yield of Selected Farms Crops, Izombe Flow station Experience' NNPC Workshop, Port Harcourt, 1987.

buildings in the area and contributes significantly to climate change, thus affecting communities all over world.[154] In essence, the effects of persistent gas flaring transcend the local communities close to the flare stacks. The oil-companies however contend that gas flares are not as dangerous as otherwise claimed. In the opinion of Mr Tako Koninga (former Managing Director of Texaco in Nigeria); 'the flaring of gas does not create a kind of environmental problem' and the process only amounts to 'a loss of valuable hydrocarbons'.[155] Another argument by the industry is that the flares benefit the local population as it provides them with required heat to dry their foodstuff.[156] Perhaps the low level of awareness with regards the effects of gas flaring particularly on crops[157] is a reason why the oil-companies sustain this argument which Turner describes as 'environmentally racist'.[158] The following section highlights the social impacts of oil on the Niger Delta and draws the links between the environmental impacts, the social effects and conflicts.

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[154] Friends of the Earth, 'Action for Justice Project Updates September 2005' <http://www.foe.co.uk/resource/event_presentations/action_for_justice_project.pdf> accessed 05 December 2007.

[155] O Oyebadejo, and V Ugbaja, 'Oil as Threat: Well Blowouts, Pipeline Failures and Spills...', (1995) 1 *Nigeria Oil and Gas Monthly* 9, 14.

[156] Argument credited to Mr Bobo Brown, Shell Nigeria's Eastern Division public relations officer. See Essential Action and Global Exchange, *Oil for Nothing: Multinational Corporations, Environmental Destruction, Death and Impunity in the Niger Delta*, (2000) (Article) <http://www.essentialaction.org/shell/Final_Report.pdf> accessed 02 December 2007.

[157] J Frynas, *Oil in Nigeria: Conflict and Litigation between Oil Companies and Village Communities* (Transaction Publishers, New Brunswick 2000) 165.

[158] 'Oil companies lie, deceive, play ethnic card to divide host communities', Interview in National Interest (Lagos), 31 July 2001, 30.

3.4.3.2 The Social Impacts of Oil on the Host-Communities

The major social impact of the oil industry on the social structure is the increased competition for land. Land is required by the oil-industry to site facilities such as pipelines, terminals, flowstations and to construct access roads, accommodation and recreation facilities for staff. There are about 250 fields dotted across the Delta, with more than six hundred oil fields,[159] 7,000 kilometres of pipelines, 10 export terminals, 275 flow stations, 3 refineries (Warri, Port Harcourt I and II) and a massive LNG project in Bonny and Brass amongst other facilities.[160] Generally, allocation of land for oil purposes takes priority over communal requirements including farming, the inhabitants' traditional occupation.[161] In essence, land becomes inaccessible to the host-communities to meet their economic and social needs. This cause of scarcity is further exacerbated by oil-induced pollution from spills and other effluent discharges onto land and water sources that destroy farm lands and produce, forests, wildlife[162] as well as aquifers and fishing grounds.[163] The consequences include over-farming resulting in the loss of soil fertility and erosion of the top soil,[164] lower crop harvests,

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[159] Nigeria National Petroleum Corporation, 'Development of Nigeria's Oil Industry', online: http://www.nnpcgroup.com/development.htm. Accessed; 22 June 2006.

[160] Niger Delta Development Commission, *Niger Delta Master Plan* (Port Harcourt, Rivers State, NDDC, 2005).

[161] Under the Land Use Act, land may be appropriated from the community for oil-related purposes. See section 5.3 below for a comprehensive discussion of the Act and its effects on land allocation and use.

[162] O Ibeanu, 'Oiling the Friction: Environmental Conflict Management in the Niger Delta, Nigeria', (2000) *Environmental Change and Security Project Report,* Issue 6, 23.

[163] P Ogon, 'Land and Forest Resource Use in the Niger Delta: Issues in Regulation and Sustainable Management', (Article) <www.globetrotter.berkeley.edu/ GreenGovernance/papers/Ogon2006.pdf> accessed 08 March 2006.

[164] C Achi, 'Hydrocarbon Exploitation, Environmental Degradation and Poverty: The Niger Delta Experience', (2003) Proceedings of the 7th International Specialised IWA Conference, vol 2, 33.

reduction of real income and increased poverty with the attendant social, health and environmental issues. Water pollution results in destruction of the region's aquatic species that constitute the largest fresh water species in any coastal system in West Africa.[165] It also reduces available water to meet human needs and increases the risk of associated health hazards.

As far back as 1992, representations were made to the World Conference of Indigenous Peoples on Environment and Development at Rio's Earth Summit by the Rivers Chiefs. The report stated in part:

> ... we have widespread water pollution and soil/land pollution that respectively result in the death of most aquatic eggs and juvenile stages of life of fin-fish and shell-fish and sensible animals (like oysters) on the one hand, whilst, on the other hand agricultural land contaminated with oil spills become dangerous for farming, even where they continue to produce any significant yields. Apart from the basic fact that contaminated soils are rendered relatively but seriously infertile and polluted, sometimes for at least 30 years, the farmers and fishermen who have thus been dislocated then observe with great anger the extremely wide gulf between the lifestyles and incomes of oil-industry workers and themselves rendered economically impotent by the same oil industry: confrontations and anger in the oil producing areas occasionally explode into calamities.[166]

A salient point to note in the above observation is that the difference in lifestyles and incomes of the oil-industry workers is one of the effects of non-active participation of host-communities in the industry they host.[167] The derivation paid to the region decreased periodically, compensatory payments for acquired land were made nugatory and compensation for pollution were arbitrary and often inadequate, leaving the host-communities in economically disadvantaged position.[168] The point made at this point simply

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[165] World Bank, *Defining An Environmental Strategy for the Niger Delta*, Vol. 1 (1995), 24-27.

[166] *H Dappa-Biriye et al.* (n 145) Appendix 4-D.

[167] See section 4.4.2 below for further discussions.

[168] These issues are discussed more extensively in Chapter 5 below.

is that the difference in lifestyle as pointed out by the report is also consequence of the legal structure that regulates the oil-industry.

Oil spills result in fires that claim lives, destroy land and economic properties thereby increasing the economic hardships of the host-communities. Though many of these oil-induced fires go unreported,[169] the impacts on the local communities are immense. Not only does fire claim lives and destroy existing property but it also renders the impacted area economically unviable for some time. The Jesse fire caused by an explosion of a 16-inch petrol pipeline linking the Warri refinery to Kaduna in October 1988 is perhaps the most publicized.[170] The fire claimed over 1000 lives, destroyed land, agricultural produce and animals, some of which are endemic to the region. The affected communities were not compensated because the incidence was alleged to have been caused by sabotage.[171] Loss of endemic species results in economic hardship of communities that rely on exploiting their economic importance. Inadequate biodiversity conservation regulations to protect these species from oil operations further increase the risk of their extinction. In Ebeku's opinion, biodiversity legislation is purposely lax to promote the unhindered production of oil in the

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[169] 'Nigerian Government's NNPC's Oil Spill at Atlas Cove near Lagos', Urhobo Historical website <http://www.waado.org/Environment/PhotoGallery/AtlasCoveSpill.html> accessed 15 December 2007.

[170] 'Pipeline Vandalization and Oil Scooping in the Niger's Delta and Others', (Article) African Conservation Forums website <http://www.africanconservation.org/dcforum/DCForumID29/11.html> accessed 27 November, 2007. See also, World Press Conference held at Ekakpamre on Oil Spillage and Fire Disaster in Four Urhobo Communities on September 17-18, 1999, in Ughelli South Local Government Area of Delta State, Nigeria online <http://www.waado.org/Organizations/UNA/EkakpamreFire.html> accessed 27 November 2007.

[171] Environmental Rights Action (Friends of the Earth, Nigeria), 'Idjerhe [Jesse] Oil Fire Disaster Nigeria Petrol Pipeline Explosion: An Avoidable Tragedy' <http://www.waado.org/Environment/IdjerheFire/idjerhe_Era.htm> accessed 27 November 2007.

area.[172] Species that survive death after ingestion of oil discharges or effluents, such as fish, store them and pass these toxins on to humans through the food chain.[173] Naturally, these have impacts on human health. Zaidi examined the health impacts of the oil-industry on local communities by comparing the Ecuadorian Amazon and the Niger Delta.[174] The study revealed that both areas have similar biologically diverse tropical forests and experience intensive oil exploitation activities. Diseases common in both areas include cancer, reproductive and immunological health complications, dermatoses, eczema, respiratory and neurological disorders.[175] Other cases of 'congenital malformations' are allegedly prevalent in Niger Delta communities where 'some of the children are born with one nostril, some are born with almost no nostrils and mutilated lips amongst others.'[176]

These socio-environmental impacts of the oil-industry on the host-communities raise fundamental questions about the security threats posed by the oil-industry. There is a divergence of opinion on the connotation 'security' in Nigeria's oil-industry. To its operators, it is the unhindered production of oil and accumulating revenues. To the host-communities, it

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[172] K Ebeku, 'Biodiversity Conservation in Nigeria: An Appraisal of the Legal Regime in Relation to the Niger Delta Area of the Country' (2004) 16 *Journal of Environmental Law* 3, 374.

[173] Fish can store toxic materials like chromium and mercury in their brains for a long time and pass to humans through the food chain. See *O Ibeanu* (n 162) 23.

[174] S Zaidi, 'Human Effects of Oil Development in the Ecuadorian Amazon: A Challenge to Legal Thinking', (1994) 14 *Environmental Impact Assessment Review* 5-6, 337-348.

[175] *S Zaidi* (n 174) 342.

[176] I Semenitari, 'Cartels of fraud' Tell Newsmagazine, April 19, 2004, 17. Also, W Ndifon, 'Health Impact of Major Oil Spill: A case study of Mobil in Akwa Ibom State, Nigeria', in The Proceedings of the International Seminar on the Petroleum Industry and the Nigerian Environment Organized by the Department of Petroleum Resources at Abuja, Nigeria, (1998) 804-813.

refers to the maintenance of the carrying capacity of the fragile Niger Delta environment to support their socio-economic sustenance. In Ibeanu's words;

> It is the realization that an unsustainable exploitation of crude oil, with its devastation of farmland and fishing waters, threatens resource flows and livelihoods for both individuals and communities as collectives. When a population feels its livelihood threatened, it feels insecure. Therefore, elimination of deprivation is a key concern of the oil-bearing communities of the Niger Delta.[177]

In essence, the deprivation of livelihood in the host-communities is precipitated by the oil-industry; essentially by its impact on the environment which leads to insecurity. Griffiths and O'Callaghan buttress the inter-linkages between the environment, development and human security.[178] They note that:

> This more radical approach to the issue of human security reflects a more holistic concern with human life and dignity. The idea of human life invites us to focus on the individual's need to be safe from hunger, disease, and regression, as well as protected against events likely to undermine the normal pattern of everyday existence.[179]

As clearly revealed in the above sections, the oil-industry adversely affects the 'normal pattern of everyday existence' of its host-communities. It deprives them of their human rights including the rights to life and livelihood, health and a healthy environment, and landholding necessary to pursue their sustainable development.[180] This thesis is particularly concerned with determining how the legal framework regulating the oil-industry has contributed to this state of affairs and has influenced the recurring outbreaks of violent conflicts. While this is done critically in subsequent chapters, it is important at this stage to draw the causal link between the highlighted economic and socio-environmental effects of the oil-industry and the conflicts. The acute scarcity of land generated by the oil-industry has caused friction and

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[177] *O Ibeanu* (n 162) 25-26.

[178] The relationship between the environment and development is discussed in section 4.2 below.

[179] M Griffiths and T O'Callaghan, *International Relations: The Key Concepts* (Routledge, London 2002) 294.

[180] Refer to Chapter 4 below.

hostilities between erstwhile peaceful neighbors resulting in intra and inter-ethnic disputes.[181] Compensation payments made by the oil-companies also generate numerous conflicts. A report produced by WAC Global Services,[182] for Shell indicted the company in the manner its procedures for awarding contracts, gaining access to land and dealing with community representatives 'fed conflicts'.[183]

The influences of the oil-industry in these conflicts are examined in detail later.[184] However, it is important to note herewith that the above issues also contribute to social instability. Accesses to land, compensation payments and other pecuniary benefits from the oil-industry are some of the common causes of intra and inter-communal clashes in the Niger Delta as well as clashes between communities and oil-companies. As a report by Nigeria's National Planning Commission and the United Nations Children's Fund (UNICEF) in 2001 notes; competition among rival elites and their ethno-regional constituencies for control of the huge rents that accrue to the State from the operations of the petroleum industry is at the heart of the problem which has resulted in a crisis of governance and public management.[185] The perceived denial of access coupled with deprivation of economic sustenance, as Fekumor

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[181] R Okoh, 'Conflict Management in the Niger Delta Region of Nigeria: A Participatory Approach', (Article) <http://www.accord.org.za/ajcr/2005-1/AJCR2005_pgs91-114_okoh.pdf> accessed 16 October 2007

[182] The group of experts in conflict resolution carried out extended fieldwork and produced a report for Shell.

[183] K Meier, 'Shell "feeds" Nigeria conflict, may end onshore work', Bloomberg, June 10, 2004 <http://www.nigeriavillagesquare1.com/Articles/Karl_Meier_shell.html> accessed 30 November 2007.

[184] Refer to Chapter 5 below that elaborates on the role of the oil companies in the exacerbation of conflicts in the Niger Delta region.

[185] The report was cited in IRIN, 'NIGERIA: Focus on the scourge of poverty' <www.irinnews.org/report.aspx?reportid=32448> accessed 06 June, 2007.

notes, agitates the population and the slightest misunderstanding sparks conflicts.[186] Many of these conflicts are manifested in varying degrees of violence that now beset the region. The conflicts that now characterize the Niger Delta region are however not novel. Conflicts over resources also characterized the area early in the 19th century. The next section engages, albeit briefly, with the previous conflicts and reveals the similarities with the present ones.

3.4.4 Historical Context of Conflicts in the Niger Delta

Historical accounts reveal that conflicts over the management of resources marred with violence occurred in the Niger Delta before the present oil-related disputes. This section argues that there are parallels between the circumstances and causes of the earlier conflicts and the prevalent ones with historical lessons to be learnt in resolving the present conflicts. First, both the present and earlier conflicts revolved around a resource of intense local and international value; first, palm-oil and now, crude-oil. Secondly, there is a similarity between the parties involved in both conflicts, namely the government, providers of foreign capital and the host-communities. Thirdly, the causes of both conflicts are traceable to the exclusion of the host-communities from participation in flourishing industries. It is important to note though that the previous conflicts did not have a prominent environmental angle as the contemporary ones. Nonetheless, it is opined that they are analogous as this thesis argues that the environmental consequences of crude-oil exploitation exacerbates conflicts and not the primary cause of the conflicts. The importance of engaging with historical perspectives on modern issues is noted by Vaughan who asserts that:

> reconstructed traditions, myths and histories grow out of the living memories and beliefs of communities which are not frozen in time but operate in the context of the prevailing class structure, ambiguous communal identities and a rapidly changing political economy...recurring conflict is a good example of how conflicting

[186] See, Constitutional Rights Project, *Land, Oil and Human Rights in Nigeria's Delta Region* (Constitutional Rights Project, Lagos 1999) 16.

> interpretations of history and traditions shape collective political action in the modern era.[187]

Ukeje noted with particular reference to the conflicts and endemic violence in the Niger Delta that:

> One major shortcoming of extant works on the political economy of the Niger Delta is that many of them are limited to the period since the commercial exportation of crude oil in 1958. They often convey the impression that the ingredients of history are absent in the menu of violence that has ravaged Nigeria's delta region. In reality, however, it is only by investigating critically the historicity of the Niger Delta (and complementing same by critically probing contemporary forces and factors) that scholars can expose the many 'hidden transcripts' necessary for representing a holistic, rather than a partial picture of conflicts in that region.[188]

In essence, an historical perception to the conflicts in the Niger Delta generates enhances the understanding of the contemporary conflicts and in this case, with a view to resolving them. The historical context is briefly highlighted[189] to reveal the role of public participation in the conflicts.

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[187] O Vaughan, 'Assessing Grassroots Politics and Community Development in Nigeria' (1995) 377 *African Affair* 94, 504.

[188] C Ukeje, 'Oil Capital, Ethnic Nationalism and Civil Conflicts in the Niger Delta of Nigeria' (PhD Thesis, Obafemi Awolowo University 2005) 5.

[189] This section does not delve into the intricacies of the palm-oil era. However, the historical accounts of this era are discussed in great detail in: K Dike, *Trade and Politics in the Niger Delta, 1830-1885: An Introduction to the Economic and Political History of Nigeria* (Oxford University Press, Oxford 1956); O Ikime, *The merchant prince of the Niger Delta*, Heinemann, London 1968); M Crowder, *The Story of Nigeria* (Faber, London I962); C Gertzel, 'Relations between African and European Traders in the Niger Delta 1880-1896' (1962) 3 *The Journal of African History* 2, 361-366; *C Ukeje* (n 187); and, U Ukiwo 'From "Pirates" to "Militants": A Historical Perspective on Anti-State and Anti-Oil Company Mobilization among the Ijaw of Warri, Western Niger Delta' (2007) 106 *African Affairs* 425, 587-610.

The trade in oil-palm developed after the abolition of slave trade in 1807 with produce from plantations in the Niger Delta exported to the United Kingdom through Liverpool.[190] Over 25,000 tonnes of palm oil[191] was exported per year by 1856 from the region then under the British Oil Rivers Protectorate established in 1885.[192] A century later, produce from the Eastern Niger Delta accounted for 87 per cent of the total national output of the product[193] making it almost as significant as crude-oil's current contribution in relative terms. The flourishing trade in palm-oil gave rise to powerful trading states[194] and personalities such as King Jaja of Opobo and Nana of Itsekiri that were forcefully dominated by the British to ensure a direct control of the trade to guarantee the steady and cheap supply of palm-oil.[195] Local opposition to British domination led to the forceful seizure of properties and territories[196] and in Jaja's case, exile to the West Indies in 1887.[197] A salient point to note at this point is that in the same vein, opposition to the oil-industry has resulted in similar incidences discussed in detail later.[198] Gertzel notes that by removing Jaja and Nana, the

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[190] D Omoweh, *Shell Petroleum Development Company, the State and Underdevelopment of Nigeria's Niger Delta: A Study in Environmental Degradation* (Africa World Press, Inc., Trenton 2005), 76. See also, *O Ikime* (n 188). See also, *M Crowder* (n188) 86.

[191] This figure represented about half of the total quantity of the product exported from Africa. See, *K Dike* (n 188) 101.

[192] *C Gertzel* (n 188) 361.

[193] *D Omoweh* (n 189) 82.

[194] Some of these trading-states that include Bonny, Owome (New Calabar), Okrika and Brass (Nembe) are equally important in the crude-oil era with oil deposits and facilities sited therein.

[195] *C Gertzel* (n 188) 361-366.

[196] O Ikime, *Niger Delta Rivalry* (London: Longmans, 1969) 69.

[197] 'King Jaja of Opobo', Black History Pages website <http://www.blackhistorypages.net/pages/jaja.php> accessed 12 June, 2007.

[198] See generally, Chapter 5 below.

British administration was removing the only Delta Africans who had the resources even to attempt to establish an African export trade.[199] In essence, the Protectorate deprived those few African traders who may have had the resources to participate in the trade the opportunity to do so despite the General Act of the Berlin Conference which implied the freedom of African middlemen to embark upon the export trade, much in the same way as European exporters were allowed to collect produce inland.[200]

It is significant to note that the native middlemen also attempted to frustrate European efforts to collect produce directly from the hinterland. Such attempts were rebuffed with force. While the Consul ordered a blockade of Opobo Town to try to 'bring them to their senses',[201] Brass was razed to the ground[202] following their revolt that included attack of the company's port in Akassa and seizure of 67 men as hostages.[203] The above is reminiscent of the occurrences in contemporary Niger Delta where restive host-communities protesting about their exclusion from the oil-industry are handled with force.[204] The use of coercion however did not sustain the interests of the Europeans for long. As Gertzel noted:

> Finally, in 1893, after six years of disturbances, the Europeans accepted defeat, and came to terms with the Opobo chiefs to restore the old position. They sold their interior factories for A7000 (500 puncheons of oil), and agreed to withdraw completely from the markets. In return, the chiefs agreed to give them a fair share of trade, instead of taking it all to Millers. Once the Europeans withdrew, trade revived

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[199] *C Gertzel* (n 188) 366.

[200] *C Gertzel* (n 188) 361-366.

[201] *C Gertzel* (n 188) 363.

[202] J Flint, *Sir George Goldie and the Making of Nigeria* (Macmillan, London 1960) 187-215.

[203] *D Omoweh* (n 189) 13-14.

[204] The Umuechem, Odi and Choba incidences are a few of the more widely reported incidences and are highlighted in Chapter 5 below.

> and Opobo quickly retrieved its earlier position as the major exporter around the Rivers.[205]

Defeat essentially involved the realization that the denial of the rights of the indigenous population to participate freely and actively in the oil-palm trade was not beneficial to anyone. Restoration of the former position of local participation not only quelled the conflicts and violence but also promoted communal prosperity. It is in the same vein that this thesis argues that it is fundamental that public participation rights of the host-communities that have been reduced over the years be restored as a means towards the cessation of the present conflicts. Indeed, it was less complex to restore participatory rights to trade in oil-palm than is needed in the contemporary oil-industry with its complex legal and commercial structure. The nexus between this historical context, participatory rights and conflicts is revealed by Okonta's insightful observation that:

> The present crisis in the Niger Delta can be better understood as a long-drawn out historical process, itself propelled and animated by complex international economic and political forces and which the local inhabitants have been trying to comprehend, resist or turn to their own advantage these past one hundred years with varying degrees of success and failure. In other words, it is a story of power and resistance to it; of alien and imposed authority and attempts to indigenise it and make it accountable to the people it purports to rule; an epic tale of ordinary men and women battling against vastly more superior forces threatening to take the bread from their mouth and destroy their way of life into the bargain.[206]

The present conflict involves issues that are contemporarily expressed in rights-based terminologies. It is for this reason that this thesis approaches the resolution of the conflicts in the area from a 'rights' perspective. It argues that the disregard of public participation rights in particular is a fundamental cause of the violent conflicts which now hamper the development of the oil industry. It highlights the environmental aspect given the natural environmental consequences of the oil-industry that exacerbates the conflicts and resultant

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[205] *C Gertzel* (n 188) 364.

[206] I Okonta, 'The Lingering Crisis in Nigeria's Niger Delta and Suggestions for a Peaceful Resolution' (Article) <http://www.cdd.org.uk/resources/workingpapers/niger_delta_eng.htm> accessed 01 May 2007.

violence. Thus, it argues that the laws and policies, especially those regulating the oil industry, must at least recognize the essence and promote the enforcement of public participation and environmental rights to facilitate sustainable peace and promote the sustainable development of Nigeria's oil-industry.[207]

[207] See Chapter 7 below where the imperatives of the recognition of environmental rights in resolving the conflicts in Nigeria's oil-industry are discussed in detail.

CHAPTER FOUR

SUSTAINABLE DEVELOPMENT, ENVIRONMENTAL HUMAN RIGHTS AND PUBLIC PARTICIPATION

4.1 Introduction

During the course of this thesis, the terms 'sustainable development', 'environmental human rights' and 'public participation' will feature extensively. These terms are ambiguous with meanings often ascribed to them depending on the academic discipline and/or, socio-economic background of the definer. This chapter defines the terms as used in the context of the thesis. The discussion is divided into three broad sections. The first section defines 'sustainable development' and analyzes its history and evolution into a global paradigm of human development. The second section defines the evolving model of 'environmental human-rights' and analyzes its nature, development and characteristics. 'Public participation' is defined in the third section with emphasis on its meaning and relevance in relation to natural resource exploitation.

4.2 Sustainable Development

The first part of this section investigates the historical background of the sustainable development paradigm while the second section delves into 'sectoral' and 'holistic' definitions of the term. A working definition is proffered in the third and concluding part of this section.

4.2.1 Historical Background of the Concept of Sustainable Development

The World Commission on Environment and Development (WCED) defines 'sustainable development' as 'the ability of humanity to ensure that it meets the needs of the present

without compromising the ability of future generations to meet their own needs.'[1] According to the WCED, sustainable development comprises two key concepts. These are 'the concept of needs, in particular, the essential needs of the world's poor, to which overriding priority should be given; and the idea of limitations imposed by the state of technology and social organization on the environment's ability to meet present and future needs.'[2] In essence, according to the WCED definition, the concept aims at economic and social development – with emphasis on the 'world's poor' – with due consideration to the environmental impacts of such activities on the earth's ecosystem. Though the work of the WCED published in 1987 popularized the term, its ideology was not novel as earlier research and publications had been in existence before the turn of the century with notable contributions from Malthus.[3] At the turn of the Century, contributions from social scientists including Veblen[4] and Pigou;[5] drew attention to external costs of economic activities and in 1950 Kapp[6] published a comprehensive analysis of all the important issues that since the late 1970s have staged a

[1] World Commission on Environment and Development (WCED), *Our Common Future* (Oxford University Press, Oxford 1987) 43.

[2] *World Commission on Environment and Development* (n 1).

[3] T Malthus, *An Essay on the Principle of Population as it Affects the Future Improvement of Society*, (London, 1798).

[4] Veblen Th., *The Technicians and the Revolution*, reprinted in Veblen Th.: *The Portable Veblen*, (Viking Press, New York 1948).

[5] A Pigou, *The Economics of Welfare,* (Macmillan, London 1932), 134ff.

[6] K Kapp, *The Social Cost of Private Enterprise,* (Harvard University Press, Cambridge 1950). The book deals with air pollution, water pollution, loss of biological diversity, premature depletion of energy and other non-renewable resources, erosion, deforestation as well as unsustainable social developments like widening income disparities, etc. Kapp concludes that amongst other measures, legislation has to be changed in a way that the 'true costs of production' become obvious, with other words, that an internalization of environmental costs becomes feasible.

comeback under the 'sustainable development' paradigm. Carson's book - *Silent Spring* - published in 1962 also projected some aspects integral to modern sustainable development. It integrated research on toxicology, ecology and epidemiology and suggested that agricultural pesticides were accumulating to catastrophic levels and were capable of doing damage to animal species and human health thus shattering the assumption that the environment had an infinite capacity to absorb pollutants.[7]

The International Biological Programme; a ten-year study initiated by nations around the world in 1963 analyzed environmental damage with respect to the biological and ecological mechanisms through which it occurs and created a large body of data thus laying the foundation for science-based environmentalism.[8] Ehrlich's book *Population Bomb*[9] published in 1968 shed light on the connection between human population, resource exploitation and the environment –prime issues in sustainable development discourse. Further work in this regard was carried out by the Club of Rome established to pursue a holistic understanding of, and, solutions to the 'world problematique'.[10] In June 1971, the *Founex Report*[11] called for the integration of environment and development strategies. It noted that while concern about the environment sprang from the production and consumption patterns of the industrialized world, many of the environmental problems were a result of underdevelopment and poverty.

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[7] See generally, 'Sustainable Development Timeline' < http://www.iisd.org/timeline/> accessed; 26 June 2004.

[8] *Sustainable Development Timeline* (n 8).

[9] See generally, <http://www.pbs.org/population_bomb/> accessed 03 July 2004.

[10] The Club of Rome was established by 36 European economists and scientists and led by Italian industrialist Aurrelio Peccei and Scottish scientist Alexander King. In 1968, it commissioned a study of global proportions to model and analyze the dynamic interactions between industrial production, population, environmental damage, food consumption and natural resource usage.

[11] The report was the result of the deliberations of a panel of experts that met in Founex, Switzerland.

The Report is considered an important factor that persuaded developing countries of the world to attend the Stockholm Conference in 1972.[12] That year, Rawls' *A Theory of Justice* was published wherein he argued that all social primary goods such as liberty and opportunity, income and wealth, and the basis of self-respect – are to be distributed equally unless an unequal distribution of any or all of these goods is to the advantage of the least favoured.[13] Based on the utilitarian reasoning, he argued that 'utility needed to be infused with an altruistic regard for the general interest in that it requires a relaxation of individualist disinterest in the welfare of others in favour of the altruistic requirement of concern for descendants.' In other words, intergenerational equity was an important factor in social equity and justice.

The 1972 Stockholm Conference provided the basis for the recognition of environmental issues on a global scale and the link between the environment and development was internationally appreciated as it was the first time that nations of the world were discussing the issue multilaterally. The conference led to the establishment of the United Nations Environment Programme (UNEP) and national environmental protection agencies.[14] Similarly, Non-Governmental Organizations (NGOs) sprang up with their efforts geared towards the promotion of sustainability.[15] The concept was broadly expounded during the

[12] See generally, *Sustainable Development Timeline* (n 8).

[13] J Rawls, *A Theory of Justice* (Clarendon, Oxford 1971).

[14] The USA prior to the Conference had passed the National Environmental Policy Act (EPA) creating the first national agency for environmental protection - the Environmental Protection Agency in 1969.

[15] For instance, the International Institute for Environment and Development (IIED) was formed in Britain in 1971 with a mandate to seek ways to make economic progress without destroying the environmental resource base; and Development Alternatives was established in India in 1983 as a non-profit research, development and

1980s. The World Conservation Strategy, prepared by the International Union for the Conservation of Nature (IUCN) along with the United Nations Environmental Programme (UNEP) and the World Wildlife Fund (WWF) in 1980, defined development as the modification of the biosphere and the application of human, financial, living and non-living resources to satisfy human needs and improve the quality of human life.[16] The section 'Towards Sustainable Development' identified the main agents of habitat destruction as poverty, population pressure, social inequity and the terms of trade. It called for a new International Development Strategy with the aims of redressing inequities, achieving a more dynamic and stable world economy and stimulating accelerating economic growth and countering the worst impacts of poverty. The Independent Commission on International Development Issues re-emphasized the requirement for a new global North/South economic relationship in its *North: South - A Programme for Survival* (Brandt Report).[17] The Global 2000 Report to the President, *Entering the Twenty-First Century* prepared under President Jimmy Carter highlighted the important role biodiversity plays in sustainable development given its role in the proper functioning of the planetary ecosystem and the fact that the robust nature of ecosystems is weakened by species extinction.[18]

These efforts may be seen as part of the earlier attempts that influenced, or, at least, provided the basis for the 'new' sustainable development paradigm enunciated by the WCED. The

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consultancy organisation to foster a new relationship between people, technology and the environment in the South in order to attain the goal of sustainable development.

[16] The detailed report is available online at http://w3.iprolink.ch/iucnlib/index.html. Accessed; 22 May 2004.

[17] <http://w3.iprolink.ch/iucnlib/index.html> accessed 22 May 2004

[18] The Global 2000 Report to the President, *Entering the Twenty-First Century*. (Council on Environmental Quality and the Department of State, Blue Angel Inc., Charlottesville 1981).

Commission's Report – *Our Common Future* – published in 1987 weaved social, economic, cultural and environmental issues under a single notion of 'sustainable development'.[19] The Report popularized the term and tied the conflicting problems together and, for the first time, gave some direction for comprehensive global solutions. The Report asserted that economic development cannot stop, but it must change course to fit within the planet's ecological limits thus providing impetus to an international consultation process. Since then, there has been a lot of national and international activity geared towards understanding the concept and attaining its goals including the 1992 UN Conference on Environment and Development (UNCED) and the World Summit on Sustainable Development held in South Africa in 2002.[20]

4.2.2 Defining Sustainable Development

The concept of sustainable development though philosophically and politically attractive is difficult to define. This is because of divergent interpretations of the term and significant unresolved issues related to it such as the widely differing definitions of 'need' between rich and poor nations or, within nations, rich or poor families. However, there seems to be a general understanding regarding the intent of the concept which seems better understood than defined. As Tolba observed, the concept has become an article of faith, a shibboleth: often

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[19] *World Commission on Environment and Development* (n 1).

[20] M Segger, A Khalfan, M Gehring and M Toering, 'Prospects for Principles of International Sustainable Development Law after the WSSD: Common but Differentiated Responsibilities, Precaution and Participation' (2003) 12, *RECIEL* 1, 54. See also, M Pallemaerts, 'International Law and Sustainable Development: Any Progress in Johannesburg?' (2003) 12*RECIEL* 1, 1-11.

used but little explained.[21] As Sachs noted, '...every time in the last 30 years that the destructive effects of development were recognized, the concept was extended in such a way as to include both injury and therapy.'[22] Similarly Mitcham describes sustainable development as 'an attempt to save development from itself'.[23] Rosemarin argues that the divergence in the terms 'sustainable' and 'development' leads to the contradiction in the concept. According to Rosemarin:

> Sustainable implies the elements of long term renewal, maintenance, recycling, minimal raw natural exploitation and management of people's needs on a collective basis. Development can be interpreted in many different ways but according to our present industrial-based culture it implies short term planning, minimal maintenance, waste, maximal exploitation of raw materials and emphasis on the individual. Besides economic growth however, development can also mean social, cultural and spiritual evolution. Somehow this aspect of sustainability must first come to the surface for an ecologically-based type of development to evolve.[24]

Notwithstanding the above observation, there are several attempts at defining the concept and its ambit. Tolba describes what sustainable development seeks to fulfil to include:

(i) help for the poor because they are left with no option other than to destroy their environment;
(ii) The idea of self-reliant development, within natural resource constraints;
(iii) The idea of cost-effective development using differing economic criteria to the traditional approach; that is to say development should not degrade environmental quality, nor should it reduce productivity in the long run;
(iv) The great issues of health control, appropriate technologies, food self-reliance, clean water and shelter for all; and,

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[21] See generally, M Tolba, *Sustainable Development: Constraints and Opportunities*, (Butterworth, London 1987).

[22] W Sachs, 'Environment and Development: The Story of a Dangerous Liaison', (1991), 21 *The Ecologist* 6, 254.

[23] C Mitcham, 'The Concept of Sustainable Development: its Origins and Ambivalence' (1995), 17 *Technology in Society* 3, 324.

[24] A Rosemarin, 'Sustainability as a New and Necessary Philosophy', (1990) 19 *Ambio* 2, 51.

(v) The notion that people-centred initiatives are needed; human beings, in other words, are the resources in the concept.[25]

Within the scope of the above suggestions lie numerous alternative definitions often influenced by the area of specialty of the definer. However the most quoted definition of 'sustainable development' remains that offered by the Brundtland Commission which seems to lay the basis from which other definitions seem to get some form of inspiration and direction from.[26] Since the Commission published its report, the concept of sustainable development has been recognized to be made up of three factors, viz; economic, environmental and social.[27] An economically sustainable system must be able to produce goods and services on a continuing basis, to maintain manageable levels of government and external debt, and to avoid extreme sectoral imbalances which damage agricultural or industrial production. An environmentally sustainable system must maintain a stable resource base, avoiding over-exploitation of renewable resource systems or environmental sink functions, and depleting non-renewable resources only to the extent that investment is made in adequate substitutes. This includes maintenance of biodiversity, atmospheric stability, and other ecosystem functions not ordinarily classed as economic resources. Finally, a socially sustainable system must achieve distributional equity, adequate provision of social services including health and education, gender equity, and political accountability and participation. The World Summit on Sustainable Development put a new emphasis on the three-pillared

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[25] *M Tolba* (n 21).

[26] P Pembleton, 'The Three Dimensions: Defining Sustainable Development', (Article) <www.unido.org/en/doc/3563> accessed 25 April 2004.

[27] See generally, J Harris, 'Basic Principles of Sustainable Development', (Global Development and Environment Institute Working Paper 00-04 2000) <http://ideas.repec.org/p/wpa/wuwpdc/0106006.html> accessed 12 May 2005.

approach to sustainable development, which seems to be appearing as the new international definition.[28] The question of social and economic development came out from the shadows, arguably sidelining questions of environmental protection at the Johannesburg Summit.[29] The objective of alleviating extreme poverty was absolutely central to the outputs from the Summit that made a commitment to halve poverty by 2015.[30] Though the Brundtland Commission had earlier noted that ending poverty was a crucial element of sustainable development,[31] the Johannesburg Summit amplified this into international reckoning. Holder and Lee highlighted the relationship between environmental protection and poverty eradication thus:

> The link between environmental protection and poverty eradication is made on the basis that the poor generally suffer most from environmental degradation, being more likely to live in environmentally degraded areas and to rely on environmental resources (forests, soil, climate) for food, shelter and warmth...And just as the poor suffer from environmental degradation, the desperately poor may degrade the environment in search of survival.[32]

Despite the clear focus on the poverty-environment link, sustainable development is broadly concerned with balancing the three distinct, yet, complementary factors optimally to obtain

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[28] J Holder and M Lee, *Environmental Protection, Law and Policy: Text and Materials* (2nd edition, Cambridge University Press, Cambridge 2007) 237. The authors however noted that that prior to the Summit, the three-limbed approach had appeared in UK and EU documents.

[29] L Rajamani, 'From Stockholm to Johannesburg: The Anatomy of Dissonance in the International Environmental Regime' (2003) 12 *RECIEL* 1, 23

[30] Johannesburg Plan of Implementation, Article 7.

[31] *World Commission on Environment and Development* (n 1) 8. The Brundtland Commission noted therein that 'wide-spread poverty is no longer inevitable. Poverty is not always an evil in itself ... A world in which poverty is endemic will always be prone to ecological and other catastrophes.'See also, W Sachs (ed.), *The Development Dictionary: A Guide to Knowledge as Power* (Zed books, London 1992) 29.

[32] *J Holder and M Lee* (n 28) 239.

equilibrium. Implementing the three-pronged approach to sustainable development is a formidable task that is beyond the concern of environment departments, agencies and interest groups. Consequently, sustainable development is understood and implemented in a variety of contexts by a variety of bodies.[33] The following section examines some of the definitions of the concept from different sectors. The definitions are examined under two headings – 'sectoral' and 'holistic'. This method is adopted to reveal the importance of each dimension as well as the synergy between them as a concept.

4.2.2.1 The 'Sectoral' Approach to Defining Sustainable Development

It is common in extant literature for authors to emphasize the dimension of their specialty in their definitions and discussions on sustainable development. Authors with a background in economics for instance are inclined to emphasize its economic component. For instance, Goodland and Ledoc define sustainable development as a pattern of social and structured economic transformations (i.e. development) which optimizes the economic and societal benefits available in the present, without jeopardizing the likely potential for similar benefits in the future.[34] To them, the primary goal of sustainable development is to achieve a reasonable (however defined) and equitably distributed level of economic well-being that can be perpetuated continually for many human generations.

Thus, sustainable development implies:

> Using renewable natural resources in a manner which does not eliminate or degrade them, or otherwise diminish their usefulness for future generations...Sustainable development further implies using non-renewable (exhaustible) mineral resources in a manner which does not unnecessarily preclude easy access to them by future generations...Sustainable development also implies depleting non-renewable energy

[33] *J Holder and M Lee* (n 28) 245.

[34] See generally, R Goodland and G Ledoc, 'Neoclassical Economics and Principles of Sustainable Development', (1987) 38 *Ecological Modeling*, 19-46.

> resources at a slow enough rate so as to ensure the high probability of an orderly society transition to renewable energy sources.[35]

Haveman defines sustainable development as the maintenance or growth of the aggregate level of economic well-being, defined as the level of per capita economic well-being[36] while Costanza and Wainger define it as the amount of consumption that can be sustained indefinitely without degrading capital stocks, including natural capital stocks.[37] The term has also been defined in terms of increase in per capita utility of well-being over time or a set of 'development indicators' increasing over time.[38] Economic growth on this analysis means real Gross National Product (GNP) per capita is increasing over time. It is notable however that the observation of such a trend does not mean that growth is sustainable. Sustainable economic growth means that real GNP per capita is increasing over time and the increase is not threatened by 'feedback' from either biophysical impacts (pollution, resource problems) or from social impacts (social disruption). Adapting the above definition, sustainable development may be interpreted to mean that either per capita utility or well-being is increasing over time with free exchange or substitution between natural and man-made capital or that per capita utility or well-being is increasing over time subject to non-declining natural wealth.[39]

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[35] B Chauhan, *Environmental Studies* (Firewall Media, New Delhi 2008) 271.

[36] R Haveman, 'Thoughts on the Sustainable Development Concept and the Environmental Effects of Economic Policy', OECD seminar on The Economics of Environmental Issues, Paris: Sept. 25, 1989, Paper No. 5.

[37] R Costanza and L Wainger, *Ecological Economics, Mending the Earth*, (North Atlantic Books, Berkeley 1991).

[38] D Pearce, A Markandya and E Barbier, *Blueprint for a Green Economy*, (Earthscan Publications Ltd, London 1989).

[39] J Holmberg, (ed.), *Making Development Sustainable (*Island Press, Washington D.C. 1992).

While the above definitions cannot be faulted as being inaccurate, the importance of environmental considerations in economic development processes has grown significantly and has become a focal point in defining sustainable development. Hence some attempts to define sustainable development have portrayed the environment as the central point thereby affirming that the lessons of ecology can, and should be applied to economic processes.[40] According to Lele, sustainability is by default taken to mean the existence of the ecological conditions necessary to support human life at a specified level of well-being through future generations.[41] Lele further describes sustainability as a new way of life and approach to social and economic activities for all societies, rich and poor, which is compatible with the preservation of the environment.[42] Sustainable development is also referred to as 'ecologically sustainable development' and defined in terms of changes in economic structure, organization and activity of an economic ecological system that are directed towards maximum welfare and which can be sustained by available resources.[43] Emphasis on the sustenance of basic life support systems is reiterated in the definition of sustainable development to be the indefinite survival of the human species (with a quality of life beyond mere biological survival) through the maintenance of basic life support systems (air, water, land, biota) and the existence of infrastructures and institutions which distribute and protect the components of these systems.[44] The concept is also defined relative to the satisfaction of

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[40] See generally, M Redclift, *Sustainable Development* (Methuen, London 1987).

[41] S Lele, 'Sustainable Development: A Critical Review' (1991) 19 *World Development* 6, 607-621.

[42] *S Lele* (n 41).

[43] L Braat and I Steetskamp, 'Ecological-Economic Analysis for Regional Sustainable Development', in R Costanza (ed.) *Ecological Economics* (Columbia University Press, New York 1991) 271.

[44] D Liverman, M Hanson, B Brown, and J Merideth, 'Global Sustainability: Towards Measurement', (1998) 12 *Environmental Management* 2, 133-143.

human necessities without compromising the basis of that development, which is to say, the environment.[45] The essence of the environmental dimension of the concept is captured by Pearce and Watford that define it thus:

> Sustainable development describes a process in which the natural resource base is not allowed to deteriorate. It emphasizes the hitherto unappreciated role of the environmental quality and environmental inputs in the process of raising real income and quality of life.[46]

The third dimension of the sustainable development concept is the social dimension which complements the environmental sustainability and ecological economics views neither of which have solely nor together been a complete approach to defining the concept. The Rio Declaration acknowledges the environmental and economic dimensions and emphasizes the 'human angle' to development. Principle 1 of the Rio Declaration states for instance that 'Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.'[47] The Declaration lists the other social goals including inter-generational equity,[48] eradication of poverty,[49] and public participation[50] which have formed the core of the 'social' definition of sustainable development. This social angle to defining sustainable development has broken the hitherto 'limited, instrumental view

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[45] M Winograd, 'Environmental Indicators for Latin America and the Caribbean', in T Trzyna, (ed.) *A Sustainable World: Defining and Measuring Sustainable Development* (IUCN, Sacramento 1995). See also Former British Prime Minister Margaret Thatcher's speech to the Royal Society on Sept. 27, 1988 where she pointed out that the though government espouses the concept of sustainable economic development, stable prosperity can be achieved throughout the world provided the environment is nurtured and safeguarded.

[46] D Pearce and J Watford, *World without End* (Oxford University Press, Washington, D.C. 1993), 8.

[47] Note also the UNDP, 1990 Human Development Report (UNDP, 1991).

[48] Rio Declaration on Environment and Development (Report of the United Nations Conference on Environment and Development 12 August 1992) A/CONF.151/26 (Vol. I) Principle 3.

[49] *Rio Declaration* (n 42) Principle 5.

[50] *Rio Declaration* (n 42) Principle 10.

of conservation and development' and sought to 'suggest some of the positive moral dimensions of the new social paradigm' and now 'grope for a richer symbolic language with which to speak about the concept of sustainable development'.[51]

Munro defines sustainable development as 'a complex of activities that can be expected to improve the human condition in such a manner that the improvement can be maintained.'[52] In essence, the goal of a society is to engage in activities based on a long-term vision that foresees the consequences such diverse activities to ensure that they do not break the cycles of renewal and hold conservation and generational concerns high. It should also avoid adopting mutually irreconcilable objectives and ensure social justice because great disparities of wealth or privilege will breed destructive disharmony.[53] In other terms, sustainable development is defined in terms of the overall development of the human being. This includes increases in real income per capita; improvements in health and nutritional status; education achievement; access to resources; a 'fairer' distribution of income; and, increases

[51] J Engel, 'Introduction: The Ethics of Sustainable Development' in J Engel and J Engel (eds.) *The Ethics of Environment and Development* (University of Arizona Press, Tucson 1990), 10. The authors note that authors now use terminologies such as 'authentic integral development', 'ecological/holistic world view', 'reverential development', 'ecosophical development', 'just, participatory ecodevelopment', 'communalism', 'desirable society' to describe the concept from this 'social' angle.

[52] D Munro, 'Sustainability: Rhetoric or Reality' in T Trzyna (ed.) *A Sustainable World: Defining and Measuring Sustainable Development*, (IUCN, Sacramento 1995).

[53] K Hossain, 'Evolving Principles of Sustainable Development and Good Governance' in K Ginther, et al. (eds.) *Sustainable Development And Good Governance* (Kluwer Academic Publishers, Norwell, Ma. 1995).

in basic freedoms.[54] Norgaard emphasizes the inter-generational consideration in his definition in the following terms:

> [Sustainability of development] is concerned with (a) the rights of future generations to the services of natural and produced assets and (b) whether the formal and informal institutions which affect the transfer of assets to future generations are adequate to assure the quality of life in the long-run.[55]

What is clear from the above is that from a sectoral viewpoint, there are different ways to approach the definition or description of sustainable development. While none of the highlighted definitions are faulted as incomplete, each one emphasizes one of the three factors of the concept and is influenced by the academic inclination of the definer.

4.2.2.2 The 'Holistic' Approach to Defining Sustainable Development

The broad objective of sustainable development is to attain the optimal level of interaction between the three systems - the biological and natural resource system, the economic system, and the social system.[56] In essence, an all-embracing definition of the concept should lay emphasis on the need to balance social equity, ecological integrity, and economic prosperity. In this light, sustainable development is defined as; 'a development of a socio-environmental system with a high potential for continuity because it is kept within economic, social, cultural, ecological and physical constraints.'[57] In theory, sustainable development involves

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[54] D Pearce, E Barbier and A Markandya, 'Sustainable Development and Cost- Benefit Analysis' London Environmental Economics Centre, Paper 88-01.

[55] R Norgaard, 'Sustainability of the Economics of Assuring Assets for Future Generations', World Bank, Asia Regional Office, Working Paper Series No. 832. 1992.

[56] See generally, E Barbier, *Economics, Natural Resource Scarcity and Development* (Earthscan Publications Ltd., London 1989).

[57] H de Graaf, C. Musters and W ter Keurs, 'Sustainable Development: Looking for New Strategies' (1996) 16 *Ecological Economics* 3, 214.

the interaction of these three dimensions at optimally beneficial levels. However, in reality, the level of interaction required to balance the three factors that make up the sustainable development paradigm can only be achieved by trade-offs between them. The required levels of trade-offs will be influenced primarily by the level of development of the country in question. While developed countries are less likely to sacrifice environmental concerns for economic development, the reverse is more likely to be the case in developing countries; particularly resource-rich ones such as Nigeria, where majority of the population lives in poverty. Expectedly, economic development measured quantitatively in terms of increased food availability, real income, educational services, health care, sanitation and water supply, etc.[58] will be given pre-eminence in the trade-offs.

McCormick's definition of sustainable development in relation to developing countries subtly emphasizes the above point. In his opinion, the concept is usually applied to less developed countries and the kind of economic and social development needed to improve the living conditions of the world's poor without destroying or undermining the natural resource base.[59] In essence, in developing countries, the reduction of absolute poverty by providing lasting and secure livelihoods is the primary focus of the concept while the minimization of resource depletion, environmental degradation, cultural disruption and social instability are secondary issues. The reality of this position is evidenced in Nigeria where the unhindered exploitation of oil is given precedence over its economic and social consequences. The oil-revenues provide the financial base of the country to achieve its economic development. The success

[58] E Barbier, 'The Concept of Sustainable Economic Development', (1987) 14 *Environmental Conservation* 2.

[59] J McCormick, *Reclaiming Paradise* (Indiana University Press, Bloomington 1991).

of the country in achieving its economic development goals is beyond the purview of the discussion at this stage.[60]

Developed countries on the other hand generally lay more emphasis on maintaining their achieved levels of economic development with minimal adverse effects on the environment. Increasing prominence is laid on the integration of the public in the decision-making of the 'development' processes and promoting global initiatives towards achieving sustainable development goals. These include the promotion of world peace, good governance and accountability, debt reduction for developing countries as well as advancing more propitious terms of trade and non-declining foreign aid.[61] The inter-generational aspect; that is, the ability of future generations to have resources to meet their own needs[62] is also receiving significant attention. In Beder's opinion, inter-generational equity previously recognized in the Universal Declaration of Human Rights (UDHR)[63] is the 'central ethical principle behind

[60] Refer to section 3.4.2 below.

[61] See, Report of the World Summit on Sustainable Development, Johannesburg, 26 August-4 September 2002, A/CONF.199/20, Chapter 1, Paragraphs 11–15.

[62] See generally, I Serageldin, 'Sustainability as Opportunity and the Problem of Social Capital', (1996) 3 *The Brown Journal of World Affairs* 2, 187-203.

[63] Preamble states that: 'Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world... '. Reference to 'all members of the human family' has a temporal dimension, which brings all generations within its scope. See E Weiss, 'Intergenerational Equity: A Legal Framework for Global Environmental Change' in E Weiss. (ed.) *Environmental Change and International Law: New Challenges and Dimensions* (UN University Press, Tokyo 1992) 385-412.

sustainable development'.[64] The principle articulates that all members of each generation of human beings inherit a natural and cultural patrimony from past generations, both as beneficiaries and as custodians and have a duty to pass on this heritage to future generations. It further implies that this right to benefit from and develop this natural and cultural heritage is inseparably coupled with the obligation to use this heritage in such a manner that it can be passed on to future generations in no worse condition than it was received from past generations.[65] Pezzy following this approach defines the concept as 'non-declining per capita utility - because of its self-evident appeal as a criterion for inter-generational equity'.[66] Munasinghe and Lutz describe it as an approach that will permit continuing improvements in the quality of life with a lower intensity of resource use, thereby leaving for future generations an undiminished or even enhanced stock of natural resources and other assets.[67]

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[64] S Beder, 'Costing the Earth: Equity, Sustainable Development and Environmental Economics', (2000) 4 *New Zealand Journal of Environmental Law* 1, 227.

[65] E Weiss, *In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity*, (United Nations University, Tokyo 1989), 293.

[66] J Pezzey, 'Economic Analysis of Sustainable Growth and Sustainable Development' (World Bank Environment Department, Washington D.C. 1989), working paper no. 15.

[67] M Munasinghe and E Lutz, 'Environmental-Economic Evaluation of Projects and Policies for Sustainable Development' (World Bank Environment Department, Washington D.C. 1989), working paper no. 42. The IUCN defines sustainable development similarly as:

...[T]he means to achieving a quality of life (or standard of living) that can be maintained for many generations because it is: (i) socially desirable, fulfilling people's cultural, material, and spiritual needs in equitable ways; (ii) economically viable, paying for itself, with costs not exceeding income; and (iii) ecologically sustainable, maintaining the long-term viability of supporting ecosystems. See generally, IUCN, 'World Conservation Union in Guide to Preparing and Implementing National Sustainable Development Strategies and Other Multi-sectoral Environment and Development Strategies', prepared by the IUCN's Commission on Environmental Strategies

The issue of inter-generational equity raises fundamental issues such as the types and levels of trade-offs acceptable especially in the absence of the beneficiaries (future generations) in the decision-making processes. This debate is represented on two fronts posited by the 'weak' and 'strong' sustainability groups. The 'weak' group suggest that in achieving economic advances to the detriment of the environment, alternative investments may be made to provide the future generation with benefits. The latter group however argue that the environment offers more than just economic potential that cannot be replaced by human-made wealth thus provision of alternatives sources of wealth instead of a degraded environment is unacceptable.[68] Beder notes that there are various reasons why strong sustainability may be preferable to weak sustainability and these are closely related to reasons of 'non-substitutability', 'uncertainty' and 'irreversibility' of environmental assets for which there are no certain substitutes such as the ozone layer, the watershed protection functions of tropical forests, the pollution-cleaning and nutrient-trap functions of wetlands. [69]

A pertinent example is the gas flaring that takes place during oil exploitation activities in Nigeria. This contributes significantly to carbon dioxide emissions that damage the ozone layer which contributes significantly to the change in climatic conditions while the region's vast tropical forests and wetlands that are natural 'protectors' are destroyed to maximize oil production. This situation tests the uncertainty in the theoretical and practical framework of 'sustainable development' especially as it questions what trade-offs should be allowed for the

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Working Group on Strategies for Sustainability, the IUCN Secretariat and the Environmental Planning Group of the International Institute for Environment and Development, pre-publication draft, 1993.

[68] *S Beder* (n 64) 228-229.

[69] *S Beder* (n 64) 228-229. See also, D Pearce, A Markandya, and E Barbier, *Blueprint for a Green Economy* (Earthscan, London 1989) chapter 2.

future generations. In the above instance for example, should the delicate physical environmental qualities of the Niger Delta be subjected to economic development activities to alleviate the present generation from abject poverty or should economic development be subjugated for environmental quality to enable future generations have similar or better opportunities than the present generation? Such a question is pertinent especially as the 'needs' of the future generations include both 'developmental and environmental' needs.[70] Thus, trading-off environmental concerns or economic development for the present generation may not be considered 'beneficial' to a future generation keen on enjoying the aesthetic and other advantages of the physical environment.

In the absence of representatives of the future generation participating in decision-making regarding the necessary trade-offs, Young argues that governments (as primary decision-makers) will need to rely on a wide range of policy approaches and institutional arrangements that are conducive to the maintenance of inter-generational equity which include community consultation and education, modifying land use planning and zoning instruments, project assessment, improving and re-directing research amongst others.[71] While the preferences of unborn generations can only be speculated on, it is imperative that their interests form the core of present day development decisions. Thus, will unhindered oil exploitation (at the expense of the environment) augur well for the future generations of the Niger Delta region and indeed, Nigeria? This question is incidental to the central question of this thesis that

[70] See Principle 3 of the Rio Declaration. It states: 'the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.'

[71] M Young, 'The Precautionary Principles as a Key Element of Ecologically Sustainable Development' in R Harding and E Fisher (eds.) *Perspectives on the Precautionary Principle* (Federation Press, Sydney 1999), 139-149.

seeks to examine the extent of public participation in the decision-making process of Nigeria's oil-industry.

4.2.2.3 Sustainable Development: A Working Definition

Existing attempts at defining sustainable development have been criticized as being 'inconsistent'[72] or considered 'either too vague to mean very much or have been too strong to be always and everywhere appealing.'[73] On the other hand, its fluidity makes it possible to adapt it to divergent local and national circumstances within a unified global goal and is most likely the basis of its attraction. It is hard to imagine and doubtful that the paradigm would enjoy the same popular acceptance it does if an uncompromising definition and scope had been adopted from inception. As the search for a satisfactory middle-ground definition continues,[74] it is imperative that a working definition of the term as used is this thesis is offered. Thus sustainable development for the purpose of this work refers to:

> Improving and maintaining the quality of life of all human beings; particularly those in less developed nations, with their active participation in the process and ensuring that the socio-economic and environmental capacities are well managed using available knowledge and technologies to ensure that future generations can have at least equivalent benefits and quality of life to those of the present generation.

The definition offered above emphasizes the notion of sustainable development with particular reference to developing countries such as Nigeria that have not experienced significant economic development. It recognizes that given the state of underdevelopment in such countries, the primary focus and precedence would be on economic development.

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[72] See, S Lele, 'Sustainable Development: A Critical Review' (1991) 19 *World Development* 6, 607-621.

