CORPORATE VIOLATIONS OF HUMAN RIGHTS AND THE ENVIRONMENT IN DEVELOPING MARKETS: EXPLORING THE ROLE OF CORPORATE LAW

Abstract

This thesis addresses the problem of environmental degradation and human rights abuses by Multinational Corporations (MNCs) operating in developing markets, which has been attributed to the difficulty in regulating modern MNCs. Three main factors that create the environment for corporate impunity for human rights and environmental abuse in developing markets as identified by current scholarship are the mismatch between the modern corporate structure and the rules of corporate law, the insensitivity of the governments of developing markets to the plight of human rights victims, and the general lack of access to judicial and administrative remedies. However, even though the current corporate legal architecture is one of the factors that contribute to corporate human rights and environmental regulatory challenge, emerging regulatory initiatives that seek to address the problem do not consider corporate law reform as one of the options that could resolve the challenge. This thesis challenges the current scholarship and regulatory focus on remedial solution to the problem and investigates existing regimes. This investigation focuses on two areas. First, it focuses on international human rights law and international environmental law, and, secondly, on the legal and regulatory regimes concerned with the corporation, human rights and the environment in Nigeria and selected major developed market jurisdictions. The thesis identifies the current procedures for applying international norms to MNCs as the major problem with the international regimes, and the weak and inefficient enforcement infrastructure in Nigeria and other developing markets as the major problem with holding MNCs accountable for human rights and environmental abuses in developing markets. As a result, the thesis argues that the regulatory challenge could be addressed by focusing on MNC activities at the national level, and suggests a shift from the remedial focus of the current regimes to a preventative approach. The thesis proposes a review of the corporate legal architecture to incorporate the group that is most affected by corporate externalities into corporate boards because that is where the decisions that generate the abuses are made. The thesis concludes with a blueprint for the proposed structure which is aimed at promoting responsible human rights and environmental friendly decision-making as a means of injecting human rights responsibility into corporate decision making, and addressing the problem of corporate human rights and environmental abuses, especially in developing markets.

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Human rights and environmental abuses by multinational corporations (MNCs) operating in developing markets have become a topical issue since the 1990s. The socio-economic problem emanating from the human rights abuses and egregious environmental degradation in the Niger Delta region of Nigeria as a result of the emergence of armed groups who claim to fight for the victims of the abuses prompted this research. The fact that the problem is associated with the activity of corporations makes a review of corporate regulation a primary question for this research because corporations consists of people and corporations depend on people as much as people depend on them. This mutual dependency is the basis for the focus of this research on the relationship between corporate human rights victims and the corporations operating in developing markets, especially Nigeria.

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1 An Overview

1.1 Introduction

Globalization has created a new politico-economic climate around the world in which multinational corporations (MNCs),[1] as the chief drivers of global business activities, have become major actors. Multinational operations by business corporations are, however, not a new phenomenon. Peter Muchlinski identified four periods in the evolution of modern MNCs beginning with the European colonial trading companies established during the 16th and 17th centuries.[2] These early MNCs exhibit the same kind of productive integration across borders found in their modern counterparts but there is a remarkable difference in the mode and scale of their operations. Modern MNCs adopt truly global production chains by expanding their manufacturing and distribution networks around the world,[3] unlike their 16th century ancestors that operated mostly as trading companies and agents of colonial powers.[4]

The increased global activity of today's MNCs is facilitated by the new phenomenon broadly classified as globalization, i.e., the general development in society that is characterised by the 'closer integration of the countries and peoples of the world … and the breaking down of artificial barriers to the flows of goods, services, capital, knowledge and (to a lesser extent) people across borders'.[5] Many factors have made globalization possible. Chief amongst them is improved satellite communication and rapid technological developments. In addition, policy reforms initiatives, such as privatisation and

[1] The acronyms MNCs and TNCs will be used to represent "Multinational corporations" and "Transnational corporations", the preferred terms that will be used interchangeably throughout in this thesis to denote major multinational business corporations defined as 'corporations ... which have their home in one country but which operate and live under the laws and customs of another country as well'. Other terminologies such as "Multinational enterprises" (MNEs) are also used to identify multinational (global) business operations but the differences in terminologies is not material to discussion on global business operations in this thesis. For a definition of the various terminologies and their origin, see Peter M. Muchlinski, *Multinational Enterprises and the Law* (2nd ed., Oxford University Press 2007) 5-8.
[2] *Ibid.*, 8-25.
[3] Beth Stephens, 'The Amorality of Profit: The Transnational Corporation and Human Rights' (2002) 20 Berkeley J. Int'l L. 45, 55.
[4] James W. Hurst, *The Legitimacy of the Business Corporation in the Law of the United States 1780-1970* (The University Press of Virginia 1970) 4.
[5] Joseph Stiglitz, *Globalization and its Discontents* (London: Penguin Books 2002) 9.

liberalisation, especially under the auspices of institutions such as the World Trade Organisation (WTO), the World Bank and the International Monetary Fund (IMF), have facilitated economic globalization and MNCs' dominance of the global economic space.[6]

Globalization has changed the way economic players conduct their affairs around the world. This has created new challenges for the economic players themselves and those that depend on them for economic development, especially developing markets.[7] Faced with heightened competition in both the product and capital markets, MNCs wishing to achieve global scale and become globally competitive often search for the most inexpensive manufacturing and operating sites. As a result, many of them are drawn to countries that offer cheap labour and raw materials, and in which labour, health and other human rights are largely unenforced.[8]

Thus, globalization created the impetus for modern MNCs to expand their operations in order to have a global reach. Although profit has been identified as the underlying motive for global operations and international investment,[9] it is important to note that there are different forms of foreign direct investment (FDI). Understanding such differences will provide the basis for us to understand the reasons for the dearth of foreign investment in developing markets and its role in promoting abuses of human rights and the environment in those countries.

Commentators have categorised foreign investment into four types: natural resource-seeking investment, market-seeking investment, efficiency-seeking investment and strategic asset-seeking investment.[10] Of the four forms of FDI, developing markets are mostly able to attract natural resource seeking FDI.[11] This has been attributed to the

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[6] Addo M. K, ,Human Rights and Transnational Corporations – an Introduction in Addo M. K, (ed*) Human Rights Standards and the Responsibility of Transnational Corporations* (Kluwer Law International; 1999) 6.
[7] Developing markets or developing countries are defined according to their Gross National Income (GNI) per capita per year. Countries with GNI of US $11,905 and less are classified as developing countries (as specified by World Bank, 2013). The countries listed in this category include, China, India, Brazil, Nigeria, South Africa etc. <http://www.iawp.org/joiniawp/countrylist.htm> accessed 20 January 2017.
[8] Christen Broecker, '"Better the Devil You Know": Home State Approaches to Transnational Corporate Accountability' (2008-2009) 41 N.Y.U. J. Int'l L. & Pol. 159, 164.
[9] Muchlinski, (n 1) 37.
[10] *Ibid*., 32.
[11] UNCTAD World Investment Report (United Nations 1996) 56-71.

prevalence of corruption, inadequate infrastructure, low skill levels and macroeconomic uncertainty in those countries.[12] However, because they are not readily able to attract other forms of FDI, the decreased demand for raw materials in the 1990s resulted in acute dearth of FDI in most developing markets.[13] It is the combination of a dearth of foreign investment, the increasing debt profile, balance of payment difficulties and declining economy, which has bedevilled most developing markets since the 1970s, that has exacerbated the demand for foreign investment. The prevailing economic difficulty during this period opened many developing markets to the Bretton Wood Institutions (the World Bank and the IMF) to step in with their packages of policy prescriptions under the rubric of structural adjustment.[14]

As a result of the pressure to repay the foreign loans owed mostly to the Bretton Wood Institutions, most developing markets generally resort to simply increasing the export of natural resources and agricultural commodities as a means of improving their foreign exchange earnings.[15] Since the foreign capital is expected to come from foreign corporations, many governments in developing markets began to grant special incentives, including different kinds of subsidy to them.[16] For example, Nigeria, the focus of this research, has opened its economy to FDI since the 1990s with legislative reforms aimed at attracting foreign investment.[17]

The problem with overdependence on the extractive (natural resource) sector is that it is the very sector where human rights abuse is most prevalent.[18] Thus, the focus of developing market economic systems on extractive activities created the environment for

[12]Naomi Uzor, 'PWC Projects Nigeria's Economy to Rank Top 10 in 2050' Daily Vanguard, (Lagos, 18 March 2016 <http://www.vanguardngr.com/2016/03/pwc-projects-nigerias-economy-rank-top-10-2050> accessed 26 March 2016.
[13]Muchlinski (n 1) 22.
[14] David C. Korten, *When Corporations Rule the World* (2nd edn, San Francisco: Kumarian Press Inc. and Berrett-Koehler Publishers, Inc. 2001) 163.
[15]*Ibid*., 164-5.
[16] *Ibid*.
[17] Nigeria has revised its Company Act twice (1990-2004) in the last two decades, this is apart from the plethora of other investor friendly legislation such as the Foreign Exchange (Monitoring and Miscellaneous Provisions) Act, Nigerian Investments Promotion Commission Act (N.I.P.C. Act) amongst others. All the investor friendly legislation are designed with the aim to attract foreign investment.
[18] See the Commission on Human Rights, 'Interim Report of the Special Representative of the Secretary General on the Issues of Human Rights and Transnational Corporations and other Business Enterprises' E/CN.4/2006/97 (22 February 2006), para. 30.

corporate disregard for human rights and the environment of local communities.[19] This is why this thesis is primarily concerned with how to address the social impact of extractive MNCs on local communities in developing markets with Nigeria, especially the Niger Delta region, as the central focus.

Although Nigeria is the main focus of this thesis, it is generally representative of many developing markets as it relates to the abuses of human rights perpetrated by MNCs mostly in those markets. According to Elisa Giuliani and Chiara Macchi,[20] economic and human rights impacts of MNCs on their host nations are relatively similar across developing markets. The authors point to empirical evidence of human rights abuses in developing countries, such as India, Chile, the Democratic Republic of Congo and Nigeria, which they attribute to fierce competition to attract MNCs, and a weak legal environment.[21] Thus, the discussions, findings and suggestions in this thesis may also be relevant to other developing markets in Africa, Asia and Latin America.

1.2 Statement of the Problem

It will be useful at this stage to understand what a corporation is, and how it can affect others, especially the non-shareholder groups that current corporate law scholarship has classified as "other constituencies" or corporate "outsiders".[22] This is because corporations are responsible for environmental degradation and human rights abuses, in which are the focus of this thesis. In this regard, it is important to note that the business corporation is

[19] Korten (n 14) 164.
[20] Elisa Giuliani and Chiara Macchi, 'Multinational Corporations' Economic and Human Rights Impacts on Developing Countries: A Review and Research Agenda' (2014) 38 Cambridge Journal of Economics, 479, 482-90.
[21] *Ibid*., 479-90.
[22] This group include creditors, employees, customers, local communities etc. It is important to note that while authors like Derek French *et al* classify this group together as other constituencies, Reinier Kraakman *et al* distinguishes between employees and creditors, and the rest of the group. The authors classify employees and creditors as non-shareholder contractual stakeholders, and the others as non-contractual stakeholders. Notwithstanding the differences in the classification, one thing that is common to all these stakeholders is that they are not the primary focus of corporate law. See Reinier Kraakman *et al, The Anatomy of Corporate Law: A Comparative and Functional Approach* (3rd edn., Oxford: Oxford University Press 2017) 29, 81-95; Derek French *et al, Company Law* (34th edn., Oxford: Oxford University Press 2016) 30-1.

a legal person according to law.[23] As legal persons operating within a political system, corporations are social organs with rights and obligations.[24] Some commentators argue that corporations are important organs of society since 'they own property; pay taxes; consume raw materials; generate goods, services and wastes; and play a central role in the lives of their workers and customers'.[25] As social organs, corporations are bound by the basic moral and legal norms of the society in which they operate[26] and, because they operate in society, they are capable of causing injury and they do indeed cause extensive injury in developing markets.[27] The recourse available to an individual or a local community that may suffer as a result of such injuries caused by a foreign-headquartered MNC, or the means by which such injuries could be prevented or minimized, are some of the questions that this research seeks to answer.

To seek a corporate law solution to the problems of MNC human rights abuses and environmental degradation will require a critical examination of issues relating to the organisation of business and its global operation. This will involve the interrogation of how the current corporate legal architecture addresses social and environmental issues, especially in a global context. It will also be useful to critically analyse the activities that generate the violations as well as the rights affected. This will provide a rational basis to identify the challenges associated with regulating corporate abuses and how corporate law could effectively address the challenges identified by this thesis.

[23]This point was emphasized per Chief Justice Marshall that 'corporation is an artificial being, invisible, intangible and existing only in contemplation of law', in *Trustees of Dartmouth College v Woodward* (1819) 17 US (Wheat) 518, 636.
[24] Surya Deva, *Regulating Corporate Human Rights Violations: Humanizing Business* (Oxon: Routledge 2014) 146.
[25] R. Bratspies, '"Organs of Society": A Plea for Human Rights Accountabilityfor Transnational Enterprises and other Business Entities'(2005) vol. 13 Michigan State Journal of International Law 9, 15.
[26] Deva, (n 24) 147
[27] For example, the fact that MNCs cause extensive harm to the environment of local communities was the major point of agreement between the parties in a recent case in a UK court concerning environmental violations in Nigeria involving Roya Dutch Shell Plc. See *His Royal Highness Emere Godwin Bebe Okpabi and Others* v *Royal Dutch Shell Plc and Shell Petroleum Development Company of Nigeria Limited* (2017) EWHC 89 (TCC), 8.

1.2.1 The Impact of Globalization and MNC Operations

As the engineers and major beneficiaries of globalization, MNCs have seized the opportunity to participate in a greater liberalized market, thereby increasing their capacity to realize enormous profits across the world.[28] This has not only increased their economic power and global visibility but also ensured greater political influence. MNCs now play direct and indirect influential roles beyond matters of business such as trade agreements and international patent protection, as they now take an active part in national and international economic policy.[29]

It is important to note that the growing power of business corporations did not begin with global MNCs. Corporate power and its pervasive influence in society has been a matter of concern that attracted the attention of Adolf Berle and Gardiner Means as long ago as 1932 when they wrote:

> The rise of the modern corporation has brought a concentration of economic power which can compete on equal terms with the modern state – economic power versus political power, each strong in its own field. The state seeks in some aspects to regulate the corporation, while the corporation, steadily becoming more powerful, makes effort to avoid such regulation. Where its own interests are concerned, it even attempts to dominate the state. The future may see the economic organism, now typified by the corporation, not only on an equal plane with the state, but possibly even superseding it as the dominant form of social organisation. The law of corporations, accordingly might well be considered as a potential constitutional law for the economic state, while

[28] Sukanya Pillay, 'And Justice for All? Globalization, Multinational Corporations, and the Need for Legally Enforceble Human Rights Protections' (2003-2004) 81 U. Det. Mercy L. Rev. 489, 497.
[29] Stephens (n 3) 58.

> business practice is increasingly assuming the aspect of economic statesmanship.[30]

Berle and Means wrote long before the emergence of mega MNCs and transnational investments became common place. However, their prophesy that the corporation might supersede the state as the dominant form of social organisation[31] is arguably true of today's MNCs. This is because, even if they may not yet have actually replaced the state as the unit of official power, 'it must be admitted that decisions and activities of transnational corporations carry considerable weight in national and international policy-making'.[32]

The immense power wielded by today's MNCs derives from their economic power. Most MNCs generate economic wealth that dwarfs the GDP of many nation states. For example, 'the combined revenues of just General Motors and Ford ... exceed the combined GDP for all of sub-Saharan Africa'.[33] In addition to the growing economic power of MNCs is their global reach: as John Ruggie noted in 2004, 'the universe of transnational corporations consists roughly of 63,000 firms, with more than 800,000 subsidiaries and millions of suppliers and distributors connected through global value chains'[34] spread across the globe.

As the major drivers of globalization, MNCs are in large part responsible for the benefits associated with it. Thus, the International Chamber of Commerce suggest that:

> [g]lobalization is about worldwide economic activity – about open markets, competition and free flow of goods, ... Consumers are its

[30] Adolf A. Berle and Gardiner C. Means, *The Modern Corporation and Private Property* (10th Print, New Brunswick: Transaction Publishers Tenth printing 2009) 313.
[31] *Ibid*.
[32] Addo, (n 6) 4.
[33] Joshua Karliner, *Corporate Planet*, 'Global 500: The World's Largest Corporations', Fortune August 1995, World Bank Development Report 200-2001, 5. See also Sara Anderson and John Cavanagh, Top 200: The Rising of Corporate Global Power (New Press 2000) Institute for Policy Studies, Washington DC, which concludes at p.3 that 'General Motors is now bigger than Denmark; DaimlerChrysler is bigger than Poland; Royal Dutch/Shell is bigger than Venezuela; IBM is bigger than Singapore; Sony is bigger than Pakistan', and that 'top 200 corporations' combined sales are bigger than the combined economies of all countries minus the biggest 10'. See <http://www.corpwatch.org/trac/corner/glob/ips/top200.html> accessed 19 February 2017.
[34] John Gerard Ruggie, 'American Exceptionalism, Exemptionalism and Global Governance' (2004) John F. Kennedy Sch. Of Govt, Working Paper No. RWP04-006, 1, 14. See <http://www.ssrn.com/abstract=157642>.

> principal beneficiary. Its benefits in terms of faster growth, quicker access to technology, cheaper imports and greater competition are available for all. Globalization has made the world economy more efficient and has created hundreds of millions of jobs, mainly, but not only, in developing countries.[35]

This does not mean that globalization and the activities of MNCs are all about global economic progress and job creation in developing markets. Apart from the economic prosperity associated with globalization as defined by 'reduction in global poverty, the increase in jobs, ... and economies of scale enjoyed by consumers',[36] the activities of MNCs also produce certain adverse effects that impact upon the environment and the human rights of the communities where they operate in developing markets.[37] It is this adverse effect of globalization, and the lack of adequate remedy for the victims of corporate-related abuses of human rights and the environment in developing markets, that are the focus of the present inquiry.

Unlike the Berle and Means' corporation, where the concern was that dispersion of shareholding and concentration of management power in corporate boards led to the emergence of new princes of industry and thus created the problem of management accountability to shareholders and other stakeholders,[38] MNCs pose a far more complex challenge. This is because MNCs' have for the most part successfully discarded the 19th century "public" beginning[39] of the modern corporation and yet still managed to retain the vital benefits of legal personality and limited liability.[40]

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[35] International Chamber of Commerce, Brief on Globalization (November 22, 2000) <http://www.iccwbo.org/Data/Policies/2000/ICC-brief-on-globalization. > accessed 05 December 2016.
[36] Pillay, (n 28) 493.
[37] *Ibid*., 489.
[38] Berle and Means, (n 30) 4-5.
[39] The idea that 19th century corporations had a public beginning emanates from the public character of the early corporations as public-interest undertaking chattered for activities of some public interest; see Hurst (n 4) 15.
[40] Jennifer G. Hill, 'Public Beginnings, Private Ends – Should Corporate Law Privilege the Interests of Shareholder?' (1998) 9 Australian Journal of Corporate Law 21, 21.

1.2.2 The Evolution of the Modern Corporation and Traditional Corporate Law[41]

The idea of incorporation did not start with commercial activities in mind. Before the 16th century, incorporation was used only in 'connection with ecclesiastical and public bodies, such as chapters, monasteries and boroughs, which had corporate personality conferred upon them by a charter from the Crown'.[42] The increase in commercial activities precipitated by overseas trade necessitated a new conception of the corporation as a structure useful for private trading operations.[43] The requirement of incorporation by 16th century merchants was to ensure their monopoly of a particular type of trade or product as a body, which was only guaranteed under a charter granted by the Crown.[44] However, the grant by the Crown was designed to accomplish public purposes, in addition to creating monopoly rights for merchants.[45]

As commercial activities grew towards the end of the 19th century, the corporation became more important as an entity for promoting economic activities, making its use for undertaking public responsibilities of secondary significance.[46] Eventually, the increasing familiarity with the corporation as a vehicle for conducting business activities led to the abandonment of special charters in favour of legislation.[47] As a result, new incorporation statutes, such as the Joint Stock Companies Registration and Regulation Act 1844 (generally referred to as the Joint Stock Companies Act), were enacted with the aim of making incorporation freely available.[48]

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[41] The terms corporations and companies will be used interchangeably throughout in this thesis to represent the for-profit business structure that provides its "owners" (members/shareholders) with limited liability. The terms corporate law and company law will also be used interchangeably to represent the law that regulates the for-profit business corporation. It is acknowledged that in certain jurisdictions', notably the US, different legal regimes regulate companies and corporations. However, the distinction between the corporation and company is not material to the discussion in this thesis. For an analysis of the differences, see Joseph Shade, *Business Associations in a Nutshell* (3rd edn, St Paul: Thomas/West 2006) 46-50.
[42] L.C.B. Gower, Gower's Principles of Modern Company Law (5th edn., London: Sweet & Maxwell 1992) 19.
[43] A detailed discussion of the history and development of the corporation and corporate law in the common law world is outside the scope of this thesis. For a fuller and more colourful account of the history of the corporation and corporate law in the common law world, the reader is referred to Gower, *ibid*.
[44] The crown is the king or queen in England who was the sovereign and it is used here to represent government.
[45] Phillip I. Blumberg, *The Multinational Challenge to Corporate Law: The Search for a New Corporate Personality* (New York: Oxford University Press 1993) 5.
[46] Hurst (n 4) 4.
[47] *Ibid.*, 18.
[48] Gower, (n 42), 19.

There are two important points to note here about the modern corporation. The first is that the corporation enjoys legal status only by the incidence of incorporation.[49] The second concerns the modern corporation and its two guiding principles – separate legal personality and its close cousin, limited liability. Both features were developed to support the 19th century focus of nation states on the use of the corporation as a structure for promoting economic activities.[50]

The legal personality principle on the one hand created the capacity for parties to act as a single entity in law – to sue and be sued, to hold and transfer title to real or personal property and to act with legal effect under a common seal.[51] The result is that the enterprise is able to continue undisturbed in law by a change of shareholders or a change in their fortune because, by virtue of the principle, corporate assets are shielded from both the shareholders and their creditors.[52] The limited liability doctrine, on the other hand, encouraged contribution from diverse investors by limiting the risk to their personal wealth, as limited liability provides a statutory assurance that 'nobody risks more than he chips in'.[53] Thus, the twin principle of corporate personality and limited liability facilitated 19th century industrialization, which was the main reason for making incorporation freely available.

Since industrialization and economic development was the focus of nation states in the 19th century era, and the business corporation is the vehicle for achieving that purpose, it made sense to protect those who contributed capital and who were not part of the day-to-day running of the business. However, limited liability for shareholders exposes the creditors of their company to a greater risk that their debt might be unsatisfied than when dealing with an unincorporated business: hence the early statutes also provided for

[49] See per Chief Justice Marshall, *Trustees of Dartmouth College* (n 23).
[50] Hurst, (n 4) 22.
[51] *Ibid*., 19.
[52] John Armour and his colleagues termed the legal personality doctrine "entity shielding" device 'to emphasize that it involves shielding the assets of the entity – the corporation – from the creditors of the entity's owners'. See John Armour, Henry Hansmann and Reinier Kraakman, 'What is Corporate Law?' in Reinier Kraakman *et al*., *Anatomy of Corporate Law: A Comparative and Functional Approach* (3rd edn., Oxford: Oxford University Press 2017) 5-8.
[53] Frank H. Easterbrook and D. R. Fischel, *The Economic Structure of Corporate Law* (Cambridge-Massachusetts: Harvard University Press 1996) 40.

the protection of creditors, to minimize the scope of abuse of the concept of limited liability.[54]

The social impact of the early corporations' was not also overlooked as corporate charters contained specific limitations on the corporation's purposes and powers.[55] At the time that the twin concepts of separate personality and limited liability were established, the holding company concept, which is the norm for large corporations nowadays, was prohibited.[56] This restriction was especially necessary to restrict the corporate monopoly power[57] and to make corporations behave well.[58] Walter Werner explained how traditional corporate law (in the US) protected the public interest in the following words: '[i]n the nation's early years the states created corporations sparingly and regulated them strictly. The first corporations, run by their proprietors and constrained by law, exercised state-granted privileges to further the public interest'.[59] Some of the strict regulations imposed by traditional corporate law includes the requirement that proponents of a charter justify every clause before the legislature, and that certain aspects about the corporation's operations be made a matter of public record.[60]

Some of these traditional restrictions, including the later disclosure requirement, are still important parts of corporate law today. Corporations are generally required by law to register their constitutional documents with the registrar of companies so that those dealing with the corporation are aware of the company's internal arrangements. In some jurisdictions, such as Nigeria, the Memorandum of Association and the Articles of Association are the constitutional documents that are required to be registered with the registrar of companies.[61] In other jurisdictions, especially in the UK, the company's constitution includes the company's articles, and shareholder resolutions and

[54] John E. Parkinson, *Corporate Power and Responsibility: Issues in the Theory of Company Law* (Oxford: Clarendon Press) 1.
[55]Hurst (n 4) 44-5.
[56]See per Justice Brandies in *Louis K. Liggett, Inc.* v *Lee* (1933) 288 US 517, 556, 589.
[57]Blumberg (n 45) 52-4.
[58] Walter Werner, 'Corporate Law in Search of Its Future' (1981) 81 Colum. L. Rev. 1611, 1612.
[59] *Ibid.*
[60]Hurst, (n 4) 29.
[61] *Companies and Allied Matters Act* (CAMA) Cap C20 LFN, s 33.

agreements.[62] However, as discussions below will show, the importance of these restrictions is very limited in the context of MNCs, especially with regard to their global operations, and enormous power and influence.

1.2.3 Globalization, Change in Corporate Structure and the Regulatory Challenge

There are two important aspects to the development of modern MNCs in relation to the corporate group concept and their multinational operation. The corporate group concept is a late 19th century development traceable to the activities of the New Jersey legislature, which by statute in 1888 authorised the acquiring of shares by a corporation in other corporations.[63] This is the precursor of "corporate groups" with multi-layered structures. However, globalization provides the impetus for the multinational operation of "corporate groups" and the emergence of truly global MNCs 'for which territory is not the cardinal organising principle'.[64] Thus, today's MNCs are able to operate from headquarters in major economic capitals[65] through subsidiaries, located in many developing markets.

Furthermore, MNCs are able to exploit the established corporate law concepts of separate personality and limited liability to organise their activities. The separate personality principle provides the basis for MNCs to operate separate business entities as members of a corporate group based on the concept of the corporation's distinct personality which is detached from the identity of its shareholders.[66] They are also able to rely on the limited liability concept to shield them from the debt and wrongful acts or omissions of their subsidiaries.

The new multi-layered structure of MNCs and the increasing ease with which they are able to operate across the globe signifies a change in the traditional role and concept

[62] UK *Companies Act* 2006, s 17
[63] Blumberg, (n 45) 56.
[64] Ruggie, (n 34) 5.
[65] In this thesis, the major economic capitals are used to represent the economic capitals of the major economic jurisdictions of United States, UK, Germany and Japan.
[66] Irit Mevorach, *Insolvency within Multinational Enterprise Groups* (Oxford: Oxford University Press) 17.

of the corporation.[67] One would expect that the new developments in the structure of corporations and the dramatic change in their operations would have brought about a change in corporate law. This is not the case, however, as legal concepts fashioned to serve 19th century corporations are still expected to regulate 21st century mega-MNCs.

The problem with traditional corporate law is that, in addition to the fact that it has a national focus, it did not envisage the corporate group structure of modern MNCs, which has no doubt proved to be a remarkable and efficient economic machine for global operation. The corporate group arrangement creates the opportunity for a MNC to incorporate in different countries and control production and service facilities outside the country in which it is based. The emphasis on this operational model is on a system of decision-making, permitting coherent policies and a common strategy through one decision-making centre. [68]

The implication of centralized decision-making in the context of MNC operations is that it substantially removes management from local concerns,[69] thereby creating a gap between the decision makers and those affected by the decisions, such as the local communities. This is instructive because, notwithstanding the fact that a MNC may exercise dominant control over the group members, each member is still as a matter of law a separate and autonomous entity.[70] This has made it possible for MNCs to exploit the legal personality principle and deliberately structure their corporate operations in such a way that the separate legal personality designed to shield corporate assets has become a standard refuge for corporate irresponsibility for MNCs operating in developing markets.[71] In the corporate group arrangement, it does not matter that the MNC is the major shareholder of the subsidiary or that the MNC directs its operations or even that the subsidiary is created as a special purpose vehicle (SPV)[72] just to ensure that legal liability

[67] Deva, (n 24) 4.
[68] Janet Dine, The Governance of Corporate Groups (Cambridge: Cambridge University Press 2000) 42.
[69] *Ibid*.
[70] Per Lord McNaughten in *Salomon* v *Salomon Co Ltd* (1897) AC 22, 51.
[71] Deva, (n 24) 213.
[72] Apart from the acronym SPV, a subsidiary of a MNC is also referred to as special purpose entity (SPE) or special purpose company (SPC). However, the terms SPV or subsidiary will be used throughout in this thesis.

in respect of particular activities of the SPV does not fall on the parent MNC: it will nonetheless avoid liability as long as the MNC/SPV has gone through formal registration.[73]

Since the focus of this thesis is on the Niger Delta, it is important to point out how the corporate legal personality has been used recently to shield Royal Dutch Shell PLC (RDS) from alleged human rights abuses committed by Shell Petroleum Development Company (SPDC). Even though SPDC is a subsidiary of RDS, the English court concluded in the case of *Godwin Bebe Okpabi and Others* v *Royal Dutch Shell PLC*[74] that 'there is simply no connection whatsoever between this jurisdiction and the claims brought by the claimants, who are Nigerian citizens, for breaches of statutory duty/or in common law for acts and omissions in Nigeria, by a Nigerian company'.[75] Thus, RDC and SPDC are two different entities based in two different jurisdictions. This is the consequence of the corporate legal personality principle.

The same principle applies to the limited liability doctrine granted to serve the interest of dispersed and passive shareholders, which today applies to limit the liability of MNCs to their investment in the subsidiary notwithstanding that the parent company may be the only or the major beneficiary of the subsidiary's profits.[76] Thus, a 'doctrine designed to protect *investors* in an enterprise, not the enterprise itself, is now extended to protect each fragment of the business from liability for the obligations of all the other fragments'.[77] Phillip Blumberg has argued that such an extension is illogical because it ignores today's economic realities and makes a mockery of the underlying objective of the doctrine.[78]

Blumberg might be right because traditional corporate law did not envisage a Western-owned corporation with headquarters in a Western city carrying on oil exploration activities through a wholly-owned subsidiary in the creeks of the Niger Delta Region, with

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For a detailed analysis of the origin and relevance of the use of the different terminologies, the reader is referred to, Mevorach, (n 66) 17.
[73]Per Slade LJ, *Adams* v *Cape Industries Plc* (1990) BCLC 479, 513.
[74] (2017) EWHC 89 (TCC)
[75] *Ibid*., para 119.
[76]Lynn Stout, *The Shareholder Value Myth: How Putting Shareholders First Harms Investors, Corporations, and the Public* (San Francisco: Berrett-Koehler Publishers, Inc 2012) 16.
[77]Blumberg, (n 45) 59.
[78] *Ibid*.

the attendant environmental and human rights implications.[79] It did not envisage a Western company taking advantage of the availability of cheap labour in the growing Asian market by locating its garment factories in Bangladesh[80] or chemical operations in a remote Indian village.[81] These, however, are the realities of today: MNCs are seeking improved earnings by exploiting the resources and cheap labour available in developing markets. This development obviously creates a new regime of stakeholders and new challenges, which were probably not envisaged but which are the direct outcomes of such operations that were not envisaged by traditional corporate law.

It is important to keep the problem that prompted this research in focus – the increasing internationalization of corporate power and its role in the growing incidence of human rights and environmental abuses in developing markets, coupled with the inability of developing market authorities to hold these corporations to account. This is especially important in view of the social consequences generated by the neglect of local communities that play host to MNCs in developing markets. A case in point is the conflict in the Niger Delta region of Nigeria, which threatens local, national and global security.[82]

The situation in the Niger Delta, as will be discussed below, makes it imperative to effectively address the problems of corporate-related human rights abuses and environmental degradation in the region. However, to be able to effectively address the problem of the abuses in places like the Niger Delta, it is important to first identify their nature in order to fully understand the factors that encourage and sustain them. Understanding these underlying factors will provide a rational basis to recommend the improvements necessary to make MNCs more responsive to the social impacts of their activities.

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[79] See the comparison on oil spill in Europe and what is happening in Nigeria by Audrey Gaughran, Amnesty International Global Issues Director where she states that in any other country what is taking place in Nigeria 'would be a national emergency. In Nigeria it appears to be a standard operation procedure for the oil industry. The human cost is horrific – people living with pollution ever day of their lives'. <http://www.amnesty.org/.../hundreds-of-oil-spills-continue-to-blight-niger-deltal> accessed 13 August 2016.
[80] See Factory collapse in Bangladesh, <http://www.globallabourrights.org/campaigns/factory-collapse-in-bangladesh> accessed 27 January 2015.
[81] An example is the UCC chemical factory disaster in Bhopal, India. Deva, (n 24) 26-63.
[82] Olalekan Adekola, Gordon Mitchell and Alan Grainger, 'Inequality and Ecosystem Services: The Value and Social Distribution of Niger Delta Wetland Services' (2015) 12 Ecosystem Services 42-54, 43.

1.2.4 The Factual Matrix of the Violations in the Niger Delta and Remedial Challenges

Any meaningful discussion about how to address the problem of corporate-related environmental degradation and human rights abuses in the Niger Delta will necessarily begin by identifying the types of activity that generate the abuses, and the rights affected by such abuses. Developing markets, and particularly the Niger Delta, provide a perfect example of how the activity of MNCs, especially those in the extractive sector, abuse the rights of the local communities.[83] The plethora of cases brought against MNCs in foreign courts, especially in the United States under the Alien Tort Claims Act (ATCA) [84] and more recently in the UK,[85] in pursuance of human rights abuse claims attests to this. It is important to review some of these abuses for a proper understanding of their nature because that will reveal the factors at play and the reasons that the abuses are mostly prevalent in developing markets.

The exploratory activities of Shell Petroleum Development Company (a subsidiary of Royal Dutch Shell) and other oil MNCs such as the Italian corporation, ENI, constitute a major source of pollution and environmental damage in the Niger Delta Region. The incidence of environmental damage caused by oil pollution was the subject of a 2011 United Nations Environmental Program (UNEP) report that confirmed the extent of damage, and which it estimated would take about thirty years to clean up.[86] In addition, Shell and ENI also admitted to 550 oil spills in 2010.[87] Moreover, the Niger Delta Region is replete with abandoned oil pipelines still spilling crude oil into the environment. Gas

[83] See the Commission on Human Rights, (n 18); United Nations Environmental Programme (UNEP) 2011 Report on the Niger Delta at <http://www.unep.org/nigeria> accessed March 23, 2016.
[84] Esther *Kiobel v. Royal Dutch Shell Petroleum Co*., (2013) 133 S. Ct.1659; *Maria Aguinda v. Texaco, Inc*. (2002) 303 F. 3d 470; *Wiwa v. Royal Dutch Petroleum Co.* (2000) 226 F. 3d 88.
[85] *His Royal Highness Emere Godwin Ebebe Okpabi and Others* v *Royal Dutch Shell Plc and Shell Petroleum Development Company Nigeria Limited* (2017) EWHC 89 (TCC); *Dominic Liswaniso Lungowe and Others* v *Vedanta Resources Plc and Konkola Copper Mines Plc* [2016] EWHC 975 (TCC); *Bodo Community* v *Shell Petroleum Development Company of Nigeria* (2014) EWHC 1973 (TCC).
[86]UNEP Report 2011 (n 81); see also 'Shell and Nigeria have Failed on Oil Clean-up, Amnesty Says' The Guardian (Lagos, 4 August 2014) <http://www.theguardian.com/environmental/2014/aug/04/shell-nigeria-oil-pollution-clean-up-amnesty> accessed March 12, 2017.
[87] See the report by Audrey Gaughran which states that 'Europe have had an average of 10 spills a year between 1971-2011', (n 79).

flaring is another major source of pollution. It is a common feature in the region, lighting up the local communities and oil fields day and night with the attendant damage to the ecosystem.[88] The result has been the deleterious contamination of the waters, land and atmosphere in the Niger Delta, with the attendant damage to the health of the local communities, their farmland and other means of livelihood, with direct implication for their lives.

Recourse to legal remedies for violations in the Niger Delta should not in principle pose any serious problem because liability for the violations identified above could be litigated under established heads of law. The contamination of the waters, land and atmosphere from exploratory activities by the oil corporations constitute an actionable tort, especially under the rule in *Ryland* v *Fletcher*[89] and nuisance.[90] In addition, the right of the affected communities to 'a general satisfactory environment ...' is protected under the African Charter on Human and Peoples' Rights.[91] The right to life, right to health and right to water are some of the rights guaranteed under the International Bill of Rights (IBR).[92]

It is obvious from the foregoing that the rights abused by MNCs in the Niger Delta and other developing markets are protected under municipal laws and international agreements and yet what we see in practice is a widespread situation of impunity. This has been attributed to the fact that corporations remain largely unaccountable for the abuse of the environment and human rights in developing markets because they are able to exploit loopholes in existing regimes and weaknesses in the legal enforcement institutions in those markets.[93]

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[88] Oludayo Oluduro, *Oil Exploration and Human Rights Violations in Nigeria's Oil Producing Communities* (Cambridge: Intersentia 2014) 309.
[89] (1868) LR 3 HL 330.
[90] This is concerned with private nuisance. See *St Helens Smelting Co* v *Tipping* (1865) 11 HLC 642.
[91] This right is guaranteed under article 24 of the African Charter on Human and Peoples' Right 1981, Adopted 27 June 1981, and entered into force on 21 October, 1986 OAU. Doc. CAB/LEG/67/3 Rev. 5.
[92] 'International Bill of Rights' is the expression used for the Universal Declaration of Human Rights (UDHR), GA Res. 2200A (XXI), UN Doc. A/6316 (1966); International Covenant on Civil and Political Rights (ICCPR) G.A. Res 2200A (XXI) UN Doc. A/6316 (1966 ; and International Covenant on Economic Social and Cultural Rights (ICESCR), GA Res 2200A (XXI), UN Doc. A/6316 (1966).
[93] Deva, (n 24) 9.

From the discussions so far, it is clear that globalization and the associated changes in corporate structure represent one major factor that creates the environment for corporate impunity for human rights and environmental abuses. However, two other contributing factors, as identified by current scholarship are governmental insensitivity to the plight of human rights victims and the lack of access to judicial remedies for those victims in developing markets.[94] In the case of the Niger Delta, this insensitivity has been attributed to the strong vested interest of the Nigerian government in the oil sector, based on the fact that crude oil and natural gas account for over 95% of the government's export earnings and 80% of its budgetary revenue.[95]

In the effort to protect its most important source of revenue the Nigerian government has responded to agitations (peaceful or violent) by the local communities, in protest at the damage to their environment, in very unorthodox ways. A detachment of the Nigerian Army has operated in the region since the 1990s. It is stationed there specifically to protect oil production facilities. The soldiers – commonly referred to as the "military task force", now renamed "operation polo shield" (OPS)[96] – patrol the communities, randomly arresting perceived dissidents and ruthlessly destroying whole communities when unrest emerges.[97]

It is important to point out that since the mid-1960s, when oil became the mainstay of the Nigerian economy, it is in the 2016 budget that oil is for the first time proposed to account for only 12.2% of Nigeria's budgetary revenue.[98] However, the importance of oil to the Nigerian economy is not diminished by the significant reduction in its budgetary contribution, because oil and natural gas remain the dominant foreign exchange earners for the government and the retention of the office of the Minister of Petroleum by the

[94] Deva (n 24), 24-45.
[95] See, <http:/www.indexmundi.com/nigeria/economy> accessed 21 January 2017.
[96] Mike Odiegwu, 'Bayelsa Polls: Tension as Delta, Rivers Militants Regroup' The Nation, December 27, 2015 <http://www.thenationonlin.net/bayelsa-poll-tension-as-delta-rivers-ex-militants-regroup> accessed 27 December 2015.
[97] For example, in 1999, in response to the killing of twelve policemen by the youths of Odi who were protesting the damage to their community by the oil companies the government ordered a military invasion of Odi in what was known as the Odi massacre. When the military left Odi, no building was left standing in addition to over 2,000 deaths. Most of the dead were women, the elderly and children. See Oluduro, (n 85) 234.
[98] Appropriation Act 2016, at <htpp://www.budgetoffice.gov.ng>. accessed 27 December 2016.

Nigerian President[99] underscores the importance of the oil sector to the Nigerian economy. Thus, in order to keep the oil flowing and to ensure stability in government spending, the government will readily overlook and sometimes aid human rights and environmental abuses perpetrated by the oil corporations.[100] This attitude of the Nigerian government opened the Niger Delta up to some of the most egregious human rights and environmental abuses in human history.[101]

Another factor that has encouraged corporate abuses of human rights in developing markets is the almost complete absence of access to judicial remedies because of the inefficiency of legal enforcement institutions, especially the courts. This is reflected in undue delays that characterise justice administration in most developing markets. In the case of Nigeria, the disposal by the courts of cases involving oil spills by oil MNCs takes an unduly long time. An example is the *Shell Petroleum Development Company Nigeria Ltd* case,[102] which took 32 years to resolve.[103]

Thus, the major factors discussed above encourage, in different ways, the wanton human rights abuses and destruction of the Niger Delta environment by oil MNCs operating in the region. The many years of environmental degradation and social damage to the Delta have created a new and devastating social problem, with the emergence of armed groups who claim to fight for the victims of human rights and environmental abuses perpetrated by the oil MNCs in the region.

The activities of armed groups began during the 1990s, with some frustrated and angry youths in the region taking to militancy, blowing up oil pipelines and taking oil workers hostage.[104] Activities of these militants have sometimes created global concern.

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[99]The Guardian, 'Nigerian President Muhammadu Buhari to Become Oil Minister in Own Cabinet' <http://www.theguardian.com/2015/sep/30/nigeria-president-muhammadu-buhari-to-become-oil-minister-in-own-cabinet> accessed 17 March 2017.
[100] Guiliani and Macchi, (n 20) 480.
[101] See a detailed assessment of the pollution in the oil-producing area of the Nigerian Niger Delta, UNEP Report 2011, (n 83).
[102]*Shell Petroleum Development Company Nigeria Ltd v Chief Joel Anaro & Ors,* (2015) LPELR -24750 (SC).
[103]Ade Adesomoju, 'Oil Spill: 32 Years After, Supreme Court Orders Shell to Pay N30m Compensation' The Punch, 6 June 2015. This case which commenced in the High Court of the then Bendel State in 1983 was concluded on 6 June 2015.
[104] Oronto Douglas, Ike Okonta, Dimiera Von Kemedi and Michael Watts (2014) Institute of International Studies, University of Berkeley, U.S.A.

For example, the activities of the Niger Delta militants radically disrupted oil production in March and April 2003 leading to an increase in oil prices in the global market and 'reinforcing the notion that Nigeria, and the new West Africa "Gulf States" in general, are matters of US security concern'.[105]

Militancy in the Niger Delta creates a huge dent in the Nigerian economy because of the depletion of the Government's revenue target from oil. The activity of militants in the Niger Delta has made it impossible for the country to meet its allocated Organization of Petroleum Exporting Countries (OPEC) production quota of 2.2 million barrels per day. In view of the importance of the oil revenue to Nigeria's national budget and overall economy, the Government granted total amnesty in August 2009 to all militants who would drop their weapons.[106] The amnesty program has, however, failed to end militancy in the region despite the huge cost to the Government, estimated at about 260 billion Naira (US$1.5bn).[107] This is due in large part to the distrust between the government and the Niger Delta communities.[108]

Apart from the slight rise in production experienced in the first few months after the announcement of the amnesty program in 2009, Nigeria has consistently produced below the OPEC allocated quota. This is due largely to the return of most of the militants to the creeks, where they engage in stealing crude oil from pipelines and illegally refining crude oil with the active connivance of the local communities.[109] The estimated revenue

<http://www.oldweb.geog.berkeley.edu/ProjectResources/ND%20Website/WP/4-DouglasVonOkonta.pdf> accessed March 23, 2017.

[105] *Ibid*.

[106] Militancy in the Nigeria affected crude oil production and export necessitating urgent action by the government, which set up a Presidential Panel and Disarmament of Militants in the Niger Delta on the 5th May 2009. The government accepted the report of the committee and granted amnesty to the Niger Delta militants with effect from August 6, 2009. The immediate result of the amnesty was increase in Nigeria's crude oil production from 800 to 2.3 million barrels per day. See Oluduro, (n 88) 202-3; see also Drew Hinshaw, 'Niger Delta Amnesty Program Fails to End Militancy' *The Wall Street Journal* (New York September 4 2012) <http://www.nigerdeltalpolitics.wordpress.com/2012/09/04/nigeridelta-amnesty-program-fail-to-end-militancy> accessed March 24, 2016.

