The Rights-Based Approach to Extractive Resource Governance in Nigeria through the Lens of the UN Guiding Principles on Business and Human Rights: Lessons from South Africa

Omogboyega Abe
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Supervisor: Associate Professor Ada Ordor

DECLARATION

I declare that the thesis for the degree of Doctor of Philosophy at the University of Cape Town hereby submitted, has not been previously submitted for a degree at this or any other university, that it is my work in design and execution, and that all the materials contained herein have been duly acknowledged.

Signed by candidate

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Omogboyega O. Abe Date

DEDICATION

This thesis is dedicated to:

My wife, Ruth Lelosa Abe

and

My son, Oluwadamilola Ayomide Abe.

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ABSTRACT

This thesis examines the prospects and potentials of implementing the United Nations Guiding Principles on Business and Human Rights (GPs), in the extractive industry in Nigeria. It considers the prospects of amending existing laws and strengthening regulatory agencies. At the same time, it explores the option of creating new business and human rights institutional agencies to address corporate and business-related human rights abuse. Using the elements of the rights-based approach, the linkages between human rights and extractive activities are examined. The lack of an effective legal and institutional framework to integrate human rights protections into environmental laws has prevented communities which host extractive projects from realising their human rights. On 16th June 2011, the United Nations Human Rights Council, unanimously endorsed the Guiding Principles on Business and Human Rights which provide guidelines for the state's duty to protect human rights, corporate responsibility to respect human rights and access to remedies for victims of corporate-related human rights violations. The GPs provide a rights-based approach to safeguarding extractive resource governance, pertinent to a jurisdiction like Nigeria. Drawing significant lessons from South Africa – due to its proactive legislation imposing human rights compliance on companies – the research examines the potential of implementing the GPs in Nigeria's extractive resource industry.

A combination of doctrinal and empirical research is utilised in the examination of the subject-matter. A key finding of the research is that a proactive implementation of the GPs will reduce or prevent the harmful exploitation of natural resources, thereby creating a positive extractive resource governance and guaranteeing sustainable development. The critical steps towards implementation would be to integrate the GPs into current laws in a way that does not undermine the social contract, but enhances positive governance within communities. The contribution of the thesis in this respect is the development of a legal and institutional framework through which human rights principles can be integrated into domestic legal regimes in the extractive resource industry in Nigeria so as to guide the implementation of the GPs

The rights-based approach adopted in the research provides a pathway for the sustainable development of Nigeria's extractive resources. South Africa is at the forefront of the campaign for a binding business and human rights treaty and its domestic legal regime and judicial activity continue to demonstrate the progressive realisation of human rights. Only credible institutions

infused with an in-depth understanding of the socio-economic, cultural and political realities of extractive communities can legislate properly for them and monitor compliance. The GPs present a valuable roadmap for strengthening institutions to ensure that business activities in the extractive industry and beyond are not devoid of pertinent human rights considerations.

ABBREVIATIONS

AG	-	Attorney General
BHR	-	Business and Human Rights
BIT	-	Bilateral Investment Treaties (BIT)
CAMA	-	Companies and Allied Matters Act
CEO	-	Chief Executive Officer
CESR	-	Center for Economic and Social Rights
CSR	-	Corporate Social Responsibility
DRC	-	Democratic Republic of the Congo (DRC)
DPR	-	Department of Petroleum Resources
EAP	-	Environmental Assessment Practitioner
EIA	-	Environmental Impact Assessment
EMP	-	Environmental Management Plan
EMPr	-	Environmental Management Programme
ESIA	-	Environmental and Social Impact Assessment
EU	-	European Union
EITI	-	Extractive Industries Transparency Initiative
FDI	-	Foreign Direct Investment
FPIC	-	Free, Prior, Informed Consent
GP	-	Guiding Principles
HRBA	-	Human Rights Based Approach
HRC	-	Human Rights Council
HRDD	-	Human Rights Due Diligence
HVDS	-	High Voltage Distribution System (HVDS)
ICSID	-	International Centre for the Settlement of Investment Disputes
ILO	-	International Labour Organization
IoDSA	-	Institute of Directors
LFN	-	Laws of the Federation of Nigeria
LUA	-	Land Use Act
MNC	-	Multinational companies
MOSOP	-	Movement for the Survival of Ogoni People

NAP	-	National Action Plan
NDDC	-	Niger Delta Development Commission
NEITI	-	Nigerian Extractive Industries Transparency Initiative
NGO	-	Non Governmental Organisation
NHRI	-	National Human Rights Institutions
NOSDRA	-	National Oil Spill Detection and Response Agency
NNHRC	-	Nigerian National Human Rights Commission
NNPC	-	Nigerian National Petroleum Corporation
OECD	-	Organization for Economic Cooperation and Development
OGP	-	Open Government Partnership
OGPP	-	Oil-Gas Processing Plant
OPA	-	Oil Pipelines Act
PDT	-	Participatory Development Theory
PHCN	-	Power Holding Company of Nigeria
PIB	-	Petroleum Industry Bill
PPDC	-	Public and Private Development Center
PWYP	-	Publish What You Pay
SAHRC	-	South African Human Rights Commission
SERAC	-	Social and Economic Rights Action Centre
SLO	-	Social Licence to Operate
SRSG	-	Special Representative of the UN Secretary General
TNC	-	Transnational companies
UN	-	United Nations
UNEP	-	United Nations Environment Programme
UNGPs	-	United Nations Guiding Principles on Business and Human Rights

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CHAPTER ONE: GENERAL INTRODUCTION

> 'The historic adoption of the Sustainable Development Goals last month underscores a long-standing truth: there will be no peace without development, no development without peace, and neither without respect for human rights.'[1]

1.1 Introduction

This thesis examines the potentials and challenges associated with adopting the United Nations Human Rights Based Approach (HRBA) as a legal and institutional framework for addressing human rights questions in resource extraction projects using Nigeria as a focal country – with lessons drawn from South Africa.[2]

Drawing from the United Nations Guiding Principles on Business and Human Rights (GPs) and extractive resource projects, this thesis discusses the importance of integrating human rights protection into extant relevant laws, and the execution of extractive resource projects. The research considers how human rights protection can be effectively implanted into domestic laws, regulations and corporate practice. In so doing, it examines the practicality of implementing the GPs (as a HRBA) through adaptation of legal and practical structures. The research also identifies other relevant approaches through which human rights norms may be integrated into corporate practice. This will consequently give companies the social licence to operate – which is an important 'licence' in the debate on extractive resource governance.[3] The objective is to ensure that the implementation of the GPs will ensure positive extractive resource governance, while at the same time guaranteeing that state and corporate actors are held liable for breaching their human rights obligations. The effect will be to create a synergy between key stakeholders in

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[1] United Nations Secretary-General, Ban Ki-moon, in remarks to the General Assembly debate on peace operations made on 12 October 2015. See: 'Secretary-General's remarks at formal debate of the General Assembly on peace operations [as delivered]', *https://www.un.org/sg/en/content/sg/statement/2015-10-12/secretary-generals-remarks-formal-debate-general-assembly-peace*, accessed 15 October 2016. Flowing from the above quote, this thesis argues that the peaceful development of Africa's natural resources can only be done in an atmosphere of respect for human rights.

[2] The United Nations HRBA used in this thesis refers to the Framework proposed by the Special Representative of the UN Secretary General (SRSG), Prof. John Ruggie. It encourages all non-state actors to mainstream human right norms into their activities. See: Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', Report of the Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and Other Business Enterprises, UN Doc. A/HRC/17/31 (21 March 2011). ['Guiding Principles', 'Ruggie Framework'].

[3] See: 'The Human Rights Based Approach to Development Cooperation: Towards a Common Understanding among UN Agencies', *https://undg.org/wp-content/uploads/2016/09/6959-The_Human_Rights_Based_Approach_to_Development_Cooperation_Towards_a_Common_Understanding_among_UN.pdf*, accessed 15 October 2016.

the extractive resource industry: state, corporations and local communities. Though mining falls under extractive resource industry, this thesis is limited to oil and gas activities in Nigeria and mining activities in South Africa.

This introductory chapter provides the background to the entire study. It problematises the difference in development strides in Sub-Saharan Africa relative to developed nations, in the area of extractive resource governance. While the developed nations have done well, developing nations – mainly Sub-Saharan Africa countries – are still struggling to find a way of securing the desired dividends of extractive resources.[4] Ranging from civil wars arising in diamond conflicts to environmental degradation to mineral exploitation, the stories are of woe, conflict and further impoverishment for the indigenes of resource rich communities.[5] Harnessing the benefits of resource extraction has become so problematic, that the challenges far outweigh the desired results. Not only has this led to the impoverishment of African citizens, but it has exacerbated wars and ethnic conflicts. The activities of multinational companies (MNCs) are rarely felt in a positive way;[6] the state cares little about improving lives in indigenous communities.[7] These teething problems, which are unique to developing countries,[8] foreground the need for a more comprehensive understanding of shared communal responsibility within a local context. With this approach, companies, local communities and the state will have a common and shared

[4] Yannis Arvanitis, & Maxime Weigert, 'Turning Resource Curse into Development Dividends in Guinea-Bissau' (2017) *Resources Policy*, 226. See further Stewart Patrick, 'Why Natural Resources Are a Curse on Developing Countries and How to Fix It' *The Atlantic* (30 April 2012), *https://www.theatlantic.com/international/archive/2012/04/why-natural-resources-are-a-curse-on-developing-countries-and-how-to-fix-it/256508/*, accessed 9 May 2018.

[5] In the year 2000, the United Nations condemned illicit trade in diamonds that had helped fuel conflicts in war-torn Sierra Leone. The UN called on the business community in diamond trade, to establish a legal regime for demarcating diamonds from legitimate sources. See the following UN Documents: SC Res 1173, UN SCOR, 53rd sess, 3891st mtg, UN Doc S/RES/1173 (12 June 1998); SC Res 1295, UN SCOR, 55th sess, 4129th mtg, UN Doc S/RES/1295 (18 April 2000) ['The Situation in Angola']; SC Res 1306, UN SCOR, 55th sess, 4168th mtg, UN Doc S/RES/1306 (5 July 2000) ['The Situation in Sierra Leone']; SC Res 1343, UN SCOR, 56th sess, 4287th mtg, UN Doc S/RES/1343 (7 March 2001) ['The Situation in Liberia'].

[6] In the context of this work, multinational corporations (MNCs) shall be used interchangeably with transnational corporations (TNCs). An MNCs is an organisation, which owns or controls production of goods or services in one or more countries – other than the home country. See, further, Christopher B Doob, *Social Inequality and Social Stratification in US Society* (2013). See, also, 'Multinational Corporations' *http://www2.econ.iastate.edu/classes/econ355/choi/mul.htm*, accessed 16 October 2016.

[7] Amy Copley, 'Figure of the week: Extractive resource governance in Africa' *Brookings* (6 July 2017), *https://www.brookings.edu/blog/africa-in-focus/2017/07/06/figure-of-the-week-extractive-resource-governance-in-africa/*, accessed 9 May 2018; see further Stewart Patrick, Fragile States, Global Threats, and International Security (2011).

[8] Ibid.

responsibility to co-exist with one another.[9] Considering its importance to the African economy, this thesis focuses on the implementation of the GPs in the extractive resource industry.

This chapter begins with a contextual analysis of the earliest attempts to regulate corporate activities in the extractive sector, showing how those attempts have failed. It further examines the importance of the proactive implementation of the GPs in the extractive resource industry. This chapter further analyses the human rights questions and challenges facing extractive resource governance. Thereafter, it reveals how these challenges can create a 'smart mix' approach:[10] where soft-law instruments will, over time, metamorphose into legally binding instruments – thereby creating cross-cutting synergies between business, human rights and policy measures.

1.2 Background to the Study

The oil industry has been Nigeria's main revenue earning sector. Yet, Nigerians continue to suffer untold hardships arising from activities involving corporate related human rights violations. The 2011 United Nations Environment Programme (UNEP) Report,[11] revealed that the activities of multinational oil companies have systematically contaminated most of Ogoniland. These have serious consequences for human life and well-being. The extent of environmental degradation as evidenced in the Report can be summarized as follows: large-scale evidence of contamination of land and underground water courses, high levels of harmful substances and pollutants, such as benzene, found in community drinking water, residues of harmful substances still found on sites claimed to have been cleaned by the oil companies, failure of the oil companies to operate according to Nigerian standards or any recognised global

[9] Salar Ghahramani, 'Sovereigns, Socially Responsible Investing, and the Enforcement of International Law through Portfolio Investment and Shareholder Activism: The Three Models' (2014) *U of Penn J Int'l L* 1073 [Social activism, along with socially responsible investing (SRI), has a long history among individuals and private institutional investors].

[10] In the context of business and human rights, 'smart mix approach' are approaches that utilises a combination of voluntary and regulatory measures in addressing human rights concerns in business activities. See further Daniel Kinderman, 'Time for a reality check: Is Business Willing to Support a Smart Mix of Complementary Regulation in Private Governance?' (2016), *Policy and Society*, 29-42.

[11] UNEP, (2011), Environmental Assessment of Ogoniland, *https://postconflict.unep.ch/publications/OEA/UNEP_OEA.pdf*, accessed 9 May 2018, 8.

standard.[12] No doubt, oil exploration in Ogoniland has resulted in severe environmental degradation, oil pollution and grave injustices to the people of Ogoniland.[13] The Report further states that it will require $1 billion for the first five years and between twenty-five to thirty years to complete any environmental restoration in Ogoniland, once ongoing pollution is stopped.[14] The various human rights violations evident in this Report show a long overdue need to restore host communities of Nigeria's extractive projects.[15] The imperative of instituting a system of human rights compliance in business ventures in the extractive industry constitutes the focus of this research.

Observing human rights principles in business continues to be one of the greatest challenges facing the current generation. Over the years, concern over human rights violations by businesses has increased exponentially. This led Moyn to conclude that 'human rights are not so much an inheritance to preserve as an intervention to make'.[16] The world and developing countries continue to grapple with the idea of making corporations mitigate or reduce adverse human rights violations within their spheres of operation.[17]

The concept of human rights is both simple and powerful. The simplicity and power of human rights lies in the idea that every person is endowed with inherent dignity, and has equal and inalienable rights.[18] Traditionally, human rights were conceived and 'designed as a set of rules' and practices to defend citizens from the excessive powers of the state. As a result, states are obliged to ensure that their citizens live a life of dignity. Several human rights instruments

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[12] Ibid, 12.

[13] Ibid.

[14] Ibid, at 15 and 211.

[15] See further, Mercy Makpor, Regina Leite, 'The Nigerian Oil Industry: Assessing Community Development and Sustainability' (2017) *International Journal of Business and Management*, 66. [noting the positive impact when development takes place in host communities and sustainability is attained]; Kola Odeku, 'Effective Implementation of Environmental Management Plan for Sustainable Mining' (2017) *Environmental Economics*, 26-35. [arguing for environmental protection in the process of mining operations and highlighting the importance of sustainable mining in order to ensure that mining is conducted sensibly and responsibly]; Solomon Olajide Fadun, 'Corporate Social Responsibility (CSR) Practices and Stakeholders Expectations: The Nigerian Perspectives' (2014) *Research in Business and Management*, 13. [noting that business should protect wide range of stakeholders' interest]

[16] Samuel Moyn, *The Last Utopia: Human Rights in History* (2010) 9.

[17] Surya Deva, 'Guiding Principles on Business and Human Rights: Implications for Companies' (2012) 9(2) *European Company Law* 102.

[18] Preamble to the Stockholm Declaration on the Human Environment (1972).

have been enacted since 1948 to protect the inviolability of human lives.[19] These mechanisms, 'collectively referred to as the International Bill of Rights,'[20] did not however specifically provide for corporate-related human rights abuses. The idea that 'business enterprises must have human rights responsibilities backed by legal requirements in their spheres of operation, is relatively new and is still not universally accepted.'[21] Much has been said about states adopting policy measures aimed at responsible natural resource extraction, but the tendency has been to describe the problem rather than come up with a solution.[22]

There have been various attempts since the 1960s to regulate the activities of corporate actors and their impact on human rights. The United Nations (UN), through several treaties and conventions,[23] has continued to urge MNCs to observe minimum, basic, human rights protection in their activities. The disparities in the response to these instruments is evident in the attitude of the MNCs which adhere to the basic protection of human rights in developed countries – but which turn a blind eye to such protection in developing countries. The 'lack of binding legal and moral frameworks to guide the behaviour of MNCs emerged as one of the global socio-economic problems of developing countries during the late twentieth century.'[24] Concerted determination to solve these problems led to the drafting of the UN Guiding Principles on Business and Human Rights in 2011.[25] It is thus essential to examine how existing human rights frameworks can be

[19] The Universal Declaration of Human Rights (UDHR) is the first document by the United Nations to set a common standard of achievements for all peoples and all nations in human rights respect and compliance. It particularly sets out fundamental human rights to be universally protected. See further the International Bill of Rights: Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights (ICCPR) 1966, and the International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966. See also Oyeniyi Abe, 'The Feasibility of Implementing the United Nations Guiding Principles on Business and Human Rights in the Extractive Industry in Nigeria' (2016) *Journal of Sustainable Development Law and Policy* 138.

[20] Ibid.

[21] Abe, above (note 19), 138. See further John G. Ruggie, *Just Business: Multinational Corporations and Human Rights* (2013) xxv.

[22] Some of the problems related to human rights violations in the context of resource extraction include: land grabs, access to information, water and air pollution, displacement of citizens from their ancestral lands, and lack of participation by locals in development initiatives.

[23] The International Bill of Rights, above (note 19).

[24] Abe, above (note 19). Mathias Koenig-Archibugi, 'Transnational Corporations and Public Accountability' (2004) 39(2) *Government and Opposition: An Int'l J Comp. Politics* 240.

[25] Ibid.

integrated into national and international efforts to reduce the irresponsible extraction of natural resources and reduce other corporate catastrophes caused by human activity.

In a slightly symmetrical development, the UN sought to regulate corporate actors. In 1974, the UN established a Centre for Transnational Corporations, to 'draft a Multinational Code of Conduct for Transnational Corporations.'[26] Part A of the Draft Code was concluded in 1983, while Part B was finalised in 1990. The Code placed a tremendous obligation on MNCs to 'not only respect the laws of the host states, but also to desist from any form of political or economic interference in the domestic policies' of such states.[27] Few years later, the Organization for Economic Cooperation and Development (OECD), suggested some rules for corporate actors.[28] The OECD guidelines 'represent the most detailed attempt at regulating MNCs around that period.'[29] The Guidelines instruct corporations to respect human rights in any country in which they might operate. However, the Guidelines were 'intended to be non-binding.'[30] Furthermore, the MNCs were involved in the sustained growth of the economies of the developed states within the OECD.[31]

Numerous other initiatives have called for more openness in extractive resource management. The Kimberley Process Certification Scheme was one of the first initiatives to track the illicit sale of diamonds (referred to as 'blood diamonds' which are exploited by MNCs,

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[26] See: UN Code of Conduct on Transnational Corporations, 23 I.L.M. 626 (1984).

[27] Steven Ratner 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001) 111 *Yale Law Journal* 467 at 519.

[28] OECD (2011), OECD Guidelines for Multinational Enterprises. The Guidelines were updated in 2011 for the fifth time since they were first adopted in 1976. See further *http://www.oecd.org/daf/inv/mne/48004323.pdf*, accessed 16 October 2015.

[29] John Gerard Ruggie, 'Business and Human Rights: The Evolving International Agenda', (2007) 101 *American J. Int'l L.* 819 at 834

[30] See Larry C Backer, 'Transnational Corporations' Outward Expression of Inward Self-Constitution: The Enforcement of Human Rights by Apple, Inc.' (2013) 20 *Indiana J of Global Legal Std* 827. [Arguing that the system of managing corporate behaviour outside imperatives of local laws creates three governance systems arising from multifaceted arrangement between states, international organizations and global actors]

[31] See Gunther Teubner, 'Self-Constitutionalizing TNCs? On the Linkage of "Private" and "Public" Corporate Codes of Conduct,' (2011) 18 *Indiana J Global Legal Std* 635. [noting that the codes are constitutional instincts which impacts TNC drastically. Their metamorphosis into binding constitutional standards is beyond state instrumentality but inner workings within private organizations]; see also George K. Foster, 'Investors, States, and Stakeholders: Power Asymmetries in International Investment and the Stabilizing Potential of Investment Treaties, (2013) 17 *Lewis & Clark L Rev* 361. [arguing that investors owe self-imposed obligations toward local stakeholders such as OECD].

with the proceeds funding rebel governments and their allies against legitimate governments), from being imported from states involved in conflicts or ethnic wars. State parties would have to 'certify that any diamonds to be exported are conflict-free – before they can enter the international market.'[32] The Extractive Industries Transparency Initiative (EITI) is a multi-stakeholder approach which promotes openness, transparency and accountability in the management of natural resources in the decision-making process.[33] A significant objective of this initiative is that member states 'agree to disclose information on tax payments, licences and contracts'.[34] Nigeria is a signatory to the initiative, having voluntarily signed up to the global initiative. To show its commitment, Nigeria passed the EITI Act, 2007[35] to enforce implementation of the initiative in the country. It became the first country in the world to support this voluntary implementation with legislation.[36] Nigeria has shown meaningful progress in implementing the aims of the initiative. However, South Africa is not a signatory to the initiative. It is important to stress that the purpose of the initiative is to reconcile the information given by the company with that obtained from the government. As will be argued in later chapters, this is a clear indication that soft-law instruments could be used as a yardstick for controlling MNCs, in order to ensure extractive resource governance.

In addition, the Publish What You Pay (PWYP) coalition was launched as a bid to avoid the resource curse pandemic – by promoting transparency.[37] It does this through three pillars: publish why you pay and how you extract, publish what you pay, and publish what you earn and

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[32] General Assembly Resolution 55/56, A/ RES/55/56 (29 January 2001); See 'Kimberly Process Core Document' *https://www.kimberleyprocess.com/en/kpcs-core-document*, accessed 13 October 2016; See also Holly Cullen, 'Is there a Future for the Kimberley Process Certification Scheme for Conflict Diamonds?'(2013) 12 *Macquerie Law Journal* 2 [noting that activities of NGOs exposed the relationship between sales from diamonds to finance armed rebel groups].

[33] See 'Who We Are' *https://eiti.org/who-we-are*, accessed 15 October 2015.

[34] See 'How We Work' *https://eiti.org/about/how-we-work*, accessed 15 October 2015. See further 'Open EITI Data' *https://eiti.org/data#compare-key-figures-in-eiti-reports*, accessed 15 October 2015 [how revenues from member country's extractive resources are being managed].

[35] See 'NEITI: Nigeria' *https://eiti.org/nigeria*, accessed 15 October 2015. [Nigeria domesticated its version of this initiative and made it imperative on agencies in the extractive industry to ensure reporting, disclosure and transparency in all revenues from the extractive industry].

[36] Ibid.

[37] See 'About' *http://www.publishwhatyoupay.org/about/*, accessed 15 October 2015.

how you spend.[38] While it was launched in Nigeria in 2004 – facilitating the implementation of the EITI process – it was launched in South Africa in 2016, with the aim of ensuring 'mandatory financial and non-financial information across the extractives value chain'.[39] The Open Government Partnership (OGP) is a multilateral partnership, which aims to 'secure concrete commitments from governments to promote transparency, empower citizens, fight corruption, and harness new technologies to strengthen governance'.[40] Interestingly, OGP membership consists of representatives of governments and NGOs.[41] Nigeria submitted an intention to join the OGP through its Minister of Justice on 20 June 2016.[42] It developed a National Action Plan to implement the OGP initiative between January 2017 and June 2019.[43] South Africa, on the other hand, has been more proactive in implementing the OGP Initiative.[44] The Natural Resource Charter is a set of principles designed for civil society and government, and details the best approach for harnessing the opportunities created by extractive resource governance.[45] It is generally prescriptive and indicates what can make countries successful in terms of positively managing their extractive resources. Other initiatives include the UN Global Compact,[46] and

[38] Ibid.

[39] See 'South Africa' *http://www.publishwhatyoupay.org/members/south-africa/*, accessed 15 October 2015.

[40] See 'About' *https://www.opengovpartnership.org/about*, accessed 26 April 2017.

[41] Ibid

[42] See 'OGP: Nigeria' *https://www.opengovpartnership.org/country/nigeria*, accessed 19 April 2017.

[43] See 'Nigeria: OGP National Action Plan (January 2017 – June 2019), *https://www.opengovpartnership.org/country/nigeria/action-plan*, accessed 26 April 2017.

[44] See 'South Africa: Introduction' *https://www.opengovpartnership.org/countries/south-africa*, accessed 26 April 2017. [Under the NAP for implementation, South Africa seeks to 'increase public integrity by improving public services, creating safer communities, effectively managing public resources and increasing accountability']

[45] See 'Natural Resources Charter' *http://resourcegovernance.org/approach/natural-resource-charter*, accessed 26 April 2017.

[46] See 'The Ten Principles of the UN Global Compact' available at *https://www.unglobalcompact.org/what-is-gc/mission/principles*, accessed 26 April 2017 [These Principles direct MNCs to align their practices to conform with human rights, labour, environment and anti-corruption goals]; see also Voluntary Principles for Security and Human Rights (2000), which provides guidance for extractive sector companies, Code of Conduct for Private Security Service Providers (2010), the OECD Due Diligence Guidelines for Responsible Supply Chains of Minerals from Conflict-Affected and High Risk Areas (2011); see further Scott Jerbi, 'Extractives and Multi-Stakeholder Initiatives: The Voluntary Principles on Security and Human Rights; the Extractive Industries Transparency Initiative; the Kimberley Process Certification Scheme' in Dorothée Baumann-Pauly and Justine Nolan (eds.) *Business and Human Rights: From Principles to Practice* (2016) 166.

§1503 of the Dodd–Frank Wall Street Reform and Consumer Protection Act, which provides for disclosures on conflict materials in or near the Democratic Republic of the Congo (DRC).[47] It addresses the relationships between corporate-induced human rights abuses, armed groups, the mining of conflict minerals – and also promotes peace and security in the DRC.[48] In 2003, the UN adopted the 'Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights'.[49] This instrument was approved on 13 August 2003 by the United Nations Sub-Commission on the Promotion and Protection of Human Rights.[50] However, as inventive as these treaties and instruments may be, their realisation at national and international levels has been met with challenges. Fears around these domestic applications have propelled the debate on an approach that integrates human rights protection with extractive resource governance, and corporate practice and conduct.[51]

In July 2005, then UN Secretary General Kofi Annan appointed Professor John G. Ruggie as his Special Representative on Business and Human Rights (SRSG).[52] Initially, Ruggie's duty was to 'identify and clarify standards of corporate responsibility and accountability regarding human rights, elaborate on states' roles in regulating and adjudicating corporate activities, clarify concepts such as 'complicity' and sphere of influence, develop methodologies for human rights impact assessments and consider state and corporate best practices'.[53] The SRSG, after widespread consultations, eventually produced the UN Guiding

[47] Pub.L. 111–203, H.R. 4173.

[48] Ibid (§ 1502).

[49] U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003). Article 14 of the Draft Norms requires MNCs to act in accordance with national laws, regulations and policies relating to the preservation of the environment of their host countries. They must conduct their activities in accordance with relevant international agreements, principles and standards in a manner that guarantees sustainable development.

[50] For a comparative analysis of the draft UN Code of Conduct and the Norms, see 'At A Glance' *http://hrlibrary.umn.edu/ataglance/compdftun.html*, accessed 13 October 2015.

[51] Madhumita Chatterji *Corporate Social Responsibility* (2014) 1; Andrew Crane & Dirk Matten *Business Ethics, Managing Corporate Citizenship and Sustainability in the Age of Globalization* 3rd ed (2010) ch 3.

[52] Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework,* U.N. Doc. A/HRC/17/31 (Mar. 21, 2011).

[53] See Human Rights Resolution 2005/69, 'Human Rights and Transnational Corporations and Other Business Enterprises' Chap. XVII, E/CN.4/2005/L.10/Add.17 (20 April 2005).

Principles on Business and Human Rights (Guiding Principles).[54] On 16 June 2011, the Human Rights Council Resolution 17/4 endorsed the GPs – for implementing the UN 'Protect, Respect and Remedy' Framework.[55] The GPs provide an allocation of tasks between the states (as duty bearers of protecting and realising human rights established in international treaties) and companies, who are duty-bound to respect the rights and apply due diligence in their activities – especially when they are operating in weak zones.[56] This resolution doubtless marks a turning point in terms of creating an inclusive standard for MNCs liability for business-induced human rights violations.[57] The GPs re-emphasised the significance of states' existing obligations in protecting human rights, the need for businesses to comply with domestic laws and rules, and providing adequate remedies to victims of human rights violations.[58] Applying these Principles to the extractive industry, the GPs seek to enhance corporate practices in order to achieve concrete results for victims of human rights violations – as well as communities that are host to extractive projects and which are recipients of a corporate-induced environmental disaster.[59]

The initiatives discussed in this section illustrate the efforts aimed at ensuring that businesses positively impact on human rights in their areas of operation. The effectiveness of these initiatives lies in the responsiveness of corporate actors relative to understanding the precariousness and unpredictability of their activities which impact tremendously on human rights in weak zones. Indeed, this latest attempt is not a 'silver bullet' panacea for the business and human rights dilemma.[60] Instead, and depending on the side of the aisle, it gives stakeholders

[54] Guiding Principles, above (note 2).

[55] Ruggie Framework, above (note 2).

[56] Ibid.

[57] See Surya Deva 'Human Rights Violations by Multinational Corporations and International Law: Where from Here?' (2003) 19 *Connecticut J Int'l L* 1[noting that literature has focused more on obligations of states under international law]; Steven R. Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001) 111 *Yale L J* 443.

[58] Guiding Principles, above (note 2).

[59] See Larry C. Backer, 'From Institutional Misalignments to Socially Sustainable Governance: The Guiding Principles for the Implementation of the United Nations' "Protect, Respect and Remedy" and the Construction of Inter-Systemic Global Governance' (2012) 25 *Pacific McGeorge Global Business & Development Law Journal* 69 (analyzing ways the GPs could help achieve sustainable development].

[60] Human Rights Council, A/HRC/8/5, 'Protect, Respect and Remedy: A Framework for Business and Human Rights' Report of the Special Representative of the Secretary-General on the Issue of

an opportunity to demand their rights and insist that corporate responsibility involves respecting human rights.

Undeniably, the GPs have suffered from a fair amount of criticism,[61] which relates to the voluntary nature of the GPs and the passive approach to respecting human rights by the corporations – which Ruggie prescribes as the *do no harm* standard.[62] While these criticisms may be plausible in that the GPs give companies wide discretion to cherry-pick human rights provisions of their choice and at their own pace, they do not weaken the potentials of the GPs in any way. The GPs are currently in their sixth year. The fact that they have outlived earlier initiatives suggests potential for mitigating and reducing adverse human rights violations in the extractive industry – particularly in Africa. Certainly, the GPs do not provide a 'silver bullet' resolution to the corporate abuse of human rights. However, they have again triggered a discussion on the dangers of the intractable clarification of corporate responsibility and on the need for developing a framework that would mainstream human rights protection into corporate practice and culture. This research seeks to build on this foundation, and takes the debate on integrating human rights further by conducting a socio-legal approach to the implementation of the GPs for key stakeholders in the extractive resource industry in Nigeria.[63] This study examines various approaches aimed at the implementation of the GPs, identifies gaps in the business and human rights agenda, and formulates a legal and institutional approach that streamlines human rights practices into corporate culture. This is so that, over time, companies

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Human Rights and Transnational Corporations and other Business Enterprises, (7 April 2008) para 7. ["A/HRC/8/5"].

[61] Florian Wettstein, 'Normativity, Ethics, and the UN Guiding Principles on Business and Human Rights: A Critical Assessment (2015) 14(2) *Journal of Human Rights* 170 [opposing Ruggie's '*do no harm'* proviso and arguing for positive duty on corporations to respect human rights]; Surya Deva, & David Bilchitz (eds.) *Human Rights Obligations of Business. Beyond the Corporate Responsibility to Respect?* (2013) [advocating for a broader understanding of corporate human rights responsibility]; Anna Grear & Burns H. Weston, 'The Betrayal of Human Rights and the Urgency of Universal Corporate Accountability: Reflections on a Post-Kiobel Lawscape' (2015) 15 *Human Rights Law Review* 40 [noting that the juridical order is too ideologically skewed to guarantee the kind of human rights justice hoped for globally].

[62] A/HRC/8/5, above (note 49) para. 24.

[63] Today, companies are crafting human rights policies relying on and referring to the GPs. See Barrick Gold, 'Our Commitment to Human Rights' *http://www.barrick.com/responsibility/society/human-rights/our-commitment/default.aspx*, accessed 27 April 2017.

become aware of their human rights engagement with local community stakeholders that are host to their extractive projects.[64]

1.3 Statement of the Research Problem

Harnessing the dividends of extractive resources in Africa has not only remained challenging – but has also led to civil wars, ethnic conflicts, and rent seeking. Extractive resource governance in Sub-Saharan Africa has created many human rights challenges, including land displacement by citizens in order to make room for extractive projects. This is particularly important when local people have spiritual and traditional attachments to their land and hold the land in high regard. Other issues include locating projects in local communities that lack infrastructural amenities, and which are poor and vulnerable, lack local community consultation and participation in the decision-making process, lack transparency and accountability, and have little or no access to judicial remedies for victims of human rights violations. Related to these challenges is the debate over who owns the natural resources, and, therefore, in whose interest the extraction should accrue to. Most constitutional and domestic regimes have been able to craft legislation in a way that gives absolute right over natural resources to the state; however, the state is expected to utilise those resources for the benefit of the people. The various challenges related to extractive resources do not seem to have adequate solutions. Using an admixture of various rights-based approaches to extractive resource governance, has not been considered extensively in the literature.

The question then arises: Why has there been corporate-related human rights violations in Nigeria's extractive sector over the years, despite home state regulation of MNCs? The presumption is that MNCs typically prefer to violate human rights than to remedy or mitigate adverse human rights violations – even where the need to respect human rights is glaringly obvious. Various corporate disasters: Bhopal (1984 – India), Shell (1997 – Nigeria), Marikana (2012 – South Africa) and Rana Plaza (2013 – Bangladesh), have shown that companies will continue to double down on their dislike for compliance with human rights. Corporate entities do

[64] Such approaches include, but not limited to, financial encouragement, hard and soft laws and development of corporate culture.

not have effective complaints processes for grievances related to their activities.[65] Victims of human rights violations on the other hand find it difficult to hold MNCs accountable – either in the domestic courts due to court delays, judicial corruption and ineptitude, prohibitive costs and weak enforcement of laws, or at international level, due to the principle of *forum non-convenience.*[66] Global and national efforts are needed to limit the misuse of natural resources in developing countries – which is often excessive.

Furthermore, MNCs hardly ever admit any wrong-doing when victims demand compensation, but are quick to claim sabotage and local community violence.[67] While some pay fines as compensation, they do not accept that human rights violations were caused by their activities. For instance, Shell (Nigeria) has and continues to pay huge sums of money in out-of-court settlements, and yet it still engages in massively corrupt practices and extreme violations of human rights.[68] Recently, an NGO, Global Witness & Finance Unearthed stated that Shell and Eni were involved in corporate complicity which deprived Nigerians of $1.1 billion through corrupt oil deals in the lucrative oil block, OPL 245.[69] MNCs understand they must comply with host state laws. However, these companies have established over time that complying with legal norms may not guarantee their prosperity – especially in developing countries like Nigeria with weak enforcement capabilities. Some companies with reports of human rights compliance cannot

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[65] Bruce Harvey, 'Community Complaints, Disputes and Grievance Guidance' *Rio Tinto* (1 June 2011), *http://www.qal.com.au/media/9257/community-complaints-disputes-grievance-guidance-2011-2014.pdf*, accessed 9 May 2018

[66] *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013).

[67] John Vidal, 'Shell made False claims about Niger Delta Oil Pollution, says Amnesty' *The Guardian* (7 November 2013), *https://www.theguardian.com/global-development/2013/nov/07/shell-oil-niger-delta-pollution-amnesty*, accessed 9 May 2018.

[68] Stanley Reed, 'Shell and Eni to be Tried Over $1.3 Billion Nigerian Oil Deal' *New York Times* (201 December 2017). Other cases of human rights violations which have ended in the courts include *Wiwa et al v. Royal Dutch Petroleum Company and Shell Transport and Trading Company PLC* (2002) 226 F. 3d 88 [out-of court-settlement]; *Larry Bowoto et al. v. Chevron Texaco Corp. et al* (2004) 312. F. Supp.2d 1229 [Plaintiffs' claims denied]; Bodo community oil spill (Shell agreed to a £ 55 million out of court-settlement in January 2015 and an agreement to clean-up the oil pollution).

[69] See 'New Report by Global Witness & Finance Uncovered says Shell and Eni were involved in a corrupt oil deal which deprived the Nigerian people of more than $1.1 billion' *https://www.business-humanrights.org/en/new-report-by-global-witness-finance-uncovered-says-shell-and-eni-were-involved-in-a-corrupt-oil-deal-which-deprived-the-nigerian-people-of-more-than-11-billion*, accessed 27 April 2017.

produce any evidence to support their claim.[70] Home and host-state regulations have not checked on the excesses of these MNCs. The inability of the international community to craft regulations that would guide corporate practices and mitigate adverse human rights violations, could have serious implications for the effective implementation of the GPs. Weak economies lower human rights standards so that MNCs find it attractive to function in the states concerned.[71] Short-term gains in these countries are, however, illusory – and they weaken longer-term recovery.[72] The protracted and unrestrained governance gaps encourage MNCs to operate without sanctions or caution.

Current research suggests that resource wealth can go hand-in-hand with unstable development, macroeconomic instability,[73] 'high unemployment, poverty and inequality',[74] 'environmental degradation, resource-related conflicts',[75] ingrained corruption,[76] and more generally the 'resource curse' theory.[77] Developed countries have however shown the commitment and capacity to enforce their laws, so mandating their companies to be involved in responsible behaviours wherever they operate. Given its centrality to African economies, there is a growing demand for research into the governance of the extractive sector in relation to

[70] Most, if not all MNCs have ethical statements indicating that they uphold human rights principles and standards. However, most statements are only good on paper. Their conduct and practice indicate otherwise.

[71] See Paul Stevens & Evelyn Dietsche, 'Resource curse: An Analysis of Causes, Experiences and Possible Ways Forward' (2008) 36 *Energy Policy* 58. [noting that natural resources do not contribute to development of a weak state as evident in developed nations].

[72] Ibid.

[73] Samuel E. Wills, Lemma W. Senbet, et. all, 'Sovereign Wealth Funds and Natural Resource Management in Africa' (2016) *Journal of African Economies* ii3.

[74] William B. Hurlbut, 'Overcoming Poverty and Inequality in South Africa: An Assessment of Drivers, Constraints and Opportunities' (The World Bank, March 2018) 42.

[75] Blake Ratner, Ruth Meinzen-Dick, et.all, 'Resource Conflict, Collective Action, and Resilience: An Analytical Framework' (2013) *International Journal of the Commons*, 183.

[76] Kempe Ronald Hope, '*Corruption and Governance in Africa'* (2017) 125-162.

[77] The resource curse refers to a situation where countries heavily dependent on natural resources have slow economic growth, lack economic diversification, suffer from environmental degradation, experience corruption, ethnic conflicts and local communities, mainly indigenous peoples and women, do not fully participate in decision-making. [See Macartan Humphreys, Jeffrey D. Sachs & Joseph E. Stiglitz (eds) *Escaping the resource curse* (2007); See further H. Mostert, H. V. Niekerk, 'Disadvantage, Fairness and Power Crises in Africa, A Focused Look at Energy Justice' in Yinka Omorogbe & Ada Ordor (eds.) *Ending Africa's Energy Deficit and the Law: Achieving Sustainable Energy for All in Africa* (2018), 65.

sustainable development. The rallying point is learning from the mistakes of the past and the experience in developed countries of administering extractive industries in a way that positively contributes to the development agenda of the newly ratified SDG.[78]

The inherent problems are massive displacement without adequate consultation or compensation when making way for extractive projects, shooting, the rape and killing of protestors by the state-sanctioned security apparatus,[79] an inadequate or non-existent access to judicial remedies for victims of human rights violations, and, finally, lack of political will. These instances are a stark reminder that corporate disasters represent state failure to address corporate impunity and failure to assume 'duty' in respect of respect human rights under national and international laws. While it is envisaged that integrating human rights protection into domestic laws and policies would be the panacea to these intractable challenges, a rights-based approach to extractive resource governance would be a holistic framework that would safeguard future generations from corporate-related human rights abuses and climate disaster.

MNCs are not subject to any single global regulator, and thus the difficulties in integrating human rights standards into the operations of extractive industries constitutes a growing concern for victims of corporate-related abuses, national bodies, and the international community. Not only do victims of human rights abuses face the daily challenges of living, they also are denied access to justice through the courts. States, on the other hand, lack the political will to enforce laws due to Foreign Direct Investment (FDI) from extractive projects. The task, therefore, is to ascertain what international human rights standards currently regulate corporate conduct as opposed to the conduct of states and individuals, and to clarify the corresponding roles of states and businesses in safeguarding these rights. This clarification can be done through a socio-legal approach in a country like Nigeria, which grapples with turning resource wealth into manifest development. The lack of a legal and institutional framework to integrate human rights protections into extant environmental laws has prevented communities which host extractive projects from realizing their human rights.

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[78] Goal 16 seeks to 'promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.' See Transforming Our World: The 2030 Agenda for Sustainable Development, Vol. A/70/L.1 (18 September 2015), *http://www.un.org/ga/search/view_doc.asp?symbol=A/70/L.1&Lang=E*, accessed 16 October 2015.

[79] Berta Esperanza Hernández-Truyol 'Culture Clashes: Indigenous Populations and globalization--the case of Belo Monte' (2014) 12 *Seattle Journal for Social Justice* 775.

This research considers the impact of extractive companies on their host communities and how this has affected the ability of such communities to develop in an environmentally sustainable way. Drawing significant lessons from South Africa – due to its proactive legislation imposing human rights compliance on companies – this thesis examines the potential of implementing the GPs in Nigeria's extractive resource industry.

1.4 Research Questions

Guiding the research are the overarching questions:

1. What legal, policy and institutional frameworks at the domestic level would facilitate the integration of the Guiding Principles into extractive resource projects approval and implementation?
2. What are the practical challenges and prospects of adopting a rights-based approach to extractive resource governance?
3. What is the legal justification and value of incorporating the rights-based approach by way of the Guiding Principles into corporate governance models?

Engaging with these questions will determine how developing countries can craft policies and programmes that will not only incentivise corporate responsibility but facilitate the social licence to operate (SLO). The capacity of local communities to structure their environment in their own way, to be represented in governance, and to be able to voice their concerns about extractive projects, is absent from the debates on the SLO. However, this is fundamental in indigenous contexts.

Previous studies around the problem investigated in this research suggest a central premise which is at the heart of the research questions articulated above. This premise is that, in a developing country such as Nigeria, the outcomes of legal provisions are influenced and determined by a combination of factors, not just simple rule of law indicators. This means that often, a range of approaches comprised of mandatory and voluntary elements will be necessary to address identified issues with any measure of success. For example, corporate responsibility to respect human rights simpliciter may not be enough to secure corporate compliance in the face of weak enforcement capacity of state institutions. Other considerations may be necessary to secure the proactive involvement of companies in socially responsible projects. The ability of local

communities to insert themselves as a collective into the decision-making process around extractive projects, for instance, is one key consideration. The provision of business incentives to compliant companies could be another consideration. The suitability of the Guiding Principles for advancing contextualised complementary options is at the centre of this study.

1.5 Justification for Study

Many countries have developed standards of operation for MNCs – including the GPs.[80] While these have shown tremendous promise, adequate steps need to be taken to ensure that these recommendations are effective in practice. For example, the UN Commission on Transnational Corporations failed after almost 20 years of regulating MNCs activities. Existing research has not considered the feasibility and viability of countries agreeing to give constitutional recognition to such strong rights-based principles. The current research attempts to fill this gap.

While home state regulations have been instructive in controlling MNCs, host states have not yet understood the urgency of developing new rules or adapting emerging rules to the local context. This study therefore examines emerging debates on the alternative approaches for ensuring the integration of human rights norms into business conduct and corporate culture.[81] Thus the question is how best to incorporate and implement the GPs. This is particularly important when it is considered that the GPs are voluntary. The main task is identifying the means through which states can address human rights concerns in the extractive industry through laws, policies, regulations, and judicial pronouncements. In implementing the GPs, companies need to be proactive and more involved in the protection and realisation of human rights. The obligation to achieve this depends on the moral imperatives of companies in terms of being involved in human rights. Hence, can there be incentives for companies to address these human rights concerns and thereby indirectly achieve the intent of the GPs? This makes a research such as this imperative to investigate the relationship between corporate accountability and human rights.

The linkages between human rights and business are here to stay. States and corporate actors both share control and authority. A system must be put in place to address the linkages

[80] See generally the OECD Guidelines for Multinational Enterprises (2011).

[81] GPs 1 and 2 clearly spell out the role of States and business in the business and human rights agenda.

between human rights and trade, investment, and socio-economic development. The Nigerian legal regime does admit of corporate human rights obligations or refer to international human rights treaties on human rights. However, it is the norm that if a state starts to enforce a strict set of regulations, MNCs can simply relocate and reincorporate somewhere else. There is therefore a need to balance the interests of states and MNCs and the GPs provide a template for advancing this balance. However, there have been no studies on the usefulness of the GPs in the extractive industry in Nigeria – and hence the usefulness of this research. This thesis is focused on the extractive industry, which makes it relevant to African economies.

The choice of South Africa as a comparator for the study was based on several factors. First, while South Africa has robust constitutional and regulatory provisions that integrate human rights provisions, Nigeria does not have those provisions as robust in its body of laws. South Africa therefore is far ahead of Nigeria in mainstreaming human rights into the extractive sector.[82] Hence, the aim of this research to draw lessons from South Africa's proactive legislative and judicial realisation of human rights. Furthermore, South Africa continues to update its corporate laws and regulations to reflect human rights and corporate social responsibility.[83] Second, South Africa is categorised as an 'upper-middle income economy' by the World Bank.[84] Its economy is the 'largest in Africa'[85] and the '34th-largest in the world'.[86] Not only is South

[82] See further: Hamann, Ralph, et al., 'Business and Human Rights in South Africa: An Analysis of Antecedents of Human Rights Due Diligence' (2009) *Journal of Business Ethics* 453–473. [examining how South African companies consider human rights in their operations]; John Ruggie, 'Protect, Respect and Remedy: A Framework for Business and Human Rights' Report of the Special Representative of the United Nations Secretary-General on the issue of Human Rights and Transnational Corporations and other Business Enterprises, *https://www.mitpressjournals.org/doi/pdf/10.1162/itgg.2008.3.2.189*, accessed 11 May 2018. [identifying publicly funded mediation services, such as those handling labour rights disputes in South Africa]; *Piero Foresti, Laura De Carli and others v. Republic of South Africa (International Centre for Settlement of Investment Disputes*, Case No. ARB (AF)/07/1); Tristan Borer, 'A Taxonomy of Victims and Perpetrators: Human Rights and Reconciliation in South Africa' (2003) *Human Rights Quarterly* 1088.

[83] South Africa's current Companies Act was amended in 2008 (Companies Act, Act 71 of 2008). It came into effect on 1 May 2011. Nigeria's Companies and Allied Matters Act, 1990 was enacted on 2 January 1990. It has not undergone any modification or amendment since then. In terms of regulations, South Africa produces guidelines for the governance structures and operation of companies in South Africa. Four reports have been issues. King I (1994), King II (2002), King III (2009), King IV (2016). In Nigeria, for the first time, the Financial Reporting Council (FRC) of Nigeria, following a court ruling, issued Nigeria's National Code of Corporate Governance on 17 October 2016 in accordance with section 50 of the FRC Act, 2011.

[84] The World Bank: South Africa, *http://data.worldbank.org/country/south-africa*, accessed 24 September 2015.

[85] Matthew Davies, 'South Africa Regains Africa's 'biggest economy' title from Nigeria' *BBC News* (11 August 2016), *http://www.bbc.com/news/world-africa-37045276*, accessed 10 May 2018.

Africa recognized as a central power in international affairs, but it provides substantial regional influence.[87] However, despite its industrialised status, South Africa continues to grapple with racial disparities, poverty, income inequality, and large-scale unemployment in its black majority ethnic group.[88] Under the Natives' Land Act, 1913,[89] majority of blacks were deprived ownership of land. This continues to have serious implications for development of South African mineral resources, as few blacks own land – even today. Despite these challenges, South Africa has made significant progress in the enforcement of its laws and court judgments. It has well-developed legal and energy sectors.[90] There is still a strong sense of the rule of law, and very active NGOs are prepared to monitor the issues.

Nigeria is the largest producer of oil in Sub-Saharan Africa,[91] but is still under-developed in many respects – which makes the discourse on the implementation of the GPs timely and necessary. Popularly referred to as the 'giant of Africa' due to the size of its population,[92] Nigeria is currently the second largest economy in Africa.[93] Despite the size of its economy, Nigeria has grappled unsuccessfully to turn its resource wealth into improved standards of living for all its citizens. The Niger-Delta region which hosts most extractive projects has witnessed and continues to witness oil spills, environmental degradation, and major corporate-induced

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[86] International Monetary Fund: Report for Selected Countries and Subjects, *http://www.imf.org/external/pubs/ft/weo/2014/02/weodata/weorept.aspx?pr.x=61&pr.y=12&sy=2012&ey=2019&scsm=1&ssd=1&sort=country&ds=.&br=1&c=199&s=NGDPD%2CNGDPDPC%2CPPPGDP%2CPPPPC&grp=0&a*, accessed 24 September 2015.

[87] Andrew F Cooper, Agatha Antkiewicz & Timothy M Shaw, 'Lessons from/for BRICS about South-North Relations at the start of the 21st Century: Economic Size Trumps All Else?' (2007) 9(4) *Int'l Studies Rev* 675.

[88] See 'South Africa has Widest Gap Between Rich and Poor' *Business Report* (27 September 2009), *https://web.archive.org/web/20111023162404/http://www.iol.co.za/business/business-news/south-africa-has-widest-gap-between-rich-and-poor-1.707558*, accessed 27 April, 2017.

[89] Act No. 27 of 1913.

[90] The World Factbook, *https://www.cia.gov/library/publications/the-world-factbook/geos/sf.html*, accessed 27 April 2017.

[91] Chineme Okafor, 'Nigeria Reclaims Africa's Top Oil Producer Spot' *ThisDay* (10 January 2017), *https://www.thisdaylive.com/index.php/2017/01/10/nigeria-reclaims-africas-top-oil-producer-spot/*, accessed 10 May 2018.

[92] National Population Commission, 'Nigeria's Population Hits 198M People – Npopc Chairman', *http://population.gov.ng/nigerias-population-hit-198m-people-npopc-chairman/*, accessed 9 May 2018; Peter Holmes, *Nigeria: Giant of Africa* (1987).

[93]Matthew Davies, 'South Africa Regains Africa's 'biggest economy' title from Nigeria' *BBC News* (11 August 2016), *http://www.bbc.com/news/world-africa-37045276*, accessed 9 May 2018.

environmental disasters.[94] Most of Nigeria's legal regime concerning the environment does not have human rights provisions, and the Constitution does not offer a pathway for corporate responsibility in respecting human rights.

Thus, while these two countries face similar challenges in the management of their natural resources, South Africa offers a more progressive legal framework and pathway towards sustainable development through its robust engagement with key stakeholders, efficient systems and effective laws. Nigeria can learn from South Africa by integrating human rights into corporate laws and regulations, while simultaneously providing incentives for corporations for their CSR projects.

1.6 Research Methodology

Positivism and phenomenalism are the two most common used philosophical paradigms that determine the purpose and research methods of any study. Positivism researches the social world through scientific methods with an emphasis on quantitative data and statistical analysis, and with the aim to establish generalisations for comparisons.[95] Phenomenalism, on the other hand, considers people's experiences and focuses on 'understanding the meanings that respondents ascribe to various phenomenon' – by asking the 'how' and 'why' questions.[96] Interviews as an element of qualitative data, for instance, allow the interviewer to get the most out of respondents by probing, and encouraging them to provide detailed answers.[97] This thesis uses a case study investigation as it builds more confidence in the research – in that it ties the research questions to the findings derived from the data.[98] Furthermore, a case study is an 'empirical inquiry, which investigates a contemporary phenomenon within its real-life context, especially when the boundaries between

[94] Ikechukwu Dialoke & Sampson Justice, 'Effect of Regional Agitation for Resource Control on Human Capital Development: A Study of Niger Delta Region of Nigeria' (2017) *International Journal of Social Sciences and Management Research*, 2545.

[95] Mark Easterby-Smith, Richard Thorpe, Andy Lowe (eds.) *Management Research: An Introduction* (2001) 122 [defining positivism as 'research that progresses through hypothesis and deductions']

[96] Mark Saunders, Philip Lewis, Adrian Thornhill (eds.) *Research Methods for Business Students* (2007) 313.

[97] Robert Burns, *Introduction to Research Methods* (2000).

[98] K.M Eisenhardt & M. E Graebner 'Theory Building from Cases: Opportunities and Challenges' (2007) 50(1) *Academy of Management Journal*, 25.

phenomenon and context are not clear'.[99] Although the investigation is set against the wider backdrop of corporate responsibility to respect human rights, the analysis did not cover the various litigations against MNCs in the non-extractive industry. However, it is expected that the critical examination of the duty to protect human rights by states in chapter three can be applied to resolving conflicts without undue recourse to litigation.[100] Furthermore, chapter four examines various approaches that will foster corporate-community relations – laying the foundation for the granting of a social licence to operate. A key advantage of investigating a contemporary phenomenon is that it allows the researcher to examine real-life issues through the lens of major stakeholders impacted by corporate practice. This analysis may subsequently uncover or provide further insight into 'unknown' concerns or wider issues.[101] However, the crucial question which supports this study is not whether the findings can be 'generalised to a wider universe', but rather how well the researcher generates theory out of the findings.[102]

The desktop part of the research was done through a review of the literature, statutes and legislation – upon which the qualitative analysis was built. The primary sources used are human rights conventions, the UN Guiding Principles on Business and Human Rights, the 1996 South African Constitution, the 1999 Nigerian Constitution, and case law from relevant countries. Other sources include: journal articles; law texts; documents and reports commissioned and collected by government agencies, human rights bodies and commissions; the United Nations' specialized agencies on corporate entities; Non Governmental Organisations (NGOs); and other electronic sources on business and human rights. These materials were sourced between 2015 and 2017. Operative words like 'Guiding Principles' and 'Business and Human Rights' were used in the applicable internet search engine.

According to Cownie, the law is moving from traditional, doctrinal desktop research to a more multidisciplinary and contextual analysis.[103] Thus, while this thesis focused on the legal

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[99] Robert Yin, *Case Study Research, Designs and Methods* (1994) 13.

[100] Judith Schrempf-Stirling, Florian Wettstein, 'Beyond Guilty Verdicts: Human Rights Litigation and its Impact on Corporations' Human Rights Policies' (2017) *Journal of Business Ethics* 545. [noting that opening legal channels for human rights litigation could be a potent way government can incentivize firms to respect human rights]

[101] P.M. Brewerton and Lynne J Millward, *Organizational Research Methods: A Guide for Students and Researcher*s, (2001) 53.

[102] Yin, above (note 99) 9.

[103] Fiona Cownie, *Legal Academics: Cultures and Identities* (2004) 197.

aspect of implementing the GPs, the qualitative method utilised a socio-legal approach to highlight the various avenues through which human rights can be integrated into corporate conduct. However, the depth of empirical investigation needed to go deeper in Nigeria due to the dearth of resources on the empirical implementation of the GPs in that jurisdiction. Besides, substantial qualitative research has been done in South Africa, and hence research will likely be a replication of existing investigation and information on the implementation of the GPs. South Africa is at the forefront of calls for a binding Business and Human Rights (BHR) treaty.

For the empirical research in Nigeria, Lagos state and three local government areas in Rivers State were visited and the research was carried out from October to November 2016 – while in South Africa the research took place from August to September 2016. Rivers State is a major oil-producing state in Nigeria; the three local governments host substantial extractive resource projects. The residents have also been involved in recurring conflicts with major MNCs over oil spillages and environmental degradation. Hence, the sites were selected to have an in-depth knowledge of the challenges faced by local communities. Participants included local leaders – who represented the communities in meetings, citizens and government agencies. A judicial officer's views about the implementation of the GPs were also obtained. Judicial officers determine the applicability of voluntary mechanisms in law courts, and their role in implementing the GPs has not been documented in the literature. In Lagos – the commercial capital of Nigeria – an oil company executive was interviewed. The purpose was to obtain first-hand, information on the practical implementation of corporate policies and programmes in host communities. The researcher administered online questionnaires to 33 respondents who represented a diverse mix of policy-makers, company workers, and community residents. The physical interviews were designed to derive the views of the various stakeholders, assess the level of motivation, and ascertain how various approaches could fill a regulatory vacuum in Nigeria.

Open-ended questions were asked to source information on the participants' experience with growing up in communities ravaged by environmental degradation. The outline of interview questions used for community residents, company executives, and judges in Nigeria are attached as Appendices A, B and C, respectively. Purposive sampling was used to interview participants who were crucial to the research, as well as industry professionals or judicial actors who are instrumental to the implementation and enforcement of such soft laws as the GPs. These individuals had a grasp of the human rights, environmental and labour challenges facing the

extractive resource industry, and also understood the local community-MNCs interface and challenges for implementing environmentally friendly laws by the MNCs and government.

During the interviews, notes and audio recordings were used to clarify how participants viewed the influence of the GPs in curbing the violation of human rights by non-state actors. Written consent was obtained prior to the interviews, and each participant was assured of their confidentiality and anonymity. Information from the audio recordings and notes was immediately transcribed and incorporated into the body of the thesis in chapter 5. All the interviewees willingly gave information, and understood that the questions were for research purposes. Field observations also formed part of the data collection. In South Africa, the online questionnaire was targeted at residents of the three main mining provinces – with the expectation that some victims of human rights violations in the local communities where the mines operate would have a story to tell. The research ethics clearance was obtained from the Ethics Committee, Faculty of Law, University of Cape Town, prior to the commencement of the empirical research.

The findings from these interviews provide a balanced approach to corporate accountability for human rights violations in the context of extractive industries. The focus on South Africa and Nigeria was to obtain information on human, labour and environmental rights – from victims of human rights abuses, policy formulators, and implementation agencies. The findings from empirical research reported in chapter five clearly create pathways for transparent and accountable management of the extractive resource industry.

1.7 Limitations and Challenges

In South Africa, the researcher encountered limitations relating to the time and funding for visiting some mining companies. In addition, there were logistical challenges as earlier invitations to visit a mine in Johannesburg were cancelled at short notice. Efforts to re-schedule meetings through e-mails and telephone calls all failed. Email requests for visits to mines, law firms and other organisations were often not acknowledged or responded to. This was expected given the contentious and highly sensitive nature of the mining sector. Corporate entities are very reluctant to divulge information. That said, the literature and data obtained via the questionnaire go a long way in representing the information needed.

In Nigeria, the researcher experienced little or no challenges. An extractive company in the United States which had presence in Nigeria, however denied the researcher's request for a physical interview (see Appendix D).

The scope of this thesis is limited to those theories that advance the integration of human rights principles into the domestic legal regime and extractive projects. Such theories include: corporate governance, social change, and distributive justice.

1.8 Definition of Key Terms

Certain words have various meanings depending on the context of usage. Furthermore, some debates surround the general, objective or all-embracing definition of these words. It is not the intention of this thesis to engage in the debate over which of the definitions are acceptable or not. Considering that this thesis is context-specific to the extractive resource industry, key words used are defined below:

1.8.1 Environment

Environment encompasses everything around humanity. It includes the physical, humans, animals and other natural forces. The environment shapes and affects the growth and development of the person. The sustenance and development of a person can be directed by the environment such person inhabits. The interaction between people and their surroundings also determines in what light environment is construed. For example, environmentalists conceive 'environment' as the protection of the quality of the natural environment, which can only be achieved when humans desist from environmentally harmful practices. To cater for, and nurture for environment, are the core values of environmentalists. To them, protecting the natural environment keeps the society safe. For instance, Section 37 of Nigerian NESREA Act defines environment to include: "water, air land and all plants and human beings or animals living therein and the inter-relationships which exist among these or any of them.[104]

'Environment' has been defined variously by legal scholars. This reflects the agelong contentions amongst scholars on the scope, aim and boundaries of environmental protection.

[104] National Environmental Standards and Regulations Agency Act 2007. (Nigeria)

While some see it in terms of nature and change in climatic conditions – others view it as changes in the earth system. Curi notes that the complexities in defining environment is closely related to the aspirations which serves as a prerequisite to the implementation of human rights.[105] Johnson believes that if the environmental stress to which an individual is exposed is extreme, irreversible damage and death may result.[106] Whatever the case – human life and the human environment are inseparable.[107]

Principle 1 of the 1972 Stockholm Declaration on the Environment states that:

> Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations. In this respect, policies promoting or perpetuating apartheid, racial segregation, discrimination, colonial and other forms of oppression and foreign domination stand condemned and must be eliminated.[108]

The various definitions of environment indicate that the peaceful enjoyment of a clean environment is an important index for the enjoyment of human rights. Much of the activities of MNCs degrade the environment – thus affecting the peaceful enjoyment of this right. This thesis adopts the conception of environment under Principle 1 of the Stockholm Declaration. The fundamental right of the local community to be protected from the harmful and deleterious effects of extractive resource governance is one of the focus of this thesis.

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[105] Urjana Curi, 'Concept of Environment, Sustainable Development and Respect for Human Rights, (2013) *Juridical Trib* 219.

[106] Giles Johnson, 'Environment' (2017) *AccessScience, http://www.accessscience.com/content/235500*, accessed 9 May 2018.

[107] Melissa Thorme, Establishing Environment as a Human Right, *Denver Journal of International Law and Policy* 19 (1991), 301; see also Luis E. Rodriguez-Rivera, 'Is the Human Right to Environment Recognized Under International Law? It Depends on the Source' (2001) 12 *Colorado Journal of International Environmental Law* 1.

[108] Declaration of the United Nations Conference on the Human Environment, held in Stockholm on 16 June 1972. UN Doc A/CONF48/14/Rev.1. (1972).

1.8.2 Human Rights

Human rights is a fluid concept; the fluidity of the concept has given rise to varied definitions of human rights. Each definition justifies the approach it has adopted. The abstract analysis of human rights differs based on the prevailing school of thought at that point in time.[109]

Human rights are universal and inalienable rights. They are moral or ethical principles that prescribes basic standards of human behaviour.[110] These behaviours, referred to as inalienable rights generally, are protected under domestic and international law. Thus, human rights are rights which are inherent in all human beings by the very fact that they are human. Due to their inalienable nature, these rights cannot be derogated – even in the face of overwhelming economic interest.

The doctrine of human rights has been highly contentious under domestic, regional and international law. It is more contentious within the sphere of mandating businesses to engage in human rights protection. While it is generally agreed that human rights refer to a wide variety of rights, there is a disagreement as to which of these particular rights should be included within the general framework of business and human rights.

In the context of extractive resource industry, multinational corporations have been hugely involved in gross violations of human rights.[111] The human rights obligations of non-state actors have been the focus of the business and human rights debate. Ultimately, human rights are achieved under a working ecosystem and healthy environment. In this thesis,[112] human rights

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[109] Naturalists school of thought view human rights as those conferred by God, therefore, they see man made laws as subject to divine laws for it to be valid. On the other hand, legal positivists, who believes in separation of church from state affairs view human rights differently. They see human rights as those legal orders derived either from the command of the sovereign ruler. See the work of natural law theorists: St. Thomas Aquinas (1225-74) Summa Theologiae, John Locke, *The Two Treatises of Civil Government* (Hollis 1689), R George, 'Natural Law' (2008) 31(1) Harvard Journal of Law and Public Policy 171-96. See also J. Shestak 'The Philosophical Foundations of human rights in J. Symonides (ed) *Human Rights Concept and Standards* (2000), 33-35; J Finnis *Natural Law and Natural Rights* (1980) 280; R. Wacks *Understanding Jurisprudence: An Introduction to Legal Theory* (2005) 15; Olawuyi, Damilola 'The Human Rights' Based Approach to Climate Change Mitigation: Legal Framework for Addressing Human Rights Questions in Mitigation Projects (2013) Unpublished DPhil thesis, University of Oxford, 31.

[110] See generally R. Crisp (ed.) *Griffin on Human Rights* (2014).

[111] See generally Peter Johnson, *The New Human Rights Movement: Reinventing the Economy to End Oppression* (2017).

[112] See appendix E for a list of the human rights treaties under international law as ratified by Nigeria and South Africa. See also article 38 of the Statute of the International Court of Justice, 39 AJIL Supp.215 (1945), *http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0*, accessed 26 October 2015.

shall be construed to mean that all humans are entitled to all the rights and liberties necessary – without any form of distinction like 'race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.[113]

1.8.3 Soft Law

Soft laws are used in this work to refer to the numerous UN resolutions and other guiding rules which have no legally binding force under international law. Soft laws are so called, because they are 'soft'. This is in the sense that they are not mandatory and legally binding, but serve as forceful persuasion for states to comply with or adapt their laws to reflect the principles enshrined in the soft laws. This thesis discusses several such UN declarations and resolutions, codes of conduct, and soft laws. The UN Guiding Principles on Business and Human Rights – itself a soft law – is the main Human Rights Based Approach used in this thesis.

The debates on the role of soft laws under international law are considered in the body of this thesis.[114] This type of law offers useful guides for analysing the pattern and extent to which corporate organisations could refuse to comply with laid-down rules. They serve as tools for developing a framework for self-regulatory laws under international law. Soft laws serve as a precursor to the emergence of binding laws, and also serve as a template for how international policies can be implemented.[115]

1.8.4 Sustainable Development

The modern conception of the term 'sustainable development' can be traced to the 1987 Bruntland Report, in which sustainable development was defined as a 'kind of development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.[116] Agenda 21 of the Earth Summit[117] identified information, integration and

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[113] See article 2 of the Universal Declaration of Human Rights.

[114] A. Guzman and T Meyer, 'International Soft Law' (2010) 2 *Journal of Legal Analysis* 171.

[115] Ibid.

[116] Annex to *document A/42/427* - Development and International Co-operation: Environment. Formally known as the World Commission on Environment and Development, the UN established the Brundtland Commission officially released the 'Our Common Future', also known as the Brundtland Report in December 1987.

[117] UN Conference on Environment and Development held in Rio de Janeiro, Brazil in 1992.

participation as building blocks for sustainable development. Extractive resource governance is almost always shrouded in secrecy – especially in low-income countries.

This thesis adopts the extensive definition given to sustainable development at the Earth Summit.[118] Sustainable development must be that activity that enhances social inclusion, economic development and the promotion of human rights. The protection and promotion of human rights stands as a foundation for sustainable development. Furthermore, the public trust doctrine demands that government maintains and utilises natural resources through legitimate development – with the sole aim of improving the lives of the population.

The United Nations, in charting a new agenda for sustainable development, stated that it is determined to ensure that all human beings fulfill their potential with dignity and equality and in a healthy environment. It further went on to state that the UN is determined to protect the planet from degradation, 'sustainably managing its natural resources so that it can support the needs of the present and future generations'.[119]

1.8.5 Social Licence to Operate (SLO)

Social licence to operate (SLO) refers to the extent to which corporate entities meet the 'expectations of local communities, the wider society, and various constituent groups'.[120] It was not until the 1990s that the concept of SLO gained traction due to rising business and human rights challenges that occurred during this period. Local communities thereafter began to pressure MNCs to do more than the law requires, by engaging in sustainable practices. Thus, while government grants a legal licence, local communities grant a social licence based on the credibility of the MNCs in question. This 'social permission' allows the company to work without hindrance.

SLO is not dependent on any formula or definition. It simply signifies the level of approval by a local community. For instance, the mere mention of Shell triggers tension and

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[118] Ibid.

[119] UN A/RES/70/1. 21 October 2015. See 'Transforming our world: the 2030 Agenda for Sustainable Development' *http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E*, accessed 18 June 2017. The 17 Sustainable Development Goals and 169 targets announced by the United Nations on 25 September 2015 seeks to realize unqualified enjoyment of human rights by all.

[120] N. Gunninham, R. Kagan, and D. Thornton, 'Social License and Environmental Protection: Why Business Go Beyond Compliance' (2004) Journal *of the American Bar Foundation* 307.

resentment in the Niger-Delta community in Nigeria. This is due to Shell's failure to obtain SLO and a consistent lack of sustainable practices. There is no hard and fast rule for obtaining SLO. Companies must develop good working relationships with their host communities. The sustenance of SLO is based on consultation with the local communities and 'participation in decision-making processes.'

The concept of SLO is essential to this research. Without SLO, corporate responsibility to respect human rights will be fraught with significant challenges. This thesis therefore construes SLO as a sustainable relationship that exists between a MNCs and its host community – on the expectation that there is or will continue to be mutual trust, communication, transparency and access to information. Relying on the social contract theory, companies are given SLO on the expectation that there is good corporate behaviour. SLO will also require that MNCs appreciate the dynamics of local communities which may be spiritually and culturally attached to their lands – despite the potential conflict with MNCs desire to use such lands for developmental purposes.

1.9 Outline of Thesis

This thesis is divided into seven chapters:

Chapter one is an introductory chapter which relates the research problem and the justification for the research. It also identifies the research questions and the methodology for answering those questions.

Chapter two examines the concept of corporate governance and its practical adaptability to the Business and Human Rights (BHR) debate. While companies continue to be involved in CSR initiatives, states are to give them direction and to incentivise any beneficial programmes for communities. BHR builds on this and offers a closer nexus between various stakeholders in managing the relationship between companies and their host communities. The chapter considered the stakeholder theory extensively, and argued for the local community stakeholder connection with MNCs. This is the only basis for the granting of the social licence to operate – thereby ensuring that the aims and objectives of the GPs are attained. The chapter then critically examines the effectiveness of incentives for compliance with human rights norms, and also the adequacy of penalties for promoting deterrence. The chapter lays down a conceptual and theoretical framework within which the GPs can be implemented.

Chapter three discusses emerging approaches to integrating human rights into state laws, policies, rules and regulations. With an emphasis on Nigeria, the chapter considers the idea of mainstreaming human rights norms under international law – through the application of elements of the Human Rights Based Approach (HRBA).

Chapter four discusses the core provisions of the HRBA and how they can be implanted into local legislation – thereby driving corporate conduct in terms of respecting human rights. One of the challenges facing the global corporate community is securing a mandatory legal regime as it concerns human rights fulfilment. This chapter examines the strategies adopted by the UN HRBA: access to information, participation, accountability, and access to justice. These strategies have played a significant role in understanding the GPs. The strategies have also sharpened the quest for an international legal order for human rights in business. In this context, the chapter examines the basic provisions of the GPs which initiated the framework.

Chapter five moves from the traditional and theoretical discussion of corporate human rights to a more practical approach. The chapter presents the data analysis of the findings of the research and suggests future pathways to ensure positive extractive resource governance.

Chapter six is divided into two parts. The first part develops a legal and institutional framework that will guide the implementation of the GPs. This part also provides a roadmap for developing a National Action Plan for Nigeria. The second part offers some recommendations and concludes the thesis. The findings are based on an examination of theories and practical analysis carried out during the research. Recommendations are made for Nigeria and South Africa, although South Africa was used as a model. The work proffers a basis for future research and the reform of the legal regime in Nigeria.

1.10 Conclusion

This chapter provides an overview of the entire thesis. It highlighted the positive impact on the society when development takes place in host communities and sustainability is achieved. It further discusses the potential of adopting a rights-based approach for implementing the GPs in Nigeria – using South Africa as a model country. By so doing, it considered a combination of approaches that could provide a much-needed solution to the teething problems of extractive resource governance in Sub-Saharan Africa. The chapter further analyzed the human rights

questions and challenges facing current international business and human rights regimes, which is reflected in the debate on the mandatory versus voluntary approach to human rights observance. Thereafter, it revealed how these challenges can create an avenue for seeking an unorthodox approach: an approach that considers the cross-cutting synergies between business, human rights and policy measures aimed at positive extractive resource governance. The chapter emphasized that the efforts to regulate corporate conduct in relation to human rights compliance, identification of best practices, and local community participation, would lead to the granting of a social licence to operate. The importance of considering the implementation of the GPs in the extractive industry in Nigeria was reinforced. Furthermore, the recent focus on HRBA is predicated on the fact that human rights tests have proceeded beyond setting standards and implementation. They now focus more on the social inclusion of the local community and indigenous peoples in projects and decision-making in relation to matters that affect them.

CHAPTER TWO: IMPLEMENTING THE GUIDING PRINCIPLES THROUGH CORPORATE GOVERNANCE PARADIGMS

2.1 Introduction

Most countries in Sub-Saharan Africa gained their independence through intense liberation struggles. In the process of doing this, two main challenges affected their developmental outcomes. First, at the time most of the countries discovered their natural resources, they had just gained independence. Hence, development of the 'unexpected' resources raised significant governance challenges.[1] Rather than growth, the dividends of the resources turned the states into an autocratic system, – thereby weakening their fragile democracies. Second, the enormous investments in extractive projects placed a fiscal liability on these states. This resulted in slow growth and development, further depriving the states of the needed financial sustenance to embark on most of the extractive resource projects.[2]

Chapter 1 laid the foundation for the direction of this thesis. It highlighted the need to implement the Guiding Principles (GPs) in the wake of increasingly belligerent corporate activities in developing countries like Nigeria. This chapter reviews the different theories of corporate governance, which serves as a precursor to the Business and Human Rights (BHR) debate. Local communities are important stakeholders under the multi-stakeholder approach to extractive resource governance. This chapter therefore considers that local communities are ranked higher in the hierarchy of stakeholders as a means to plausibly implement the GPs, based on numerous reasons. Implementation of the GPs will accommodate the needs of those who are impacted most by the activities of the extractive companies. The approach will also provide a basis for granting the social licence to operate, which was identified in the previous chapter as the condition for sustainable extractive resource governance. Chapter 2 begins with classical cases of human rights violations in the focus countries and globally. These cases are archetypes of corporate disrespect for human rights laws and practice. Most Corporate Social Responsibility (CSR) initiatives do not address the role of government in bridging governance gaps occasioned by globalisation. Hence the BHR debate has conscripted states to be involved in the CSR

[1] Gavin Hilson, 'Corporate Social Responsibility in the Extractive Industry: Experiences from Developing Countries' (2012) 37 *Resources Pol'y* 132.