[73] A Heyes and C Liston-Heyes, 'Sustainable Resource Use: the Search for Meaning' (1995) 23 *Energy Policy* 1, 3.

[74] *A Heyes and C Liston-Heyes* (n 73).

However, it is important that environmental concerns are adequately considered because economic development activities also have adverse effects on the environment. This is more so in finite natural resource-based economies like Nigeria's where mining activities have long-term negative consequences on the environment. The focus on economic development and neglect of the environmental and social factors are arguably the core reasons for the conflicts in the Nigerian oil-industry. This thesis posits that the absence of an adequate legal framework to promote and ensure the active involvement of the citizenry in the development process, particularly the oil-industry, is responsible for the conflicts and violence that beset it. It is suggested that inadequate public involvement instigates non-transparency in the industry that is itself the prime cause of economic mismanagement and (mis)governance.

It is pertinent to note in concluding this section that sustainable development is not a fixed state but rather a process of change in which the exploitation of resources, the direction of investments, the orientation of technological development and institutional changes are made consistent with present as well as future needs. The ultimate challenge for research on sustainable development remains the integration of the three dimensions - environmental, economical and social - into a common socio-environmental system that could be guided towards some kind of an equilibrium state, that is, sustainability - leaving future generations with at least as many opportunities as the present generation have.[75]

4.3 Environmental Human Rights

This section highlights the evolving background to environmental human rights. The exposition on these 'rights' are important because procedural rights form the core of public

[75] *I Serageldin* (n 62) 188.

participation in environmental matters. One of the central arguments of the thesis is that inadequate legal provisions regarding public involvement in environmental issues instigate, or, and exacerbate conflicts and violence in Nigeria's oil-industry. The arguments regarding the nature of environmental human rights are explored in an attempt to define the term as expressed in this thesis. The first part proffers a definition of the term while the second part examines the arguments regarding the nature of the 'rights'. The third part highlights the substantive right to a healthy environment and the fourth discusses the procedural rights

4.3.1 Definition of Environmental Human Rights

The nature, definition and scope of the environmental human rights remain uncertain. Apple suggests that the term manages to be both elusive and controversial: elusive because there is no universal definition, controversial because many from the environmental sector define them from an ecocentric perspective (environment first) while the human rights constituency is predominantly anthropocentric (humans first).[76] There is however a general consensus that the environment needs to be protected.[77] This is especially due to the recognition of the intrinsic link between the protection of the environment, human rights and more recently, sustainable development.[78] Simply put, environmental human right involves a rights-based approach to environmental protection which, in its most prominent formulation, is divided

[76] B Apple, 'Commentary' (2004) 2 *Human Rights Dialogue* 11, 34-35.

[77] See generally, International Institute for Environment and Development (IIED), 'Environment and Human Rights: A New Approach to Sustainable Development' (IIED, 2001).

[78] See, Final Report of the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities (Ksetini Final Report), U.N. Doc. E/CN.4/Sub.2/1994/9 (1994) 74. Also, *Gabcikovo-Nagymaros Project* (37 I.L.M 206) where Justice Weeramantry, former Vice-President of the World Court recognized the link between environmental protection and human rights and placed environmental protection within the human rights doctrine.

into protection of procedural rights and substantive rights.[79] Burger distinguishes substantive and procedural categorization, in the following terms:

> Procedural rights have the benefit of cultural and political sensitivity in defining appropriate levels within individual nations or regions while substantive rights may provide stronger protections against potentially misinformed governments (and their represented publics) bent on getting rich quick and achieving gross levels of consumption.[80]

In essence, environmental human rights refer to a rights-based approach to environmental protection through a combination of substantive and procedural rights.

The rights-based approach to environmental protection has developed significantly since the last quarter of the 20th century when the perception that environmental protection could be promoted by setting it up in the framework of human rights which had by then been firmly established under international law and practice.[81] Beginning with the Stockholm Declaration on the Human Environment of 1972[82] that inspired action on the environment and human

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[79] M Burger, 'Bi-Polar and Polycentric Approaches to Human Rights and the Environment', (2003) 28 *Columbia Journal of Environmental Law* 371, 376; M Lorenzen, 'Background Paper on the Project Environmental Human Rights' prepared for ANPED, The Northern Alliance for Sustainability; online: <http://www.anped.org/docs/background%20document.doc> accessed 01 May 2004; and, IIED (n).

[80] *M Burger* (n 79) 376.

[81] M DeMerieux, 'Deriving Environmental Rights from the European Convention for the Protection of Human Rights and Fundamental Freedoms' (2001) 21 *Oxford Journal of Legal Studies* 3, 522.

[82] Though the Declaration recognizes the link between the environment and human rights, it did not create a 'right' to environment. See especially the Preamble and Principle 1 of the Declaration. Declaration of the United Nations Conference on the Human Environment, 16 June 1972, UN Doc. A/.Conf.48/14/Rev.1, 3. See also, S Attapatu, 'The Right to a Healthy Life of the Right to Die Polluted? The Emergence of a Human Right to a Healthy Environment under International Law' (2002) 16 *Tulane Environmental Law Journal* 65, 74 where it is argued that the use of the word 'man' rather than 'person' in the Declaration is an intention not to confer a right as it is interpreted as using 'non-rights language'.

rights discourse, there are now numerous references to environmental human rights contained in treaties and protocols; resolutions and reports from commissions, committees, secretariats, specialized agencies and similar entities; and, and more recently, have been considered in arriving at administrative and judicial decisions. The most comprehensive enunciation of environmental human rights is the Draft Principles on the Human Rights and the Environment prepared by the Special Rapporteur on Human Rights and the Environment in 1989, and submitted to the UN in 1994.[83] Though the draft principles are not legally enforceable, they are universally referred to and serve the useful purpose of defining the direction that international law is likely to follow in building the foundations for future binding international and regional agreements. Indeed, the international community has not defined in practical terms the threshold below which the level of environmental quality must fall before a breach of the individual human right will have occurred or above which the level of environmental quality must rise to occasion excess of environmental rights.[84]

The draft principles divided into four broad sections, are adopted as the foundation in this discussion on environmental human rights. The First section of the draft principles asserts that human rights, an ecologically sound environment, sustainable development and peace are interdependent and indivisible and affirms the right to a 'secure, healthy and ecologically sound environment' for all persons and the future generations. Part II contains a list of 'substantive rights' while Part III contains the 'procedural rights' and Part IV contains the 'duties' on the individual and the State to protect the environment. The categorization of the

[83] Draft Principles on Human Rights and the Environment, E/CN.4/Sub.2/1994/9, Annex I (1994). The draft principles are also referred to as the 'Ksentini Report'.

[84] P Sands, 'Human Rights Aspects of Environmental Law' (1993) 7 *Interights Bulletin* 4, 64.

elements of environmental human rights as contained in the Ksentini Report is used in discussing the difficulties in defining the right.

4.3.2 The Nature of Environmental Human Rights

The first Part of the Draft Principles expressly links human rights, the environment, sustainable development and peace while affirming that all persons have the right to a secure, healthy and ecologically sound environment. This right, and other human rights, including civil, cultural, economic, political and social rights, according to the Principles are universal, interdependent and indivisible.[85] In other words, environmental human rights are expectedly of the same character as other recognized human rights which they complement and together form an inseparable 'body of rights'. In reality, however, there are lingering doubts regarding the exact nature and scope of 'environmental human rights' and may be questioned whether a particular 'right' falls under the purview of environmental law, or human rights law, a hybrid of existing legal frameworks or a new rubric of rights.

4.3.2.1 The Environmental Approach

According to environmental approach, the state of the environment plays an important role in determining the human rights condition of its inhabitants thus the protection of the environment is a necessary pre-condition for the enjoyment of international human rights. This view seems to have gained some support from the UN General Assembly (UNGA) that has referred to the preservation of nature as 'a prerequisite for the normal life of man'.[86] Toepfer observed similarly that:

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[85] See Principles 1 and 2.

[86] GA Res. 35/48 of 30 Oct. 1980.

> Human rights cannot be secured in a degraded or polluted environment. The fundamental right to life is threatened by soil degradation and deforestation and by exposures to toxic chemicals, hazardous wastes and contaminated drinking water...Environmental conditions clearly help to determine the extent to which people enjoy their basic rights to life, health, adequate food and housing, and traditional livelihood and culture. It is time to recognize that those who pollute or destroy the natural environment are not just committing a crime against nature, but are violating human rights as well.[87]

Ziemer expressed likewise that:

> The environmental dimension of human rights cannot be fully realized within a degraded or polluted environment. The fundamental right to life can be denied by events with environmental consequences: deaths caused by acute exposure to radioactivity or contaminated drinking water. The right to health; the right to safe and healthy working conditions; the right to adequate housing and food; these are all fundamental rights recognized in the Universal Declaration of Human Rights, and all have significant environmental dimensions. Exposure to toxic chemicals through careless hazardous waste disposal or industrial practices; the marginalization of pastoralists and subsistence farmers through soil depletion, deforestation, and confiscating traditional grazing lands; thesn (sic) plateau--fencing off traditional nomadic migration routes, or using traditional grazing lands for military installations or Chinese settlements--the result is a denial of fundamental human rights.[88]

In other words, human rights such as those to life, health, adequate food, shelter and to culture and self-determination may be violated as a result of environmental damage.

4.3.2.1 Human Rights Approach

The human rights approach also recognizes the linkages between human rights and environmental protection and regards certain human rights as essential elements to achieving environmental protection.[89] This approach supports the use of established human rights such

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[87] Klaus Toepfer, UNEP Executive Director in his statement to the 57th Session of the Commission on Human Rights in 2001.

[88] L Ziemer, 'Environmental Harm as a Human Rights Violation: Forging New Links' <http://www.tibet.com/Eco/Green97/violation.html> accessed 01 May 2004.

[89] D Shelton, 'The Links between International Human Rights Guarantees and Environmental Protection', Center for International Studies, University of Chicago, 16 April 2004, 2.

as the right to life and the right to property to protect the environment thereby negating the need to have a new rubric of rights that seeks to specifically protect the environment. This approach according to Shelton is well-illustrated in the Rio Declaration which 'formulates a link between human rights and environmental protection largely in procedural terms' as declared in Principle 10. Principle 10 states:

> Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

These procedural rights which are now a common feature in subsequent human rights instruments are also adopted in environmental texts in order to have better environmental decision-making and enforcement.[90]

In furtherance of widespread recognition of the human rights angle to environmental protection, it has been suggested that further steps need to be taken particularly:

- To affirm the link between human rights and environmental protection as an essential tool in the eradication of poverty and the achievement of sustainable development;
- To treat economic, environmental and human rights norms in an integrated manner, and develop legal and other concepts and techniques for achieving such integration;
- To recognize the environmental dimension in the effective enjoyment of human rights protection and promotion, and the human rights dimension in environmental protection and promotion, in part by developing rights-based approaches to environmental protection and promotion of sustainable development;
- To support the growing recognition of a right to a secure, healthy and ecologically sound environment, either as a constitutionally guaranteed entitlement/right or as a guiding principle of national and international law;
- To emphasize the responsibility of private actors and develop effective mechanisms to prevent and redress environmental degradation, including remedies for victims, in national and international instruments in the field of environment and human rights;

[90] *D Shelton* (n 89).

- To consider more broadly the catalogue of substantive human rights that can be marshalled to assist in achieving environmental protection, with particular reference *inter alia* to the rights of indigenous peoples and other vulnerable groups; and
- To identify and move to correct gaps and limitations in substantive protections, with a view to strengthening international instruments and further normative developments aiming at consistency and equality in the application of minimum standards of environmental protection within the framework of human rights protection.
- With regard to institutional arrangements, the linkage between human rights and the environment is in need of reinforcement. This could be achieved by:
- Ensuring that environmental bodies and procedures are fully aware of the increasing environmental role played by human rights bodies and procedures, and that human rights bodies are fully aware of the increasing human rights role played by environmental institutions and procedures;
- Ensuring greater emphasis on environmental protection in the work of human rights bodies and procedures, particularly by encouraging closer engagement of UNEP in the work of the human rights treaty bodies, and closer engagement of OHCHR in the work of the secretariats to multilateral environmental agreements;
- Establishing a formal institutional relationship between OHCHR and UNEP with a view to strengthening the links and connections between human rights and environmental issues.[91]

The above lofty statement in a nutshell is a call for the recognition of substantive and procedural rights to enjoy stipulated minimum levels of 'healthy' environmental conditions enforceable as a matter of right. Though there is progress in the recognition of the human rights dimension to environmental protection especially within national boundaries, it is unlikely that this will result in an internationally defined 'minimum standard'. However, increased co-operation between human rights and environmental bodies working together may however reduce the conflicting perspectives on environmental human rights and promote a better understanding of what comprises a 'right'. It is noteworthy that this approach has been adopted by the European Court on Human Rights in interpreting and

[91] Conclusion of the Meeting of Experts on Human Rights and the Environment. The meeting was held in furtherance of decision 2001/111 of the United Nations Commission on Human Rights, the United Nations High Commissioner for Human Rights and the Executive Director of the United Nations Environment Programme jointly organized a one-day Expert Seminar on Human Rights and the Environment (16 January 2002). This Seminar was preceded by a two-day preparatory meeting of experts (14-15 January 2002).

implementing the European Convention on Human Rights (ECHR), which does not contain any explicit provisions concerning the right to a clean or quiet environment. The Grand Chamber decided in *Hatton and Others v United Kingdom*[92] that where an individual is directly and seriously affected by noise or other pollution, an issue may arise under Article 8.[93]

4.3.2.2 New Rights?

The third, 'new rights' approach views the links between the environment and human rights as indivisible and inseparable. Under this view, connecting human rights and the environment reveals that human rights abuses often lead to environmental harm, just as environmental degradation may result in human rights violations.[94] Therefore, it is posited that a new rights-based approach to protect the intrinsic link between human rights and environmental protection that places the people harmed by environmental degradation at its centre be adopted.[95] Under this view, it is suggested that articulating the fundamental rights of peoples with respect to the environment creates the opportunity to secure those rights through human rights bodies in an international forum; a method that has proved to be most useful to help those people most vulnerable to environmental harm (and usually the least able to access remedies or political support within their own countries) preserve their fundamental human rights.

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[92] Judgment of the Grand Chamber of 8 July 2003, 22, para. 96.

[93] See also, *Powell and Rayner v the United Kingdom* (judgment of 21 February 1990, Series A no. 172, 18, para. 40), *López Ostra v Spain* (judgment of 9 December 1994, Series A no. 303-C, 54-55, para. 51).

[94] *L Ziemer* (n 88).

[95] *D Shelton* (n 89) 2.

4.3.2.3 No Right?

There is a strong argument that there is no need for a separate generic right to a decent viable or satisfactory environment or for the re-conceptualization of international environmental law into the law of environmental rights.[96] While some deny its need based on the redundancy and uncertainty in the definition of the proposed right(s) and anthropocentricity,[97] others suggest that there is no need to have a separate 'right to environment' to protect the environment because existing human rights norms if fully realized are robust enough to protect the environment.[98] Talliant argues that rather than rely on the environmental paradigm, a development approach (which is also still evolving) should be adopted as this is likely to achieve more 'victories in the courtroom'.[99] Kwong opines that the 'development of so-called environmental rights' poses great obstacles to environmental protection because in the process of its expansion, it has become 'complex and far reaching...resulting in the gross violation of human rights' especially (in his illustrations) the right to property and labour.[100]

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[96] A Boyle, 'The Role of International Human Rights Law in the Protection of the Environment', in A Boyle and M Anderson (eds.) *Human Rights Approaches to Environmental Protection* (Clarendon Press, Oxford 1996), 56.

[97] *M DeMerieux* (n 81) 524.

[98] See the following contributions in A Boyle and M Anderson (eds.) *Human Rights Approaches to Environmental Protection* (Clarendon Press, Oxford 1996): J Merrills, 'Environmental Protection and Human Rights: Conceptual Aspects', 25-42; R Churchill 'Environmental Rights in Existing Human Rights Treaties', 89-108; and A Harding, 'Practical Human Rights, NGOs and the Environment in Malaysia', 227-244.

[99] J Taillant, 'A Nascent Agenda for the Americas' (2004) 2 *Human Rights Dialogue* 11, 29.

[100] J Kwong, 'Environmental "Rights": Special Rights or No Rights at all' (1999) Liberal Dűsűne Topululğu and Association for Liberal Thinking, <www.liberal-dt.org.tr/Inglizce/articles/main.htm> accessed 01 March 2004.

4.3.2.4 Observations on the Nature of Environmental Human Rights

While debates rage on the exact nature of environmental human rights, it appears that the substantive rather than the procedural aspects are the main reason for its criticism. This observation is made on the basis that while literature on 'environmental human rights' generally questions the nature, extent and enforceability of substantive rights, it usually promotes the 'rights' empowering the public to take part in environmental decision-making processes.[101] It is acknowledged that the 'rights' have not matured to a level of conceptual clarity and certainty but this is not enough reason to deny their existence. Evidently, every new ideology or concept must go through an initial period when it will be subjected to 'validity tests'. As Boyle notes, precisely the same arguments were made in early opposition to the recognition of economic and social rights based on the divergent viewpoints of the relative moral and social value of each category, or rights within categories.[102]

4.3.3 Substantive Environmental Rights

Substantive environmental rights refer to the existence and protection of a 'right to an adequate environment' by law. The 'right' as espoused by the Draft Principles generally seeks to promote the right of all persons to have a right to an environment adequate equitably to meet the needs of present generations without impairing the rights of future generations to meet equitably their needs.[103] Principle 2 describes an 'adequate' environment in vague terms

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[101] See, C Redgewell, 'Life, the Universe and Everything: A Critic of Anthropocentric Rights' in A Boyle and M. Anderson (eds.) *Human Rights Approaches To Environmental Protection* (Clarendon Press, Oxford 1996), 86-87.

[102] *A Boyle* (n 98) 46.

[103] Draft Principles on Human Rights and the Environment, E/CN.4/Sub.2/1994/9, (Draft Principles), Principle 4.

to be a 'secure, healthy and ecologically sound environment'. Though similar phraseology is adopted in several regional[104] and national provisions that seek to promote this substantive right, the interpretation of the adjectives used often do not provide precise descriptions to the extent of the right.[105] Anderson observes in this regards that it is not easy to translate the quantitative and qualitative dimensions of environmental protection standards into legal terms.[106] Du Bois raises some ethical difficulties involved in determining what the rights are meant to protect.[107] He questions whether 'human health and livelihood, or ecological sustainability, or the aesthetic values of existing natural endowments' are to be protected. The

[104] Note particularly Article 24 of the African charter on Human and Peoples' Rights (ACHPR) that uses the phrase 'right to a general satisfactory environment favourable to their development'. The Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights (1988) via Article 11 uses the phrase: 'right to live in a healthy environment'. Apparently to emphasize the import of Article 11, a note was appended to the Protocol to explain that its provision is much wider than its formulation in Article 12 (2) (b) of the international Covenant on Economic, Social and Cultural Rights (1966) which Attaputu contends does not endorse a human right to a healthy environment. See generally, *S Attapatu* (n 76) 89.

[105] Some of the expressions used to describe the substantive 'right to a healthy environment' include the right to a 'healthy, balanced environment which is fit for human development - Article 41 of the Argentine Constitution'; 'an ecologically balanced environment' - Article 225 of the Brazilian Constitution; and, 'safe and healthy environment' - Article 50 of the Constitution of the Ukraine. See generally, CIEL, 'Human Rights, Environment, and Economic Development: Existing and Emerging Standards in International Law and Global Society' (Article) <http://www.ciel.org/Publications/olp3iii2.html> accessed; 22 May 2005. See generally, D Shelton, 'Human Rights, Environmental Rights and the Right to the Environment' (1991) 28 *Stanford Journal of International Law* 103.

[106] M Anderson, 'Human Rights Approaches to Environmental Protection: An Overview', in A Boyle and M Anderson (eds.) *Human Rights Approaches to Environmental Protection,* (Clarendon Press, Oxford 1996), 11.

[107] F du Bois, 'Social Justice and Judicial Enforcement of Environmental Rights and Duties' in A Boyle and M Anderson (eds.) *Human Rights Approaches to Environmental Protection,* (Clarendon Press, Oxford 1996), 153-176.

question of who the right holders are also arises and pertinent points include: are the beneficiaries of the rights limited to individuals or do they include groups;[108] how are the interests of the present evaluated against that of the future generations and vice-versa;[109] and is the right supposedly limited to human beings exclusively or does it extend to the earth and other animals?[110] The inability to construct a clear jurisprudence of the 'right' especially in the international sphere[111] is a strong basis for argument that there is no need to have a substantive right to a healthy environment. Consequently, it is commonly suggested that existing human rights provisions can be utilized to meet the objectives that such a 'new' right is anticipated to meet.[112]

However, it is posited that the difficulty in having a precise definition and scope of the substantive right should not diminish its practical purposes. For instance, it may be argued that despite the advantage of an absolute clarity of purpose and the consequent fostering of 'healthier relationship with other rights'[113] it may achieve, it will be impracticable to have a universal definition apply in real terms to all nations of the world. The inappropriateness of the right in some jurisdictions may then lead to questions being raised regarding its utility therefore an exercise to clearly define it may lead to highlighting its limitations. This may then raise fresh queries regarding its validity and increase arguments that the 'right' is devoid of utility. It is suggested that, rather than concentrate on the search for a universally

[108] *J Merrills* (n 98) 28.

[109] *J Merrills* (n 98) 31-33.

[110] See generally, *C Redgewell* (n 101) 71-88 and *J Merrills* (n 98) 34.

[111] See generally, *M Anderson* (n 106) 10-19.

[112] See section 2.3.1.4 above.

[113] *J Kwong* (n 100).

unanimous definition or description of the right, it is more practical that national and/or regional law and policies define the scope of the right. These national and regional instruments will necessarily take into consideration peculiar individual circumstances such as levels of economic, political and socio-cultural development of the country involved which are crucial determinant factors to determine what level of environmental protection will be permitted in the course of development activities.

Already, there are differing standards of recognition given to the right and the scope depends essentially on peculiar circumstances. For instance, the United Kingdom (UK) does not recognize the substantive right to a healthy environment preferring to rely on precisely formulated and properly enforced national laws against environmental pollution of different kinds to secure satisfactory overall environmental protection. Other countries such as India and Pakistan however rely more on promoting the right in a substantive nomenclature. Presently, the influence of the nebulous substantive 'right to a healthy environment' has influenced about 100 of the world's 191 nations[114] to recognize the 'right'[115] or the state's obligation to prevent environmental harm.[116] Also, 54 of these countries recognize a

[114] To date, there are 191 members of the United Nations, Timor-Leste retaining member status in September 2002. See U.N., *Member States*, <http://www.un.org/members/index.html> accessed 10 March 2004.

[115] Fifty-three countries expressly recognize the 'right'. These include: Angola, Argentina, Azerbaijan, Belarus, Belgium, Benin, Brazil, Bulgaria, Burkina Faso, Cameroon, Cape Verde, Chad, Chechnya, Chile, Colombia, Congo, Costa Rica, Croatia, Cuba, Czech Republic, Ecuador, El Salvador, Ethiopia, Finland, Georgia, Honduras, Hungary, Kyrgyzstan, Latvia, Macedonia, Mali, Moldova, Mongolia, Mozambique, Nicaragua, Niger, Norway, Paraguay, Philippines, Portugal, Russia, Sao Tome and Principe, Seychelles, Slovakia, Slovenia, South Africa, South Korea, Spain, Tajikistan, Togo, Turkey, Ukraine, Yugoslavia..

[116] Ninety-two countries give constitutional make it the duty of the national government to prevent harm to the environment. These include: Andorra, Angola, Argentina, Armenia, Azerbaijan, Bahrain, Belarus, Belgium,

responsibility of citizens or residents to protect the environment while 14 prohibit the use of property in a manner that harms the environment or encourage land use planning to prevent such harm and 19 explicitly make those who harm the environment liable for compensation and/or remediation of the harm, or establish a right to compensation for those suffering environmental injury.[117]

What is the ambit of the substantive environmental right? Pathak suggests quite broadly that it aims to 'create an ethos promoting individual and collective welfare in all the dimensions

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Benin, Bolivia, Brazil, Bulgaria, Burkina Faso, Cambodia, Cameroon, Cape Verde, Chad, Chechnya, Chile, China, Colombia, Congo, Costa Rica, Croatia, Cuba, Czech Republic, Ecuador, El Salvador, Equatorial Guinea, Eritrea (draft), Ethiopia, Finland, Georgia, Germany, Ghana, Greece, Guatemala, Guyana, Haiti, Honduras, Hungary, India, Iran, Kazakhstan, Kuwait, Kyrgyzstan, Laos, Latvia Lithuania, Macedonia, Madagascar, Malawi, Mali, Malta, Mexico, Micronesia, Moldova, Mongolia, Mozambique, Namibia, Nepal, Netherlands, Nicaragua, Niger, Norway, Palau, Panama, Papa New Guinea, Paraguay, Peru, Philippines, Poland, Portugal, Romania, Russia, Sao Tome and Principe, Saudi Arabia, Seychelles, Slovakia, Slovenia, South Africa, South Korea, Spain, Sri Lanka, Suriname, Switzerland, Taiwan, Tajikistan, Tanzania, Thailand, Togo, Turkey, Turkmenistan, Uganda, Ukraine, Uzbekistan, Venezuela, Vietnam, Yugoslavia, Zambia.

[117] Earth Justice, 'Issue Paper Human Rights and the Environment', Materials For the 60th Session of the United Nations Commission on Human Rights Geneva, 15 March - 23 April 2004 <www.earthjustice.org> accessed 22 May 2005. At least 35 are African countries representing about 66 per cent of African nations that have constitutional provisions ensuring the right to a healthy environment which represents a significant increase from just two countries - Equatorial Guinea and Ethiopia - that had environmental provisions in their constitutions in the mid 1980s. See, C Bruch, and W Coker, 'Breathing Life into Fundamental Principles: Constitutional Environmental Law in Africa', World Resources Institute, Working Paper No. 2 (2001) <http://www.eli.org/pdf/breathinglife.pdf> accessed 22 May 2005.

human existence.'[118] The Centre for International Environmental Law (CIEL), notes similarly that despite the stylistic variations which articulate the right, its core concern is 'affording each person a right to an environment that supports his physical and spiritual well-being and development'.[119] It suggests that the type of environment suggested would likely proscribe the dumping of toxic wastes in areas inhabited and utilized by local populations, the degradation of forests, depletion of biodiversity including genetic variation of agricultural crops, as well as levels of air and water pollution which compromise human health in urban centres.[120] Part II of the Ksentini Report that contains a more expansive list including two which shall be discussed more in subsequent parts of the thesis in relation to oil exploration and production activities in Nigeria.[121] The first of these is the right to freedom from pollution, environmental degradation and activities that adversely affect the environment, threaten life, health, livelihood, well-being or sustainable development within, across or outside national boundaries.[122] The second is the right of all persons not to be evicted from their homes or land for the purpose of, or as a consequence of, decisions or actions affecting the environment, except in emergencies or due to a compelling purpose benefiting society as a whole and not attainable by other means. All persons have the right to participate effectively in decisions and to negotiate concerning their eviction and the right, if evicted, to

[118] R Pathak, 'The Human Rights System as a Conceptual Framework for Environmental Law' in E Brown (ed.) *Environmental Change and International Law: New Challenges and Dimensions* (United Nations University Press, Tokyo 1992), 209.

[119] See, *CIEL* (n 98).

[120] See, *CIEL* (n 98).

[121] *Draft Principles* (n 97) Annex I lists the substantive rights.

[122] *Draft Principles* (n 97) Article 5.

timely and adequate restitution, compensation and/or appropriate and sufficient accommodation or land.[123]

4.3.4 Procedural Rights

Procedural rights are contained in Part III of the Ksentini Report and well expressed in Article 10 of the Rio Declaration. Essentially, the right broadly consists of the right to environmental information, the right to participate in environmental decision-making and the right to administrative or judicial determination of environmental disputes. These rights referred to as the 'three pillars' of procedural rights have become standard features in contemporary international instruments including Agenda 21 adopted in 1992 to implement the principles in the Rio Declaration and considered to be the blueprint for Sustainable Development,[124] and the United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention). Boyle notes that this new formulation differs significantly from earlier participatory rights in the ICCPR and regional human rights conventions is its greater specificity and environmental focus and its emphasis both on participation in decision-making, including access to information and on access to justice.[125]

The Aarhus Convention though regional in scope is significant globally and is considered the most ambitious international instrument in its coverage of procedural rights and by far the

[123] *Draft Principles* (n 97) Article 11.

[124] Issues relating to access to information, public participation, and access to justice appear throughout Agenda 21, particularly in Chapters 12, 19, 23, 27, 36, 37, and 40..

[125] *A Boyle* (n 96) 60.

most impressive elaboration of principle 10 of the Rio Declaration.[126] It is elaborate in its provisions which recognize the three pillars of procedural rights in its objective to promote greater accountability and transparency in environmental matters.[127] However, despite the positive response it has received from NGOs and governments,[128] Lee and Abbot opine that it is a fairly weak legal document given its 'quite vague and permissive' character and the absence of adequate enforcement mechanisms.[129] The Convention is however used as the basis of the discussion on procedural rights as it remains the 'broadest and most detailed requirements to date' on the issue.[130] It is worth noting that an advantage of procedural rights over the substantive formulation of environmental human rights is that it avoids the problems of anthropocentricity to the extent that rights can be exercised on behalf of the environment or of its non-human components, and not solely for human benefit.[131]

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[126] K Annan 'Foreword' in S Stec and S Casey-Lefkowitz, *The Aarhus Convention: An Implementation Guide* (United Nations Economic Commission for Europe, New York 2000).

[127] R Macrory and S Turner, 'Participatory Right, Transboundary Environmental Governance and EC Law' (2002) 39 *Common Market Law Review* 1, 507. See also, M Lee and C Abbot, 'The Usual Suspects? Public Participation under the Aarhus Convention' (2003) 66 *Modern Law Review* 1, 82.

[128] S MacAllister, 'The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters' (1998) 10 *Colorado Journal of International Environmental Law and Policy* 187.

[129] M Lee and C Abbot, 'The Usual Suspects? Public Participation under the Aarhus Convention' (2003) 66 *Modern Law Review* 1, 81-82.

[130] G Pring and S Noé, 'The Emerging International Law of Public Participation Affecting Global Mining, Energy, and Resources Development' in D Zillman, A Lucas, and G Pring, (eds.) *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources* (Oxford University Press, Oxford 2002) 43.

[131] *A Boyle* (n 96) 62.

4.3.4.1 The Right to Environmental Information

Article 4 of the Aarhus Convention grants the right to environmental information without an interest having to be stated subject to a number of exceptions. Environmental information is defined to include any information on the state of the elements of the environment, factors affecting the environment or likely to do so, cost-benefit analyses used in environmental decision-making, information on human health and safety, and cultural sites and built structures, inasmuch as they are or may be affected by the state of the elements of the environment.[132] Though the Convention defines 'environmental information' broadly, its Member States have been accused of sometimes interpreting it narrowly[133] and the courts have made it clear in the case of *Meclenburg v Kreiss Pinneberg der Landrat*[134] that the concept is broad and all-embracing. The Convention contains a number of exceptions to 'access' which are contained Article 4(3)[135] and (4).[136] However the grounds of refusal are to

[132] Article 2(3) of the Aarhus Convention.

[133] European Commission, *Report on the Experience Gained in the Application of Council Directive 90/313 on Freedom of Access to Information on the Environment*, COM (2000)400, 4.

[134] Case C-321/96, [1998] ECR I – 3809. In the case, the applicant was refused access to a copy of the statement of the views by the competent countryside authority in connection with planning approval for the construction of the 'western by-pass'. The ECJ held that such information did fall within the definition of 'information relating to the environment' and was not covered by the exemption relating to proceedings of a 'judicial or quasi-judicial nature'.

[135] A request for environmental information may be refused if:

(a) The public authority to which the request is addressed does not hold the environmental information requested;

(b) The request is manifestly unreasonable or formulated in too general a manner; or

(c) The request concerns material in the course of completion or concerns internal communications of public authorities where such an exemption is provided for in national law or customary practice, taking into account the public interest served by disclosure.

be interpreted in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment. The information sought must be made available at 'such a charge that may not exceed a reasonable cost' which the charging authority bearing the responsibility to provide a schedule of charges which may be levied, the circumstances when the charges may be levied or waived and when such payment is pre-conditional to receipt of the information sought.[137] The provisions of the Aarhus Convention on the right to environmental information,

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[136] A request for environmental information may be refused if the disclosure would adversely affect:

(a) The confidentiality of the proceedings of public authorities, where such confidentiality is provided for under national law;

(b) International relations, national defence or public security;

(c) The course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature;

(d) The confidentiality of commercial and industrial information, where such confidentiality is protected by law in order to protect a legitimate economic interest. Within this framework, information on emissions which is relevant for the protection of the environment shall be disclosed;

(e) Intellectual property rights;

(f) The confidentiality of personal data and/or files relating to a natural person where that person has not consented to the disclosure of the information to the public, where such confidentiality is provided for in national law;

(g) The interests of a third party which has supplied the information requested without that party being under or capable of being put under a legal obligation to do so, and where that party does not consent to the release of the material; or

(h) The environment to which the information relates, such as the breeding sites of rare species.

[137] Article 4(8).

according to Lee and Abott, give impetus to the active collection and dissemination of environmental information.[138]

4.3.4.2 The Right to Act to Protect the Environment

This aspect generally confers the right of the public to participate in the environmental decision-making process. Under the Aarhus Convention, the role of the public is recognized in three stages: decisions on specific activities,[139] plans programmes and policies relating to the environment,[140] and the preparation of executive regulations and/generally applicable legally binding normative instruments.[141] These provisions create a remarkable difference in the UK for instance where environmental regulations are 'historically exceptionally closed to public influence.'[142] The Aarhus Convention has changed the hitherto general lack of obligation to allow the public participate in decisions, environmental or otherwise.[143] It stresses the need to provide detailed information on the subject-matter,[144] early public consultation,[145] have due regard to public input[146] reinforced by the provision that the reasons

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[138] *M Lee and C Abbot* (n 129) 92. See also, D Wilsher, 'Freedom of Environmental Information: Recent Development and Future Prospects' (2001) 7 *European Public Law* 4, 692-695.

[139] Article 6.

[140] Article 7.

[141] Article 8.

[142] J Steele, 'Participation and Deliberation in Environmental Law: Exploring a Problem-solving Approach' (2001) 21 *Oxford Journal of Legal Studies* 3, 418.

[143] It is important to state that some individual regulations provided for some level of participation. See, *M Lee and C Abbot* (n 129) 96-97.

[144] Article 6(6).

[145] Article 6(4).

[146] Article 6(8).

for the final decisions must be provided.[147] These provisions extend the obligations placed on public authorities by current environmental law such as the Environmental Impact Assessment (EIA) and Integrated Pollution Prevention and Control (IPPC) processes which emphasize 'public consultation' in environmental issues.[148] As Lee and Abbott observe, even though the EIA process influences the effectiveness of the public participation process and has become established, it does not impose environmental rights and targets like environmental human rights provisions.[149]

The Aarhus Convention goes beyond the requirements of EIAs and 'consultation'[150] as it encourages prospective applicants to identify the public concerned and enter into discussions with them before applying for a permit.[151] Article 7 requires 'appropriate practical and/or other provisions' for public participation in the 'preparation of plans and programmes relating to the environment, within a transparent and fair framework, having provided the necessary information to the public.' Davies notes that to ensure the effectiveness of this provision, such participation must take place at an early stage and give the public sufficient time to

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[147] Article 6(9).

[148] *M Lee and C Abbot* (n 129) 97-99.

[149] *M Lee and C Abbot* (n 129) 97-99.

[150] For a detailed discussion on 'consultation and the distinguishing factors between 'consultation' and 'participation', see G Whiteman and K Mamen, *Meaningful Consultation and Participation in the Mining Sector? A Review of the Consultation and Participation of Indigenous Peoples within the International Mining Sector*, (The North-South Institute, Canada 2002).

[151] Article 6(5) and (7). The Convention however does not define when it is 'appropriate' and leaves it to the discretion of the Member Parties. It brings to doubt the practical import of the provision. See *M Lee and C Abbot* (n 129) 96-97.

ensure meaningful participation.[152] With regards to policies, the Convention provides that 'to the extent appropriate, each Party shall endeavor to provide opportunities for public participation in the preparation of policies relating to the environment.' This 'vague' provision is regarded as soft law by the European Commission and it is opined that this will not create legally binding legislation at the national level.[153]

4.3.4.3 Access to Justice

Access to justice refers to the right of any person with sufficient interest to administrative and/or judicial review to address refusal to disclose environmental information or ensure public participation. As Douglas-Scott observes, the rights to information and to participate in environmental decision-making would be rendered nugatory if individuals or environmental interest groups did not also have the right to challenge certain measures.[154] The Aarhus Convention requires the establishment of review procedures where there is a refusal to disclose environmental information.[155] It also addresses the right of members of the public with 'sufficient interest' to seek review of 'impairment of a right, where the administrative procedural law of a Party requires this as a precondition' or 'challenge the substantive and procedural legality of any decision, act or omission' subject to the provisions of Article 6, and also 'where provided for under national law' any decision subject to 'other relevant

[152] P Davies 'Public Participation, the Aarhus Convention, and the European Community' in D Zillman, A Lucas, and G Prang, (eds.) *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources*, (Oxford University Press, 2002) 172.

[153] *P Davies* (n 152) 173.

[154] S Douglas-Scott, 'Environmental Rights in the European Union: Participatory Democracy or Democratic Deficit' in A. Boyle and M. Anderson (eds.) *Human Rights Approaches To Environmental Protection,* (Clarendon Press, Oxford 1996) 121.

[155] Article 9(1) of the Aarhus Convention.

provisions' of the Convention.[156] Members of the public have a right of access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.[157] This provision extends the right to enforce environmental regulation that was generally was in the hands of the regulatory authorities whose performance have been substantially criticized to members of the general public.[158]

One of the fundamental issues is to determine who has *locus standi* to maintain proceedings. The Aarhus Convention expressly defers the determination of this to national laws but emphasizes 'the objective of giving the public concerned wide access to justice'.[159] Generally, an individual or group may maintain an action if there is proof of 'sufficient interest' particularly where they represent environmental interests.[160] The effect of the

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[156] Article 9(2) of the Aarhus Convention.

[157] Article 9(3) of the Aarhus Convention.

[158] *M Lee and C Abbot* (n 129) 104.

[159] Article 2(5) defines the 'public concerned as the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.

[160] This area of the law remains uncertain in the UK. In *R v HMIP ex parte Greenpeace Ltd. (No. 2)* [1994] 4 All ER 329; and *R v Secretary of State for Foreign Affairs ex parte World Development Movement* [1995] 1 WLR 385 the courts expressed the willingness to relax the *locus standi* rule to allow groups and individuals representing environmental interests maintain actions. The courts in *R v Somerst C.C. ex parte Dixon* [1997] JPL 1030; and *R v Monopolies and Mergers Commission, ex parte Argyll Group plc* [1986] 1 WLR 763 where the court held that it would refuse to grant *locus standi* if the applicant has no interest whatsoever and is, in truth, no more than a meddlesome busybody. See also, R v *North Somerset D.C. ex parte Garnett* [1998] Env

Convention is two-fold in that it promotes direct and indirect citizen enforcement. Under direct citizen enforcement, citizens have *locus* to go to a court or review body to enforce the provisions of a law rather than simply to redress personal harm while under the indirect mode, citizens participate in the enforcement procedure through citizen complaints for example.[161] Such action may be maintained against public authorities including national governments as well as institutions of regional economic integration. However, it is debatable whether under Article 9(3) the right extends to the initiation of private civil enforcement proceedings against a firm acting in breach of environmental law.[162] The Convention provides that the procedures to enforce procedural rights should be adequate and effective including injunctive relief as appropriate and shall be 'fair, equitable, timely and not prohibitively expensive'.[163] While the practical application of this section in the UK could prove 'most demanding' as Lee and Abott note, sub-sections (2) and (3) are considered 'disappointing' as they 'provide only a watered down guarantee of access to justice.' [164]

The vague and weak language used in the Aarhus Convention particularly its allusion to 'national law' to determine standards remains a major drawback for its effectiveness. What is clear however is that there is a level of recognition given to environmental human rights by the Convention with emphasis on procedural rights by the adoption and ratification of the Convention. This gives credence to the assertion that there is at least a political commitment

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LR 91 where the court held that local walkers had no right to challenge legality of permission for aggregates due to lack of standingadopted contrasting approaches.

[161] *M Lee and C Abbot* (n 129) 104.

[162] *M Lee and C Abbot* (n 129) 105.

[163] Article 9(4).

[164] *M Lee and C Abbot* (n 129) 103 and 106.

to involve the public in environmental issues which may evolve in time to strong legal commitments within the European Union and globally.[165] Indeed, there are varying degrees of recognition of this 'right' in other parts of the world but the common ground is that environmental human rights consist of a 'rights' based combination of substantive and procedural means to promote environmental protection.[166] While the substantive right denotes the identification of a separate, independent human right, not dependent on the existing protected rights recognized in the international covenants, procedural rights refer to those applied to seek enforce participation in and/or redress for environmental issues.[167]

2.4 Public Participation

Generally, 'public participation' refers to the various mechanisms that individuals or groups may use to communicate their views on a public issue.[168] More specific definitions will be influenced primarily by geographic region and culture[169] as well as the subject-matter or issue

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[165] G Pring and S Noe, 'International Law of Public Participation', in D Zillman, A Lucas, and G Pring, (eds), *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources*, (Oxford University Press, Oxford 2002) 72.

[166] See, M Anderson, 'Human Rights Approaches to Environmental Protection: An Overview', in A Boyle and M Anderson M eds. *Human Rights Approaches to Environmental Protection* (Oxford University Press, Oxford 1996), 10; and, M Burger, 'Bi-Polar and Polycentric Approaches to Human Rights and the Environment' (2003) 28 *Columbia Journal of Environmental Law* 2, 376.

[167] *S Attapatu* (n 82) 73.

[168] *G Pring and S Noé* (n 124) 15.

[169] See, N Wengert, 'Citizen Participation: Practice in Search of a Theory' (1976) 16 *Natural Resources Journal* 23. See also, N Spyke, 'Public Participation in Environmental Decision-Making at the New Millennium: Structuring New Spheres of Public Influence' (1999) 26 *Boston College Environmental Affairs Law Review* 2, 266.

under consideration. For instance, in Europe 'participation' is used in the 'narrow or segmented sense to mean only the participation in the governmental decision-making process, as distinct from such factors as access to information and justice, which others see as integral components.'[170] In the Americas, its definition is wider as it includes sharing of information and involvement in policy formulation and development projects. The Organization of American States Inter-American Strategy for the Promotion of Public Participation in Decision Making for Sustainable Development defines public participation as:

> All interaction between government and civil society... including the process by which government and civil society open dialogue, establish partnerships, share information, and otherwise interact to design, implement, and evaluate development policies, projects and programs.[171]

In an environmental context, public participation involves the exercise of particular procedural environmental right.[172] In the development context, public participation is defined as: 'the organized efforts to increase control over resources and regulative institutions in given social situations, on the part of groups and movements of those hitherto excluded from such control'.[173] Within this context, emphasis is placed on the involvement of marginalized

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[170] *G Pring and S Noé* (n 130) 15.

[171] Organization of American States Inter-American Council for Integral Development (OASCIDI), Inter-American Strategy for the Promotion of Public Participation in Decision Making for Sustainable Development, CIDI/RES. 98 (V-o/00), OEA/Ser.W/II.5, CIDI/doc.25/00 (20 April 2000), adopting the OAS Unit For Sustainable Development and Environment, Inter-American Strategy for the Promotion of Public Participation in Decision Making for Sustainable Development (December 1999) <http://www.ispnet.org/Documents/INDEX.html> accessed 22 February 2003. See especially, the 'Policy Framework, Introduction, unnumbered para. 2'.

[172] See section 4.3.4 above.

[173] M Stiefel and M Wolfe, *A Voice for the Excluded: Popular Participation in Development - Utopia or Necessity?* (Zed Books, London 1994) 5.

groups in resource management. The empowerment of marginalized groups in development is reiterated by the International Financial Institutions including the World Bank that describes participation as a process through which stakeholders influence and share control over development initiatives and the decisions and resources which affect them.[174]

The core of public participation according to the International Association for Public Participation includes:

- People should have a say in decisions about the actions which affect their lives.
- Public participation includes the promise that the public's contribution will influence the decision.
- The public participation process communicates the interests and meets the process needs of all participants.
- The public participation process seeks out and facilitates the involvements of those potentially affected.
- The public participation process involves participants in defining how they participate.
- The public participation process communicates to participants how their input was, or was not, used.
- The public participation process provides participants with the information they need to participate in a meaningful way.[175]

In other words, 'public participation' goes beyond practical involvement in the issues at stake and extends to the public defining the mode of their involvement and receiving feedback on if, and how, their contribution has made an impact on the final decision. Internationally,

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[174] World Bank, *The World Bank Participation Sourcebook* (The World Bank, Washington D.C. 1996), 3.

[175] S Daniels and G Walker, 'Rethinking Public Participation in Natural Resources Management: Concepts from Pluralism and Five Emerging Approaches' in Pluralism and Sustainable Forestry and Rural Development: Proceedings of an International Workshop, Rome, 9-12 December 1997 (Food and Agriculture Organization of the United Nations, 1999). See also, D Priscolli, 'Participation and Conflict Management in Natural Resource Decision-Making' in B Solberg and S Miina, (eds.) *Proceedings: Conflict Management and Public Participation in Land Management* (European Forest Institute, Finland 1997), 61-88.

public participation law is particularly relevant to activities undertaken by the mining, energy and natural resources industries[176] such as Nigeria's oil industry which this thesis focuses on.

'Public participation' within a natural resources context means sharing ownership, management and benefits[177] including the meaningful contribution of 'stakeholders' in decision-making responsibility for natural resources management issues. 'Stakeholder participation' refers more specifically to those groups which may be directly affected by a company's activities, as opposed to simply involving citizens in a given geographic area.[178] There are several levels of stakeholder participation in mining projects. Arnstein classifies them into three broad categories to include participation, token participation, and non-participation. 'Participation' according to her includes citizen control, delegated power and partnership; placation, consultation and informing are characteristic of token participation; while therapy and manipulation are indicators of non-participation. Carter developed Arnstein's classification and categorizes participation into four including information-transfer, consultative (advisory), collaborative (joint decision-making) and local control.[179] Active participation will at the minimum, require that procedures exist through which 'local stakeholders' of mining projects can actively influence the decisions regarding the development of the resource to be mined.[180] In essence, public participation differs from

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[176] *G Pring and S Noé* (n 130) 28.

[177] D Pandey, *Beyond Vanishing Woods: Participatory Survival Options for Wildlife, Forests and People* (Himanshu/CSD, New Delhi: 1996).

[178] *G Whiteman and K Mamen* (n 150) 52-53.

[179] World Bank, *The World Bank Participation Sourcebook* (Washington D.C.: The World Bank, 1996).

[180] Economic Commission for Africa (ECA), *Improving Public Participation in the Sustainable Development of Mineral Resources in Africa* (ECA, Addis Ababa 2004), 1.

'consultation'.[181] Consultation in the narrow sense refers to an 'informative process'[182] and broadly as a two-way communication process whereby all parties contribute views, information and ideas, and which should precede decisions and action on the issue.[183] In any of the above formations, consultation is narrower in meaning and as Connor observes, it is 'an advisory process in which there is rarely an explicit requirement for the proponents to incorporate stakeholder contributions into decision-making.[184]

The challenge of creating the institutions and situations in which meaningful public participation can take place however remains the greatest challenge to achieving meaningful participation.[185] Holder and Lee argued that participation might actually enhance exclusion.[186] Factors that are taken into consideration in this regards include who is allowed or willing to participate; how the grounds of the debate might work to exclude some ideas and some people. While obvious forms of exclusion may take the form of inviting certain groups, less obvious forms of participation may be the location of the debates that may be inaccessible or the mode of discussions that may be technical thereby limiting participation to 'experts'. These challenges are not adequately provided for in the Aarhus Convention that 'demonstrates very little with the concern with the mechanics of public participation or with

[181] This observation has been made earlier in section 2.3.3.2 discussion the role of the public to act to protect the environment.

[182] *G Whiteman and K Mamen* (n 150) 51.

[183] Status of Women Canada, *Policy on Consultation with Stakeholders* (Government of Canada, Ottawa 1999).

[184] D Connor, 'Public participation and Impact Assessment: An Overview' (2000) 27 *Constructive Citizen Participation* 4, 5-6.

[185] J Holder and M Lee, *Environmental Protection, Law and Policy* (2nd Edition, Cambridge University Press, Cambridge 2007) 129.

[186] *J Holder and M Lee* (n 185) 129.

the possible exclusion of the poorly educated or poorly organized.'[187] This problem is especially apparent in countries such as Nigeria where the mass of the population are both illiterate and poorly organized. In many instances, public interest groups provide an avenue for citizen participation;[188] albeit with limitations. Morrow for instance argued that the employment of NGOs as a form of proxy for the general public leads to a view of public participation that, while workable and certainly convenient, is, at the same time, inevitably reductionist and potentially problematic.[189] Though these organizations contribute significantly to the decision-making process, they are not elected representatives of the 'public' and when they reach a certain mass as Morrow noted, they cease to be organs of participative democracy and become de facto representative in their function.[190] Even though Morrow placed emphasis on the role of NGOs in public participation in international environmental regulation, the same argument may apply to NGOs' participation at national levels. Other constraints to effective public participation include concerns about the time and costs of the process.

Despite the challenges of public participation, the growth in the law and practice of public participation has become one of the most significant occurrences in the mining and natural resources development in the late 20th century.[191] Public participation law is expected to

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[187] *J Holder and M Lee* (n 185) 129.

[188] See, D Curtin, 'Private Interest Representation or Civil Society Deliberation? A Contemporary Dilemma for European Union Governance' (2003) 12 *Social and Legal Studies* 1, 55.

[189] K Morrow, 'Public Participation in the Assessment of the Effects of Certain Plans and Programmes on the Environment' (2004) 4 *Yearbook of European Environmental Law* 49, 54.

[190] *K Morrow* (n 189) 54-57.

[191] *G Pring and S Noé* (n 130) 12.

become even more central to the successful sustainable development of minerals and other resources in the 21st century.[192] Consequently, despite the drawbacks of effective public participation, it is essential to integrate its practice, particularly in the mining industry.

[192] *G Pring and S Noé* (n 130) 12.

CHAPTER 5

THE LEGAL FRAMEWORK REGULATING THE NIGERIAN OIL-INDUSTRY

5.1 Introduction

This chapter analyzes the Nigerian oil-industry's regulatory regime including the National policy on the Environment, laws made to regulate oil-related operations and environmental laws that have a bearing on such operations. The main objective of the chapter is to draw a link between the regulatory framework and the prevalent violence in the industry. In essence, particular emphasis is laid in examining the laws that regulate the relationships between the stakeholders of the oil-industry, the Federal Government of Nigeria, the oil-companies and the host-communities. The provisions of these laws are critically analyzed to determine if the level of public participation permitted by them is sufficient to support the argument that inadequate public participation in the industry is a core reason for the violent conflicts prevalent in the industry. The first section of the chapter examines the National Policy on the Environment. Though not law *per se*, policy statements generally set out the definite course or method of action selected from alternatives in light of given conditions to guide and determine present and future decisions.[1] Thus, the importance of this section is to highlight Nigeria's course of action towards ensuring environmental protection in light of its conditions which include the existence of a vibrant oil-industry. It is acknowledged that the process of translating policy into law is subject to economic, political and social machinations thus laws may be different in content from policy.

[1] See generally, L Caldwell, *International Environmental Policy, Emergence and Dimensions* (Duke University Press, Durham 1984) 9.

However, highlighting the Policy's relevant provisions provides a sound basis to compare whether provisions and interpretations of relevant laws are effective in realising policy objectives. In other words, the thesis seeks to determine whether the state of the law is consistent with the stated policy objectives. The second part of the chapter highlights and analyzes the laws that regulate the Nigerian oil-industry with particular focus on the key legislation that determines the extent of public participation in the oil industry. The section is examined under three broad sections, viz: ownership and control of oil (including revenue allocation), compensation and environmental laws with particular emphasis on the Environmental Impact Assessment regulation. The chapter reveals that the regulatory framework has not fulfilled the expectations of either the Policy or the oil-industry's host-communities. Generally, the Policy promotes the sustainable development paradigm that recognizes the link between environmental protection and economic development while emphasizing the importance of public participation. The host-communities similarly expect to gain adequate benefits from the industry, despite its adverse effects on the environment through their active participation.

5.2 The National Policy on the Environment

The history of Nigeria's comprehensive environmental policy is traced to 1988.[2] Prior to 1988, laws regulating environmental protection generally were made on an ad hoc basis with those regulating the oil-industry in particular lax to attract foreign investment into the then

[2] That year, toxic wastes were discovered to have been dumped in Koko village located in the Niger Delta region. Though the culprits of the 'Koko Incidence' (as it was popularly referred to) were apprehended, Nigeria did not have any laws under which they could be properly prosecuted. See generally, M Okorodudu-Fubara, *Law of Environmental Protection: Materials and Text* (Caltop Publications (Nigeria) Limited, Ibadan 1988) 9.

emerging oil-industry.[3] At this time, it was believed that environmental protection was antithetical to economic development.[4] Following 'Koko Incident'[5] steps were taken with the aid of the United Nations Environmental Programme (UNEP) to organize an International Workshop on the Goals and Guidelines of the National Environmental Policy for Nigeria. The Conference was influenced by the ideas and principles advocated by prior international conferences that espoused the principle of sustainable development in the proper management of the environment and its resources. The Conference proposed goals and guidelines towards establishing a sound background for policies, laws and institutions for environmental protection and maintenance.[6] The outcome of the conference was the National Policy on the Environment containing comprehensive statements on the protection and maintenance of Nigeria's environmental resources. Portions of the policy relevant to this discussion on public participation and the sustainable development of the Nigerian oil-industry are discussed in this section.

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[3] Such ad hoc laws included the Public Health Acts monitored and enforced by Public Health inspectors and the Criminal Code. See generally, A Adegoroye, 'Driving Forces for Sustainable Environmental Compliance and Enforcement Program in Africa with Particular Reference to Nigeria's Fourth International Conference on Environmental Compliance and Enforcement (April 22-26, 1996) Chiang Mai, Thailand, 2. See also, J Adelegan, 'The History of Environmental Policy and Pollution of Water Sources in Nigeria (1960-2004): The way forward' (Article) <http://web.fu-berlin.de/ffu/akumwelt/bc2004/download/adelegan_f.pdf> accessed 10 May 2006.

[4] See generally, *J Adelegan* (n 3).

[5] *L Caldwell* (n 1).

[6] Some of these conferences include the 'Stockholm Conference and the Earth Summit held in Rio. Others include the report of the World Commission on Environment and Development (WCED) – 'Our Common Future', the United Nations' 'Environmental Perspectives to the Year 2000 and Beyond' and the 'Cairo Programme of Action for African Cooperation in the Field of Environment'. See, *M Okorodudu-Fubara* (n 2).

The introductory section of the Policy affirms Nigeria's commitment to a 'policy that ensures sustainable development based on the proper management of the environment in order to meet the needs of the present and future generations'.[7] It aims to launch Nigeria into an era of social justice, self-reliance and sustainable development by appreciating the interdependent links among the development processes, environmental factors as well as human and natural resources. The express reference to social justice is noteworthy because the thesis utilizes an environmental justice theory that is related to the social justice theory to critically analyze the legal framework regulating Nigeria's oil-industry.[8] The main objectives of the National Policy on the Environment are 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;
(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 ecosystem; and,
(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.[9]

The first objective of the policy in (a) above suggests a substantive right to enjoy a healthy environment.[10] The policy provides that natural resources and the environment shall be conserved for the benefit of present and future generations. In essence, government regulations and action shall be geared towards ensuring that the environment is managed to ensure that future generations derive benefits from it. This includes environmental

[7] National Policy on the Environment 1989 (revised in 1999): Introduction.

[8] See Chapter 4 above. Also, J Agyeman, R Bullard and B Evans, 'Exploring the Nexus: Bringing Together Sustainability, Environmental Justice and Equity' (2002) 6 *Space and Polity* 1, 77-90.