[107] The government has budgeted 48 billion Naira (250 million U.S dollars) annually for the program since 2010 and, it is estimated to cost the government 20 billion Naira (100 million U.S. dollars) in the 2016 budget. The Punch, December 18, 2015.

[108] See a more detailed discussion of militancy in the Niger Delta, the amnesty program, and related issues in Chapter 6, s. 6.3.3.

[109] Jimitota Onoyume, 'Communities to Loose Land for Bunkering Activities – Navy' The Vanguard, December 28, 2015,< http://www.vanguardngr.com/2015/12/communities-to-loose-land-for-bunkering-activities-navy> accessed 28 December 2015.

loss from activities of militants, such as vandalism of oil pipelines and theft of crude oil is estimated to be about US$14bn annually.[110] The estimated cost of just one January 2016 attack on some gas and oil pipelines was put at US$395,000 per day plus about US$600,000 to repair the damages.[111] The fact that the military task force (OPS) based in the region has lately been destroying illegal refineries hosted by the communities underscores the support that the militants and other criminal elements enjoy in the region.[112]

The effect of the egregious environmental degradation of the Niger Delta and the conflict that it has generated on the local communities, the oil MNCs and the economy of Nigeria, makes it imperative to devise a regulatory framework that would address the relationship between the Niger Delta communities and the oil MNCs as a strategy for preventing environmental degradation and human rights abuses in the region. This is the basis for the proposed national legal framework that will be based on public participation or more particularly, the participation of the group that is arguably the most affected by negative corporate externalities in matters of economic development and the environment in Nigeria. However, because MNCs are the regulatory target addressed in this thesis, it makes sense to briefly review how FDI and issues of human rights and the environment are regulated to underscore the proposal for a new regulatory approach.

[110] John Vidal, 'Niger Delta Oil Pipeline Vandalism Estimated to Cost $14bn a Year' The Guardian, November 10, 2015, <http://www.theguardian.com/environment/2015/nov/10/niger-delta-oil-pipeline-vandalism-estimated-to-cost-14bn-a-year>. accessed February 5, 2016.
[111] *The Vanguard*, 'Renewed Rumpus in Niger Delta' (Lagos, 26 January 2016), 1.
[112] Clement Idoko, '200 Illegal Refineries Destroyed in Niger Delta NSDC' Nigerian Tribune (Ibadan: 29 December 2015).

1.2.5 International Approaches to Regulating Human Rights Violations[113] in Developing Markets and its Challenges

Globalization, together with the new multi-layered corporate structure of MNCs, has brought immense economic power and political influence, and a change in the character of the business corporation, from a mere tool of private economic activity to a global mainstream policy institution[114] with a power greater than some states to affect the realization of rights.[115] The problem is that this change in the character of the modern corporation is not reflected in the initiatives that seek to address corporate abuses of human rights and the environment, as emerging initiatives focus mainly on the obligation of corporations under international norms. In a world where MNCs operate globally and traditional 19th century corporate law has become inadequate for addressing their social role at the individual national level, an international legal regime would appear to be more appropriate to address their operations, with particular regard to cross-border trade and foreign investment.[116]

Notwithstanding the fact that MNCs are already "participants" in the international legal system as major rights holders under various types of bilateral investment treaties (BITs) and host government agreements,[117] the orthodox view that international law does not lay down any general obligations of corporations towards society is still so far the prevailing view. Except in the field of environmental protection,[118] international law places direct obligations only on states under the International Covenant on Economic Social

[113] This thesis acknowledges that the traditional view remains that States are the only duty bearers in international law. Therefore, "corporate violations" is used in this thesis as a broad functional category, to include all forms of abuse of protected rights by all members of society including business corporations.
[114] Addo (n 6) 7.
[115] John Gerard Ruggie ' Business and Human Rights: The Evolving International Agenda' (2007) vol. No. 4 The A. J. of Int'l. L. 819, 824.
[116] Anna Beckers*, Enforcing Corporate Social Responsibility Codes* (Oxford: Hart Publishing Limited 2015) 10.
[117] Ruggie, (n 114) 824.
[118] See for example, International Convention on Civil Liability for Oil Pollution Damage 29 November 1969, art. 3, 973, U.N.T.S. 4, 5 as ammended by the protocol of 1992, art. 4; Covention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, 21 June 1993, art. 6, 7, 32 I.L.M 1228, 1233-34.

and Cultural Rights (IESCR)[119] and the International Covenant on Civil and Political Rights (ICCPR).[120]

It is, however, important to note that the recent General Comment 31 imposes binding obligations on State Parties not only to ensure the enjoyment of the rights under these treaties but also to prevent their abuse by non-State actors.[121] As a result, some have argued that States have international obligation to take steps domestically to ensure corporate compliance with human rights obligations[122] by enacting legislation 'making the prohibited conduct a crime under national law or imposing civil liability upon corporate violators'.[123]

Despite the many human rights and environmental treaties that impose obligations on States to protect human rights and the environment there is typically no international tribunal with the authority to deal with issues of corporate human rights and environmental abuses.[124] Obligations under the various BITs fall on the host states themselves, leaving the MNCs and their home states with scarcely any international obligations.[125] This has created a regulatory gap, which has engaged the UN since the last quarter of the last century as it seeks to establish a regulatory framework concerning the human rights responsibilities of business. The United Nations Draft Norms on the Responsibilities of Transnational Corporations[126] was the first major attempt to protect human rights by imposing direct responsibility on transnational corporations and other

[119] Entered into force January 3, 1976, G.A. Res. Doc. 2200A, 21 U.N GAOR Supp. (No. 16) at 49 U.N. Doc. A/6316 (1966).
[120] Entered into force on March 23, 1976, G.A. Res. 2200A, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966).
[121] HRC, General Comment 31: Nature of the General Legal Obligation Imposed on State Parties to the Covenant, UN Doc CCPR/C/21/Rev.1/Add.13 (29 March 2004) [8].
[122] Robert McCorquodale, 'Non-state Actors and International Law' in Sarah Joseph and Adam Mcbeth, Research Handbook on International Human Rights Law (Cheltenham: Edward Elgar Publishing Ltd 2010) 100.
[123]Stephens (n 3) 70.
[124] Curtis A. Bradley, 'The Costs of International Human Rights Litigation' (2001) 2 Chi. J. Int'l L. 457, 458.
[125] Muchlinski, (n 1) 84
[126] UN Economic and Social Council (ECOSOC), Sub-Committee on the Promotion and Protection of Human Rights, Economic, Social and Cultural Rights: Draft Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regards to Human Rights, UN Doc E/CN.4/Sob.2/2003/L11, 52 (August 13, 2003)

business enterprises. The Norms were however, never adopted because of strong opposition from MNCs and other powerful interests.[127]

As a result of the regulatory gap identified above, it may be correct to say that global MNCs operate largely in a legal vacuum.[128] This is because they conduct their operations from their home-States, usually in developed markets, through subsidiaries scattered across the world. This puts them safely outside the jurisdictional authority of their subsidiaries' host-States. The home-States, which ordinarily have legal authority over them, are unwilling to exert control beyond their borders or are unable to do so because of the powerful influence of business actors over politicians and governments.

At the international level, the influence of MNCs is also often reflected in the unwillingness of States to support mechanisms intended to constrain the actions of their corporations abroad. Thus, the lack of capacity on the part of host-States and the unwillingness on the part of home-States to regulate MNCs has created the incentive for them to disregard the human rights of the citizens of their host-States, especially in developing markets, with impunity.[129] This has created the necessary environment for Non-Governmental Organizations (NGO's) such as Amnesty International, Human Rights Watch, Friends of the Earth, Greenpeace and others to champion issues relating to the regulation of human rights and environmental violations in developing markets.

Often at the urging of NGOs, new regulatory initiatives in the form of international soft law instruments have emerged at international and inter-governmental levels to address the social role of globally operating corporations. Some of the major instruments in this category are the Organisation for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises (MNEs)[130] and the UN Guiding Principles.[131] In

[127] Ruggie (n 114) 821.
[128] Pillay, (n 28), 499.
[129] Broecker, (n 8).
[130] OECD Guidelines for Multinational Enterprises: Recommendations for Responsible Business Conduct in a Global Context, 25 May 2011 <http://www.oecd.org/dataoecd/43/29/48004323.pdf> (hereinafter OECD Guidelines 2011) accessed 4 January 2016.
[131] 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', A/HRC/17/31 (21 March 2011) (SRSG 'Guiding Principles').

addition, developing private corporate social responsibility (CSR) codes has become the norm for major MNCs.[132] The CSR codes are typically voluntary written commitments, as a standard to guide relationships with other stakeholders, such as local communities and employees.

The "soft-law" instruments are discussed in detail in Chapter 3. However, even though CSR codes are no doubt important initiatives that seek to address the social responsibility of MNCs they are not discussed as one of the mechanisms for regulating the conduct of MNCs for two reasons. The first is that CSR codes are private initiatives and thus not a regulatory instrument per se. Secondly, CSR codes and issues pertaining to CSR generally is a very broad topic that will require a book length treatment, which cannot be effectively dealt with within the limited space available for this thesis.

1.2.6 Legal Enforcement Challenges in Developing Markets

The increasing reports of egregious violations of human rights by MNCs operating in developing markets is an indication of general non-compliance with human rights standards as provided in current international instruments. As discussed earlier, the weakness and inefficiency of the legal enforcement institutions in developing markets also constitute a major challenge to effective regulation of corporate human rights abuses in those markets. The implication is that the current focus on the human rights obligations of corporations under international norms would also face the same enforcement challenges that have rendered domestic regimes ineffective in developing markets if the focus is primarily remedial.

Although the interaction between business and international human rights norms is discussed in chapter 3, it suffices to state here that one of the problems identified with focusing on the norms for regulating corporate human rights abuses in developing markets is that the responsibility for implementation and enforcement of international

[132] Broecker, (n 8)169.

human rights norms against private actors, such as MNCs, lies primarily at the municipal level.[133] This is one of the main reasons that we propose a shift from the current remedial approach to addressing corporate human rights abuses in developing markets because, as Patricia Kameri-Mbote and Philippe Cullet argue, legal priorities must be set to accord with domestic and available corporate support institutions.[134]

Thus, in consideration of the weak and inefficient enforcement institutions in developing markets, it is argued that prevention, rather than sanctions, should be the focus of any regulatory regime that is proposed to regulate MNCs in developing markets to address the problem of environmental degradation and human rights abuses. This is important for the following reasons. The first is to minimize reliance on the weak and inefficient legal enforcement institutions in developing markets, especially their justice system, that is beset by inordinate delays.[135] In addition, it makes sense to seek alternative ways, rather than relying on regulatory regimes that focus on remedies, especially since there is no international tribunal with the authority to adjudicate and resolve human rights issues.

Finally, the growing distrust between MNCs and their host communities, which provides the incentive for local communities in the Niger Delta to aid criminal conduct, needs to be addressed. Changing the corporate structure from the inside[136] by establishing appropriate decision-making structures that will give access to information about the activities inside the corporation to those most affected by those corporate activities may be one way to rebuild the trust between MNCs and their host communities.

It is in view of the above that we suggest a shift from the neo-liberal Anglo-American corporate governance model, which focuses primarily on shareholders,[137] to a more inclusive regime that is stakeholder-based, with provisions for interest group

[133] Paul Redmond, 'Transnational Enterprise and Human Rights: Options for Standard Setting and Compliance' (2003) 37 Int'l L. 68, 72.
[134] Patricia Kamri-Mbote and Philippe Cullet, 'Biological Diversity Management in Africa: Legal and Policy Perspectives in the Run-up to WSSD' (2002) 11 (1) RECIEL 38, 51.
[135] *The Shell Petroleum Development Company Nigeria Limited* case (n 102).
[136] Thomas Donaldson, *Corporations and Morality* (Englewood Cliff: Prentice-Hall, Inc. 1982) 166-7.
[137] Lorraine Talbot, *Progressive Corporate Governance for the 21st Century* (Oxon: Routledge 2013) 146.

participation. This is because the condition that necessitated the adoption of a shareholder-centric governance model, such as dispersed shareholding, which diminishes shareholder's capacity to control management,[138] is absent in the relationship between subsidiary/subsidiaries and their parent MNCs. As a result, the increasing social impact of corporate activities has made securing private rights for MNCs less important than ensuring their responsibility for the acts of their subsidiary/subsidiaries, which generate significant social impacts.[139] The participation of affected groups in this regard is important to counterbalance the overwhelming influence and control of MNCs over their subsidiary/subsidiaries.

1.3 Research Questions

In view of the above, the central question for this thesis will be – what is the appropriate legal or regulatory regime that will adequately address corporate abuses of human rights and the environment in developing markets? To answer this question this thesis will undertake the difficult task of identifying a new function for corporate law as a regime for regulating MNCs activity, especially in developing markets, by addressing the following six sub-questions.

(a) How adequate are the bodies of law employed to regulate the social impact of corporate activities in developing markets?
(b) How are the responsibilities of MNCs addressed in international instruments and what are the implications for developing markets, especially with regard to their relationships with the communities where they operate?
(c) Which international norms offer the appropriate normative basis upon which to base a municipal framework on interest group participation in developing markets?

[138] Berle and Means (n 30).
[139] Hill (n 40) 23.

(d) How does the current corporate legal regime in developed markets address the impact of corporate activities on non-shareholder constituencies, and what are the implications of adopting the developed market models for developing markets?

(e) What are the bases for incorporating non-shareholder groups into the corporate decision-making process?

(f) How and to what extent will their involvement (in this case, the host communities) in corporate affairs affect the interest of other stakeholders, especially the shareholder group and the government?

1.4 Scope of the Research

The focus of the discussion so far has been on the transformation of *Salomon's* corporation[140] into global institutions and major global economic and political players that generate considerable social and environmental consequences, and the inability of traditional corporate law, combined with emerging legal and regulatory initiatives, to adequately address the social and environmental abuses emanating from their activities. MNCs operate globally but issues of corporate human rights and environmental abuses tend to concentrate on developing markets.[141] Thus, this research aims to identify the factors that encourage corporate abuses of human rights and the environment in developing markets.

It is not possible within the space allowed for this thesis to discuss the situations in all of the developing markets, so, as already indicated, Nigeria and particularly the Niger

[140] This is used here to reflect the genesis of the separate corporate personality and to highlight the paradox in applying the *Salomon* principle of strict separate corporate personality to corporate groups. The importance of *Salomon* to the corporate personality priciple lies in the fact that the principle was established in the case of *Salomon* v *Salomon & Co* (1897) A.C 22, H.L. The result is that a company is disticnt and different from the shareholders. Provided that the incorporation formalities are complied with, the company is a legal person with its own rights and liabilities.

[141] Doreen McBarnet and Patrick Schmidt, 'Corporate Accountability Through Creative Enforcement: Human Rights, the Alien Tort Claims Act and the Limits of Legal Impunity' in Doreen McBarnet, Aurora Voiculescu and Tom Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge University Press 2009) 148.

Delta region will be the central focus. However, references will be made to the legal and regulatory environment of some major developing markets, such as India and South Africa, to demonstrate how corporate law in those jurisdictions regulates the social impacts of corporate activities. The choice of India and South Africa as reference developing markets in this respect is based on two factors. The first is that both India and South Africa are common law jurisdictions, as is Nigeria.[142] The second is that both countries are major developing markets as members of the Group of 20 (G20) largest economies in the world.[143] The general reference to situations in other developing markets is also designed to underscore the general trend of human rights abuses and the failure of their legal systems to adequately rein in the major corporations or redress corporate human rights abuses there.

It is acknowledged that corporate human rights abuses by MNCs are not peculiar to local communities in developing markets but it is arguable that the most egregious abuses in recent human history have all occurred there.[144] This justifies the concentration of this research on developing markets. It is also true that the rights abuses in developing markets are not confined to local communities, as other constituencies, such as customers of the corporations, their employees, suppliers and other third-party relationships may be affected by MNC activity. These other relationships have engaged the attention of human rights campaigners and advocates of corporate social responsibility in developed markets. In fact, academic and scholarly concerns about corporate human rights abuses in developed markets are mostly concentrated on other constituencies, almost to the exclusion of host communities.[145]

This research will focus on three branches of law – corporate law, human rights law and environmental law, as the basic regulatory mechanisms that deal with issues in

[142] Rafael La Porta et al., 'Law and Finance' (1998) J. of Pol. Economy vol. 106 No. 6, 1113, 1136.
[143] Jamil Mustapha, 'What is the G20 and How Does it Work' <http://www.telegraph.co.uk/business/0/what-is-the-g20-and-how-does-it-work/> accessed 27 January 2017.
[144] Some examples of such violations include the Bhopal UCC factory disaster in India, the environmental destruction of Ogoni land by Shell Development Corporation in Nigerian and the destruction of the Ecuadorian Amazon jungle by Texaco.
[145] Alan E. Garfield, 'Special Issue on the Corporate Stakeholder Debate: The Classical Theory and its Critics' (1995) 43 AM. J. COMP. L. 150, 157-63.

the corporate, human rights and environmental arena. In addition, the emerging regulatory initiatives at the international level will also be discussed. The present status of these legal regimes and regulatory initiatives, and their capacity to regulate corporate abuses of human rights and the environment, will be examined. There will also be references to other body of laws that regulate relationships within society, such as criminal law, tort law etc.

1.5 Research Methodology

The problem that prompted this research is the abuse of the rights of local communities in developing markets by business corporations operating there. There are laws and ancillary regulations in most developing markets that regulate relationships with the corporation. Therefore, the fact that corporate human rights abuses have continued in developing markets with relative impunity[146] may be the result of weaknesses in the laws available to address such abuses. Accordingly, discussions on the problems identified in this thesis will begin with an analysis of existing legal regimes. This necessarily makes the doctrinal methodology the primary research method for this thesis.

Thus, this research involves a study and analysis of relevant primary and secondary materials that touch on the relationships with business corporation. It involves a doctrinal case law analysis of corporate abuses of human rights and the environment. This is with a view to identifying the problems that hinder the redressing of corporate human rights wrongs against local communities in developing markets. For example, a doctrinal analysis of case law involving rights abuses by MNCs in Nigeria and at least one major developing jurisdiction, India, is undertaken. Two important cases, *Bhopal v UCC*[147] and that of *Jonah Gbemere v Shell Petroleum Development Co*[148] are central to this analysis, which aims to demonstrate the difficulty in proceeding against MNCs for corporate human rights abuses.

[146] Broecker, (n 8) 167.
[147] Deva, (n 24) 26
[148] (2005) Suit No. FHC/B/CS/53/05

Essentially, corporate law regulates corporations and a doctrinal analysis of the existing corporate legal regimes in some developed and developing market jurisdictions is undertaken. The twin principles of legal personality and limited liability form the core of this analysis which reveals problems in their application to 21st century MNCs and their subsidiaries. This is because of the need to address the problem with applying these principles to shield MNCs from the legal consequences arising from harm committed against non-shareholder groups by their subsidiaries operating in developing markets. This is especially important in light of judicial pronouncements, such as the dictum by Slade LJ in *Adams* v *Cape Industries Plc.,*[149] that:

> if the company chooses to arrange the foreign affairs of its group in such a way that the business carried on in a particular country is the business of the subsidiary and not its own, it is, in our judgement, entitled to do so. Neither in this class of case nor in any other class of case is it open to the courts to disregard the principle of *Salomon* v *Salomon* [1897] AC 22 merely because it considers it just to do so.[150]

To complement the doctrinal method, a theoretical analysis of secondary materials is necessary to effectively answer the questions set by this thesis. This study offers an insight into scholarly views about an appropriate regime for regulating MNCs to make them accountable for human rights abuses in developing markets. It also provides a basis for understanding the relevance of corporate governance to the interest of other stakeholders, such as local communities.

Most important in this area is the analysis of the neoliberal Anglo-American model of shareholder primacy, which is based on the premise that the neoliberal model is the most efficient and dynamic way to govern corporations.[151] The model is critically evaluated and compared with alternative models identified by comparative research,[152] especially

[149] (1991) BCLC 479.
[150] *Ibid*., 513.
[151] Talbot, (n 137) 191.
[152] Raphael La Porta, Florecio Lopez-de-Silanes and Andrei Shleifer, 'Corporate Ownership Around the World' (April 1999) The Journal of Finance Vol. 54 No. 2 471-517, 472.

the German "Codetermination"[153] model. This is with a view to identifying how and to what extent corporate governance matters for the successful regulation of the social impact of corporate activities in developed markets. This makes the comparative method an important aspect of this research because it will help us to draw on the useful descriptions on the differences and similarities between the two systems and thus develop the appropriate model for addressing the problem identified by this research.

1.6 Research Structure

One of the main arguments in this thesis is that the weak institutions in developing markets, especially the weak and inefficient legal enforcement institutions,[154] makes the remedial solution to human rights abuses in those countries an unreliable option. Thus, the focus here will be on prevention. The aim is to obviate the need to rely so much on the weak enforcement institutions in developing markets.

In as much as it is agreed that the dynamic nature of today's MNCs makes them difficult regulatory targets for municipal authorities, it is also true that they enter and operate in new jurisdictions under some form of regulation.[155] This means that such regulations that regulate their entry could also be relied upon to regulate their conduct. Therefore, considering the absence of general obligations for corporations under international law and the apparently inefficient legal and regulatory environment in developing markets, it makes sense to think of adequate regulation for the relationship between business corporations and local communities in developing markets as a matter

[153] The German "Codetermination" model is a corporate governance model in Germany that allows for the participation of labour on corporate boards. See Mark J. Roe, 'German Codetermination and German Securities Markets' (1998) 1998 Colum J. Eur. L. Rev. 167, 167; Johannes Schregle, 'Co-determination in the Federal Republic of Germany: A Comparative View' (1978) Int'l Lab. Rev. 81.

[154] Comparative corporate law scholarship has identified corporate support institutions as the institutions that support the economic market (business), such as stock exchanges, business press, law enforcement institutions such as the police and the courts, etc. See Bernard S. Black, 'Legal and Institutional Prconditions for a Strong Securies Market' (2001) 48 UCLA L.R. 781.

[155] See for example, Section 54 CAMA, which prescribes that any corporation wishing to do business in Nigeria must go through incorporation under the Act.

that could be achieved through the specific law that regulates business corporations – corporate law.

To address the above issues, this thesis is divided into eight chapters including this introductory chapter. Chapter two surveys the legal and regulatory environment in our reference developing market jurisdiction, Nigeria. The chapter examines existing legislation that deals with the abuses identified in the Nigerian Niger Delta, such as human rights laws, environmental law, tort law, criminal law and some oil industry specific legislation. This investigation is intended to reveal the weaknesses inherent in the Nigerian legal environment that has made it difficult and sometimes impossible to obtain adequate remedies against MNCs for the abuses of the local environment and human rights of the local communities.

Chapter three interrogates the focus on international norms and other international soft law instruments as a basis for achieving corporate accountability for human rights. In this regard, this chapter evaluates the International Bill of Rights (IBR)[156] and two soft law instruments: the OECD Guidelines and the UNGPs. The aim of this evaluation is to identify the strength and weaknesses of the instruments with a view to understanding how they could be implemented to achieve the goal of preventing corporate abuse of the environment and human rights. It will also provide an appropriate a basis to effectively challenge the current scholarship focus on remedial solution as a strategy for implementing international regulation and holding artificial non-State actors such as MNCs accountable for human rights abuses.

To support the main proposal for a municipal framework for public participation in corporate affairs as a strategy for preventing human rights and environmental abuses in developing markets, Chapter Four critically analyses international environmental norms and the approaches to implementing them at the national level. This is with a view to identifying the peculiar challenges that have made corporate-related environmental

[156] 'International Bill of Rights' is the expression used for the UDHR, the ICCPR and the ICESCR.

degradation the standard in developing markets despite the international environmental law focus on public participation as a strategy for preventing environmental harm. This will provide a rational basis for the proposed national legal framework on public participation as an alternative to a general reliance on environmental impact assessment (EIA) regime for promoting the concept of public participation.

Developing markets are the focus of most contemporary discussions on protection of local communities from abuses by business corporations.[157] This is an indication that relationships between local communities and business corporations may not be seriously at issue in major economic jurisdictions. However, because a corporate law solution is the strategy ultimately adopted in this thesis for achieving human rights and environmental integrity in developing markets, Chapter Five examines how corporate law addresses non-shareholder concerns, especially under the Anglo/American system. The focus on the Anglo/American model is for two reasons. The first is that it is the model that has spread around the world.[158] Secondly, the alternative model, usually classified as the stakeholder model, generally accommodates the interests of other stakeholders. The aim in this chapter is to determine the implication of adopting the Anglo/American model for developing markets as a basis to support the proposal for the inclusion of non-shareholder groups in the corporate governance structure in those markets.

Chapter Six examines the effect of corporate activities on certain stakeholder groups to justify the suggestion for the involvement of local community representatives on corporate boards in developing markets. The chapter generally interrogates the principles upon which the shareholder vision of corporate law is based. This is with a view to identifying a premise that can support the proposed involvement of local communities in corporate affairs. The chapter also reviews government initiatives that seek to address the challenges in the Niger Delta to determine why the various initiatives have so far failed adequately to address the challenges of human rights and environmental abuses in the

[157] McBarnet and Schmidt (n 141).
[158] Talbot, (n 137) 162-4.

region. This failure has been identified as the major factor responsible for the growing insecurity in the region, highlighting the need for an alternative, especially one that can engender co-operation amongst the major stakeholders. Chapter Seven develops the blueprint for the proposed alternative participatory structure, and Chapter Eight concludes the thesis.

2. Regulating and Redressing Corporate Human Rights and Environmental Violations in Developing Markets: A Focus on Legal, Regulatory and Enforcement Regimes in Nigeria

2.1 Introduction

The increasing involvement of Western MNCs in developing markets, especially the penetration of the extractive MNCs into their remote parts, has become a major source of global human rights concern since the 1990s. This is because of the growing corporate impunity for environmental degradation and human rights abuses, which has been attributed to the legal and regulatory inadequacies in developing markets.[1] Despite the acknowledged importance of MNC investment to economic development of developing markets, the need to protect their environment and the human rights of local communities there cannot be overemphasised. This underscores the role of law as a basis for ensuring a balance between the goals of economic development and the rights of citizens, especially the rights of MNC host communities in developing markets to a healthy and clean environment. As Roscoe Pound puts it, 'law is a social institution which seeks to balance conflicting interests and satisfy as many claims as possible with the minimum of friction'.[2]

However, John Armour cautions that the role of law should not be overstated because its importance depends to a large extent on its deterrent effect which is more a function of the probability of its enforcement[3] rather than the size of the potential penalty.[4] Therefore it is important to investigate the legal and regulatory environment in at least one developing market. This is with a view to identifying whether it is the weakness of the laws themselves or the inefficiency of regulatory and legal enforcement institutions that is primarily to blame for the inability of developing market authorities to rein in MNCs

[1] Surya Deva, Regulating Corporate Human Rights Violations: Humanizing Business (Routledge 2014) 12.
[2] Roscoe Pound, 'A Theory of Social Interests' in Papers and Proceedings of American Sociological Society, May 1921.
[3] John Armour, 'Enforcement Strategies in UK Corporate Governance: A Roadmap and Empirical Assessment' inJohn Armour and Jennifer Payne (eds), Rationality in Company Law: Essays in Honour of DD Prentice (Portland: Hart Publishing 2009) 77.
[4] The term "penalty" is used here as a broad functional category, to include all consequences of enforcement that are likely to be costly for a violator and thereby serve to deter misconduct.

operating there. Environmental degradation and human rights abuses in developing markets (including Nigeria) by the MNCs operating in those markets is well documented.[5] In the case of Nigeria, a recent comparison of oil spills in Europe and Nigeria by Audrey Gaughran, Amnesty International Global Issues Director captures the egregious environmental degradation in the Niger Delta region of the country. According to Gaughran, while Europe has had an average of 10 spills a year between 1971-2011, the case of Nigeria is different because, 'if what is happening in Nigeria were to take place in any other country, this would be a national emergency. In Nigeria, it appears to be a standard operation procedure for the oil industry. The human cost is horrific – people living with pollution every day of their lives'.[6]

It is important to note that most of the abuses have gone on for years without adequate remedy for the victims in most cases.[7] Since corporate abuses of human rights and the environment is an affront to the rights of those affected by it, one may ask if there are no laws in countries like Nigeria (where the abuses are most prevalent) that could be relied upon to prevent them or alternatively provide a remedy for the victims when they occur. As a matter of fact, there are laws in most developing markets that regulate relations between persons – tort law, criminal law etc. There are also specialist laws that touch on relationships with business corporations, such as corporate law, labour law, consumer protection laws etc. and in most cases, environmental[8] and human rights laws that deal with issues of the environment and human rights. It is instructive that Nigeria,

[5] See the Commission on Human Rights, 'Interim Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and other Businesses', E/CN.4/2006/97 (February 22 2006) para. 30; Center for Economic and Social Rights, Rights Violation in the Ecuadorian Amazon: The Human Consequences of Oil Development 1 (1994) cited by Chris Jochnick, 'Confronting the Impunity of Non-State Actors: New Fields for the Promotion of Human Rights' (1999) 21.1 Human Rights Quarterly 56-79, 57.

[6] <http://www.amnesty.org/.../hundreds-of-oil-spills-continue-to-blight-niger-delta> accessed 20 March 2017.

[7] Olubayo Oluduro, *Oil Exploration and Human Rights Violations in Nigeria's Oil Producing Communities* (Cambridge: Intersentia Publishing Ltd 2014) 3.

[8] For example, Nigeria has two pieces of legislation that deal exclusively with issues of the environment – Environmental Impact Assessment Act 1992 Cap E.12 Laws of the Federation 2004; National Environmental Standards and Regulations Enforcement Agency (NESREA) Act 2007 Cap N.164.

the focus of this review, operates the common law system as do most of the leading developing market jurisdictions[9] and they also have functioning courts.[10]

The previous chapter identified two developments in Nigeria that are the direct consequences of the situation of impunity for environmental degradation and human rights abuses in the Niger Delta. The first is the emergence of armed groups who have taken to violent agitations to protest the abuse of their environment.[11] The second is the increasing activity of international NGOs in the Niger Delta, especially with regard to the opportunities they provide for MNC human rights victims to pursue legal remedies in foreign courts.[12] This is the basis for the conclusion by certain commentators that laws in developing markets are undeveloped and that their legal enforcement infrastructure are weak and inefficient and therefore unable to support legal rights and enforce obligations.[13]

Two things are clear from the discussion so far. The first is that weak and inefficient laws and legal enforcement infrastructure have been identified as the major reasons for corporate impunity for human rights and environmental abuses in developing markets. Secondly, Nigeria presents an archetypical picture of this situation in terms of the severity and frequency of abuses of human rights and the environment and the failure of their legal system to adequately redress the abuses. It is in view of this that this chapter investigates Nigerian legal regimes and other regulatory and legal enforcement infrastructure to determine their adequacy for redressing abuses of human rights and the environment by MNCs. This will provide the appropriate basis for the suggestion for the law reform envisaged in this thesis.

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[9] Raphael La Porta and his colleagues classified Nigeria, India, Malaysia, Pakistan and South Africa as common law countries with English legal origin. See Raphael La Porta *et al*, 'Legal Determinants of External Finance' (1997) Vol 52, No. 3 The Journal of Finance 1131-1150, 1137-8.

[10] *Ibid*.

[11] Chapter I, section 1.2.4, 19.

[12] Audrey Gaughran, 'Shell's Niger Delta Pollution: the Good, the Bad and the Ongoing Quest for Justice' (Livewire: Amnesty's Global Human Rights Blog) <http://www.livewire.amnesty.org/2013/02/01/shells-niger-delta-pollution-the-good-the-bad-and-the-ongoing-quest-for-justice/comment-page-1> accessed 18 February 2017.

[13] N Uzor, 'PWC Projects Nigeria's Economy to Rank Top 10 in 2050' The Vanguard, 18 March 2016 <http://www.vanguardngr.com/2016/03/pwc-projects-nigerias-economy-rank-top-10-2050> accessed 19 March 2017; Oluduro (n 6).

2.2 Legal and Regulatory Regimes Relevant and Specific to the Environment, Human Rights and the Oil Industry in Nigeria

This chapter investigates the legal and regulatory regimes in Nigeria that specifically regulate human rights, the environment and the oil industry to ensure the protection of the environment and human rights in the country. Some legal regimes that do not necessarily focus specifically on issues of human rights and the environment or on oil sector activities but which contain provisions that are directly relevant to those matters are also investigated. These include criminal law and tort law principles of nuisance and negligence, and the rule in *Rylands* v *Fletcher*.[14] This investigation will provide a basis for understanding why preventing or redressing abuses of human rights and the environment in Nigeria has remained unachievable despite the plethora of legislation available in the country.

2.2.1 Common Law

Before oil pollution became a major issue in Nigeria's socio-political and economic discourse and the subsequent introduction of industry-specific legislation to deal with matters of pollution, the common law remedies of nuisance and negligence, and the rule in *Rylands* v *Fletcher*[15] were available to victims of pollution in the country. These common-law rules are still used today to pursue claims concerning oil pollution and to seek redress against perpetrators of acts committed 'in the context of injury suffered in respect of individual's right to enjoy his property and immediate environment free from interference and disturbance'.[16]

The common law is an important part of Nigeria's legal system. Although there is a plethora of statutes that deal with the environment, human rights and oil industry

[14] (1866) L.R. 1 Exch. 265; (1868) L.R. 3H.L. 330.
[15] *Ibid*.
[16] Kent Nnadozie, 'Environmental Regulation of the Oil and Gas Industry in Nigeria' in Beatrice Chaytor and Kevin R. Gray (eds), *International Environmental Law and Policy in Africa, Environment and Policy* Vol. 36, (Kluwer Academic Publishers 2003) 115.

specific activities, the common law could prove exceptionally useful where there is a *lacuna* in the provisions of such statutes or where such statutes do not confer any right of private action on victims of oil pollution. The common law theories usually relied upon by the victims of corporate environmental and human rights abuses in Nigeria's Niger Delta, and the difficulties in applying those rules to oil pollution and other oil industry related violations of human rights and the environment are examined below.

a] The Tort of Nuisance

The purpose of the tort of nuisance is to protect a person from disturbance or injury caused by the conduct of other persons or, inconvenience in the use of his property. Examples of oil exploratory-related nuisance include the discharge of oil, which consequently causes damage to fish ponds,[17] etc. As reiterated by the Nigerian Court of Appeal, the common law of England applicable in Nigeria recognises that nuisance may be either private or public.[18]

Public nuisance occurs where the injury, damage or inconvenience inflicted by the tortfeasor is to the public generally or to a class large enough to come within its ambit.[19] Where the inconvenience, injury or damage complained of is so widespread that it affects the public as a whole, it is actionable by the Attorney General. However, under the Constitution of the Federal Republic of Nigeria (CFRN) [20] 1999 (as amended)[21] a private person is permitted to maintain a private action in public nuisance if he can prove that the conduct of the defendant complained of caused him greater inconvenience or damage over and above that suffered by the public as a whole.[22]

Private nuisance, on the other hand, is an unlawful or unreasonable interference with another person's convenience, use and enjoyment of his or her land or any rights

[17] *S.P.D.C*. v *Adamkue* (2003) 11 N.W.L.R. [Pt. 832] 537, 546.
[18] *Ibid.*
[19] *Savage* v *Akirimade* (1964) LLR 238.
[20] The acronym CFRN will be used to represent the Constitution of Nigeria throughout this thesis.
[21] Cap C23, Laws of the Federation of Nigeria (LFN), 2004
[22] *Ibid*., s. 17 (1) (e).

touching and running with land.[23] The injuries under private nuisance are categorised under three headings – physical damage to plaintiff's property, substantial interference with the use and enjoyment of his or her land and interference with an easement or profit.[24] There are major challenges with relying on either private or public nuisance for addressing the problem of oil pollution. The major problem associated with the law of private nuisance is about how to strike a balance between the right of the defendant to use *his* land as he wishes, and the right of the plaintiff to be protected from interference with *his* enjoyment of land.[25] This is in addition to the fact that the tort of private nuisance protects property, which makes it impossible for a victim of oil pollution to access a remedy under the regime for a whole range of injuries such as a personal injury affecting his health or having physiological effects because of pollution.[26]

In the case of public nuisance, the problem of proof is a major challenge. This is because a plaintiff for private action in public nuisance would need to prove that the inconvenience or injury he suffered is over and above that suffered by the rest of the public to maintain a private action in public nuisance. This requirement of proof has in some instances worked against many victims of oil exploratory related infringements in the Niger Delta[27] leading many writers to conclude that proof is a major problem with the law of public nuisance in Nigeria.[28]

b] Negligence

The tort of negligence is the most commonly used common law remedy against the oil companies operating in the Niger Delta. The problem with relying on negligence like all other common law remedies is the elements that the plaintiff will need to prove to succeed.

[23] Ese O. Malemi, *Law of Tort* (1st ed, Lagos: Princeton Publishing Co 2008) 356.
[24] G. Kodilinye and O. Aluko, *Nigerian Law of Tort* (2nd ed, Ibadan: Spectrum Law Publishing 1999) 95.
[25] *Ibid*., 96.
[26] Ambrose O. Ekpu, 'Environmental Impact of Oil on Water: A Comparative Overview of the Law and Policy in the United States and Nigeria' (1995-1996) 24 Denver. J. Int'l L. & Pol'y 55, 93.
[27] *Amos &Ors* v *S.P.D.C.* (1976) 42 S.C. 70.
[28] A. O. Okukpon 'Tort Law and the Protection of the Individual against Industrial Pollution' (2001-2002) Vol. 1 No. 1 University of Benin Law Journal 99, 104; Olarenwaju Fagbohun, *The Law of Pollution and Envirnmental Restoration: A Comparative Review* (Lagos: Odade Publishers 2010) 258.

This is in addition to the many defences available to a defendant.[29] A plaintiff in a claim under negligence is required to prove the existence of a duty of care owed to him by the defendant, breach of that duty by the defendant, and damage to the plaintiff arising as a consequence of that breach. Discharging this burden under the tort of negligence in cases of oil pollution has proved a difficult task.[30] It is because of these challenges that C. E. Emole has described the common law of tort as 'ill-suited for the purpose of contending with oil pollution'.[31]

It is important to briefly discuss how the issue of burden of proof and the defences available to a defendant under the tort of negligence constitute an impediment to obtaining remedies in cases involving oil MNCs in Nigeria. Two main reasons have been identified for the difficulty in discharging this burden of proof. First is that in a highly technical industry such as the oil industry, proof of negligence requires for the most part expert scientific evidence. The victims of oil pollution who are mostly poor and uneducated rural community dwellers are unable to afford the cost of securing such scientific evidence and the services of skilled experts[32] required to match the oil companies who have the resources to bring expert evidence and technical knowledge to justify their actions.

Two cases illustrate the types of problem encountered by oil pollution victims seeking remedies under the tort of negligence against oil MNCs in Nigeria. First is in the case of *Seismograph Services* v *Benedict Onakposa*,[33] where the court stated that it preferred the witnesses provided by the defendant because the witnesses called by the plaintiff were not skilled in the relevant field, unlike the witnesses for the appellants who are a geophysicist, a chartered structural engineer and a seismologist.[34] In the case of *Chinda & Ors* v *Shell BP Petroleum Company of Nigeria*,[35] the plaintiffs case was dismissed

[29] Oluduro (n 7) 167.
[30] Oluduro, *ibid*.; *Anthony Atunbi* v *Shell BP Petroleum Company of Nigeria*, Suite No. UCH/48/73 Ughelli High Court, delivered on 12 November 1974.
[31] C. E. Emole, 'Regulation of Oil and Gas Pollution' (1998) Vol 28 No. 2 Journal of Environmental Policy and Law 108.
[32] S. A. Ienlanya, 'A Critical Examination of the Attitude of the Nigerian High Courts in the Proof of Environmental Pollution in Oil Related Litigations' (2010) Vol. 1 No. 1 University of Benin Law Journal 273, 280.
[33] (1972) 4 S.C 110.
[34] *Ibid.*, 121.
[35] (1974) 2 RSLR 1.

because the plaintiff could not prove any negligence on the part of the defendant in the management and control of gas flaring.

The second problem with claiming under the tort of negligence is that the action may become statute barred where the action is not commenced at the time the defendant committed the negligent act. This problem arose in *George Horsefall* v *Shell BP (Nigeria) Ltd*[36] where the court held that, in negligence, the cause of action accrued at the time of the negligence because it was then that the damage which allegedly flowed from the negligence conduct was caused even though its consequences might not have been apparent until later.[37] The problem with this is that a victim may be unable to claim successfully under negligence if the effect of the hazard does not become immediately obvious. For example, in the case of oil pollution, the pipeline leakage and the oil discharged on a farmland may be visible and the damage to the soil apparent but, the full effect of the discharged oil on the farmland and the environment may not be fully realised until years later.[38] Therefore, a plaintiff who has suffered injury (from the environmental damage as a result of the pollution) which symptom has not manifested as it is in this case will be unable to convince the court that he has indeed suffered more injury than what is ordinarily visible.

c] The Rule in *Rylands* v *Fletcher*

The *Rylands* v *Fletcher*[39] rule is a rule of strict liability which operates to fix liability on the polluter for any damage that occurs from his activity irrespective of whether it occurred as a result of his fault or not. The rule is arguably the most effective method of proceeding against a defendant in an action for oil pollution. The plaintiff only needs to prove three

[36] (1974) 2 RSLR 124.
[37] See section 8 (1) Limitation Laws of Lagos State Cap L. 67 2005. Unlike in England where the Limitation Act 1980 has a national application, Limitation Laws in Nigeria are State laws with limited application within the individual states. However, the provisions of the Lagos State Limitation Laws is in pari materia with the provisions of the Limitation Laws of the 35 other states in Nigeria and that of Abuja, the Federal Capital Territory.
[38] Adewale Omobolaji, 'Judicial Attitude to Environmnetal Hazards in Nigeria's Oil Industry' Proceedings of International Seminar sponsored by the Federal Ministry of Works and Housing, November 11-14 , 1985, 49.
[39] (1866) L.R. 1Ex. 265; affirmed 1868 L.R. 3 H.L. 330.

facts – that the defendant for his own purpose brings on his land and collects and keeps there anything likely to do mischief if it escapes, that there was a non-natural user of his land, and that the plaintiff suffered damage which is the natural consequence of its escape.[40]

In addition, some phrases in the rule, such as 'anything likely to do mischief if it escapes',[41] appears sufficiently wide ranging to make it a potent weapon against polluters in the Niger Delta. In fact, the courts have ruled that such 'things' include not only inherently 'dangerous' materials such as explosives,[42] gas,[43] and petrol[44] but also innocuous things such as water[45] and crude oil[46] but only when collected in large quantities.

As promising as this rule might appear to be for victims of oil pollution, there are some inherent limitations in the rule, such as the exceptions, and some defences available to a polluter that could operate in his favour and thus defeat claims under the rule. The first is that a claimant must prove that the material came on the land of the defendant 'in the course of non-natural user of the land'. The implication of this is that the defendant must have brought the thing that escaped onto his land and accumulated it there, because the rule applies only to 'things artificially brought or kept upon the land'.[47] The problem with the application of this rule in oil pollution cases is that unless in cases where oil waste accumulated by a defendant escapes and causes damage on a plaintiff's land,[48] oil exploration activities could not be classified as a non-natural user of land in order to come within the rule.[49]

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[40] *Rylands* case, (n 39) 338-40.
[41] Per Blackburn J., ibid., 279
[42] *Rainham Chemical works Ltd* v *Belvedere Fish Guano Co.* [1921] A.C. 465.
[43] *Batcheller* v *Tunbridge Wells Gas Co* (1901) 84 L.T. 765.
[44] *Mangrove* v *Pandelis* [1919] 2 K.B. 43.
[45] *Oladehin* v *Continental Textile Mills Ltd* (1975) 6 CCHCJ 1269.
[46] *Umudje* v *Shell B.P* (1975) 11 S.C 155, 172.
[47] Bartlett v Tottenham [1932] 1 Ch. 114, 131, per Lawrence J.
[48] *Umudje's* case, (n 46) 173.
[49] O. Adewale, Rylands v Fletcher and the Nigerian Petroleum Industry (1987/88) 8/9 J. Private and Property Law 37, 40-42; Ambrose Ekpu has argued that the rule does not have uniform application in the United States where, for example, the courts in Texas and Oklahoma have rejected the rule holding that the use of land for oil and gas operations in those states was not an unnatural use. See Ekpu, (n 26) 92.