[2] Ibid, 133

initiatives of corporate bodies. The chapter then discusses the debates surrounding CSR and BHR and how these concepts have continued to sharpen the implementation and applicability of the GPs. The implementation of the GPs is based on good faith due to its normative structure. However, what effect does morality play in the corporate inclination towards profit maximisation, and how does lack of 'incentivising' contribute to the BHR and CSR polemics?

While firms have the legal licence to extract resources, they lack the social licence to operate. This has resulted in weak or non-existent human rights due diligence, and heightened tension between the local community and firms, and a widened gap between government and the governed. For local communities, several factors would ensure that the risks associated with resource utilisation are reduced or addressed. These factors include: empowerment, 'participation in decision-making processes', and providing an avenue for assessing governments and business conduct. The focus on the social responsibility of corporate actors is essential if the GPs are to be successful.

2.2 Country Case Studies

a. Niger-Delta: The Ogoni Experience

Nigeria 'is one of the world's largest oil producers.'[3] In 1970, Nigeria nationalised its oil industry,[4] and operates a Joint Venture Agreement with other foreign companies.[5] Constitutionally, oil derivatives accrue to states on a 13% basis. Much of the proceeds go to the

[3] The World Fact Book: Nigeria, *https://www.cia.gov/library/publications/the-world-factbook/geos/ni.html*, accessed, 28 April 2017.

[4] The Nigerian Enterprises Promotion Decree, 1979 created greater opportunity for Nigerians to own, manage and control the productive enterprises in the country.

[5] The Indigenization policy failed to utilize the capabilities or readiness of the private sector to optimally perform in the productive sector of the economy. See Chibuzo S.A. Ogbuagu, 'The Nigerian Indigenization Policy: Nationalism or Pragmatism?' (1983) *African Affairs* 242. [Arguing that the indigenization policy was based on a strong feeling of political and economic nationalism. As a result, economic efficiency may in some cases be sacrificed in the drive to replace foreign nationals with indigenous Nigerians in the economic sector. Thus, the indigenization programme was highly politicized]. See further Ibironke Odumosu, 'Transferring Alberta's Gas Flaring Reduction Regulatory Framework to Nigeria: Potentials and Limitations' (2007) 44(4) *Alberta Law Review* 863. [arguing for a reform of the legislative and regulatory framework, as well as the restructuring of the regulatory institutions responsible for ensuring gas flaring reduction in Nigeria]. See also Ashley Palomaki, 'Flames Away: Why Corporate Social Responsibility is Necessary to Stop Excess Natural Gas Flaring in Nigeria' (2013) 24 *Colorado Journal of International Environmental Law & Policy*, 499. [noting that CSR programs to date have admittedly been unsuccessful at controlling flaring in Nigeria]

federal government. One community that has been hugely impacted by resource exploitation in the Niger-Delta region of Nigeria, and which is extensively discussed in the literature, is the Ogoni community. This community drew much attention to their plight through the proactive engagement of 'social movements like the Movement for the Survival of the Ogoni People (MOSOP).'[6]

The Ogonis are an ingenious and versatile indigenous group in Nigeria.[7] They have suffered various human rights violations since oil was discovered in the region.[8] For decades, oil spillage became a natural occurrence, partly due to the deleterious activities of Royal Dutch/Shell Company.[9] The United Nations Environment Programme (UNEP), in its assessment of numerous sites in Ogoni, discovered that several years of oil exploration in Ogoni land has resulted into 'oil spillage, oil slicks, gas flaring and waste discharge – the once alluvial soil of the Niger-Delta is no longer viable for agricultural use due to widespread land degradation'.[10]

Ken Saro-Wiwa, a well-known environmentalist, 'led MOSOP in a non-violent crusade against" resource exploitation – especially by Shell (Nigeria). In October 1990, MOSOP presented the 'Ogoni Bill of Rights, a document which provided for the 'political and economic emancipation of the *Ogoni* people.'[11] The Bill of Rights was designed to ensure that the Ogoni's gain ownership of their resources and land. Throughout the period of political turmoil, Saro-Wiwa alleged that MNCs and the Nigerian government were pursuing 'environmental wars and genocidal attacks against the Ogoni and indeed all the peoples of the Niger-Delta'.[12] Furious by the dauntless determinations of the Ogoni citizens led by MOSOP, the then military government

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[6] Timothy Hunt, *The Politics of Bones: Dr. Owens Wiwa and the Struggle for Nigeria's oil* (2006) 56; Chinedu O. Okafor, *Legitimizing Human Rights NGOs: Lessons From Nigeria* (2006) 39–41; See further 'Movement for the Survival of the Ogoni People (MOSOP) and Ogoni News and Resources' at *http://mosop.org*, accessed 29 April, 2017;Human Rights Watch, 'The Ogoni Crisis: A Case-Study of Military Repression in Southeastern Nigeria' (1995), *http://www.refworld.org/docid/3ae6a7d8c.html*, accessed 6 January 2017.

[7] O Abe, 'Utilization of Natural Resources in Nigeria: Human Rights Considerations' (2014) *India Quarterly: A J. Int'l Affairs,* 5.

[8] Ibid.

[9] Ibid. see also Steven Crayford 'Conflict and Conflict Resolution in Africa' (1996) 42(2) *Africa Today* 183–197.

[10] UNEP Report, (2011). Environmental Assessment of Ogoniland, *http://postconflict.unep.ch/publications/OEA/UNEP_OEA.pdf*, accessed 6 January 2016.

[11] Abe, above (note 7) 6.

[12] Ibid.

continuously invaded the community – resulting in deaths and general disempowerment of the Ogoni people. In 1995, Ken Saro-Wiwa was accused of involvement in the murder of four Ogoni leaders. He was then 'sentenced to death by hanging, by a special military tribunal'.[13]

Shell's activities in Nigeria are an example of how monstrous MNCs have become when they operate in weak jurisdictions like Nigeria. Shell continues to pay huge fines for corrupt practices, oil spillage, and environmental degradation. Apart from being banned from operating in Ogoniland since the Saro-Wiwa incident, it continues to exploit Nigeria's oil preserve. Shell has been part of Nigeria since independence.[14] The company aids and abets the Nigerian state in human rights violations through the hiring of state security forces to rape women, kill protesters, and to protect its assets. These security forces could have been used to protect oil pipelines to avoid pipeline sabotage – which MNCs are quick to blame on local residents when there is an oil spillage. Ironically, some of the 'witnesses who testified against Saro-Wiwa' subsequently confessed that they had actually been bribed by Shell to testify falsely.[15] Several corporate liability human rights lawsuits were brought before Nigerian courts to hold Shell (and other MNCs: Chevron, Agip, Elf) culpable for human rights violations in Nigeria. These violations revolve around land grabbing, oil spillage, torture, and inhumane treatment in relation to the activities of the MNCs.[16] In *Wiwa v Royal Dutch Petroleum Co*.,[17] Shell agreed to a $15.5 m (₦4.7 bn) 'out-of-court settlement in a case brought by relatives of nine environmentalists –

[13] Ibid. For a detailed explication of the literature of and the impact of oil contamination in *Ogoniland*, see Olof Lindén & Pålsson Jonas, 'Oil Contamination in Ogoniland, Niger Delta' (2013) 42(6) *Ambio* 685–701; see further R. T. Ako, *Environmental Justice in Developing Countries: Perspectives from Africa and Asia-Pacific* (2013); Susana C. Mijares Pena, 'Human Rights Violations by Canadian Companies Abroad: Choc v. Hudbay Minerals, Inc.' (2014) 5 *Western J Legal Studies* 1; Barisere Rachel Konne, 'Inadequate Monitoring and Enforcement in the Nigerian Oil Industry: The Case of Shell and Ogoniland,' (2014) 47 *Cornell International Law Journal* 181; David Wheeler, Heike Fabig, Richard Boele, 'Paradoxes and Dilemmas for Stakeholder Responsive Firms in the Extractive Sector: Lessons from the Case of Shell and the Ogoni (2002) 39(3) *Journal of Business Ethics* 297-318.

[14] See Justine Nolan, 'Business and Human Rights in Context' in Dorothée Baumann-Pauly and Justine Nolan (eds) *Business and Human Rights: From Principles to Practice* (2016) 25.

[15] Abe, above (note 7) 6. See further Eveline Lubbes and Andy Rowell, 'NGOs and BBC Targeted by Shell PR Machine in Wake of Saro-Wiwa Death' *The Guardian* (9 November 2010), *https://www.theguardian.com/business/2010/nov/09/shell-pr-saro-wiwa-nigeria*, accessed 30 April 2017.

[16] H. Mostert, H. Niekerk, 'Disadvantage, Fairness and Power Crises in Africa, A Focused Look at Energy Justice' in Yinka Omorogbe & Ada Ordor (eds.) *Ending Africa's Energy Deficit and the Law: Achieving Sustainable Energy for All in Africa* (2018), 46-47, 52. [consequences of mismanagement of Nigeria's oil and gas industry is close to disastrous]

[17] 226 F.3d 88 (2d Cir. 2000), cert. denied, 532 U.S. 941.

including Ken Saro-Wiwa'.[18] In *Bowoto v Chevron Texaco Corp.*,[19] it was alleged that Chevron committed serious human rights violations in Nigeria when it utilised the Nigerian military to shoot at and kill some non-violent protesters at its facilities – who were protesting economic sabotage and environmental degradation caused by Chevron. In *Bodo Community v Shell Petroleum Development Company of Nigeria (The Bomu-Bonny Oil Pipeline Litigation),*[20] Shell agreed to an out-of-court settlement of £55 m (₦ 21 bn) due to oil spillage from Shell's pipelines – which left the Bodo and Gokana peoples and communities devastated. In *Okpabi v Royal Dutch Shell Plc*,[21] the plaintiffs sought damages from an English court due to serious and ongoing environmental pollution caused by oil spills which could be traced to Shell's facilities in their community. The court held that RDS (the parent company) does not owe a duty of care 'for the acts and/or omissions of the subsidiary company', Shell Petroleum Development Company (SPDC).[22]

b. The Marikana Incident

South Africa has been bedeviled with corporate impunity since apartheid was adopted in 1948. As a result, a corporate code of conduct known as the Sullivan Principles was developed. These Principles were generally aimed at boycotting South African companies – thereby applying economic pressure on South Africa.

In 2012, Lonmin, a British company, sacked 12,000 miners after a prolonged strike over wages and a failure to adhere to labour standards.[23] This action then 'led to sporadic strikes

[18] Abe, above (note 7) 6.

[19] 312 F. Supp. 2d 1229 (N.D. Cal. 2004).

[20] [2014] EWHC 1973 (TCC).

[21] [2017] EWHC 89 (TCC). [This case bothers on duty of care which owed by a parent company to a subsidiary]

[22] See also *Kiobel v. Royal Dutch Petroleum*, 621 F.3d 111, 120 (2d Cir. 2010). Shell responded to these human rights criticisms by launching a corporate human rights policy in 1999, tailored in a 'stakeholder-sensitive manner.' see further Shell International, 'People, Planet and Profits - The Shell Report 2001' *http://www.bcsd.org.tw/sites/default/files/node/domain_case/107.upload.125.pdf*, accessed 28 April, 2017. It also participated in the arrangements that led to the Voluntary Principles on Security and Human Rights (discussed in chapter 1).

[23] For a detailed discussion of the Marikana incident, see Bonita Meyersfield, 'Empty Promises and the Myth of Mining: Does Mining Lead to Pro-Poor Development?' (2017) *Business and Human Rights Journal* 37.

across the South African mining sector'.[24] Apart from the needed wage increase, the local community had been despoiled through the activities of Lonmin: youth unemployment was high, and the miners were contracting silicosis and tuberculosis.[25] The subsequent strike action resulted in the death of 34 miners who were shot dead by the South African police on 16 August 2012. These deaths have been likened to the 1960 'Sharpeville Massacre'.[26] Meyersfield uses the Marikana incident to show that mining promises and realities do not always align.[27] MacShane contextualised the situation with the observation that: 'the shanty towns a few streets away from fabulously wealthy gated residential areas and luxury stores are a reminder of the old South Africa, even if the black bourgeoisie roar around in BMWs and share expensive restaurants with their former white oppressors'.[28]

These cases show the stark realities of a regime of corporate impunity for human rights violations in weak zones like Nigeria.[29] There is recurring evidence that MNCs do not have systems in place to conduct their activities in a systemic way by incorporating key stakeholders in a manner that respects their human rights. MNCs do not respect local laws – especially given that the enforcement mechanisms and political will are unavailable. Firms may operate in highly

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[24] Abe, above (note 7) 139.

[25] See SAPA, 'Lonmin an example of exploitation' *Business Report* 17 August 2012, *http://www.iol.co.za/business/companies/lonmin-an-example-of-exploitation-1.1365221#.Vj2FX_mrTIW*, accessed 10 January 2016.

[26] See Marikana Commission of Inquiry, *Report on Matters of Public, National and International Concern Arising Out of the Tragic Incidents at the Lonmin Mine in Marikana, in the North-West Province* (2015), *http://107.6.66.171/Full%20Report%20of%20the%20Marikana%20Commision%20of%20Inquiry.pdf*, accessed 30 April 2017; see also Richard Stupart, 'The Night Before Lonmin's Explanation' *African Scene, http://www.africanscene.co.za/2012/08/the-night-before-lonmins-explanation/,* accessed 8 January 2016. Lonmin, well aware of the reports of intimidation and violence and being fully aware of their inability to protect their employees, urged the employees to go to work and after the killings of security personnel by the strikers, failed to inform employees of the dangers of coming to work and failed to withdraw their call to work during the strike; See further Ian Smillie, 'Blood Diamonds and Non-State Actors, (2013) 46(4) *Vanderbilt J Tran'l L* 1006.

[27] Meyersfield, above (n 23) 34.

[28] Dennis MacShane, 'Marikana is a Reminder of the Apartheid Years' *Newstatesman* (10 September 2012) 141(No. 5113).

[29] Incidents like this have also happened in other parts of the world. The Bhopal toxic gas leakage at the Bhopal chemical plant in India led to the death of about 10,000 people within a three day period [see Surya Deva, 'Bhopal: the Saga Continues 31 Years On' in Dorothée Baumann-Pauly and Justine Nolan, Business and Human Rights: From Principles to Practice (2016) 41]; On 24 April, 2013, there was an accident at the Rana Plaza factory, Dhaka, Bangladesh, where a garment factory collapsed leading to the death of about 1,129 people [S. Deva, *Regulating Corporate Human Rights Violations: Humanizing Business* (2012) 25];

challenging contexts and often prefer to enter contractual relationships with local business partners in the region that share their values and ideals. This has led to heightened levels of tension and distrust between the local community and the MNCs. The whole essence of socially responsible projects is to use the profits from natural resource extraction to develop the host community. MNCs are quick to accuse their host communities of sabotage, but on the other hand, local communities assert that the companies harm the environment through their activities and do not engage in any form of CSR. The assumption therefore is if these MNCs are accepted as joint stakeholders in the development theory, these communities may well in turn willingly offer security services for the firm's installations. This state of affairs is an indication of the gap between globalisation and governance.

Thus, building on the case studies highlighted above, this chapter argues for a stakeholder approach that conflates the rights of local communities in terms of being involved in project management with other key stakeholders such as NGOs and labour unions.[30]

2.3 Theoretical Basis for Corporate Social Responsibility

The concept of corporate social responsibility (CSR) has progressed since the 19th century,[31] and continues to do so, shaped in part by the dynamics of globalisation and the demands of economic liberty.[32] While the debate on Business and Human Rights (BHR) continues to increase, CSR has reduced the rigid state-centric role in human rights matters and has created revolutionary responsibilities for corporate organisations. These responsibilities stem from the financial implications of carrying out socially responsible projects. Companies are thus obliged to perform CSR – whether they like it or not. In addition, the enforcement of CSR initiatives has been

[30] If these incidents were to happen in developed societies today, the results would have been different. See the Gulf of Mexico oil spill in the US where BP paid $61b for fines and remediation efforts. See Steven Mufson, 'BP's Big Bill For the World's Largest Oil Spill Reaches $61.6 billion' *The Washington Post* (14 July 2016), *https://www.washingtonpost.com/business/economy/bps-big-bill-for-the-worlds-largest-oil-spill-now-reaches-616-billion/2016/07/14/7248cdaa-49f0-11e6-acbc-4d4870a079da_story.html?utm_term=.f09381417ae0,* accessed 29 April 2017.

[31] Ved P. Nanda & Ralph Lake (eds), *The Law of Transnational Business Transactions* (2014) 19.

[32] Michael Hopkins, *Corporate Social Responsibility and International Development: Is Business the Solution?* (2006) 9

influenced by the Westphalian regime which recognises states as the only bodies that can enforce rights under international law.

BHR seems to have conflated states' role as duty bearers with that of corporate human rights responsibility. Wettstein argues that CSR cannot be linked to BHR without focusing on its connection to the 'pre-existing obligation of states'.[33] This is the core intention of the GPs. Wettstein's reasoning resonates with the contention that states are now integrated with companies under the BHR regime – a responsibility they never shared with corporations under the CSR regime. While CSR requirements focus on the social responsibilities of companies, the GPs expands the responsibilities of states and companies more cohesively. This is instructive for several reasons. Hitherto, there were set boundaries between states and businesses under CSR discussions. States were not fully concerned about developments in the CSR field. Under the BHR regime, states are now more fully integrated and involved in BHR issues. Therefore, the BHR debate has helped heighten the role of states in implementing CSR paradigms. This is evident in some states developing National Action Plans (NAP) detailing the roadmap for implementing the GPs.[34]

BHR and CSR are two sides of a flip coin, each working together to enhance corporate responsibility for human rights. The real challenge under BHR is to develop a framework or model for corporate accountability, and at the same time identify distinct roles and responsibilities of States. What this chapter therefore seeks to do is to identify the best approach under the BHR and CSR paradigms – and use it as a basis to advance the argument for the implementation of the GPs in this thesis. Ironically, extractive companies operating in Africa comply with the regulatory laws of their home states (mostly developed countries), while developing countries like Nigeria grapple with enforcing human rights principles applicable to corporate entities.

Just as corporations are being inundated with various challenges – so also has CSR attracted various definitional conceptions. CSR is perceived as the framework for:

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[33] Florian Wettstein, 'From Side Show to Main Act: Can Business and Human Rights Save Corporate Responsibility? in Dorothée Baumann-Pauly and Justine Nolan (eds) (2016) *Business and Human Rights: From Principles to Practice* 99.

[34] Ibid.

> meeting societal preconditions for business, building social infrastructure, *giving back to host communities*, managing business drivers and risks, creating business value, holding business accountable and sharing collective responsibility.[35] (emphasis added)

Corporations are designed to make a profit. In pursuing those profits, it is expected that they will pursue social ends voluntarily. Meanwhile, a 'myopic focus on profit over human welfare' often drives MNCs to be involved in crimes against humanity.[36] When this economic rationale is applied to their activities – companies often consider that any consideration of human rights compliance cannot offset the resources and time it would take them to deal with other multifaceted matters underscoring BHR. In the European Union (EU), CSR raises three significant innovations: First, firms raise their standards higher and go beyond those set by legal or regulatory requirements – and by implication set a higher benchmark of social development, environmental protection and regard for human rights.[37] In so doing, they are 'giving back to host communities'. Second, CSR regulates the relationship between the corporation and its stakeholders.[38] Third, CSR ensures that the Board of the corporation raises the standard set for their fiduciary duties.[39] Amid global transformation, climate change and terrorism – to mention just a few challenges – how will corporations, while focusing on profit maximisation, make a lasting and positive impact on their host communities? Should firms see CSR as an investment or as a cost? If states are committed to mitigating adverse risks associated with corporate-made

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[35] Bryan Horrigan, *Corporate Social Responsibility in the 21st century, Debates, Models and Practices Across Government, Law and Business* (2010) 34.

[36] With reference to Shell (Nigeria); Bhopal (India); Marikana (South Africa), see chapter 1.2. See also *Doe v. Nestle USA* No. 10-56739 D.C. No. 2:05-CV-05133- SVW-JTL, where the US Court of Appeals concluded that 'the plaintiffs' allegations satisfied the more stringent "purpose" standard by suggesting that a narrow-minded focus on profit over human welfare drove the defendants to act with the purpose of obtaining the cheapest cocoa possible, even if it meant facilitating child slavery.'

[37] Green Paper, 'Promoting a European Framework for Corporate Social Responsibility' DOC/01/9 (18 July 2001) 4.

[38] Terje I. Vaaland, Morten Heide, 'Managing Corporate Social Responsibility: Lessons from the Oil Industry' (2008) 3(2) *Corporate Communications: An International Journal* 212-225. [arguing that CSR implies building and maintaining relationships with society through interplay between actors, resources and activities]

[39] Green Paper, above, note 36

disasters through BHR – what role should the corporate entities themselves play considering that irresponsible and distrustful behavior can undermine a company's core business interests.[40]

The discussion on the theoretical basis for CSR is incomplete without briefly mentioning the role of NGOs. NGOs have from time immemorial, and continue to be, the champions of CSR.[41] The initial approach was to wage war against poor living and working conditions, low wages, health and safety violations, and the right to form trade unions. Unfortunately, however, these issues still linger. The complexity in resolving these problems is complicated by labour standards in supply chains – as reflected in the Rana Plaza incident (Bangladesh). Firms want to maximise profits with the lowest personnel costs. They are also mindful that poor working conditions could have serious implications for the reputation of their firms. This creates a dilemma and to resolve this dilemma the GPs seek to offer improved normative clearness and convergence on corporate respect for human rights. The effect of this clarity is to offer new and positive paradigms for the corporate conduct and approach towards human rights compliance. For instance, in chapter 1, it was stated that the GPs have now become sources of reference for corporate human rights policies.[42] The GPs are also influencing legislation[43] and offering prototypes in terms of the access of victims to judicial remedies[44] – thereby balancing corporate profit maximisation and societal expectations of being socially responsible. Integrating human rights into business becomes imperative for granting the social licence to operate (SLO). A company that desires local community legitimisation, therefore recognises this imperative and constructs appropriate human rights policies and compliance.[45] Creating a shared responsibility

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[40] Christina Keinert, *Corporate Social Responsibility as an International Strategy* (2008) 34-35.

[41] For this, see Wayne Visser, Dirk Manfred Pohl, et all, *The A to Z of Corporate Social Responsibility: A Complete Reference Guide to Concepts, Codes and Organizations*, (2008) x-xi.

[42] See chapter 1.1. Barrick Gold's human rights policy reads thus: 'To help meet our commitment, human rights considerations have been embedded into Barrick's values…we have developed a human rights program that is robust and comprehensive, strives to be consistent with the UN Guiding Principles (UNGPs)…' (emphasis added). see Barrick Gold, 'Our Commitment to Human Rights' *http://www.barrick.com/responsibility/society/human-rights/our-commitment/default.aspx*, accessed 30 April 2017.

[43] See EU Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, OJ 2014 No. L 330, in force 6 December 2014.

[44] *Choc v Hudbay Minerals Inc*, 2013 ONSC 1414.

[45] See K. Russell, 'Tim Cook Erupts after Shareholder Asks Him to Focus Only on Profit' *Business Insider*, (28 February 2014), *http://www.businessinsider.com/tim-cook-versus-a-conservative-think-tank-2014-2#ixzz3amX018fg*,

or approach between BHR and CSR, is important to identify this legitimisation. This is also in line with the hypothesis drawn in this research, that the grant of the SLO is instrumental in fostering the corporate-community relationship, which is needed to actualise the objectives of the GPs. But how can a company build this SLO or integrate human rights into its business? The next section critically examines the theories of corporate governance and adopts a model for this thesis.

2.4 Competing Theories of Corporate Governance

This section examines the two main dominant theories of CSR, and their applicability to the implementation of the GPs in the context of the extractive industry in Nigeria. There are several theoretical models of corporate governance, but the shareholder and stakeholder models are the most renowned. Furthermore, there is a marginal difference between the discussion of CSR theories from a management perspective and discussions within a legal paradigm. This chapter analyses the two relevant theories and provide legal justifications for their usage based on business and society relationships, with particular reference to ethical responsibilities of corporations to society. Other theories are more in line with management or business ethics.[46]

2.4.1 *Shareholder Theory*

Theorists under this philosophy ground their belief in the understanding that corporate organisations are juristic persons – formed to make profits for the benefit of shareholders. They do not believe that the firm exists to serve the purpose of other constituencies, including the community in which that corporation may operate.[47] In his seminal work on 'Capitalism and Freedom', Friedman stated that:

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accessed 30 April, 2014, quoted from *Dorothée Baumann-Pauly and Michael Posner* , 'Making the Business Case for Human Rights: An Assessment' in Dorothée Baumann-Pauly and Justine Nolan (eds) *Business and Human Rights: From Principles to Practice* (2016) 34.

46 Elisabet Garriga, Dome`nec Mele´, 'Corporate Social Responsibility Theories: Mapping the Territory' (2004) 53(51) *Journal of Business Ethics*, 57-71. [recommended the necessity to develop a new theory on the business and society relationship, which should integrate different dimensions of corporate social responsibility]

47 See Samuel Mansell, 'Shareholder Theory and Kant's 'Duty of Beneficence' (2013) 3 *Journal of Business Ethics* 583-599. [noting the possibility within the ethical framework of shareholder theory for managers to pursue directly the happiness of non-shareholders].

> There is one and only one social responsibility – to use its resources and engaging in activities designed to increase its profits as long as it stays within the rules of the game, which is to say, engages in free and open competition *without deception or fraud*.[48] (emphasis added).

Friedman further stated that:

> In a free enterprise, private-property system, a corporate executive is an employee of the owners of the business. He has direct responsibility to his employers. That responsibility is to conduct the business in accordance with their desires, which generally will be to make as much money as possible *while conforming to the basic rules of the society*, both those embodied in law and those *embodied in ethical custom*.[49] (emphasis added)

Friedman's idea about CSR fails to consider that a particular code of conduct can metamorphose into a treaty, if it has become a set of accepted norms of behaviour in the international community. When a CSR becomes a treaty, CSR becomes mandatory. Can it then be concluded that firms are solely there to make profits, going by the same Friedman directive that 'firms must comply with law set up for that purpose'? If Friedman had seen CSR as an investment rather than a cost, he would have appreciated that events change over the course of time. A business concern could change from producing artificial products to organic products and this has serious ethical considerations. Since firms must comply with the laws governing their activities at any point in time, the organic-producing company must place ethical considerations above profit maximisation – with serious implications for its CSR initiatives.[50] To therefore have the idea of CSR being set in stone as *just* profit making – defies all logic. In their bid to further entrench shareholder wealth maximisation, adherents of shareholder theory would deem as outright stealing, any attempt by managers to become involved in CSR. Since CSR has not been legally

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[48] Milton Friedman, *Capitalism and Freedom* (1982) 133.

[49] Milton Friedman, 'The Social Responsibility of Business is to increase its Profits' *New York Time*s (13 September 1970) 126. See also Frederick Hayek, 'The Corporation in a Democratic Society: In Whose Interest Ought it and Will It Be Run?' in Melvin Anshen and George Bach (eds), *Management in the Corporation,* (1985) 100 [corporations should not use their resources for specific ends other than those of a long-run maximization of the return on the capital placed under their control].

[50] See further John Mackey & Rajendra Sisodia *Conscious Capitalism: Liberating the Heroic Spirit of Business* (2013). John Mackey is the co-founder of Whole Foods, the largest organic food manufacturing company in the US. He pioneered the concept of conscious businesses where he believes that business should strive to benefit people and the environment. See Sarah Green, 'Whole Foods' John Mackey on Capitalism's Moral Code' *Harvard Business Review*, *https://hbr.org/2013/01/whole-foods-john-mackey-on-cap*, accessed 7 January 2016.

provided for, theorists believe that any deviation from the agreed Memorandum and Articles of Association of the Company must be submitted to the general meeting of the company for approval. Even then, they expect government to give legal backing to such a decision through legislation.[51] Obviously, BHR grew out of concerns of these theorists, who believe that CSR must be legally provided for in order to be recognised.

Shareholder theorists believe that the dictates of capitalism allow only strict legal compliance, without more, as the hallmarks of corporate governance. CSR on the other hand, takes business beyond the scope of legal provisions, recognising that the means to an end of profits involves many other stakeholders – particularly in the local community – whose recognition in the extractive resource industry goes a long way in the success story of any firm.

Much debate has occurred around Friedman's conception of the essence of a firm. However, a closer look at his statements above indicates that in as much as Friedman emphasises the essence of profit maximisation for a company – he supports the notion that this must be morally done in an ethical and a just way,[52] which is the essence of BHR. In a way, therefore, Friedman's idea delves into an aspect which BHR will, in later years, become associated with. If we all agree that the Board or CEO of a company is the moral agent of the company and thus has a moral obligation to make more money for the company in the right way – the issue of solely and narrowly categorising companies as money-making ventures would not arise. The decision-makers of a firm must be well informed of the activities of the firm and must take full responsibility for the decisions that affect that firm. This has led proponents of mandatory CSR to argue that even though the company makes profits for the shareholders, they owe it a moral duty to ensure that their company is involved in some form of socially responsible project.[53] This thesis does not agree with Friedman's philosophy, and it emphatically questions the logic behind 'economic rationale' as the main reason behind activities in the extractive resource industry.

[51] Friedman, above (note 48).

[52] See Justine Nolan, 'Business and Human Rights in Context' in Dorothee Baumann-Pauly and Justine Nolan (eds) *Business and Human Rights: From Principles to Practice* (2016) 21.

[53] See Florian Wettstein, 'Waiting for the Mountain to Move: The Role of Multinational Corporations in the Quest for Global Justice' (2013) *Notizie di Politeia*, 13; Surya Deva & David Bilchitz (eds), *Human Rights obligations of Business: Beyond the Corporate Responsibility to Respect?* (2013).

Following the law and obeying ethical customs embedded in society are a *sine qua non* for sensible corporate practice.

The evolution of modernity and advances in technological innovations can no longer support the claim that corporations are founded solely for profit. Were this to be so, surely the founders of corporate organisations would not be involved in socially responsible projects all over the world? To claim – as Friedman's theory suggests – that the founders of corporate giants like Warren Buffet, Bill Gates or Mark Zuckerberg who spend money on their philanthropic work, are robbing their company of profits meant for the company, is in fact uncharitable. If these 'philanthropists' were employees, they would be paid salaries, bonuses and other emoluments. If upon their retirement, they decide to invest their life savings in issues that are of interest to them – how would that translate into 'robbing Peter to pay Paul'? Corporate foundations are indeed set aside independently of the firm, and so do MNCs activate the 'subsidiary corporate personality principle' to avoid culpability for human rights violations of a subsidiary company.

In response to Milton Friedman's comments in a 21st century public debate, Whole Foods CEO, John Mackey, denied that his company's commitment in its mission statement to donate 5% of net profits to philanthropic causes (approved unanimously by company owners) – amounted to philanthropic 'theft' from the company's investors.[54] Furthermore, to ensure success over time, Unilever's CEO, Paul Polman, believes that the fiduciary duty of corporations goes beyond 'short-term shareholder's returns' – to advancing commerce in the interest of society and business.[55] His statement is instructive here:

> I don't think our fiduciary duty is to put shareholders first … if we focus our company on improving the lives of the world's citizens and come up with genuine sustainable solutions, we are more in synch with consumers and society and ultimately this will result in good shareholder returns. Why would you invest in a company which is out of sync with the

[54] John Mackey, 'Rethinking the Social Responsibility of Business Debate' 28 September 2005, *http://www.wholefoodsmarket.com/blog/john-mackeys-blog/rethinking-social-responsibility-of%C2%A0business*, accessed 9 January 2016.

[55] See Dorothee Baumann-Pauly and Michael Posner, 'Making the Business Case for Human Rights: An Assessment' in Dorothee Baumann-Pauly and Justine Nolan (eds) (2016) *Business and Human Rights: From Principles to Practice* 35.

> needs of society, that does not … think about the costs of externalities, or of its negative impacts on society?[56]

It would be greatly unconscionable and immoral, therefore, to assume that firms that engage in CSR are hurting the shareholders. CSR initiatives improve individual and communal lives by creating value in many dimensions.

The narrow approach of Friedman to business can be better understood in the context in which it was presented. In the late 19th century most of the countries that depended on and fought for control over natural resources were in the Global North. Activities in the extractive industry were not under scrutiny, and, as a result, CSR was not a major issue to contend with. The huge investment, highly intensive labour and other associated climate-change factors now associated with extractive resource development in the Global South were non-existent. Furthermore, there were major socio-economic uncertainties, and many people were not pleased with the way the global market was run, and also the legacy of interventionism and Keynesian economics pervaded the historical narrative. Thus, the dynamics of globalisation and different socio-economic, legal and political landscapes of resource extraction, challenge the conclusion that the purpose of a company is solely to maximise profits. Today, the question that begs an answer is: of what benefit will companies be to society if their sole purpose is profit making, and in that process the environment is polluted, human lives are lost, and poverty increases? Globalisation and climate change are prompting stakeholders to broadly conceptualise the role of corporations, and at the same time avoid any conflict with the law. Not only does society have the right to demand that corporations consider moral factors in decision-making, but corporations incessantly violate the human rights of the local community. This thesis therefore rejects the notion of profit maximisation in the BHR and CSR debate. It takes the stand that corporate best practices and good conduct legitimises corporate presence in the extractive resource industry. This may not be achieved through mandatory or voluntary mechanisms, but through a combination of both approaches (as discussed in chapter 4). Thus, the thesis draws significant lessons from South Africa – especially in the areas where it has been able to draft codes into corporate practices that ensure effective corporate governance. For instance, South Africa drafted

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[56] See J. Confino, 'Unilever's Paul Polman: Challenging the Corporate Status Quo' *The Guardian*, 24 April 2012, quoted in Dorothee Baumann-Pauly and Justine Nolan (eds) (Ibid).

the King Report on Corporate Governance as a voluntary mechanism.[57] This Code outlines the basic corporate governance structure of companies. Compliance with the Code is a requirement for companies to be listed on the Johannesburg Stock Exchange, and hence the Codes are indirectly mandatory. The Code also co-exists with the Companies Act – making it imperative for the Board and the company to comply with it.

2.4.2 *Stakeholder Theory*

The modern concept of the stakeholder theory is associated with Robert E. Freeman.[58] His work was a challenge to Friedman's philosophy that shareholders should have priority over stakeholders. Interestingly, Freeman had just published his seminal book when the Bhopal (India) disaster happened. In his work, he contends there is a fiduciary duty between the management of the company and all its stakeholders, and therefore corporate management must prioritise its stakeholders. But who then are the stakeholders? According to Freeman, these 'are those who have a stake in or claim on the firm';[59] those that can affect or be affected by a company's purpose. In the extractive sector, these stakeholders include the investors, civil society and host communities. Thus, Freeman would support the view that managers have a duty to their host community who are impacted by their activities.[60] Indeed, a consideration of the host community is vital to the granting of SLO, and, by implication, the success of the firm. This thesis defines a stakeholder in the context of the extractive resource industry, as the local community, which is host to extractive projects, and which has an interest in the action and behaviour of the industry.

Extractive companies must balance profit maximisation and create a positive impact on their immediate community. Such an impact can only be created where there is a receptive community. While the 'stakeholders' feel a level of distrust towards the MNCs, they expect some economic activity in their community. The challenge is how to mitigate or reduce adverse

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[57] IoDSA, *King Code on Corporate Governance*, (2016), *http://www.iodsa.co.za/?kingIII*, accessed 30 April 2017.

[58] See Robert E. Freeman, *Strategic Management: A Stakeholder Approach* (1984) 144.

[59] Robert E. Freeman, 'A Stakeholder Theory of the Modern Corporation' *Perspectives in Business Ethics* (2001) 144.

[60] Ibid at 59.

human rights violations. This thesis adopts the stakeholder approach to refer to the local communities which host extractive projects in Nigeria. Stakeholder theory supports the desire to avoid, redress and mitigate human rights violation. The theory follows a simple logic: If the company does not meet the needs of the local community, it is highly likely that the community will revolt and economic sustainability will be hampered.[61] Government will be then be deprived of FDI, the local community will be deprived of white-collar jobs, and development will not take place in that community. In the long term, the stakeholders lose out in the power play of profit maximisation. Therefore, to legitimise SLO the 'stakeholder' (local community) must be given a high priority and must be deferred to in certain key decisions involving project planning, and execution and implementation – through a transparent and open process. It is not only conscionable for the MNCs to do this – it is in their best interest.

The GPs 3, 10, 16, 18, 20, 21, 28, 29 and 31 support the foregoing argument by making copious references to 'affected stakeholder', which in the context of this thesis would be referred to as the 'local community'. These Principles emphasise the whole essence of a rights-based approach to extractive resource governance (discussed in chapter 4). For instance, the Principles require companies to communicate their human rights impact to stakeholders. This is particularly so in the context of extractive resources where the operating environment poses a substantial risk to human rights. The commentary to GP 10 states that the GPs could serve as a foundation for accumulative positive effect – that stipulates the separate 'roles and responsibilities of all relevant stakeholders'. It also requires states to encourage or incentivise corporate reporting.[62] Therefore, the GPs have integrated BHR and CSR together, creating functions for states and corporations in a bid to facilitate a regime of corporate respect for human rights. They further enjoin the companies to engage in meaningful consultation with the local community (see GP 18(b)). Consultation obviates many challenges. It reduces tension with host communities, facilitates the granting of SLO, builds community trust in extractive companies in the face of dwindling resources, and prioritises respect for ethical behaviour and local community

[61] Lorenzo Sacconi, 'Corporate Social Responsibility as a Model of Extended Corporate Governance: An Explanation Based on The Economic Theories of Social Contract, Reputation and Reciprocal Conformism' (2004) LIUC, Ethics, Law and Economics Paper No. 142, 6. [CSR operates where those who run a firm have responsibilities towards all the firm's stakeholders]

[62] See Commentary to GP 10.

initiatives.[63] Freeman further stresses that CSR and the business continuity of the firm are two inseparable issues on a continuum:

> Corporate social responsibility is often looked at as an 'add-on' to 'business as usual' and the phrase often heard from executives is 'corporate social responsibility is fine, if you can afford it'.[64]

It is not just a matter of affording it, but an imperative for companies to be socially responsible. Without the support of its stakeholders, the continued existence of a firm is in doubt – given the connection between economics and social activity. Business is all about the voluntary and mutual exchange of goods and services. If people remain the dominant factor in the market chain, firms must constructively ensure that their services have a positive impact on the people.[65]

Where a company prioritises profit maximisation above social issues, such a company loses social legitimacy. This social legitimacy is the basis of constructive extractive resource governance. The local communities which are host to extractive projects are the single dominant stakeholder in the BHR debate. This thesis has placed the local community higher in the hierarchy of stakeholders – simply because other stakeholders are paid for services rendered. The indigenous peoples and local community are not paid. How does one quantify the damages or pay the community whose social and physical infrastructure have been destroyed by the activities of the MNCs?[66] It is difficult to understand how MNCs perform creditably well in

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[63] On 5 November 2015, a tailings dam collapsed in Brazil releasing huge wastes and industrial chemicals. About 17 people died as a result and several million lives were impacted. Subsequently, an agreement was reached by Samarco Mining S.A (the company operating the dam) and the Brazilian government. The court suspended the settlement agreement because there was not only minimal consultation with the communities impacted by the incident, there was no public participation and transparency in arriving at an agreed sum. See further Baskut TUNCAK, 'Lessons from the Samarco Disaster' (2017) *Business and Human Rights Journal,* 161.

[64] See Freeman, above (n 58) 40; see also Michael Walzer, *Thick and Thin: Moral Argument at Home and Abroad* (1994) 66.

[65] Heather Elms, Michael E. Johnson-Cramer and Shawn L. Berman, 'Bounding the World's Miseries: Corporate Responsibility and Freemans Stakeholder Theory' in Robert A. Phillips (ed) *Stakeholder Theory: Impact and Prospects* (2011), 11.

[66] See further Jeffrey S Harrison & R. Edward Freeman, 'Stakeholders, Social Responsibility, and Performance: Empirical Evidence and Theoretical Perspectives' (1999) 42 *Academy of Manag't J* 483 [any attempt to differentiate CSR from business concern is arbitrary and further integration of economics and social issues is vital to the existence of the firm]; see also Max B.E. Clarkson, 'A stakeholder Framework for Analyzing and Evaluating Corporate Social Performance' (1995) 20 *Academy of Manag't Rev* 92-117 [the set must be bounded and relatively narrow if the notion of the ST is to have any meaning].

developed countries – but find it difficult to comply with laid down rules and regulations in developing states like Nigeria. Could it be the issue of the difference in social, legal and ethical contexts that may have influenced this state of affairs? It is not only normative to be socially responsive – but also it is morally just and equitable to be so.

Corporations must begin to see themselves as moral agents following the Kantian ethical philosophy. According to Werhane, corporations are not moral persons – but are collective bodies created, operated and perpetuated by individual human moral agents.[67] Scholars have grappled with the question of whether moral status can be accorded to corporations in the same way as persons.[68] It is not the intention of this thesis to add to that debate, and the argument does not contribute to the theory laid down in this chapter. However, suffice to say, corporations are abstract entities and do not have hands, ears, a head and legs like human beings;[69] however, they could be criminally prosecuted for their wrongdoings – distinct from the officers of the company. For instance, when a court decides to dissolve a company, this terminates the company, much like sentencing a human being to death for murder. Concluding, therefore, as Werhane did, that because companies do not have hands, legs and ears, and therefore cannot be literally punished, but human beings who carry out the functions of the company as primary moral agents – does not contribute to the debate on corporate liability for human rights violations.[70]

The GPs are normative principles stating the respective roles and responsibilities for states and businesses. These are several principles which specify societal expectations from states in general, and companies in particular. If the host communities allow the companies to operate, the firms should be able to reciprocate a good gesture in terms of making the communities better than they met it. It defies imagination that a local community will blow up pipeline installations in their communities – just to settle scores with the state or the firms. Firms are a creation of the law, and should therefore respect human rights and comply with all

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[67] Patricia Werhane 'Corporate Moral Agency and the Responsibility to Respect Human Rights in the UN Guiding Principles: Do Corporations have moral rights?' (2016) *Business and Human Rights J.* 7.

[68] See Patricia Werhane & Christopher McMahon, 'The Ontological and Moral Status of Organizations' (1995) 5 *Business Ethics Quarterly,* 541.

[69] Werhane, above (n 67) 14 ['…with which she could shake hands, ask to dinner or graphically picture…'].

[70] See Robert Phillips, R. Edward Freeman, Andrew C. Wicks, 'What Stakeholder Theory is not? *Business Ethics Quarterly,'* 13(4): 13; Kant, I. 1787/1929. Critique of Pure reason. New York: St. Martins Press. [It is morally just for companies to be socially responsible].

applicable laws. Though firms argue that they hire local people, and build roads, schools and provide electricity – these laudable objectives do not project the expectations of society, unless the community emphatically stipulates this as their idea of social responsibility. Corporations should have a duty to protect and respect human rights, and not just a responsibility.[71] The local communities in fact expect more social projects from the firms than the government, due to the 'deep-pocket theory': corporations have extensive power and economic control in society. The only expectation of the people is that this power and control be tamed by the state. One often overlooked reason why companies lose social legitimacy is that companies (e.g. Shell-Nigeria) use their resources to support the political ambitions of leaders who they think will be beneficial to them in terms of policy-making and implementation.

Freeman's work therefore clearly affirms that local communities and extractive companies are moral agents which are obliged to respect each other's dignity and autonomy.[72] This thesis follows this paradigm. Firms are obliged to treat their stakeholders with the utmost of dignity and respect and must remediate any claim relating to human rights violation(s).[73] This responsibility on the part of firms does not preclude the need for host communities to be accountable; responsibility applies both ways. Extractive projects benefit the host communities as much as they do all of society. The implementation of the GPs will be achieved on the platform of reciprocal rights and duties. If the companies are incentivised to be involved in CSR, they would naturally comply with rules and regulations – normative or otherwise. After all, firms are the legal, economic and social products of the community.[74]

2.5 Misconceptions About the Stakeholder Theory

[71] Dennis Arnold, 'Transnational Corporations and the Duty to Respect Basic Human Rights' (2010) 20 *Business Ethics Quarterly,* 371.

[72] Heather Elms, Michael E. Johnson-Cramer and Shawn L. Berman, 'Bounding the World's Miseries: Corporate Responsibility and Freemans Stakeholder Theory' in Robert A. Phillips (ed) *Stakeholder Theory: Impact and Prospects,* (2011) 25.

[73] Thomas Donaldson & Thomas W. Dunfee, *Ties that Bind: A Social Contracts Approach to Business Ethics. Cambridge* (1999); R. Edward Freeman & R.A Phillips, 'Stakeholder Theory: A Libertarian Approach' (2002) 12 *Business Ethics Quarterly* 331-349.

[74] Lee E. Preston & James E. Post, *Private Management and Public Policy: The Principle of Public Responsibility* (Stanford University Press, 1975) 52.

The stakeholder theory has had its fair share of criticism. Some authors are of the view that the stakeholder theory destroys business accountability since 'a business that is accountable to all is accountable to none'.[75] Granted, raising one stakeholder above another may limit accountability and introduce favouritism in decision-making. However, it must be remembered that the doctrine of checks and balances is there to monitor the board and management of the company and to prevent them from deviating from the CSR initiative bestowed on a stakeholder group. In articulating the purpose of the firm, the board must determine the extent of the relationship between management and a key stakeholder, in order to achieve that purpose. Both political will and managerial disposition are needed on the part of states and the firm, to build lasting relationships between the firm and the host community. This creates a shared value system between the corporation and the community. Profit maximisation is the result, and community building through CSR is the driver that will propel the realisation of this result. The ideal relationship between stakeholders and the firm is best captured by Freeman's observation that:

> When the local community grants the firm the right to build facilities … the firm cannot expose the community to unreasonable hazards in the form of pollution, toxic waste, and so on. If for some reason the firm must leave a community…when it discovers some danger … it is expected to inform the local community and to work with the community to overcome any problem. When the firm mismanages its relationship with the local community, it is in the same position as a citizen who commits a crime. It has violated the implicit social contract with the community and should expect to be distrusted and ostracized.[76]

This implicit 'social contract' theory will be discussed and applied in the data collected in chapter 5. However, it needs be stated here that the firm needs the community as much as the community needs the firm. The firm's success depends largely on how well it manages its relationship with its community. The board's duty is to balance the interest of the community stakeholder against the desire to maximise the firm's organisational interest. Essentially, the firm is expected to do much more than just follow the dictates of the law in terms of addressing CSR

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[75] Robert Phillips, R. Edward Freeman & Andrew C. Wicks, 'What Stakeholder theory is Not' (2003) 13(4) *Business Ethics Quarterly* (2003), 479-502; see also John Kaler, 'Differentiating Stakeholder Theories' (2003) 46(1) *J. Business Ethics* 76.

[76] R. Edward Freeman, 'Stakeholder Theory of the Modern Corporation' in T. Donaldson and P. Werhane (eds) *Ethical Issues in Business: A Philosophical Approach* (2002) 43.

concerns.[77] However, how can the board structure therefore maximise the potentials inherent in the GPs, thereby actualising their corporate responsibility to respect human rights? The next section addresses this important question.

2.6 The Board Structure of a Firm: Correlative Rights and Duties Between Corporations and Local Communities

A firm acts through its members in a General Meeting, its Board of Directors, or through its officers and agents.[78] The General Meeting or the Board directs issues and determines socially responsible projects to be undertaken by the company. Since the business of the company (including CSR) is managed by the Board, the Board has wide-ranging executive powers. For instance, they may deviate from the resolution of the members of the company in a General Meeting. The condition for doing this however, is that the Board must act in good faith and with due diligence. Such acts carried out by the Board are still sometimes subject to the Memorandum and Articles of the Company.

The responsibility of the Board goes a long way in terms of apportioning blame for human rights violations. Sometimes conflicts arise as the Board struggles to work in the interests of the organisation, while at the same time engaging in CSR. Firms in the extractive industry in developing countries like Nigeria often operate in conflict zones with the attendant effects of youth restiveness, militancy, and environmental pollution. As a result, subsistence activities like farming and fishing tend to become impossible or extremely difficult for the communities to undertake. A rising concern has been the predicted effect of global warming, flooding of coastlines, severe storms, a rise in sea levels, and departure from normal agricultural conditions.[79] However, how do these concerns affect the Board? Where the Board decides not to use their power in a socially responsible manner, they will probably lose it.

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[77] William Bradford, 'Beyond Good and Evil: The Commensurability of Corporate Profits and Human Rights' (2012) 26 *Notre Dame J. L. Ethics & Pub. Policy* 14; See also John D. Bishop, 'The Moral Responsibility of Corporate Executives for Disasters' (1991) 10(5) *Journal of Business Ethics* 377-383 [When things go wrong, Managers most often deny any knowledge of the occurrence of any act].

[78] See section 63 of the Companies and Allied Matters Act, Nigeria.

[79] MNCs operating in Nigeria enhance the greenhouse effect due to massive gas flaring. Until this natural gas is effectively cupped, processed and sold as domestic gas, addressing global warming may remain a mirage.

Firms act on the collective will of persons – whose sole responsibility is to work in the best interests of the firm. In light of this, this thesis takes the position that under the stakeholder theory the firm works in the best interests of those who will be greatly impacted by their activities – and in the context of this work these are the host communities for their extractive projects. The mutuality or reciprocity of these responsibilities or duties between corporation and host community is not in doubt. Thus, as much as the Board is directly responsible to the firm through a corporate structure, it indirectly expects that the structure works in the best interests of their stakeholders (the host community) – otherwise the loss of social legitimacy could have serious implications for the firm itself. This thesis therefore offers four propositions to demonstrate the correlative rights and duties between firms and stakeholders, and these propositions are developed further in chapters 4 and 5.

2.6.1 *Social Licence Validates the Responsibility and Power of Firms*

MNCs may have the necessary legal licence to operate in Nigeria or South Africa, but they often lack the social licence to operate (SLO). This was the basis for tension and conflict in the Shell (Nigeria) and Marikana (South Africa) incidents. Obtaining SLO is instrumental to the continued existence of MNCs – due to the potential for the adverse infringement of human rights in host communities. To achieve SLO, companies must engage and partner with their host communities in designing and implementing extractive and development projects. A key area in which this can be achieved is testing their projects in terms of a human rights impact assessment – in line with GP 18. The inability to obtain SLO leads to tension and conflict, which destroys the community-corporate trust, which is a veritable foundation for the granting of SLO: this is further developed in chapter 5. Furthermore, MNCs wield remarkable power over developing countries like Nigeria, especially when such control extends to human rights compliance, extractive resources, and community development.[80] Considering that some MNCs are richer and more powerful than states, this proposition yields value.[81] The local community must take part in

[80] See GPs 11 and 13.

[81] See further Keith Davis & Robert L Blomstrim, *Business and Society: Environment and Responsibility* (1975) 50. See also J. Ruggie, 'Multinationals as Global Institutions: Power, Authority and Relative Autonomy' (2017) *Regulation and Governance,* 9, 13. [noting that MNCs have become a global institution in terms of their power, authority and relative autonomy]

project design, execution, and implementation. This creates an avenue for social trust and amity between the community and the firm.

2.6.2 *Transparency and Accountability are sine-qua-non-for obtaining Social Licence to Operate*

GPs 21 and 31 require firms to present the human rights impact in a transparent and accountable way, to all of those who will be impacted by their activities. Though the GPs state that companies should provide this information when stakeholders raise concerns about the human rights impact – this thesis submits that companies should not wait until they are asked to provide information. Responsibility demands doing what is needful, without being prompted to do so. When a community is unaware of a series of issues like: efforts in remediating oil spillage, contracts between states and investors – heightened tensions and distrust set in. The shrouded secrecy of extractive contracts and various legal requirements breed environmental disasters, which have resulted in conflicts and battles in Nigeria's Niger-Delta. Open channels of communication ensure transparency and accountability. The GPs also state that the information can be provided through various means such as case studies and statistics. These avenues provide the basis for social legitimacy.

2.6.3 *Cost-Benefit Analysis and Environmental Impact Assessments Prevent Unmitigated Violation of Human Rights*

The idea that firms are created solely for profit defies logic considering the benefits or impact of profit maximisation on the community. Most countries ensure that firms establish and consider the extent to which any activity to be authorised by any level of government could affect the environment.[82] Thus, firms are obliged to study the potential, substantial, organic, and socio-economic effects of a proposed development project on the immediate and more distant environment. These effects must be identified, examined, and foreseen.[83] The responsible use

[82] See section 1 of the Environmental Impact Assessment Act of 1992, Nigeria; See also Damilola Olawuyi, *The Principles of Nigerian Environmental Law* (2015) 208.

[83] See GP 19.

and exploitation of natural resources is necessary – considering the 'social costs and benefits of a proposed activity', sustainable productivity of the ecosystem, and preventing degradation of the environment.[84] This is further developed in chapter 5.

2.6.4 *Firms as Moral Agents Owe Society Social Service Responsibility*

This proposition is at the core of this thesis. Firms must be encouraged to do much more than what the law strictly provides, as far as CSR is concerned. This underscores the debate over the mandatory versus voluntary status of the GPs. The concept of incentivising social responsibility is discussed in the later part of this chapter. When oil spillage occurs or environmental degradation arises, MNCs are always quick to attribute it to sabotage. However, these companies have the expertise to prevent, mitigate and address human rights violations, and also to prevent further sabotage. Furthermore, where the fault cannot be traced to the firm, firms should still be involved in solving social problems related to their activities. Shell's inability to remediate oil spillage led to the environmental degradation of Ogoni land. It is not only for the good of the community, but also in the interests of the company for it to be involved in socially responsible projects.[85]

CSR as a public value – is in the interest of the public good. Companies need public value to sustain their businesses. When their services are not appreciated or held in public veneration, they lose social legitimacy. This is more so when firms solve social problems and support human rights.

2.7 Sustainable Approach to Implementing the GPs.

This research takes a different approach to calls for mandatory CSR. As indicated earlier, BHR has fused state responsibility as the duty bearer with that of a corporate function in terms of respecting human rights. Hence, BHR compliance demands that States and corporations integrate for effective governance. This chapter has focused on the integration of state and business

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[84] See *Oronto Douglas v Shell Petroleum Development Company*, Unreported suit No: FHC/L/C/573/931. See further sections 2(2) and 7 of the Environmental Impact Assessment Act of 1992, Nigeria.

[85] See generally Keith Davis, 'Five Propositions for Social Responsibility' (1975) 18(3) *Business Horizons* XVIII.

functions – to submit that a stakeholder theory putting local communities which are host to extractive projects on a high pedestal, is instrumental and functional for the discourse in this thesis. Thus, a pathway for implementation of the GPs is replicated in the social responsibility of the companies to do much more than what is actually stated in the law, while states should create incentives for entering such CSR commitments. Indeed, states, firms and the local community can form a synergic relationship. After all, issues of climate change, environmental pollution, business, and human rights affect all strata of society. One way this social responsibility can be achieved is in the idea of corporate reporting. For instance, Zerk cites the 'comply or explain' approach in the Johannesburg Stock Exchange Listing Rules. Firms are obliged to report annually the extent of their compliance with designated corporate governance standards in the form of an 'if not, why not' basis – as an example of a corporate disclosure regulation exerting 'pressure on companies to be more socially responsible'.[86] This unquestionably satisfies the corporate reporting requirements of the GPs.

The notion of human rights as it applies to corporations continues to evolve. As MNCs continue to grow significantly in developing countries, so also are human rights challenges evolving.[87] Human rights abuse has not declined – rather it has continued to grow exponentially. MNCs are either complacent in terms of recognising international human rights principles or are complicit in human rights violations. States, on the other hand, are weak in enforcing their laws, especially when it comes to MNCs – for fear of losing FDI. While Friedman believes 'it is the responsibility of states to protect human rights' and for societal development, Freeman believes that 'corporations have a moral imperative to protect human rights' – which gives them the SLO and creates a much wider role for them in society. This research concurs with Freeman and finds that businesses who want longevity and social legitimacy will work towards increasing an internal and external relationship, in order to provide value for the company. After all, what goes on in the internal structure of a firm can affect external conditionality.[88] Once the needs of local communities are met, the needs of the shareholders will already have been met. If it is the

[86] Jennifer A. Zerk, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law* (2011) 36.

[87] The 2013 Raza Plana incident.

[88] See *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.,* 506 A. 2d 173, 182 (Del. 1986) [Directors can consider other constituencies: employees, community interests, only when doing so provides benefit to shareholders as well]

contention that corporate law is shareholder-centric, companies cannot meet the expectations of these shareholders if they do not have the enabling environment to operate. Shareholders expect dividends which are only possible if companies are fully functional. Where there is tension and conflict in their areas of operation (as in Nigeria's Niger-Delta) due to youth and indigene restiveness – occasioned by their lack of social legitimacy – shareholders should not expect any form of returns. As a result of the foregoing, the stakeholder model is instructive for examination of the implementation of the GPs in this thesis. One of the ways to sustain the implementation of the GPs, and as part of state-corporate integration, is to incentivise social responsibility projects.

2.7.1 *Incentivising Socially Responsible Projects*

Where firms value accepted norms, reputational concerns about the future may create incentives for them to enforce the norms. However, to create a robust relationship, the duty of being socially responsible should not fall on the companies alone. States and local communities have a role to play. On the part of the states, incentivising and compliance programmes can be designed for companies operating in the extractive resource industry – to promote GPs compliance. The basis for incentives is found in the commentary to GP 3, which provides that states are to encourage companies who communicate their human rights impact through incentives – which 'could include provisions to give weight to such self-reporting in the event of any judicial or administrative proceeding'.[89]

The Nigerian government can demand that MNCs have an ethics and compliance programme to comply with the GPs. This could be drafted into the Companies Act or similar regulations. Where companies violate those programmes, this could form the basis for criminal prosecution. Indirectly, implementation of the GPs would form part of corporate culture – as no company wants to be prosecuted, be it for civil or criminal crimes.[90] However, mere non-compliance should not be the basis for prosecution. At the first instance, companies should be given the opportunity to remedy any harm caused by their activities, and this is where the

[89] See commentary to GP 3.

[90] See further Maurice E. Stucke, 'In Search of Effective Ethic and Compliance Programme' (2014) 39(4) *Journal of Corporation Law*; Peter Henning, 'Lessons from the Glaxo Case in China' *New York Times* 29 July 2013 [companies have invested massively in compliance programs to avoid wrongdoing].

incentives come in.[91] The 2008 economic crunch heightened unethical and irresponsible behaviour in MNCs, and it is difficult for the government to ensure and promote compliance when it is not doing its part to protect human rights. Besides, a compliance programme cannot stop gas flaring with the attendant environmental pollution, when that is a cheaper option for the company than other operational processes. Thus, compliance with human rights norms should not affect profit making. Therefore, government – in creating these incentives[92] – must use the GPs as benchmarks for assessing the human rights performance of companies.

The goal of incentivising is to establish a sustained corporate culture that would, over time, enable firms to comply with laws without being forced to do so. The Nigerian state must therefore design an incentive for CSR projects. Although a visible, financial, incentive-based approach would aid compliance with ethical norms, the incentive need not be only financially-based. It could also take the form of annual awards and a medal, and also television documentaries highlighting how the company is responding to the corporate-community relationship. This would promote an organisational culture of self-regulation, and companies would be enthusiastic and eager to conform with the law.

Undeniably, culture plays a substantial role in the life of an organisation. Under the stakeholders' theory, it was contended that managers are agents of the stakeholders and the community. Firms can only operate optimally in resource-rich areas if they have the SLO. By so doing, companies avoid distracting court cases, punitive fines, and the distrust of the host community; court cases take up a significant part of the firm's time and progress. In Nigeria, for instance, court cases involving MNCs drag on for decades – compelling some plaintiffs to seek help in foreign jurisdictions. During this period, firms are uncertain about their stance: huge fines may be imposed, reputational damage occurs, and managers' job security may be at risk. These issues seriously divert the company's attention.[93] Providing incentives for compliance therefore

[91] In the United States, § 101 (c) (2) of the Sarbanes Oxley Act (2002) mandates public disclosure of compliance programme. Directors of companies are now obliged to ensure truthful reportage of the firm's compliance efforts.

[92] Such as tax breaks.

[93] Muel Kaptein, 'The Ethics of Organizations: A longitudinal Study of the US Working Population' (2010) 92 *J. Bus Ethics* 601.

helps organisations detect illegality on time.[94] It is also a sustainable way of ensuring the social responsibility of firms.

When firms believe they are too big for the state in which they operate, there is a tendency for them to break the law. Even the threat of huge fines might not be effective as a deterrent for corporate abuse – but it is worth a try. Management should divert its attention and ensure that realistic moral standards are set and that sufficient means are provided to promote good behaviour.[95] Firms must have codes that are clear and accessible to all stakeholders. Furthermore, the firm must periodically assess itself to determine whether those codes are taken into consideration in terms of management decisions. These concerns have been addressed in the GPs. Therefore, if states and companies consider these concerns and work to actualise them, there will be an unconscious implementation of the GPs. An '*incentivisation*' system may not always promote an ethical organisational culture necessary to deter and prevent corporate crimes – but it will create a consciousness that firms would consider when conducting business.[96]

2.8 Conclusion

The local community as an important stakeholder under the stakeholder theory discussed in this thesis epitomises an important group that has an interest in how the extraction of their resources is developed, as well as in the action and behaviour of extractive companies. The idea behind this model is that business managers must uphold a positive relationship with society and their environment, if they are to operate effectively. Failure to do so can harm a business reputation and ultimately affect the ability of these businesses to operate. These positive relationships were lacking in the Shell (Nigeria) and Marikana (South Africa) incidents. The tragedies of these events clearly revealed major gaps in the way companies observe their CSR. Nigeria may have to amend its company law to accommodate stakeholder interest in the Board of Directors.[97]

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[94] See Wouter P.J. Wils, 'Antitrust Compliance Programmes and Optimal Antitrust Enforcement, (2013) 1(1) *J. Antitrust Enforcement* 52.

[95] Ibid at 793.

[96] Ibid at 832.

[97] See King Report on Corporate Governance of South Africa which recommendations have significantly influenced the Company Act of 2008; see also sections 76 & 111 of Germany's *Aktiengesetz* (AktG-German law on stock corporations) which provides for Management Board and Supervisory Board in a two-tier structure.

Stakeholder representative would have to take into account the interest and concerns of the local community where extractive projects are to take place. They do not control the direction of the company – but ensure that management takes cognisance of the existence of the indigenous people in their decision-making processes. The inclusion of stakeholder representatives in the Board enhances the reputation of the firm and creates an environment of trust.

Since all stakeholders do not have the same effect on an organisation, this chapter developed the local community as an important group in the hierarchy of stakeholders – especially in the context of the extractive resource industry which this thesis is concerned about. Thus, the local communities are an important stakeholder for MNCs, because the companies rely on them for long-term survival. This approach is a better way for thinking about creating value for host communities – by paying attention to the community's demands. Social responsibilities of business therefore must be seen from the standpoint of the practical creation of social values – which will create a positive business impact on their immediate communities. The stakeholder theory starts with an idea of purpose, and tries to create value for a narrow group of people. Business creates value in a responsible way when it connects with the local community and civil society who are instrumental in meeting societal demands. This approach takes care of the environment and at the same time can still make money for shareholders. Until there is less of an emphasis on monetary enticement as the goal of political governance – realising the dividends of the extraction of natural resources will remain a mirage. Otherwise, firms will find themselves able to make laws for themselves and to comply with laws under their own terms. This results in lack of consultation with the local people, so making the company become a 'sort of de facto government'.[98]

This chapter found that extractive companies become involved in CSR without having an idea of the socio-cultural context of the local community. Firms should pay attention to the cultural needs of the local community where they operate. The Marikana incident demonstrated that management must have been aware that nothing compares to workers demanding a raise in their pay and better living conditions. Flexing their muscles with the workers and the community simply because they can do so will only complicate the problem and not solve it. It does not provide for SLO or create value for the companies. For CSR initiatives to have an impact, government, firms and the local community must enjoy a robust relationship – for the ultimate

[98] Hilson, above (n 1) 132.

good of society. The next chapter examines ways the state can create value through integration of human rights principles into domestic legislation.

CHAPTER THREE: IMPLEMENTATION OF THE 'PROTECT' FRAMEWORK.

3.1 Introduction

The previous chapter identified the applicable theories upon which the implementation of the GPs in a developing country like Nigeria can be carried out. It recognised and adopted the stakeholder approach, with particular reference to the importance of the stakeholders to resolving the consistent conflict which has bedeviled the extractive resource industry in Nigeria. The stymied growth in weakly governed countries arises from the lack of an ideological roadmap to develop the extractive industry.[1] This is due to poor political and socio-economic infrastructure, corruption, and weak or non-existent rule of law and law enforcement.[2] However, the development of a country's resource industry should benefit its citizens through wealth creation and provision of basic amenities. The position of government, as representative of the people when signing extractive contracts with investors, is questionable when the citizens do not obtain any benefits from such contract. The foundation for much of the extractive resource industry in Nigeria was laid under the colonial rule. During this period, there was blatant disregard for recognition of the local community as key players in determining how they wish to control their resources. The methodical and fundamental injustice these communities were subjected to has made any subsequent distribution of income from natural resources herculean. The idea of sustainable development was not in the contemplation of development formulators in Africa's colonial era.

This chapter identifies the ideological road maps that build on the GPs. It does this through a critical examination of various legal and voluntary instruments. Africa 'hosts over two-thirds of the world's reserves of platinum, which are essential in the electronic industry'.[3] Natural resources in Africa 'constitutes a major share of exports and tax revenues'.[4] These

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[1] See Merilee S. Grindle, 'Good Enough Governance: Poverty Reduction and Reform in Developing Countries' (2004) 17(4) *Governance* 525–548. [Transparency, less corruption, accountability are *sine-qua-non* to effective and efficient management]

[2] Ibid.

[3] African Development Bank Information Note *Natural Resource Management and Structural Transformation in Africa*. (2013) 156.

[4] UNECA Africa Union Commission Issue Paper E/ECA/COE/31/3 and AU/CAMEF/EXP/3(VII) *Unleashing Africa's Potential as a Pole of Global Growth* (2012).

resources present both challenges and prospects for the countries concerned. The countries can leverage the resources to accelerate broad-based economic development, poverty reduction, and prosperity for all their citizens. However, harnessing the benefits of the resources have been problematic. Not only have these countries failed to reap the benefits of the resources, but the development of the resources has triggered violent conflicts, destroyed the environment, exacerbated inequalities across gender and geography, displaced communities, and undermined democratic governance.[5] But there are also countries where effective management of the resources has produced sustainable and equitable human development.[6] It is generally believed that what makes the difference between these two categories of countries – is the design and implementation of a broad set of rules and regulations.[7] These include legal and institutional frameworks for the distribution of revenue from the resources; legal and institutional mechanisms that 'foster transparency and accountability in the management' of revenues from the resources (GP 21); mechanisms which address the social, human and environmental impacts of extractive resource development (through the adaptation of the stakeholder theory) – especially in 'indigenous peoples and local communities'; and policies and mechanisms that 'ensure that human rights are well integrated' into the extractive sector.[8]

Focusing primarily on the first pillar of the GPs: 'State duty to protect human rights' – this chapter argues for a more effective regulatory, monitoring system and impact assessment requirements. This argument is situated within the concept of the Human Rights Based Approach (HRBA), which is captured in the GPs as a pathway to achieve the post-2015 Sustainable Development Agenda.[9] This chapter unpacks the human rights duties of states under domestic

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[5] Hany Gamil Besada, Franklyn Lisk & Philip Martin, 'Regulating Extraction in Africa: Towards a Framework for Accountability in the Global South' (2015) 2(1) *Governance in Africa* 1.

[6] Ibid. Botswana is a prime example of how best to use natural resources to expedite economic growth and development. It enforced a policy to process its mined diamonds locally and has created a strong private sector aimed at transforming its development path towards achieving sustainable outcomes. See further Joseph E. Stiglitz, *Globalizations and Its Discontents* (2002) 39.

[7] Bonnie Campbell, *Mining in Africa: Regulation and Development* (2009).

[8] Ibid. See also Michael Ross, *The Oil Curse: How Petroleum Wealth Shapes the Development of Nations* (2012) [arguing that extractive resource dependence insulates political leaders from transparency and accountability-a core manifestation of the 'resource curse' - with an observable correlation between resource abundance and political corruption].

[9] 'Sustainable Development Goals' *http://www.un.org/sustainabledevelopment/sustainable-development-goals/*, accessed 1 May 2017.

legislation. Presently, domestic laws do not provide for direct human rights obligations for companies, and violations of human rights must therefore be couched in the form of states' obligation to protect human rights violations by businesses. Thus, the essence is to identify human rights obligations, challenges and prospects – in order to advance the implementation of the GPs through domestic laws. Clearly, developing a mechanism to enforce internationally accepted norms through the Business and Human Rights (BHR) agenda, would be the invention of the 21st century.

3.2 The Human Rights Based Approach to Extractive Resource Governance

This section discusses the HRBA and how this approach can be used as a basis for implementing Pillar 1 of the GPs. It analyses the legal prospects of adopting the GPs as a framework through which human rights standards can be systemically integrated into extant extractive legal regimes. The implementation of the GPs would demand amending extant laws and policies that would recognise the duty of states to protect and respect those laws. Chapter 4 advances the discussions in this chapter by applying the elements of the HRBA – such as citizens' right to demand participation, information, and access to justice – to the discussion on corporate responsibility to respect human rights.[10]

Some countries have adopted the 'rights-based approach' as a tool for 'integrating human rights' into their decision making processes.[11] The Swedish government, for instance, went further to describe the HRBA as an efficient tool grounded in internationally accepted standards, which thereby provides a legal standard and a framework clarifying the State's duty to protect and realise human rights.[12] The HRBA thus have potential to identify the root causes of human

[10] See 'The Human Rights Based Approach to Development Cooperation: Towards a Common Understanding Among the United Nations Agency,' (2003), *http://hrbaportal.org/the-human-rights-based-approach-to-development-cooperation-towards-a-common-understanding-among-un-agencies*, accessed 25 July 2016. ['HRBA'].

[11] See Australian Human Rights Commission 'Human Rights Based Approaches,' *https://www.humanrights.gov.au/human-rights-based-approaches*, accessed 22 November 2016; J Boesen and T Martin, 'Applying a Rights Based Approach in Denmark: An Inspirational Guide for Civil Society' (Danish Institute for Human Rights) (2007).

[12] A Frankovits and P Earle, Working Together, The Human Rights Based Approach to Development Cooperation in Sweden Parts 1 & 2 (SIDA and HRCA 2001).

rights violations and for creating a pathway to address those root causes. When applied consistently, they transform into state action over time – eventually becoming accepted general principles applied by non-state actors. This approach requires the inclusion of human rights considerations into state laws and project agreements.

Being a conceptual framework of the UN, the HRBA actualises human development by working to 'redress discriminatory practices and unjust distributions of power that impede developmental progress'.[13] A HRBA would incorporate the wishes and concerns of the local community, the poor and vulnerable people – in terms of siting extractive resource projects in their communities. Due to its very nature, the HRBA is a means of integrating human rights principles into other measures of planned institutional processes.[14] This process of integration was discussed in chapter 2, as a bridge gap between BHR and CSR.[15] HRBA cannot solve all socio-economic and political challenges facing a developing country, and this thesis concurs with this probability. Rather, the thesis examines the emergence of the GPs as a potential HRBA for addressing the human rights violations of a local community.

The UN did not provide any universal requirements for a HRBA.[16] However, human rights bodies have agreed on certain minimum qualities for recognition as a HRBA. First, it must fulfill human rights. Second, it must 'identify rights-holders and their entitlements, and corresponding duty-bearers and their obligations'.[17] Third, it must 'work towards strengthening the capacities of rights-holders to make their claims – and those of duty-bearers to meet their obligations'.[18] In 2003, the UN Development Group adopted the 'UN Statement of Common Understanding on Human Rights-Based Approaches to Development Cooperation and Programming (the Common Understanding)'. The Common Understanding provided a template

[13] HRBA, above (n 10).

[14] Jacob Kirkemann Boesen & Hans Otto Sano 'The Implications and Value added of a Human Rights Based Approach' in Bard Andreassen & Stephen P. Marks (eds), *Development as a Human right: Legal, Political and Economic Dimensions* (2010) 82.

[15] C. Walker-Said and J.D. Kelly (eds), *Corporate Social Responsibility? Human Rights in the New Global Economy* (2015). [arguing for actual and potential impact of CSR on human rights]

[16] HRBA, above (n 10).

[17] Ibid.

[18] Ibid.

for ensuring that a HRBA is applied consistently in the meaning, nature, design and implementation of such HRBA – and also applied consistently at all levels of governance.[19]

The state therefore shares a larger responsibility, compared to corporations, in implementing rules that establish human rights considerations as the basis for development, and this is the basis of this chapter. The 'Common Understanding' requires states to further the realisation of human rights instruments – thereby providing a foundation for applying the GPs to extractive resource governance.[20] Certain elements are indispensable and unique to an approach deemed a HRBA. These are:

a) 'Assessment and analysis of the human rights claims of rights-holders and the corresponding human rights obligations of duty-bearers – as well as the immediate, underlying, and structural causes of the non-realisation of rights.
b) Programmes assess the capacity of rights-holders to claim their rights and of duty-bearers to fulfil their obligations, and then develop strategies to build these capacities.
c) Programmes monitor and evaluate both outcomes and processes, guided by human rights standards and principles.
d) Programming is informed by the recommendations of international human rights bodies and mechanisms'.[21]

A close examination of the GPs indicates that the above indices have been integrated into the GPs. For instance, GPs 1 specifies that 'states must protect against human rights violations within their territory'. Thus, states, as duty bearers, must fulfill their obligations to enable rights-holders, the local community, to claim their rights. The HRBA supports efforts aimed at addressing causes of rights violations at all developmental stages, and also how to address them. To achieve this, Pillar 1 re-emphasises the importance of states' duty to protect the human rights of its citizens against the belligerent activity of third parties. By integrating the GPs such as participation (GPs 18), access to justice (Pillar III), and access to information (GPs 8, 21, 31) into laws and policies regulating extractive resource projects – the GPs would be a preventive

[19] Ibid. See further Dzodzi Tsikata, 'The Rights-Based Approach to Development: Potential for Change or More of the Same' (2009) 35(4) *IDS Bulletin*, 130.