[9] See section 2 of the National Policy on Environment. Also, see generally, Japan International Cooperation Agency (JICA), *Country Profile On Environment: Nigeria*, November 1999, 8.

[10] Refer to section 2.3.3 above for a discussion on the substantive right to enjoy a healthy environment.

conservation as mentioned in (b) and the overall maintenance of ecosystems and ecological processes to preserve biodiversity in (c) above. Section (c) is particularly relevant to the Niger Delta region that is rich in biodiversity and also hosts the oil-industry that this thesis analyzes.[11] Objective (d) expresses the intent that individuals and communities play an active role in 'environmental improvement efforts'. The express reference to individual and community participation recognizes Nigeria's two-tier 'public' which remains essentially communal in the rural areas and varying degrees of individualism in its urban areas. Thus, the roles of the 'community' in environmental protection in areas such as the Niger Delta will presumably be a core feature of Nigeria's environmental legislation. This is more so as the third section of the policy document lists the strategies for implementing its stated objectives to include the establishment and, or, strengthening legal, institutional, regulatory, research, monitoring, evaluation, public information, and other relevant mechanisms for ensuring the attainment of the specific goals and targets of the policy. The strategies are expected to lead to:

(a) the establishment of adequate environmental standards as well as the monitoring and evaluation of changes in the environment;

(b) the publication and dissemination of relevant environmental data;

(c) prior environmental assessment of proposed activities which may affect the environment or the use of a natural resource.

Even though the National Policy on the Environment does not explicitly refer to environmental human rights, the above strategies are reminiscent of the elements of substantive and procedural environmental rights discussed previously.[12] The extent to which the above stated objectives of the policy have translated to law is determined in subsequent

[11] Please refer to section 3.2.2 that describes the qualities of the Niger Delta region.

[12] See Chapter 2 above.

sections of the thesis with emphasis on the role of the legal structure in exacerbating violent conflicts in the oil-industry.

The Policy aims to promote active public participation environmental improvement efforts through:

(a) ensuring broad public participation in consensus-building towards defining environmental policy objectives;
(b) adopting community-based approaches to community education and enlightenment through cultural relevant social groups, voluntary associations and occupational organizations;
(c) intensifying the use of mass and folk media at Federal, State and Local Government levels;
(d) campaigning for a 'safe environment by the year 2000'; in conjunction with the campaign for health for all by the year 2000;
(e) encouraging the inclusion of environmental awareness and enlightenment studies in the educational curriculum at all levels;
(f) giving due attention, in the pursuit of environmental goals, to the role of NGOs and community groups and especially the contributions that can be made by youth and women's groups.[13]

The above provisions recognize the importance of public participation in the sustainable development paradigm. They also acknowledge the peculiar socio-cultural nature of Nigeria's pluralistic society by aiming to promote participation through 'community-based' approaches as well as mass and folk media.[14] The role of the NGOs, youth and women that are at the forefront of environmental protection activities in the Niger Delta are also expressed in the Policy. Incidentally, youth and women groups are now at the forefront of environmental protection in the face of oil exploration and production in the Niger Delta region.[15]

[13] See section 4 of the National Policy on the Environment.

[14] The express mention of these various modes of communication is expectedly to ensure active public participation particularly in the rural areas where the level of literacy is low.

[15] Refer to section 6.2.3 below.

The fifth section of the Policy provides for the institutional and intergovernmental arrangements to promote the harmonious management of the policy formulation and implementation processes. These include suggestions for the establishment of a Federal Environmental Protection Agency to be responsible for environmental protection and management programmes. It also suggests the establishment of a Federal Ministry of Environment, in due course, in recognition of the over-riding importance of the environment in the life of the nation. Other recommendations include the harmonization of existing legal provisions on the environment and promulgation of new 'appropriate' laws; and, the elevation of environmental protection and the aspiration to have a safe and healthy environment as a constitutional duty for government.[16] The concluding section of the Policy proposes the means successfully to monitor and evaluate its overall goals. It draws a nexus between social justice, self-reliance and sustainable development which it lists as relevant factors towards ensuring that all sectors are involved in the implementation of policy in an integrated and coherent manner.

The Policy has had some significant impacts on the institutional and regulatory framework for environmental protection in Nigeria including the creation of FEPA in 1988[17] and a Federal Ministry of Environment in June 1999.[18] The Policy also laid down the foundation

[16] See section 6 of the National Policy on the Environment. This also includes the promulgation of laws to ratify international treaties on the environment to make them part of national law.

[17] FEPA Decree No. 58 of 1988.

[18] Presidential Directive Ref. No. SGF.6/S.221, of October 12, 1999. The Federal Environmental Protection Agency was subsumed into the Federal Ministry of Environment in 1999 and was responsible for coordinating environmental protection and natural resources conservation including tackling the environmental problems of the Niger Delta. The Federal Environmental Protection Agency has now been scrapped and replaced by the National Environmental Standards and Regulation Enforcement Agency. Refer to section 5.3.5 below.

for other policy guidelines and statements on the environment including the National Agenda 21 (published in 1999) and Vision 2010.[19] The Policy also contributed to the development of a more coordinated approach to environmental protection through legislation to replace the hitherto ad-hoc approach. Based on the provisions of the Policy, one would expect Nigeria to have an environmental protection framework (especially with respect to public participation) worthy of emulation. Yet, concern about environmental pollution is a fundamental reason for the conflicts that plague the oil-industry. The following section highlights key provisions of oil-related legislation with particular reference to the level of public participation in the oil-industry and how these provisions have contributed to the conflicts.

5.3 The Legal Framework Regulating Nigeria's Oil-Industry

A plethora of laws are relevant (in varying degrees) to the oil-industry, but space prevents examination of these in detail. Thus this section concentrates on the laws that most directly influence the relationships between the oil-industry's stakeholders particularly those considered most pertinent to public participation.[20] These are considered in three broad categories, viz: ownership and control of oil resources, compensation and (relevant) environmental laws. The interpretation of these laws and their impacts on stakeholders'

See generally, Nigeria First (Official website of the Office of Public Communications) <http://www.nigeriafirst.org/article_336.shtml> accessed 05 May 2006.

[19] While Agenda 21 is concerned with various cross-sectoral areas of environmental concerns and maps out strategies on how to address them, Vision 2010 highlights the environmental goals Nigeria aims to achieve by the year 2010. The vision is to have a safe and healthy environment that secures the economic and social well-being of the present and future generations including the elimination of oil spillages, gas flaring and oil pollution. See generally, Vision 2010 Report <http://www.vision2010.org/vision-2010/ecology.htm> accessed 22 June 2005.

[20] Refer generally to section 2.4 above for a definition of 'public participation' in this regards.

conflicting interests are a fundamental cause of the violence that besets the industry. It is important to note that Nigeria has a pluralistic legal system. Its laws are made up of the received English law,[21] customary law[22] and statutory laws[23] which all have an impact on the regulation of the oil-industry. Specifically, land law is an area that forms part of the oil-industry's regulatory framework where the plurality is evident. Customary law still has a strong influence on the perception of landholding and consequently, compensation, despite statutory provisions. This is more so since most oil operations take place in rural areas where customary laws and practice still regulate the affairs of its inhabitants. The divergence in this area of law generates different opinions and expectations regarding the rights and responsibilities that each of the industry's stakeholders expect from the other. The statutory provisions are discussed in the following three sub-sections.

5.3.1 Ownership and Control of Oil Resources

The ownership and control of oil (and consequently, oil-revenues) is legally vested in the Federal Government of Nigeria. The history of government ownership of the resource dates

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[21] English laws comprise of common law principles, the doctrines of equity and statutes of general application in force in England on January 1, 1900; and, statutes of subsidiary legislation on specified matters and English law made before October 1, 1960 and introduced to Nigerian law by English legislation which have not been repealed by the appropriate authority after independence.

[22] Customary laws applied (and continue to apply) essentially between people of the same tribe subject to the satisfaction of the rules of natural justice, equity and good conscience and compatibility with the law for the time being in force. For an in-depth discussion on customary law in pre and post-colonial Africa, see A Yakubu, 'Colonialism, Customary Law and the Post-Colonial State in Africa: The Case of Nigeria' (2003) 30 *Africa Development* 4, 201 –220.

[23] See generally, A Obilade, *The Nigerian Legal System* (Sweet and Maxwell, London 1979). See also, A Allott, 'The Future of African Law' in H Kuper and L Kuper (eds.), *African Law Adaptation and Development* (University of California Press, Berkeley 1965) 220-221.

back to colonial periods when the Crown owned the resource. Early laws regulating the ownership of oil include the Mining Regulation (Oil) Ordinance of 1907.[24] Section 5 provided that: 'It shall be lawful for the Governor to enter into an agreement with any Native Authority for the purchase of full and exclusive rights in and over all mineral oils within and under any lands which are the property of any Native Community'.[25] Section 16 of the Ordinance granted the natives the rights to land for 'gathering firewood, hunting, using water, farming or any other rights… if and so long as such right can and shall be exercised without interfering with the rights conferred upon the holder of the license.' Though this Ordinance did not expressly vest ownership in the Crown, it conferred the exclusive rights to exploit it on upon the Crown. This position remained the same under the Mineral Oils Ordinance of 1914 which also regulated the right to search for, win and work mineral oils without expressly containing provisions on the ownership of oil resources. Amendments to the Ordinance in 1916 vested the ownership of oil in the Crown. The Minerals Act replaced this Ordinance in 1945 and reaffirmed this position. Section 3 of the Minerals Act stated:

> The entire property in and control of all mineral oils in, under or upon any lands in Nigeria, or of all rivers, streams and water courses throughout Nigeria is and shall be vested in the Crown [State], save in so far as such rights may in any case have been limited by any express grant made before the commencement of this Act.

Further amendments in 1950 and 1959 vested the Crown (State) with the absolute right and control over the colonial state's oil resources whether onshore and offshore. The Republican Constitution of 1963 vested the Federal Government with all properties (including oil) previously held by the Crown. Section 158(1) stated thus:

> all 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;

[24] C.O. 588/ 2: Southern Nigeria Certified Ordinances, 1906-1907

[25] See section 5 of the Mining Regulation (Oil) Ordinance of 1907.

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

Since this Constitutional provision vested all properties hitherto held by the Crown in the Federal Government, the ownership of oil resources has expressly been legally vested in the Federal Government, whether civilian or military.[26] Specifically, the Petroleum Act states that the ownership and control of oil resources is the exclusive preserve of the Federal Government. Section 1 provides:

> (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.[27]

Without rehashing provisions of several other laws and decrees made by subsequent governments on the ownership and control of oil resources in Nigeria, it is suffice to state that the position of the law on the subject has remained unchanged. Section 44(3) of the 1999 Constitution states in this regard that:

> 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 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.

In essence, since the colonial government appropriated oil resources to the Crown, the precursor to the Nigerian State, oil resources have remained under the exclusive ownership

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[26] K Ebeku, 'Oil and the Niger Delta People: the Injustice of the Land Use Act' (2001) 9 *CEPMLP Internet Journal* 14 <www.dundee.ac.uk/cepmlp/journal/html/article9-14html> accessed 28 July 2003.

[27] Some of these other Decrees include the Land Use Decree of 1978, the Exclusive Economic Zone Decree No. 28 of 5 October 1978, the Lands (Title Vesting etc.) Decree No. 52 of 1993 (Osborne Land Decree), and the National Inland Waterways Authority Decree No. 13 of 1997.

and control of the central government. A corollary of State ownership and control of the resource is that the State distributes revenues derived from the resource. With the Federal Government solely possessed of the ownership and control of oil, participation of the host-communities in terms of receiving benefits from the industry is limited to revenue allocation. The next section discusses the laws that regulate the allocation of oil-revenues.

5.3.2 Laws Regulating the Allocation of Oil Revenues

The Constitution regulates the allocation of federal revenue, which includes oil-revenue, among the federating states of the nation under a prescribed formula. Factors including a state's population, land mass and terrain, derivation, fiscal autonomy, internal generated revenue, national integration, social development factor, need, and equality[28] are considered in the determination of the revenue allocation formula. This method of revenue allocation initiated while Nigeria was a British colony has been controversial since its inception and it has sparked off more constitutional, political and legal controversies than any other issue in the country.[29] The influx of oil revenues into the Federation Account has made revenue allocation even more contentious. Oil-bearing states have contended that revenue allocation, and specifically derivation, has been essentially a political rather than an economic tool with them suffering the worse of it.[30] Derivation, which is the major bone of discontent in contemporary revenue allocation is a form of compensation for the loss in revenue or other economic activities through utilization of the land of governments (or communities) for

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[28] See generally, section 162(2) CFRN 1999.

[29] J Udeh, 'Petroleum Revenue Management: The Nigerian Perspective', Oil, Gas, Mining and Chemicals Department of the WBG and ESMAP Workshop on Petroleum Revenue Management Washington, DC, October 23-24, 2002.

[30] D Dafinone, 'Resource Control: The Economic & Political Dimensions', (Article) Urhobo Historical Society website <http://waado.org> accessed 22 June 2005.

national resource generation.[31] The main issue in distribution of oil-revenues is related to the (in)adequacy of derivation paid to the oil-bearing states of the federation. The historical development of revenue allocation with emphasis on the derivation principle is analyzed to reveal why it is a source of conflicts.

From the inception of revenue allocation, derivation was set at 100 per cent. Thus, revenue derived from mining, rent and royalties belonged exclusively to the region of origin. It was reduced to 50 per cent in 1958 by the Raisman Commission after the discovery of oil in commercial quantities in 1957 and to 45 per cent in 1970.[32] Further reductions to the derivation followed in 1971 after the government made a distinction between onshore and offshore oil.[33] The Federal Government abrogated all royalties, rents and other revenues from offshore production, thereby denying oil-bearing states revenue from offshore oil[34] and further reduced derivation from on-shore revenue to 20 per cent in 1973 despite the oil-boom.[35] It is noteworthy that there is a correlation between the reductions in derivation

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[31] R Ako, 'Resource Control or Revenue Allocation: the Path to Sustainable Development in the Nigerian Oil Producing Communities' 35th Annual Conference of the Nigerian Society of International Law , 23–25 June 2005, Asaba, Nigeria. Derivation can also be put in place usually in rent for the use of land and/or payment for exploiting mineral from the land – [that] is royalty. See the Report of the Constitutional Conference Debates 1994-1995, vol. III submitted to the Federal Government of Nigeria, Abuja, Nigeria.

[32] Constitution Distributable Pool Account Decree No.13 of 1970.

[33] See the Offshore Oil Revenues Decree No. 9 and the Territorial Waters (Amendment) Decree No. 38 made a clear distinction between onshore and offshore oil resources. In 1978, the FMG promulgated the Exclusive Economic Zone Decree No. 28 that reiterated exclusive control of offshore resources in the Federal Government.

[34] S Oyovbaire, 'The Politics of Revenue Allocation' in K Panter- Brick (ed.) *Soldiers and Oil: The Political Transformation of Nigeria*, (Frank Cass, London 1978) 226-229.

[35] Constitution (Financial Provisions, Etc.) Decree No. 6 of 1975.

percentages and relative increases in the volume of crude oil produced, the sale price and consequently total revenues that accrued to the State.[36] In 1981, the Federal Government passed the Allocation of Revenue (Federation Accounts) Act which purportedly reviewed the revenue allocation formula reduced derivation to 5 per cent. Two-fifths of the 5 per cent derivation fund was to be paid directly to the states in direct proportion to the value of minerals extracted from their areas and the rest was to be paid in to a special fund to be administered by the Federal Government for the development of the mineral producing areas.[37]

The legality of the Allocation of Revenue (Federation Accounts) Act was challenged in *Attorney-General Bendel State v Attorney-General Federation*[38] wherein the plaintiffs sought, *inter alia*, and obtained a declaration that the Act was not an Act of the National Assembly and that its provisions regarding the division of public revenue between the Federation and the states of the federation were unconstitutional, null and void, and of no effect. A new Allocation of Revenue Act was passed in 1982 which reduced derivation to 2 per cent and allocated 1.5 per cent of derivation for the development of mineral-producing areas.[39] This Act was amended by the military government via the Allocation of Revenue (Federation Account) Amendment Decree in 1984.[40] The Decree retained the 1.5 per cent set aside for the development of mineral producing states and allocated 2 per cent of the 32.5 per cent allotted to the states of the federation directly to the mineral producing states in direct

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[36] J Frynas, *Oil in Nigeria: Conflict and Litigation between Oil Companies and Village Communities* (Transaction Publishers, New Brunswick 2000) 17.

[37] See Sections 1-4 of the Allocation of Revenue (Federation Accounts) Act of 1981.

[38] (1982) 4 NCLR 178.

[39] See sections 1, 2(2) and 2(4) of the Allocation of Revenue Act No. 1 of 1982.

[40] See the Allocation of Revenue (Federation Account) Amendment Decree No. 36 of 1984.

proportion to the value of minerals extracted from such states. In 1992, further amendments were made to revenue allocation.[41] The fund to develop the mineral producing states was doubled to 3 per cent;[42] 1 per cent of the revenue accruing to the federation account derived from minerals was to be shared among the mineral-producing states in proportion to the amount of mineral produced from each state[43] and the abolition of the onshore and offshore dichotomy was re-affirmed.[44]

Following the return to democratic governance in 1999, constitutional provisions once again regulated revenue allocation. Section 162(2) of the Constitution provides that derivation must be 'at least 13 per cent'. The percentage may be increased in accordance with the provisions of the section but not reduced.[45] In the absence of an Act of the National Assembly prescribing a revenue allocation formula in line with section 162 at the onset of the

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[41] See the Allocation of Revenue (Federation Account) (Amendment) Decree No 106 of 1992.

[42] See particularly, section 4A (2) of the Allocation of Revenue (Federation Account) Amendment Act No. 106 of 1992. The money was allocated directly to the Oil Mineral Producing Areas Development Commission (OMPADEC) that was created in 1992 to 'address the difficulties and sufferings of inhabitants of the oil-producing areas of Nigeria' that had been compounded by the impacts of the Structural Adjustment Programme (SAP) the government had adopted to address national economic maladies. See generally, section 2 of the Oil Mineral Producing Areas Development Commission (OMPADEC) Decree No. 23 of 1992. See also, I Okonta and O Douglas, *Where Vultures Feast: Shell, Human Rights, and Oil* (Sierra Club Books, San Francisco 2001) 33.

[43] See particularly, section 4A (6) of the Allocation of Revenue (Federation Account) Amendment Act No. 106 of 1992.

[44] See particularly, section 4A (3) of the Allocation of Revenue (Federation Account) Amendment Act No. 106 of 1992.

[45] The President may, on advice of the Revenue Mobilization Allocation and Fiscal Commission (RMAFC), table proposals for revenue allocation before the National Assembly for approval.

democratic regime, there was uncertainty regarding the formula that would apply. Section 313 of the Constitution which provides that for this eventuality states that the system of revenue allocation in existence for the financial year beginning from 1st January 1998 and ending on 31st December 1998 was to be applied. Thus, the Allocation of Revenue (Federation Account etc) Act[46] as amended by Decree 106 of 1992 would continue to suffice in the interim. However, the provision of Decree 106 that proscribed the onshore/offshore dichotomy was inconsistent with section 44(3) of the Constitution that made a clear distinction between onshore and offshore oil. The disparity in these legal provisions and the possible effects on revenue allocation led to agitation particularly in the oil-bearing regions that believed they were being cheated. The Supreme Court had to determine the validity of the legal revenue allocation formula in *Attorney-General of the Federation v Attorney-General of Abia State and 35 Ors*.[47] Without going into the intricacies of the case, the Court decided that the Federal Government owned offshore oil resources.[48] This decision resuscitated the controversial 'Offshore Decree'[49] that had been abolished in 1992. Consequently, oil-bearing states were not entitled to receive revenues from offshore oil

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[46] Cap 16 LFN 1990.

[47] (2000) 96 LRCN 559. The case is popularly referred to as the ''Resource Control Suit' and sometimes as the 'Offshore Boundary Limitation Case'.

[48] *Attorney-General of the Federation v Attorney-General of Abia State and 35 Ors* (2000) 96 LRCN 559, 595–597. The issues in the case were complex and far-reaching as it determined many other ancillary issues some of which are not of direct import in this dissertation. However, reference will be made to some of the issues as are deemed relevant in later sections. See generally, E Egede, 'Who Owns the Nigerian Offshore Seabed: Federal or States? An Examination of the *Attorney-General of the Federation v Attorney-General of Abia State & 35 Ors* Case', (2005) 49 *Journal of African Law* 1, 73-93.

[49] Offshore Oil Revenues Decree No. 9 of 1971.

thereby drastically reducing revenues to some states. The Court also ordered states that had received 'derivation' payments from offshore oil-revenues to refund them.

The court's decision sparked fresh protests in the Niger Delta. To forestall chaos amidst fears that further violence would mar then upcoming elections, the Federal Government opted for a political resolution of the issue. Eventually, a new revenue allocation law – the Allocation of Revenue (Abolition of Dichotomy in the Application of Derivation) Act 2004 – that recognized the rights of states to benefit from offshore resources replaced the Supreme Court's ruling. It is important to observe that barely six months after the Act was passed, non oil-bearing states challenged the constitutionality of the 2004 Allocation Act.[50] From the history of revenue allocation in Nigeria highlighted above, it is indisputable that revenue allocation (particularly derivation) has been haphazard over time with the oil-rich states being the worse off, despite substantial increases in oil production and revenue figures. It is argued that the military interregna made it easier to alter the allocation formula[51] arguably in favour of the Northern states despite being devoid of oil. Agbowu in his analysis of allocation of oil revenues in Nigeria observed that before 1966, Northern Nigeria received 12.6 per cent of oil-revenues while Southern Nigeria received 67.4 per cent and the Federal Government, 20 per cent.[52] After the military took over in1966, oil-revenue was shared for approximately 20 years in the following order: North - 54 per cent; East – 22 per cent; West – 18 per cent and Mid-West (core Niger Delta area) – 6 per cent.[53] Even more pertinent at this point is his

[50] The case is still before the Supreme Court.

[51] B Onimode, 'Fiscal Federalism in 21st Century: Options for Nigeria', International Conference on New Directions in Federalism in Africa, Organized by the African Centre for Democratic Governance Abuja, March 15-17, 1999, 7.

[52] D Agbowu, *Nigeria: The Truth* (Bajot Publishing LLC, Greenville 2006) 159.

[53] *D Agbowu* (n 52) 159-160.

observation that this formula led to the restiveness in the region.[54] A major source of complaint was that the region that bears the oil and suffers the adverse consequences of its exploitation ought to receive more in derivation than it has since the discovery of oil. The perception in the area is that what the region receives in derivation over the years is a consequence of its minority status in Nigeria. The inability to influence a change by the political process has led to the reliance on violent means to gain attention. The return to democratic governance in May 1999, witnessed increased agitation for an upward review of the derivation percentage, the clamour for resource control and as well as an upsurge in violence[55] following further failures to exert political influence to amend the revenue formula.[56]

5.3.3 Laws Regulating Landholding

Landholding is an important aspect of oil operations in Nigeria. It determines access to land for oil operations and secondly, compensatory claims relating to damage to land during oil operations. The Land Use Act[57] is the principal enactment that regulates land ownership in Nigeria. Portions of the Act relevant to public participation in the oil-industry are highlighted in this section to reveal the links with the conflicts that have embroiled the industry. The

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[54] *D Agbowu* (n 52) 159-160.

[55] M Ameh, 'Ownership and Control of Mineral Resources: Can the Brazilian Model Be Used to Douse Resource Control Agitation in Nigeria's Oil Producing States?' *CEPMLP Internet Journal* <http://www.dundee.ac.uk/cepmlp/car/html/CAR10_ARTICLE37.PDF> accessed 23 January, 2008.

[56] A National Political Reforms Conference was held in 2005 to discuss issues of national importance. One of these was the issue of revenue allocation. The representatives of the Niger Delta attended the Conference with a clear mandate to achieve an increase in 'derivation'. See chapter 6 below for a detailed exposition.

[57] Chapter L5 Laws of the Federation of Nigeria 2004. It was originally promulgated as the Land Use Decree No. 6 of 1978.

main objective of the Act expressed in section 1 is to vest absolute ownership of land in the government. It states:

> Subject to the provisions of this Act, all land comprised in the territory of each State in the Federation are hereby vested in the Governor of that 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.[58]

This provision, and indeed the entire Act changed the structure of land ownership in Nigeria; particularly southern Nigeria, where land was previously held communally.[59]

The legal principle of customary land tenureship was recognized by the Privy Council in the *locus classicus* of *Amodu Tijani v. Secretary, Southern Nigeria*[60] where the Council stated *inter alia*:

> The next fact which it is important to bear in mind in order to understand the native land law is that the notion of individual ownership is quite foreign to native ideas. Land belongs to the community, the village or the family, never to the individual. All the members of the community, the 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 a loose mode of speech is sometimes called the owner. He is to 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 it to cultivate or build upon, goes to him for it. But the land still remains the property of the community or family. He cannot make any important disposition of the land without consulting the elders of the community or family, and their consent must in all cases be given before a grant can be made to a stranger.

It is noteworthy that in that case, the Privy Council held that the simple assertion of British sovereignty did not, and could not, serve to extinguish the legal rights of the Aboriginal people to their traditional territories. It asserted further that although Aboriginal title to land could be extinguished by the sovereign Crown, any such extinguishment would normally

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[58] All lands in urban areas are under the control and management of the State while other lands are under the control and management of the Local Government, within the area of jurisdiction of which the land is situated. See particularly, section 2(1) (a) and (b) of the Land Use Act.

[59] A Allott, 'Nigeria: Land Use Decree, 1978' (1978) 22 *Journal of African Law* 2, 136.

[60] [1921] 2 AC 404.

require some degree of Aboriginal involvement to be lawful and effective.[61] In essence, public participation is a necessary element of extinguishment of legal rights to land. Returning to the issues of land ownership under the Land Use Act, the true intent of the Act remained controversial for over a decade till the decisions of the Supreme Court in *Makanjuola v Balogun*[62] and later *Abioye v Yakubu.*[63] The Court held in the latter case that:

> (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 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).[64]

In essence, the Act transferred ownership, control and management of lands hitherto vested in the family or community to the state governments. This alteration has had peculiar impacts on the oil-rich Niger Delta region. This section specifically highlights the impacts that contributed to the exclusion of the public from active participation in the industry and its consequences that include violent conflicts.

First, the Act abrogated the host-communities legal control over the activities of the oil-industry within their communities. In Nigeria, mineral resources are excluded from the

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[61] K Lochead, 'Whose Land is it Anyway? The Long Road to the Nisga'a Treaty' in R Campbell (eds) *The Real Worlds of Canadian politics: Cases in Process and Policy* (4th edn Broadview Press, Peterborough, ON. 2004) 283.

[62] (1989) 5 SC 82.

[63] (1991) 5 NWLR (Part 190), 130.

[64] For a detailed analysis of some of the previous inconsistent decisions regarding the main intent of the Land Use Act, see *K Ebeku* (n 26). See also, L Agbosu, 'Extinction of Customary Tenancy in Nigeria by the Land Use Act: *Akinloye v Ogungbe*' (1983) 27 *Journal of African Law* 2, 188-195.

definition of 'land'.[65] In other words, prior to the Land Use Act, while the Government owned the oil, ownership of land was vested in the communities. Consequently, to exploit the resource, an oil-company had to obtain permission from both the Government (oil mining licence or lease) and liaise with the host-communities on the extent their operations before entering upon the land. With ownership of land transferred to the Government, it now has the exclusive preserve to grant legal rights to a company to exploit oil. In essence, the Land Use Act completed the Government's comprehensive ownership, control and management of oil resources even though Ayodele-Akaakar avers that the assumption of ownership reached its full scale earlier in 1971 with the promulgation of the Offshore Oil Revenue Decree.[66] It is more plausible to contend that the Land Use Act was the final act of absolute ownership because though the Offshore Oil Revenue Decree abrogated the rights of the regions (states) to the minerals in their continental shelves, it did not completely preclude the oil-communities from holding legal rights (to land) in the oil-industry.

Secondly, the Act legitimized the appropriation of land from its occupiers for 'overriding public interests' that included 'the requirement of the land for mining purposes or oil pipelines or for any purpose connected therewith.'[67] In other words, in reality the inhabitants of the oil-rich Niger Delta are temporary occupiers of land they occupy as they could be legally displaced to allow oil exploitation. This is contrary to customary landholding practices that are possibly as old as the tribes themselves. Landholding in rural areas is an integral part of traditional identification and allegedly serves as a spiritual link to tribal and

[65] See section 18 of the Interpretation Act, Chapter I23 Laws of the Federation of Nigeria 2004.

[66] F Ayodele-Akaakar, 'Appraising the Oil & Gas Laws: A Search for Enduring Legislation for The Niger Delta Region' (Article) <http://www.jsd-africa.com/Jsda/Fallwinter2001/articlespdf/ARC%20-%20APPRAISING%20THE%20OIL%20and%20Gas.pdf> accessed 09 March 2006.

[67] See generally section 28 of the LUA.

personal ancestry. Thus appropriating such lands from the indigenous population dispossess them of their basic means to economic survival ('distribution') and cultural identity ('recognition').[68] It is noteworthy to recount the Privy Council's decision in *Tijani's Case* that public involvement is a compulsory component in the 'effective and lawful' appropriation of land from its original owners.[69] This issue, from the Deltans viewpoint is further aggravated by the derisive compensation regime established by the Land Use Act.[70] These combinations of factors have contributed to the restiveness and consequent violence against the oil-industry because the industry is regarded as a combination of economic opportunists interested only in profit while depriving the indigenous population of their cultural identity, livelihood and desecrating their spiritual existence.

An incidental consequence of the Land Use Act that has contributed to the outbreak of violence in the Niger Delta is its erosion of traditional authority. Power in the traditional sense was inextricably linked to land as evidenced by customary land tenure practices. Traditional authorities[71] were responsible for the allocation of land and matters incidental thereto including conflict resolution arising from land ownership and use, as well as compensation. This loss of authority created a lacuna in the traditional means of exercising control over the community particularly among the youths that have become very militant.[72] As Umar notes, land conflicts are proving more difficult to solve because local institutions

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[68] Refer to section 4.4.2 above.

[69] *Tijani's case* (n 60).

[70] The compensatory regime is discussed in detail in the following section 5.3.4 below.

[71] These include family heads, the village headman, chiefs or, and kings.

[72] For an exposition on youths and the rise of violence in the Niger Delta, see, C Ukeje, 'Youths, Violence and the Collapse of Public Order in the Niger Delta Region of Nigeria' (2001) 36 *Africa Development* 2, 337-366.

have largely lost their authority and few institutional innovations have been developed.[73] Aluko and Amidu however argue that any attempt to eliminate the traditional authority's input into land management will create confusion in land management.[74] According to Waboke, the land use system in Nigeria is the 'sacred source of all the conflicts and crises that have bedevilled the Niger Delta region of Nigeria'.[75] It has left in its wake, conflicts and crises in the relations between government and the people, ethnic groups, communities and multinational companies; regions and the Federal Government and a host of ethnic conflicts in the nation-building process, swelling up recently into threats of violent rebellion against the Nigerian State by the Niger Delta Peoples Volunteer Force which was asking for self-determination for the Ijaws or the convocation of a Sovereign National Conference.[76] Interestingly, Shell notes that the increasing militancy in the Niger Delta (linked to the Land Use Act) is overthrowing traditional social order in those communities.[77] In essence, the Act has not only initiated a myriad of problems that contribute to violent conflicts in the Niger Delta but also stemmed traditional authority in land matters that is arguably a veritable means to manage them.

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[73] See generally, B Umar, 'The Pastoral-Agricultural Conflicts in Zamfara State, Nigeria' (Article) <http://conference.ifas.ufl.edu/ifsa/posters/Umar.doc> accessed 02 February 2008.

[74] B Aluko and A Amidu, 'Women and Land Rights Reforms in Nigeria', Promoting Land Administration and Good Governance 5th FIG Regional Conference Accra, Ghana, March 8-11, 2006, TS9.4, 9-10.

[75] E Waboke, 'Against Land Use Decrees' (2005) <www.dawodu.com/waboke1.htm> accessed 29 January, 2008.

[76] *E Waboke* (n 75) See also, *K Ebeku* (n 26).

[77] *C Ukeje* (n 72) 342.

5.3.4 The Compensation Regime

The oil-industry's compensation regime is regulated both by statutory law and Common Law. This section reveals the shortfalls of the compensation regime that regulates Nigeria's oil-industry. The argument in a nutshell is that the inhabitants of the region are denied access to adequate compensation by the legal framework regulating compensatory awards. Compensation in the oil-industry may be categorized under two broad headings. The first is for land-take that depicts the process of land acquisition prior to oil activities while the second is in consideration for the adverse socio-economic and environmental effects the oil-industry has on tits host-communities. This section argues that generally, the difficulties and consequent failure to receive adequate compensation due to the difficulties in satisfying statutory and judicial requirements to proof liability of the oil-companies contributes to the angst of the communities already aggrieved by earlier negative effects the industry has on their lives. Consequently, they are encouraged to seek alternative means to receive settlements they believe they are entitled to. It is common for communities to initiate court proceedings and engage in negotiations with the companies and have recourse to extra-legal means concurrently to increase their chances of settlement.[78] These extra-legal activities include hijacking oil-company equipments, staff and installations. In many instances, law enforcement officers are invited to prevent such acts or retrieve the hijacked persons or things which result in violent clashes. The first part of this section concentrates on relevant statutory provisions while the second discusses the relevant Common Law principles.[79]

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[78] Personal experience as well as information deciphered from discussions with lawyers that represent both the oil-bearing communities and the oil-industry.

[79] There are several dimensions to the role of compensation in violent conflicts in the Niger Delta but this thesis concentrates on the role of legal provisions in particular. For a more general critique of the role of compensation in violence in the Niger Delta, see A Ikelegbe, 'The Economy of Conflict' (2005) 14 *Nordic Journal of African Studies* 2, 208–234.

5.3.4.1 The Statutory Regime Regulating Compensation

The 1999 Constitution is the main law that regulates compensation in Nigeria. Section 44 provides that:

> (1) No moveable property or any interest in an immovable property shall be taken possession of compulsorily and no right over or interest in any such property shall be acquired compulsorily in any part of Nigeria except in the manner and for the purposes prescribed by a law that, among other things -
>
> (a) requires the prompt payment of compensation therefore 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 of law or tribunal or body having jurisdiction in that part of Nigeria.

Compensation for oil is however exempt from this provision as section 44(3) reiterates that the absolute ownership of 'all minerals, mineral oils and natural gas' is vested in the Federal Government of Nigeria.

Prior to the 1999 Constitution quoted above, the provisions of the Land Use Act dictated the oil-industry's compensation regime. With regards to compensation for land appropriated for oil purposes,[80] section 29(2)(b) of the Act provides that the occupier of land acquired for mining purposes is entitled to compensation in accordance with the provisions of the Petroleum Act. The Petroleum Act provides that holders of oil exploration licenses, oil prospecting licenses or oil mining leases pay 'fair and adequate compensation for the disturbance of surface or other rights' to the owner or occupier of the licensed or leased land.[81] 'Surface rights' include economic improvements on land such as economic trees,

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[80] Section 28(3)(b) Land Use Act.

[81] See, the First Schedule, section 36 of the Petroleum Act. Section 77 of the repealed Minerals Act contained provisions similar to the Petroleum Act. It provided that any person prospecting or mining shall pay to the 'owner or occupier' 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,

crops, private fishponds and houses but excludes allodial rights, future earnings and loss of use of the land. Consequently, an occupier of land for farming purposes for instance would be compensated only at the value of his economic crops at the time the land was appropriated and not for his loss of use of such land for future farming purposes or his expected future earnings farming activities on the land. The Land Use Act also exempted the courts jurisdiction from the determination of cases regarding land appropriation for oil-related activities and the adequacy of compensation.[82] Section 47(2) states in this regard 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'. Where a dispute arises regarding the adequacy of compensation in accordance with section 29, the Land Use and Allocation Committee is to resolve it.[83] It is important to note that this Committee is under the direct control of state governors who select members to the committee[84] and regulate its proceedings.[85]

Thus the Government was both a party and final arbiter in oil-related land appropriation disputes. This provision was valid until the May 1999 when the present Constitution became effective. By virtue of section 274(5) of the 1979 Constitution, any law that referred compensation disputes to the courts for adjudication was to be considered inconsistent with the Land Use Act and consequently, unenforceable.[86] However this position has been

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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.

[82] See generally section 28 and 29 of the Land Use Act.

[83] See section 2 of the Land Use Act.

[84] See section 2(3) of the Land Use Act.

[85] See section 2(4) of the Land Use Act.

[86] One of such examples is section 20 of the Oil Pipelines Act.

reversed under the 1999 Constitution. Section 44(1)(b) of the 1999 Constitution provides any person claiming compensation for moveable property or interest in immovable property 'a right of access for the determination of his interest in the property and the amount of compensation to a court of law or tribunal or body having jurisdiction in that part of Nigeria.' Consequently, the authority of the Land Use and Allocation Committee to determine the quantum of compensation payable under the Act is now subject to judicial review. Clearly, before 1999 the law denied aggrieved communities and individuals access to the courts to adjudicate on the fairness of compensatory awards. As a result, there are several instances where aggrieved persons hijacked equipment or, and staff of oil-companies for ransom for figures believed to be reasonable for whatever perceived damages had been suffered.[87] In some instances, the ransom requested was paid while in others, the law enforcement agents were invited to rescue the seized equipment or staff. Unfortunately, sometimes reprisal kidnapping of indigenes from the aggrieved communities were carried out and hostages traded subsequently. At other times, the police (or armed forces) employ aggressive methods to attempt a resolution of outstanding issues and thereby aggravate the already tense situation.

Compensation during oil exploitation is regulated by different laws. The Oil Pipelines Act[88] contains some provisions to this effect. Section 11(5) 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 licence, 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 licence, for any such damage not otherwise made good; and

[87] *A Ikelegbe* (n 79) 217.

[88] Chapter O7 Laws of the Federation of Nigeria 2004.

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 of or leakage from the pipeline or an ancillary installation, for any such damage not otherwise made good.

If the amount of such compensation is not agreed between any such person and the holder, it shall be fixed by a court in accordance with Part IV of this Act.

Under the provisions of this Act, any person may claim compensation for damage done to the 'improvements on land';[89] disturbances caused by the holder of the licence;[90] damages suffered by any person due to the negligence of the holder or his agents[91] or as a consequence of leakage or breakage from the pipeline or ancillary installation[92] and for the loss (if any) in the value of the land or interests in land.[93] Section 20(3) stipulates how the amount of compensation for loss in value of land or interest in land is to be determined. It states:

> In determining the loss in value of the land or interest in land of a claimant the court shall assess the value of the land or the interests injuriously affected at the date immediately before the grant of the licence and shall assess the residual value to the claimant of the same land or interest consequent upon and at the date of the grant of the licence and shall determine the loss suffered by the claimant as the difference between the values so found, if such residual value is a lesser sum.

Clearly, compensation for the loss in value of land or interest in land is intended to be calculated strictly on the basis of 'improvements on land' as prescribed by the Land Use Act whose provisions are overriding in the determination of compensation.[94] In other words, other losses such as of use and enjoyment of the land and future earnings are not considered in the award of compensation. These limits to the amount of compensation also contribute to the

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[89] Section 20(2)(a) of the Oil Pipelines Act.

[90] Section 20(2)(b) of the Oil Pipelines Act.

[91] Section 20(2)(c) of the Oil Pipelines Act.

[92] Section 20(2)(d) of the Oil Pipelines Act.

[93] Section 20(2)(e) of the Oil Pipelines Act. See also, section 20(1) that refers to compensatory awards made for claims in made under the provisions of section 6(3) of the Act.

[94] See particularly Section 20(5) of the Oil Pipelines Act.

frustration and resultant violence in the Niger Delta. As Epia noted that 'the recent hostage crisis which ravaged the Niger Delta and put an undesirable stain on Nigeria's image on the international spotlight introduces another dimension to the problems of an area in search of compensation for neglect...'[95]

This section revealed that prior to May 1999, the courts were exempt from determining the adequacy of compensation for land in the course of oil exploration and production. The government appointed and regulated Land Use and Allocation Committee was not subject to judicial review thereby impeding the inhabitants' right to access justice. Furthermore, the legal regulations governing the award of compensation limited compensatory awards to improvements made on land without considering other incidental losses such as loss of the use of land or possible future earnings therefrom. In the Niger Delta region where land scarcity exists partly due to its topography, the compensation regime aggravates the situation due to its shortfalls discussed above. The absence of legal avenues to resolve issues of dispute has encouraged the resort to extra-legal means. A recent decision on compensation such as *Farah's case* where substantial compensation was awarded to the plaintiffs is more likely to encourage other aggrieved members of the Delta communities to seek justice through the courts rather than seek recourse to extra-legal means.

5.3.4.2 Common Law Principles

Common law principles are an integral part of Nigerian law in general[96] and the oil-industry's regulatory framework in particular. They include the torts of nuisance, negligence and the

[95] O Epia, 'Niger Delta: A new dimension to crisis' Thisday Newspapers (Lagos), 16 February 2006.

[96] The history of the Common Law as a source of Law in Nigeria dates back to its official introduction into the colony of Lagos in 1863 by the British colonial administration, through Ordinance No. 3 of that year. The

rule in *Rylands v. Fletcher*.[97] The reliefs available under these torts include compensation; injunction against the offensive action; or, specific performance to clean-up of the impacted environment. However, compensation which is the usual remedy for torts[98] is the main focus of this section. This section analyzes the compensation regime through decided cases and highlights particularly the difficulties that the plaintiffs encounter in proving their cases. It is argued that these encumbrances reduce the confidence aggrieved host-communities have in the legal system to compensate their losses and encourage them to seek alternate means to receive reparation.[99]

5.3.4.2.1 Nuisance

There are two branches of nuisance namely, private and public nuisance. Though the criteria to determine liability are the same in both classes, the person(s) affected by an act or omission determines its classification into either a private of public nuisance.[100] When the act or omission interferes with, disturbs, or annoys a person in the exercise or enjoyment of his ownership or occupation of land or of some easement profit, or other right, used or enjoyed in connected with land, it is classified as a private nuisance.[101] Where the affected right belongs

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current Nigerian enactments that received English Law include the Interpretation Act Cap. 192 Law of the Federation of Nigeria, 1990, which is in force as a federal law, applicable throughout the Federation. See generally, A Obilade, *The Nigerian Legal System* (Sweet and Maxwell, London 1979) 55. Also, J Asein, *Introduction to Nigerian Legal System* (Sam Bookman Publishers, Ibadan 1998) 92-108.

[97] (1866) L.R. [Ex 265; (1868) L.R.] H.L. 330.

[98] *J Frynas* (n 36) 189. See also, S Awogbade, S Sipasi and O Binuyo, 'Nigeria' in C Perales (ed.) *Getting the Deal Through: Environment 2008 in 26 Jurisdictions* (Getting the Deal Through, 2007) 102.

[99] See section 5.3.4 above.

[100] A Owolabi, 'An Examination of the Legal Framework for the control and Management of Pollution in Nigeria' (2003) 45 *Journal of Indian Law Institute* 1, 59.

[101] Per Eso JSC in *Ipadeola and Another v Oshowole and Another* (1987) 5 SC 376 at. 389.

to the public, it was a public nuisance and actionable only by the Attorney–General of the Federation[102] except the individual could establish the act or omission resulted in him suffering damages over and above other members of the public.[103] A consequence of this distinction was that communities adversely affected by oil operations were unable to maintain actions successfully. In *Chief Amos & Ors (for themselves as individuals and on behalf of the Ogbia Community Brass Division) v Shell-B.P Petroleum Development Company Ltd & Another*[104] for instance, the plaintiffs in their representative capacity claimed special and general damages for injuries suffered as a result of the defendants deliberate blocking of Koko Creek in the course of their petroleum operations. The blockade allegedly paralyzed agricultural and economic activities in the area. The court held that Koko Creek was a public waterway and that its obstruction constituted a public nuisance and since the plaintiff failed to prove any damage suffered over and above that suffered by the general public, their action must fail.[105]

This distinction between private and public nuisance was eradicated in *Adediran & Another v Interland Transport*[106] where the Supreme Court considered the nature of *locus standi* in public nuisance in general terms. Karibi-Whyte, JSC stated in *Adediran's case* that: '[T]he

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[102] Per Nnaemeka Agu, JCA in *Interland Transport Ltd v Adediran and Another* (1986) 2 NWLR (Pt 20) 78 at 87. Any action that falls under the head of public nuisance will be held procedural defective and incompetent if instituted by anyone other than the Attorney-General. See, *Lawani & Ors v West African Cement Company Ltd.* (1973) 3 UILR (Pt IV) at 489.

[103] *Ipadeola & Another v Oshowole & Another* (1987) 1 SC 376, 393; *Adediran & Another v. Interland Transport* (1986) 2 NWLR (Pt. 20) at 85.

[104] (1977) 6 SC 104.

[105] (1977) 6 SC 109.

[106] (1991) 9 NWLR (Pt. 214) 155.

restriction imposed at Common Law on the right of action in public nuisance is inconsistent with the provisions of section 6(6)(b) of the Constitution, 1979 and to that extent is void.'[107] Section 6(6)(b) of the 1979 Constitution which is the same as the provisions of section 6(6)(b) of the 1999 grants the courts judicial powers to adjudicate in 'all matters between persons, or between government or authority and to any persons in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person'. Since the distinction between private and public nuisance was eliminated, there has been a rise in the number of cases where an individual is suing an oil company on behalf of a family or the larger community.[108] It is posited that the previous position of the law regarding the distinction between private and public nuisance deprived communities in the Niger Delta from accessing justice. This inability to institute actions because they fell into the category of 'public nuisance' contributed to the inhabitants' frustration with the legal system particularly because the Attorney-General of the Federation never exercised this authority despite innumerable opportunities. This (in)action (amongst others) substantiates allegations that the Government is sympathetic to the oil-industry over and above the interests of its citizens that inhabit the Niger Delta region.[109]

5.3.4.2.2 Negligence

Negligence in law refers to the breach of a legal duty to take care which results in damage, undesired by the defendant, to the plaintiff.[110] It connotes the complex concept of a duty owed to someone, the breach of that duty and damage suffered as a consequence by the

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[107] *Adesanya v President of the Federal Republic of Nigeria & Another* (1991) 9 NWLR (Pt. 214) 155 at 180.

[108] For examples see, *Shell Petroleum Development Company Ltd. v Tiebo* (1996) 4 NWLR (Pt. 445) 657 and *Farah v Shell* (1995) 3 NWLR (pt 382) 148.

[109] Refer to *Gbemre's case* in section 5.3.5.1 above.

[110] G Kodilinye and O Aluko, *The Nigerian Law of Torts* (2nd edn Spectrum Law Publishing, Ibadan 1999) 182.

person to whom the duty is owed.[111] In essence, for an action to succeed in negligence, the plaintiff must prove that the defendant was careless in the exercise of the specified duty to take care.[112] In *Seismograph Services (Nigeria) Ltd v Mark*[113] the plaintiff claimed compensation for damage done from the destruction of his fishing nets by a seismic boat. The court opined that the boat tearing the nets did not sufficiently prove negligence on the defendant's part. The judge questioned what act or omission amounted to negligence. Said Uwaifo, JCA:

> In the present case, what did the defendants (Seismograph Service) do or fail to do which was the cause of the accident? Did the captain of the vessel engage in excessive speed in navigating her? Did he fail to sound the alarm or did he do so too late to signal her approach? Did the captain fail to keep a proper look out? Did he fail to slow down? Did he navigate at the time of the day he was not expected to?[114]

In the judge's opinion, the plaintiff did not indicate the particulars of negligence. The court found that the plaintiff did not prove that the defendant breached a duty a duty of care towards him.

In *Seismograph Services (Nigeria) Ltd v Ogbeni*,[115] the plaintiff claimed extensive damage was done to his buildings as a result of seismic operations carried out by the defendant/appellant. During the proceedings, an employee of the company gave evidence to confirm that the house did not have the cracks before the shooting operations. However, the court held that the plaintiff's case failed because he could not prove the negligence of the defendants that was not 'within his knowledge'. In other words, the plaintiff did not have the

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[111] Per Kalgo JSC in *Anyah v Imo Concorde Hotels* (2002) 12 SC (Pt 1) 77 at 85.

[112] Lord Atkin in *Donoghue v Stevenson* (1932) AC 562, HL, at 580. See also, *Anyah v Imo Concorde Hotels* (2002) 12 S.C. (pt II) 77 at 85 per Kalgo JSC.

[113] (1993) 7 NWLR (Pt. 304) 203.

[114] Per Uwaifo, JCA at 214.

[115] (1976) 4 SC 85.

requisite scientific knowledge to prove that the defendant's activities could, and, did, have the alleged effect on his building. In *Chinda & Ors v Shell-BP*,[116] the plaintiffs sued the defendant for the heat, noise and vibration resulting from the negligent management and control of the flare set used during gas flaring operations which resulted in damages to their property. The court held that they could not prove any negligence on the part of the defendants in the management and control of the flare site, and therefore their action must fail.[117]

The above cases all reveal that a plaintiff must prove that the defendant breached an accepted standard of behaviour. Consequently in cases, particularly those that relate to actual oil operations, the plaintiffs must prove breach of technical standards that are ordinarily beyond the knowledge of these communities.[118] The difficulty in proving technical details is further compounded by the inability to afford the expenses of hiring technical experts and conducting tests to attempt to prove their cases.[119] Where expert opinion is not adduced in these cases, the court is bound to act on the unchallenged or uncontroverted evidence of the defendant's expert.[120] The absence of any form of legal aid to assist these communities with

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[116] (1974) 2 RSLR 1.

[117] See also *Anthony Atubin v Shell-BP* Suit No. UHC /48/73.

[118] T Osipitan, 'Problems of Proof in Environmental Litigations' in J Omotola (ed.) *Environmental Laws Including Compensation* (University of Lagos, Lagos 1990) 112-115. Also, F Erhonsele, 'The Onus of Proof in Cases of Environmental Degradation in Oil Related Litigations: A Case for Change in Attitude of Nigerian Courts' in L Atsegbua (ed.) *Selected Essays on Petroleum and Environmental Law* (Department of Public Law, Uniben, Benin 2000).

[119] See generally, A Adedeji, and R Ako, 'Hindrances to Effective Legal Response to the Problem of Oil Pollution in the Niger Delta' (2005) 5 *UNIZIK Law Journal* 1, 415-439.

[120] Per Sowemimo JSC in *Seismograph Services Ltd v. Ogbeni* (1976) 4 SC 85.

pursuing such cases that affect their source of livelihood further limits their chances of a fair trial. However these obstacles may be surmounted where the plaintiff relies on the principle of *res ipsa loquitur*; that means literally, the fact speaks for itself.[121] Under this principle, all the plaintiff needs prove is that the thing that inflicted the damage was under the sole management and control of the defendant or of someone for whom he is responsible or whom he has a right to control and that in the ordinary course of event, the injury should not have happened unless there was want of care.[122] Three conditions are required to rely on this principle successfully. First, the plaintiff must prove that the accident occurred. Secondly, he must prove that the occurrence would not have happened 'in the ordinary cause of things without negligence on the part of somebody other than the plaintiff'. Finally, the facts should suggest that the defendant and not the plaintiff were negligent.[123]

In *Mon v Shell-BP*,[124] the plaintiffs claimed compensation for damage from an oil spill. The court deciding in the plaintiff's favour held that: '[N]egligence on the part of defendants has been pleaded, and there is no evidence of it. None in fact is needed, for they must naturally be held responsible for the results arising from an escape of oil which they should have kept under their control'.[125] Fekumo opines that this principle is also applicable if a well blowout causes widespread oil spillage that result in damage to life and property.[126] Clearly, the

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[121] The maxim literally means 'the thing speaks for itself'.

[122] Per Karibi Whyte JSC, in *Aliu Bello and Others v A.G. of Oyo State* (1986) 12 SC 1 at 93-94, Kazeem JCA., in *Lagos University Teaching Hospital v Yemi Lawal* (1982) 3 FNR 184 at 193.

[123] J Frynas (n 36) 191.

[124] (1970-1972) 1 RSLR 71.

[125] Per Holden CJ at 73.

[126] J Fekumo, 'Civil Liability for Damages Caused by Oil Pollution' in J Omotola, (ed.) *Environmental Law in Nigeria Including Compensation* (University of Lagos, Lagos 1990) 271.

principle is easier to apply in incidences of oil spills where damage caused by oil-operations is manifest. Nonetheless, this principle is not an end in itself as the defendant may rebut it by adducing expert evidence to show that he took all reasonable care and acted in accordance with standard industry practice.[127] If the defendant successfully establishes the incident may have occurred without his negligence, the burden of proving negligence shifts back to the plaintiff.[128]

5.3.4.2.3 The rule in *Rylands v Fletcher*[129]

The rule in *Rylands v Fletcher* created the rule of strict liability under common law. The rule formulated by Blackburn J in the Court of Exchequer Chamber and affirmed by the House of Lords arises where:

> a person who for his own purposes, brings on his land, collects and keeps there, anything likely to do mischief if it escapes, must keep it at his peril, and if he does not do so, is prima-facie answerable for all the damages which are the natural consequences of its escape.[130]

It is one of the main instances whereby a person acts at his peril and is responsible for accidental harm independent of the existence of either wrongful intent or negligence. Despite several exceptions to the original rule,[131] Nigerian courts have held that the use of land to lay

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[127] *NEPA v Role* (2000) 7 NWLR (Pt 663) 69.

[128] Morris, LJ in *Roe v Ministry of Health* (1954) 2 All ER 131 at 139. See also, *Shell v Enoch* (1992) 8 NWLR (Pt. 259) 335.

[129] (1868) LR 3 HL 330.

[130] (1868) LR 3 HL 330, 338-340.

[131] The exceptions include the 'non-natural user' exemption introduced by Lord Cairns and the 'reasonability' test introduced by Lord Goff in *Cambridge Water v Eastern Countries Leather* (1994) All ER 53, 69. Scrutton LJ in *Smith and others v Schilling* (1928) LTR 475, 478 opined regarding these exceptions that it is 'doubtful whether there is much left of the rationale of strict liability as originally contemplated in 1866.'

crude oil–carrying pipes through the swamp forest is a non-natural user of land.[132] Consequently, oil operations particularly, oil spills fall within the scope of this tort that is commonly utilized in oil-litigation in Nigeria.[133] In fact, as Frynas notes in his analysis of *Umudje and Another v Shell-BP Petroleum Development Co. Ltd.*[134] this rule appears to be more readily applied to oil spill cases than other bases for civil liability. In that case, the plaintiffs sued the oil company for damages resulting from an oil waste pit and the construction of a road. The company had constructed a waterway and failed to insert enough culverts under it leading to a diversion of fish that previously entered into the plaintiff's artificial ponds and lakes during the rainy season. The court accepted the facts but found that while the defendant company was not liable under the rule in *Rylands v. Fletcher* for the blockage, it was liable for the oil spill.[135] According to the court:

> Liability on the part of an owner or the person in control of an oil-waste pit, such as the one located at Location 'E' in the case in hand, exists under the rule in *Rylands v. Fletcher* although the 'escape' has not occurred as a result of negligence on his part.[136]

The defences available under this head of tort as applicable in the oil industry have however whittled down its efficacy. A defendant may plead that the cause of the spill was an act of

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[132] *Ikpede v Shell–BP* (1973) MWSJ 61; *Umudje and Another v Shell-BP Petroleum Development Co. Ltd* (1975) 5 UILR (Pt 1) 115.

[133] See particularly, *Shell Petroleum Development Company Ltd. v Tiebo,* (1996) 4 NWLR (Pt. 445) 657. In this case, crude oil from Shell's installation spilled to the plaintiff's/respondent's lands, streams and ponds and polluted the source of drinking water, killed fishes in their swamps and paralyzed their economic sustenance. The plaintiffs/respondents relied on the common law principle of strict liability successfully. The Court of Appeal awarded N400,000 as special damages for the loss and injury to the young raffia palm and the cumulative sum of N5,600,000 as damages.

[134] (1975) 5 UILR (Pt 1) 115.

[135] Per Idigbe JSC at 170-171 and 172.

[136] Per Idigbe JSC at 172.