It is perhaps important to note how the uncertainty in the concept of non-natural user under the Ryland rule constitute a major challenge in its application in modern times. The challenges posed by the concept largely influenced the decision in *Umudje's* case,[50] and as Lord Goff of Chieveley said in *Cambridge Water* case,[51] 'the non-natural user envisaged by Lord Cairns in the *Ryland* case itself are redolent of a different age',[52] which did not have the kind of operations and interests in the Nigerian oil sector in mind. In fact, some authors have queried the appropriateness of applying the rule in *Ryland's* case to oil operations in Nigeria, as they express the doubt that oil operations could be considered a non-natural user of land in a country whose fortune depends almost entirely oil.[53]

Apart from the strict application of the rule as observed above, Nigerian courts have accepted certain defences to defeat the application of the rule. For example, the rule has been held inapplicable where the escape complained of was caused by the deliberate act of a stranger (for example, where the escape is caused by the act of pipeline vandals or where the defendant's pipeline was damaged by unknown persons), which the defendant could not have reasonably anticipated. The rule is also inapplicable where the defendant acted on a statutory authority. In the case of *Ikpede* v *Shell Petroleum Development Co*[54] where the damage complained of resulted from the laying of pipelines in pursuance to a licence granted under the Oil Pipelines Act,[55] the court held that acting under a statutory authority constitutes a valid defence for a polluter under the rule provided the polluter is not negligent.[56]

It is noteworthy that one major advantage of the *Rylands* rule, and indeed common law tort generally, is that it affords a pollution victim a private right of action,

[50] (n 46), 173-4.
[51] *Cambridge Water Co*. v *Eastern Countries Leather Plc*. [1994] 2 AC 264.
[52] *Ibid*., 308.
[53] Adewale (n 45); Ambrose Ekpu has argued that the rule does not have uniform application in the United States where, for example, the courts in Texas and Oklahoma have rejected the rule holding that the use of land for oil and gas operations in those states was not an unnatural use. See Ekpu, (n 26) 92.
[54] [1973] NMLR 61.
[55] Cap 07 LFN 2004.
[56] *Ikpede's* case (n 54); see also *Bodo Community v Shell Petroleum Development Company of Nigeria* (2014) EWHC 1973 (TCC), 93.

which may not always be available under the statutes. This is probably why most of the claims against the oil MNCs with regard to pollution, especially in the Niger Delta, have been brought under common law tort.[57] However, except in a few cases, such as in *F.B Farah & Ors* v *Shell BP Petroleum Company of Nigeria*[58] where the court awarded a total sum of ₦4,621,307 (US$11,554) as damages to a group of oil pollution victims, most successful claimants in common law tort action are usually awarded ridiculously low damages.

The award of low damages to claimants that seek remedies under common law tort is one of the major challenges for victims of environmental damage by MNCs in the Niger Delta. Unlike under statutes where penalties for certain environmental harms are prescribed, the damages to be awarded in cases brought under common law tort depend on the discretion of the court, and one major factor that has influenced the attitude of Nigerian courts in the award of damages in cases involving oil corporations is the economic interest of the Nigerian government. As a result, the courts generally prioritize the interest of the government over the rights of ordinary people in matters concerning oil and gas activities. In the case of *Godspower Nweke* v *Nigerian Agip Oil Company Ltd,*[59] the court merely awarded the plaintiff the same amount that the defendant company had previously offered to the plaintiff, which he had rejected before proceeding with action in the court.[60] In the case of *R. Mon & Anor* v *Shell BP*[61] the court awarded a paltry ₦200 (US$0.5) as damages to the plaintiffs.

The difficulties encountered by pollution victims as discussed above, and the very insignificant compensatory damages normally awarded by Nigerian courts, are some of the reason why victims of oil pollution are constrained to accept whatever compensation is offered to them by the polluting oil companies no matter how grossly inadequate those

[57] *Ikpede*, (n 54); *Umudje* (n 46), *Edhemowe v Shell B P Development Company of Nigeria Ltd*, Suit No. UHC/12/70 judgement of Ugheli High Court (unreported 29 January 1971).
[58] (1995) 3 NWLR. (pt. 382) 148.
[59] (1976) 10 S.C. 101.
[60] Yinka Omoregbe, *Oil and Gas in Nigeria* (Lagos: Malthouse Press Ltd 2001) 156.
[61] (1970-1972) IR.S.L.R. 71.

offers might be. This has generally limited the value of the otherwise very useful common law tort as a procedure for seeking remedies against oil MNCs in Nigeria.

2.2.2 Incidental Legislation

There are some laws in Nigeria that are not specifically enacted to regulate human rights, the environment or the oil industry but the provisions of which touch on the abuses that occur in those areas. An example is the Nigerian Criminal Code (CC).[62] The Criminal Code regulates crime generally and the State Attorneys-General have the responsibility to prosecute offenders under the Act for State offences[63] while the Attorney General of the Federation has the exclusive mandate to prosecute offences against the Federation.[64]

There are some offences created under the Act, the ingredients of which are arguably present in the nature of the pollution perpetrated by the oil companies in the Niger Delta, such as oil pollution of rivers and farmlands. According to the CC, '[a]ny person who corrupts or fouls water of any spring, stream, well, tank, reservoir, or place so as to render it less fit for the purposes for which it is ordinarily used, is guilty of a misdemeanour and is liable for imprisonment for six months'.[65] Another section in the Act that is also relevant with regard to the problem of pollution is s. 247, which provides that, any person, who:

> (a) vitiates the atmosphere in any place so as to make it noxious to the health of persons in general dwelling or carrying on business in the neighbourhood, or passing along the highway; or (b) does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of disease dangerous to life,

[62] Cap. C38 LFN 2004.
[63] CFRN, s. 211.
[64] *Ibid*., s. 174.
[65] Criminal Code , Cap. C38 LFN 2004, s. 245.

whether human or animal, is guilty of a misdemeanour, and is liable to imprisonment for six months.

These sections obviously cover such pollutions that result from oil spills and gas flaring which pollute the air and water in the Niger Delta with the attendant health implications for humans and animals.[66]

Despite the direct relationship between these sections and the pollution in the Niger Delta, the government has never invoked the provisions to punish proven cases of pollution in the region. Some authors attribute the non-invocation of the CC provisions to the drawbacks in its application to non-natural persons, especially the oil MNCs. Another problem, as some argue, is that proceeding against oil MNCs under the CC is especially difficult because the Nigerian Evidence Act[67] requires that criminal cases must be proved beyond reasonable doubt to secure a conviction.[68] In cases involving oil MNCs where scientific evidence might be required in view of their sophisticated mode of operation, obtaining such scientific evidence required to prove a case against them[69] might be difficult.

In addition, it may not even make sense to spend the time and effort trying to prove the case of pollution under the CC beyond reasonable doubt because, the offences relating to pollution and environmental abuses are merely classified as a misdemeanour in the Act and they attract a mere six months imprisonment as the only punishment.[70] This very light treatment of such obviously serious environmental and human rights offences, which admittedly was not in contemplation when the law was made, makes it inappropriate to rely on the Nigerian Criminal Code for dealing with the abuse of human rights and the environment in the country.

[66] J. O. Owoyemi, 'An Overview of Health Hazards of Oil Spill in Niger Delta Region of Nigeria' (2011) Vol. 4 No. 2 Nigerian Journal of Food, Drug and Health Law 67.
[67] Evidence Act, Cap E14 LFN 2004.
[68] *Ibid*., s. 135.
[69] Oluduro (n 7) 134.
[70] Criminal Code, s. 247 (b).

2.2.3 Environmental Specific Legislation in Nigeria

Environmental law in Nigeria developed on an ad hoc basis in reaction to serious environmental infractions in the country, and developments in the field of international environmental law. So far two pieces of legislation in Nigeria focuses primarily on the specific issue of environmental abuses. The first is the Federal Environmental Protection Agency (FEPA) Decree No. 58 of 1988.[71] This Decree was promulgated[72] in reaction to the dumping of toxic waste by an Italian firm in a small village named Koko in Delta State Nigeria, in 1988. It established an agency called the Federal Environmental Protection Agency (FEPA), charged with the responsibility of protecting and developing the environment.

The second environmental specific legislation, the Environmental Impact Assessment (EIA) Decree was promulgated in 1992.[73] According to O. Ameyan, Director, Department of Environmental Assessment, Federal Ministry of Environment, '[t]he Federal Government of Nigeria enacted the … [EIA Act] as a demonstration of her commitment to the Rio Declaration'.[74] It is important to note that there is another view about why the EIA Act was enacted in Nigeria. According to this view, the increasing agitation in the Niger Delta, which generated substantial media and international pressure was the major reason why the government enacted the Act as a means of engaging and consulting with local communities before the commencement of new projects.[75] The two

[71] This Decree has been repealed and replaced by the 2007 National Environmental Standards and Regulation Enforcement Agency (NESREA) Act, Cap. F10 Laws of the Federation of Nigeria (LFN) 2004.
[72] Promulgated because it was not an Act of Parliament since it was a Decree made by the then Military Government.
[73] Decree No. 86 of 1992, now Environmental Impact Assessment (EIA) Act, Cap. E12, LFN 2004.
[74] O Ameyan, 'Environmental Impact Assessment: Insight into the Environmental Impact Regulatory Process and Implementation for Qualifying Projects', a paper presented at the seminar: 'Preparing Business in Nigeria for Environmental Challenges and Opportunities' organised by Manufacturers Association of Nigeria (MAN), held in Lagos, Nigeria, on 4 November 2008, 2, cited by Uzuazo Etemire*, Law and Practice on Public Participation in Environmental Matters: The Nigerian Example in Transnational Comparative Perspective* (Oxon: Routledge 2016) 57.
[75] P. C Williams, 'The Environmental Impact Assessment Act and Processes as an Environmental and Livelihood Advocacy Tool' in B. Obayanju and M. Obaseki (eds), *Defending the Environment: The Role of Environmental Impact Assessment* (Benin City: Environmental Rights Act 2009) 7, 9.

opinions above correspond with the events leading up to the enactment of the EIA Act but the view that it was enacted to fulfil governments commitment to the Rio Declaration makes sense at least on a superficial level, given that the Act was enacted at about the same period that the Rio Declaration was produced.[76]

Notwithstanding the seeming controversy about the factors that prompted the enactment of the Act, the important thing to note about the EIA Act here is that its enactment is not as a result of the Nigerian government's conscious effort to address the problem of environmental degradation in the country but rather as a reaction to related developments in the environmental arena (whether it is the development in international environmental law or the agitation in the Niger Delta). Some commentators argue that the fact that the law was perhaps not made by the government of its own volition may have been the reason that it adopted the "lowest common denominator" approach in designing the regime,[77] given its obvious weaknesses as discussed below.

The EIA Act and the National Environmental Standards and Regulations Enforcement Agency (NESREA) Act are accordingly reviewed below to identify how, and to what extent, Nigeria's environmental laws address the environmental challenges in the country, especially in view of the general acknowledgement by academic writers and NGOs that Nigeria is the global signpost for environmental abuses by MNCs.[78] This review will provide the appropriate basis to assess the effectiveness and efficiency of the two pieces of legislation in controlling environmental abuses, especially with regard to effective regulation of the environmental impacts of the activities of MNCs operating in the Niger Delta.

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[76] Etemire, (n 74) 57.
[77] Chris Wood, 'Environmental Impact Assessment in Developing Countries: an Overview' a paper presented at the conference on *New Directions for Impact Assessment for Development: Methods and Practice*, held in Manchester 24-25 November 2003, 5; cited by Etemire, (n 75) 57.
[78] JG Frynas, 'The oil industry in Nigeria: conflict between oil companies and local people' in JG Frynas & S Pegg (eds.), *Transnational corporations and human rights* (New York: Palmgrave Macmillan 2003) 99; D Vogel, *The market for virtue: the potential and limits of corporate social responsibility* (Washington D.C. Brookings Institute Press 2006) 140-4; Gaughran, (n 6).

2.2.3.1 National Environmental Standards and Regulations Enforcement Agency (NESREA) Act[79]

NESREA is the environment regulator in Nigeria. Its primary responsibility is to protect and maintain environmental quality in the country. NESREA, however, only came into existence in 2007 after the President of Nigeria assented to the Act on 30 July of that year.[80] Before NESREA, the agency responsible for protecting and developing the environment in Nigeria was the Federal Environment Protection Agency (FEPA) established by Decree No. 58 of 1988.[81] FEPA and other departments in charge of environmental matters in other Ministries were merged in 1999 to form the Federal Ministry of Environment. However, absence of enforcement authority as a result of this merger, necessitated the creation of NESREA as a department in the Federal Ministry of Environment, Housing and Urban Development to address issues of the enforcement of environmental laws, standards and regulations in the country.[82]

NESREA has the responsibility for the 'protection and development of the environment ... including coordination and liaison with relevant stakeholders within and outside Nigeria on matters of enforcement of environmental standards, regulations, rules, laws, policies and guidelines'.[83] The functions of the Agency are listed in Section 7 of the Act to include:

(a) enforce compliance with laws, guidelines, policies and standards on environmental matters;
(b) coordinate and liaise with stakeholders, within and outside Nigeria, on matters of environmental standards, regulations and enforcement;
(c) enforce compliance with provisions of international agreements, protocols, conventions and treaties on the environment, including climate change,

[79] Cap. F10 LFN 2004; this Act will be referred to as the NESREA Act throughout in this thesis.
[80] See the Federal Republic of Nigeria Official Gazette, Government Notice No. 61, Act No. 25, Section 36 of which repealed the Federal Environmental Protection Agency (FEPA) Act.
[81] Cap. F10 LFN 2004.
[82] Oluduro (n 7) 144.
[83] NESREA Act, s. 2.

biodiversity, conservation, desertification, forestry, oil and gas, chemicals, hazardous wastes, ozone depletion, marine and wildlife, pollution, sanitation and such other environmental agreements as may from time to time come into force;

(d) enforce compliance with policies, standards, legislations and guidelines on water quality, environmental health and sanitation, including pollution abatement ...;

(h) enforce through compliance monitoring, the environmental regulations and standards on noise, air, land, seas, oceans and other water bodies other than in the oil and gas sector ...; and

(k) conduct environmental audit and establish data bank on regulatory and enforcement mechanisms of environmental standards other than in the oil and gas sector ...[84]

Apart from the functions listed under Section 7, the Agency also has wide investigative and enforcement powers[85] except that its mandate does not include investigation of oil spillage.[86] The agency is further empowered under the Act to enforce compliance, and to 'control and monitor environmental regulations generally, except in the oil and gas sector'.[87]

The extensive investigative and enforcement powers of the Agency under the NESREA Act notwithstanding, it is argued that the Act may not offer much as a regulatory regime for addressing the specific issues of environmental degradation and abuse of human rights in Nigeria for several reasons. First, it is important to note that commentators have identified that the worst cases of abuse of human rights and the environment in developing markets occur in the mineral extractive industries,[88] and in

[84] See discussions below for why NESREA is precluded from exercising authority in environmental matters relating to the operations in the oil and gas sector under section 7 (k).
[85] S. 8 (d)-(g).
[86] S. 8 (g)
[87] S. 7 (g), (j) and (k).
[88] Commission on Human Rights, 'Interim Report of the Special Representative of the Secretary General on the Issues of Human Rights and Transnational Corporations and other Business Enterprises' E/CN.4/2006/97 (22

the case of Nigeria, oil exploratory activities in the Niger Delta have been identified as the main source of environmental degradation and abuse of human rights in the country.[89] Despite the fact that most of the environmental and human rights challenges in Nigeria are attributed to the activities of oil MNCs, the Agency is precluded from dealing with issues relating to oil and gas.[90] This is probably to avoid conflict between NESREA and the National Oil Spill Detection and Response Agency (NOSDRA), the body that is charged specifically with the responsibility to manage oil spill/pollution.[91]

Another major weakness of the NESREA Act is the criminalization of non-compliance. The Agency has authority to make regulations and standards to protect the nation's air and water quality, and to 'coordinate and liaise with stakeholders within and outside Nigeria, on matters of environmental standards'.[92] However, there is no provision in the entire Act requiring it to mobilise stakeholders in line with its statutory functions for the purposes of preventing environmental degradation; instead the Act emphasises prosecution of violators in accordance with the Criminal Procedure Act.[93] This is a major deficiency in the Act given the challenges with the criminal justice administration in Nigeria, which is the major reason identified for the non-invocation of the CC to address issues of pollution under the Criminal Code Act itself.[94]

Under the NESREA Act a violator is liable to pay an amount not exceeding ₦200,000 (US$500) or one year imprisonment with ₦20,000 (US$50) payable for every day of continuing the violation for an individual offender.[95] Where the violator is a body corporate the liability is an amount not exceeding ₦2,000,000 (US$5,000) and ₦50,000 (US$125) for every day of continuing the violation.[96] This is also the case where there is

February 2006), para 30; Sukanya Pillay, 'And Justice for All? Globalisation, Multinational Corporations, and the Need for Legally Enforceable Reights Protection' (2003-2004) 81 U. Det Mercy L. Rev. 489, 503; Oluduro (n 8) 231-2

[89] See the report on pollution in the oil-producing areas of the Nigerian Niger Delta by the United Nations Environmental program (UNEP) Report 2011,< http://www.unep.org/nigeria> accessed March 20 2017.

[90] See s. 7 (g), (j) and (k).

[91] Ss. 6 and 7, *National Oil Spill Detection and Response Agency (Establishment)* Act 2006.

[92] NESREA Act, s 7 (b).

[93] The Criminal Procedure Act is applicable if the offence is committed in the Southern states while the Criminal Procedure Code is applicable for the offences committed in the Northern states.

[94] See discussions on Criminal Code Act, s. 2.2.2.

[95] NESREA Act, s. 20 (3).

[96] *Ibid*., s. 20 (4)

a 'discharge in harmful quantities of any hazardous substance into the air or upon the land and the waters of Nigeria or at the adjoining shorelines; except where such discharge is permitted or authorized under any law in force in Nigeria'.[97] The punishment for discharging such harmful quantities of any hazardous substance or violating this section of the Act is a fine for an amount not exceeding ₦1,000,000 (US$2,500) or imprisonment for a term not exceeding 5 years for the individual[98] and for a corporate body, a fine not exceeding ₦1,000,000 (US$2,500) and additional fine of ₦50,000 (US$125) for every day the offence subsists.[99]

Apart from the considerably low fines prescribed for the offences under the Act, which makes it economically efficient to breach the regulations, the inefficiency of the Nigerian criminal justice system is well documented, and as discussed below, the system is not known for diligent prosecution of cases, especially those cases involving high profile offenders, such as oil MNCs.[100] It is argued that the criminal justice system is not likely to be able to punish powerful organization like the oil MNCs operating in Nigeria.

It may be argued that the NESREA Act contains some laudable provisions but it also has a major shortcoming, namely, that it did not create any rights for potential victims or any opportunity for consultation with them as a strategy for preventing environmental violations. In a country like Nigeria, where the lack of funding has been identified as the major reason for the general lack of national institutional capacity, it is doubtful that the Agency can obtain adequate funding to efficiently deliver on the functions as outlined in section 7 or the investigations and general enforcement of its mandate under section 8. This makes it imperative to develop a strategy for preventing environmental harm, such as building a synergy between the oil MNCs and their local host communities. Without this, it is difficult to see how the Act can offer much to victims of environmental and human rights violations in Nigeria.

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[97] NESREA Act, s. 27 (1).
[98] *Ibid*., s. 27 (2)
[99] *Ibid*., s. 27 (3).
[100] See *Shell Petroleum Development Company Nig. Ltd v Chief Joel Anaro & Ors* (2015) LPELR – 24750 (S.C). This case was prosecuted for 32 years. See (n 206).

2.2.3.2 Environmental Impact Assessment Decree 1992[101]

The Environmental Impact Assessment (EIA)[102] Decree 1992 was the first legislative framework for EIA in Nigeria. It is worthy to note that, even before the Act, especially beginning from the 1980s, EIA has been recognized as a planning tool for evaluating the environmental consequences of proposed projects in Nigeria.[103] Thus, the National Development Plan of 1981-1986 and the National Environmental Policy 1989 both indicated that 'feasibility studies for all projects both private and public should be accompanied by environmental impact assessment'.[104]

The requirement of EIA during this period has been attributed to the activities of the so-called development assistance agencies, such as the World Bank[105] and the African Development Bank,[106] which during the late 1980s and the dawn of the 1990s began to mainstream environmental considerations into their lending or project financing decisions by requiring borrower countries (such as Nigeria) to undertake some form of formalised EIA procedure for relevant projects.[107] During this period, operators in the oil and gas sector were also required by the Department of Petroleum Resources (DPR) to carry out EIA under the guidelines prepared by its Environment and Safety Unit. It is important to note that all these references to EIA before 1992 were mere administrative codes of procedure and therefore had no consequences attached in cases of non-compliance.[108] As a result, the Nigerian government, apparently in complying with the requirements of the Rio Declaration[109] to establish mechanisms in its domestic law for the exercise of

[101] Decree No. 86 of 1992 now Cap. E12 LFN 2004.
[102] The acronym EIA will be used throughout in this chapter to represent the Environment Impact Assessment (EIA) Decree 1992.
[103] Oluduro (n 7) 155.
[104] *Ibid*.
[105] The World Bank Operational Manual: Operational Policies January 1999. <http://www.env.go.jp/earth/coop/document/10-eiae-7.pdf> accessed 14 February 2017.
[106] African Development Bank, Integrated Environmental and Social Impact Assessment Guidelines, October 2003 <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Policy-Documents/Integrated%20Environmental%20and%20Social%20Impact%20Assessment%20Guidelines.pdf> accessed 14 February 2017.
[107] Etemire, (n 74) 57.
[108] Oluduro, (n 7) 155; citing Olawale Ajai, Environmental Impact Assessment and Sustainable Development: A Review of the Nigerian Legal Framework, Nigerian Current Legal Problems (Vol. 2 & 3) 16 (1998).
[109] See also Principle 10 of Rio Declaration 1992.

procedural rights relating to access to environmental information and participation in decision-making,[110] enacted the Environmental Impact Assessment (EIA) Decree 1992.

The stated objective of the EIA Decree is to establish before a decision is taken by a person, authority or government body intending to undertake or authorize any activity, that those matters that may be likely, or to a 'significant extent may affect the environment or have environmental effects, shall first be taken into consideration; and to encourage the dissemination of information relating to the environmental impacts of any proposed activities to interested parties generally'.[111] Section 4 prescribes the minimum content of an EIA to include:

(a) a description of the proposed activity;
(b) a description of the potential affected environment including specific information necessary to identify and assess the environmental effects of the proposed activities;
(c) a description of the practical activities, as appropriate;
(d) an assessment of the likely or potential environmental impacts on the proposed activity and the alternatives, including the direct and indirect cumulative, short-term and long-term effect:
(e) an identification and description of measures available to mitigate adverse environmental impacts of proposed activity and assessment of those measures;
(f) an indication of gaps in knowledge and uncertainty which may be encountered in computing the required information:
(g) an indication of whether the environment of any other State, Local Government Area or areas outside Nigeria is likely to be affected by the proposed activity or its alternatives; and
(h) a brief and non technical summary of the information provided under paragraph (a) to (g) of this section.

[110] Marc Pallemaerts, 'International Environmental Law in the Age of Sustainable Development: A Critical Assessment of the UNCED Process' (1996) 15 Journal of Law & Commerce 623-676, 642.
[111] EIA Act s. 1.

It is the responsibility of the Federal Environmental Protection Agency (now enlarged into the Ministry of Environment) to examine the information provided by the environmental impact assessment.[112] However, before the Agency gives a decision (which must be in writing)[113] on an activity to which environmental assessment has been produced, 'the Agency shall give opportunity to government agencies, members of the public, experts in any relevant discipline and interested groups to make comment on environmental impact assessment of the activity'.[114]

The EIA Act provides for a Mandatory Study List (specified in the Schedule to the Decree)[115] of activities on which EIA is mandatory or where the project is likely to have significant adverse environmental impact that may not be mitigable; or where public concerns respecting the environmental effects of the project warrants it.[116] It is important to note that the Decree also provides for criminal sanction for non-compliance with its provisions.[117]

Ordinarily it should be expected that the very wide coverage of the Act provides a sufficient basis for addressing the negative environmental impacts of oil MNC activities in the Niger Delta. This has not been the case, however, because of what some authors have labelled the "monumental inadequacies" in the EIA Act.[118] First, they point to the power granted the President in the Act to exclude some projects from EIA on the grounds of 'minimal environmental impact of the project'.[119] The main problems with this provision is that the Act did not specify what is "minimal environmental impact", and there is no provision for the President to seek the opinion of experts before deciding on

[112] EIA Act, s. 7
[113] *Ibid*., s. 9 (1) (a).
[114] *Ibid*., s. 7.
[115] The activities under this list includes, agriculture, airport, drainage, and irrigation, land reclamation, fisheries, forestry, housing, infrastructure, ports, mining, petroleum (oil and gas projects are listed under petroleum) etc.
[116] EIA Act, s. 27.
[117] *Ibid*., s. 62 provides that '[A]ny person who fails to comply with the provisions of this Decree shall be guilty of an offence under this Decree and on conviction in the case of an individual to N100,000 (US$250) fine or to five years imprisonment and in the case of a firm or corporation to a fine of not less than N50,000 (US$125) and not more than N1,000,000 (US$2,500).
[118] Oluduro (n 7) 158.
[119] Section 14 grants the President of Nigeria a discretion to exclude some project from EIA if he thinks they will have minimal environmental impact.

the environmental impact of a particular project. It is in view of this lacuna that some authors argue that Section 14 of EIA Act is open to abuse especially in a corrupt political environment like Nigeria,[120] especially given the interest of the government in activities in the oil sector.

Second is the problem with the EIA procedure in the Act because of its failure to give full effect to the procedural elements found in Rio Principle 10 even though the Act was enacted to give effect to the Principles of the Rio Declaration. Principle 10 of Rio requires States to provide appropriate access to information, public participation and effective access to judicial and administrative proceedings, including remedy and redress, which the Act did not provide for in clear terms, as discussed below. The Act enjoins the Federal Environmental Protection Agency (the Agency responsible for the administration of EIA procedure in Nigeria)[121] to disseminate information about an EIA in respect of proposed activities. It also provides for the examination of the information provided as part of EIA in Section 6 and, the public, government agencies and interest groups are given opportunity to make an input in Section 7. The major problem is that the Act did not provide for how potential environmental victims and interest groups would ensure that the procedure is followed, or what they can do to redress cases of non-compliance.

It is important to note, as David Hunter *et al* have argued, that '[o]ne of the primary reasons for conducting environmental assessment is to inform the public of proposed projects and engage them in a meaningful dialogue about the potential benefits and environmental and social costs of a proposed activity'.[122] In this regard, while meaningful access to information helps to promote more rational and informed decision-making, effective participation by the public and interest group provides a basis for ensuring that development decisions do not disregard the environment.

[120] Oluduro (n 7) 159.
[121] EIA Act s. 7.
[122] David Hunter, James Salzman and Durwood Zaelke, *International Environmental Law and Policy* (3rd edn, New York: Foundation Press 2007) 534.

However, effective access to the public is not always provided by the developer or the public authority concerned.[123] Where this is the case, the third pillar concerning effective access to justice plays a fundamental role as it provides a mechanism for the public or interest groups to seek recourse to an administrative or judicial remedy when public authorities or those involved with the activity concerned fail to comply with their obligations or follow the provisions of the Act. This makes access to justice the cornerstone of public participation as envisaged in the Rio Document.

Under the Nigerian EIA Act there is no provision for potentially affected groups to seek judicial remedies. The Act merely provides for a nebulous procedure that include the referral of the comment filed by potentially affected persons and the recommendations of the Agency (where the Agency is of the opinion that a project is likely to cause significant environmental effect that may not be mitigable)[124] to a Council for referral to mediation or a review panel.[125] The problem with this arrangement is that the same Council and the Agency are in charge of the appointment of the mediator[126] and the Review Panel,[127] and there is no provision for any party that is not satisfied with the outcome of the mediation or the panel's review to seek redress.

Rather than clearly providing for or elaborating on the right of aggrieved members of the public or interest groups to challenge the substantive and procedural legality of any decision under the EIA Act, it merely provides in section 57 that, '[a]n application for judicial review in connection with any matter under this Act shall be refused where the sole ground for relief established on the application is a defect in form or a technical irregularity'. This simply means that aggrieved persons are bound by the decisions of the so-called panel or mediator since their right to a judicial review is circumscribed by section 57 of the Act.

[123] See generally Amnesty International, *Nigeria: Petroleum, Pollution and Poverty in the Niger Delta* (London: Amnesty International Publications 2009) 57-8.
[124] EIA Act s. 26 (a).
[125] *Ibid*., s. 26.
[126] *Ibid*., s. 31.
[127] *Ibid*., s. 35

This technical barring of the public or interest groups from subjecting to judicial review acts and omissions that negatively impact on their ability to participate effectively under the EIA Act is hardly the appropriate way to give effect to the Rio Principles. According to Uzuazo Etemire, relevant government agencies and developers are by now aware of the difficulty placed in the way of aggrieved members of the public and interest groups in seeking to enforce the provisions of the Act and thus disregard its provisions whenever it suits them.[128]

The disregard of the right of the public and interest groups under the EIA Act played out in the exclusion of the Gbaran Deep Oil Field Landlords Association in the EIA process of the Gbaran Oil fields phase 1 Field Development by SPDC (Well Drilling Campaign). According to the association:

> [W]hereas Section 7 of the EIA Decree empowers government agencies, the public and other interest groups to make input in EIA reports, no copy of the said EIA was displayed either at Yenagoa Local Government Council Office, nor Okolobiri, headquarters of the Gbaran/Ekpetiama LGA. Therefore, the interested groups in the main host local government areas are denied the opportunity to have access to and comment on the EIA report. No health risk analysis in the Gbaran Oil Field communities and therefore no mitigating measures. There was no consultation with the communities...[129]

The problem identified above in the case of the Gbaran Oil Field highlights a major inadequacy of the Nigeria EIA Act. The Rio Declaration and the implication of relying on the EIA regime as a procedure for implementing public participation in activities that are likely to create environmental harm is discussed in Chapter 4.[130] However, it suffices to

[128] Etemire, (n 74) 227.
[129] Tari Dadiowei, *Environmental Impact Assessment and Sustainable Development in the Niger Delta: The Gbarian Oil Field Experience*, (2009) Niger Delta Economies of Violence Working Paper No. 2.
[130] Chapter IV, ss. 4.2 and 4.3.

state here that the Nigerian EIA Act as the legislation intended to incorporate the Rio Principles, did not fully give effect to the principles enunciated in the Rio Declaration.

Public participation under the Rio Declaration is a strategy aimed at preventing environmental harm, but the Nigerian EIA Act which purports to incorporate the Rio Principles, rather than focusing on the strategy of prevention, emphasises fines and punishment by generally criminalizing non-compliance.[131] It is argued that the provisions for payment of fines to the government under the Act does nothing to help the environmental well-being of those affected by the activities of oil MNCs operating in the Niger Delta. This is because, apart from the problem already identified with the Nigerian criminal justice system, the very low liability of ₦100,000 (US$250) fine or five years imprisonment for an individual offender, and a fine not less than ₦50,000 (US$125) and not more than ₦1,000,000 (US$2,500) for corporate bodies, does little to encourage compliance with the provisions of the EIA Act. It is argued that this regime of fines is not capable of deterring a polluter for whom it will cost a thousand times more to engage in an environmentally friendly operation, and who knows that legal challenges against violations of the environment could remain in the court for decades.

2.2.4 Some Oil Sector Specific Legislation

The first well in Nigeria where oil was found in commercial quantity was drilled in Oloibiri in the present day Bayelsa State in 1956.[132] The discovery of oil in commercial quantity meant an increase in oil exploration and ancillary activities in Nigeria. This development also brought the need to regulate the new industry in the expectation of its increased activity,[133] to ensure enhanced revenue for the government as well as to protect the local

[131] EIA Act, s. 62
[132] Oluduro (n 7) 25.
[133] For example, in 1959 the Federal Government reviewed the sole concession right for oil exploration over the whole country granted to Shell in line with the policy of increasing the pace of exploration and ensuring that the country was not dependent on one company or one nation for its oil exploratory activities. However for a more detailed history of the development of oil exploration activities in Nigeria, the reader is referrred to N. K. Obasi, Foreign Participation in the Nigerian Oil and Gas Industry, <http://www.waado.org/Environment/OilEploration/oilcompanies_history_obasi.htm> accessed 26 February 2017.

residents and the environment of the area where the exploratory activities are taking place. To achieve this purpose some oil industry specific legislation was put in place, beginning with the Oil Pipelines Act of 1956.[134] Some of the laws in question are reviewed below with a view to determining to what extent they have contributed to the protection of the environment and the indigenous people of Niger Delta region of Nigeria.

2.2.4.1 The Oil Pipelines Act 1956

The Oil Pipelines Act was the first piece of legislation enacted in Nigeria to regulate activities in the oil industry with a view to protecting the environment and the people in the communities that host oil exploration activities.[135] The preamble states the rationale for the Act, which is to 'make provision for licences to be granted for the establishment and maintenance of pipelines incidental and supplementary to oilfields and mining and for purposes ancillary to such pipelines'.[136] Section 4 (1) of the Act provides for the grant of permits to survey the route for an oil pipeline for the transportation of mineral oil, natural gas or such other products. For the protection of the host communities, the permit holder is expected to take reasonable steps to avoid damage to the land entered upon and the owner of such land is entitled to compensation where any damage occurs.[137]

The Act contains some important provisions to further protect owners of land or persons with an interest in any land that is the subject of a particular grant. For example, section 9[138] confers a right on potential victims to object to the grant of a licence where an activity which is the subject of the grant is likely to cause severe damage. Section 11 (5), on the other hand, confers a right of action on victims whose land or interest in land has been injuriously affected, or any person suffering damage by reason of or consequence of the licence holder's negligence to make good the damage.

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[134] Cap 07 LFN 2004.
[135] Ekpu, (n 26) 89.
[136] Preamble to the Oil Pipelines Act.
[137] Oil Pipelines Act s. 6 (3).
[138] *Ibid.*, s 9 provides that where there is a foreseable risk of damage. The owner of the land or a person with interest in land may object to the grant of the licence.

Section 17 (4) of the Act specifically touches on the protection of the environment and states:

> [E]very licence shall be subject to the provisions contained in this Act as in force at the date of its grant and to such regulations concerning public safety, the avoidance of interference with works of public safety in, over and under the land included in the licence and the prevention of pollution of such lands or any waters as may from time to time be in force.

It is important to note that some authors have commended the Act, especially the provisions in Section 11 (5), which according to them provide claimants with a fair chance of success, since it does not require them to establish negligence on the part of the licence holder to ground liability.[139] It is instructive that despite this seeming advantage that the Act offers to potential victims of environmental damage, it has remained for the most part under-utilised. This has been attributed to the qualification of the so-called rights of victims under section 11 (5) (c), which excludes any duty to pay compensation for damages arising from acts of sabotage.[140] This provision constitutes a major impediment to victims of oil pollution because it has become a standard refuge for oil companies in the Niger Delta seeking to evade liability for their environmental damaging activities.[141]

The exclusion of compensation for damages arising from acts of sabotage is considered a very strong defect that grossly undermines the usefulness of the Act to oil pollution victims because the total prohibition denies innocent victims of oil pollution the right to access damages under the Act. The opportunity to seek remedy in court without the need to prove negligence on the part of the licence holder is the major advantage of the Act.

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[139] Ekpu (n 26) 89; Oluduro (n 7) 138.
[140] Oil Pipelines Act, s. 11 (5) (c).
[141] Shell in its Sustainable Report 2013 claimes that most oil spills onshore in Niger Delta were as a result of sabotage and oil theft, as only 15% was due to operational failures. Shell Sustainable Report: <http://www.reports.shell.com/sustainability-report/2013/servicepages/downloads/files/entire_shell_sr13.pdf> accessed 7 March 2017. It follows that compensation will not be available to most of the innocent victims of pollution where most of the spills result from acts of sabotage as the report indicates.

Therefore, the complete exclusion of payment of compensation in cases of damages arising from acts of sabotage effectively limits this advantage and thus undermines the importance of the Act as a regime for addressing environmental pollution by oil MNCs in Nigeria.

2.2.4.2 Oil in Navigable Waters Act 1968 (Oil Act)[142]

The Oil in Navigable Waters Act has been described as the only legislation in Nigeria that is entirely devoted to oil pollution of water.[143] The Act was enacted to implement the 1954 International Convention for the Prevention of Pollution of the Sea by Oil to protect navigable waters from oil pollution.[144] Under the Act, it is an offence for any ship to discharge 'any mixture containing not less than 100 parts of oil' into any part of the sea designated as 'prohibited sea area'.[145] Prohibited sea areas are listed in the Schedule to the Act and it covers areas within 50 miles from land and outside the territorial waters of Nigeria and all the seven seas.[146]

It is also an offence under the Act, to discharge oil from any vessel from any place on land, or from any apparatus used for transferring oil from or to a vessel into the 'whole of the sea within the seaward limits of the territorial waters of Nigeria' and all other waters within those limits including inland waters which are 'navigable by sea-going ships'.[147] The penalty for violating these provisions is a fine for the owner or master of the ship not exceeding ₦2,000 (US$5) upon summary trial.[148]

The Act has many shortcomings that makes it unsuitable for protecting the environment and people of the Niger Delta from the violative activities of the oil companies operating in the region. The first is that the limiting of the offences for pollution under

[142] Cap 06 LFN 2004.
[143] Ekpu (n 26) 82.
[144] *Ibid*.
[145] Oil Act, s. 1.
[146] *Ibid*., para. 1 and 2 of the Schedule to the Act.
[147] Oil Act s. 3
[148] *Ibid*., s. 6.

Section 3 of the Act to inland waters which are 'navigable by sea going ships' constitutes a major drawback because it effectively shuts out the Niger Delta communities from the protection offered by the section. This is because the main source of oil pollution in the region is the onshore and offshore activities of the oil corporations. The limited coverage of the Act may be the main reason for the limited reliance on it as a regime for managing pollution in the Niger Delta. Secondly, the ₦2,000 (US$5) fine for discharging oil into the waters is not capable of deterring a polluter, and it has been rightly described as a slap on the wrist.[149] This very low regime of fines may have contributed largely to the general non-compliance by the oil companies who are noted for their environmental damage of the Niger Delta.

Third, there is a myriad of liberal defences available to a polluter under Section 4 of the Act. For example, it is a valid defence for a polluter to plead that the purpose of the discharge from the vessel occurred 1) for the purpose of securing the safety of the vessel, 2) for the purpose of preventing damage to any vessel or cargo, 3) for the purpose of saving life, 4) as a consequence of damage to the vessel and 5) by reason of leakage if the leakage was not due to any want of reasonable care. This is in addition to the defence of sabotage, absence of negligence and showing that the oil was contained in an effluent produced from a refinery.[150]

Finally, the requirement for the consent of the Attorney General of the Federation before the commencement of any action in a matter of oil spillage[151] is another provision that limits the effectiveness of the Act for environmental protection in the Niger Delta. This is because, where oil spillage occurs in a remote village, it will cost a considerable amount of delay to reach the Attorney General of the Federation because of the chain of reporting from the local authorities to the State Government who will eventually notify the Attorney General. In addition, the Attorney General represents a major stakeholder in the Nigerian oil industry – the Federal Government, which derives its major revenue from the

[149] Oluduro, (n 7) 136.
[150] Oil Act, s. 4 (3)-(5)
[151] Oil Act s. 20.

industry. Thus, the fact that there is no record of prosecution under the Oil in Navigable Waters Act since its enactment is an indication that the Attorney General may be unwilling to prosecute the oil sector operators.[152] This may be because the Nigerian government is a major stakeholder in the petroleum sector.

2.2.4.3 Petroleum Act 1969 and The Petroleum (Drilling and Production) Regulations[153]

The Petroleum Act is mainly concerned with the business regulation of the petroleum industry with very little reference to matters of pollution, prevention or remediation.[154] The significance of the Act with regard to environmental regulation lies in its Section 9, which empowers the Minister of Petroleum Resources (Minister) to make regulations on a wide range of issues, including the prevention of the pollution of watercourses and the atmosphere during petroleum operations.[155] Although the Minister has issued several regulations pursuant to the authority to make regulations under the Act, Regulation 25, which contains the Petroleum (Drilling and Production) Regulations 1969, is perhaps the most significant regulation on environmental protection. It provides that:

> The licensee or lessee shall adopt all practical precautions including the provision of up-to-date equipment approved by the Director of Petroleum Resources to prevent pollution of inland waters, rivers, water courses, the territorial waters of Nigeria or the high seas by oil, mud or other fluid or substances which might contaminate the water, bank or shore line which might cause harm or destruction to fresh water or marine life and where any such pollution occurs or has occurred, shall take prompt steps to control and, if possible end it.

The Regulation also requires the licensee or lessee to,

[152] Oluduro (n 7) 137.
[153] The Petroleum (Drilling and Production) Regulation enacted in Legal Notice (L N) 69 of 1969; a subsidiary legislation to the Petroleum Act Cap P10 LFN 2004.
[154] Ekpu (n 27) 79.
[155] Petroleum Regulation, reg. 9 (1) (b) (iii)

> 1) maintain all apparatus, appliances, boreholes, and wells capable of producing petroleum in good repair condition, 2) carry out all its operations in a proper and workmanlike manner accepted by the Director of Petroleum Resources as amounting to good oil field practices' 3) take reasonable steps to control the flow and prevent the escape of petroleum into any water, well, spring, stream, river, lake, reservoir, estuary, or harbour; and cause as little damage as possible to the surface of the relevant area and to the trees, crops, buildings, structures and other property.[156]

Other important regulations relevant to environmental protection are Regulation 21, which obligates the licensee to pay adequate compensation where protected and productive trees are cut and where a person's fishing rights are interfered with by the unreasonable exercise of licensee's right. Regulation 40 also requires the licensee to drain all waste oil, brine, and sludge or refuse into proper receptacles and dispose of them in a manner approved by the Director.

These Regulations appear to address issues of environmental pollution comprehensively. However, it is important to note that there is no provision in the entire body of the Regulation for clean-up in the event of an oil discharge or a process for preventing such occurrence, rather the operator is merely required under Regulation 25, to 'control and, if possible end (the pollution)'.[157] This is considered a major weakness of the regime. This is in addition to the fact that there are no sanctions prescribed for the violation of any of the obligations imposed under the Regulation other than the general power of the Minister to revoke the operator's license or lease,[158] or to order the suspension of their operations[159] for failure to comply with the enabling Act or any regulations issued thereunder.[160]

[156] Reg. 36.
[157] Ekpu, (n 26) 81.
[158] Paragraph 24 of Schedule 1 to the Petroleum Act.
[159] *Ibid*., s. 8 (1) (f)
[160] Ekpu (n 26) 81.

The imposition of such a severe sanction for every case of non-compliance has been described as unrealistic in view of the economic consequence of such a revocation to the national economy because of the importance of oil to the national economy.[161] The fact that there has not been any such revocation underscores the weakness of the Regulation in this regard. This makes the Petroleum Act an unlikely legislation that can effectively secure the environment and the rights of oil pollution victims against violative activities of oil companies operating in the Nigerian Niger Delta.

2.2.4.4 National Oil Spill Detection and Response Agency (Establishment) Act 2006[162]

The National Oil Spill Detection and Response Agency (NOSDRA)[163] was established in 2006 under the NOSDRA (Establishment) Act as an agency under the Federal Ministry of Environment, Housing and Urban Development. NOSDRA was specifically created to fill the legal and institutional gap with respect to policing and addressing oil spills in Nigeria. The mandate of the Agency under Section 5 of the Act, which includes the establishment of a viable national operational organization to ensure safety, timely, effective and appropriate responses to major oil spills ... as well as ensuring clean-up and remediation of all impacted sites to best possible extent attest to this.

Section 6 and 7 of the Act sets out the functions of the Agency to include that it shall:

(i) be responsible for surveillance and ensure compliance with all existing environmental legislation and the detection of oil spills in the petroleum sector;

(ii) receive report of oil spillages and coordinate oil spill response activities throughout Nigeria;

[161] Oluduro (n 7) 144.
[162] No. 15 of 2006 A.407, Acts and Subsidiary Legislations 2006 Vol. 1.
[163] The acronym NOSDRA will be used throughout in this project to represent the National Oil Spill Detection and Response Agency.

(iii) co-ordinate the implementation of the National Oil Spill Contingency Plan (NOSCP) as may be formulated, from time to time, by the Federal Government;

(iv) co-ordinate the implementation of the NOSCP in the removal of hazardous substances as may be issued by the Federal Government; and

(v) undertake surveillance, reporting, alerting and other response activities as they relate to oil spillages.