[20] Through the 'Common Understanding', the HRBA is anchored on six principles, namely: Universality and Inalienability, Indivisibility, Inter-Dependence and Inter-Relatedness, Equality and Non-Discrimination,[20] Participation and Inclusion,[20] Accountability and Rule of Law.

[21] HRBA, above (note 10).

approach to human rights repressions occasioned by such projects.[22] The GPs also provide a basis for citizens to hold MNCs accountable for human rights violations.[23]

Essentially, what this approach envisages is that existing environmental legislation would be reformed to make room for project-approval guidelines that will integrate human rights principles. This will give rights-holders the basis to seek redress when development projects violate their human rights or to seek a review of already approved projects. This is the intention of the GPs. HRBA consequently call attention to the obligation of the state to protect the human rights of its citizens through the adaptation of its laws, programmes and policies to align to the objectives of the GPs. But how can states adapt these human rights principles for domestic application? The next sections identify areas of convergence in extant extractive resource laws.

3.3 Operationalising the GPs in Nigeria's Extractive Resource Industry: The States' Duty to Protect Human Rights under Nigeria's Domestic Laws.

This section examines the adequacy of domestic laws – considering the responsibility to implement the GPs, placed primarily on the states. GP 1 states that:

> States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through *effective policies, legislation, regulations, and adjudication*.[24] (emphasis added)

The desire for corporate accountability will continue to occupy prime place in BHR discourse. GP 1 effectively places positive responsibility on states to protect citizens from corporate abuse through a mix of approaches. Accordingly, this GPs effectively fulfils human rights by obliging states to prevent corporate abuse, identifies rights-holders (states' citizens) and strengthens the

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[22] D. Olawuyi, *The Human Rights-Based Approach to Carbon Finance* (2016) 253.

[23] See J Ruggie, 'United Nations Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework' (2011) UN Document A/HRC/17/31 (21 March 2011) paras 8-12; see also D Korten, *When Corporations Rule the World* (2001).

[24] Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', Report of the Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and Other Business Enterprises UN Doc. A/HRC/17/31 (21 March 2011). ['Guiding Principles']

capacity of rights-holders to make their claims through various mandatory and voluntary approaches. The yardstick for the GPs to qualify as a rights-based approach has therefore been met. This section examines whether the states have failed to take appropriate steps to prevent corporate abuses and whether those approaches (legislation, regulations, policies and adjudication) have passed the litmus test represented by GP 1. The breach of relevant environmental, corporate and labour laws by corporate bodies will also be examined. Violation of these laws would amount to human rights violations – since they occur within the purview of states' duty to protect human rights.

Nigeria has a plethora of laws that regulate the extractive resource industry (see Appendix E for relevant laws).[25] This would constitute a 'smart mix' of methods to advance corporate respect for human rights – as indicated in GP 3.[26] The Commentary to GP 3 provides that the 'failure of states to enforce existing laws that directly or indirectly regulate business respect for human rights is often a significant legal gap in State practice.' Thus, GP 3 emphasises enforcement of laws that regulate business. Nigerian laws have failed to address and impact the local communities who are recipients of bad corporate decision.[27] In any event, these laws do not provide for adequate monitoring, neither do they insist on human rights compliance and information.[28] This laxity fails to hold MNCs accountable for human rights violations in the extractive industry. The government must therefore carry out a review of whether these laws are adequate for guaranteeing human rights protections for citizens. The next section reviews extant laws and how they can foster implementation.

[25] Hence, this thesis is not calling for the creation of new laws but to integrate human rights dynamics into existing law. The major regulatory standard is the Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN), 2002. In South Africa, the Minerals and Petroleum Resources Development Act of 2002 regulates mining activities.

[26] See Commentary to GP 3.

[27] Corruption and lack of engagement with local community is the primary cause of weak enforcement.

[28] Commentary to GP 3.

3.3.1 The Constitution

The primary purpose of a Constitution is for states to protect citizens from abuse – including corporate abuse.[29] Human rights provisions are therefore enshrined in most constitutions. Under the Nigerian Constitution,[30] obligation for the protection of environmental human rights is shared among the federal and state governments.[31] Under the Second Schedule, Part I (Exclusive Legislative List) of the Nigerian Constitution, Items 29, 36, 39, 60 and 64 lists the exclusive jurisdictions of the federal government in terms of legislation.[32] These areas comprise mines and minerals – including oil fields. Part II of the Second Schedule (Concurrent Legislative List) specifies the capacities of both the federal and state governments to legislate on. Furthermore, section 20 of the Constitution vests on the state, the obligation to 'protect and improve the environment, and preserve the water, air and land of Nigeria'.

This thesis submits that Chapter II of the 1999 Constitution is realisable. The basis for this is extensively justified in Chapter 6.4.2. However, it can be noted here that section 17 (2) (b) and (d) recognise the sanctity of a human person, in order to guarantee social order. In furtherance of this objective, 'exploitation of human or natural resources in any form whatsoever for reasons, other than the good of the community, shall be prevented'.[33] The non-justiciability of this provision is not in doubt; it falls under Chapter II which covers 'Fundamental Objectives and Directive Principles of State Policy'. They merely serve as recommendations to the state to pursue and are therefore non-justiciable by virtue of section 6(6)(c) of the Constitution. Despite the non-justiciability of this provisions, they can be realised through the fundamental human rights provisions contained in Chapter IV – as a pathway to guarantee salient human rights, including environmental rights under the Constitution. Moreover, section 12 provides that any treaty the state enters into must be domesticated, through an enactment by the National Assembly, before having the force of law. The GPs have not become a treaty yet; however,

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[29] Charles Fombad, 'Strengthening Constitutional Order and Upholding the Rule of Law in Central Africa: Reversing the Descent Towards Symbolic Constitutionalism' (2014) 14 *African Human Rights L J* 414.

[30] Constitution of the Federal Republic of Nigeria (1999).

[31] O. Abe, 'Utilisation of Natural Resources in Nigeria: Human Rights Considerations' (2014) *India Quarterly: A Journal of International Affairs,* 3.

[32] Ibid.

[33] section 17 (2) (b) (d) of Nigeria's Constitution, 1999.

victims of human rights violations can pursue their environmental rights through the African Charter on Human and Peoples Right (Ratification and Enforcement) Act.[34] In *Fawehinmi v Abacha*,[35] the court held that the African Court on Human and Peoples' Rights exists to provide justice to victims of human rights violations, where such victims cannot claim their rights in local courts. Likewise, in *Social and Economic Rights Action Centre (SERAC) v Nigeria*,[36] the court laid down the principle that the African Charter on Human and Peoples' Rights can be enforced in Nigerian courts, even though some of the provisions of the Charter conflicts with the non-justiciable provisions in Nigeria's Constitution. The Court found that Nigeria had violated the rights to environment under article 24, life under article 4, and health under article 16 of the African Charter on Human and Peoples' Rights.[37]

What is the implication of the foregoing to the implementation of the GPs? GP 1 provides that the state must protect against human rights abuse by businesses within its territory – through a mix of legislation and regulations. The GPs further provides that the states are not directly responsible for human rights violations by third parties, including business enterprises, but can shape those enterprises' behaviour through laws and regulations.[38] The Constitution is the *grundnorm* of all laws[39] – it is the supreme law of the land and is therefore an avenue for protecting human rights in the extractive resource context. All other laws find their legitimacy in the Constitution, to the extent that where other environmental laws provide for human rights compliance, such provision could, 'to the extent it is inconsistent with the Constitution', be deemed to be null and void.[40]

Under GP 3, states are encouraged to implement laws that requires businesses to respect human rights. Constitutional provisions would have been a suitable avenue for Nigeria to do this. Nigeria's Constitution does not however provide a robust basis for the enforcement and

[34] Cap A9, Laws of the Federation, 1999.

[35] (1996) 9 NWLR (Pt. 475) 990.

[36] Communication No. 155/96, 2001.

[37] Abe, above (note 31) 3.

[38] Commentary to GP 1.

[39] Section 1(1) of the Nigerian Constitution.

[40] Section 1(3) of Nigerian Constitution.

implementation of the GPs. For instance, section 44 (3) of the Constitution vests the control of all extractive resources on land or upon waters in the Nigerian government. The provision that would have allowed for the implementation (section 17) is non-justiciable. The GPs are voluntary, and two persuasive documents cannot be used for claiming rights before the courts. Nigeria's Constitution is therefore not conducive for enforcing business respect for human rights, as GP 1 directs. The right to life is guaranteed under section 33(1) of the Constitution. This right will be threatened where the deleterious activities are left unchecked – especially where such activities are sanctioned by the state. Environmental rights which can be linked to the right to life should therefore be enforceable under the Constitution. In any case, environmental rights and socio-economic rights can still be enforceable in proactive jurisdictions, by courts who cherish the ideals of freedom and the 'right to dignity of the human person'.[41]

The Constitution makes no reference to the BHR agenda. Thus, the Nigeria Constitution must guarantee the International Bill of Rights. This Bill of Rights will apply to all persons, including non-state actors. MNCs do not violate the Constitutions or domestic legislation of their home states. They must comply with home state regulations and laws. Since corporations are bound by the provisions of Chapter IV of the Constitution, enforcement of Chapter II (such as environmental rights) can be achieved through the actualization of the right to life under Chapter IV. This is logical when one considers that civil and political rights under Chapter IV is applicable to persons and corporations. Therefore, corporate accountability can easily be achieved if claims are brought under Chapter IV of the Constitution. Hence, environmental rights (socio-economic rights) will indirectly have an effect under the Constitution. As the Constitution presently is, the civil and political rights under chapter IV are applicable to the state, individuals and corporations.[42] This effectively creates a 'vertical and horizontal' application of the rights. [43]

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[41] See *Aturu v Minister of Petroleum Resources & Ors*, FHC/ABJ/CS/591/2009. [holding that governments decision not to control the national economy in a way that would guarantee social justice and happiness of its citizens is in clear violation of Chapter II of the Constitution] Though the law in Nigeria today is that socio-economic rights are not justiciable, see further *Okogie v. The Attorney-General of Lagos State* (1981) 2 NCLR 350.

[42] See Emeka Polycarp Amechi, 'Millennium Development Goals (MDGs) and Policy Reform: Realising the Right to Environment in Africa' (Saarbrucken: Verlag Dr. Müller (VDM) August 2010) 83; see also *Agbai & Ors v. Okogbue*, (1991) 10 S.C.N.J. 49, 87

[43] Ibid. ICT Access to Justice: Human Rights Abuses Involving Corporations – Federal Republic of Nigeria (2012) 5. ['ICT Access']

3.3.2 Petroleum Act, (1969)[44]

The Petroleum Act provides for the extraction of oil and gas from the 'territorial waters and continental shelf of Nigeria'.[45] It also vests ownership of all petroleum resources, and the revenue obtained therefrom, in the federal government.[46] Granting the state exclusive ownership over natural resources could however hamper the state-corporate-community relationship, as the debate rages on concerning who owns natural resources. Despite this provision, the state can use its unhindered authority to facilitate the implementation of GP 4. This is because states are objects – 'duty bearers under international law' and are therefore the 'trustees' of the GPs.[47]

The Act empowers the Minister (Petroleum Resources) to make regulations incidental to the purpose of the Act, and to provide generally for 'matters relating to licences and leases granted under the Act'.[48] Such matters could include: 'safe working, the prevention of pollution of water courses and the atmosphere, and the making of reports and returns (including the reporting of accidents) and inquiries into accidents'.[49] The Petroleum Minister is, however, empowered to revoke any licence or lease where the holder fails to comply with the provisions of the regulations.[50] These wide discretionary powers provide the basis for implementation of the GPs – particularly with reference to public reporting as widely provided for under GP 3 (d).[51] Pursuant to the powers to make Regulations provided under the Act – the Petroleum (Drilling and Production) Regulations, 1969, were enacted. The Regulations oblige licensees or lessees to take adequate precautions to 'prevent the pollution of inland waters, rivers, and territorial waters of Nigeria, by oil or other fluids or substances which might contaminate the water, banks of

[44] Cap P10, Laws of the Federation of Nigeria, 2004.

[45] See Preamble to the Act.

[46] Ibid.

[47] See the commentary to GP 4.

[48] Section 9(1) (b)(iii) of the Petroleum Act.

[49] Ibid.

[50] Ibid.

[51] GP 3 (d) provides that, in fulfilling their duty to protect, states should encourage and require companies to communicate how they address their human rights impact.

rivers or the Nigerian shoreline'.[52] They further mandate the corporate actor to control and remedy any such pollution or harm.[53] This is instructive for the implementation of GP 2, which requires states to remedy any harm done and to respect human rights where they operate. Crafting regulations around this preserves the states' own reputation, and also ensures predictability for business enterprises.[54] Furthermore, GP 8 recommends state support for departmental agencies to be conscious of and to observe the states' human rights obligations when carrying out their mandates.

The Department of Petroleum Resources (DPR) is the regulatory agency for the enforcement of petroleum regulations in Nigeria. Some of the key functions of the Department are to: supervise all petroleum-related operations carried out by businesses;[55] to monitor the petroleum industry to ensure it is in line with national goals and aspirations; and ensure that health, safety and environment policies adapt to global and domestic best practices.[56] A cursory examination of the Department's website does not reveal anything closely related to BHR – and does not indicate whether the state has provided adequate mechanisms for information, training and support for key staff who shape business practices.[57] The Nigerian government should therefore ensure that the DPR is aware of government's human rights obligations (if any exist) – by providing the Department with sufficient information and training on BHR. Furthermore, section 9(1) (b) (iii) of the Act empowers the DPR to make regulations for the enforcement of safety and environmental guidelines. Pursuant to this, the DPR issues guidelines which cover the control of pollution from various aspects like petroleum and processing operations. These guidelines are set in the Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN).

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[52] Section 25 of the Petroleum (Drilling and Production) Regulation, 1969.

[53] Ibid.

[54] See commentary to GP 2.

[55] See Department of Petroleum Resources, 'What We Do' *https://dpr.gov.ng/index/functions-of-dpr/#,* accessed 2 May 2017.

[56] Ibid.

[57] See Department of Petroleum Resources, 'Welcome to Department of Petroleum Resources' *https://dpr.gov.ng/index/*, accessed 4 May 2017.

3.3.3 The Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN)[58]

EGASPIN controls pollution from various aspects of petroleum operations. It sets out to regulate the environmental management practices relating to the accidental discharge of oil from oil and gas installations. It also establishes monitoring requirements for oil and gas production.[59] It specifically limits the extent of gas flaring and controls the amount of emissions in flares.[60] The Guidelines are enforceable against the MNCs in the areas of oil pollution. The Guidelines thus aim to establish standards for environmental quality control of the petroleum industry.

3.3.4 Oil Pipelines Act, 1956

The Oil Pipelines Act (OPA)[61] provides for a licence to be 'granted for the establishment and maintenance of pipelines constructed for use in oil mining and oil fields'.[62] In the empirical key informant interview conducted in Port Harcourt, Nigeria, it was indicated that one of the main causes of oil spillage in Nigeria is sabotage by the local community – causing pipeline bursting or rupturing. Some of these pipelines pre-dated Nigeria's independence and are not being maintained periodically. While sabotage could be a potent reason, the MNCs do not adequately maintain the pipelines. For instance, the Act succinctly provides that:

> The holder of a permit … shall take all reasonable steps to avoid unnecessary damage to any land … and any buildings, crops or profitable trees thereon, shall make compensation to the owners or occupiers for any damage done …[63]

Section 5 (d) of OPA obliges the holder of a permit, together with officers and workmen, to enter any land to determine its suitability for the 'establishment of an oil pipeline'. Section 25 allows

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[58] Department of Petroleum Resources, 'Environmental Guidelines and Standards for the Petroleum Industry in Nigeria' (2002) ['Guidelines']

[59] Ibid.

[60] Ibid at paras 3.8.8.1 (iii)-(ix); para 5.6.2.2.

[61] Cap O4, Laws of the Federation of Nigeria, 2004. ['OPA']

[62] See Preamble to the Act

[63] Section 6(3) of OPA.

holders of permit to violate the rights of people by depriving them of the right to property. This arises when such permit holders enter a particular land area, and give the occupant only 14 days of advance notice.[64] Any attempt to deny the permit holder entry will be punishable under the law – with 'three months' imprisonment or the option of a fine'.[65] These provisions could make the implementation of the GPs challenging. Not only have these particular occupants been on the land for years, they are now possibly subject to imprisonment if there is resistance. Nobody would allow their land to be taken at will – even under the law – where such persons have a spiritual attachment to and derive other benefits from the land. In the *Endorois* case,[66] the Kenyan government evicted the Endorois people from their indigenous land for the building of a national reserve and tourist facilities. Only minimal compensation was paid to the Endorois people. The African Commission on Human and Peoples' Rights held that the Kenyan government infringed on the rights of the Endorois people by evicting them from their land. These violations included the right to property, health, culture, religion and natural resources. It therefore ordered Kenya to reinstate the Endorois people to their land and also to compensate them. Under the OPA, the compensation regime does not identify how much is to be paid where a licence holder causes injury to the land in question.[67] It is only where there is a dispute on the amount to be paid as compensation, that recourse can be made to a court.[68]

To ensure local community-corporate trust, section 21 of OPA provides that the court may consider, where the local community's interests have been seriously injured by the acts of the MNCs, that compensation be paid to the ruler, headman or member of the community concerned (on behalf of the community). However, why should the court have to wait until the community is seriously injured? Local communities have sentimental attachments to their land, which range from spiritual to commercial issues, and any deprivation may cause them injury.

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[64] Ibid.

[65] Ibid.

[66] See 276/03, Center for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council)/Kenya; see also Derek Hawkins, 'Activists and Police Trade Blame after Dakota Access Protester Severely Injured' *The Washington Post,* 22 November 2016, *https://www.washingtonpost.com/news/morning-mix/wp/2016/11/22/activists-and-police-trade-blame-after-dakota-access-protester-severely-injured/?utm_term=.83f18b473638,* accessed 4 May 2017.

[67] Section 6 (3).

[68] See Part IV of OPA.

This provision – with noble intentions in terms of compensation – creates an easy regime for MNCs to violate local community human rights. Furthermore, the amount of compensation is insufficient reason for a victim to officially or orally object to the destruction of the occupant's land.[69] The incongruity in determining the amount of compensation speaks volumes on the approach of the state to human rights violations relating to the local community. Presently, the Ogoni land has been devastated by years of exploitation and no extractive company currently operates there. Stipulating and measuring adequate compensation will send a clear message to companies: there are serious complications and large fines to be paid when best practices are not ensured. The permit holder under the Act is not answerable to the future effects of the current devastation of the land. The determination of compensation is discretionary, and is subject to the whims of the court. The court assesses the land or interests on the land, in determining the loss in value.[70] Thus, if the court is not inclined to the BHR agenda – the progressive realisation of the GPs through an instructive Act like OPA could be very challenging.

Section 14 (b) of OPA precludes a licensee (except permitted by the terms of the licence) from making any modification or construction in the 'flow of water in any navigable waterway, in a way that would block or inhibit with the free and safe passage of vessels, canoes or other craft'.[71] The express permission of the Minister (Petroleum Resources) is required if the above provision is to be varied by the lessee. The Act also subjects all licences to regulations concerning public safety and the prevention of land or water pollution.[72] Pursuant to this, section 33 empowers the Minister (Petroleum Resources) to prescribe adequate measures concerning public safety and the prevention of land or water pollution.[73] The Act provides for a ridiculously small amount of money to apply for a licence (₦50, ¢0.16) and for the granting of a licence (₦200, ¢0.66); these amounts could promote frivolous applications. An amount paid does not however determine the responsibility of a licensee, however, a high licensing fee to construct a

[69] Section 9(2) of OPA.

[70] See generally section 20 of OPA.

[71] Section 14 (c) of OPA.

[72] See section 17 (4) of OPA.

[73] see also section 34 of OPA.

pipeline across community land, for instance, would put pressure on the licensee to consider human rights implications in its operations.

As a sequel to sections 33 and 34 of the Act, the DPR published Guidelines for the Operation and Maintenance of Oil and Gas Pipelines.[74] The Guidelines require a prospective applicant for the construction of an oil pipeline to submit to the DPR a preliminary environmental impact assessment.[75] The Guidelines also oblige an applicant to establish an emergency plan – should there be system failures, accidents and other emergencies.[76] This emergency plan shall include plans for prompt and pragmatic remedial action for the protection of the property, environment and pipeline.[77] These provisions conform to GP 3(c), which recommends to states that they provide operational direction to companies on 'how to respect human rights throughout their operations'.

3.3.5 Environmental Impact Assessment Act, 1992

Within the last decade, the Environmental Impact Assessment (EIA) process has evolved to a wider consideration of the socio-cultural and health consequences of projects. This evolution, now referred to as Environmental and Social Impact Assessment (ESIA), envisages an evaluation of the effect of a developmental project on a people's culture, community, health and well-being.[78] This evolution combines health, socio-economic, environmental, cultural and

[74] See Department of Petroleum Resources 'Guidelines and Procedure for The Construction, Operation and Maintenance of Oil and Gas Pipeline Systems in Nigeria' (2007), DPR P-1P

[75] Ibid, at sections 1.2.3.7 and 1.2.3.8.

[76] Section 2.4.1.

[77] Ibid.

[78] See further T. C. Nzeadibe, et. all, Integrating Community Perceptions and Cultural Diversity in Social Impact Assessment in Nigeria' (2015) 55, *Environmental Impact Assessment Review*, 74. [noting the extent of local perceptions and cultural diversity in participatory development and arguing for the integration of community perceptions and cultural diversity into Nigeria's Environmental and Social Impact Assessments]; Z.A. Elum, K. Mopipi, & A. Henri-Ukoha, 'Oil exploitation and its socioeconomic effects on the Niger Delta region of Nigeria' (2016) 23 *Environmental Science and Pollution Research*, 12880-12889. [arguing for an increased role of companies operating in the Niger-Delta to modernise infrastructure and equipment so as to prevent avoidable oil spillages that often lead to community restiveness, and further intensify joint efforts between multinationals and government in the capital development].

psychological well-being and an all-encompassing assessment of inter-relationships between human beings and the natural environment.[79]

The EIA Act was promulgated as Decree No 86 of 1992. Under the Act, it is compulsory for any extractive project to establish whether such activity may likely, or to some extent, affect the environment or have any environmental effect.[80] Before deciding to approve the proposed activity, government authorities at all levels, corporate bodies, and any person – must take such environmental effect into account before either granting or applying for a grant.[81] The EIA Act therefore forbids the undertaking of or embarking on projects which may significantly affect the environment, without prior consideration of their environmental effects.[82] This process must include sharing information and consultation between the project developer and local community members which are host to the extractive project.[83]

The Act provides a mandatory list of the development projects that must be preceded by an EIA.[84] Thus, any extractive resource projects must be subjected to an impact assessment process. Section 12 provides that where an extractive project is identified, the government or any of its agencies shall not permit such projects to be done in any form, shape or manner – unless such an agency has, in accordance with its statutory powers, assessed that such projects should proceed with or without any conditions. Despite this, where a project will affect the environment – even though it is not contained in the mandatory list, the Act provides that appropriate environmental issues should be identified and studied before such a project or activity commences.[85] An impact assessment must contain information on how the proposed activity affects the environment, and whether there are alternative means for carrying out the project and ways to mitigate adverse environmental impacts of the project – including human rights

[79] Nzeadibe et al, above note 78.

[80] Section 1(a) of the EIA Act.

[81] Ibid.

[82] Section 2(1) (2)(3) of the EIA Act.

[83] Sections 4 and 9(1) provides the minimum contents of an EIA; human rights impact is not included.

[84] See Section 12, Schedule to EIA Act.

[85] Section 3(1) of EIA Act.

violations.[86] GP 18 provides that, in order to measure human rights risks, companies should 'identify any actual or potential adverse human rights impacts' that may arise in the course of their activities; this makes impact assessment imperative. Likewise, GP 19 provides that companies 'should integrate the findings from their human rights impact assessment' into their business activities. Consequently, under the GPs, human rights impact assessments must be incorporated into other processes like environmental and social impact assessments.[87] Businesses are capable of potentially impacting practically on any internationally recognised human rights. Thus, the EIA Act must be expanded to accommodate human rights impact assessment, as part of its impact assessment processes. Furthermore, efforts to avoid or lessen unfavourable human rights impacts must be geared to integrating the outcomes of EIA within corporate human rights policy commitments. This will facilitate a regime of corporate culture in terms of preparing for any potential human rights impact of corporate behaviours.

The EIA ensures that the local community is aware of potential developmental projects. This is possible through public participation in public hearings – and the proceedings of such hearings, including public comments, shall be detailed in a panel's report.[88] Through this process, opportunity is given to government, the public, and specialists to make comments on the EIA of a proposed project.[89] The extent to which the local community is to be involved is however, unclear. That said, the Act specifically mentions 'public', and it therefore seems that project developers and government officials may only allow the public to attend public hearings and voice their concerns, but after that their concerns may not necessarily be included in a 'panel's report' – since the report is not subjected to any referendum. Besides, the mere fact that an EIA is only useful in a pre-development stage, makes the enforcement of an EIA questionable. An impact assessment must follow the life-cycle of any project. The EIA does not mention any human rights impact assessment; thus, it is possible that while carrying out the environmental impacts of a project, certain rights of local communities may be violated, such as the right to property – which is different from environmental impacts (oil pollution, gas flaring).

[86] Sections 4, 17(1) (2) of the EIA Act.

[87] See Commentary to GP 18.

[88] Section 27 of the EIA Act.

[89] See sections 6-11 of the EIA Act.

However, under the Act, human rights violations are not included. Any violation of the provisions of the Act carries a term of imprisonment or the offender is liable to fines.[90] Like other extant environmental laws, the financial penalty for a corporate body carries a fine of ₦1million ($3275). These paltry penalties will, however, not ensure serious compliance with the Act.

The sustainability of resource projects cannot be left to the state alone. Independent review panels or bodies should be constituted to periodically review these extractive resource projects so that they conform to human rights aspirations. To ensure positive extractive resource governance, there must be a 'transparent, accountable and rights-based process'[91] for extractive projects.

3.3.6 The National Oil Spill Detection and Response Agency (NOSDRA)

The Law establishing the Agency is known as the National Oil Spill Detection and Response (Establishment) Act No. 15 of 2006. This Act empowers the Agency to regulate oil and gas industries with regard to oil spillages,[92] and to detect and respond to oil spills in Nigeria.[93] The core functions of the Agency are to: ensure compliance with environmental legislation concerning oil spills;[94] coordinate oil-spill response activities throughout Nigeria;[95] co-ordinate the implementation of the National Oil Spill Contingency Plan (NOSCP) for the elimination of dangerous substances, as may be published by the government from time to time;[96] assist with arbitrating between host communities and the environment degrader; measure any harm

[90] Section 62.

[91] D. Olawuyi, *The Human Rights Based Approach to Carbon Finance* (2016) 71.

[92] NOSDRA Act No. 15 of 2006, see also Statutory Instrument No.25 Oil Spill Recovery, Clean-up, Remediation and Damage Assessment Regulations, 2011.

[93] See Preamble to the NOSDRA Act.

[94] See section 5 of NOSDRA Act; see also Statutory Instrument No.25 Oil Spill Recovery, Clean-up, Remediation and Damage Assessment Regulations, 2011.

[95] Ibid.

[96] Ibid.

triggered by an oil discharge; and supervise the clean-up operations, in order to guarantee full restoration of the affected areas.[97]

The procedure for NOSDRA when an oil spill occurs, includes:

1. Receive report of incident with the location and date of the oil spill, as well as the name of the facility from which the leak occurred.
2. Participate in a Joint Investigation Visit (JIV) to determine the cause and extent of the pollution. Members of the JIV include representatives of NOSDRA, DPR, the Rivers State Ministry of Environment, the spiller (the oil company), and the community.
3. Geo-referencing all oil-spill sites, by recording the coordinates of the site using a Global Positioning System (GPS).
4. Enter details of the oil spill in the Agency's online data bank.
5. Receive a clean-up/remediation plan from oil companies.
6. The Agency will monitor the clean-up or remediation work.
7. Certify and close-out the oil-spill incident. This is done by visiting the site after the clean-up/remediation work is completed, to collect soil or water samples for laboratory analysis to determine if the level of harmful substances like Total Petroleum Hydrocarbon (TPH), Benzene, Toluene and Xylene in the contaminated site or medium, are within allowable regulatory limits.[98]

In chapter 5, the data analysis has revealed that, in some instances, NOSDRA does not certify and close-out the oil-spill incident – even when it is obvious that remediation has been concluded. When an oil spillage occurs, payment for compensation is based on the law.[99] First, the operator of the facility where the oil has spilled shall pay compensation to an oil-spill victim for damages caused.[100] Second, compensation is not paid when the cause of the spill is due to sabotage.[101] Third, the operator shall internalise the cost of compensation – as part of the polluter-pays-principle.

In an interview with key personnel of NOSDRA, the researcher was informed that the Agency – being a regulatory body in nature – does not respond to oil spillages directly, but rather the owner of a facility where spills occurred (MNCs) is expected by law to report and inform the

[97] Ibid.

[98] Ibid.

[99] Part III, section 26, statutory Instrument No.25 Oil Spill Recovery, Clean-up, Remediation and Damage Assessment Regulations, 2011,

[100] Ibid at s 26(1).

[101] S 26(2)

Agency about the spillage within 24 hours.[102] Furthermore, the Agency does not carry out clean-up operations; it monitors clean-up activities carried out by the spiller, to ensure that the clean-up is done in line with the regulations. On whether the Agency seeks advice from the community, the researcher was also informed that:

> A representative of a community is always part of the team that carries out joint investigation to determine the cause of a spill incident and oil-spill-related activities, and, as such, they are part of those that contribute to decision-making in the field during investigation and assessment.[103]

According to GP 18, human rights situations are dynamic, and states must therefore craft policies in response to changes in an operating environment. NOSDRA seems to be empowered to respond to these oil-spill challenges. Whether it is effective in doing this, seems yet to be determined; Chapter 5 provides an overview of this responsibility.

3.3.7 Niger-Delta Development Commission (NDDC)

To protect the Niger-Delta environment, the National Assembly enacted the Niger-Delta Development Commission Act, 2000 – which established the NDDC. The Commission was set up to facilitate the 'sustainable development of the Niger-Delta' region. The core functions of the NDDC are to: prevent environmental problems that arise from the extraction of natural resources; and to advise the state on the avoidance and control of oil spillages and environmental contamination. The terms of this Act are in consonance with GP 1, which provides for the state's duty to protect against human rights through effective legislation

3.3.8 The Petroleum Bill

After 17 years of debating the comprehensive Petroleum Industry Bill – on 25 May 2017 the Nigerian National Assembly passed a small portion of the bill as the Petroleum Industry Governance Bill (PIGB),[104] which is now awaiting the Presidents assent. The original

[102] Interview with a key staff of NOSDRA on 15 October 2016.

[103] Ibid.

[104] See Federal Republic of Nigeria, 'A Bill for an Act to Establish the Legal and Regulatory Framework,

comprehensive bill had to be split into three Bills in order for one part to be passed as the PIGB.[105] The third bill, which is also yet to be passed, is largely relevant to the discourse in this thesis and focuses on the Host Community Fund and the management of local community participation in governance.[106]

For purposes of the discussion in this segment, the three bills are referred to jointly as the Petroleum Industry Bill as initially titled. The Nigerian government has sought to regulate the extractive industry through the drafting of the Petroleum Industry Bill (PIB). This bill, when fully passed into law, will provide a comprehensive legal structure for the petroleum industry. It will also reform the industry through amalgamation of all existing laws and is expected to promote rapid development of the petroleum sector. However, since this bill was introduced in the National Assembly in 2009, it has not yet been made law as a result of numerous vested interests which have influenced redrafts of various accountability provisions. Even the component of the PIB that has been passed by the National Assembly as the PIGB is yet to be assented to by the President.

The PIB seeks to create adequate extractive resource governance. Some of its key objectives include: 'promoting transparency and openness in the administration of petroleum resources in Nigeria, promoting the development of Nigerian content in the petroleum industry;

Institutions and Regulatory Authorities for the Nigerian Petroleum Industry, to establish Guidelines for the Operation of the Upstream and Downstream Sectors, and for Purposes Connected with the Same' (Petroleum Industry Bill, HB 159, 2008), *http://www.petroleumindustrybill.com/wp-content/uploads/2012/07/Presidency-bill-HB_159_0.pdf*, accessed 21 May 2018; The Senate, Federal Republic of Nigeria, Report of The Senate Joint Committee on the Petroleum Industry Governance Bill 2017, SB 237, *http://www.petroleumindustrybill.com/wp-content/uploads/2017/05/FINAL-COPY-OF-PETROLEUM-INDUSTRY-GOVERNANCE-BILL-2017-May-15.pdf*, accessed 20 May 2018; Online Editor, 'Senate Passes Petroleum Industry Governance Bill, *The Guardian* (25 May 2017); See further Julia Payne, Camillus Eboh, 'Nigeria passes major oil reform bill after 17 year struggle' *Reuters* (18 January 2018), *https://www.reuters.com/article/us-nigeria-oil-law/nigeria-passes-major-oil-reform-bill-after-17-year-struggle-idUSKBN1F72I2*, accessed 19 May 2018.

[105] Ibid.

[106] See, Federal Republic of Nigeria, Petroleum Host and Impacted Communities Development Bill 2018, *http://www.petroleumindustrybill.com/wp-content/uploads/2018/04/PHICDB.pdf*, accessed 21 May 2018. See further, Federal Republic of Nigeria, 'Harmonized Petroleum Industry Governance Bill 2018', *http://www.petroleumindustrybill.com/wp-content/uploads/2018/04/Harmonised-Clean-Copy-of-Petroleum-Industry-and-Governance-Bill-2018.pdf*, accessed 21 May 2018; Federal Republic of Nigeria, 'Petroleum Industry Fiscal Bill 2018, (SB. 472), *http://www.petroleumindustrybill.com/wp-content/uploads/2018/04/PIFB.pdf*, accessed 21 May 2018; Federal Republic of Nigeria, 'The Petroleum Industry Administration Bill 2008, (SB. 540), *http://www.petroleumindustrybill.com/wp-content/uploads/2018/04/PIAB.pdf*, accessed 21 May 2018.

and protecting the health, safety and the environment during petroleum operations'.[107] The PIB seeks to increase exploration of petroleum resources, unbundle the hydra-headed Nigerian National Petroleum Corporation (NNPC), and overhaul the upstream and downstream sectors and create a new fiscal regime.[108] Under the new regime, gas flaring will be eradicated,[109] gas supply will be optimised (particularly for power generation), and efficient and effective regulatory agencies will be created.[110] Interestingly, the PIB intends to create new regulatory institutions – while eliminating the old ones.[111] While the PIB seeks to reform existing law, it still allows for the same sorts of problems that existing laws have failed to resolve. For instance, under section 5, the Minister 'shall exercise general supervision over all the operations and institutions in the industry'.[112] These wide and general powers granted to the Minister do not provide for the needed transparency in the extractive sector, which is an imperative under the commentary to GP 21. Concentration of powers without checks and balances leads to corruption and the abuse of power. The Minister's power should be diminished, in order to allow for consultation with the host communities to extractive projects and departmental agencies – in this case the DPR. Furthermore, the current rate of petroleum profits tax under the Petroleum Profits Tax Act, 1959, should be reviewed in order for the tax to promote meaningful impacts on the indigenous community. The current tax rate is 50% for operations in the deep offshore and the inland basin – while 85% is for operations onshore and in shallow waters.[113] Despite this huge amount of money, however, the local community does not feel the impact of the Nigerian state in terms of using the tax proceeds for the development of its citizens.

[107] Section 1 of the Bill.

[108] Ibid.

[109] Sections 179 (3) (f), 201, 275.

[110] Ibid.

[111] These institutions include Petroleum Technical Bureau, Petroleum Equalization Fund, National Petroleum Assets Management Corporation, Upstream Petroleum Inspectorate, National Gas company. Existing legislation such as the Associated Gas Re-Injection Act, Petroleum Profits Tax Act 1959, Petroleum Act 1969 will be repealed.

[112] Under section 5, the Minister has wide discretionary powers to allocate licenses for the exploration, prospecting, and mining of oil. Thus, no oversight or due process for allocating such oil blocks.

[113] Section 21 and 22 of the Petroleum Profits Tax Act, Cap P13, LFN, 2004.

The most innovative and significant arrangement under the PIB is the unbundling of the NNPC.[114] The NNPC has continued to be a powerhouse of corruption and also a bureaucratic bottleneck. For about a decade, the NNPC did not audit its account once[115] – this while it was used as a conduit for money laundering.[116] An important novelty in the PIB which is relevant to this research is the establishment of the Petroleum Host Community Fund.[117] This mandates MNCs in the upstream sector to remit 10% of their monthly net profits to the Fund – to be applied to the 'development of the economic and social infrastructure' of the host communities to extractive resource projects.[118] This is doubtless intended to safeguard the interests of the host communities and to encourage transparency and accountability in the operations of the industry. Ill-advisedly, however, the management of the Fund is vested in the Minister.[119] Furthermore, the President is empowered 'to grant a license or lease' without expressly subjecting the President's powers, in this context, to the requirement of an open and competitive bidding process.[120] This provision could be said to contradict one of the objectives of the PIB – promoting transparency and openness in the Nigerian oil and gas industry. The Act could further provide for agencies that would ensure transparency and accountability. These Agencies will be independent, multi-stakeholder initiatives saddled with the responsibility to monitor and enforce government compliance with extractive-related issues. Hopefully, the Fund will mitigate human and environmental pollution in affected local communities.

GP 21 recommends the provision of transparency and accountability to persons impacted by extractive resource projects; this responsibility falls on businesses. To ensure accountability, institutions that are independent of government interests must be set up. They should be bodies

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[114] Section 148 of the PIB.

[115] Anjli Raval & Maggie Fick, 'Nigeria Unveils First Accounts in Decade' *Financial Times* 15 February 2016, *https://www.ft.com/content/b5a5f5f0-cf20-11e5-92a1-c5e23ef99c77*, accessed 5 May 2017.

[116] 'Nigeria's NNPC 'failed to pay' $16bn in oil revenues' *BBC News*, *http://www.bbc.com/news/world-africa-35810599*, accessed 5 May 2017.

[117] Section 116 of the PIB.

[118] Ibid. The Nigerian Constitution provides for the payment of 13% of the revenue from the Federation Account be paid to oil producing States.

[119] Section 118 (6) & 8.

[120] Section 191.

that review project implementation – to ensure that guidelines and the laws are complied with. It is easy for national governments and project proponents to lay claim to transparency and human rights protection during the design and execution of an extractive project. Some even go as far as providing policy statements on websites. This considered, there is a need to establish formal compliance mechanisms under the BHR regime, to measure and monitor human rights compliance in the execution of extractive projects. Such bodies must be divested of government pressure or control and must constantly review extractive projects to ensure they consistently obey laws and regulations that protects human rights of local communities.[121] The BHR agenda is critical. Transparency and accountability go beyond mere statements on websites and reports and should include reviewing and monitoring the methods and approaches of complying with such statements. Without adequate monitoring and accountability mechanisms under the Commentary to GP 5 and GP 31 – a project designed to achieve a laudable goal can produce monstrous repercussions for the public. It is therefore imperative for the state to establish institutions that will monitor and investigate allegations of human rights abuses. Any institution established by the state to investigate allegations of human rights abuse must be independent of government or any form of political control. The institutions that will monitor and investigate allegations of human rights abuses must also indicate that MNCs have satisfied the requirements for human rights compliance, before a project commences.

An innovative provision under the PIB is the requirement for a licensee to submit an environmental management plan for approval.[122] This plan is expected to contain the licensee's written environmental policy, objectives and targets, and commitments to comply with the relevant laws, regulations and guidelines.[123] The plan should also investigate, assess and evaluate the impact of the licensee's proposed activities on the environment.[124] The plan shall detail how the licensee intends to mitigate any adverse effect of negative activities on the environment, and how the negative impact will be contained or remedied.[125] The licensee will also develop an

[121] See article 15 of the Aarhus Convention which established a non-confrontational and non-judicial Compliance Committee.

[122] Section 200 of the Bill

[123] Ibid.

[124] Ibid, see also Sections 179 (e) and 195 (g).

[125] Section 293.

environmental awareness plan which details the manner in which it intends to inform its employees of any risks which may result from their operations, and the ways the risks may be curtailed so as to avoid pollution or environmental degradation.[126] Concentrating the management of natural resources in the hands of state agencies has not yielded any positive extractive resource governance – hence the suggestion to create a state-community (NGO)-corporate relationship.

3.3.9 The Land Use Act, 1978[127]

Every individual has the immutable right to own immovable property in any place where such individual is lawfully permitted to reside.[128] Although section 44 (1) of the Constitution provides that 'any right over, or interest in', immoveable property shall not be taken possession of or acquired compulsorily, except where a law provides for such compulsory acquisition, section 44 (3) effectively grants the entire property and control of natural resources 'in, under or upon any land, territorial waters and the Exclusive Economic Zone' to the Federal Government of Nigeria. The management of such resources is, however, to be prescribed by parliament.

Extractive resource projects have the potential to deprive individuals of land rights. More compelling is that in many cases of compulsory acquisition, compensation is not paid by the state. Article 17 of the Universal Declaration of Human Rights protects the right of individuals to ownership and use of property. The United Nations Declaration on the Rights of Indigenous Peoples provides that states shall, *inter alia,* 'provide effective mechanisms for the prevention of, and redress for, any action – which has the aim or effect of dispossessing indigenous peoples of their lands, territories or resources'.[129] Article 14 of the African Charter on Human and People's Rights guarantees the right to property,[130] though this right can be infringed in the interests of the public, community, and must be done within the purview of appropriate laws.[131] The Land Use

[126] Ibid.

[127] Cap L, LFN, 2004.

[128] Sections 43 and 44 of the Nigerian constitution (Nigeria); sections 25, 26 of South African Constitution (1996).

[129] Article 8 (2) (b) of the United Nations Declaration on the Rights of Indigenous Peoples.

[130] See Article 14.

[131] Ibid.

Act (LUA) entrusts all the land in the 'urban area of a state in the governor of that state' – who 'holds the land in trust for the people and manages it for them'[132]. The rights to land in non-urban areas are vested in local governments.[133] The rights of the state or the local government to hold these lands in trust does not apply to lands owned by the federal government[134] – which includes lands on which extractive resource projects are built.

The commentary to GP 3 directs states to review whether their laws and policies provide a conducive environment for corporate respect for human rights. GP 3 particularly recommends that states clarify the area of law pertaining to 'access to land, including entitlements and ownership of land necessary to protect rights-holders' and corporate entities.[135] The LUA unnecessarily strips Nigerians of ownership over their land and natural resources. Section 66 explicitly states that the exclusive right of land owners (subject to a 99-year of right of occupancy) is restricted against the governor of a state, and any land where there is prospecting for natural resources.[136] Thus, local communities do not have access to and ownership over the properties where extractive projects are undertaken. Where they are already in possession of the land, the governor can withdraw a 'right of occupancy' over the land where there is a prospect of an oil pipeline or mining. To avoid this right deprivation, most indigenes keep quiet if they discover natural resources on their land – so preventing the government from accessing the resources. In an interview with a key informant from Old Bakana, the Degema local government area of Rivers State, the research participant said:

> The government is not trying to do anything. So many people are keeping quiet about the minerals found on their property. I know of a place where there is limestone […] they said they will not mine it […] They are only avoiding federal government from coming into the community. If the federal government comes in, the community will be evacuated. […]

[132] Ibid.

[133] Sections 1 and 2 of the LUA.

[134] Section 49 of the LUA.

[135] See Commentary to GP 3.

[136] Section 28 of the LUA.

The LUA does not consider the rights to property or potential violation of local community human rights, when communities are relocated or dispossessed of their land.[137] Adequate compensation is not paid to victims of land grabs by the state and companies, while victims are not resettled very well. The weak human rights regime does not facilitate the sustainable development of extractive resources. This could have serious implications for the implementation of the GPs. The government must provide a guarantee 'that project sites and lands have not been indiscriminately acquired – and where procedurally acquired, adequate compensation must have been paid to those whose lands have been affected. This policy would prompt the government to take the human rights agenda seriously'.[138]

The right to own immoveable property is subject to the overriding states' authority to utilise that land in the interest of the public. Such state authority must be exercised prudently in the interests of the host communities, not the MNCs.[139] Occasionally, lands are appropriated for political reasons – exclusive of reparation. Indigenous communities have deep ancestral ties to their land, if for any reason, these communities are to be relocated, adequate compensation must be paid. Since the idea of compensation is based on public interest,[140] it is therefore morally and ethically sensible to pay adequate compensation. Perhaps, host communities should be included in the contractual negotiations between state and MNCs before any land is expropriated. Under this arrangement, extractive projects on land taken from communities will not be stifled by those communities.

Ordinarily, development of a country's natural resources should be for the economic development and empowerment of the citizens of that country. However, host communities are not involved in the decisions to develop these resources. These decisions implicate the host

[137] In *SERAC v Nigeria*, (2001) AHRLR 60 (ACHPR 2001), the African Commission held that the forceful possession of Ogoni land, without compensation, violated article 14 of the African Charter on Human and Peoples Rights. In South Africa, customary land rights have a tortuous history because of the land policy under the apartheid government. For instance, the Communal Land Rights Act, 2004 (No. 11, 2004), transfers communal lands to communities and regulates the democratic administration of communal lands by communities; the Restitution of Land Rights Act (No. 22 of 1994-the Act sets up a process of giving redress to persons and communities that lost land during the apartheid government.

[138] O. Abe, 'The Feasibility of Implementing the United Nations Guiding Principles on Business and Human Rights in the Extractive Industry in Nigeria' (2016) *Journal of Sustainable Development Law and Policy* 155.

[139] Ibid.

[140] Section 28 of the LUA.

communities tremendously – dislocation from land, deprivation of spiritual and cultural practices. To further the intentions of the GPs, government must adequately compensate local communities where communal lands have been acquired for the development of extractive resource projects.

3.3.10 Companies and Allied Matters Act (CAMA) 1990[141]

CAMA is the only statutory document that regulates corporate entities in Nigeria. CAMA has 696 sections. However, it does not provide for human rights protection in any of the sections. Nonetheless, under section 300 the court may grant injunctions against company actions that contradict or are *ultra vires* the company's Articles of Incorporation or are in breach of shareholder rights. Due to the lack of human rights provisions in CAMA, it is difficult to know whether the actions of directors or the company in relation to human rights compliance, will amount to a breach of the fiduciary duties of the directors. The provision enabling the company to sue in order to remedy any wrong is contained in the 'Protection of Minorities from Illegal and Oppressive Conduct' section of the Act.[142] CAMA must be revised to adapt to changing dynamics of globalisation in the context of business and human rights. It must contain the human rights interests of key stakeholders in the resource sector - host communities to extractive resource projects.

The CAMA requires Directors to have duty of care towards their stockholders.[143] Furthermore the Act compels Directors to act in 'utmost good faith towards the company'.[144] Thus, at the Management level, rational decisions should be taken, that will not lead to human rights violations of stakeholders. Executives of the company should consider human rights obligations to be in the best interests of the company. Can it therefore be said that a Director may have authorised human rights infringements which the company actively took part in? This research submits that the company's 'best interest' does not only end in satisfying the shareholders, but also extends to complying with human rights duties available under domestic corporate and environmental laws. For instance, GP 3 (b) provides that, states must 'ensure that

[141] Cap C20, LFN, 2004. ['CAMA']

[142] See Part X of CAMA.

[143] Section 279 of CAMA.

[144] Ibid.

their laws and policies in the area of corporate law do not constrain but enable business respect for human rights'. To achieve this, CAMA must require companies to commit to respecting human rights in their activities. Human rights commitments must be incorporated into their Memorandum and Articles of Association. Any company dealing with the extractive industry must include in its Article of Incorporation how it commits to socially responsible custom – which must include the responsibility to respect human rights. Furthermore, for any such companies listed on Nigeria's stock exchange, there must be a requirement that companies commit to their human rights responsibilities through their CSR, ethical dealings, and social commitments. South Africa has been able to achieve this listing requirement under the King Code of Corporate Governance.

Since CAMA was enacted in 1990, it has not experienced any thoughtful amendment procedure. CAMA must therefore be restructured to accommodate human rights provisions in the corporate set-up. At the point of company registration, the GPs can be included in the incorporation documents to be submitted by the companies, who must commit to human rights principles.[145] Nigeria can take a cue from India in this regard. In 2013, India directed all its registered companies earning above a particular threshold – to 'spend at least 2% of their average net profits over three years in pursuance of' CSR within India'.[146] After all, some of Nigeria's environmental laws – as discussed above – recognise human rights, and corporate law can do more than that.

The courts have been divided on whether corporations have human rights obligations. In *Ategie v Mck Nigeria Ltd*,[147] the court declined jurisdiction over an enforcement of fundamental rights claimed on the basis that the case could not be brought against a company – even though there was an allegation of a breach of fundamental rights. In *Abdulhamid v. Akar*,[148] the Supreme

[145] See Alexor Limited, Integrated Report 2014 (2014) at 17. Companies do need to understand the importance of negotiating with local communities in provision of essential services, such as health care, housing, water and education. Integrity, business ethics and compliance with domestic law are *sine qua non*-to protecting the safety and health of the host local communities.

[146] See section 135 of India's Companies Act 2013. It further requires companies to disclose their CSR programmes in their financial reports and on the company's website. Reasons for failure to spend the required amount must also be indicated in the report. See Companies (Corporate Social Responsibility Policy) Rules, 2014.

[147] Suit No. M/454/92. See generally, ICT Access, above (n 42) 21.

[148] (2006) 5 S.C., 44. See in particular, *Ale v. Obasanjo* (1996) 6 NWLR (Pt. 458) 394; *Aderinto v. Omojola* (1998) 1 FHCLR 101.

Court held that where the violation of human rights is committed by non-state actors, the victim would have a right to proceed against the perpetrator. In *Uzoukwu v Ezeonu II*,[149] the Court of Appeal held that infringements of civil and political rights under the 1979 Constitution were enforceable against the state, non-state actors and individuals.[150] In *Peterside v IMB*,[151] the Court rejected the notion that fundamental rights guaranteed under chapter four of the Constitution can only be enforced against government but cannot be enforced by one individual against another, including corporate actors.[152]

It seems the courts are more inclined to entertain public interest litigations in human rights brought under the Fundamental Rights (Enforcement Procedure) Rules, 2009.[153] The Rules prevent the striking out of a case for want of *locus standi*.[154] Instructively, section 3 (b) advances applications which may be brought under the GPs. It provides that the Court 'shall respect municipal, regional and international bill of rights' brought to its attention, whether these bills form instruments themselves or they constitute parts of a larger documents like constitutions.[155] Under the Rules, the Courts are enjoined to proactively ensure fairness for all classes of petitioners: 'poor, illiterate, uninformed, vulnerable, incarcerated, and the unrepresented'.[156] The Rules oblige Courts to ensure the speedy and effective enforcement and realisation of human rights.[157] This can be done by advancing good governance, human rights and culture through

[149] (1991) 6 NWLR [Pt. 200] 708.

[150] Ibid.

[151] (1993) 2 NWLR (Pt. 278) 377.

[152] See further *Onwo v. Oko* (1996) 6 NWLR (Pt. 456) 584 at 603; *Okoi v. Inah* (1998) 1 FHCLR 677; *Anigboro v. Sea Trucks Ltd* (1995) 6 NWLR (Pt. 399) 35.

[153] Section 3 (e) of the Fundamental Rights (Enforcement Procedure) Rules, 2009. ['FREP'].

[154] Ibid, section 3(e); see further: *Adesanya v The President of Nigeria*, (1981) 2 NCLR 258; See also Tunde I. Ogowewo, 'Wrecking the Law: How Article III of the Constitution of the United States Led to the Discovery of a Law of Standing to Sue in Nigeria, (2017) 26 *Brooklyn Journal of International Law*, 527 [tracing the problem with standing to sue in Nigeria to the construction placed by the courts on section 6(6) (b) of the Nigerian Constitution.

[155] Ibid, section 3 (b).

[156] Ibid, section 3(d).

[157] Ibid, section 3 (f).

positive deference to human rights enforcement. Provision of human rights obligations under CAMA would be the only solution to states' duty to protect human rights under GP 1.

3.3.11 National Environmental Standards and Regulations Enforcement Agency (Establishment) Act 2007. (NESREA Act).

The NESREA Act repealed the Federal Environmental Protection Act and established the National Environmental Standards and Regulations Enforcement Agency (the Agency). The Agency is generally responsible for the "protection and development of the environment, biodiversity conservation and sustainable development of Nigeria's natural resources",[158] as well as the enforcement of environmental standards regulations, rules, laws, policies and guidelines.[159] The Agency is specifically tasked with the responsibility of enforcing compliance with the provisions of international agreements, protocols, conventions, and treaties on the environment, including conventions on climate change, ozone depletion, amongst others. Unfortunately, the Agency is excluded from regulation of air pollution in the oil and gas sector.[160]

In furtherance of its mandate to protect the environment, the Agency has released several regulations to protect the environment. An important one which is instructive for this thesis is the National Environmental (Pollution Abatement in Mining and Processing of Coal, Ores and Industrial Minerals) Regulations 2009.[161] These Regulations are basically directed at minimizing pollution from mining and processing of coal ores and industrial minerals. Extractive industries are obliged to apply up-to-date, efficient and cleaner production technologies, and also pollution prevention measures that will bring environmental and economic benefits.[162] They further

[158] Sections 2, 18 of the NESREA Act.

[159] Ibid.

[160] See section 7 (c), (d), (h) of the NESREA Act.

[161] National Environmental (Pollution Abatement in Mining and Processing of Coal, Ores and Industrial Minerals) Regulations (2009).

[162] Ibid, articles 1-3

provide that extractive companies must ensure compliance with prescribed guidelines for safe levels of air pollutants tolerable to human, plants and animals.[163]

3.3.12 Nigerian National Human Rights Commission Act 1995

The Nigerian National Human Rights Commission of Nigeria (the Commission) was established by the National Human Rights Commission Act, 1995, as amended by the NHRC Act, 2010.[164] The Commission functions as an extra-judicial mechanism which safeguards the human rights of the Nigerian population, provides an enabling environment for promotion, protection, and enforcement of human rights.[165] It monitors human rights in Nigeria, assists victims of human rights violations, and helps in the formulation of the Nigerian Government's policies on human rights.[166] The Commission has not been active in terms of the business and human rights agenda. There is no record of any investigation either instigated by the Commission or involved in, concerning corporate-related human rights violations.

3.3.13 Child Rights Act 2003

One area which could be overlooked under the business and human rights agenda in Nigeria concerns the protection of the child. This is particularly important because of the disproportionate impact on children's health, development and future constituted by the negative effects of extractive industry activity.[167] Furthermore, some multinational corporations are known to engage child labour in certain jurisdictions. For example, in *Doe v Nestle*[168] an action

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[163] Ibid, article 30.

[164] See the National Human Rights Commission Act, 1995, as amended by the National Human Rights Commission Act, 2010.

[165] Ibid.

[166] May Agbamuche-Mbu**,** 'Nigeria and its Human Rights Commission', *ThisDay* (21 October 2014), *https://web.archive.org/web/20150402095128/http://www.thisdaylive.com/articles/nigeria-and-its-human-rights-commission/191769/*, accessed 11 May 2018.

[167] See further, J. Gardam, 'A Gender Aware Approach to Legal and Policy Strategies for Achieving Access to Modern Energy Services in Sub-Saharan Africa' in Yinka Omorogbe & Ada Ordor (eds.) *Ending Africa's Energy Deficit and the Law: Achieving Sustainable Energy for All in Africa* (2018), 191; Ibe Okegbe, 'The Denial of Sustainable Energy as a Violation of Child Rights' in Yinka Omorogbe & Ada Ordor (eds.) *Ending Africa's Energy Deficit and the Law: Achieving Sustainable Energy for All in Africa* (2018),215-232.

[168] No. 10-56739. D.C. No. 2:05-CV-05133- SVW-JTL.

was brought by former child slaves who were forced to harvest cocoa in the Ivory Coast. The plaintiffs alleged that the defendant corporations aided and abetted child slavery by providing assistance to Ivorian farmers. The Nigerian National Human Rights Commission (NNHRC) must therefore be proactive in the promotion and protection of children's rights. The Nigerian Child Rights Act 2003,[169] domesticated the UN Convention on the Rights of the Child 1989.

The CRA was designed to provide a holistic legislation for the protection of rights and responsibilities of children. Section 1 of the CRA provides as follows: 'in every action concerning a child, whether undertaken by an individual, public or private body, institutions of service, court of law, or administrative or legislative authority, the best interest of the child shall be the primary consideration.'[170] The Act acknowledges the inalienable right of each child to certain basic rights, including the right to life,[171] freedom of thought, conscience and religion, subject to parental guidance,[172] protection from sexual exploitation, prostitution and pornography.[173] In particular, the CRA provides that children must be protected from child labour, skin marks, among other forms of abuse.[174] Consequently, the Act recognises the vulnerability of children owing to their tender age and limited opportunities and makes provisions for their specific needs and rights. In effect, the CRA presents a channel for the operationalising of the GPs.

The NNHRC thus provides a robust platform for the promotion, protection and enforcement of human rights. Nigeria's signature to the UN Declaration of Human Rights, 1948 obliges the state to integrate human rights protection into domestic laws and its institutions of learning. Therefore, the Nigerian state has a duty to educate children on human rights as expressed in several human rights treaties and declarations. NNHRC must do more in raising awareness about respect for child rights. Citizenship education in the form of lectures, review of

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[169] Cap C1, Laws of the Federation of Nigeria 2010. ["CRA"]

[170] Section 1 of the CRA.

[171] Section 3 of the CRA.

[172] Section 7 of the CRA.

[173] Sections 31-32 of the CRA.

[174] See sections 24, 26, 28, 39, 33 of the CRA.

school curriculum and seminars could prevent the denial of the existence of such rights and enable people to better understand the essence of child rights.[175]

3.3.14 Corporate Criminal Jurisdiction

GP 2 requires home states to ensure that their 'companies respect human rights in their operations'. One of the various ways this can be achieved, is to create direct extra-territorial legislation in home states for corporate criminal liability. Furthermore, GP 7 stipulates that states must ensure heightened corporate respect for human rights in conflict zones. The GPs particularly directs states to review their laws, policies and to identify gaps (where available) in conformity, with their duty to ensure that corporations show heightened respect for human rights.[176] These laws include crafting criminal liability for corporations that commit human rights violations.[177]

The importance of criminalising the activities of corporations is pertinent to achieving the responsibility of respecting human rights under the GPs (see chapter 2). Thus, much depends on the ability of prosecutors, investigators and state agencies to use available laws and avenues to ensure states' duty to protect human rights against third parties – under Pillar I of the GPs. The challenge with corporate criminal liability is that it has not been accepted globally. The Malabo Protocol which allows for corporate criminal prosecution in African courts, has not been ratified by African states.[178] Although Nigeria has adopted corporate criminality into its corporate law, it is not yet clear how the concept can be adopted and applied. That said, it remains a useful tool for ensuring that corporations are held liable for their human rights violations and an extension of the state's duty with regard to GPs 1 and 2. The discussion here is concerned with the criminal

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[175] See generally Ibe Okegbe Ifeakandu, 'The Denial of Sustainable Energy as a Violation of Child Rights' in Yinka Omorogbe & Ada Ordor (eds.) *Ending Africa's Energy Deficit and the Law: Achieving Sustainable Energy for All in Africa* (2018), 215.

[176] See Commentary to GP 7.

[177] This duty is in line with states' commitment under international criminal law. See further commentaries to GP 7, 17, 23 and 25 (states should prevent barriers to legitimate human rights cases from being brought before the courts).

[178] Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, A.U.Doc. No. STC/Legal/Min. 7(1) Rev. 1 (May 14, 2014. The African Heads of State adopted the Malabo Protocol on June 30, 2014, at its Twenty-Third Ordinary Session. [Malabo Protocol].

liability of the corporation itself, and not of officers or individuals who commit crimes while being employed by the company.

Nigeria provides for corporate criminal liability under its environmental and corporate laws. In the environmental sector, The Harmful Waste (Special Criminal Provisions) Act,[179] criminalises the conduct of a corporate body – where such conduct was done with the consent or in connivance with the Director or other officers of the company.[180] The corporate body and any such officers shall be guilty of the crime and punished accordingly. Furthermore, section 6 of the Oil in Navigable Waters Act[181] provides that 'a person shall be guilty of an offence under sections 1, 3 and 5, and liable to a fine'. The 'persons' referred to in the mentioned sections are the 'owner or master' of the ship or vessels. Thus, where a corporate body owns a ship, such a body will be held liable and convicted for the offence. Section 3(1) of the Associated Gas Re-Injection Act, 1979, prohibits the flaring of gas in Nigeria without the permission of the Minister (Petroleum Resources). However, subsection (2) allows the Minister to allow gas flaring where the 'utilization or re-injection of the produced gas is not appropriate or feasible in a particular field(s).' The company may pay such an amount as the Minister deems fit to flare gas continually. Section 4 states that 'where any person commits an offence under section 3', such a person will lose the concessions granted. Furthermore, the Minister may direct that any entitlement due to the offending person may be withheld, or order the 'repair or restoration of any reservoir in the field in accordance with good oil-field practice.' The Act does not define who a 'person' is, but it is assumed that a 'person' refers to a corporate body – since it is only such body that can flare gas. In any event, the Act applies to compel oil and gas companies in Nigeria to submit gas re-injection programmes.[182] Section 27 (2) of the NESREA Act, 2007, bans the release of harmful and hazardous substances on the land and waters of Nigeria, except where such a discharge is allowed under Nigerian law. Any corporate body that violates this provision commits an offence and is liable, upon conviction, to a fine of not more than N1million

[179] Cap H1, Laws of the Federation of Nigeria, 2004.

[180] Section 7 of the Act.

[181] Cape 06, LFN, 2004.

[182] See Preamble to the Act.

($2,800) and an added fine of N50,000 ($140) for each day the offence exists.[183] Furthermore, this Act defers to the Harmful Waste (Special Criminal Provisions) Act in respect of any hazardous substance constituting harmful waste under section 37 of the Harmful Waste Act. Section 60 of the EIA Act stipulates that a firm shall be guilty of an offence where such a firm fails to comply with the provisions of the Act, and, upon conviction, is liable to pay a fine of not less than N50,000 ($140) and not more than N100,000 ($280).

In the corporate sector, sections 65-67 of CAMA regulate liability for the acts of the company. The sections provide for criminal and civil liability of the company. This liability accrues to the company in much the same way, as if it were a natural person. However, it imputes the acts of Directors and other offices of the company as being that of the company – if such acts took place during the ordinary course of the company's business. Nevertheless, there is an exception. The company will not incur civil liability for any person's act, if such a person had actual knowledge that the company had no power to act in such a manner or that he or she was acting in an irregular manner.[184] Furthermore, where an activity is carried out by the company, it is not the defence of the company to say that such an activity did not take place during the ordinary course of business of the company, or authorised by its memorandum and therefore it cannot be held criminally liable.[185] The company will still be liable, though the activity did not take place in the course of the business of the company.

Prosecution of companies for egregious conduct strengthens good governance, rule of law, and encourages accountability.[186] It is often the case that the personal liability or mental state of employees is inputted on the company. Sometimes, the veil of the corporation is lifted to discover which individuals are responsible for the corporate crime.[187] This research takes the position that it is quite possible to impose criminal liability on the corporation based on the

[183] Section 27 (3) (4) of the NESREA Act.

[184] Section 65 (a) of CAMA.

[185] Section 65 (b) of CAMA.

[186] David Uhlmann, 'The Pendulum Swings: Reconsidering Corporate Criminal Prosecution' (2016) 49 *UC Davis L. Review* 1235.

[187] The concept of corporate moral obligation to respect human rights has been discussed in chapter 2.3.2.

shared knowledge of the company employees.[188] Companies do not want to be associated with crime, however, they engage in illegal conduct, thereby betraying the public trust. The mere fact that they have become monstrous and outgrow the financial capacity of most developing states means that they should be held responsible for their criminal conduct, separate from individuals who work for the company. Occasionally, corporate practice and beliefs may affect the behaviour of officers of the company. Thus, creating a separate criminal liability system puts a check on an illegal corporate culture. Therefore, the CAMA must be amended to authorise corporate criminal liability separate from the criminal liability of its employees or agents. After all, if companies can be legal persons for the purpose of juristic personality, companies can be legal persons when sued for torture, murder and other egregious crimes.

3.4 South Africa

3.4.1 Constitution of the Republic of South Africa, 1996

South Africa has imposed human rights compliance on corporations. This is provided for under Chapter 2 (Bill of Rights) of its Constitution.[189] Article 8(2) provides that:

> A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

The implication of the foregoing is that South Africa has provided a robust legal regime through which the GPs can be implemented. Article 8(2) of the Constitution directly applies horizontally to corporate respect for human rights. Thus, victims of human rights violations by corporations can approach the South African courts to enforce their fundamental human rights. This provision lends credence to the fact that it imposes positive obligations on the corporations – instead of the '*do no harm*' obligations of the GPs which scholars have cited as the basis for the passive nature of the GPs. The horizontal application of human rights to corporations also follows GPs 7 and 8, where states are expected to support and ensure that government departments and agencies at

[188] See further David Uhlman 'Erosion of Corporate Criminal Liability' (2013) 72 *Maryland L. Review* 1301.

[189] See also Articles 20(1), 260 of the Constitution of Kenya.

national level are informed and act in accordance with government human rights obligations. This horizontal domestic policy coherence has implications for managing the BHR agenda. In *Glenister v President of the Republic of South Africa*,[190] the Constitutional Court laid down the principle that the '*do no harm'* responsibility goes beyond the 'mere negative obligation not to act in a manner that would infringe a right'.[191] It also includes 'positive duties on the state to take deliberate, reasonable measures to give effect to all of the fundamental rights contained in the Bill of Rights'.[192] Thus South Africa has taken the intentions of the GPs even further. This is facilitated by the proactive nature of the judiciary in terms of the radical realisation of socio-economic, cultural, and human rights. As will be discussed later, this is a novel approach which Nigeria can draw lessons from. This is not surprising. South Africa's human rights system can be traced to its colonial past, where racial injustices and widespread dehumanisation of the black majority was the order of the day. Furthermore, GP 2 provides that states must 'set out clearly the expectation' that companies registered in their territory respect human rights through their activities. This has been aptly provided for under South Africa's Bill of Rights' constitutional provision.

3.4.2 Companies Act, 2008

South Africa's corporate law has far reaching implications for implementing the GPs. The key objective of the Act is provided for in Section 7 (a), which states that the Companies Act must 'promote compliance with the Bill of Rights as provided in the Constitution'.[193] Thus, in the management of the affairs of the company, Directors and officers of the company must ensure that activities of their company is geared towards promoting and encouraging human rights as contained in international legal instruments. Perhaps, corporate officers failed, in the Marikana incident, to work in the best interest of the company, when they did not consider the interests of the stakeholders who demanded for a pay rise. Section 15(a) provides that a company's 'Memorandum of Incorporation must be consistent with the Companies Act'. This is where the

[190] (2011) 3 SA 347.

[191] Ibid.

[192] Ibid.

[193] Section 7 (a) of the Act.

GPs becomes instructive. The implication of this is that each provision of the Memorandum must be conscious of the fact that it must comply with the Bill of Rights contained in the Act and in the Constitution. Company law in South Africa is therefore subject to the Bill of Rights. South African companies must consider human rights violations and take appropriate measures to avoid them. The failure to consider these human rights violations led to the various ongoing silicosis cases before South African court,[194] and Mine-community distrust. Thus, there is the '*duty'* on the part of corporate actors to go beyond the *do no harm* requirement in respecting human rights when operating in weak zones.[195] The question therefore is how may officers of the company ensure that their company does not engage in egregious conduct? The Act gives a clue. The Board makes decisions for the company. Such decisions must be in the interest of the company and to the satisfaction of the shareholders. Certainly, decisions that encourage the violations of human rights are not in the interest of the company. Furthermore, the fiduciary duties of a director, under Section 76 (3), provides that a Director, in the course of his employment, must exercise their functions in good faith, in the best interest of the company, and with a reasonable degree of care, skill and diligence. The exercise of these fiduciary duties is discretionary. However, in the 'best interest' of the company would amount to taking appropriate measures not to infringe the rights of the company's host community. These are non-derogable provisions which should be implemented strictly, especially against MNCs.

The discretionary nature of the exercise of fiduciary duties of Directors impedes the ability to say, with certainty, that companies act in accordance with human rights obligations. However, since section 15 requires that the Articles of Incorporation is consistent with the Companies Act, this thesis submits that the Companies Act should expressly stipulate that Memorandum and Articles of Incorporation of a company must include human rights obligations of such companies – and which the company must strive to accomplish. Perhaps, the GPs could be integrated into the Articles of Incorporation. This would give support to the promotion of compliance with the Bill of Rights as contained under section 7 of the Act. To promote transparency and accountability, the Institute of Directors, South Africa (IoDSA) published the

[194] *Bongani Nkala & 68 ors v. Harmony Gold Mining Company & 31 ors*, Consolidated Case Number: 48226/12

[195] There has been huge debate on whether the term 'duty' should be applied to corporations as against responsibility to respect human rights. These arguments are based on the status of the states as duty bearers and thus have the legal imperatives to uphold this duty as against corporations who do not have such correlative duty under international law.

King Report on Corporate Governance in South Africa.[196] The Report obliges companies to document their social responsibility projects.[197] The necessary implication of the foregoing is to the effect that the documents submitted by a company for incorporation must commit to human rights standards.

3.4.3 Mineral and Petroleum Resources Development Act 28 of 2002 (amended in 2008) (MPRDA)

This Act is the primary law regulating the mining industry in South Africa.[198] It seeks to ensure that all South Africans have 'equitable access to the nation's mineral and petroleum resources'.[199] It further ensures that mining companies contribute 'to the socio-economic development of their host communities.'[200]

Unlike the Nigerian petroleum regime, this Act ensures that the custody of 'mineral and petroleum resources is the common heritage of all South Africans';[201] the state is, however, the custodian of the resources.[202] Thus, as custodian, the state must work towards the sustainable development of the country's resources, and at the same time must promote socio-economic

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[196] See 'Kings Code for Governance Principles for South Africa, 2009' *https://c.ymcdn.com/sites/www.iodsa.co.za/resource/collection/94445006-4F18-4335-B7FB-7F5A8B23FB3F/King_III_Code_for_Governance_Principles_.pdf*, accessed 28 April 2017. [The IoDSA has produced King Reports I to IV].

[197] Ibid.

[198] Some of the relevant laws applicable to extractive resource governance in the context of the local communities include: The Basic Conditions of Employment Act (right to fair labor practices as provided for in Section 23(1) of the Constitution, it also regulates basic working conditions such as hours of work, leave, remuneration, termination of employment); The Employment Equity Act (prohibits unfair discrimination, embodies South Africa's affirmative action policy); The Labour Relations Act(gives effect to Section 27 of the South Africa Constitution, it regulates trade union activities and guarantees freedom of association, right to strike and ADR; and collective bargaining); The Occupational Health and Safety Act(provides for the health and safety of persons at work); National Environmental Management Act, 1998 (regulates EIA); The Communal Land Rights Act (transfers communal lands to communities and regulates the democratic administration of communal lands by communities); The Expropriation Act(expropriation of land and other property for public use).

[199] Section 2 (e) of MPRDA.

[200] Section 2 (i) of MPRDA.

[201] Section 3 (1) of MPRDA.

[202] Ibid.

development.[203] Considering South Africa's racial and colonial history, the Minister is obliged to provide assistance to any historically disadvantaged person in conducting mining operations.[204] This is aimed at achieving equitable access to the nation's mineral resources.[205] Furthermore, the holder of an EIA is mandated to conduct an EIA and to communicate the impact of that EIA.[206] Where the impact has caused damage to the land, the holder of the mining right must manage such environmental impact by rehabilitating the environment affected by the damage.[207]

GP 9 states that the 'state should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives … through investment treaties or contracts'.[208] The MPRDA promotes equity in mining through granting access to 'historically disadvantaged persons' provided for under the Act. In 2007, Luxembourg and Italian investors brought a claim against South Africa at the International Centre for Settlement of Investment Disputes (ICSID) – arguing that the MPRDA expropriated their mineral rights.[209] The investors argued that these expropriations were unlawful because they did not follow due process and were not adequately compensated. Not only was the MPRDA in line with the South African Constitution, but it served as the 'custodian' of the country's mineral resources for the benefit of the people. The MPRDA was also an extension of the Broad-Based Black Economic Empowerment Policy. Both countries settled the case in 2010. However, shortly after the settlement, South Africa initiated a review of its Bilateral Investment Treaties (BIT). In the aftermath, South Africa terminated several of its BIT, claiming that such BIT 'pose risks and limitations on the ability of the government to pursue its constitutional-based transformation agenda'. The latest such move was done on 23 June 2013 – when it 'served a notice of

[203] Section 3 (3) of MPRDA.

[204] Section 12(1) of MPRDA.

[205] Section 13(3)(a) of MPRDA.

[206] Section 38, 39 (1) of MPRDA.

[207] Ibid.

[208] See GP 9.