God, act or default of the plaintiff, with the consent of the plaintiff, an independent act of third party or with statutory authority.[137] These defences; particular 'acts of a third party' (sabotage), have been applied, and sometimes recklessly, to avoid liability.[138] The Shell-initiated Niger Delta Environmental Survey (NDES) concluded in its report that many operators have hidden under the cloak of sabotage to avoid remediation in cases of environmental spills, accidents and discharges. For instance in *Shell v Enoch*,[139] where Shell relied on the defence of sabotage in a suit for damages caused by oil spills, the trial judge held:

> It is clear here that the plaintiffs had shown that there was an explosion at the defendant's manifold and that there was crude oil spillage which was extensive as a result of that damage...There was evidence that no third party caused the explosion and that no one in the community did it.[140]

Similarly, in *Shell v Isaiah*, the Court of Appeal labelled Shell's defence of sabotage 'an afterthought'.[141] It is worth questioning if is fair to deny an entire community compensation where the community is not complicit in the act of sabotage. After all, the companies are bound to secure their installations. The defence of 'statutory authority' also exempts companies from liability under the rule. For instance, in *Ikpede v Shell*,[142] a leakage of crude oil from the defendant's pipeline caused damage to the plaintiff's fish swamp. Although the requirements of the rule in *Ryland v Fletcher* were satisfied, because the laying of its pipeline

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[137] G. Kodinliye, *Nigerian Law of Torts* (Sweet & Maxwell, London 1982)117-121.

[138] *Shell v Otoko*, (1990) 6 NWLR (Pt. 159) 693.

[139] (1992) 8 NWLR (Pt. 259) 335.

[140] Per Jacks, JCA at 341.

[141] (1997) 6 NWLR 236.

[142] (1973) All NLR 61.

was done in pursuance to a statutory authority as the company was issued a licence under the Oil Pipelines Act, the company escaped liability.[143]

5.3.4.2.4 Commentary

There are important inferences to be drawn from the above examination of the role of statutory and Common Law in the determination of compensation. The first is that considerably more actions are instituted based on the Common Law principles than statutory law. This is mainly because the remedies available under the Common Law regime are more substantial. For instance, under the repealed FEPA Act for instance, a maximum fine of N500,000 was prescribed for activities that polluted the environment. However, under Common Law, there are no strict limits to the amount of compensation that may be awarded. In *Farah v Shell*[144] for instance, the Court of Appeal objected to the use official of compensation rates and application of statute law in determining compensation. The court held inter alia that: 'Where a tortuous act is committed, the injured party is entitled to damages in accordance with the measure of damages applicable to his injury.'[145] This is not to suggest however that compensation actions based on Common Law generally favour the host-communities. If anything, indications from oil-related cases suggest that the oil-companies benefitted more from the judicial attitude of Nigerian courts.

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[143] See also, *Irou v Shell B.P. Petroleum Development Co. (Nigeria) Ltd*, Unreported Suit No. W/89/71 (Warri High Court), November 26, 1973. In that case, the court was of the opinion that since the defendants had been granted an oil exploration licence, an order of injunction may render such licence nugatory.

[144] (1995) 3 NWLR (Pt. 382) 148 at 195.

[145] (1995) 3 NWLR (Pt. 382) 148 at 195.

Frynas noted, for instance, that though the applicable torts offer legal remedies to plaintiffs suing oil-companies; each tort imposes specific limitations on the plaintiff's ability to sue.[146] Okonmah noted further that even where the action succeeds, the amount of damages awarded by the courts is inadequate to assuage the claimant's losses.[147] Frynas disagrees with this assertion based on recent decisions particularly *Shell v Farah*[148] and *Elf v Sillo*[149] where substantial awards in compensation were made.[150] These recent awards are likely to influence an increase in the recourse to the judicial system for compensation. However, the point being stressed at this juncture is that the inadequacy of the compensation regime that was strictly adhered to by the courts contributed to dissatisfaction in the legal system and the consequent reliance on extra-legal means. It is important to point out that due to the sheer inadequacy the government approved compensation rates, the Oil Producers Trade Section (OPTS) of the Lagos Chamber of Commerce[151] has its own rates that are significantly higher than the government rates. These rates are used in practice though they are flawed because they were reached arbitrarily by oil sector operators without reference to the prevailing market rates, the yielding potential and life span of the crops.[152] These rates are also not regularly revised to reflect the country's changing economic realities.

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[146] J Frynas (n 36) 193.

[147] P Okonmah, 'Right to a Clean Environment: The Case for the People of Oil Producing Communities in the Nigerian Delta' (1997) 41 *Journal of African Law* 1, 43.

[148] (1995) 3 NWLR (Pt. 382) 148.

[149] (1994) 6 NWLR (Pt. 350) 258.

[150] J Frynas, 'Legal Change in Africa: Evidence from Oil-related Litigation in Nigeria' (1999) 43 *Journal of African Law* 2, 122.

[151] The organization is an association of oil-producing companies in Nigeria.

[152] A Sampson, 'Ecologist blames FG for oil pipelines vandalisation' Daily Independent (Nigeria) August 20, 2003.

5.3.5 Laws Regulating Environmental Protection

A natural consequence of oil-industry activities is its adverse effects on the physical environment. Thus the legal framework regulating environmental protection influences the manner oil-companies operate. The more stringent the environmental framework is, the higher the level of care that needs to be taken to ensure minimal damage is done to the environment. This section examines key legislation that regulates environmental protection in Nigeria and have an impact on oil operations. It reveals the connection between these laws, conflicts and the consequent violence that has become prevalent in the region. These laws are discussed in two sub-sections. The first analyzes the laws made specifically to regulate the oil-industry while the second concentrates on general environmental laws with particular reference to the Environmental Impact Assessment (EIA) Act.

5.3.5.1 The Petroleum Laws

The Petroleum Act is the main statutory regulation regarding the control of the oil-industry. It grants the minister with responsibility for petroleum affairs power to supervise the oil-industry. Section 9 empowers him to make regulations on sundry issues including the prevention of pollution of water courses, and the atmosphere[153] and the construction, maintenance and operation of installations used in the pursuance of the Act.[154] The Petroleum (Drilling and Production) Regulation is one of such regulations. Its primary objective is to control the safety of operation of all drilling, production, and other operations necessary for the production and subsequent handling of crude oil and natural gas. Regulation 25 provides that:

> The licensee or lessee of a oil mining lease shall adopt all practicable precautions, including the provisions of up to date equipment approved by the Director of

[153] See particularly section 9(1)(b) of the Petroleum Act.

[154] See particularly section 9(1)(c) of the Petroleum Act.

> Petroleum Resources, to prevent pollution of the inland waters, rivers, water courses, the territorial waters of Nigeria or the high seas by oil mud or other fluids or substances which may contaminate the water, banks or shoreline or which may cause harm or destruction to fresh water or marine life, and where such pollution occurs or has occurred, shall take prompt steps to control and, if possible end it.

Regulation 36 contains provisions regulating the maintenance of apparatus and conduct of operations. It states:

> The licensee or lessee shall maintain all apparatus and appliances in the use of his operations, and all wells and boreholes capable of producing petroleum in good repair and condition, and shall carry out all his operations in 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 field practice; and without prejudice to the generality of the foregoing he shall, in accordance with those practices, take all steps practicable-
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> (a) to control the flow and to prevent the escape of avoidable waste of petroleum discovered in or obtained form the relevant area;
> (b) to prevent damage to adjoining petroleum-bearing strata;
> (c) except for the purpose of secondary recovery as authorized by the Director of Petroleum Resources, to prevent the entrance of water through boreholes and wells to petroleum-bearing strata;
> (d) to prevent the escape of petroleum into any water , well, spring, stream, river, lake, reservoir, estuary, or harbour; and,
> (e) to cause as little damage as possible to the surface of the relevant area and to the trees, crops, buildings, structures and other property thereon.

There are a few noteworthy points in the above provisions. First, the Minister empowered to supervise the industry is a member of the Federal Government that holds majority stake in the industry through its national oil company. Consequently, there is a conflict of interests regarding his role (just like the Federal Government itself) as the chief regulator of the industry and representing a government that holds majority stakes in the industry. Given the central role of oil in the socio-economic and political development of Nigeria, it is doubtful that the Minister can perform this primary function effectively without partiality. For instance, there is no reported instance of sanctions being imposed against an oil company by the Minister despite several alleged and proved cases of oil-induced pollution contrary to the country's environmental laws. Secondly, the Regulation neither defines the qualifying terms used in it nor does it indicate levels beyond which the environment will be considered as

polluted. This and other laws have generally been interpreted to suggest that the standard required in Nigeria is less stringent than standards in more developed countries.

However, it is argued that the requirements of Nigeria's legislation regarding the standard of operation required of the oil companies are of the same standard as in more developed countries. The Nigerian Minerals Oil (Safety) Regulations expressly provides that in defining the phrase 'good oil field practice', reference is to be made to the 'current Institute of Petroleum Safety Codes, the American Petroleum Institute's Codes or the American Society of Mechanical Engineers Codes'.[155] In essence, prevailing standards in United Kingdom and the United States of America are to apply in Nigeria's oil-industry. This renders claims made by the industry that their standards of operation are lower in Nigeria because the law permits it nugatory. The oil-companies generally argue that they adhere to the different national environmental standards in their areas of operations and claim that the allegation of 'double standards' of operation is mistaken, because it is based on the notion that there is a single, 'absolute environmental standard'.[156] Undoubtedly, there are different environmental standards but clearly, Nigeria's law imposes the standards in developed countries where these companies operate to higher standards. The difference between Nigeria and the UK or USA lies in the ability of Nigeria to enforce its regulations. Nonetheless, it is posited that state's failure to effectively regulate these corporations is not a licence for these corporations to perform below legal standards. This is more so that the perceived low standard of operations

[155] Section 7 Nigerian Minerals Oil (Safety) Regulations.

[156] PIRC Intelligence, March 1997, Issue 3.

is a major contributory factor to the restiveness in the region[157] with consequences including violent conflicts.[158]

Another important enactment to note is the Associated Gas (Re-Injection) Act 1979 (as amended) that seeks to reduce gas flaring during oil production.[159] The Act originally required oil-companies to stop flaring associated gas by 1984. This terminal date was postponed by amendments to the Act in 1984[160] and 1985[161] that also increased the fines for gas flaring.[162] They also permitted gas to be flared where the Minister lawfully issued a ministerial certificate to permit gas flaring on specific oil-fields.[163] The Government has again extended the deadline to end gas flaring that expired on the 31st December 31, 2007 till 31st December, 2008.[164] Under the new gas flaring policy, which took effect from January 1, 2008, oil-companies are required to pay a fine of $3.5 for every 1000 standard cubic feet of gas flared in addition to shutting down any oil field where associated gas is flared after the

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[157] See particularly Article (f) of the Kaiama Declaration. Similar provisions are contained in other community Bills of Rights including the Ogoni Bill of Rights (Article 16) and the Oron Bill of Rights (Article 8).

[158] I Eteng, 'Minority Rights under Nigeria's Federal Structure' in *Constitution and Federalism, Proceedings of the Conference on Constitution and Federalism* (University of Lagos, Lagos 1996) 111-165.

[159] Chapter A25, Laws of the Federation of Nigeria 2004.

[160] Associated Gas Re-Injection (Continued Flaring of Gas) Regulations 1984.

[161] Associated Gas Re-Injection (Amendment) Decree, 1985.

[162] The fine was first set at 0.50 Naira per million cubic feet (mcf) and increased to 10 Naira (approximately £0.04 based on an exchange rate of N250 to £1.00) effective from January 1998.

[163] Section 3.

[164] I Uwugiaren, 'Nigeria: Groups Petition National Assembly On 2008 Gas Flaring Deadline', (Article) <http://allafrica.com/stories/200801210662.html> accessed 26 January 2008.

new deadline.[165] Two issues are important to note at this point. First, it is doubtful that the Government will shut down any fields after the deadline as the power to punish erring companies for varied operating offences have never been exercised. Secondly, this law is contrary to a High Court's decision in recent decision in *Gbemre v SPDC and Others*.[166] In that case, the court ordered that the process for the Enactment of a Bill for an Act of National Assembly be initiated for the speedy amendment of the relevant section of the Associated Gas Regulation Act and the Regulations made there under to quickly bring them in line with the provisions of Chapter 4 of the Constitution that lists the Fundamental Human Rights provisions.[167]

5.3.5.2 Environmental Regulation

The protection of Nigeria's environment is regulated by statutory law and Common Law principles of torts. These tort principles are an essential part of regulating the protection of the fragile Delta environment as they are more often relied on in actions against the oil-industry than the statutory regime. It is important to note that Nigeria's statutory regime is in the process of reform. Some of the reforms include the repeal of the Federal Environmental Protection Agency Act that empowered (now defunct) Federal Environmental Protection Agency to establish and enforce national environmental standards.[168] The National Environmental Standards and Regulations Enforcement Agency has been established in its place to enforce national environmental standards with the exemption of the petroleum

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[165] K Aderinokun, 'Nigeria: gas flare-out – "No going back on Dec. date"', This Day Newspapers (Lagos) 30, January, 2008.

[166] Suit No: FHC/B/C/153/05 in the Federal High Court of Nigeria Benin Division. Refer to section 7.3.1.1 for a full discussion of the case.

[167] *Gbemre's case* (n 166) 4.

[168] See particularly section 7 of the NESREA Act.

sector.[169] The oil-sector is monitored essentially by the Department of Petroleum Resources and the newly created National Oil Spill Detection and Response Agency.[170] While the Department of Petroleum Resources sets guidelines and standards for the industry, National Oil Spill Detection and Response Agency is 'responsible for surveillance and ensure compliance with all existing environmental legislation and detection of oil spills in the petroleum sector'.[171] While the Federal Ministry of Environment remains the main cross-sectoral regulator of the environment. There are on-going efforts to harmonise all environmental regulations in Nigeria including the review of the National Policy on the Environment, Environmental Impact Assessment Act and the promulgation of a Nigerian Environmental Management Bill into law that is expected to further change the administrative structure of the Nigeria's environmental sector.[172]

Presently, specific guidelines to address spillage management and compensation are being developed by National Oil Spill Detection and Response Agency. The Director-General of the Agency noted that professionalism and scientific approach are required in making estimates, but that it was always best if the affected communities and the oil company reach

[169] See particularly section 7 of the NESREA Act. Specifically, the Agency is mandated to enforce compliance with environmental standards, regulations, rules, laws, policies and guidelines. It is also responsible for the protection and development of the environment, biodiversity conservation, sustainable development and the development of environmental technology.

[170] National Oil Spill Detection and Response Agency Act No. 15 of 2006.

[171] Section 6(a) NOSDRA Act. See generally sections 5 and 6 for the objectives and functions of the Agency respectively.

[172] The Bill was in the draft stage as at August 2007. See, *S Awogbade* (n 98) 104.

an agreement amicably.[173] While this exercise gives the opportunity for public involvement, it is suggested that 'professionalism and scientific approaches' as well as economic realities form the basis of such negotiation. There is also concern about the implementation of a fair compensation regime where the negotiations are limited to the industry and community representatives. Unbiased representatives from relevant organizations including National Oil Spill Detection and Response Agency, NGOs and international organizations should be part of the process to avoid likely deadlocks that could exacerbate the prevalent conflicts. As noted previously Environmental Impact Assessment is an effective means to inculcate public involvement in the oil-industry. It is posited that constant interaction between the industry and their host-communities over matters relevant to the Environmental Impact Assessment will encourage mutual respect and understanding between them. It will also create a channel of communication for other matters incidental to their peaceful co-existence. Consequently, relevant provisions of the Environmental Impact Assessment Act are examined to determine whether they promote a high level of interaction where the above stated ideals may be achieved to sustain peace in the industry.

5.3.5.2.1 Environmental Impact Assessment Act[174]

The main purpose of an EIA is to identify the environmental, social and economic impacts of a project prior to decision-making.[175] It also enables members of the public access to information on the state of their environment and be party to the decision-making process on

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[173] -- 'Oil spill guidelines out soon', Guardian online breaking news, 07 February 2008; <www.guardiannewsngr.com/breaking_news/article01> accessed 07 February 2008.

[174] Chapter E12 of the Laws of the Federation of Nigeria 2004.

[175] United Nations Environment Programme (UNEP) website: www.unep.org. Accessed; 20 August 2005.

activities that have the potential to adversely affect it.[176] This section concentrates on the provisions that relate to public involvement in the Environmental Impact Assessment process. For activities listed in the mandatory study list, including oil exploration and production activities, section 23 provides:

> Where the Agency is of the opinion that a project is described in the mandatory study list, the Agency shall-
>
> (a) ensure that a mandatory study is conducted, and a mandatory study report is prepared and submitted to the Agency, in accordance with the provisions of this Decree; or
>
> (b) refer the project to the Council for a referral to mediation or a review panel in accordance with section 25 of this Decree.

Issues that the Environmental Impact Assessment should address and expectedly form the basis for the report are contained in section 4. Expectedly, these should be the contents of the report yet it does not provide that public involvement should be a part of it.[177] Section 7 permits the public to comment on the EIA of an activity. It provides that:

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[176] Section 1of the EIA Act that states the goals and objectives of the EIA process. A Kiss and D Shelton, *International Environmental Law* (Transnational Publishers Inc., New York 2000) 203 and J Priscolli, 'Participation and Conflict Management in Natural Resource Decision-Making' in B Sohlberg and M Saija (eds) *Conflict Management and Public Participation in Land Management,* European Forest Institute (EFI) proceedings 14 (1997) 61-88.

[177] Section 4 provides that: An environmental impact assessment shall include at least the following minimum matters, that is-

(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;

(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;

> Before the Agency gives a decision on an activity to which an environmental assessment has been produced, the Agency shall give opportunity to government agencies, members of the public, experts in any relevant discipline and interested groups to make comment on environmental impact assessment of the activity.

Adequate time must elapse for these comments to be considered before the Agency decides whether the proposed activity should be authorized or undertaken[178] and the written decision of the Agency must be made available to any interested person or group.[179] If no interested person or group requests for the report, the Agency is required to publish its decision in any manner it deems appropriate[180] through which members of the public or interested persons shall be notified.[181] In reality, these provisions are sometimes not strictly adhered to and the EIA process (where it is carried out) is often at the discretion of the project proponent. An instance of a major project that did not follow this process is the Nigerian Liquefied Natural Gas (NLNG) project at Bonny. The project proponents that included the Federal Government of Nigeria and a consortium of oil-companies including Shell as the operator of the project were challenged in *Douglas v Shell*[182] for failing to carry out the mandatory EIA required for such projects before embarking on it. The Federal High Court dismissed the case on the grounds that the plaintiff did not have *locus standi* to institute the action despite being a

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(f) an indication of gaps in knowledge and uncertainty which may be encountered in computing the required information;

(g) an indication of whether the environment of any other State or Local Government Area 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.

[178] See section 8 of the EIA Act.

[179] See particularly, section 9(1) and (2) of the EIA Act.

[180] See section 9(4) of the EIA Act.

[181] See section 9(3) of the EIA Act.

[182] (1999) 2 NWLR (Pt. 591).

native of one of the affected communities and a frontline environmental activist. According to the court, Douglas did not show that prima facie evidence that his right was affected nor any direct injury caused to him. On appeal, the Court of Appeal held that the Federal High Court was in breach of a number of procedural rules when deciding the case thus set the earlier decision aside and remitted it to a different judge for retrial.[183] However, the retrial did not proceed as the project had been completed. It is noteworthy to point out that community problems evolved shortly after and the Federal Government became actively involved in assisting to conclude a memorandum of understanding (MOU) between the NLNG and the community so that the first shipment of LNG would not be delayed.[184]

Returning to the analysis of the EIA Act, one can assert that it limits meaningful public involvement as section 25(2) provides that the public may comment only on the conclusions and recommendations of the mandatory study report.[185] In essence, public involvement in the EIA is not compulsory during 'scoping' which is arguably the most important aspect of the EIA. Briefly, scoping is an early aspect of the assessment that defines the scope of the environmental study.[186] Two major inferences can be drawn from the above assertion. First, public interests during the actual assessment are unlikely to be adequately considered and protected since their participation in the determination of the scope and methodology of the EIA is not guaranteed by law. This questions the efficacy of the EIA process wherein the

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[183] Unreported Suit No. CA/L/143/97 in the Court of Appeal.

[184] E. Emeseh, 'The Limitations of Law in Promoting Synergy between Environment and Development Policies in Developing Countries: A Case Study of the Petroleum Industry in Nigeria' (2006) 24 *Journal of Energy and Natural Resources Law* 4, 574-606.

[185] See particularly section 25(2) of the EIA Act.

[186] See generally, K. Raymond and A Coates, *Guidance on EIA: Scoping* (Environmental Resources Management, Edinburgh 2001).

actual process of the assessment determines its success rather than the outcome.[187] It is noteworthy that in practice, the Federal Ministry of Environment exercises its discretion to determine the level of public involvement during scoping.[188] The mandatory report may be referred to mediation or a review panel where the Council believe 'the project is likely to cause significant adverse environmental effects that may not be mitigable',[189] or public concerns respecting the environmental effects of the project warrant it.[190] Where the report is sent for review under the provisions of section 25, the Act simply requires the review panel's report must contain the conclusions and recommendations of the panel relating to the environmental effects of the project and any mitigation measures or follow-up program, and a summary of the comments received from the public.[191] In this instance, the Act stops short of democratic public participation; that is, ensuring that public opinion in the EIA process are properly considered and consequently influence the decision.[192]

5.4 Conclusion

This Chapter has examined relevant laws that regulate Nigeria's oil-industry and revealed that the these laws generally contributed to the erosion of the capacity of the host-communities to be actively involved in issues related to the industry, particularly as it

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[187] See generally, section 2.4.1 above.

[188] R. Ako, 'Ensuring Public Participation In Environmental Impact Assessment of Development Projects in the Niger Delta Region of Nigeria: A Veritable Tool For Sustainable Development' (2006) 3 *Environtropica* 2, 12.

[189] See section 26(a)(i) of the EIA Act.

[190] See section 26(a)(ii) of the EIA Act.

[191] See section 37 of the EIA Act.

[192] *R Ako* (n 188) 7. See also, J Stærdahl, et. al., 'Environmental Impact Assessment in Thailand, South Africa, Malaysia and Denmark', Working Report, 2003 (Article) <http://www.ruc.dk/upload/application/pdf/9c4d310e/workingpaper1.pdf> acessed; 22 March 2005.

affected their environment. It also revealed that judicial decisions in oil-related cases often have benefitted the oil-industry apparently to safeguard the Government's economic interests.[193] Unfortunately, these economic interests have been prioritized over the environmental impacts of the communities in proximity to oil exploration and production activities. For instance, in *Irou v Shell*,[194] the court failed to order an injunction to stop the defendant from polluting the plaintiff's land, fish ponds and creek because in its opinion, nothing should hinder the operations of the oil-industry because of its immense contribution to national income.[195] This line of reasoning appears to have had an overbearing influence in deciding oil-related cases[196] Ajomo noted in this regard that:

> In the oil sector where environmental degradation is most prevalent, the all-pervading influence of the oil companies and the paternalistic attitude of 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 recognize is that economic development can be compatible with environmental conservation.[197]

This doctrine has tacitly approved of oil-induced pollution and its adverse consequences for the host-communities. These included the pollution environmental resources including land, rivers, aquatic species, farm produce, etc that the inhabitants of the region rely on for their

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[193] See, A Ekpu, 'Environmental Impact of Oil on Water: A Comparative Overview of Law and Policy in the United States and Nigeria' (1995) 4 *Denver Journal of International Law* 214.

[194] Unreported Suit No. W/89/71 (Warri High Court), November 26, 1973.

[195] See a different approach in the US case of *Amoco Production Co. v Village of Gambell, Alaska*, (1987) 480 US 531 where the Supreme Court observed that environmental injury, by its nature can seldom be adequately remedied by money because the damage is often permanent or at least of a long duration. In the opinion of the court, if such injury is sufficiently likely, the balance of harm will usually favour the issuance of an injunction to protect the environment.

[196] See also, *Chinda v Shell* (1974) 2 RSLR 1and *Shell-BP v Usoro*, (1960) SCNLR 121.

[197] M Ajomo, 'An Examination of Federal Environmental Protection Laws in Nigeria' in M Ajomo and O Adewale (eds.) *Environmental Laws and Sustainable Development in Nigeria* (Nigeria Institute for Advanced Legal Studies, Lagos 1994) 22.

socio-economic and spiritual existence. The environmental and consequent socio-economic factors losses aggravated by other related factors instigated violent conflicts. Some of these factors include the lax enforcement of environmental laws in the region, constant reduction in oil-revenues to the host-communities, the formidability of the oil-industry operators (manifested especially during litigation), huge cost of litigation and restricted access to courts.[198]

[198] See generally, *A Adedeji, and R Ako* (n 119) 415-439.

CHAPTER 5

THE LEGAL FRAMEWORK REGULATING THE NIGERIAN OIL-INDUSTRY

5.1 Introduction

This chapter analyzes the Nigerian oil-industry's regulatory regime including the National policy on the Environment, laws made to regulate oil-related operations and environmental laws that have a bearing on such operations. The main objective of the chapter is to draw a link between the regulatory framework and the prevalent violence in the industry. In essence, particular emphasis is laid in examining the laws that regulate the relationships between the stakeholders of the oil-industry, the Federal Government of Nigeria, the oil-companies and the host-communities. The provisions of these laws are critically analyzed to determine if the level of public participation permitted by them is sufficient to support the argument that inadequate public participation in the industry is a core reason for the violent conflicts prevalent in the industry. The first section of the chapter examines the National Policy on the Environment. Though not law *per se*, policy statements generally set out the definite course or method of action selected from alternatives in light of given conditions to guide and determine present and future decisions.[1] Thus, the importance of this section is to highlight Nigeria's course of action towards ensuring environmental protection in light of its conditions which include the existence of a vibrant oil-industry. It is acknowledged that the process of translating policy into law is subject to economic, political and social machinations thus laws may be different in content from policy.

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[1] See generally, L Caldwell, *International Environmental Policy, Emergence and Dimensions* (Duke University Press, Durham 1984) 9.

However, highlighting the Policy's relevant provisions provides a sound basis to compare whether provisions and interpretations of relevant laws are effective in realising policy objectives. In other words, the thesis seeks to determine whether the state of the law is consistent with the stated policy objectives. The second part of the chapter highlights and analyzes the laws that regulate the Nigerian oil-industry with particular focus on the key legislation that determines the extent of public participation in the oil industry. The section is examined under three broad sections, viz: ownership and control of oil (including revenue allocation), compensation and environmental laws with particular emphasis on the Environmental Impact Assessment regulation. The chapter reveals that the regulatory framework has not fulfilled the expectations of either the Policy or the oil-industry's host-communities. Generally, the Policy promotes the sustainable development paradigm that recognizes the link between environmental protection and economic development while emphasizing the importance of public participation. The host-communities similarly expect to gain adequate benefits from the industry, despite its adverse effects on the environment through their active participation.

5.2 The National Policy on the Environment

The history of Nigeria's comprehensive environmental policy is traced to 1988.[2] Prior to 1988, laws regulating environmental protection generally were made on an ad hoc basis with those regulating the oil-industry in particular lax to attract foreign investment into the then

[2] That year, toxic wastes were discovered to have been dumped in Koko village located in the Niger Delta region. Though the culprits of the 'Koko Incidence' (as it was popularly referred to) were apprehended, Nigeria did not have any laws under which they could be properly prosecuted. See generally, M Okorodudu-Fubara, *Law of Environmental Protection: Materials and Text* (Caltop Publications (Nigeria) Limited, Ibadan 1988) 9.

emerging oil-industry.[3] At this time, it was believed that environmental protection was antithetical to economic development.[4] Following 'Koko Incident'[5] steps were taken with the aid of the United Nations Environmental Programme (UNEP) to organize an International Workshop on the Goals and Guidelines of the National Environmental Policy for Nigeria. The Conference was influenced by the ideas and principles advocated by prior international conferences that espoused the principle of sustainable development in the proper management of the environment and its resources. The Conference proposed goals and guidelines towards establishing a sound background for policies, laws and institutions for environmental protection and maintenance.[6] The outcome of the conference was the National Policy on the Environment containing comprehensive statements on the protection and maintenance of Nigeria's environmental resources. Portions of the policy relevant to this discussion on public participation and the sustainable development of the Nigerian oil-industry are discussed in this section.

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[3] Such ad hoc laws included the Public Health Acts monitored and enforced by Public Health inspectors and the Criminal Code. See generally, A Adegoroye, 'Driving Forces for Sustainable Environmental Compliance and Enforcement Program in Africa with Particular Reference to Nigeria's Fourth International Conference on Environmental Compliance and Enforcement (April 22-26, 1996) Chiang Mai, Thailand, 2. See also, J Adelegan, 'The History of Environmental Policy and Pollution of Water Sources in Nigeria (1960-2004): The way forward' (Article) <http://web.fu-berlin.de/ffu/akumwelt/bc2004/download/adelegan_f.pdf> accessed 10 May 2006.

[4] See generally, *J Adelegan* (n 3).

[5] *L Caldwell* (n 1).

[6] Some of these conferences include the 'Stockholm Conference and the Earth Summit held in Rio. Others include the report of the World Commission on Environment and Development (WCED) – 'Our Common Future', the United Nations' 'Environmental Perspectives to the Year 2000 and Beyond' and the 'Cairo Programme of Action for African Cooperation in the Field of Environment'. See, *M Okorodudu-Fubara* (n 2).

The introductory section of the Policy affirms Nigeria's commitment to a 'policy that ensures sustainable development based on the proper management of the environment in order to meet the needs of the present and future generations'.[7] It aims to launch Nigeria into an era of social justice, self-reliance and sustainable development by appreciating the interdependent links among the development processes, environmental factors as well as human and natural resources. The express reference to social justice is noteworthy because the thesis utilizes an environmental justice theory that is related to the social justice theory to critically analyze the legal framework regulating Nigeria's oil-industry.[8] The main objectives of the National Policy on the Environment are 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;
(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 ecosystem; and,
(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.[9]

The first objective of the policy in (a) above suggests a substantive right to enjoy a healthy environment.[10] The policy provides that natural resources and the environment shall be conserved for the benefit of present and future generations. In essence, government regulations and action shall be geared towards ensuring that the environment is managed to ensure that future generations derive benefits from it. This includes environmental

[7] National Policy on the Environment 1989 (revised in 1999): Introduction.

[8] See Chapter 4 above. Also, J Agyeman, R Bullard and B Evans, 'Exploring the Nexus: Bringing Together Sustainability, Environmental Justice and Equity' (2002) 6 *Space and Polity* 1, 77-90.

[9] See section 2 of the National Policy on Environment. Also, see generally, Japan International Cooperation Agency (JICA), *Country Profile On Environment: Nigeria*, November 1999, 8.

[10] Refer to section 2.3.3 above for a discussion on the substantive right to enjoy a healthy environment.

conservation as mentioned in (b) and the overall maintenance of ecosystems and ecological processes to preserve biodiversity in (c) above. Section (c) is particularly relevant to the Niger Delta region that is rich in biodiversity and also hosts the oil-industry that this thesis analyzes.[11] Objective (d) expresses the intent that individuals and communities play an active role in 'environmental improvement efforts'. The express reference to individual and community participation recognizes Nigeria's two-tier 'public' which remains essentially communal in the rural areas and varying degrees of individualism in its urban areas. Thus, the roles of the 'community' in environmental protection in areas such as the Niger Delta will presumably be a core feature of Nigeria's environmental legislation. This is more so as the third section of the policy document lists the strategies for implementing its stated objectives to include the establishment and, or, strengthening legal, institutional, regulatory, research, monitoring, evaluation, public information, and other relevant mechanisms for ensuring the attainment of the specific goals and targets of the policy. The strategies are expected to lead to:

(a) the establishment of adequate environmental standards as well as the monitoring and evaluation of changes in the environment;

(b) the publication and dissemination of relevant environmental data;

(c) prior environmental assessment of proposed activities which may affect the environment or the use of a natural resource.

Even though the National Policy on the Environment does not explicitly refer to environmental human rights, the above strategies are reminiscent of the elements of substantive and procedural environmental rights discussed previously.[12] The extent to which the above stated objectives of the policy have translated to law is determined in subsequent

[11] Please refer to section 3.2.2 that describes the qualities of the Niger Delta region.

[12] See Chapter 2 above.

sections of the thesis with emphasis on the role of the legal structure in exacerbating violent conflicts in the oil-industry.

The Policy aims to promote active public participation environmental improvement efforts through:

(a) ensuring broad public participation in consensus-building towards defining environmental policy objectives;
(b) adopting community-based approaches to community education and enlightenment through cultural relevant social groups, voluntary associations and occupational organizations;
(c) intensifying the use of mass and folk media at Federal, State and Local Government levels;
(d) campaigning for a 'safe environment by the year 2000'; in conjunction with the campaign for health for all by the year 2000;
(e) encouraging the inclusion of environmental awareness and enlightenment studies in the educational curriculum at all levels;
(f) giving due attention, in the pursuit of environmental goals, to the role of NGOs and community groups and especially the contributions that can be made by youth and women's groups.[13]

The above provisions recognize the importance of public participation in the sustainable development paradigm. They also acknowledge the peculiar socio-cultural nature of Nigeria's pluralistic society by aiming to promote participation through 'community-based' approaches as well as mass and folk media.[14] The role of the NGOs, youth and women that are at the forefront of environmental protection activities in the Niger Delta are also expressed in the Policy. Incidentally, youth and women groups are now at the forefront of environmental protection in the face of oil exploration and production in the Niger Delta region.[15]

[13] See section 4 of the National Policy on the Environment.

[14] The express mention of these various modes of communication is expectedly to ensure active public participation particularly in the rural areas where the level of literacy is low.

[15] Refer to section 6.2.3 below.

The fifth section of the Policy provides for the institutional and intergovernmental arrangements to promote the harmonious management of the policy formulation and implementation processes. These include suggestions for the establishment of a Federal Environmental Protection Agency to be responsible for environmental protection and management programmes. It also suggests the establishment of a Federal Ministry of Environment, in due course, in recognition of the over-riding importance of the environment in the life of the nation. Other recommendations include the harmonization of existing legal provisions on the environment and promulgation of new 'appropriate' laws; and, the elevation of environmental protection and the aspiration to have a safe and healthy environment as a constitutional duty for government.[16] The concluding section of the Policy proposes the means successfully to monitor and evaluate its overall goals. It draws a nexus between social justice, self-reliance and sustainable development which it lists as relevant factors towards ensuring that all sectors are involved in the implementation of policy in an integrated and coherent manner.

The Policy has had some significant impacts on the institutional and regulatory framework for environmental protection in Nigeria including the creation of FEPA in 1988[17] and a Federal Ministry of Environment in June 1999.[18] The Policy also laid down the foundation

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[16] See section 6 of the National Policy on the Environment. This also includes the promulgation of laws to ratify international treaties on the environment to make them part of national law.

[17] FEPA Decree No. 58 of 1988.

[18] Presidential Directive Ref. No. SGF.6/S.221, of October 12, 1999. The Federal Environmental Protection Agency was subsumed into the Federal Ministry of Environment in 1999 and was responsible for coordinating environmental protection and natural resources conservation including tackling the environmental problems of the Niger Delta. The Federal Environmental Protection Agency has now been scrapped and replaced by the National Environmental Standards and Regulation Enforcement Agency. Refer to section 5.3.5 below.

for other policy guidelines and statements on the environment including the National Agenda 21 (published in 1999) and Vision 2010.[19] The Policy also contributed to the development of a more coordinated approach to environmental protection through legislation to replace the hitherto ad-hoc approach. Based on the provisions of the Policy, one would expect Nigeria to have an environmental protection framework (especially with respect to public participation) worthy of emulation. Yet, concern about environmental pollution is a fundamental reason for the conflicts that plague the oil-industry. The following section highlights key provisions of oil-related legislation with particular reference to the level of public participation in the oil-industry and how these provisions have contributed to the conflicts.

5.3 The Legal Framework Regulating Nigeria's Oil-Industry

A plethora of laws are relevant (in varying degrees) to the oil-industry, but space prevents examination of these in detail. Thus this section concentrates on the laws that most directly influence the relationships between the oil-industry's stakeholders particularly those considered most pertinent to public participation.[20] These are considered in three broad categories, viz: ownership and control of oil resources, compensation and (relevant) environmental laws. The interpretation of these laws and their impacts on stakeholders'

See generally, Nigeria First (Official website of the Office of Public Communications) <http://www.nigeriafirst.org/article_336.shtml> accessed 05 May 2006.

[19] While Agenda 21 is concerned with various cross-sectoral areas of environmental concerns and maps out strategies on how to address them, Vision 2010 highlights the environmental goals Nigeria aims to achieve by the year 2010. The vision is to have a safe and healthy environment that secures the economic and social well-being of the present and future generations including the elimination of oil spillages, gas flaring and oil pollution. See generally, Vision 2010 Report <http://www.vision2010.org/vision-2010/ecology.htm> accessed 22 June 2005.

[20] Refer generally to section 2.4 above for a definition of 'public participation' in this regards.

conflicting interests are a fundamental cause of the violence that besets the industry. It is important to note that Nigeria has a pluralistic legal system. Its laws are made up of the received English law,[21] customary law[22] and statutory laws[23] which all have an impact on the regulation of the oil-industry. Specifically, land law is an area that forms part of the oil-industry's regulatory framework where the plurality is evident. Customary law still has a strong influence on the perception of landholding and consequently, compensation, despite statutory provisions. This is more so since most oil operations take place in rural areas where customary laws and practice still regulate the affairs of its inhabitants. The divergence in this area of law generates different opinions and expectations regarding the rights and responsibilities that each of the industry's stakeholders expect from the other. The statutory provisions are discussed in the following three sub-sections.

5.3.1 Ownership and Control of Oil Resources

The ownership and control of oil (and consequently, oil-revenues) is legally vested in the Federal Government of Nigeria. The history of government ownership of the resource dates

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[21] English laws comprise of common law principles, the doctrines of equity and statutes of general application in force in England on January 1, 1900; and, statutes of subsidiary legislation on specified matters and English law made before October 1, 1960 and introduced to Nigerian law by English legislation which have not been repealed by the appropriate authority after independence.

[22] Customary laws applied (and continue to apply) essentially between people of the same tribe subject to the satisfaction of the rules of natural justice, equity and good conscience and compatibility with the law for the time being in force. For an in-depth discussion on customary law in pre and post-colonial Africa, see A Yakubu, 'Colonialism, Customary Law and the Post-Colonial State in Africa: The Case of Nigeria' (2003) 30 *Africa Development* 4, 201 –220.

[23] See generally, A Obilade, *The Nigerian Legal System* (Sweet and Maxwell, London 1979). See also, A Allott, 'The Future of African Law' in H Kuper and L Kuper (eds.), *African Law Adaptation and Development* (University of California Press, Berkeley 1965) 220-221.

back to colonial periods when the Crown owned the resource. Early laws regulating the ownership of oil include the Mining Regulation (Oil) Ordinance of 1907.[24] Section 5 provided that: 'It shall be lawful for the Governor to enter into an agreement with any Native Authority for the purchase of full and exclusive rights in and over all mineral oils within and under any lands which are the property of any Native Community'.[25] Section 16 of the Ordinance granted the natives the rights to land for 'gathering firewood, hunting, using water, farming or any other rights… if and so long as such right can and shall be exercised without interfering with the rights conferred upon the holder of the license.' Though this Ordinance did not expressly vest ownership in the Crown, it conferred the exclusive rights to exploit it on upon the Crown. This position remained the same under the Mineral Oils Ordinance of 1914 which also regulated the right to search for, win and work mineral oils without expressly containing provisions on the ownership of oil resources. Amendments to the Ordinance in 1916 vested the ownership of oil in the Crown. The Minerals Act replaced this Ordinance in 1945 and reaffirmed this position. Section 3 of the Minerals Act stated:

> The entire property in and control of all mineral oils in, under or upon any lands in Nigeria, or of all rivers, streams and water courses throughout Nigeria is and shall be vested in the Crown [State], save in so far as such rights may in any case have been limited by any express grant made before the commencement of this Act.

Further amendments in 1950 and 1959 vested the Crown (State) with the absolute right and control over the colonial state's oil resources whether onshore and offshore. The Republican Constitution of 1963 vested the Federal Government with all properties (including oil) previously held by the Crown. Section 158(1) stated thus:

> all 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;

[24] C.O. 588/ 2: Southern Nigeria Certified Ordinances, 1906-1907

[25] See section 5 of the Mining Regulation (Oil) Ordinance of 1907.

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

Since this Constitutional provision vested all properties hitherto held by the Crown in the Federal Government, the ownership of oil resources has expressly been legally vested in the Federal Government, whether civilian or military.[26] Specifically, the Petroleum Act states that the ownership and control of oil resources is the exclusive preserve of the Federal Government. Section 1 provides:

> (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.[27]

Without rehashing provisions of several other laws and decrees made by subsequent governments on the ownership and control of oil resources in Nigeria, it is suffice to state that the position of the law on the subject has remained unchanged. Section 44(3) of the 1999 Constitution states in this regard that:

> 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 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.

In essence, since the colonial government appropriated oil resources to the Crown, the precursor to the Nigerian State, oil resources have remained under the exclusive ownership

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[26] K Ebeku, 'Oil and the Niger Delta People: the Injustice of the Land Use Act' (2001) 9 *CEPMLP Internet Journal* 14 <www.dundee.ac.uk/cepmlp/journal/html/article9-14html> accessed 28 July 2003.

[27] Some of these other Decrees include the Land Use Decree of 1978, the Exclusive Economic Zone Decree No. 28 of 5 October 1978, the Lands (Title Vesting etc.) Decree No. 52 of 1993 (Osborne Land Decree), and the National Inland Waterways Authority Decree No. 13 of 1997.

and control of the central government. A corollary of State ownership and control of the resource is that the State distributes revenues derived from the resource. With the Federal Government solely possessed of the ownership and control of oil, participation of the host-communities in terms of receiving benefits from the industry is limited to revenue allocation. The next section discusses the laws that regulate the allocation of oil-revenues.

5.3.2 Laws Regulating the Allocation of Oil Revenues

The Constitution regulates the allocation of federal revenue, which includes oil-revenue, among the federating states of the nation under a prescribed formula. Factors including a state's population, land mass and terrain, derivation, fiscal autonomy, internal generated revenue, national integration, social development factor, need, and equality[28] are considered in the determination of the revenue allocation formula. This method of revenue allocation initiated while Nigeria was a British colony has been controversial since its inception and it has sparked off more constitutional, political and legal controversies than any other issue in the country.[29] The influx of oil revenues into the Federation Account has made revenue allocation even more contentious. Oil-bearing states have contended that revenue allocation, and specifically derivation, has been essentially a political rather than an economic tool with them suffering the worse of it.[30] Derivation, which is the major bone of discontent in contemporary revenue allocation is a form of compensation for the loss in revenue or other economic activities through utilization of the land of governments (or communities) for

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[28] See generally, section 162(2) CFRN 1999.

[29] J Udeh, 'Petroleum Revenue Management: The Nigerian Perspective', Oil, Gas, Mining and Chemicals Department of the WBG and ESMAP Workshop on Petroleum Revenue Management Washington, DC, October 23-24, 2002.

[30] D Dafinone, 'Resource Control: The Economic & Political Dimensions', (Article) Urhobo Historical Society website <http://waado.org> accessed 22 June 2005.

national resource generation.[31] The main issue in distribution of oil-revenues is related to the (in)adequacy of derivation paid to the oil-bearing states of the federation. The historical development of revenue allocation with emphasis on the derivation principle is analyzed to reveal why it is a source of conflicts.

From the inception of revenue allocation, derivation was set at 100 per cent. Thus, revenue derived from mining, rent and royalties belonged exclusively to the region of origin. It was reduced to 50 per cent in 1958 by the Raisman Commission after the discovery of oil in commercial quantities in 1957 and to 45 per cent in 1970.[32] Further reductions to the derivation followed in 1971 after the government made a distinction between onshore and offshore oil.[33] The Federal Government abrogated all royalties, rents and other revenues from offshore production, thereby denying oil-bearing states revenue from offshore oil[34] and further reduced derivation from on-shore revenue to 20 per cent in 1973 despite the oil-boom.[35] It is noteworthy that there is a correlation between the reductions in derivation

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[31] R Ako, 'Resource Control or Revenue Allocation: the Path to Sustainable Development in the Nigerian Oil Producing Communities' 35th Annual Conference of the Nigerian Society of International Law , 23–25 June 2005, Asaba, Nigeria. Derivation can also be put in place usually in rent for the use of land and/or payment for exploiting mineral from the land – [that] is royalty. See the Report of the Constitutional Conference Debates 1994-1995, vol. III submitted to the Federal Government of Nigeria, Abuja, Nigeria.

[32] Constitution Distributable Pool Account Decree No.13 of 1970.

[33] See the Offshore Oil Revenues Decree No. 9 and the Territorial Waters (Amendment) Decree No. 38 made a clear distinction between onshore and offshore oil resources. In 1978, the FMG promulgated the Exclusive Economic Zone Decree No. 28 that reiterated exclusive control of offshore resources in the Federal Government.

[34] S Oyovbaire, 'The Politics of Revenue Allocation' in K Panter- Brick (ed.) *Soldiers and Oil: The Political Transformation of Nigeria*, (Frank Cass, London 1978) 226-229.

[35] Constitution (Financial Provisions, Etc.) Decree No. 6 of 1975.

percentages and relative increases in the volume of crude oil produced, the sale price and consequently total revenues that accrued to the State.[36] In 1981, the Federal Government passed the Allocation of Revenue (Federation Accounts) Act which purportedly reviewed the revenue allocation formula reduced derivation to 5 per cent. Two-fifths of the 5 per cent derivation fund was to be paid directly to the states in direct proportion to the value of minerals extracted from their areas and the rest was to be paid in to a special fund to be administered by the Federal Government for the development of the mineral producing areas.[37]

The legality of the Allocation of Revenue (Federation Accounts) Act was challenged in *Attorney-General Bendel State v Attorney-General Federation*[38] wherein the plaintiffs sought, *inter alia*, and obtained a declaration that the Act was not an Act of the National Assembly and that its provisions regarding the division of public revenue between the Federation and the states of the federation were unconstitutional, null and void, and of no effect. A new Allocation of Revenue Act was passed in 1982 which reduced derivation to 2 per cent and allocated 1.5 per cent of derivation for the development of mineral-producing areas.[39] This Act was amended by the military government via the Allocation of Revenue (Federation Account) Amendment Decree in 1984.[40] The Decree retained the 1.5 per cent set aside for the development of mineral producing states and allocated 2 per cent of the 32.5 per cent allotted to the states of the federation directly to the mineral producing states in direct

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[36] J Frynas, *Oil in Nigeria: Conflict and Litigation between Oil Companies and Village Communities* (Transaction Publishers, New Brunswick 2000) 17.

[37] See Sections 1-4 of the Allocation of Revenue (Federation Accounts) Act of 1981.

[38] (1982) 4 NCLR 178.

[39] See sections 1, 2(2) and 2(4) of the Allocation of Revenue Act No. 1 of 1982.

[40] See the Allocation of Revenue (Federation Account) Amendment Decree No. 36 of 1984.

proportion to the value of minerals extracted from such states. In 1992, further amendments were made to revenue allocation.[41] The fund to develop the mineral producing states was doubled to 3 per cent;[42] 1 per cent of the revenue accruing to the federation account derived from minerals was to be shared among the mineral-producing states in proportion to the amount of mineral produced from each state[43] and the abolition of the onshore and offshore dichotomy was re-affirmed.[44]

Following the return to democratic governance in 1999, constitutional provisions once again regulated revenue allocation. Section 162(2) of the Constitution provides that derivation must be 'at least 13 per cent'. The percentage may be increased in accordance with the provisions of the section but not reduced.[45] In the absence of an Act of the National Assembly prescribing a revenue allocation formula in line with section 162 at the onset of the

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[41] See the Allocation of Revenue (Federation Account) (Amendment) Decree No 106 of 1992.

[42] See particularly, section 4A (2) of the Allocation of Revenue (Federation Account) Amendment Act No. 106 of 1992. The money was allocated directly to the Oil Mineral Producing Areas Development Commission (OMPADEC) that was created in 1992 to 'address the difficulties and sufferings of inhabitants of the oil-producing areas of Nigeria' that had been compounded by the impacts of the Structural Adjustment Programme (SAP) the government had adopted to address national economic maladies. See generally, section 2 of the Oil Mineral Producing Areas Development Commission (OMPADEC) Decree No. 23 of 1992. See also, I Okonta and O Douglas, *Where Vultures Feast: Shell, Human Rights, and Oil* (Sierra Club Books, San Francisco 2001) 33.

[43] See particularly, section 4A (6) of the Allocation of Revenue (Federation Account) Amendment Act No. 106 of 1992.

[44] See particularly, section 4A (3) of the Allocation of Revenue (Federation Account) Amendment Act No. 106 of 1992.

[45] The President may, on advice of the Revenue Mobilization Allocation and Fiscal Commission (RMAFC), table proposals for revenue allocation before the National Assembly for approval.

democratic regime, there was uncertainty regarding the formula that would apply. Section 313 of the Constitution which provides that for this eventuality states that the system of revenue allocation in existence for the financial year beginning from 1st January 1998 and ending on 31st December 1998 was to be applied. Thus, the Allocation of Revenue (Federation Account etc) Act[46] as amended by Decree 106 of 1992 would continue to suffice in the interim. However, the provision of Decree 106 that proscribed the onshore/offshore dichotomy was inconsistent with section 44(3) of the Constitution that made a clear distinction between onshore and offshore oil. The disparity in these legal provisions and the possible effects on revenue allocation led to agitation particularly in the oil-bearing regions that believed they were being cheated. The Supreme Court had to determine the validity of the legal revenue allocation formula in *Attorney-General of the Federation v Attorney-General of Abia State and 35 Ors*.[47] Without going into the intricacies of the case, the Court decided that the Federal Government owned offshore oil resources.[48] This decision resuscitated the controversial 'Offshore Decree'[49] that had been abolished in 1992. Consequently, oil-bearing states were not entitled to receive revenues from offshore oil

[46] Cap 16 LFN 1990.

[47] (2000) 96 LRCN 559. The case is popularly referred to as the ''Resource Control Suit' and sometimes as the 'Offshore Boundary Limitation Case'.

[48] *Attorney-General of the Federation v Attorney-General of Abia State and 35 Ors* (2000) 96 LRCN 559, 595–597. The issues in the case were complex and far-reaching as it determined many other ancillary issues some of which are not of direct import in this dissertation. However, reference will be made to some of the issues as are deemed relevant in later sections. See generally, E Egede, 'Who Owns the Nigerian Offshore Seabed: Federal or States? An Examination of the *Attorney-General of the Federation v Attorney-General of Abia State & 35 Ors* Case', (2005) 49 *Journal of African Law* 1, 73-93.

[49] Offshore Oil Revenues Decree No. 9 of 1971.

thereby drastically reducing revenues to some states. The Court also ordered states that had received 'derivation' payments from offshore oil-revenues to refund them.

The court's decision sparked fresh protests in the Niger Delta. To forestall chaos amidst fears that further violence would mar then upcoming elections, the Federal Government opted for a political resolution of the issue. Eventually, a new revenue allocation law – the Allocation of Revenue (Abolition of Dichotomy in the Application of Derivation) Act 2004 – that recognized the rights of states to benefit from offshore resources replaced the Supreme Court's ruling. It is important to observe that barely six months after the Act was passed, non oil-bearing states challenged the constitutionality of the 2004 Allocation Act.[50] From the history of revenue allocation in Nigeria highlighted above, it is indisputable that revenue allocation (particularly derivation) has been haphazard over time with the oil-rich states being the worse off, despite substantial increases in oil production and revenue figures. It is argued that the military interregna made it easier to alter the allocation formula[51] arguably in favour of the Northern states despite being devoid of oil. Agbowu in his analysis of allocation of oil revenues in Nigeria observed that before 1966, Northern Nigeria received 12.6 per cent of oil-revenues while Southern Nigeria received 67.4 per cent and the Federal Government, 20 per cent.[52] After the military took over in1966, oil-revenue was shared for approximately 20 years in the following order: North - 54 per cent; East – 22 per cent; West – 18 per cent and Mid-West (core Niger Delta area) – 6 per cent.[53] Even more pertinent at this point is his

[50] The case is still before the Supreme Court.

[51] B Onimode, 'Fiscal Federalism in 21st Century: Options for Nigeria', International Conference on New Directions in Federalism in Africa, Organized by the African Centre for Democratic Governance Abuja, March 15-17, 1999, 7.

[52] D Agbowu, *Nigeria: The Truth* (Bajot Publishing LLC, Greenville 2006) 159.

[53] *D Agbowu* (n 52) 159-160.

observation that this formula led to the restiveness in the region.[54] A major source of complaint was that the region that bears the oil and suffers the adverse consequences of its exploitation ought to receive more in derivation than it has since the discovery of oil. The perception in the area is that what the region receives in derivation over the years is a consequence of its minority status in Nigeria. The inability to influence a change by the political process has led to the reliance on violent means to gain attention. The return to democratic governance in May 1999, witnessed increased agitation for an upward review of the derivation percentage, the clamour for resource control and as well as an upsurge in violence[55] following further failures to exert political influence to amend the revenue formula.[56]

5.3.3 Laws Regulating Landholding

Landholding is an important aspect of oil operations in Nigeria. It determines access to land for oil operations and secondly, compensatory claims relating to damage to land during oil operations. The Land Use Act[57] is the principal enactment that regulates land ownership in Nigeria. Portions of the Act relevant to public participation in the oil-industry are highlighted in this section to reveal the links with the conflicts that have embroiled the industry. The

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[54] *D Agbowu* (n 52) 159-160.

[55] M Ameh, 'Ownership and Control of Mineral Resources: Can the Brazilian Model Be Used to Douse Resource Control Agitation in Nigeria's Oil Producing States?' *CEPMLP Internet Journal* <http://www.dundee.ac.uk/cepmlp/car/html/CAR10_ARTICLE37.PDF> accessed 23 January, 2008.

[56] A National Political Reforms Conference was held in 2005 to discuss issues of national importance. One of these was the issue of revenue allocation. The representatives of the Niger Delta attended the Conference with a clear mandate to achieve an increase in 'derivation'. See chapter 6 below for a detailed exposition.

[57] Chapter L5 Laws of the Federation of Nigeria 2004. It was originally promulgated as the Land Use Decree No. 6 of 1978.

main objective of the Act expressed in section 1 is to vest absolute ownership of land in the government. It states:

> Subject to the provisions of this Act, all land comprised in the territory of each State in the Federation are hereby vested in the Governor of that 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.[58]

This provision, and indeed the entire Act changed the structure of land ownership in Nigeria; particularly southern Nigeria, where land was previously held communally.[59]

The legal principle of customary land tenureship was recognized by the Privy Council in the *locus classicus* of *Amodu Tijani v. Secretary, Southern Nigeria*[60] where the Council stated *inter alia*:

> The next fact which it is important to bear in mind in order to understand the native land law is that the notion of individual ownership is quite foreign to native ideas. Land belongs to the community, the village or the family, never to the individual. All the members of the community, the 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 a loose mode of speech is sometimes called the owner. He is to 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 it to cultivate or build upon, goes to him for it. But the land still remains the property of the community or family. He cannot make any important disposition of the land without consulting the elders of the community or family, and their consent must in all cases be given before a grant can be made to a stranger.

It is noteworthy that in that case, the Privy Council held that the simple assertion of British sovereignty did not, and could not, serve to extinguish the legal rights of the Aboriginal people to their traditional territories. It asserted further that although Aboriginal title to land could be extinguished by the sovereign Crown, any such extinguishment would normally

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[58] All lands in urban areas are under the control and management of the State while other lands are under the control and management of the Local Government, within the area of jurisdiction of which the land is situated. See particularly, section 2(1) (a) and (b) of the Land Use Act.

[59] A Allott, 'Nigeria: Land Use Decree, 1978' (1978) 22 *Journal of African Law* 2, 136.

[60] [1921] 2 AC 404.

require some degree of Aboriginal involvement to be lawful and effective.[61] In essence, public participation is a necessary element of extinguishment of legal rights to land. Returning to the issues of land ownership under the Land Use Act, the true intent of the Act remained controversial for over a decade till the decisions of the Supreme Court in *Makanjuola v Balogun*[62] and later *Abioye v Yakubu.*[63] The Court held in the latter case that:

> (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 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).[64]

In essence, the Act transferred ownership, control and management of lands hitherto vested in the family or community to the state governments. This alteration has had peculiar impacts on the oil-rich Niger Delta region. This section specifically highlights the impacts that contributed to the exclusion of the public from active participation in the industry and its consequences that include violent conflicts.