In carrying out these functions, the Agency is empowered under Section 7 of the NOSDRA Act to co-opt all the Government Ministries and Agencies listed in the Second Schedule to the Act, particularly in the management of a Tier 3 or a major Tier 2 oil spill.[164]

In view of the devastating effect of oil pollution in the Niger Delta Region regarded as one of the most polluted environments in the world[165] the NOSDRA Act is commendable, especially because it addresses the intractable problem of oil pollution with a focus on oil spills. Some of its provisions deal directly with the basic problem of reporting of oil spills[166] and compensation.[167] According to Section 6 of the Act, an oil spiller is expected to report an oil spill to the Agency in writing not later than 24 hours after the spill has occurred. However, failure to report in accordance with the provisions of the Act shall attract a penalty in the sum of ₦500,000 (US$1,250) for each day of failure to report the occurrence. There is also a further penalty of ₦1,000,000 (US$2,500) per day for failure to clean up the impacted site, to all practical extent including remediation.[168]

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[164] According to Bamidele Ajakaiye, 'Tier 1 handles spills less than or equal to 7 tonnes (50 bbls), that may occur at or near a company's own facility. Tier 2 handles spills greater than 7 tonnes, but less or equal to 700 tonnes (5,000 llbs), in the vicinity of a company's facility where resources from another company or industry is possible. Governemnt Response Agency in the area can be called in, on a mutual aid basis. Tier 3 handles spills greater than 700 tonnes (5,000 llbs), where substantial further resources would be required and supported from a national or international cooperative stockpile, such as the OIL Spill Response Ltd (OSRL), may be necessary. Such an operation is subject to government control and direction'. See Bamidele Ajakaiye, Role of NOSDRA in Environmental Management Protection and Enforcement in the Oil and Gas Industry; a paper presented at the 2008 Manufacturers Association of Nigeria (M.A.N), Environmental Management Seminar; Theme: Preparing Businesses in Nigeria for Environmental Challenges and Opportunities; held on the 4th November 2008 at the Conference Hall, M.A.N House, 77 Obafemi Awolowo Way, Ikeja-Lagos; cited by Oluduro, (n 8) 148.

[165] See the UNEP Report, (n 90).

[166] NOSDRA Act, s. 6.

[167] NOSDRA Act, s. 19.

[168] *Ibid*., ss. 6 (2) and (3).

There is also assessment of damage, monitoring response compliance, and the compensatory provisions under Section 19 of the Act. According to Section 19,

> in the event of any major oil spill the Agency is to assess the extent of damage to the ecology by matching conditions following the spill against those which existed before; to undertake a post-spill impact assessment to determine the extent and intensity of the damage and long term effects; advise the Government (Federal and State) on possible effects on the health of the people, and ensure that remedial action for the restoration and compensation of the environment is taken.

It is also the duty of the Agency under this section to assist in mediation between the affected community and the oil spiller to ensure payment of compensation by the defaulting company to the affected community on the basis of the polluter-pays-principle. The section also empowers the Agency to monitor the response effort during emergencies so as to 'ensure full compliance with the legislation and the protection of highly sensitive areas, habitats, and the salvation of endangered wildlife; assess any damage caused by the oil spillage and monitor the clean-up operations to ensure full rehabilitation of the affected areas'.

These are no doubt laudable and ambitious provisions designed to address the serious problem of oil spills in the Niger Delta but it is severely limited as a regime, especially with regard to protection of the environmental and human rights of local communities in the region. One of the major drawbacks is that its mandate according to section 5 does not include prevention of oil spills or pollution generally. Furthermore, it is doubtful that the Agency has the expertise and the necessary equipment to carry out its core mandate under section 19. This is especially important because it is the main section in the Act that specifically addresses the problem of oil spill, with regard to post-spill impact assessment and compensation of the victims. To underscore the lack of capacity to deal with its core mandate, Amnesty International in a 2009 Report states

that the Agency actually relies on the defaulting oil company to provide transportation, equipment and expertise to carry out their mandate.[169]

Its competence as a mediator between the oil MNCs and local communities is also doubtful. If as adverted to above the Agency lacks the expertise and equipment to carry out their mandate, it remains to be seen how the same Agency can adequately assess a damage caused by oil spill as to be able to properly address the question of compensation for the victims. The lack of institutional capacity emphasised in the Amnesty International Report is a major problem with most of the government institutions in Nigeria. This makes it imperative to seek other ways of dealing with human rights and environmental challenges in the country. Incorporating major stakeholders in environmental and human rights administration in the country is one way to complement existing regulatory agencies because their participation will help to fill the gap created by the lack of institutional capacity.

2.2.5 Human Rights Specific Legislation

The human right to a healthy environment is considered indispensable for leading a life with human dignity and a prerequisite for the realization of other human rights.[170] Some authors argue that the need to protect and improve 'man's environment arise[s] directly out of a vital need to protect human life, to assure its quality and condition ... and the development of the human personality'.[171] As a result, the devastation of the environment in Nigeria expectedly engendered some efforts aimed at adequately protecting the human rights of the local communities affected by those corporate activities that constitute harm to the environment and result in human rights abuse to the local inhabitants.

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[169] Amnesty International Report (2009), Nigeria: Petroleum, Pollution and Poverty in the Niger Delta, 44 <http://www.amnesty.org/en/library/asset/AFR44/017/2009/en/e2415061-da5c-44f8-a73c-a7a476621d/afr440172009en.pdf> accessed 20 February 2017.

[170] Jona Razzaque, 'Right to a Healthy Environment in Human Rights Law' in Mashood A. Baderin and Manisuli Ssenyonjo (eds), *International Human Rights Law: Six Decades after the UDHR and Beyond* (Ashgate Publishing Company 2010) 115.

[171] R. S. Pathak, 'The Human Rights System as a Conceptual Framework for Environmental Law' in E. B. Weiss, (ed) *Enironmental Change and International Law* (United Nations University Press 1992) 209.

The African Charter on Human and Peoples' Rights (African Charter) 1981[172] has had the most influence on human rights legislation in Nigeria. The Charter expressly provides for 'a right to a general satisfactory environment …'.[173] This has given a new impetus to human rights law legislation in Nigeria.[174] Thus, apart from the regimes discussed above under which pollution victims can seek redress, the Nigerian Constitution and the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act also addresses the specific problem of human rights abuses.

2.2.5.1 The Constitution of Federal Republic of Nigeria (CFRN) 1999

The Constitution of Federal Republic of Nigeria 1999 understandably does not deal with issues of human rights with respect to the relationship between identified groups such as local communities and private entities like the business corporation but it guarantees most of the rights abused by business corporations, such as the right to life[175] and dignity of the human person.[176] In spite of the negative impacts of the activities of MNCs, especially the impact of the activities of oil MNCs operating in the Niger Delta on the human rights of local communities in the region, the protection offered by the Nigerian Constitution is rarely invoked by victims.[177] In view of the reluctance of human rights victims to rely on the human rights related provisions in the Nigerian Constitution, it is important to examine those provisions so as to be able to determine if or how those provisions may be relevant for addressing corporate human rights abuses in the first place.

The Nigerian Constitution provides for the fundamental right to life under the fundamental rights provisions contained in Chapter IV as follows: 'every person has a right to life, and no one shall be deprived intentionally of his life, save in the execution of the

[172] Adopted June 27, 1981 and entered into force October 21, 1986, OAU Doc. OAU/CAB/LEG/67/3/Rev.5 (hereinafter called the African Charter).
[173] Art. 24, the African Charter,
[174] The African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Cap A1 LFN 2004 is the legislation enacted to implement (domesticate) the African Charter in Nigeria.
[175] CFRN, s. 33
[176] *Ibid*., s. 34.
[177] Oluduro (n 7) 399.

sentence of a court in respect of a criminal offence of which he has been found guilty'.[178] This provision gives the impression of adequate protection of the individual from any action that may lead to the loss of his life or the threat to it. However, Section 33 (2) appears to qualify this protection. The section provides that '[a] person shall not be regarded as having been deprived of his life in contravention of this section, if he dies as a result of the use, to such an extent in such circumstance as are permitted by law, of such force as is reasonably necessary …'. This appears to suggest that the protection offered by section 33 is against physical assault which may result in death. Therefore, the acts of business corporations that may cause harm to the individual or his community and probably result in the death of some of its members do not come within this constitutional guarantee of right to life. This qualification, no doubt constrains the enjoyment of the protected rights.[179]

Chapter IV of the Nigerian Constitution also provides for the dignity of the human person thus: 'every person is entitled to respect for the dignity of his person, and accordingly no one shall be subjected to inhuman or degrading treatment'.[180] However, whether the activities of MNCs that abuse the environment and the human rights of local communities comes within the contemplation of this provision is one that has yet to be judicially confirmed. The case of *Jonah Gbemre* v *Shell Petroleum Development Company Nig. Ltd and 2 others,*[181] which the plaintiff filed at the Federal High Court Benin City, Nigeria in July 2005, in a representative capacity on behalf of himself and the Iwherekan community in Delta State, was the first attempt to claim under sections 33 and 34 of CFRN. The plaintiff alleged that the activities (gas flaring) of the respondents (Shell and the Nigerian National Petroleum Corporation NNPC) violated his right to life and human dignity under sections 33 and 44 CFRN. It is instructive that the court in this case

[178] CFRN, s. 33.
[179] The prevailing view amongst environmental law experts in Nigeria is that environmental rights violation is a threat to human life and therefore comes within the fundamental rights provisions in Chapter IV of the Nigerian Constitution 1999 (as amended). See E. O. Erhagbe, 'Are Environmental Rights Human Rights' (2002) Vol. 3 University of Benin Journal of Private and Property Law 65; C. A. Omaka, 'Environmental Law and Human Rights: The Natural Nexus' (2005) Vol. 1 No. 1 Journal of Law and Diplomacy 17.
[180] CFRN, s. 34 (1) (a).
[181] Suit No. FHC/B/CS/53/05.

pronounced the activities of the respondents to be in violation of Section 34 (1) (a). However, the conclusion of the matter is awaiting the decision of the Court of Appeal.

Despite the favourable decision in *Gbemre's* case, there are peculiar challenges with proceeding against MNCs for the violation of any provision of Chapter IV of the CFRN. The rights under Chapter IV can only be enforced by means of the Fundamental Rights (Enforcement Procedure) Rules (Enforcement Rules) as prescribed by section 46 of the Nigerian Constitution. This is a major challenge for MNC human rights victims because environmental and human rights abuses by business corporations is not generally acknowledged as violations of the rights under Chapter IV of the Nigerian constitution as decided recently by the Federal High Court in Port Harcourt in the case of *Ikechukwu Opara & Others* v *Shell Petroleum Development Company Nig. Ltd and 5 others*.[182]

There are two major problems with the prescribed mode of enforcing human rights actions. First is that failure to comply with the prescribed method of commencing an action under the Enforcement Rules will nullify such proceedings.[183] This is also the case where the subject matter of the suit is not Chapter IV of the Constitution.[184] The implication is that where the court is of the view that the matter does not come within Chapter IV it cannot proceed to hear the matter based on its merits because the plaintiff will be deemed to have commenced the matter under the wrong rule and the case would normally be struck out in such circumstance. This was the basis for the decision in Opara's case, where the court ruled that the rights created by the African Charter were beyond the definition ascribed to "fundamental rights" as contemplated by section 46 CFRN and so could not be enforced by means of Fundamental Rights (Enforcement Procedure) Rules.[185]

In addition, a successful claimant under the fundamental rights provisions is also not entitled to compensatory damages. This is because the remedies available to claimants under the fundamental rights provisions are restraining orders.[186] The absence of

[182] Suit No. FHC/PH/CS/518/2005.
[183] Enforcement Rules 2009, Order IX, 1 (i).
[184] *Ibid*., Order IX, 1 (ii).
[185] *Opara's* case (n 182).
[186] *Gbemre* case (n 181); Enforcement Rules, Or XI.

monetary compensation under the fundamental rights provisions makes it an unreliable option for MNC human rights victims that may have suffered substantial pecuniary losses as a result of environmental damage. This may be one of the main reasons for the limited use of the provision by MNC human rights victims in Nigeria.

2.2.5.2 African Charter on Human and Peoples' Right (Ratification and Enforcement) Act[187]

This Act is the result of the domestication of the African Charter on Human and Peoples' Rights 1981.[188] The Charter has become a part of Nigerian law and thus enforceable by Nigerian courts. The Charter is unique in many respects. The first is that it specifically recognises the rights to a clean environment under Article 24 which provides that 'all people shall have the right to a general satisfactory environment favourable to their development'. Secondly, the Charter does not make any distinction between civil and political rights or economic, social and cultural rights as the African Commission has affirmed that all rights under the Charter are enforceable.[189] This makes the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act at least superficially, a potent tool for the protection of the human rights and the environment of Nigerian communities against the violative activities of MNCs.

The Act has some inherent advantages over some provisions in the Nigerian constitution in relation to the protection of MNC human rights victims. This is because the Act could be relied upon to enforce those rights threatened by the constant pollution of the atmosphere and drinking water in the Niger Delta that are non-justiciable under the Nigerian constitution, such as the right to good health. Although there is a human right to a healthy environment provision under Chapter II of the Nigerian Constitution, the constitution itself states that items under Chapter II are non-justiciable, which means that

[187] Cap A9 LFN 2004.
[188] Adopted 27 June 1981, entered into force on 21 October, 1986 OAU. Doc. CAB/LEG/67/3 Rev. 5. The acronym The Charter will be used to represent the African Charter on Human and Peoples' Rights.
[189] *Social and Economic Rights Action Centre (SERAC) and Centre for Economic and Social Rights (CESR)* v *Nigeria*, Communication No. 155/96 (Unreported, African Commission on Human and peoples' Rights, 27 October 2001) para 44.

they cannot be litigated upon and are thus unenforceable by action in court.[190] In this regard, the Charter provides an opportunity for victims of oil pollution to ventilate those rights, which they cannot claim under the constitution.

Despite the positive interpretation of the fundamental rights provisions in the Nigerian constitution in *Gbemre's* case, it is important to note that the ability of oil pollution victims to successfully enforce their rights under the Charter does not depend only on the ability of the Nigerian judiciary to positively and effectively interpret its provisions but also on the efficiency of the justice system to ensure timeous disposition of cases. In *Gbemre's* case discussed above, the court found that activities (gas flaring) of the defendants (Shell and NNPC) were a violation of the claimants' fundamental rights to life (including healthy environment) and dignity of human person guaranteed by sections 33 (1) and 34 (1) of the Nigerian Constitution 1999; and reinforced by Article 4, 16 and 24 of the Charter. Although this decision was hailed for adopting a liberal interpretation of the rights to life and dignity of human person under the Charter,[191] the successful claimants in the case cannot act on the judgement because it is still awaiting the decision of the Appeal Court where an appeal against the judgement has been lodged.

It is instructive that the cases of *Gbemre* and *Opara* were concluded at different divisions of the FHC in 2005. However, both cases are yet to be finally resolved because the Nigerian Court of Appeal is yet to decide the appeal, which may eventually be challenged at the Supreme Court anyway. It is such delays as discussed below that constitute the major challenges, which makes the remedial option unreliable as a process for addressing issues concerning corporate human rights and environmental abuses in Nigeria.

[190] CFRN, s. 6 (6) (c).
[191] Oluduro, (n 7) 400.

2.3 Regulating Corporate Violations of Human Rights and the Environment: Nigeria's Legal Enforcement Regime

Discussions so far shows that most of the statutes for addressing issues of human rights and the environment in Nigeria offer remedial solutions with emphasis on penalty/fines, damages and payment of compensation, which makes a functional and efficient judicial system imperative to secure enforcement. This also makes it important to investigate the Nigerian legal enforcement regimes because, despite the availability of a plethora of laws with regard to human rights and environmental regulation in the country, corporate abuse of human rights and environment is still prevalent there.

2.3.1 Legal Enforcement Challenges to Environmental and Human Rights Regulation in Nigeria

Legal enforcement institutions, especially the courts in developing markets, which includes Nigeria, have been described as corrupt and inefficient. The growing recourse to international litigation by MNC human rights victims from developing markets,[192] which has been attributed to corruption and inefficiency of their legal enforcement institutions attest to this: and has made it difficult for MNC human rights victims to obtain justice locally.[193] Corruption is generally acknowledged as a major factor that contributes to inefficiency in most institutions of government in Nigeria.[194] However, it is argued that a number of other factors may be responsible for the inefficiency of the country's justice administration system, especially with regard to the prosecution of cases against oil MNCs. As discussion below will show, the weaknesses in the major environmental and oil industry regimes in Nigeria and the country's governance system and socio-economic make-up affects the efficiency of Nigerian courts in various ways.

[192] See a list of international litigations undertaken by human rights and environmental violation victims, especially in the US and the UK, chapter I, s. 1.2.4 (n 82 & 83).
[193] Richard Meeran, 'Access to Remedy: The United Kingdom Experience of MNC Tort Litigation for Human Rights Violations' in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect* (Cambridge: Cambridge University Press 2015).
[194] Oluduro, (n 7) 351-363.

First, regulations such as the Petroleum Act which prescribes the revocation of an operator's license for failure to comply with the enabling Act or any regulation issued thereunder[195] have serious implications for effective justice administration. This is because the implementation of such a provision may damage the national economy because of the dependence of the country on oil. The implication is that such a provision may never really be implemented or enforced by the courts.

In addition, the Nigerian adversarial system of winner-takes-all plays a major role in the attitude of the judiciary in prioritizing the economic interest of the government over issues of environmental protection and the rights of the ordinary Nigerians. This is reflected in *Allan Iron* v *Shell British Petroleum (Nig) Ltd*[196] where the court refused to order an injunction against continuing pollution of land, fishpond and creek because, 'to grant the order of injunction ... would amount to asking the defendants (Shell BP) to stop operating in the area ... mineral oil is the main source of the country's revenue'.[197] Decisions such as this, makes it important to devise a more inclusive system that focuses on prevention because, as M. A. Ajomo observed while commenting on the decision in *Iron's* case: 'in the oil sector where environmental degradation is most prevalent, the all-pervading influence of the oil companies and the paternalistic attitude of the judges towards them in matters relating to environmental hazards created by the companies have made the enforcement of environmental laws ineffective ...'[198]

Underfunding of the Nigerian judiciary is another major factor that hinders effective justice delivery. It manifests in the slow pace and general inefficiency in Nigerian justice administration as there are considerably few courts and limited numbers of judicial officers saddled with more cases than they can adequately deal with, especially at the appellate level. Even though there are over 400 High Courts in Nigeria comprising 19 Federal High

[195] Petroleum Act, s. 8 (1) (f).
[196] Judgement of a Warri High Court (unreported) in Suit No. W/89/71 of 26 November 1973.
[197] *Ibid.*
[198] M. A. Ajomo, 'An Examination of Federal Environmental Laws in Nigeria' in M. A. Ajomo and O Adewale (eds), *Environmental Law and Sustainable Development in Nigeria* (NIALS 1994) 22-23.

Courts[199] and about 400 States High Courts,[200] there are only 17 Court of Appeal Divisions[201] to hear appeals from the various High Courts, and only one Supreme Court[202] to hear appeals from the 17 Court of Appeal Divisions.

The paucity of judicial officers across all the three layers of the Nigerian court system (High Court to the Supreme Court), and limited number of appellate courts means more cases-load for individual judges. This is responsible for the congestion in Nigerian courts, which manifests in undue delays in justice delivery. As a result, some cases have taken over three decades to go through the Nigerian court system (from High Court to the Supreme Court). For example, the case of *Elf Nigeria Limited v Opeme Sillo & Daniel Etseni*,[203] which relates to damages suffered in 1967, was heard at the High Court in 1987, the Court of Appeal in 1990 and the Supreme Court in 1994. The case of *Shell Petroleum Development Company Nigeria Ltd* v *Chief Joel Anaro & Ors*[204] took 32 years to resolve.[205] It is perhaps important to point out that the appeal filed by Shell Petroleum Development Company Nig. Ltd in 2006 against the 2005 judgement of the Federal High Court in Benin[206] is still on appeal where it has been lodged since 2006.

The implication of such delays cannot be overemphasised. This is because the interest sought to be protected in the action may often become irredeemable over a long period of litigation. In the case of *Gbemre* where the relief sought by the plaintiffs was granted, the benefit of the grant cannot be realised until the final resolution of the appeal, probably at the Supreme Court. The problem here is that the company would continue with the activity that creates the harm until the final resolution of the matter irrespective of the attendant human rights and environmental implications.[207] It is in view of this that

[199] <Http://www.finelib.com/judiciary/federal-high-court-divisions> accessed 18 August 2017.
[200] <http://www/finelib.com/judiciary/state-high-court> accessed 18 August 17.
[201] <http://www.finelib.com/judiciary/court-of-appeal-and-divisions> accessed 18 August 2017.
[202] <supremecourt.gov.ng> accessed 18 August 2017.
[203] (1994) 6 NWLR [pt. 350] 258.
[204] (2015) LPELR -24750 (SC).
[205] Ade Adesomoju, 'Oil Spill: 32 Years After, Supreme Court Orders Shell to Pay N30m Compensation' The Punch, 6 June 2015. This case which commenced in the High Court of the then Bendel State in 1983 was concluded on 6 June 2015.
[206] *Gbemre's* case (n 181).
[207] It is acknowledged that a plaintiff may seek and obtain interim relief pending the resolution of the matter, but where an interim order is appealed, such appeals usually take many years to resolve as they often take on a life of their own, thereby making interim application an unnecessary route through which to seek urgent relief in Nigeria.

this thesis proposes a regime of prevention to obviate the need to rely almost entirely on the weak and inefficient judicial system in Nigeria.

Finally, the formidable position of MNCs and their all-pervading influence is recognised globally as a major impediment against many attempts towards achieving human rights and environmental accountability for global MNCs. It is not surprising how the formidable influence of MNCs affect the enforcement of human rights in Nigeria. First, there is a clear mismatch between the MNCs who have both the technology and the enormous financial power to defend any allegation of abuse of human rights and the environment against the victims of such abuses who are mostly poor and uneducated farmers and fishermen. The former has the resources to engage the best lawyers and experts where expert evidence is required.[208] This mismatch between the oil MNC defendants and local farmers/anglers plaintiffs is most evident in common law tort cases, especially the tort of negligence where proof is required to find liability. Because of the poor economic conditions of the victims and the expensive and uncertain option of litigation most oil pollution victims are constrained to accept whatever compensation is offered to them out of court by the polluting companies no matter how inadequate those offers might be.[209]

It is important to note that some Nigerian government departments are already taking steps to build internal mechanisms in their system in order to avoid as much as possible, the need to bring issues concerning them before the Nigerian judiciary. The Nigerian Bureau for Public Procurement is one example of such departments. According to its Director General, Emeka Ezeh, the Bureau is building a comprehensive internal regulatory system for the bureau to prevent fraud in the system. This is to avoid recourse to the courts because according to him, 'none of the numerous cases of fraud commenced against their staff in the courts in the past seven years has been concluded'.[210] This

[208] Oluduro (n 7) 179.
[209] Ekpu (n 26) 100
[210] Dateline Abuja (Channels Television 3 January 2015) <http://www.channelstv.com/programmes/dateline-abuja> accessed 7 January 2015.

underscores the general inefficiency in the Nigerian justice system. This also supports the main suggestion in this thesis about the need to develop internal decision-making structures inside the corporation that will include non-shareholder groups such as local communities as a way of providing a means by which the local communities can hold corporations responsible to their human rights and environmental obligations.

Conclusion

We have traced the problem of regulating MNCs in Nigeria to weak and inefficient laws and inefficient enforcement institutions. First, Nigerian laws in general did not really set any standards for MNCs to meet in order to preserve the environment and water sources in Nigeria. Secondly the legal regime focuses almost exclusively on remedies which depend almost entirely on the courts to realise them. Ordinarily there is nothing wrong with this but, in a country like Nigeria with a weak enforcement infrastructure, such a legal arrangement is unlikely to adequately address the challenges they are meant to address.

The prevalence of environmental degradation and human rights violations in Nigeria underscores the failure of the current remedial focus of the country's environmental and oil industry related regimes. The general lack of institutional capacity as identified above, especially with regard to the judiciary and regulatory agencies, such as NESREA and NOSDRA is an indication that the Nigerian government alone cannot effectively deal with human rights and environmental administration. Thus, there is a need to bring in other stakeholders, especially the most affected groups, such as the local communities to participate in environmental and human rights administration in the country.

The main argument in this thesis is that corporate law has the potential to adequately regulate the relationship between MNCs and other constituents such as local communities that host them. Therefore, to obviate the need to rely exclusively on the unreliable court system and other regulatory agencies in Nigeria, it is important to factor the relationship

between MNCs and their neighbours, especially the local communities into the corporate legal regime. However, since the abuses addressed in this thesis concern MNCs, it is important to explore the basis for developing such a national legal framework from existing international norms and other international regulations. Therefore, the next two chapters will interrogate international human rights and environmental norms to identify the basis for developing the proposed national legal framework.

3. Corporate Accountability for Human Rights Violations in Developing Markets: Challenges in Focusing on International Regulation and Human Rights Standard

3.1 Introduction

One major impact of globalisation is the interconnectedness and interdependence of the world's economic markets in an emergent single global economic market, driven and dominated by multinational corporations (MNCs). The presence of MNCs on the world stage and their unavoidable penetration into the remote parts of developing markets exposes the local communities in those markets to some of the damaging effects of their activities. The impact of such activities on the environment and human rights of local communities, especially the activities of extractive MNCs, has often generated international outcry,[1] and has been the subject of several international lawsuits.[2] This raises the important question about not only the preventive mechanism for dealing with the human rights and environmental impact of corporate activities but also the recourse available to victims affected by the direct or complicit violative act of a foreign-headquartered MNC operating in developing markets.[3]

This question has become especially relevant given the frequency with which non-governmental organizations (NGOs) and activists have publicized instances of business conduct that has violated universally agreed upon human rights norms since the 1990s.[4] The outrage that followed some of the major human rights and environmental disasters in

[1]An example is the uproaar against Shell for its role in Nigeria, following the hanging of Ken Saro Wiwa and and eight other Ogoni activists on November 1, 1995. See David Vogel, *The Market for Virtue: The Potential and Limits of Corporate Social Responsibility* (Washinton D.C.: Brookings Institute Press 2006), 140-4.
[2]See for example, *Bodo Community* v *Shell Petroleum Development Company (Nigeria) Ltd*, Case No. HQ11X01280 (Shell/Nigeria); *Beanal* v *Freeport-McMoran, Inc.*, 197 F.3d 161 (5th Cir. 1999) (Freeport-McMoran/Indonesia); *Jota* v *Texaco, Inc.*, 157 F.3d 153 (2nd Cir. 1998) (Texaco/Ecuador).
[3] Sukanya Pillay 'And Justice for All? Globalisation, Multinational Corporations, and the Need for Legally Enforceable Rights protection' 81 *U. Det Mercy L. Rev*. 489 (2003-2004) 489.
[4] See for example, Human Rights Watch & Center for Human Rights & Global Justice, On the Margins of Profit: Rights at Risk in the Global Economy (February 2008), <http://www.hrw.org/sites/default/files/reports/bhr0208webwcover.pdf> (hereinafter On the Margins of Profit) accessed 19 March 2016; Human Rights Watch, 'The Price of Oil: Corporate Responsibility and Human Rights Violation in Nigeria's Oil Producing Communities' (January 1999) <http://pantheon.hrw.org/reports/1999/nigeria/nigeria0199.pdf> accessed 19 March 2017.

developing markets[5] is one of the major factors that has influenced the development of new initiatives on Business and Human Rights (BHR), which has led to the emergence of various soft law instruments developed by the UN and some inter-governmental institutions and the adoption of Corporate Social Responsibility (CSR) codes by some major MNCs since the 1990s.[6]

Notwithstanding the growing body of regulatory initiatives that seek to make MNCs accountable for human rights and environmental abuses, environmental damage and human rights abuses are still prevalent in developing markets.[7] This has led to the conclusion by some commentators that existing legal and regulatory regimes for regulating MNCs are inadequate.[8] As a result, there has been increasing focus by commentators on human rights standards as a basis for corporate accountability for human rights violations.[9]

In view of the increasing focus on human rights standards as a means of achieving this accountability, the aim of this chapter is to critically analyse international human rights law and other international soft law instruments developed to regulate the conduct of MNCs. This analysis will focus on how these international instruments apply to MNCs. This is with a view to identifying how MNCs could actually be held to human rights standards in light of the views in current scholarship that municipal laws are incapable of regulating a difficult regulatory target, such as a MNC,[10] which is the basis for the current focus on a

[5] Some examples of environmental and human right disasters that has generated global outrage include, the destruction of Ecuadorian Amazon by Texaco, The Inter-American Commission on human Rights, 'Report on the Situation of Human Rights in Ecuador', Inter-AM. Comm'n on Hum. Rts., O.A.S. Doc. OEA/Ser.L/V/11.96, doc. 10 rev. 1 (1997); the activities of Shell that cause environmental degradation in Ogoni and the eventual hanging of Ken Saro Wiwa and his 8 Ogoni kinsmen, on 1st November 1995. BBC News, '1995: Nigeria Hangs Human Rights Activist' 10 November 1995, <http://www.news.bbc.co.uk/onthisday/hi/dates/stories/november/10/newsid_2539000/2539561.stm> accessed 26 January 2015; the collapse of a factory building in Sava, Bangladesh, March 13 2013, BBC News 3 May 2012, ,http://www.bbc.co.uk/news/world-asia-22394094> accessed 02 March 2017.

[6] Christen Broecker, '"Better the Devil You Know": Home State Approaches to Transnational Corporate Accountability' (2008-2009) 41 *N.Y.U. J. Int'l L. & Pol.* 159, 160.

[7] See the Commission on Human Rights, 'Interim Report of the Special Representative to the Secretary General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises', E/CN.4/2006/97 (22 February 2006) para. 30; see also the United Nations Environmental Programme (UNEP) 2011 Report on the Niger Delta at <http://www.unep.ord/nigeria> accessed 23 March 2017.

[8] Pillay (n 3) 522; Surya Deva, *Regulating Corporate Human Rights Violations: Humanising Business* (Oxon: Routledge 2012), 12.

[9] See for example, Michael K. Addo, 'Human Rights and Transnational Corporations – an Introduction' in Michael K. Addo (ed), *Human Rights Standards and the Responsibility of Transnational Corporations* (The Hague: Kluwer Law International 1999); Chris Jochnick, 'Confronting the Impunity of Non-State Actors: New Fields for the Promotion of Human Rights' (1999) 21 *Human Rights Quarterly* 56-79; Pillay (n 3); Deva, *ibid*.

[10] See Addo, (n 9), 6-9; Deva (n 8), 211.

human rights approach. The analysis of international human rights law and international soft law instruments will be followed with a critique of Surya Deva, who forcefully advocates that regulation of MNCs should transcend municipal levels. The critique of Deva's opinion here will focus on the authors' views about the growing influence of MNCs, the regulatory challenge that results from that, and his suggested approach for regulating MNCs to ensure that they comply with human rights standards.

The overall aim in this chapter is to generally clarify and provide further understanding of the development and purpose of international human rights norms and other international initiatives as a basis to analyse the challenges in applying them to MNCs. This is with a view to determining the adequacy of these instruments as a regime for addressing corporate abuses of human rights as well as highlighting their aspects that could be usefully adapted to formulate a national legal framework that can complement them to provide effective regulation for MNCs, especially in the context of their operations in developing markets.

3.2 International Human Rights Law and Its Addressees

The events that led to the two World Wars, especially the events that led to World War II, prompted the formation of the United Nations (UN) and the establishment of human rights on the global agenda. The Charter of the UN (hereinafter referred to as "the Charter"), which was adopted in 1945 and entered into force on 24 October 1945, addresses the problems of 'mass violations of human rights and serious infringements of territorial sovereignty, the main events that had precipitated the two World Wars and caused great suffering'.[11] Thus, Art 1 (1) of the Charter declares the aim of UN to be the maintenance of international peace and security. However, it was generally accepted that respect for human rights and fundamental freedoms is a precondition for achieving such peace and

[11] Rhona K. M. Smith, *Textbook on International Human Rights* (Oxford: Oxford University Press 2014), 26.

security. This was the primary basis for the inclusion of human rights in the constituent document (the Charter) of the UN.[12]

The fundamentality of human rights protection is reinforced in the declared purpose of the Charter, which is stated in Art 1 (3) as '[t]o achieve international co-operation in solving international problems … and in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction …'. In furtherance of this purpose, the General Assembly (GA) adopted the Universal Declaration of Human Rights (UDHR)[13] on 10 December 1948, which states in its preamble that '… every individual and organ of society … shall strive … to promote respect for these rights and freedoms'. Although the UDHR is not technically legally binding, it was followed in 1966 by a binding enforceable tabulation of rights in two instruments: the International Covenant on Civil and Political Rights (ICCPR)[14] and the International Covenant on Economic, Social and Cultural Rights (ICESCR),[15] which took a further ten years to attract sufficient ratification to enter into force.[16] All three instruments, the UDHR, the ICCPR and the ICESCR are often collectively called the International Bill of Rights (IBR),[17] which the UN has referred to as 'the ethical and legal basis for all human rights work of the United Nations …'.[18]

In addition to the IBR, different regions of the world have established regional machinery for the protection and promotion of human rights. Some of the regional instruments that emanate from regional organizations that are politically and legally relevant to Nigeria include the African Charter on Human and Peoples' Rights (the African Charter),[19] the European Convention on Human Rights (ECHR),[20] and the American

[12] Smith (n 11), 26.
[13] Universal Declaration of Human Rights, Preamble, Dec. 10, 1948, U.N Doc. A/810 (hereinafter Universal Declaration).
[14] Entered into force on March 23, 1976, G.A. Res. 2200A, 21 U.N GAOR Supp. (no 16) at 52, U.N Doc. A/6316 (1966).
[15] Entered into force January 3, 1976, G.A Res. Doc. 2200A, 21 U.N GAOR Supp. (no 17) at 49 U.N Doc. A/6316 (1966).
[16] Smith, (n 11), 37.
[17] 'International Bill of Rights' is the expression used for the UDHR, the ICCPR and the ICESCR.
[18] Office of the High Commissioner for Human Rights (OHCHR), *Fact Sheet No 22*, 3.
[19] Adopted 27 June 1981 (entered into force 21 October 1986) OAU. Doc. CAB/LEG/67/3 Rev. 5.
[20] European Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, 213 U.N.T.S. 222 (entered into force 3 September 1953).

Convention on Human Rights (ACHR).[21] The ACHPR is binding on Nigeria as a member of the African Union (AU), which has not only ratified the ACHPR but has also '… incorporated the African Charter … into its domestic law'.[22]

The importance of other regional instruments to Nigeria lies in the requirement under the African Charter that the African Commission draw upon the universal and other regional standards.[23] Although the way certain rights are treated in the regional instruments reflect regional concerns, priorities and legal traditions, there is generally no risk of fragmentation and undermining of universal norms because each system has in fact grounded its guarantees on the UDHR.[24] For example, the ECHR states in its preamble that it was drafted to 'to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration'.

It is important to state that the rights allegedly abused by business corporations in Nigeria and other developing markets are protected in both the regional human rights instruments and the IBR. For example, the right of the local communities to 'a general satisfactory environment ...' is protected under the ACHPR.[25] The right to life, the right to health and the right to water are some of the rights guaranteed under the IBR.[26] Therefore, to fully appreciate the reasons why the rights guaranteed in both the international and regional human rights instruments are continuously and flagrantly abused, especially by MNCs operating in developing markets, a good starting point is to identify the proper addressees of the rights and obligations in the instruments. This is important to be able to determine in the first place if the international human rights instruments are applicable to all the actors operating on the international stage.

[21] 22 November 1969, 9 ILM 673.
[22] *Social and Economic Rights Action Centre (SERAC) and Centre for Economic and Social Rights (CESR)* v *Nigeria*, Communication No. 155/96 (Unreported, African Commission on Human and peoples' Rights, 27 October 2001), para 41.
[23] Article 60.
[24] Dinah L. Shelton*, Advanced Introduction to International Human Rights Law* (Cheltenham: Edward Elgar Publishing Limited 2014), 103.
[25] ACHPR, article 24.
[26] For example, art. 1 UDHR; art. 25 UDHR; art. 6 ICCPR and art. 12 ICESCR.

There is no doubt that international human rights instruments are devoted to recognising the individual's rights and the corresponding obligations of States. The ICCPR clearly states the obligation on each State Party to the Covenant to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant.[27] Some commentators argue that this is because international human rights law developed at a time when States monopolized international relations and the international human rights system relied on connecting every individual to a responsible State that had the capacity to deliver protection, as other actors such as business corporations and other international economic organizations were out of sight.[28] Besides, in 1945 there was little awareness of any need to protect individuals against non-state actors as the actions that precipitated the two World Wars such as violations of human rights and sovereignty were State actions.

However, the emergence of powerful non-State actors, especially MNCs, on the international stage has engendered concerns for corporate accountability for human rights, and a renewed interest in the question whether there are real direct legal obligations for non-State actors, especially MNCs, contained in the international human rights instruments.[29] The result is the subsequent evolution of the UN's powers to adopt policies or take measures directed at corporate responsibility for human rights, which is now derived from the implied powers of the UN and a broad interpretation of the rights enshrined in the IBR in the context of corporate human rights concerns which were not there at the time existing rights were first formulated.[30]

Thus, in this context, while States are clearly the primary addressees of human rights obligations, several texts also contain provisions that speak to duties of persons

[27] ICCPR Art 2 (1).
[28] Koen De Feyter, *Human Rights: Social Justice in the Age of the Market* (Dhaka: The University Press Ltd 2005), 1.
[29] August Reinisch, 'The Changing International Legal Framework for Dealing with Non-State Actors' in Alston (ed), *Non-State Actors and Human Rights* (Oxford: Oxford University Press 2005) 70-1.
[30] Michael R. Anderson, 'Human Rights Approaches to Environmental Protection: An Overview' in Alan E. Boyle and Michael R. Anderson (eds), *Human Rights Approaches to Environmental Protection* (Oxford: Clarendon Press 1996), 7.

(natural and non-natural including business corporations) in society.[31] An example is the preamble to the UDHR which, as mentioned above, states that every individual and every organ of society shall strive to promote respect for human rights and fundamental freedoms. Apart from the UDHR, both the ICCPR and the ICESCR also recognise private obligations in their preambles, which is stated in the following terms: 'the individual, having duties to other individuals and to the community of which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant'.[32]

As August Reinisch points out, although the obligations imposed on non-State actors under the Covenants 'may not yet lead to the availability of adequate procedural remedies',[33] various human rights bodies have reaffirmed that the core human rights obligations are binding on all members of society including business corporations. The Committee on Economic, Social and Cultural Rights (CESCR) stated in its General Comment No. 14 that '[w]hile only States are parties to the Covenant and thus ultimately accountable for compliance with it, all members of society – individuals, …, as well as the private business sector – have responsibilities regarding the realization of the right to health …'.[34]

To underscore the obligation of business under the ICESCR, the CESCR recently acknowledged how corporate activities have negatively affected economic and social rights because of States' failure to ensure compliance, under their jurisdiction, with internationally recognised human rights norms and standards. As a result, it adopted the General Comment No. 24 in August 2017 with a view to clarifying the duties of State

[31]Reinisch, (n 29), 71; Beth Stephens, 'The Amorality of Profit: Transnational Corporations and Human Rights' (2002) 20 *Berkely J. Int'l L.* 45, 72.
[32]International Covenant on Civil and Political Rights, Dec. 19, 1966, para. 5, 999 U.N.T.S. 171, 173 (entered into force Jan. 3, 1976); International Covenant on Economic, Social and Cultural Rights, Dec. 19, 1966, para. 5, 993 U.N.T.S. 3, 5 (entered into force Jan. 3, 1976).
[33]Reinisch, (n 29), 71.
[34] E/C.12/2000/4, para 42.

parties with regard to preventing and addressing the adverse impacts of business activities on human rights.[35]

In view of the focus on prevention of human rights abuses in this thesis, it is perhaps necessary to interrogate General Comment 24 further with a view to understanding how it clarifies the obligation of States under the Covenant. Most important in this regard is the protection obligation of States to prevent effectively infringements of the Covenant rights in the context of business activities. 'This requires that States parties adopt legislative … and other appropriate measures, to ensure protection against Covenant rights violations linked to business activities …'.[36] This obligation entails a positive duty to adopt a legal framework requiring business entities to exercise human rights due diligence in order, amongst other things, to prevent the risks of violations of Covenant rights.

This means that States are required to provide the foundation for corporate responsibility to prevent human rights abuses. To underscore the obligation in this regard, State parties are also required under the ICCPR not only to protect individuals against violations of Covenant rights by its agents and other non-State actors but also to ensure that failure to observe the duties under the Covenant by private person such as business corporations' is investigated and punished or redressed.[37]

The positive obligation of States has been confirmed in the landmark case of *SERAC and CESR* v *Nigeria*[38] where the African Human Rights Commission (the Commission), outlined States' obligations regarding human rights in the following words:

> [i]nternationally accepted ideas of the various obligations engendered by human rights indicate that all rights – both civil and political rights and social and economic – generate at least four levels of duties for a

[35] Committee on Economic and Social Rights, General Comment No. 24 (2017) on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities, E/C.12/GC/24, para 1.
[36] *Ibid*., 5.
[37]Human Rights Committee, General Comments No. 31: The Nature of the General Legal Obligation Imposed on State Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13, para. 8 (May 26, 2004) reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.8, (May 8, 2006) 233 (hereinafter Treaty Bodies Compilation).
[38]*SERAC,* para 59.

> [s]tate that undertakes to adhere to a rights regime, namely the duty to respect, protect, promote and fulfil these rights. These obligations … entail a combination of negative and positive duties.[39]

The Commission held that the obligation to protect human rights is a positive duty which requires States to 'take measures to protect beneficiaries of the protected rights against all political, economic and social interferences'.[40] The underlying reason for this positive obligation, according to Zenon Stavrinides, is that human rights are better protected where 'appropriate laws and administrative policies are supported by equally appropriate governmental machinery – courts, police and penal institutions …'.[41] Thus, in view of the positive duty of States to protect human rights, the African Commission, citing Articles 16 and 24 of the ACHR, in addition to ICESR, held that '[Nigeria is in violation] of local peoples' rights to ... health ... and life [by] breaching its duty to protect the Ogoni people from damaging acts of oil companies'.[42] The positive duty of States to protect human rights also informed the decision in *Oneryildiz* v *Turkey,*[43] where the European Court of Human Rights (the ECtHR) explained that Article 2 of the European Convention on Human Rights (ECHR) imposes an obligation on the State to protect human rights whether the activity that led to the violation of rights is conducted by the State or by a private company.[44]

It is in view of the above that we argue that the implementation and enforcement of those private obligations recognized in both the preamble to the UDHR, the ICCPR, and the ICESCR depends for the most part on a State's capability to protect individuals within its territory by adequately regulating every individual (including MNCs) and organs of society operating within jurisdiction. Thus, the duty to protect involves the obligation on States in two respects. The first is the duty to prevent the abuse of human rights. The

[39] *SERAC,* para 44.
[40] *Ibid*., para 46.
[41] Zenon Stavrinides, 'Human Rights Obligations under United Nations Charter' (1999) 3 *Int'l J. Hum. Rts*. 38, 45-6.
[42] *SERAC,* para 59.
[43] 2004- XII; (2005) 41 EHRR 324 [GC].
[44] *Oneryildiz*, para 101.

second is the duty to investigate, punish or remedy human rights abuse because, without sanctions and redress, the State's duty to protect rights could be rendered illusory.[45] To fulfil the States' obligation to protect human rights, therefore, requires that the State not only provide adequate access to a remedy for human rights victims, but also take appropriate steps to prevent such abuses through legislative or administrative means.[46]

Apart from the human rights obligations of business corporations in the IBRs discussed above, there has been renewed effort to establish international legal obligations of corporations and other business entities, especially since the era of deregulation and privatization began in the 1980s.[47] This renewed effort is led by human rights activists and developing countries and it is aimed at setting human rights standards, especially for the major MNCs, with a view to counterbalance the growing power of MNCs with the increased potential for abuse of workers and other human rights.[48] Some major soft law instruments that have emanated from this effort are the Organisation for Economic Co-operation and Development (OECD) Guidelines[49] and the UN Guiding Principles (UNGP).[50] These international regulatory initiatives are discussed in the next section with a view to identifying how they incorporate the human rights obligations in the IBR, as a basis to support the validity of an alternative national legal framework.

It is important to emphasise that although these international initiatives are soft law instruments and therefore have no binding authority, their importance lies in the fact that they set human rights standards, which the MNCs are expected to comply with, in addition to complying with national laws in the jurisdictions where they operate.[51] It is probably on the strength of corporate obligations under the various human rights

[45]Shelton, (n 24), 214.
[46] General Comment 24 (n 35), 5.
[47] *Ibid*., 209
[48] *Ibid*.
[49]OECD (2011) OECD Guidelines for Multinational Enterprises (OECD Publishing 2011) <http://dx.doi.org/10.1787/9789264115415-en> (hereinafter OECD Guidelines 2011) accessed 26 September 2016.
[50]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', A/HRC/17/31 (21 March 2011) (SRSG 'Guiding Principles').
[51]UNGPs, Principles 2 & 3.

instruments that some human rights lawyers suggest that corporate responsibility should be based on human rights standards.[52]

However, even though discussions so far reveal that corporations may have human rights responsibilities under the international human rights instruments, especially in the context of a broader interpretation of the Charter and the emerging international soft law instruments, how they could be held to such responsibilities, especially with regard to the circumstances in developing markets is the main issue discussed in the remainder of this chapter. This will thus form the basis for the critique of the international soft law instruments and Surya Deva's "integrated theory" undertaken later, to highlight their inadequacies and suggest alternative approaches to regulating MNCs to make them more responsive to their human rights responsibilities.