[209] Herbert Smith Freehills, 'South Africa Terminates its Bilateral Investment Treaty With Spain: Second BIT Terminated as Part of South Africa's Planned Review of its Investment Treaty, *Lexology* (21 August 2013), *http://www.lexology.com/library/detail.aspx?g=daf93855-71f9-425e-92d3-5368d104f8ff*, accessed 5 May 2017.

termination of its BIT with Spain'.[210] The implication of South Africa's move is that investors must consider South Africa's racial history and modern attempt to empower economically disadvantaged people through the instruments of the law.[211] These BIT create economic advantages for states, and thus the redistributive tendencies under the MPRDA could be contrary to the 'fair and equitable treatment provisions' under most BIT. Thus, South Africa seems to be fully compliant with the GPs through ensuring that it is retaining adequate policy and regulatory space for protecting human rights, and at the same time protecting investors.[212]

Furthermore, BIT protect investors against any arbitrary treatment by the host government and should ordinarily protect the citizens against any high handedness on the part of investors. In a bid to attract FDI, host governments enter onerous contractual agreements with MNCs. The terms of those agreements protect foreign investors against arbitrary conduct by host governments. Sometimes, however, these agreements can prevent the application of existing domestic laws when certain acts beyond the contemplation of the parties arise.[213] Government is thus locked-in for the entire duration of the project, and may not be able to apply, for instance, a new environmental law. Where government enacts a new environmental law as a result of emerging environmental challenges, investors could seek to challenge such new laws – especially where they will violate the terms of existing BIT. When this happens, the BIT become the only point of reference. Other extenuating factors such as public interest are not considered.[214] Nigeria seems to lack bargaining power when negotiating these BIT. Very protective and extreme provisions are agreed to with investors – making it clear that the primary interests are not those of the community. The Nigerian Investment Promotion Commission Act No 16 of 1995 makes no mention of human rights. The South African government remedied this

[210] Ibid.

[211] See also section 4 of the Protection of Investment Act, No. 22 (2015) which affirms the Bill of Rights as applicable in the South African Constitution.

[212] See Commentary to GP 9.

[213] JG Ruggie, above (note 80) 86.

[214] Ibid. For instance, Nigeria through its subsidiary enterprise, NNPC, operates a JVA with MNCs in the ratio of 60:40. This agreement does not make mention of corporate responsibility to protect human rights despite the fact that governments stakes are higher in these agreements. Little, if any, of these JVAs or PSCs provide requirements for public hearing and public consultations. Clause 20.3 of the WAGP IPA mandates the West African Gas Pipeline company to 'pay to any affected legitimate land owners or lawful occupiers of land…fair compensation for disturbance or damage caused by the activities of the company or the project contractors on such land.'

defect when it enacted the Black Economic Empowerment programme – which sought to empower the black majority by giving them an opportunity to partake in governance. Despite criticism of the programme, it did in fact create a more balanced approach and tightened investment agreements.[215]

To integrate the black majority into the economic development of South Africa and to correct the racial disparities of the apartheid regime, the Broad-Based Black Economic Empowerment (BBBEE) Act (Act 53 of 2003) was enacted as a form of affirmative action. Under this programme, wealth was distributed across a cross-section of historically disadvantaged South Africans. In furtherance of the Act, the Codes of Good Practice, 2007, were designed to fulfill the ideals of the programme. Among other things, the Act measures ownership, management control and employment – to ensure that equitable transfer of the above indices is met.

3.5 Lessons to be Learned?

3.5.1 Constitutional Rights

Nigeria should amend its corporate law to provide for human rights obligations for extractive companies. South Africa has not only codified human rights obligations in its Companies Act, it constitutionally provided for the application of Bill of Rights to legal and natural persons. Currently, human rights violations against corporations in Nigeria's extractive sector are mounted in form of state responsibility, to protect the human rights of third parties. Hence, there is the importance of direct obligations for companies – as this will relieve states of unnecessary court cases.

The South African Constitution guarantees the right to property ownership without any form of deprivation,[216] although this right, much like the Nigerian case, is subject to grounds

[215] See further South Africa, Department of Trade and Industry, 'Bilateral Investment Treaty Policy Framework Review,' June 2009, 5. The South African government was not aware of a certain provision in a Bilateral Investment Treaty that had granted mining interests to Italy and Luxembourg under a binding international arbitration, to sue the government for damages. This was due to some provisions of the Black Economic Empowerment Act. Either the government was not fully informed, or it just did not take to advice.

[216] Section 25

under which lands may be expropriated.[217] Court decisions have exemplified post-apartheid property rights and supremacy of the constitution. In *Alexkor Ltd and Another v Richterveld Community*,[218] there was a dispute between the Richtersveld community and a diamond miner concerning the return of ancestral land to the indigenous community. The court held that, allowing the miner to continue possession of the land will amount to grave injustice considering the fact that the community had been disposed of their land rights by the government. The court subsequently ordered the return of the land in dispute, with its mineral resources, to the community. Furthermore, section 26 of South Africa's Constitution created a fundamental right to housing. In *Government of the Republic of South Africa v Grootboom*,[219] the land in question, occupied by the claimant, was being repossessed for redevelopment. The Constitutional Court held that section 26 created a justiciable right to housing in South Africa. Although the Court realised the practical difficulties in achieving socio-economic rights, it nonetheless granted temporary housing for the claimant. In *Port Elizabeth Municipality v Various Occupiers,*[220] some members of a community had been illegally residing on a vacant, private land. The municipality of Port Elizabeth sough to evict this group of people. The Constitutional Court declined the municipality's request, holding that the eviction could not proceed. This decision represents a 'new task'[221] of the court which was to manage 'the counterpositioning of conventional rights of ownership against the new, equally relevant, right not to be arbitrarily deprived of a home, without creating hierarchies of privilege.'[222]

These cases show the progressive attitude of the South African law and courts in respect of asserting the human rights of local communities who are hosts to mineral projects. Nigeria must show a commitment towards the realisation of property rights for citizens who are effectively dispossessed by developmental projects. The South African model where rights to the environment are enforceable in court is recommended for Nigeria. Alternatively, socio-economic

[217] see section 36 of the Constitution.

[218] [2003] ZACC 18

[219] [2000] ZACC 19.

[220] [2004] ZACC 7.

[221] Ibid, para 23.

[222] H Mostert and A Pope (eds) *The Principles of The Law of Property in South Africa* (2010) 15-16.

rights can be moved to the justiciable part of Chapter IV of the Constitution to ease enforcement. When the socio-economic rights become enforceable, the GPs will be indirectly enforceable.

The justiciability of socio-economic rights under Nigeria's Constitution is important.[223] There are significant lessons to be learned from South Africa in terms of the realisation of human rights. Firstly, this section analyses the issue of non-justiciability of Chapter II of the Nigerian Constitution, and shows how that has erroneously gained traction in the literature. Section 6(6)(c) of the Constitution excludes the exercise of judicial powers over chapter 2 of the Constitution. The section provides thus:

> The judicial powers […] shall not *except as otherwise provided by this Constitution,* extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy […]. (emphasis added)

The phrase 'except as otherwise provided by this Constitution' lends itself to different interpretations which can be found in the same Constitution. Hence, where other provisions in the same Constitution allow, chapter II will be justiciable. Firstly, section 13 of the Constitution mandates all organs of government, including the judiciary, to comply with the provisions of Chapter II. This is evident in the use of the words 'duty' and 'responsibility' in that section. Under the Second Schedule, Part I (Exclusive Legislative List), Item 60 (a) obliges the federal government to promote and enforce the observance of Chapter II. In effect, chapter II underpins the entire Constitution. In *FRN v Anache*,[224] the court held that since the justiciability of Chapter II is qualified by the phrase 'save as otherwise provided by the Constitution', this gives room for the justiciability of chapter II. The implication of the foregoing is that if the Constitution references Chapter II in another part which makes the said chapter II justiciable – the courts will be inclined to give legal teeth to the enforcement of Chapter II. In *Olafisoye v Federal Republic of Nigeria*,[225] the Supreme Court held that section 6 (6) (c) of the Constitution is not absolute or sacrosanct. Since the said provision defers to other parts of the Constitution by using the words

[223] See section 6(6)(c) of the Constitution of the Federal Republic of Nigeria 1999.

[224] 2004 14 WRN 1.

[225] (2004) 4 NWLR {Pt. 864} 580.

'except as otherwise provided by this Constitution', it therefore provides an opportunity for chapter II to be justiciable.

In *Okogie and Others v The Attorney-General of Lagos State,*[226] the Lagos State government abolished private schools – thereby preventing the proprietors of such schools from providing access to education under section 18 of the Constitution. The Court of Appeal held that the government had no power to abolish private schools under the state laws. Hence, government's act 'violated the right to freedom of expression' under the Constitution.[227] In effect, the court used a provision in Chapter IV to actualise Chapter II provisions.[228] On appeal, the Supreme Court laid down the principle that Chapter II is enforceable when a law has been made to give force to the provisions of Chapter II. Hence, in granting the applicant's relief, the court held that sections 16 (1) (c) and 18 of the Constitution safeguard the applicants' right to contribute to the Nigerian economy. Furthermore, in *Attorney-General of Ondo State v Attorney-General of the Federation,*[229] the Supreme Court justified the enactment of the Corrupt Practices and Other Related Offences Act, 2000 (which established the Independent Corrupt Practices and Other Related Offences Commission) – based on the 'Fundamental Objectives and Directive Principles of State Policy.' The Court further held that the provisions of Chapter II fall under the jurisdiction of the executive (contained in the Exclusive Legislative List).[230] Thus, the state and the legislature must work together to make legislation that will give teeth to the provisions of chapter II, as the occasion demands. The Supreme Court also held in *Attorney-General of Lagos State v Attorney-General of the Federation,*[231] that the Nigerian legislature was exercising its functions under the fundamental objectives when it enacted the Federal Environmental Protection Agency Act (1988) – in order to protect the environment. These cases affirm that a rejection of the justiciability of Chapter II has not been handed down by the courts. Much depends on the legislature enacting laws based on Chapter II, and litigants exploring all the

[226] (1981) 1 NCLR 281.

[227] Ibid, at 220

[228] See also *Adewole v Jakande* (1981) 1 NCLR 262, 279.

[229] (2002) FWLR (Part 111) 1972 at 2144.

[230] Ibid.

[231] (2003) 15 NWLR (Pt. 842) 113, 175.

provisions of the Constitution that support Chapter II. Rather than limit their argument based on a dogmatic and strict interpretation of section 6 (6) (c), public interest litigators should be innovative when seeking the enforcement of socio-economic rights. For instance, the notion of public interest under section 25 (4) of the South African Constitution is to the effect that the state must commit to land reform – so as to ensure equitable access to South Africa's natural resources. Section 25(1) forbids the deprivation of the right to property. Section 38 provides for the enforcement of rights, and states that any person listed under the section has a right to approach a competent court where any of the rights contained in the Bill of Rights have been infringed or threatened. Furthermore, with regard to South Africa, the Restitution of Land Rights Act 22 of 1994 provides that 'land belongs to the indigenous community.' Thus, the South African jurisdiction is robust for the realisation of *locus standi* and opens up an opportunity for public interest litigation. Consequently, the South African Constitution guarantees the Bill of Rights and its applicability to corporate bodies.[232]

3.5.2 Environmental Impact Assessment

Nigeria's environmental impact assessments have many lessons to learn from South Africa's experience.[233] In South Africa, the EIA process typically involves desktop research, a scoping phase, preparation of an EIA report, public participation, and the formulation of an Environmental Management Plan (EMP).[234] An assessment report must contain a detailed description of the proposed activity and the environment that may be impacted by the activity, the need and importance of the activity, a description and comparative analysis of identified possible alternatives to the activity, and a statement on how an environmental impact is defined.[235] On the other hand, Nigeria's EIA requires companies to undergo an environmental assessment of their activities before commencement,[236] and this does not include a detailed

[232] Section 8.

[233] See SADC Environmental Legislation Handbook (2012), 331. GPs 18 and 19 specifically provide for environmental, social and human rights impact assessment.

[234] Ibid. see further Environmental Impact Assessment Regulations (2014). [EIAR, 2014]

[235] See generally Regulations 19-21, 23 of EIAR, 2014.

[236] Section 3(1) of EIA Act (Nigeria).

procedure. However, a process for mitigation must be indicated in the report.[237] An EIA underscores the importance of stakeholder engagement. When local communities are involved as stakeholders, there is a connection with the company which can identify and understand stakeholder needs, concerns and desires. Consultation provides a basis for clear, accurate and timely information to be provided to stakeholders in respect of potential impacts on the local community.[238]

South Africa's EIA provides for an Environmental Assessment Practitioner (EAP).[239] The Practitioner is obliged to give notice to affected parties of the application for environmental authorisation by a MNCs.[240] This gives room for the local community to discuss the proprietary of allowing such community to work on its land. It is the responsibility of the Practitioner to ensure that the information is made available to interested and affected persons and that participation is done in a way that gives room for stakeholders to comment on the application.[241] Furthermore, Section 39 of the Minerals and Petroleum Resources Development Act (MPRDA) 28 of 2002, mandates a mine to submit an EMP. The importance of this regulation is for the mines to show how they intend to prevent or mitigate the adverse effects of their activities on the environment. In addition, mining companies must present a Social and Labour Plan (SLP), which will indicate how the company will ensure fair and equal treatment of the company's own workers, and also infrastructure development within the community.[242] Nigeria's regime does not provide for these extensive requirements.

The Nigerian regime on impact assessment should designate a competent authority, devoid of government patronage or control, which will administer impact assessment. Currently, the Department of Petroleum Resources is saddled with this responsibility. A government agency

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[237] Sections 16 and 17 of EIA Act (Nigeria).

[238] EU Directive 2011/92/EU, article 6(2) [While informed consent is novel in Africa, the European Union requires informed consent before any developmental project is done].

[239] Regulations 1, 7 of EIAR, 2014. ['The Practitioner']. See also sections 1 and 24H of the National Environmental Management Act, 1998 (Act No. 107 of 1998).

[240] Ibid. This can be done through placing advertisements in newspapers, an official gazette, or a notice at a conspicuous place.

[241] See generally Regulations 39-44.

[242] See section 25 of the MPRDA.

solely in control of such a responsibility cannot truthfully and objectively work against the interests of MNCs, for obvious reasons.[243] Furthermore, impact assessment in Nigeria does not encourage the participation of local communities which will be impacted by the environmental work.[244] Local community participation remains key to achieving the business and human rights principles. The procedure for achieving this must be clearly spelt out. For instance, in South Africa, an application for impact assessment must be supported by an EMP.[245] Such an EMP specifies many procedures for achieving the environmental programme. The EMP must include information on mitigation measures to be taken to address the environmental impact, identification of persons responsible for the implementation of the mitigation measures, and measures to rehabilitate the environment affected by any environmental impact – among others.[246] The burden of proving environmental mitigation is on the 'holder of a prospecting or mining right',[247] and thus where there has been any form of environmental damage, pollution or ecological degradation which can be traced to the activities of the mining company – that company will be solely responsible.[248] Remarkably, the MPDRA mandates prospective companies to conduct the impact of their mining activities on cultural resources, as part of the EMP.[249] Furthermore, an approved Environmental Management Programme (EMPr) or EMP is the foundation for prospecting or mining.[250]

Section 5(4)(c) of MPRDA provides that an applicant can commence mining-related activities on land which they do not own, after notifying and consulting with the land owner. This provides for participation and not a situation where the government takes over the land

[243] Where an impact assessment does not meet the minimum standards, the DPR can decide to look the other way to enable them receive foreign direct investment from the MNCs.

[244] See section 7, EIA Act (Nigeria).

[245] Section 39 of the MPRDA.

[246] Regulation 19.

[247] See section 38(1)(e) of the MPRDA.

[248] Ibid. see further section 38(2) [stipulating culpability of directors of the company]; 21 (1)(b) [noting report on compliance with the approved EMP].

[249] Regulations 1, 2 (h) (iv).

[250] Regulation 19.

without consultation. A further provision should incorporate written consent, before the commencement of any project. In addition to the above, Nigeria's EMP – which is currently non-existent – should clearly indicate the mitigation, monitoring and institutional measures to be taken during project design, execution and implementation. This approach will deter MNCs which might be eager to circumvent the provisions of the law to obtain the maximum benefits from non-compliance in terms of mitigation efforts.

In South Africa, the Practitioner must be an independent practitioner with expertise in conducting impact assessments.[251] Such a Practitioner must be versed in the relevant laws, objectives, and must disclose material information that may influence any decision to be taken.[252] An EIA with strong participation from an affected affluent community in Mossel Bay, South Africa, reveals the impact of community input. An EIA for the Mossel Bay community was suspended because there was an allegation that the EIA was non-compliant with South Africa's environmental regulations, and, most importantly, the EAP was not fully independent.[253] Likewise, after some years of bickering, the national government approved the shale gas development in the Karoo region. There has, however, been fierce criticism and petitioning for the project not to commence.[254] In *Silvermine Valley Coalition v Sybrand Van Der Spuy Boerderye and Others*,[255] the court held that an EIA was designed to ensure that official authorisation is given before any land is put to specific use – with particular reference to extractive activities.

Nigeria can take a cue from the South African experience – and particularly focus on the experience and expertise of members of the body responsible for reviewing an impact assessment done by companies. The first step, however, would be to amend the Environmental Impact Assessment Act to make provision for an independent review panel, instead of vesting

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[251] Regulation 13.

[252] Ibid.

[253] See Southcapenet, 'EIA for Proposed Mossel Bay LNG Terminal Suspended after Objections, (26 November 2013), *http://thegremlin.co.za/mossel-bay-news/wordpress/2013/11/26/eia-for-proposed-mossel-bay-lng-terminal-suspended-after-objections/*, accessed 5 May 2017.

[254] Jenna Etheridge, 'Government gives green light for shale gas fracking in Karoo' *News24* 30 March 2017, *http://www.news24.com/SouthAfrica/News/govt-gives-green-light-for-shale-gas-fracking-in-karoo-20170330*, accessed 5 May 2017.

[255] 2002 (1) SA 478 (C).

the responsibility for impact assessment on a government agency: The Department of Petroleum Resources.

3.5.3 Mineral Rights Ownership

The question of mineral right ownership is very instructive in the case of the Royal Bafokeng community and Anglo American Platinum. This case relates to how mining companies undermine traditional governance mechanisms in local communities. Mines must engage with local communities in the most productive way through understanding of the local customary laws. Anglo American Platinum (Amplats) decided to mine in Mapela, Limpopo Province. The mining later resulted in community discord and violence – because the company failed to understand the power dynamics and local governance in a community. Amplats set aside R175 million for settlement claims with the community.[256] The community leader, Kgoshi Langa, was the head of the trust where the money was paid, and he had significant control over other trustees. Expectedly, Chief Langa started living a profligate life: acquiring properties and disposing of country land in favour of the mining operations.[257] Meanwhile, in the community, Kgoshi Langa lacked credibility. Unfortunately, Amplats did not negotiate with the right people – which exacerbated the whole scenario and led to more violent clashes and tensions. The Mapela community was outraged because Amplats refused to negotiate with them directly, and instead negotiated with compromised community leaders, and detail about the settlement was withheld from them.[258] The violence escalated when the community heard that the leader, Kgoshi Langa, had signed the settlement agreement which the whole community had kicked against. A clash of community ideals ensued. Amplats agreed with the traditional leader's position that he was only obliged to consult with his traditional council and not the entire community. This is the position which most extractive companies take: divide and rule tactics.

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[256] Tamara Jewett, 'Mining, Land and Community in Comunal Areas III: Community Governance' 11 August 2016, *http://hsf.org.za/resource-centre/hsf-briefs/mining-land-and-community-in-communal-areas-iii-community-governance,* accessed 11 May 2017.

[257] Lucky Biyase, 'Anger mounts against Bafokeng King' *Business Day,* 16 JUNE 2013, *HTTPS://WWW.BUSINESSLIVE.CO.ZA/BD/COMPANIES/LAND-AND-AGRICULTURE/2013-06-16-ANGER-MOUNTS-AGAINST-BAFOKENG-KING/,* accessed 11 May 2017.

[258] Ibid.

Amplats failed to cross the transparency and accountability 'Rubicon'. On whether there is any collaboration with local communities in Nigeria, a key informant informed the researcher that:

> This is where people are getting angry … this character of divide and rule. When you know this is supposed to involve everybody, you meet 2 or 3 chiefs and talk to them – bribing them. What are they doing? They are creating confusion and conflict. Come to the community [where] there are elders and chiefs. After negotiating, the chiefs will call the youths and say this is what we have agreed on – any questions? Some of these elders cannot go far, [and] they haven't gone far. There are people that haven't gone to Lagos but they are chiefs today; their view is only within – they haven't seen development as it is done elsewhere. Bring the development back to the people. Those are the things that we are talking about. Suppression can only last for a while. Later the people will realize their rights. Companies can't work on their own because they are strangers. Companies are supposed to develop their areas, but government must also support them. They must supervise. There was a community in Bayelsa which I went to. Shell has facilities there. The only availability of light is inside the Shell facility. Yet Shell companies only border the community by a big gate. In this host community there is no light, no water. The community that produces the good things of life [which] Shell enjoys has no water and light. This same community alone produces nothing less than 50 oil wells. But when there is a flood, it sweeps the whole community.[259]

Another informant stated thus:

> Secondly, the oil companies themselves must be sincere in relating to the people. On the challenges they know that it is the right person to meet – but won't meet that person, but another person. At the end of the day they pay peanuts. When they get to a community they should ask for the right person. Further, when making these payments, there should be transparency. So, there won't be room for suspicion. They should publish what they are paid.[260]

In another development, Amplats set up a Royal Bafokeng Development Trust to cater for development projects and an educational system.[261] Despite, this, the mining benefitted a few elite and not the entire community. However, it is the community members – workers and miners

[259] Interview with a local resident from Old Bakan, Degema Local government, Rivers State on 8 October, 2016.

[260] Interview with from Buguma, Asari-Toru local government area, Rives State on 9 October 2016.

[261] Sobantu Mzwakali, 'Rural community's attempt for redress sidelined by leadership' *LARC, http://www.larc.uct.ac.za/news/rural-community's-attempt-redress-sidelined-leadership,* accessed 23 July 2016.

– which are greatly impacted by the activities of the mines (see the Marikana incident in Chapter 2).

In October 2015, mineworkers sought permission from the South Gauteng High Court to bring a class action against mining companies in respect of mine workers who have silicosis and tuberculosis due to hazardous work environments.[262] The mineworkers claimed that the management of the mines failed to protect them from excessive levels of dust and the risks of silicosis and tuberculosis.[263] Despite the fact that as early as 1912 South Africa had introduced compensation for silicosis as an occupational disease – getting the mines to implement this directive has proved abortive. The state simply seems to have turned a blind eye to the mine companies' culture of impunity. The mining industry has been immune to liability for injuries sustained by mineworkers due to exposure to silica dust.[264]

Extracting natural resources does not curse a country – it is the failure to manage the extractive enterprise holistically that creates problems. This is exacerbated by governmental inability to diversify the economy. Countries like the United States and the United Kingdom have developed their natural endowments – coal and steel in earlier times – and have gone on to become the world's leading economies.[265] Extractives do not have to doom a nation.[266] It has been shown that when resource dependence goes bad, the results are devastating.[267] Bevan *et al.*

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[262] See *Bongani Nkala & 68 ors v. Harmony Gold Mining Company & 31 ors*, Consolidated Case Number: 48226/12; see further: Alide Dasnois, 'The long battle to get the mines to cough up' *Groundup* 3 September 2015, available at *http://www.groundup.org.za/media/features/silicosis/silicosis_0022.html*, accessed 22 July 2016.

[263] Ibid.

[264] Ibid.

[265] See Gavin Wright and Jesse Czelusta, 'Exorcizing the Resource Curse: Minerals as a Knowledge Industry, Past and Present' (2002) Stanford University Working Paper, 5. See also Jim Motavalli, '*Natural Gas Signals a 'Manufacturing Renaissance' New York Times* (10 April 2012), *http://www.nytimes.com/2012/04/11/business/energy-environment/wider-availability-expands-uses-for-natural-gas.html*, accessed 26 June 2017).

[266] Bonita Meyersfield, 'Empty Promises and the Myth of Mining: Does Mining Lead to Pro-Poor Development?' *Business and Human Rights Journal* (2017), 32 (noting that while mining brings profit, it does not result in socio-economic development of affected communities).

[267] Michael Ross, *The Oil Curse, How Petroleum Wealth Shapes the Development of Nations*, (Princeton: Princeton University Press, 2012) [arguing that since 1980, the developing nations that have been wealthier, democratic and peaceful are countries without oil. Oil states are 50 percent more likely to be ruled by autocrats and more than twice as likely to have civil wars as the non-oil states. They are also more secretive, more financially volatile, and provide women with fewer economic and political opportunities].

sum it up succinctly when they assert that in the 1960s, Nigeria was the largest exporter of palm oil and ground nuts in the world; the country had a vibrant agricultural sector. However, when oil was discovered, exports dwindled, and the country has become a net importer of food items today.[268]

3.6 Conclusion

This chapter has discussed the legal, fiscal and institutional frameworks for further strengthening states' duty to protect human rights in line with the GPs. The enforcement of sound environmental laws has been a huge obstacle to Nigeria's development – economically, socially, and politically.[269]

To ensure enforcement of local laws and to entrench a policy of self-regulation, extractive contracts must not be shrouded in so much secrecy that citizens do not know when a project is to be executed. Authorities should publish contracts and make them readily available to citizens. These documents can be disclosed without a threat to national security. Indisputably, citizens are the co-owners of these natural resources, which are held in trust by the government. They therefore have a right to know and to understand the terms of the contract signed on their behalf. When contracts are kept secret, citizens cannot monitor the way and manner which government implements the terms of the contract. Corruption and mismanagement therefore may set in. Contract transparency is therefore vital for ensuring that laws are followed, country benefits are maximised, and host communities are assured that government is acting in their interests.

The regulatory environment in which businesses operate is not usually monitored or equipped such that communities can reap the dividends of resource extraction. Companies avoid costs arising from conflicts within a community, and governments are either not well enough prepared or unable to handle complex and multi-stakeholder investments – due to weak enforcement of laws and a lack of transparency and accountability. Communities are therefore

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[268] David Bevan, Paul Collier, and Jan William Gunning, *Nigeria and Indonesia* (1999) quoted by Leif Wennar, *Blood Oil, Tyrants, Violence and Rules that Run the World (*2016) 9.

[269] See Damilola Olawuyi, 'The Human Rights Based Approach to Climate Change Mitigation: Legal Framework for Addressing Human Rights Questions in Mitigation Projects,' (2013) Unpublished DPhil Thesis, University of Oxford, 100.

left to experience the ineptitude of government and to bear the costs. This invariably aggravates social tension, poverty, and corruption. Local communities are also not involved in decision-making – and their consent is not sought in project implementation.

Doubtless, encouraging efficient and transparent management of natural resources and its associated expectations relating to the improved welfare of citizens, remains a daunting challenge. The Nigerian government lacks the technical resources and capacity to enforce monitoring and compliance efforts by MNCs. Most of the statistics available on compliance with regulatory statutes are provided by the MNCs themselves.[270] It is therefore imperative for states to establish an autonomous and independent monitoring department – with the authority to ascertain and implement best corporate practices in the extractive industry. Where there is failure on the part of any company to respect human rights, appropriate sanctions should apply. An inability to present institutional checks or audit accounts of state-owned enterprises leads to rent-seeking conduct. Hence, this chapter has relied on an indirect approach to implementing the GPs. Rather than craft new policies, it considers the strengthening of extant extractive resource laws to include and incorporate human rights provisions. Perhaps the time has come for governments to establish specialised courts on business and human rights. Before this is achieved, companies and individuals must be named in any resource concession processes and licences – so that it is clear who can be held responsible for any breach.

Norway has been able to manage its extractive resources through the establishment of its Sovereign Wealth Fund, which has been utilised for social, economic and infrastructural development of the Norwegian people.[271] Government representatives should negotiate fair and better deals on behalf of the citizens. Governments can use apolitical and neutral third parties for this purpose. Beyond good policies at national and industry levels, making extractive resources work for development will also require building constructive partnerships between MNCs and host communities based on trust, mutual interests, and a common understanding of the challenges and opportunities. Harnessing the extractive resources in Nigeria and South Africa

[270] Uwafiokun Idemudia, 'Corporate Social Responsibility and the Rentier Nigerian State: Rethinking the Role of Government and the Possibility of Corporate Social Development in the Niger Delta,' (2010) 30(1) *Canadian Journal of Development Studies,* 141.

[271] United Nations Industrial Development Organization (UNIDO), 2011, Promoting Industrial Diversification in Resource Intensive Economies: The Experiences of Sub-Saharan Africa and Central Asia Regions. Vienna: Vienna International Centre.

within an accountable, human rights-friendly regulatory framework, will contribute significantly to turning around the fortunes of members of host communities – if not the entire country.

Without doubt, confidential clauses should be eliminated from extractive resource contracts. Apart from commercial secrets,[272] governments should engage in full disclosure of the terms of the agreements, the bidding process, and the allocation of oil blocks for example. Responsible extractive resource management significantly reduces avenues for corruption. It can also reduce income inequality, stabilise the economy, prevent conflicts and help build trust in the whole process – to ensure that the proceeds of such projects are judiciously used for the benefit of the citizens who own the property concerned. The argument that contracts contain commercially sensitive information that could cause harm can easily be rebutted by the presumption that contracts are generally widely circulated within the private sector – and the types of contract being circulated do not generally contain information that could impact on a company's competitiveness. Besides, confidentiality clauses can make room for certain exceptions if the parties to the contract agree to this.[273] Furthermore, for the companies concerned, contract transparency builds a better relationship and more trust with their host communities – so creating an avenue for the granting of a thriving social licence. It also decreases the risk of corruption in negotiations and the pressure to negotiate. As for government, contract transparency increases trust between government and citizens, and also increases the capacity to monitor contracts and government's reputation before investors. For the host communities, contract transparency allows for checks on company and government compliance with the contract. Contracts will then be geared towards national development and the management of public resources. Apart from a prohibition on contract secrecy – either through mutual consent or government legislation – such contracts must be easily understood in the local language of the country and of the host communities.

The next chapter focuses on corporate liability for human rights violations and access to justice by victims of human rights violation – using the lens of the Guiding Principles for analysis. It applies the elements of HRBA, discussed in this chapter, to promote the implementation of the GPs. Using the HRBA as a tool for analysing the GPs, is hinged on the

[272] James Gathii and Ibironke Odumosu-Ayanu, 'The Turn to Contractual Responsibility in the Global Extractive Industry,' (2016) *Business and Human Rights Journal* 74.

[273] Countries like Ghana and Liberia have received significant investment from disclosing contracts.

fact that human rights safeguards will be applied to developmental projects, and such safeguards include access to justice, public participation in decision-making, equality and non-discrimination, and access to information and accountability.

CHAPTER 4: CORPORATE 'DUTY' TO RESPECT HUMAN RIGHTS AND ACCESS TO JUDICIAL REMEDIES

4.1 Introduction

This thesis has anchored its arguments on the premise that businesses must not only consider their profitability and growth – but also the interests of their immediate environment. They must weigh the impact of their activities on their host communities. To date, the international legal order does not offer a robust regime for corporate liability. The result is a conflict between human rights principles under international law and under national laws. It is even more complex when such rules or laws are of normative value, making liability difficult to become domesticated. To avoid the challenges of implementation, the GPs can be integrated into various rules, regulations and memoranda to produce an indirect effect.[1] While Chapter three examined the first Pillar of the GPs, this chapter discusses Pillars II (corporate responsibility to respect human rights) and III (access to a remedy, with particular reference to non-judicial mechanisms) of the GPs. It appraises the important contributions of the elements of a rights-based approach to resource governance. This will create legal obligations for corporate entities to integrate human rights values into their activities and projects.[2]

To situate the discussions in an appropriate context, this chapter begins with an exposition of the theory of system transformation. Anchored in the social change theory, corporate actors become socialised into certain behavioural patterns. This chapter further examines the adaptation of the elements of the Human Rights Based Approach (HRBA) to extractive resource governance. The discussion is based on two assumptions: first, firms have sufficient legal personality to bear legal rights and duties; and second, despite tremendous CSR initiatives by MNCs, local communities do not feel sufficient positive impact of extractive resource projects compared to the high socio-economic and environmental costs of such

[1] This thesis does not call for the creation of additional laws to implement the GPs, but rather it calls for an indirect approach where local laws can be amended to incorporate the GPs.

[2] Surya Deva, 'Treating Human Rights Lightly: A Critique of the Consensus Rhetoric and the Language Employed by the Guiding Principles' in Surya Deva & David Bilchitz (eds) *Human Rights Obligations of Business Beyond the Corporate Responsibility to Respect?* (2013) 78 at 93 [arguing that the usage of responsibility as against 'duty' is to denote 'non-legal duties.'].

projects.[3] Drawing examples from resource projects, cases and the literature, this chapter argues for a well-adjusted methodology among government (in the form of policies and directives) and extractive companies (in the form of CSR initiatives) – and pays particular attention to responsibility and development results in the extractive industry. After all, corporate obligation to respect human rights stems from the obligations arising under domestic corporate law and international human rights instruments.

4.2 Social Change as a System of Corporate Transformation

This section discusses social change theory and how its understanding can help transform systemic conduct of corporate entities in relation to respect for human rights.

Social change emphasises the directions of structural changes, effects and consequences from a particular group.[4] Jenson conceives of social change as 'modification in ways of doing and thinking of people'.[5] Lundberg and others define social change as 'any modification in established … standards of conduct'.[6] Social change may therefore be holistically construed as 'an alteration in the cultural, structural, population, or ecological characteristics of a social system such as a society'.[7] Social change theory allows us to conceive monumental processes of transformation across historical and contemporary timelines. Thus, where there is a variation in the *status quo* due to alterations in geographical spread, cultural values, or ideologies, social change is said to have taken place. Through the processes of social change there are evident changes in the values and social norms that bring people together to help create social order.

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[3] Idemudia, Uwafiokun, 'Corporate Social Responsibility and the Rentier Nigerian State: Rethinking the Role of Government and the Possibility of Corporate Social Development in the Niger Delta' (2010) *Canadian Journal of Development Studies* 131. [explaining that there have been over 5000 oil spills between 2000 and 2004 as well as a massive oil spill in November 2012]

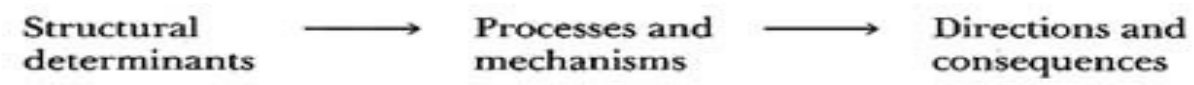
[4] *Hans Haferkamp and Neil J. Smelser (eds)* Social Change and Modernity (1992) 2.

[5] Shelly Shah, 'Theories of Social Change: Meaning, Nature and Processes' *Sociology Discussion*, *http://www.sociologydiscussion.com/sociology/theories-of-social-change-meaning-nature-and-processes/2364*, accessed 6 May 2017.

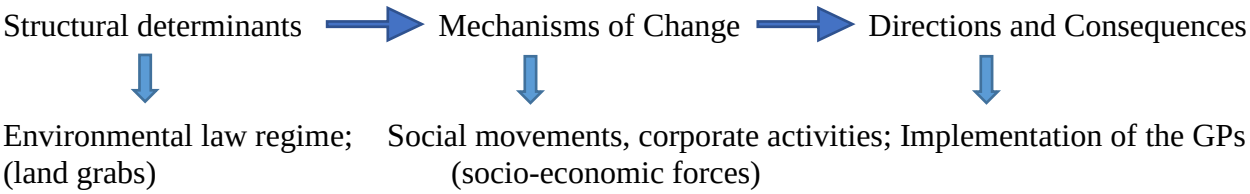
[6] Ibid.

[7] A.G. Johnson *The Blackwell Dictionary of Sociology: A User's Guide to Sociological Language* (2000) 285.

Social change can be driven by cultural, religious, economic, legal, or technological forces.[8] For instance, Strasser and Randall identify the following factors as determinants of social change: 'magnitude of change, time span, direction, rate of change, and amount of violence involved'.[9] Haferkamp and Smelser's Model of Social Change follows this model:



The debate on the imperatives of corporate 'duty' to respect human rights is driven by cultural, religious (e.g. local communities resisting land grabs by extractive companies due to their spiritual ties to the land), economic, and legal aspects of social change. Thus, corporate responsibility to respect human rights goes beyond the mere duty to be involved in CSR. This responsibility demands a conscious attempt by companies to inject CSR into board management and programmes – so that over time it becomes an unassailable part of corporate culture. In such a scenario, social change is said to have taken place. Consequently, social norms could become law over time if compliance with the GPs is strategically done – so evolving into 'corporate culture.'[10] This culture will involve a conflation of voluntary and legal regimes with cultural and socio-economic forces within a social field. Haferkamp and Smelser's model chart can be represented as:



[8] S Hermann and S Randall (eds.) *An Introduction to Theories of Social Change* (1981) 16.

[9] Ibid.

[10] In most European countries today, smoking outside has been banned by regulation, subject to the enactment of a law. Social change occurred when the society instinctively supported moves to curb the smoking menace. See Meera Senthilingam, 'What Finland's plan to be tobacco-free can teach the world' *CNN Health*, 26 January 2017, *http://edition.cnn.com/2017/01/26/health/finland-tobacco-free-plan/*, accessed 6 May 2017. [Finland begins plans to end smoking in 2040]

The above chart shows that the effects of corporate activities and the legal regime regulating such activities interrelates in a social space, with traditional, political and economic forces. These forces show how people should normally interact with each other in a mutually acceptable manner – thereby leading to implementation of the GPs.

The social change model guarantees the implementation of the GPs in a certain way. Basically, social norms do not necessarily demand legislative enforcement. These norms grant MNCs the needed social licence to extract natural resources. Therefore, the implementation of the GPs emerge from corporate adaptation to the demands of socio-economic forces. Most allegations against corporations have stemmed from their inability to keep up with social change and to adapt to social behaviour. It is easy for companies to publish reports on CSR – but how do they ensure that they adapt to social change? Often, there are no systems in place to support the claim of human rights compliance. The next section discuses corporate due diligence requirements, to reveal how corporations can be committed to implement the GPs.

4.3 Corporate Human Rights Due Diligence (HRDD)

In clarifying the concept of corporate HRDD, Ruggie and Sherman distinguish between 'standard of conduct to discharge a responsibility' and a 'process to manage human rights risks'.[11] The authors explicitly state that businesses are obliged to go beyond the law in preventing and addressing any involvement in adverse human rights impact. As a result, companies obtain the fundamental SLO from their host communities. The corporate responsibility to respect human rights applies regardless of any efforts by the state. The commentary to GP 18 states that the essence of HRDD is to 'understand the specific impacts on specific people, given a specific context', and hence it is not just checking the assets and liabilities of a firm – but is an attempt to unravel any actual or potential human rights violations over the whole duration of a project. Under GP 17, the basic component of HRDD, therefore, is to assess actual and potential human rights impacts, integrate and act upon the findings, track

[11] See J. G. Ruggie & J.F. Sherman, 'The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights: Reply to Professors Bonnitcha and Mccorquodale' (2017) *European Journal of International Law https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2997128*, (accessed 29 August 2017).

responses, and communicate how the impacts are addressed.[12] This process obviates the need for companies to show that they respect human rights.

According to Taylor, due diligence is the solution to the intractable problem of corporate responsibility – especially when companies source 'metals and minerals from war zones where serious human rights abuses and armed conflicts were rampant'.[13] Commentary to GP 7 requires states to warn corporations operating in conflict-prone zones of the risk of being involved in gross human rights abuses. GP 15 (b) provides that corporations should have 'policies and programmes' in place in order to be able to meet their human rights responsibility. These policies and programmes, which must be in accordance with their size and circumstances, include HRDD practices that identify, address and mitigate adverse human rights impacts.[14] But how can companies identify and mitigate adverse human rights abuses? GP 17 gives direction on what must be contained in a HRDD. It specifies that companies should integrate findings from the HRDD into their human rights policy, and must communicate how human rights impacts are addressed.[15] HRDD must cover adverse human rights impact of the business activities, the nature and context of the company's operations, and must be an ongoing exercise – considering that the risks associated with human rights may change as the corporations change practice.[16] These HRDD indices are further elaborated in GP 18 to 21.

Even with the best of intentions, corporations in the extractive industry have the potential to be involved in human rights violations (see GP 22). Hence, when HRDD identifies an intentional or unintentional violation, it must actively remediate such impacts on rights holders: the host community to extractive projects. When firms integrate HRDD into their programmes, they can easily defend themselves against legal claims, as there would be an opportunity to indicate there was every reasonable precaution to prevent human rights violations. On the question of whether there is a remediation of environmental degradation or HRDD, a local resident, who was a key informant, said that:

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[12] Ibid. See GP 17.

[13] Mark Taylor, 'The Ruggie Framework: Polycentric Regulation and the Implications for Corporate Social Responsibility' (2011) *Nordic Journal of Applied Ethics* 5.

[14] See GP 17.

[15] Ibid.

[16] Ibid.

> You are doing these things to take care of something that is negative. It is all about preventative, there are measures that are supposed to be in place […] but many of these companies don't do that. I came to the understanding that these measures to be put in place are far more expensive than them just paying compensation. So, they choose to endanger lives rather than doing the right thing. They are not interested in putting these measures in place. It is not the roads or hospitals that are the problems. If you do these things and [there are] no appropriate drugs to take care of the health of the people, do you just build the hospital and leave it as a monument […] It is better to prevent all these things from happening.[17]

Although, showing good cause for HRDD does not absolve the company of any allegation of human rights abuses – it does show serious commitment to the ideals of human rights, as typified under the GPs.[18] Therefore, HRDD should run through the life-cycle of a project, especially in situations where social tensions are rampant. For example, the underlying basis for corporate involvement in adverse human rights impacts, stems from the extent of such a company's participation in the human rights infringement. The questions that determine this are, did the company: *cause* the impact; *contribute* to the impact; and is it *directly linked* to its actions, products or services without contributing to the infringement.[19] Under GP 18, the conduct of HRDD must include consultation with those who are at heightened risk of being affected by the corporate conduct. This would include assessing 'specific impacts on specific people, given a specific context of operations'.[20] In the context of this thesis, for example, this would mean the impacts of oil pollution and gas flaring on the Niger-Delta people.

The various ways that extractive companies have failed to conduct HRDD and remediate the adverse impacts of their activities, can be seen in the oil pollution, gas flaring and climate change that is affecting the Niger-Delta region of Nigeria. This is well exemplified in *Jonah Gbemre (for himself and as representing Iwherekan Community in Delta State, Nigeria) v Shell Petroleum Development Company, NNPC & Attorney General of the Federation*.[21] The

[17] Interview collected on 3 October 2016 in Port Harcourt, Nigeria.

[18] See for instance GPs 17, 22 and commentary to GP 19.

[19] See GP 19.

[20] Commentary to GP 18.

[21] FHC/B/CS/S3/05. [A Federal High Court decision on the 14 November 2005 before Honourable Justice C.V. Nwokorie]

applicant's claim, in summary, was that due to the first respondent's activities in their community, their right to a clean, poison-free and healthy environment had been violated. Furthermore, the applicant claimed that the first respondent's continuous gas flaring in the applicant's local community constituted a violation of their fundamental rights to life and dignity of the human person, respectively, which are guaranteed by sections 33(1) and 34(1) of the Nigerian Constitution and which are reinforced by articles 4, 16 and 24 of the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act.[22] The court was unsparing in its condemnation of the respondents. It held that the continuous flaring of gas by Shell in the *Iwherekan* community was a gross violation of the applicants' right to life and dignity of the human person which are provided for under the Constitution.[23] The court further ordered the applicants to cease gas flaring.[24] The court also ordered the Attorney-General, who never made an appearance throughout the proceedings, to begin the process of amending the relevant sections of the Associated Gas Re-Injection Act, 1979, and the Regulations made pursuant to the Act – so that they are compatible with Chapter 4 of the Constitution.[25]

Despite this judgment, gas flaring still continues, and, in fact, the state frustrated enforcement of this judgment. Initially, upon the expiration of the order of stay of execution, the applicants appeared in court – but not the defendants or their representatives. Subsequently it was revealed that the trial judge had been removed and transferred to a High Court in northern Nigeria. The case file also went missing.[26] Secondly, when Shell and NNPC appealed on the grounds of jurisdiction, the court staff – without putting the applicant or his lawyer on notice – deceitfully adjourned the case. Even when the presiding judge promised to investigate the matter and discipline the person responsible, the matter was never heard in public.[27] This is proof that in weakly governed jurisdictions, bureaucracy and administrative bottlenecks often prevent litigants

[22] Cap A9, LFN, 2004. [African Charter].

[23] *Gbemre's* case, above (n 21).

[24] Ibid.

[25] Ibid.

[26] Friends of the Earth Trust, 'Archived Press Release' *Friends of the Earth* 2 May 2007, *https://www.foe.co.uk/resource/press_releases/shell_fails_to_obey_gas_fl_02052007*, accessed 8 May 2017.

[27] G. Enogholase, 'Benin Court Registrar Under Investigation' *Vanguard*, 27 September 2006.

from achieving justice in national courts. In the European Union (EU), legislation requires corporate due diligence.[28] States are required under EU law to subject their due diligence conduct to necessity, proportionality, and legislation.[29] In some other jurisdictions due diligence requirements have been translated into law.[30]

HRDD must focus on what impact the company is making on its host community. For instance, Nike or Adidas might decide to build a children's playground as part of their CSR. The question then is – why are they doing this? This is simply because they are potential consumers and not because of human rights impacts. Therefore, CSR is different from corporate respect for human rights under the business and human rights (BHR) paradigm. Furthermore, there is a difference between ordinary due diligence and HRDD. For instance, in mergers and acquisitions, where one company buys the other, corporate lawyers check the debts, assets and liabilities of each company. This is business due diligence, while HRDD is about impacts. What impact is that company having on its immediate environment? It could be on its host community, indigenous people or even employees. Corporate HRDD therefore advances corporate engagement with issues that could otherwise affect the corporate image of the company.

Another argument is to develop incentives for corporations involved in due diligence.[31] States, for instance, may reduce the costs of remedying environmental pollution as well as criminal liability for such pollution. States can also provide guidance to corporations through information materials explaining the importance of HRDD under the GPs. Corporate laws should

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[28] See Olga Martin-Ortega, 'Human Rights Due Diligence for Corporations: From Voluntary Standards to Hard Law at Last?' (2013) 31 *Netherlands Quarterly of Human Rights*, 44, 52.

[29] See Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010; see further Directive 2013/34/EU of the European Parliament and of the Council, 26 June 2013, OJ L182/52 [Amended by Directive 2014/95/EU concerning disclosure of non-financial and diversity information by certain large undertakings and groups, 22 October 2014].

[30] See § 1502 of the US Dodd-Frank Act as it relates to certification of minerals from the Democratic Republic of the Congo; see the revisions to the OECD Guidelines (2011). On 21 February 2017, the French parliament adopted a law imposing due diligence obligations for parent and subsidiary companies. This, no doubt will enhance corporate respect for human rights and the environment. The law will make French MNCs assess the impact of their activities and those of their subsidiaries and contractors on the people and the environment by providing periodic statements to this effect. See further Jerome Chaplier, 'France Adopts Corporate Duty of Vigilance Law: A First Historic Step Towards Better Human Rights and Environmental Protection' *https://business-humanrights.org/sites/default/files/documents/France%20adopts%20corporate%20duty%20of%20vigilance%20law_%20PRESS%20RELEASE_21%20February.pdf*, accessed 9 May 2017.

[31] Incentivizing under BHR regime has been discussed in chapter 2.4.

incorporate reporting requirements for due diligence. The law should stipulate what constitutes adequate HRDD and that reporting of such HRDD is required. Mechanisms should be in place to verify such information given by the company – and could include the auditing of reports and adequate sanctions issued where there are false reports or information. Corporate lawyers should be trained on how to advise their corporate clients on human rights impacts. The courts should also be agents of social change – by creating stronger legal standards through their judgments.

The GPs offer a functional examination of the importance of corporate HRDD to extractive resource governance. The provision of GPs on HRDD is important for the extractive sector. First, HRDD will identify the major stakeholders who will be impacted by their activities: the local community. Second, it will identify all the human rights values that could potentially be violated: land displacement; air, land and water pollution; and serious health implications (tuberculosis and silicosis). Third, HRDD will provide solutions to mitigate or reduce such potential or actual impact. The government must enforce the HRDD if the various human rights violations from extractive projects are to be curtailed.

In light of emerging threats occasioned by globalisation, the GPs have created a standard for corporations to inculcate HRDD and impact assessment into their corporate culture. What, therefore, are the implications of corporate responsibility in the extractive industry for Nigeria? Flowing from the general framework of HRBA discussed in chapter three, the next section discusses the basic elements of HRBA - as a framework for implementing the GPs.[32] This rights-based perspective involves decision-making procedures, from policy formulation and administrative actions to law-making. The elements which are important for this research (participation, accountability and transparency, access to information) are discussed below.

[32] Different human rights commissions and organizations have implemented the HRBA in divers ways. For instance, in 2006, FAO developed PANTHER Principles in the application of HRBA to right to food and food security. PANTHER stands for Participation, Accountability, Non-Discrimination, Transparency, Human Dignity, Empowerment and Rule of Law, see *http://www.fao.org/righttofood/about-right-to-food/human-right-principles-panther/en/*, accessed 9 May 2017; The Australian Human Rights Commission also developed PANEL (Participation, Accountability, Non-discrimination, Empowerment, Legality) in the application of HRBA to its own work, see *https://www.humanrights.gov.au/human-rights-based-approaches*, accessed 9 May 2017.

4.4 Adaptation of the HRBA to the Corporate Responsibility to Respect Human Rights

4.4.1 *Participation in Extractive Resource Governance*

One of the most important international human rights safeguards in extractive resource development is the right of local communities to participate in decision-making processes. This thesis conceives participation as the right of the local community to take part in decision-making processes – with a view to influencing the outcomes.[33] The theoretical basis for participation, Participatory Development Theory (PDT), advocates that local communities express their views and advance their position on projects that could impact on them, before those projects are approved.[34] In the context of extractive resource governance, participation improves effectiveness, justness, responsibility, and the 'inclusion of local people who have been excluded by the command and control model'.[35] Participation includes consultation and an opportunity for local communities to actively take part in a free and informed manner,[36] that will create a meaningful and robust contribution to any project affecting their socio-political, cultural, and environmental rights.

The emergence of PDT can be traced to the activism of civil rights organisations in the late 1990s, when the BHR debate began to gain traction.[37] The theory therefore emerged as a response to increasing challenges occasioned by globalisation, which has left a wide vacuum in governance.[38] The inability of those who are likely to be affected by a project, to take part in

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[33] See Damilola Olawuyi, *The Human Rights Based Approach to Carbon Finance* (2016) 179.

[34] See further B Barton, 'Underlying Concepts and Theoretical Issues in Public Participation in Resource Development' in D. Zillman, N Donald, A Lucas, and G Pring (eds.) *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources* (2002) 11.

[35] See further Volker Mauerhofer, 'Public Participation in Environmental Matters: Compendium, Challenges and Chances Globally' (2016) 52 *Land Use Policy* 481 [noting that participation in environmental matters covers decision-making, access to information and justice].

[36] H. Mostert, H. V. Niekerk, 'Disadvantage, Fairness and Power Crises in Africa, A Focused Look at Energy Justice' in Yinka Omorogbe & Ada Ordor (eds.) *Ending Africa's Energy Deficit and the Law: Achieving Sustainable Energy for All in Africa* (2018), 63. [all individuals must be fairly represented in decision-making process and full information disclosure by government and industry are very important]; See further Kirsten Jenkins, Darren McCauley, et.all, 'Energy Justice: A Conceptual Review (2016) *Energy Research and Social Sciences.* 177.

[37] The 1984 Bhopal toxic chemical spill (India), various Shell atrocities in Niger-Delta (Nigeria), Nike confessing to facilitating worker exploitation (Indonesia). Interestingly, these incidents still happen till date, the 2013 collapse of the Rana Plaza building (Bangladesh) is a clear example.

[38] Ruggie claims that 'conflict zones can function as essentially law-free zones where corporate-related human rights abuses are subject only to self-restraint and the occasional lawsuit in another country based on statutes with

their democratic affairs, further left the challenge of achieving sustainable development.[39] It was also during this period that nations around the world started tilting towards the idea of liberal democracy.[40] The fall of communist Russia and its influence on eastern European countries paved the way for capitalism to thrive. In between these developments, the aspirations of the potentially affected public were however not factored into the push for economic liberalisation.[41] The result was that the state, far disconnected from the people, entered resource contracts on behalf of these people. These contracts did not take human rights concerns into consideration. Thus, the state, and by extension the companies, created economic values for themselves – in a way that did not produce values for society. As a result, societal needs and challenges could not be met[42] – thereby creating a period of social exclusion.

Various international human rights instruments support the idea of participatory development.[43] These calls for public participation ensure that host communities to extractive projects, which were previously on a low rung of the ladder, were now seen as strategic partners and not as 'abstract concepts' in terms of ensuring positive extractive resource governance.[44] The opinions of local community members were therefore seen as being instrumental for having conflict-free, socio-cultural development of extractive communities. This is obvious in three ways. First, the MNCs are strangers to the host country, and even more so to the local community. Second, MNCs do not understand the political, socio-cultural and spiritual

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extraterritorial reach. This created the biggest gap between globalization and governance,' see J. Ruggie, *Business and Human Rights* (2013) 33.

[39] G.I Priyadarisini, 'Environmental Policies in India Towards Achieving Sustainable Development' (2016) *IQSR J Humanities & Soc. Science* 58.

[40] *Ibid*

[41] See Peter Seele and Irina Lock, 'Instrumental and/or Deliberative? A Typology of CSR Communication Tools' (2015) *J Business Ethics* 401.

[42] Michael E. Porter & Mark R. Kramer, 'Creating Shared Value' *Harvard Business Review*, (2011) 89.

[43] See article 1 of the UN Declaration on the Right to Development, adopted 4 Dec. 1986, UN Doc. A/RES/41/128 at 186; article 13 of the African Charter.

[44] Zarina Patel, 'Environmental Justice in South Africa: Tools and Trade-offs' (2009) *J Social Dynamics* 94; see also Nzalalemba Kubanza, Dillip Das and Danny Simatele 'Some Happy, Others Sad: Exploring Environmental Justice in Solid Waste Management in Kinshasa, The Democratic Republic of Congo' (2017) *J Local Environment* 595. [finding that waste products end up in the poorest and least powerful communities in DRC and arguing for a politico-cultural mechanism on remedying these inequalities]

attachment of the locals to their ancestral lands. Third, both government and MNCs do not understand the complexity and enormity of the problem at local level. The attendant skirmishes can be avoided if the local community takes part in development project decisions that facilitate social cohesion and social licence.

It is the expectation of the society that income from oil, gas and mineral products must benefit members of the society, particularly, the host communities where such resources are obtained. The questions that follows are: can it be said that the local communities are consulted before extractive projects are sited in their communities? Does there exist social contract between host communities and the states whose role is to distribute the social and economic benefits accordingly? For instance, the indigenization policy of Nigeria in the 1970s and the Broad Based Economic Empowerment Act (Act 53 of 2003) of South Africa sought to empower local content in the areas of control of natural resources. Initially, the idea behind these policies was that stakes would be transferred from foreign company owned local subsidiaries to indigenous owners or to the state. These utopian policies would have gone a long way to eradicate environmental injustice and perceived structural imbalances. However, the failure of state machinery to defend and implement these laws aggressively took over much of their existence.

4.4.2 *Robert Chamber's Theory*

Robert Chambers is one of the earliest proponents of the Participatory Development Theory (PDT).[45] His work primarily focuses on the inclusion of those likely to be affected by a project, in the decision-making processes. Creating a people-centred approach to development, Chamber's work becomes instructive to this thesis as a way of building arguments for local community participation in extractive resource development.

In his seminal work, Chambers argued that any discussion of the meaningful inclusion of indigenous knowledge must divest itself from a top-down approach which excludes local people from decision-making.[46] He asks how it is possible to painstakingly involve local communities in 'development'. He believes that only participation can make this happen. Due to extensive

[45] R Chambers, *Whose Reality Counts? Putting the First Last* (1997).

[46] Ibid.

criticism of the orthodox 'top-down technocratic interventions', the notion of participation materialised as an indispensable component of a people-centred 'development' paradigm – which puts poor people first.[47] Some of these top-down approaches can be found in modernisation theories.[48]

Chambers further argues that the inclusion of local people in development increases the knowledge of policy-makers and development professionals of the needs and desires of the local people. Thus, development professionals must listen to and learn from the very people they are trying to help. He calls for a 'reversal of values' in the approach of development professionals – to one that puts the local people first (putting the last first) in the hierarchy of stakeholders. He puts the poor and marginalized at the epicentre of his developmental policy process. Often referred to as 'development's best advocate',[49] Chambers' participatory and development theory posits that the poor should be acknowledged when a development problem is identified and when projects are implemented. He therefore calls for a complete shift towards an approach that is more people-driven and process-orientated. In a new set of thinking, Chambers contends that projects must be organised and controlled by the communities ('lowers') themselves – rather than privileged outsiders ('uppers').[50] Hence, development must be done by or with the people concerned, rather than for or to them.[51] The importance of local people and the poor in rural areas in development outcomes, is very important.[52] Chamber's work questioned the rationale of development outcomes that are not pro-poor or do not incorporate poor people in such

[47] See No Longer at Ease, 'Participation: People Power by Putting the First Last?' *Youth Development Voice* 30 September 2011, *https://youthdevelopmentvoice.wordpress.com/2011/09/30/participation-people-power-by-putting-the-first-last-robert-chambers/*, accessed 10 May 2017.

[48] For example, the Marxist theory of modernization theorized that as nations developed, adopting a communist approach to governing, would end conflict, exploitation, and inequality. Economic development and social change would lead developing nations to develop into a society much like that of the Soviet Union. On the other hand, the capitalist version of modernization theorized that as nations developed, economic development and social change would lead to democracy.

[49] Andrea Cornwall and Ian Scoones (eds) *Revolutionizing Development: Reflections on the work of Robert Chambers* (2011) 13.

[50] No Longer at Ease, above (n 47).

[51] Ibid.

[52] David Simon (ed) *Fifty Key Thinkers in Development* (2006).

outcomes.[53] Thus, in the context of extractive resource governance, development projects that have the input of the people, the local community, and which are pro-poor and conform to the ideals of environmental justice, would easily facilitate social licence and enjoy the legitimacy of the people.

In determining when participation is said to have taken place, Cohen and Uphoff propose that the following questions must be asked:[54]

i) What kind of participation? Is it participation in decision-making, implementation, benefits (or harmful consequences) or in evaluation?[55]

ii) Who is participating in it (residents, local leaders, government personnel, or foreign personnel)?[56]

iii) How is participation occurring (basis, form, extent and effect of participation)?[57]

Each of these questions is now discussed in turn:

a. What kind of participation?

Timely and adequate information on extractive resource projects must be provided to the affected local community. The adequacy of the contribution to such projects must be measured under a reasonable person's test. Local communities must take part in and be able to influence decisions that affect them – especially considering that most members of this community, typically being illiterate, may not be able to understand the technicalities of extractive language. Environmental treaties lie the Aarhus Convention provide some ideas on what constitutes

[53] For a criticism of Chambers work, see I. Kapoor, *The Devil's in the Theory: A Critical Appraisal of Robert Chambers' work on Participatory Development* (2002) 23.

[54] John Cohen & Norman Uphoff, *Participation's Place in Rural Development: Seeking Clarity through Specificity* (1980) *World Development* 214.

[55] Ibid.

[56] Ibid.

[57] Ibid.

adequate participation.[58] The Convention guarantees the '… right of access to information, public participation in decision-making, and access to justice in environmental matters …'.[59] Article 7 provides that each Party to the Convention 'shall make appropriate practical and/or other provisions for the public to participate during the preparation of plans and programmes relating to the environment, within a transparent and fair framework, having provided the necessary information to the public'.[60] The Article also obliges each party to endeavour to provide opportunities for public participation in the preparation of policies relating to the environment.[61] What this means, is that state parties are to provide for public participation before any decision on environmental matters can be made. Nigeria can draw significant lessons from the Aarhus Convention in the areas of public participation in decision-making, access to justice, and access to information.

Although the GPs do not mention participation – they provide for meaningful consultation with key stakeholders. For instance, to measure human rights risks or to engage in HRDD, corporations should assess their 'actual or potential human rights impacts'. This assessment involves 'meaningful consultation with potentially affected groups'. This group refers to the host communities to extractive resource projects. To fulfil the right to participate, local communities must be able to freely and fairly express their views – without any form of coercion, manipulation or use of force. This is the hallmark of a democratic society. The people know what is best for them and can decide how that transformative project can be best achieved. The right to participate can only be achieved in an open and inclusive decision-making process.

b. Who is participating? The local community as an important stakeholder

For local communities to participate in extractive governance, corporate management will have to integrate members of the community into decision-making.[62] This participation should be

[58] See the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, done at Aarhus, Denmark, on 25 June 1998 (Aarhus Convention).

[59] Ibid, at article 1.

[60] Ibid, at article 17.

[61] Ibid.

[62] In Germany, workers have the right to participate in management of the companies they work. See Germanys Co-determination Act, 1976. See further E. McGaughey, 'The Codetermination Bargains: The History of German

sought in a transparent and consultative manner, while stakeholders should be able to express their views fairly and fearlessly. Host communities are the most impacted by the harmful activities of MNCs. Involving the stakeholders legitimises the project to be carried out in their community and also creates social licence for the firms. The mere fact that the host community has been given the necessary advantage of participating in decision-making, should not be an avenue used to delay development projects. The aim of broad-based participation is to avoid unnecessary hurdles and the politicisation of the entire process. The community should not see it as an avenue to impede development. The objective should be a transparent solution which is anchored in a solid based, pragmatic approach.

In engaging meaningfully with the local community stakeholders, the commentary to GP 18 obliges companies to consult their host communities directly – considering 'language and other potential barriers to effective engagement'. What are these barriers to effective engagement? Stakeholder engagement and meetings should be held in the community which will be hosting the project in question. The meetings should be conducted in the language understood by the community, and all scientific and technical terms must be explained. Logistical support (use of interpreters, for instance) should be provided to facilitate attendance by all community members. Furthermore, adequate care must be taken to ensure that vulnerable members of the society are well represented. Firms can obtain the opinion of the community beforehand (in the form of questionnaires) – to establish what the immediate needs of the society would be. For instance, on the relationship between local communities and extractive companies, one research participant from Port Harcourt, Nigeria, stated thus:

> […] The government should have a hand in approaching the community before even issuing the licence to operate. They should ask the local communities if they can empower any company that wants to start operation in the particular local government. It should even be the community that should even empower the government, for the government to empower the companies […][63]

Greater responsibility should be placed on government and firms to show that wide consultation took place with the local community, and that such communities were given adequate

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Corporate and Labour Law' (2015) LSE Legal Studies Working Paper No. 10/2015. This thesis argues that representatives of host communities should take part in board meetings of extractive companies planning to start a development project.

[63] Interview with Mr. A conducted on 3 October 2016.

opportunities to take part in decision-making. Domestic policies must be focused on giving mandatory backing to this suggestion. The participation of local community is indispensable to understanding the local context. Citizens must lead their own development and build their own institutions. In effect, where companies have incorporated local community participation into their policies – there must be rewards. At the same time, sanctions should be meted out to those who have failed to comply with established human rights benchmarks.[64]

When participation fails, the community is left with no choice but to resist any projects that may be sited on their land. The ability to decide whether to allow extractive companies into their territory or to protect their land, rivers and farms, is the bedrock of sustainable development. This bottom-up approach (using Chamber's theory) of participatory development creates the right of the local community to participate in decision-making, as well as the legitimacy of the social licence of the oil companies to operate. Environmental sustainability lays the foundation for environmental justice. Encouraging local community participation reduces conflicts in the resource zones. The recourse to participatory paradigms prevents the unilateral exercise of control, and, by extension, decisions by the central government in relation to control of natural resources.

c. How is Participation Occurring?

The foundation, method, scope and consequence of the occurrence of participation are best typified by the codification of a new and growing concept of participatory development: the Free, Prior and Informed Consent (FPIC) – which provides a platform through which the right to participate can be realised.[65] The FPIC allows the local community to freely give or withhold consent to any decision that will affect their lands, territories, or livelihoods.[66] To be able to refuse or approve any developmental projects, a local community must be fully engaged with the

[64] See Environmental Justice Atlas, 'Hydraulic Fracking in the Karoo, South Africa,' *https://ejatlas.org/conflict/hydraulic-fracturing-fracking-in-the-karoo-south-africa*, accessed 11 May 2017. [community objecting to shale gas fracking]

[65] Adrienne Mckeehan & Theresa Buppert, 'Free, Prior and Informed Consent: Empowering Communities for People-Focused Conservation' (2014) 35(3) *Harvard International Review* 48; Phillippe Hanna & Frank Vanclay, 'Human Rights, Indigenous Peoples and the Concept of Free, Prior and Informed Consent' (2013) 31(2) *Impact Assessment and Project Appraisal* 146.

[66] Mckeehan & Buppert, above (n 65) 48.

extractive companies and government regarding decisions about the projects to be made. They also must also have access to this process in a form and language that is understood by them.[67]

The FPIC principle has its foundation in the ILO Convention 169.[68] The Convention was introduced to protect the rights of indigenous peoples – whose communities are endowed with natural resources. The Convention provides that indigenous peoples are entitled to free and informed consent before they are relocated from their land.[69] Although the Niger-Delta peoples of Nigeria are not classified as indigenous peoples, they occupy a vast enclave of land endowed with natural resources. They comprise different ethnic groups and therefore should have the inalienable right to participate in decision-making and to give or withhold consent to activities conducted in that vast amount of territory.[70] The control of their lands, which includes the resources thereon, affords the local communities the opportunity to maintain their cultures, without hindering the economic development needed in the community.

The FPIC principle respects tribal peoples' cultural, political and spiritual practices. As each community's challenges and circumstances vary – so also should this concept be adapted to each project. The general requirement should be that the concept should be applied from the time of project conceptualisation, through to design, proposal, information, execution, and evaluation.[71] This principle outlines how stakeholders should relate with each other, and gives priority to the local community. It is therefore safe to conclude that while FPIC lays the

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[67] Deanna Kemp and John Owen, 'Corporate Readiness and the Human Rights Risks of Applying FPIC in the Global Mining' (2017) *Business and Human Rights Journal* 164. [noting that FPIC must be adapted to local context and corporate ability to support the principle].

[68] (ILO No. 169) (1989), Convention on Indigenous and Tribal Peoples in Independent Countries - 169/1989. Adopted in 1989 and entered force in 1991. This is a legally binding instrument that deals with indigenous and tribal people's rights.

[69] Ibid. see further sections 6, (consultation must take place), 7,16 and 22 of the Convention; see also articles 1,12,19 (states shall consult and cooperate in good faith with the indigenous peoples concerned though their own representative institutions in order to obtain Free, Prior and Informed consent before adopting and implementing legislative or administrative measures that may affect them), 20 and 27 of the UN Declaration on the Rights of Indigenous Peoples, UN Doc/A/61/L.67 (2007).

[70] See Jide James-Eluyode, 'Exploring the Comparative Natural Resource Revenue Allocation Model of Native American Tribes and Indigenous African Tribes' (2017) *Race, Racism and the Law, http://www.racism.org/index.php/articles/worldwide/oppressed-groups/174-indigenous-peoples/1567-comparativenaturalresource?showall=&start=6*, accessed 30 August 2017.

[71] See also Report of the International Workshop on Methodologies Regarding Free Prior and Informed Consent E/C.19/2005/3, endorsed by the United Nations Permanent Forum on Indigenous Issues (UNPFII) at its Fourth Session in 2005).

foundation, the GPs build on it. For FPIC to achieve remarkable success, there must be some mechanisms to determine what counts as FPIC. These must centre on the collaborative efforts of the entire community and must accommodate the concerns of the voiceless. As stated earlier, this collaboration must be free – that is honest, and devoid of any coercion, bias, intimidation or manipulation. In doing this, traditional cultures and spiritual connection must be respected. The term 'Prior' denotes that consent has been sought and obtained before the project was embarked upon. 'Informed' means that the local community is aware of the full intent and scope of any project to be embarked upon, before giving their consent.[72] Any relevant information should be made known to the community prior to seeking their consent. 'Consent' denotes that the information given was processed well by the local community.[73] Due to the nature of the extractive industries, consent once given can be withdrawn.[74] For instance, a key informant from Port Harcourt stated that:

> […] Sometimes these licences can be reviewed; it should be on short terms so as to monitor the companies – maybe one year. Before you renew the licence, you confirm with the community if they are doing well. Is there anything that is not done right? if there is anything that is not done right, they don't have the licence to operate again in that community.[75]

This will prevent MNCs from fraudulently obtaining consent prior to the commencement of a project. The application of the FPIC would allow stakeholders to discuss the importance of the extractive resource project, before the MNCs embark on the project. Where the project would be greatly inimical to the environment and the peoples that live therein, it should be discontinued.

The application of the FPIC is, however, fraught with many challenges. People can only apply the principle if they are aware of its existence. Thus, local peoples must be given access to information in a language they understand, and they have a right to give and to withhold consent for any extractive projects in their community. The commentary to GP 18 supports this.

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[72] Hanna & Vanclay, above (n 65).

[73] Ibid.

[74] Sometimes, extractive companies can manipulate local residents through financial incentives so as to get their consent to a project. Where this is discovered subsequently, it can form a basis for withdrawing consent.

[75] Interview, above (n 17).

Likewise, GP 31 provides that barriers of access to non-judicial grievance mechanisms may include language difficulties. The essence of GP 31 is to give the local community the right of first refusal. Furthermore, there should be mandatory provisions in environmental laws that safeguard the implementation of FPIC. Gaining the consent of the local community in project planning and execution would allow corporations to discuss the benefits and risks associated with the project, and the means to avoid or mitigate those risks.[76] An understanding of the FPIC will be beneficial for the prospects of implementing the GPs. The Nigerian government must adopt a mandatory requirement for companies to ensure participation and adoption of the FPIC, as a requirement for the commencement of any project.[77] Sadly, however, most extractive projects do not comply with FPIC requirements.

In Nigeria, the Kwale Project is based in Kwale, Delta State. Since the discovery of oil, Nigeria has been struggling with curbing gas flaring.[78] The Kwale/Okpai Gas Plant, which started on-stream production in 1987, was designed to curb that gas flaring. The Kwale Project is a joint venture partnership which was concluded in 2006 between the Nigerian government (represented by the Nigerian National Petroleum Corporation) and three MNCs: Shell Petroleum Development Company, Nigerian Agip Oil Company (NAOC), and Phillip Oil. The project, which was designed to reduce gas flared from oil and gas explorations, involves a process whereby gas previously flared at the Kwale Oil-Gas Processing Plant (OGPP) is transported through a pipeline to the Okpai combined gas cycle turbine power plant – in order to generate electricity.[79] Despite its nobility, projects like this do not impact positively on the lives of the

[76] Damilola Olawuyi, *The Human Rights-Based Approach to Carbon Finance* (2016) 294.

[77] See further Articles 1(1), 2(3), 8(2) of the UN Declaration on the Right to Development [right to vote and to participate in public affairs, and constitutive – rights to freedom of expression, of assembly and of association. Right to participate in cultural life and in family life. Rights of participation for vulnerable groups: women, children, minorities, indigenous peoples, peoples with disabilities and migrant workers].

[78] See Okorowo C. Agochi, 'Gas Flaring in the Niger Delta Nigeria: An Act of Inhumanity to Man and His Environment' (2014) *Int'l J Social, Behavioural, Educational, Economic, Business and Industrial Engineering,* 2346. [Nigeria flares more natural gas associated with oil extraction than any other country on the planet, with estimates suggesting that of the 3.5 billion cubic feet of Associated Gas (AG) produced annually 2.5 billion cubic feet, or about 70% is wasted via flaring. This equals about 25% of the UK's total natural gas consumption, and is equivalent of the entire African continents gas consumption. Most of these flares burn 24 hours a day and some have been doing so for over 50 years. Communities near these flares are deprived of even the comfort of night's natural darkness]; See also 'Kwale Community Projects' *http://www.napims.com/Kwale.html*, accessed 16 May 2017.

[79] Olawuyi, above (n. 76) 78. Presently, the Kwale/Okpai gas project runs through eight communities. The host communities are: Oleh, Irri, Idheze, Kwale, Beneku, Aboh, Abalagada, and Okpa.

host communities. First, the federal government never consulted or informed the Kwale community about the project or its immediate impact on the community. Second, residents of the Kwale community, for instance, do not benefit from the electricity generated through the plant. Rather, the electricity goes directly into the national grid and is redistributed by the Nigerian government. Besides, the project suffers from a lack of transparency in its bidding, approval and execution phases; a lack of stakeholder participation and free, informed consultation; and a lack of transparent environmental impact assessment, which should run throughout the project.[80] These human rights concerns doubtless continue to blur the social licence of the MNCs, and affect the legitimacy of the projects. As a result, host communities take to the streets in protests, disturb construction works, and petitions from environmentalists and NGOs become rampant.[81] Furthermore, the Kwale project is significant for one reason: it failed to comply with the FPIC of the Kwale community before the project started.

The silicosis cases discussed in chapter three reveal the inability of mines to provide an adequate and enabling environment for the mineworkers to work and to be informed of the impact of the project on their land and health.[82] In 2011, Jindal Africa (Pty) Ltd began the extraction of iron ore in the Makhasaneni area of South Africa. The residents of Makhasaneni area have the rights to use and access their land, which is protected under the Constitution and under the Interim Protection of Informal Land Rights Act (IPILRA).[83] However, Jindal did not consult with the residents of Makhasaneni on the mining activities – before exploring the ore. It was only when the mining vehicles arrived at the site that the residents heard about the project for the first time. Interestingly, the mining company contended that it was given the mining rights by the local traditional ruler, inkosi Thandazani Zulu, and by the nominal owner of the land (the Ingonyama Trust). The livestock and ancestral graves of some residents were damaged

[80] Ibid, 79.