First, the Act abrogated the host-communities legal control over the activities of the oil-industry within their communities. In Nigeria, mineral resources are excluded from the

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[61] K Lochead, 'Whose Land is it Anyway? The Long Road to the Nisga'a Treaty' in R Campbell (eds) *The Real Worlds of Canadian politics: Cases in Process and Policy* (4th edn Broadview Press, Peterborough, ON. 2004) 283.

[62] (1989) 5 SC 82.

[63] (1991) 5 NWLR (Part 190), 130.

[64] For a detailed analysis of some of the previous inconsistent decisions regarding the main intent of the Land Use Act, see *K Ebeku* (n 26). See also, L Agbosu, 'Extinction of Customary Tenancy in Nigeria by the Land Use Act: *Akinloye v Ogungbe*' (1983) 27 *Journal of African Law* 2, 188-195.

definition of 'land'.[65] In other words, prior to the Land Use Act, while the Government owned the oil, ownership of land was vested in the communities. Consequently, to exploit the resource, an oil-company had to obtain permission from both the Government (oil mining licence or lease) and liaise with the host-communities on the extent their operations before entering upon the land. With ownership of land transferred to the Government, it now has the exclusive preserve to grant legal rights to a company to exploit oil. In essence, the Land Use Act completed the Government's comprehensive ownership, control and management of oil resources even though Ayodele-Akaakar avers that the assumption of ownership reached its full scale earlier in 1971 with the promulgation of the Offshore Oil Revenue Decree.[66] It is more plausible to contend that the Land Use Act was the final act of absolute ownership because though the Offshore Oil Revenue Decree abrogated the rights of the regions (states) to the minerals in their continental shelves, it did not completely preclude the oil-communities from holding legal rights (to land) in the oil-industry.

Secondly, the Act legitimized the appropriation of land from its occupiers for 'overriding public interests' that included 'the requirement of the land for mining purposes or oil pipelines or for any purpose connected therewith.'[67] In other words, in reality the inhabitants of the oil-rich Niger Delta are temporary occupiers of land they occupy as they could be legally displaced to allow oil exploitation. This is contrary to customary landholding practices that are possibly as old as the tribes themselves. Landholding in rural areas is an integral part of traditional identification and allegedly serves as a spiritual link to tribal and

[65] See section 18 of the Interpretation Act, Chapter I23 Laws of the Federation of Nigeria 2004.

[66] F Ayodele-Akaakar, 'Appraising the Oil & Gas Laws: A Search for Enduring Legislation for The Niger Delta Region' (Article) <http://www.jsd-africa.com/Jsda/Fallwinter2001/articlespdf/ARC%20-%20APPRAISING%20THE%20OIL%20and%20Gas.pdf> accessed 09 March 2006.

[67] See generally section 28 of the LUA.

personal ancestry. Thus appropriating such lands from the indigenous population dispossess them of their basic means to economic survival ('distribution') and cultural identity ('recognition').[68] It is noteworthy to recount the Privy Council's decision in *Tijani's Case* that public involvement is a compulsory component in the 'effective and lawful' appropriation of land from its original owners.[69] This issue, from the Deltans viewpoint is further aggravated by the derisive compensation regime established by the Land Use Act.[70] These combinations of factors have contributed to the restiveness and consequent violence against the oil-industry because the industry is regarded as a combination of economic opportunists interested only in profit while depriving the indigenous population of their cultural identity, livelihood and desecrating their spiritual existence.

An incidental consequence of the Land Use Act that has contributed to the outbreak of violence in the Niger Delta is its erosion of traditional authority. Power in the traditional sense was inextricably linked to land as evidenced by customary land tenure practices. Traditional authorities[71] were responsible for the allocation of land and matters incidental thereto including conflict resolution arising from land ownership and use, as well as compensation. This loss of authority created a lacuna in the traditional means of exercising control over the community particularly among the youths that have become very militant.[72] As Umar notes, land conflicts are proving more difficult to solve because local institutions

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[68] Refer to section 4.4.2 above.

[69] *Tijani's case* (n 60).

[70] The compensatory regime is discussed in detail in the following section 5.3.4 below.

[71] These include family heads, the village headman, chiefs or, and kings.

[72] For an exposition on youths and the rise of violence in the Niger Delta, see, C Ukeje, 'Youths, Violence and the Collapse of Public Order in the Niger Delta Region of Nigeria' (2001) 36 *Africa Development* 2, 337-366.

have largely lost their authority and few institutional innovations have been developed.[73] Aluko and Amidu however argue that any attempt to eliminate the traditional authority's input into land management will create confusion in land management.[74] According to Waboke, the land use system in Nigeria is the 'sacred source of all the conflicts and crises that have bedevilled the Niger Delta region of Nigeria'.[75] It has left in its wake, conflicts and crises in the relations between government and the people, ethnic groups, communities and multinational companies; regions and the Federal Government and a host of ethnic conflicts in the nation-building process, swelling up recently into threats of violent rebellion against the Nigerian State by the Niger Delta Peoples Volunteer Force which was asking for self-determination for the Ijaws or the convocation of a Sovereign National Conference.[76] Interestingly, Shell notes that the increasing militancy in the Niger Delta (linked to the Land Use Act) is overthrowing traditional social order in those communities.[77] In essence, the Act has not only initiated a myriad of problems that contribute to violent conflicts in the Niger Delta but also stemmed traditional authority in land matters that is arguably a veritable means to manage them.

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[73] See generally, B Umar, 'The Pastoral-Agricultural Conflicts in Zamfara State, Nigeria' (Article) <http://conference.ifas.ufl.edu/ifsa/posters/Umar.doc> accessed 02 February 2008.

[74] B Aluko and A Amidu, 'Women and Land Rights Reforms in Nigeria', Promoting Land Administration and Good Governance 5th FIG Regional Conference Accra, Ghana, March 8-11, 2006, TS9.4, 9-10.

[75] E Waboke, 'Against Land Use Decrees' (2005) <www.dawodu.com/waboke1.htm> accessed 29 January, 2008.

[76] *E Waboke* (n 75) See also, *K Ebeku* (n 26).

[77] *C Ukeje* (n 72) 342.

5.3.4 The Compensation Regime

The oil-industry's compensation regime is regulated both by statutory law and Common Law. This section reveals the shortfalls of the compensation regime that regulates Nigeria's oil-industry. The argument in a nutshell is that the inhabitants of the region are denied access to adequate compensation by the legal framework regulating compensatory awards. Compensation in the oil-industry may be categorized under two broad headings. The first is for land-take that depicts the process of land acquisition prior to oil activities while the second is in consideration for the adverse socio-economic and environmental effects the oil-industry has on tits host-communities. This section argues that generally, the difficulties and consequent failure to receive adequate compensation due to the difficulties in satisfying statutory and judicial requirements to proof liability of the oil-companies contributes to the angst of the communities already aggrieved by earlier negative effects the industry has on their lives. Consequently, they are encouraged to seek alternative means to receive settlements they believe they are entitled to. It is common for communities to initiate court proceedings and engage in negotiations with the companies and have recourse to extra-legal means concurrently to increase their chances of settlement.[78] These extra-legal activities include hijacking oil-company equipments, staff and installations. In many instances, law enforcement officers are invited to prevent such acts or retrieve the hijacked persons or things which result in violent clashes. The first part of this section concentrates on relevant statutory provisions while the second discusses the relevant Common Law principles.[79]

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[78] Personal experience as well as information deciphered from discussions with lawyers that represent both the oil-bearing communities and the oil-industry.

[79] There are several dimensions to the role of compensation in violent conflicts in the Niger Delta but this thesis concentrates on the role of legal provisions in particular. For a more general critique of the role of compensation in violence in the Niger Delta, see A Ikelegbe, 'The Economy of Conflict' (2005) 14 *Nordic Journal of African Studies* 2, 208–234.

5.3.4.1 The Statutory Regime Regulating Compensation

The 1999 Constitution is the main law that regulates compensation in Nigeria. Section 44 provides that:

> (1) No moveable property or any interest in an immovable property shall be taken possession of compulsorily and no right over or interest in any such property shall be acquired compulsorily in any part of Nigeria except in the manner and for the purposes prescribed by a law that, among other things -
>
> (a) requires the prompt payment of compensation therefore 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 of law or tribunal or body having jurisdiction in that part of Nigeria.

Compensation for oil is however exempt from this provision as section 44(3) reiterates that the absolute ownership of 'all minerals, mineral oils and natural gas' is vested in the Federal Government of Nigeria.

Prior to the 1999 Constitution quoted above, the provisions of the Land Use Act dictated the oil-industry's compensation regime. With regards to compensation for land appropriated for oil purposes,[80] section 29(2)(b) of the Act provides that the occupier of land acquired for mining purposes is entitled to compensation in accordance with the provisions of the Petroleum Act. The Petroleum Act provides that holders of oil exploration licenses, oil prospecting licenses or oil mining leases pay 'fair and adequate compensation for the disturbance of surface or other rights' to the owner or occupier of the licensed or leased land.[81] 'Surface rights' include economic improvements on land such as economic trees,

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[80] Section 28(3)(b) Land Use Act.

[81] See, the First Schedule, section 36 of the Petroleum Act. Section 77 of the repealed Minerals Act contained provisions similar to the Petroleum Act. It provided that any person prospecting or mining shall pay to the 'owner or occupier' 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,

crops, private fishponds and houses but excludes allodial rights, future earnings and loss of use of the land. Consequently, an occupier of land for farming purposes for instance would be compensated only at the value of his economic crops at the time the land was appropriated and not for his loss of use of such land for future farming purposes or his expected future earnings farming activities on the land. The Land Use Act also exempted the courts jurisdiction from the determination of cases regarding land appropriation for oil-related activities and the adequacy of compensation.[82] Section 47(2) states in this regard 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'. Where a dispute arises regarding the adequacy of compensation in accordance with section 29, the Land Use and Allocation Committee is to resolve it.[83] It is important to note that this Committee is under the direct control of state governors who select members to the committee[84] and regulate its proceedings.[85]

Thus the Government was both a party and final arbiter in oil-related land appropriation disputes. This provision was valid until the May 1999 when the present Constitution became effective. By virtue of section 274(5) of the 1979 Constitution, any law that referred compensation disputes to the courts for adjudication was to be considered inconsistent with the Land Use Act and consequently, unenforceable.[86] However this position has been

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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.

[82] See generally section 28 and 29 of the Land Use Act.

[83] See section 2 of the Land Use Act.

[84] See section 2(3) of the Land Use Act.

[85] See section 2(4) of the Land Use Act.

[86] One of such examples is section 20 of the Oil Pipelines Act.

reversed under the 1999 Constitution. Section 44(1)(b) of the 1999 Constitution provides any person claiming compensation for moveable property or interest in immovable property 'a right of access for the determination of his interest in the property and the amount of compensation to a court of law or tribunal or body having jurisdiction in that part of Nigeria.' Consequently, the authority of the Land Use and Allocation Committee to determine the quantum of compensation payable under the Act is now subject to judicial review. Clearly, before 1999 the law denied aggrieved communities and individuals access to the courts to adjudicate on the fairness of compensatory awards. As a result, there are several instances where aggrieved persons hijacked equipment or, and staff of oil-companies for ransom for figures believed to be reasonable for whatever perceived damages had been suffered.[87] In some instances, the ransom requested was paid while in others, the law enforcement agents were invited to rescue the seized equipment or staff. Unfortunately, sometimes reprisal kidnapping of indigenes from the aggrieved communities were carried out and hostages traded subsequently. At other times, the police (or armed forces) employ aggressive methods to attempt a resolution of outstanding issues and thereby aggravate the already tense situation.

Compensation during oil exploitation is regulated by different laws. The Oil Pipelines Act[88] contains some provisions to this effect. Section 11(5) provides that:

> The holder of a licence shall pay compensation –
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> 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 licence, 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 licence, for any such damage not otherwise made good; and

[87] *A Ikelegbe* (n 79) 217.

[88] Chapter O7 Laws of the Federation of Nigeria 2004.

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 of or leakage from the pipeline or an ancillary installation, for any such damage not otherwise made good.

If the amount of such compensation is not agreed between any such person and the holder, it shall be fixed by a court in accordance with Part IV of this Act.

Under the provisions of this Act, any person may claim compensation for damage done to the 'improvements on land';[89] disturbances caused by the holder of the licence;[90] damages suffered by any person due to the negligence of the holder or his agents[91] or as a consequence of leakage or breakage from the pipeline or ancillary installation[92] and for the loss (if any) in the value of the land or interests in land.[93] Section 20(3) stipulates how the amount of compensation for loss in value of land or interest in land is to be determined. It states:

> In determining the loss in value of the land or interest in land of a claimant the court shall assess the value of the land or the interests injuriously affected at the date immediately before the grant of the licence and shall assess the residual value to the claimant of the same land or interest consequent upon and at the date of the grant of the licence and shall determine the loss suffered by the claimant as the difference between the values so found, if such residual value is a lesser sum.

Clearly, compensation for the loss in value of land or interest in land is intended to be calculated strictly on the basis of 'improvements on land' as prescribed by the Land Use Act whose provisions are overriding in the determination of compensation.[94] In other words, other losses such as of use and enjoyment of the land and future earnings are not considered in the award of compensation. These limits to the amount of compensation also contribute to the

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[89] Section 20(2)(a) of the Oil Pipelines Act.

[90] Section 20(2)(b) of the Oil Pipelines Act.

[91] Section 20(2)(c) of the Oil Pipelines Act.

[92] Section 20(2)(d) of the Oil Pipelines Act.

[93] Section 20(2)(e) of the Oil Pipelines Act. See also, section 20(1) that refers to compensatory awards made for claims in made under the provisions of section 6(3) of the Act.

[94] See particularly Section 20(5) of the Oil Pipelines Act.

frustration and resultant violence in the Niger Delta. As Epia noted that 'the recent hostage crisis which ravaged the Niger Delta and put an undesirable stain on Nigeria's image on the international spotlight introduces another dimension to the problems of an area in search of compensation for neglect...'[95]

This section revealed that prior to May 1999, the courts were exempt from determining the adequacy of compensation for land in the course of oil exploration and production. The government appointed and regulated Land Use and Allocation Committee was not subject to judicial review thereby impeding the inhabitants' right to access justice. Furthermore, the legal regulations governing the award of compensation limited compensatory awards to improvements made on land without considering other incidental losses such as loss of the use of land or possible future earnings therefrom. In the Niger Delta region where land scarcity exists partly due to its topography, the compensation regime aggravates the situation due to its shortfalls discussed above. The absence of legal avenues to resolve issues of dispute has encouraged the resort to extra-legal means. A recent decision on compensation such as *Farah's case* where substantial compensation was awarded to the plaintiffs is more likely to encourage other aggrieved members of the Delta communities to seek justice through the courts rather than seek recourse to extra-legal means.

5.3.4.2 Common Law Principles

Common law principles are an integral part of Nigerian law in general[96] and the oil-industry's regulatory framework in particular. They include the torts of nuisance, negligence and the

[95] O Epia, 'Niger Delta: A new dimension to crisis' Thisday Newspapers (Lagos), 16 February 2006.

[96] The history of the Common Law as a source of Law in Nigeria dates back to its official introduction into the colony of Lagos in 1863 by the British colonial administration, through Ordinance No. 3 of that year. The

rule in *Rylands v. Fletcher*.[97] The reliefs available under these torts include compensation; injunction against the offensive action; or, specific performance to clean-up of the impacted environment. However, compensation which is the usual remedy for torts[98] is the main focus of this section. This section analyzes the compensation regime through decided cases and highlights particularly the difficulties that the plaintiffs encounter in proving their cases. It is argued that these encumbrances reduce the confidence aggrieved host-communities have in the legal system to compensate their losses and encourage them to seek alternate means to receive reparation.[99]

5.3.4.2.1 Nuisance

There are two branches of nuisance namely, private and public nuisance. Though the criteria to determine liability are the same in both classes, the person(s) affected by an act or omission determines its classification into either a private of public nuisance.[100] When the act or omission interferes with, disturbs, or annoys a person in the exercise or enjoyment of his ownership or occupation of land or of some easement profit, or other right, used or enjoyed in connected with land, it is classified as a private nuisance.[101] Where the affected right belongs

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current Nigerian enactments that received English Law include the Interpretation Act Cap. 192 Law of the Federation of Nigeria, 1990, which is in force as a federal law, applicable throughout the Federation. See generally, A Obilade, *The Nigerian Legal System* (Sweet and Maxwell, London 1979) 55. Also, J Asein, *Introduction to Nigerian Legal System* (Sam Bookman Publishers, Ibadan 1998) 92-108.

[97] (1866) L.R. [Ex 265; (1868) L.R.] H.L. 330.

[98] *J Frynas* (n 36) 189. See also, S Awogbade, S Sipasi and O Binuyo, 'Nigeria' in C Perales (ed.) *Getting the Deal Through: Environment 2008 in 26 Jurisdictions* (Getting the Deal Through, 2007) 102.

[99] See section 5.3.4 above.

[100] A Owolabi, 'An Examination of the Legal Framework for the control and Management of Pollution in Nigeria' (2003) 45 *Journal of Indian Law Institute* 1, 59.

[101] Per Eso JSC in *Ipadeola and Another v Oshowole and Another* (1987) 5 SC 376 at. 389.

to the public, it was a public nuisance and actionable only by the Attorney–General of the Federation[102] except the individual could establish the act or omission resulted in him suffering damages over and above other members of the public.[103] A consequence of this distinction was that communities adversely affected by oil operations were unable to maintain actions successfully. In *Chief Amos & Ors (for themselves as individuals and on behalf of the Ogbia Community Brass Division) v Shell-B.P Petroleum Development Company Ltd & Another*[104] for instance, the plaintiffs in their representative capacity claimed special and general damages for injuries suffered as a result of the defendants deliberate blocking of Koko Creek in the course of their petroleum operations. The blockade allegedly paralyzed agricultural and economic activities in the area. The court held that Koko Creek was a public waterway and that its obstruction constituted a public nuisance and since the plaintiff failed to prove any damage suffered over and above that suffered by the general public, their action must fail.[105]

This distinction between private and public nuisance was eradicated in *Adediran & Another v Interland Transport*[106] where the Supreme Court considered the nature of *locus standi* in public nuisance in general terms. Karibi-Whyte, JSC stated in *Adediran's case* that: '[T]he

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[102] Per Nnaemeka Agu, JCA in *Interland Transport Ltd v Adediran and Another* (1986) 2 NWLR (Pt 20) 78 at 87. Any action that falls under the head of public nuisance will be held procedural defective and incompetent if instituted by anyone other than the Attorney-General. See, *Lawani & Ors v West African Cement Company Ltd.* (1973) 3 UILR (Pt IV) at 489.

[103] *Ipadeola & Another v Oshowole & Another* (1987) 1 SC 376, 393; *Adediran & Another v. Interland Transport* (1986) 2 NWLR (Pt. 20) at 85.

[104] (1977) 6 SC 104.

[105] (1977) 6 SC 109.

[106] (1991) 9 NWLR (Pt. 214) 155.

restriction imposed at Common Law on the right of action in public nuisance is inconsistent with the provisions of section 6(6)(b) of the Constitution, 1979 and to that extent is void.'[107] Section 6(6)(b) of the 1979 Constitution which is the same as the provisions of section 6(6)(b) of the 1999 grants the courts judicial powers to adjudicate in 'all matters between persons, or between government or authority and to any persons in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person'. Since the distinction between private and public nuisance was eliminated, there has been a rise in the number of cases where an individual is suing an oil company on behalf of a family or the larger community.[108] It is posited that the previous position of the law regarding the distinction between private and public nuisance deprived communities in the Niger Delta from accessing justice. This inability to institute actions because they fell into the category of 'public nuisance' contributed to the inhabitants' frustration with the legal system particularly because the Attorney-General of the Federation never exercised this authority despite innumerable opportunities. This (in)action (amongst others) substantiates allegations that the Government is sympathetic to the oil-industry over and above the interests of its citizens that inhabit the Niger Delta region.[109]

5.3.4.2.2 Negligence

Negligence in law refers to the breach of a legal duty to take care which results in damage, undesired by the defendant, to the plaintiff.[110] It connotes the complex concept of a duty owed to someone, the breach of that duty and damage suffered as a consequence by the

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[107] *Adesanya v President of the Federal Republic of Nigeria & Another (*1991) 9 NWLR (Pt. 214) 155 at 180.

[108] For examples see, *Shell Petroleum Development Company Ltd. v Tiebo* (1996) 4 NWLR (Pt. 445) 657 and *Farah v Shell* (1995) 3 NWLR (pt 382) 148.

[109] Refer to *Gbemre's case* in section 5.3.5.1 above.

[110] G Kodilinye and O Aluko, *The Nigerian Law of Torts* (2nd edn Spectrum Law Publishing, Ibadan 1999) 182.

person to whom the duty is owed.[111] In essence, for an action to succeed in negligence, the plaintiff must prove that the defendant was careless in the exercise of the specified duty to take care.[112] In *Seismograph Services (Nigeria) Ltd v Mark*[113] the plaintiff claimed compensation for damage done from the destruction of his fishing nets by a seismic boat. The court opined that the boat tearing the nets did not sufficiently prove negligence on the defendant's part. The judge questioned what act or omission amounted to negligence. Said Uwaifo, JCA:

> In the present case, what did the defendants (Seismograph Service) do or fail to do which was the cause of the accident? Did the captain of the vessel engage in excessive speed in navigating her? Did he fail to sound the alarm or did he do so too late to signal her approach? Did the captain fail to keep a proper look out? Did he fail to slow down? Did he navigate at the time of the day he was not expected to?[114]

In the judge's opinion, the plaintiff did not indicate the particulars of negligence. The court found that the plaintiff did not prove that the defendant breached a duty a duty of care towards him.

In *Seismograph Services (Nigeria) Ltd v Ogbeni*,[115] the plaintiff claimed extensive damage was done to his buildings as a result of seismic operations carried out by the defendant/appellant. During the proceedings, an employee of the company gave evidence to confirm that the house did not have the cracks before the shooting operations. However, the court held that the plaintiff's case failed because he could not prove the negligence of the defendants that was not 'within his knowledge'. In other words, the plaintiff did not have the

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[111] Per Kalgo JSC in *Anyah v Imo Concorde Hotels* (2002) 12 SC (Pt 1) 77 at 85.

[112] Lord Atkin in *Donoghue v Stevenson* (1932) AC 562, HL, at 580. See also, *Anyah v Imo Concorde Hotels* (2002) 12 S.C. (pt II) 77 at 85 per Kalgo JSC.

[113] (1993) 7 NWLR (Pt. 304) 203.

[114] Per Uwaifo, JCA at 214.

[115] (1976) 4 SC 85.

requisite scientific knowledge to prove that the defendant's activities could, and, did, have the alleged effect on his building. In *Chinda & Ors v Shell-BP*,[116] the plaintiffs sued the defendant for the heat, noise and vibration resulting from the negligent management and control of the flare set used during gas flaring operations which resulted in damages to their property. The court held that they could not prove any negligence on the part of the defendants in the management and control of the flare site, and therefore their action must fail.[117]

The above cases all reveal that a plaintiff must prove that the defendant breached an accepted standard of behaviour. Consequently in cases, particularly those that relate to actual oil operations, the plaintiffs must prove breach of technical standards that are ordinarily beyond the knowledge of these communities.[118] The difficulty in proving technical details is further compounded by the inability to afford the expenses of hiring technical experts and conducting tests to attempt to prove their cases.[119] Where expert opinion is not adduced in these cases, the court is bound to act on the unchallenged or uncontroverted evidence of the defendant's expert.[120] The absence of any form of legal aid to assist these communities with

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[116] (1974) 2 RSLR 1.

[117] See also *Anthony Atubin v Shell-BP* Suit No. UHC /48/73.

[118] T Osipitan, 'Problems of Proof in Environmental Litigations' in J Omotola (ed.) *Environmental Laws Including Compensation* (University of Lagos, Lagos 1990) 112-115. Also, F Erhonsele, 'The Onus of Proof in Cases of Environmental Degradation in Oil Related Litigations: A Case for Change in Attitude of Nigerian Courts' in L Atsegbua (ed.) *Selected Essays on Petroleum and Environmental Law* (Department of Public Law, Uniben, Benin 2000).

[119] See generally, A Adedeji, and R Ako, 'Hindrances to Effective Legal Response to the Problem of Oil Pollution in the Niger Delta' (2005) 5 *UNIZIK Law Journal* 1, 415-439.

[120] Per Sowemimo JSC in *Seismograph Services Ltd v. Ogbeni* (1976) 4 SC 85.

pursuing such cases that affect their source of livelihood further limits their chances of a fair trial. However these obstacles may be surmounted where the plaintiff relies on the principle of *res ipsa loquitur*; that means literally, the fact speaks for itself.[121] Under this principle, all the plaintiff needs prove is that the thing that inflicted the damage was under the sole management and control of the defendant or of someone for whom he is responsible or whom he has a right to control and that in the ordinary course of event, the injury should not have happened unless there was want of care.[122] Three conditions are required to rely on this principle successfully. First, the plaintiff must prove that the accident occurred. Secondly, he must prove that the occurrence would not have happened 'in the ordinary cause of things without negligence on the part of somebody other than the plaintiff'. Finally, the facts should suggest that the defendant and not the plaintiff were negligent.[123]

In *Mon v Shell-BP*,[124] the plaintiffs claimed compensation for damage from an oil spill. The court deciding in the plaintiff's favour held that: '[N]egligence on the part of defendants has been pleaded, and there is no evidence of it. None in fact is needed, for they must naturally be held responsible for the results arising from an escape of oil which they should have kept under their control'.[125] Fekumo opines that this principle is also applicable if a well blowout causes widespread oil spillage that result in damage to life and property.[126] Clearly, the

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[121] The maxim literally means 'the thing speaks for itself'.

[122] Per Karibi Whyte JSC, in *Aliu Bello and Others v A.G. of Oyo State* (1986) 12 SC 1 at 93-94, Kazeem JCA., in *Lagos University Teaching Hospital v Yemi Lawal* (1982) 3 FNR 184 at 193.

[123] J Frynas (n 36) 191.

[124] (1970-1972) 1 RSLR 71.

[125] Per Holden CJ at 73.

[126] J Fekumo, 'Civil Liability for Damages Caused by Oil Pollution' in J Omotola, (ed.) *Environmental Law in Nigeria Including Compensation* (University of Lagos, Lagos 1990) 271.

principle is easier to apply in incidences of oil spills where damage caused by oil-operations is manifest. Nonetheless, this principle is not an end in itself as the defendant may rebut it by adducing expert evidence to show that he took all reasonable care and acted in accordance with standard industry practice.[127] If the defendant successfully establishes the incident may have occurred without his negligence, the burden of proving negligence shifts back to the plaintiff.[128]

5.3.4.2.3 The rule in *Rylands v Fletcher*[129]

The rule in *Rylands v Fletcher* created the rule of strict liability under common law. The rule formulated by Blackburn J in the Court of Exchequer Chamber and affirmed by the House of Lords arises where:

> a person who for his own purposes, brings on his land, collects and keeps there, anything likely to do mischief if it escapes, must keep it at his peril, and if he does not do so, is prima-facie answerable for all the damages which are the natural consequences of its escape.[130]

It is one of the main instances whereby a person acts at his peril and is responsible for accidental harm independent of the existence of either wrongful intent or negligence. Despite several exceptions to the original rule,[131] Nigerian courts have held that the use of land to lay

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[127] *NEPA v Role* (2000) 7 NWLR (Pt 663) 69.

[128] Morris, LJ in *Roe v Ministry of Health* (1954) 2 All ER 131 at 139. See also, *Shell v Enoch* (1992) 8 NWLR (Pt. 259) 335.

[129] (1868) LR 3 HL 330.

[130] (1868) LR 3 HL 330, 338-340.

[131] The exceptions include the 'non-natural user' exemption introduced by Lord Cairns and the 'reasonability' test introduced by Lord Goff in *Cambridge Water v Eastern Countries Leather* (1994) All ER 53, 69. Scrutton LJ in *Smith and others v Schilling* (1928) LTR 475, 478 opined regarding these exceptions that it is 'doubtful whether there is much left of the rationale of strict liability as originally contemplated in 1866.'

crude oil–carrying pipes through the swamp forest is a non-natural user of land.[132] Consequently, oil operations particularly, oil spills fall within the scope of this tort that is commonly utilized in oil-litigation in Nigeria.[133] In fact, as Frynas notes in his analysis of *Umudje and Another v Shell-BP Petroleum Development Co. Ltd.*[134] this rule appears to be more readily applied to oil spill cases than other bases for civil liability. In that case, the plaintiffs sued the oil company for damages resulting from an oil waste pit and the construction of a road. The company had constructed a waterway and failed to insert enough culverts under it leading to a diversion of fish that previously entered into the plaintiff's artificial ponds and lakes during the rainy season. The court accepted the facts but found that while the defendant company was not liable under the rule in *Rylands v. Fletcher* for the blockage, it was liable for the oil spill.[135] According to the court:

> Liability on the part of an owner or the person in control of an oil-waste pit, such as the one located at Location 'E' in the case in hand, exists under the rule in *Rylands v. Fletcher* although the 'escape' has not occurred as a result of negligence on his part.[136]

The defences available under this head of tort as applicable in the oil industry have however whittled down its efficacy. A defendant may plead that the cause of the spill was an act of

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[132] *Ikpede v Shell–BP* (1973) MWSJ 61; *Umudje and Another v Shell-BP Petroleum Development Co. Ltd* (1975) 5 UILR (Pt 1) 115.

[133] See particularly, *Shell Petroleum Development Company Ltd. v Tiebo,* (1996) 4 NWLR (Pt. 445) 657. In this case, crude oil from Shell's installation spilled to the plaintiff's/respondent's lands, streams and ponds and polluted the source of drinking water, killed fishes in their swamps and paralyzed their economic sustenance. The plaintiffs/respondents relied on the common law principle of strict liability successfully. The Court of Appeal awarded N400,000 as special damages for the loss and injury to the young raffia palm and the cumulative sum of N5,600,000 as damages.

[134] (1975) 5 UILR (Pt 1) 115.

[135] Per Idigbe JSC at 170-171 and 172.

[136] Per Idigbe JSC at 172.

God, act or default of the plaintiff, with the consent of the plaintiff, an independent act of third party or with statutory authority.[137] These defences; particular 'acts of a third party' (sabotage), have been applied, and sometimes recklessly, to avoid liability.[138] The Shell-initiated Niger Delta Environmental Survey (NDES) concluded in its report that many operators have hidden under the cloak of sabotage to avoid remediation in cases of environmental spills, accidents and discharges. For instance in *Shell v Enoch*,[139] where Shell relied on the defence of sabotage in a suit for damages caused by oil spills, the trial judge held:

> It is clear here that the plaintiffs had shown that there was an explosion at the defendant's manifold and that there was crude oil spillage which was extensive as a result of that damage...There was evidence that no third party caused the explosion and that no one in the community did it.[140]

Similarly, in *Shell v Isaiah*, the Court of Appeal labelled Shell's defence of sabotage 'an afterthought'.[141] It is worth questioning if is fair to deny an entire community compensation where the community is not complicit in the act of sabotage. After all, the companies are bound to secure their installations. The defence of 'statutory authority' also exempts companies from liability under the rule. For instance, in *Ikpede v Shell*,[142] a leakage of crude oil from the defendant's pipeline caused damage to the plaintiff's fish swamp. Although the requirements of the rule in *Ryland v Fletcher* were satisfied, because the laying of its pipeline

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[137] G. Kodinliye, *Nigerian Law of Torts* (Sweet & Maxwell, London 1982)117-121.

[138] *Shell v Otoko*, (1990) 6 NWLR (Pt. 159) 693.

[139] (1992) 8 NWLR (Pt. 259) 335.

[140] Per Jacks, JCA at 341.

[141] (1997) 6 NWLR 236.

[142] (1973) All NLR 61.

was done in pursuance to a statutory authority as the company was issued a licence under the Oil Pipelines Act, the company escaped liability.[143]

5.3.4.2.4 Commentary

There are important inferences to be drawn from the above examination of the role of statutory and Common Law in the determination of compensation. The first is that considerably more actions are instituted based on the Common Law principles than statutory law. This is mainly because the remedies available under the Common Law regime are more substantial. For instance, under the repealed FEPA Act for instance, a maximum fine of N500,000 was prescribed for activities that polluted the environment. However, under Common Law, there are no strict limits to the amount of compensation that may be awarded. In *Farah v Shell*[144] for instance, the Court of Appeal objected to the use official of compensation rates and application of statute law in determining compensation. The court held inter alia that: 'Where a tortuous act is committed, the injured party is entitled to damages in accordance with the measure of damages applicable to his injury.'[145] This is not to suggest however that compensation actions based on Common Law generally favour the host-communities. If anything, indications from oil-related cases suggest that the oil-companies benefitted more from the judicial attitude of Nigerian courts.

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[143] See also, *Irou v Shell B.P. Petroleum Development Co. (Nigeria) Ltd*, Unreported Suit No. W/89/71 (Warri High Court), November 26, 1973. In that case, the court was of the opinion that since the defendants had been granted an oil exploration licence, an order of injunction may render such licence nugatory.

[144] (1995) 3 NWLR (Pt. 382) 148 at 195.

[145] (1995) 3 NWLR (Pt. 382) 148 at 195.

Frynas noted, for instance, that though the applicable torts offer legal remedies to plaintiffs suing oil-companies; each tort imposes specific limitations on the plaintiff's ability to sue.[146] Okonmah noted further that even where the action succeeds, the amount of damages awarded by the courts is inadequate to assuage the claimant's losses.[147] Frynas disagrees with this assertion based on recent decisions particularly *Shell v Farah*[148] and *Elf v Sillo*[149] where substantial awards in compensation were made.[150] These recent awards are likely to influence an increase in the recourse to the judicial system for compensation. However, the point being stressed at this juncture is that the inadequacy of the compensation regime that was strictly adhered to by the courts contributed to dissatisfaction in the legal system and the consequent reliance on extra-legal means. It is important to point out that due to the sheer inadequacy the government approved compensation rates, the Oil Producers Trade Section (OPTS) of the Lagos Chamber of Commerce[151] has its own rates that are significantly higher than the government rates. These rates are used in practice though they are flawed because they were reached arbitrarily by oil sector operators without reference to the prevailing market rates, the yielding potential and life span of the crops.[152] These rates are also not regularly revised to reflect the country's changing economic realities.

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[146] J Frynas (n 36) 193.

[147] P Okonmah, 'Right to a Clean Environment: The Case for the People of Oil Producing Communities in the Nigerian Delta' (1997) 41 *Journal of African Law* 1, 43.

[148] (1995) 3 NWLR (Pt. 382) 148.

[149] (1994) 6 NWLR (Pt. 350) 258.

[150] J Frynas, 'Legal Change in Africa: Evidence from Oil-related Litigation in Nigeria' (1999) 43 *Journal of African Law* 2, 122.

[151] The organization is an association of oil-producing companies in Nigeria.

[152] A Sampson, 'Ecologist blames FG for oil pipelines vandalisation' Daily Independent (Nigeria) August 20, 2003.

5.3.5 Laws Regulating Environmental Protection

A natural consequence of oil-industry activities is its adverse effects on the physical environment. Thus the legal framework regulating environmental protection influences the manner oil-companies operate. The more stringent the environmental framework is, the higher the level of care that needs to be taken to ensure minimal damage is done to the environment. This section examines key legislation that regulates environmental protection in Nigeria and have an impact on oil operations. It reveals the connection between these laws, conflicts and the consequent violence that has become prevalent in the region. These laws are discussed in two sub-sections. The first analyzes the laws made specifically to regulate the oil-industry while the second concentrates on general environmental laws with particular reference to the Environmental Impact Assessment (EIA) Act.

5.3.5.1 The Petroleum Laws

The Petroleum Act is the main statutory regulation regarding the control of the oil-industry. It grants the minister with responsibility for petroleum affairs power to supervise the oil-industry. Section 9 empowers him to make regulations on sundry issues including the prevention of pollution of water courses, and the atmosphere[153] and the construction, maintenance and operation of installations used in the pursuance of the Act.[154] The Petroleum (Drilling and Production) Regulation is one of such regulations. Its primary objective is to control the safety of operation of all drilling, production, and other operations necessary for the production and subsequent handling of crude oil and natural gas. Regulation 25 provides that:

> The licensee or lessee of a oil mining lease shall adopt all practicable precautions, including the provisions of up to date equipment approved by the Director of

[153] See particularly section 9(1)(b) of the Petroleum Act.

[154] See particularly section 9(1)(c) of the Petroleum Act.

> Petroleum Resources, to prevent pollution of the inland waters, rivers, water courses, the territorial waters of Nigeria or the high seas by oil mud or other fluids or substances which may contaminate the water, banks or shoreline or which may cause harm or destruction to fresh water or marine life, and where such pollution occurs or has occurred, shall take prompt steps to control and, if possible end it.

Regulation 36 contains provisions regulating the maintenance of apparatus and conduct of operations. It states:

> The licensee or lessee shall maintain all apparatus and appliances in the use of his operations, and all wells and boreholes capable of producing petroleum in good repair and condition, and shall carry out all his operations in 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 field practice; and without prejudice to the generality of the foregoing he shall, in accordance with those practices, take all steps practicable-
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> (a) to control the flow and to prevent the escape of avoidable waste of petroleum discovered in or obtained form the relevant area;
> (b) to prevent damage to adjoining petroleum-bearing strata;
> (c) except for the purpose of secondary recovery as authorized by the Director of Petroleum Resources, to prevent the entrance of water through boreholes and wells to petroleum-bearing strata;
> (d) to prevent the escape of petroleum into any water , well, spring, stream, river, lake, reservoir, estuary, or harbour; and,
> (e) to cause as little damage as possible to the surface of the relevant area and to the trees, crops, buildings, structures and other property thereon.

There are a few noteworthy points in the above provisions. First, the Minister empowered to supervise the industry is a member of the Federal Government that holds majority stake in the industry through its national oil company. Consequently, there is a conflict of interests regarding his role (just like the Federal Government itself) as the chief regulator of the industry and representing a government that holds majority stakes in the industry. Given the central role of oil in the socio-economic and political development of Nigeria, it is doubtful that the Minister can perform this primary function effectively without partiality. For instance, there is no reported instance of sanctions being imposed against an oil company by the Minister despite several alleged and proved cases of oil-induced pollution contrary to the country's environmental laws. Secondly, the Regulation neither defines the qualifying terms used in it nor does it indicate levels beyond which the environment will be considered as

polluted. This and other laws have generally been interpreted to suggest that the standard required in Nigeria is less stringent than standards in more developed countries.

However, it is argued that the requirements of Nigeria's legislation regarding the standard of operation required of the oil companies are of the same standard as in more developed countries. The Nigerian Minerals Oil (Safety) Regulations expressly provides that in defining the phrase 'good oil field practice', reference is to be made to the 'current Institute of Petroleum Safety Codes, the American Petroleum Institute's Codes or the American Society of Mechanical Engineers Codes'.[155] In essence, prevailing standards in United Kingdom and the United States of America are to apply in Nigeria's oil-industry. This renders claims made by the industry that their standards of operation are lower in Nigeria because the law permits it nugatory. The oil-companies generally argue that they adhere to the different national environmental standards in their areas of operations and claim that the allegation of 'double standards' of operation is mistaken, because it is based on the notion that there is a single, 'absolute environmental standard'.[156] Undoubtedly, there are different environmental standards but clearly, Nigeria's law imposes the standards in developed countries where these companies operate to higher standards. The difference between Nigeria and the UK or USA lies in the ability of Nigeria to enforce its regulations. Nonetheless, it is posited that state's failure to effectively regulate these corporations is not a licence for these corporations to perform below legal standards. This is more so that the perceived low standard of operations

[155] Section 7 Nigerian Minerals Oil (Safety) Regulations.

[156] PIRC Intelligence, March 1997, Issue 3.

is a major contributory factor to the restiveness in the region[157] with consequences including violent conflicts.[158]

Another important enactment to note is the Associated Gas (Re-Injection) Act 1979 (as amended) that seeks to reduce gas flaring during oil production.[159] The Act originally required oil-companies to stop flaring associated gas by 1984. This terminal date was postponed by amendments to the Act in 1984[160] and 1985[161] that also increased the fines for gas flaring.[162] They also permitted gas to be flared where the Minister lawfully issued a ministerial certificate to permit gas flaring on specific oil-fields.[163] The Government has again extended the deadline to end gas flaring that expired on the 31st December 31, 2007 till 31st December, 2008.[164] Under the new gas flaring policy, which took effect from January 1, 2008, oil-companies are required to pay a fine of $3.5 for every 1000 standard cubic feet of gas flared in addition to shutting down any oil field where associated gas is flared after the

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[157] See particularly Article (f) of the Kaiama Declaration. Similar provisions are contained in other community Bills of Rights including the Ogoni Bill of Rights (Article 16) and the Oron Bill of Rights (Article 8).

[158] I Eteng, 'Minority Rights under Nigeria's Federal Structure' in *Constitution and Federalism, Proceedings of the Conference on Constitution and Federalism* (University of Lagos, Lagos 1996) 111-165.

[159] Chapter A25, Laws of the Federation of Nigeria 2004.

[160] Associated Gas Re-Injection (Continued Flaring of Gas) Regulations 1984.

[161] Associated Gas Re-Injection (Amendment) Decree, 1985.

[162] The fine was first set at 0.50 Naira per million cubic feet (mcf) and increased to 10 Naira (approximately £0.04 based on an exchange rate of N250 to £1.00) effective from January 1998.

[163] Section 3.

[164] I Uwugiaren, 'Nigeria: Groups Petition National Assembly On 2008 Gas Flaring Deadline', (Article) <http://allafrica.com/stories/200801210662.html> accessed 26 January 2008.

new deadline.[165] Two issues are important to note at this point. First, it is doubtful that the Government will shut down any fields after the deadline as the power to punish erring companies for varied operating offences have never been exercised. Secondly, this law is contrary to a High Court's decision in recent decision in *Gbemre v SPDC and Others*.[166] In that case, the court ordered that the process for the Enactment of a Bill for an Act of National Assembly be initiated for the speedy amendment of the relevant section of the Associated Gas Regulation Act and the Regulations made there under to quickly bring them in line with the provisions of Chapter 4 of the Constitution that lists the Fundamental Human Rights provisions.[167]

5.3.5.2 Environmental Regulation

The protection of Nigeria's environment is regulated by statutory law and Common Law principles of torts. These tort principles are an essential part of regulating the protection of the fragile Delta environment as they are more often relied on in actions against the oil-industry than the statutory regime. It is important to note that Nigeria's statutory regime is in the process of reform. Some of the reforms include the repeal of the Federal Environmental Protection Agency Act that empowered (now defunct) Federal Environmental Protection Agency to establish and enforce national environmental standards.[168] The National Environmental Standards and Regulations Enforcement Agency has been established in its place to enforce national environmental standards with the exemption of the petroleum

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[165] K Aderinokun, 'Nigeria: gas flare-out – "No going back on Dec. date"', This Day Newspapers (Lagos) 30, January, 2008.

[166] Suit No: FHC/B/C/153/05 in the Federal High Court of Nigeria Benin Division. Refer to section 7.3.1.1 for a full discussion of the case.

[167] *Gbemre's case* (n 166) 4.

[168] See particularly section 7 of the NESREA Act.

sector.[169] The oil-sector is monitored essentially by the Department of Petroleum Resources and the newly created National Oil Spill Detection and Response Agency.[170] While the Department of Petroleum Resources sets guidelines and standards for the industry, National Oil Spill Detection and Response Agency is 'responsible for surveillance and ensure compliance with all existing environmental legislation and detection of oil spills in the petroleum sector'.[171] While the Federal Ministry of Environment remains the main cross-sectoral regulator of the environment. There are on-going efforts to harmonise all environmental regulations in Nigeria including the review of the National Policy on the Environment, Environmental Impact Assessment Act and the promulgation of a Nigerian Environmental Management Bill into law that is expected to further change the administrative structure of the Nigeria's environmental sector.[172]

Presently, specific guidelines to address spillage management and compensation are being developed by National Oil Spill Detection and Response Agency. The Director-General of the Agency noted that professionalism and scientific approach are required in making estimates, but that it was always best if the affected communities and the oil company reach

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[169] See particularly section 7 of the NESREA Act. Specifically, the Agency is mandated to enforce compliance with environmental standards, regulations, rules, laws, policies and guidelines. It is also responsible for the protection and development of the environment, biodiversity conservation, sustainable development and the development of environmental technology.

[170] National Oil Spill Detection and Response Agency Act No. 15 of 2006.

[171] Section 6(a) NOSDRA Act. See generally sections 5 and 6 for the objectives and functions of the Agency respectively.

[172] The Bill was in the draft stage as at August 2007. See, *S Awogbade* (n 98) 104.

an agreement amicably.[173] While this exercise gives the opportunity for public involvement, it is suggested that 'professionalism and scientific approaches' as well as economic realities form the basis of such negotiation. There is also concern about the implementation of a fair compensation regime where the negotiations are limited to the industry and community representatives. Unbiased representatives from relevant organizations including National Oil Spill Detection and Response Agency, NGOs and international organizations should be part of the process to avoid likely deadlocks that could exacerbate the prevalent conflicts. As noted previously Environmental Impact Assessment is an effective means to inculcate public involvement in the oil-industry. It is posited that constant interaction between the industry and their host-communities over matters relevant to the Environmental Impact Assessment will encourage mutual respect and understanding between them. It will also create a channel of communication for other matters incidental to their peaceful co-existence. Consequently, relevant provisions of the Environmental Impact Assessment Act are examined to determine whether they promote a high level of interaction where the above stated ideals may be achieved to sustain peace in the industry.

5.3.5.2.1 Environmental Impact Assessment Act[174]

The main purpose of an EIA is to identify the environmental, social and economic impacts of a project prior to decision-making.[175] It also enables members of the public access to information on the state of their environment and be party to the decision-making process on

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[173] -- 'Oil spill guidelines out soon', Guardian online breaking news, 07 February 2008; <www.guardiannewsngr.com/breaking_news/article01> accessed 07 February 2008.

[174] Chapter E12 of the Laws of the Federation of Nigeria 2004.

[175] United Nations Environment Programme (UNEP) website: www.unep.org. Accessed; 20 August 2005.

activities that have the potential to adversely affect it.[176] This section concentrates on the provisions that relate to public involvement in the Environmental Impact Assessment process. For activities listed in the mandatory study list, including oil exploration and production activities, section 23 provides:

> Where the Agency is of the opinion that a project is described in the mandatory study list, the Agency shall-
>
> (a) ensure that a mandatory study is conducted, and a mandatory study report is prepared and submitted to the Agency, in accordance with the provisions of this Decree; or
>
> (b) refer the project to the Council for a referral to mediation or a review panel in accordance with section 25 of this Decree.

Issues that the Environmental Impact Assessment should address and expectedly form the basis for the report are contained in section 4. Expectedly, these should be the contents of the report yet it does not provide that public involvement should be a part of it.[177] Section 7 permits the public to comment on the EIA of an activity. It provides that:

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[176] Section 1of the EIA Act that states the goals and objectives of the EIA process. A Kiss and D Shelton, *International Environmental Law* (Transnational Publishers Inc., New York 2000) 203 and J Priscolli, 'Participation and Conflict Management in Natural Resource Decision-Making' in B Sohlberg and M Saija (eds) *Conflict Management and Public Participation in Land Management,* European Forest Institute (EFI) proceedings 14 (1997) 61-88.

[177] Section 4 provides that: An environmental impact assessment shall include at least the following minimum matters, that is-

(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;

(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;

> Before the Agency gives a decision on an activity to which an environmental assessment has been produced, the Agency shall give opportunity to government agencies, members of the public, experts in any relevant discipline and interested groups to make comment on environmental impact assessment of the activity.

Adequate time must elapse for these comments to be considered before the Agency decides whether the proposed activity should be authorized or undertaken[178] and the written decision of the Agency must be made available to any interested person or group.[179] If no interested person or group requests for the report, the Agency is required to publish its decision in any manner it deems appropriate[180] through which members of the public or interested persons shall be notified.[181] In reality, these provisions are sometimes not strictly adhered to and the EIA process (where it is carried out) is often at the discretion of the project proponent. An instance of a major project that did not follow this process is the Nigerian Liquefied Natural Gas (NLNG) project at Bonny. The project proponents that included the Federal Government of Nigeria and a consortium of oil-companies including Shell as the operator of the project were challenged in *Douglas v Shell*[182] for failing to carry out the mandatory EIA required for such projects before embarking on it. The Federal High Court dismissed the case on the grounds that the plaintiff did not have *locus standi* to institute the action despite being a

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(f) an indication of gaps in knowledge and uncertainty which may be encountered in computing the required information;

(g) an indication of whether the environment of any other State or Local Government Area 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.

[178] See section 8 of the EIA Act.

[179] See particularly, section 9(1) and (2) of the EIA Act.

[180] See section 9(4) of the EIA Act.

[181] See section 9(3) of the EIA Act.

[182] (1999) 2 NWLR (Pt. 591).

native of one of the affected communities and a frontline environmental activist. According to the court, Douglas did not show that prima facie evidence that his right was affected nor any direct injury caused to him. On appeal, the Court of Appeal held that the Federal High Court was in breach of a number of procedural rules when deciding the case thus set the earlier decision aside and remitted it to a different judge for retrial.[183] However, the retrial did not proceed as the project had been completed. It is noteworthy to point out that community problems evolved shortly after and the Federal Government became actively involved in assisting to conclude a memorandum of understanding (MOU) between the NLNG and the community so that the first shipment of LNG would not be delayed.[184]

Returning to the analysis of the EIA Act, one can assert that it limits meaningful public involvement as section 25(2) provides that the public may comment only on the conclusions and recommendations of the mandatory study report.[185] In essence, public involvement in the EIA is not compulsory during 'scoping' which is arguably the most important aspect of the EIA. Briefly, scoping is an early aspect of the assessment that defines the scope of the environmental study.[186] Two major inferences can be drawn from the above assertion. First, public interests during the actual assessment are unlikely to be adequately considered and protected since their participation in the determination of the scope and methodology of the EIA is not guaranteed by law. This questions the efficacy of the EIA process wherein the

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[183] Unreported Suit No. CA/L/143/97 in the Court of Appeal.

[184] E. Emeseh, 'The Limitations of Law in Promoting Synergy between Environment and Development Policies in Developing Countries: A Case Study of the Petroleum Industry in Nigeria' (2006) 24 *Journal of Energy and Natural Resources Law* 4, 574-606.

[185] See particularly section 25(2) of the EIA Act.

[186] See generally, K. Raymond and A Coates, *Guidance on EIA: Scoping* (Environmental Resources Management, Edinburgh 2001).

actual process of the assessment determines its success rather than the outcome.[187] It is noteworthy that in practice, the Federal Ministry of Environment exercises its discretion to determine the level of public involvement during scoping.[188] The mandatory report may be referred to mediation or a review panel where the Council believe 'the project is likely to cause significant adverse environmental effects that may not be mitigable',[189] or public concerns respecting the environmental effects of the project warrant it.[190] Where the report is sent for review under the provisions of section 25, the Act simply requires the review panel's report must contain the conclusions and recommendations of the panel relating to the environmental effects of the project and any mitigation measures or follow-up program, and a summary of the comments received from the public.[191] In this instance, the Act stops short of democratic public participation; that is, ensuring that public opinion in the EIA process are properly considered and consequently influence the decision.[192]

5.4 Conclusion

This Chapter has examined relevant laws that regulate Nigeria's oil-industry and revealed that the these laws generally contributed to the erosion of the capacity of the host-communities to be actively involved in issues related to the industry, particularly as it

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[187] See generally, section 2.4.1 above.

[188] R. Ako, 'Ensuring Public Participation In Environmental Impact Assessment of Development Projects in the Niger Delta Region of Nigeria: A Veritable Tool For Sustainable Development' (2006) 3 *Environtropica* 2, 12.

[189] See section 26(a)(i) of the EIA Act.

[190] See section 26(a)(ii) of the EIA Act.

[191] See section 37 of the EIA Act.

[192] *R Ako* (n 188) 7. See also, J Stærdahl, et. al., 'Environmental Impact Assessment in Thailand, South Africa, Malaysia and Denmark', Working Report, 2003 (Article) <http://www.ruc.dk/upload/application/pdf/9c4d310e/workingpaper1.pdf> acessed; 22 March 2005.

affected their environment. It also revealed that judicial decisions in oil-related cases often have benefitted the oil-industry apparently to safeguard the Government's economic interests.[193] Unfortunately, these economic interests have been prioritized over the environmental impacts of the communities in proximity to oil exploration and production activities. For instance, in *Irou v Shell*,[194] the court failed to order an injunction to stop the defendant from polluting the plaintiff's land, fish ponds and creek because in its opinion, nothing should hinder the operations of the oil-industry because of its immense contribution to national income.[195] This line of reasoning appears to have had an overbearing influence in deciding oil-related cases[196] Ajomo noted in this regard that:

> In the oil sector where environmental degradation is most prevalent, the all-pervading influence of the oil companies and the paternalistic attitude of 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 recognize is that economic development can be compatible with environmental conservation.[197]

This doctrine has tacitly approved of oil-induced pollution and its adverse consequences for the host-communities. These included the pollution environmental resources including land, rivers, aquatic species, farm produce, etc that the inhabitants of the region rely on for their

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[193] See, A Ekpu, 'Environmental Impact of Oil on Water: A Comparative Overview of Law and Policy in the United States and Nigeria' (1995) 4 *Denver Journal of International Law* 214.

[194] Unreported Suit No. W/89/71 (Warri High Court), November 26, 1973.

[195] See a different approach in the US case of *Amoco Production Co. v Village of Gambell, Alaska*, (1987) 480 US 531 where the Supreme Court observed that environmental injury, by its nature can seldom be adequately remedied by money because the damage is often permanent or at least of a long duration. In the opinion of the court, if such injury is sufficiently likely, the balance of harm will usually favour the issuance of an injunction to protect the environment.

[196] See also, *Chinda v Shell* (1974) 2 RSLR 1and *Shell-BP v Usoro*, (1960) SCNLR 121.

[197] M Ajomo, 'An Examination of Federal Environmental Protection Laws in Nigeria' in M Ajomo and O Adewale (eds.) *Environmental Laws and Sustainable Development in Nigeria* (Nigeria Institute for Advanced Legal Studies, Lagos 1994) 22.

socio-economic and spiritual existence. The environmental and consequent socio-economic factors losses aggravated by other related factors instigated violent conflicts. Some of these factors include the lax enforcement of environmental laws in the region, constant reduction in oil-revenues to the host-communities, the formidability of the oil-industry operators (manifested especially during litigation), huge cost of litigation and restricted access to courts.[198]

[198] See generally, *A Adedeji, and R Ako* (n 119) 415-439.

CHAPTER 6

RESPONSES TO THE LEGAL REGIME: THE PERPETUATION OF VIOLENCE

6.1 Introduction

This chapter analyzes the responses of the oil-industry's primary stakeholders; that is the Federal Government, the oil companies and the host-communities, to the regulatory framework since the inception of the oil exploitation activities in the country. It aims to reveal the role of public participation, or, the lack of it, in the perpetuation of violence against the oil-industry. The first part of this chapter, divided into four sections, argues that there is a connection between the development of the legal framework regulating the oil-industry and opposition to its activities. It draws the link between the development of the oil-industry's regulatory framework, the decline in public participation in the industry and increasing restiveness in the region. The first part of the chapter is divided into four sections. Each of the sections represents a time period selected to highlight fundamental changes in the legal provisions and emphasizing the decline in public participation and the responses to such provisions. The first period extends from pre-independent Nigeria till 1978 and may be termed the 'early period' of the oil-industry. During this period, the government sought to affirm its legal ownership and control of oil resources and revenues accruing from the resource. The second period spans from 1978 till 1990 when the law regarding landholding was promulgated and its impacts felt in the oil-bearing communities. The third period is that between 1990 and 1999 which witnessed a significant increase in oil-induced violence beyond the earlier periods. The final period

examined begins in 1999 when democratic governance was reinstituted in Nigeria to 2007.