3.3 Addressing MNC Responsibility for Human Rights: The Role of International Soft Law Instruments

MNCs are the major drivers of globalization and international investment. Their activities have played a major part in the flow of foreign direct investment (FDI) which has grown considerably since the last quarter of the 20th century to about US$1.45 trillion in 2013.[53] Although developing markets share of FDI has increased to about 50% of global FDI since 2014,[54] their share of FDI is still substantially concentrated in the extractive sector.[55] In addition to the concentration of their FDI in the environmentally sensitive extractive sector is the fact that FDI is a key source of capital for developing markets. As a result, MNCs and their investment have had enormous impact on the economy and environment in developing markets.[56]

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[52] Addo, (n 9), 5-6.
[53] United Nations Conference on Trade and Development (UNCTAD) *World Investment Report* 2014 (United Nations 2014) xii at <http://www.unctad.org/en/PublicationLibrary/wir2014_en.pdf>.
[54] UNCTAD< World Investment Report 2014, 9.
[55] *Ibid*.
[56] Jennifer Clapp, 'Global Environmental Governance for Corporate Responsibility and Accountability' (2005) vol. 5 No. 3 Massachusetts Institute of Technology, 23, 23 <http://www.mitpressjournals.org/doi/abs/10.1162/1526380054794916#.V71kvZgrLIU>.

MNCs are generally associated with the benefits of globalization and international investment, such as job creation, production of goods and services and general economic development in developing markets.[57] However, given the growing body of evidence, the negative impact of corporate activity on the environment and human rights of the communities where they operate in developing markets,[58] tends to obscure the benefits that can be derived from their economic activities, for which there is actually lack of conclusive evidence.[59]

Although we have identified the regulatory gap created by the internationalization of corporate power and influence as constituting a major challenge to the effective regulation of corporate human rights abuses, this is, however, compounded by the almost complete lack of access to judicial remedies for human rights victims in developing markets. This is due to the inefficiency of their legal enforcement institutions, especially the courts. It is perhaps important to note here that the lack of legal enforcement capacity in developing markets may be one of the main reasons why foreign investors bypass the legal enforcement infrastructure in developing markets by the use of bilateral investment treaties (BITs).

The numerous BITs and Free Trade Agreements (FTAs) with stand-alone investment chapters usually provide for investor protection, which establishes minimum standards of treatment for investors from other contracting States in the territory of the host State. Non-compliance with the standards in the treaties is enforced by international arbitration tribunals specified in the particular BIT.[60]

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[57] International Chamber of Commerce, Brief on Globalization (November 22, 2000) <http://www.iccwbo.org/Data/Policies/2000/ICC-brief-on-globalization. > accessed March 28, 2017.
[58] See for example, Human Rights Watch & Center for Human Rights & Global Justice, On the Margins of Profit: Rights at Risk in the Global Economy (February 2008), <http://www.hrw.org/reports/2008/bhr0208/bhr0208webwcover.pdf> (hereinafter On the Margins of Profit); Human Rights Watch, 'The Price of Oil: Corporate Responsibility and Human Rights Violation in Nigeria's Oil Producing Communities' (January 1999) <http://www.hrw.org/reports/1999/nigeria/nigeria0199.pdf> accessed 26 January 2016.
[59] See UN High Commissioner for Human Rights, *Report on Human Rights, Trade and Investment*, E/CN.4/Sub.2/2003/9, delivered to the Sub-Commission on the Promotion and Protection of Human Rights, U.N. Doc. 2 July 2003, 6-8.
[60] For a more detailed discussion on the regulation of investor/host-state relations under the BITs and the procedure for the settlement of investment dispute, the reader is referred to Peter Muchlinski, Multinational Enterprises and the Law (2nd edn., Oxford: Oxford University Press 2007), particularly chapter 17.

Thus, the lack of enforcement capacity is responsible for the regulatory double-standards in developing markets as corporate impacts on human rights and the environment of their host communities is regulated by municipal regimes and enforced by local enforcement institutions while FDI is regulated by BITs and enforced by international arbitration tribunals. The implication is that MNCs can afford to be careless about the environment and human rights of the local communities because they can exploit the weak legal environment in developing markets to escape liability.[61] This has contributed in large part to the prevailing corporate impunity for environmental degradation and human rights abuses in developing markets, and the corresponding need to fill the regulatory gap with regard to the impacts of corporate activities on the local communities where they operate.

The situation identified above has provided the enabling environment for non-governmental organizations (NGOs) such as Amnesty International, Human Rights Watch, Friends of the Earth, Greenpeace and others to champion issues relating to the regulation of human rights and environmental abuses in developing markets. As discussed earlier, the increased pressure from the NGOs is one of the major factors that has influenced the development of new initiatives on business and human rights (BHR)[62]

Although commentators have identified different kinds of code, discussions here will be limited to "public welfare codes", i.e. 'codes of conduct that seek to promote socially responsible MNC conduct', [63] and particularly those codes that are primarily concerned with issues of human rights of local communities from where MNCs operate in developing markets. It is acknowledged that the negative impact of corporate activity in developing markets is not, however, limited to the degradation of the environment and abuses of human rights of local communities. Labour rights and consumer rights amongst many other rights are also affected by corporate decisions and activities but, discussion about

[61] See the Bhopal case in India discussed below in s. 3.4.1.
[62] Broecker, (n 6) 160.
[63] Sean D. Murphy, 'Taking Multinational Corporate Codes of Conduct to the Next Level' (2004-2005) 43 Colum J. Transnat'l L. 389, 393.

corporate human rights abuses in this thesis is concerned almost exclusively with the rights of the local communities for reasons that will be explained in Chapter 6.[64]

Therefore, even though the ILO Declaration on MNEs and Social Policy,[65] the UN Global Compact (UNGC),[66] the Organisation for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises (MNEs),[67] the UN Guiding Principles (UNGPs),[68] and the ISO 26000 Guidance on Social Responsibility are all recognized as principles and guidelines that specify rules on the responsibility of corporations towards society,[69] discussions here will be limited to the OECD Guidelines and the UNGPs. This is for two reasons. The first is because of the limited space allowed for this research which will not permit a discussion of all the aforementioned instruments. Secondly, the selected instruments are representative of existing mechanisms that seek to address the abuse of human rights by MNCs. They originate from major global and inter-governmental institutions and represent both internal and external sources (private and inter-governmental sources), in addition to the fact that they address specific issues of MNCs abuses of human rights and the environment of local communities.

The differences in the source of the instruments notwithstanding, they all share some common characteristics. In particular, they are generally voluntary in nature; MNCs are not forced to adopt them but, 'rather, pledge themselves to do so; they typically consist of a series of principles, standards or guidelines and they mostly draw on or refer

[64] Section, 6.2.
[65] Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, ILO, (MNE Declaration) – 5th Edition (March 2017) <http://www.ilo.org/empent/Publications/WCMS_094386/Lang-en/index.html>.
[66] UN Global Compact,< http://www.unglobalcompact.org/what-is-gc/mission/principles> accessed February 29, 2017.
[67] OECD Guidelines for Multinational Enterprises: Recommendations for Responsible Business Conduct in a Global Context, 25 May 2011 <http://www.oecd.org/dataoecd/43/29/48004323.pdf> (hereinafter OECD Guidelines 2011) accessed 4 January 2017.
[68] 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', A/HRC/17/31 (21 March 2011) (SRSG 'Guiding Principles').
[69] European Commission, A Renewed EU Strategy 2011-14 for Corporate Social Responsibility COM (2011) 681 final, 6.

to international norms, particularly in the fields of labour, human rights and the environment'.[70]

Commentators point to some of their advantages and disadvantages, but the evidence of their inadequacy as a regime capable of truly filling the regulatory gap on a global level is implicit in the growing cases of human rights and environmental abuses in developing markets.[71] Therefore, we evaluate the OECD Guidelines and the UNGPs below so as to identify their disadvantages and, highlight the advantages that could be usefully adapted to achieve corporate accountability for human rights in developing markets.

3.3.1. The OECD Guidelines

The OECD Guidelines are recommendations addressed by governments of the Organization for Economic Co-operation and Development (OECD) to MNCs[72] operating in or from adhering countries.[73] The organization currently has 34 member countries[74] with 8 non-member adhering countries, which makes it altogether 42 OECD adhering countries that follow the Guidelines.[75] The Guidelines are non-binding principles and standards addressed to MNCs with the aim to encourage responsible business conduct in a global context consistent with applicable laws and internationally recognised standards.[76] Although limited to the 42 adhering countries, their importance lies in the fact that those countries

[70] Murphy (n 63) 400.
[71] See the comparison on oil spill in European and what is happenning in Nigeria by Audrey Gaughran, Amnesty International Global Issues Director where she states that in any other country what is taking place in Nigeria 'would be a national emergency. In Nigeria it appears to be a standard operation procedure for the oil industry. The human cost is horrific – people living with pollution ever day of their lives'. <http://www.amnesty.org/.../hundreds-of-oil-spills-continue-to-blight-niger-deltal> accessed 13 August 2017.
[72] Although Multinational Enterprises (MNEs) is the official identification used in the OECD Guidelines for global corporations, we will use Multinational Corporations (MNCs) to maintain consistency throughout in this thesis.
[73] The preface to the Guidelines, OECD (2011), OECD Guidelines for Multinational Enterprises, OECD Publishing (hereinafter OECD Guidelines 2011), 3. <http://dx.doi.org/10.1787/978926115415-en>.
[74] Currently, the thirty-four member states are: Australia, Austria, Belgium, Canada, Chile, the Czech Republic, Denmark, Estonia, Finland, France Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Luxemburg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, the Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States, OECD Guidelines 2011, *ibid*.
[75] OECD Guidelines 2011, 3.
[76] *Ibid*.

'represent the source of the large majority of the world's FDI and the headquarters of a majority of the world's largest MNEs'.[77]

It is important to note that the first OECD Guidelines came into effect on 21 June 1976,[78] and they were revised in June 2000. The current version is the updated OECD Guidelines 2011 with a new Chapter IV on human rights.[79] More broadly, the 2011 Guidelines cover issues of disclosure, human rights, employment and industrial relations, environment, combating bribery, consumer interest, science and technology, competition, taxation, and implementation of the guidelines. However, this evaluation will focus on the specific relevance of the Guidelines in defining human rights responsible conduct for business with reference to business compliance and their implementation, and their practical impact on the protection of human rights, especially in the context of developing markets. It will also make references to the environmental context for two reasons. The first is that this thesis is concerned with human rights and environmental abuses in developing markets. Second is the acknowledged link between environmental degradation and human rights abuses as commentators have argued that a degraded environment contributes directly to infringements of human rights.[80]

3.3.1.1 Human Rights and the Environment in the Text of the OECD Guidelines

In evaluating the human rights and the environment text of the Guidelines, it is important to note some important recommendations in the Guidelines that define their purpose and the expectations (since the Guidelines do not impose legal obligations) in the document as the standard for their implementation generally, and with particular reference to human rights and the environment. The aim of the Guidelines as stated in the Preface is 'to ensure that the operations of these enterprises are in harmony with government policies, to

[77] *Ibid*.
[78] OECD Declaration on International Investment and Multinational Enterprises, 21 June 1976, reprinted in 1976, ILM vol. 15, 967 (hereinafter OECD Guidelines of 1976).
[79] OECD Guidelines 2011.
[80] Anderson, (n 30), 3.

strengthen the basis of mutual confidence between enterprises and societies in which they operate …'.[81] It also stresses that the common aim of adhering governments is to encourage the positive contribution from MNCs to economic, environmental and social progress.[82] Paragraph 2 which embodies the Concepts and Principles clearly states that '[o]beying domestic laws is the first obligation of enterprises'.[83] The Guidelines also recognises the right of governments 'to prescribe the conditions under which multinational enterprises operate within their jurisdictions'.[84]

As a general Policy, enterprises are required under the Guidelines to 'take fully into account established policies in the countries in which they operate, and consider the views of other stakeholders'.[85] In this regard, they are required to avoid 'causing or contributing to adverse impacts on matters covered by the Guidelines …',[86] which includes human rights and the environment.[87] One way to achieve this is to '[e]ngage with relevant stakeholders in order to provide meaningful opportunities for their views to be taken into account in relation to planning and decision making for projects or other activities that may *significantly impact local communities'*.[88] In the Commentary attached to the General Policies, stakeholder engagement is stated to 'involve interactive processes of engagement with relevant stakeholders, through, for example, meeting, hearings, or consultation proceedings'.[89] The Commentary further emphasises the importance of engagement, stating that it 'can be particularly helpful in the planning and decision-making concerning projects or other activities involving, for example, the intense use of land, or water, which could significantly affect local communities'.[90]

With respect to human rights, the 2011 update has a specific chapter (Chapter 4) on human rights. The chapter generally refers to the international law obligation of States

[81] OECD Guidelines 2011, 13, para 1.
[82] *Ibid*., 15, para 9.
[83] *Ibid*., 17, para 2.
[84] *Ibid*., 18, para 8.
[85] *Ibid*., 19.
[86] *Ibid*., 20, para 11.
[87] *Ibid*., 3-4.
[88] I*bid*., para 14. (emphasis added)
[89] *Ibid*., 25, para 25.
[90] OCED Guidelines 2011, 25, para 25.

to protect human rights.[91] In this regard, enterprises are required, within the framework of internationally recognised human rights, to respect the international human rights obligations of the countries in which they operate as well as relevant domestic laws and regulations.[92] Apart from the general requirement to respect human rights, enterprises are required to take some specific actions to promote such respect, such as to have a policy commitment to respect human rights,[93] carry out human rights due diligence[94] and provide for or co-operate through legitimate process in the remediation of adverse human rights impacts.[95]

The Commentary attached to the recommendation on human rights sets the framework for the specific recommendations concerning enterprises' respect for human rights, which draws upon the UN Framework for Business and Human Rights "Protect, Respect and Remedy" and the UNGPs.[96] For corporations, the reference to human rights in the Guidelines should be made as a minimum to the internationally recognised human rights, as expressed in the International Bill of Rights irrespective of the country or specific context of enterprises operations.

However, it is worthy of note that the reference to the international obligations of States in the Guidelines and the setting of the framework concerning respect for human rights based on the UNGPs is a clear indication of the intention not to create human rights obligations for corporations in the Guidelines since human rights obligations rests primarily with States. Therefore, the usefulness of the specific requirements on enterprises to respect human rights, as well as all the actions required of enterprises to promote human rights in the Guidelines will depend on the efficacy of the implementation of the Guidelines as discussed below.

[91] *Ibid*., 31.
[92] *Ibid*., para 1.
[93] *Ibid*., para 4.
[94] *Ibid*., para 5.
[95] *Ibid*., para 6.
[96] *Ibid*., 31, para 37.

3.3.1.2 A Critique of the OECD Guidelines

Although the OECD Guidelines are essentially voluntary and contain non-binding principles and standards for responsible business conduct,[97] adhering countries have a binding commitment to implement them, and matters covered by the Guidelines may also be the subject of national law and international commitments.[98] In order to promote the effectiveness of the Guidelines, adhering countries are mandated to set up National Contact Points (NCPs) to handle enquiries and contribute to the resolution of issues that arise relating to the implementation of the Guidelines.[99] The Guidelines also provide for an Investment Committee (the Committee), which shall be responsible for clarification of the Guidelines, in addition to assisting the NCPs in carrying out their activities.[100] Thus, the implementation and enforcement of the Guidelines depends on the mandate and workings of the NCPs and the Committee.

Since the Guidelines are aimed at promoting responsible business conduct and ensuring that enterprises operate in harmony with government policies, especially in the societies where they operate, the Guidelines provide for extensive Procedural Guidance outlining the duties of the NCPs and the Committee, including their powers,[101] to facilitate their implementation. However, neither the NCPs nor the Committee (the two bodies upon which the efficacy of the implementation of the Guidelines depends) have powers to enforce the Guidelines or sanction a MNC for non-compliance since observance of the Guidelines by enterprises is voluntary and not legally enforceable.[102] Therefore, the efficacy of the implementation of the Guidelines depends largely on the voluntary corporate uptake of the specific requirements to promote human rights and environmental integrity that follows from societal pressure.[103] It is argued that the absence of

[97] OECD Guidelines 2011, 3; 17, para 1.
[98] *Ibid*., 13, para 1.
[99] *Ibid*., 68, para 1.
[100] *Ibid*., 74, para 1.
[101] *Ibid*., 71-5.
[102] OECD Guidelines 2011, 17, para 1.
[103] Nicola Jägers, 'Will Transnational Private Regulation Close the Gap?' in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge: Cambridge University Press 2015) 296.

mechanisms for enforcing the Guidelines negates the rights of the victims that may suffer as a result of non-compliance with them. This is because enforcement is an important procedure through which compliance with a regulatory norm is secured in relation to the regulatory target.[104]

The major problem with reliance on NCPs to resolve issues between a MNC and other stakeholders is that the Guidelines have not endowed the NCPs with any "teeth". Therefore, they are virtually helpless if their recommendations are not complied with or where a given MNC manifestly breaches the Guidelines.[105] The lack of authority to sanction a defaulting MNC is also the problem with the mandate of the Committee. The mandate of the Committee to interpret the Guidelines and consider the requests from NCPs for assistance in carrying out their activities does not include the authority for the Committee to pronounce on the fault of a MNC. In fact, the Guidelines forbid the Committee to 'reach conclusions on the conduct of individual enterprises'.[106]

It is important to note the relative improvement in the activities of the NCPs with regard to the increasing numbers and admissibility of human rights cases that have been brought before them since the 2011 review.[107] This has been attributed to the broader human rights issues addressed in the 2011 Guidelines with a separate human rights chapter drawing on the UNGPs by which companies are now required to identify, prevent and remedy negative human rights impacts which may result from their operations, and to carry out human rights due diligence.

However, the relative improvement on human rights issues dealt with by the NCPs has not been reflected in the area of securing the co-operation of MNCs. The non-cooperation of MNCs is attributable to the lack of sanctioning authority to rein in a non-compliant MNC and this considerably undermines the NCPs efforts. This has been blamed

[104] *Ibid*., 305.
[105] Deva (n 8) 88.
[106] OECD Guidelines 2011, 69, para 4.
[107] John Ruggie and Tamaryn Nelson, 'Human Rights and the OECD Guidelines for Multinational Enterprises: Normative Innovations and Implementation Challenges' (2015) Corporate Social Responsibility Initiative Working Paper No. 66 Cambridge, MA, 1, 13-17

on the attitude of the OECD member countries because, as John Ruggie and Tamaryn Nelson have pointed out, apart from Canada, 'no government has publicly stated that non-cooperation by a company with an NCP or a negative finding against a company will have any material consequences imposed by a government'.[108]

In addition to the lack of sanctioning authority, the limited opportunity for social sanctions is another factor that seriously undermines efficacy of the Guidelines as a regime for corporate accountability for human rights and environmental abuses. The provision for the confidentiality of the proceedings and outcomes in the Guidelines requires that the content of the agreement reached by the parties has to be kept secret unless the parties wish to make it public.[109] This confidentiality provision operates to limit the social enforceability of the Guidelines.[110] This is because non-compliant MNCs are shielded from the public, thereby diminishing the opportunity for social sanctions.

Apart from the problems with the general implementation and enforcement of the Guidelines, there are also some major problems with human rights protection in the Guidelines. However, since the chapter on human rights draws upon the SRSG's Framework and the UNGPs discussed below, it suffices to mention here that the provisions that corporations should respect human rights and have a policy commitment to this effect are likely to encounter the same problem inherent in the UNGPs. This is because the UNGPs do not impose any human rights obligations on corporations.[111] These inadequacies in the Guidelines may have informed the view that the real impact of the Guidelines as a regime for making MNCs accountable for human rights and the environment is rather limited.[112]

Despite the shortcomings observed about the implementation of the Guidelines above, it is argued that some of its provisions could be usefully adapted to build an efficient process for corporate accountability for human rights and the environment. For example,

[108] Ruggie and Nelson, (n 107), 21.
[109] OECD Guidelines 2011, para C.3.
[110] Deva (n 8) 87.
[111] See discussion on UNGPs below, s 3.3.2.
[112] Christian Aid, Amnesty International and Friends of the Earth, Flagship of Failure? The UK's Implementation of the OECD Guidelines and Approach to Corporate Accountability, November 2005, 13-20. <http://www.christianaid.org.uk/images/F1167PDF.pdf>.

the requirement in the Guidelines that MNCs should obey domestic laws and the recognition that governments have the right to prescribe the conditions under which multinational enterprises operate within their jurisdictions, provides a good opportunity for States to develop an appropriate legal regime to address the twin issues of human rights and the environment in fulfilment of their obligations under international norms.

It is instructive that the OECD Guidelines recognise the need to engage with relevant stakeholders in order to provide meaningful opportunities for their views to be taken into account in relation to planning and decision-making for projects and activities that may significantly impact local communities. This provision amongst others that emphasise public involvement in the Guidelines provides added impetus for host States to look into the possibility of providing a more effective procedure for public participation as a strategy for preventing human rights abuse. This is particularly important given that a State's duty to protect under the ICCPR[113] is a positive duty,[114] which requires that the state not only provide access to a remedy for human rights victims, but also take appropriate steps to prevent such violations through legislative or administrative means.[115]

3.3.2 The UN Guiding Principles on Business and Human Rights

The UN Guiding Principles (UNGPs) on Business and Human Rights occupy a prominent position as arguably the most important UN document that deals with the relations between business corporations and human rights.[116] Perhaps it is important to note here that the creation of the Special Representative post and the journey through the process and eventual adoption of the UNGPs was not an easy one. The Special Representative to the Secretary General (SRSG) of the UN Professor John Ruggie himself has stated that the creation of his office came about as a result of a train wreck in Geneva. This is in reference

[113] Art. 2 (1).
[114] SERAC case para. 46.
[115] General Comment 24, (n 35), 5.
[116] Anna Beckers*, Enforcing Corporate Social Responsibility Codes* (Oxford: Hart Publishing Limited 2015) 14.

to the vehement opposition by developed nations and the business community to the Sub-Commission on Human Rights draft of what was intended to be a legal code, called the UN Norms,[117] for regulating the human rights impact of MNCs.[118]

To fully appreciate how the underpinning principles of the UNGPs may influence the conduct of MNCs and thus, understand their proper role as a regime for addressing the social role of business, it is important to briefly discuss the circumstances that led to preference of the SRSG for a non-binding regime.

The UN's direct engagement with MNCs on the impact of their activities on society (which was the main focus of the engagement) can be traced back to the request by the Economic and Social Council (ECOSOC) of the UN in 1972 for the Secretary General of the UN to establish a group of eminent persons to study the impact of MNCs on world development (especially in developing markets) and international relations.[119] The ECOSOC group recommended that the UN set up a Commission on MNCs and formulate a code of conduct for them as a priority objective.[120] However, the proposed code which emanated from this effort, the UN Norms, was never adopted even though it enjoyed tremendous support from developing markets.[121] The developed markets and MNCs opposed them due to their proposed binding character and the Commission subsequently declared that the Norms had 'no legal status'.[122]

The UN's effort to address corporate impunity for human rights violations did not stop with the failure to adopt the UN Norms. On the contrary, the UN adopted a different strategy for corporate accountability for human rights that is not based on any international legal obligation or on any other international standard, but based on social

[117] UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (13 August 2003).
[118] SRSG, 'Remarks: Delivered at a Forum on Corporate Social Responsibility, Co-Sponsored by the Fair Labour Association and the German Network of Business Ethics, Bamberg Germany' (14 June 2006) SRSG, '2006 Remarks')
[119] Muchlinski, (n 60) 660.
[120] *Ibid*.
[121] David Bilchitz and Surya Deva, The Human Rights Obligation of Business: A Critical Framework for the Future' in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge: Cambridge University Press 2015) 5.
[122] Human Rights Commission Decision 2004/116, 60th session, para. (c), confirmed by ECOSOC Decision 2004/279, E/CN.4/2004/127.

expectation. The new effort was the outcome of the proposal by the SRSG who was appointed by the UN Secretary General at the request of the Human Rights Council on the issue of human rights and transnational corporations.[123] Ruggie's final report, known as the UN Guiding Principles was subsequently endorsed by the Human Rights Council on 16 June 2011.[124]

3.3.2.1 Human Rights Text in the UN Guiding Principles

We have discussed the background to the non-binding character of the UNGPs. The SRSG himself in his interim report denied that MNCs are subject to any binding obligation under international law, beyond a few possible exceptions.[125] The conclusion was that the UN Norms cannot be legally binding because there is no human rights instrument that imposes binding obligations on business corporations. This set the stage for the SRSG to premise his work on the Protect, Respect and Remedy Framework, often referred to as the three pillars of 'the State duty to protect against human rights abuses by third parties, including business; the corporate responsibility to respect human rights; and the need for effective access to remedies'.[126]

Surya Deva argues that the choice of the term "responsibility", rather than the term "duty", to respect human rights was deliberate to ensure that any breach of human rights on the part of a company does not carry legal consequences.[127] This was done to win the support of MNCs and the business community who had in the past opposed the

[123] Commission on Human Rights, 'Pomotion and Protection of Human Rights', E/CN.42005/L.87 (15 April 2005).
[124] Human Rights Council, 'New Guiding Principles on Business and Human Rights endorsed by the UN Human Rights Council' (16 June 2011), <http://www.ohchr.org.en/News-Events/Pages/DisplayNews.aspx?NewsID=11164&LangID=E>.
[125] Commission on Human Rights, 'Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises', E/CN.4.2006/97 (22 February 2006) (SRSG, '2006 Interim Report') paras. 60-61.
[126] Human Rights Council, 'Protect, Respect and Remedy: A Framework for Business and Human Rights – Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises', A/HRC/8/5 (7 April 2008) para 9.
[127] Deva (n 8) 106.

adoption of the UN Norms because of their binding character with a preference for voluntary regulation.[128]

The three pillars of this framework were further elaborated upon in the UNGPs developed by the SRSG to operationalise the Framework.[129] It is instructive that the UNGPs state under its General Principles that the 'Guiding Principles are grounded in recognition of: State's existing obligations to respect, protect and fulfil human rights and fundamental freedoms'.[130] It is in this light that we will view the first pillar – the State's duty to protect under the UNGPs. Principle 1 stipulates that '[s]tates must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises'.

Although the commentary attached to Principle 1 provides that states are not *per se* responsible for abuse by private actors, they may breach their international human rights obligations when they fail to take appropriate steps to prevent, investigate, punish and redress private actors' abuse. In addition, states are required to enforce laws that are aimed at, or have the effect of requiring business enterprises to respect human rights as well as to ensure that laws and policies governing the creation and ongoing operation of business, including corporate law, do not constrain but enable business respect for human rights.[131]

In view of the States' obligation to protect, the three pillars of the Framework appear to be concurrent and mutually supportive so that states, in the 'exercise of their duty to protect, would ensure through regulation or otherwise, that businesses corporations respect human rights as defined in the second pillar'.[132] Thus, a state's duty to protect human rights includes a duty to ensure that corporations respect human rights.

[128] Deva and Bilchitz (n 121) 6-10.
[129] SRSG, Guiding Principles.
[130] SRSG, Guiding Principles, General Principles.
[131] SRSG Guiding Principles, Principle 3 (a) and (b).
[132] Carlos Lopez, 'The "Ruggie Process" from Legal Obligations to Corporate Social Responsibility?' in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge: Cambridge University Press 2015) 64.

As elaborated in the UNGPs, '[t]he responsibility of business enterprises to respect human rights refers to internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Rights …'.[133] In order to identify, prevent, mitigate and account for how they address human rights impacts, business enterprises are required to carry out human rights due diligence.[134] It is instructive that human rights due diligence is expected to 'cover adverse human rights impacts that business enterprise may cause or contribute to through its activities'.[135] Such impacts are required to be addressed through prevention or mitigation.[136] To underscore the fundamentality of prevention in this regard, human rights due diligence should be initiated as early as possible in the development of a new activity in order to mitigate human rights risks.[137]

There are two important things to note here about the corporate responsibility to respect human rights because of their relevance to our focus on the concept of public participation as a strategy for preventing corporate human rights abuses. First, as discussed in the concluding chapter, carrying out human rights due diligence is the envisaged responsibility of the proposed local community representatives.[138] The second is concerning the requirement in Principle 18 that business enterprises 'engage in meaningful consultation with potentially affected groups and relevant stakeholders'.[139]

It is important to note that the Commentary attached to Principle 18 further emphasises the importance of engagement with relevant stakeholders. It states that '[t]o enable business enterprises to assess their human rights impacts accurately, they should seek to understand the concerns of potentially affected stakeholders by consulting them directly'. This is a clear endorsement of the participation for stakeholders affected by corporate activities in decisions that are likely to generate human rights harm as a strategy for preventing the harm. It is thus the duty of countries like Nigeria to take the

[133] SRSG, Guiding Principles, Principle 12.
[134] *Ibid*, Principle17.
[135] *Ibid*., (a)
[136] Commentary to Principle 17.
[137] *Ibid*.
[138] See p. 227.
[139] *Ibid*, Principle 18 (b).

necessary steps through legislative means in compliance with their international law obligation to protect against business-related human rights abuse.

As part of their duty to protect against business-related human rights abuse, the third pillar which provides for access to remedy requires states to take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means that people affected within their territory or jurisdiction have access to an effective remedy. Although access to remedy is fundamental to the efficiency of the other two pillars because it provides the opportunities to redress non-compliance by public authorities and corporations, it is of secondary importance here because the focus of the discussion here is on prevention rather than a remedial solution to human rights violations. Thus, we will critique the principles elaborated in the first and second pillars to determine to what extent the UNGPs have succeeded in filling the regulatory gap for globally operating MNCs and suggest improvements that could contribute to minimizing or preventing human rights violations in developing markets.

3.3.2.2 A Critique of the UN Guiding Principles

Some commentators commend the SRSG's Framework and Guiding Principles for pushing the human rights agenda forward and providing the initial step towards filling the regulatory gap for globally operating MNCs.[140] It is agreed that the UNGPs may be worthy of commendation as far as they concern States' duty to protect human rights, a duty which is grounded in the States' existing international obligation to respect, protect, promote and fulfil human rights.

Although the SRSG selected only one type of duty each for States and for corporations, i.e. the duty to protect for States and the responsibility to respect for corporations, this did not in any way diminish the international obligation of States under international law. This is because the obligation to protect human rights has been held to

[140] Deva (n 8) 109; Beckers, (n 116), 15.

be a positive duty which requires a State to 'take measures to protect beneficiaries of the protected rights against all political, economic and social interferences'.[141] Even the UNGPs require States in Principles 2 and 3, to set out clearly the expectation that all businesses within their jurisdiction shall respect human rights, and enforce laws that are aimed at, or have the effect of, requiring business to respect human rights. Thus, a State's obligation under international human rights law is fully encapsulated in the UNGPs.

The main problem with the UNGPs is in relation to the responsibilities of business corporations. For example, even though the instances of corporate abuses of human rights are well documented, corporations have no duty in the UNGPs, only a responsibility to respect human rights. This is understandable as the SRSG was trying to avoid the fate that befell the UN Norms. The problem here is that this approach shifts the focus from the human rights obligation of corporations to the obligation of states.[142] There are three main problems with this.

The first is the problem of implementation. If corporations have only a responsibility to respect human rights, what happens where they fail, for example, to adopt human rights policy commitments (Principle 16) or conduct the recommended due diligence steps (Principles 17 to 20)? In this case, to achieve corporate responsibility to respect human rights may depend entirely on social pressure because as the SRSG posits, the failure of corporations to meet their responsibility to respect human rights 'can subject companies to the courts of public opinion – comprising employees, communities, consumers, civil society, as well as investors …'.[143] This is hardly an effective procedure for securing compliance with a regulatory norm. As Nicola Jägers has pointed out, the effectiveness of transnational private regulation depends for the most part on enforcement,[144] rather than on social pressure.

[141] *SERAC* case, para 46.
[142] Deva (n 8) 110.
[143] SRSG, 2008 Framework, para 54.
[144] Jägers, (n 103) 305.

Another problem with corporate responsibility to respect human rights is that the UNGPs did not offer any normative basis for corporate responsibility for human rights. It seems that business enterprises should respect human rights because as the SRSG posits in his 2008 report, 'it is the basic expectation society has of business'.[145] This, according to the SRSGs elaboration of the content and scope of "corporate responsibility to respect" is the basis for businesses to obtain their social license to operate, which is 'based in prevailing social norms'.[146] The SRSG, however, did not clarify the origin and character of those social norms. Even though the report itself recognises that social norms 'may vary by region and industry', it still concludes that the 'corporate responsibility to respect', as a social norm, has acquired universal value.[147] As Carlos Lopez has argued, 'this is not only inconsistent but lacks normative foundation'.[148]

Finally, there is no identification as to what rights the responsibilities are attached to, except as defined in Principle 12 by reference to all the rights enshrined in the International Bill of Rights (IBR). The problem here is that the IBR does not address corporations directly,[149] and this raises the problem of how these rights could be translated into responsibilities for business.[150]

However, it is argued that the problems identified above may not substantially undermine the capacity of the UNGPs as a regime for addressing the human rights impacts of MNCs. This is because by recognising the international law obligation of States to protect human rights, it has established a link between the States' duty to protect human rights and the corporations' responsibility to respect human rights. Therefore, the fact that the UNGPs did not impose any obligation on corporations with regard to corporate responsibility to respect human rights does not thereby affect the obligations

[145] SRSG, 2008 Framework, para 9.
[146] Human Rights Council, 'Business and Human Rights: Towards Operationalizing the "Protect, Respect and Remedy" Framework', A/HRC/11/13 (22 April 2009) para 46
[147] *Ibid*.
[148] Lopez, (n 132) 66-7.
[149] M. Goodhart, 'Human Rights and Non-State Actors: Theoretical Puzzles' in George Andreopoulos, Zehra F. K. Arat and Peter Juviler (eds), *Non-State Actors in the Human Rights Universe* (Bloomfield: Kumarian Press 2006) 23, 34-5.
[150] Deva, (n 8) 112.

of States under international law to protect against human rights abuse within their territory by third parties, including business corporations.

To fulfil the obligation to protect human rights within its territory, States are not merely required to provide access to a remedy for human rights victims but they are also required to take appropriate steps to prevent such violations through legislative or administrative means.[151] The requirement in the UNGPs for States to enact and enforce laws that require business enterprises to promote or guide corporations to respect their human rights responsibilities[152] confirms the important role for municipal authorities in the effort to regulate (with a view to preventing) corporate human rights abuses under the UNGPs. Therefore, in compliance with the duty to protect human rights under the UNGPs, States could exploit their international law mandate by exploring the legislative option. In this respect, a legislation on public participation in line with Principle 18, which provides for engagement with affected stakeholders may be appropriate to give potentially affected stakeholders the opportunity to participate effectively in decision-making over matters that affect their lives.

The emphasis on prevention in international instruments underscores the main argument in this thesis to involve potentially affected groups in decision-making as a strategy for preventing corporate abuses of human rights rather than focusing on remedies for the victims, which most developing markets lack the infrastructure to implement. Thus, a review of Surya Deva's integrated theory of regulation is undertaken below to underscore the inadequacies of a remedial approach to regulating corporate human rights abuses, and highlight how protection obligation of States could be usefully adapted to formulate a national legal framework to provide effective regulation for MNCs operating in developing markets. It is important to note that the OECD Guidelines and the UNGPs are part of international efforts developed with the aim to achieve corporate accountability for human rights abuses, which Deva classified inadequate. Thus, this

[151] General Comment 24, (n 35) 5.
[152] SRSG, Guiding Principles, Principle 3.

review will also provide a basis for understanding why he considers these soft law instruments inadequate.

3.4 Surya Deva and the Basis for the 'Integrated Theory of Regulation'

Surya Deva developed the "integrated theory of regulation" to solve what he termed the difficulty in regulating a difficult regulatory target – the MNC.[153] In his view, this approach could be employed as a means to assemble various regulatory tools in order 'to develop an effective regulatory framework to deal with corporate human rights abuses'.[154] It is instructive that the underlying reason why Deva suggests an integrated approach is that the structure and operation of MNCs makes them a difficult regulatory target, which cannot be adequately regulated by a single regulatory theory or strategy.

It is agreed that Deva and most of the current human rights law scholarship are right on the need for a legal/regulatory framework that could address the current situation of corporate impunity for human rights abuses in developing markets. It is also agreed that the complex nature of modern MNCs and their global operations makes them a difficult regulatory target. However, it is argued that the view that by their nature MNCs cannot be effectively regulated under domestic laws, which is the basis for the focus of much current scholarship on human rights as the basis for corporate responsibility, may not be entirely convincing. As the discussion below will show, the view is based on a focus on remedies for MNC human rights victims rather than a focus on regulating MNC activity to prevent corporate human rights abuses from occurring in the first place.

It is also agreed that regulating MNCs within the jurisdiction of a developing market is a difficult, if not an impossible task because MNCs normally operate in developing markets through their special purpose vehicles (SPVs). However, it is argued that the law that regulates their entry into a developing market could be relied upon to

[153] Deva, (n 8), 50-1.
[154] *Ibid*., 200.

also regulate their conduct within the jurisdiction with a view to preventing corporate abuses of human rights and the environment. In this regard, domestic laws could be relied upon to regulate the activity of MNCs rather than focusing on remedies for MNC human rights victims. The place of domestic laws, especially corporate law, as a regime for addressing corporate responsibility will be discussed later on. However, in order to be able to effectively challenge Deva's views on the subject of regulating MNCs, it is important to first, identify and analyse the basis for his views.

Deva identifies three sets of question that represent what he terms the three broad challenges to the goal of humanizing business – why, what and how (the WWH challenge).[155] First, why should corporations have human rights responsibility? second, what is the exact nature and scope of corporate human rights responsibility? and third, how can corporations', especially MNCs, be held accountable for human rights violations?[156] To resolve these challenges he begins by identifying the existing problems. He employs Bhopal[157] as a case study to investigate how MNCs are able to violate human rights and escape liability in developing markets by exploiting loopholes in existing regulations.[158]

Deva's choice of Bhopal, a remote Indian town and the site of a disastrous toxic gas leakage during the night of 2 December 1984 from the MIC storage tank of the Bhopal chemical plant owned and operated by Union Carbide India Limited (UCIL), a subsidiary of Union Carbide Company (UCC)),[159] is important to the issues addressed in this thesis for two reasons. The first is that it reveals the manifest failure of traditional corporate law concepts to deal adequately with the MNC phenomenon.[160] Secondly, it brings to the fore some of the factors that make MNCs operating in developing markets a difficult

[155] Deva, (n 8), 1.
[156] *Ibid*.
[157] Bhopal represents the gas leak in the Union Carbide Corporation (UCC) plant in Bhopal India in 1984 in which over 15,000 (fifteen thousand people) died. Deva, *ibid*., 24-45.
[158] *Ibid*., 2.
[159]Union Carbide Company (UCC) is the American parent company of Union Carbide India Limited (UCIL). The acronyms UCC and UCIL will be used throughout in this project to represent Union Carbide Company and Union Carbide India Limited. See Deva, (n 8), 29.
[160] Muchlinski, (n 60), 321.

regulatory target, such as the desire for foreign investment and the weak and inefficient legal enforcement infrastructure.

Deva extensively discusses how the control of UCIL by UCC contributed to the Bhopal disaster. He may or may not agree that how the Indian subsidiary, UCIL, was controlled played an important part in the Bhopal accident and that a different corporate governance structure would probably have produced a different outcome. These factors are the subject of the present inquiry, as we seek to show how the interaction between them contributes to the human rights regulatory challenge in developing markets, and why it is important to focus on prevention rather than focusing on remedies for MNC human rights victims.

3.4.1 Human Rights Violations and the Predisposing Factors in Developing Markets: The Case of Bhopal

The power and economic influence of UCC and the demand for foreign investment played a major part in the post-entry negotiations between UCC and its host (India), as well as the manner in which the company operated in the country. According to Deva, the company was able to capitalize on the Indian Government's pressure to industrialize by exploiting existing laws and effectively bypassing their application of it to its own operation in a spectacular fashion. First, the Industrial Development and Regulation Act 1951 reserved the formulation of pesticide activities for small local Indian firms, and the Foreign Exchange Regulation Act 1973 also limited foreign ownership of Indian firms to 40 percent.[161] UCC was able to bypass the obstacles imposed by both pieces of legislation to establish UCIL. It is important to understand the effect of majority control in corporate decision-making in order to fully appreciate why it was important to UCC, as well as its contribution to the Bhopal disaster.

[161] Muchlinski, (n 60) 26.

It is a general rule of company law that ownership of shares in a company having share capital qualifies the holder as a member of the company.[162] In other words, shareholding is synonymous with membership.[163] The desire for majority control by UCC in this case is instructive. This is because corporate law virtually separates ownership and control and the key players in the formal decision-making structure of companies, especially public companies, are a group called the 'board of directors'.[164] Thus, the powers of the shareholders to initiate corporate actions is very limited as they are only entitled to approve or disapprove a few board actions.[165]

It is noteworthy that the separation of ownership[166] and control is partial or non-existent where there is majority control, i.e. where the corporation has a dominant shareholder who owns more than 50 percent of the outstanding voting shares. [167] In this case a shareholder is able to control the board and the management of the company. This is the typical structure of a corporate group involving a MNC and its group members (subsidiary/subsidiaries), usually structured in a hierarchical "pyramid" form of ownership, where a parent company wholly owns (or holds the majority shares in) the subsidiary/subsidiaries and may in fact dominate their management.[168]

The total control that UCC exercised over the Indian subsidiary (UCIL), which was achieved by persuading the Indian government to grant them an exemption from the 40 per cent rule,[169] merits further discussion because of the implication of foreign control to

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[162] See Section 112, *Companies Act 2006* (hereinafter UK CA 2006); Section 79, *Companies & Allied Matters Act* Cap C20 Laws of the Federation of Nigeria 2004 (hereinafter (CAMA); Section 2 (55) and 45-50 *The Companies Act*, 2013 (No. 18 of 2013) (hereinafter Indian CA).
[163] Derek French *et al, Mayson, French and Ryan on Company Law* (34th edn, Oxford: Oxford University Press 2013) 167.
[164] *Aranson* v *Lewis* [1984] 473 A.2d 805 [Supreme Court of Delaware], 811; s 71 UK CA 2006; ss 244 & 63 (3) CAMA; Stephen Bainbridge, *The New Corporate Governance in Theory and Practice* (New York: Oxford University Press 2008), 4.
[165] Bainbridge*, ibid*.
[166] We acknowledge that certain corporate law scholars object to the view that corporations could be owned like "dogs and wombats" See Bruce Welling, *Corporate Law in Canada: The Governing Principles* (London, Ontario: Scribblers Publishing 2006) 593. However, for the purpose of determining the basis for participation in corporate governance, a functional view, that corporations are functionally owned by investors will be adopted in this thesis. See Henry Hansmann, *The Ownership of Enterprise* (Cambridge: Belknap Press of Harvard University 1996) 11.
[167] Adolf A. Berle and Gardiner C. Means, *The Modern Corporation & Private Property* (10th print, New Brunswick: Transaction Publishers 2009) 84-116.
[168] Irit Mevorach, *Insolvency within Multinational Enterprise Groups* (Oxford: Oxford University Press) 16.
[169] Deva, (n 8), 26.

the Bhopal disaster. UCC did in fact exercise real control over the subsidiary, UCIL, a company engaged in carrying on a hazardous activity at the Bhopal plant. Thus, based on UCC's ownership of the majority of equity (50.9 per cent) in the subsidiary,[170] it controlled the composition of the board of directors of UCIL and also had full control over its management.[171] The control by the parent company extended beyond representation on the board of directors 'to the taking of key decisions regarding issues such as technology, plant design, safety, storage and handling of MIC,[172] training of employees and financial viability of the firm'.[173]

Apart from this excessive centralization, which created a communication and management gap between the parent UCC and the Indian subsidiary, there was also the problem of differences in the expectation of the parent MNC and the Indian government because the Indian subsidiary did not meet the profit expectation of the parent company.[174] As a result, UCC was not very interested in the proper management or successful running of its subsidiary (UCIL) and thus resorted to cost-cutting measures. The company adopted inferior standards in terms of its staff training and maintenance of the Bhopal plant in comparison to the standard operated in West Virginia and other plants belonging to the parent UCC.[175]

The Indian government on the other hand preferred that the Bhopal plant would continue to operate safely but was reluctant to rein in the company, not only because it manufactured pesticides locally but also because it provided much needed employment. At this point, issues of safety and the environment took a back seat because these were not the priorities of UCC[176] at the time. The application of inferior technology in the Bhopal plant, in addition to compromised safety standards and poor staff training, at a company like UCIL that was involved in dealing with or storing Methyl Isocyanate (MIC), an ultra-

[170] Muchlinski, (n 60) 315.
[171] *Ibid*.
[172] MIC is the acronym for methyl isocyanate, the chemical that caused the explosion in the Bhopal plant.
[173] Deva, (n 8), 28.
[174] *Ibid*.
[175] Amnesty International, *Clouds of Injustice: Bhopal Disaster 20 Years On* (Amnesty International 2004) 42-3.
[176] Deva (n 8) 29.

hazardous and dangerous substance,[177] meant that Bhopal was a disaster waiting to happen.