[81] See Environmental Justice Atlas, 'Kwale-Okpai CDM Project, Nigeria' *https://ejatlas.org/conflict/kwale-okpai-cdm-project-nigeria*, accessed 26 March 2017.

[82] See *Bongani Nkala & 68 ors v. Harmony Gold Mining Company & 31 ors*, Consolidated Case Number: 48226/12. See further chapter 3.5.3.

[83] See Tabelo Timse, 'King's Trust sells people out to Mining' *Mail & Guardian* 5 June 2015, *https://mg.co.za/article/2015-06-04-kings-trust-sells-people-out-to-mining*, accessed 9 May 2017.

and water sources were contaminated.[84] There was also the story of an aged woman who owned land and had been cultivating it for about 20 years. She depended on the farm produce from the land to feed her eleven grandchildren and five other children. The mine – without free, prior and informed notice – descended on her land and immediately commenced prospecting. Jindal not only failed to inform her of its intended actions, but also failed to remedy any environmental effect on the land.[85]

In the Endorois case,[86] the African Commission affirmed the FPIC principle. The indigenous Endorois peoples had been removed from their ancestral land by the Kenyan government in order to create a natural park – without prior consultation and adequate compensation.[87] The Endorois people are traditional pastoralists who had lived in or around Lake Bogoria in Kenya from time immemorial.[88] The case relates to their eviction from their ancestral and traditional land, in order to pave the way for a state-run reserve and tourist destination. The Kenyan courts refused to hear the case, and hence the Endorois people approached the African Commission on Human and Peoples' Rights – which held that the Kenyan government had infringed on the human rights of the Endorois people by evicting them from their land, and had paid them little or no compensation.[89] This was a violation of the Endorois peoples' rights to property, development, health, culture, religion and natural resources.[90] The Commission therefore ordered Kenya to restore the indigenous people to their historical and traditional land, and also to adequately compensate them.[91]

The Endorois case admits two presumptions. First, the state cares less about the development of its citizens when they live in an environment which is conducive to FDI. In this case, Lake Bogoria where the Endorois people lived, had great potential for tourism due to its

[84] Ibid.

[85] Ibid.

[86] *Centre for Minority Rights Development & Others v Kenya* (2009) AHRLR 75 (ACHPR 2009).

[87] Ibid at 291.

[88] Ibid.

[89] Ibid.

[90] Ibid.

[91] Ibid.

population of flamingos and abundant flora and fauna. However, the Endorois people claimed that the lake was a symbol of their religion and culture and was also a traditional burial site for their ancestors. Second, the state does not consult the local community before embarking on any government developmental initiatives – especially concerning natural resources which are a growing source of income for most African nations. For instance, the Endorois people claimed that they fruitlessly tried to persuade the Kenyan government to reverse its policy on Lake Bogoria, and were also rebuffed by the local authorities and agencies in charge of wildlife. This case therefore illustrates the importance of the FPIC rule in project development. The Kenyan government deprived its citizens of adequate compensation or substitute grazing land, refused the Endorois people any form of participation and consultation before their land was usurped, and did not comply with the FPIC principle.

The African Commission held that the Kenyan government was under an obligation to obtain the FPIC of the whole community – since the project had major implications for their lives.[92] What flows from the Endorois decision, and which is instructive for the Nigerian situation, is that in the context of natural resources, for any extractive project or development that could significantly affect the host community – the state and MNCs must not only consult the host community, but must also obtain their FPIC in line with the religion, customs and traditions of the community. The African Commission also confirmed a rights-based approach to extractive resource governance in a 2012 resolution.[93] The Commission held that the state must take all necessary measures to ensure participation – including the FPIC of communities which are host to extractive projects – in decision-making processes related to extractive resource governance.[94]

In *African Commission on Human and Peoples' Rights v. Kenya*,[95] two NGOs, Centre for Minority Rights Development (CEMIRIDE) and Minority Rights Group International (MRGI), acting on behalf of the Ogiek Community of the Mau Forest brought an action before the African

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[92] Ibid at 226.

[93] See African Commission on Human and Peoples' Rights, '224: Resolution on a Human Rights-Based Approach to Natural Resources Governance' 51st Ordinary Session, 18 April to 2 May 2012, The Gambia, *http://www.achpr.org/sessions/51st/resolutions/224*, accessed 9 May 2017.

[94] Ibid.

[95] Application No. 006/2012 (Judgment delivered on 26 May 2017, Arusha, Tanzania).

Commission on Human and Peoples' Rights (African Commission). In October 2009, Kenyan Forestry Service (KFS), issued a 30-day eviction notice to the Ogiek Community and other settlers of the Mau Forest, asking them to leave the forest.[96] The 'public interest justification' for evicting the Ogieks was for the preservation of the natural ecosystem. The government claimed that the forest is a reserved water catchment zone, and therefore part of government land.[97] The African Commission initially ordered the KFS to suspend the implementation of the eviction notice.[98] The Commission considered the socio-economic and political survival of the Ogiek Community should the eviction notice be carried out. However, KFS failed to observe this order. Considering the grave human rights violations in this case, the African Commission referred the matter to the African Court on Human and Peoples' Right (African Court) for adjudication.

The Ogieks are an indigenous community in Kenya, who have been living in the Mau Forest complex for generations. They are predominantly hunter-gatherers and their way of life and survival depend on the Forest which is their ancestral land. Their survival, in part, depends on unhindered access to and use of their traditional land and natural resources.[99] The attachment to land and natural resources is one of the inviolable rights of indigenous communities. The Ogieks people contended that they were not involved in the decision leading to their eviction. This non-consultation is a continuation of the historical injustices suffered by the Ogieks.[100] The Ogieks therefore allege a violation of articles 1(obligation of member states), 2(right to freedom from discrimination), 4(right to life), 8(right to freedom of conscience), 14(right to property), 17(2)(right to take part in cultural life) and (3)(promotion and protection of traditional values), 21(right to free disposal of wealth and natural resources), and 22 (right to economic, social and cultural development) of the African Charter on Human and Peoples' Rights. The Applicants therefore prayed the court to stop their eviction; recognize the Ogieks' historic land;[101] and be

[96] Ibid, 3.

[97] Ibid.

[98] Ibid, 2

[99] Ibid, 32.

[100] Ibid, 3

[101] Ibid, 9

compensated by the Kenyan government for all the loss the Ogieks have suffered through the loss of their property, natural resources and freedom to practice their religion and culture.[102]

The court, unanimously held that the Kenyan government violated Articles 1, 2, 8, 14 17(2) and (3), 21 and 22 of the African Charter. It also ordered the Kenyan government to take all appropriate measures within a reasonable time frame to remedy all the violations established.[103] In particular, the Court held that evicting the Ogieks people from their ancestral lands, without due prior consultation and against their will violated the Ogieks peoples' right to land under Article 14 of the African Charter.[104] The judgment recognises Ogieks' status as a distinct tribe under Article 2 of the African Charter; it also recognises the connection between the indigenous peoples and the spiritual attachment their land. Hence, the eviction notice would deprive the Ogieks a right to practice their religion and will also limit their freedom to engage in cultural activities and practices - a clear violation of Articles 8 and Article 17 (2) and (3) of the African Charter.[105] The Court further held that by the governments action, the Ogieks are prevented from enjoying the abundance of food produced by their ancestral land, thus constituting a violation of Article 21.[106]

This case advances two principles. First, it was not in dispute that the Ogieks have never been consulted on matters relating to the Mau Forest or on their eviction. Active consultation prevents community revolt. The eviction would have negatively impacted the socio-economic and cultural development of the Ogiek people. Second, one of the hallmarks of determining indigeneity is whether there has been changes in the way of life or cultural tendencies of the indigenous peoples. The Court noted that while some features of indigenous culture, for instance, dressing, could change over time, the intrinsic traditional values rooted in their 'self-identification and shared mentality often remain unchanged'.[107] In this case, the cultural traits of

[102] Ibid, 9.

[103] Ibid, 68

[104] Ibid, 38

[105] Ibid, 57

[106] Ibid, 61.

[107] Ibid, 57.

the Ogieks peoples had been kept intact over the years despite infiltration of their culture as a result of civilization and modernisation.

4.4.3 *Accountability and Transparency*

Accountability and transparency mechanisms facilitate the HRBA to extractive resource governance. They are a key element of the HRBA – which guarantees the potential implementation of the GPs. The Commentary to GP 1 stipulates that states have a duty to protect and promote human rights. One of the ways to achieve this protection, is by providing for adequate accountability and also through legal transparency. Furthermore, the commentary to GP 21 provides that the obligation to respect human rights requires companies to have programmes and policies through which they can demonstrate human rights compliance. Indeed, this obligation requires companies to communicate those policies and provide 'a measure of transparency and accountability' to individuals or the local community. GP 31 provides that states and non-state actors should keep parties to a grievance informed about the progress of such grievance. This information could be in the form of case studies, indicators or more exhaustive information about the management of certain cases.

Measuring human rights observance provides a clear and precise indication of progress made, when previously it had been lacking. Rules and safeguards help to prevent human rights violations. Transparency and accountability are at the core of extractive resource governance in Nigeria. A transparent and accountable establishment which is consistent with the BHR, will measure the impact of laws and policies on human rights compliance. For example, all environmental laws must provide for compliance mechanisms that monitor the actualisation of human rights. Despite Nigeria's plethora of laws regulating the extractive resource industry, these laws have failed to address and impact on the local communities who are recipients of bad corporate decisions. Besides, these laws do not provide for adequate monitoring, and do not insist on human rights compliance information. This laxity fails to hold MNCs accountable for human rights violations in the extractive industry. It is possibly this laxity that leads to the prosecution of human rights violations in the home states of MNCs.

In *Akpan v Shell Petroleum Development Company of Nigeria Ltd & Royal Dutch Shell Plc*,[108] a Dutch NGO, Milieudefensie, supported the plaintiff, Akpan, by instituting this action in a Dutch District court. The plaintiff, a Nigerian farmer and fisherman, challenged Shell's activities on his land and fish ponds.

The case concerns two major oil spills from Shell Petroleum Development Company's (SPDC) oil wells between 2006 and 2007. These oil wells were situated in the plaintiff's village and vicinity. During the same period (2006 and 2007), the plaintiff exploited land and fish ponds in Ikot Ada Udo, Akwa-Ibom State, Nigeria.[109] For some years, the oil wells referred to were not used for production as they were mainly exploratory wells. They were subsequently abandoned. In August 2006, large volumes of oil spilled from these wells. These spillages were reported to SPDC which made efforts, together with its employees and government agencies, to contain and secure the oil spills. However, the host communities prevented access to the well. After careful negotiations with the host community, an SPDC employee finally gained access and stopped the spill in 2007. The well had spilled about 629 barrels of oil, and the cause of the spill was linked tampering with the wellhead. Indeed, oil leaks can be attributed to sabotage or obsolete equipment used by operators. One of the main reasons for sabotage is to indirectly receive compensation from MNCs. Another factor could be to steal oil. Between 2008 and 2009, SPDC contracted two companies to perform remediation work (using the RENA method) in the plaintiff's village, and, in particular, near to the oil wells.[110]

Despite SPDC's efforts, however, the plaintiff claimed that the company – being the well operator – failed, refused or neglected to properly secure the wellhead, thereby resulting in an oil spill which damaged the plaintiff's farm and land in the vicinity. The plaintiff therefore brought various claims against SPDC, including: liability for the torts of negligence, nuisance and liability for damages under the common-law rule in *Rylands v Fletcher*. This rule has been

[108] C/09/337050 / HA ZA 09-1580 (2013) ['Akpan']. Other cases with similar facts of oil spillage destroying farmlands which were decided by the Dutch Court but not successful are: *Oguru & ors v. SPDC*, C/09/330891 / HA ZA 09-0579(2013); *Dooh v. SPDC*, C/09/337058 / HA ZA 09-1581 (2013). In Oguru's case, however, the court held that mandating Shell Plc, the degrader of the environment to remediate the environmental pollution and prepare an adequate contingency plan for future responses to oil spills will benefit not only the communities involved in the suit but the environment and society in general, it ruled that the claims of the plaintiffs must fail due to inability to proof beyond reasonable doubt the tort of negligence.

[109] Ibid, 2.

[110] Ibid. RENA stands for 'Remediation by Enhanced Natural Attenuation through land farming process.'

codified into Nigerian law. [111] The plaintiff believed that he should be compensated by SPDC for the damage he had suffered and continues to suffer, as a result of the alleged various torts by SPDC.[112] SPDC, on the other hand, claimed that the wellhead was damaged by sabotage.

Under Nigerian law, a finding of sabotage as the cause of an oil spill, by a court, does not lead to the liability of the operator.[113] The Dutch court applied Nigerian law, based on the Dutch conflict of law rules. The District Court found that the two oil spills of 2006 and 2007 were caused by sabotage triggered by third parties. As a result of this finding, the court held that SPDC was not liable for damage caused by the two oil spills,[114] since, under Nigerian law, an operator cannot be liable for sabotage caused by third parties. The court relied on the common-law rule in *Rylands v Fletcher*, which has been codified under the OPA. Thus, liability for the consequences of the occurrence of an oil spill will be determined by the parties that caused it. If the damage had been caused by SPDC's negligence, the company would have been liable, but it was not liable if the damage had been caused by the plaintiff or third parties. The court found that under Nigerian law there is no general duty of care to prevent third parties from inflicting damage on others.[115] Thus, upon a finding of sabotage as the cause of spillage, SPDC will not be liable – since it had no control over the acts of third parties. In effect, Nigerian law did not provide for a 'general legal obligation for pipeline operators to prevent sabotage'.[116]

On liability for the tort of negligence and duty of care of SPDC against the plaintiff, the court established that under Nigerian law, SPDC would be liable for the act of negligence if it neglected to 'protect, maintain or repair any work structure executed under its license'.[117] Unfortunately, however, there are no cases under Nigerian law where an MNCs was found liable

[111] See section 11 (5) (c) of the Oil Pipelines Act, 1956. [OPA] The provisions of this Act and other domestic laws in Nigeria has been extensively discussed in chapter 3.

[112] Ibid. 6.

[113] OPA, above (n 111).

[114] Akpan, above (n 108) 20.

[115] Ibid. 21.

[116] Christine Kaufmann, 'Holding Multinational Corporations Accountable for Human Rights Violations: Litigation outside the United States' in Dorothée Baumann-Pauly and Justine Nolan (eds) *Business and Human Rights: From Principles to Practice* (2016) 270.

[117] See section 11 (5) (b) of the OPA.

for damage due to an oil spill arising from the tort of negligence, which attributed negligence to situations where the company had violated a general duty of care to prevent sabotage of its oil wells by third parties.[118] In effect, where a Nigerian court finds that sabotage was involved, the company involved will not be held liable for the tort of negligence.

Despite the court's findings on sabotage, it held that SPDC failed to properly secure the oil wells in question. In the opinion of the court, SPDC should have 'foreseen this obvious risk of sabotage',[119] and taken 'preventive measures against any risk'[120] occasioned by not properly protecting an equipment it had abandoned for years. The conclusion, therefore, was that SPDC committed a specific tort of negligence against Akpan by insufficiently securing the wellhead of its installation before the oil spills happened, and which destroyed Akpan's farms.[121] This inadequate protection was the main reason for the sabotage – done in a less strenuous manner by third parties – which led to the oil spills. SPDC was thus found liable for the damage Akpan suffered as a result of these spills. SPDC was not responsible for any active conduct in this case, but, for the specific tort of negligence against Akpan. In SPDC v Ijaw Aborigines of Bayelsa State, the Federal High Court ordered Shell to pay the sum of $1.5billion to the Ijaw Aborigines of Bayelsa State, having found that Shell violated the right to environment under article 24 of the African Charter on Human and Peoples' Right.

These cases represents a positive attempt at bringing MNCs who operate under a culture of impunity, to answer for their negligence and excesses. SPDC had the financial capability and clout to correctly remediate the contamination of the lands and fish ponds that belonged to Akpan in accordance with Nigerian law – but failed to do so. Nigerian courts should develop a proactive approach to upholding the sanctity of human dignity of those affected by the activities of the MNCs – by ensuring that court judgments are complied with. To date, Nigerian case law built on a tort of negligence has no precedent in which an extractive company was held liable for damages due to oil spillage, gas flaring or environmental pollution – because the MNCs had violated a general duty of care to prevent sabotage of its oil installations by third parties. Where

[118] Akpan, above (n 108) 21.

[119] Akpan, above (n 108) 23.

[120] Ibid.

[121] Ibid. 28.

Nigerian courts found that sabotage in oil spillage occurred, the MNCs were not held liable. The Nigerian Supreme Court missed the opportunity to remedy this situation in *Shell Petroleum Development Company of Nigeria Limited v Tiebo & Ors*.[122] In this case, the court did not consider the company's negligence, even though it was the company's equipment that caused the oil spill. Rather, the court dwelt extensively on the award of general and special damages to the plaintiff. The Nigerian parliament should immediately enact laws that would provide for a general legal obligation for MNCs to prevent sabotage. This is the essence of the business and human rights debate. Unless there is a foreseeable risk, MNCs are obliged to remedy any adverse human rights impact occasioned by its activities, even where such impact was caused by third parties.[123] Furthermore, there is no legal obligation under Nigerian law for a parent company to stop its subsidiaries from causing injury to individuals or third parties – except in a few circumstances that were not applicable in the present case.[124]

In *Shell v Isaiah,*[125] the respondents claimed compensation from the appellants for the damage and loss to the marine and domestic life of the respondents. The damage was caused by the appellant's oil exploration activities which resulted in oil spillage and pollution on the respondent's land. The case was wrongly filed at the State High Court instead of the Federal High Court. As a result, the Supreme Court declined to award compensation because the lower court that had awarded compensation, had no jurisdiction to do so in the first place. Likewise, in *Ogaile v Shell*,[126] the plaintiff's case was on the scientific proof of oil spillage on the plaintiff's land. The court dismissed the plaintiff's claim because it believed that the testimony of the expert witness called by Shell to establish Shell's defence, was more convincing than that of the expert witness called by the plaintiff to establish Shell's liability.

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[122] (2005) 9 NWLR (Pt. 931) 439.

[123] See GP 22.

[124] In *Tel-Oren v Libyan Arab Republic*, 726 F.2d 774 (DC Cir. 1984), the plaintiffs sued the Palestine Liberation Organization for terrorist related attacks in Israel. The court dismissed the case but no reason for dismissal was given. Justice Bork concluded that the plaintiff lacked the *locus standi* to sue since international law did not provide for a 'right to sue.' The US congress responded to Justice Bork's conclusion by passing the Torture Victim Protection Act, 28 USC §1350, which grants aliens the 'right to sue' for torture and extrajudicial killing under foreign law.

[125] (1997) 6 NWLR [Pt. 508] 236.

[126] (1997) 1 NWLR [Pt. 480] 148.

The implication of the Akpan case, in particular, for the BHR regime, is that under Nigerian law MNCs do not have a general duty of care towards their host communities – where sabotage occurs. Remarkably, Akpan's case contrasts sharply with the *Gbemre* case. In the *Gbemre* case, the court held that Shell violated the human rights of the plaintiff and his community by actively engaging in gas flaring for an extended period. However, in Akpan's case, Shell was not involved in any active misconduct – but was merely negligent. The court was however wrong to have found that Shell cannot be held responsible for sabotage it did not take part in. Failure to properly protect its facilities can lead to damaging outcomes for the community. As the Dutch court rightly found, under Nigerian law, MNCs have no general duty of care towards host communities to extractive projects – to be able to prevent sabotage of their facilities and oil wells. Despite the frequent occurrence of sabotage as a cause of oil spillage, as evident in this case, Nigerian law does not provide a cause of action whereby the installation of an oil pipeline, oil wells or any oil facility, creates a hazardous situation that will give rise to a general duty of care. MNCs have both horizontal and vertical relationships with the local community – an important stakeholder in the BHR paradigm. In Akpan's case, the burden of proof lies heavily on the company to prove that the local community did not cause the oil spillage as a result of sabotage. This case, founded on a horizontal relationship because there was no nexus between the company and the saboteurs to warrant a breach of a duty of care, has illustrated the reluctance of the Nigerian courts to hold that an act of sabotage by third parties can lead to an infringement of human rights. Greater responsibility lies with the company to protect its facilities against any form of destruction or damage. To prevent sabotage, MNCs should engage closely with the local communities in relation to the security and protection of their facilities. This is the essence of a social licence. Fostering a closer relationship with the local communities will enhance business activities and both the MNCs and the communities stand to benefit.

Corporate accountability stems from the inability to prevent projects that completely violate the human rights of host communities. To avoid this, a compliance mechanism (fully discussed in chapter 6) should be established within the company to forestall any potential projects that do not meet the accountability threshold discussed in this thesis. Perhaps the impact assessment, which should run through the project cycle, becomes instructive here. This assessment can quickly identify potential violations and mitigate against them. Furthermore,

independent institutions are essential for accountability in terms of project review and implementation – to ensure that guidelines and laws are complied with. It is easy for national governments and project proponents to lay claim to transparency and human rights protection during the design and execution of an extractive project. Some even go as far as providing policy statements on websites. These should, however, not take the place of formal compliance mechanisms under a BHR regime – for measuring and monitoring human rights compliance before and during the execution of extractive projects.[127]

4.4.4 *Access to Information*

GP 21 mandates companies to communicate externally the ways in which they address their human rights impacts – especially in such circumstances where the local community demands to know the communal impact of their projects. The communication of such information must be accessible to intended audiences.[128] The rights of the local community to demand answers to questions about developments in their community should not be constrained. International instruments guarantee the right of people to receive information. Article 9 of the African Charter on Human and Peoples' Rights provides that every individual shall have the right to receive information. Access to information guarantees transparency, and holds decision-makers accountable. Any restriction on the right to information creates room for manipulation of the participatory process.

Most environmental and extractive projects are shrouded in so much secrecy that host communities remonstrate against such potentially developmental projects. Local communities are entitled to certain key and basic information on how a project will benefit and affect them. They can, however, only make this informed decision if they are part of the decision-making process. Corporate reporting must include all the necessary details (and those not even considered necessary) of a project. Although the accuracy or honesty in such a report by

[127] See article 15 of the Aarhus Convention which established a non-confrontational and non-judicial Compliance Committee.

[128] See GP. 21 (a).

corporate entities remains debatable – the utility in reporting shows transparency and accountability. The question though, is what constitutes adequate information?[129]

The adequacy of information must be assessed by reference to the amount of information publicly available, and also the ease of access to that information. The nature of the project also determines the adequacy of that information. In Nigeria, the Freedom of Information Act seems to provide an avenue for local communities to seek information on resource extraction projects in their communities.[130] The operation of this Act has however been hindered by the reluctance of government to grant requests made by people. In *Nigerian Contract Monitoring Coalition v Power Holding Company of Nigeria (PHCN),*[131] a coalition of civil society organisations sought an order to compel the PHCN and the Attorney General of Nigeria to provide it with procurement information relating to Bid N. NGP-D2 – for the supply of 300 units of 11 KV, 500A On-Load Sectionalisers for installation at the High Voltage Distribution System (HVDS) networks in Abuja, Lagos, and also Oyo States. In the suit brought under a representative capacity by an NGO – Public and Private Development Center (PPDC) – under the Freedom of Information Act, the coalition asked the PHCN to provide information on the contract sum, the conditions of the contract, payment terms, and the number of required sectionalisers in each of the HVDS networks. It also sought information on impact assessment, documents relating to the design and specification requirements, and also other documents. PHCN had initially refused to provide any of the records and documents. However, a judgment of the Federal High Court in Abuja compelled PHCN to release the information, which showed lack of regard to due process in the award of the contract.[132] The long and tortuous road to litigation could have been avoided if PHCN had acceded to the initial request to release the information. Release of information, as in this case, allows civil society to monitor the award and execution of a contract. Access to information continues to remain a challenge in Nigeria, where management of extractive resources has been shrouded in secrecy. Lack of openness, transparency and information, all deprive the community of the opportunity to participate in matters that concern them.

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[129] See also article 19 of the Universal Declaration on Human Rights [right to seek, receive and impart information].

[130] See section 1 of the Freedom of Information Act 2011.

[131] Suit No: FHC/ABJ/CS/582/2012.

[132] Ibid.

MNCs must develop a culture of information dissemination. They must constantly make public to the local residents and the country at large, detailed information about their activities. Denials of access to relevant documents and information breed mistrust and a lack of faith in the process. Firms must publish information regarding oil pollution and other climate change effects whenever it occurs, and detailing why it occurred and the efforts made to mitigate the occurrence. Presently, no law requires MNCs to publish information on these effects, and particularly on their greenhouse gas emissions and the acid rain pollutants they generate. It is the right of the people to know the causes and effects of the degradation of their environment. Furthermore, it is essential for everybody to know which mineral/petroleum rights have been allocated in a country, what the successful applications are, and which applications or auctions were unsuccessful. Furthermore, society has the right to know who owns the concessions, and who owns the contracts for the development of oil and mineral resources in any given country. This is essential for resource management. People should be able to know who has ultimate control over concessions or natural resource contracts. However, the public is typically not even aware of such contracts. Making information on extractive resource projects accessible, will boost transparency. Considering the huge investments in extractive resource projects, it is imperative that information on all activities be disclosed – including information on the social, political, cultural, and environmental impacts of the project.

All stakeholders, including vulnerable members, must be included in the decision-making process of a project. Extractive companies must show that their consultation covers a wide range of local community stakeholders. Vulnerable and marginalised members must be given equal access in terms of attending and participating in meetings.[133] They must also be provided with language interpreters and access to healthcare and free transportation during the consultation process. Combating a serious environmental threat requires urgent and timely action through instruments that impose tough sanctions on polluters. The determination of those sanctions leads to the third pillar of the Guiding Principles: Access to Remedies, which is discussed below.

[133] See further EGM/EPDM /2005/REPORT, 'Equal Participation of Women and Men in Decision-Making Processes, with Particular Emphasis on Political Participation and Leadership' Report of the Expert Group Meeting, Addis-Ababa, Ethiopia, 24 – 27 October 2005, *http://www.un.org/womenwatch/daw/egm/eql-men/FinalReport.pdf*, accessed 31 August 2017.

4.5 Access to Remedies

Under GP 25, states have a duty to take measures – including judicial, administrative and legislative measures – to protect the public against human rights violations by businesses. This section focuses on a non-judicial process through which a remedy can be obtained. It is instructive to note that this method relies on and supplements an effective state-based judicial system. GP 27 underscores the importance of non-judicial grievance mechanisms to remedy corporate-related human rights violations. Some of these non-judicial mechanisms include administrative and legislative approaches under the GP 27 commentary.

The National Human Rights Institutions (NHRI) have an important role to play in this regard. The mandates of NHRI must be expanded to include investigations of complaints arising from corporate-related human rights violations, and must be able to address those complaints through a range of approaches – including mediation, conciliation, legal aid, training of relevant stakeholders, and other 'culturally appropriate and rights-compatible processes'.[134] The state must adequately fund its NHRI. While Nigeria's National Human Rights Commission (HRC) lacks the mandate to address business-related human rights violations, South African Human Rights Commission (SAHRC) is proactive in this regard.[135] It has also defined competent authorities, which can investigate alleged violations of human rights in the extractive resource industry.[136] These include the SAHRC,[137] The Public Protector,[138] The Commission on Gender Equality,[139] and The Commission for Conciliation, Mediation and Arbitration.[140] These bodies can attribute harm to the perpetrator at any point in time.

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[134] GP 27 Commentary.

[135] South Africa, unlike Nigeria, has robust mechanisms for indirect implementation of the GPs. South African constitution guarantees the Bill of Rights, see section 9(6) of the Human Rights Commission Act 54 of 1994, The Promotion of Equality and Prevention of Unfair Discrimination Act, The Protection from Harassment Act, The Occupational Health and Safety Act.

[136] See Chapter 9 of South African Constitution. Most of these are Chapter Nine institutions. These institutions are established under Chapter 9 of the Constitution to safeguard South Africa's democracy.

[137] See the South African Human Rights Commission Act, 2013 [which established the Human Rights Commission to address human rights violations and see effective redress for such violations, it also engages in monitoring, investigating and reporting on human rights], see also section 184 of the Constitution.

[138] The Public Protector Act of 23, 1994 enables a Public Protector to investigate and redress improper and prejudicial conduct, maladministration, and abuse of power in government.

[139] The Commission protects human rights by advancing gender equality in all spheres of society.

To guarantee effectiveness of the non-judicial grievance mechanism, GP 31 lists several criteria that should serve as a yardstick for designing and measuring a non-judicial grievance mechanism: legitimacy, accessibility, predictability, equitability, transparency, rights-compatibility, a source of continuous learning, and based on engagement and dialogue. Obstacles to accessibility may include language, illiteracy, costs, and lack of awareness of the availability of grievance mechanisms.[141] Access to justice is the bedrock of sustainable development, and, more importantly, corporations are not excluded from this responsibility. They must provide complaint mechanisms for individuals and communities which are adversely impacted by their activities. Under this Pillar, justice must not only be done, but it must manifestly be seen to be done. Justice must be readily available and effective in meeting complaints from victims of human rights violations. This thesis construes access to justice as meaning the availability and effectiveness of formal and non-formal complaint mechanisms – through which victims of human rights violations related to the extraction of natural resources, can seek redress. This avenue enables the public to disagree with projects that are inimical to the sustenance of their environment and community.

The events of Ogoni and Marikana have shown that states lack strong criminal and civil prosecutorial powers to ensure that corporations are brought to justice or that individuals and local communities receive justice. If this is not the case, they are unwilling to exercise those powers. This lack of will on the part of the state presents a legal barrier to litigants. This causes many litigants to seek justice beyond the borders of their countries, despite the jurisdictional challenges posed by the doctrine of *forum non-convenience*, and, relatively recently, the issues surrounding the 'presumption against extraterritoriality' rule – which precludes US courts from assuming jurisdiction over cases that do not 'touch and concern' the United States with sufficient force.

The question before the US Supreme Court in *Kiobel v Royal Dutch Petroleum Co.*,[142] was whether corporations could be sued under international law. This case was a class action suit

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[140] A dispute resolution body established under the Labour Relations Act, 66 of 1995

[141] GP 31 Commentary.

[142] (2013) S. Ct. 133 S. Ct. 1659, section 3 (paragraph 16). See also *Republic of Ecuador v. Chevron Corp*., 638 F.3d 384 (2d Cir. 2011). [the court noted that a notice of arbitration and ongoing litigation can coexist without undermining a courts dismissal of *forum non-convenience*]

filed on behalf of Nigerian plaintiffs, who were engaged in peaceful protests in *Ogoniland* against resource exploitation in the Ogoni region of the Niger-Delta. They alleged that Royal Dutch Shell was involved in the suppression of the peaceful protests – by conspiring with and financing the Nigerian military forces to suppress their protests. They further alleged that Shell was complicit in the various human rights violations caused by the Nigerian military. The initial complaint was filed under the Alien Tort Statute (ATS) in 2002.[143] The Supreme Court held that there was a 'presumption of extra territoriality against the application of the ATS' to claims brought against companies that had no immediate connection to the United States.[144] Rather than determine whether the ATS forecloses corporate liability, the court avoided the question of corporate liability, and ruled that companies can only be sued under ATS when such cases 'touch and concern the territory of the United States … with sufficient force to displace the presumption' test.[145] Despite the *Kiobel's* case, the US Supreme Court, again, considered the question of whether corporations can be sued for egregious violations of international law. In *Jesner v Arab Bank,*[146] the plaintiffs alleged that Arab Bank supported international terrorism, financed suicide bombings in Israel and compensated families of suicide bombers.[147] At the lower court,[148] the bank was found liable for violating the U.S. Anti-Terrorism Act. At the Supreme Court, the Court held that foreign corporations may not be defendants in suits brought under the ATS.[149] The Court reasoned that it would be inappropriate for courts to extend ATS liability to foreign corporations in the absence of an express provision from Congress.[150] The

[143] 28 U.S.C. S 1350 (ATS).

[144] For arguments on Kiobel, see Ralph G. Steinhardt, 'Kiobel and the Weakening of Precedent: A Long Walk for A Short Drink' (2013) 107 *Am. J. Int'l L.* 841. [arguing that significant issues remain for future resolution, but it is unrealistic to expect answers on the basis of the Court's decision because what is law in Kiobel isn't clear and what is clear in Kiobel isn't law; what is clear in Kiobel is actually not law at all but a continuing, seemingly visceral resistance to treating modern international law in both treaty and customary form as law of the United States]

[145] Kiobel, above (n 141) 1669.

[146] 548 U.S_ (2018)

[147] Ibid.

[148] *See Jesner v. Arab Bank* 16-499, 2d Cir. (2017).

[149] Ibid, above (n. 146).

[150] Ibid.

Court effectively upheld the decision in *Kiobel's* case, further affirming that the 'presumption against extraterritoriality' applies to the ATS claims,[151] and that even claims that 'touch and concern the territory of the United States' must do so with sufficient force to displace that presumption.[152]

Nigerian courts should strengthen their ideological orientation in safeguarding the sanctity of Nigerian lives – particularly flowing from the *Gbemre* case. Similarly, in *Re: South African Apartheid Litigation*,[153] a group of black South Africans brought claims against the US companies Ford Motors and IBM, for allegedly conducting business that helped perpetuate racial apartheid. The 2nd U.S. Circuit Court of Appeals held that the parent companies could not be held accountable for the actions of their South African subsidiaries during the time the apartheid regime was in power. On appeal, the US Supreme Court, deferring to the lower court, further limited the contexts in which aliens could hold companies accountable in US courts – for their participation in, or complicity with, human rights abuses abroad.[154]

The situation in Nigeria is exacerbated by other factors – including widespread corruption in the justice system, delays in prosecution, unnecessary public holidays, inadequate scientific proof, the inability to secure legal representation, a lack of judicial independence (economic and political pressures), lack of training, and lack of expertise and support for state prosecutors to enable them to investigate individual and corporate-related human rights abuses. An increasing problem is the inability to keep up with new directions and trends in the BHR debate. While South Africa is innovative in terms of establishing specialised courts to address emerging issues, Nigeria lumps all manner of claims in the same court – making administration of justice a herculean task. A significant number of judges also need to be re-trained in professional ethics.[155] The principle of a separate legal personality often occasions difficulty, as it becomes difficult to ascribe liability to members of an extensive corporate entity. This was the major factor in excluding Royal Dutch Shell from liability in Akpan's case, which was discussed

[151] Ibid.

[152] Ibid.

[153] No. 14-4104.

[154] See also Ntsebeza v. Ford Motor Co., 15-1020 (February 12, 2016).

[155] Issues of impartiality, integrity and ability to accord due process are still challenges.

earlier. This is further complicated by the rule of *locus standi*, which determines who has the right or legal standing to sue.[156] Prosecuting cases that fall under BHR, is not any easier.[157] These difficulties are compounded by the fact that most litigants, and especially the local communities, are not party to the state-investor contracts, and therefore are oblivious of the contents of such agreements.[158] They therefore lack the requisite knowledge of their rights and responsibilities under the contracts.

There is still no clear evidence that companies have effective grievance mechanisms. They have grievance mechanisms to settle internal disputes, but the growing challenges under the BHR demand that companies, and especially extractive companies, should look into the possibility of activating grievance mechanisms that include their host communities. Ruggie points out that most human rights-related grievances between companies and local communities or individuals began as small disputes which the companies largely ignore or dismiss, before they escalate.[159] The failure of companies to have strengthened in-house, early stage conflict-resolution mechanisms led to the Ogoni and Marikana incidents.[160] The underlying basis for access to remedies is that manifest remedial avenues must be unrestricted to the host communities and individuals, which are impacted by extractive resource projects. Access to remedies can only be achieved under a transparent and effective judicial system which is capable of delivering justice. However, the challenge seems to be determining what constitutes access to justice. What safeguards are in place to ensure that local communities can access remedies for human rights violations?

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[156] See J. G. Ruggie, *Just Business: Multinational Corporations and Human Rights* (2013) 103.

[157] See 'The Corporate Crimes Principles: Advancing Investigations and Prosecutions in Human Rights Cases' (2016), *http://www.commercecrimehumanrights.org/wp-content/uploads/2016/10/CCHR-0929-Final.pdf,* accessed 9 May 2017.

[158] To ensure transparency, there must be a determination as to what is an appropriate level of contract disclosure? How may state-investor transparency requirements be balanced? How can the public be more engaged in monitoring of the extractive projects?

[159] Ruggie, above (n 156) 118.

[160] See Linus Gitahi, 'Involve Communities to Reduce Conflicts' *Daily Nation* 1 July 2016.

4.5.1 *Elements of Access to Remedies*

This section briefly discusses the elements needed to have adequate safeguards to ensure access to justice. These elements include: effective administration of justice, legal framework, accessibility, and burden of proof. Each is now discussed:

A. *Effective Administration of Justice*: The twin pillars of natural justice – *audi alterem partem*[161] and *nemo judex in causa sua*[162] – guarantee unhindered access to justice. The effective administration of justice requires the removal of barriers which hinder access to remedies for human rights violations. The HRBA prescribes this removal of barriers and legal systems all over the world support this. Some of these barriers include: long delays, expensive prosecution of cases, prohibitive costs of hiring experienced lawyers, inadequate and/or inexperienced legal representation, expensive legal procedures, bureaucratic bottlenecks, and weak enforcement of laws. As the intended recipients of justice are the poor and marginalised groups in society, access to justice can be made accessible to them through effective traditional justice mechanisms which are devoid of bureaucratic procedures and bottlenecks. To achieve this, stakeholders must be able to bring cases before the complaints boards, without being confronted with the 'standing' issue. The state must ensure that poor and indigent parties are provided with the necessary support to enforce their rights.
B. *Creating a Standard Legal framework for Corporate Liability*: The GPs provide normative principles in the area of access to justice. Seeking justice in the courts at the local, state and federal levels in Nigeria could be challenging. At the international level, recent cases have shown that seeking justice under the BHR paradigm is a herculean task. For instance, the *Kiobel* case indicates that if the subject matter does not 'touch and concern' the United States with sufficient force, the US courts will deny aliens any claim under the ATS. Following this trend, in *Doe v Nestle*[163] the United States Court of Appeal had to deal with the question of whether the defendant corporation assisted and encouraged child slavery, by aiding Ivorian farmers. The case was instituted by former child slaves who were forced to harvest cocoa in

[161] Hear the other side.

[162] No person shall be a judge in his own court.

[163] No. 10-56739. D.C. No. 2:05-CV-05133- SVW-JTL.

Ivory Coast. The defendant corporation had denied liability – claiming that it was not liable for the acts of its subsidiary, and argued that if there was any incidence of child slavery, such incidence would relate to the Ivorian farmers and not the company *per se*, because the company never dealt directly with the farmers. Such an argument beggar's belief. If *Kiobel* had not been dealt a death knell on the issue of corporate liability, the company would not have used this line of argument. Rightfully, the court held that there is no definite law of corporate immunity or liability.[164] The court observed that the prohibition against slavery was universal and could be asserted against the corporate defendants in this case. In determining whether a corporation can be held liable, the court believed it must not only look to international law, but must apply 'customary international law to determine the nature and scope of the norm underlying the plaintiff's claim, and domestic tort law to determine whether the recovery from the corporation is permissible'.[165] Interestingly, the court sounded more defiant when the issue of aiding and abetting arose. The court held that the:

> plaintiffs' allegations satisfied the more stringent "purpose" standard by suggesting that a myopic focus on profit over human welfare drove the defendants to act with the purpose of obtaining the cheapest cocoa possible, even if it meant facilitating child slavery.[166]

In this case, Nestlé aided the commission of a crime, and also instigated, planned and helped with the execution of the crime. To argue that the company was not the party directly responsible for the crime is spurious. The company could not have claimed ignorance of the fact that children, were used by Ivorian farmers on the Ivorian farms; it was more concerned about profits. Under the BHR debate, knowledge and foreseeability of risks can trigger liability. The Supreme Court[167] rejected Nestlé's bid to dismiss the suit – affirming the lower court's reasoning. It is interesting to note that throughout the proceeding it was not contended

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[164] Ibid.

[165] Ibid.

[166] Ibid.

[167] See *Nestle Inc v. John Doe*, U.S. Supreme Court, No. 15-349.

that Nestlé offered monetary and technical support to local farmers in order to secure the cheapest source of cocoa.

The Nigerian state must provide adequate mechanisms for citizens to seek redress domestically. There should be a legal milieu, where citizens can activate a complaints mechanism when their existence is threatened by the activities of MNCs. The question of expensive domestic litigation and spurious adjournment wears out plaintiffs who are seeking environmental justice. The exhaustion of local remedies, for instance, has proven not to work effectively in weak zones.[168] In the first place, litigation in local communities is haphazard due to the constant tension in such communities.[169] Complaints bodies at international level should therefore understand that local remedies may not be effective or sufficient. Hence, home state or international legal jurisdiction should not operate to deprive litigants of the opportunity to seek legal redress in weak zones.

C. *Access to Appropriate Forums***:** In *SERAC & Anor v Nigeria*,[170] two NGOs – Social and Economic Rights Action Committee (SERAC) and the Center for Economic and Social Rights (CESR) – on behalf of the Ogoni people in 1996, claimed that the Nigerian state was in violation of articles 2 (right to non-discrimination), 4 (right to life), 14 (right to property), 16 (right to health), 18 (right to family), 21 (right of peoples to freely dispose of their resources), and 24 (right to environment) of the African Charter on Human and Peoples' Rights. The Nigerian military government had been involved in oil exploration through the state enterprise Nigerian National Petroleum Corporation (NNPC). The NNPC operates a joint-venture programme with various oil companies, at the ratio of 60:40. The NNPC is the majority shareholder, while Shell is the largest oil company in this consortium. The relationship between Shell and the NNPC has led to environmental degradation and health problems for the Ogoni people. The complaint seriously indicted the oil companies for their harmful activities – such as disposing toxic wastes into the environment in violation of international environmental standards, so causing contaminated air, water and soil with

[168] This is procedure whereby international courts will only attend to a claim if it can affirm that all available domestic remedies have been invoked and exhausted.

[169] A notorious militant once threatened a judge who was handling his case, see Ise-Oluwa Ige, 'Nigeria: Dokubo Threatens to Kill Judge' *http://allafrica.com/stories/200702060052.html*, accessed 8 May 2017.

[170] (2001) AHRLR 60.

serious short- and long-term effects. The complaint further alleged that the Nigerian government had condoned the activities of Shell, by placing the legal and military powers of the state at the disposal of the oil companies. One such incident led to the series of events that culminated in the execution of the leader of the Ogoni people, Ken Saro Wiwa, and also several other residents. In their judgment, the African Commission on Human and Peoples' Rights found that the Nigerian government had violated articles 2, 4, 14, 16, 18(1), 21 and 24 of the African Charter, and directed the government to ensure the protection of the environment, health and livelihood of the people of Ogoniland.[171] It also enjoined the government to conduct an investigation into the human rights violations described above, and to prosecute officials of the security forces, the NNPC, and any relevant agencies involved in the human rights violations.[172] The government was directed to pay adequate compensation to victims of the human rights violations and to undertake a comprehensive clean-up of lands and rivers damaged by oil operations.[173] The government was also tasked to provide information on health and environmental risks – and to provide meaningful access to regulatory and decision-making bodies for communities likely to be affected by oil operations.[174] Curiously, the decision of the Commission was against the Nigerian state, but the main perpetrator of the various criminal acts, the NNPC, was never indicted or sanctioned, neither was the company joined as a party.[175] To date, Nigeria has not enforced this judgment.

Affordability is key in terms of gaining access to the judicial system. One may be given access to a court, but may not be able to afford initiating or prosecuting the case to the end. Certain administrative costs usually demanded in local courts, should be dropped when it comes to business and human rights cases before the courts. The ineptitude and corruption of court officials frustrates the diligent prosecution of cases. To obtain certified copies of court decisions is sometimes problematic. To gain access to justice – there must be manifest efforts

[171] Ibid, at 9.

[172] Ibid.

[173] Ibid.

[174] Ibid.

[175] See chapter 2.2 (a) for the discussion of other Nigerian environmental cases.

> to ensure that indigent litigants are allowed access to the courts. Some of these plaintiffs are peasant farmers who do not have the financial means to pursue private litigation. Even when they have the resources or where the NGOs can pursue private litigation on their behalf, there is no assurance that these parties can financially enforce the judgment in the face of immeasurable financial resources from MNCs who can oppose litigation and the enforcement of judgments.

BHR can function optimally when a framework is designed that holistically and truthfully considers the yearnings and aspirations of local communities in the extractive resource context. This is achieved when human rights obligations are drafted in contractual agreements between investors and the state on the one hand, and investors and the local community on the other hand.[176] This would allow communities to establish long-lasting relationships with MNCs and the state. The extent of judicial activities in establishing liability for corporate-related human rights violations, is now discussed.

4.6 Going Forward

Doubtless, the GPs constitute a normative platform for preventing and addressing corporate-related human rights abuses. They have prescribed minimum standards of behaviour for companies and bring to the fore the less talked about separation of human rights from corporate objectives. It is important to stress that the state duty to respect, operates independently of the corporate responsibility to respect. This should ensure that MNCs do not exert a negative influence on the capability of the state to operate effectively. The differentiated responsibility status for both states and businesses under the GPs, will facilitate a robust and holistic development of rights protection in the extractive resource context. Each would be made to address issues as they come up – rather than trade blame and excuses. Likewise, remedial recourse for victims of human rights abuses is available in judicial and non-judicial forms. The judicial remedy is state-based, adversarial, and comes after the violation, while the non-judicial remedy prevents any potential violation and recourse to litigation – and starts the moment a

[176] See generally James Gathii & Odumosu-Ayanu, 'The Turn to Contractual Responsibility in the Global Extractive Industry' (2016) *Business and Human Rights Journal* 69.

relationship is created, for instance between the community and the company. Therefore, a non-judicial remedy and preventative measures should be utilised by the company and civil society. To this extent, the GPs have been able to form an 'integrated, logically coherent, and comprehensive platform for action'.[177] Thus, corporations must align their profitable opportunities with their social personalities – closely safeguarding corporate responsibility.[178]

A major challenge to corporate liability stems from the parent-subsidiary theory.[179] The determining factor should be whether there is a duty of care between the parent and subsidiary company. The Nigerian Companies Act makes mention of fiduciary duties of Directors towards the company.[180] This could extend to not only the best interest of the company but to ensuring the success of the company in the areas of environmental responsibility, participatory democracy of the local community, and respect for the local community. In *Chandler v Cape*,[181] the English court set four criteria for determining at what point parent companies can be liable under the subsidiary principle:

1. First, the business of the parent and subsidiary are in a relevant respect the same;
2. Second, the parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the industry;
3. Third, the subsidiary's system of work was unsafe, as the parent company knew, or ought to have known; and
4. Fourth, the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees' protection. It is not necessary to show that the parent was involved in the health and safety policy of the subsidiary.[182]

[177] Ruggie (n 155) 125.

[178] See Madhumita Chatterji, Corporate Social Responsibility (2011) 6.

[179] See Daria Davitti, 'Refining the Protect, Respect and Remedy Framework for Business and Human Rights and its Guiding Principles' (2016) *Human Rights Law Review* 57 [noting that home state jurisdiction implies the relationship between the state and company and therefore, a *de facto* power of authority over the company]

[180] Section 279 of the Companies and Allied Matters Act, 1990.

[181] [2012] EWCA Civ 525, para 80.

[182] Ibid.

Once it can be established that the parent is usually involved in production and the financial management of the subsidiary, a relationship should be interpreted.[183] These subsidiary principles were not applied in the numerous cases discussed in this chapter.

GP 2 obligates states to set out clear expectations that companies domiciled in their territories/jurisdictions respect human rights through their operations. One of the ways of setting out this clear expectation, is to adopt an approach that requires parent companies to 'report on the global operations of the entire enterprise'.[184] When applied, parent companies will find it difficult to avoid liability when their subsidiary companies are found to have violated the human rights of local communities. It would be unusual if Royal Dutch Shell did not have any relationship or derive any financial benefit from its Nigerian subsidiary, so preventing the application of these principles. In fact, companies in developed nations set up subsidiaries in developing nations to either overcome high trade barriers or to take advantage of cheap labour in those weak zones.[185] Unfortunately, the drive for FDI dictates liberalisation of markets, deregulation of products, and privatisation – which allows developing countries to turn a blind eye to enforcement of laws in order for MNCs to operate.

The use of the word 'responsibility' instead of 'duty' to denote corporate respect for human rights should not be construed to mean that corporations do not have any legal duties under national laws. After all, social responsibility needs are paramount in areas where governance structures are porous.

4.7 Conclusion

This chapter considered and applied the elements of the HRBA, as a pathway to implementing the corporate duty to respect human rights and to access remedies. In allocating responsibility for corporations to respect human rights, this chapter argued that greater emphasis lay with domestic legislation. This thesis does not call for the creation of new laws – but for the strengthening of existing domestic laws. Companies must continue to engage in dialogue with community

[183] Ibid., Para. 80.

[184] Commentary to GP 2.

[185] Scott Jerbi, 'Business and Human Rights at the UN: What Might Happen Next?' (2009) *Human Rights Quarterly* 299.

stakeholders. This enhances transparency and corporate legitimacy. Dialogue and empowerment are effective tools which forestall corporate human rights violations. The *Kiobel* case showed that victims of human rights abuses may find it difficult to seek remedies in the home states of MNCs. Therefore, the host state should be able to enforce and ensure adequate protection of its citizens, when negotiating state-investor contracts.[186]

Doubtless, these approaches may help prevent and mitigate the adverse effects of extractive projects on the human rights of citizens. Indeed, firms have sufficient legal personality to bear legal rights and duties. They can be held liable for human rights violations – even though the GPs use the words 'responsibility' instead of 'duties'. This is more evident if companies show commitment to due diligence and the inclusion of the local community in decision-making. This is necessary, because including local communities in the decision-making process remains crucial for finding a lasting solution to extractive resource governance in Nigeria. In the next chapter, empirical facts relating to the practical implementation of the GPs in Nigeria and South Africa are discussed.

[186] Most extractive contracts, hiding under confidentiality clauses are shrouded in secrecy. Sometimes, the government invokes these clauses to control information without a legitimate reason for doing so. The public opinion is however drifting towards lifting confidentiality clauses so that the citizens can have a basis for demanding for responsible governance where it is lacking.

CHAPTER 5: PRACTICAL IMPLEMENTATION OF THE GUIDING PRINCIPLES IN THE EXTRACTIVE RESOURCE INDUSTRY

5.1 Introduction

A rights-based approach to extractive resource governance provides a just and ethical path towards developing social expectations that corporations ought to make a proactive contribution towards solving grave communal problems associated with their activities. This is the foundation for the social licence to operate by the multinational companies (MNCs).[1]

The previous chapter found that following a Human Rights Based Approach (HRBA – the Guiding Principles) to extractive resource governance provides a time-tested way of addressing negative development outcomes – such as those experienced in the focal countries. This chapter presents the results of empirical research on the prospects of implementing the Guiding Principles (GPs). It assesses the impact of business on human rights through the eyes of members of the host communities. Applying the principle of integration of human rights into business as a moral imperative, local community participation, consultation and awareness – through citizenship education – will contribute to the implementation of the GPs in the extractive resource industry. The empirical results are used to identify the problems and subsequently solutions are proffered based on international law and literature review.[2]

This chapter presents findings from empirical research conducted to determine the suitability and prospects of the implementation of the GPs. Based on the findings, the contention is therefore that the implementation of the GPs is the first step in ensuring extractive resource governance. The second step is determining how to adopt, mainstream and integrate the GPs into extant laws and corporate practice – so as not to undermine the social contract that binds society, and in a way that guarantees development and positive governance within the communities. Thirdly, this chapter identifies the necessary elements for creating a mainstreaming approach to successfully addressing the identified issues.

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[1] T. Campbell, 'The Normative Grounding of Corporate Social Responsibility: A Human Rights Approach' in Doreen J. McBarnet, A. Voiculescu & T. Campbell (eds) *The New Corporate Accountability: Corporate Social Responsibility and the Law* (2007) 557.

[2] See further R. Cryer, T. Hervey and B. Sokhi-Bulley, *Research Methodologies in EU and International Law* (2011).

It is important to note that the limited number of participants involved in this research is reflective of a number of factors, including language barrier, security concerns of the participants and logistical challenges. The participants that were eventually interviewed expressly asked that their identities be not disclosed. Hence, due to the scope of the interviews conducted, and the nature of the methodological approach, the survey, by no means, can be regarded as representative. However, since it is combined with the review of the literature, it builds a rough profile of the key human rights challenges in Nigeria's extractive sector.

5.2 Empirical Research Methodology

A qualitative analysis of the implementation of the GPs in Nigeria and South Africa was undertaken. While the Nigerian example highlights various challenges in the oil and gas industry in the Niger-Delta, the South African example reveals the challenges associated with mining in selected provinces in the country.

5.2.1 Case Selection

The study used a double case-study approach, with a qualitative research methodology. Qualitative methods allow the researcher to obtain in-depth data from people who have first-hand information on the topic being investigated.[3] The choice of Rivers State (Nigeria) was based on its position as the largest oil-producing state in Nigeria. The state was the epicentre of the infamous Ogoni incident and has seen increased conflicts between host communities and MNCs. The choice of the Mpumalanga, Limpopo and North-West Provinces (South Africa) was predicated on their position as mining locations. The perspectives of residents of mining communities on the GPs, and the implications for businesses operating in their communities, were considered relevant.

[3] A.C. Edmondson & S.E. McManus, 'Methodological Fit in Management Field Research' (2007) *Academy of Management Review* 1246.

5.2.2 Data Collection

Data were collected between August 2016 and November 2016. The researcher used a combination of online questionnaires and semi-structured interviews to obtain information on the impact of business on human rights and the implementation of the GPs – from community residents and the representatives of state agencies involved in the regulation of non-state actors.

5.2.3 Data Analysis

A. South Africa

A total of 55 people responded to the online questionnaire. These questions specifically targeted residents of the mining communities in three South African provinces: Mpumalanga, Limpopo and North-West. Out of this representation, 4 respondents (10.53%) were from Mpumalanga, 13 respondents (34.21%) from Limpopo, and 7 respondents (18.42%) were from the North-West; 31 other respondents from different mining communities also participated, having experienced some form of business and human rights challenges. Semi-structured interviews were held with 5 residents from Mpumalanga and Gauteng Provinces; 1 NGO; and 1 oil and gas executive. These interviews were voluntarily given, and the consent of the respondents was first secured.

B. Nigeria

In Nigeria, an online questionnaire was administered to 33 research participants; 13 respondents (54.17%) considered themselves to be from an oil and gas community, while 10 respondents (41.67%) did not consider themselves to be from a major oil and gas community. However, these latter 10 were from a neighbouring community in an oil-producing state, and were therefore also impacted by the activities of the MNCs. Further, 15 respondents (71.43%) were practising lawyers, 2 respondents were corporate executives (9.52%), and 25 respondents (23.81%) were local community residents. In addition, 14 respondents (63.64%) had experience in human rights litigation or practice – ranging from researching cases to the prosecution of court cases. Others have defended several fundamental rights suits in Nigerian courts (both at the courts of first instance and the appellate court). Most legal practitioners who responded had represented clients in a variety of matters – including oil spillage, violation of fundamental rights, prolonged detention without trial by the police, destruction of private property by soldiers, demolition of

houses illegally built on land acquired by government, and environmental rights and enforcement generally.

Empirical research took place in the Port-Harcourt, Degema and Asari-Toru local government areas of Rivers State, Nigeria over a period of 20 days – and in Lagos, Nigeria, for 10 days. Semi-structured interviews were held with 15 residents; 1 local leader; 2 state agencies; and 1 judicial officer in Rivers State. In Lagos, one oil and gas company executive was interviewed. These interviews were voluntarily given, and the consent of the interviewees was first obtained. The field research also included data obtained through observations, and during visits to oil and gas communities in Nigeria. This was facilitated by the researcher's extensive experience of having lived for several years in the Niger-Delta community. During the interviews, notes were taken and an audio recording was utilised, and permission for this was granted by the participants. Each of the physical interviews lasted about 40 minutes. An interview guide, with questions set out under different themes, was used. The interview questions are attached as appendices A to C.

The online questionnaire was stopped after the researcher had determined that the quality of responses so far obtained created a valid understanding of the problems related to how the GPs can be implemented. In total, there were 27 physical interviews (20 residents, 1 NGO, 2 extractive company executives, 1 local community leader, 2 state agencies, and 1 judicial officer).

5.3 Data Analysis Methods

Empirical information is presented under two themes: corporate responsibility to respect human rights, and access to remedies. Within these overarching themes, the data analysis considers the suitability of using elements of the HRBA, discussed in chapter four, as a legal framework for integrating human rights principles into extractive resource projects. The purpose is to provide an empirically grounded analysis of the human rights challenges and barriers to effective implementation of the GPs. The presumption is that corporate actors do not take responsibility for their adverse impacts on society in the areas of human rights, the environment, and ethical issues. Thus, the data analysed identify issues that need to be addressed in order to enhance states' ability to prevent, punish and redress human rights abuse through effective policies,

regulations and adjudication. For the companies, the issues identified will enhance effective impact assessments and increase their capacity to meet other due diligence requirements. For the local community, the findings contribute to the articulation of various dimensions and ways in which these rights-holders are directly impacted by resource-extraction activities – thus indicating the urgency of interventions like the GPs.

5.4 Pillar II: Corporate Responsibility to Respect Human Rights

5.4.1 Gender Representation

The GPs recognise the challenges that could be faced by indigenous people, women and vulnerable members of society.[4] The implementation of the GPs in respect of gender is stated in the General Principles section of the GPs, as follows:

> These Guiding Principles should be implemented in a non-discriminatory manner, with particular attention to the rights and needs of … populations that may be at heightened risk of becoming … marginalized … *women* and men.[5] (emphasis added)

The gender distribution of respondents was: 67% female and 33% male in Nigeria, while in South Africa 50% of respondents were female, 47% were male, and 3% preferred not to answer. [See gender chart in appendices K & L].

The field research yielded valuable gendered information with regard to environmental matters. First, in South Africa, women were more empowered, and with better education and awareness of environmental rights. This seems to be an outcome of South Africa's racial history where the men were made to work in the mines and the women served as house maids – under white masters. As a result, they had to be educated in other to communicate. In Nigeria, women in rural communities are more involved in agriculture, focusing on crop and livestock faming, while the men have an easier access to education and better economic advantage. Second, African societies are still largely patriarchal in nature. This affects the distribution of wealth,

[4] See commentary to GP 3; GP 7(b) and commentary to GP. 18.

[5] "Guiding Principles on Business and Human Rights, Implementing the 'Protect, Respect and Remedy' Framework" HR/PUB/11/04 (2011) [Guiding Principles].

which results in an unequal economic advantage of one group over another. The under-representation of women in the decision-making process reflects the socio-economic inequalities between men and women.[6] Activities around mining, such as food vendors and social life, in rural South African communities, for instance, have led to an upsurge in forced prostitution, trafficking of women and girls, and the spread of sexually transmitted diseases. There seems to be a connection between resource extraction and violence against women. Men are also negatively impacted by the presence of extractive industries in communities, however, the impact and level of vulnerability of women is significantly higher. For instance, in South Africa, the added stress and burden on women who must nurse their spouses during illness caused by the environmental conditions of mines cannot be quantified. This is the subject of an ongoing silicosis case in South Africa.[7]

Third, social gender roles significantly determine the nature of the impact of the extractive industry – resulting in unequal benefits and risks for men and women. For instance, land allocation and child rearing are based on gender roles. Women principally assume responsibility for the feeding and wellbeing of their family, in addition to their farming roles. The direct impact of acid rain, water contamination, pollution, and land grabbing on these local communities are therefore largely felt by women. A key informant from Degema stated thus:

> It is a serious issue. When I was growing up I remember we used to put a bucket outside when it is raining to collect water, but now we can't do that because of acid. The rain itself is now acid as a result of flaring of the gas. So, you cannot even drink it. Our roofs are being damaged because of the acidic nature of the air and the environment. It's making the roof rusty. When we were growing up, we just went to the river and caught some fishes but now it's not like that – the oil spillage has damaged the seas and rivers. These fishes are no longer there. If you want them you have to go deep into the sea before you find them. The source of livelihoods has been destroyed and farmlands destroyed. In most of the places, as you are digging the ground you'll see crude oil, and as a result crops cannot grow in that soil, and even if they grow those crops are acidic.[8]

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[6] Institute for Human Rights and Business, 'Human Rights in Tanzania's Extractive Sector: Exploring the Terrain' (December 2016) 54, *www.ihrb.org/focusareas/commodities/human-rights-in-tanzanias-extractive-sector-exploring-the-terrain*, accessed 10 March 2017.

[7] See chapter 4 for an exposition of *Bongani Nkala & Ors v. Harmony Gold Mining Company Ltd & Ors*, Case No: 48226/12.

[8] Interview with Mr. S (Degema local government, Nigeria) conducted on 3 October 2016.

While activities relating to extraction results in a reduced value of the land, the duties of women in terms of attending to the wellbeing of their family do not reduce. Men attend meetings with extractive companies, hold chieftaincy titles, and are compensated for their land – while women are still discriminated against in respect of access to land and property ownership. It was difficult to ascertain the number of land owned by women in the areas visited in Nigeria. Children work under hazardous or exploitative labour conditions and are involved in illegal oil refining. In Ibeno community (Akwa-Ibom State), which was visited by the researcher, the environment surrounding the community is darkened as a result of years of gas-flaring by Exxon Mobil.

Further, the exclusion of women from community meetings and decision-making processes is a challenge to the actualisation of the Free, Prior, Informed Consent (FPIC) principle under the participatory framework of the HRBA. Some local community residents in Degema and Asari-Toru local governments said that companies hardly ever hire educated women from their community – because they believe oil and gas-related engineering and technical work is a male preserve. The same reasoning is applied in the mining industry. Besides, the companies cannot afford to lose human resource time during the women's statutorily mandated maternity leave. Women were only employed in low paying house-maintenance, cleaning and helper positions, and the community meeting times often conflicted with their working hours.

Comprehensive consultation continues to be a herculean task for most local communities. This is due to leadership structures that are characterised by power struggles – making it difficult for companies to engage with community leaders. As indicated above, women are left out in the information gap. While most community members, especially women, do not understand the English language adequately, company representatives do not understand the local languages, which makes communication difficult. This reinforces the argument in Chapter four, that to ensure proper consultation and participation, meetings should be conducted in local languages and using interpreters.[9] These inequalities in gender participation in community consultations are a hindrance to the implementation of the GPs.[10]

[9] See chapter 4.3.1.1 (ii).

[10] See further J. Gardam, 'A Gender Aware Approach to Legal and Policy Strategies for Achieving Access to Modern Energy Services in Sub-Saharan Africa' in Yinka Omorogbe & Ada Ordor (eds.) *Ending Africa's Energy Deficit and the Law: Achieving Sustainable Energy for All in Africa* (2018), 191.

5.4.2 People with Disabilities

There is no doubt that people with a disability continue to face significant stigma, abuse and discrimination. In Nigeria, there is no regulatory policy or framework to help disabled people to gain access to government buildings. There are structural defects in these buildings that prevent those with a disability from engaging in meaningful public life. Disabled people cannot reasonably access public transport, and educational institutions and facilities with ease. Buildings and cars are not designed to cater for these vulnerable members of the society. In South Africa, two respondents (20%) agree that there are protective mechanisms for vulnerable members of society, while eight respondents (8%) agree that there is no mechanism in place to ensure that vulnerable members are taken care of. In Nigeria, with regard to protective mechanisms, two respondents (12.50%) said they were in place, while 13 respondents (81.25%) said none were in place.

5.4.3 Knowledge of the Guiding Principles (GPs)

The findings on this point are captured in pie charts in appendices M & N.

A. South Africa

Nine respondents (81.82%) had not heard about the GPs, while only 1 person (9.09%) indicated knowledge of the GPs. Responses given by the participants in relation to the GPs include the following:

> ‘I glanced over them at the start of this survey but do not have a comprehensive understanding of them’ (Western Cape Province);
>
> ‘Through various courses taken at the university’ (Mpumalanga Province);
>
> ‘I was aware of certain UN treaties, but only was informed of this treaty doing this assessment’ (North-West Province);
>
> ‘I assumed such a thing existed, an assumption which was confirmed upon discovering this survey. I also vaguely remember hearing it come up in social justice circles surrounding discussions of sustainability (socioeconomic and environmental justice). Safely, in the last several years.’ (Western Cape Province);

'On 14 Sept. 2016 from Google' (Mpumalanga Province);

'Through a research project undertaken by an academic at UCT.'

There is therefore very little knowledge of the GPs in extractive communities in South Africa.

B. Nigeria

Nine respondents (40.91%) were aware of the GPs, 13 respondents (59.09%) were not aware of the GPs, while 10 respondents (66.67%) further said that their company has not trained them or provided relevant departments with information on the GPs.

There is greater awareness of the GPs in Nigeria than in South Africa. However, South Africa is one of the countries at the forefront of the campaign for the adoption of an international legal binding instrument on Business and Human Rights.[11] Nigeria's awareness can be attributed to years of resistance and activism surrounding extractive resources in the Niger-Delta. Instruments like the GP are therefore perceived as having the potential to further highlight and address the plight of the Niger-Delta people. and the responsibility of corporations to respect human rights. On legal representation made relying on the GPs, two respondents (10%) said they have expressly referred to or relied on the GPs in their cases. Reliance was based on the principles inherent in the GPs. Fourteen (14) other respondents (70%) said they were unaware of the GPs. For those who referred to the GPs in court cases, their litigation strategy was constituted by several factors such as NGO support driving the litigation, research, well-filed pleadings, strong advocacy, and reference to local law. Unsurprisingly, the Nigerian state does not prioritise the dissemination of information on the importance of the GPs. In some cases involving corporate actors and the community, the matter is settled out of court. In certain other cases the matters were struck out on technical grounds. Some other cases were confidential and could not be discussed.

[11] See UN Doc. A/HRC/RES/26/9/L.22/Rev.1, (25 June 2014) 'Elaboration of an International Legally Binding Instrument on Transnational Corporations and other Business Enterprises with respect to Human Rights.'

5.4.4 Accessibility and Information

In South Africa, most respondents feel that the GPs document should be made available to mines in the identified provinces to promote the awareness of its key principles in the local communities around the mines – and for the benefit of South Africans as a whole. Seven respondents (77.78%) wanted the GPs translated into local languages, while only 2 (22.22%) did not believe that translation into local languages mattered. In Nigeria, 14 respondents (70%) believe that the GPs should be translated into local languages.[12] Only two respondents (10%) disagreed. There is therefore a preference for translating the GP into local languages. This will ease communication and implementation.

Furthermore, on accessibility in Nigeria, 14 respondents (73.68%) answered in the affirmative when asked whether the GP should be made available to every company planning to incorporate in Nigeria. Companies can provide the translated GPs to their workforce – thereby integrating the principles into corporate culture. Furthermore, companies should conduct seminars and workshops for Directors, senior executives, subsidiaries and workers. Some, however, believe that the GP can only be enforced upon domestication by the local legislature. It is interesting to note that about 70% of respondents have not done any research on the GPs.

The GPs emphasise the importance of information dissemination with regard to corporate human rights impact assessments (HRIA) and other public reporting. Specifically, the GPs provide for communication on how companies address their HRIA;[13] the provision of information by the state and parastatals/agencies in fulfilling human rights obligations;[14] the sharing of information about challenges and best practices;[15] information to evaluate corporate response to HRIA;[16] aggrieved parties' access to information, advice and expertise on fair,

[12] The Nigerian Freedom of Information Act, 2011 was translated to local languages to ensure better understanding by the citizens, civil societies and government agencies. See 'NOA Unveils Information Act in 3 Nigerian Languages,' *http://www.foia.justice.gov.ng/index.php?option=com_content&view=article&id=27:noa-unveils-information-act-in-3-nigerian-languages&catid=10&Itemid=101&lang=en*, accessed 15 March 2017.

[13] GP 3.

[14] See GP 8, commentary to GP 10.

[15] Commentary to GP 10, GP 21 (b).

[16] See GP 21 (b).

informed and respectful terms;[17] and public information.[18] Information dissemination on the part of states and companies is strategic to implementing the GPs.

5.4.5 Incentives for the Corporate Good

In South Africa, seven respondents (63.64%) said yes to the creation of incentives for companies that engage in corporate social responsibility (CSR). Two respondents (18.18%) were indifferent. A respondent from Limpopo said it should be mandatory for companies to engage in CSR.[19] One respondent said:

> '… it is not particularly encouraging to imagine having to pay someone for them to NOT be a cancer upon people and planet.' (North-West Province)

CSR should be a moral imperative for companies, so that over time it will become a culture and companies will not feel obliged or see it as a favour when they are asked to be involved in socially responsible initiatives. Furthermore, when asked if there should be naming and shaming companies that fail to uphold CSR initiatives, one respondent said: '*there should be naming and fixing (not shaming)'.* Most respondents however feel some form of 'shaming' should be encouraged. To some extent companies still value their public reputation and image in the eyes of the public.

In Nigeria, the situation is a little different. Eleven respondents (68.75%) wanted incentives for CSR, while four respondents (25%) did not. All the respondents also supported the naming and shaming approach. However, some respondents also felt that sanctions should be applied, as there were doubts about whether naming and shaming would achieve the necessary outcome if it lacks financial or legal consequences.

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[17] GP 31 (d); see also commentary to GP 31.

[18] See GP 31 generally.

[19] See chapter two (4.3) for the discussion of CSR and its implication for business and human rights.

5.4.6 Transparency and Accountability

The commentary to GP 21 requires companies to show respect for human rights through transparency and accountability to those impacted by their activities. GP 5 requires states to ensure adequate independent monitoring and accountability mechanisms to oversee the activities of businesses.

Transparency is an important element of the HRBA to extractive resource governance. On whether companies should engage in open communication with their local community with respect to the possible impact of their business on the environment, three respondents (27.27%) agreed, while five respondents (45.45%) disagreed in South Africa. According to the respondents who answered in the affirmative, some of the ways they ensure open communication are by sending people into the communities to communicate, and by using signs as well as public gatherings. However, it was felt that mines are more frequently abandoned and that a mine closure procedure is seldom adequately followed. In any event, companies are believed to engage in data manipulation to reduce the apparent negative impact of their activities.

In Nigeria, five respondents (31.25%) agreed with open communication from the companies, while four respondents (25%) disagreed in this regard. According to the respondents, communication is shared with the public through citizen mediation centers and town-hall meetings.

In both countries, a strong perception of collusion between state agencies and extractive companies to avoid acknowledging and addressing human rights concerns was identified. In South Africa, seven respondents (70%) said they felt government personnel do not respond or investigate human rights violations identified by local communities.

Respondents in South Africa identified challenges like failure to carry out environmental impact assessments, bribing of government officials, and the adoption of capitalist-driven market systems – instead of people-centred development.

In Nigeria's extractive industries, several issues were identified by respondents as presenting a persistent challenge to transparency and accountability. A key issue was nepotism, which leads to the appointment of unqualified people into professional and technical positions. Technical or professional mismatch means that the job of monitoring the impact of extractive activities, for instance, will not be properly carried out. Other challenges include compromised government officials checkmating the work of professionals who are supposed to monitor the

impact of company activities, and often truncating the channel of communication for community grievances to reach government agencies.

5.4.7 Participation

The GPs do not expressly provide for the participatory rights of key stakeholders in decision-making processes. It is however stated that in assessing any actual or potential adverse human rights impact, corporations should consult with potentially affected communities in assessing human rights risks.[20] The decision to consult is left entirely at the discretion of the companies. GP 31 also directs that operational-level mechanisms should be based on consulting with stakeholder groups – focusing on engagement and dialogue to resolve grievances. The *lacuna* created by the non-inclusion of participatory rights has been covered in this thesis through the adoption of 'participation' as a key important element of the HRBA to extractive resource governance.[21]

On the question of whether companies actually involve the local community in monitoring extractive resource projects in South Africa, one respondent (10%) said yes, while nine (90%) said no. This is a stakeholder-wide confirmation of the fact that there is a disconnect between extractive companies and their host communities – a disconnect that translates into the lack of a social licence to operate. In Nigeria, two respondents (14.29%) said yes to the question, while 6 (42.86%) said no. Some respondents, especially legal practitioners who have worked on human rights cases, believe there is an element of collaboration between MNCs and their host communities, while others claim there is no such collaboration. On whether there is consultation before any project is carried out, five respondents (50%) said yes. There was, however, a perception that consultation is inconsistent, inadequate and quietly done, in order to minimise the number of participants and consequently to reduce the risk of rejection by the community.

Consultation takes place in a variety of ways. In some communities in Limpopo, the chief hosts a compulsory meeting for all the community members and this is where all the upcoming

[20] See GP 18.

[21] See further Tara J. Melish, 'Putting 'Human Rights' Back into the UN Guiding Principles on Business and Human Rights: Shifting Frames and Embedding Participation Rights' in Cesar Rodriguez-Garavito (ed) *Business and Human Rights: Beyond the Beginning* (2014) 16. [calling for either a '*supplementary Guiding Principle'* or the incorporation of a fourth "participate" pillar into the Ruggie Framework]

projects are communicated to the community. Communication is also done by way of public meetings in Limpopo and in Mpumalanga. In the Western Cape, there are periodic talks in community centres, but these are felt to be inadequate and ineffective in terms of reaching the majority of stakeholders – nor do they present an accurate overview of the process. The feeling of respondents in South Africa is that there should be third-party facilitators explaining to communities the extractive process and its impact on the environment. Community leaders can use various forums for consultation including, in some areas, newspapers and the post. The point was also made that residents who stay around the mines generally do not own their own houses and consequently do not have much say.