Democracy ushered in new expectations and agitation based on ideals of equity and justice particularly for increased derivation and resource control from the oil-rich communities. The end date represents the two terms that the Obasanjo administration was in power and there was a consistent government policy to engage the 'Delta situation'. Though a new government led by Musa Yar'adua took over administration of the country and promised a different approach, nothing significant has occurred in that respect. The second part of the chapter argues that increased revenue and resource control alone do not amount to public participation as is suggested in Nigeria. It argues the establishment of elements of active public participation is prerequisite to the adoption of either increased derivation or resource control as initiatives to curb violence against the oil industry.[1] It argues that the rate of violence will increase if either of the above initiatives is adopted without first establishing elements of active public participation. The chapter also highlights the development of the host-communities' agitation from scattered incidences of localized protests to a common rights-based movement.

6.2 The Eras of Responses

This part of the chapter is divided into four sections which highlight the responses of the oil-industry's stakeholders; that is, the Federal Government, the oil-companies and the Host-Communities to the legal framework regulating the oil-industry. The responses of

[1] See section 2.4 above on the elements of active public participation in the natural resource industry.

the State Governments are also included in the period from 1999 when the country returned to democratic governance and the states exercised political independence from the central government. The involvement of the state governors is important because they precipitated the agitation for increased derivation and resource control since 1999.

6.2.1 Pre-Independence – 1978

The ownership, control and management of oil were vested in the Crown prior to Nigeria's independence.[2] With plans to bequeath the colony a federal structure, ethnic nationalities from the Delta region expressed fears of domination by the other 'major' ethnic groups. The Ijaws[3] for instance argued at the Willinks Commission, set up to look into the fears of the minority before granting independence to Nigeria, that the peculiar problems of those living in the creeks and the swamps of the delta were not understood and indeed deliberately neglected by both the regional and federal government.[4] Also, the indigenous (traditional) rulers from the area, many of whom had concluded 'treaties of protection' with the British in the eighteenth and nineteenth centuries, argued that the British should revoke the treaties and allow them revert to their previous position of independence, rather than become a part of the Nigerian state.[5] Clearly, the inhabitants of

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[2] See section 5.3.1 above.

[3] The Ijaws are the largest ethnic group in Delta region and the fourth largest ethnic group in Nigeria.

[4] S Okafor, 'Ideal and Reality in British Administrative Policy in Eastern Nigeria' (1974) 73 *African Affairs* 293, 459-471.

[5] See generally, Human Rights Watch, *The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities* (Human Rights Watch/Africa, Washington D.C. 1999) 92.

the Niger Delta region had held fears of impending neglect. It is posited at the time of the Willinks Commission, the importance of the discovery of oil was not lost on all the parties. The Commission admitted that these fears were well founded refused the requests of these groups which it referred to as the 'poor, backward and neglected'[6] because the Commission was unqualified to 'form conclusions on any legal or moral obligation of Her Majesty's Government'.[7] It also rejected the request for the creation of new states on the ground that 'it is seldom possible to draw a clean boundary which does not create a fresh minority'.[8]

Instead, the Commission proposed that a federal board be created to consider the problems of the Niger Delta and 'to direct the development of the areas into channels which would meet the peculiar problems,' and the assumption of joint federal and regional responsibility for the 'development of special areas.'[9] The Willinks Commission recognized the issues regarding the minority status of the Niger Delta area in the Nigerian federation and its recommendations on a development board were given effect in 1961. The Niger Delta Development Board (NDDB) that was established in 1961 was, however, limited in its capacity to bring about any meaningful development of the Niger Delta. It was empowered merely to undertake surveys and make recommendations to the

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[6] 'Report of the Commission appointed to enquire into fears of Minorities and the means of allaying them' (Willink's Commission), C.O.957/4, Colonial Office, July 1958, 94.

[7] *Willink's Commission* (n 6) 87.

[8] *Willink's Commission* (n 6) 87.

[9] *Willink's Commission* (n 6) 94.

federal and regional governments.[10] The Board's performance was, however, hindered from its inception by several factors including its statutory function as an 'advisory' body to 'conduct a feasibility survey of the area with a view to ascertaining measures necessary to promote its physical development, submit ideas of development schemes for the area and to report progress annually.'[11] Secondly, the board was allegedly under-funded and other factors including the military *coup d'etats* of 1966 and finally, the civil war that followed in their wake contributed to put an end to whatever aspirations that the Niger Delta Development Board had to impact positively on the Niger Delta communities.[12]

The first oil-induced violence occurred in February 1966 when Adaka Boro led the Niger Delta Volunteer Force to rebel against the Federal Government's control of the oil-industry. The rebellion was attributed to the dissatisfaction in the oil-bearing communities with the growing oil-industry aggravated by the non-performance of the Niger Delta Development Board.[13] This revolution was quelled by military forces 12

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[10] See generally, E Alagoa and N Tamuno (eds.) *Lands and Peoples of Nigeria: Rivers State* (Riverside Communications, Port-Harcourt 1989).

[11] G Ejuwa, 'Niger-delta: Panacea to perennial crisis', Vanguard Newspapers (Lagos) <http://www.vanguardngr.com/articles/2002/viewpoints/vp120022006.html> accessed; 20 February 2006.

[12] I Okonta, 'The Lingering Crisis in Nigeria's Niger Delta and Suggestions for a Peaceful Resolution', (2000) (Article) <http://www.cdd.org.uk/resources/workingpapers/niger_delta_eng.htm> accessed 22 June 2004.

[13] International Crisis Group, *The Swamps of Insurgency: Nigeria's Delta Unrest*, Crisis Group Africa Report N°115, 3 August 2006, 4.

days later, but the simmering discontent among the host-communities was not addressed. This period also witnessed the apparent politicization of access to oil that culminated in the Civil War (1967-1970).[14] Shortly afterwards, the Federal Government was party to more oil-induced violence in the Civil War.[15] The build-up to the war began with a coup in January 1966 and a later counter-coup in July. The first coup was executed mainly by officers from the Eastern region, who overthrew the civilian government of led by Balewa, a northerner while the following coup was executed mainly by officers from the north. Both incidences altered the country's political balance and destroyed the fragile trust existing between the major ethnic groups.[16] After the second coup, the East was excluded from power at the central government culminating in fears that 'their' oil would be used to benefit other parts of the country to their exclusion. Buoyed by the belief that it could be self-sufficient with oil-revenues, the Eastern region seceded from the Nigerian federation in 1967 as the Republic of Biafra.[17] Immediately after the Federal Military Government won the war, it restructured the country's political formation and the legal

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[14] See generally, K Soremekun and C Obi, 'The Changing Pattern of Foreign Investment in the Nigerian Oil Industry' (1994) 17 *Africa Development* 3, 14.

[15] See generally, *K Soremekun and C Obi* (n 14) 14. See also, M Ross, 'Nigeria's Oil Sector and the Poor', paper prepared for the UK Department for International Development "Nigeria: Drivers of Change" Program, May 2003, 12; and, ICE Case Studies: 'The Biafran War' <http://www.american.edu/ted/ice/biafra.htm> accessed 01 October 2006.

[16] See generally, A Atofarati, 'The Nigerian Civil War: Causes, Strategies, And Lessons Learnt' (Article) <http://www.globalsecurity.org/military/library/report/1992/AAA.htm> accessed; 01 October 2006.

[17] -- 'The Nigerian Civil War', <http://www.nigeria-planet.com/The-Nigerian-Civil-War.html> accessed 01 October 2006.

framework regulating the oil-industry to abrogate the absolute ownership and control of the resource.

The Federal Military Government adopted a 'unitary federalism' whereby all the federating units became largely dependent on the central government for their finances and general administration to suit the military command structure.[18] Laws were made by military fiat by the Supreme Military Council[19] and all states were bound by them regardless of their impact on the citizens of the state. It was under these circumstances that many of the laws regulating the oil-industry including the Petroleum Act,[20] Oil in Navigable Waters Act,[21] Oil Pipelines Act[22] and the Offshore Revenues Act,[23] were promulgated. The post-Civil War laws basically re-asserted the Federal Government's absolute control over oil resources as well as increasing its sphere of control over oil-revenues. It is posited that the Federal Government's intent at this time was to assume complete legal control of the resource and thus deter the oil-bearing communities from further attempts to assert ownership and control of the resource.

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[18] Each of the 12 new states was governed by a serving military governor of lower rank that was responsible to the Head of State and Commander-in-Chief of the Armed Forces.

[19] The Supreme Military Council (SMC) was the highest law making body comprised essentially of high-ranking military officers that held ministerial appointments under the government.

[20] Chapter P10 Laws of the Federation of Nigeria 2004.

[21] Chapter O6 Laws of the Federation of Nigeria 2004.

[22] Chapter O7 Laws of the Federation of Nigeria 2004.

[23] Decree No. 9 of 1971.

It is important to note that the legal ownership and control of the resource did not completely exclude the host-communities from actively participating in the industry at this time. Land belonged to the local communities and their permission was required before oil exploration and production activities could commence. Communal ownership of land was recognized in the *Amodu Tijani v Secretary, Southern Nigeria*[24] where the Court held *inter alia* that:

> ... In order to understand the native land law is that the notion of individual ownership is quite foreign to native ideas. Land belongs to the community, the village or the family, never to the individual. All the members of the community, the 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 a loose mode of speech is sometimes called the owner... He cannot make any important disposition of the land without consulting the elders of the community or family, and their consent must in all cases be given before a grant can be made to a stranger.[25]

Thus, while the Federal Government as the legal owner of oil issued licenses to interested companies, such companies required the express consent of the communities in the areas where they intended to operate. Therefore, the companies had to negotiate terms of operations such as land lease, community benefits, compensation and employment of the local population before they commenced their operations.

These agreements were reached in line with the culture of the communities and involved an established broad-based decision-making process representative of the entire community through methods entrenched in tradition. Despite the exclusion of the host-communities from ownership and control of the resource and its revenue, participation

[24] [1921] 2 AC 399.

[25] *Amodu Tijani* (n 24) 401.

was guaranteed by landholding. More so, the courts had the undisputed jurisdiction to mediate in disputes related to the oil industry generally and land matters in particular. For instance, in *Nzekwu v Attorney-General East-Central State*[26] the government sought to compulsorily acquire 800 acres of land near Onitsha. The government offered to pay the Ogbo family that owned 397 acres of the land rent of £10 per annum for 20 years. The family rejected the offer. The family claimed that before the notice of acquisition, it had co-operated with the oil companies having leased a part of the land to Total Oil for 95 years at a rent of £945 per annum in 1957 and another to Shell-BP for a ferry ramp at a rent of £200 per annum. The family subsequently sued the government and the Supreme Court awarded the family the sum of £252,600 for the land and the houses thereon. There are some salient points worthy of note from this decision regarding the recognition of host-communities' rights to public participation in the oil-industry at the time. First it revealed that they had unfettered access to the judiciary to determine disputes related to land particularly meant for oil-related purposes. Secondly, the judiciary recognized their legal rights to the land they held under customary law. Third, the decision indicated that they were entitled to compensation both for the land and the improvements thereon.

It is argued that the recognition these factors contributed to the relative peace that characterized the oil-industry during the pre-1978 period. It is posited that factors including the legal framework and access to the judiciary that existed in that period contributed to the host-communities' recourse to judicial settlement of disputes between them and the oil-industry. Though there was a dearth of reported cases in the pre-1978

[26] (1972) All NLR 543.

period, it is argued that the low number of reported cases oil-related violence suggests that disputes were resolved through legal procedures. While there is a reasonable number of reported cases in this regards,[27] reports of widespread violence were comparatively insignificant compared to present rates of violence. While it may be argued that there has been an increase in the overall number of oil-related litigated cases, this increase may be attributed in part to the growth in the size of the oil-industry.[28] Also, in the subsequent periods, judicial processes were instituted by oil-communities essentially as insurance against their failure to obtain 'reparation' from oil-companies and as a bargain tool in negotiations for settlements.[29]

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[27] Some of these cases include *Shell-BP v Usoro* (1960) SCNLR 121; *Seismograph Service v Onokposa* (1972) 1 All NLR (Pt. 1) 347; *Seismograph Services (Nigeria) Limited v Ogbeni* (1976) 4 SC 85; and *Seismograph Service v. Akporuovo* (1974) 1 All NLR 104. Others include: *Umudje v Shell Petroleum Development Company Nigeria Limited* (1974) 4 ECSLR 564; *Ikpede v Shell–BP* (1973) MWSJ 61; *Chief A.S. Amos and others (for themselves as individuals and on behalf of the Ogbia Community Brass Division) v Shell Petroleum Development Company of Nigeria Limited and Another* (1974) 4 ECLAR 486; and *Chinda v Shell-BP* (1974) 2 RSLR 1.

[28] J Frynas, *Oil in Nigeria: Conflict and Litigation between Oil Companies and Village Communities* (Transaction Publishers, Hamburg 2000) 216-224.

[29] Personal observations during work experience including court attendances in such cases. It is important to note that at this time, the general trend of judicial decisions was to promote the continued exploitation of oil due to its economic importance to the country. Thus the communities did not expect justice.

6.2.2 1978 - 1990

The major change in the legal structure of the oil-industry at this time was the promulgation of the Land Use Act 1978.[30] This enactment significantly altered the existing relationship between the industry's stakeholders and arguably is one of the most important factors contributing to violent conflicts in the region.[31] The general impact of the Act was that it extinguished communal ownership and control of land and vested them in the government.[32] The Supreme Court of Nigeria in *Abioye v Yakubu*[33] with regards the impact of the Land Use Act held *inter alia*:

> (1)[T]he 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 the federation in trust for the use and benefit of all Nigerians (leaving individuals, etc., with 'rights of occupancy'); and
> (2)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).[34]

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[30] The Act was originally promulgated as the Land Use Decree No. 6 of 1978.

[31] See generally, Constitutional Rights Project, *Land, Oil and Human Rights in Nigeria's Delta Region* (Constitutional Rights Project, Lagos 1999).

[32] See, *Nkwocha v The Governor of Anambra State* (1984) 6 SC 362, *Abioye v Yakubu* (1991) 5 NWLR (Part 190), 130 and *Makanjuola v Balogun* (1989) 5 SC 82.

[33] (1991) 5 NWLR (Part 190), 130.

[34] See also, *Makanjuola's case* (n 32). These cases settled the confusion regarding the interpretation of the true intent of the Land Use Act in previous cases including: *Sir Adetokunbo Ademola v John Amoo* (Suit No. AB/8/81 of 2/8/82); *Aina Co. Ltd v Commissioner for Lands & Housing Oyo State* (Suit No. 1/439/81 High Court of Ibadan Jugement 24th May 1981); *Akinloye v Oyejide* (Suit No. HC/ GA/ 83 of 17/ 7/ 88); and, *Amodu Tijani v Secretary Southern Nigeria* (1921) A.C. 399). For a full exposition of these cases, see

Though the government alleged the Act was necessary to enable both the Government and private individuals acquire land for developmental purposes,[35] it has been argued that the Act was promulgated to give the government greater control over the oil-industry.[36] A major factor in support of this assertion is that the Act was promulgated on the recommendation of the minority report of the Government's Land Use Panel.[37] It recommended that land be nationalized on the grounds that 'the idea of Government being the custodian of land (as) in the Northern States is germane and should remain acceptable base for land use'. The majority report on the other hand explicitly advised

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O.Sholanke, 'Nigerian Land Use Act - A Volcanic Eruption or a Slight Tremor - *Garuba Abioye v Saadu Yakubu*, The Case Note' (1992) 36 *Journal of African Law* 1, 93-98.

[35] L Olayiwola and O Adeleye, 'Land Reform – Experience from Nigeria', Promoting Land Administration and Good Governance 5th FIG Regional Conference held in Accra, Ghana, March 8-11, 2006, 3. See also, J Omotola, *Essays on the Land Use Act, 1978* (University of Lagos Press, Lagos 1980), Chapter 2.

[36] K Omeje, *High Stakes and Stakeholders: Oil Conflict and Security in Nigeria* (Ashgate, Aldershot 2006) 47. See also, P Torulagha, 'It Is Time to Repeal the Land and Resources Use Decrees', (2006) (Article) <http://nigeriaworld.com/cgi-bin/search/search.pl?Realm=Nigeriaworld&Match=1&Terms=Priye+Torulagha&Rank=1> accessed 03 May 2006. Also, G Osinaike and J Oyegunle, 'Major General David Ejoor's eye-opening statements'<Ijawnation@yahoogroups.com> accessed; 06 July 2005.

[37] The minority report recommended that land be nationalized on the grounds that 'the idea of Government being the custodian of land (as) in the Northern States is germane and should remain acceptable base for land use'. See, P Francis, 'For the Use and Common Benefit of All Nigerians: Consequences of the 1978 Land Nationalization' (1984) 54 *Journal of the International African Institute* 3, 7.

against either the nationalization of land or the extension of the land tenure system of the northern states to the whole country.[38]

The effects of the Land Use Act 1978 on public participation in the oil-industry, and reactions to it, are highlighted in this section. First, the Act legitimized the appropriation of land for 'overriding public interests' which included 'the requirement of the land for mining purposes or oil pipelines or for any purpose connected therewith'.[39] The impacts on the active public participation of the host-communities include the exclusion of the communities from negotiation with the oil-industry regarding land use. The negotiation process served the purposes of sharing environmental information and pre-contractual agreements regarding the benefits that would accrue to the communities from oil activities that would take place on their land. Another important impact of the Act is that it contributed significantly to the loss of traditional power which is inextricably linked to land. Indeed, one of the central functions of the King or elders was the responsibility to protect and manage communal land. The Land Act recognizes the traditional authority in land as it provides that the Governor may direct that compensation due to a community may be paid 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.[40] This derision of traditional authority particularly in the Niger Delta region has led to the

[38] *P Francis* (n 37) 7.

[39] See generally section 28 of the Land Use Act.

[40] See section 29(3)(b) of the Land Use Act.

upsurge in youth militancy[41] which Ebeku avers 'from all indications...is the direct result of the loss of their land rights'.[42]

The Land Use Act 1978 also impacted the oil-industry's compensatory regime. With land vested in the government under the Act, the communities were deprived of their legal right to collect rent and other forms of royalties from oil-companies operating within their territories. The Act limits communal rights to compensation for improvements on land such as buildings or farm produce when such land is appropriated or such interests are interfered with during oil operations. Under the Act, compensation for land itself is now paid to the governor who is not legally obliged to remit such payments to the affected communities.[43] In essence, the oil-companies are not under any legal obligation to compensate the communities for land expropriated or damaged in the course of oil exploration and production.[44] The impact of the Act upon communities in this regard was aptly captured by a government constituted judicial inquiry thus:

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[41] See generally, C Ukeje, 'Youths, Violence and the Collapse of Public Order in the Niger Delta Region of Nigeria' (2001) 26 *Africa Development* 2, 337-366.

[42] K Ebeku, 'Oil and the Niger Delta People: The Injustice of the Land Use Act' (2000) 9 *CEPMLP Internet Journal* 14 <www.dundee.ac.uk/cepmlp/journal/html/vol9/article9-14.html> accessed 22 May 2002.

[43] Section 29(2) of the Land Use Act refers to the Minerals Act or the Petroleum Act for the regulation of compensation payments. While these laws provide that the 'holder or occupier' of private land is entitled to compensation, the section 1 of the Land Use Act vests ownership of land in the Government. Consequently, the Government alone is entitled for compensation for land itself.

[44] Shell for instance is quoted as claiming that as a responsible company, it obeys the laws of the country, one of which is the Land Use Decree of 1978 which vests ownership of all land with the government and as

> Their streams get polluted with the disposal of waste products from oil operations rendering the river void of fishes...their farm crops planted on the remaining areas of farmland get damaged by oil pollution; their economic trees are hewed down; their economic situation bites and there is no help for them. These deprivations without any compensatory benefits, cause frustration...The compensations paid for these deprivations are just pittance, meagre pittance, on which people cannot subsist for even six months and they become frustrated with life…[45]

This marked a major alteration to the previous status quo whereby the host-communities played an integral part in land matters, particularly compensation as revealed in the decision in *Nzekwu's Case* discussed above.[46]

Another major impact of the Land Use Act on public participation is that it purportedly ousts the jurisdiction of the courts from the determination of issues concerning or pertaining to the vesting of all lands in the government and it's the exercise of its powers thereto including the amount and adequacy of compensation.[47] Instead, the Land Use and Allocation Committee, whose members are appointed by state governors, are authorized to determine disputes as to the amount of compensation payable under the Act.[48] In summary, the Act deprived the host-communities access to justice in addition to other

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such it gives compensation for the surface rights of all land acquired for its use and for damage…from subsequent activity, including oil spills. See generally, *K Ebeku* (n 42). See also, Constitutional Rights Project, *Land, Oil and Human Rights in Nigeria's Delta Region* (Constitutional Rights Project, Lagos 1999) 15-16.

[45] 'The environmental and social costs of living next door to Shell' <http://archive.greenpeace.org/comms/ken/enviro.html> accessed 13 January 2008.

[46] Refer to section 6.2.1 above.

[47] See generally section 47 of the Land Use Act.

[48] See generally section 2 of the Land Use Act.

rights including the right to hold land, to obtain environmental information and adequate compensation. All these have contributed to the feeling of antagonism within the local population against the oil-industry which breeds violence. As Fekumor noted; 'they (host-communities) have been deprived of their mainstay (land) and yet the damage is not paid for. Because they are not adequately compensated, the slightest misunderstanding is conflict.'[49] However the impacts of the Act were not felt till the 1990s thus the reactions to it are discussed in the following section. However, it should be noted that this period was mainly characterized by scattered communal protests from different communities over issues related to the provision of 'development' benefits such as schools, hospital, roads and scholarships for example.

6.2.3 1990 -1999

The period between 1990 and 1999 marked a momentous transformation in the relationship between the stakeholders in the Nigerian oil-industry. The effects of the Land Use Act became manifest in this period after an extensive period of uncertainty that followed the promulgation of the Act.[50] By 1990, it had become judicially established that the effect of the Act was to dispossess the host-communities of the ownership and control of land hitherto held communally and incidental rights that guaranteed their participation in the oil-industry. This period is perhaps the most crucial in the history of conflicts in Nigeria's oil-industry. The community protests developed from disaggregated

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[49] Quoted in *Constitutional Rights Project* (n 44) 16.

[50] *Constitutional Rights Project* (n 44) 2. Also, N Agu, JSC in *Usikaro v Itsekiri Land Trustees* (1991) 2 NWLR (Part 172), 150 at 173. See also, *Amadi v NNPC* (2000) 10 NWLR 76 at 80.

and uncoordinated pocket of groups pursuing a range of advocacy activities along cultural, economic and environmental lines towards a more co-ordinated rights-based approach. The earlier periods of this era witnessed an increase the women and youths participation in protests[51] following the failure of earlier responses including formal communal representations to the oil-companies and Government, newspaper publications, street protests and judicial intervention.[52] From the mid-1990s, intellectual approach adopted by the Movement for the Survival of Ogoni People (MOSOP) created in 1990 to represent the interests of the Ogoni ethnic-group against the oil-industry began to influence the entire region.[53]

The Movement for the Survival of Ogoni People adopted the Ogoni Bill of Rights which expressed the demands of the group within a rights-based context as the philosophical basis of their struggle.[54] The Bill of Rights demanded political autonomy to participate in national affairs; the right to control and use of a fair proportion of Ogoni economic resources for Ogoni development; and the right to protect the Ogoni environment and

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[51] See generally, Greenpeace International, *Shell-Shocked: The Environmental and Social Costs of Living with Shell in Nigeria* (Greenpeace, Netherlands 1994) and C Ukeje, 'From Aba to Ugborodo: Gender Identity and Alternative Discourse of Social Protest among Women in the Oil Delta of Nigeria' (2004) 32 *Oxford Development Studies* 4, 605-618.

[52] L Owugah, 'Phases of Resistance in the Niger Delta' (1999) 6 *Centre for Advanced Social Sciences Newsletter* 2, 5-6 and *C Ukeje* (n 61) 57.

[53] The Ogonis have a rich history of politicized, mass-based struggles dating back to pre-independent Nigeria. See generally, B Naanen., 'Oil Producing Minorities and the Restructuring of Nigerian Federalism: The Case of the Ogoni People' (1995) 33 *Journal of Commonwealth and Comparative Politics* 1, 46-78.

[54] *Human Rights Watch* (n 5) 124.

ecology from further degradation. These demands were based on the perception that the area was neglected both environmentally and socio-economically as a result of it being politically marginalized in federal politics. This was the first time that oil-related issues in the region were presented within the human rights discourse that was understood and appreciated by the international community. Consequently, the organization utilized several international fora to highlight the problems faced by the Ogonis and to publicise their demands.[55] The rights-based approach yielded significant results including Nigeria's suspension from the Commonwealth of Nations; the withdrawal of ambassadors by several countries, protest actions by internationally renowned human rights and environmental groups including Amnesty International and environmental Greenpeace. It also resulted in pressure from the European Union to impose economic sanctions and the cancellation of a proposed $100 million loan and $80 million equity deal to Nigeria Liquefied Natural Gas (NLNG)[56] project to produce a gas plant and pipeline in the Niger Delta by the International Finance Corporation.[57] Notably, the involvement of international NGOs further entrenched the Ogonis (and subsequently, other ethnic groups in the region) claims within human and environmental rights perspectives. This strategy was copied by other ethnic groups in the Niger Delta that subsequently engaged the oil-industry and the international community in rights-based context emphasizing their role

[55] For instance, in 1992, Saro-Wiwa represented MOSOP at the United Nation's Unrepresented Nation's and People's Organization (UNPO) in Geneva, Switzerland where he delivered a speech and presented the Ogoni Bill of Rights in person, with his book, *Genocide in Nigeria: The Ogoni Tragedy* (1993).

[56] The NLNG Company is owned by the Nigerian government and the major oil producers in Nigeria including Shell, Elf, and Agip.

[57] ICE Case Studies, 'Ogoni and Nigeria Conflict over Oil', Case No. 64.

as stakeholders and the desire for improved participation in the industry. Communities began to express their concerns and demands within human and socio-economic rights discourse, drafted Bills of Rights which they presented to the 'Government and people of Nigeria' and campaigned locally and internationally against the devastating effects of oil operations on their environments and socio-economic existence.[58]

The making of the Kaiama Declaration is another important watershed in communal responses to the oil-industry in this era. The Declaration was a result of the All Ijaw Youths Conference held in Kaiama town in December, 1998. The conference brought together youths of all Ijaw tribes that had gradually become the vanguard in the campaign against the activities of the oil-industry and its devastating effects on the host-communities.[59] The youths agreed to continue their struggle based on the principles of the Declaration which drew inspiration from the OBR in expressing its grievances and demands within a rights-based context. This changed the face of the conflicts that was principally aimed at convincing the industry to concede some developmental benefits to

[58] Some of these Bills of Rights include Movement for the Survival of the Izon (Ijaw) Ethnic Nationality in the Niger Delta's (MOSIEND) 'Izon People's Charter', the Movement for Reparation to Ogbia"s (MORETO) Charter of Demands of the Ogbia People and the Kaiama Declaration adopted by various Ijaw youth organizations drawn from Ijaw territories across six oil-bearing states. See generally, *Human Rights Watch* (n 5) 124-129.

[59] The Declaration was assented to by a broad base of Ijaw youth organizations drawn from over five hundred communities from over 40 clans that make up the Ijaw nation and representing 25 representative organisations Ijaw. See generally the Introduction of the Kaiama Declaration. See, V Ojakorotu, 'Youth Militancy and Development Efforts in African Multiethnic Society: MOSOP and the IYC in the Niger Delta region of Nigeria' (2006) 2 *Asteriskos* 229, 237.

them. The host-communities thus began to assert that their 'rights' actively to participate in the oil-industry had been continually abused mainly because they constituted a political minority in the Nigerian federation.[60] The Declaration proclaimed their main aspiration to achieve self-determination and justice which included the reclamation of their 'natural rights to ownership and control of their land and resources' which they have been deprived of 'through the instrumentality of undemocratic Nigerian State legislations...'[61]

The government's response was to resort to increase military presence in the region and to create a new development board to provide necessary infrastructure to develop the region. The role of the paramilitary Mobile Police (MOPOL)[62] particularly in devastation of Umuechem town in October 1990[63] and detailed activities of the notorious Rivers State Internal Security Task Force (RSISTF)[64] in Ogoniland became the norm in the region in a bid to rid it of its renewed rights-based agitation.[65] Perhaps most notable in this period

[60] Note particularly Paragraphs (a)-(d) of the Kaiama Declaration.

[61] See particularly Article (g) of the Kaiama Declaration.

[62] This arm of the police is commonly referred to as 'kill-and-go' in Nigeria.

[63] *Human Rights Watch* (n 5) 123.

[64] While the unit was created specifically to deal with the 'Ogoni crisis', other security units such as 'Operation Salvage' were subsequently set up to protect oil installations in other parts of the oil-rich Delta region.

[65] Review of African Political Economy briefing, 'Nigeria in Crisis: Nigeria, Oil and the Ogoni' (1995) 64 *Review of African Political Economy* 22, 244-245.

were the events that led to the 'judicial murder'[66] of Ken Saro-Wiwa and 8 other MOSOP members on charges of murder before a military tribunal that was internationally acclaimed to be unfair and lacking transparency.[67] The Oil Mineral Producing Areas Development Commission (OMPADEC) was set up in 1992 in response to the unrelenting agitation in the Niger delta region. The Commission was to administer a special fund, comprising 3 per cent of oil-revenues, to develop the oil-producing areas of Nigeria.[68] It however failed to achieve its major objective of appeasing the oil-bearing communities as it failed to implement an integrated development programme.[69] Without going into specific details of the operations of the Commission, it is suffice to state that in addition to it being chastised for non-performance of its functions, the funds allocated to it were 'misappropriated or misspent'.[70] Four years after its creation, its senior

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[66] Comment made by British Prime Minister John Major at an emergency meeting of Commonwealth leaders in New Zealand, November 1995 < www.hansard.act.gov.au> 12 January 1996.

[67] See generally, M Birnbaum *Nigeria: Fundamental Rights Denied: Report of the Trial of Ken Saro-Wiwa and Others* (1995) Article 19 in Association with the Bar Human Rights Committee of England and Wales and the Law Society of England and Wales, 9. Also, C Bob, 'Political Process Theory and Transnational Movements: Dialectics of Protest among Nigeria's Ogoni Minority' (2002) 49 *Social Problems* 3, 395-415.

[68] See section 2 of the OMPADEC Decree No. 23 of 1992.

[69] In a study conducted by the Centre for Development and Conflict Management Studies (CEDCOMS), 84.4 per cent of respondents were of the opinion that OMPADEC did not promote peace and development while only 15.6 per cent felt otherwise. See generally, C Ukeje and A Odebiyi (eds.) Oil and Violent Conflicts in the Niger Delta (African Books Collective, Oxford 2003) 33.

[70] J Frynas, 'Corporate and State Responses to Anti-oil Protests in the Niger Delta' (2001) 100 *African Affairs* 398, 34.

management was sacked as a result of allegations of corruption and mismanagement.[71] The subsequent management team was sacked two years later, in 1998, for similar reasons.[72] Thereafter, several committees were mandated to find solutions to the growing militancy and disruption of oil operations in the delta region. However, other than the usual official platitude that the government would provide social amenities to alleviate the poverty of the indigenes, there is no evidence of any tangible positive outcome achieved by such committees.

It is important to note that during this period, the Niger Delta region benefitted from the process of 'state creation' as a development-oriented exercise. State creation is carried out ostensibly to correct the structural imbalances of the federal system and has significant political and economic benefits.[73] Politically, it accords greater recognition to affected ethnic groups that were previously minorities within former states. Economic benefits also accrue to the new states as they receive a share of national revenues directly from the central government.[74] However it is argued that in reality, state creation did not

[71] *Human Rights Watch* (n 5) 46.

[72] Eric Opia that was selected as sole administrator failed to account for N6.7 billion he had received on behalf of the Commission. See *J Frynas* (n 70) 38.

[73] O Nwosu, 'The National Question: Issues and Lessons of Boundary Adjustment in Nigeria - The Ndoki Case' (1998) 15 *Journal of Third World Studies* 2, 79-101.

[74] N Uwadibie, 'Oil and Macroeconomic Policies in the Twenty-First Century', in E Udogu (ed.) *Nigeria in the Twenty-First Century: Strategies for Political and Peaceful Coexistence* (Africa World Press Inc., Trenton, NJ. 2005) 74-75. It is also argued that state creation in Nigeria was a tool the military used to shift attention away from regime failures and excesses, notably the illegitimacy of military rule and economic decline. Mobilization for state creation served to divide opposition to military government because it

yield any substantial benefits to the delta region because the Federal Government also acceded to the demands of the majority ethnic groups that their more populous states be segmented to ensure an egalitarian distribution of national resources.[75] Thus after several state creation exercises, the three largest ethnic minorities still dominate the politics of the country and receive more in oil-revenues. In essence, it is safe to conclude that the notion that state creation in Nigeria would solve the problems of ethnic minority groups proved to be unfounded.[76] It did not reduce the growing agitation in the Niger Delta region. If anything, it contributed to intra-ethnic conflicts over new boundaries and the location of new state capitals.[77]

During the 1990 to 1999 period, the oil-companies increased their social spending in the region which was hitherto largely insignificant.[78] For instance, Shell recorded a significant increase in its community development spending from approximately US$1.4

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focused attention at the local scale, as new state movements competed for access to centrally controlled resources and political recognition of their ethno-regional group(s). See generally, B Kraxberger, 'Geo-historical Trajectories of Democratic Transition: The Case of Nigeria' (2004) 60 *GeoJournal* 1, 81-92.

[75] P Adogambe, 'Politics of State Creation and Ethnic Relations in Nigeria' in C Toffolo (ed.) *Emancipating Cultural Pluralism* (State University of New York Press, Albany 2003) 215.

[76] H Alapiki, 'State Creation in Nigeria: Failed Approaches to National Integration and Local Autonomy' (2005) 48 *African Studies Review* 3, 49-65; and, R Akinyele, 'State Creation in Nigeria: The Willink Report in Retrospect' (1996) 39 *African Studies Review* 2, 71.

[77] See for instance, Human Rights Watch, *The Warri Crisis: Fuelling the Violence*, (HRW Report, 2003), 15:18(A).

[78] *J Frynas* (n 70) 41.

million between 1980 and 1991[79] to about US$36 million in 1996 alone.[80] The increase in social spending is even more remarkable when it is considered vis-à-vis the oil-companies previous stance that funding development projects was strictly the responsibility of the Government. The reason for the shift in stance is echoed in the words of Irene Gerlach, the Community Programme and Relations Adviser at BP Amoco that:

> There was a clear understanding that the people's of the Niger Delta were not only not benefiting from the revenue generated by the oil industry, but were actually suffering as a consequence of often corrupt and dictatorial Nigerian authorities at the time. On top of that, the awful hanging of Ken Saro-Wiwa and the Ogoni 8 heightened for us the problems in the Delta and brought with it a more sharpened focus as to what Statoil-BP should be doing.[81]

Increased community spending was thus a pro-active measure to earn an ethical license for oil-companies to continue operating in the Niger Delta region. The focus of corporate spending shifted from agricultural and other small-scale projects to major infrastructure investments including hospitals, electrification projects and provision of scholarships for indigenes of the region.[82] These were considered essential corporate social responsibility expenditure in Nigeria, where the government had failed to provide some of these basic

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[79] E Odogwu, 'The Environment and Community relations: The Shell Petroleum Development Company of Nigeria's Experience', First International Conference on Health, Safety and the Environment in Oil and Gas Exploration and Production, the Hague, 11-14 November 1991.

[80] Shell Petroleum Development Company, *People and the Environment: Annual Report 1996* (Shell Petroleum Development Company, Lagos 1997). The other oil-companies in the region increased their community spending significantly. See, *Human Rights Watch* (n 5) 103-105.

[81] Quoted in *J Frynas* (n 70) 41-42.

[82] See generally, *Human Rights Watch* (n 5) Chapter 6.

necessities.[83] The companies also increased their reliance on 'security' often stating their preference for the paramilitary units notoriously deadly in their operations.[84] The companies paid these officers an allowance and provide logistic support for their operations that have grave human rights violations consequences. Nonetheless, the companies are quick to deny their complicity when such occasions arise. Pegg however argues that they cannot absolve themselves of complicity in the following terms:

> These companies claim credit for the peaceful resolution of disputes when they ask the military authorities not to intervene forcibly. Yet they disclaim responsibility for fatalities when they do request intervention, arguing that they are required to do so by domestic law. Companies are not powerless actors. They make choices that directly affect the security or insecurity of local populations.[85]

Over this period, three observations may be made regarding the oil-companies and the 'security' option. First, they exploited the close relationship they had with the Federal Government that holds majority stakes in the ventures with them to request for security personnel not suited to handle civil protests. Secondly, that they are complicit in the

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[83] K Amaeshi, A Adi, C Ogbechie and O Amao, *Corporate Social Responsibility in Nigeria: Western Mimicry or Indigenous Influences?* International Centre for Corporate Social Responsibility (ICCSR) Research Paper Series No. 39-2006, 19.

[84] The companies maintain a batch of supernumerary police (also known as spy police). These officers are a part of the regular Nigerian Police attached to the oil-companies to guard their residential and operational facilities as well as 'provide escort duties in areas of high risk'. The companies that use these officers pay them allowances for their services; an arrangement Shell justifies citing high incidences of security risks claiming that it is normal for 'leading commercial businesses' to use their services. See generally, Shell Petroleum Development Company of Nigeria Ltd (SPDC), 'Firearms – the Shell position', press release, 17 January 1996 and SPDC, 'Shell and the Supernumerary Police in Nigeria', press release, 9 February 1996.

[85] S Pegg, 'The Cost of Doing Business: Transnational Corporations and Violence in Nigeria' (1999) 30 *Security Dialogue* 4, 475–79.

activities of the security agencies and finally that this strategy failed to achieve the desired objective of unhindered oil exploration and production in the Niger Delta. Rather, incidences of violence escalated in the Niger delta with an estimated thousand killed annually, putting it at par with conflicts in Chechnya and Colombia.[86] The fundamental causes of these conflicts are linked to the oil-industry's regulatory framework which its host-communities consider inimical to their 'rights' and interests. Sachs describes the situation in the region as a classical demonstration of how societies tend to impose the burden of resource exploitation on the people least able to cope, the impoverished minorities.[87] Van Dessel notes that the 'serious, complicated and explosive' situation in the delta is caused by 'too many promises and disappointments in the past that have exhausted the patience and confidence of the people...'[88] Sagay is more explicit in his observation that:

> ...as a result of decades of marginalisation and obnoxious regulations, the people of the area are not involved in the production processes in the [Niger Delta] area. The cumulative effects of the Petroleum Law, Land Use Act, etc. are alienation, disempowerment, pauperization and immiscrization of the people against the spirit of 'the Fundamental Objectives and Directive Principles of State Policy' which stipulate inter alia that "the exploitation of human or natural resources in any form whatever for reasons, other than the good of the community, shall be prevented'. It is common knowledge that the environment of the south-south has been so degraded that it is already endangering livelihoods and health of the people in several communities. Indeed, this is matter that requires urgent scientific documentation using participatory methodologies that involve the Niger Delta communities. It appears to us that there is a collaborative amnesia by the Nigerian state and the oil companies over the hazards which ongoing pollution,

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[86] 'Unrest has big impact on Nigeria oil output', International Herald Tribune, Friday June 11, 2004 <http://www.iht.com/> accessed 15 June, 2004.

[87] A Sachs, 'Dying for Oil' *World Watch*, May- June 1996, 12.

[88] J Van Dessel, 'The Environmental Situation in the Niger Delta, Nigeria', Internal position Paper prepared for GreenPeace Netherlands, (1995), 29.

> arising from gas flares, oil spillages, etc pose to the health of the people. Today, the right to a clean and safe environment and the right to life are being negated by the destruction of the environment and the forceful alienation of communal lands...Attempts by the peoples of the area to protest their marginalization in the power matrix and political economy of Nigeria have been repressed by the combined monstrous might of the state, multinational corporations and the ruling classes. In this respect the tales from Jesse, Odi, Kaiama, Umuechem and Ogoniland are still fresh in our minds.[89]

In a nutshell, the agitation by the host-communities transformed from scattered and isolated pockets of protests to organized rights-based mass protests with youths playing prominent roles.[90] A salient point in this observation is that the youths continued to rely extensively on militant tactic unlike MOSOP for instance that maintained an intellectual approach. Nwabueze made a distinction between the Ogoni approach and the Ijaws where youth presence is most visible as follows:

> The Ogoni movement could as well be a clear and unmistaken signal that voiceless, subordinate and underprivileged groups whose docility have been mistaken for a sign of weakness would, in the future, take up the gauntlet and confront the state with demands whose resolution would imply the dissolution of the burgeoning nation state. The Ijaw struggle, on the other hand, provides data on imitative mass revolt but more importantly for the covert processes, gestation and brazen expression of revolt and rejection of structures and institutions of state power and authority.[91]

The common goal of the host-communities however remained the recognition of their rights to participate actively in the oil-industry they host and derive benefits commensurate to their role as stakeholders in it. This goal was not achieved in this period

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[89] I Sagay, 'The Extraction Industry in the Niger Delta and the Environment' Fourth Annual Lecture of the Anpez Centre for Environment and Development, Port Harcourt, 15 November 2001.

[90] See generally, S Agbakwa, 'A Path Least Taken: Economic and Social Rights and the Prospects of Conflict Prevention and Peacebuilding in Africa' (2003) 47 *Journal of African Law* 1, 38-64.

[91] G Nwabueze, 'Contextualizing the Niger Delta Crisis' (1999) 6 *Centre for Advanced Social Science (CASS) Newsletter* 2, 2.

that witnessed increased disturbances and major cuts in production of oil from the region.[92] The next period represents a period when democratic governance was reinstated in Nigeria and expectations were high regarding the impact of the rule of law on the Niger Delta crisis.

6.2.4 1999-2007

The restiveness in the Niger Delta region persisted and the Head of State, General Abubakar in his 1999 New Year address to the nation, warned the Niger Delta communities that: 'we cannot allow the continued reckless expression of these (angry) feelings. Seizure of oil wells, rigs and platforms, as well as hostage-taking, vehicular hijacking, all in the name of expressing grievances, are totally unacceptable to this administration.'[93] The spates of oil-induced conflicts and violence remained widespread and its resolution was considered a daunting task for the in-coming government. Kenneth Roth, the Executive Director of Human Rights Watch observed that 'whoever wins this presidential election will have to cope with growing violence in the Niger Delta…'[94] He warned that the oil-companies and the new government should commit themselves to a new approach based on zero tolerance for human rights abuse by the police and military

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[92] Energy information Administration website, online: http://www.eia.doe.gov/emeu/cabs/chrn1997.html. Accessed; 10 March 1999.

[93] Quoted in *C Ukeje and A Odebiyi* (n 69) 3.

[94] Human Rights Watch, 'Oil Companies Complicit in Nigerian Abuses: Rights Group Urges Oil Firms to Help Prevent Niger Delta Crackdown' <http://hrw.org/english/docs/1999/02/23/nigeri804_txt.htm> accessed 30 March 2000.

in the region.[95] While the period witnessed continued rights-based agitation for increased participation in the oil-industry by the host-communities, the state governments within the Niger Delta region joined in the agitation. The aims of the state governments were centred on increased derivation and resource control. These are discussed in the following section while the Federal Government and oil-companies' responses are considered in subsequent sections.

6.2.4.1 Host-Community and State Responses

It is important to note that for the first time since the 1990s when violence escalated in the Niger Delta region, the states took a position on the crisis.[96] Generally, they adopted a political approach in demanding increased participation in the oil-industry. However, their approach was hinged on two major platforms; increased derivation and resource control. Their argument in a nutshell is that they deserve an increase in oil-revenues to compensate them for the adverse environmental and socio-economic impacts of oil exploration and production in their states. Otherwise, they should be granted control of the oil-industry as was the case prior to independence when each region controlled its resources and contributed a percentage to the central government. They further allege that this arrangement changed after the exploitation of oil in commercial quantities from the Niger Delta due to the absence of political and economic power from the region to

[95] *Human Rights Watch* (n 94).

[96] Before 1999, the states had been ruled by military administrators appointed by the Head of State and considered to be holding the positions as part of their military postings. Thus, they were for all intents and purposes an extension of the Federal Government and could not hold any views contrary to policies and operations of the central government.

oppose it. Under the aegis of the South-South Governors political forum, their campaign has caught-on strongly and increased derivation or resource control is considered as the viable options to resolve the crisis. The thesis however argues that such involvement of the states in the industry is not tantamount to active public participation and has the potential to exacerbate the violent conflicts in the region.[97]

Community agitation with the youths at the forefront continued unabated between 1999 and 2007 with new dimensions added to the existing oil-induced violence that are classified here as political and economic dimensions. Politicians in the run-up to the elections in in 2003 and 2007 allegedly sponsored youth gangs for electoral purposes.[98] Also, many gangs have used the cover of existing violence to perpetuate economic-induced kidnappings of families of politicians and oil-company staff for ransom. [99] While these dimensions to the violence in the region are noted, this thesis concentrates on conflicts that are directly linked to community participation in the oil-industry. The

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[97] Please refer to section 7.2 below for an incise analysis of increased derivation and resource control.

[98] D Bekoe, 'Strategies for Peace in the Niger Delta', Unites States Institute for Peace (USIP) Briefing December 2005 <http://www.usip.org/pubs/usipeace_briefings/2005/1219_nigerdelta.html> accessed 02 April 2008.

[99] See, BBC, 'Nigeria's shadowy oil rebels', Thursday, 20 April 2006 <http://news.bbc.co.uk/1/hi/world/africa/4732210.stm> accessed 24 April 2006. See also, 'For oil companies, it is cheaper to pay a ransom surcharge than shut down pipelines', Royal African Society website: <http://www.royalafricansociety.org/index.php?option=com_content&task=view&id=423> accessed 02 April 2008. D Naku, 'Nigeria: gunmen kidnap son of Bayelsa Deputy Speaker', Daily Champion (Lagos) 28 March 2008, online on allAfrica.com website <http://allafrica.com/stories/200803280393.html> accessed 02 April 2008.

activities of the Movement for the Emancipation of the Niger-Delta (MEND) are perhaps the most widely recognized in this regard recently due to the sophistication, scale and range of its attacks on oil facilities and security forces.[100] Its activities have translated the long-simmering delta from a local nuisance for the oil industry into an international economic flash point.[101] The impacts of their activities on international oil prices especially since 2003 are considered the latest in the strategies to draw attention to their plight as host-communities of the oil-industry. The militants calculate that the impacts of their activities will influence the international community; particularly USA and the UK to bear down on the Nigerian government to resolve the seemingly unending crisis which this thesis argues boils down a failure in the recognition of the rights of host-communities

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[100] See generally, T Ashby, 'Analysis: Niger Delta militants evolve to greater threats', Reuters 20 January, 2006 <http://www.alertnet.org/thenews/newsdesk/L19304609.htm> accessed 08 March 2006. See also, BBC, 'Nigeria's shadowy oil rebels', Thursday, 20 April 2006 <http://news.bbc.co.uk/1/hi/world/africa/4732210.stm> accessed 24 April 2006.

[101] The global oil market has been continuously rattled by the militants' attacks oil operations which cut Nigeria's oil exports of 2.5 million barrels a day by more than 20 per cent since January and increasing the pressure of demand for the product over its supply and consequently its price. D Olojede, 'Oil-rich Nigerian delta demanding self-determination', <www.energybulletin.net/2944.html> accessed 23 January 2006; C Cummins, 'As oil supplies are stretched, rebels, terrorists get new clout media-savvy guerrillas roil global oil prices in fight with Nigerian Government', Wall Street Journal, April 10, 2006; Page A1 and E Harris, 'Nigerian militants foresee more violence', The Washington Post, Monday, February 27 2006 <http://www.washingtonpost.com/wp-dyn/content/article/2006/02/27/AR2006022700732.html> accessed 10 March 2006.

and consequently the distribution of the dividends of the industry they host.[102] According to Movement for the Emancipation of the Niger Delta, 'the fact that we have influenced the price of world oil, no matter how little, and caught the attention of the foreign media indicates we are on the right track.'[103] In essence, it may be argued that the violence that characterizes Nigeria's oil-industry is a local response to issues of (mis)recognition of their role as stakeholders in the industry that has transcended from scattered protests for development infrastructure to youth-led mass revolts expressed in minority-rights contexts for active public participation.[104] The current state of violence in the region is disrupting oil operations in the region and the fortunes of its other stakeholders.[105] The responses of the Federal Government and the Oil-companies are considered in turn in the following sections.

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[102] L Kintz, 'Overview of Current Media Practices and Trends in West Africa' (2007) 6 *Global Media Journal* 10, Article No. 13 <http://lass.calumet.purdue.edu/cca/gmj/sp07/graduate/gmj-sp07-grad-fork-kintz.htm> accessed 08 May 2008. See also, O Ifowodo, 'Pouring Words on Troubled Waters: Nigeria's Niger Delta as a Burning National Allegory', Creative Writing on War and Peace in Africa held on 1–2 December 2006 in Uppsala, Sweden.

[103] *C Cummins* (n 102) A1.

[104] See generally, V Ojakorotu, 'The Internationalization of Oil Violence in the Niger Delta of Nigeria' (2008) 7 *Alternatives: Turkish Journal of International Relations* 1, 95.

[105] C Amanze-Nwachuku, 'Again, militant attacks push up oil price', Thisday Newspapers (Lagos), Wednesday 23 April 2008 <http://www.thisdayonline.com/nview.php?id=109519> accessed 23 April, 2008. Integrated Regional Information Network News, 'Nigeria: oil-rich Niger Delta faces "shocking" new wave of violence', 27 January, 2006 <http://www.irinnews.org/report.asp?ReportID=51397> accessed 10 March 2006.

6.2.4.2 Federal Government Responses

The civilian government adopted the initiatives that were typical of past governments including installing a strong military presence in the region and the creation of a new development board called the Niger Delta Development Commission (NNDC). The NDDC, created to develop the region physically'[106] like its predecessors, has had its operations received with mixed feelings and has been allegedly hampered by underfunding.[107] That notwithstanding, the Commission has partnered with international agencies to assist it in performing its functions[108] and its performance has been more visible, even if limited, than other government initiatives to address issues related to the restiveness in the Niger Delta and security of the oil-industry.[109] A novel approach in this

[106] See generally section 7 of the NDDC Act that lists the functions of the Commission.

[107] By virtue of section 14(2) of the NDDC Act, the Federal Government, member states and oil-companies are to contribute to the funding of the Commission. The Federal Government reportedly pays only 10 percent instead of 15 percent and it has paid nothing of the 50 percent of the Ecological Fund due member states of the Commission. See E Ubani, 'Niger-Delta: what Abuja Summit must do', Thisday Newspapers (Lagos), 30 March 2006 <http://www.thisdayonline.com> accessed 30 March 2006.

[108] Human Rights Watch, *The Niger Delta: No Democratic Dividend*, (Human Rights Watch/Africa, Washington D.C. 2002) 26.

[109] The Special Security Committee on Oil Producing Areas inaugurated in November, 2001 comprised of representatives of the Federal Government, oil-bearing states and oil-companies was mandated to address the prevailing situation in the oil producing areas which have, in recent past, witnessed unprecedented vandalization of oil pipelines, disruptions, kidnappings, extortion and a general state of insecurity. See, *Human Rights Watch* (n 108) 28. In April, 2006, the Consolidated Council on Social and Economic Development of Coastal States of the Niger Delta (CCSEDCSND) was created to provide solutions to the continued hostilities and violence in the region against the backdrop of demands for increased shares of the oil wealth derived from the region by its inhabitants. The plans for the region under this initiative is to

period was the Federal Government's recourse to the judiciary to resolve disputes regarding the distribution of offshore oil revenues. Typically, past (military) governments, promulgated Decrees to give legal backing to actions that were deemed to be in the best interests of the central government. In the case that ensued - *Attorney-General of the Federation v Attorney-General of Abia State*[110] - the main issue for the determination of the Supreme Court was whether the states were entitled to share in offshore oil revenues. The Court held in favour of the Federal Government that offshore oil was its exclusive property and it was not legally bound to share such revenues. The significant point to note is that the Federal Government thought it expedient to seek a political solution rather than adhering strictly with the court's decision. Consequently, the Allocation of Revenue (Abolition of Dichotomy in the Application of Derivation) Act 2004 was passed at the instance of the Federal Government to recognize the rights of states to benefit from offshore resources up to 200 meters depth isobaths.[111]

However, the Federal Government sought a political solution to the issue as it foresaw that adhering strictly to the Court's legal interpretation would exacerbate the state of social unrest particularly in the Niger Delta region. There are some salient points to be

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develop nine key areas in the region including employment, transportation, education, health, communication, environment, agriculture, power and water resources. See generally for more details; L Nwankwere, 'Obasanjo unfolds development plan for Niger Delta' The Sun Newspapers, April 19, 2006 <http://www.sunnewsonline.com/webpages/news/national/2006/apr/19/national-19-04-2006-003.htm> accessed April 19, 2006.

[110] (2001) 11 NWLR (pt. 725) 689. The case is more popularly referred to as the Resource Control suit.

[111] See the Allocation of Revenue (Abolition of Dichotomy in the Application of Derivation) Act 2004.

inferred from this. First, on a normative level, the Federal Government 'recognized' the expediency in resolving the issue politically. Even though the judicial decision was in its favour, strictly adhering to it would not be rationally justifiable as it would have further entrenched institutional rules already considered asymmetrical in favour of the oil-industry which it is a part of and increased 'social suffering'.[112] On the normative basis, recourse to judiciary at the Federal Government's instance is indicative of recognition and respect of the region's membership and participation in the greater community.[113] This is more so when it is considered against the backdrop that the Federal Government usually promulgated a Decree or made new regulations affirming its stance on such conflicting issues. This may be ascribed to the appreciation of democratic values in the country where law-making requires a broader consensus than was required under military regimes.

Despite the advent of democracy based on the cardinal of respect for the rule of law, the Federal Government continued the policy of maintaining a strong military presence in the region. Barely six months after President Obasanjo assumed office, he allegedly ordered the military to ransack Odi located in Bayelsa state. Despite the conflicting accounts of what really transpired, it is argued it was premeditated to serve as a warning against the

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[112] See section 4.4.2 above. A Honneth, 'Redistribution as Recognition: A Response to Nancy Fraser', in N Fraser and A Honneth (eds.) *Redistribution or Recognition? A Political-Philosophical Exchange*. (Verso, London 2003) 131.

[113] Refer to section 4.4.2 above. D Schlosberg, 'Reconceiving Environmental Justice: Global Movements and Political Theories' (2000) 13 *Environmental Politics* 3, 519 and I Young, *Justice and the Politics of Difference* (Princeton University Press, Princeton, NJ. 1990) 23.

rising ethnic-based conflicts in the country and the disruption of oil exploration in the Niger Delta region in particular. For instance, while the Chief of Army Staff claimed that the President approved the operation,[114] the defence minister reportedly claimed that it was initiated with the mandate of protecting lives and property 'particularly oil platforms, flow stations, operating rig terminals and pipelines refineries and power installations in the Niger Delta.[115] Fani-Kayode, a presidential spokesman claimed that the action was necessary to back up government policy. In his words:

> When we need to be hard, we have been very hard. We were very tough when it came to a place called Odi town where our policemen and our people were killed by these ethnic militants. And the Federal Government went in and literally levelled the whole place. And the proof of the pudding is in the eating. It has never happened again since that time. So I think that policy works.[116]

Unfortunately, the policy did not work as suggested by Fani-Kayode because the communities in the Niger Delta did not relent in their movement for changes in the legal structure that deprived them of participatory rights in the oil-industry they host.

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[114] The Army chief responding to questions in a Newswatch magazine interview said:

> The operation in Odi was done very professionally.... [A]fter the operation, at the end, I went to the president and briefed him on the operation we conducted.... If the president or minister didn't like it, that is when they would have removed me or order for my court-martial.... This was something that was approved by the president himself. Who am I to leave Abuja and go on operation in Port Harcourt or Bayelsa on my own? What status do I have?

See, *Human Rights Watch* (109) 22.

[115] Integrated Regional Information Network News, 'Nigeria: Focus on the Deployment of Troops in Odi', online at the University of Pennsylvania African Studies website <http://www.africa.upenn.edu/Newsletters/irinw-123099.html> accessed 05 May, 2008.

[116] S Inskeep, 'Race to share in Nigeria's oil bounty', National Public Radio, 22 August 2005.