The major problem in this unfolding situation at the Bhopal plant is that, at the decision-making level inside UCIL, there was no representative committed to defending the rights and interests of the vulnerable groups, i.e. those exposed to the dangers of an accident, especially the workers and the local community. This is because the Indian Companies Act,[178] just like equivalent legislation in most developing markets, such as Nigeria,[179] and even in major economic jurisdictions especially in the common law world,[180] recognizes only two decision-making elements – the board of directors and the company in the annual general meeting. In the case of UCC/UCIL, and consistent with how many MNCs are organised and structured, the parent UCC controlled the functioning of its subsidiary UCIL.[181]

Another major factor that encourages corporate irresponsibility in developing markets is the insensitivity of the governments of those states and a lack of access to judicial remedies as a result of the inefficiency of their legal enforcement infrastructure. In the case of Bhopal, the convoluted battle to secure compensation for the victims revealed the profound deficiency in the Indian legal enforcement infrastructure, which is the general trend in many developing markets. In the Bhopal disaster case, the Indian government, which secured the exclusive right (through the Bhopal Gas Leak Disaster (Processing of Claims) Act 1985),[182] to represent the victims, considered it best to sue the parent company UCC in a US court. UCC on the other hand pushed for the trial to

[177] UCC's *Reactive and Harzadous Chemicals Manual*, states that MIC is 'a hazardous material by all means of contact' and recognised poison by inhalation', UCC, *Bhopal Methyl Isocyanate incident Investigation Team Report*, Danbury, March 1985 as quoted in Amnesty International (n 129) 11.
[178] *The Companies Act, 2013* (No. 18 of 2013) (hereinafter Indian CA 2013), ss 88-122 and s.279. This is in pari materia with ss 165-192, 285-292, Companies Act, 1956 (Act No. 1 of 1956) (hereinafter Indian CA 1956), the extant corporate legal regime in India at the time of the Bhopal incident.
[179] Companies and Allied Matters Act Cap C20 Laws of the Federation of Nigeria 2005 (hereinafter CAMA), ss 211-244, 279.
[180] In the UK, the power to govern the company is shared between the shareholders and the board of directors and it is a contractual relationship and it is the articles that determines the extent of management power conferred on the board. See, Companies Act 2006, ss 257; The Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 2, Sch 1, art 3 (Ltd); reg 4, Sch 3 art 3 (Plc).
[181] Deva, (n 8), 28.
[182] Bhopal Gas Leak Disaster (Processing of Claims) Act 1985 (No. 21 of 1985).

take place in an Indian court where they could rely on the weakness of the system to manipulate the process in order to induce a settlement.[183] The other reason that the Indian government preferred to pursue the matter in a US court was because of the 'general incompetence of the Indian courts and the legal system to handle effectively a case of this magnitude'.[184]

The case which the Indian government commenced in the US court was, however, eventually dismissed on the grounds of *forum non conveniens,* as the judge declared that he was 'firmly convinced that the Indian legal system is in a far better position than the American courts to determine the cause of the tragic event and thereby fix liabilities'.[185] The later litigation that took place in Indian courts confirmed not only the general incompetence earlier pleaded by the Indian government in the US court, but also the dilemma that dealing with MNCs poses for developing markets.

Two developments in the trial that took place in India highlight the insensitivity of the Indian authorities and the inefficiency in their legal enforcement infrastructure. The first is that the case was not vigorously prosecuted because the Government of India tried to avoid any action that would expose its role in the Bhopal disaster and thereby subject it to international scrutiny. This was in addition to the fact that it did not want the Bhopal litigation to discourage other MNCs from investing in India.[186] Secondly, UCC was able to exploit the inefficiency of the Indian enforcement infrastructure to such effect that throughout the period of litigation, from the district court through to the High Court and Supreme Court, the matter never proceeded to an assessment on the merits of the case. Thus, after years of frustrating litigation, the India Supreme Court finally approved a settlement between UCC and the Indian government by its two orders dated 14 and 15 February 1989,[187] in the following words: '[t]he aforesaid payments [US$470 million]

[183] Deva, (n 8), 40.
[184] *Ibid*., 38.
[185] *In Re: Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December 1984*, (1986) 634 F. Supp. 842, 866
[186] Deva, (n 8), 39.
[187] *Union Carbide Corporation* v *Union of India* AIR 1990 SC 273.

shall be made to the Union of India as claimant and for the benefit of all victims of the Bhopal disaster ... and not as fines, penalties, or punitive damage'.[188]

The Bhopal case represents a typical scenario of a human rights abuse in developing markets[189] and the type of redress available to the victims of such abuses. This case study represents the situation in developing markets, which Deva argues, that existing regulatory initiatives are inadequate to deal with and he proposes his "integrated theory of regulation" as a process of integrating different available levels of regulation to effectively deal with corporate human rights abuses.

As we proceed to review the levels of regulation proposed by Deva, it is important to note that employing a mix of regulatory regimes is in principle a useful strategy for the effective regulation of modern multi-layered corporations operating multi-nationally. Therefore, there is no attempt here to contest the efficacy of Deva's multi-layered regulatory mix. However, in view of the fact that he also identifies how the structure of the modern corporation may have contributed to the Bhopal disaster, it is important to evaluate his stages of regulation and the strategy for their implementation to determine how his suggested approach to integrated regulation addresses the problem posed by the modern corporate structure.

3.4.2 Deva's Three Levels of Regulation

Deva identifies three levels of regulation for his integrated approach that is aimed at adequately regulating MNCs to ensure human rights integrity in developing markets. The three levels are reviewed below. However, a critique of the integrated approach that would follow will concentrate on two levels of regulation (the national and international levels) for two reasons. The first is to support the main argument in this thesis that effective human rights regulation can be achieved at the national level by focusing on

[188] *Ibid*., 275.
[189] Deva, (n 8), 24.

regulating the activities of MNCs rather than focusing on regulating the MNCs themselves. This point is discussed fully in chapter 7.[190] Second is to highlight aspect of international instruments that could be exploited to develop an appropriate regime for addressing corporate abuses of human rights.

3.4.2.1 A Review of Deva's Proposed Regulation at the Institutional Level

Deva argues that there is a need for regulation at the institutional level. According to him, the place of the corporation as an important institution in society makes regulation at the institutional level imperative.[191] By regulation at the institutional level, the author means the 'putting in place of codes of conduct, guidelines, principles, charters ... or policy statements by each business enterprise'.[192] Deva distinguishes his suggested corporate code from the "self-regulating" corporate codes voluntarily adopted by most major MNCs. According to him the proposed code is a 'modified version of self-regulation'.[193] He identifies this modification as, first, that in designing the proposed code the concerned institution is to be guided by the content of regulatory initiatives at the national and international levels as well as by input from its stakeholders. Second, the stakeholders of the institution concerned will try to ensure, through a range of strategies and sanctions, that the initiatives adopted are implemented in their letter and spirit by the concerned corporation.[194]

It is important to note that Deva rightly anticipates that opinions may sometimes diverge between a particular MNC and its stakeholders about the contents of the proposed code. To resolve such differences when they arise, he proposes that the institution concerned should adopt the view reflective of its position and issue an *explanatory note* along with the adopted code to explain the circumstances that required deviations from

[190] Chapter 7, s. 7.3.
[191] Deva, (n 8), 204.
[192] *Ibid*.
[193] *Ibid*.; citing M. Clark, *Regulation: The Social Control of Business between Law and politics* (Macmillan Press Ltd 2000) 3.
[194] Deva, *ibid*.

existing national or international regulations, or why certain suggestions of stakeholders have not been included in the code.[195] The implication of resolving the divergence of opinions between a MNC and its stakeholders in this manner is that the proposed code does not necessarily have to conform to any national or international regulations to guide their operations' with respect to human rights as long as the non-conformity could be explained in the explanatory note.

There are many problems with the corporate codes suggested by Deva as a regulatory tool intended to make MNCs take their human rights responsibilities seriously. First, he acknowledges that there is a preponderance of voluntary corporate codes adopted by major MNCs with respect to human rights.[196] Therefore, his attempt to differentiate his own suggested code from the other corporate codes currently adopted and operated by most major MNCs clearly exposes the deficiencies inherent in his proposal. He states that the regulatory initiative which he proposes at the institutional level will be voluntary in the sense that government will not enforce it, but he maintains that the code will not be altogether without teeth. In his view, the teeth will be provided by the 'institutional compliance mechanisms put in place by the concerned MNC as well as the activities of stakeholders and civil society groups'.[197]

It is argued, however, that there is nothing in the proposed code that makes it any different from other corporate codes. There is nothing new in his suggestion that the formulation of his proposed code will be guided by the content of regulatory initiatives at the international and national levels. The analysis of corporate codes by the European Commission reveals that most corporate codes are already guided by the contents of major international regulatory initiatives and human rights instruments.[198] In addition, civil society groups and other stakeholders already play prominent roles with regard to

[195] Deva, (n 8), 207.
[196] Business and Human Rights Resourse Centre, 'Company Policy Statements on Human Rights'. <http://www.business-humanrights.org/Document/Policies> accessed February 16, 2016.
[197] Deva, (n 8), 207.
[198] European Commission, 'An Analysis of Policy References Made by Large EU Companies to Internationally Recognised CSR Guidelines and Principles', March 2013, <http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr/csr-guide-princ-2013_en.pdf.> at 7.

the implementation of corporate codes.[199] Besides, Deva's tenuous case for stakeholders to have a role in the implementation of his suggested code contradicts his earlier view that the code does not necessarily have to conform to any national or international guidelines or incorporate the opinions of stakeholders.[200]

Apart from the fact that the MNCs themselves are to formulate the proposed code, implementation of, and compliance with the code will also depend on the adopting corporations. It is doubtful, given the focus of MNCs on profit, that they will put in place any compliance mechanism with the necessary teeth, especially if compliance with such a code will in any way affect their economic interest. This is especially important because Deva himself had earlier acknowledged that 'in the absence of a clear, positive relation of codes of conduct to business profits, several corporations may be hesitant to adopt and/or implement corporate codes; corporations will not regulate themselves into competitive disadvantage'.[201]

How Deva's proposed code could have been useful to his case study, Bhopal, remains to be seen. The MNC in this case, UCC, that is supposed to design and adopt the code, was not particularly interested in the successful running of the company because the Bhopal plant was considered unprofitable.[202] The failures that led to the Bhopal disaster did not result from the absence of a code but from economic considerations that led UCC to adopt inferior safety and maintenance standards. Therefore, it is argued that Deva's proposed code would have been unable to change the Bhopal situation.

[199] OECD (2001), Making Code of Conduct Work: Management Control System and Corporate Responsibility (OECD Publishing 2001/03) 3.
[200] Deva, (n 8), 207.
[201] *Ibid*., 78.
[202] Deva, (n 8), 28-9.

3.4.2.2 A Review of Deva's Proposed Regulation at the National Level

Deva argues that regulation at the national level is an 'indispensable medium to control and redress corporate human rights abuses'[203] but he does not think that the current regulations at that level are enough to control and redress abuses. To achieve regulatory efficiency, he suggests that a regulatory regime at the national level should aim to influence corporate conduct both from the *outside* and the *inside.* He therefore suggests the revision of existing national laws that 'touch on human rights, such as labour law, investment law, environmental law, consumer protection law etc., or the enactment of new laws to incorporate principles governing corporate human rights responsibilities'.[204].

It is instructive that corporate law is Deva's focus 'regarding bringing about changes from the inside (i.e. changes in the process of corporate decision making)'.[205] He argues that changes in corporate law are required because the premise on which the fundamental principles of the 'corporate law of all advanced economies are based has changed drastically, which makes it difficult to inject human rights responsibility into corporate decision-making'.[206] Deva argues that there are many approaches that could be adopted to bring about the proposed change and, in fact, he cites some countries that have already amended their corporate law to broaden its scope to encompass the interests of other stakeholders beyond shareholders, such as in the UK, South Africa and India.[207] The implication and extent of the obligation of corporate directors to other stakeholders under these regimes will be discussed later on.

Deva's reference to the way in which MNCs misuse the twin principles of separate legal personality and limited liability to evade their liability for human rights abuses[208] is instructive. He acknowledges the importance of these principles and argues that they should not be allowed to become a standard refuge for corporate irresponsibility.[209]

[203] Deva, (n 8), 28-9.
[204] *Ibid*., 209.
[205] *Ibid*., 211.
[206] *Ibid*.
[207] *Ibid*., 196-7.
[208] *Ibid*., 212.
[209] *Ibid*., 213.

However, the problem is that his proposed approach to avoiding the misuse of the principles does not in reality reflect change from the inside. He adopts the three *remedial responses* of (1) allowing case-by-case ad hoc exceptions to the twin principle; (2) the enterprise principle and (3) the network liability approaches canvassed by Peter Muchlinski.[210]

It is important to point out that the responses canvassed by Muchlinski above are aimed at "lifting the corporate veil" as a means of justifying group liability in circumstances where the subsidiary of a MNC has insufficient assets to meet the claims against it,[211] as happened in the Bhopal case. Such a remedial solution to corporate abuses of human rights is at variance with Deva's own proposed change of corporate conduct from the inside, which, he himself acknowledges, involves a review of the current corporate legal regime to broaden its scope to include the interests of other stakeholders.[212] The mismatch between, on the one hand, Deva's identified problem of the misuse of the twin principles of separate legal personality and limited liability, and on the other, his suggested solution to the problem deserves further treatment here because of its implication for the regulation of corporate human rights abuses.

There is an important point to note here about the modern corporation and its two guiding principles – separate legal personality and its close cousin, limited liability. As discussed in chapter 1, both features were developed to support the 19th century focus of nation States on the use of the corporation as a structure for promoting economic activities.[213] However, in this modern era of corporate group and multi-national operation by major MNCs, the twin concepts of separate personality and limited liability have brought about a new challenge. This is because of the extension of the concepts nowadays to corporate groups (a concept by which a MNC is permitted to hold the majority or all the shares in a subsidiary/subsidiaries), a phenomenon that developed after these principles

[210] Muchlinski, (n 60), 321-26.
[211] *Ibid*., 313.
[212] Deva, (n 8), 211-2.
[213] Chapter 1, (n 51).

were established.[214] This has generated a lot of concern in the commercial world, as courts are often called upon to answer the question whether those corporations which are members of a group are to be treated as a single economic entity (enterprise theory). The courts have often rejected the idea that corporations in a corporate group be treated as a single economic entity.[215] The celebrated case of *Adams v Cape Industries Plc*[216] epitomizes the judicial view that the "veil of incorporation" cannot be disregarded in order to hold a parent company liable for the act or omission of the subsidiary.[217]

It is in light of such judicial pronouncements, as the dictum by Slade LJ in the *Adams* case above, that Muchlinski's suggestion is relevant as a strategy for attaching legal liability to a parent company for the acts or omissions of the subsidiary. In fact, Muchlinski criticized the UK Company Law Review Steering Group[218] for failing 'to confront the question whether the *Adams* case went too far in blocking veil lifting in appropriate cases, such as where involuntary creditors needed to seek out the resources of the group as a whole for adequate compensation'.[219]

Thus, it is for the purposes of securing adequate compensation for corporate tort victims that Muchlinski chose to base his analysis of corporate group liability on two competing objectives, one of which is relevant to our discussion here, namely, 'the need to ensure that the resulting allocation of risk in the group does not end in a failure to compensate third parties for losses caused by the activities of group members'.[220] Where there is an allegation of human rights abuse, the enterprise theory could be adopted to treat the whole group as one enterprise. It is in furtherance of this view and to support his own suggestion of how to avoid the misuse of the separate legal personality principle that Deva argues forcefully for the adoption of the theory of "limited eclipse personality". His own theory is proposed to work as a temporary eclipse of the separate legal

[214] Philip I. Blumberg, The Multinational Challenge to Corporate Law: The Search for a New Corporate Personality (Oxford: Oxford University Press), 139.
[215] See *Adams* v *Cape Industries Plc* [1990] BCLC 479, 513.
[216] *Ibid*.
[217] *Ibid*., 513.
[218] The Company Law Steering Group *Modern Company Law for a Competitive Economy* (London: DTI, 2001)
[219] Muchlinski, (n 60), 326.
[220] *Ibid*., 321.

personality of the subsidiaries of the corporate group in cases of alleged human rights abuses, so that the victims can be free to sue the immediate or ultimate parent corporation of that group as a matter of principle.[221]

In view of the above, even though we agree with Deva on the indispensability of national laws for controlling and redressing corporate human rights abuses, we regard his remedial approach as inadequate for the following reasons. The first is that Deva himself acknowledges that command and control rules that influence the corporate conduct from outside, by merely specifying an outcome to be achieved and responding with sanctions, are not sufficient.[222] This informs his proposed change from the inside, which does not merely influence corporate decisions but also decision-making processes by changing the internal structure of corporations.[223] However, as the discussion above has shown, Deva's remedial-based solution does not address issues of corporate decision-making.

The second problem with Deva's reliance on the remedial approach is that it considerably diminishes the opportunity for him adequately to address his proposed change from the inside, which is supposed to inject human rights responsibility into corporate decision-making.[224] In particular, his proposal is not consistent with the so-called amendment of the corporate legal regime in the UK, South Africa and India, which, according to him, imposes duties on corporate managers to take the interests of non-shareholders into account. Under the new corporate law regimes in the countries he identifies above, the internal structure of the corporation is not in reality affected by the introduction of those provisions that, according to Deva, broadens the scope of corporate law to accommodate the interests of stakeholders.[225] The changes he identifies do not provide for non-shareholders per se or to be part of the decision-making process, and no mechanism is provided through which non-shareholders can hold those who make the decisions to account.

[221] Deva, (n 8) 213.
[222] *Ibid.*, 208.
[223] *Ibid.*
[224] *Ibid.*, 211.
[225] *Ibid.*, 196-7

Corporate governance and the interests of other stakeholders under the corporate legal regime of the UK, South Africa, India and Nigeria will be discussed in chapter 5,[226] but it suffices to state here that s 172 UK Companies Act 2006 (UK CA 2006) which Deva relied on to identify the UK as one of those jurisdictions which have made changes in their corporate law is merely an embodiment of the concept of "enlightened shareholder value" (ESV).[227] The ESV theory itself did not completely depart from the vision that directors are to manage the corporation in such a way as to ensure that the wealth of shareholders is maximized.

It is in view of the above that we question Deva's approach to integrated regulation. This is because s 172 UK CA 2006 did not alter the traditional UK corporate governance structure that is designed to protect shareholders. This makes the system inadequate for protecting the interests of non-shareholders because in the absence of the change from the inside which Deva proposes, non-shareholder constituencies will have to depend on those command and control laws that influence the corporation from outside, which Deva himself impugns.

3.4.2.3 A Review of Deva's Proposed Regulation at the International Level

Another aspect of Deva's 'integrated approach' is an international framework that can formulate corporate human rights responsibility and ensure its implementation by MNCs as a way to overcome the limitations of national regulatory initiatives.[228] It is instructive that the author issues a caveat on the numerous obstacles against such effort. According to him, '... an agreement on developing international norms and international enforcement mechanisms is not proving to be an easy one in view of the numerous looming challenges'.[229] Some of the challenges that Deva identifies include intense

[226] See a detailed discussion on corporate governance in chapter 5, s. 5.2.1.
[227] Jean Jacques du Plessis et al, *Principles of Contemporary Corporate Governance* (3rd edn., Cambridge: Cambridge University Press 2015) 60.
[228] Deva, (n 8), 214.
[229] *Ibid*.

lobbying from the business sector against a binding international framework and the divergence that exists among states about the nature and scope of international regulation, including fears of consequential dilution of their sovereignty.[230] Fully aware of these challenges, Deva premises his proposed regulation at the international level on international agreements about corporate human rights responsibilities, which he expects to be given a more precise meaning at the national level.[231]

The fact that the premise for Deva's proposed international regulation is international agreements, which are expected to be given more precise meaning at the national level raises some fundamental questions. International agreements are important sources of international law,[232] and national law is the medium through which states implement their obligations under international law.[233] It means that Deva is not in fact, proposing anything new. As discussed earlier, international human rights instruments are devoted to recognising the individual's rights and the corresponding obligations of states according to the ICCPR.[234]

It is acknowledged that the IBR – the UDHR, the ICCPR and the ICESCR recognise private obligations in their preambles. However, the problem is that even though corporations are bound by those rules of international law that are applicable to all persons, 'such rules are mostly restricted to fundamental norms such as those enjoining genocide, torture, slavery and forced labour, crimes against humanity, …'.[235] In fact, 'outside the European Union Framework, it is only in exceptional circumstances that corporations are expressly and directly regulated under international human rights law'.[236] Related to this is the fact that there are only a few mechanisms under international law[237]

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[230] *Ibid*.
[231] *Ibid*., 215.
[232] Thomas Buergenthal and Sean Murphy, *Public International Law in a Nutshell* (4th edn., St Paul: Thomas/West 2007), 24; citing I.C.J. Statute, Article 38 (1) (b).
[233] Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment* (3rd edn., Oxford: Oxford University Press 2009), 270.
[234] ICCPR, Art 2 (1).
[235] Paul Redmond, 'Transnational Enterprise and Human Rights: Options for Standard Setting and Compliance (2003) 37 Int'l L. 68, 71.
[236] *Ibid*., 72.
[237] See for example, the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (4th edn., Geneva: International Labour Office 2006), for non-binding interpretative procedures with

to enforce human rights norms against private actors outside the criminal sphere.[238] Thus the responsibility for implementation and enforcement of international human rights norms against private actors such as MNCs lies primarily at the national level.[239] Accordingly, human rights standards can only be applied indirectly to corporations. In the case of MNCs operating in developing markets their obligation for human rights is either through the State in which they are incorporated (their home State)[240] or through the State in which they are operating (the host State)'.[241]

The problems of implementation and enforcement identified earlier as the major impediment to applying international norms to MNCs, especially in the context of developing markets, will also affect any proposed regulation at the international level that focuses primarily on obtaining remedies for MNC human rights victims. Thus, it is argued that the focus on obtaining remedies for MNC human rights victims substantially undermines the otherwise usefulness of international human rights law under the integrated theory. Deva himself acknowledges this fact in his evaluation of current international initiative that seek to regulate MNC conduct.[242] According to him, the initiatives including the OECD Guidelines and the UNGPs are inadequate as regimes for addressing MNCs human rights violations in developing markets. One of the major reasons he classifies them as inadequate is 'deficient and undeveloped implementation and enforcement mechanisms'.[243]

respect to the Guidelines and Declarations that they have adopted concerning international business operations.
[238] Redmond, (n 235), 72.
[239] *Ibid.*
[240] The Barcelona Traction Co., (*Belgium v S*pain) 1970 I.C.J. 3.
[241] Redmond (n 235), 72.
[242] Deva, (n 8), 64-118.
[243] *Ibid*., 115.

3.4.2 A Critique of Surya Deva's Approach to Integrated Regulation and the Case for Corporate Law Reform

Deva's integrated approach which requires a regulatory regime at three levels, each of which should complement the other in enforcing human rights responsibilities of MNCs[244] makes sense if one considers the structure of MNCs and their global operation. However, the major problem with Deva's suggested approach is in the manner of its implementation. It is instructive that he strongly contends that corporations should have social responsibility. He argues that as members of society, they are expected 'to play their part by taking appropriate measures within their respective areas of operation: for example, ensuring that effluents from their factories are not discharged into rivers to preserve the environment ...'.[245]

Deva is right in this respect because playing their part will include acting as responsible members of society and respecting the rights of others, such as local communities and the environment. This is what it means to be socially responsible but it is how to enforce corporate responsibility that is at issue. Even though Deva agrees on the need to broaden the scope of corporate law to encompass the interests of other stakeholders beyond shareholders, he did not offer any suggestion as to how corporate law reform could form the basis for his suggested integration.

In order fully to appreciate the uncertainty of Deva's integrated theory, it is important to offer a brief analysis of how he expects that the integrated application of the three levels of regulation might lead to a more responsible conduct by MNCs in developing markets. The author adopts a "top down" approach because, according to him, there is an emerging consensus on corporate human rights responsibilities at the international level, which has gained recognition in various international instruments and major international regulatory initiatives,[246] such as the OECD Guidelines and the UNGPs.

[244] Deva, (n 8), 203.
[245] *Ibid*., 123.
[246] Deva, (n 8) 202.

This may be the case, but it is how this responsibility could be translated in the national context that is the issue.

As noted above, the OECD Guidelines and the UNGPs are part of the international initiatives that Deva classifies inadequate, as regimes for addressing corporate accountability for human rights. The review of Deva's three levels of regulation above shows that his focus is on how to achieve remedy for human rights victims. This is the reason he fails to identify how these initiatives could be usefully implemented to achieve his suggested change from inside, which in his words, is supposed to 'inject human rights responsibility into corporate decision-making'.[247] The two instruments provide for the participation of potentially affected groups in decisions that are likely to cause human rights and environmental harm. It is argued that their participation in this regard would promote human rights and environmentally friendly decision-making and thereby inject human rights responsibility into corporate decision-making.

Deva argues that regulatory initiatives at the institutional and national levels should conform to global human rights standards but he also suggests that some modifications to these standards should be permitted at the national level to meet local circumstances.[248] He appears to contradict this position by suggesting that MNCs would be expected to apply home country or international standards in host countries. It is difficult to see how the permission to modify international human rights standards to *meet local circumstances*[249] will not negatively influence the decision by MNCs to apply home country or international standards in host countries, especially if it will be economically rewarding to apply a different (lower) standard in a host country.

Another problem with Deva's approach to integrated regulation is that, even though international norms and various regulatory initiatives may emphasise responsibilities of business in certain respects, his so-called "top down" approach does

[247] *Ibid*., 211
[248] *Ibid*., 202.
[249] Emphasis added.

not specify any process for adopting human rights responsibilities in the national or institutional context. It is instructive that he argues that a "bottom up" approach will also be at work under his integration theory.[250] By this he means that the standards adopted by companies at an institutional level and those formulated by governments at a national level will form the basis for an agreement on standards at the international level.[251]

It is clear inconsistency for the same author who argues that international regulatory initiatives would form the basis for regulatory standards at institutional and national levels to suggest that standards adopted and formulated at the same institutional and national levels will form the basis for agreements at the international level. Even though he argues that this is '[t]he crucial aspect of this integration process as a continuous upward-downward cycle of dialogue and evolution between regulatory initiatives at three levels',[252] it is doubtful that such "top down" and "bottom up" oscillation of his integration theory could provide an appropriate basis for a consistent regulatory tool for addressing corporate human rights abuses.

It is important to note that we accept the basic premises of integrated regulation, which is that international human rights standards should influence the contents of standards at the institutional, and more importantly at the national level. However, we question the usefulness of an integrated model that primarily focuses on a remedial solution to corporate human rights regulation.

It is agreed that international human rights standards, and other international norms and international regulatory initiatives should influence the contents of a national framework that aims to regulate corporate human rights abuses in developing markets. However, it is argued that in view of the weak legal environment in developing markets, the focus of such regulation should be prevention rather than on how to provide effective remedy for corporate human rights victims. This makes it important to identify those

[250] Deva, (n 8) 202.
[251] *Ibid*.
[252] Deva, (n 8), 202.

norms that espouse public participation as a strategy for preventing corporate abuses of human rights and the environment. This is with a view to identifying a basis upon which to build a national legal framework for regulating MNC conduct and thus addressing the abuses.

In this regard, it is important to note that the kind of harm addressed in this thesis is not gratuitously inflicted for its own sake, as a means of deliberate repression or abuse, but emerges as a by-product of the scramble for economic development. It is for this reason that it is now widely accepted within the international legal order that development must be sustainable if it is not to prove counterproductive, just as the Bhopal case and other such human rights disasters have proved to be. It is also important to note that the human rights abuses discussed in this thesis is environmental-degradation-induced, and there has been a growing recognition of the link between the protection of the natural environment and the enjoyment of human rights as part of sustainable development.[253]

In view of the above, the next chapter will investigate international environmental law to identify the norms that espouse public participation. Thus, the approach to the proposed public participation is based on the view that human rights and environmental protection as part of sustainable development 'cannot be left to government alone but require and benefit from notions of participatory right'[254] already reflected in existing civil and political right.[255] The obligation to promote the protection of economic, social and cultural rights, which require States to take positive measures to prevent the abuse of the Covenant rights[256] provides a useful backdrop to the proposed national legal framework based on public participation.

Thus, although Deva proposes regulations at three levels, it is argued that it is integration at the national and international levels that could be usefully exploited in a

[253] UN Doc. E/CN. 4/2004/L.104.
[254] Patricia Birnie, Alan Boyle and Catherine Redgwell, International Law and the Environment (3rd edn, Oxford: Oxford University Press 2009) 288.
[255] UDHR, arts 19, 21; ICCPR, arts. 19, 25.
[256] ICESCR, art 11.

manner that is different from his suggested approach to promote a more responsible corporate behaviour in developing markets. States could exploit their obligation under international law to develop a national legal framework to address corporate responsibility for human rights. In this regard, and given the foundational role of States in providing the legal infrastructure for corporations, the potentials of corporate law could be exploited to attempt to influence corporate conduct from the "inside". To achieve this will require a review of the corporate legal architecture to incorporate the interests of those most affected by corporate externalities such as local communities in the corporate governance structure, thereby making them part of corporate decision-making process.

It is important to note that the UNGPs acknowledges the duty of States to protect human rights in its Principle 1, which requires them to enact laws that require business enterprises to respect human rights[257] as well as take appropriate steps to prevent the abuse of the rights through legislative or administrative means. The engagement with potentially affected groups is also recognised under the OECD Guidelines and the UNGPs.[258] This is instructive because it is coming from private sector endorsed initiatives. Thus, by adopting interest group participation in decision making and recognising the authority of national governments to enact laws necessary to promote respect for human rights, it can be taken that the regulatory target will be bound or at least be guided by the principles expressed in such initiatives.

3.5 Conclusion

One major point of agreement with Surya Deva is on the impact that the growing power and influence of MNCs and their operations in developing markets is having on the environment and human rights of local communities, and the urgent need to fashion a workable regulatory regime to adequately address the problem. However, the author also

[257] UNGPs prin. 3.
[258] OECD Guidelines, 3-4, para. 25; UNGPs prin. 18.

argues that municipal laws are incapable of regulating a difficult regulatory target like a MNC because of their domestic focus amongst other deficiencies. This is the point of disagreement because it is argued that corporate law in individual jurisdictions has the inherent potential to adequately regulate MNC conduct and thus prevent corporate abuses of human rights.

Even though it is agreed that there are many factors that promote corporate irresponsibility in developing markets, it is nevertheless instructive that Deva acknowledges that the change in corporate structure is fundamental to the present situation of corporate impunity for human rights abuses. He also agrees that municipal laws and institutions are important even though he insists that they are incapable of effectively regulating MNCs. However, the fact that Deva did not specifically address how re-modelling of corporate law could address the fundamental problem posed by the current corporate structure underscores his focus on a remedial solution.

The problem with the focus on a remedial solution is that the weaknesses associated with legal enforcement institutions in developing markets makes a regime that focuses on remedy an unreliable option. It also makes a human rights approach that is based on Deva's strategy of integrated regulation an unreliable option too. Therefore, it is argued that developing markets require a regime that accords with available corporate support infrastructure within jurisdiction. In this regard, a legislative option with a focus on prevention, which emphasises public participation in corporate decision-making based on international norms, could be formulated to provide a more reliable basis to regulate MNC conduct. This will provide the opportunity for potentially affected groups, especially the local communities in developing markets to hold MNCs accountable to human rights standards.

4. International Environmental Law and Public Participation: Law and Practice of Public Participation in Human Rights and Environmental Matters

4.1Introduction

In view of the weak legal environment in developing markets, especially the inability of their legal enforcement institutions to adequately address corporate abuses of human rights and the environment, the previous chapter suggested a shift from the current remedial approach, which focuses on human rights obligations of businesses, to a preventive approach that is based on public participation. This is especially relevant given the established invaluableness of adequate and meaningful public participation in environmental decision-making process as extensively elaborated in international environmental law. Thus, the aim of this chapter is to critically evaluate international environmental law and the procedure for its implementation at the national level to identify the challenges in the context of MNC operation in developing markets. This is with a view to understanding the reason for the prevalence of environmental degradation in most developing markets and thus underscore the suggestion for an alternative approach to public participation as a strategy for preventing environmental degradation and human rights abuses, especially in developing markets.

The framing of preventive principles in this chapter will have the principle of prevention as explicitly and implicitly set out by an extensive body of international environmental treaties[1] and related instruments[2] with respect to public participation as its focus.[3] Two important regional instruments – the African Charter on Human and Peoples' Rights (ACHPR)[4] and the 1998 Aarhus Convention[5] both of which provide for environmental

[1] Ramsar Convention on Wetlands of International Importance 1971 (1972) 996 UNTS 245, 11 ILM 963; World Heritage Convention, 6 November 1972, 1037 UNTS 151; Basel Convention, 22 March 1989, 28 ILM 657; Climate Change Convention, 9 May 1992, (1992) 31 ILM 849; Biodiversity Convention, 5 June 1992, (1992) 31 ILM 818; Desertification Convention, 17 June 1994, (1994) 33 ILM 1328.
[2] Stockholm Declaration on the Human Environment (1972), UN Doc. A/CONF/48/14/REV.1; World Charter for Nature, 22 October 1982, (1983) 22 ILM 455; Rio Declaration on Environment and Development (1992), adopted by the UN Conference on Environment and Development (UNCED), UN Doc. A/CONF. 151/26 (Vol. 1) (1992).
[3] Philippe Sands and Jacqueline Peel, with Adriana Fabra and Ruth Mackenzie, *Principles of International Environmental Law* (3rd edn. Cambridge: Cambridge University Press 2012) 200-3.
[4] Adopted 27 June 1981 (entered into force 21 October 1986) OAU. Doc. CAB/LEG/67/3 Rev. 5.
[5] United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters (1998) 38 ILM (1999) 515.

rights, will also be referred to in this discussion. The ACHPR is legally binding on Nigeria, which has not only ratified it but has incorporated it into its domestic law.[6] The reference to Aarhus Convention, however, is based on its global recognition as 'the most impressive elaboration'[7] and 'advanced articulation'[8] of Principle 10 of the Rio Declaration on public participation.[9] Thus, an analysis of the Convention will provide a rational basis to evaluate the implementation procedure for the public participation concept. This makes Aarhus an important reference for assessing the application of the concept in Nigeria and other developing markets.

This chapter will also analyse the link between human rights and the environment as a basis for determining the relevance of existing human rights norms in the area of environmental protection. This is especially important because a degraded physical environment contributes to the abuses of human rights in developing markets, some of which have generated global outrage.[10] However, even though the focus is on procedural elements as set out in certain instruments, such as the Rio Declaration[11] as a basis for developing a national legal framework on public participation in developing markets, reference will also be made to certain substantive elements with respect to public participation as set out in various environmental treaties listed earlier, such as the Ramsar Convention etc.[12] This is with a view to identifying those norms that provide for public

[6] *Social and Economic Rights Action Centre (SERAC) and Centre for Economic and Social Rights (CESR)* v *Nigeria*, Communication No. 155/96 (Unreported, African Commission on Human and peoples' Rights, 27 October 2001) para 41.
[7] Stephen Stec and Susan Casey-Lefkowitz, *The Arhus Convention: An Implementation Guide* (New York: UN, 2002) Forward.
[8] United Nations Environmental Program, *Manual on Compliance with and Enforcement of Multilateral Agreements* (Nairobi: UNEP 2006) 109.
[9] UN Doc. A/CONF. 151/26 (Vol. 1) (1992).
[10] Some examples of environmental and human right disasters that has generated global outrage include, the destruction of Ecuadorian Amazon by Texaco, The Inter-American Commission on human Rights, 'Report on the Situation of Human Rights in Ecuador', Inter-AM. Comm'n on Hum. Rts., O.A.S. Doc. OEA/Ser.L/V/11.96, doc. 10 rev. 1 (1997); the activities of Shell that cause environmental degradation in Ogoni and the eventual hanging of Ken Saro Wiwa and his 8 Ogoni kinsmen, on November 1, 1995, <http://www.news.bbc.co.uk/onthisday/hi/dates/stories/november/10/newsid_2539000/2539561.stm> accessed 26 January 2015; the collapse of a factory building in Sava, Bangladesh, March 13 2013, BBC News 3 May 2012, ,http://www.bbc.co.uk/news/world-asia-22394094> accessed March o2, 2016.
[11] The relevance of the Rio Declaration in this respect will be discussed later on, but suffice to mention here that the Rio Declaration, especially its Principle 10 has been identified as providing the appropriate basis for better environmental decision-making and enforcement in procedural terms. See Dinah L. Shelton, 'Introduction' in Dinah L. Shelton (ed), *Human Rights and the Environment Volume 1* (Cheltenham: Edward Elgar Publishing Limited 2011) x.
[12] See (n 1&2).

participation as it relates to their focus,[13] and to identify how the substantive elements could be adapted to bring about effective participation and thereby prevent human rights and environmental abuses.

In view of the above, this chapter will interrogate four main areas: the relevant international and regional environmental instruments relevant to public participation and environmental protection, the link between human rights and the environment, implementation of the public participation concept and the challenges, and substantive international environmental law to identify the useful elements capable of aiding public participation.

4.2 Development of International Environmental Law, Environmental Protection and the Public Participation Initiative

Modern international environmental law developed on an *ad hoc* basis in reaction to emerging environmental problems of the 19th century arising from shared utilization of natural resources, such as water, wildlife and fisheries in transboundary areas and over the allocation and exploitation of marine resources outside national jurisdictions.[14] Philippe Sands and his colleagues have identified four periods in the evolution of modern international environmental law beginning with the development of bilateral fisheries treaties in the 19th century through to the second period beginning with the creation of the UN (1945). The third period coincided with the UN Conference on the Human Environment (UNCHE) (from 1972), and the final period was set in motion by the UN Conference on Environment and Development (UNCED) (from 1992).[15]

The 19th century era in international environmental law, which is usually referred to as the traditional era,[16] focused on the conservation of wildlife (fisheries, birds and

[13] Ramsar Convention (n 1),
[14] Peter H. Sand, 'The Evolution of International Environmental Law' in Daniel Bodansky, Jutta Brunnee and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford: Oxford University Press 2008) 31.
[15] Sands *et al*, (n 3), 22.
[16] Sands *et al, ibid*.; P H Sand, (n 14).

seals) as well as the protection of rivers and seas, and later, on preventing pollution.[17] Some of the major treaties adopted in this early period[18] include: 1881 International Convention Respecting Measures to be Taken against *Phylloxera vastatrix*,[19] the North Sea Fisheries (Overfishing Convention),[20] 1865 Convention regulating fishing in the Rhine,[21] and the 1911 Convention for the Preservation and Protection of Fur Seals.[22]

A new approach to international environmental law emerged with the establishment of the UN as 'a central institution in the conduct of international relations'.[23] This period witnessed the broadening of the range of environmental concerns addressed by international regulatory activity to include a focus on the causes of pollution resulting from certain ultra-hazardous activities.[24] Although the UN Charter did not include provisions on environmental protection or the conservation of natural resources,[25] the UN's purpose, which include the achievement of 'international co-operation in solving international problems of economic, social, cultural or humanitarian character …',[26] provided the basis for subsequent environmental activities of the UN.[27] This is evident in the emergence of several UN specialised agencies and bodies such as the Food and Agricultural Organisation (FAO) and the UN Educational Scientific and Cultural Organisation (UNESCO) amongst many others, which during this period assumed new environmental functions. [28]

It is important to note that increasing military and industrial activity necessitated the shift of emphasis away from protection of flora and fauna to general issues of pollution

[17] Sands *et al, ibid*., 23-25.
[18] It is important to note that most of the developing world were colonies of European powers during this period. In fact, the first regional conservation treaty of general scope in Africa, the 1902 Convention for the Protection of Birds Useful to Agriculture (102 BFSP 969), was adopted by the major powers controlling the countries of Africa with a view to regulating the exploitation of wildlife and encouraging the creation of nature reserves in the continent. See Michael Bowman, Peter Davies and Catherine Redgwell, (eds), *Lyster's International Wildlife Law* (2nd edn, Cambridge: Cambridge University Press 2010), 5.
[19] 73 *BFSP* 323
[20] 1882, UN Doc. ST/LEG/SER.B/6, 1957, 695.
[21] 25 *IPE* 200, this followed, earlier, bilateral, arrangements; cited by Bowman, Davies and Redgwell (n 18), 4.
[22] 8 *IPE* 3682.
[23]Adam Roberts and Benedict Kingsbury, *United Nations, Divided World* (2nd ed, Oxford: Clarendon Press 1996) 1.
[24] Sands *et al*, (n 3) 26-7.
[25] *Ibid*.
[26] Art. 1 (3) UN Charter, 26 June 1945, entered into force 24 October 1945, 1 UNTS xvi.
[27] Sands *et al*, (n 3) 27.
[28] See for example, (FAO) the International Treaty on Plant Genetic Resources for Food and Agriculture (2001), especially the Preamble and art 2. <www.fao.org/3/a-i0510e.pdf>; see also (UNESCO) Convention Concerning the Protection of the World Cultural and Natural Heritage (1972), especially art 2. <whc.unesco.org/archive/convention-en.pdf>.

control, thereby leading to the adoption of new treaties.[29] Some of the early treaties adopted during this period include the Test Ban Treaty in 1963[30] and one directly relevant to the activities in the Niger Delta and thus, relevant to the discussion in this chapter, which is the global convention for the prevention of oil pollution.[31] It was adopted in reaction to incidents of large scale oil pollution, which caused damage to the marine environment and to people and property.[32]

There was a noticeable proliferation of environmental rules and treaties both at the international and regional levels addressing specific activities that cause environmental damage[33] between 1945 when the UN Charter was adopted and the adoption of the Stockholm Declaration at the UN Conference on the Human Environment (UNCHE) in 1972.[34] However, the 1972 UNCHE marked the first attempt to co-ordinate international environmental law and policy as well as the emergence of international environmental law as a distinct legal field.[35] The need for a co-ordinated environmental policy to cement the place of environmental protection on the international agenda has been attributed to the globalization of commercial activities. This brought about an increased volume of world trade and consumption of the earth's resources,[36] which has led to the emergence of new man-made risks of industrial pollution and resource degradation by hazardous substances or activities,[37] which did not respect national boundaries.[38]

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[29] Sands *et al*, (n 3) 28.
[30] Moscow, 5 August 1963, entered into force 10 October 1963, 480 UNTS 43.
[31] 1954 International Convention for the Prevention of Pollution of the Sea by Oil, London, 12 May 1954, entered into force 26 July 1958, 327 UNTS 3.
[32] Sands *et al*, (n 3) 28.
[33] For example, the 1959 Antarctic Treaty, Washington, 1 December 1959, entered into force 23 June 1961, 402 UNTS 71; the 1968 African Nature Convention, Algiers, 15 September 1968, entered into force 16 June 1969, 1001 UNTS 3; 1971 Ramsar Convention on Wetlands, Ramsar, 2 February 1971, entered into force 21 December 1975, 996 UNTS 245. However, for a more comprehensive listing and detailed discussion on environmental instruments developed during this period, the reader is referred to Sands *et al*, *ibid*., particularly to chapters 7, 9, 10 and 11.
[34] UN Doc. A/CONF.48/14 at 2-65, and Corr. 1 (1972), 11 ILM. 1416 (1972).
[35] Jaye Ellis and Stepan Wood, 'International Environmental Law' in Benjamin J. Richardson and Stepan Wood (eds), *Environmental Law for Sustainability* (Portland: Hart Publishing 2006) 343.
[36] Elena Blanco and Jona Razzaque, *Globalisation and Natural Resources Law: Challenges, Key Issues and Perspectives* (Cheltenham: Edward Elgar Publishing Limited 2011), 1.
[37] P H Sands, (n 17) 35
[38] George (Rock) Pring and Susan Y. Noe, 'The Emerging International Law of Public Participation Affecting Global Mining, Energy, and Resource Development' in Donald N. Zillman, Alastair R. Lucas and George (Rock) Pring (eds), *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources* (Oxford: Oxford University Press 2002) 26.

Although the Stockholm Conference did not adopt any binding obligations, it adopted three important measures that influenced legal and institutional development in environmental regulation and policy at both the international and regional levels. The first is the recognition of the human right to the environment in Principle 1, which states that

> [m]an has a 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.[39]

The second is the creation of the United Nations Environmental Program (UNEP) and the third is the recognition of States' responsibility to protect the environment in Principle 21.