These reasons are in line with the assumptions underlying this thesis, and the failure of companies in the extractive industry to obtain a social licence to operate – as discussed under the elements of the HRBA to extractive resource governance in chapter four. Consultation demands much more than going to a community and asking the indigenes to sign an acceptance form. The purpose of the consultation is for communities to tell the companies what they think about the proposed project, and what the impact will be on their environment. This can be achieved through town hall meetings and other periodic meetings.[22] In Nigeria, respondents supported widespread consultation through participatory town hall meetings.[23] The incidence of minimal consultation with only a few chiefs, which was practised by some companies, was perceived as being open to abuse by way of divide-and-rule tactics, bribery, and diversion of funds. Proper consultation would create avenues for a range of issues that emanate from extractive activities to be discussed, and for appropriate solutions to be generated, and for remedial measures to be implemented. This range of issues includes provision of electricity and potable water to communities in the area, preventive and protective measures in relation to flooding, and proper clean-ups of oil spills.[24]

Consultation is different from consent. For instance, the Nigerian Minerals and Mines Act 2007 provides for a binding agreement with the host community before the commencement

[22] See chapter 4.4.1.1 for discussion on the impact of town hall meetings.

[23] Interview with Participant A. collected at Port Harcourt, Nigeria on 23 October 2017.

[24] Interview with Participant S at Old Bakana, Degema Local Government, Rivers State, Nigeria, on 24 September 2016.

of any development project.[25] The aim of the agreement is to ensure that there is a framework for the transfer of social and economic benefit to the community.[26] This is a condition precedent to the commencement of any developmental project. This is a novel provision which is absent from previous mining Acts and is especially absent from oil and gas legislation. Community Development Agreements can be used by extractive companies as instruments for consulting with local communities. The South African equivalent, the Minerals and Petroleum Resources Development Act of 2002, does not require consent. Mining companies can still get a licence – even where the community does not want the development to take place.[27]

5.4.8 Exposure to Pollutants or Toxins

With regard to exposure to environmental pollutants, nine respondents (90%) in the South African survey affirmed that they are exposed to pollutants as a result of extractive industry activities. In all areas surveyed, respondents experience airborne and waterborne pollutants. These include a hazy atmosphere and contaminated rivers and waterways in Limpopo Province, particle pollutants from heavy metals and land dumps in North-West Province, the use of unprocessed and often toxic fuel sources such as raw coal in Mpumalanga Province, and the contamination of the water supply with industrial waste in Western Cape Province. Various other pollutants to which community members are exposed include sulfur dioxide, carbon monoxide, asbestos, fine dust, and dust storms. Furthermore, acid mine drainage problems result in water from the mines flowing into surrounding water sources, where members of local communities use the water to bath, wash their clothes and water plants around the mine.

In Nigeria, there was consensus that local communities are exposed to environmental toxins. The different pollutants identified include noise, air and water pollution through carbon emissions, gas flaring, and oil spillage, leaked petroleum, and toxic waste substances and gases. Community members are also exposed to residues from mined raw materials like tin and gold which are released during mining owing to the artisanal nature of mining and inadequate environmental monitoring. Weak compliance and enforcement by regulatory agencies also

[25] Section 116 of the Nigerian Minerals and Mining Act, 2007.

[26] Ibid at section 117.

[27] This is however contrary to the Interim Protection of Informal Land Rights Act (IPILRA) of 1996. [The Act requires community groups to consent to deprivations of their land rights]

contribute to exposure of the community to environmental hazards. Furthermore, in both countries, most of the respondents assert that the companies are not quick to remedy environmental harm emanating from their activities.

5.4.9 Human Rights Challenges

The researcher identified three main areas in which human rights challenges are experienced in the extractive industry: the environment, health, and labour. In South Africa, nine respondents (81.82%) identified the environment, four respondents (54.55%) identified health, while seven respondents (63.64%) identified labour. The findings on this point are captured in appendix O & P. In Nigeria, 10 respondents (71.43%) identified the environment, 6 respondents (28.57%) identified health, while seven respondents (64.29%) identified labour as the areas that present key challenges.

The implication of the above information is that although the communities believe that all the identified challenges are present in their community, the attitude towards the impact of those challenges differs. Environmental concerns continue to occupy prime place in the minds of these local communities – simply because that is the most easily identifiable and obvious impact of MNCs activities. Health concerns are also key.

In an interview with an oil and gas executive in Nigeria, when asked if the company treats citizens who are impacted by their activities, the respondent answered as follows:

> Well, we don't treat – we only do awareness. We donate equipment for diagnostic purposes. This makes the identification of sickness easier. However, we have stopped that. Treatment is expensive and if we must treat we can't stop it. Now that the oil price has gone done, when there is no money how do we go on? It is not sustainable. We do intervene sometimes in critical cases like the outbreak of Ebola.[28]

Flowing from this, the next section presents responses to questions of human rights violations and access to remedies.

[28] Interview with Participant Ab on the CSR of an extractive company. Interview collected on 7 October 2016.

5.5 Pillar III: Access to Remedies for Victims of Human Rights Violations

5.5.1 Response of State Agencies to Environmental Clean-ups

In Nigeria, 13 respondents (100%) did not think the government has done enough for the indigenous communities in relation to costs and risks associated with extractive projects, while another 12 respondents (92.31%) said relevant state agencies responsible for law enforcement do not address the challenges of oil, gas, and mining exploration.

As indicated in section 3.2.1.6 in chapter three, the National Oil Spill Detection and Response Agency (NOSDRA) is a regulatory body which does not respond to oil spillages directly. Rather, the spiller informs NOSDRA within 24 hours and it monitors clean-up operations to ensure that pollutants in the affected medium (soil, water and sediment) have been reduced to a level allowed by the regulations and law governing oil-spill clean-up and remediation. The graph in appendix Q shows an upward trend in the number of oil spillages impacting on host communities to extractive projects between 2010 and 2015, as well as the causes and effects of such spillages.[29]

In 2010, 25 cases of oil spillage were reported to NOSDRA in Rivers State (see Appendix F). The records show that spillage occurs almost monthly.[30] Of the 25 cases, only 3 had a clean-up date and completion date. However, 11 cases had a post clean-up date. How NOSDRA arrived at a post clean-up completion date without clean-up and completion dates remains a mystery. Surprisingly, 22 of the spills were caused by sabotage. NOSDRA could, however, not provide evidence of or reasons for the sabotage. In 2011, 70 cases of oil spillage were reported – an increase in reported cases. Sabotage is still a significant cause of oil spillage. There was limited data on clean-up dates and post completion clean-up. This suggests that NOSDRA is not responsive to the concerns of the community or data on clean-ups is not available (see Appendix G). For instance, there were no data for 2012. In 2013, there were 211 incidents of oil spillage, being a significant increase from earlier years. NOSDRA records show that a spill on 28 December 2013 was caused by gas emission around the wellhead. However, the cause for the spillage was given as sabotage. Sabotage describes the activities of host

[29] Yearly details of oil spillages are presented in appendix.

[30] The information in this section was obtained from the National Oil Spill Detection and Response Agency (NOSDRA), Port-Harcourt Office on 25th October 2016.

communities in terms of destroying pipes and disturbing the work of the companies in the oil industry. However, it is difficult to see how gas emissions around the wellhead can be traced to the activities of host communities. Some of these emissions are attributed to the negligence or failures of companies in the oil industry. For instance, a spill that occurred on 22 November 2013 in Degema was caused by corrosion at a position on the flowline and the swamp.[31] On 26 July 2013, unknown persons made away with the choke box of the wellhead.[32]

In 2014, there were 479 reported incidents of oil spillage.[33] As in earlier years, there was very scant reporting of clean-up processes, or if there was any post clean-up inspection at all. Sabotage was the cause of most of those spillages. In 2015, there were 296 incidents.[34] In spite of all of this, there are scant details on post clean-up inspection dates and certification dates. This could mean that the clean-up is still ongoing or that no clean-up was ever done – especially where the cause can be traced to sabotage.

In any event, the information shows a remarkably large gap between sabotage and other factors causing oil spillage in the Niger-Delta.[35] Equipment failure is the next cause of oil spillage. While equipment failure is sometimes beyond the control of human agents, extractive companies should take all necessary precautions to ensure that best practices are followed and that technology is put in place to activate any equipment or to deal with operational failure. Closely related to this is the issue of corrosion. Some of the pipelines pre-date independence. It is the responsibility of the companies that own them to constantly check their pipelines for rust and other forms of weakening. A rusty pipeline has damaging effects – not only for the community, but also for the soil.

5.5.2 Compensation to Local Communities in Respect of Human Rights Violations

In South Africa, 5 respondents (50%) said there was inadequate compensation made to local communities for human rights violations, forced displacements, land grabs, environmental

[31] See appendix H.

[32] Ibid.

[33] See appendix I

[34] See appendix J

[35] Ibid.

pollution and associated disasters. Two (2) respondents (20%) felt that there is adequate compensation. Some of the respondents said there is some form of compensation, such as housing allocation, but there is no evidence to support this. Most respondents said there is no compensation – but rather diseases, ecological destruction and displacement. In Nigeria, 9 respondents (64.29%) believe adequate compensation is paid for land acquisition, while 4 respondents (28.57%) disagreed.

Based on this information, there seem to be proactive efforts by state authorities to compensate victims of land grabs and other violations that characterise extractive projects. Perhaps this can be attributed to the long years of neglect and the experience of the Ogoni community in their dealings with the Shell company. States must do more to provide basic amenities for affected communities – before requiring companies to do more. A key respondent who had been following the silicosis case in South Africa said that often miners who became ill with silicosis were not informed they had silicosis, but were laid off on grounds of redundancy.[36] This is an outrageous response because the miners contracted silicosis because they had worked in the mines – and for no other reason. Although the gold mine would say that workers were given masks and safety training, the workers response was that the masks were inadequate, or were not clean or that some of them ran out of masks.[37] Some of them used the same mask for over 20 years.[38] The briefing on the use of masks was only done once, and then not again for about 30 years.[39] The position of the mines seems to be that silicosis is invisible and does not render one incapable of work – but only makes one breathless and tired. The difficulty in finding work for redundant miners is exacerbated by the fact that many began to work in the mines in their teenage years, and have no other skills after having worked in the mines for decades.[40]

The reasoning of the mines in South Africa about the ability of workers to function effectively after contracting a deadly disease, illustrates the failure of companies in the extractive industry to obtain a social licence to operate in the areas they work in. Within a social licence to

[36] Interview with Participant T in Cape Town, South Africa 19 September 2016.

[37] Ibid.

[38] Ibid.

[39] Ibid.

[40] Ibid.

operate framework – the rehabilitation and support of redundant workers would be mandatory. In the absence of that, extractive companies continue to toe the line of Friedman's shareholder theory, by optimising profit over and above social responsibility.

The Nigerian legal regime contains some procedures and guidelines for compensation, and yet local communities are not adequately compensated. The research established that sometimes false claims come from indigenes, and because there is no adequate registry or data to monitor claims by people, government sometimes delays compensation. Some people usually called *omo-onílè*,[41] pester and collect money from the land owners and companies – even before the government gets to the communities. NOSDRA's position is that it does not pay compensation since it does not operate any oil field, as such. Payment of compensation is however based on the law.[42] Communities sometimes subvert the law by pressuring oil company representatives to pay them money – instead of improving infrastructure like roads. [43]

5.5.3 Capacity of Courts and Access to Judicial Remedies

GPs 25 to 31 provide the basis for victims to access remedies through judicial, administrative, legislative or other means. However, in jurisdictions like Nigeria, access to judicial remedies is clouded by several factors, including: excessive costs of filing and prosecuting cases, scientific proof of environmental claims, time-limitation, standing to sue, and legal awareness.

In South Africa, six respondents (60%) said courts in Mpumalanga, Limpopo and North-West Provinces are insufficiently equipped to handle human rights violations in the mining industry. One person (10%) however answered in the affirmative. A further finding in South Africa was that citizens cannot take up such issues with the courts because legal support is expensive or inaccessible.[44] This makes it difficult for mine workers to access legal assistance.

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[41] These are indigenes of the local communities who claim ancestral ownership of the land.

[42] See Part III, section 26 (1) (2) (3), Statutory Instrument No. 25 Oil Spill Recovery, Clean-Up, Remediation and Damage Assessment Regulations 2011 which provides as follows: 'The owner or operator of an oil spill facility shall pay compensation to an oil spill victim for damages caused to the victim's person, business or property; compensation shall not be paid for spill caused by third party interference (i.e. oil spill caused by sabotage); the operator shall internalize the cost of compensation as part of the polluter-pays-principle.'

[43] Interview with Participant S, conducted on 4 October 2016.

[44] In South Africa, cases of litigation against companies that failed to adhere to environmental regulations include: *Minister of Water Affairs and Forestry v Stilfontein Gold Mining (Pty) Ltd* 2006 5 SA 333 (W), *Kebble v Minister of*

The above three provinces do not have high courts within their proximity, and litigants from mining communities would have to travel a long way to cities like Johannesburg and Pretoria. As one of the respondents (a civil rights advocate) put it:

> They tell you that you have a right to life but when that right is violated, you first need to prove yourself. It's not them proving that no, we didn't violate your rights – it's you trying to prove they did violate my rights …. It takes the resources that many do not have. I think access is always an issue.[45]

In Nigeria, the 'scientific proof' theory provided in Nigerian laws,[46] stipulates that those claiming any environmental degradation must prove those claims. However, there has been a progressive change in the attitude of courts to extractive companies' treatment of their host communities and soft law instruments like the GPs.[47] In realising human rights, courts would readily defer to such instruments as the GPs to ensure that justice is done. However, there still seems to be a lack of clarity or no provisions at all. Most respondents believe the GPs are important for resolving the question of corporate liability. To date, there is very little or no municipal law in Nigeria which clarifies corporate responsibilities under the GPs. The difficulties and expense associated with accessing the judicial system is exacerbated by a lack of rights awareness on the part of community members. [48] Furthermore, there are difficulties like unfair judgments, bureaucratic delays, and compromised community leader work in relation to attempts to deal with group redress.[49]

Water Affairs and Forestry 2007 JOL 20659 (SCA), *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* 2004 5 SA 124 (W); *Sasol Oil (Pty) Ltd v Metacalf* 2004 5 SA 161 (W).

[45] Interview with Participant Sibongile conducted on 28 August 2016.

[46] See section 15 of the Oil Pipelines Act, 1956.

[47] See *Gbemre's* case.

[48] Interview with Participant S, conducted on 4 October 2016.

[49] Interview with Justice Ol. of the Ondo State High Court, Akure Judicial Division.

Interestingly, while South Africa supports efforts leading to a binding business and human rights treaty,[50] Nigeria does not have a clear policy statement on the GPs.

5.5.4 Citizenship Enforcement of Laws

Access to remedies encompasses the ability of aggrieved citizens to institute legal proceedings before a court of law or other independent and impartial body established by law. Thus, the ability of private citizens to enforce laws and regulations in the public interest is a critical component of access to remedies. There is a strong basis for citizenship enforcement of laws in South Africa when compared to Nigeria. For instance, section 38 of the South African Constitution promotes public interest litigation on the basis of the Bill of Rights. Furthermore, other statutes empower South African citizens to enforce environmental and mining-related laws in the interest of the public. For example, section 32 of the National Environmental Management Act, 107 of 1998, empowers citizens to seek appropriate relief in respect of any breach of their environmental rights, or of any provision contained in any environmental management law.[51] This provision enables citizens to enforce their rights in court where the protection of the environment is threatened, or the extraction of natural resources is done in an unsustainable way.[52] It also includes class-action suits, where an action can be brought in the interest of, or on behalf of a group or class of persons whose interests are affected, as well as in the interest of protecting the environment.[53]

In addition, section 33 of the NEM Act, empowers private prosecution of environmental offences. Thus, South African citizens can institute proceedings against extractive companies for environmental offences where public regulatory agencies fail to do so. Without doubt, these statutory provisions effectively displace the narrow conceptualisation of the doctrine of *locus standi* in South Africa.

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[50] See UN Doc. A/HRC/RES/26/9/L.22/Rev.1, (25 June 2014) 'Elaboration of an International Legally Binding Instrument on Transnational Corporations and other Business Enterprises with respect to Human Rights.

[51] Section 32 (1) of the National Environmental Management Act, 107 of 1998 (NEM, South Africa).

[52] Ibid.

[53] Ibid.

The GPs emphasises the duty of States to protect human rights.[54] This duty is carried out through enforcement of laws that advance corporate respect for human rights. For a variety of reasons, developing countries grapple with enforcing laws and regulations governing the natural resource industry.[55] This is a significant legal gap in state practice. One means of closing this enforcement gap in Nigeria is through citizen enforcement of laws and regulations, as is the case in South Africa. No doubt, if Nigerians are empowered to enforce laws and regulations in the public interest, the enforcement gaps will be greatly reduced.[56]

5.6 Key Findings

In chapter two it was argued that where a company prioritises profit maximisation over and above social issues, that company loses social legitimacy. This social legitimacy is key to realising the potential of the GPs. This can only happen when goods (in this context, extractive resource wealth) are distributed equitably to citizens. Key findings from the collected data, are now presented.

First, the implementation of the GPs will ensure effective extractive resource governance. This is because the GPs emanate from a human rights-based approach to development. Community respondents also think that proactive implementation of the GPs will yield positive impacts for the community. However, little was known about the GPs in the areas visited. Besides, residents of rural communities are typically illiterate and do not understand their rights and what the GPs stand for. States must therefore create awareness for the people on the intent and purpose of the GPs. This is where the NGOs should come in. Public interest litigation should be used to invoke human rights protection in Nigeria. This intervention should take an expansive view of rights – so as to include all human rights relating to the impact of the extractive industry – including the right to health, clean drinking water, legal aid, a speedy trial, and a healthy

[54] See generally GP 3.

[55] See commentary to GP. 3.

[56] See further Emeka Amechi, 'Strengthening Environmental Public Interest Litigation through Citizen Suits in Nigeria: Learning from the South African Environmental Jurisprudential Development' (2015) *African Journal of International & Comparative Law* 383. [arguing for the strengthening of environmental public interest litigation in Nigeria through appropriate legislative actions that will spur the development of citizen suits targeted at the protection of the environment]

environment. NGOs are more abreast of developments in law and policy than local communities, and are in a better position to give a voice to the voiceless. In effect, coalitions of NGOs should systematically organise to challenge any extractive project that violates human rights or affects the environment. For instance, many respondents are unaware that there is a complaints mechanism through which their grievances can be channeled. An NGO can educate community members on utilising the complaints mechanism. Furthermore, NGOs can advance the inclusion of citizenship education that integrates business and human rights with other civic issues in the school curriculum up to university level. In this way, the youth of communities that host extractive industries are informed and empowered in ways that ultimately advance development for their communities. Furthermore, implementation of the GPs will give companies an avenue to project their human rights policies and programmes – and at the same time provide citizens with a platform from which to exercise and secure their rights. In addition, public-interest litigation not only complements the efforts of public agencies charged with regulating the extractive industry, but it is also in conformity with the GPs. Concisely, institution of actions by NGOs or citizens help to shape and set the parameters for public participation in environmental regulation. In *Earthlife Africa (Cape Town) v. Director General of Environmental Affairs and Tourism and another*,[57] the applicant is an NGO involved in campaigning against perceived 'environmental injustices' in the Cape Town area and promoting public participation in environmental decision-making processes with a view to promoting and lobbying for good governance and informed decision-making. It instituted this action on behalf of the residents of Cape Town who may be exposed to potential risks posed by the construction of a demonstration model 110 MegaWatt class pebble bed modular reactor (PBMR), and in the public interest. On the issue of whether the applicant had first exhausted its internal remedies, the court held that this case presented an 'exceptional circumstances under the Promotion of Administrative Justice Act 3 of 2000 (PAJA), and that it was in the interests of justice that the applicant be exempted in terms of section 7(2) of PAJA from the obligation of having to exhaust its internal remedies before approaching this court on review. It further held that Earthlife was entitled to an opportunity to make submissions on the final report preceding the Director-General's decision.

[57] Case No. 7653/03 [2005] ZAWCHC 7.

Because no opportunity to do so had been given, the decision was held to be fatally flawed and the part of the process flawed by the irregularity was set aside.

Second, the existence of Global Memorandum of Understanding (GMOUs) between oil companies and local communities in Nigeria has, to some extent, created less tension between host communities and extractive companies. The GMOUs are designed to obtain a social licence to operate and promote corporate social responsibility, particularly the development of infrastructure in the oil-producing communities. In fact, GMOUs constitute important mechanisms for local participation in resource governance.[58] GMOUs are widely utilised in the Nigerian oil and gas sector.[59] These agreements, although voluntary, are becoming the preferred means of forging corporate-community alliance and trust. It is generally being resorted to by oil and gas companies in Nigeria.[60] For example, by the end of 2011, Shell (Nigeria) had signed and implemented twenty-seven agreements, covering 290 communities in its areas of operation.[61]

Section 116 of the Nigerian Minerals and Mining Act, 2007 obliges mining companies to enter into Community Development Agreements (CDAs) with host communities prior to the commencement of a mining project. This provision is only applicable to mining projects. An extension of this provision is necessary for the oil and gas industry. GP 18 requires project proponents to consult with host communities in assessing human rights risks. CDAs could be used by companies as mechanisms for consulting with local communities, thus accomplishing a principal objective of the GPs. furthermore, CDAs could be used by companies as tools for achieving GPs 17 to 21 which require companies to carry out human rights due diligence. Such

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[58] See further Austin Shaffer, Skylar Zillox and Jessica Smith, 'Memoranda of Understanding and the Social License to Operate in Colorado's Unconventional Energy Industry: A Study of Citizen Complaints' (2017) *Journal of Energy & Natural Resources Law* 69 at 71. [arguing that Memoranda of Understanding provides a space for host communities to air their grievances and participate in the governance process as well as integration of local concerns into the planning and regulation of extractive projects]

[59] See further Ibironke Odumose-Ayanu, 'Governments, Investors and Local Communities: Analysis of a Multi-Actor Investment Contract Framework' (2014) 15 *Melbourne Journal of International Law* 1.

[60] Osamuyimen Egbon, Uwafiokun Idemudia and Kenneth Amaeshi, 'Shell Nigeria's Global Memorandum of Understanding and Corporate-Community Accountability Relations: A Critical Appraisal, (2018) 31(1) *Accounting, Auditing & Accountability Journal*, 51. [exploring the extent to which GMOUs promotes corporate-community accountability necessary for fostering sustainable community development in Nigeria's Niger Delta]; see also Kiikpoye Aaron, 'New Corporate Social Responsibility Models for Oil Companies in Nigeria's Delta region: What Challenges for Sustainability?' (2012) 12(4) *Progress in Development Studies* 259 at 266.

[61] Shell, 'Global Memorandum of Understanding (GMOU)', *https://www.shell.com.ng/sustainability/communities/gmou.html*, accessed 11 May 2018

statutory provisions requiring CDAs could address issues such as the assessment of actual and potential human rights impacts arising from a project, as well as measures for mitigating such impacts.[62] Where effectively implemented, GMOUs will help companies obtain from their host communities a social license to operate.

As earlier indicated, social legitimacy enhances the potentials for implementing the GPs. This social license, through GMOUs or CDAs legitimizes a company's activities within the communities. The various oil and gas legislation and the Petroleum Industry Governance Bill should incorporate CDAs in order to make them binding on host communities and companies. As it currently stands, GMOUs currently in force are binding in honour only, hence the recurrent tensions and conflicts between host communities and companies.

Third, GPs 14 to 27 provide for human rights impact assessment (HRIA) and due diligence (DD). These concepts enable project developers to identify, anticipate and respond to the potential human rights impact of a project on the local community and vulnerable groups.[63] In conducting these HRIA and DD processes, extractive companies typically do not communicate whether any assessment has been done or whether they took human rights into consideration when planning their projects. Companies should be monitored to ensure they consistently prioritise and address human rights risks and proffer ways to avoid or mitigate the adverse results flowing from such risks. Although most extractive companies have codes of conduct which detail their social responsibility and impact assessments – much more than that is needed. Real-time tracking of efforts made in addressing and mitigating the impact and communicating these efforts to stakeholders, must accompany the activity of extractive companies. Furthermore, involving the community in the design of a company grievance mechanism and building on community traditions shows respect for the community, and in the long-term secures a social licence and a community sense of ownership.[64]

Fourth, the South African Human Rights Commission (SAHRC) was proactive in adopting the business and human rights concept as its strategic focus area for the 2014–2015

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[62] See GP. 17

[63] See John Knox, Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Health and Sustainable Environment, John Knox: Mapping Report, UNHRC, (30 December 2013) UN Doc A/HRC/25/53 at para 36 online

[64] Institute for Business and Human Rights, Extractive Sector in Kenya, 76.

period.[65] The aim was to increase its institutional understanding of the ways businesses impact on the enjoyment of human rights – particularly in respect of the impact on children.[66] The SARHC has also relied on the GPs in some of the cases it has prosecuted in court.[67] On the other hand, the Nigerian National Human Rights Commission (NHRC) does not have any policy statement or action for the implementation of the GPs,[68] and yet its website clearly lists the environment and the Niger-Delta as thematic areas.[69] There is no indication that the NHRC engages with key stakeholders which represent civil society formations, in this regard. The limited NHRC presence in Port-Harcourt, the presumed capital of the Niger-Delta, has been criticised as being disempowering for extractive communities – who find the NHRC headquarters in Abuja too distant and inaccessible unless they are lucky enough to have NGO representation.[70] The NHRC should develop partnerships with other state agencies and NGOs in designing a plan to implement the GPs and to craft a national action plan. Furthermore, it would be beneficial for the NHRC to learn from its South African counterpart (the SAHRC), in vigorously investigating how business activities affect the enjoyment of human rights in their territory.

Fifth, flowing from the preceding point, an examination of Nigeria's environmental impact assessment shows that it has many lessons to learn from South Africa's impact assessment processes.[71] A comparative analysis of the two countries' environmental impact

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[65] See the Human Rights Commission Act 54 (1994) which established the Commission. It is also provided for under the South African Constitution Act 200 of 1993; see further South African Human Rights Commission, 'ANNUAL REPORT 2015/16' 3, 30, *http://www.sahrc.org.za/home/21/files/SAHRC%20Annual%20Report%202016%20full%20report%20low%20res%20for%20web.pdf*, accessed 11 May 2017.

[66] Ibid, 3.

[67] See the *University of Stellenbosch Legal Aid Clinic and others v Minister of Justice and Correctional Services and others*, [2015] 3 all SA 644 (WCC), where the South African Human Rights Commission served as amicus curiae

[68] See the National Human Rights Commission (NHRC) Act, 1995, as amended by the NHRC Act, 2010. The establishment of the Commission was done in line with the United Nations General Assembly which enjoins all member States to establish national human rights institutions for the promotion and protection of human rights.

[69] Ibid, see *http://www.nigeriarights.gov.ng/index.php*, accessed 11 May 2017.

[70] Interview with a Port Harcourt Local resident, collected on 3 November 2016.

[71] See SADC Environmental Legislation Handbook (2012), 331. GPs 18 and 19 specifically provide for environmental, social and human rights impact assessment.

assessment (EIA) frameworks was done in chapter three, and showed that South Africa has a very strong EIA process. This is good for business and the community as it progressively leads to the achievement of a social licence to operate. Nigeria can draw lessons from the South African practice by growing and retaining a pool of well-trained environmental assessment practitioners, who are appointed on a non-partisan basis. Furthermore, the Nigerian regulatory framework on impact assessment should designate a competent authority, devoid of government patronage or control, that will administer and monitor the implementation of impact assessment requirements. The Department of Petroleum Resources cannot truthfully and objectively implement measures that work against the interests of extractive companies, because as a government agency they are a bureaucratic bottleneck and have corrupt tendencies.

Nigeria needs to identify the role of environmental compliance and enforcement mechanisms in the implementation of the GPs. As it is, Nigeria's Constitution treats environmental justice as non-justiciable – although it maintains a number of agencies relating to environmental protection.[72] However, a multiplicity of agencies and laws gives rise to difficulty in implementation. Already there are bureaucratic bottlenecks with the application for permits, and the oversight and monitoring responsibilities of existing government departments. What is needed is the strengthening of the capabilities of existing enforcement agencies operating under various laws, and making necessary amendments to incorporate the GPs for guidance. Apart from the current Petroleum Bill before the Nigerian legislature, all the environmental or extractive resource-related laws do not have clear human rights provisions, so making it difficult to implement the GPs directly. On the other hand, in South Africa, section 24 of the Constitution provides for an actionable environmental right which places a positive obligation on the state to observe this right. Section 33 further provides that environmental decisions must meet the requirements of lawfulness, fairness and reasonableness. This presents useful lessons for Nigeria.

5.7 Conclusion

This chapter analysed information obtained for implementing the GPs. Findings were presented under pillars II and III of the GPs. In respect of pillar II (corporate responsibility to respect human rights), the analysis was done in various segments, as follows: gender representation,

[72] NESREA, DPR.

people with disabilities, knowledge of the GPs, accessibility and information, incentives for corporate good, transparency and accountability, participation, exposure to pollutants, and human rights challenges. With regard to pillar III (access to remedies for victims of human rights violations), the analysis was conducted in three segments: state agencies' response to environmental clean-up, compensation to local communities for human rights violations, and capacity of courts and access to judicial remedies. Prominent issues emerging from the analysis centred around community participation, due diligence, environmental impact assessments, and the critical importance of NGO support to communities in the exercise of various rights. The chapter reinforces Freeman's model of prioritising stakeholders[73] – in this case local communities – in legitimising corporate activities. The analysis also shows the gender disparities in the distribution of social and economic goods (from the extractive industry) to wider society. This is also instructive in terms of the call of the GP for wider consultation and participation. The GPs envisage that with greater awareness of human rights imperatives in business, where a community is not consulted properly they can approach the courts to challenge the granting of either a mining or oil and gas licence. When participation, the hallmark of environmental democratisation, fails – the community is left with no other choice but to resist any projects that may be sited in their territory. The ability to decide whether to allow extractive companies in their territory or to protect their land, rivers and farms from extractive activities, forms the bedrock of environmental democracy.

The next chapter develops a legal framework for implementing the GPs in Nigeria.

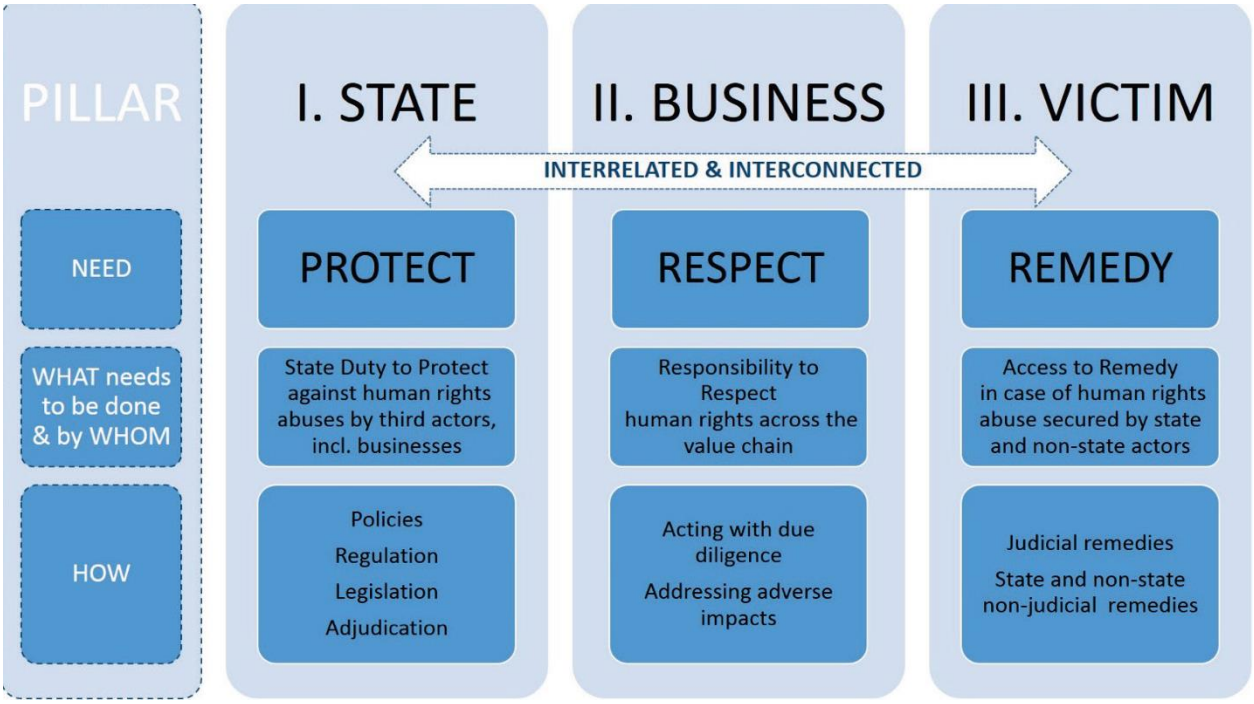
[73] See chapter 2.3.2.

CHAPTER 6: LEGAL AND INSTITUTIONAL FRAMEWORK FOR THE IMPLEMENTATION OF THE GUIDING PRINCIPLES IN NIGERIA.

6.1 Introduction

The previous chapter described and analysed the efforts towards the practical realisation of the Guiding Principles (GPs) in Nigeria and South Africa. This chapter builds on this analysis and answers the research questions raised in chapter one of this thesis.[1] Developing a legal and institutional framework for the implementation of the GPs is central to this thesis. This thesis sought to examine the practical realisation of the GPs in the extractive sector in Nigeria. It explored the potential for adopting the Human Rights Based Approach (HRBA) to extractive resource governance, which was set out in chapters 4 and 5 of this thesis. It also considered domestic legislation in South Africa which could serve as an example for Nigeria to craft and amend domestic laws and regulations as a pathway to implementing the GPs. Furthermore, this thesis investigated and unpacked the 'state duty to protect; corporate responsibility to respect; and access to remedies' under the GPs. Implementation of the GPs in Nigeria is an indispensable condition to extractive resource governance. The strength of the implementation of the GPs lies in the ability and dogmatic determination of the states to strengthen their domestic laws and to adequately regulate corporate activities in a manner consistent with the intents of the GPs. When corporations breach host state laws, they breach labour, environmental, criminal and human rights laws. As a result, they have indirectly breached the GPs. Those breaches can be latent if domestic laws do not contain human rights provisions to guard against corporate-related abuse. An investigation of Nigerian laws shows that this is not the case. In fact, legal and institutional frameworks designed to integrate human rights principles for MNCs have not been developed in the Nigerian context. The link between the state's duty to protect and corporate responsibility to respect human rights, is best captured in Faracik's diagrammatic representation of the implementation of the GPs below:

[1] See chapter 1.4.



Source: Beata Faracik, 'Implementation of the UN Guiding Principles on Business and Human Rights – Schematic Overview' (2017) 13.

The previous chapter identified lack of citizenship education as one of the many challenges to the implementation of the GPs. This chapter recommends legal and institutional frameworks that will aid the realisation of the GPs. It adopts the rights-based approach in drafting a National Action Plan (NAP), so that Nigeria can show commitment to the ideals of the GPs. To date, only 13 countries have published their NAP.[2] Nigeria and South Africa have not developed or shown any commitment to developing a NAP.[3] However, Africa is bedevilled by the cataclysmic effect of extractive resource development.

[2] The following countries have developed National Actions Plan: UK (September 2013, updated May 2016); Netherlands (December 2013); Denmark (April 2014); Spain (Summer 2014); Finland (October 2014); Lithuania (February 2015); Sweden (August 2015); Norway (October 2015); Colombia (December 2015); Switzerland (December 2016); Italy (December 2016); USA (December 2016); Germany (December 2016). Some states are in the process of developing a NAP or committed to doing one; see further UNHCR 'State National Action Plans'*http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx*, accessed 13 May 2017.

[3] South Africa has been more proactive through the South Africa Human Rights Commission. See SAHRC 'Annual Performance Plan 2014/2015'; South Africa also supports a treaty-based framework for BHR, for this see the Human Rights Council Resolution 26/9; see further Isaac Mangena, 'SAHRC Launches Human Rights and Business Country Guide to Sensitize Business to key Human Rights Shortcoming in SA' SAHRC (22 March 2014). Other than a stakeholders' consultation on NAP held on 7 July 2015 in Lokoja, Kogi State, Nigeria's National Human Rights Commission has not done anything overtly for the BHR agenda.

6.2 Legal Framework and Domestic Application of the GPs

6.2.1 *Developing National Action Plans*

Africa is the richest continent on the planet,[4] although it remains the poorest.[5] Exploitation of the environment has continued to occur at an alarming rate over the last few decades. While humanity has tilled and plundered the earth with reckless abandon, it seems that the Earth is running out of resources.[6] Extraction of natural resources is one of those activities which humanity has undertaken, in order to achieve social and economic survival.

Adoption of a NAP in Nigeria should be a policy tool used by government, which sets out priorities that would encourage strategic mechanisms to ensure corporate accountability.[7] It will also serve as a guidance for states to facilitate tougher regulatory enforcement and monitor the implementation of the GPs. The question is how those principles and concepts which have been discussed in this thesis will be applied to ensure the implementation of the GPs. A domestic NAP must therefore tackle the question of corporate human rights violations and how the state can balance the drive for FDI with corporate accountability for human rights violations. A NAP which is well structured, adapted to local context, comprehensive, and which follows a transparent process – will expedite the implementation of the GPs.

The first step is either to amend the existing Nigerian National Human Rights Commission (NNHRC) Act, 1995, or the office of the Attorney-General (AG) set up an Independent Panel of Experts on Business and Human Rights (Panel of Experts) made up of experts who can identify the root causes and proffer solutions to the challenges in the extractive industry. The NNHRC has a statutory obligation to encourage and protect human rights. GP 3 lends credence to this by stating that National Human Rights Institutions (NHRI) must provide

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[4] See Miriam Mannak, 'Africa: Why the Richest Continent is also the Poorest' *Climate & Capitalism*, (5 September 2008), *http://climateandcapitalism.com/2008/09/05/africa-why-the-richest-continent-is-also-the-poorest/*, accessed 29 May 2017.

[5] Ibid.

[6] Mark Townsend, Jason Burke, 'Earth will Expire by 2050' *The Guardian* (7 July 2002), *https://www.theguardian.com/uk/2002/jul/07/research.waste*, accessed 29 May 2017.

[7] See Human Rights Council, 'Report of the Working Group on the Issue of Human Rights and Transnational Corporations and other Business Enterprises' (5 May 2014) (A/HRC/26/25) para 10; For the essential criteria of a NAP, see United Nations Working Group on Business and Human Rights (2016), Guidance on National Action Plans on Business and Human Rights, UN WG, November 2016, *http://www.ohchr.org/Documents/Issues/Business/UNWG_NAPGuidance.pdf*, accessed 5 June 2017.

guidance on human rights to states and businesses. Thus, Nigerian Human Rights Commission must assist the government with identifying and seeking amendment of relevant laws where necessary. One of the many ways could be changing the procedural laws so that the burden of proof in environmental litigation falls on the MNCs who have the technical and scientific wherewithal to prove the cause and effects of oil pollution. NHRI action would be a driving force in a state's drive to develop a NAP. Since the NNHRC has failed to initially raise awareness on the GPs, and being the only body statutorily empowered to do so – it is therefore recommended that the Panel of Experts should serve as an advisory group in terms of developing a NAP for implementing the GPs. The purpose of the Panel of Experts is to provide expert advice to the government on the need to amend existing laws and to integrate human rights provisions into those laws – relying on the GPs. The Panel of Experts should not include more than 50 members of high moral standing, who have acknowledged expertise in business and human rights. These members shall derive from academia, civil society, the Human Rights Commission, state prosecutors, corporate bodies and think-thank institutions.

The second step is that the Panel of Experts should design an Action Plan showing ways in which Nigeria can show commitment to protecting human rights – proffering avenues for mitigating or reducing adverse human rights violations of corporations, and how corporate bodies can integrate human rights impact assessment and human rights due diligence into their corporate cultures. Such an Action Plan should clarify the exact duties of non-state actors, and identify government priorities including monitoring and evaluation of implementation, and how the state can translate the GPs into meaningful legal contexts. Currently, corporations are subject to the Companies and Allied Matters Act (CAMA) which prescribes the fiduciary duties of Directors and criminal sanctions for the acts of the company. However, further details should emerge with particular reference to human rights violations and mitigation. On the part of corporate actors, any extractive project must satisfy the elements of the HRBA to extractive resource governance which was discussed in chapter 4 – that is, participation, non-discrimination, transparency, accountability, and access to information. There must be provisions for the protection of human rights in extractive contracts, and information on how the issue of land expropriation will be resolved. Corporate reporting included in the Action Plan must contain actual human rights impacts, efforts aimed at remediating the impact, community engagement, local community consultation and participation, and social and environmental impact

assessment. The Action Plan drafted by the Human Rights Commission or the Panel of Expert will then be submitted to the AG, who will present the Action Plan to the Executive Meeting of Ministers and the President. Upon ratification by the Federal Executive Council, the Action Plan will be submitted to the National Assembly for enactment.

Following the enactment of the Action Plan by the National Assembly, government must engage with the MNCs in giving effect to the GPs – in order to ensure sustainable development of Nigeria's extractive resources.[8] To give effect to a potential Action Plan, this study proposes a legal and institutional structure to realise the potentials of the GPs. This legal framework, which is discussed in the rest of this chapter, will provide a clear guideline for companies, and will show commitment on the part of government to upholding its duty to protect the human rights of its citizens.

6.2.2 *Integrating Human Rights into the Domestic Legal Regime in Nigeria: Amendments to Extractive Legislation*

The inadequacy of human rights protection in local laws is a challenge to the implementation of the GPs. Therefore, the first step will be to amend all extant laws related to the extractive sector to incorporate a human rights ethos. The Petroleum Industry Bill (PIB), currently under consideration before the National Assembly, should be re-drafted in alignment with the GPs. Incorporating human rights commitments such as the GPs into the PIB will go a long way in identifying Nigeria as a serious partner in implementing the GPs. Human rights language must be easily identified in the laws.

This section provides pathways for inclusion of human rights language in the existing laws:

A. The Petroleum Act, (1969)

The Preamble to the Act should be amended to read as follows:

> An Act to provide for the exploration of petroleum from the territorial waters and the continental shelf of Nigeria *without violating the human rights of the host communities* and to vest the ownership of, and all on-shore and off-shore revenue from petroleum resources derivable therefrom in the Federal Government *who shall exercise the proper utilization of*

[8] For the essential criteria of an Action Plan, see United Nations Working Group on Business and Human Rights (2016), Guidance on National Action Plans on Business and Human Rights, UN WG, November 2016, *http://ohchr.org/Documents/Issues/Business/UNWG_NAPGuidance.pdf*, accessed 29 October 2017.

> *such resources on behalf of all Nigerians* and for all other matters incidental thereto. (italicized words added).

Furthermore, section 2 of the Act which regulates the granting of oil licences and mining leases should be amended to provide for local community participation in the granting of an oil licence. Any licensed company must be required to incorporate and provide for due diligence requirements and a human rights impact assessment which incorporates the Free, Prior, Informed Consent (FPIC) of the host community. Furthermore, the Petroleum (Drilling and Production) Regulations, 1969, which were made incidental to the Petroleum Act should include human rights content which makes local community participation and consultation imperative – before any oil prospecting or mining activity starts. Section 1(2) (h) of the Regulation which provides for the employment quota of Nigerians in the oil and gas industry, must be amended to further favour the local community of the extractive activity. These are the people who are impacted by extractive projects, and this research has established a basis for their participation in governance.[9] Additionally, Section 17 of the Regulation limits the entry of a licensee into sacred lands – which are usually used for spiritual purposes. However, the question of which land is sacred is determined by the state authority, whose decisions are final. This provision however makes a mockery of the rights-based approach to extractive resource governance. In the face of FDI and state complicity with MNCs, asking the state to determine which land is sacred is spurious and alarming. Niger-Delta communities hold their land in reverence for spiritual and agricultural purposes. The state government is not the right body to determine the designation of land as sacred – without the input of the local community. Furthermore, if the Act can prohibit pipeline construction near a building, it should prohibit such construction on sacred sites.[10] Thus, the Petroleum Act should be amended to specify that:

> a licence shall not authorise the holder to construct any works upon any land which is the site of or is within fifty metres of any spiritual or communal land.

The condition of the determination of sacred land by a state authority should be removed. The Regulation should be amended to allow for a representative body in such a community, or in the

[9] See chapter 5.4.7.

[10] See section 17 (1) (a) of the Petroleum Act.

case of the Niger-Delta community, a body comprising different ethnic groups and clans, to negotiate collective interests with the government in determining any land as sacred land. Every group represented in this body should partake in the election of their representatives and where such a representative goes beyond the wishes of a clan or tribe, the community should be able to impeach such a representative. This process must be free and fair. Elderly and vulnerable members of society can provide social and historical contexts on issues when needed. Participation in determining which land is sacred should be done without coercion and with the central input of the local community. Under no circumstance should there be the granting of operational licences or leases without consulting community members. The extensive powers granted to the Minister to exercise this right should be curtailed in a way that makes the FPIC principles mandatory.

B. The Oil Pipeline Act (OPA) (1956).

The OPA regulates licences for the construction and maintenance of pipelines for oil and mining extraction. Construction and the laying of pipelines in Nigeria leads to dislocation of community members from their ancestral lands – sometimes without any form of compensation. Hence, section 9 should be amended to ensure that the human rights of land owners are not violated. Where land has been affected by the granting of a licence, not only should adequate compensation be paid, but alternative housing or landed property should be provided for residents or victims. The granting of licences under Part III of the Act should be amended to include consultation and local community participation in decision-making – leading to the granting of such licenses. Community members should also participate in all project-related activities.

Like the Petroleum (Drilling and Production) Regulations discussed above, the OPA also prevents the usurpation of sacred land. However, it does not place the burden of determining which land is sacred on the state. Section 15 (1) (a) prohibits a licensee from entering or taking possession of any land held to be ‘sacred or the object of veneration’, unless express permission has been given by the owner. However, the determination of which land is sacred or who owns or occupies such lands is left to the court to determine. Free, Prior, Informed Consent (FPIC) would ensure that extractive companies consult with the local community – to avoid any usurpation of sacred land. In this regard, the views and historical account of the elderly and aged

in the community will go a long way in determining which land is sacred.[11] After all, the court will still rely on evidence brought by the elderly and chiefs in the community, to determine issues of customary law or sacred land. Extractive companies can avoid tortuous litigation processes by consulting with affected stakeholders, as encapsulated in GP 18. It is recommended that the Oil Pipeline Act should indicate how such assent, under section 15(1), is obtained – and the processes and procedures involved in obtaining the assent, such as consultation, language (or the use of interpreters), gender representation, and the participatory framework.[12] Furthermore, host communities must be involved in oil pipeline construction. The involvement can take various forms, and this could include employment by the MNCs, using an orderly and recognised representative platform to question the motives of an investor in terms of complying with environmental laws and standards, prevent access to spiritual and communal lands, and receive guarantees that investors will comply with any pre-project arrangement.

C. The Petroleum Industry Bill (PIB)

After 17 years of debating the comprehensive Petroleum Industry Bill – on 25 May 2017 the Nigerian National Assembly passed a small portion of the Bill as the Petroleum Industry Governance Bill (PIGB),[13] and is now awaiting the assent of the President. As discussed in chapter three,[14] the Bill seeks to promote transparency and accountability in the administration of Nigeria's petroleum resources.[15] The original comprehensive Bill had to be split into three Bills in order for one part to be passed as the PIGB. The first section regulates the 'governing structure' of the Nigerian oil and gas industry. Though this is a giant step towards passing the entire Bill into law, the current passage of this section is not the end of the road. The second section, which is yet to be passed, concerns fiscal governance, while the third section, which is also yet to be passed, is largely relevant to the discourse in this thesis and focuses on the Host Community Fund and the management of local community participation in governance. Serious

[11] See further Deanna Kemp and John Owen, 'Corporate Readiness and the Human Rights Risks of Applying FPIC in the Global Mining' (2017) *Business and Human Rights Journal* 164. [FPIC must be adapted to local context and corporate ability to support the principle]

[12] See 1 above (under PA) for determination of question as to sacred land.

[13] Online Editor, 'Senate Passes Petroleum Industry Governance Bill, *The Guardian* (25 May 2017).

[14] See chapter 3.3.8

[15] Section 1 of the Petroleum Industry Governance Bill.

commitment is therefore needed on the part of the executive for the judicious execution of this governance bill and other bills required to make the extractive industry compliant with global practices. The PIB is an ambitious law which among other things, seeks to develop the Niger-Delta communities which are hosts to extractive projects. To ensure this effectively, the other sections of the PIB, yet to be passed, must be re-drafted to provide for the 'right to negotiate' in respect of extractive projects. They must also give power to the local community and create channels and mechanisms for ensuring that the concerns raised by the local communities are addressed by the Nigerian government and project proponents in compliance with the GPs. It is submitted that community consent can be withdrawn at any stage of a project where the initial consent was obtained by fraud.

D. Environmental Impact Assessment (EIA) Act, (1992)

The EIA Act must be amended to cater for preliminary assessment of extractive projects. Preliminary assessment goes beyond mere screening and scoping stages. This assessment must integrate the host communities, consider the viability of the project in terms of human rights implications, health consequences of such projects and costs of relocation of community members. Currently, the Act does not require human rights considerations in conducting preliminary assessments.

Before extractive projects are conducted, there must be detailed description and analysis of the objectives and impact of such projects on the community at the first instance, and on the country at large. Issues here would include relocation of members of the community, the siting of the project (in relation to spiritual affinity to the land), closeness to natural habitats or monument sites, post-completion operations such as decommissioning and the closing of mines, and the effect of such activity on the immediate environment. Thus, an EIA remains crucial for identifying these issues. However, while the current law prescribes that an EIA is to be done before the project, it is submitted that an EIA should be done before, during, and after the completion of the project. This will be in form of a monitoring plan that assesses the effect of a developmental project on the host community's culture, community, health and well-being. This would enable various stakeholders to determine whether the intended objectives have been met, and if not, whether reparations are possible. It is this pre-project report that will be presented to

the Department of Petroleum Resources (DPR) and made available in an accessible language to the local community who are the hosts of the project.[16]

The Environment Impact Assessment Act (Amendment) Bill, 2010, has been before the Nigerian legislature since 2010.[17] The Bill seeks to amend the Environment Impact Assessment Act and make it more responsive to the aspirations of the people. It seeks to ensure that project developers, approving authority and persons whose livelihood will be affected by the proposed project are involved in the decision making to safeguard the environment and ensure adequate re-mediation of the environment. The passage of this bill will lend credence to the recommendations highlighted in this thesis that seek to ensure that preliminary assessment is done before, during and after the project as well as involving the host communities in decision making. For instance, paragraph 9 of the proposed amendment provides that project proponents shall submit a security bond, the value of which the Assessment Agency shall stipulate for the remediation of any adverse environmental impact after completion of the project. This guarantees that where the host communities have been impacted, appropriate compensation and remediation will be done. An impact assessment done during and after the completion of the project can only give effect to this proposed amendment.

The importance of this assessment is key in determining the liability of such a project and its potential to acquire the social licence to operate (SLO). For instance, this report will indicate if there will be environmental effects of gas flaring, acid rain, oil pollution – and how the company intends to mitigate or reduce this. The report will also address the social, economic, cultural and environmental impacts of the project, and what percentage of the host community will be employed. The information yielded by this assessment will determine how many homes will be lost, how many locals will be displaced, the possibility of land expropriation, and whether

[16] See further Aoife McCullough, 'Environmental Impact Assessments in Developing Countries: We need to talk about Politics' (2017) 4(3) *The Extractive Industries and Society* 448. [finding that the implementation of EIA in developing countries has been found to be relatively ineffective]; Allan Ingelson, Chilenye Nwapi, 'Environmental Impact Assessment Process for Oil, Gas and Mining Projects in Nigeria: A Critical Analysis' (2014) 10(1) *Law, Environment and Development Journal* 37. [arguing that although EIAs have become a standard legal requirement for all oil, gas and mining projects in Nigeria, not much is achieved in terms of managing the impacts of these projects].

[17] See National Assembly, Nigeria, 'A Bill for an Act to Amend the Environment Impact Assessment Act, Cap. E12, Laws of the Federation of Nigeria 2004 to Strengthen the Process of Approvals and Decision Making on Project Inclusive and for Other Connected Purposes' *https://www.nass.gov.ng/document/download/1251,* accessed 11 May 2018.

there is an alternative site for the project. It is only at the planning stage that these issues can be identified – and if such issues cannot be resolved, extractive projects should not proceed. These issues are more pertinent when the oil wells and activities are onshore. The extent of contamination and corporate-induced human rights violations are more visible onshore compared to when oil activities are undertaken offshore.

E. Corporate Human Rights Due Diligence (HRDD)

This requirement must be incorporated into the Companies and Allied Matters Act (CAMA). It will require companies to identify real and possible impacts of their projects on the human rights of their host communities, and how they intend to avoid or mitigate such impacts. This would include integrating and acting upon the findings. The lack of HRDD has led to corporate disasters such as the deleterious effects of gas flaring and acid rain. Regrettably, this same gas that can be converted to domestic use, is lost through indiscriminate flaring.

The due diligence must include a community-based human rights impact assessment (HRIA), which advances the aim of due diligence by 'knowing and showing' how companies respect human rights. HRIA complements EIA and due diligence processes, and hence are an integral part of the GPs. Through the HRIA, companies will be obliged to demonstrate the extent to which their activities have been subjected to HRIA. HRIA would also help identify if there is potential for the displacement of people from their homes, the loss of fishing and farming by local communities, and potential for oil spillage. For instance, the researcher asked the local communities he visited a series of questions about the extent of corporate HRDD. These questions included: what potential human rights violations have occurred (gas flaring, oil spillage, destruction of fishing and farming activities); whether there was any impact of extractive projects on host communities (land expropriation, dislocation from land, loss of rights to live on the land, health, the environment and housing); and whether there were any efforts to remediate the potential and actual human rights violations (local community engagement, FPIC). These questions helped to drive home the urgency and necessity of environmental and human rights due diligence.[18]

[18] See chapter 5.4.7, 5.4.8, 5.4.9, 5.5.2.

HRDD should also commence at the initial stage and run through the life-cycle of the project. This should be mandated by the state as a pre-condition for granting oil exploration rights. This gives companies guidance on how to avoid or mitigate human rights violations. The GPs support the continuous conduct of HRDD. When a project ends, due diligence will determine whether the project had negatively affected the host community. For example, the failure of Shell to do HRDD after its operations, when it decided not to secure a wellhead it was no longer using, caused the company to pay huge fines in the *Akpan v Shell* case.[19]

As discussed in chapter two, the issue of incentivising is key to achieving corporate HRDD. For instance, the Indian government recently launched National Corporate Social Responsibility (CSR) awards to recognise companies that contribute to social welfare and that have made an impact on society through their sustainable CSR initiatives.[20] This forms part of the government's efforts to incentivise companies that contribute to social welfare. Under India's Companies Act 2013, a class of companies that meet a designated profit threshold is required to spend 2% of its average annual net profit on CSR. Incentivised companies are expected to have focused on the following areas: human development, economic development, welfare, the environment and sustainable development. Nigeria can also incorporate similar provisions in its corporate law. The use of national awards and TV shows will encourage MNCs to do more in terms of integrating human rights into their practices. Furthermore, Switzerland is currently considering whether to introduce a constitutional amendment that will include mandatory environmental impact assessment and human rights due diligence for companies domiciled in Switzerland. The proposal got the needed 100,000 signatures – in line with Article 139 of the Swiss Constitution (1999) which states that 'any 100,000 persons who are eligible to vote may, within 18 months of the publication of any proposal, request a partial amendment of the Federal Constitution.' Of significance is the fact that the people have a final say in the form of referendum, before the Cantons vote for the proposal.[21] This proposal, however, returned a

[19] Case Number: C/09/337050, HA ZA 09-1580.

[20] Policy, Government Launches Awards for CSR Nominations open Till June 18, *The Economic Times*, 15 May 2017, *http://economictimes.indiatimes.com/news/economy/policy/govt-launches-awards-for-csr-nominations-open-till-jun-18/articleshow/58685469.cms*, accessed 7 June 2017.

[21] See generally Article 139 of the Swiss Constitution (1999).

negative vote in the Swiss Parliament in March 2015.[22] If eventually voted on and approved by the Swiss Parliament, the initiative will amend the Swiss Constitution to the effect that the Confederate states will take appropriate measures to improve respect for environmental, business and human rights.[23] This has far-reaching implications for the BHR paradigm in Switzerland. First, the proposal mandates Swiss-based MNCs to adopt environmental impact assessment and human rights due diligence in alignment with the GPs. Second, this responsibility will also extend to subsidiaries of the parent company and other companies under the control of Swiss companies. These kinds of measures, if introduced in Nigeria, will have a far-reaching effect on managing extractive resource governance.

F. Access to Information

Contract disclosure has been shrouded in secrecy in Nigeria's extractive sector for a long time. This has led to failure in transparency, with its concomitant effects. A legal requirement for access to information would pave the way for unfettered access to project information in Nigeria. Citizens do not have to demand information – it should be freely available. The Freedom of Information Act (2011) is currently only applicable to public institutions. Among other things, the Act seeks to make 'public records and information more freely available, protect public records and information and protect serving public officers from adverse consequences of disclosing certain kinds of information'.[24] The Act should therefore be amended or a constitutional access to information provided – to ease the process and to reduce the burden of requesting and accessing information.[25]

In the extractive sector, investor-state contracts are the bastion of non-disclosure. Extractive companies and government agencies must periodically make available project information – such as parties involved, the names of companies and the Board of Directors, non-

[22] See generally the website of Swiss Coalition for Corporate Justice at *http://konzern-initiative.ch/coalition/?lang=en*, accessed 29 March 2017.

[23] Ibid.

[24] See preamble to the Act.

[25] See section 39 of the Nigerian Constitution which guarantees freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference.

judicial grievance mechanisms to address complaints in relation to the project and the impact on the immediate environment, the cost involved, the number of local employees, and the benefit of extractive projects to the immediate community. This information does not in any way compromise or threaten national security, and instead provides a basis for the social licence to operate (SLO). This information must be readily available through the life of the project – as there may be changes in the contract sum and transfer of an oil concession, for instance. Furthermore, government must establish an Extractive Sector Information Management Centre (ESIMC),[26] where information concerning oil concessions and other extractive projects is made readily available. The information must be provided in the languages spoken in the project area and must be easily accessible by local communities. The ESIMC must be managed by an effective communicator. Periodic town-hall meetings, the use of town criers and assembly forum should be a matter of necessity – not only for the dissemination of information, but for making available documents that are crucial to the projects undertaken. There can be no exception to transparency; it is a fundamental part of extractive resource governance. TV and radio programmes must be utilised by the government as an avenue to put information before the public. The trust of local communities is gained when the necessary information is made public, without first demanding it. This gives key stakeholders confidence and trust in the MNCs. Information about any project must be detailed and given in the language understood by the community. Considering the low literacy levels in most local communities, extractive industries must provide information in the language spoken by the community where they operate.[27] Thus, the GPs should be translated into the Niger-Delta languages – for ease of comprehension. The same applies to other extractive locations such as mining communities in the north-central part of Nigeria. If it means using language interpreters, that should and must be done. This will ensure that the message gets to the intended beneficiaries. The era of stating that the plaintiffs, who are mostly poor indigenous people, should bring scientific proof that companies are engaged in environmental pollution should end. Increasingly, companies are inundated with calls to be more transparent and open in their daily operations and access to information is one of the ways to

[26] ['Information Management Centre']

[27] In Nigeria, the Freedom of Information Act has been translated to the three main Nigerian languages: Hausa, Igbo and Yoruba, see FOIA Nigeria, 'NOA Unveils Information Act in 3 Nigerian Language' *http://www.foia.justice.gov.ng/index.php?option=com_content&view=article&id=27:noa-unveils-information-act-in-3-nigerian-languages&catid=10&Itemid=101&lang=en*, accessed 7 June 2017.

demonstrate this. GPs 8,[28] and 21,[29] lend credence to this. Extractive companies have a duty to the public and the local community to periodically provide appropriate information about their activities, in a language which is understood by their host communities.

Government cannot just state that there are exemptions to disclosure – they must clearly state the reasons for these exceptions. Other than national interest, it is difficult to justify other grounds for restricting information provision. The purpose of positive extractive resource governance, is defeated if litigants go through a long and arduous process of requesting information from the public service.[30] At any point in time, the denial of information requests from citizens must be based on the genuine reason that such denial will be more beneficial than the releasing of such information. Public officials must show cause why releasing such information would lead to the violation of an existing law. For instance, releasing information on the following elements should not ordinarily constitute a threat to national security: extractive projects, bidding processes, parties involved, any conflict of interest, operational cost of the project, human rights and environmental impact assessment, and community participation.[31] This burden of proof lies squarely with the government. Ordinarily, government does not have to wait for a request for information to be filed in order to publish information. They must make it a duty to constantly and periodically publish information that, in their opinion, will benefit the public interest and this should be a duty prescribed by law, for instance, the Petroleum Industry Bill should mandate ESIMC to periodically publish any relevant information.

G. The Associated Gas Re-Injection Act, 1979 (AGRIA)

The complete cessation of gas flaring in Nigeria is long overdue. The AGRIA and the Associated Gas Re-Injection (Continued Flaring of Gas) Regulations must be amended to cease the flaring of gas, unless such gas is re-injected for domestic use. Section 3 of the Act prohibits the flaring

[28] States should inform, train and support government departments and agencies on how it fulfills its human rights obligations.

[29] Requiring business enterprises to communicate how they address human rights impact.

[30] See further the Report of the Special Rapporteur, Promotion and Protection of the Right to Freedom of Opinion and Expression, I UN Doc. E/CN.4/2000/63, 18 January 2000.

[31] See further articles 4 & 5 of the Aarhus Convention.

of gas by extractive companies – unless permission has been granted by the Minister. This permission to flare gas is discretionary and the Minister may permit gas flaring[32] and determine payment for such flaring.[33]

Nigeria loses around ₦900 million ($2, 500,000) daily to gas flaring.[34] Oil and gas companies currently flare about 700 million standard cubic feet of gas per day.[35] Gas flaring should be made unattractive to oil producers, by statutorily placing a significant penalty on every cubic feet of gas flared.[36] Otherwise, extractive companies will find it cheaper to indiscriminately flare natural gas rather than channel the gas towards domestic consumption. Indiscriminate flaring of gas undoubtedly pollutes the environment and is one of the causes of global warming.

The negative effects of gas flaring cannot be quantified. It has potentially harmful effects on the health and livelihood of the host communities, as they release a variety of poisonous chemicals into the environment.[37] The social and environmental costs of gas flaring are extensive. They include destruction of wildlife and biodiversity, pollution of air and drinking water, degradation of farmland and damage to aquatic ecosystems.[38] Rather than depend on kerosene or firewood, further depleting the forest, natural gas could serve as a veritable source of sustainable energy. In fact, it could generate megawatts of electricity that is in dire shortage in Nigeria.

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[32] Section 3 (2) (a) of AGRIA.

[33] Section 3 (2) (b) of AGRIA.

[34] Micheal Eboh, 'Nigeria Losing N868m daily to Gas Flaring', *Vanguard News* (6 March 2018), *https://www.vanguardngr.com/2018/03/nigeria-losing-n868m-daily-gas-flaring-nnpc/*, accessed 11 May 2018.

[35] Ibid.

[36] David M. Doya, Antony Sguazzin, 'Gas Flaring Law Error Cost Nigeria Billions of Dollars' *Bloomberg*, (29 January 2018), *https://www.bloomberg.com/news/articles/2018-01-29/gas-flaring-law-error-cost-nigeria-billions-of-dollars*, accessed 11 May 2018. [the federal government imposed a penalty of $3.50 per thousand standard cubic feet (SCF) of flared gas on defaulting company]

[37] C. Nwaoha, D. Wood, 'A Review of the Utilization and Monetization of Nigeria's Natural Gas Resources: Current Realities (2014) 18, *Journal of Natural Gas Science and Engineering*, 424. [noting different gas utilization options, export potential, and government policies that are stimulating gas investments in Nigeria]

[38] Eman A. Emam, 'Environmental Pollution and Measurement of Gas Flaring' (2016), *International Journal of Scientific Research in Science, Engineering and Technology* 252. [noting that gas flaring is a major contributor to air pollution and acid rain]

Nigeria will greatly benefit from the development of its conventional and unconventional sources of gas.[39] Partnering with development agencies, Nigeria can utilise its gas deposits for the socio-economic development of the country. The utilisation of natural resources in Nigeria should not be to the detriment of host communities, even where domestic laws are silent on punitive measures to polluters of the environment. Indeed, it can be argued that failure to prohibit gas flaring is a human rights violation, particularly of the host communities where gas continues to be flared.[40]

The AGRIA should be amended to prohibit indiscriminate flaring of gas. AGRIA's approach does not prohibit gas flaring but assumes that defaulters would be encouraged to reduce or control flaring. Gas flaring has led to acid rain and has destroyed the resources that once sustained millions of Niger Delta region inhabitants who farmed and fished in the now bleak environment.[41]

Gas flaring and pipeline leakages have certainly damaged the resources that previously sustained the Niger-Delta communities who farmed and fished in the now unproductive environment. This, is compounded by the fact that MNCs rarely complete clean-up of the numerous and often massive oil spills, neither do they compensate affected communities. Resistance by communities against these practices have been met with a callous clampdown through military force.[42] Other than utilising the flared gas for domestic use, there is no basis for continuous flaring of gas in the manner the Act prescribes. Gas flaring, which is directly concentrated on the community seriously threatens its livelihood.

The certificate issued under the Regulations which permits the continued flaring of gas needs to be discontinued. As a result of oil-induced ecological destruction in the Niger-Delta, farming activities have become extremely difficult. Gas flaring in Nigeria is not only wasteful, but also releases large amounts of methane, which has very high global warming potential. While flaring in developed countries has decreased, in Nigeria it has grown proportionately with oil

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[39] Ibid.

[40] See further Uwem Udok & E. B. Akpan, 'Gas Flaring in Nigeria: Problems and Prospects, (2017) 5(1) *Global Journal of Politics and Law Research* 16.

[41] See further *Jonah Gbemre v SPDC* Unreported Suit No: FHC/B/CS/53/05.

[42] Earthrights International, '*Bowoto v Chevron Texaco' https://www.earthrights.org/legal/bowoto-v-chevron,* accessed 8 June 2017.

production. For instance, Nigeria loses 'about 1.2 trillion standard cubic feet of gas annually' – a quantity that could 'generate over 12,000 megawatts of electricity.'[43]

The legal frameworks discussed in this section should be revised or amended to require that states, as duty bearers, are obliged to protect rights holders from human rights violations. The next section critically evaluates the institutional frameworks in place for the enforcement of the domestic laws in line with the implementation of the GPs.

6.3 Institutional Framework for Implementing the GPs in Nigeria

1. *Department of Petroleum Resources (DPR)*

The DPR – under the management and control of the Ministry of Petroleum Resources – is the major regulatory agency for oil and gas operations in Nigeria. It is responsible for the granting of licences and permits for activities in the petroleum industry. Furthermore, the Nigerian National Petroleum Corporation (NNPC) is a state-owned agency that operates joint ventures with the MNCs. It seems that the activities of the DPR conflate with those of the NNPC. The Petroleum Industry Bill (PIB) currently before the National Assembly is recommending the unbundling of NNPC into two different entities in order to promote effective governance. Despite this, both agencies do not have human rights policies and programmes in place. This thesis recommends that a Business and Human Rights Unit (BHRU) be established under the management of the DPR, Ministry of Petroleum or the Nigerian National Human Rights Commission.

It is inexplicable that MNCs do not have field offices or headquarters in the Niger-Delta of Nigeria. The international headquarters of ExxonMobil, Chevron and Shell are in Irving, Texas (not Washington DC or New York), San Ramon, California, and The Hague, Netherlands (not Amsterdam) respectively. The headquarters and operational department of BHRU should be situated in any of the Niger-Delta states. This will give the BHRU an opportunity to report and mediate with local communities effectively during times of conflict. The next section discusses the practicability of this Unit.

[43] Emeka Ojijiagwo, Chike F. Oduoza & Nwabueze Emekwuru, 'Economics of Gas to Wire Technology Applied in Gas Flare Management' (2016) *Engineering Science and Technology*, 2109.

2. *Business and Human Rights Unit (BHRU)*

The BHRU[44] will be responsible for identifying and safeguarding human rights issues in the extractive resource industry. It will be responsible for coordinating and mandating Human Rights Due Diligence (HRDD) and Human Rights Impact Assessment (HRIA) before any extractive project commences. It will serve as a check on corporation excesses by monitoring their activities. The BHRU will coordinate settlement of grievances between host communities and MNCs.

Creating a human rights agency within the extractive sector in Nigeria has come of age considering the extensive human rights violations that have characterised the industry over the years. Undoubtedly there is the linkage between human rights and the environment, trade, and socio-economic factors that face host communities in the extractive sector. BHRU would ensure that from design to implementation, extractive resource projects do not infringe the human rights of local communities. It would serve as the linkage and rallying point between the local community and MNCs – as well as other stakeholders, NGOs, and pressure groups. BHRU will ensure that MNCs keep to their obligation to respect human rights in their spheres of operation, will be responsible for investigating human rights abuses, and will be authorised to certify a project for having fulfilled human rights obligations. No oil and gas legislation provides for Free, Prior, Informed, Consent (FPIC). The Business and Human Rights Unit (BHRU) must therefore make it a matter of policy to ensure that MNCs obtain the prior and informed consent of the local community.

This thesis has identified the local community as important stakeholders in the hierarchy of stakeholders. The community includes its vulnerable members: women, children and the disabled, community leaders, the youth and NGOs. In obtaining consent, community representation must be verified to be doubly sure that these are people who share the values and concerns of the entire community. FPIC must be a condition precedent to commencing any extractive project in the local community. As already indicated, consent earlier given can be withdrawn during the pendency of the project. This provides a remedy for consent obtained by dishonest manipulation by the MNCs. The consent must relate to the project, and consent given should not be taken as applying to all projects by the MNCs. Where a MNCs obtains consent for

[44] The exact agency where this Department will best fit will be determined by the Independent Panel of Experts.

a project and another project comes up, the MNCs should approach the community again for consent for the second project.

One of the issues identified during interviews was that trained and qualified people are not involved in quality assessment and monitoring. Thus, personnel of BHRU should cut across various disciplines, and include environmentalists, and labour and human rights experts from academia and those who have sufficient training in extractive resource governance. Mere training in environmental law does not suffice. Staff must understand and show commitment to processes for integrating rights into corporate practices and conduct.

Human rights education and training should be regularly conducted with corporate entities. To integrate a rights-based approach, implementation and policy formulators in BHRU must be trained and very well acquainted with the GPs, so that monitoring and implementation is more effective. Periodic assessment and evaluation of staff should be carried out to assess their level of engagement with the GPs. Ongoing staff development through various avenues such as summer school programmes, certificate courses, seminars and conferences would be essential.

Remuneration of BHRU members is also important. They must be well paid and catered for so that they are not vulnerable to financial inducements from extractive companies. Funding should be appropriated by the legislature. With regard to the BHRU, none of its members or their immediate family members should have shares in any extractive company while they are members of the BHRU.

3. *Grievance Review Mechanism Board (GRMB)*

GP 25 provides for a non-judicial grievance mechanism which may be administered by a state agency on a statutory or constitutional basis. The Nigerian National Human Rights Commission (NNHRC) would have been well suited for this purpose – however, their ambivalent approach to the business and human rights debate and non-committal stance to the GPs to date, does not suggest that the Commission can be trusted with this responsibility. Companies should be required by law to set up complaints mechanisms to tackle grievances from host communities head-on – before they spiral out of control. However, extractive companies cannot be the focus of complaints and at the same time determine the outcome of complaints. This makes it imperative for a Grievance Review Mechanism Board to be established by the state. A grievance

review mechanism should be geared towards dialogue and offer a pragmatic approach to areas of concern.[45]

The proposed GRMB will attend to grievances related to extractive resources. The Board should be involved in seeking a remedy on behalf of victims of human rights violations. The Board's terms of reference would include the following: to review all complaints emanating from extractive project sites and host communities; hold periodic meetings and consultations with MNCs and local communities to review any complaints received. Currently, MNCs do not have grievance mechanisms in place in the local community.

Investigation by the GRMB will form the basis for it to suspend a licence already given to an MNCs or to ask them to pay a penalty. Identifying and remedying complaints at an early stage help prevent continuous violation, thus avoiding prolonged litigation. Hence, the rights-based approach used in this thesis is based on local community monitoring of extractive projects from the beginning of a project – and throughout the life of that project. The mere fact that a project has been certified to conform to human rights standards at the beginning does not mean the appropriate agencies should not continuously monitor and report on its compliance with human rights criteria. Hence the major task of GRMB is to enforce compliance with relevant legislation that integrate human rights obligations and to ensure compliance with a business and human rights policy through a non-judicial formal complaints mechanism for extractive industry communities.

There are victims of extractive projects in the Niger-Delta because of the inability of MNCs to approach issues in a humane manner – and hence where protesters or the communities raise areas of concern, the GRMB must respond promptly to these concerns and report to relevant state agencies on how they have acted. Investigating and containing disputes at the earliest stage prevents social tension and facilitates SLO. The GRMB must have dedicated desk officers who are indigenes of the Niger-Delta, and who are responsible for mediating between the MNCs and the local community. There must be dedicated phone and email services and periodic visits to project sites and communities to obtain information from the illiterate and poor who cannot use information technology and/or are unable to present cases before the Board.

[45] See GP 31(h).

Indeed, the GRMB will create a channel for the local community to demand transparency and accountability and to participate in the decision-making process.