It is noteworthy that military action as experienced in Odi was replicated in other parts of the Niger Delta region including Odioma and Choba.[117] Furthermore, a new military formation - the 83rd mechanized division in October 2000 – was created specifically to protect oil-installations in addition to the Special Task Forces previously set-up for the same purpose.[118] A military pact has also been signed with the US government under which US officers are to train Nigerian soldiers who are expected to be deployed to the Niger Delta and to supply logistics under several military 'training assistance programmes'.[119] Despite the US Department of Defence's insistence that it will emphasize civilian control of the military and human rights in its projected Nigeria training programs, it is argued that these concerns will be superseded by economic and security interests tied to oil.[120] This is more so since the typical mindset of Nigerian military personnel in the region is to suppress any form of agitation 'against national interest' with 'superior fire power.'[121] In Nigeria where 'national interest' is an euphemism for the unhindered exploitation of oil, it is argued that human rights

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[117] See, Amnesty International, 'Nigeria Ten Years on: Injustice and Violence Haunt the Niger Delta' <http://web.amnesty.org/library/index/engafr440222005> accessed 11 January 2006.

[118] The Vanguard, October 7, 2000, online: www.vanguardngr.com/news.

[119] M Fleshman, 'The International Community and the Crisis in Nigeria's Oil Producing Communities: A Perspective on the US Role (2001) 61 *ACAS Bulletin* 1, 5.

[120] M Fleshman, 'The International Community and the Crisis in Nigeria's Oil Producing Communities: A Perspective on the US Role' (2001) 61 *ACAS Bulletin* 1, 3. K Akosah-Sarpong, 'Washington eyes Africa's oil', *West Africa*, No. 4354, 2-8 Dec. 2002, 10. For a full discussion of US interest in Africa's oil, see D Volman, 'Oil, Arms, and Violence in Africa' (2004) 66 *ACAS Bulletin* 1, 15-25

[121] See generally, Niger Delta Human and Environmental Rescue Organization (ND-HERO), 'Fresh tension grips Niger Delta', *Delta Today*, Issue 8 - October 1, 2000.

considerations will be subjected to economic and security considerations that revolve around the exploitation of Nigeria's oil.

It is important to refer to the National Political Reforms Conference that was convened by the Federal Government in July 2005. Though the Conference was not an initiative directly targeted at resolving the crisis in the Niger Delta, it is important for three main reasons. First, the increased restiveness in the Niger Delta, with its governors actively clamouring for resource control, was a core reason for it being conveyed. Secondly, the Conference highlighted the impacts of the absence of economic and political power of minority groups. Despite previous government reports and public perception regarding the need to review oil legislation in the country and increase derivation to the region, the efforts of the representatives of the Niger Delta region to the conference were unable to muster the required support to achieve this. In fact, a report by the Federal Government initiated Special Security Committee on Oil Producing Areas published shortly before the inauguration of the conference had made recommendations including the repeal of the Land-Use Act, Petroleum Act, Gas Re-injection Act and other laws that dispossess oil-producing areas of their land and the upward review of the 13% derivation to at least 50%.[122] Again, the politics of the minority that has beset the region prior to independence came to the fore.[123] Thirdly, the recommendations of the Conference reinforce the

[122] For instance the See generally, *Human Rights Watch* (n 108) 28.

[123] As a result, the delegates from the Niger Delta region walked out on the conference in anger and frustration. See generally, S Omotola, 'The Next Gulf? Oil Politics, Environmental Apocalypse and Rising Tension in the Niger Delta' (2006) *1The African Centre for the Constructive Resolution of Disputes (ACCORD) Occasional Paper Series* 3, 8 and *K Omeje* (n 36) 31-32.

central argument of the thesis that the rights of the host-communities to participate in the oil-industry they host ought to be recognized as a means to ending the crisis. The National Political Reforms Conference with regards to the perceived neglect of the Niger Delta region and the consequent state of anarchy recommended that:

- a clear affirmation of the inherent right of the people of the oil producing areas of the country not to remain mere spectators but to be actively involved in the management and control of the resources in their place by having assured places in the Federal Government mechanisms for the management of the oil and gas exploration and marketing;
- an expert commission should be appointed by the Federal Government to study all the ramifications of the industry, including revenue allocation with a view to reporting within a period of not more than six months, how the mineral resources concerned can best be controlled and managed to the benefit of the people of both the states where the resources are located and of the country as a whole; and
- an increase in the level of derivation from the present 13 per cent to 17 per cent, in the interim pending the report of the expert commission.

Clearly, the National Political Reforms Conference affirmed the 'inherent right' of the host-communities to be 'actively involved' in the oil-industry beyond receiving increased derivation payments. Unfortunately the recommendations of the conference like that of the Special Security Committee on Oil Producing Areas that advocate the recognition of

host-communities' rights to participate in the oil-industry have not been implemented by the Federal Government. It is posited that the Federal Government has over the years ignored such recommendations mainly for fiscal and political reasons. The recognition of participatory rights will reduce the oil revenues that will accrue to the Federal Government that relies heavily on such revenues to run its budget and also give the Niger Delta region some political leverage in federal politics. These will result in a twist in the political balance of the country that is controlled by ethnic 'majorities' that rely extensively on oil revenues to develop their areas. In other words, granting these participatory rights, theoretically speaking, is tantamount to recognition of the host-communities and will result in the (re)distribution of rights and benefits in the Nigerian oil industry considered to be unbeneficial to the Federal Government controlled by the major ethnic groups. The responses of the oil-companies are considered in the next section.

6.2.4.3 Oil-Companies' Responses

Generally, the oil-companies operating in the Niger Delta region have become more responsive to community development. This change is attributable to the impact of the communities' rights-based agitation that attracted international sympathy to their plight and increased the pressure on the companies particularly by human and environmental rights organizations to adopt pro-development initiatives. It had also become apparent that relying on repressive methods had greater repercussions for the oil-companies that

were targeted by militant groups for reprisal attacks.[124] This fear is not unfounded as MEND targeted oil-installations in response to attacks on its strongholds by military forces.[125] The companies have increased goal-oriented community development activities to meet their 'social license to operate'.[126] These activities have involved initiating stakeholders' meetings with representatives of the host-communities, various levels of government, journalists, non-governmental organizations, and academia in attendance. The aim of the meetings, which Shell tags the 'stakeholders' workshop forum', is to share information on its operations. The companies also consult with their host-communities to reach mutual agreements referred to as Memoranda of Understanding on the projects to be initiated by the companies for the communities' benefits. The agreements essentially detail the benefits particular communities will derive for as hosts such as employment benefits, development projects and scholarship awards for instance.

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[124] C Osagie, 'Crackdown on militants worries oil firms', Thisday Newspaper (Lagos) 21 August 2006 <http://www.afrika.no/Detailed/12588.html> accessed 21 August 2006.

[125] S James, 'Niger Delta militants kidnap 9 oil workers', Thisday Newspaper (Lagos) 18 February 2006. M Oduniyi, 'Militants threaten more attacks', Thisday Newspaper (Lagos) 19 February 2006, online: < http://www.thisdayonline.com/nview.php?id=41185> accessed; 19 February 2006. C Osagie, 'Niger Delta militants announce temporary ceasefire', Thisday Newspaper (Lagos) 06 October 2006 <http://www.thisdayonline.com/nview.php?id=60017>. Accessed; 06 October 2006.

[126] WAC Global Services, 'Peace and Security in the Niger Delta: Conflict Expert Group Baseline Report, Working Paper for SPDC', WAC Global Services, 2003.

For instance, Shell has reportedly reached agreements with host-communities for at least 15 of the 90 communities to be affected by its Gbaran Integrated Oil and Gas Project.[127] There are also industry claims regarding improved environmental practices. Shell for instance claims to carry out the ISO 14001 certification process and has initiated moves to improve the quality of the environmental impact assessments carried out before new oil exploration or production can take place.[128] The ISO 14001 is an international specification for an environmental management system (EMS). It specifies requirements for establishing an environmental policy, determining environmental aspects and impacts of products, activities or services, planning environmental objectives and measurable targets, implementation and operation of programs to meet objectives and targets, checking, corrective action and management review.[129] Several oil-companies have also reorganized their community development departments, increased their budgets and began collaborating with non-governmental organizations to deliver community

[127] The Gbaran Integrated Oil and Gas Project is currently the largest oil and gas project being undertaken by Shell Petroleum Development Company. See, Shell Petroleum Development Company, *Shell Nigeria Annual Report 2005: People and the Environment* (Shell, 2006) 26.

[128] See for example; Ecumenical Centre for Corporate Responsibility, *When the Pressure Drops: An Assessment of Shell's Progress in the Niger Delta* (Ecumenical Centre for Corporate Responsibility, Oxford 2002) 7. Also the documents on the engagement of Business Partners for Development with Shell Petroleum Development Company on the EIA process available at: www.bpd-naturalresources.org/html/focus_spdc.html. Accessed; 15 October 2006.

[129] For information on the ISO 14001 standard see the website of the International Organization for Standardization, www.iso.ch. Accessed; 20 May 2007.

development projects to ensure their sustainability.[130] Shell for instance has reorganized its community development unit into the Sustainable Community Development (SCD) Unit with a shift in emphasis to 'sustainability and the long-term perspective for all its projects'.[131] The SCD strategy accentuates capacity building and aims to put the benefiting communities in the lead in decision-making and planning of their development while recognizing the symbiotic relationship between development and peace.

This development model is expected to replace the previous model which failed for the following reasons, catalogued by the Niger Delta Development Commission:

i. An excessively community-pressure driven or crisis management approach, which reduced development efforts to meeting a set of demands expressed in MoUs with the communities;
ii. A high rate of default on the MoUs, which have usually been explained as due to budgetary constraints;
iii. A high cash-payment and placatory tendency to dealing with community agitations;
iv. The absence of any long-term or integrated view to development challenges;
v. The limited arrangements if any for maintenance of infrastructure provided, leading to very short-lived benefits from the rapid collapse of structures erected; and,
vi. The poor networking and synergy with other agencies and governments, leading to duplication of infrastructure and poor resource use.[132]

Unfortunately, these problems listed by the NDDC are still characteristic of recent community development efforts and contribute to on-going conflicts in the region.[133]

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[130] See, J Frynas, 'The False Developmental Promise of Corporate Social Responsibility' (2005) 81 *International Affairs* 3, 588. Also, *Shell Petroleum Development Company* (n 128) 24-26.

[131] *J Frynas* (n 130) 588.

[132] Section 2.5 NNDC

Specifically, the MOUs are a source of conflicts as the oil-companies do not adhere to the agreements contained therein. Since these MOUS are not legally enforceable, aggrieved communities embark on protests against the promissory company to force them to perform. More often than not, the state security apparatus is invited to quell the restiveness, thus starting a new cycle of conflicts and violence. In fact, the rising incidences of violence in the industry have been linked to community efforts to force the companies to implement such MOUs.

For instance, the Corporate Engagement Project[134] after following a June-July 2004 field visit to the operations of the Nigerian subsidiary of Total concluded that 'only those groups that obstruct operations (or threaten to) are "compensated".'[135] In other words, the perpetuation of violence is a sought of measure of vigilance among the communities to receive their promised incentives. Idemudia and Ite further allege that such projects initiated by the oil-companies also contribute to conflicts for reasons that include low community participation and the companies' failure to improve core business

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[133] See generally, U Idemudia and U Ite, 'Corporate-Community Relations in Nigeria's Oil Industry: Challenges and Imperatives' (2006) 13 *Corporate Social Responsibility and Environmental Management* 4, 194-206.

[134] The Corporate Engagement Project (CEP) is directed by the Collaborative for Development Action (CDA); an organization that specializes in consulting on community development issues.

[135] L Zandvliet and A Nwankpo, 'Corporate Engagement Project; Elf Petroleum Nigeria Limited (EPNL) Field Visit to Nigeria: 30 June-13 July 2004', August 2004 quoted in International Crisis Group, *The Swamps of Insurgency: Nigeria's Delta Unrest*, Crisis Group Africa Report N°115 2006, 11.

practices.[136] Notably, the Akassa project funded by Statoil (now ChevronTexaco) and implemented by ProNatura International (PNI) - a development Non-Governmental Organization (NGO) – that adopted a participatory approach with stakeholders is considered the first truly successful community development project in the Niger Delta region.[137] The partnership employed a methodology that is both interactive with the community and proactive in attempting to tackle its problems to deliver the project thereby demonstrating the value of inculcating active public participation in development projects.

Meanwhile, the general development practices among the companies continue to instigate violent conflicts that portend imminent threats locally and globally. For instance, a report produced by WAC Global Services[138] on behalf of Shell in 2002 warned that if current conflict trends continue uninterrupted, it would be surprising if Shell in Nigeria is able to continue onshore resource extraction in the Niger Delta beyond 2008, whilst complying

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[136] *U Idemudia and U Ite* (n 134) 194-206.

[137] World Business Council for Sustainable Development (WBCSD), 'Statoil and BP the Akassa Community Development Project in Nigeria', <www.wbcsd.ch/web/publications/case/statoil_bp_akassa_full_case_final_web.pdf> accessed 12 August 2006. See also, World Bank, 'Beyond Corporate Social Responsibility: The Scope for Corporate Investment in Community Driven Development', (2006) Report No. 37379-GLB 36-41 and J Egan, 'The Akassa approach', BBC News, Thursday, 22 April, 1999, online: <http://news.bbc.co.uk/1/hi/programmes/crossing_continents/325313.stm> accessed 05 May 2008.

[138] WAC Global Services was hired by Shell in 2002 to assess the impact of its activities on conflict in the Delta.

with Shell business principles.[139] While the report specifically referred to Shell, the warning is indeed instructive to the entire industry. These conflicts are partly responsible for the substantial rise in global oil prices that may increase up to $200 a barrel if supply continues to struggle to meet demand as reported by the British Broadcasting Corporation.[140] Thus, it is imperative that the root causes of these oil-induced conflicts be resolved. It is instructive to note that though there has been a remarkable increase in the budgetary allocations of oil-companies to community development projects, their failure to deliver public oriented projects with the involvement of the host-communities has reduced the possible positive effects of such increases.[141] A related reason is the continued reliance on the security option by these companies that often result in the abuse of human rights of the inhabitants of its host-communities. For instance, a corporate

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[139] *WAC Global Services* (n 126).

[140] Other factors that are affecting oil supplies other than the conflicts in the Niger Delta include the increased Chinese demand and the Middle-East crisis. 'Oil price 'may hit $200 a barrel', BBC online news, 7 May 2008 <http://news.bbc.co.uk/1/hi/business/7387203.stm> accessed 10 May, 2008. See also, W Etim, 'Niger Delta crisis hikes oil prices, says President', Guardian Newspapers (Lagos), May 11, 2008 <http://www.guardiannewsngr.com/news/article11//indexn3_html?pdate=110508&ptitle=Niger%20Delta%20Crisis%20Hikes%20Oil%20Price,%20Says%20President&cpdate=110508> accessed 11 May 2008.

[141] Shell for instance reportedly committed approximately US$52 million to community development in the Niger Delta in 2001, approximately US$100 million in 2002 and 2003and US$107 million in 2005. See generally, M Peel, 'Crisis in the Niger Delta: How Failures of Transparency and Accountability are Destroying the Region', AFP Bp05/02 (2005), 5 and Shell Petroleum Development Company, *Shell Nigeria Annual Report 2005: People and the Environment* <http://www.shell.com/static/nigeria/downloads/pdfs/2005_shell_nigeria_report.pdf> accessed 20 October 2006.

spokesperson David Miller at an August 3, 1999 Congressional hearing revealed that that US companies were prepared to provide additional funds to the Obasanjo government to bolster the security force presence in the Niger Delta oil fields.[142] Within the Niger Delta region, the companies have on numerous occasions been party to raids, attacks and other forms of military action against their host-communities.[143] Overall, the oil-companies operating in the Niger Delta region have adopted a more aggressive approach towards earning their social license to operate.[144] However, these have failed to have the desired effect because the communities are not actively involved in the development process aimed at them.

6.3 Concluding Observations

This section has examined the role of the legal framework that regulates Nigeria's oil-industry and how the responses to it have contributed to the prevalent state of violent conflicts in the region. It has highlighted the significant changes that have affected the relationships among the stakeholders of the industry; that is, the Federal Government of Nigeria, the oil-companies, the host-communities and more recently, the state

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[142] *M Fleshman* (n 120) 5.

[143] Environmental Rights Action (Friends of the Earth, Nigeria), 'Nigerian Soldiers Destroy Odioma Community' (2005) <http://www.eraction.org/> accessed 12 February 2006.

[144] See, Human Rights Watch (n 109) 33. Also, K. Cohen, Vice President, Public Affairs, 'Corporate Social Responsibility Challenges', remarks at Gitelson Symposium, Columbia University, January 26, 2001; Rene Dahan, ExxonMobil Executive Vice President, 'Business in a World of Conflict', remarks to Denver, Colorado, International Chamber of Commerce, May 7, 2002 <www.exxonmobil.com> accessed 21 July 2002.

governments within the region. Specifically, the development of the conflicts highlighting their transformation from scattered protests has centred on the provision of development infrastructure to rights-based contexts emphasizing environmental and minority rights. It is important to state categorically that this section of the thesis does not suggest that the oil industry's regulatory framework is the sole cause of these conflicts. Rather, it argues that it is a fundamental contributory factor of the prevalent conflicts as it deprives its host-communities the right to participate actively in the industry they host.

The section has argued that development and security strategies have failed because the struggle has now assumed a rights-based dimension and has gone beyond the provision of development infrastructure and jobs. The plan by Obasanjo's regime to create 20,000 jobs and invest in roads, education and health specifically for indigenes of the region has been rejected as unsatisfactory. The Movement for the Emancipation of the Niger Delta described the job offers that included positions in the police and armed forces as 'menial' and insulting because these security institutions were agents in the perpetuation of havoc in their homesteads. The organization's major compliant however is that the initiative did not address 'what we have demanded…the control of our resources' thereby displaying a lack of seriousness on the part of the government.[145] It appears that the security option has failed because the inhabitants of the region, particularly the youths, have thrown down the gauntlet to extricate themselves from the deprivations they have suffered as a result of being host-communities to the oil-industry. Relenting in the struggle at this stage

[145] Integrated Regional Information Network News 'NIGERIA: Delta militants denounce Obasanjo's plan for oil region, threaten more attacks' <http://www.irinnews.org> accessed

is not considered an option because it is believed it will worsen their (host-communities) situation; including possible reprisals from the Federal Government and further humiliation and deprivation through continued marginalization. This is more so that the effects of their agitation directly affects global security and increases the likelihood of foreign intervention to urgently end the crisis.[146]

With regards to the oil-companies whose activities the host-communities allege disrupt their environment and socio-economic well-being, the section revealed that the oil-companies have recently realized the need to integrate their host-communities into the development process. However, this development appears to be more of corporate rhetoric than substance as unfolding events in the region suggest. The MOUs rather than integrating public involvement in the development process to avert conflicts instigate fresh spates of violence. Many of the MOUs are initiated under the threat of violence from the host-communities.[147] Even then, the oil-companies often fail to live up to their responsibilities as contained therein thereby sparking new rounds of conflicts and deepening the existing feeling of distrust and suspicion.[148] Indeed, these agreements seem more of a 'fire-brigade' approach to resolving an imminent crisis rather than a systematic

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[146] These inferences are drawn from discussions with opinion leaders and youths in the Niger Delta region.

[147] 'Youths vacate Shell, Chevron facilities', The Nigerian Guardian Newspapers (Lagos), 08 December 2004. Also, host-communities have to stage disrupt oil operations to get attention for requests to review 'Memoranda of Understanding'. See, 'Warri: militant youths leave flowstation', Thisday Newspapers, 24 November 2004.

[148] N Colombant, 'Shell Oil Slowly Resumes Production in Nigeria' <http://www.axcessnews.com/commodities_010705a.shtml> accessed 22 March 2006.

approach to active public participation towards effective relationship and conflict management. Also, because these MOUs are not legally binding agreements and thus unenforceable through legal processes, the host-communities often resort to protests against the 'erring' company that often invite the security agencies to ensure the safety of lives and property. The resultant clashes with the protesters culminate in violent incidents that contribute to the vicious cycle of violence in the industry.[149] Regarding this 'new' corporate approach, Human Rights Watch observed that:

> for the villager living near Shell's facilities in the Niger Delta, little if anything has changed: too often, oil spills still destroy farming land or fishing grounds and remediation is poor; state security forces deployed to Shell's facilities continue to harass people indiscriminately; and the benefits of the oil industry are still channelled to a small elite.[150]

Thus, for the consensual approach to be successful, it has to be a genuine effort at integrating the host-communities as partners in development as evidenced in the Akassa project.

In a nutshell, the rights-based demands of the host-communities have surpassed the initiatives projected by the Federal Government and oil-industries. A civil society leader succinctly observed in this regards that 'when people have modest demands and even

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[149] One of the incidences involving Chevron is a subject of litigation under the Alien Torts Claims Act (ATCA) of 1789 – *Bowoto v Chevron*, United States District Court for the Northern District of California, Case No.: C99-2506 CAL. See also, C Osagie, 'Defence chief warns Niger Delta militants', Thisday Newspaper (Lagos) 31 July 2006.

[150] *Human Rights Watch* (n 109) 31.

those modest demands are not met, what they do is step up their demands.'[151] This is what has happened in the Niger Delta region where the present initiatives may have placated the host-communities a couple of decades ago before they began to express their discontent within a rights-based context. It is doubtful that any initiative that does not address the 'policy of squeezing maximum production from the Niger Delta at the expense of its environment and future [which] is not an accident based upon ignorance [but] is a deliberate policy which has been complemented by a harsh and oppressive legal regime'[152] will be considered sincere. More so, it would take more than rhetorical policy statements to convince the communities that a change is forthcoming due to the history of failed promises that have eroded whatever collective trust oil communities may have had in government or oil companies to meet their immediate and long term needs.[153] This is especially so as the minority status of the region has become a major flashpoint in the articulation of, and, modality for, organizing social forces to resist alienation, extraction and exclusion by the hegemonic coalitions of the ethnic elite.[154]

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[151] See, Crisis Group, 'Nigeria's Faltering Federal Experiment', *Crisis Group Africa Report N°119,* 25 October 2006, 8.

[152] I Sagay, 'The Extraction Industry in the Niger Delta and the Environment', Fourth Annual Lecture of the ANPEZ Centre for Environment and Development delivered on 15 November, 2001, Port Harcourt, River State, Nigeria.

[153] *C Ukeje and A Odebiyi* (n 69) 40.

[154] C Obi, The Changing Forms of Identity Politics in Nigeria under Economic Adjustment. The Case of the Oil Minorities Movement of the Niger Delta (2001) Nordiska Research Report No. 119, 87.

CHAPTER SEVEN

PUBLIC PARTICIPATION IN THE NIGERIAN OIL INDUSTRY: PROSPECTS AND PROBLEMS

7.1 Introduction

Previous sections of the thesis have argued that the erosion of the Niger Delta inhabitants' rights to participate actively in the oil-industry is a contributory cause of the violence that besets the oil-industry. This section argues for what will amount to active public participation in the Nigerian oil-industry. It is divided into two broad sections. The first part argues that the state governments' proposals and campaigns for increased derivation and resource control will not rid the region of oil-induced conflicts and violence. It argues that these initiatives are not a substitute for active participation. It argues further that they are more likely to exacerbate the existing conflicts and initiate new ones in the absence of 'public participation'.[1] The second part proposes methods by which the host-communities might be guaranteed rights of participation which the thesis argues are essential to the resolution of conflict and maintain peace in Nigeria's oil-industry.

7.2 The Argument against Increased Derivation and Resource Control

As noted previously,[2] the return to democratic rule in 1999 instilled the state governments with political and socio-economical principles independent of the Federal Government. The crisis in the Niger Delta however became the rallying point for its state governments who claimed that their (states) exclusion from the ownership and management of the industry they

[1] Refer generally to section 2.4 above that defines public participation with particular relevance to the extractive industry.

[2] See section 6.2.4 above.

host was the cause of restiveness.[3] Thus under the aegis of the south-south governors, they advocated that peace can be achieved only if the states be allowed to reap adequate benefits from the resource bestowed on their land by God.[4] This, according to the states could be achieved either by increasing derivation payments to the affected states or by granting them control over the resource. Two facts are evident from the governors' position on the Niger Delta crisis. The first is that the oil-bearing states do not receive adequate benefits from the oil-industry and secondly, that resource control or increased derivation will satisfy the aspirations of 'adequate benefits' and potentially resolve the current imbroglio. This section briefly examines the hitherto unconsidered but probable consequences that resource control or increased derivation may have on the region. It reinstates the central argument that rights of public participation are essential as the basis to guarantee sustainable peace in the area. This discussion is deemed necessary because the governors have exploited political power to influence a growing redefinition of the longstanding crisis that is increasingly characterised in rights-based terms.

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[3] C Obi, 'Resource Control in Nigeria's Niger Delta' (2007) 2 *Global Knowledge* 1, 59; A Adesopo and A Asaju, 'Natural Resource Distribution, Agitation for Resource Control Right and the Practice of Federalism in Nigeria' (2004) 15 *Journal of Human Ecology* 4, 281 and S Nyityo, 'Colonial Administration and the Origins of the Movement for Resource Control in Nigeria' <http://www.sephis.org/pdf/nyityo.pdf.> accessed 15 May 2008. See also, J Overly, 'Resource Control: Akwa Ibom gets its fair share: Governor takes on federal government and wins' <http://www.internationalreports.net/africa/nigeria/akwa%20ibom%202005/dec29%20resource.html> accessed 15 May 2008.

[4] O Edevbie, 'Senator Fred Brume and Resource Control Matters Arising' <http://www.waado.org/NigerDelta/Essays/ResourceControl/Edevbie_Andrew.html> accessed 02 December 2007.

The proponents of increased derivation argue that the adverse effects of the oil-industry upon host-communities (and states) far outweigh the payment they receive in derivation.[5] They argue that since derivation is a form of compensation that the states receive for these negative impacts, the payments they receive should be increased adequately compensate them for the environmental and socio-political burdens the industry places on them. Presently, the states are paid 13 per cent of oil revenues that accrue to the Federation Account in accordance with section 162(2) of the 1999 Constitution that prescribes that the states receive at least 13 per cent of such revenues.[6] The governors of the Niger Delta states are advocating for an increase of derivation to 50 per cent as was the case prior to oil becoming the dominant foreign exchange earner in the 1970s.[7] Thus, the arguments and conclusions in this section are based on the assumption that derivation is increased to 50 per cent as sought by the governors. The implication of increased derivation is that the state governments and not the host-communities will continue to be the direct beneficiaries. Under the current constitution, derivation payments are made to the states[8] that then allocate revenues to their constituent

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[5] *A Adesopo and A Asaju* (n 3) 281-282 and R Dunmoye, 'Resource Control: Which way forward?' (2002) 5 *The Nigerian Social Scientist* 1, 51.

[6] See section 5.3.2 above.

[7] A Ekpo, 'Fiscal Federalism in Nigeria: Unsettled Issues', <http://www.federalism.ch/files/categories/IntensivkursII/Nigeriag4.pdf> accessed 15 May 2008. The first reduction was in 1971 with the promulgation of the Offshore Oil Revenues Decree No. 9 (1971) that vested all offshore Oil Revenue and the Ownership of the Territorial Waters and the continental shelf in the Federal Military Government. This legislation reduced derivation to the states to 30% and after a series of further reductions; the states received only 1.5% in derivation by 1984. See generally, L Atakpu, 'Resource-Based Conflicts: Challenges of Oil Extraction in Nigeria' <http://www.adelphi-consult.com/ECC2007/Downloads/Atakpu_WG_A_I_Day_1.pdf> accessed 16 May 2008.

[8] See section 162(4), (5), (6) and (8) of the 1999 CFRN.

Local Government Councils as prescribed by the State House of Assembly.[9] In essence, derived oil-revenues will be divided at the discretion of the state government, with the potential consequence that the oil-bearing communities may not receive substantial parts of the derived allocation. What is more, the governments are not legally obliged to pay a specified percentage of the funds to the oil-bearing communities. However, some states have initiated oil producing areas development commissions fashioned after the NDDC to initiate development projects in the oil-bearing communities. These commissions are funded by a certain percentage of derived funds allocated to the state. For instance, the Ondo State Oil Producing Areas Development Commission Law, (2003) prescribes that the Commission be funded by 40 per cent of the 'at least 13 per cent' derivation paid to the state.[10] Prior to the current political dispensation, only Ondo State had such a board.

Despite the above observation in favour of increased derivation, a common argument is that as the amounts paid to the state governments increase, allocations to the local governments will increase and development will be stimulated among the local communities. However, as historical and contemporary events reveal, the increases in derivation over the years have not produced any significant development results. Consequently, state governments have suffered scathing criticisms from the Federal Government and their citizens that they have utilised the increased derived revenues injudiciously.[11] Obasanjo in his assessment of Delta governors' utilization of the increased derivation revenue that accrued to them under his tenure observed that 'the obvious assessment so far is that not much impact has been made on the lives and

[9] Section 162(7) CFRN 1999.

[10] Delta state created a similar agency; the Delta State Oil Producing Areas Development Commission (DESOPADEC) in 2007.

[11] O Ibeanu, 'The Rhetoric of Rights: Understanding the Changing Discourses of Rights in the Niger Delta' (2004) 68 *ACAS Bulletin* 1, 16.

living standards of most ordinary people of the Niger Delta'.[12] According to Obasanjo, this has given the citizens 'legitimate reason' to feel aggrieved.[13] The 'aggrieved citizens' have in the same vein also queried their state governments' application of oil-revenues claiming that the governors 'just do what they want to do' with the money.[14] The Federal Government irked by the alleged rate of profligacy embarked on a campaign of transparency in the extractive industry and began to publish its allocation of oil revenues to state governments since 2003. It is important to state that the basis for this action is itself questionable as the central government's rhetoric of transparency had other underpinnings including undermining the state governments' pursuit for resource control. That notwithstanding, the reality of the situation in the states suggest that the respective state governments have not expended the increased oil revenues that have accrued to them judiciously.[15] Consequently, one cannot affirm that further increases in derivation will yield benefits to the poor and needy people that inhabit the region nor guarantee participation in the disbursement of the increased revenue.

Resource control may refer to the absolute or principal control of a resource. According to Sagay the term includes the exclusive right of a region to the ownership and control of resources, both natural and created within its territory, and involves the region having 'a direct and decisive role in the exploration for, the exploitation and disposal of, including sales

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[12] M Peel, *Crisis in the Niger Delta: How Failures of Transparency and Accountability are Destroying the Region*, AFP BP 05/02 (2005), 7.

[13] *M Peel* (n 12) 7.

[14] E Ujah, 'Niger Delta wants direct allocation to host communities', Vanguard Newspapers (Laos) 31 March 2006 <http://www.vanguardngr.com/articles/2002/cover/march06/31032006/f231032006.html> accessed 03 April 2006.

[15] *O Ibeanu* (n 11) 16.

of the harvested resources'.[16] Douglas suggests that resource control 'denotes a compelling desire to regain ownership, control, use and management of resources for the primary benefit of the first owner (the communities and people) on whose land the resources originate.'[17] Thus with regards oil in the Niger Delta, the main objective of resource control is to ensure that the states are involved in the exploitation and sharing of benefits from the oil-industry. However, the impacts of both absolute and principal control will be highlighted below. There are two immediate consequences of absolute resource control. First; the Niger Delta states will effectively own the resource and control its huge revenues and secondly, the management of the oil-industry will become the responsibility of the states.

While increase in revenues accruing to the states may be interpreted as a positive outcome, the previous section has suggested that such an increase does not necessarily result in corresponding developmental improvements for the inhabitants of the region.[18] It is more likely that the influx of oil-revenues to the state will precipitate a jostle among local actors (including politicians, chiefs, local elite and militants) to gain political, financial and territorial advantage over each other in access to oil-revenues. The political process in Nigeria, particularly the Niger Delta, has been fraught with a high violence rate as politicians

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[16] I. Sagay, 'Federalism, the Constitution and Resource Control: My Response', The Guardian Newspapers (Lagos) 13 August 2001, online: http://www.ngrguardiannews.com/. Accessed; 14 August 2001.

[17] O Douglas, 'A Community Guide to Understanding Resource Control' <http://www.waado.org/NigerDelta/Essays/ResourceControl/Guide_Douglas.html> accessed 14 December 2006.

[18] R Ako, 'The Essence of Public Participation in Enshrining Sustainable Peace in Nigeria's Oil Industry' International Conference on the Nigerian State, Oil Industry and the Niger Delta, Bayelsa State, March 11-13, 2008.

struggle for political power to achieve private financial gains.[19] Human Rights Watch observed regarding Delta State for instance that 'the control of the government structure of Delta State has become a major prize both for the individuals and the political parties concerned.'[20] With all revenues accruing directly to the Niger Delta states, it is predicted that a higher level of violence will accompany subsequent electoral processes fuelled by the desire to be part of the caucus that controls increased revenues. Pressure related to access to land that is a critical factor in the current conflicts will also increase. With increased revenues accruing to the state governments, the inhabitants will anticipate that compensatory claims over land will ensure them a benefit from oil-revenues. This perception, which already fuels intra and inter-ethnic conflicts in the region, will expectedly exacerbate violent conflicts in the region with more money at stake.[21]

Regarding the control of the oil industry by the states, it appears that the proponents of resource control assume that the Niger Delta states will impose more stringent social and environmental operating levels on the oil companies. This assumption is questionable because there is no real indication that the states will not follow the same path as the federal government in ensuring an operating environment that maximises production levels and revenues. Secondly, it is doubtful that the state governments are capable of effectively monitoring the operations of the oil-multinationals particularly in the short to middle-term

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[19] For instance, in Rivers State, politicians colluded with cultists to overwhelm their opposition to access political power. See for a full analysis of the process; Human Rights Watch, 'Violence in Nigeria's Oil Rich Rivers State in 2004', HRW Briefing Paper February, 2005, 3.

[20] Human Rights Watch, *The Warri Crisis: Fuelling the Violence* HRW Report (2003) 15:18 (A), 15.

[21] See generally, UN Integrated Regional Information Networks, 'Money And Oil At Root of Delta Violence, Rights Group Says' <http://www.mail-archive.com/brc-news@lists.tao.ca/msg00060.html> accessed 20 March 2007.

period. This argument is based on the fact that the states lack the requisite levels of technical manpower and expertise (amongst other logistics) to manage the oil-industry. Particularly, it remains difficult to envisage how these states will recruit competent staff to supervise this highly technical sector especially given the pre-conditions for employment at state levels in Nigeria where ethnicity is a predominant factor.[22] Perhaps a way out will be for the states to recognize that the Federal Government will continue to play a role in the management of the oil-industry with the states having principal control, as suggested by Sagay and Oronto.

Sagay suggests that the industry can be jointly supervised by both the federal and state governments through the establishment of a Petroleum Affairs Commission to take over the functions of the Minister of Petroleum Affairs in the management and control of the oil-industry.[23] The functions of the Commission will include the issuance of permits, licenses and the conclusion of agreements with oil companies as well as the supervision of all areas of the industry. The practicality of such a commission is well beyond the scope of this thesis, but it will be revealing to see how such a body will be constituted given the rivalry that exists between the state and federal government with regards the control and management of the oil-industry. This section rather concentrates on how these initiatives fall short of meeting the rights-based demands of the host-communities that seek to be recognized as stakeholders in

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[22] J Lohor, 'Warri crisis: FG considers full-scale military action: House requests judicial commission as violence worsens', Thisday Newspapers (Lagos) 20 August 2003 <http://www.thisdayonline.com/news/20030820news01.html> accessed 20 August 2003.

[23] According to the professor, agencies such as the Department of Petroleum Resources (DPR) tat presently supervises the industry and the Nigerian National Petroleum Corporation (NNPC) that partners the oil-multinationals on behalf of the Federal Government will be under the control of the body. See, I Sagay, 'Federalism, the Constitution and resource control: my response', The Guardian Newspapers (Lagos), 13 August 2001.

the industry. Indeed, it may be argued that since the state governments are representative of the communities, if the states achieve resource control, then the demands of the host-communities to participate in the industry would be satisfied.

The following conclusions can be drawn from the above discussions. First, that the states as administrative units are the guaranteed recipients of the additional benefits that will accrue to the region either through resource control of increased derivation. Under such circumstances, the enjoyment of benefits from the oil-industry is limited principally to the elite who are better equipped to struggle for dominance in the region and control increased oil revenues that will accumulate to the states. Secondly, the proponents of increased derivation and resource control have not highlighted the role of the host-communities under the new dispensation. It is argued that these communities, that bear the brunt of the adverse effects of the oil-industry, should be primary beneficiaries especially if there are real intentions to establish long-lasting peace in the region. Thirdly, with regard to the establishment of state development agencies, that despite their possible effectiveness in ensuring distribution of benefits to the host-communities, their positive contribution will be limited where the communities are not partners in the development process. In other words, avenues must exist to ensure their participation in the determination and management of such development initiatives and projects as exemplified in the Akassa project.[24] The mere establishment and existence of development agencies is not enough as experiences from the federal level have revealed.[25] Also, the demands of the host-communities are not limited to the derivation of fiscal benefits from the oil-industry but also include their aspirations to enjoy their

[24] Refer to section 6.2.4.3 above.

[25] K Ebeku, 'Appraising Nigeria's Niger Delta Development Commission Act 2000' (2004) 25 *Statute Law Review* 1, 85–89.

environmental rights.[26] In essence, the conflicts in the region are more likely to continue even if derivation is increased or resource control is granted to the states and oil-induced environmental pollution continues unabated and access to the judiciary remains hindered. Thus, increased derivation or resource control cannot resolve the crisis in the oil-industry permanently under the current legal framework that does not promote active public participation in the industry. The following section analyzes what the priorities should be with regard to public participation in Nigeria's oil-industry to ensure that conflicts are defused and the resource and region are sustainably developed.

7.3 The Imperative of Public Participation in Nigeria's oil-Industry

The causes of conflicts in Nigeria's oil-industry are multifarious thus it will be an oversimplification to suggest that a single solution exists to adequately resolve them. However, it is argued that active public participation is a prerequisite to address some of the most prevalent conflicts and to promote sustainable peace in Nigeria's oil-industry thereafter. The thesis suggests that a priority in this regards should be to promote the active involvement of the host-communities in environmental matters. Hence, the environmental human rights of these communities should be legally recognized and enforceable. As noted earlier, this includes the substantive right to a healthy environment and procedural environmental rights.[27] The procedural rights include the right to environmental information, to participate in the decision-making process and to have unhindered access to the judiciary where conflicts arise.[28] The basis for this line of argument is that the on-going conflicts fit into the description of environmental conflicts. The Environment and Conflicts Project describe

[26] See generally section 2.3 above.

[27] Refer to section 2.3.3 and 2.3.4 above.

[28] Refer to section 2.3.4 above.

environmental conflicts as traditional conflicts induced by environmental degradation.[29] They are characterized by overuse of renewable resources; overstrain of the environment's sink capacity (pollution); impoverishment of the space of living and activities of the extractive industry that directly or indirectly lead to widespread disruption of landscapes.[30] These environmental conflicts do not necessarily result in violence as witnessed in the Niger Delta.

According to Baechler, the resort to violence only occurs if and when some of five key circumstances coincide. They include:

> *Inevitable environmental conditions*, this is when group survival is dependent on degraded resources for which no substitutes are apparent; *scarcity of regulatory mechanisms and poor state performance*, as far as a political system is incapable of producing certain social and political conditions, whereas sustainable resource use is far from being attainable; *instrumentalizing the environment*, in terms of using the environment (and its destruction) in order to pursue specific group interests so that environmental discrimination becomes an (ideological) issue of group identity; *opportunities to build-up organizations and find allies*, this is when actors organize and arm themselves in political settings - often behind a strong leader - and gain allies. Rural actors capable of waging conflict need powerful coalition partners from different social levels to support their goals, for instance, part of the *intelligencia*, members of the middle class, or a charismatic leader of an ethnic minority at risk; *spill-over from a historic conflict*, as far as environmental discrimination occurs within the context of an existing (historic) conflict structure and, as a result, the conflict receives new impetus.[31]

The above conditions have been manifested in the oil-rich Delta since the exploration and production of oil began in the area thus the violence may be attributed to the oil-industry's induction of these factors. First, the oil-industry has adversely affected the environment that provides the basis of economic subsistence for its inhabitants that are traditionally fishermen and farmers. The economy of the region has not diversified and the local population still rely

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[29] See, G Baechler, 'Why Environmental Transformation Causes Violence: A Synthesis' (1998) 4 *Environmental Change and Security Project Report* 1, 24-44.

[30] G Baechler, 'Transformation of Resource Conflicts. Approach and Instruments', Discussion Forum North-South, Basic Documents No. 3 (1999).

[31] *G Baechler* (n 30).

on their traditional economic skills for survival.[32] The regulatory mechanisms for the protection of the environment and consequently the livelihood of these populations are weak and the State has not performed positively to alleviate through policy or action the negative effects of the oil-industry on this population.[33] Consequently, the groups that inhabit the region have formed alliances based on or promoted by the common adverse environmental effects of the oil-industry on their livelihood which they allege is a result of their minority status in the federation.[34] The ethnic organizations have established, exploited and developed alliances with local, national and international interest groups and NGOs particularly those focussed on environment and human rights issues. The role of Ken Saro-Wiwa, the murdered charismatic leader of MOSOP,[35] cannot be over-emphasized while the historical link between past and present conflicts in the region has been previously highlighted.[36] In essence, the violence in the oil-industry are inextricably linked to environmental factors though advanced and sustained by a combination of surrounding socio-economic and political factors. This is typical of developing countries where the correlation between violence and environmental degradation is relatively weak but other factors such as poverty and poor state performance combine to result in the escalation of conflicts.[37] Consequently, the emanating violence manifests itself in diverse forms sometimes as political, social, economic, ethnic, religious or

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[32] Refer to section 3.4.2 above.

[33] Refer to Chapter 5 above.

[34] Refer to Chapter 6 above.

[35] Refer to section 6.2.3 above.

[36] Refer to section 3.4.4 above.

[37] See generally, G Baechler, 'Environmental Degradation and Violent Conflict: Hypotheses, Research Agenda and Theory-Building' in M. Suliman (ed.) *Ecology, Politics and Violent Conflicts* (Zed Books, London 1999) 76-112.

territorial conflicts, or conflicts over resources or national interests, or other types of conflict.[38]

It is within this context that it is argued that the prevalent spates of violence in the Niger Delta region are classified as environmental conflicts. As a result, the thesis argues that the crisis in Nigeria's oil-industry may be efficiently addressed by recognizing the environmental perspective to the conflicts and adopting broad-based environmental procedures as the prerequisite to other factors deemed relevant such as increased derivation and resource control discussed in the previous section. Specifically, it is suggested that the precondition for the sustainable peace in Nigeria's oil-industry is to recognize the host-communities' roles as stakeholders of their environment. As it will be recalled from previous discussions, these communities have become temporary occupants and lack legal rights to determine or participate in environmental matters that affect their lives and livelihood.[39] More so, the host-communities are not adequately compensated when their land - which is the main source of economic sustenance - is polluted.[40] Thus, it is suggested that these communities' rights to benefit from the environment they inhabit ought to be legally recognized. Environmental human rights should be recognized to ensure that communities are not completely alienated from their ancestral land which they claim to have spiritual links with and which provides the basis for their continued socio-economic survival. The expected impacts of enshrining environmental human rights; both substantively and procedurally, are discussed in the following section.[41]

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[38] S Libiszewski, ENCOP Occasional Paper No. 1 (1992), 13.

[39] Refer to section 5.3.3 above.

[40] Refer generally to section 5.3.4 above.

[41] Refer to section 2.3.3 and 2.3.4 above.

7.3.1 Substantive Environmental Rights in Nigeria's Oil-Industry

It has been noted previously that the substantive right to a healthy environment is vague and its adoption as a 'new' right has been criticized in some quarters as unnecessary.[42] However, the right has been adopted by numerous nations of the world; some via constitutional provisions.[43] While the situation in Nigeria will be examined later in this section, the role that the express recognition of the right may play in managing oil-induced conflicts and violence in Nigeria's delta region are considered. The major impact of the recognition of substantive environmental right; particularly if it is constitutionally recognized is that it will promote the promulgation of subsidiary legislation to substantiate the right. Expectedly, this will include legislation that affirms that citizens have the right to enjoy the full benefits of the environment including the procedural rights necessary to protect environmental quality. This will necessitate the operators of the oil-industry to increase investment in operational safety procedures to mitigate incidences of oil-related pollution and avoid the avalanche of lawsuits that are likely to follow. In other words, the express recognition of a constitutional right to a healthy environment will induce a transformation of the *modus operandi* of oil-companies operating in the Niger Delta region that will ultimately contribute to a more sustainable exploitation of the resource and the environment.

Indeed, the constitutional protection of environmental quality rights does not automatically guarantee the recognition of these rights in practice. For instance, though the Russian

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[42] See generally section 2.3.4.

[43] K Ebeku, 'Constitutional Right to a Healthy Environment and Human Rights Approaches to Environmental Protection in Nigeria: *Gbemre v Shell* Revisited' (2007) 16*RECIEL* 3, 312. See also, C Bruch and W Coker, 'Breathing Life into Fundamental Principles: Constitutional Environmental Law in Africa', World Resources Institute, Working Paper No. 2 (2001) <http://www.eli.org/pdf/breathinglife.pdf> accessed 14 May, 2004.

Constitution guarantees environmental human rights, there is evidence of gross environmental pollution in the country.[44] The argument in this section simply is that where constitutional provisions are available to form the basis for litigation against oil-companies' mode of operations, the companies are more likely to be wary of their mode of operations to avoid an avalanche of litigation against them. In addition to the expense of possible large-scale litigation, the companies would be portrayed in bad light particularly where decisions in such cases confirm that oil-companies' operations routinely infringe on the environmental human rights of their host-communities. This section is divided into two sections. The first section highlights the case of *Gbemre v Shell*[45] which is till date the only oil-related case decided in Nigeria based on the existence of the substantive right to a healthy environment. The subsequent section argues why it is argued that the enforcement of the right will be more effective if it is constitutionally recognized.

7.3.1.1 Gbemre's case

The original suit in *Gbemre v Shell* was filed on July 20, 2005 by Mr. Jonah Gbemre on behalf of himself and the Iwherekan community against Shell, the Nigerian National Petroleum Corporation (NNPC) and the Attorney-General of the Federation, to end gas flaring in the community. He argued that gas flaring violated the right of the community to enjoy a healthy environment as provided by Article 24 of the African Charter and the constitutional guarantee of the right to life and dignity of persons provided for in sections 33 and 34 of the 1999 Constitution. He averred that the company had been flaring gas continuously for over 35 years which has contributed to air pollution and acid rain, adverse

[44] See *Fadeyeva v Russia* (Application No. 55723/00) ECHR 9 June 2005.

[45] Suit No. FHC/B/C/153/05 delivered on 14 November, 2005.

climate change, reduction in crop production, respiratory diseases and premature deaths.[46] The plaintiff asked for the following reliefs;

(1) a declaration that the constitutionally guaranteed rights to life and dignity of the human person provided in Sections 33(1) and 34(1) of the Constitution includes the right to a clean, poison-free, pollution-free and healthy environment;

(2) a declaration that the actions of the respondents in continuing to flare gas in the course of their oil exploration and production activities in the applicant's community is a violation of the fundamental rights to life (including healthy environment) and the dignity of the human person guaranteed by Sections 33(1) and 34(1) respectively of the Constitution;

(3) a declaration that the provisions of Section 3(2)(a) and (b) of the Associated Gas Re-Injection Act and Section 1 of the Associated Gas Re-Injection (Continued Flaring of Gas) Regulations, under which the continued flaring of gas in Nigeria may be allowed, are inconsistent with the applicant's right to life and/or dignity of the human person enshrined in Sections 33(1) and 34(1) of the Constitution and therefore are unconstitutional, null and void; and

(4) an order of perpetual injunction restraining the respondents by themselves or by their agents, servants, contractors or workers or otherwise howsoever from further flaring of gas in the applicant's community.

The defendants in their defence claimed that their oil exploitation and processing activities had not caused air pollution, any respiratory diseases or death. They also claimed that their

[46] Suit No. FHC/B/C/153/05 delivered on 14 November, 2005, 4-5.

operations have in no way affected the fundamental rights of the applicant including their rights to healthy air or environment, life or dignity to entitle him to bring the action.[47]

Justice Nwokire delivered a reserved judgement on November 14, 2005 in the case that was heard pursuant to section 46 of the 1999 CFRN which provides for a special (fast-track) legal procedure for the enforcement of the fundamental human rights provisions of the Constitution. He held that:

(1) His court had jurisdiction to grant leave to the applicants to apply for the enforcement of their fundamental rights to life and dignity of the human person as guaranteed by Sections 33 and 34 of the Constitution.
(2) The constitutionally guaranteed rights to life and dignity of the human person inevitably includes the rights to a clean, poison-free, pollution-free, and healthy environment.
(3) The actions of the respondents in continuing to flare gas in the course of their oil exploration and production activities in the applicant's community is a gross violation of the community members' (including the applicant's) fundamental right to life (including healthy environment) and dignity of the human person as enshrined in the Constitution of Nigeria 1999.[48]

In essence, the judge granted all the relief sought by the plaintiff. It is particularly noteworthy that the judge gave the broad interpretation to the right to life and human dignity to include the right to live in a healthy environment as has been established in several other jurisdictions.[49]

Consequently, the judge ordered the Attorney-General of the Federation to immediately set in motion, after due consultation with the Federal Executive Council, necessary processes for the Enactment of an Act of National Assembly for the speedy amendment of the relevant

[47] Suit No. FHC/B/C/153/05 delivered on 14 November, 2005, 14-15.

[48] *Gbemre's case* (n 45) 14-15.

[49] R Ako and A Adedeji, 'Environmental Justice in Nigeria: A Comparative Analysis' in I Luginaah and E Yanful (eds) *Environmental and Health in Developing Countries: Managing an Emerging Crisis* (Springer Publishers, Forthcoming).

sections of the Associated Gas Regulation Act and the Regulations made thereunder to quickly bring them in line with the provision of Chapter 4 of the Constitution. This order was made especially in view of the fact that the Associated Gas Regulation Act even by itself also makes continuous gas flaring a crime having prescribed penalties in respect. The defendant company however continued to flare gas despite the fact that it did not have a 'stay of execution' on the High Court's judgement. Shell subsequently appealed against the High Court's ruling on procedural grounds, challenging the court's competence to try the case, and against the judgment. In December 2005, contempt of court proceedings were instituted against the defendants for continuing to flare gas 32 days after the initial judgment without a stay of execution in place. In April 2006, in determining the stay application, the Federal High Court granted a stay on ending the flaring till the end of April 2007 provided:

- that Shell achieved a quarterly phase-by-phase stoppage of its gas flaring in Nigeria under the supervision of the High Court within the year the stay was granted for;
- a detailed phase-by-phase technical scheme of arrangement, scheduled in such a way as to achieve a total non-flaring scenario in all their on-shore flow stations by 30th April 2007 be prepared by the Managing Director of Shell Nigeria, the Group Managing Director of the NNPC, the Nigerian Petroleum Minister, and the Company Secretary of NNPC; and
- These four individuals appear before the judge to present the same in open court on 31st May 2006.

On 23 May 2006, the Court of Appeal overturned the first instance court's order in respect of the personal appearances of the CEOs and Minister. On the expiration of the 'stay of execution', the conditions had not been met. While the representatives of the plaintiff appeared in court at the expiration of the 'stay of execution' on April 30, 2007, none of the

defendants or their legal representatives showed up. Furthermore, the Judge (Justice Nwokire) had been removed from the case having been transferred to another court in Katsina and the court file was not available.[50] Similarly, at the Court of Appeal's hearing on Shell and NNPC's jurisdiction appeal, it was discovered that the case had been wrongly adjourned by court staff without any notice to the applicant or his lawyers. These events have led to well-founded insinuations that the State and oil-companies are influencing the judiciary to ensure that a judicial precedence recognizing the substantive right is not set. For instance, Roderick, co-Chairman of the Climate Justice Programme that is taking an active role in pursuing the case commented on the role of the government in frustrating the case thus:

> ...the fact that the judge has been removed from the case, transferred to the north of the country, and there have been problems with the court file for a second time, suggests a degree of interference in the judicial system which is unacceptable in a purported democracy acting under the rule of law.[51]

This observation reflects the thinking of the public who believe that the State has neglected its responsibility to protect the host-communities in order to promote its interest as partners of the oil-companies and amass oil-revenues. It is argued that the State is averse to the judicial recognition of the substantive right to a healthy environment because such recognition will 'adversely' affect its oil-revenues. Financial resources will be required to engage in the barrage of litigation bound to follow and the settlement of compensation where the oil-companies are found liable for impeding the host-communities' right to enjoy a healthy environment. The oil-industry will also be forced to commit substantial funds to improve its operations to avoid environmental pollution and its attendant costs. In essence, the companies

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[50] Friends of the Earth International Press Briefing, 'Shell fails to obey gas flaring court order', 02 May, 2007 <http://www.foe.co.uk/resource/press_releases/shell_fails_to_obey_gas_fl_02052007.html> accessed 29 May 2008.

[51] *Friends of the Earth* (n 50).

will have less in profits while the State will also receive less in revenues. This is in addition to the international embarrassment such litigation will cause to both parties.

There are salient points to note regarding the outcomes of *Gbemre's case*. The first is that the African Charter was confirmed to be applicable in Nigeria. This decision is similar to the African Commission on Human and Peoples' Rights' decision in *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria*.[52] In SERAC's case, the Ogoni people sued the Nigerian government for abuses against their lands, environment, housing, and health caused by oil production and government security forces. The Commission in its decision held that the Nigerian government violated seven articles (including Article 24) of the Charter to which the country is a signatory.[53] Interestingly, this case was not cited as in the decision in *Gbemre's case*. Secondly, the judge noted that the Federal Government is responsible to its citizens to make laws to safeguard the environmental rights of its citizens. The African Commission in *SERAC's case* similarly noted that the State is obliged to protect right-holders against other subjects by legislation and provision of effective remedies and by taking measures to ensure that there is an effective interplay of laws and regulations that enable individuals freely realize their rights and freedoms.[54] Third is the broad interpretation to the right to life adopted by the judge in suggesting that the right to a healthy environment exists in Nigeria even if it is not expressly stated in its laws. Finally, it appears that the State and oil-corporations that operate Nigeria's oil-industry are averse to the recognition of the substantive right for the fear of its

[52] Communication 155/96, Fifteenth Annual Activity Report (2001-2002).

[53] J Lobe, 'People versus Big Oil: Rights of Nigerian Indigenous People Recognized', Foreign Policy in Focus (FPIF), 05 July 2002 < http://www.fpif.org/pdf/gac/0207nigeria.pdf> accessed 16 August 2002.

[54] See particularly Para. 46 of the ACHPR's ruling.

repercussions on their profits. However, it is argued that there are more benefits to derive from the recognition of substantive rights than the expected loss of revenue. Briefly, it is argued that this will promote the sustainable development of the region and its resources. First, the environment will be considered a viable resource for all stakeholders and its protection will ensure that the needs of the host-communities that rely on it for socio-economic and spiritual reasons are not neglected. Secondly, a major source of conflicts will have been addressed thereby contributing to the optimal exploitation of the resource without compromising the needs of the host-communities; present and future.

The case is presently in the process of a purposefully slow and frustrating process of appeal.[55] Based on information received from the applicant's counsel and Roderick of the Climate Justice Programme[56] since 2005 Shell has not taken appropriate steps to have the appeal properly entered for hearing, and is deploying all procedural tactics to delay or frustrate the hearing of the appeal. According to Roderick, 'the appeal is in the system, but everything is on hold at the moment . . . The litigation is mindnumbingly procedural, as if there is too much fear to deal with the substantive issue'.[57] It is posited that the dilatory attitude of the oil-company is not unconnected with the fact that the industry is afraid of how a decision affirming the right to a healthy environment may affect their operations. Expectedly, an affirmation of the existence and enforceability of the right will initiate an avalanche of similar cases against Shell and other companies that operate in the region. While this fear may be well founded, it is argued that the affirmation of the right has more positive effects for the

[55] *K Ebeku* (n 43) 319.

[56] The Climate Justice Programme is a London-based international non-governmental organization that provided financial and legal support for the plaintiff in this case.