The recognition of human rights to the environment, as will be discussed later, is important because it links human rights and the environment, thereby creating the opportunity to mobilise human rights law to provide protection in the environmental scenario.[40] In addition, it has been credited with contributing to the "constitutionalisation" of environmental protection and the development of national case law regarding environmental rights around the world.[41] The UNEP has also made an important contribution to the development and application of international environmental law in many areas, particularly in the development of environmental treaties. The agency has played a prominent role in the development of some major environmental treaties, such as the 1989 Basel Convention on the control of transboundary movement of hazardous wastes and their disposal,[42] the 1992 UN Framework Convention on Biological Diversity,[43] and the 2000 Protocol on Biosafety to the Convention on Biological Diversity.[44]

[39] Stockholm Declaration, Principle 1.
[40] Lynda Collins, 'The United Nations, Human Rights and the Environment' in Anna Grear and Louis J. Kotze (eds), *Research Handbook on Human Rights and the Environment* (Cheltenham: Edward Elgar Publishing Limited 2015) 225.
[41] David R. Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (Vancouver: UBC Press 2012) 112-3.
[42] Basel Convention, 22 March 1989 (1989) 28 ILM 657.
[43] Biodiversity Convention, 5 June 1992 (1992) 31 ILM 818.
[44] Biosafety Protocol, adopted 29 January 2000.

Principle 21 of the Stockholm Declaration, apart from affirming the usual exclusive sovereignty of states over their natural resources in the first part, laid the fundamental building blocks of international environmental law by recognising the environment as an exception to absolute sovereignty.[45] Principle 21 provides that,

> [s]tates have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or areas beyond the limits of national jurisdiction.[46]

Thus, Principle 21, together with other related principles aimed at preventing environmental degradation, such as the principles of integration, precaution and the 'important environmental norm included in the catalogue of the Rio Principles'[47] – environmental impact assessment, discussed later in this chapter, form the 'basic network of obligations that compel States to turn their attention to environmental protection and to other states' interests in the environment in the course of their domestic and international affairs'.[48]

Although the UNCHE set the scene for international activities at the international and regional levels, and influenced legal and institutional developments with regard to environmental regulation and policy, the Rio Declaration on Environment adopted at the UN Conference on Environment and Development (UNCED) in 1992,[49] presently constitutes the most significant universally endorsed statement of the general rights and obligations of States concerning the environment.[50] Sustainable development is at the

[45] Ellis and Wood (n 35) 357.
[46] Stockholm Declaration, Report of the United Nations Conference on the Human Environment, Stockholm, 5-6 June 1972 (UN Publication No E.7311A14 and corrigendum), ch. 1.
[47] Ulrich Beyerlin, 'Different Types of Norms in International Environmental Law: Policies, Principles and Rules' in Daniel Bodansky, Jutta Brunnee and Ellen Hey (eds), The Oxford Handbook of International Environmental Law (Oxford: Oxford University Press 2017), 425, 439.
[48] Ellis and Wood, (n 38), 355-6.
[49] UN Doc. A/CONF. 151/26 (Vol. 1) (1992).
[50] Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment* (3rd edn, Oxford: Oxford University Press 2009) 112

heart of the Rio Declaration. This provided the basis for Agenda 21, another major agreement reached at the Rio Earth Summit, the "blueprint" for sustainable development. The significance of Agenda 21 lies in the devotion of a separate chapter to public participation, especially in the more specific context of environment and development.[51] It provides that:

> [o]ne of the fundamental prerequisites for the achievement of sustainable development is broad public participation in decision-making. Furthermore, in the more specific context of environment and development, the need for new forms of participation has emerged. This includes the need of individuals, groups … to participate in decisions, particularly those which potentially affect the communities in which they live and work ….[52]

The Rio Declaration supports the sustainable development agenda in very important ways. First, in Principle 2, it recognises the responsibility of states to develop in a sustainable manner. Second, the substantive elements set out in Principles 3-8, especially the integration of economic development and environmental protection in Principle 4 are fundamental to the sustainable development agenda. Although Principle 2 of the Rio Declaration merely echoed the language of rights and responsibility of States found in Principle 21 of the Stockholm Declaration, the Rio Declaration is peculiar because it incorporates both the principle of integration as a basis for achieving sustainable development (Principle 4) and the means by which sustainable development may be facilitated at the national level (procedural element).[53] Principle 4, provides that '[i]n order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation of it'. The appropriate means to facilitate the purpose set out in Principle 4 are set out in Principles 10, 11, 15 and 17, discussed below.

[51] Pring and Noe, (n 38) 32.
[52] Agenda 21, 23.2 (1992), Approved by the UNCED, Rio De Janeiro, 13 June 1992, UN Doc. A/CONF.151/26 (vols. I-III) (1992).
[53] Birnie, Boyle and Redgwell, (n 50) 116-123.

As Patricia Birnie *et al* have argued, '[t]he purpose of Principle 4 is to ensure that development decisions do not disregard environmental considerations. Integration of these competing values is fundamental to the concept of sustainable development and has implications across a broad range of national and international policy'.[54] On the other hand, Principle 10 provides the appropriate basis for better environmental decision-making and enforcement in procedural terms based on access to information, public participation and access to effective judicial and administrative proceedings, including redress and remedy.[55] This makes the Rio Declaration, especially Principle 10, fundamental to any discussion on public participation in decision-making in environmental matters because it captures the full essence of public participation and the States' responsibility to facilitate public involvement in decision-making in matters of the environment and development.

Notwithstanding the importance of the Rio Declaration as an international framework for public participation in environmental matters, it is important to bear in mind that the Rio Declaration is "soft law" and therefore has no binding authority in its own right. With this fact in mind, and since international environmental law like every other aspect of international law is not necessarily tailored towards any particular nation's needs,[56] different jurisdictions have developed their framework laws incorporating the general principles in the Rio Declaration to suit their individual national needs. As discussed in chapter 2, Nigeria has incorporated the principles in a number of pieces of legislation.[57]

Given the "soft law" status of the Rio Declaration it is important to identify the link between human rights and the environment as a basis for developing a national legal framework for public participation in matters of human rights and the environment. This is because of the challenges with the implementation of the Principles espoused in the Rio

[54] Birnie, Boyle and Redgwell, (n 50) 117.
[55] Shelton, (n 11) x.
[56] Patricia Kameri-Mbote and Philippe Cullet, 'Biological Diversity Management in Africa: Legal and Policy Perspective in the Run-up to WSSD' (2002) 11 (1) RECIEL 38, 51
[57] See chapter II, sections 2.2.3, 2.2.3.1-2.2.3.2.

Declaration in countries like Nigeria as a result of the general lack of institutional capacity in most developing markets (including Nigeria).[58]

4.3 Human Rights, Environmental Protection and Public Participation in Environmental Matters

The importance of public participation, especially the participation of the communities affected by development activities that affect the environment, in the decision-making about such activities cannot be overemphasised. This is acknowledged not only by authors[59] but also in international instruments.[60] According to Elena Blanco and Jona Razzaque, 'participation in the decision-making process creates a sense of "ownership" in the decision itself'.[61]

It is instructive that commentators acknowledge that the international law of public participation has been developed foremost and furthest in the area of the environment and development. Some argue that this is the reason that the law and practice of public participation focuses on the mining, energy and natural resources sectors.[62] These sectors have also been identified as the main sources of human rights and environmental abuses in developing markets.[63] This underscores the importance of public participation in development activities, especially in developing markets where development activities are mostly concentrated in the natural resource sector.[64]

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[58] See chapter II,56-8.
[59] See Pring and Noe (n 38) 23; Blanco and Razzaque (n 36) 21.
[60] See the Preamble to the 1998 UN Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters (hereinafter Arhus Convention) 25 June 1998, 2161 UNTS 447, available at <http://wwwunece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf> accessed 4 July 2016.
[61] Blanco and Razzaque, (n 36) 150.
[62] Pring and Noe, (n 38) 28.
[63] See the Commission on Human Rights, 'Interim Report of the Special Representative of the Secretary General on the Issues of Human Rights and Transnational Corporations and other Business Enterprises' E/CN.4/2006/97 (22 February 2006), para. 30.
[64] UNCTAD World Investment Report (United Nations 1996) 56-71.

It is important to identify the basis for adopting public participation, a procedural right contained in human rights instruments,[65] in the environmental context as a strategy for achieving better environmental protection and enforcement.[66] This is because only a few international human rights treaties, such as the International Covenant on Economic, Social and Cultural Rights (ICESCR)[67] incorporate explicit reference to environmental matters.[68]

Although environmental rights have been identified as 'arguably the most universal form of human rights,'[69] the human right to a healthy environment has been a topic of debate 'since human rights and environmental concerns converged in the early 1970s'.[70] The first recognition of a human right to the environment can be traced to the UN in Principle 1 of the Stockholm Declaration, which states that [m]an 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, …'.[71] Since Stockholm, the UN has also recognised the human right to environment in several reports,[72] communications and other "soft law" instruments.[73]

However, even though the Rio Declaration explicitly reaffirms the Stockholm Declaration and essentially seeks to build on it, unlike the Stockholm Declaration, the human right to a healthy environment was not expressly provided for in the Rio Declaration. While Principle 1 of the Stockholm Declaration gives greater emphasis to human rights,[74] the Rio Declaration Principle 1 on the other hand, merely makes human

[65] See the provisions of the right to information and participation in public affairs in the following international and regional human rights instruments: UDHR Arts. 19, 21; ICCPR Arts. 19, 25 and 1969 Inter-American Convention on Human Rights Art 23.
[66] Shelton (n 14) x.
[67] Entered into force January 3, 1966, G.A Res. Doc. 2200A, 21 U.N GAOR Supp. (no. 17) at U.N. Doc. A/6316 (1966)
[68] See Arts 11 and 12.
[69] Collins, (n 40) 222.
[70] Boyd, (n 41) 20
[71] Stockholm Declaration, Principle 1.
[72] See for example, the UN Human Rights Council (HRC), Report of the OHCHR on the Relationship Between Climate Change and Human Rights (hereinafter 'OHCHR 2009 Report'), UN Doc. A/HRC/10/61, 15 Jan. 2009, para. 18; OHCHR, Analytical Study on the Relationship Between Human Rights and the Environment (hereinafter 'OHCHR 2011 Report'), UN Doc. A/HRC/19/34, 16 Dec. 2011, para. 2.
[73] See the 1989 Hague Declaration on the Environment; UN GA Res. 1990 and 2000.
[74] Alan Boyle, Human Rights or Environmental Rights? A Reassessment' in Dinah L. Shelton (ed*), Human Rights and the Environmen*t vol. 1 (Cheltenham: Edward Elgar Publishing Limited 2011), 473

beings 'the centre of concerns for sustainable development' and declares their general entitlement to a healthy and productive life in harmony with nature.[75] The recognition of human rights to the environment only in non-binding (environmental) regimes and the failure of the Rio Declaration to give greater emphasis to human rights has been attributed to 'the uncertainty and debate about the proper place of human-rights law in the development of international environmental law'.[76]

The on-going debate about human rights to the environment notwithstanding, the link between human rights and the environment is not in any serious dispute as most commentators agree that 'human rights and environmental protection are interdependent, complementary, and indivisible'.[77] The right to a healthy environment, they say, may be derived from existing human rights norms, such as the right to life, health and livelihood. For example, if a citizen is asphyxiated by noxious gas emanating from a government sanctioned private activity by a corporation, some argue, 'it is the same if the citizen is shot or beaten by government agents'.[78]

Some argue that Principle 1 of the Rio Declaration did not adequately represent a rights-based approach as envisaged in the Stockholm Declaration.[79] However, it is argued that the norms in Principle 10 reflects the procedural rights contained in the human rights instruments. Thus, the adoption of procedural rights in order to have better environmental rights decision-making and enforcement system justifies 'the proposition that there is a role for human-rights law in promoting procedures for protection of the environment, and a need for further development over and above those more general rights already protected in human-rights treaties'.[80]

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[75] Rio Declaration, Principle 1.
[76] Birnie, Boyle and Redgwell (n 50) 271, citing Dinah Shelton, 'What Happened in Rio to Human Rights' (1992) 3 YbIEL 91.
[77] Michael R. Anderson, 'Human Rights Approaches to Environmental Protection: An Overview' in Alan Boyle and Michael Anderson (eds), Human Rights Approaches to Environmental Protection (Oxford: Oxford University Press 1996) 3.
[78] Collins (n 40) 225.
[79] See for example, Mariana T. Acevedo, 'The Intersection of Human Rights and Environmental Protection in the European Court of Human Rights' (1999-2000) 8 N.Y.U. Envtl. L.J. 437, 451.
[80] Birnie, Boyle and Redgwell (n 50) 290, citing as example, ECOSOC, Human Rights and Environment: Preliminary Report, UN Doc. E/CN 4/Sub 2/1991/8.

Although the Rio instrument is "soft law" and therefore has no binding effect, its significance is not diminished by its "soft law" status because there is arguably a "hard" duty upon states to give due consideration in good faith to the implementation of the norms.[81] This is evident in the growing impact of "soft law" on public participation or work in the real world as the "soft law" of public participation is hardening in national legislation[82] and regional human rights and environmental instruments,[83] with the 1998 Arhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters by the UN Economic Commission for Europe (Aarhus Convention)[84] undoubtedly being the most prominent. This makes the Aarhus Convention an important reference Convention on the concept of public participation.

Thus, in view of the global endorsement of the Aarhus convention as the '… the most ambitious venture in the area of "environmental democracy" … the most impressive elaboration' of Principle 10,[85] it is important to do a brief review of the of Convention at this point. This is to identify the implementation procedure as provided in the regime, as a basis for undertaking a critique of the procedure for implementing the public participation concept generally. This will help to explain why the current procedure for implementing the concept is not suitable for countries like Nigeria.

Public participation under the Aarhus Convention involves three important elements or 'pillars': public access to environmental information, public participation in environmental decision-making processes and access to judicial and administrative redress (otherwise termed access to justice in environmental matters). The first pillar, which is public access to information provides that in making environmental decisions,

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[81] See *Request for an Examination of the Situation in Accordance with the Court's judgement in the Nuclear Test Case*, ICJ Reports (1995) 288. ['*Request for an Examination Case*']; *Case Concerning the Gabcikovo-Nagymaros Dam*, ICJ Reports (1997) 7 ['*Gabcikovo-Nagymaros Case*']; *Pulp Mills on the Uruguay Case*, ICJ Reports (2006) para 80 ['*Pulp Mills Case*']. See generally Birnie, Boyle and Redgwell (n 53) 138-40.

[82] Since the 1992 Rio Declaration on Environment and Development, many jurisdictions have enacted domestic legislation in one form or another incorporating public participation. See for example Nigeria's Environmental Impact Assessment Act.

[83] Donald N. Zillman, 'Introduction to Public Participation in the Twenty-first Century' in Donald N Zillman, Alastair R. Lucas and George (Rock) Pring (eds), Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources (Oxford: Oxford University Press 2002) 4.

[84] UNECE Convention (n 5).

[85] Stec and Casey-Lefkowitz (n 10)

public authorities[86] have a duty under the Convention to make information available to the public when requested, and the Convention stipulates time frames for responding to these requests.[87]

Public participation is the second pillar under the Aarhus Convention. The Convention requires states to provide for the public to be able to participate in the decision-making of a project, plan, policy or programme relating to the environment.[88] The third pillar which is access to justice in environmental matters is fundamental because it is closely tied to the other two pillars as the effectiveness of the other pillars depends on it. This is because access to justice provides a mechanism for the public or "the public concerned" to seek recourse to an administrative or judicial remedy. This is especially relevant when public authorities or corporations disregard the procedures prescribed in the first and second pillars and thus fail to comply with their obligations under the Convention. This makes access to justice the cornerstone of public participation under the Convention.

There are two important things from the discussion above that buttress the suggestion for public involvement in decision-making concerning corporate activities that a likely to generate human rights and environmental ham in developing markets. First is that States duty to protect against rights abuse could be relied upon to develop a new national legal framework for public participation. Secondly, the Rio Document, especially Principle 10 and Agenda 21 underscore the significance of public participation[89] as a strategy for preventing environmental harm. Given that national law is the medium through which States implement their international law obligations, it is important to interrogate the process of implementing the international law concept of public

[86] See public authorities as defined under art 2 (2) and covers any government body or any natural or legal persons performing public administrative functions, and may include privatised companies providing public services. See Stec and Casey-Lefkowitz The Arhus Convention, above at note 114 at p 44.
[87] Arts 4 and 5.
[88] Arhus Convention, art 7 deals with plans, programmes and policies and Article 8 deals with public participation during preparation of executive regulation.
[89] Birnie, Boyle and Redgwell (n 50) 112.

participation to understand why the prevention of environmental abuses (the focus of the concept) has not been achieved in developing markets.

4.4 Implementation and Enforcement of Public Participation in International Instruments

There is a general consensus amongst academic commentators that Principle 10 of the Rio Declaration is the broadest and perhaps the most important endorsement of public participation.[90] It provides that '[e]nvironmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have … the opportunity to participate in decision-making processes'.[91] This is reinforced with two further principles that emphasise the necessity for participation by youth[92] and indigenous people.[93] The importance of the participation of youth and indigenous people is discussed later in Chapter 6.[94]

Procedural environmental rights as provided in the environmental instruments discussed above include access to environmental information, participation in environmental decision-making and access to judicial and administrative redress for environmental wrongs.[95] This generally involves participatory rights in decision-making of people over environmental matters that affect their lives.[96]

Notwithstanding the plethora of normative (binding and non-binding) instruments that espouses public participation as a strategy for preventing environmental harm, environmental degradation is still a major concern in developing markets where corporate abuses of human rights and the environment is still prevalent. There is no doubt that international law plays an important normative role but to achieve a healthy environment as envisaged under the various international instruments will require the effective

[90] Pring and Noe, (n 38) 42; Collins (n 40) 227; Blanco and Razzaque (n 36) 152-3.
[91] Rio Declaration, Principle 10.
[92] *Ibid*., Principle 21.
[93] *Ibid*, Principle 22.
[94] Chapter VII, s. 7.3.1.
[95] Dinah Shelton, 'Human Rights, Environmental Rights and the Right to Environment' (1991) 28 Stan Envtl L. J. 103, 117.
[96] Blanco and Razzaque (n 36) 226.

implementation of norms at the national level. This is because national law is the medium through which states implement their obligations under international and regional instruments, and regulate the conduct of their nationals and corporations both inside and beyond their borders.[97] This raises the important question about how participatory norms in the international and regional instruments are implemented and enforced at the national level.

Commentators have identified two parallel paths through which public participation has been implemented as the "environmental impact assessment" (EIA) laws and the later approach of injecting public participation into decision-making processes outside EIAs or into environmental decision making generally.[98] This later approach is found nowadays in legal authorities dealing with planning, sustainable development, some industrial activities, such as mining, energy facilities, waste disposal, chemical plants and dams, and government activities generally.[99]

Even though it is acknowledged that public participation is recognised in laws other than EIA, the discussion here on the implementation of public participation will focus on EIA laws. This is because there is a general emphasis on EIA in most international norms that provide for public participation. The 1992 Rio Declaration, apart from the general provision for public participation in its Principle 10, also provides specifically for EIA in Principle 17, which according to Birnie *et al* affords the strongest evidence of international support for EIA.[100] It provides that '[e]nvironmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant impact on the environment and are subject to a decision of a competent national authority'.[101]

[97] Birnie, Boyle and Redgwell, (n 50) 270.
[98] Pring and Noe, (n 38) 38.
[99] *Ibid*, 39.
[100] Birnie, Boyle and Redgwell (n 50) 166.
[101] Principle 17, Rio Declaration.

Agenda 21[102] also make copious reference to EIA and similar processes and identifies 'the need for individuals, groups and organizations to participate in environmental impact assessment procedures and to know about and participate in decisions, particularly those which potentially affect the communities in which they live and work'.[103] Although the Aarhus, our reference Convention on public participation, did not specify the kind of public participation that may be required under the regime, the focus of Article 6(6) on the information to be made available to the public includes:

1. a description of the site and the physical and technical characteristics of the proposed activity, including an estimate of the expected residues and emissions
2. a description of the significant effects of the proposed activity on the environment
3. a description of the measures envisaged to prevent and/or reduce the effects, including emissions
4. an outline of the main alternatives studied by the applicant.

Birnie *et al* state that a comparison of the requirements under Article 6(6) Aarhus Convention and Annex II of the 1991 Espoo Convention on EIA[104] shows that the matters under Aarhus 6(6) are those normally included in EIA, which makes implementing Aarhus a requirement of some kind of EIA process.[105]

Furthermore, the fact that the so-called development assistance agencies, such as the World Bank[106] and the African Development Bank,[107] require environmental assessment (EA) of the projects for bank financing to ensure that they are environmentally sound and sustainable[108] underscores the general acceptance of EIA as the process for implementing public participation in matters of economic development and the

[102] Agenda 21, 23.2 (1992), Approved by the UNCED, Rio De Janeiro, 13 June 1992, UN Doc. A/CONF.151/26 (vols. I-III) (1992).
[103] *Ibid*.
[104] UNECE Convention on Environmental Impact Assessment in a Transboundary Context (1991)
[105] Birnie, Boyle and Redgwell (n 53) 293.
[106] The World Bank Operational Manual: Operational Policies January 1999. <http://www.env.go.jp/earth/coop/document/10-eiae-7.pdf> accessed 14 February 2017.
[107] African Development Bank, Integrated Environmental and Social Impact Assessment Guidelines, October 2003 <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Policy-Documents/Integrated%20Environmental%20and%20Social%20Impact%20Assessment%20Guidelines.pdf> accessed 14 February 2017.
[108] The World Bank Operational Manual, (n 108).

environment. EIA has also become a common feature in national legislation.[109] Apart from EIA being a major tool of environmental management since its adoption in the US National Environmental Policy Act 1969, many Eastern European nations[110] and major developing markets including China[111] have adopted EIA as a national legislation.[112]

4.4.1 Environmental Impact Assessment as a Procedure for Implementing Public Participation

Public participation underpins almost all EIA schemes and the effectiveness of EIA is influenced in large part by public involvement in the process.[113] The goal of EIA according to some authors is 'to integrate environmental issues into development planning, in order to maximize the potential for environmentally sound and sustainable decisions and plans'.[114] There is no doubt that the proliferation of EIA[115] has not led to the achievement of this goal, given the continuing deterioration of environmental quality and the frequency with which NGOs and activists publicized instances of environmental disasters arising from the activities of MNCs in developing markets.[116]

As David Hunter *et al* have argued, '[o]ne of the primary reasons for conducting environmental assessment is to inform the public of proposed projects and engage them in a *meaningful dialogue*[117] about the potential benefits and environmental and social costs of a proposed activity'.[118] Therefore, in view of the continuing environmental degradation

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[109] UN, *Current Policies, Strategies and Aspects of Environmental Impact Assessment in a Transboundary Context* (New York: UN Publications 1997)
[110] Many East European states are parties to the 1991 Espoo Convention. See generally in Gerd Winter (ed.), *European Environmental Law: A Comparative Perspective* (Aldershot: Dartmouth 1996).
[111] Law of the People's Republic of China on the Environmental Impact Assessment (2002), with Implementation Regulation on Public Participation (2006).
[112] Nigeria also enacted EIA legislation in 1992. See Environmental Impact Assessment Act, Cap E12 LFN 2004.
[113] Pring and Noe, (n 38) 38.
[114] *Ibid*.
[115] Birnie, Boyle and Redgwell, (n 50) 166.
[116] See for example, Human Rights Watch & Center for Human Rights & Global Justice, On the Margins of Profit: Rights at Risk in the Global Economy (February 2008), <http://www.hrw.org/reports/2008/bhr0208/bhr0208webwcover.pdf> (hereinafter On the Margins of Profit); Human Rights Watch, 'The Price of Oil: Corporate Responsibility and Human Rights Violation in Nigeria's Oil Producing Communities' (January 1999) <http://www.hrw.org/reports/1999/nigeria/nigeria0199.pdf> accessed 26 January 2017.
[117] Emphasis added.
[118] David Hunter, James Salzman and Durwood Zaelke, International Environmental Law and Policy (3rd edn, New York: Foundation Press 2007) 534.

occasioned by the activities of MNCs in developing markets, the central concern here is to understand how effectively the current law and practice of public participation provides an opportunity for a meaningful dialogue between project developers and local communities, how well the EIA regime solves the underlying problems it was designed to address, and to look for how to improve the effectiveness of public participation in decision-making in the area of environment and economic development.

To understand the relevance of public participation in the current EIA regime, it is important to review three important aspects of it – the parties addressed by the particular EIA regime, the parties that make the final decision and the mode of public participation in the regime, as well as the focus of an EIA regime. The EIA legislation generally addresses States and corporations.[119] The EIA process is one which at the direction of "public authority" involves the presentation, collection, publication and assessment of information for project evaluation.[120] For example, a corporation wishing to undertake an economic activity supplies the environmental statement, the main product of an EIA which usually contains 'a description of the proposed development, the data necessary to identify and assess its environmental effects, a description of proposed mitigation measures and summary of information'.[121] Reference to the public or the "public concerned" under an EIA is tangential as they are merely required to be informed by the "public authority".[122]

The decision whether a project which is the subject of a particular EIA is to proceed or not is made by the relevant "public authority". The only role for the participating public in the process is to provide comments or inputs into the process.[123] Although the relevant public authority is required to take due account of the outcome of the public participation in its final decision,[124] there is no obligation on the part of the public authority to accept and align the final decision to suit the outcome of the public participation or the comments

[119] Hunter, Salzman and Zaelke, (n 118) 367.
[120] Carolyn Abbot, 'Environmental Command Regulation' in Benjamin J. Richardson and Stepan Wood (eds), *Environmental Law and Sustainability* (Portland: Hart Publishing 2006) 74.
[121] *Ibid*. See also Nigeria's EIA Act s 4 and Article (6) Arhus Convention.
[122] EIA Act, ss 7, 21(3), 24, 33(1) and 36 (b); Arhus Convention, Article 6(2).
[123] EIA Act, 36(b); Aarhus Convention, Article 6.
[124] Aarhus Convention, Article 6(8)

received.[125] However, the failure to take public input into consideration in reaching the final decision could be a basis for legal challenge as provided, especially under the Aarhus Convention.

By providing for the public or interest groups to challenge any substantive or procedural legality of any decision under the Convention, Aarhus emphasises a fundamental procedural element found in Principle 10 of Rio – access to justice. This is why Aarhus is relevant to the discussion on public participation here because of the provision for legal challenge in Article 9 of the Convention. The Aarhus Convention mandates the establishment of procedures which are fair, equitable, timely and not prohibitively expensive for the review of cases of non-compliance.[126] The aim is to provide effective access to challenge the refusal of access to information or to seek prevention of and/or remedy for environmental harm as a result of non-compliance with the Convention.[127] The Nigerian EIA Act did not have a related provision but even if it had done, the problem with access to justice in the country, as discussed in chapter 2,[128] makes the EIA regime an unreliable procedure on which to base public participation in Nigeria and other developing markets in similar situation to Nigeria.

Finally, EIA involves two opposing interests and groups. The first one is between the environment and development. The second is between the government, who are for the most part concerned with the economic benefit of a proposed activity, and the public or local communities who, as beneficiaries of the natural environment, are usually concerned with environmental effect of it. Thus, an EIA involves a decision by a public authority to balance the information provided by the EIA against considerations for the impact of the proposed project and economic development. When viewed from this perspective, a "satisfactory" EIA need not necessarily show the absence of environmental

[125] Spain ACCC/C/2008/24, ECE/MP.PP/C.1/2009/8/Add. 1, 8 February 2011, paras 98-9.
[126] Aarhus Convention, Article 9(4).
[127] Pring and Noe (n 38) 44.
[128] Chapter II, s 2.3.1.

harm, it is sufficient if it provides the necessary information about the project's likely impact and follows due process.[129]

In view of the above, and given the desire for economic development in developing markets, public involvement under the EIA regime is unlikely to effectively address environmental degradation in those markets. Apart from the fact that EIA is mostly project based and does not consider policy options,[130] there is general lack of institutional capacity in developing markets. There are two important ways that the lack of institutional capacity may affect the EIA procedure in countries like Nigeria. The first is that the public authorities lack the expertise and necessary equipment that may be required to effectively carry out or supervise an EIA process, such as the type involving complex operations undertaken by oil MNCs.[131]

Secondly, considering the fundamentality of access to justice with regard to public participation to both the Rio Declaration and the Aarhus Convention, a country like Nigeria that is associated with a weak and inefficient justice administration system[132] cannot effectively rely on a process that depends entirely upon the efficiency of the justice system. The Nigerian Gbaran oil field case in which the landlords' association of the community were shut out of the EIA process is a case in point.[133] This makes it important to devise a more inclusive regime of public participation in developing markets, rather than relying on the EIA process that bifurcates the interests in the process into "insiders" and "outsiders".

4.5 Substantive International Environmental Law and the Public Participation Concept

Having identified the basis and the need for an alternative national legal framework for public/interest group participation in decision-making concerning those activities that are likely to create human rights and environmental harm in developing markets, it is also

[129] Birnie, Boyle and Redgwell, (n 50) 165.
[130] Blanco and Razzaque (n 36) 163.
[131] See chapter II, (n 166).
[132] See chapter II, s. 2.3.1.
[133] *Ibid*., (n 126).

important to investigate substantive international environmental law on prevention and public participation further. This is with a view to identifying the technical developments in the area that could aid effective participation under the proposed national legal framework. This is relevant because some States, including Nigeria, have assumed certain substantive conservation obligations and their application to the proposed participatory framework will be in fulfilment of those obligations.

The corporate human rights and environmental abuses discussed in this thesis occur mostly in the Niger Delta wetlands. This makes the Ramsar Convention on Wetlands[134] the natural focus of this interrogation. However, it is important to note the acknowledgement of the Convention on Biological Diversity (CBD) by some authors as the first international treaty explicitly to address all aspect of biodiversity[135] covering issues relevant to the problems addressed in this thesis, such as the obligation to introduce EIA as a strategy for minimising adverse environmental impact as well as public participation where appropriate.[136] Despite the acknowledged importance of the CBD, it is important to note that the Convention has very broad and general coverage which is why it leaves much of the detail to be regulated by the more narrowly focused conventions addressed to specific ecosystems, such as the Ramsar Convention by virtue of its Article 22, which provides that the 'provisions of Convention shall not affect the rights and obligations of any Contracting Party deriving from existing international agreement …'.

It is in view of the above that this interrogation here will focus on the Ramsar Convention to underscore its relevance to a country like Nigeria regarding regulating the activities in the Delta wetlands. The aim is to highlight the important substantive provisions of the Convention that are relevant to local communities' participation concept by identifying some useful guidelines that could promote their effective participation. This is important for two reasons. The first is that Nigeria, and especially the Niger Delta, the central focus of this thesis is an important wetland. More importantly, it is home to the

[134] Ramsar Convention (n 1).
[135] Bowman *et al*, (n 18) 594.
[136] CBD, art 14.

Niger Delta people and the source of their livelihood. It is also the source of Nigeria's crude oil, and host to the oil MNCs operating in the country.[137] It is the importance of the delta wetlands, and other regions where economic activities take place, to their local communities that makes some of the guidelines for implementing the substantive provisions of Ramsar relevant to the proposed regime.

The key substantive obligations regarding wetlands are contained in Article 3, which provided the basis for the development of the key guidelines relevant to this interrogation. Article 3(1) provides that: 'The Contracting Parties shall formulate and implement their planning so as to promote the conservation of the wetlands included in the List, and as far as possible the wise use of wetlands in their territory'.[138] Michael Bowman has criticised this provision as vague because in addition to the fact that 'it did not create any legal obligation, important concepts, such as "wise use" is not defined in the text, and there is no duty to secure or guarantee such use but only to "promote" it "as far as possible"'.[139] However, as the discussion below will show, 'the incorporation within the Convention of an institutional mechanism for ongoing review of its implementation has provided an opportunity for clarifying the vague aspects of the text and adapting them to the evolving environmental challenges'.[140]

The establishment of a committee for the continuous implementation of the Convention at the Regina Conference in 1987[141] by the Conference of the Contracting Parties (CoP) provided the initial foundation to address the shortcomings in the Convention. Following the establishment of this committee and subsequent meetings of

[137] Olalekan Adekola and Gordon Mitchell, 'The Niger Delta Wetlands: Threats to Ecosystem Services, their Importance to Dependent Communities and Possible Management Measures' (2011) Int'l J. of Biodiversity Science, Ecosystem Services and Management Vol. 1, 50—68, 51.
[138] Ramsar by this provision appears to make a distinction between "conservation" and "wise use" with regard to Listed sites and wetlands generally, and this has been the subject of extensive academic debate. However, this distinction and the assumptions underlying this admittedly important debate is not material to the discussion here because our primary focus is on the concept of "wise use". In fact, consistent practice under the Convention appears to reject any sharp distinction between "conservation" and "wise use" because the principal emphasis of Ramsar deliberations have been upon "wise use" even in relation to listed sites. However, for a more colourful and detailed discussion on the subject, the reader is referred to Bowman *et al*, (n 21) 414-423.
[139] M. J. Bowman, 'The Ramsar Convention Comes of Age' ((1995) Netherlands International Law Review, XLII: 1-52, 11
[140] Bowman *et al,* (n 18) 416.
[141] Resolution 3.3 and Annex to the Regina Recommendations.

the CoP several resolutions have been adopted. Two of them are relevant to the discussion here because of our focus on the wise use concept. The first is the decision of the Conference in Kampala 2005[142] to streamline implementation of the Ramsar Strategic Plan around five key goals, one of which is "to work towards achieving the wise use of all wetlands". Secondly, several useful guidelines have been established for the application of the concept of wise use, including Resolution 5.6 on the 'Guidelines for the implementation of the wise use concept'.[143] It is noteworthy that virtually all the elements of the guidance materials from relevant decisions have been supplemented by more fully elaborated guidelines adopted by later meetings of the Cop and now consolidated in the Ramsar "toolkit" of *Wise Use Handbooks*.[144]

The relevance of the wise use concept lies in the fact that it is founded upon the notion of sustainable utilisation of wetland resources in line with regulated exploitation.[145] This makes the wise use concept relevant to the discussion here since the concern in this thesis is the sustainable exploitation of the resources in Niger Delta wetland. Sustainable exploitation of wetlands was the main focus of the 2005 Kampala Conference, which established a revised framework for the wise use of wetlands. One major contribution of the revised framework that is relevant to the wise use concept is that it incorporates the following definition: 'Wise use of wetlands is the maintenance of their ecological character, achieved through the implementation of ecosystem approaches, within the context of sustainable development'.[146] Thus, since wise use entails maintenance of ecological character of the wetland in question, it becomes imperative that development activities, such as the type undertaken by oil MNCs in the Niger Delta must be undertaken in a sustainable manner in order to achieve this goal.

[142] See Resolution X.1, which sets the Strategic Plan for 2009-15.
[143] Resolution 5.6, Annex.
[144] 4th edn., 2010, hereafter Handbooks, of which there are twenty in all, http://www.ramsar.org/resources/ramsar-hanbooks.
[145] Bowman *et al,* (n 18) 415.
[146] Resolution IX.1 Annex A: A Conceptual Framework for the Wise Use of Wetlands and the Maintenance of their Ecological Character.

Having identified what wise use concept entails it is important to understand how the Ramsar Convention addresses the subject of public participation to achieve sustainability. Three key resolutions[147] adopted by the CoP with a view to maintaining ecological character, which derived from the substantive provisions in Article 3 are relevant in this regard. The first is Resolution X.1 – the Strategic Plan 2009-2915. It is significant that this Strategic Plan recognises the relevance of integrated approach to resource management as a strategy for achieving wise use.[148] One of the main goals of the Resolution is 'to work towards achieving the wise use of all wetlands by ensuring that all Contracting Parties develop, adopt and use the necessary and appropriate instruments and measures with the participation of the local indigenous and non-indigenous population …'[149] in order to achieve sustainability. This is a clear endorsement of public participation. To underscore the relevance of the Convention to the concept of public participation therefore, it is important to identify other resolutions that provide the mechanisms to aid such participation to make it effective.

Resolution X.17 on environmental impact assessment is relevant in this regard. It provides for assessment and evaluation of impact of development activities with a view to promoting the wise use of wetlands.[150] This is the "implied" EIA requirement, which derives from Article 3(2) of the Ramsar Convention. It requires Contracting Parties to 'arrange to be informed at the earliest possible time if the ecological character of any wetland in its territory and included in the List has changed, is changing or is likely to change as a result of technological developments, pollution or human interference'. This provided the basis for the development of the updated technical guidance on EIA[151] prepared by the Scientific and Technical Review Panel (STRP). Contracting Parties are required to draw the guidelines in this Resolution to the attention of all relevant stakeholders.[152]

[147] Resolution X.1, Resolution X.17, and Resolution X.19.
[148] Resolution X.1, 1.
[149] Resolution X.1, 8.
[150] Resolution X.17, 8.
[151] Resolution X.17: Environmental Impact Assessment and Strategic Environmental Assessment: updated scientific and technical guidance.
[152] *Ibid*., 2.

The importance of technical guidance to the participation of interest groups as envisaged in this thesis cannot be overemphasised given the complexity of most MNCs operations, especially the oil MNCs operating in regions with delicate ecology, such as the Niger Delta. It is instructive that the EIA is required to be an iterative process of assessing impacts, re-designing alternatives and comparison.[153] This is unlike the EIA process, such as the Nigerian EIA regime[154] that does not consider policy options.[155] The fact that the Resolution provides for a review of environmental impact assessment to ensure scientific and technical accuracy based on the standard in the STRP guidance[156] makes it a useful guide for the local community representatives discussed in Chapter 7.[157]

Finally, the Convention will be useful to places like the Niger Delta with regard to remediation. Even though the Convention itself does not expressly demand remedial action in relation to sites undergoing adverse ecological change, some authors have argued that the fact that Recommendation 4.8 requires parties with sites at risk 'to take swift and effective action' to prevent or remedy changes in ecological character, connotes an intention to address such adverse impacts.[158] This might be the case because the need to act when there is a change in ecological character could also be implied under Article 3(2) where Contracting Parties have committed themselves to 'arrange to be informed at the earliest possible time if the ecological character of any wetland in its territory and included in the List has changed, is changing or is likely to change as the result of technological developments, pollution or other human interferences'.

The work of the STRP will also be useful in this regard because the Panel has been instructed in the context of Resolution X.16 to 'develop guidance on mitigation of and compensation for losses of wetlands area and wetland values'.[159] This provides an opportunity for a country like Nigeria to usefully apply this for remediation of the egregious

[153] *Ibid*., 18
[154] See ch. II, s. 2.2.3.2.
[155] Blanco and Razzaque, (n 36) 163
[156] Resolution X.17, 21.
[157] S. 7.3.3.
[158] Bowman *et al*, (n 18) 423.
[159] Resolution XI.9, 1-2.

damage to the Niger Delta wetlands. It also provides a useful tool for assessing the damages by the local community representatives.

In view of the above, it is argued that a mechanism by which States can be informed of adverse changes is an invaluable aid to performance of the wise use obligation for wetlands. Thus, the Ramsar regime in addition to emphasising public participation, provides effective mechanism to support the participatory process through the work of the STRP.

4.5 Conclusion

The discussion in this chapter reveals that existing international environmental norms provides explicitly for public participation as a strategy for achieving prevention of environmental harm. The adoption of the Aarhus Convention and the growing EIA legislation across the world which adopts the Rio Declaration on Environment and Development since the 1992 UNCED attest to this. There is a general acknowledgement of the virtues of public participation by commentators[160] and in international instruments.[161] However, the effectiveness of international commitments, such as the endorsement of public participation espoused in international environmental instruments depends on how they are put into practice at the national level.

In the case of Nigeria, the growing cases of environmental degradation which has been blamed for emerging social problems, such as of the militancy in the Niger Delta is a clear indication that a new procedure for implementing the public participation concept has become imperative. The link identified between human rights and environmental protection provides a basis to develop an alternative procedure. However, the effectiveness of the proposed national framework for addressing the abuses in places like the Niger Delta will depend to a large extent on the efficiency and technical competence

[160] Pring and Noe, (n 38) 23; Blanco and Razzaque (n 36), 21
[161] See the Preamble to Aarhus Convention.

of the representatives. Thus, to achieve effective representation given the complexity of the oil MNCs operation in Nigeria and other developing markets in similar situation, the Ramsar "toolkit" of Wise Use Handbooks would provide invaluable aid to the representatives under the proposed national legal framework.

Thus, Nigeria could rely on its obligations under the various instruments to develop the proposed national legal framework on public participation to address human rights and environmental abuses in the country as well as provide effective means for such participation. Since the corporation is the medium for undertaking development activities that cause environmental degradation and human rights abuses addressed in this thesis, it is argued that corporate board level is the appropriate platform for their involvement in this regard. This is because that is where the decisions that generate the harm is made. The next chapter will argue that local communities have a sufficient stake to make their involvement in corporate decision-making necessary.

5. Corporate Governance, Regulating Corporate Responsibility of Business and Stakeholder Participation Perspectives

5.1 Introduction

As discussed in chapters 1 and 2, the rampant corporate abuses of human rights and the environment in developing markets is the consequence of a regulatory gap created at the national and international levels as a result of the internationalization of corporate power and influence. As a result, there has been renewed pressure from human rights activists and developing markets to establish international legal obligations for corporations and other business entities, especially since the era of governmental deregulation and privatization began in the 1980s.[1] This has led to the development of new international initiatives on business and human rights (BHR) and the emergence of some major soft law instruments from inter-governmental institutions as well as Corporate Social Responsibility (CSR) Codes by major MNCs.[2]

Despite these initiatives, corporate related abuses of human rights and the environment still occur frequently in developing markets, such as the egregious environmental degradation by oil MNCs in the Niger Delta region of Nigeria described as horrific by Audrey Gaughran, Amnesty International Global Issues Director.[3] This has led to the conclusion by some commentators that existing legal and regulatory regimes for regulating MNCs are inadequate.[4] As a result, the aim of this research is to seek an alternative means of regulating MNCs activity in developing markets by focusing on preventing the abuses. This is because of the weak and inefficient legal environment in developing markets, which has rendered the current remedial approach of seeking redress after the violations might have occurred unsuitable. The previous chapter interrogated

[1] Dinah L. Shelton, *Advanced Introduction to International Human Rights Law* (Cheltenham: Edward Elgar Publishing Limited 2014) 209.
[2] Christen Broecker, '"Better the Devil You Know": Home State Approaches to Transnational Corporate Accountability' (2008-2009) 41 N.Y.U. J. Int'l L. & Pol. 159, 160.
[3] See Audrey Gaughran's comparison of oil spill in Europe and Nigeria, chapter 1, (n 76).
[4] Sukanya Pillay, 'And Justice for All? Globalization, Multinational Corporations, and the Need for Legally Enforceable Rights Protection' ((2003-2004) 81 U. Det. Mercy L. Rev. 489, 489; Surya Deva, *Regulating Corporate Violations of Human Rights: Humanising Business* (Oxon: Routledge 2014), 12.

international environmental norms that espouse the principle of participation as a strategy for preventing environmental degradation with a view to identifying a normative foundation upon which to develop an alternative regime that is based on prevention. Discussions in that chapter show that the procedures for implementing international norms that seek to prevent environmental harm in countries like Nigeria have been largely inefficient and thus in need of an alternative process.

Thus, it is argued that incorporating other stakeholders (those that current corporate law scholarship refers to as "other constituencies" or corporate "outsiders"),[5] especially those most affected by negative corporate externalities, into the corporate decision-making process is one way to ensure that human rights and environmentally friendly decisions are made inside the corporation. This is because they are the group that have the greatest incentive to make the decisions that will promote human rights and environmental integrity and thereby prevent the abuses.

Since corporate governance is 'the system by which companies are directed and controlled',[6] it is argued that the method by which the interests of other stakeholders are dealt with inside the corporation should necessarily be the province of corporate governance. This makes it imperative to explore how new features of corporate law (as the regime that governs the creation and operation of corporations)[7] could be developed to bring about a system of corporate governance that will include other stakeholders in the corporate governance structure as a strategy for achieving the participatory principle

[5] This group include creditors, employees, customers, local communities etc. However, it is important to note that while authors like Derek French *et al* classify this group together as other constituencies, Reinier Kraakman *et al* distinguishes between employees and creditors, and the rest of the group. The authors classify employees and creditors as non-shareholder contractual stakeholder, and the others as non-contractual stakeholders. Notwithstanding the differences in the classification, one thing that is common to all these stakeholders is that they are not the primary focus of corporate law. See Reinier Kraakman *et al, The Anatomy of Corporate Law: A Comparative and Functional Approach* (3rd edn., Oxford: Oxford University Press 2017) 29, 81-95; Derek French *et al, Mayson French and Ryan on Company Law* (34th edn., Oxford: Oxford University Press 2017) 90-1.

[6] See the definition of "corporate governance" in the *Report of the Committee on the Financial Aspect of Corporate Governance* (hereinafter Cadbury Report 1992) (Committee on the Financial Aspect of Corporate Governance, 1992); *The King Report on Corporate Governance* (hereinafter King 1994) (Institute of Directors in South Africa, 1994.

[7] Susan McLaughlin, *Unlocking Company Law* (Oxon: Routledge 2015) 2.

and preventing environmental degradation and human rights abuses by MNCs in developing markets.

To address the issues of outside stakeholder participation, this chapter will interrogate current corporate governance regime and practice, especially in the common-law world, with a focus on the UK ("shareholder primacy" corporate governance model) and some major developing market jurisdictions that operate under the common law, such as India, South Africa and Nigeria. Although the reasons for the focus on the UK model are discussed below, it is important to note here that the alternative model classified by commentators as the stakeholder model, which is usually associated with Germany and Japan, already accommodates other stakeholders.[8] The aim of this interrogation is to underscore the need to reconceptualise the corporate legal architecture in developing markets, which is the central theme of this thesis.