4. *Enforcement Division (ED)*

As previously indicated, Nigeria has a plethora of laws regulating extractive activities and resources. While some of these laws may not be in tune with modern dictates or may lack human rights content, one of the challenges to extractive resource governance is a lack of enforcement of available laws. Considering the new and emerging dictates of business and human rights and their implication for the extractive industry, this section proposes an Enforcement Division that will purposefully enforce the legal and institutional framework proposed in this thesis. More strategically, an ED under the Business and Human Rights Unit, will enforce human rights protection under the laws which are GPs compliant – that is those laws with human rights content. Thus, an Enforcement Division will be invested with powers to constantly monitor the environmental, social, and human rights impact assessment, and the Corporate Human Rights Due Diligence, in order to ensure maximum effective extractive resource governance. The Enforcement Division will be able to prescribe sanctions for companies that fail to conduct due diligence, human rights impact assessment and environmental impact assessment for a project. This process will build on and cooperate with existing agencies and capacities such as the armed forces, civil defence, police, National Drug Law Enforcement Agency, and local community – and hence may be cost-effective to manage. Enforcement Division members must be trained in human rights protection and observance and must be involved in any law enforcement process related to extractive activities. Members of the Enforcement Division must also undergo further training on the adaptation and application of human rights in business operations, in order to develop deep understanding of the workings of the business and human rights framework.

To insulate the Enforcement Division from political maneuvering, members must source their information and obtain their data from sources which are independent of government control. Thus, the Enforcement Division may have to rely more on local intelligence. Sources may include company insiders, local residents, surveys, questionnaires and inspection services – when determining whether a project fulfills human rights requirements and standards. To do this effectively, the Enforcement Division would have to connect to local channels of information and other forms of local engagement.

6.4 Lessons from South Africa and Recommendations

6.4.1 *Social and Labour Plan*

In South Africa, the Mineral and Petroleum Resources Development Act (2002)[46] urges mining companies to develop Social and Labour Plans (SLP) in consultation with local communities. The Act refers to South Africa's 'Broad Based Economic Empowerment' (discussed in chapter 4) and requires that such a programme empowers the socio-economic development of host communities to extractive projects.[47] On the permission for and length of extraction, the Act obliges the Minister to grant mining rights only when mining will not result in environmental pollution or degradation,[48] and when the applicant has provided for a SLP.[49] The Social and Labour Plan requirement does not end at the application stage, and runs throughout the duration of the project. In renewing the mining licence, the Minister can only grant the renewal if the applicant has consistently shown commitment to the Social Labour Plan.[50] The holder of a mining right must also 'submit to the Director-General an annual report detailing the holder's compliance with the SLP.'[51] The foundation for a mining right in South Africa is therefore hinged on the mandatory design, commitment to, and execution of a SLP.[52] These provisions are in line with GPs 3, 8, and 28 – which oblige states to gauge their human rights impacts and produce programmes and policies, which will ensure that deleterious activities of businesses are curtailed. In amending its extractive resource laws, Nigeria must create an avenue for the design of a Social and Labour Plan, in conjunction with affected communities, which will show how such extractive activities will impact on host communities, and where the impact is negative, the efforts to mitigate or address such impacts.

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[46] See Mineral and Petroleum Resources Development Amendment Act 49 of 2008.

[47] Ibid, section 1 (vi).

[48] Section 23 (1) (d) of the MPRDA.

[49] Section 23 (1) (e) of the Act.

[50] Sections 24 (3) (c), 25 (2) (f), 85 of the Act.

[51] Section 28 (2) (c).

[52] Section 84 (1) (g); Item 5 (2) (f).

6.4.2 *The Companies Act*

The Companies Act of South Africa promotes adherence to the Bill of Rights as provided for in the Constitution, in terms of the application of company law. Nigeria can adopt this model under the Companies and Allied Matters Act, 1990 (CAMA) by introducing human rights language. Furthermore, fiduciary duties of directors should be expanded to include human rights obligations. Companies should incorporate human rights standards and principles such as the GPs in their Memorandum and Articles of Incorporation. With regard to South Africa, the King Report on Corporate Governance (IV - 2016),[53] also prescribes certain standards which companies must adhere to in order to be socially responsible. Although a voluntary document, companies seeking to trade on the Johannesburg Stock Exchange (JSE) must comply with the requirements of the Code. Furthermore, like the Mineral and Petroleum Resources Development Act, South Africa's Companies Act requires companies to report on their social impact and environmental duties. As indicated in the last section, a human rights impact assessment must be the yardstick for resource projects and related laws. Hence, human rights provisions must be emphasised in Nigeria's labour laws and regulations, in order to promote and protect workers' rights.[54] Other related labour and environmental laws must aim to protect and promote the rights of citizens to a healthy environment. This protection must cover clean water, clean air and arable land.[55] Nigerian corporate and securities' laws must encourage ethical corporate behaviour and respect for human rights – through comprehensive financial reporting and other company registration requirements, environmental impact assessments, and corporate social responsibility provisions.

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[53] King Report on Corporate Governance, 2016 (King IV).

[54] In respect of South Africa, see Section 23 (1) of the South African Constitution. See the Basic Conditions of Employment Act, No. 11, 2002 which gives effect to the right to fair labour practices provided under the South African Constitution. The Employment Equity Act prohibits unfair discrimination.

[55] In South Africa, the National Environmental Management: Waste Act, 2008; National Environmental Management (Act 107 of 1998), Hazardous Substances Act 9Act 5 of 1973), Occupation Health and Safety Act (Act 85 of 1993), National Environmental Management Act (Act 107 of 1998), Mineral and Petroleum Resources Development Act (Act 28 of 2002) attests to the protection of the environment. In Nigeria, there is the Environmental Impact Assessment Act 92 of 1986, Minerals and Mines Act, 2007, Harmful (Special Criminal Provisions) Waste Act (No. 42 of 1988), National Environmental Standards and Regulation Enforcement Agency Act, 2007, National Oil Spill Detection and Response Agency (NOSDRA) Act, 2006, Mineral Oils (Safety) Regulations of 1962, Oil in Navigable Waters Act of 1968, Mineral Oils (Safety) Regulation (Revised) of 1997, Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN) of 2002, Associated Gas Re-Injection Act, 1979, Oil Pipelines Act, 1956, Petroleum Act, 1969.

The procurement process is a key aspect of integrity building that must be developed in the regulatory framework for extractive resources in Nigeria. Procurement regulations must be guided by fairness, transparency, cost-effectiveness, equitability, and local content policy. In Nigeria, the Companies and Allied Matters Act, (1990) does not clearly state what is expected of companies in terms of human rights.[56] It also does not clarify the human rights duties of Directors, and does not recognise the interests of stakeholders other than shareholders.[57]

Companies can do some self-regulation, but they need to know what the law requires in terms of human rights compliance. In South Africa, the King Code on Corporate Governance is a voluntary document on corporate responsibility – but companies who want to be listed on the JSE must fulfil the requirements of the Code. In the United Kingdom, the Modern Slavery Act, 2015 (which relied on the GPs) derived from civil society pressure on the state to address the indirect role that companies play in modern slavery, through their supply-chain labour workforce.

6.4.3 *State-Investor Treaties*

South Africa terminated most of its bilateral investment treaties in favour of affirmative action and the passage of the Broad-Based Black Economic Empowerment (BBBEE). This was done in the interest of the racially disadvantaged majority in South Africa. South Africa cancelled most of its existing treaties when it found it challenging to incorporate affirmative action and BBBEE into such treaties. These actions were aimed at reducing income inequality and protecting racially disadvantaged people. When entering contracts, the Nigerian state must discharge its duty to promote human rights, by insisting on incorporating human rights protection into the extractive agreements it concludes.

Nigeria needs strong institutions and personalities to facilitate extractive governance and revenue management. In less resource-rich countries citizens pay tax which is used by government to fund public expenditure. Where public goods funded by such expenditure are not provided, citizens are relentless in scrutinising or demanding information on how government spends it tax money. In resource-rich countries like Nigeria however, extractive companies pay tax, and until recently, citizens' tax has been insignificant. The implication is that citizens are

[56] Cap C1, Laws of the Federation of Nigeria, 2004.

[57] See chapter 6.2.

less likely to monitor government spending or to put pressure on government to promote accountability in public expenditure. Nigeria should therefore evaluate its decision-making process and institute a rights-based approach to resource governance – as explicated in this thesis.

6.5 Conclusion

This chapter has developed a legal and institutional framework through which the GPs can be implemented. It demands the integration of human rights principles into existing laws and the establishment of bodies that will facilitate implementation. After all, at the international level intergovernmental bodies like the UN Human Rights Council promote and protect state compliance with the provisions of international treaties and instruments even if non-binding. The next chapter presents general recommendations and concludes the thesis.

CHAPTER 7: RECOMMENDATIONS AND CONCLUSIONS

7.1 Global Adaptation of the GPs

Globally, the GPs have been incorporated into a number of soft law instruments. These include the revised OECD Guidelines (2011), the revised International Finance Corporation Performance Standards on Environmental and Social Sustainability (2012), the ISO 26000 Social Responsibility Standard, and the UN Global Compact. The GPs have also been either adopted or endorsed by the American Bar Association and the European Commission. In some countries, the GPs have impacted on domestic legislation such as: the Dodd-Frank Act (US); the Business Supply Chain Transparency on Trafficking and Slavery Act, 2015 (US); the Business Transparency on Trafficking and Slavery Act, H.R. 2759: Global Online Freedom Act, 2013 (US); the California Transparency in Supply Chains Act 2010 (US); and the Modern Slavery Act, 2015 (UK).

For international organisations, the GPs considerably influenced FIFA when it included in its constitution the commitment to respect all internationally recognised human rights – and used human rights criteria in bidding requirements for the World Cup with the GPs as a template. Globalisation has extended the spread of MNCs into places where gross violations of human rights are endemic. People are speaking of the language of human rights, and the issues have been pushed beyond the traditional confines of human rights. Many initiatives have been helpful in reducing the incidence of human rights abuse – but there has not been sufficient progress in accessing remedies in jurisdictions like Nigeria. For instance, how do we know that the incidences of human rights abuses are declining as a result of various measures taken by the government and companies? To avoid these protracted arguments about the best solution, documentation is needed. As much as there is a call for the tightening of state regulations, states must incentivise companies and support the community without harming business activities. The corporate image is enhanced if the company can show that they actively protect human rights. When human rights have been integrated into domestic law, international human rights norms become naturally applicable – as mandatory and enforceable provisions against the harmful effects of globalisation. After all, MNCs are creations of domestic statutes, and they cannot be seen to avoid compliance with domestic laws.

The state's responsibility stems from its status under international law. In keeping with territorial jurisdiction, states can only protect individuals within their own territories. This makes it extremely difficult for states to discipline erring companies headquartered within their domain, but which operate globally. It is thus a dangerous phenomenon to live in a society where MNCs operate with reckless abandon, unchecked by any known mandatory rule of international human rights law, without avenues for victims of corporate disasters or wrongdoing to seek redress.

7.2 Summary of Thesis

This thesis set out to investigate the practical implementation of the UN Guiding Principles on Business and Human Rights in Nigeria's extractive resource industry. This section reviews the research contributions of this thesis and draws conclusions from the research.

Most of the existing literature on the GPs have focused on the weaknesses inherent in the soft law nature of the GPs, while some question the passive tone of the GPs towards the *do no harm* principle directed at corporate entities. To carry out a critical examination of the GPs based on the hypothesis drawn in chapter 1, this thesis was divided into six chapters. The thesis discusses the implementation of the GPs and their practical application in the extractive resource industry. Through empirical analysis, it was established that the following human rights challenges could hamper the implementation of the GPs: land expropriation, environmental pollution, gas flaring, lack of transparency, lack of accountability and participation in decision-making processes, and ineffective judicial grievance mechanisms.[1] These identified human rights concerns and their impact on the implementation of the GPs have not received sufficient attention in the existing literature. Besides, the adaptation of these principles in an African context has not been substantially addressed. The rights-based approach to extractive resource governance through legal and institutional reforms could help a jurisdiction such as Nigeria to achieve holistic sustainable development of the extractive sector, where the rights of the local community are guaranteed and fundamental human rights protection is integrated into current

[1] See chapter 5.

laws.[2] Using a rights-based approach identified in chapter three and discussed in chapter four, the thesis explored the impact of the GPs on domestic laws, policies, regulations and projects, and demonstrated how the identified issues affect human rights. In effect, this thesis has sufficiently answered the research questions. The thesis also examined how extractive projects – particularly the construction of oil-well facilities and exploratory activities – seriously impact on the host communities, producing human rights consequences in these communities. Although the GPs do not provide mechanisms or guidelines on how human rights can be integrated into domestic laws and extractive projects, the research endeavoured to address the question of how human rights can be integrated into the domestic body of law through legal and institutional frameworks.[3]

The research also discussed the need for the reform of existing extractive resources-related laws in Nigeria to address the human rights challenges militating against effective extractive resource governance.[4] Also examined was the practical basis for adopting the Human Rights Based Approach (HRBA) as a framework for integrating human rights principles into extractive resource projects and approval.[5] It investigated the research question posed on the extent to which the elements of a rights-based approach can be integrated into domestic legislation and the value of incorporating the GPs into corporate governance paradigms.[6]

Earlier research has not focused on the theoretical and practical applicability of the HRBA (the GPs) as a pathway leading to extractive resource governance, hence the continuous and increasing debate over the binding and voluntary nature of the GPs, which could militate against implementation of the GPs. The research proposes the GPs as a basis for a rights-based approach, and shows how, despite the voluntary nature of the GPs, they could be a reference point and foundation for systemically integrating human rights into Nigeria's body of laws.[7] For instance, the participatory development theory could be used as a basis for facilitating free, prior,

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[2] See generally, Sam Amadi, 'Improving Electricity Access through Policy Reform: A Theoretical Statement on Legal Reform in Nigeria's Power Sector' in Yinka Omorogbe & Ada Ordor (eds.) *Ending Africa's Energy Deficit and the Law: Achieving Sustainable Energy for All in Africa* (2018), 344.

[3] See chapters 3.3 and 6.2.

[4] Ibid.

[5] See chapter 3.

[6] See chapter 3.3.

[7] See chapters 3.3, 4.3, 6.2.

informed consent as a pre-condition under the environmental, social and human rights impact or the human rights due diligence requirements of corporations. The theoretical and empirical analysis in chapter 5 has demonstrated how states can adapt domestic laws to reflect the intentions and potential of the GPs. The consequence is to integrate human rights obligations into the extraction of natural resources, to create a consistent, participatory and 'smart mix' framework.[8]

While concerns about human rights violations in the extractive resource industry are not a novel concept, the consideration of adapting a rights-based approach to local context in the extractive industry has not been sufficiently explored in the literature. One reason for this could be the lack of empirical investigation on how the GPs could be potentially implemented in the identified areas of concern. The research comprised in this thesis articulates a model for adapting and integrating human rights into extractive projects and domestic legislation.[9] The study explored the imperative of connecting human rights with developmental projects, as well as providing a legal and institutional pathway for sustaining these principles over time. In this regard, the obligations of the state to protect human rights and the potential of adopting the GPs as a rights-based approach in extractive resource project execution and implementation were discussed. This is particularly to ensure that resource and developmental projects do not produce adverse human rights consequences, and where they do, that proactive and adequate measures are taken to address and mitigate such violations.

The study first identified and discussed the relevant elements of the rights-based approach: participation, transparency and accountability, access to justice, and access to information.[10] The focus was on how these elements can be recognised in the constitution and domestic laws – taking significant lessons from the South African experience where corporations are subjected to human rights protection under the constitution and various laws with corporate application. The research also identified and discussed possible implementation problems and solutions such as providing for an enforcement and monitoring team devoid of political

[8] See chapters 6.2 and 6.3

[9] Ibid.

[10] See chapter 3.2.

patronage with adequate financial support.[11] To address the enforcement challenges and to establish a legal and institutional framework, chapter 6 proposed a legal and institutional framework for the realisation of the GPs in a jurisdiction like Nigeria. The proposed reforms include the periodic conduct of due diligence. This approach incorporates a human rights impact assessment which directs companies to constantly verify if they are meeting the minimum threshold for guaranteeing human rights compliance. It also stipulates measures to be taken by the company before approval is given for the extraction of natural resources. The requirements include: local community stakeholder consultation; access to information; social, environmental and human rights impact assessment; the effect of consultation and approval of host communities as a means to obtain the social licence to operate; and periodic reporting of human rights compliance by companies to show commitment and to further obtain guarantees that would prevent incessant protests and sabotage from the local community.[12] In addition, the research discussed the institutional reforms needed to ensure the protection of those human rights provisions that have been suggested for incorporation into existing laws.[13] Such reforms would include the setting up of an Independent Panel of Experts to draft a National Action Plan, and the strengthening of the National Human Rights Commission with responsibilities geared towards assessment and revision of domestic laws.[14] The framework developed in this study provides a systemic approach for integrating human rights provisions into domestic laws. This proposition will facilitate the granting of social licence to operate by communities and reduce tensions, protests and litigation.

Finally, the study carried out an empirical analysis of the GPs amongst the key stakeholders to determine the extent to which this rights-based approach can create a positive extractive resource governance. The issue of enforcement can be made easier if all the stakeholders are included in the process that will ensure resource governance. The reforms proposed in this study will contribute to the creation of a robust foundation for enforcement if all parties adequately perform their duties.

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[11] See chapter 6.3 (4).

[12] See chapter 4.4.

[13] See chapter 6.3.

[14] See chapter 6.2.1.

7.3 Challenges to Implementation of the GPs[15]

7.3.1 Political Will

The state's duty to protect human rights under the GPs builds on the existing legal obligations of states under international law. While the MNCs could frustrate the intentions and enforcement of the laws, local communities could also over-reach their monitoring capacities. In their bid to attract foreign direct investment, the government fails to enforce applicable laws, and approves development projects that do not effectively translate into the development of the people. When the local community protests, government uses its security apparatus to suppress a legitimate demand for transparent and accountable systems of governance.[16]

Willingness on the part of political leaders is important for the implementation of the GPs. Political leaders must not block funding avenues to agencies that work towards the development and implementation of the GPs. The National Action Plans so far developed have mostly come from Europe and the Americas. It is unacceptable that not one African country has developed a National Action Plan, and yet the continent feels the brunt of the exploitative activities of extractive companies which are mostly domiciled in developed countries.

The Nigerian government must involve all identified stakeholders, including religious leaders, the local community, NGOs, and academia – in addressing human rights violations in the extractive resource industry. If these stakeholders can look beyond political affiliation or dis-incentivisation and understand that achieving a holistic governance through a rights-based approach would not only promote social licence to operate, but citizens would develop faith in the capabilities of their elected officials to represent them and to manage their affairs judiciously. It will also prevent resistance to extractive projects, and to genuine developmental efforts by MNCs, and promote the integrity of human rights regimes in Nigeria where the rights of those immediately impacted – the local communities – are considered and reflected in government policies and regulations. Perhaps, Nigeria should vigorously address the lack of infrastructures reflected in the inability of local refineries to meet up with the refining of petroleum products for local consumption. MNCs must be made to guarantee that a substantial refining of the extractive

[15] See further Beata Farrick, 'Implementation of the UN Guiding Principles on Business and Human Rights' (2017).

[16] Yinka Omorogbe & Ada Ordor (eds.) *Ending Africa's Energy Deficit and the Law: Achieving Sustainable Energy for All in Africa* (2018), 380.

resources be done locally. Not only will this create job opportunities for the local community, governments tax income will significantly increase.

To remedy lack of political will, politicians should be required to divest themselves of any extractive companies, and to declare any foreign accounts they own. It would be unconscionable for political office holders to have vested interests in extractive companies – and still be part of the regulatory mechanism for the companies.

7.3.2 Citizenship Education

The empirical research showed that awareness of the GPs in the first place ranges from minimal to non-existent. This lack of awareness exists among government agencies, local residents, and other stakeholders. The literacy level in the Niger-Delta area of Nigeria is abysmally low. There needs to be aggressive citizenship education generally and also to promote awareness of the GPs with a focus on the local communities which are predominantly illiterate. The local community must be enlightened about their rights and how to go about claiming their rights. From the interviews conducted, most local residents are ignorant of the right channels in which to direct their grievance – and as a result they become violent, destroy properties, engage in kidnapping and other social vices. This is where the work of the Human Rights Commission and NGOs become pertinent. Citizenship education must include processes to seek justice, free and accessible information in the language understood by the locals, and publicity in relation to methods for seeking help when human rights are violated.

Apart from enlightenment, there must be a forum where people can contribute in their local language to issues around extractive activities. Many people do not know how to read and write, but they have a part to play. Educational awareness must therefore present in less technical multilingual formats. The community should be able to communicate in the language they feel comfortable with. Furthermore, civil law remedies and criminal liability should be explored by litigators and investigators in response to human rights violations. Finally, policy-makers must be aware of the GPs themselves, before implementation can take place.

7.3.3 Environmental Democratisation

To ensure proper participation in governance, all developmental projects must be presented to the local community in a language understood by that community, and should demonstrate a deep knowledge of local customs. The views and concerns of the community captured in any such meeting must be incorporated into the project plan and design. Such a project must adapt the consultation process to the specific customs and concerns of each local community, which is host to the project. This process will give citizens a basis to demand the enforcement of their rights when projects do not go according to the agreed plan.

Nigeria can adopt popular normative initiatives whereby citizens will promote the adoption of laws or regulations regulating their environment. The local community will take an active role and participate in all the discussions leading to the passing of any such laws. Before any discussions are incorporated into law, a referendum should take place which asks the local communities whether they agree to incorporating such initiatives into any body of law. Here the people, who are direct recipients of the law, would have an opportunity to approve or reject a draft legal order or even revoke one that is in place. However, before this process is activated, there must have been a sensitisation and awareness campaign, followed by an authorisation process such as a collection of signatures or other process. The final draft of the proposed instrument would then be presented to legislature with the caveat that the inputs of the local community to the original version, should be maintained. There must, however, be set criteria for consultation and participation. For instance, there could be a mandatory minimum requirement that stipulates the fraction of the total registered voter population that could be required to cast a vote to validate the community's input into the draft law on the proposed amendment. This would constitute a threshold that confirms that consultations have properly taken place. The lawmakers representing constituencies with extractive activities may be required to demonstrate that this consultation has taken place.

7.3.4 Judicial Independence

The Nigerian judiciary treats the GPs as soft law initiatives. Despite the softness of the GPs, Nigerian judges must be proactive in realising human rights compliance through the GPs. Besides, the judiciary must be totally independent, without fear or favour – for there to be effective implementation of the GPs. There must be periodic training and seminars for judges

and law-enforcement officers. The independence of the judiciary is important. Adequate training for judges, investigators, and corporate lawyers on business and human rights must be fully supported and encouraged. Administration of justice in Nigeria must be reformed to encompass competence in human rights decisions. Cases bothering on business and human rights must be speedily resolved. Judges must show commitment to the GPs through a progressive realisation in their judgments. The judicial process must not frustrate the business and human rights cause. Thus, technical and procedural difficulties must be eliminated. The judiciary is important to the implementation of the GPs. Judicial officers must be impartial, people of high integrity and with sufficient knowledge of human rights challenges in business practice.

Judges must be free from any control or influence from other arms of government. This control could be exerted be in the process leading up to the appointment of judges, funding for the judiciary and corruption. There must be financial autonomy for the judiciary to enable judicial officers to perform their duties creditably. Unnecessary delay in administering justice weakens the implementation of the GPs. This delay becomes obvious when judges do not sit at regularly or where there is unnecessary adjournment of cases, meant to frustrate the administration of justice.

7.4 Summary of Recommendations

The recommendations in this segment are clustered around legal, social and administrative measures.

7.4.1 Legal Measures

Human rights are not provided for in current environmental laws identified in this thesis. The Nigerian legal regime must appreciate that the linkage between business and human rights is a reality. This extractive regime must recognise the importance of human rights in its environmental, labour and company laws – with particular reference to the GPs. Hence, there is a need for the state to show commitment to realising human rights by reviewing and/or amending its laws in light of the aggressive and continuous human rights violations by corporate entities. Without reform of domestic laws, the business and human rights agenda will be frustrated.

The Nigerian Constitution must recognise the Bill of Rights as justiciable rights which apply to natural and artificial persons. It must also provide for participation of the local

community in managing their natural resources and recognise the long years of extractive resource mis-management and socio-economic neglect of the host communities to extractive projects.

Nigeria must reform its domestic laws in the areas of environmental, labour and company law – to provide room for human rights protection in the extractive industries. The Petroleum Act, Oil Pipelines and Petroleum Industry Bill must incorporate human rights provisions and protect the rights of host communities of extractive projects.[17] Furthermore, the right to property, under the Land Use Act, must be reformed to allow adequate compensation to victims of land grabs and forced eviction due to extractive projects. For instance, the Environmental Guidelines and Standards for Petroleum Industry in Nigeria as well as the National Environmental Standards and Regulations Enforcement Agency (Establishment) Act, 2007 do not provide for citizenship education, access to information, and public participation in decision-making. CAMA is long overdue for amendment in line with current global realities. Human rights protection must be contained in any amendment to CAMA, considering the fact that Nigeria is a mono-economy solely dependent on oil. As indicated earlier in the thesis,[18] the Environmental Impact Assessment, must be amended to provide for socio-cultural and health consequences of extractive projects.

7.4.2 Social Measures

The involvement of the community in negotiations between the state and MNCs for any development project will guarantee the social licence to operate. Furthermore, most extractive resource projects are sited in poverty-stricken communities. MNCs must show commitment and promise that their projects will not further degrade or dehumanise the people. There needs to be a social and labour plan, as earlier discussed, which provides for the social inclusion of the local community as well as employment standards that favour the local community. Environmental impact assessment must clearly set out human rights impact assessment which identify groups at heightened risk of extractive resource project impact. The vulnerable members of the community

[17] The Petroleum Industry Bill seeks to repeal the Petroleum Act and Oil Pipelines Act when eventually passed.

[18] See Chapter 3.3.5

must be factored into this process. It is also key that access to information is streamlined to ensure that information on extractive projects is readily available when requested. There is no need to use the court system before information is released.

State-Investor contracts should be drafted to include and protect human rights, and GPs 9 and 10 form the basis for this.[19] MNCs must negotiate Community Development Agreements with their host communities before any project commences. This will give government the opportunity to actively engage with local communities and will facilitate informed participation in decision-making – especially on environmental protection. This Agreement must contain clear and accurate information to local governments and local communities about the expected revenue flows, in order to help manage expectations. Linked to this is the need for information sharing among government officials involved in business and human rights implementation beyond national boundaries. Through this process Nigerian officials can learn and gain more information from countries that have developed National Action Plans.

7.4.3 Administrative Measures

The Nigerian National Human Rights Commission must create a unit within its establishment to focus on business and human rights as earlier discussed.[20] This unit will also conduct periodic research and analysis on the practical implementation of the GPs and the impact of corporate activities on human rights. Natural resource management in Nigeria lacks adequate information dissemination, engagement and communication around the state-MNC-local community nexus. This then results in lack of transparency and accountability, social exclusion, and lack of participation in decision-making processes. In addressing these issues, the gendered impact of extractives must be considered in the policy and decision-making process. Strengthening democracy and accountability at local level continues to be very important. It will be reasonable for the government and companies to provide an anonymous hotline in local languages for local residents to voice their concerns, express their opinion and channel grievances. For those who may not be able to access this service, direct physical engagement should be provided for.[21]

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[19] See chapters 2.4.2 and 3.4.3.

[20] See chapter 6.3 (2).

[21] See chapter 6.3 (3).

In conducting human rights due diligence, extractive companies should work on the identified human rights impact and report to the public how they have been able to overcome pertinent impacts. The public presentation should be in a suitable format such as a workshop or seminar where NGOs, human rights activists, local communities and other stakeholders are given the opportunity to make presentations. This will remove any one-sided presentation, and company executives will have the opportunity to discuss matters with their stakeholders. Upon presentation to the public, comments and suggestions must be incorporated into the final report presented. Collective efforts will ensure that areas of concern are identified and that solutions are developed to ensure maximum respect for human rights. This process will not only make the companies socially responsible – but will facilitate social licence to operate. It is obvious that the GPs are becoming important to extractive companies, and thus implementing this process will give the rights-holders a voice, identify the particular human rights concerns, and help diagnose the proper solution to identified problems. Furthermore, to avoid potential litigation, non-judicial grievance mechanisms must be put in place to deal with identified complaints from all persons – particularly the host communities – and such mechanisms must be easily accessible by the local community.

Though the GPs make no formal reference to free, prior, informed consent (except general consultation), obtaining the prior and informed consent of host communities to extractive projects is a basis for participatory development, social inclusion, and community empowerment. Through this process, minority and dissenting opinions are integrated into any formal report.

7.5 Conclusion

For the sake of humanity's future, we must be conscious of the exploitation of fossil-fuel energy sources and capitalistic systems – which have utilised the world's resources in such a disastrous way. A proactive implementation of the GPs will reduce or prevent this harmful exploitation of natural resources, thereby creating a positive extractive resource governance and guaranteeing sustainable development. In Nigeria and South Africa, resource extraction started before the newborn nations had a chance to develop institutions to oversee the common good and limit arbitrary power.

Nigeria is a vast country with many languages and diverse populations. Concentrating all decision-making in a central legislative chamber removed from the realities of local people reduces the possibility of a realistic solution to the legitimate concerns of those impacted by extractive projects. The contention in this thesis, therefore, is that the implementation of the GPs is the first step in ensuring extractive resource governance. The second step is to strategise and consider the value in adopting and integrating the GPs into current laws so as not to undermine the social contract that binds the society and in a way guarantee development and positive governance within the communities.

The rights-based approach adopted in this thesis provides a pathway for the sustainable development of Nigeria's extractive resources. Legislation must come from the very people that such legislation aims to protect. To this end, Nigeria must draw lessons from South Africa's law-making process and enforcement policy which takes cognisance of its historical past. South Africa is at the forefront of the campaign for a binding business and human rights treaty and this is strongly reflected in its domestic legal regime and judicial activity, demonstrating the progressive realisation of human rights. Only credible institutions that appreciate the socio-economic, cultural and political realities of extractive communities can legislate properly for them and monitor compliance. Further research is necessary for determining the necessity of a binding treaty on business and human rights, and the implementation of the GPs in the totality of Nigeria's body of laws.. As it currently stands, the UN Guiding Principles on Business and Human Rights present a valuable roadmap for strengthening institutions to ensure that business activities in the extractive industry and beyond are not devoid of pertinent human rights considerations.

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APPENDIX A

Questionnaire for Local Communities

Aim of Questionnaire: To obtain the views of local community residents, hosts to various developmental and extractive projects, on various human rights challenges they face, availability of access to remedies for such human rights violations, public-participation in decision-making process, access to information and other aspects of rights based approach to extractive resource governance.

1. Are you aware of the UN Protect, Respect and Remedy Framework and the Guiding Principles?
    - When did you become aware?
    - How did you become aware?
2. Should the Guiding Principles (GPs) be made available to host communities.
3. Should the GPs be translated to local languages?
4. Should companies bear full responsibilities for human rights violations in the mine industry?
5. Do extractive companies engage your community in open communication about possible impact of their business on the environment?
6. Is your community involved in the monitoring of extractive resource projects?
    - How is your community involved?
7. Is your community exposed to pollutants or any form of toxin?
    - What are these pollutants or toxins?
8. Should there be financial incentives for companies who engage in CSR?
9. Are there adequate protective mechanisms for vulnerable groups such as old women, children and disabled?
10. Is there adequate compensation given to local communities for human rights violations, forced displacement, land grabbing, environmental pollution?
11. What are the main human rights challenges facing your community?
12. Is your community consulted before any project is carried out?
    - How does consultation take place?
13. Do victims of human rights violations have easy access to judicial remedies?
14. Are courts equipped to handle human rights violations in the mining industry?
15. What are the challenges being faced by your community as a result of oil and gas exploration?
16. Anything else relevant you would like to add or share?

APPENDIX B

Questionnaire for Corporate Executives

Aim of Questionnaire: To obtain the views of extractive company executives as proponents of extractive and developmental projects. It also aims to extract information on corporate policies and programmes with regards to how extractive companies address and mitigate human rights violations in their areas of operations, access to remedies for such human rights violations, public-participation in decision-making process, access to information and other aspects of rights based approach to extractive resource governance.

A. Background of Interviewee

1. Please tell me about your experience with human rights litigation bothering on corporate liability.
    - Your role in the said proceedings?
    - How many of such cases?
    - Nature of the cases?

B. Corporate Human Rights Policy and Practice

1. What are the main human rights challenges facing your organization?

- Does your company have human rights principles adopted as part of their operations?
- Corporate code of conduct
- Accessibility of the codes to the employees
- Involvement of host/local community in drafting the codes

C. Knowledge of the UN Guiding Principles

1. Are you aware of the UN Protect, Respect and Remedy Framework and the Guiding Principles?
    - When did you become aware?
    - How did you become aware?

2. Can you please briefly describe a record, if any, of court cases with local communities over human rights litigation?
    - How many did the company win?
    - How many did the company loose?
    - How many are ongoing?

D. Community Relations

1. Is the local community participation in project planning and development?
2. How do you incorporate the local community?
3. Do you have every reason to believe there is inadequate compensation paid to local communities?
    - Forced displacement
    - Falsification of records on corporate social responsibility
4. Is there any provision for relocating and re-housing displaced people?

5. Does your firm have any record keeping of complaints arising from local communities?

- How have you been able to deal with such complaints

E. *Application of the Guiding Principles*

1. What role does your company perform with respect to open communication with the public with respect to impact of your business on the public or the environment?
2. Do you involve the local community in any monitoring of project or related work?
3. Do you have every reason to believe your host community is exposed to pollutants or toxins?
4. Can the state impose on extractive resource companies' compulsory social responsibility projects?
   - Social license,
   - Free, Prior, Informed Consent
   - Involvement of local community
5. Should there be financial incentives for your company if it engages in corporate social responsibility and implementation of the Guiding Principles?
6. What is your opinion of the '*name and shame'* policy of the government for companies that fail to comply with the Guiding Principles?
7. What is your opinion on the issue of corporate criminal liability?
8. Do you think the government has done enough for the indigenous communities as regards costs and risks with the extractive projects?
9. Are there adequate protective mechanisms for vulnerable groups such as women, children, minorities, and indigenous peoples?
10. Has your company trained/provided relevant departments with information on the Guiding Principles?
11. Any other information you may wish to add?

APPENDIX C

Questionnaire for Judicial Officers

Aim of Questionnaire: To obtain progressive realization of human rights, judicial officers are instrumental to ensuring that such soft law instruments such as the GPs are implemented. This interview is designed to obtain the views of judicial officers as to the effect of such instruments as the Guiding Principles towards positive extractive resource governance.

A. *Background of Interviewee*

1. Please tell me about your judicial experience with emphasis on human rights litigation.
    - number/volume of cases
    - Nature of the cases/decisions
    - *Marikana/Ogoni* cases

B. Knowledge of the UN Guiding Principles

1. Are you aware of the UN Protect, Respect and Remedy Framework and the Guiding Principles?
    - When did you become aware?
    - How did you become aware?
2. Did you expressly refer to or rely on the Guiding Principles in your judgments?
    - How did you rely on the Guiding Principles?
3. Can you share your views on the Guiding Principles?
    - How flexibility should the implementation of the Guiding Principles be?
    - Factors that shape flexibility
    - Reality of implementation in South Africa

C. Implementation/Application of the UN Guiding Principles

1. Can you tell me or describe the relevant considerations that went into your desire to refer to the GPs?
    - What were the determining factors?

2. Do you feel the Guiding Principles are relevant to the resolution of the question of corporate liability for human rights violation?
    - What are your reasons?

3. Would the Guiding Principles or such UN Standards have been able to prevent incidents as the *Marikana* or *Ogoni* tragedies?

4. Can you, please describe, how you reflect on socio-economic and environmental changes in your judgments?
    - Unemployment
    - High level of illiteracy
    - Labour migrations

5. Do you think there is a change in Courts willingness to recognize or consider soft law and other UN Standards over the years?
    - Which direction do you feel this is moving?
    - Why should the Courts recognize the Guiding Principles?

6. Can you, please, state your views on whether the Guiding Principles should be mandatory or voluntary?

7. Anything else relevant you would like to add or share?

APPENDIX D

Research Assistance

@exxonmobil.com>

Fri 2/19/2016 7:55 AM

To:Abe, Omogboyega <oabe@luc.edu>;

Dear Mr. Abe,

Thank you for your recent inquiry regarding an interview with ExxonMobil as part of your research project on the UN Guiding Principles on Business and Human Rights (UNGPs).

Our approach to human rights is consistent with the UN Guiding Principles (UNGPs), and ExxonMobil also works closely with industry groups such as IPIECA as well as multilateral organizations such as the Voluntary Principles on Security and Human Rights to help operationalize the UNGPs across our sector. Although we will not be able to participate in your study, IPIECA would be a helpful resource for you on this topic. Our annual corporate citizenship report (http://corporate.exxonmobil.com/en/community/corporate-citizenship-report) and Papua New Guinea Liquified Natural Gas (LNG) project website (http://pnglng.com/) provide additional information as well.

We wish you success with your project and future studies

/ Advisor
Public & Government Affairs

Exxon Mobil Corporation
5959 Las Colinas Blvd.
Irving, TX 75039
972 444 1122 Tel
517 290 7430 Mobile

APPENDIX E

Table A: International Legal Instruments

S/No	International Instrument	Nigeria	South Africa
1	International Convention on the Elimination of All Forms of Racial Discrimination. (Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965. Entry into force 4 January 1969, in accordance with Article 19. See articles 1,2,4	Ratification/Accession: 16 October 1967	Ratification/Accession: 10 December 1998
2.	International Covenant on Civil and Political Rights Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966. Entry into force 23 March 1976, in accordance with Article 49. See articles 5,41(e), 44	Ratification/Accession: 29 July 1993	Ratification: 10 December 1998
3.	International Covenant on Economic, Social and Cultural Rights Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966. Entry into force 3 January 1976, in accordance with article 27 See article 10	Ratification/Accession: 29 July 1993	Ratification: 12 January 2015
4.	Convention on the Elimination of All Forms of Discrimination against Women New York, 18 December 1979 See articles 10,11,13,15	Ratification/Accession: 13 June 1985	Ratification: 15 December 1995
5.	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Adopted and opened for signature,	Ratification/Accession: 28 June 2001	Signature: 1993, Ratification: 10 December 1998

	ratification and accession by General Assembly resolution 39/46 of 10 December 1984. Entry into force 26 June 1987, in accordance with article 27 (1) See article 3		
6.	Convention on the Rights of the Child Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990, in accordance with article 49 See article 37 (c)	Ratification/Accession: 19 April 1991	Signature: 1993, Ratification: 16 June 1995
7.	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families Adopted by General Assembly resolution 45/158 of 18 December 1990 See articles 5, 16,19, 21	Ratification/Accession: 27 July 2009	No Action
8	Convention on the Rights of Persons with Disabilities See articles 1,4,6,27	Ratification/Accession: 24 September 2010	Signature: 2007, Ratification/Accession: 30 November 2007
9	Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, The General Assembly adopted resolution A/RES/63/117, on 10 December 2008.	No Action	No Action
10	Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death Penalty, 1991. Adopted and proclaimed by General Assembly resolution 44/128 of 15 December 1989.	No Action	Ratification/Accession: 28 August 2002
11.	Optional Protocol to the Convention on the Elimination of All Forms of	Signature: 2000, Ratification/Accession:	Ratification/Accession: 18 October 2005

	Discrimination against Women	22 November 2004.	
12.	Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict Adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000, entry into force 12 February 2002.	Ratification/Accession: 25 September 2012	Signature: 2002, Ratification/Accession: 24 September 2009
13.	Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. Adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000, entered into force on 18 January 2002. See articles 8, 11.	Ratification/Accession: 27 September 2010	Ratification/Accession: 30 June 2003
14.	Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure. Adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/66/138 of 19 December 2011 entered into force on 14 April 2014.	No Action	No Action
15.	Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Adopted on 18 December 2002 at the fifty-seventh session of the General Assembly of the United Nations by resolution A/RES/57/199, entered into force on 22 June 2006.	Ratification/Accession: 27 July 2009	Signature in 2006
16.	Optional Protocol to the Convention on the Rights of Persons with Disabilities	Signature: 2007, Ratification/Accession: 24 September 2010	Signature: 2007, Ratification/Accession: 30 November 2007

17.	Convention on the Prevention and Punishment of the Crime of Genocide, Paris, 9 December 1948 Binding	Ratified: 27 July, 2009	Ratified: 10 December 1998

Sources: United Nations Human Rights Office, office of the High Commissioner, 'The Core International Human Rights Instruments and their Monitoring Bodies.' [*http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx*, for Nigeria, see *http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=127&Lang=E*, for South Africa, see *http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=127&Lang=E* (accessed 19 July 2017).

Table B: Regional Human Rights Instruments

S/No	Regional Instruments	Nigeria	South Africa
1	African Charter on Human and Peoples' Rights (Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986)	Ratification: 22 June 1983	Ratification: 09 July 1996
2.	African Charter on Democracy, Elections and Governance.	Ratified: 1st December 2011	Ratified 24 December 2010
3.	Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa	Ratified: 16 December 2004	17 December 2004
4.	Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights.	Ratified: 20 May 2004	03 July 2002
5.	African Charter on the Rights and Welfare of the Child.	Ratified:23 July 2001	Ratified: 07 January 2000

Sources: United Nations Human Rights Office, office of the High Commissioner, 'The Core International Human Rights Instruments and their Monitoring Bodies.' [*http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx*, for Nigeria, see *http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=127&Lang=E*, for South Africa, see *http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=127&Lang=E* (accessed 19 July 2017).

Table C: International Labour Organization

Nigeria:
Nigeria has ratified 8 (out of 8) key core Conventions, 2 (out of 4) governance related Conventions, 30 (out of 177) technical Conventions.[22] Out of these Conventions, 30 are in force, 10 have been denounced. The following Conventions have the potency of backing to the Guiding Principles.

1. C029 - Forced Labour Convention, 1930 (No.29): ratified 17 October 1960. [Core Convention]
2. C087 – Freedom of Association and Protection of the Right to Organize Convention, 1948 (No.87): ratified 16 June 1961. [Core Convention]
3. C098 - Right to Organize and Collective Bargaining Convention, 1949 (No. 98): 17 October 1960. [Core Convention]
4. C100 - Equal Remuneration Convention, 1951 (No.100): ratified 8 May 1974. [Core Convention]
5. C105 - Abolition of Forced Labour Convention, 1957 (No. 105): ratified 17 October 1960. [Core Convention]
6. C111 - Discrimination (Employment and Occupation) Convention, 1958 (No.111): ratified 2 October 2002. [Core Convention]
7. C138 - Minimum Age Convention, 1973 (No.138): ratified 2 October 2002. [Core Convention]
8. C182 - Worst Forms of Child Labour Convention, 1999 (No. 182): ratified 2 October 2002. [Core Convention]
9. C081 - Labour Inspection Convention, 1947 (No. 81): ratified 17 October 1960. [Relevant Convention]
10. C144 - Tripartite Consultation (International Labour Standards) Convention, 1976 (N0. 144): ratified 3 May 1994. [Relevant Convention].
11. C011 - Right of Association (Agriculture) Convention, 1921 (No. 11): ratified 16 June 1961.
12. C019 - Equality of Treatment (Accident Compensation) Compensation) Convention, 1925 (No. 19): ratified 17 October 1960.
13. C026 - Minimum Wage_Fixing Machinery Convention, 1928 (No. 26): ratified 16 June 1961.
14. C032 - Protection Against Accidents (Dockers) Convention (Revised), 1932 (No. 32): ratified 16 June 1961.

[22] See NORMLEX 'Ratifications for Nigeria' *http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:103259*, accessed 19 July 2017.

15. C045 - Underground Work (Women) Convention, 1935 (No. 45): ratified 17 October 1960.
16. C050 - Recruiting of Indigenous Workers Convention, 1936 (No. 50): ratified 17 October 1960.
17. C064 - Contracts of Employment (Indigenous Workers) Convention, 1939 (No. 64): ratified 17 October 1960.
18. C065 - Penal Sanctions (Indigenous Workers) Convention, 1939 (No.64): ratified 17 October 1960.
19. C088 - Employment Service Convention, 1948 (No. 81): ratified 16 June 1961.
20. C094 - Labour Clauses (Public Contracts) Convention, 1949 (No. 94): ratified 17 October 1960.
21. C095 - Protection of Wages Convention, 1949 (No. 95): ratified 17 October 1960.
22. C097 - Migration for Employment Convention (Revised), 1949 (No. 97): ratified 17 October 1960.
23. C104 - Abolition of Penal Sanctions (Indigenous Workers) Convention, 1955 (No. 104): ratified 17 october 1960.
24. C116 - Final Articles Revision Convention, 1961(No.116): ratified 27 June 1962.
25. C123 – Minimum Age (Underground Work) Convention, 1965 (No. 123): ratified 14 May 1974.
26. C137 - Dock Work Convention, 1973 (No. 137): ratified 22 March 2004.
27. C155 - Occupational Safety and Health Convention, 1981 (No.155): Ratified 3 May 1994.
28. C159 - Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983 (No. 159): ratified 26 August 2010.
29. C185 - Seafarers' Identity Documents Convention (Revised), 2003 (No. 185): ratified 19 August 2004.
30. MLC - Maritime Labour Convention, 2006 (MLC, 2006): ratified 18 June 2013.

The following Conventions have not been ratified by Nigeria:[23]

1. C122 - Employment Policy Convention, 1964 (No.122). [Relevant Convention]
2. C129 – Labour Inspection (Agriculture) Convention, 1969 (No. 129). [Relevant Convention]
3. C014 – Weekly Rest (Industry) Convention, 1921 (No.14).
4. C077 – Medical Examination of Young Persons (Industry) Convention, 1946 (No. 77).
5. C078 – Medical Examination of Young Persons (Non-Industrial Occupations) Convention, 1946 (No. 78).
6. C102 – Social Security (Minimum Standards) Convention, 1952 (No. 102).
7. C106 – Weekly Rest (Commerce and Offices) Convention, 1957 (No. 106).
8. C110 – Plantations Convention, 1958 (No. 110).
9. C115 – Radiation Protection Convention, 1960 (No. 115).
10. C118 – Equality of Treatment (Social Security) Convention, 1962 (No. 118).
11. C120 – Hygiene (Commerce and Offices) Convention, 1964 (No. 120).

[23] See 'Up-to-date Conventions and Protocols not Ratifed by Nigeria', *http://www.ilo.org/dyn/normlex/en/f?p=1000:11210:0::NO:11210:P11210_COUNTRY_ID:103259*, accessed 10 May 2018

12. C121 – Employment Injury Benefits Convention, 1964 [Schedule I amended in 1980] (No. 121).
13. C124 – Medical Examination of Young Persons (Underground Work) Convention, 1965 (No. 124).
14. C128 – Invalidity, Old-Age and Survivors' benefits Convention, 1967 (No. 128).
15. C130 – Medical Care and Sickness Benefits Convention, 1969 (No. 130).
16. C131 – Minimum Wage Fixing Convention, 1970 (No. 131).
17. C135 – Workers' Representatives Convention, 1971 (No. 135).
18. C139 – Occupational Cancer Convention, 1974 (No. 139).
19. C140 – Paid Educational Leave Convention, 1974 (No. 140).
20. C141 – Rural Workers' Organizations Convention, 1975 (No. 141).
21. C142 – Human Resources Development Convention, 1975 (No. 142)
22. C143 – Migrant Workers 9Supplementary Provisions) Convention, 1975 (No. 143).
23. C148 - Working Environment (Air Pollution, Noise and Vibration) Convention, 1975 (No. 143).
24. C149 – Nursing Personnel Convention, 1977 (No. 149).
25. C150 – Labour Administration Convention, 1978 (No. 150).
26. C151 - Labour Relations (Public Service) Convention, 1978 (No. 151).
27. C152 – Occupational Safety and Health (Dock Work) Convention, 1979 (No. 152).
28. C154 – Collective Bargaining Convention, 1981 (No. 154).
29. C156 – Workers with Family Responsibilities Convention, 1981 (No. 156).
30. C157 – Maintenance of Social Security Rights Convention, 1982 (No. 157).
31. C160 – Labour Statistics Convention, 1985 (No. 160).
32. C161 – Occupational Health Services Convention, 1985 (No. 161).
33. C162 – Asbestos Convention, 1986 (No. 162).
34. C167 – Safety and Heath in Construction Convention, 1988 (No. 167).
35. C168 – Employment Promotions and Protection against Unemployment Convention, 1988 (No. 168).
36. C169 – Indigenous and Tribal Peoples Convention, 1989 (No. 169)
37. C170 – Chemicals Convention, 1990 (No. 170).
38. C171 – Night Work Convention, 1990 (No. 171).
39. C172 – Working Conditions (Hotels and Restaurants) Convention, 1991 (No. 172).
40. C173 – Protection of Workers' Claims (Employer's Insolvency) Convention, 1992 (No. 173).
41. C174 – Prevention of Major Industrial Accidents Convention, 1993 (No. 174).
42. C175 – Part-Time Work Convention, 1994 (No. 175).
43. C176 – Safety and Health in Mines Convention, 1995 (No. 176).
44. C177 – Home Work Convention, 1996 (No. 177).
45. C181 – Private Employment Agencies Convention, 1997 (No. 181).
46. C183 – Maternity Protection Convention, 2000 (No. 183).
47. C184 – Safety and Health in Agriculture Convention, 2001 (No. 184).
48. C187 – Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187).
49. C188 – Work in Fishing Convention, 2007 (No. 188).
50. C189 – Domestic Workers Convention, 2011 (No. 189).
51. P029 – Protocol of 2014 to the Forced Labour Convention, 1930

52. P081 – Protocol of 1995 to the Labour Inspection Convention, 1947.
53. P089 – Protocol of 1990 to the Night Work (Women) Convention (Revised), 1948.
54. P110 – Protocol of 1982 to the Plantations Convention, 1958.
55. P155 – Protocol of 2002 to the Occupational Safety and Health Convention, 1981.
56.

South Africa

South Africa has ratified 8 (out of 8) fundamental Conventions, 2 (out of 4) governance Convenience, 17 (out of 177) technical Conventions. Out of these Conventions, 23 are in force, 2 have been denounced. The following Conventions have the potency of backing to the Guiding Principles.[24]

1. C029 - Forced Labour Convention, 1930 (No. 29): ratified 5 March 1997. [Fundamental Convention]
2. C087 - Freedom of Association and Protection of the Right to Organize Convention: ratified 19 February 1996. [Fundamental Convention]
3. C098 - Right to Organize and Collective Bargaining Convention, 1949 (No. 98): ratified 19 February 1996. [Fundamental Convention]
4. C100 - Equal Remuneration Convention, 1951 (No. 100): ratified 30 March 2000. [Fundamental Convention]
5. C105 – Abolition of Forced Labour Convention, 1957 (No. 105). Fundamental Convention]
6. C111 - Discrimination (Employment and Occupation) Convention, 1958 (No.111): ratified 5 March 1997. [Fundamental Convention]
7. C138 - Minimum Age Convention, 1973 (No. 138): ratified 30 March 2000. [Fundamental Convention]
8. C182 - Worst Forms of Child Labour Convention, 1999 (No. 182): ratified 7 June 2000. [Fundamental Convention]
9. C081 - Labour Inspection Convention, 1947 (No. 81): ratified 20 June 2013. [Relevant Convention]
10. C144 - Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144): ratified 18 February 2003. [Relevant Convention]
11. C002 – Unemployment Convention, 1919 (No. 2).
12. C019 - Equality of Treatment (Accident Compensation) Convention, 1925 (No. 19): ratified 30 March 1926.
13. C026 - Minimum Wage-Fixing Machinery Convention, 1928 (No. 26): ratified 28 December 1932.
14. C042 - Workmen's Compensation (Occupational Diseases) Convention (Revised), 1934 (No. 42): ratified 26 February 1952.
15. C045 - Underground Work (Women) Convention, 1935 (No. 45): ratified 25 June 1936
16. C063 - Convention concerning Statistics of Wages and Hours of Work, 1938 (No.63) Excluding Parts II and IV: ratified 8 august 1939.
17. C080 - Final Articles Revision Convention, 1946 (No. 80): ratified 19 June 1947.

[24] See 'Ratifications for South Africa', *http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102888*, accessed 10 May 2018.

18. C089 - Night Work (Women) Convention (Revised), 1948 (No. 89): ratified 2 March 1950.
19. C116 - Final Articles Revision Convention 1961 (No. 116): ratified 9 August 1963.
20. C155 – Occupational Safety and Health Convention, 1981 (No. 155): Ratified 18 February 2003.
21. C176 - Safety and Health in Mines Convention, 1995 (No. 176): ratified 9 June 2000.
22. MLC, 2006 - Maritime Labour Convention, 2006 (MLC, 2006): ratified 20 June 2013.
23. C189 - Domestic Workers Convention, 2011 (No. 189): ratified 20 June 2013.

The following Conventions have not been ratified by South Africa.[25]

1. C122 – Employment Policy Convention, 1964 (No. 122).
2. C129 - Labour Inspection (Agriculture) Convention, 1969 (No. 129.
3. C014 – Weekly Rest (Industry) Convention, 1921 (No. 14).
4. C077 – Medical Examination of Young Persons (Industry) Convention, 1946 (No. 77).
5. C078 – Medical Examination of Young Persons (Non-Industrial Occupations) Convention, 1946 (No. 78).
6. C094 – Labour Clauses (Public Contracts) Convention, 1949 (No. 94).
7. C095 – Protection of Wages Convention, 1949 (No. 95).
8. C097 – Migration for Employment Convention (Revised), 1949 (No. 97).
9. C102 – Social Security (Minimum Standards) Convention, 1952 (No. 102).
10. C106 – Weekly Rest (Commerce and Offices) Convention, 1957 (No. 106).
11. C110 – Plantations Convention, 1958 (No. 110).
12. C115 – Radiation Protection Convention, 1960 (No. 115).
13. C118 – Equality of Treatment (Social Security) Convention, 1962 (No. 118).
14. C120 – Hygiene (Commerce and Offices) Convention, 1964 (No. 120).
15. C121 – Employment Injury Benefits Convention, 1964 [Schedule I amended in 1980] (No. 121).
16. C124 – Medical Examination of Young Persons (Underground Work) Convention, 1965 (No. 124)
17. C128 – Invalidity, Old-Age and Survivors' Benefits Convention, 1967 (No. 128).
18. C130- Medical Care and Sickness Benefits Convention, 1969 (No. 130).
19. C131 – Minimum Wage Fixing Convention, 1970 (No. 131).
20. C135 – Workers' Representatives Convention, 1971 (No. 135).
21. C139 – Occupational Cancer Convention, 1974 (No. 139).
22. C140 – Paid Educational Leave Convention, 1974 (No. 140).
23. C141 – Rural Workers Organizations Convention, 1975 (No. 141).
24. C142 – Human Resources Development Convention, 1975 (No. 142)
25. C143 – Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143).
26. C148 – Working Environment (Air Pollution, Noise and Vibration) Convention, 1977 (No. 148).
27. C149 - Nursing Personnel Convention, 1977 (No. 149).
28. C150 – Labour Administration Convention, 1978 (No. 150).

[25] See 'Up-to-date Conventions and Protocols not Ratified by South Africa', *http://www.ilo.org/dyn/normlex/en/f?p=1000:11210:0::NO:11210:P11210_COUNTRY_ID:103259*, accessed 10 May 2018.

29. C151 – Labour Relations (Public Service) Convention, 1978 (No. 151).
30. C152 – Occupational Safety and Health (Dock Work) Convention, 1979 (No. 152).
31. C154 – Collective Bargaining Convention, 1981 (No. 154).
32. C156 - Workers with Family Responsibilities Convention, 1981 (No. 156).
33. C157 – Maintenance of Social Security Rights Convention, 1982 (No. 157).
34. C159 – Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983 (No. 159).
35. C160 – Labour Statistics Convention, 1985 (No. 160).
36. C161 – Occupational Health Services Convention, 1985 (No. 161).
37. C162 – Asbestos Convention, 1986 (No. 162).
38. C167 – Safety and Health in Construction Convention, 1988 (No. 167).
39. C168 – Employment Promotion and Protection against Unemployment Convention, 1988 (No. 168).
40. C169 – Indigenous and Tribal Peoples Convention, 1989 (No. 169).
41. C170 – Chemicals Convention, 1990 (No. 170).
42. C171 – Night Work Convention, 1990 (No. 171).
43. C172 - - Working Conditions (Hotels and Restaurants) Convention, 1991 (No. 172)
44. C173 - Protection of Workers' Claims (Employer's Insolvency) Convention, 1992 (No. 173)
45. C174 - Prevention of Major Industrial Accidents Convention, 1993 (No. 174)
46. C175 - Part-Time Work Convention, 1994 (No. 175)
47. C177 - Home Work Convention, 1996 (No. 177)
48. C181 - Private Employment Agencies Convention, 1997 (No. 181)
49. C183 - Maternity Protection Convention, 2000 (No. 183)
50. C184 - Safety and Health in Agriculture Convention, 2001 (No. 184)
51. C185 - Seafarers' Identity Documents Convention (Revised), 2003 (No. 185)
52. C187 - Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187)
53. P029 - Protocol of 2014 to the Forced Labour Convention, 1930
54. P081 - Protocol of 1995 to the Labour Inspection Convention, 1947
55. P089 - Protocol of 1990 to the Night Work (Women) Convention (Revised), 1948
56. P110 - Protocol of 1982 to the Plantations Convention, 1958
57. P155 - Protocol of 2002 to the Occupational Safety and Health Convention, 1981

APPENDIX F

2010 Report

S|No	State	Coy	Incident No	Incident Date	Cause	LGA	Cleanupdate	Compl.Date	PostCleanUpI	FinalSamplDa	Certif.Date
1	RI	NAOC	2010/LAR/003/005	01/05/10	sab	Abua-Odual			08/27/10	02/20/11	12/04/13
2	RI	NAOC	2010/LAR/014/024	02/01/10	sab	Ogba/Egbema/Ndoni				02/20/11	
3	RI	NAOC	2010/LAR/018/028	02/02/10	sab	Ogba/Egbema/Ndoni				07/07/11	
4	RI	NAOC	2010/LAR/084/155	05/11/10	sab	Ogba/Egbema/Ndoni				07/06/11	12/04/13
5	RI	SPDC	2010_502957	04/17/10	sab	Akuku Toru			07/07/11	08/25/11	03/11/13
6	RI	SPDC	2010_537786	07/11/10	sab	Ahoada-West			09/21/10	05/05/11	
7	RI	SPDC	2010_564645	09/20/10	sab	Ahoada-West			11/22/10	05/05/11	02/11/13
8	RI	SPDC	2010_544529	08/01/10	sab	Bonny	12/10/13		12/10/13	12/10/13	02/11/13
9	RI	SPDC	2010_515815	05/21/10	sab	Degema					
10	RI	SPDC	2010_517222	05/24/10	sab	Ahoada East	10/20/11	11/14/11	11/23/11		03/13/14
11	RI	NAOC	2010/LAR/030/046	02/14/10	sab	Ogba/Egbema/Ndoni			07/20/10	05/19/12	
12	RI	SPDC		05/24/10	sab	Ahoada East					
13	RI	SPDC	2010_465457	01/06/10	sab	Emuoha	07/08/10	07/13/10	08/26/10	03/29/11	03/11/13
14	RI	NAOC	2010/LAR/218/382	12/23/10							
15	RI	NAOC		04/24/10	eqf	Obio/Akpor					
16	RI	NAOC		04/25/10	sab	Abua-Odual					
17	RI	NAOC		04/25/10	sab	Abua-Odual					
18	RI	NAOC	2010/LAR/198/339	11/17/10	sab	Abua-Odual					
19	RI	NAOC	2010/LAR/202/353	12/05/10	sab	Abua-Odual					
20	RI	NAOC	2010/SAR/099/245	08/23/10	sab	Abua-Odual					
21	RI	SPDC		07/06/10	ytd				05/20/11		
22	RI	SPDC	2010_526539	06/13/10	sab				05/20/11	07/14/11	02/11/13
23	RI	NAOC	2010/LAR/156/263	09/14/10	sab	Ogba/Egbema/Ndoni					
24	RI	SPDC	2010_559423	09/06/10	sab	Ahoada-West	09/15/10	09/16/10	02/17/11	07/14/11	02/11/13
25	RI	SPDC	2010_528305	06/19/10	sab	Ohaji/Egbema				06/02/11	02/11/13

APPENDIX G

							APPENDIX G						
							2011 Report						
S\No	State	Incident No	Incide.Date	Cause	LGA	cleanupdate	cleanupcomp	postcleanupinsp	remed. start	remed.end	remed.type	finalsampli	certif.date
1	RI	2011_670909	06/09/11	sab	Gokana			09/29/11	06/01/11	10/30/11	RENA	09/13/11	02/11/13
2	RI		08/02/11	sab									
3	RI	2011/LAR/052/096	05/02/11	ytd	Ah.-West								
4	RI	2011/LAR/065/120	06/01/11	sab	Egbeme			03/05/12					
5	RI	2011/LAR/074/135	06/16/11	sab	Egbeme	10/03/11	10/17/11	11/02/11					
6	RI	2011/LAR/075/136	06/20/11	sab	Ah.-West			12/14/12					
7	RI	2011/LAR/076/142	06/22/11	eqf	Egbeme	03/15/12	05/23/12	05/25/12					
8	RI	2011/LAR/098/173	07/17/11	ome	Egbeme			12/05/11					
9	RI	2011/LAR/104/183	07/26/11	eqf	Egbeme	03/15/12	05/23/12	05/25/12					
10	RI	2011/LAR/110/200	08/15/11	ytd	Egbeme								
11	RI	2011/LAR/111/201	08/17/11	sab	Egbeme								
12	RI	2011/LAR/126/229	09/12/11	sab	Egbeme								
13	RI	2011/LAR/127/237	09/13/11	sab	Ah.-West			11/17/11					
14	RI	2011/LAR/134/248	09/26/11	eqf	Ah.-West								
15	RI	2011/LAR/180/307	11/11/11	eqf	Ah.-West								
16	RI	2011/LAR/181/308	11/12/11	sab	Ah.-West	11/30/11	12/08/11	12/23/11					
17	RI	2011/LAR/185/323	11/20/11	sab	Ah.-West								
18	RI	2011/LAR/188/327A	11/25/11	cor	Egbeme								
19	RI	2011/LAR/188/327B	11/25/11	sab	Egbeme								
20	RI	2011/LAR/195/348	12/09/11	sab	Ah.-West								
21	RI	2011/LAR/204/366	12/27/11	sab	Ah.-West								
22	RI	2011/LAR/202/364	12/27/11	sab	Ah.-West								
23	RI	2011/LAR/203/365	12/27/11	sab	Ah.-West								
24	RI		11/13/11	cor	Akuku-Toru								
25	RI		02/16/11	eqf	Abua-Odual								
26	RI		03/07/11	sab	Bonny								
27	RI		03/07/11	sab	Bonny								

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28	RI		03/07/11	sab	Bonny												
29	RI		03/07/11	sab	Bonny												
30	RI		03/07/11	sab	Bonny												
31	RI		03/07/11	sab	Bonny												
32	RI	2011_607886	01/07/11	sab	Akuku-Toru										05/25/11	02/11/13	
33	RI	2011_620690	02/09/11	sab	Bonny												
34	RI	2011_621008	02/09/11	sab	Omumma	03/21/11	03/25/11	04/13/11								02/11/13	
35	RI	2011_622495	02/14/11	sab	Obio/Akpor										09/29/11	02/11/13	
36	RI	2011_626696	02/24/11	sab	Bonny												
37	RI	2011_631995	03/07/11	sab	Bonny												
38	RI		03/26/11	sab	Bonny												
39	RI		03/26/11	sab	Bonny												
40	RI		03/26/11	sab	Bonny												
41	RI		03/26/11	sab	Bonny												
42	RI		03/26/11	sab	Bonny												
43	RI		03/26/11	sab	Bonny												
44	RI		03/26/11	sab	Bonny												
45	RI		03/26/11	sab	Bonny												
46	RI		03/27/11	sab	Omumma												
47	RI		03/29/11	sab	Bonny												
48	RI		04/05/11	sab	Akuku-Toru												
49	RI	2011_634250	03/12/11	sab	Omumma	03/23/11	03/25/11	04/13/11	06/01/11	07/30/11	RENA	04/13/12	03/13/14				
50	RI	2011_638020	03/22/11	sab	Obio/Akpor	03/27/11	03/28/11	04/12/11				08/05/11	02/11/13				
51	RI	2011_638284	03/22/11	cor	Etche	03/27/11	03/30/11	04/12/11				07/26/11	02/11/13				
52	RI	2011_639812	03/27/11	sab	Omumma	03/30/11	04/06/11	05/26/11	11/01/11	02/29/12	RENA	02/02/12	03/13/14				
53	RI	2011_641066	03/29/11	sab	Bonny				10/01/11	11/30/11	RENA	11/11/11					
54	RI	2011_645479	04/05/11	sab	Akuku-Toru												
55	RI	2011_650026	04/13/11	ome	Emuoha			06/09/11	11/01/11	02/29/12	RENA	01/31/12	03/13/14				
56	RI	2011_651139	04/22/11	sab	Etche	04/24/11	05/06/11	05/25/11	05/01/12	07/31/12	RENA	06/13/12					
57	RI	2011_653037	04/27/11	sab	Ikwere	05/27/11	05/31/11	06/10/11	05/01/12	07/31/12	RENA						

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58	RI	2011_653037	04/27/11	sab	Ikwere				02/01/12	06/30/12	RENA	05/11/12	03/13/14	
59	RI	2011_657132	05/06/11	sab	Emuoha			06/15/12					12/10/13	
60	RI	2011_744183	11/22/11	eqf	DEGEMA	12/10/13			05/01/12	09/30/12	RENA	09/06/12	03/13/14	
61	RI	2011_728425	10/18/11	sab	Eleme				05/01/12	09/30/12	RENA	09/06/12	03/13/14	
62	RI	2011_731764	10/26/11	sab	OYIGBO				05/01/12	09/30/12	RENA	09/06/12	03/13/14	
63	RI	2011_738282	11/09/11	sab	Eleme				05/01/12	09/30/12	RENA	09/06/12	03/13/14	
64	RI	2011/LAR/063/118	06/01/11	sab	Ah.-West	11/30/11	12/08/11	12/23/11						
65	RI	2011/SAR/009/020	01/23/11	ytd	Abua-Odual									
66	RI	2011/LAR/041/077	03/31/11	ytd	Ah.-West									
67	RI	2011_713460	09/13/11	sab	Ah.-West			02/08/12	12/01/11	02/28/12	RENA		03/14/14	
68	RI	2011_633111	03/10/11	sab	Gokana			10/20/11	03/20/14	04/23/14	RENA	05/22/14		
69	RI	2011_734895	11/01/11	sab	Gokana						RENA	11/21/14		
70	RI	2011/LAR/165/286	10/30/11	eqf	Egbema	07/22/15	07/28/15	09/09/15						

APPENDIX H

S|No	State	IncidentDate	Cause	LGA	CleanupDate	CleanupCompleDate	PostCleanupInspecDate	RemediaStart	RemediaEnd	FinalSamplDate	Certifica.Date
1	RI	11/19/13	eqf	Egbema							
2	RI	11/18/13	sab	Ah.-West							
3	RI	11/10/13	sab	Ah.-West	12/28/14	01/15/15	05/07/15				
4	RI	08/28/13	sab	Egbema							
5	RI	11/26/13	sab	Egbema							
6	RI	11/26/13	sab	Egbema							
7	RI	06/13/13	eqf	Ah.-West			12/09/13				
8	RI	12/29/13	sab	Egbema							
9	RI	12/29/13	sab	Egbema							
10	RI	12/28/13	sab	Egbema							
11	RI	12/03/13	sab	Egbema							
12	RI	11/12/13	sab								
13	RI	11/22/13	cor	Degema	01/26/15	04/16/15	04/24/15				
14	RI	11/22/13	ytd								
15	RI	12/29/13	eqf	Egbema							
16	RI	12/16/13	cor	Egbema							
17	RI	12/16/13	cor	Egbema							
18	RI	12/26/13	sab								
19	RI	12/29/13	sab	Egbema							
20	RI	12/28/13	sab	Egbema							
21	RI	12/10/13	sab	Obio/Akpor	03/04/14	05/13/14	06/05/14	03/04/14	05/13/14	06/05/14	
22	RI	12/02/13	cor	Eleme			10/13/14				
23	RI	11/27/13	cor	Degema	11/27/14	08/17/15	08/18/15				
24	RI	12/02/13	sab	Degema							
25	RI	11/26/13	cor	Akuku-Toru	11/27/13	04/30/15	05/04/15			05/04/15	
26	RI	12/31/13	sab	Gokana							
27	RI	12/30/13	sab	Tai	03/14/14	04/20/14	04/10/14	03/14/14	04/20/14	04/10/14	
28	RI	12/31/13	eqf	Etche	06/02/15	06/30/15	08/19/15				
29	RI	12/11/13	sab	Eleme							
30	RI	12/14/13	sab	Ah.-West							
31	RI	12/28/13	sab	Tai							
32	RI	06/25/13	sab	Emuoha	11/05/13	12/18/13	01/31/14				
33	RI	04/10/13	sab	Ah.-West							
34	RI	04/10/13	sab								
35	RI	02/25/13	eqf	Akuku-Toru							
36	RI	12/11/13	ytd								
37	RI	11/17/13	sab	Eleme			05/19/14	04/07/14	04/19/14	05/19/14	

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38	RI	11/03/13	sab		03/14/14	04/20/14	04/20/14	03/13/14	04/12/14	04/20/14		
39	RI	09/18/13	sab	Ah.-West	11/13/13	01/17/14	01/30/14					
40	RI	09/28/13	sab	Ah.-West								
41	RI	09/23/13	sab	Ah.-West	11/13/13	01/12/14	01/30/14					
42	RI	11/28/13										
43	RI	12/03/13			07/15/14	10/07/14	10/31/14			10/31/14		
44	RI	11/26/13										
45	RI	01/10/13	sab	Ah.-West								
46	RI	01/10/13	sab	Ah.-West			05/30/13					
47	RI	01/13/13	cor	Ah.-West								
48	RI	10/02/13	sab	Egbema								
49	RI	01/14/13	cor	Ah.-West								
50	RI	01/15/13	sab	Ah.-West			05/30/13					
51	RI	01/17/13	sab	Ah.-West								
52	RI	02/02/13	sab	Egbema								
53	RI	02/02/13	sab	Egbema								
54	RI	02/05/13	sab	Ah.-West								
55	RI	02/15/13	sab	Ah.-West			05/30/13					
56	RI	04/15/13	sab	Ah.-West								
57	RI	03/29/13	sab	Ah.-West								
58	RI	04/18/13	eqf	Ah.-West			08/14/13					
59	RI	04/22/13	sab	Ah.-West								
60	RI	05/04/13	ome	Ah.-West								
61	RI	05/12/13	sab	Egbema	05/20/13	11/20/13	05/19/14			05/19/14		
62	RI	05/18/13	sab									
63	RI	06/09/13	sab	Ah.-West	08/12/13	08/25/13	08/27/13					
64	RI	06/12/13	eqf	Oguta								
65	RI	06/25/13	sab	Egbema								
66	RI	06/27/13	ytd	Ah.-West								
67	RI	06/29/13	sab	Ah.-West			08/27/13					
68	RI	07/12/13	sab	Ah.-West	09/30/13	11/14/13	07/25/14					
69	RI	04/26/13	sab	Ah.-West			12/12/13			12/12/13	07/13/15	
70	RI	11/28/13	sab	Ah.-West	11/28/13	05/22/14	06/04/14					
71	RI	11/18/13	sab	Emuoha	06/10/14	07/03/14	07/17/14					
72	RI	03/22/13	sab	Bonny	10/23/13	01/29/14	02/12/14			02/12/14		
73	RI	03/22/13	sab	Bonny	10/23/13	01/29/14	02/12/14			02/12/14		
74	RI	03/22/13	sab	Bonny	10/23/13	01/29/14	02/12/14			02/12/14		
75	RI	10/25/13	sab	Degema	11/29/13	01/29/14	02/12/14			02/12/14		
76	RI	03/22/13	sab	Bonny								
77	RI	12/09/13	sab	Degema								

78	RI	12/09/13	sab	Degema							
79	RI	03/22/13	sab	Bonny	10/29/13	11/20/13	02/13/14			02/13/14	
80	RI	04/29/13	sab	Bonny	10/29/13	11/20/13	02/13/14			02/13/14	
81	RI	05/08/13	sab	Bonny	10/29/13	12/06/13	02/12/14			02/12/14	
82	RI	08/14/13	sab	Degema	11/29/13	01/29/14	02/12/14			02/12/14	07/13/15
83	RI	05/08/13	sab	Bonny	10/29/13	12/06/13	02/12/14			02/12/14	
84	RI	04/29/13	sab	Bonny	10/29/13	11/20/13	02/13/14			02/13/14	
85	RI	10/31/13	cor	Degema							
86	RI	10/20/13	sab	Akuku Toru							
87	RI	05/22/13	sab	Ah.-West							
88	RI	11/28/13	sab	Tai	04/11/14	05/15/14	04/15/14	04/11/14	04/27/14	05/15/14	
89	RI	11/14/13		Ah.-West							
90	RI	11/21/13	ytd								
91	RI	11/30/13	sab	Egbema							
92	RI	11/29/13									
93	RI	11/29/13									
94	RI	11/29/13	sab	Egbema							
95	RI	11/29/13	sab	Egbema							
96	RI	11/29/13	sab	Egbema							
97	RI	11/28/13	sab	Egbema							
98	RI	11/28/13	sab	Egbema							
99	RI	12/31/13	sab	Egbema							
100	RI	12/31/13	eqf	Egbema							
101	RI	03/09/13	sab	Ah.-West	10/16/13	01/10/14	01/30/14				
102	RI	07/26/13	sab	Egbema							
103	RI	06/03/13	sab	Bonny	12/17/13						07/13/15
104	RI	04/29/13	sab	Degema	12/17/13						07/13/15
105	RI	07/18/13	sab	Bonny	12/05/13	12/05/13					07/13/15
106	RI	11/26/13	ytd	Akuku Toru							
107	RI	08/24/13	sab	Oyigbo							
108	RI	10/19/13	sab	Ah.-West	10/19/13	05/22/14	06/04/14				
109	RI	11/21/13	sab	Gokana							
110	RI	11/26/13	ytd								
111	RI	06/16/13	ytd								
112	RI	08/14/13	sab								
113	RI	07/15/13	sab	Degema						11/11/13	
114	RI	07/30/13	sab	Degema							07/13/15
115	RI	08/14/13	sab							12/03/13	07/13/15
116	RI	08/30/13	cor	Degema	08/31/13	05/19/14	05/20/14			05/20/14	
117	RI	08/18/13	ome		08/18/13	05/19/14	05/20/14			05/20/14	