[57] *K Ebeku* (n 43) 319.

sustainable development of the Niger Delta's resources (including oil exploitation) and its inhabitants. While this is argued in the next part of this section, this section has revealed that the substantive right to a healthy environment exists in law in Nigeria though its enforceability and scope remains subject to on-going litigation. It is suggested that it took this long for prospective litigants to aver the existence of the right because Nigerian judges appeared to be more conversant with tortious claims than contemporary international environmental law principles and were thought to be partial towards the oil-companies.[58]

7.3.1.2 Substantive Rights to a Healthy Environment and the Constitution

As a corollary to the argument that the substantive right to a healthy environment exists in Nigeria, this section argues that right would be better advanced if it was prescribed in the Constitution. The main reason for this assertion is that the right has remained dormant because of the belief that it would be unenforceable against the State and the oil-companies that jointly explore and produce oil in the Niger Delta region. Simply put, it is easier to enforce constitutional rights because they are not easily subjected to socio-economic and political manoeuvres. Usually, what the courts have to determine in cases involving rights guaranteed by the Constitution is if the alleged right has been violated and if it has, prescribe the remedy. It must be noted that there are germane arguments against the need to have a separate right to a healthy environment. While some argue that it will lead to a proliferation of rights, and that existing rights may be used to protect it,[59] others argue that the difficulty of

[58] M Uwais, 'Recent Development in Nigerian Strengthening Legal and Institutional Framework for Promoting Environmental Management' Global Judges symposium on Sustainable Development and the Role of law, Johannesburg, South Africa 18–20 August 2002.

[59] See sections 2.3.2.3 and 2.3.2.4 above.

enforcing socio-economic rights particularly in developing countries makes it unnecessary.[60] Regarding the former point, there are difficulties as evidenced in *Gbemre's case* where it is uncertain whether the broad interpretation will be judicially recognized. With regards the second point, there is evidence that reveals that socio-economic rights are enforced in developing countries.[61] In South Africa for example, the Constitutional Court has affirmed the existence of the socio-economic rights and made orders directing the government to respect them.[62] Thus, it is argued that the substantive right to a healthy environment can and should be enforced despite the economic interest attached to the current state of oil exploration and production. This is more so given that environmental pollution is linked to the poverty (that is rife in the Niger Delta region) and vice-versa.[63] It is posited that the non-recognition of environmental rights contributes to the deteriorating state of the environment and ultimately deepens poverty in affected areas.

Having noted the arguments against having the substantive right to a healthy environment as a constitutional right, the peculiar situation in Nigeria is highlighted below. Since 1983, this

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[60] J Mubangizi, 'Prospects and Challenges in the Protection and Enforcement of Socio-Economic Rights: Lessons from the South African Experience' VII World Congress of the International Association of Constitutional Law, Athens, June 11-15, 2007.

[61] *J Mubangizi* (n 60). See also, J Mubangizi, 'The Constitutional Protection of Socio-Economic Rights in Selected African Countries: A Comparative Evaluation' (2006) 2 *African Journal of Legal Studies* 1, 1-19.

[62] See for examples: *The Government of the Republic of South Africa v Grootboom*, 2000 (11) BCLR 1169 (CC) and *Van Biljon v Minister of Correctional Services*, 1997 (6) BCLR 789 (C).

[63] F Hilton, 'Poverty and Pollution Abatement: Evidence from Lead Phase-Out' (2006) 56 *Ecological Economics* 1, 125-131; A Duraiappah, 'Poverty and Environmental Degradation: A Review and Analysis of the Nexus' (1998) 26 *World Development* 12, 2169-2179 and A Ekbom, and J Bojo, *Poverty and Environment: Evidence of Links and Integration into the Country Assistance Strategy Process*, (The World Bank Environment Group, Africa Region, 1999).

right has arguably existed in Nigeria's statute books, but has been unenforced because of the uncertainty surrounding its applicability. The right was enacted into national legislation via the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act in 1983.[64] Section 1 of the Act provides that:

> As from the commencement of this Act, the provisions of the African Charter on Human and Peoples' Rights which are set out in the Schedule to this Act shall, subject as thereunder provided, have force of law in Nigeria and shall be given full recognition and effect and be applied by all authorities and persons exercising legislative, executive or judicial powers in Nigeria.

Therefore, the provisions of the African Charter including section 24 in particular that guarantees the right to enjoy a healthy environment are applicable in Nigeria as if they were made by its federal legislature. This was held to be the correct position of the law in the case of *Muhammed Garuba and Others v Attorney-General of Lagos State*[65] and affirmed by the Supreme Court in the later case of *General Sani Abacha and Others v. Chief Gani Fawehinmi*.[66] In that case, the applicant was arrested and detained by government security agents. The applicant sought a declaration that the arrest and continued detention without charge constituted a violation of his fundamental rights guaranteed under relevant sections of the CFRN and the ACHPR (Ratification and Enforcement) Act and therefore illegal and unconstitutional. The Supreme Court held that by virtue of Cap. 10, the African Charter is now part of the laws of Nigeria and like all other laws the Courts must uphold it. The Supreme Court held that because Cap 10 is a statute with international flavour, if there is a conflict between it and another statue, its provisions will prevail over those of that other

[64] Cap A10 Laws of the Federation of Nigeria (LFN) 2004.

[65] Unreported suit no. ID559M/90.

[66] SC 45/1997.

statue for the reason that it is presumed that the legislature does not intend to breach an international obligation.[67]

That notwithstanding, the fear still exists that the judiciary will not exercise its discretion to recognize the existence of the right to a healthy environment law and hold that it is enforceable against the oil-industry.[68] However, if the right is constitutionally recognized, the courts only have to determine whether or not it has been infringed. Also, the fast-track special procedure rules provided under section 46 of the 1999 CFRN will be applicable to its proceedings and thus ensure that such cases are speedily heard. This is important in Nigeria where the procedures of justice are slow particularly in oil-related litigation and the oil-companies have become notorious for taking advantage of this to prolong proceedings in a bid to frustrate plaintiffs who are usually unable to afford such protracted litigation. In *Shell v Udi*[69] for instance, the plaintiff claimed compensation for the destruction of fish ponds and trees during an oil operation. On the date of the hearing in the Ughelli High Court, neither a company representative nor a lawyer was in attendance. The company lawyer sent in a letter requesting an adjournment because he allegedly had to attend a law conference. His colleagues failed to appear and they failed to file a statement of defence despite a time-frame of over 4 months to prepare for the case. The judges opined that the attitude of the company lawyers was an example of 'wilful refusal or neglect to comply with the Rules of Court'.[70] In that case, the judge refused to grant the adjournment and awarded the plaintiffs compensation. The Court of Appeal dismissed the appeal brought before it and confirmed the

[67] See generally, *Chief Gani Fawehinmi v General Sani Abacha and Others* (1996) 9 NWLR 710.

[68] Personal communication with Niger Delta community lawyers.

[69] (1996) 6 NWLR 483.

[70] Ibid at 495.

decision of the lower court. This approach was also resorted to by Shell's lawyers in *Gbemre's case* where the judge opined that this was the longest argument he had ever heard on an adjournment application.[71] The judge was able to counter the defendants delay tactics by hearing the case under High Court's 'fast-track' procedure which allows for cases involving fundamental human rights abuse to be heard promptly. This was possible in *Gbemre's case* because the judge adopted the broad interpretation of the right to life to include the right to a healthy environment. Ebeku has argued that the judge's decision to apply the speed track procedure may form a reasonable ground for appeal.[72] If the justices of the appeal court do not adopt this wide interpretation, the effectiveness of *Gbemre's case* will be diminished.

The significance of including the substantive right to a healthy environment in a constitution is succinctly noted by the Preamble of the 1996 Algerian Constitution and the observation of the Philippine Supreme Court in the case of *Oposa v Factoran.*[73] The former states *inter alia* that:

> The Constitution is above everything. It is the fundamental law which guarantees individual and collective rights and liberties, protects the principle of people's free choice and confers legitimacy to the exercise of powers. It allows the assurance of legal protection and control of the actions of the public authorities in a society wherein prevails the law and man's progress in all its dimensions…

The Supreme Court of the Philippines in *Oposa's case* noted:

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[71] See also, *Shell v Uzoaru*, (1994) 9 NWLR (Pt. 366), 51 where Onalaja, JCA castigated this approach by the oil-companies' lawyers thus:

> I put it succinctly, that abuse of judicial process is misuse of judicial procedure intentionally to feather one's interest to the detriment of one's adversary, and no court shall support or permit the abuse of its process. With the decision in *Nwadiaro v Shell* the further pursuit of this appeal is vexatious. Knowing fully well the rule of judicial precedent that the Court of Appeal is bound by its previous decision as the issues decided therein are the same, the present appellant is stopped by record from pursuing this appeal which is frivolous and [sic] abuse of process of this court.

[72] *K Ebeku* (n 43) 319.

[73] GR No 101083, 224 SCRA 793 (1993)

> As a matter of fact, these basic rights need not even be written in the Constitution for they are assumed to exist from the inception of humankind. If they are now explicitly mentioned in the fundamental character, it is because of the well founded fear of its framers that unless the rights to a balanced and healthful ecology and health are mandated as state policies by the Constitution itself thereby highlighting their continuing importance and imposing upon the state a solemn obligation to preserve the first and protect and advance the second, the day would not be far when all else would be lost not only for the present generation, but also for those to come generations which stand to inherit nothing but perched earth incapable of sustaining life.[74]

This fear is real in the Nigeria's oil-rich Delta region where the negative effects of oil exploration and production are exposing the ecosystem and the inhabitants (present and future) to grave risks.[75] The argument advanced here is that in the absence of the right to a healthy environment explicitly stated in the Constitution, the State will continue to neglect its responsibility towards its citizens in this regard. Notably, the host-communities of the oil-industry will continue to face the arduous task of litigation based on the adverse effects of the industry on their rights generally and the right to a healthy environment in particular. It is argued that if this difficulty remains, the host-communities will continue to seek recourse to extra-legal means to achieve 'justice'. Indeed, this will only escalate the rate of violent conflicts in the region.

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[74] *Oposa's case* (n 73) 14-15.

[75] See generally, D Omoweh, *Shell Petroleum Development Company, the State and Underdevelopment of Nigeria's Niger Delta: A Study in Environmental Degradation* (Africa World Press, Inc., Trenton 2005). Also, I Okonta and O Douglas, *Where Vultures feast: Shell, Human Rights and Oil*, (London: Verso, 2003) and Human Rights Watch, *The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities* (Human Rights Watch/Africa, Washington D.C. 1999).

7.3.2 The Role of Procedural Rights

This section will highlight how the legal recognition of the elements of procedural rights may contribute to the resolution and management of conflicts in Nigeria's oil-industry.[76] Fülöp and Kiss note regarding the link between the three elements of procedural rights that environmental information promotes greater awareness about the shared responsibility that everyone has to protect the environment and allows all to participate and intervene in its improvement.[77] In essence, while it is necessary to have access to environmental information to participate meaningfully in the decision-making process, access to justice must be guaranteed to ensure that the mechanisms exist to resolve issues in dispute regarding access to information and/or and participation in the decision-making process to avoid recourse to extra-legal actions including violence as exemplified in Nigeria. However, as argued previously, the legal framework regulating Nigeria's oil-industry does not adequately provide for procedural rights.[78] This thesis' main argument is that the absence of these factors contributes fundamentally to the state of violence and instability in the oil-industry. This section highlights how the recognition of composite procedural rights will contribute to sustainable peace in Nigeria's oil-industry. This section will highlight the main advantage(s) of each element of procedural rights in relation to the applicability in managing conflicts in Nigeria's oil-industry with practical instances. It is important to note however that the advantage(s) highlighted for any one of the elements of procedural rights is not intended to be

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[76] The three elements of procedural rights include the right environmental information; to participate meaningfully in the decision-making process; and, access to justice. See section 2.3.4 above.

[77] S Fülöp and C Kiss, 'Information Availability: A Key to Building Trust in the Minerals Sector (Review of Systems for Making Information Available)' Mining, Minerals and Sustainable Development (MMSD) Report No. 4 (2001) 6.

[78] Refer to Chapter 5 above.

exclusive to that element as they may overlap. This method of classification is adhered to for simplicity.

7.3.2.1 The Right to Information

The right to information simply refers to access to information on the state of all the media of the environment; on activities or measures that are likely to have an adverse effect on them and any activities or administrative or other measures (including any environmental management programmes) which are designed to protect environmental media.[79] Usually, the requirement of project proponents to divulge such information is contained in Environmental Impact Assessment (EIA) legislation. However, the provisions and implementation of such provisions are often subject to the prevailing socio-economic circumstances of the particular countries. The EIA provisions in Nigeria have been analyzed to reveal that they do not promote active or democratic public participation in environmental information dissemination.[80] For instance, an EIA was not conducted before the Nigeria Liquefied Natural Gas Project project began. This is despite the fact that the project was funded by several international and national financial institutions and had the Federal Government and a consortium of oil-companies with Shell Petroleum Development Company of Nigeria as the operator.[81] It is noteworthy that recently, communities, especially in the Niger Delta have become proactive in participating in EIA programmes and sometimes carry out their own studies or review reports allegedly prepared by project proponents.[82] The major contribution of enshrining the right to environmental information in Nigeria's oil-industry is that it will

[79] Environmental Information Regulations 1992.

[80] See section 5.3.5.2.1 above.

[81] See, *Oronto Douglas v Shell Petroleum Development Company Ltd. and Others* (1999) 2 NWLR (Pt. 591).

[82] R Ako, 'Ensuring Public Participation In Environmental Impact Assessment of Development Projects in the Niger Delta Region of Nigeria: A Veritable Tool For Sustainable Development' (2006) 3 *Environtropica* 2, 12.

promote interaction between the oil-industry and its host-communities build trust and reduce the conflicts in the region that border essentially on environmental issues.[83]

Where there are channels for the dissemination of environmental information, interaction between the oil-industry and its host-communities will improve and provide an opportunity to build trust and partnership that is currently lacking.[84] Early exchange of environmental information that includes the purpose land is to be acquired for and its effects on the local population; particularly their access to land which is their main source of economic survival will improve the existing relationships.[85] For instance, where a company has been granted the licence to prospect for oil in a community, it should inform the communities to be affected by its operations before entering into these communities. The socio-economic and cultural impacts of the seismic, drilling and production on the host-communities should be revealed and plans to mitigate them, and if possible, avoid them should be considered.[86] Matters related to compensation for land appropriation, in case of spills or other pollution as well as the possible adverse effects of the various stages of oil operations should be discussed and ascertained. The process of interaction should be on-going such that it may also be used to discuss issues of conflicting interests that may then be resolved before they escalate into a full-blown crisis. The resultant mistrust and animosity caused by lack of early interaction

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[83] F Careaga, *Access to Information: A Key to Building Trust. The Government Role*, Mining, Minerals and Sustainable Development (MMSD) Report (2001) No. 18. See also, Article 19, 'Access to Information: An Instrumental Right for Empowerment' (Article 19, London 2007) 33.

[84] *F Careaga* (n 83).

[85] Oil Industry International Exploration and Production Forum, *Principles for Impact Assessment: the Environmental and Social Dimension*, Report No. 2.74/265, August 1997, 4.

[86] A Wawryk, 'International Environmental Standards in the Oil Industry: Improving the Operations of Transnational Oil Companies in Emerging Economies' (2002) 13 *CEPMLP Internet Journal* 3, 9-10.

between the oil-industry and its host-communities is exemplified by the Ogoni situation. Shell has been unable to continue its exploration and production activities there since Saro-Wiwa and his kinsmen were sentenced to death by hanging in 1995.[87]

Shell's attempts to pacify the Ogoni community with the aim to resume their operations have been rebuffed by the Ogonis.[88] Consequently, oil-wells in Ogoniland have remained unexploited for over a decade and the Federal Government has recently announced that it was set to revoke Shell's licence to operate in the area and grant a different company the concession to continue operations there.[89] This is not surprising as the parties do not have a history of peaceful exchanges of information as there relations have often been characterized by aggression and violence.[90] President Yar'Adua noted in this regards that: 'there is a total loss of confidence between Shell and the Ogoni people. Another operator acceptable to the Ogonis will take over. Nobody is gaining from the conflict and stalemate, so this is the best solution.'[91] Though it may be argued that Shell did not expressly breach any regulations in Nigeria by omitting interact with its host-communities, it is argued that the company ought to have been guided by international principles of operation that regulate the extraction

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[87] See generally, International Crisis Group, Nigeria: *Ogoni Land after Shell,* Policy briefing No. 54, 18 September 2008.

[88] *International Crisis Group* (n 87) 4-6.

[89] *International Crisis Group* (n 87) 6-7.

[90] See generally, E Osaghe, 'The Ogoni Uprising: Oil Politics, Minority Agitation and the Future of the Nigerian State' (1995) 94 *African Affairs* 376, 325-344 and C Welch, 'The Ogoni and Self-Determination: Increasing Violence in Nigeria' (1995) 33 *The Journal of Modern African Studies* 4, 635-650.

[91] H Igbikiowubo and B Agande, 'Total reassesses continued stay in Nigeria: Shell leaves Ogoni Dec' Vanguard Newspapers (Lagos) Thursday, 05 June, 2008.

industry.[92] While complying with industry standards may not excuse tortuous behaviour (if the industry is deemed to have 'lagged behind'), failing to meet industry standards may well be taken (politically or legally) as evidence of a lack of reasonable care.[93] The reality in Nigeria is that the extant legal framework regulating the oil-industry does not require the host-communities to be adequately informed of oil exploration and production activities that take place within their geographic environment.

It is the norm for host-communities to become aware of impending operations when a seismic crew mobilize at a site. The initial reaction from these communities is often to resist them and resort to disruption of their seismic operations usually to obtain promises of development projects and other infrastructure from them and/or the contracting oil-company. In other instances, aggrieved communities march to oil-facilities to protest their grievances. The companies in turn call on the State to provide security through its mobile police force and/or armed forces, which sparks of a cycle of violence. Thus, from the beginning of oil operations, the absence of appropriate consultation is apparent. The resultant violence and losses that follow from all parties involved could well have been avoided if there were adequate channels through which information could be disseminated between all parties involved prior to the commencement of operations.[94] It is not suggested that discussions and negotiations will always resolve the issues in dispute, but such avenues will forestall the indiscriminate

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[92] United Nations, *Environmental Guidelines for Mining Operations* (United Nations Department of Economic and Social Affairs (UNDESA) and United Nations Environment Programme Industry and Environment (UNEP) ST/TCD/20.

[93] G Pring and S Noé, 'International Law of Public Participation' in D Zillman, A Lucas, and G Pring, (eds.) *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources*, (Oxford University Press, Oxford 2002) 56.

[94] See generally, *United Nations* (n 92) Chapter 5.

resort to street protests and its attendant violence. As the current situation with the Ogonis has revealed, the oil-companies can also turn out to be the losers. In addition to the withdrawal of its licence to operate in Ogoniland, Shell will have to pay compensation for damage done to the environment over the period it exploited oil in the area.[95] The situation also reveals that there are repercussions for companies that fail to operate to the satisfaction of their host-communities even where the required actions are not legal requirements. This section argues that if the lines of communication existed between Shell and the Ogonis, the company would have been able to succeed in its attempts to negotiate the resumption of its operations into the communities it had on-going operations.

7.3.2.2 The Right to Participate in the Decision-Making

The ambit of the right to participate in environmental decision-making processes discussed previously encompasses the active involvement of host-communities (and other stakeholders) to play an active role in the determination of activities; particularly those that are likely to have an adverse effect on the environment and consultation on legislative on legislative proposals.[96] It presupposes that there is access to environmental information which is necessary to ensure meaningful involvement of the participants to make informed decisions and that the parties thereto have the right to make representations regarding a decision. However, such discontent should be expressed within the ambit of the law. In relation to conflict management in Nigeria's oil-industry, it is argued that this right will address issues related to allegations of marginalization from the oil-industry. Presently, the legal framework

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[95] J Lhuillery, 'Delta unrest casts shadow on Nigeria and world economy', AFP News Brief List, France 24 International News <http://www.france24.com/en/20080608-delta-unrest-casts-shadow-nigeria-world-economy> accessed 08 June, 2008.

[96] Refer to section 2.3.4.2 above.

regulating the oil-industry does not promote the participation of host-communities in the decision-making process and their rights to protest against oil-related activities have often led to violent conflicts.[97] The Land Use Act in particular has been criticized as the most errant of these laws and it has been criticized as an instrument to exclude host-communities from participating in the oil-industry.[98] The host-communities have maintained that the laws regulating the oil-industry which were made without their participation are responsible for the degradation of their environment. The Kaiama Declaration signed by all Ijaw youths for instance declared:

> That the degradation of the environment of Ijawland by transnational oil companies and the Nigerian State arise mainly because Ijaw people have been robbed of their natural rights to ownership and control of their land and resources through the instrumentality of undemocratic Nigerian State legislations such as the Land Use Decree of 1978, the Petroleum Decrees of 1969 and 1991, the Lands (Title Vesting etc.) Decree No. 52 of 1993 (Osborne Land Decree), the National Inland Waterways Authority Decree No. 13 of 1997 etc.[99]
>
> 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.[100]

The exclusion of the host-communities from participating in environmental decision-making processes has contributed to the discontent in the region and consequent recourse to

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[97] Y Omorogbe, 'The Legal Framework for Public Participation in Decision- making on Mining and Energy Development in Nigeria: Giving Voices to The Voiceless' in D Zillman, A Lucas and G Pring, (eds.) *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources* (Oxford University Press, Oxford 2002) 572.

[98] Refer to sections 5.3.3 and 5.3.4.

[99] Kaiama Declaration, Paragraph (g).

[100] Kaiama Declaration, Article 2.

violence.[101] This is more so that the environmental impacts of the oil-industry contribute to the negatively to the socio-economic and cultural development of the host-communities. While it is acknowledged that the Land Use Act grants the Government ownership of all lands in Nigeria, the occupiers of land also have a stake in the environment they inhabit. Consequently, they should partake in the decisions that affect their environment. A corollary to meaningful participation is that the host-communities will have access to information on the possible adverse effects of oil exploration and production activities and also the benefits they will be derive from it. A follow-up to that is that there would be meaningful ways to enforce the right in national courts.[102] It is important to state that host-communities' objection to proposals of regulations and operations ought to be recognized and respected. Indeed, such objection is an exercise of their right to participate in the decision-making process.[103] However, in exercising the right to protest, the host-communities must use methods and tactics that are lawful and peaceful without intent to frustrate and/or undermine the rights of others (in this case, the oil industry).[104]

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[101] M Bekhechi and J Mercier, *The Legal and Regulatory Framework for Environmental Impact Assessments: A Study of Selected Countries in Sub-Saharan Africa* (World Bank Publications, 2002) 23. See also, W Tilleman, Public Participation in the EIA Process: A Comparative Study of Impact Assessment in Canada, the United States and the European Community (1995) 33 *Columbia Journal of Transnational Law* 2, 337.

[102] M Bekhechi, 'Legal and Regulatory Framework for Environmental Impact Assessment in African Countries, in B Chaytor and K Gray (eds.) *International Environmental Law and Policy in Africa* (Kluwer Academic Publishers, The Netherlands 2003) 279.

[103] See generally, B Martin, 'The Contexts of Environmental Decision-Making' (1978) 50 *Australian Quarterly* 1, 105-118.

[104] T Lawson-Cruttenden, 'The limits of protest' <http://www.guardian.co.uk/environment/blog/2007/aug/14/thelimitsofprotest> accessed 28 September 2008.

7.3.2.3 Access to Justice

Access to justice as noted earlier is necessary to ensure that procedural rights are enforced.[105] As Bekhechi noted, if public participation is to become effective in African countries, it is necessary not only to recognize the rights of citizens in an environmental context, but also to ensure these rights can in some meaningful way be enforced in national courts.[106] Therefore, clear procedures should be defined to allow enable aggrieved persons commence administrative law proceedings by way of judicial review or statutory appeal.[107] It appears that even though the rules on *locus standi* have been relaxed in Nigeria, they may not have impacted directly on oil-related cases.[108] The Supreme Court of Nigeria's decision in *Adediran v Interland Transport*[109] broadened the scope of *locus standi* in terms of the public right to sue. In that case, residents of a housing estate under the aegis of a housing association filed a suit against the defendant, a transport company with offices nearby. The defendant company used its premises as a workshop and for parking trailers. The plaintiffs complained against the traffic of the trailers, which blocked the access roads to the estate, knocked down electric poles, damaged the roads and generated noise. The court held that the nuisance caused by Interland Transport was not private but public. In the court's consideration of the nature of *locus standi* in public nuisance in general terms, it held that the Common Law distinction between private and public nuisance (which was actionable only by the Attorney-General of the Federation) was contrary to the provisions of the 1979 CFRN. [110] The decision

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[105] Refer to section 2.3.4.3 above.

[106] *M Bekhechi* (n 102) 279.

[107] *M Bekhechi* (n 102) 279.

[108] J Frynas, 'Legal Change in Africa: Evidence from Oil-related Litigation in Nigeria' (1999) 43 *Journal of African Law* 2, 135-136.

[109] (1991) 9 NWLR (Pt. 214) 155.

[110] Refer to section 5.3.4.2.1 above for a discussion of *Adediran's case*.

in *Adediran's case* guaranteed individuals' rights to access courts directly where such individual has sufficient interest in such matter.[111] The Federal high Court did not appear to consider this precedent in the case of *Douglas v Shell*[112] where the plaintiff was denied the right to sue despite being an indigene of an affected community and an environmental rights activist.[113]

Following the different decisions reached by the courts, Frynas opined that the *locus standi* rule in Nigeria remains unclear.[114] Ogowewo however suggests that 'the position now seems to be that the courts proceed on a case-by-case basis, intuitively deciding who should have standing'.[115] The position appears to be that the courts rely on the 'civil rights test' that was laid down in the case of *Adesanya v President of the Federal Republic of Nigeria.*[116] Bello JSC defined the test as follows: standing will only be accorded a plaintiff who shows that this civil rights and obligations have been or are in danger of being violated or adversely affected by the act complained of.[117] It is opined that the circumstances of the plaintiff in *Douglas' case,* who was an indigene of one of the affected communities, as well as an environmental activist, met the conditions set in both *Adediran* and *Adesanya's case*. The decision in *Adediran's case*, in particular, could be interpreted to mean that both private persons and organizations; including environmental organizations, could sue oil-companies for environmental damage caused by oil operations. The Court of Appeal's decision to reverse

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[111] Per Karibi-Whyte JSC at 180.

[112] (1999) 2 NWLR (Pt. 591).

[113] Refer to section 5.3.5.2.1 above for a discussion of *Douglas' case*.

[114] *J Frynas* (n 108) 134.

[115] T Ogowewo, 'The Problem with Standing to Sue in Nigeria' (1995) 39 *Journal of African Law* 1, 18.

[116] (1981) 1 ANLR 1.

[117] *Adediran's case* (n 116) 39.

the ruling of the Federal High Court in *Douglas' case* is significant because it set aside a decision that would have contributed to the uncertainty surrounding *locus standi* in Nigeria and continued to deprive affected communities of justice in environmental litigation. The impact of this decision is particularly important in oil-related environmental pollution where the impacts often would fit more appropriately into public nuisance and rob the affected individuals and communities from asserting their rights. A classic example is the case of *Chief Amos and Others (for themselves as individuals and on behalf of the Ogbia Community Brass Division) v Shell-B.P Petroleum Development Company Ltd and Another*[118] where the plaintiffs who sued on behalf of the whole Brass Division, comprising 42 villages, failed because the court opined that the disruption was a public nuisance and thus actionable only by the Attorney-General of the Federation.[119] It is noteworthy that there is no reported case where the Attorney-General of the Federation's office instituted proceedings on behalf of communities affected by the oil-industry. The uncertainty regarding *locus standi* in Nigeria with particular reference to oil-related litigation reveals a need for clarity on procedural mechanisms to enforce oil-related grievances. A continued situation where such fundamental matters in litigation are left entirely to the discretion of judges, who have a history of prioritizing economic benefits derived from the oil-industry over its adverse environmental impacts, will continue to hinder access to environmental justice.

There have however been some transformations with regards the private right to sue in oil-related litigation.[120] In the past, those affected by oil operations usually sued oil companies as a group rather than as individual plaintiffs. It was not uncommon for judges to dismiss such

[118] (1977) 6 SC 109.

[119] See also *Horsefall v Shell-BP* (1974) 2 RSLR 126.

[120] *J Frynas* (n 108) 135-136.

suits or to limit the scope of the suits because the judge found that the plaintiffs had not proven their authority to sue as a group. In *Chinda v Shell-BP*,[121] the plaintiffs sued Shell-BP for damages as representing the Rumuokani community in Rivers State. Their claim was dismissed because 'it was not proved that the six named plaintiffs sue as representatives of all the villages'.[122] Individuals are increasingly recognized as having the right to represent a community, village or family as a whole.[123] Cases where individuals have sued oil companies in representative capacities include *Geosource v Biragbara*,[124] *Shell v Tiebo*,[125] and *Shell v Farah*.[126]

Another important aspect of access to justice is that remedies available to the plaintiffs should be 'adequate and effective' and include 'injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive.'[127] Compensation awards to plaintiffs in oil-related awards have increased substantially following the decision in *Farah's case*. The plaintiffs were awarded compensation under multiple heads including the loss of income, the social effect and general inconvenience as well as land rehabilitation. A noteworthy observation from the decision in *Farah's case* is that the court deviated from previous attitude of relying solely on legislation to limit the amount payable to aggrieved communities as compensation.[128] It appears that the courts have been influenced by the decision in *Farah's*

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[121] (1974) 2 RSLR 1.

[122] *Chinda's case* (n 121) 4.

[123] *J Frynas* (n 108) 136.

[124] (1997) 5 NWLR 607.

[125] (1996) 4 NWLR 657.

[126] 3 NWLR (Pt. 382) 148.

[127] Aarhus Convention, Article 9 (4).

[128] Refer to section 5.3.4 above.

case to award more substantial compensation awards to the aggrieved plaintiffs. In *Shell v Tiebo VII*[129] for instance, where Shell had offered to pay the community N5,500 compensation, the court of first instance awarded the community N6 million in compensation. This award was affirmed by the Court of Appeal. Despite the progress recorded in recent cases where the courts have awarded plaintiffs in oil-related litigation substantial compensation, the decisions are still open to criticism because they rarely order remediation of the impacted environment. Indeed, *Farah's case* remains the only reported case where the court ordered remediation of the affected land in addition to awarding significant compensation for damage done to land; including consequential and prospective losses. It is argued that this is a major deficiency in securing environmental justice. It is posited that the remediation of the environment is a fundamental aspect of accessing environmental justice particularly given the delicate ecosystem of the Niger Delta area and the its economic and traditional values to its inhabitants. Arguably, mere compensation payments would satisfy the present generation; albeit for a period of time, but would do little to ensure that future generations have the opportunity to enjoy the region's environmental resources.

That notwithstanding, Frynas argued that the recent increase in compensation awards has instigated an increase in the recourse to litigation by aggrieved individuals and host-communities.[130] He noted however that increased litigation has 'so far failed to reduce the quantity of violent forms of protest against oil-companies' and 'in that sense legal change could be said to have not gone far enough to discourage extra legal forms of protest such as

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[129] (1996) 4 NWLR (Pt. 445) 657. See also, *Shell v Isaiah* (1997) 6 NWLR (Pt. 508) 236.

[130] J Frynas, *Oil in Nigeria: Conflict and Litigation between Oil Companies and Village Communities* (Transaction Publishers, New Brunswick 2000) 224.

kidnapping of oil company staff.'[131] Frynas justifies his observation on the fact that there remain shortcomings in the legal framework regarding oil-related legislation. According to Frynas, 'the ambiguous nature and the uncertainty of legal outcomes could partly help to explain why a significant number of frustrated litigants and potential litigants in oil-related disputes may resort to violence.'[132] The barriers that oil-litigants face according to Frynas essentially include the attitude of Nigerian judges and statutory provisions regulating the oil-industry that are biased in favour of the oil-companies.[133] For example, judges are reluctant to grant injunctions against oil-companies even where the operations are discovered to have adverse effects on the host-communities and their environment.[134] Shell's legal manager confirmed the bias in the law regarding injunctions in favour of oil companies in 1988 thus: 'the law is on our side because in the case of a dispute, we do not have to stop operations'.[135] For instance, in *Allan Irou v Shell BP*,[136] the judge refused to grant an injunction in favour of the plaintiff whose land, fish pond and creek had been polluted by the activities of the defendant. According to judge, nothing should be done to disturb the operation of trade (i.e. mineral oil), which is the main source of Nigeria's revenue. The judge in *Chinda's case* refused to issue an injunction to seize flaring gas against the defendants. In the court's opinion, the Statement of Claim that demanded an order that the defendants [Shell-BP] refrain from operating a similar flare stack within five miles of the plaintiff's village, was considered 'an absurdly and needlessly wide demand'.[137] Finally, there are indications that

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[131] *J Frynas* (n 130) 224.

[132] *J Frynas* (n 130) 224.

[133] *J Frynas* (n 130) 224.

[134] *J Frynas* (n 108) 122-123.

[135] *J Frynas* (n 108) 122-123.

[136] Suit No. W/89/91 Warri HC/26/11/73 (Unreported).

[137] (1974) 2 RSLR 1at 14.

suggest that the Government interferes with the judicial process to protect its interests as well as its joint-venture partners as revealed in *Gbemre's case*.[138]

Though Frynas noted that the judiciary no longer views itself as merely part of the economic and political elite,[139] it is suggested that it still has to extricate itself from the influences of the executive and assert a level of independence that will foster public confidence. To achieve this, the judiciary must also have processes that ensure that its decisions are enforced. The position of this thesis is that guaranteed access to justice will eliminate the need aggrieved communities to seek recourse to extra-legal procedures to seek 'justice' which contributes to the pervasive state of violent conflicts in the Niger Delta.

7.4 Conclusion

This section has argued that the recognition of environmental rights should form the basis of public participation in Nigeria's oil-industry and reduce the incidence of violent conflicts that are prevalent in the region. Specifically, it has argued that increasing derivation to the region or, and resource control are not tantamount to active public participation and will rather increase the spates of violence in the oil-rich region. The spates of violence including kidnapping of international oil workers have been carried out essentially to raise international awareness to the plight of the host-communities. This includes the oil-industry's negative impacts on their environment and the consequent socio-economic hardships they suffer as a result and the desire to be recognized as stakeholders in this lucrative industry they host.[140] It

[138] Refer to section 7.3.1 above.

[139] *J Frynas* (n 108) 148.

[140] J. Hazen and J. Horner, *Small Arms, Armed Violence, and Insecurity in Nigeria: The Niger Delta in Perspective*, Occasional Paper No. 20 of the Small Arms Survey, Graduate Institute of International Studies, Geneva 2007, 69. See also, S. Hanson, 'MEND: The Niger Delta's Umbrella Militant Group', Council on

is important to state that the while the violence in the region began essentially as a response to these negative effects of the oil-industry, the atmosphere of persistent acrimony has provided a vulnerable environment that mischief-makers exploit to make personal pecuniary gains. These conflicts have contributed significantly to the loss in income for both the oil-industry and the State. Disruptions to production have resulted in the declaration of *force majueres*.[141] While Senator Brigidi, the Chairman of the Delta Peace and Conflict Resolution Committee claims the loss is in the region is about 300,000 barrels per day which amounts to approximately US$18 million daily, Shell put the figure at 447,000 barrels per day (for most of 2006 and 2007) and the Central Bank of Nigeria (CBN) estimated that the figure was 600,000 barrels per day in 2006.[142] Certainly, the loss is enormous. The loss becomes even more drastic when human and environmental costs as well as damage done to the local economies are factored in. Consequently, it is more beneficial to all the parties to avoid further incidences of conflicts, violence and instability in the region. Other than long-term financial certainty which is the primary motive of the business ventures, unnecessary loss of lives can be avoided just as the delicate environment of the region which in itself is a prime resource will be protected from pollution for the benefit of both present and future generations. In conclusion of this section, it should be noted that the existence of rights does not automatically signify the culpability of the oil-industry. Rather, it establishes a process

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Foreign Relation website, online:

http://www.cfr.org/publication/12920/mend.html?breadcrumb=%2Fbios%2F11891%2F. Accessed; 17 June, 2008.

[141] K. Ebiri, 'MEND attacks Shell's oil pipelines in Rivers', Guardian newspapers (Lagos) Tuesday, April 22, 2008. See also, C. Amanze-Nwachuku, 'Again, militant attacks push up oil price', Thisday Newspapers (Lagos) Wednesday, April 23, 2008.

[142] Y. Lawal, 'Nigeria loses N7.5 trillion to Niger Delta crisis' Guardian Newspapers (Lagos) Wednesday, October 17, 2007.

for the neutral determination of conflicting interests that arise in the course of oil operations in the country.

CHAPTER EIGHT

CONCLUSIONS: INTEGRATING ENVIRONMENTAL HUMAN RIGHTS IN NIGERIA - THE WAY FORWARD

8.1 Integrating Environmental Human Rights in Nigeria: The Way Forward

The thesis has argued for the need to incorporate environmental human rights into the legal framework that regulates Nigeria's oil-industry. As Ostrom noted, resolving issues of distributive justice, that usually occur within complex circumstances that make it difficult to resolve to everyone's satisfaction, does not lie in ownership agreements. Rather, it lies in governance solutions that provide for participation in collective environmental decisions that make conflict resolution available for involved actors.[1] In essence, the central solution to the conflicts in Nigeria's oil-industry does not lie in resource control (ownership) or revenue allocation (that challenges the ownership structure) but in active public involvement in environmental matters. Thus this section offers suggestions on how best to inculcate the principles of environmental human rights into the legal framework regulating Nigeria's oil-industry.

This thesis aligns with the recommendation of the National Policy on the Environment that environmental protection and the aspiration to have a safe and healthy environment be elevated to a constitutional duty of government.[2] Hayward argues that providing for environmental protection at the constitutional level has a number of potential advantages: it

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[1] E Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge University Press, Cambridge 1990) quoted in J Paavola, 'Environmental Conflicts and Institutions as Conceptual Cornerstones of Environmental Governance Research' Centre for Social and Economic Research on the Global Environment (CSERGE) Working Paper EDM 05-01, 7.

[2] See section 6 of the National Policy on the Environment. This also includes the promulgation of laws to ratify international treaties on the environment to make them part of national law.

entrenches a recognition of the importance of environmental protection; it offers the possibility of unifying principles for legislation and regulation; it secures these principles against the vicissitudes of routine politics; while at the same time enhancing possibilities of democratic participation in environmental decision-making processes.[3] It is noted that there are arguments against the need to recognize environmental human rights as 'rights'.[4] For instance Handl argues that while it should be self-evident that there is a direct functional relationship between protection of the environment and the promotion of human rights, it is much less obvious that environmental protection ought to be conceptualized in terms of a generic human right.[5] While these arguments have been noted, it is argued that there are other reasons that make Hayward's suggestion more attractive to Nigeria's peculiar circumstances.

This has to do with the status of the Land Use Act which the thesis has argued is the final straw in the exclusion of host-communities' participation in the oil-industry. The Act was annexed to the Constitution by the military administration of General Obasanjo in 1979 purportedly to make it part of it and the position has remained the same since then. As the Constitutional Rights Project noted, controversy subsequently trailed the action, with questions being asked if the insertion made the Act a part of the constitution or merely a federal law.[6] The Supreme Court settled the dilemma in the case of *Nkwocha v. Governor of Anambra State & Others*[7] where it held that the Land Use Act is not an integral part of the

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[3] T Hayward, *Constitutional Environmental Rights* (Oxford University Press, Oxford 2005) 7.

[4] See section 2.3 above generally.

[5] G Handl, 'Human Rights and the Protection of the Environment: A Mildly Revisionist View' in A. Trinidade (ed.), *Human Rights, Sustainable Development and the Environment* (IIDH, San José de Costa Rica 1992) 119.

[6] Constitutional Rights Project (CRP), *Land, Oil and Human Rights in Nigeria's Delta Region* (CRP, Lagos 1999) 5.

[7] (1984) 6 SC 362.

Constitution. It stated that the Act is an ordinary statute which became extraordinary by virtue of its entrenchment in the Constitution but is subject to the Constitution. In essence, the Land Use Act may be said to be above 'ordinary' laws and subject only to the Constitution. Thus any real attempt to promote environmental human rights will have to be constitutionally guaranteed to have any effect in Nigeria. While this suggestion appears to be straightforward, the reality of the situation is that amending the Constitution to include environmental human rights provisions is an onerous exercise. The process to amend the Land Use Act to promote, or at least, make it more tolerant to the recognition of these rights, is also onerous. The process to amend the Constitution and the Land Use Act are both contained in section 9 of the 1999 Constitution. It provides:

> (1) The National Assembly may, subject to the provision of this section, alter any of the provisions of this Constitution.
> (2) An Act of the National Assembly for the alteration of this Constitution, not being an Act to which section 8 of this Constitution applies, shall not be passed in either House of the National Assembly unless the proposal is supported by the votes of not less than two-thirds majority of all the members of that House and approved by resolution of the Houses of Assembly of not less than two-thirds of all the States.
> (3) An Act of the National Assembly for the purpose of altering the provisions of this section, section 8 or Chapter IV of this Constitution shall not be passed by either House of the National Assembly unless the proposal is approved by the votes of not less than four-fifths majority of all the members of each House, and also approved by resolution of the House of Assembly of not less than two-third of all States.
> (4) For the purposes of section 8 of this Constitution and of subsections (2) and (3) of this section, the number of members of each House of the National Assembly shall, notwithstanding any vacancy, be deemed to be the number of members specified in sections 48 and 49 of this Constitution.

In essence, before the Land Use Act may be amended, the proposed alteration must initially be supported by at least two-thirds majority of the House of Representative and the Senate that comprise the National Assembly. The proposal shall then be subject to the approval of at least two-thirds of Nigeria's 36 states. The amendment of a constitutional provision on fundamental human rights will however require at least four-fifths majority of all the members of each House of the National Assembly and a resolution passed by at least two-third of all the 36 States' House of Assembly.

Thus it is appears that it should be easier to amend the Land Use Act to promote host-communities' active participation in the oil-industry than to include environmental human rights as a constitutionally recognized right in Nigeria. However, it is argued that it is more likely for the amendment of the Constitution to succeed given the global antecedent in the constitutional recognition of the rights than the amendment of the Land Use Act ostensibly to grant host-communities the right to be involved in the oil-industry. The argument may be made that environmental rights are to be enjoyed by all citizens against the claim that the Land Use Act be amended to allow a 'minority' group assert some rights. This is more so that a constitutional review process has begun at the National Assembly.[8] However, until environmental human rights are enshrined in the Constitution, it is suggested that these rights can still be enforced by broadly interpreting the existing human rights provisions to cover environmental human rights. For this to succeed, Nigerian judges will have to exercise 'judicial activism' in environmental-related cases. Judicial activism according to Baxi as a concept is indeterminate, fungible, inescapably localized and shaped by numerous motley factors.[9] Rajamani lists the attributes of an activist judge to include the likelihood to ignore jurisdictional limits on her power, place less emphasis on adherence to precedent and exhibit less deference to political decision makers. Other attributes will include her orientation towards result; the willingness to decide cases at the 'periphery of justiciability'; to tackle 'tough and/or novel questions' and to create new theories and rights in constitutional doctrine. She is more likely to issue broad decisions that extend beyond the narrow contours

[8] S Ojeifo, 'National Assembly begins Constitution amendment process', Thisday Newspaper (Lagos), 16 April 2008, online: http://allafrica.com/stories/200804160236.html. Accessed; 09 July, 2008.

[9] U. Baxi, 'Preface' in S.P. Sathe (ed.) *Judicial Activism in India* (2nd edn Oxford University Press, Oxford 2002) xv.

of litigation, and to use her power to 'further justice – that is to protect human dignity – especially by expanding equality and personal liberty'.[10] While one may attest to the fact that these attributes contributed to the 'greening' of the constitutional right to life in India, the same may not be said of Nigeria currently.

Indeed, India shares similar colonial and thus legal history with Nigeria and both countries place the responsibility of the State to protect the environment as a 'Fundamental Objective and Directive Principle of State Policy'.[11] Though the provisions of this part of the Constitution are not intended to be enforceable against the State, they are 'fundamental in the governance of the country' and it is 'the duty of the State to apply these principles in making laws'.[12] In the Court's jurisprudence, fundamental rights are read in conjunction with Directive Principles of State Policy, 'like two wheels of a chariot, one no less important than the other'.[13] In interpreting the right to life in particular which is used to protect environmental rights generally, Chandrachud, C.J opined in *Tellis v. Bombay Municipal Council* that:

> The sweep of the right to life conferred by Article 21 is far and wide reaching. It does not mean merely that life cannot be extinguished or taken away as, for example, by the imposition and execution of the death sentence, except according to procedure established by law. That is but one aspect of the right to life. An equally important facet of the right is the right to livelihood because no person can live without the means of living…Life means something more than mere animal existence and the inhibition against the deprivation of life extends to all those limits and faculties by which life is enjoyed.[14]

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[10] L Rajamani, 'The Right to Environmental Protection in India: Many a Slip between the Cup and the Lip' (2007) 16 *RECIEL* 3, 275.

[11] See Chapter II of the 1999 CFRN generally and Part IV of the Indian Constitution.

[12] Article 39 of the Indian Constitution.

[13] *Minerva Mills v. Union of India* (1980), 3 SCC 625, para. 56.

[14] (1987) LRC (Const) 351 (Ind. SC) at 363.

This decision influenced a new legal pattern of applying the fundamental right to life as a shield to litigate environmental rights in India. In *Shanti Star Builders v Naryan Khimalal Totame & Others*,[15] the court noted that basic needs of man have been accepted to be food, clothing and shelter which are within the ambit of the right to life. According to the court, the right to life also includes the right to a decent environment and reasonable accommodation to live in which would allow him to grow in every aspect - physical, mental and intellectual. The judiciary has delivered a large number of decisions that have proven the desire to embrace innovative and progressive conceptual tools in the service of environmental protection.[16] Gallanter and Krishnan noted in this regards that India has pulled off the astonishing feat of sustaining a regime of constitutional liberty with vigorous judicial protection of human rights in a very large, very poor and very diverse society and for all its flaws and imperfections is surely one of the epic legal accomplishments of this century.[17]

This approach has been adopted in other Asian countries including Bangladesh for example where the court in the case of *Dr Mohiuddin Farooque v Bangladesh & Ors*[18] linked environmental human rights to the right to life explicitly. The court stated:

> Although we do not have any provision like Article 48A of the Indian Constitution for protection of environment, Articles 31 and 32 of our Constitution protect right to life as a fundamental right. It encompasses within its ambit, the protection and preservation of environment, ecological balance free from pollution of air and water,

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[15] 1990 (1) S.C. Appeal No. 2598 of 1989.

[16] See for instance, *Vellore Citizens Welfare Forum v Union of India* AIR 1996 SC 2715; *Rural Litigation and Entitlement Kendra v. State of U.P.* AIR 1985 SC 652 and *Francis Coralie v Union Territory of Delhi* AIR 1981 SC 746).

[17] M Gallanter and J Krishnan, 'Debased Informalism: Lok Adalats and Legal Rights in Modern India' in T. Heller and E. Jensen (eds.) *Beyond Common Knowledge: Empirical Approaches to the Rule of Law* (Stanford University Press, 2003) 76-121.

[18] 48 DLR 1996 Supreme Court Of Bangladesh Appellate Division (Civil)

> sanitation without which, life can hardly be enjoyed. Any act or omission contrary thereto will be violate of the said right to life.[19]

It is apt to note that the situation in Africa has not been as encouraging as in decisions from India, for instance. Decisions from Africa, perhaps with the exception of South Africa, reveal a general apathy for the enforcement of environmental human rights even when there are constitutional and other legal provisions that promote these rights.[20] As the thesis revealed earlier, the judicial attitude of Nigerian judges; particularly in oil-related litigation is not favourable towards the recognition and enforcement of environmental human rights thus it is doubtful if this mode will succeed.[21] It appears that despite the adherence to the principle that international law obligations 'prevail over the rules of domestic law when they are incompatible with the latter';[22] the courts have not adopted this position in oil-related litigation. It should be noted that the environmental and human rights lawyers in Nigeria can not be exempted from this castigation. It is their responsibility to invoke relevant contemporary international environmental law principles whenever and wherever they are applicable. Notwithstanding the observation of the former Chief Justice of the Federation that litigants are wary of the 'judicial attitude', it is argued that the only way for litigants to influence a change in attitude is to proffer compelling arguments based on these principles.

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[19] See also; *Virender Gaur v State of Haryana* (1995) 2 SCC 577, 580 (Ind SC)

[20] See generally, J Mubangizi, 'The Constitutional Protection of Socio-Economic Rights in Selected African Countries: A Comparative Evaluation' (2006) 2 *African Journal of Legal Studies* 1, 1-19.

[21] M Uwais, 'Recent Development in Nigerian Strengthening Legal and Institutional Framework for Promoting Environmental Management' Global Judges symposium on Sustainable Development and the Role of Law held at Johannesburg, South Africa 18th – 20th August 2002.

[22] *The Registered Trustees of the Constitutional Rights Project v President of Nigeria* Unreported suit M/102/92, judgment of 05 May 1992. See also, *Garba v Lagos State Attorney-General* Suit ID/599M/91 judgment of 31 October 1991; *Gbemres case*. But see *Wahab Akanmu v Attorney-General of Lagos State* Suit M568/91 judgment of 31 January 1991.

Having made this suggestion, in many instances, the legal representatives of these host-communities are not aware of the human rights approach to protection of the environment. Many of them were schooled in the old Common Law system and have remained ingrained in this approach to litigate against oil-companies. The success *Gbemre's case* at the appellate stage may introduce a precedent that they may learn from and rely on in future litigation. In the interim, it appears that reliance on judicial activism to protect environmental human rights is not an immediate option.

This is more so that there are quite a few reasonable grounds for appeal against the High Court's decision in *Gbemre's case*. Ebeku notes that these include the judge's failure to specifically resolve conflicting affidavit evidence as required by law; to make specific findings and cite persuasive authorities in the decision and to benefit from an address or final arguments of counsel for the respondents.[23] This, according to Ebeku is more so given the important nature of the case, and particularly having regard to the unfortunate attitude of counsel for the respondents in the case right from the outset (as manifest in the judgment), the judge ought to have invited other learned counsel to address arguments to him as *amici curiae* as is the established practice of the Supreme Court of Nigeria in important cases, particularly those that might establish new principles.[24] Since the case is currently on appeal, there are limits to the issues that may be raised. However, that the case is a milestone in Nigeria's oil-related litigation particularly as it relates to the enforcement of environmental human rights. Indeed, either way the decisions of the upper courts swing, the impacts will be manifest in future environmental litigation in Nigeria.

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[23] K Ebeku, 'Constitutional Right to a Healthy Environment and Human Rights Approaches to Environmental Protection in Nigeria: *Gbemre v Shell* Revisited' (2007) 16 *RECIEL* 3, 319.

[24] *K Ebeku* (n 23) 319.

If the Appeal Courts quashes the decision of the High Court, the host-communities will perceive this as collusion between the judiciary and the oil-multinationals to deny them of their 'rights'. This is even more likely to intensify the violence against the oil-industry. If, on the other hand, the appellate courts affirm the High Court's decision, expectedly, communities (and individuals) with similar grudges will initiate cases based on the environmental human rights protection. In the absence of certainty in the legal provisions regarding the right, subsequent cases will be decided based on individual judge's predilection thereby maintaining uncertainty in the law surrounding environmental human rights protection.[25] Such a situation has consequences which include, as witnessed in India, the foray of the judiciary into policy and law-making that it is not properly equipped to do effectively.[26] As Rajamani noted, 'policy, environmental and social, must emerge from a socio political process and must be considered in a legislative forum not a judicial one.'[27] Consequently, while this 'judicial approach' may fill the gap appropriately in the short run, it is ultimately preferable that the legal framework recognizes the rights to avoid ambiguity and confusion that may follow judicial lawmaking. Again, it is noted that though some countries with similar legal provisions to Nigeria have succeeded in enforcing environmental human rights without constitutional guarantees of the right, Nigeria's peculiar situation; particularly the status of the Land Use Act, warrants it.

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[25] *L Rajamani* (n 10) 284-285.

[26] L Rajamani, 'Public Interest Environmental Litigation in India: Exploring Issues of Access, Participation, Equity, Effectiveness and Sustainability' (2007) 19 *Journal of Environmental Law* 3, 293-321. See also, *L Rajamani* (n 10) 284.

[27] *L Rajamani* (n 26) 305.

8.2 Conclusion

This thesis had two main purposes. The first was to consider the role of law in the violent conflicts in Nigeria's oil-industry and the second was to examine how the law may be utilized to resolve and manage these conflicts. This approach has departed from past studies that have glossed over the role of law in instigating the violence that has adversely affected the Niger Delta region. The thesis has critically analyzed the development of the regulatory framework of Nigeria's oil-industry since its inception, with particularly reference to the laws that relate to the participation of the host-communities in the industry they host. It has argued that the general thrust of the regulatory framework has deprived the host-communities the right to be actively involved in the oil-industry both in terms of its management and the derivation of accruing benefits. The reactions of these communities to the laws; the responses of the oil-industry personified by the Federal Government and the oil-companies; and host-communities' counter-responses were examined to reveal how the state of violent conflicts originated. The thesis maintains that these violent conflicts have adversely affected the sustainable development of the Niger Delta region, its inhabitants, environmental resources and economical resources, including oil. The oil-industry has failed to curb; or at least reduce, the state of restiveness in the host-communities. The industry has have employed the wrong tactics of militarizing the area and promising (physical) development of the area. While militarization has further exacerbated the state of violence in the region, the failed promises to develop the region have deepened the host-communities' animosity against the oil-industry thereby worsening the overall situation.[28]

[28] R Ako and O Oyelade, 'Human Rights, the Environment and Conflict: The Case of Nigeria's Delta Region', Indian Society of International Law Fifth International Conference on International Environmental Law Conference Proceedings, (2007) Vol. 2, 917.

The host-communities' demands of increased participation are now expressed in rights-based language. This transcends past demands based on developmental needs, or as Ukeje described it, 'bread-and-butter' demands.[29] Ukeje noted that ordinarily, protests based on such demands do not result in public protest except they are mediated by 'cognitive liberation';[30] that is, when an oppressed people break out of the pessimistic and quiescent patterns of thought and begin to do something about their situation. He noted further that while social conflicts may be triggered by the denial of tangible resources, they are complicated by structurally embedded questions of identity fundamental to the social interactions that generate conflicts. This reasoning is in accordance with a central argument of this thesis that identity issues are central to the pervasive state of violent conflicts in Nigeria's oil-industry. This thesis argues through the analysis of extant laws that regulate Nigeria's oil-industry that the host-communities' rights to participate actively in the management of the oil-industry; particularly in the environmental decision-making processes, has been eroded over the years and has contributed to violent conflicts in the region.

This analysis was based on the absence of political and economic power model of the environmental justice theory that posits that communities suffer from environmental inequities because they lack political and economic power. The thesis argued that the Niger Delta region that hosts most of Nigeria's oil deposits lack the requisite political and economic power to influence government policies and laws to ensure their active involvement in the oil-industry they host. This has raised the question of political identity in the region which

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[29] C Ukeje, 'From Aba to Ugborodo: Gender Identity and Alternative Discourse of Social Protest among Women in the Oil Delta of Nigeria' (2004) 32 *Oxford Development Studies* 4, 612.

[30] *C Ukeje* (n 2) 612; quoting C Kurzman, 'Structural Opportunity and Perceived Opportunity in Social Movement Theory: The Iranian Revolution of 1979' (1996) 61 *American Sociological Review* 1, 154.

has become a fundamental part of the communities' quest to be involved in the oil-industry they host. These 'identity' and 'participation' issues as projected by the host-communities are regarded by the State as challenge on its authority and led to a stalemate. As Rothchild observed, when issues of identity and participation, or of basic personal privilege are at stake, and when the actions of one group infringe on the privacy or identity of others non-negotiable claims are made on the part of both the state and civil associations.[31] The stalemate in the case of Nigeria's oil-industry has resulted in violence that has impacted national and global economics and security. Consequently, the thesis argued that the host-communities need to be integrated into participating actively in the oil-industry as a prerequisite for peace in the oil-rich region. It argued for the Constitutional recognition of environmental human rights in Nigeria. It suggested that pending the Constitutional recognition of environmental human rights, the rights may be recognized and enforced through existing fundamental human rights provisions; particularly the right to life.

[31] See generally, D Rothchild, 'Conclusion: Management of Conflict in West Africa' in I Zartman (Ed.) *Governance as Conflict Management: Politics and Violence in West Africa* (Brookings Institution Press Washington, DC 1997) 209-213.

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