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118	RI	01/19/13	sab	Degema									07/13/15
119	RI	03/20/13	sab	Bonny									
120	RI	04/02/13	cor	Bonny				08/13/14					
121	RI	03/22/13	sab	Bonny									
122	RI	03/22/13	sab	Bonny	10/29/13	11/20/13	02/13/14					02/13/14	
123	RI	03/22/13	sab	Bonny	10/29/13	11/20/13	02/13/14					02/13/14	
124	RI	12/19/13	sab	Ah.-West									
125	RI	12/02/13	eqf	Obio/Akpor									
126	RI	07/09/13	sab	Emuoha	09/27/13	03/02/14	04/01/14	04/27/13	03/02/14	04/01/14	07/13/15		
127	RI	05/13/13	sab	Ah.-West	07/02/13	02/04/14	04/04/14	07/02/13	04/02/14	04/04/14	07/13/15		
128	RI	10/10/13	sab	Ah.-West	10/10/13	03/19/14	04/01/14			04/01/14			
129	RI	04/29/13	sab	Degema	02/06/14	03/14/14	04/03/14			04/03/14	07/13/15		
130	RI	05/03/13	eqf	Egbema									
131	RI	10/26/13	sab	Ukwa West	01/27/14	03/19/14	04/09/14	01/27/14	03/19/14	04/09/14			
132	RI	02/09/13	sab	Egbema	02/01/13	04/01/13	04/25/13	02/01/13	04/01/13	04/25/13			
133	RI	03/14/13	sab	Egbema	04/01/13	05/01/13	04/25/13	03/01/13	05/01/13	04/25/13			
134	RI	01/02/13	eqf	Egbema	03/01/13	04/01/13	04/25/13	03/01/13	04/01/13	04/25/13			
135	RI	11/10/13	sab	Egbema	11/01/13	02/01/14	04/25/14	11/01/13	02/01/14	04/25/14			
136	RI	11/30/13		Egbema	12/01/13	01/02/14	04/25/14	12/01/13	01/02/14				
137	RI	11/10/13	sab	Egbema	11/01/13	02/01/14	04/25/14	11/01/13	02/01/13	04/25/14			
138	RI	01/02/13											
139	RI	04/24/13	sab	Akuku-Toru									
140	RI	05/09/13	sab	Obio/Akpor	01/06/14	03/10/14							
141	RI	01/07/13	sab	Tai	01/08/14	03/09/14							
142	RI	04/18/13	eqf	Egbema	02/13/14	03/22/14	04/10/14	02/13/14	03/22/14	04/10/14	07/13/15		
143	RI	10/21/13	sab	Degema									
144	RI	03/22/13	sab	Degema	02/06/14	03/14/14	04/03/14			04/03/14			
145	RI	03/22/13	sab	Degema	01/21/14	04/13/14	04/03/14			04/03/14			
146	RI	03/22/13	sab	Degema	01/21/14	04/13/14	04/03/14			04/03/14			
147	RI	03/22/13	sab	Degema	01/23/14	04/13/14	04/03/14			04/03/14			
148	RI	03/22/13	sab	Degema	02/06/14	03/14/14	04/03/14			04/03/14			
149	RI	10/23/13	sab	Gokana	03/14/14	04/20/14	04/20/14	03/14/14	04/12/14	04/20/14			
150	RI	10/17/13	sab	Gokana			04/12/14	03/14/14	04/20/14	04/12/14			
151	RI	07/28/13	sab	Andoni	07/28/13	04/03/14	04/03/14			04/03/14	07/13/15		
152	RI	09/17/13	sab	Bonny	09/17/13	04/04/14	04/04/14			04/04/14			
153	RI	03/22/13	sab	Bonny	03/22/13	04/04/14	04/04/14			04/04/14			
154	RI	09/23/13	sab	Bonny	09/23/13	04/03/14	04/04/14			04/04/14			
155	RI	08/07/13	sab	Bonny	08/07/13	05/02/14	05/07/14			05/07/14			
156	RI	06/07/13	sab	Bonny	06/16/13	05/02/14	05/07/14			05/07/14	07/13/15		
157	RI	09/11/13	sab	Degema	09/11/13	05/14/14	05/15/14			05/15/14			

158	RI	03/22/13	sab	Akuku-Toru	03/22/14	05/14/14	05/15/14				
159	RI	03/22/13	sab	Degema	03/22/13	05/14/14	05/15/14			05/15/14	
160	RI	03/22/13	sab	Degema	03/22/13	05/14/14	05/15/14			05/15/14	
161	RI	03/22/13	sab	Degema	03/22/13	05/22/14	05/15/14			05/15/14	
162	RI	08/18/13	sab	Gokana			05/16/14			05/16/14	
163	RI	02/07/13	sab	Abua-Odual							
164	RI	05/31/13	sab	Abua-Odual	06/28/13	07/15/13	07/22/13				
165	RI	08/20/13	ytd	Abua-Odual							
166	RI	09/14/13	sab	Egbema							
167	RI	08/27/13	sab	Ah.-West	12/14/13	02/11/14	08/29/14			08/29/14	
168	RI	12/31/13	sab								
169	RI	11/09/13	sab	Ukwa-West	03/25/14	05/06/14	06/11/14			06/11/14	
170	RI	05/26/13	sab	Eleme			05/19/14	03/18/14	04/11/14	05/19/14	
171	RI	05/24/13	sab	Eleme			05/19/14	03/18/14	04/19/14	05/19/14	
172	RI	09/06/13	sab	Gokana	11/26/13	02/06/14	05/13/14	11/26/13	02/06/14	05/13/14	
173	RI	10/09/13	sab	Gokana	11/26/13	02/06/14	05/13/14	11/26/13	02/06/14	05/13/14	
174	RI	11/04/13	sab	Tai	04/11/14	04/27/14	05/15/14	04/11/14	04/27/14	05/15/14	
175	RI	03/13/13	cor	Etche	02/20/14	06/03/14	06/09/14	02/20/14	06/03/14	06/09/14	07/13/15
176	RI	04/06/13	sab	Etche	04/03/14	05/20/14	06/09/14	04/06/14	05/20/14	06/09/14	07/13/15
177	RI	10/16/13		Egbema	02/07/14	02/20/14	06/06/14				
178	RI	09/03/13	sab	Egbema	03/17/14	03/25/14	05/30/14				
179	RI	11/18/13	sab	Eleme							
180	RI	12/09/13	ytd	Egbema							
181	RI	12/29/13	sab	Egbema							
182	RI	12/14/13	sab	Ah.-West							
183	RI	10/09/13	eqf	Tai	10/10/13	10/17/13	06/25/14	04/14/14	05/20/14	06/25/14	
184	RI	07/01/13	sab	Etche	02/18/14	04/29/14	06/11/14			06/11/14	07/13/15
185	RI	07/31/13	sab	Ah.-West	07/31/13	05/22/14	06/04/14				07/13/15
186	RI	09/21/13	sab	Ah.-West	04/04/14	04/15/14	07/11/14				
187	RI	07/18/13	cor	Egbema	06/01/14	05/26/14	06/10/14				
188	RI	09/12/13	eqf	Bonny							
189	RI	12/30/13	sab	Akuku-Toru							
190	RI	12/15/13	sab	Degema							
191	RI	12/07/13									
192	RI	12/13/13									
193	RI	12/08/13									
194	RI	07/21/13	ytd		09/30/13	11/20/13	07/25/14				
195	RI	09/30/13	sab	Ah.-West	11/14/13	11/20/13	07/25/14				
196	RI	12/13/13		Egbema							
197	RI	10/12/13	cor	Eleme			10/13/14				

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198	RI	10/19/13	cor	Eleme			10/14/14					
199	RI	10/05/13	sab	Egbema	05/16/14	05/22/14	09/23/14				09/23/14	
200	RI	12/30/13	ytd	Akuku-Toru								
201	RI	11/06/13	sab	Gokana								
202	RI	11/06/13	sab	Gokana								
203	RI	12/11/13	sab	Eleme	12/18/14	nosdra,mnstry,cmpny,cmmnt,mlitry						
204	RI	09/15/13	sab	Akuku Toru								
205	RI	12/11/13	sab	Obio/Akpor								
206	RI	04/01/13	sab	Egbema								
207	RI	04/01/13	ytd	Egbema								
208	RI	07/10/13	sab	GOKANA	07/11/13	01/30/15	03/25/15					
209	RI	10/31/13	cor	Egbema	04/27/15	04/28/15	04/30/15					
210	RI	08/21/13	cor	Akuku Toru	08/22/13	10/02/14	11/05/14					
211	RI	05/29/13	sab	Gokana	05/29/13	07/21/16	02/11/16					

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S/No	State	LGA	Incid.Date	Cause	CleanupDate	CleanupCompl.Dat	PostCleanupInspect.Date	Remed.Start	Remed.End	Remed.Type	Fin.Sampl.Date
1	RI	Egbema	01/01/14	sab							
2	RI	Egbema	01/01/14	sab							
3	RI	Egbema	01/16/14	sab							
4	RI	Emuoha	01/24/14	sab	03/17/14	03/22/14	04/15/14				04/15/14
5	RI	Egbema	01/03/14	sab							
6	RI	Egbema	01/03/14	sab							
7	RI	Egbema	01/08/14	sab							
8	RI	Egbema	01/08/14	sab							
9	RI	Egbema	01/08/14	sab							
10	RI	Egbema	01/08/14	sab							
11	RI	Egbema	01/03/14	eqf	04/10/14	04/17/14	07/30/14				07/30/14
12	RI	Egbema	01/01/14	sab							
13	RI	Ah.-West	01/28/14	sab	05/16/14	05/22/14	09/23/14				09/23/14
14	RI	Tai	01/17/14	sab							
15	RI	Tai	01/19/14	sab							
16	RI	Egbema	01/24/14	sab							
17	RI	Akuku-Tor	01/31/14	sab							
18	RI	Egbema	01/19/14	sab							
19	RI	Egbema	01/20/14	sab							
20	RI	Egbema	01/21/14	sab							
21	RI	Egbema	01/27/14	sab							
22	RI	Egbema	01/15/14	sab							
23	RI	Ah.-West	01/13/14	sab	11/09/15	11/17/15	05/26/16				
24	RI	Ah.-West	01/13/14	sab							
25	RI	Egbema	02/09/14	sab							
26	RI	Egbema	02/07/14	cor							
27	RI	Bonny	01/07/14	sab							
28	RI	Eleme	01/17/14	sab							
29	RI	Eleme	01/17/14	sab							

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30	RI	Eleme	01/17/14	sab									
31	RI	Eleme	01/19/14	sab									
32	RI	Eleme	01/17/14	sab									
33	RI	Eleme	01/17/14	sab									
34	RI	Eleme	01/17/14	sab									
35	RI	Gokana	01/15/14	sab	11/26/13	02/06/14	05/13/14	11/26/13	02/06/14	rena			05/13/14
36	RI	Egbema	02/02/14	sab									
37	RI	Egbema	02/14/14	sab									
38	RI	Egbema	02/14/14	sab									
39	RI	Egbema	02/14/14	sab	04/16/15	04/23/15	05/05/15						
40	RI	Egbema	01/31/14	sab									
41	RI	Bonny	01/07/14	sab									
42	RI	Bonny	01/07/14	sab									
43	RI	Eleme	02/08/14	sab									
44	RI	Egbema	02/01/14	sab									
45	RI	Egbema	01/31/14	sab									
46	RI	Bonny	01/07/14	ytd									
47	RI		01/12/14	cor									
48	RI	Degema	01/12/14	cor	01/17/14	08/15/15	08/18/15						
49	RI	Egbema	02/07/14	sab									
50	RI	Egbema	02/14/14	sab	05/18/14	05/24/14	07/30/14						06/30/14
51	RI	Egbema	02/07/14	sab									
52	RI	Egbema	02/14/14	sab									
53	RI	Egbema	02/09/14	sab									
54	RI	Egbema	02/12/14	sab									
55	RI	Egbema	02/12/14	sab									
56	RI	Bonny	02/05/14	sab									
57	RI	Etche	02/20/14	sab									
58	RI	Etche	02/20/14	sab									
59	RI	Etche	02/20/14	sab									
60	RI	Etche	02/20/14	sab	04/01/14	05/26/14	06/05/14	04/01/14	05/26/14	RENA			06/05/14
61	RI	Oyigbo	02/11/14	sab									

62	RI	Egbema	02/20/14	sab							
63	RI	Emuoha	02/17/14	sab	05/21/14	07/22/14	08/07/14				08/07/14
64	RI		01/07/14	cor							
65	RI		01/03/14	ytd							
66	RI		01/03/14	other:							
67	RI		01/02/14	cor							
68	RI	Egbema	02/02/14	eqf							
69	RI	Ah.-West	02/28/14	sab							
70	RI	Eleme	02/05/14	sab			10/17/14	10/13/14	10/17/14	Physical rem	10/17/14
71	RI	ONELGA	03/01/14	sab							
72	RI	Akuku-Tor	02/21/14	ytd							
73	RI		02/08/14	sab							
74	RI	Egbema	01/11/14	sab							
75	RI	Egbema	01/11/14	sab							
76	RI	Egbema	01/11/14	sab							
77	RI	Egbema	01/11/14	sab							
78	RI	Egbema	01/09/14	cor							
79	RI		01/09/14	cor							
80	RI	Bonny	03/06/14	sab							
81	RI	Gokana	03/06/14	sab							
82	RI	Gokana	03/06/14	sab							
83	RI	Gokana	03/06/14	sab							
84	RI	Eleme	03/06/14	sab			10/17/14	10/13/14	10/17/14	Physical rem	10/17/14
85	RI	Egbema	03/09/14	sab							
86	RI	Egbema	03/09/14	eqf	03/26/14	04/11/14	07/30/14				07/30/14
87	RI	Akuku-Tor	02/25/14	cor	03/03/14	04/30/15	05/02/15				05/02/15
88	RI	Ah.-West	03/08/14	sab							
89	RI	Obio/Akpo	03/03/14	sab							
90	RI	Gokana	02/17/14	sab							
91	RI	Etche	03/03/14	sab							
92	RI	Ah.-West	03/13/14	eqf	05/27/14	07/14/14	03/01/16				
93	RI	Gokana	03/05/14	sab							

94	RI	Gokana	03/05/14	sab							
95	RI	Gokana	03/04/14	sab							
96	RI	Ah.-West	03/18/14	sab	11/19/14	11/26/14	03/06/15				03/06/15
97	RI	Bonny	03/04/14	sab							
98	RI	Bonny	03/04/14	sab							
99	RI	Ah.-West	03/04/14	cor							
100	RI	Akuku-Tor	03/19/14	cor	03/21/14	08/11/15					
101	RI	Oyigbo	03/21/14	sab							
102	RI	Bonny	03/15/14	cor	03/15/14	03/11/15	03/25/15				
103	RI	Nembe	03/17/14	sab							
104	RI	Nembe	03/17/14	sab	03/17/14	11/17/14	12/10/14				
105	RI	Gokana	03/15/14	sab							
106	RI	Gokana	02/08/14	sab							
107	RI	Gokana	03/08/14	sab							
108	RI	Gokana	02/08/14	sab							
109	RI	Gokana	02/08/14	sab							
110	RI	Gokana	03/23/14	sab							
111	RI	Oyigbo	04/03/14	sab							
112	RI	Emohua	03/28/14	sab	04/08/14	04/09/14	04/15/14				04/15/14
113	RI	Brass	03/27/14	sab							
114	RI	Degema	01/25/14	sab							
115	RI		01/16/14	sab							
116	RI	Degema	01/18/14	sab							
117	RI	Emohua	04/02/14	sab							
118	RI	Emohua	03/19/14	sab							
119	RI	Egbema	04/10/14	cor							
120	RI	Egbema	04/15/14	sab							
121	RI	Egbema	04/15/14	sab							
122	RI	Egbema	04/02/14	sab							
123	RI	Etche	04/09/14	other:							
124	RI	Bonny	04/06/14	sab							
125	RI	Bonny	04/06/14	sab							

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126	RI	Obio/Akpo	04/09/14	sab										
127	RI	Ah.-West	04/15/14	eqf										
128	RI		04/15/14	sab										
129	RI	Ah.-West	04/15/14	sab										
130	RI	Degema	03/26/14	cor	03/26/14	04/21/14	08/24/15							
131	RI	Egbema	03/25/14	cor										
132	RI	Egbema	04/07/14	sab										
133	RI	Egbema	04/07/14	sab										
134	RI	Egbema	03/26/14	sab										
135	RI	Egbema	03/23/14	sab										
136	RI	Egbema	04/22/14	eqf										
137	RI	Egbema	04/22/14	sab										
138	RI	Bonny	04/06/14	sab										
139	RI	Degema	04/09/14	sab										
140	RI	Nembe	04/14/14	sab										
141	RI		04/10/14	cor										
142	RI		01/21/14											
143	RI	Akuku-Tor	04/24/14	sab										
144	RI	Akuku-Tor	04/08/14	ome	04/13/14	04/30/15	05/04/15						05/04/15	
145	RI	Ahoada-Ea	04/16/14	sab										
146	RI	Gokana	04/28/14	sab										
147	RI	Egbema	03/10/14	sab	05/29/14	06/11/14	07/10/14							
148	RI	Egbema	03/10/14	sab										
149	RI	Egbema	04/23/14	sab										
150	RI	Egbema	04/22/14	sab										
151	RI	Egbema	04/22/14	sab										
152	RI	Egbema	04/23/14	sab	08/02/14	08/07/14	08/30/14						08/30/14	
153	RI	Ah.-West	04/08/14	sab										
154	RI	Ah.-West	03/15/14	sab	10/30/14	11/17/15	03/04/15							
155	RI	Egbema	04/23/14	eqf										
156	RI	Tai	04/22/14	sab										
157	RI	Degema	04/24/14	sab	04/04/15	07/11/14	01/30/15							

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158	RI	Egbema	04/28/14	sab								
159	RI	Egbema	04/28/14	sab								
160	RI	Egbema	04/28/14	sab								
161	RI	Egbema	05/07/14	sab	08/02/14	08/07/14	08/30/14					08/30/14
162	RI	Degema	05/07/14	sab								
163	RI	Gokana	05/19/14	sab								
164	RI	Gokana	05/08/14	sab								
165	RI	Gokana	04/22/14	sab								
166	RI	Egbema	05/21/14	sab								
167	RI	Egbema	05/21/14	sab								
168	RI	Egbema	05/26/14	sab								
169	RI	Egbema	05/19/14	sab								
170	RI	Egbema	05/19/14	sab								
171	RI	Egbema	05/19/14	sab								
172	RI	Egbema	05/22/14	sab								
173	RI	Egbema	05/18/14	sab								
174	RI	Egbema	05/18/14	sab								
175	RI	Egbema	05/19/14	sab								
176	RI	Egbema	05/19/14	sab								
177	RI	Egbema	05/10/14	sab								
178	RI	Egbema	05/23/14	eqf								
179	RI	Egbema	05/24/14	sab								
180	RI	Egbema	05/24/14	sab								
181	RI	Egbema	06/19/14	sab								
182	RI	TAI	05/22/14	sab								
183	RI	Ogba/Egbe	05/18/14	sab								
184	RI	Akuku-Tor	01/23/14	ome								
185	RI	Egbema	06/03/14	sab								
186	RI	Egbema	06/03/14	sab								
187	RI	Egbema	06/03/14	sab								
188	RI	Egbema	06/03/14	sab								
189	RI	Egbema	06/03/14	sab								

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190	RI	ONELGA	05/01/14	sab										
191	RI	Egbema	05/01/14	sab										
192	RI	Silga	05/05/14	sab										
193	RI	Bonny	05/28/14	sab										
194	RI	Akuku-Tor	06/05/14	sab										
195	RI	Egbema	05/31/14	sab										
196	RI	Egbema	05/31/14	sab										
197	RI	Egbema	05/31/14	sab										
198	RI	Egbema	05/31/14	sab										
199	RI	Egbema	05/31/14	sab										
200	RI	Egbema	05/31/14	sab										
201	RI	Eleme	05/21/14	sab								Enhanced Natural Attenuation.		
202	RI	Eleme	05/21/14	sab										
203	RI		06/07/14	ome	06/18/14	04/05/15	05/30/15					NATURAL ATTENUATION		
204	RI	Obio/Akpo	06/03/14	sab								Enhanced Natural Attenuation -Insitu		
205	RI		05/31/14	sab										
206	RI	Gokana	05/31/14	sab								Enhanced Natural attenuation -Insitu		
207	RI		05/25/14	sab										
208	RI	Gokana	05/25/14	sab										
209	RI	Egbema	03/18/14	sab										
210	RI	Egbema	03/18/14	sab										
211	RI	Egbema	03/21/14	sab										
212	RI	Egbema	03/18/14	sab										

213	RI	Gokana	02/19/14	sab							
214	RI	Egbema	06/05/14	sab							
215	RI	Egbema	06/05/14	sab							
216	RI	Egbema	06/06/14	sab							
217	RI	Egbema	06/08/14	sab							
218	RI	Emohua	06/10/14	ome							
219	RI	Gokana	06/10/14	sab						Enhanced Natural Attenuation -Insitu	
220	RI	Egbema	03/26/14	sab							
221	RI	Ah.-West	05/24/14	sab							
222	RI	Ah.-West	05/18/14	sab							
223	RI		04/21/14	ytd							
224	RI	Egbema	02/07/14	ytd							
225	RI	Asari-Toru	06/06/14	sab							
226	RI	Andoni	06/04/14	sab							
227	RI		06/04/14	sab							
228	RI	Andoni	06/04/14	sab							
229	RI	Degema	03/28/14	sab							
230	RI	Degema	06/06/14	sab							
231	RI	Akuku-Tor	06/25/14	sab							
232	RI	Akuku-Tor	06/09/14	sab							
233	RI	Akuku-Tor	06/10/14	sab							
234	RI	Egbema	06/29/14	sab							
235	RI	Egbema	06/10/14	eqf							
236	RI	Egbema	06/08/14	sab							
237	RI	Ah.-West	07/01/14	sab							
238	RI	Akuku-Tor	05/19/14	cor							
239	RI	Ikwere	07/02/14	sab	07/03/14	11/20/14	02/03/15				
240	RI	Egbema	07/02/14	cor							
241	RI	Akuku-Tor	05/09/14	cor	06/17/14	04/30/15	05/04/15				05/04/15

242	RI	Ah.-West	06/02/14	sab	05/09/15	05/14/15	05/28/15			Remediation	05/28/15
243	RI	Ah.-West	06/02/14	sab							
244	RI	Egbema	07/11/14	sab							
245	RI	Egbema	03/27/14	sab							
246	RI	Egbema	07/01/14	sab							
247	RI	Onelga	07/01/14	sab							
248	RI	Egbema	07/04/14	sab							
249	RI	Egbema	07/04/14	sab							
250	RI	Egbema	07/04/14	sab							
251	RI	Egbema	07/04/14	sab							
252	RI	Egbema	07/01/14	sab							
253	RI	Egbema	07/15/14	sab							
254	RI	Ah.-West	07/15/14	sab							
255	RI	Degema	07/16/14	sab							
256	RI	Bonny	07/05/14	sab							
257	RI	Gokana	07/10/14	sab	08/08/14	01/21/16	02/11/16				
258	RI	Gokana	07/23/14	sab							
259	RI	Egbema	05/15/14	sab							
260	RI	Egbema	07/20/14	eqf							
261	RI	Egbema	07/20/14	eqf							
262	RI	Bonny	06/20/14	sab						Enhanced Natural Attenuation -Insitu	
263	RI	Akuku-Tor	05/19/14	cor	05/19/14	04/30/15	05/08/15			Enhanced Natural Attenuation .	05/08/15
264	RI	Akuku-Tor	02/21/14	cor	02/21/14	04/30/15	05/04/15				05/04/15
265	RI	Gokana	04/22/14	sab							
266	RI	degema	07/24/14	sab	07/24/14	04/16/15	04/24/15				
267	RI	Oyigbo	07/06/14	sab							

268	RI	degema	07/24/14	sab							
269	RI	Gokana	07/27/14	sab							
270	RI	Gokana	07/28/14	sab							
271	RI	Gokana	07/29/14	sab							
272	RI	Egbema	07/16/14	eqf							
273	RI	Egbema	07/24/14	eqf							
274	RI	Degema	07/24/14	sab							
275	RI	Andoni	06/21/14	sab	06/21/14	01/30/15	03/25/15				
276	RI	Ah.-West	07/26/14	eqf	04/08/15	04/25/15	04/30/15				
277	RI		08/09/14	other:							
278	RI	Ah.-West	04/27/14	sab							
279	RI	Ah.-West	04/26/14	sab							
280	RI	Ah.-West	08/07/14	sab							
281	RI	Akuku-Tor	07/08/14	cor							
282	RI	Eleme	07/30/14	sab							
283	RI	Egbema	01/27/14	sab							
284	RI	Ah.-West	01/27/14	sab							
285	RI	Egbema	01/28/14	sab							
286	RI	Emuoha	07/29/14	sab							
287	RI	Gokana	06/27/14	sab							
288	RI	Gokana	06/27/14	sab							
289	RI	Gokana	06/27/14	sab							
290	RI	Egbema	01/31/14	sab							
291	RI	Egbema	01/31/14	sab							
292	RI	Ah.-West	01/27/14	sab							
293	RI	Egbema	01/28/14	ytd							
294	RI	Egbema	01/28/14	ytd							
295	RI	Egbema	02/12/14	ytd							
296	RI	Akuku-Tor	01/31/14	sab							
297	RI	Nembe	02/05/14	sab							
298											
299	RI		02/05/14	ytd							

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300	RI	Gokana	02/20/14	ytd								
301	RI	Akuku-Tor	08/07/14	ytd								
302	RI	Ah.-West	08/15/14	ome			01/29/16			Remediation	01/29/16	
303	RI	Egbema	02/05/14	sab								
304	RI	Akuku-Tor	08/05/14	eqf								
305	RI	Egbema	07/24/14	eqf	04/03/15	04/05/15	04/30/15					
306	RI	Egbema	08/18/14	cor								
307	RI	Ah.-West	08/19/14	eqf								
308	RI	Oyigbo	08/14/14	sab								
309	RI	Oyigbo	08/09/14	sab								
310	RI	Oyigbo	08/09/14	sab								
311	RI	Nembe	08/19/14	sab								
312	RI	Egbema	08/22/14	sab								
313	RI	Egbema	08/24/14	sab								
314	RI	Egbema	08/24/14	sab								
315	RI	Egbema	08/22/14	sab								
316	RI	Egbema	08/24/14	eqf								
317	RI	Egbema	07/27/14	eqf								
318	RI	Eleme	08/08/14	sab								
319	RI	Akuku-Tor	08/07/14	sab	08/08/14	12/12/14	07/09/15					
320	RI	Akuku-Tor	08/05/14	cor	08/06/14	04/30/15	05/08/15				05/08/15	
321	RI	Egbema	08/31/14	sab								
322	RI	Egbema	09/02/14	sab								
323	RI	Egbema	09/03/14	sab								
324	RI	Bonny	08/09/14	sab	11/22/14	03/26/15	04/24/15					
325	RI	Gokana	08/21/14	sab								
326	RI	Egbema	09/04/14	eqf								
327	RI	Ikwere	09/03/14	eqf								
328	RI	Obio/Akpo	09/13/14	sab								
329	RI	Oguta	09/03/14	sab								
330	RI	Gokana	09/19/14	sab								
331	RI	Egbema	09/20/14	sab	02/18/15	03/15/15	03/16/15					

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332	RI	Egbema	09/07/14	sab									
333	RI	Egbema	09/07/14	sab									
334	RI	Egbema	09/21/14	sab									
335	RI	ah	09/23/14	sab									
336	RI	Egbema	09/07/14	sab									
337	RI	Egbema	09/12/14	sab									
338	RI	Ikwerre	09/27/14	sab									
339	RI	Egbema	10/04/14	sab									
340	RI	Ah.-West	10/18/14	sab	03/07/15	03/15/15	03/16/15						
341	RI	Egbema	10/21/14	cor									
342	RI	Gokana	07/21/14	sab									
343	RI	Egbema	09/28/14	sab									
344	RI	Egbema	09/28/14	sab									
345	RI	Ah.-West	10/11/14	sab									
346	RI	Gokana	08/21/14	sab									
347	RI	Tai	10/13/14	sab									
348	RI	Akuku-Tor	11/11/14	eqf									
349	RI	Ah.-West	10/05/14	eqf									
350	RI	Ah.-West	09/26/14	sab									
351	RI	Egbema	11/11/14	eqf									
352	RI	Emuoha	11/14/14	cor									
353	RI	Degema	11/11/14	cor	11/15/14	01/22/16	01/28/16						
354	RI	Etche	11/12/14	cor									
355	RI	Ah.-West	09/12/14	sab									
356	RI	Ikwere	10/15/14	eqf									
357	RI	Etche	11/11/14	sab	11/13/14	08/06/15	08/19/15	05/19/02	RENA Method was used for t				
358	RI	Egbema	10/28/14	eqf									
359	RI	Egbema	09/28/14	sab									
360	RI	Egbema	09/28/14	sab	03/07/15	03/15/15	03/17/15						
361	RI	Ah.-West	11/13/14	sab	08/06/15	08/18/15	09/16/15						
362	RI	Emuoha	11/14/14	sab	11/18/16	08/07/15	08/20/15	06/03/15	RENA METHOD				
363	RI	Ah.-West	11/22/14	eqf	06/18/15	06/26/15	09/16/15						

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364	RI	Egbema	08/28/14	sab										
365	RI	Ah.-West	08/03/14	sab										
366	RI	Bonny	11/02/14	sab		09/03/15		09/07/15						
367	RI	Okrika	11/16/14	sab										
368	RI	Bonny	11/02/14	sab										
369	RI	Okrika	11/16/14	sab										
370	RI	Egbema	10/05/14	eqf										
371	RI	Egbema	09/18/14	sab										
372	RI	Egbema	10/07/14	sab										
373	RI	Egbema	10/07/14	eqf										
374	RI	Bonny	11/17/14	sab										
375	RI	Ah.-West	11/25/14	eqf										
376	RI	Bonny	11/13/14	sab										
377	RI	Bonny	11/22/14	sab	11/22/14	02/28/15		04/21/15						
378	RI	Bonny	11/22/14	sab				08/26/15						
379	RI	Akuku-Tor	11/21/14	cor	11/21/14	12/23/15		02/04/16						
380	RI	Egbema	12/05/14	eqf										
381	RI	Egbema	11/25/14	sab	04/01/15	05/22/15		02/18/16						
382	RI	Egbema	11/25/14	sab	04/01/15	05/22/15		02/18/16						
383	RI	Ah.-West	11/26/14	eqf										
384	RI	Egbema	11/21/14	eqf	05/03/15	05/17/15		07/23/15						
385	RI	Egbema	12/06/14	sab										
386	RI	Egbema	12/12/14	sab										
387	RI	Tai	10/15/14	eqf										
388	RI	Obio/Akpo	11/05/14	sab										
389	RI	Brass	08/10/14	sab										
390	RI	Egbema	08/24/14	eqf										
391	RI	Egbema	09/09/14	sab										
392	RI	WALGA	12/14/14	sab										
393	RI	Ah.-West	12/16/14	sab										
394	RI	Egbema	12/30/14	sab										
395	RI	Egbema	12/28/14	sab										

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396	RI	Egbema	12/28/14	sab										
397	RI	Egbema	12/28/14	eqf										
398	RI	Gokana	11/20/14	sab										
399	RI	Gokana	11/26/14	sab										
400	RI	Gokana	11/26/14	sab										
401	RI	Emuoha	11/28/14	other:										
402	RI	Egbema	12/28/14	eqf										
403	RI	Egbema	12/28/14	sab										
404	RI	Bonny	11/11/14	sab										
405	RI	Ah.-West	10/12/14	sab										
406	RI	Ah.-West	12/23/14	sab										
407	RI	Bonny	08/02/14	other:	08/16/14		03/27/15		08/17/14					
408	RI	Bonny	08/15/14	cor	08/15/14		03/26/15		04/24/15					
409	RI	Gokana	11/07/14	sab										
410	RI	Egbema	12/28/14	sab										
411	RI	Egbema	12/28/14	sab										
412	RI	Oyigbo	12/25/14	sab	12/27/14		04/06/16		04/28/16					
413	RI	Okrika	10/20/14	sab										
414	RI	Okrika	10/28/14	sab	10/31/14	cmmnt,cmpny,dpr,mltry,mnstry,nosdra								
415	RI	Obio/Akpo	12/11/14	sab										
416	RI	Degema	12/17/14	sab	12/19/14		01/22/16		02/03/16					
417	RI	Bonny	10/15/14	sab										
418	RI	obibgo	09/28/14	sab										
419	RI	Obio/Akpo	08/07/14	sab	07/08/14		01/12/15		02/10/15					
420	RI	Obio/Akpo	08/01/14	sab	07/08/14		01/12/15		02/10/15					
421	RI	Gokana	07/15/14	sab										
422	RI	Akuku-Tor	08/27/14	cor										
423	RI	Degema	11/13/14	eqf	11/15/14		01/20/16		02/04/16					
424	RI	Brass	12/02/14	sab										
425	RI	Emuoha	10/23/14	sab										
426	RI	Emohua	10/26/14	sab										
427	RI	Emuoha	10/26/14	sab										

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428	RI	Emuoha	10/23/14	sab								
429	RI	Emuoha	09/11/14	sab	12/06/14	06/03/15	06/23/15					
430	RI	Emohua	12/06/14	sab	12/06/14	06/03/15	06/25/15					
431	RI	Emuoha	11/11/14	sab	11/14/15	08/07/15	08/20/15	06/03/15	RENA METHOD			
432	RI	Akuku-Tor	10/21/14	ytd								
433	RI	Egbema	10/18/14	other:								
434	RI	Egbema	10/01/14	sab								
435	RI	Egbema	10/01/14	sab								
436	RI	Egbema	10/01/14	sab								
437	RI	Egbema	10/18/14	other:								
438	RI	Ah.-West	05/18/14	sab								
439	RI	Oyigbo	07/19/14	sab								
440	RI	Ah.-West	09/02/14	sab								
441	RI	Bonny	07/24/14	sab								
442	RI	Gokana	11/30/14	sab								
443	RI	Obio-Akpo	12/14/14	sab								
444	RI	Gokana	12/22/14	sab								
445	RI	Egbema	10/11/14	sab								
446	RI	Ah.-West	07/11/14	sab								
447	RI	Ah.-West	07/12/14	sab								
448	RI		09/22/14	sab								
449	RI	Egbema	09/22/14	sab								
450	RI	Egbema	10/06/14	sab								
451	RI	Egbema	10/06/14	sab								
452	RI	Egbema	10/06/14	sab								
453	RI	Akuku-Tor	11/11/14	cor								
454	RI	Ah.-West	02/20/14	ytd								
455	RI	Egbema	03/22/14	sab								
456	RI	Egbema	03/22/14	ytd								
457	RI	Egbema	03/29/14	ytd								
458	RI	Egbema	03/07/14	ytd								
459	RI	Egbema	04/05/14	ytd								

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460	RI		04/27/14	eqf								
461	RI	Umudike	11/02/14	sab								
462	RI	Umudike	11/02/14	sab	11/05/14	09/09/15		11/24/15				
463	RI	Akuku-Tor	06/26/14	sab	06/26/14	04/30/15		04/30/15				04/30/15
464	RI	Akuku-Tor	08/27/14	ome	08/30/14	04/30/15		05/08/15				05/08/15
465	RI	Tai	11/05/14	sab								
466	RI	Bomy	08/28/14	sab								
467	RI	Ah.-West	05/18/14	sab								
468	RI	Emuoha	05/04/14	sab	05/07/14	01/13/15		04/16/15				

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S/No	State	LGA	Incident Date	Cause	CleanupDate	CleanupCompleteDate	PostCleanupInspect.Date	Remed.Start	Remed.End	FinalSamplingDate	Certif.Date
1	RI	Ah.-West	01/03/15	sab							
2	RI	Ah.-West	01/03/15	other:							
3	RI	Egbema	01/11/15	eqf							
4	RI	Egbema	01/11/15	eqf							
5	RI	Egbema	01/28/15	eqf							
6	RI	Ah.-West	01/25/15	sab							
7	RI	Ikwere	01/30/15	eqf							
8	RI	Degema	01/18/15	sab			08/24/15				
9	RI	Akuku-Toru	01/17/15	sab							
10	RI	Akuku-Toru	01/22/15	sab							
11	RI	Egbema	01/25/15								
12	RI	Obio/Akpor	02/07/15	eqf							
13	RI	Ah.-West	01/31/15	sab							
14	RI	Ah.-West	02/01/15	sab							
15	RI	Egbema	02/14/15	sab							
16	RI	Egbema	01/26/15	sab							
17	RI	Etche	02/18/15	sab							
18	RI	Obio/Akpor	02/17/15	sab							
19	RI	Eleme	02/21/15	sab							
20	RI	Egbema	02/25/15	sab							
21	RI	Egbema	02/24/15	sab							
22	RI	Bonny	01/29/15	sab							
23	RI		01/22/15	sab							
24	RI	Bonny	02/20/15	sab							
25	RI	Bonny	02/23/15	sab	01/19/15	07/28/15	08/24/16				
26	RI	Egbema	02/25/15	sab							
27	RI	Gokana	02/19/15	sab							
28	RI	Ah.-West	03/05/15	sab							
29	RI	Degema	02/25/15	sab							
30	RI	Egbema	02/11/15	sab							
31	RI	Egbema	02/11/15	sab							
32	RI	Egbema	02/15/15	sab							
33	RI	Obio/Akpor	03/09/15	sab							
34	RI	Obio/Akpor	03/02/15								
35	RI	Ikwere	03/02/15	sab							
36	RI	Ikwere	03/02/15	sab							

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37	RI	Tai	02/10/15	sab								
38	RI	Eleme	02/04/15	sab								
39	RI	Egbema	03/06/15	cor								
40	RI	Egbema	03/20/15	eqf								
41	RI	Ah.-West	01/21/15	sab								
42	RI	Etche	02/20/15	sab								
43	RI	Degema	02/23/15	sab								
44	RI	Yenagoa	02/28/15	sab	04/14/15	05/19/15	05/20/15					
45	RI	Egbema	02/14/15	eqf	08/07/15	08/16/15						
46	RI	Bonny	03/06/15	sab								
47	RI	Bonny	03/12/15	sab								
48	RI	Ah.-West	04/02/15	sab								
49	RI	Egbema	04/14/15	sab								
50	RI	Egbema	04/24/15	sab								
51	RI	Egbema	04/17/15	sab								
52	RI		04/26/15	cor								
53	RI	Ikwere	05/02/15	sab								
54	RI	Ikwere	05/02/15	sab	04/29/15	05/18/15	04/19/16					
55	RI	Oyigbo	04/26/15	cor	04/29/15	05/18/15	04/20/16					
56	RI		04/02/15	sab								
57	RI	Egbema	04/17/15	sab	05/28/15	06/17/15	06/06/15					
58	RI	onelga	03/06/15	cor								
59	RI	Egbema	05/04/15	eqf								
60	RI		05/05/15	sab								
61	RI	Emohua	03/12/15	sab								
62	RI		04/14/15	sab	04/21/15	05/05/16	06/15/16					
63	RI	Emohua	02/21/15	sab								
64	RI	Obio/Akpor	05/05/15	sab								
65	RI	Onelga	02/09/15	eqf								
66	RI	Ah.-West	01/21/15	sab								
67	RI	Ah.-West	01/20/15	sab								
68	RI		05/16/15	sab								
69	RI	Etche	05/12/15	sab								
70	RI		05/19/15	sab								
71	RI		05/16/15	eqf								
72	RI	Egbema	03/11/15	sab								
73	RI	Andoni	03/17/15	sab								
74	RI	Gokana	03/20/15	sab								
75	RI	Gokana	05/12/15	sab								
76	RI	Gokana	03/30/15	sab								

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77	RI		03/17/15	sab								
78	RI	Andoni	05/07/15	sab								
79	RI	Akuku-Toru	05/15/15	cor								
80	RI	Ah.-West	05/12/15	sab								
81	RI	Ah.-West	05/12/15	sab								
82	RI	Bonny	04/30/15	cor								
83	RI	Onelga	05/27/15	cor								
84	RI	Onelga	05/26/15	sab								
85	RI	Onelga	05/30/15	sab								
86	RI	Oyigbo	05/18/15	sab								
87	RI		03/12/15	sab			03/09/16	09/07/15				
88	RI	Ah.-West	06/12/15	sab								
89	RI		03/16/15	sab								
90	RI	Eleme	05/20/15	sab						03/14/16		
91	RI	Egbema	06/13/15	sab								
92	RI	Bonny	04/29/15	cor								
93	RI	Bonny	05/09/15	sab								
94	RI	Eleme	05/21/15	sab				03/11/16	04/01/16	08/08/16		
95	RI	Gokana	05/27/15	sab								
96	RI	Tai	05/28/15	sab								
97	RI	Yenagoa	01/13/15	sab	02/14/15	03/14/15	05/21/15					
98	RI	Gokana	05/28/15	sab								
99	RI		02/11/15	sab								
100	RI	Ah.-West	05/26/15	sab								
101	RI	Onelga	05/17/15	sab								
102	RI	Onelga	05/17/15	sab								
103	RI	Onelga	05/17/15	sab								
104	RI	Gokana	06/04/15	sab								
105	RI	Gokana	06/08/15	sab								
106	RI	Gokana	05/28/15	sab								
107	RI	Gokana	06/06/15	sab								
108	RI	Ah.-West	05/20/15	sab								
109	RI	Ah.-West	05/20/15	sab								
110	RI	Onelga	03/11/15	sab								
111	RI	Ah.-West	05/20/15	sab								
112	RI	Ah.-West	05/20/15	sab								
113	RI	Ah.-West	05/20/15	sab								
114	RI	Onelga	04/14/15	sab								
115	RI	Egbema	06/01/15	sab								
116	RI	Egbema	06/01/15	sab								

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117	RI	Egbema	06/01/15	sab								
118	RI	Egbema	06/02/15	sab								
119	RI	Egbema	06/02/15	sab								
120	RI	Degema	04/19/15	sab								
121	RI	Obio/Akpor	03/10/15	sab								
122	RI	Degema	04/08/15	sab								
123	RI	Egbema	06/03/15	sab								
124	RI	Eleme	06/24/15	sab								
125	RI	Gokana	06/30/15	sab								
126	RI	Onelga	06/18/15	sab								
127	RI	Onelga	06/29/15	sab	08/02/15	08/08/15	03/08/15					
128	RI	Ah.-West	05/25/15	sab								
129	RI	Ah.-West	05/22/15	sab								
130	RI	Ah.-West	05/22/15	sab								
131	RI	Ah.-West	05/22/15	sab								
132	RI		05/22/15	sab								
133	RI		05/20/15	sab								
134	RI		05/20/15	sab								
135	RI		05/20/15	sab								
136	RI		06/18/15	eqf								
137	RI	Egbema	06/18/15	eqf								
138	RI	Egbema	06/18/15	eqf								
139	RI	Ah.-West	05/20/15	sab								
140	RI	Ah.-West	05/20/15	sab								
141	RI	Ah.-West	05/21/15	sab	08/06/15	09/15/15	09/14/15					
142	RI	Ah.-West	05/21/15	sab								
143	RI	Egbema	06/03/15	sab								
144	RI	Abua-Odual	06/02/15	sab								
145	RI	obigbo	07/02/15	sab								
146	RI	Bonny	07/05/15	sab								
147	RI	Bonny	07/05/15	sab								
148	RI	Bonny	07/05/15	sab								
149	RI	Egbema	03/01/15	cor								
150	RI	Onelga	06/29/15	sab		04/28/16	07/27/16					
151	RI	Onelga	06/28/15	sab		04/28/16	07/27/16					
152	RI	Egbema	06/03/15	sab								
153	RI	Obigbo	06/27/15	sab	06/30/15	01/27/16	03/24/16					
154	RI	Onelga	06/28/15	sab								
155	RI		06/09/15	sab								
156	RI		06/09/15	sab								

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157	RI		04/27/15	eqf								
158	RI	Degema	06/09/15	sab								
159	RI	Egbema	06/05/15	sab								
160	RI	Degema	06/23/15	eqf								
161	RI	Bonny	06/26/15	ome								
162	RI	Egbema	06/05/15	sab								
163	RI	Degema	06/08/15	sab								
164	RI	Ah.-West	07/23/15	sab								
165	RI		07/25/15	eqf								
166	RI	ELEN-KALA	07/08/15	sab								
167	RI	Bonny	06/16/15	sab								
168	RI	Abua-Odual	07/20/15	sab	07/30/15	02/24/16	07/30/16					
169	RI	Gokana	07/28/15	sab								
170	RI	Egbema	06/05/15	sab								
171	RI	Egbema	06/05/15	sab								
172	RI	Ah.-West	07/23/15	sab								
173	RI	Egbema	06/05/15	sab								
174	RI	Egbema	06/05/15	sab								
175	RI	Egbema	06/03/15	sab								
176	RI	Etche	06/26/15	eqf								
177	RI	Egbema	07/09/15	sab								
178	RI	Andoni	07/06/15	sab	07/07/15	01/21/16	02/11/16					
179	RI	Ikwere	08/14/15	sab								
180	RI	Emuoha	08/16/15	sab								
181	RI	Emuoha	08/16/15	sab								
182	RI	Egbema	07/11/15	sab								
183	RI	Egbema	07/11/15	sab								
184	RI	ONELGA	07/11/15	sab								
185	RI	Egbema	07/11/15	sab								
186	RI		07/09/15	sab								
187	RI	Ah.-West	08/23/15	sab								
188	RI	Egbema	08/28/15	sab								
189	RI	Bonny	08/25/15	sab	08/25/15	01/27/16	02/10/16					
190	RI	Akuku-Toru	07/31/15									
191	RI	Egbema	08/25/15	cor	11/06/15	11/19/15	03/08/16					
192	RI	Egbema	08/17/15	cor								
193	RI	BONNY	07/05/15	sab								
194	RI	Emohua	06/22/15	sab								
195	RI	Abua-Odual	08/22/15	sab								
196	RI	Abua-Odual	08/22/15	sab								

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197	RI	Onelga	05/18/15	eqf								
198	RI		09/06/15	sab								
199	RI	Onelga	09/13/15	sab								
200	RI	Emohua	08/31/15	sab								
201	RI		09/15/15	sab								
202	RI	Onelga	09/16/15	sab								
203	RI	Onelga	09/20/15	sab								
204	RI		09/20/15	sab								
205	RI	Abua-Odual	07/07/15	sab								
206	RI	Akuku-Toru	08/31/15	sab								
207	RI	Etche	09/13/15	sab								
208	RI	Tai	09/12/15	sab								
209	RI	OYIBGO	09/07/15	cor								
210	RI	Akuku-Toru	02/20/15	sab	02/21/15	02/02/16	06/22/16					
211	RI		09/11/15	sab								
212	RI	Abua-Odual	09/26/15	sab								
213	RI	Ikwerre	09/21/15	eqf								
214	RI	Ikwere	09/21/15	eqf								
215	RI	Abua-Odual	10/09/15	eqf								
216	RI	Egbema	10/03/15	sab								
217	RI	Egbema	10/07/15	sab								
218	RI	Onelga	10/21/15	sab								
219	RI	Tai	09/12/15	sab								
220	RI	Etche	09/13/15	sab								
221	RI	Andoni	09/28/15	cor								
222	RI	Oyigbo	09/07/15	cor								
223	RI	Ah.-West	10/03/15	sab								
224	RI	Onelga	10/25/15	sab								
225	RI	Onelga	10/25/15	sab								
226	RI	Onelga	09/20/15	sab								
227	RI	Onelga	11/05/15	sab								
228	RI	Onelga	11/06/15	sab								
229	RI		10/26/15	sab								
230	RI	Onelga	11/06/15	sab								
231	RI	Onelga	11/06/15	cor								
232	RI	Onelga	11/06/15	cor								
233	RI	Onelga	11/04/15	sab								
234	RI	Bonny	11/01/15	sab								
235	RI	Bonny	10/30/15	sab								
236	RI		11/05/15	other:Mystery								

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237	RI	Ah.-West	10/19/15	cor								
238	RI	Onelga	11/15/15	sab								
239	RI		09/01/15	sab			02/19/16					
240	RI	Ah.-West	07/30/15	eqf	12/02/15	12/15/15	03/01/16					
241	RI		10/17/15	sab			02/04/16					
242	RI	Onelga	10/29/15	sab								
243	RI	Emohua	09/11/15	sab								
244	RI	Gokana	11/09/15	sab								
245	RI	Gokana	11/09/15	sab								
246	RI	Onelga	11/17/15	sab								
247	RI	Bonny	11/01/15	sab								
248	RI	Adoni	11/10/15	sab								
249	RI	Akuku-Toru	11/01/15	internal erosion								
250	RI		05/11/15	sab								
251	RI	Onelga	11/17/15	sab								
252	RI	Ah.-West	04/11/15	eqf								
253	RI	Onelga	03/22/15	eqf								
254	RI		03/22/15	eqf								
255	RI	Onelga	12/10/15	sab								
256	RI	Egbema	09/26/15	sab								
257	RI	Egbema	11/01/15	sab								
258	RI		11/22/15	sab								
259	RI	Etche	11/04/15	sab								
260	RI	Abua-Odual	12/17/15	sab								
261	RI	Akuku-Toru	12/24/15	sab								
262	RI	Abua-Odual	04/04/15	sab								
263	RI	SILGA	07/19/15	eqf	09/02/15	09/11/15	11/11/15			11/11/15		
264	RI	Bonny	12/01/15	sab								
265	RI	Eleme	11/30/15	sab								
266	RI		07/21/15	sab								
267	RI		07/09/15	sab								
268	RI		07/31/15	sab								
269	RI		07/31/15	sab								
270	RI	Onelga	10/07/15	sab								
271	RI	Onelga	09/15/15	sab								
272	RI	Onelga	09/11/15	cor								
273	RI	Oguta	11/20/15	sab								
274	RI	Onelga	12/03/15	sab								
275	RI	Onelga	12/03/15	eqf								
276	RI		12/22/15	eqf								

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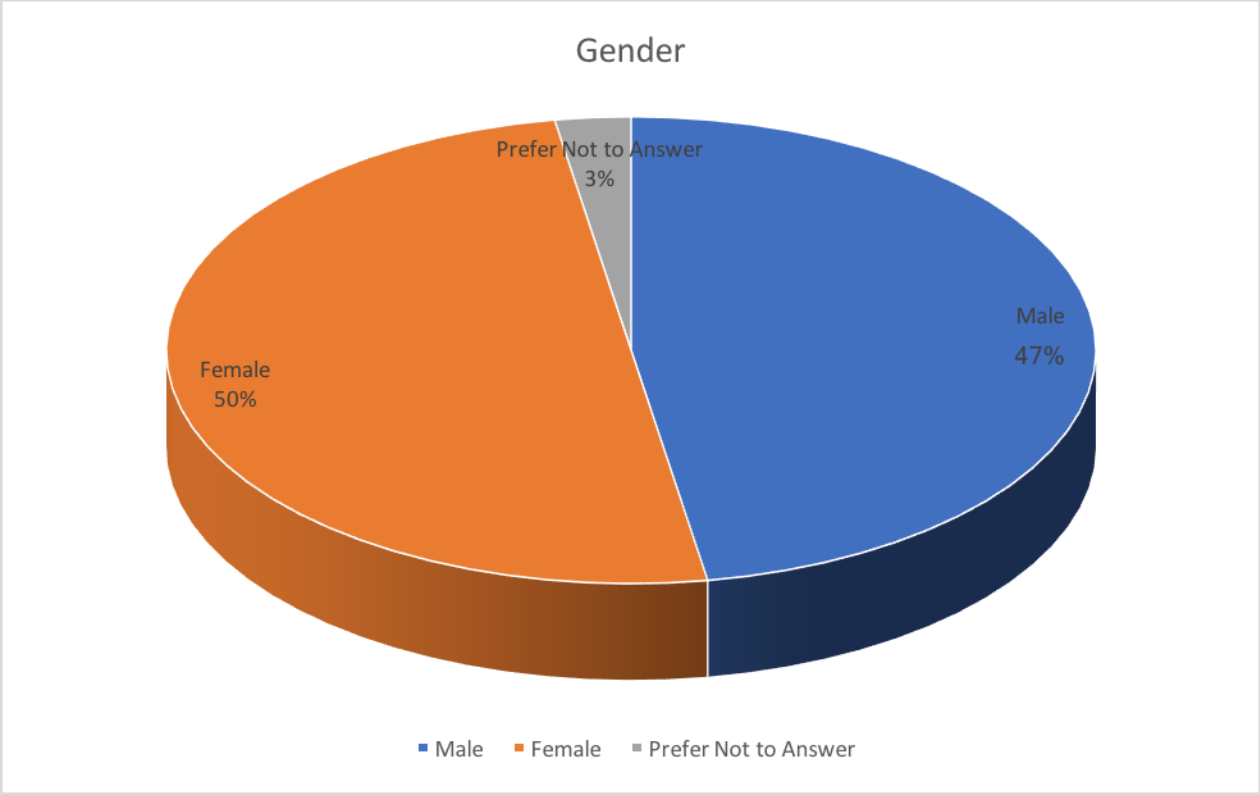
277	RI	Ah.-West	07/12/15	sab							
278	RI	Onelga	09/10/15	eqf							
279	RI		11/01/15	eqf							
280	RI	Gokana	12/30/15	sab							
281	RI	Oyigbo	10/20/15	NIL							
282	RI	Onelga	09/29/15	sab							
283	RI	Awe	10/21/15	sab							
284	RI	Tai	08/19/15	sab							
285	RI	Gokana	09/10/15	sab							
286	RI	Tai	09/07/15	sab							
287	RI		12/10/15	sab							
288	RI	Onelga	09/10/15	ome							
289	RI	Onelga	06/03/15	sab							
290	RI	Onelga	06/05/15	sab							
291	RI	Obio/Akpor	10/17/15	sab							
292	RI	Onelga	06/06/15	sab							
293	RI	Onelga	06/06/15	sab							
294	RI		12/11/15	sab			03/07/16				
295	RI		12/12/15	sab							
296	RI	Gokana	09/10/15	sab							

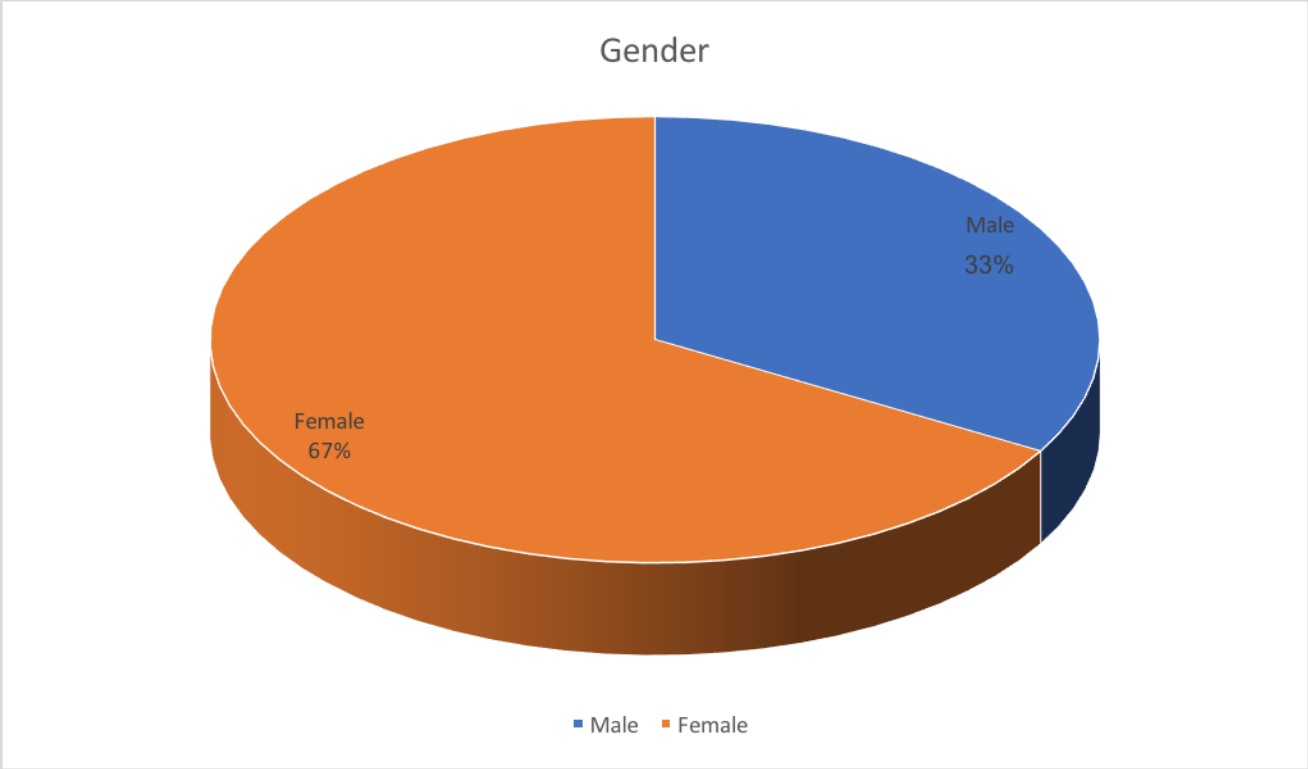
APPENDIX K

Figure 1: Gender Distribution of Participants (South Africa)



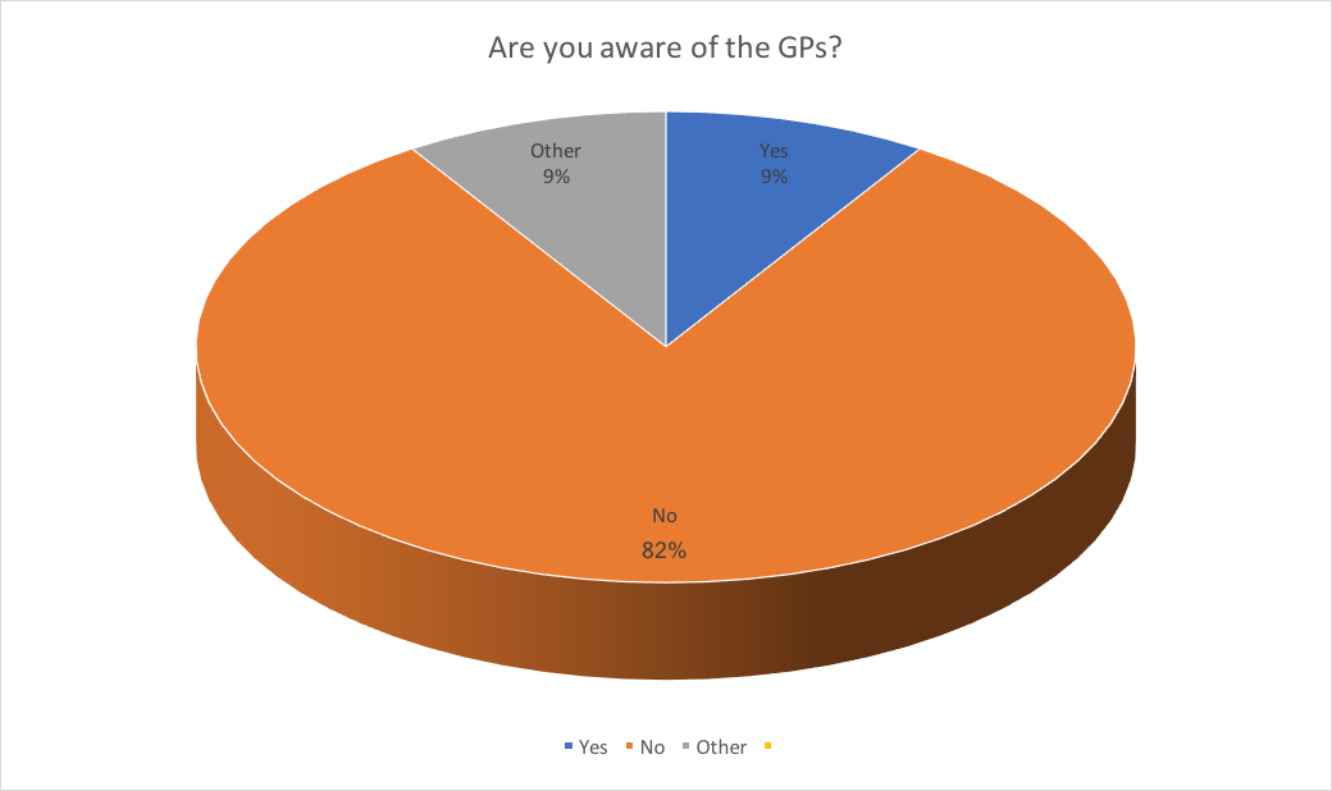
APPENDIX L

Figure 2: Gender Distribution of Participants (Nigeria)



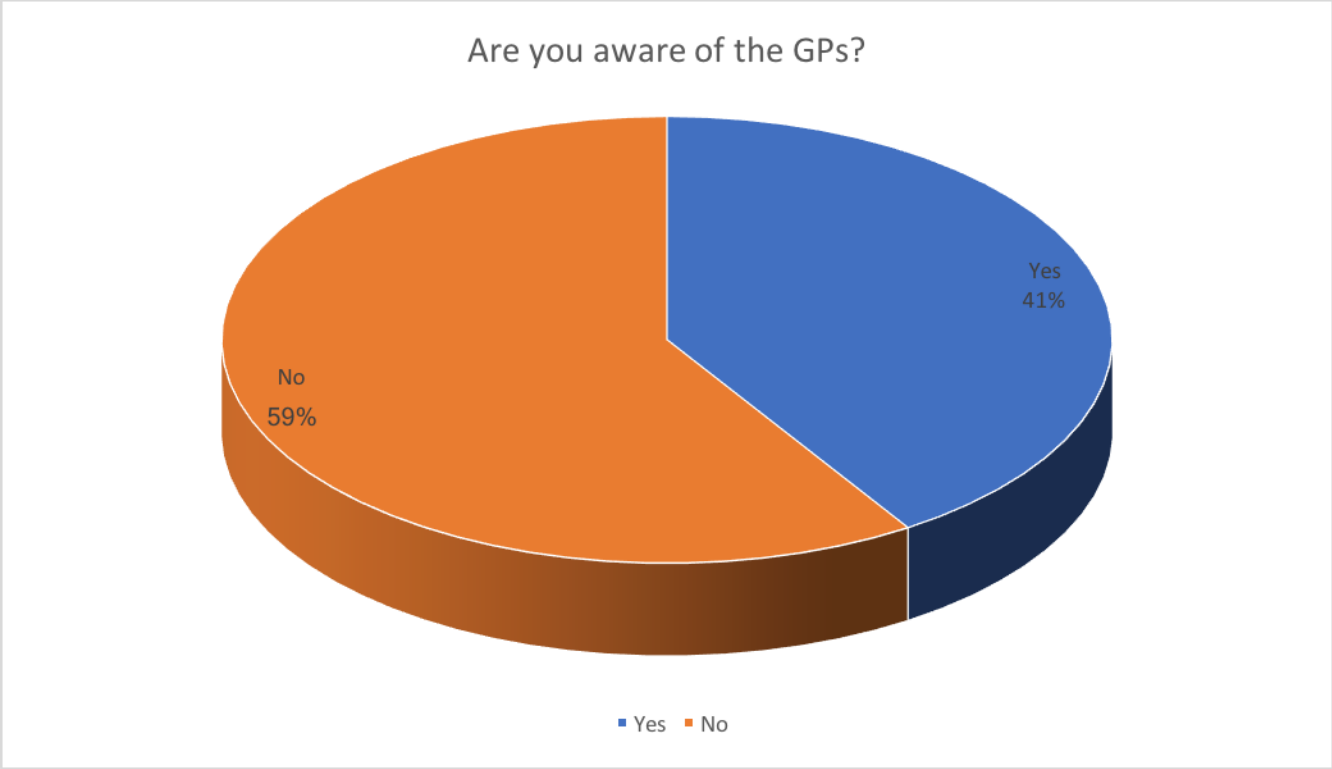
APPENDIX M

Figure 3: Knowledge of the GPs (South Africa)



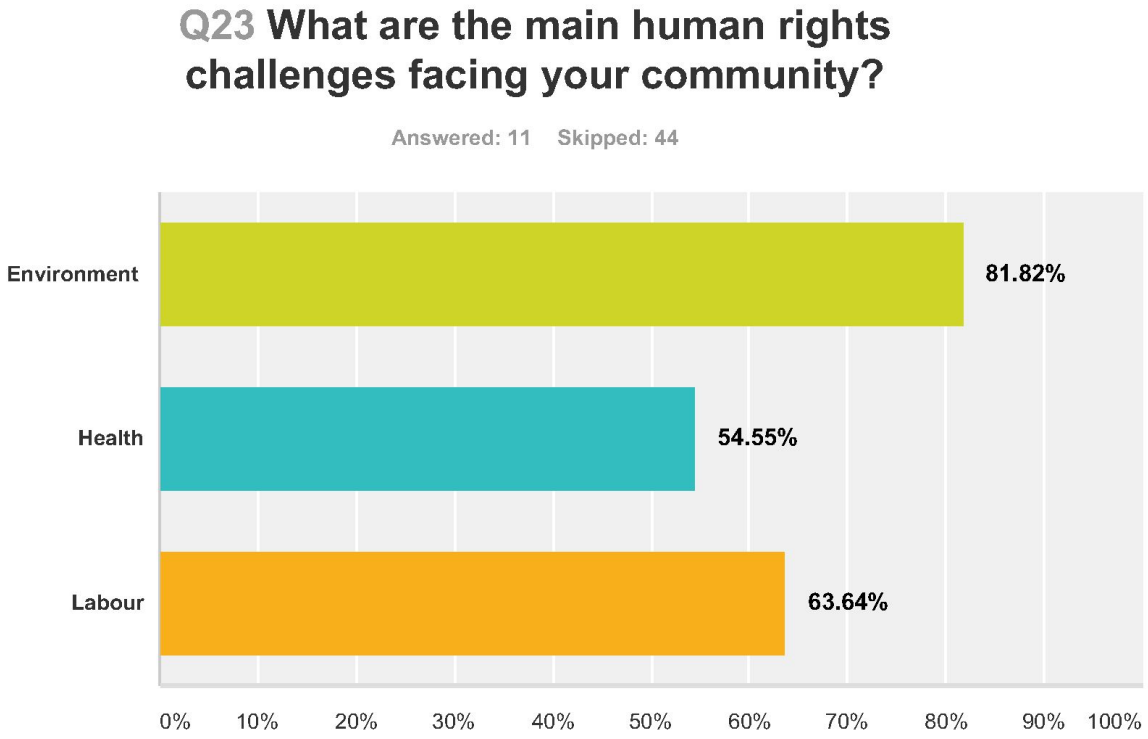
APPENDIX N

Figure 4: Knowledge of the GPs (Nigeria)



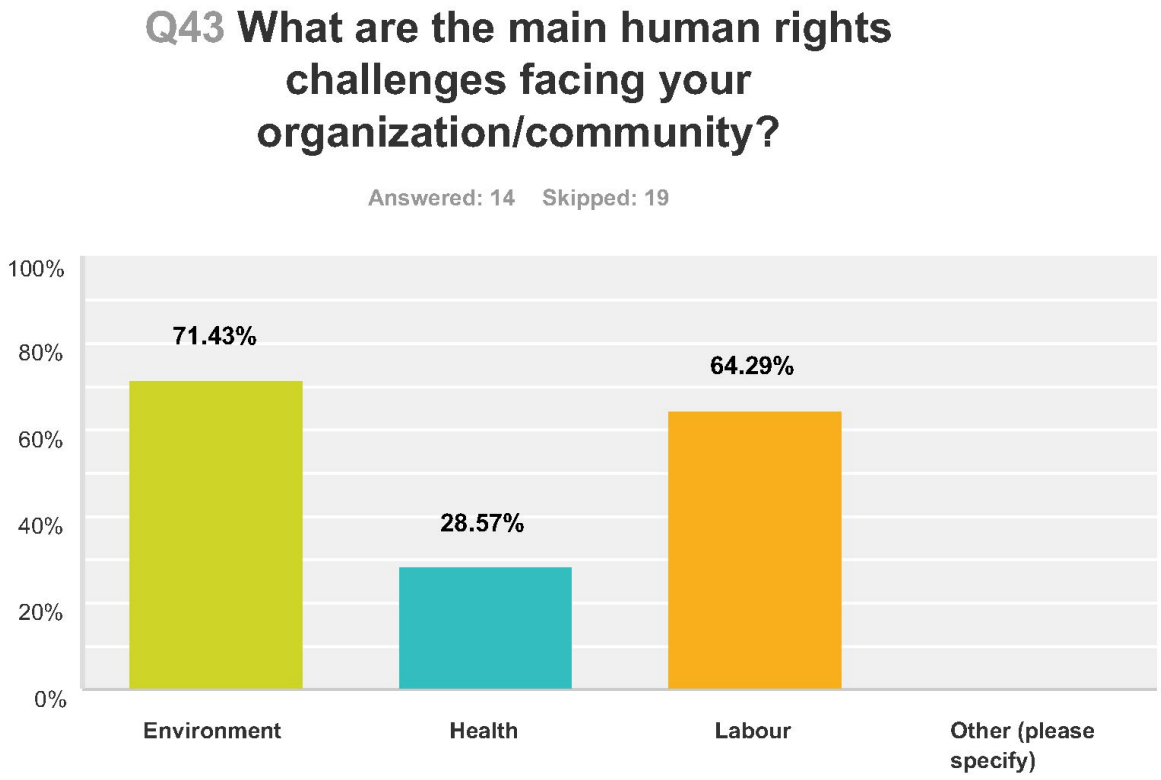
APPENDIX O

Figure 5: Human rights challenges Facing Mining Communities (South Africa)



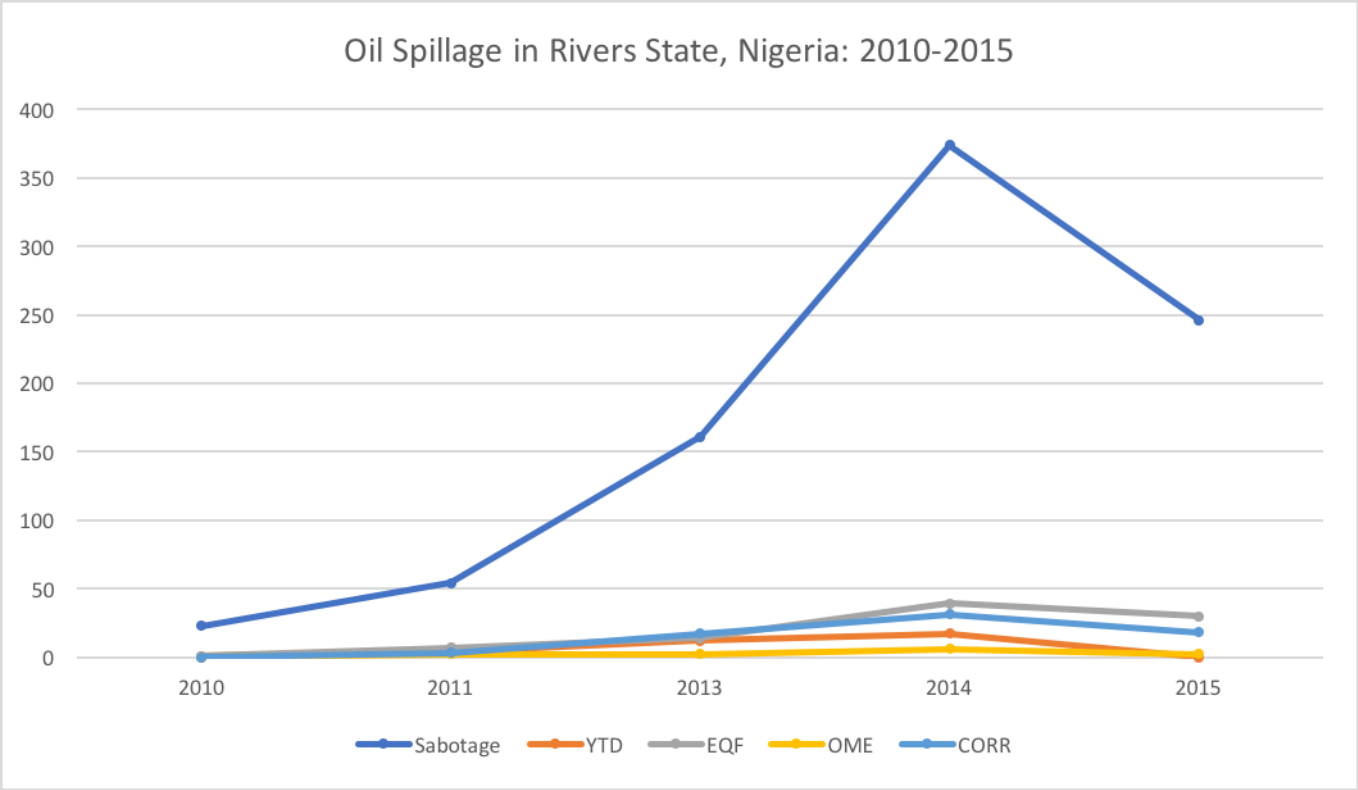
APPENDIX P

Figure 6: Human rights challenges facing oil and gas communities (Nigeria)



APPENDIX Q

Figure 7: Oil Spillage in Rivers State, Nigeria: 2010-2015



YTD: Yet to be Determined; EQF: Equipment Failure; OME: Operational Failure; CORR: Corrosion
Source: Data obtained from NOSDRA, Port Harcourt Office, Nigeria. 25/10/2016.