5.2 Corporate Governance: Introduction and Background

Corporate governance has become a topical issue in international and national socio-political and economic discourse. The importance of corporate governance and the debate about it stems from the fact that corporations are of great consequence in the world today.[9] Their fundamental role in wealth creation in capitalist economies and, more generally, their role nowadays in nearly all the nations has made them the dominant economic institutions in the world. However, corporations do not have only economic influence; the very large ones in particular can affect aspects of social and political life as well.[10] This does not mean that the way smaller corporations operate is of no significance.[11] The important point in view of the enormous influence of the modern

[8] See J. Bautz Bonanno, 'Employee Codetermination: Origins in Germany, Present Practice in Europe, and Applicability in the United States (1976-1977) 14 Harv. J. on Legis 947, 949
[9] Andrew Keay, *The Enlightened Shareholder Value Principle and Corporate Governance* (Oxon: Routledge 2014) 3.
[10] *Ibid*., 4
[11] *Ibid*., 5.

corporation is that 'no matter what size a company is it must be governed and it must be subject to appropriate rules as to how it operates'.[12]

It is important to briefly point out that issues surrounding corporate governance emanate from the separation of ownership and control of business. Although problems associated with this separation have been identified long before Adam Smith[13] offered his classical corporate governance perspective,[14] the modern concept of corporate governance arguably dates back to the birth of the limited liability company.[15] The separation of ownership and control of the corporation created the potential for shareholder and managerial interests to diverge.[16] It is based on this perception of potential conflict, and given the importance of shareholders as providers of capital, that corporate law was focused on the duties of managers to protect the property of the owners and maximise profits in their interest.[17] This is the beginning of what some authors have termed 'the central problem of corporate governance'.[18] This is because, although shareholders, as the residual claimants on the corporation's assets and earnings, are entitled to the corporation's profits, 'it is the directors and managers, not the shareholders, who decide how to spend the firm's earnings'.[19]

The focus on shareholder wealth maximization, which proponents of "corporate governance theory" classify as the "shareholder primacy" model,[20] influenced the definition of corporate governance in a narrow way. Many scholars and government departments and agencies define the term to include mainly directors as the key players, and make references to shareholders, and sometimes auditors, as the other actors

[12] *Ibid*.
[13] Adam Smith, *The Wealth of Nations* Books I-III (Middlesex: Penguin Books 1982).
[14] See Bob Tricker's excellent discussion of the subject, Bob Tricker, *Corporate Governance: Principles, Policies, and Practices* (3rd edn, Oxford: Oxford University Press 2015) 4-5.
[15] Keay, (n 9) 1.
[16] Adolf A. Berle and Gardiner C. Means, *The Modern Corporation & Private Property* (10th Print, New Brunswick: Transaction Publishers 2009) 66-111.
[17] R. Parry, 'Directors' Duties within the United Kingdom' in Stephen Tully (ed), *Research Handbook on Corporate Legal Responsibility* (Cheltenham: Edward Elgar 2005) 73-87.
[18] Stephen M. Bainbridge *The New Corporate Governance in Theory and Practice* (New York: Oxford University Press 2008) 6.
[19] *Ibid*.
[20] See a detailed and excellent classification of "Theories of Corporate Governance" by Stephen Bainbridge, *ibid*., 8-12.

involved in determining corporate policies.[21] One of the earliest definitions of corporate governance was offered by the Cadbury Committee, which stated that:

> [c]orporate governance is the system by which business corporations are directed and controlled. Boards of directors are responsible for the governance of their companies. The shareholders' role in governance is to appoint the directors and auditors and to satisfy themselves that an appropriate governance structure is in place. The responsibilities of the board include setting the company's strategic aims, providing the leadership to put them into effect, supervising the management of the business and reporting to shareholders on their stewardship. The board's actions are subject to laws, regulations and the shareholders in general meetings.[22]

The UK Department for Business, Innovation and Skills[23] also defines corporate governance as:

> the system by which companies are directed and controlled. It deals largely with the relationship between the constituent parts of a company – the directors, the board (and its sub-committees) and the shareholders. Transparency and accountability are the most important elements of good corporate governance. This includes: the timely provision by companies of good quality information; a clear and credible company decision-making process; shareholders giving proper consideration to information provided and making considered judgements.[24]

[21] Stephen Bloomfield, *Theory and Practice of Corporate Governance: An Integrated Approach* (Cambridge: Cambridge University Press 2013) 8.
[22] Cadbury *Report of the Committee on the Financial Aspects of Corporate Governance*, para 2.5.
[23] It is important to note that the Department was replaced by Department for Business, Energy & Industrial Strategy in July 2016. See the statement from Greg Clark, Secretary of State for Business, Energy and Industrial Strategy, 14 July 2016, <http://www.gov.org.uk/government/news/statement-from-greg-clark-secretary-of-state-for-business-energy-and-industrial-strategy> accessed 23 July 2017.
[24] <http://webarchive.nationalarchive.gov.uk/20090902193559/berr.gov.uk/whatwedo/businesslaw/corp-governance/page15267.html> accessed 22 September 2016

Professor Peter Mulbert on the other hand defines it in the following words:

> corporate governance deals with the decision-making at the level of the board of directors and top management (i.e., the management board in a two-tier system), and the different internal and external mechanisms that ensure that all decisions taken by the directors and top management are in line with the objective(s) of a company and its shareholders respectively'.[25]

These definitions of corporate governance generally reflect the primacy of the shareholder and thus concentrate on the ownership rights of shareholders and the consequences of the relationship between shareholders and managers.[26] This is based largely on the commercial world of the past and may still be relevant in the context of the Berle and Means corporation highlighted by separation of ownership and control.[27] The commercial world of today is different. In the context of MNCs and their relationship with their subsidiary/subsidiaries there is no separation of ownership and control. A MNC and its group members (subsidiary/subsidiaries) are usually structured in a pyramidal hierarchical form of ownership, where the parent company wholly owns or holds the majority of shares in the subsidiary/subsidiaries, and may in fact exercise full control over their management.[28] In this kind of structure it is difficult to see how corporate governance conforms to the conventional descriptions.[29]

Apart from the complete control exercised by MNCs over their subsidiaries, which makes shareholder primacy in corporate governance unnecessary, its existence can also be questioned on a number of fronts. For example, other stakeholders occupy a much more important role in a modern corporation than the traditionalist view accords them.[30] This has been attributed to the improvements in science and technology which have

[25] Peter Mulbert, 'Corporate Governance of Banks after the Financial Crises – Theory, Evidence, Reform', April 2010, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1448118> accessed 22 September 2016.
[26] Bloomfield, (n 21) xiii.
[27] See chapter 1, (n 38).
[28] Irit Mevorach, *Insolvency within Multinational Enterprise Group* (Oxford: Oxford University Press) 16.
[29] Bloomfield, (n 21) xiv.
[30] *Ibid*.

significantly contributed to how the activities of MNCs affect other stakeholders, thereby redefining their *de facto* stake and status in the corporation.

A few examples will suffice to demonstrate how the sophistication and complex modern operation of businesses increase their capacity to affect other stakeholders and the corresponding needs to take them into consideration in conducting the affairs of the corporation. Especially prominent are the blast at BP's Texas City Oil refinery which cost the lives of 15 workers and injured 170 others; the Bhopal gas leak from the storage tank owned and operated by Union Carbide India Limited (UCIL), which claimed over 15, 000 lives of the company's workers and local residents according to the 2003 official government report of the Bhopal Gas Tragedy Relief and Rehabilitation Department, State of Madhya Pradesh.[31] Others include the Bangladeshi factory building (Rana Plaza) collapse;[32] and the environmentally devastating oil spills in the Nigerian Niger Delta.[33] In view of the increasing social impact of corporate activities it is argued that securing private rights for MNCs has become less important than ensuring responsibility for the acts of their special purpose vehicles (SPVs),[34] which generate those impacts.

It is important to note that the increasing social impact of corporate activities has started to be reflected in the vision of corporate governance that has emerged since the late 1990s.[35] As a result there has been increasing reference to stakeholders in the emerging definitions of corporate governance. For example, the 2015 Principles of Corporate Governance endorsed by the G20 and OECD countries state that '[c]orporate governance involves a set of relationships between a company's management, its board, its shareholders and other stakeholders'.[36] This is particularly important coming from the

[31] Amnesty International, *Clouds of Justice: Bhopal Disaster 20 Years On* (London: Amnesty International 2004) 12.
[32] 'Bangladesh Factory Collapse Toll Passes 1,000' (BBC, 10 May 2013) <www.bbc.co.uk/news/world-asia-22476774> accessed 30 March 2017.
[33] See Human Rights Watch, 'The Price of Oil: Corporate Responsibility and Human Rights Violation in Nigeria's Oil Producing Communities' (January 1999) <http://www.hrw.org/reports/1999/nigeria/nigeria0199.pdf> accessed 26 April 2017.
[34] Jennifer G. Hill, 'Public Beginnings, Private Ends – Should Corporate Law Privilege the Interests of Shareholder?' (1998) 9 Australian Journal of Corporate Law 21, 23.
[35] Christine A. Mallin, *Corporate Governance* (5th edn., Oxford: Oxford University Press 2016) 15.
[36] OECD (2015) G20/OECD Principles of Corporate Governance (Paris: OECD Publishing) <http://dx.doi.org/10.1787/9789264236882-en>.

G20 and OECD countries, which 'represent the source of the large majority of the world's FDI and the headquarters of a majority of the world's largest MNEs'.[37]

In view of the renewed emphasis on outside corporate stakeholders, it is important to review how this new stakeholder vision is reflected in emerging corporate governance regimes so as to understand how these stakeholder interests are truly represented in emerging corporate governance discourse. Although corporate law is the major framework for corporate governance, other statutes and extra-legal regulations, such as corporate governance codes, shareholder meetings, and the work of the board of directors are also important emerging regimes on corporate governance.[38] Therefore, this review will cover the various regulations that deal with issues of corporate governance.

5.2.1 Addressing the Social Responsibility of MNCs and Emerging Corporate Governance Regimes

Although the term corporate governance has only come into prominence and become a term used on a frequent basis in the commercial world in the 1990s, 'many of the issues underlying its development have been the subject of much consideration in corporate law and practice for many years'.[39] It is important to note that the development of corporate governance is a global matter which reflects legal, cultural, ownership, and other structural differences. These differences have influenced the classification of corporate governance in various ways by different corporate governance theorists.[40] However, one important taxonomy relevant to the interrogation in this part is that which categorises corporate governance according to the interests that the corporation serves.[41] This is because of the distinction it makes between a corporate governance system that

[37] OECD Guidelines, for Multinational Enterprises, OECD Publishing (hereinafter OECD Guidelines 2011) 3 <http://dx.doi.org/10.1787/978926115415-en>; Elisa Morgera, 'An Environmental Outlook on the OECD Guidelines for Multinational Enterprises: Comparative Advantage, Legitimacy, and Outstanding Questions in the Lead Up to the 2006 Review' (2005-2006) 18 Geo. Int'l Envtl. L. Rev. 751, 752.
[38] Keay, (n 9) 8.
[39] Keay, ibid., 1; Mallin, (n 35) 15.
[40] See for example, the classification by Stephen Bainbridge (n 18) 8-9.
[41] *Ibid*., 8-9.

emphasises shareholder supremacy, which is classified as the shareholder model, and the other end of the taxonomy, namely a system that accounts for a wider group of constituents, and which is classified as the stakeholder model.

In view of the above, the examination here will focus on the shareholder primacy theory represented by the US and the UK. This is important for two reasons. First is that the shareholder primacy vision and, thus, the UK corporate governance model is the model that has spread around the world and has been embraced by key developing markets such as India, South Africa and Nigeria.[42] Secondly, the stakeholder model, as noted above, already accommodates the interest of other stakeholders which is the main issue for this investigation. In fact, the German corporate governance system will be discussed in Chapter 7 to support the main proposal in this thesis for stakeholder participation in corporate governance. Germany is a leading stakeholder model jurisdiction and the German corporate legal regime provides for the representatives of at least one stakeholder group – labour – to sit on the supervisory board alongside the directors under the German Co-determination regime.[43]

The resurgence of corporate governance as a topic of debate, has been associated with recent corporate scandals and market failures.[44] Perhaps it is important to note here that directors are at the centre of this debate and thus, an essential component of corporate governance.[45] This is because they play a pivotal role in corporations. As a result, the corporate governance debate focuses on their role and the accountability measures that could be put in place in order to avoid the scandals and failures of the past.

However, even though economic matters dominate the corporate governance debate and the emerging reforms that have been put in place in many jurisdictions, there is a noticeable increase in the consideration of environmental and social concerns,

[42] Lorraine Talbot, *Progressive Corporate Governance for the 21st Century* (Oxon: Routledge 2013) 162-63.
[43] Bonanno, (n 8) 952; Mallin (n 35) 20.
[44] Bloomfield (n 21) 3
[45] Per Middleton J. in the Australian case of *ASIC* v *Healey* [2011] FCA 717, 14.

especially given the impact of corporate failures on other stakeholders, as well as the social and environmental impact of corporate activities, especially on the local communities in which they operate. The idea is to steer corporate governance in the outside stakeholder direction to ensure adequate consideration for them and thereby encourage responsible corporate behaviour necessary to protect human rights and the environment.[46]

There has been a gradual shift away from the "shareholder supremacy" view with the recognition that there are other stakeholders in the corporation whose interests should be taken into account. The UK, our shareholder-oriented reference jurisdiction, has adopted two basic strategies with respect to incorporating other stakeholder interests within a system of corporate governance – the "enlightened shareholder value" (ESV) principle, and enhanced disclosure requirements. These strategies are provided for in the UK Companies Act 2006 (UK CA 2006) and in the various corporate governance regulations, such as the UK Corporate Governance Code,[47] other statutory instruments (SIs) and the Occupational Pension Schemes (Investment) Regulations.[48]

The concept of ESV is a backdrop to the UK corporate governance system that seeks to shift the concept of corporate governance from the narrow shareholder value to a more central focus on the interest of shareholders and other stakeholders. However, the ESV theory did not completely depart from the vision that directors are to manage the corporation in such a way as to ensure that the wealth of shareholders is maximized. The theory is achieved in the CA 2006 'through the high-level "statement of directors' duties" set out in the Act[49] to clarify the duties and responsibilities of directors'.[50] The theory maintains that the interest of shareholders is the principal obligation of directors

[46] Cynthia A. Williams and John M. Conley, 'An Emerging Third Way? The Erosion of the Anglo-American Shareholder Value Construct' (2005) 38 Cornell Int'l LJ. 493, 495.
[47] The UK Corporate Governance Code (Financial Reporting Council 2016). Some important earlier versions of the code are UK Corporate Governance Code 2010 and the Combined Code 2008.
[48] Occupational Pension Schemes (Investment) Regulations (1996) S1 1996/3172, <http://www.hmso.gov.uk/sr/sr1996/Nisr_19960584_en_1.htm>.
[49] UK CA s172.
[50] J. J. du Plessis *et al*, Principles of Contemporary Corporate Governance (3rd edn, Cambridge: Cambridge University Press 2015) 60.

and requires that directors pursue shareholders' interests but, in doing so they are to have regard to the interest of other stakeholders.[51] The idea behind section 172 of CA 2006 is 'that laws that promote shareholder primacy can simultaneously protect the interests of other stakeholders if shareholders (or those representing shareholders) are properly empowered, informed or enlightened'.[52] Thus, by aligning directors' duties with interests of members as a whole the ESV concept still reflects the shareholder theory vision.

Another important aspect of the UK strategy is the monitoring role of shareholders, which underpins the shareholder value theory. As some argue, it is in the enlightened self-interest of the shareholders to monitor how corporate managers deal with issues that affect other stakeholders as the failure to take their interests into account may prejudice the maximising of shareholder wealth.[53] The Company Law Review Group acknowledged the validity of this view. This may be the rationale for the statutory recognition of ESV, i.e. equating the company with the interest of its shareholders alone,[54] but recognizing that '… due recognition was also needed of the importance in modern business of fostering effective relationships over time, with employees, customers … and in the community more widely'.[55]

Although the UK CA 2006 addresses the interest of other stakeholders as discussed above, social and environmental issues are more generally addressed in the disclosure rules under the UK CA 2006 and the UK Corporate Governance Code. It is important to note that disclosure has always been a corporate law tool used to protect those who contribute capital to the corporation. Traditionally it is the price paid by incorporators for the grant of limited liability, which shields the shareholders' personal wealth from the reach of the corporations' creditors.[56] Disclosure rules are today

[51] UK CA s 172.
[52] Talbot, (n 42) 169.
[53] Keay, (n 9) 17.
[54] *Ibid*.
[55] UK Company Law Review Steering Group Consultation Document, Modern Company Law for a Competitive Economy: Developing a Framework (URN 00/656) (London: DTI, 2000), para 2.11.
[56] Brenda Hannigan, *Company Law* (4th edn., Oxford: Oxford University Press 2016) 19.

important requirements for regulating limited liability companies and the purpose is to assist creditors to assess risk as well as to assist shareholders and others to make appropriate resource allocations and for the efficient operation of capital markets.[57]

However, global concern about sustainability and human rights has put social and environmental reporting (disclosure) on the corporate governance agenda.[58] As a result, social and environmental reporting has become a common feature in corporate governance regulations and corporate law statutes in many jurisdictions, including the UK and those countries that borrow from it, such as India, South Africa and Nigeria amongst many other common law jurisdictions.

It is important to note here the European Union (EU)'s influence on the UK (a traditionally shareholder-oriented jurisdiction) with regards to social and environmental reporting since the turn of the century.[59] The new EU Non-Financial Reporting Directive mandates further disclosures on non-financial information for public interest entities with more than 500 employees.[60] The Directive requires the report during the financial year to include 'a consolidated non-financial statement containing information to the extent necessary for an understanding of the group's development, performance, position and impact of its activity, relating to, as a minimum, environmental, social and employee matters, respect for human rights, …'[61]

In the UK, it is the Corporate Governance Code that generally sets out the principles of corporate governance in the interest of members.[62] The codes set out standards for good practice for the board of directors and are concerned with the specific issues of accountability and the integrity of the financial markets. Adoption of the codes is not mandatory. However, because the codes are connected to the listing rules of the

[57] *Ibid*.
[58] du Plessis *et al*, (n 50) 45.
[59] See, for example, Communication from the European Commission, Corporate Social Responsibility: A Business Contribution to Sustainable Development COM(2002)347 final 4, 8.
[60] Directive 2014/95/EU, of the European Parliament and of the Council of 22 October 2014, amending Directive 2013/34/EU as regards disclosures of non-financial and diversity information by certain large undertakings and groups [2014] OJ L330/1, arts 19a and 20.
[61] The Non-Financial Reporting Directive, art 29a (1).
[62] The UK Corporate Governance Code (n 47).

London Stock Exchange, it is mandatory for premium listed companies in the UK to report on how they have complied with the standards in the code or explain where they have not and the reasons for non-compliance.[63] Under the current code this requirement is only made of those companies whose shares have premium listing on the official list, which is now held by the Financial Conduct Authority (FCA)[64] in its capacity as the UK Listing Authority.[65]

Official listing imposes extra responsibilities on issuers of securities so as to provide a lower risk for investors.[66] This is hardly surprising given the shareholder-centred view of UK corporate governance. However, matters of social and environmental reporting are also prescribed by the UK CA 2006 as the Act requires the content of directors' report to include social and environmental issues. Environmental and social reporting in the UK corporate governance system is further strengthened by other statutory instruments, especially statutory instrument (SI) 2013/1970, which prescribes directors reports for listed companies. Thus, the combined effect of the CA 2006 and SI 2013/1970 is to produce a director's report that must include social and environmental issues that concerns individual corporations.

It is instructive that one of the criteria for admission to premium listing in the UK is that the company must meet the continuing obligations of listed companies set out in (Listing Rules) LR. 9. The continuing obligation requires extra information to be provided in a premium listed company's accounts and reports, as well as compliance with the UK Corporate Governance Code. Every company with premium listed shares is subject to listing rules, which requires an annual statement of how it has applied the main principles of the Code.[67] The annual statement generally referred to as directors' or management

[63] LR. 9.8. 6 r(6)
[64] <http://www.fca.org.uk/markets/UKLA> accessed 10 October 2017.
[65] It is important to note that official listing is an optional additional regulatory regime for securities market aimed at ensuring market integrity. Under the EU regulation, Directive 2001/34/EC provides for minimum standards for official listing but individual members are granted the authority to add their own requirements, and the UK has developed a more extensive additional "super equivalent" requirements as an option and any company that choose to comply is said to have a premium listing. See French *et al*, (n 5) 212-215 for a more detailed discussion on official listing in the UK.
[66] <http://www.fca.org.uk> accessed 10 October 2017.
[67] LR. 9.8. 6 r (5)

report, which has been renamed Strategic Report and Directors' Report in the amendment to Part 15 CA 2006 is required to contain social and environmental information. Specifically, CA s 414 (C) (7) provides that the strategic report must provide information about:

(i) environmental matters (including the impact of the company's business on the environment)

(ii) the company's employees; and

(iii) social, community and human rights issues.

It is important to note that both the UK Corporate Governance Code and the reporting regulations under the CA 2006 and the SI 2013/1970 are standards based, and compliance by companies is voluntary. Under the various corporate governance schemes, there is no provision for a regulatory authority to assess what companies do or say with regards to the reports.[68] In fact, the annual statement is required to be followed with a statement whether or not the company has complied with the principles throughout the period being reported on[69] and where it did not, the company is merely required to give reasons for non-compliance. This is known as the "comply or explain" philosophy and, in the words of Andrew Keay, '[a]dopting of comply or explain means that compliance with a governance code is not mandatory, but what is compulsory is disclosing non-compliance'.[70]

Although there are concerns about the effectiveness of a standard based approach to corporate governance,[71] nevertheless, such doubts have not affected their spread around the world; and India, South Africa and Nigeria discussed below, are some of the jurisdictions that have adopted the UK approach to corporate governance.

India

[68] Andrew Keay, 'Comply or Explain in Corporate Governance Codes: in Need of Greater Regulatory Oversight?' (2014) Legal Studies vol. 34 No. 279, 279.
[69] LR. 9.8. 6 r (6).
[70] Keay, (n 68) 281.
[71] Hannigan, (n 56) 127.

Both the Indian Companies Act (Indian CA 2013)[72] and Corporate Governance Code[73] address social issues and other stakeholder concerns. The corporate governance code in India states in its preamble that adoption of the code is voluntary for Indian companies but it puts particular emphasis on 'enhancing companies' value and stakeholders' trust.[74] However, with regard to issues of the environment and local communities where Indian corporations operate, the India Companies Act 2013 has significant provisions on CSR which are mandatory under the Act.[75] Section 135 (1) provides that every company having a net worth, turnover or profit of specified a amounts must constitute a stakeholder committee which shall according to s 135 (3):

(a) formulate and recommend to the board, a Corporate Social Responsibility Policy which shall indicate the activities to be undertaken by the company as specified in Schedule VII;

(b) recommend the amount of expenditure to be incurred on the activities referred to in clause (a);

(c) monitor the Corporate Social Responsibility of the company from time to time.

Although CSR under the Indian Companies Act is mandatory, failure to comply does not attract serious consequences. Where a company fails to spend the two percent net profit as mandated under the Act, it is only required to '… in its report made under clause (o) of subsection (3) of section 134, specify the reasons for not spending the amount'.[76] Thus, mandated CSR under the Indian Companies Act is in reality a set of standards for the board of directors concerning the specific issue of CSR, and apart from the fact that compliance with it is voluntary, it depends on the company's board for its implementation. The board is responsible for setting up the CSR committee …;[77] … approving the CSR policy

[72] The Companies Act 2013 (No. 18 of 2013).
[73] India Corporate Governance Voluntary Guidelines, 2009.
[74] Ibid., Preamble.
[75] Section 35 (5) The Companies Act 2013 (No. 18 of 2013), mandates companies that earn average net profit of 50 million rupees (approximately US $816,000) to set aside 2 percent of their profit and spend same on CSR.
[76] *Ibid*, s 35 (5)
[77] Indian CA 2013, (1)

for the company …;[78] and ensuring that the activities as included in the CSR Policy of the company are undertaken by the company.[79]

There is no external monitoring or enforcement of the mandatory CSR regime in the Indian CA 2013. The board is the body that is required to report 'the details about the policy developed and implemented on the CSR initiatives taken during the year'.[80] There is also no provision for intervention by the Indian regulatory authorities in the case of non-compliance with the provisions of the Act

South Africa

South Africa has been described as having some of the most advanced corporate governance thinking and practice in the world[81] as it reflects a cultural adherence to the politics of equality and to the notion of business as a vehicle for social regeneration.[82] Social and environmental issues are addressed in both the South African Corporate Governance Code (King Code IV 2016)[83] and the South African Companies Act (South African CA 2008).[84]

The major philosophies that underpin the King Code IV are sustainable development, the organisation as an integral part of society, corporate citizenship, stakeholder inclusivity and integrated thinking.[85] Corporate governance for the purposes of King Code IV means the 'exercise of ethical and collective leadership by the governing body, and the code defines the governing as 'the board of directors of a company …' [86] in the case of a business corporation. In view of the guiding philosophies, especially on the issue of responsible corporate citizenship the governing body is required to ensure that

[78] *Ibid*., 4 (a)
[79] *Ibid*., (b)
[80] *Ibid*., s 134 (3) (o).
[81] Lynn McGregor, 'Corporate Governance in South Africa' in Christine A. Mallin (ed), *Handbook on International Corporate Governance; Country Analyses* (2nd edn Edward Elgar Publishing Limited 2011) 390.
[82] Talbot (n 42) 163.
[83] Institute of Directors, South Africa (King Code IV 2016).
[84] South African Companies Act 2008.
[85] King Code IV, 23.
[86] King Code IV, 12.

'the organisation's responsible corporate citizenship efforts include compliance with the constitution of South Africa (including the Bill of Rights), the law, etc.[87] In this regard the governing board has a responsibility to oversee and monitor how the consequences of the organisation's activities affect its status as a responsible corporate citizen.[88]

Concerning stakeholders, the code emphasises an inclusive approach that requires the governing body to take into account the legitimate and reasonable needs, interest and expectations of all material stakeholders that the organisation affect.[89] The governing board is to also oversee and monitor how the consequences of the organisation's activities affect its responsible corporate citizen by reference environment (including responsibilities in respect of pollution and protection of biodiversity).[90]

To ensure compliance, the governing body is to oversee that the organisation issues integrated report at least annually on how the organisation has complied with the provisions of the code and other legal provisions.[91] One important peculiarity of the King Code IV is the "apply and explain" philosophy. By this, the governing board is required to apply the principles in the code and explain how the code has been implemented to demonstrate application of the principle.[92] However, even though the code deals extensively with stakeholder and social issues, its legal status is stated in the code as 'a set of voluntary principles'.[93] The implication is that non-compliance does not attract any legal consequence. This is probably why it is left to the governing body to assume responsibility for the governance compliance with applicable laws,[94] and to ensure the integrity of external reports as provided in Part 5.4[95] since the code did not provide for external monitoring of its implementation or external enforcement in case of non-compliance.

[87] King Code IV, 45.
[88] *Ibid*.
[89] *Ibid*., 25; see generally Part 5.5 for stakeholder relationships.
[90] *Ibid*., 45.
[91] *Ibid*., 48.
[92] *Ibid*., 37.
[93] *Ibid*., 35.
[94] *Ibid*., 63.
[95] *Ibid*., 48.

The South African Companies Act, on the other hand, adopts the "purpose approach" as it provides that one of the purposes of the company is to achieve "social benefits".[96] The problem with protection of the natural environment under the King Code, or achieving social benefits under the Companies Act, is that their implementation is at the discretion of the company's management. Thus, consistent with the voluntary and standard based approach to corporate social and environmental regulation, there is no provision for intervention by the South African regulatory authorities where a particular corporation fails to comply with the requirements for promoting environmental and social integrity in the South African corporate governance regimes.

Nigeria

Unlike in India and South Africa, where the corporate legal regime and corporate governance code addresses social and environmental issues, in Nigeria social and environmental issues are addressed exclusively in the Nigerian Corporate Governance Code (Nigerian Code 2011).[97] Despite the fact that Nigeria has been identified as a global signpost of environmental degradation and corporate human rights abuses,[98] the Nigeria Companies and Allied Matters Act (CAMA)[99] makes no reference to the environment or human rights or other social issues. Apart from the company's employees, which CAMA prescribes as one of the matters that a director shall have regard to while acting in the interest of the company,[100] there is no other reference in the entire Act to the interest of other stakeholders.

In the Nigerian Code, the corporate relationship with other stakeholders and environmental matters is provided for in Rule 28 and it is captioned "sustainability issues".

[96] Section 7 (d), South African CA 2008.
[97] Nigeria (Code of Corporate Governance for Listed Companies 2011)
[98] Jedrzej George Frynas, 'The Oil Industry in Nigeria: Conflict between Oil Companies and Local People' in Jedrzej George Frynas and Scott Pegg (eds), *Transnational Corporations and Human Rights* (New York: Palmgrave Macmillan 2003) 99; David Vogel, *The Market for Virtue: The Potential and Limits of Corporate Social Responsibility* (Washington D.C., Brookings Institute Press 2006) 140-4.
[99] Companies and Allied Matters Act, Cap C20 LFN, 2004.
[100] CAMA, s 279 (4).

Companies are required in the Code to 'pay adequate attention to the interest of its stakeholders such as its employees, host community, the consumers and the general public'.[101] The Code did not provide for exactly how the payment of adequate attention would be achieved but does provide that '[t]he primary responsibility for ensuring good corporate governance in companies lies with the board'[102] and that 'the board should ensure that the company carries on its business in accordance with its articles … and in conformity with the laws of the country, observing the highest ethical standards and on an environmentally sustainable basis'.[103]

To ensure compliance with the Corporate Governance Code, the board is required to 'report annually on the nature and extent of the board's social, ethical, safety, health and environmental policies and practices'.[104] One of the levels of reporting according to the code is:

> application, in the company's operations, of options with the most benefit or least damage to the environment, particularly for companies operating in the disadvantaged regions or regions with delicate ecology in order to minimize the environmental impact of the company's operations.[105]

It is instructive that the Code requires the board to pay due regard to the environment while conducting the company's business as well as to report the application in their operations, of options with regard to the most benefit or least damage to the environment, especially for the companies operating in disadvantaged regions, in order to minimize environmental impact of their activities. For a country where environmental degradation is a major problem, these provisions indicate a serious attempt to address it. However, the problem is with how the provisions will be enforced to achieve the intended result.

[101] Nigeria Code 2011, 28.1.
[102] *Ibid*, 2.3.
[103] *Ibid*.
[104] *Ibid.*, 28.3.
[105] Nigerian Code 2011, 28.3 (d).

The Code, as with other codes that follow the UK model, adopts the standards-based approach that emphasises voluntary compliance as the 'responsibility for ensuring compliance with or observance of the principles and provisions … is primarily with the Board of Directors'.[106] In addition, '[t]he question whether a company … required to comply with or to observe … the provisions of this code, has complied with … the Code shall, in the first instance, be determined by the Board and its shareholders and thereafter by SEC'.[107] However, even where the Securities and Exchange Commission (SEC) determines that a company is required to comply but has not complied, it only has to notify the 'company concerned specifying the areas of non-compliance … and the specific action … needed to remedy the non-compliance'.[108] There are no provisions for sanctions in case of non-compliance. Thus, even the failure to remedy non-compliance by a particular company after SEC intervention does not carry any consequence.

Although the Nigerian Corporate Governance Code provides for relationships with stakeholders in Part D, stakeholders have no part in ensuring adherence to the Code. It is only the shareholders of public companies (since the Code applies only to public companies) that have authority to play a role under it. Their role, however, is limited to demanding compliance where there is non-compliance and seeking explanation whenever they observe non-compliance with the Code.[109]

In the absence of external monitoring and enforcement, it remains to be seen how Nigerian corporations would comply with the provisions of the Corporate Governance Code. Apart from the problem of monitoring and enforcement, the fact that the Code applies only to public companies is another major shortcoming that will significantly undermine its usefulness. Since many private companies in Nigeria also operate in regions with delicate ecology, observing the Code provisions by listed companies will mean regulating themselves into a competitive disadvantage. This may affect the willingness of

[106] *Ibid*., 1.3 (b)
[107] *Ibid*., (c)
[108] *Ibid*., (d)
[109] Nigerian Code 2011, 27.

public companies to comply with the codes, especially because there is no sanction for non-compliance.

5.2.2 The Implication of Relying on Voluntary Compliance and Standards Based Corporate Governance Codes for Developing Markets

It is clear from the discussion above that issues regarding social and environmental reporting in the UK and the jurisdictions that have borrowed from the UK regime depends on the discretion of corporate managers and their shareholders. In fact, many of the regimes that embrace the "comply or explain" concept depend on the markets generally or the company's shareholders to ensure compliance.[110] It is true that corporate bad behaviour could negatively affect the market price of a company's shares as the example of BP, discussed below, will show. However, it is how the shareholders, who are motivated by profit, would ensure that their company complies with code provisions on social and environmental impact of corporate activity that is the major concern about standard based corporate governance regimes, especially for developing markets.

The concern about reliance on shareholder stewardship to ensure compliance with corporate governance codes with regard to social and environmental issues in developing markets is based on two main factors. First is the absence of a sufficient basis for shareholder participation in the implementation and enforcement of the codes. Unlike in the UK where institutional investors play a critical role in UK listed companies, most developing markets do not have a developed community of institutional investors. Secondly, the regimes for regulating corporate environmental and social impact in developing markets are weak and undeveloped. This is in addition to the lack of enforcement potential, a critical factor that has motivated compliance with self-regulating corporate governance rules in developed markets.

[110] Keay, (n 68) 280.

Institutional investors in the UK account for about 70% of listed UK equities, most of which are held by insurance companies and pension funds.[111] It is therefore, not surprising that the three committees that provided the general foundation for the UK Corporate Governance Code[112] emphasize their role. According to Christine Mallin, the institutional investors' potential to exert significant influence on companies has a clear implication for corporate governance, especially in terms of the standards of corporate governance and issues concerned with enforcement.[113]

In view of the limited space available, it is not possible to discuss in detail here how the UK codes and other regulations influence the role of institutional investors, especially with regard to social and environmental monitoring and enforcement. However, one piece of legislation that has significantly influenced the role of institutional investors in the monitoring and enforcement of social and environmental reporting is the amendment to the Occupational Pension Schemes (Investment) Regulations (2005),[114] and which requires UK pension and fund trustees to include in their annual statement of investment principles ("S.I.P.") comments on the following:

> The extent (if at all) to which social, environmental or ethical considerations are taken into account in the selection, retention and realisation of investments;[115] [and]
>
> Their policy (if any) directing the exercise of rights (including voting rights) attached to investments.[116]

Two critical factors that motivate corporations in developed markets to comply with corporate governance codes are the threat of potentially onerous legislation[117] and, the

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[111] Williams and Conley (n 46) 537, citing Insurance Information Institute, Savings, Investment, and Debt Ownership: Ownership of Equities and Corporate Municipal Bonds.
[112] The Cadbury Committee (1992), the Greenbury Committee (1995) and the Hampel Committee (1998).
[113] Mallin, (n 35) 108.
[114] Occupational Pension Schemes (Investment) Regulations (2005) S1 2005/3378, <http://www.legislation.gov.uk/uksi/2005/3378/pdfs/uksi_20053378_300611_en.pdf>. It is important to not that the statement of investment principles is mandated by s. 35, Pensions Act 1995 (C. 26).
[115] *Ibid.*, s. 2 (3) (b).
[116] *Ibid*., s. (c).
[117] According to Cynthia Williams and John Conley, the threat of potentially onerous legislation has been an important motivator for some institutional investors to become more actively involved with portfolio companies to ensure complaince with corporate governance codes. Williams and Conley, (n 46) 540-1.

potential for enforcement. For example, the threat of legislation arising as a direct implication of the government's endorsement[118] of the 2001 Myners' Reviews recommendation,[119] has been identified as the major factor that motivates corporate compliance with social and environmental requirements in the UK. This is in addition to emphasis on the "statement of investment principle" (SIP), which has provided the activists within the institutions with the additional advantage to promote greater sensitivity to social and environmental issues.[120]

The fact that institutional investors are required under the Occupational Pension Schemes (Investment) Regulations to report how consideration for social and environmental issues by companies influence their decision to invest or retain their investment in a company provides an added impetus for them to monitor how their investee companies actually pay regard to social and environmental concerns. This is because the cost of bad behaviour could be high, and the cost of abusing the interests of other stakeholders could be higher than the benefits. Thus, the activism of institutional investors in ensuring compliance with corporate governance regulations, especially with regards to those provisions dealing with social and environmental issues is a matter of enlightened self-interest.

Investors have an interest in reducing negative externalities and the encouragement of positive ones[121] to demonstrate compliance with the Occupational Pension Regulation on account of the sanctions that might follow, because there are other bodies of law in developed markets that could be relied upon to punish erring corporations and efficient regulatory and legal enforcement institutions available to apply the laws. The Gulf of Mexico oil spill and its aftermaths, which has cost BP a total of $53.8bn,[122] is an

[118] *Ibid.*, 540.
[119] The Myners Report on institutional investment , issued in 2001 by HM Treasury, which requires institutional investors to be more proactive. Cynthia Williams and John Conley states, 'in 2001 the UK goverrnment announced ... that it would endorse Myners' voluntary approach of defining best practices and asking funds to "comply or explain" but that in two years it would conduct a qualitative and quantitative review to determine if industry practices had changed to follow the principles'. *Ibid*.
[120] *Ibid*., 541.
[121] Talbot, (n 42) 178.
[122] $18.7bn was the final payout closure for the Gulf of Mexico oil spill of a total of $53.8bn, including $5.5bn civil penalty under the Clean Water Act and $7.1bn payment to the U.S and the five Gulf States for 'natural resource damage'. SeeTom Bawden, 'Gulf of Mexico Oil Spill: BP Finally gets Disaster Closure with $18.7bn

example of what could result from the disregard of the interests of other constituencies in developed markets.[123] The high cost imposed on BP as a result of this oil spill is because the disaster occurred in the US, which is generally regarded as having a great enforcement capability. It is the ability to enforce existing legislation that exacerbated the cost to BP as $5.5bn was actually paid as a penalty under the Clean Water Act 1972.[124]

Another case that underscores the enforcement and regulatory capacity of the US is the exposure by its regulatory agency (Environmental Protection Agency) that German car manufacturer Volkswagen installed a "deceit device" in its cars to cheat emissions tests. The impact of the exposure on the share price of Volkswagen has been profound and there is speculation that the company is likely to have to pay as much as $18bn in fines and damages.[125]

In the case of developing markets, only the South African corporate governance code (King Code IV) provides for a role for institutional investor organisation.[126] Unlike in the UK where the statement of investment principles is mandated by a regulatory instrument,[127] the King Code provides for the governing body of an institutional investor organisation to ensure that responsible investment is practiced by the organisation.[128] Responsible investment is a mere principle of investment guide.[129] Thus, the absence of a developed community of institutional investors with a clear mandate under corporate governance regimes to rein in corporate managers is a major hindrance to shareholder activism in corporate governance matters.

Payout' Independent, Friday 3, July 2015. at <http://www.independent.co.uk/news/business/news/gulf-of-mexico-oil-spill-bp-finally-gets-disaster-closure-with-187bn-payout-10362877.html>. accessed 20 April 2017.

[123] It is the disregard of the interest of other stakeholder interest that was responsible for the spill in the Gulf of Mexico in 2010. The safety of the workers was not regarded as paramount in drilling operations, critically important costs were cut; ... no proper account had been taken of the environmental impact of the drilling activity with supposed "safety manual" and contigency plans cobbled together, without care or attention from other drilling locations. See Bloomfield (n 19) 72. These are the same conditions in most developing markets, especially with regard to the impact of oil exploration activities in the Niger Delta, which the Amnesty International Global Issues Director has described as horrific. Chapter 1 (n 77).

[124] See Bawden, (n 112).

[125] Russel Hotten, 'Volkswagen: The Scandal explained' BBC News, 10 December 2015 at <http://www.bbc.co.uk/news/business-34324771>. Accessed 20 April 2017.

[126] King Code IV, 73.

[127] Occupational Pension Schemes (Investment) Regulations (n 114).

[128] King Code IV, 73

[129] https://wwwunpri.org/about/what-is-responsible-investment> accessed 12 April 2018.

Even though the corporate governance codes of India, South Africa and Nigeria also provides for their corporations to consider ethical, social and environmental issues[130] there is an insufficient basis for the involvement of shareholders in their implementation. The community of institutional investors in the UK is instrumental to the efficient enforcement of social and environmental provisions of CA 2006[131] and the UK Corporate Governance Code.[132] This is unlike in India, South Africa and Nigeria and most of the developing market jurisdictions, where the legal regimes are underdeveloped, and legal enforcement has been classified as corrupt and inefficient.

Furthermore, unlike in the UK where issues of corporate governance and investor roles are prescribed in a plethora of legal and regulatory regimes, the Nigerian CAMA did not provide for corporate social and environmental regulation or any role for shareholders with regard to their regulation. In fact, under the CAMA annual accounts are exclusively concerned with financial statements.[133] According to s 342 CAMA, every company in Nigeria is required to prepare in respect, of each year a report by directors. Apart from disclosures on issues that are of importance to shareholders, such as statements on the company's asset values[134] and directors' interests,[135] directors' reports are also expected to include statements about employment of disabled people[136] but there is no provision for any statement on environmental and social issues.

Unlike CAMA, which did not provide for corporate social and environmental regulation or any role for shareholders in that regard, the Nigerian Corporate Governance Code provides that 'shareholders, especially institutional shareholders, are expected to familiarise themselves with the letter and spirit of the code and encourage or whenever necessary, demand compliance by their companies'.[137] There are two main problems with

[130] Indian Governance Guidelines; chapter 1, King Code; para 28, Nigerian Governance Code.
[131] Section 172, UK CA
[132] The UK Governance Code, 31, which requires a detailed statement of company's compliance in annual reports and accounts.
[133] S 334 CAMA.
[134] Ibid, Part II, Fifth Schedule, 1.
[135] Fifth Schedule, Part II, 2, CAMA.
[136] Ibid, Part III, 7-10.
[137] Nigerian Code 2011, 1.3 (b)

this so-called role for institutional investors in the Nigerian code. The first is that institutional investors are an emerging group in Nigeria, consisting mainly of pension funds. The pension funds are regulated by the Pension Funds Act,[138] and there are no provisions for social and environmental regulation in the Act. The Act is mainly concerned about the safety of the funds and the maintenance of fair returns on the amount invested.[139] Apart from the fact that the Act did not provide for fund managers to consider social and environmental matters specifically, it also did not provide for any discretion which could be exploited by managers to ensure such matters are considered by the investee companies. The implication is that any exercise of discretion by pension managers in that respect will be a breach of the Act.

Secondly, there is no requirement under the Code for institutional investors to particularly encourage or demand their companies to comply with social and environmental regulations prescribed in any Act or regulation. Without any such regulatory requirement, it remains to be seen how they will be motivated to bring the necessary pressure to ensure that their companies comply with social and environmental regulations. Therefore, adopting the UK's "governance oriented" model which relies on institutional shareholders to exert control over managers[140] may not be efficient as a mechanism for making companies comply with human rights and environmental regulations in developing markets.

Corporate governance structure is the platform for participation in corporate decision-making. However, a corporate governance system that is based on the UK model, which focuses on members (shareholders of the corporation) and relies on their stewardship in order to force corporations to comply with human rights and environmental standards is unlikely to reasonably address the interest of those stakeholders affected by corporate abuse of human rights and the environment. This is because, apart from the

[138] Pension Reform Act 2014.
[139] *Ibid*., s 85.
[140] John Armour and Jeffrey N. Gordon, 'The Berle-Means Corporation in the 21st Century' (2008) Working Paper, <http://www.law.yale.edu/documents/pdf/Intellectual_Life/Armour_BerleMeansCorp091021.pdf>. accessed 20 April 2017.

fact that there is no legal basis to seriously consider social and environmental matters in corporate governance regimes of most developing markets, they generally lack the legal enforcement capacity needed to incentivize companies' shareholders to diligently rein in their corporations to ensure that they comply with the standards laid down in the statutes and other regulatory instruments. This is the basis for the suggestion to adopt a new approach to corporate governance in developing markets, one based on democracy.[141] This will require as Stephen Bottomley argues, a reconceptualization of the corporate legal structure in political terms. [142]

5.2.3 The Need to Reconceptualise Corporate Legal Architecture

There is generally no doubt that corporations are significant economic actors, and as such the relevance of an economic analysis to the study of corporations' and corporate law is readily accepted.[143] However, although the political influence of the corporation in public life is widely appreciated, insufficient attention has been paid to its political theory and analysis.[144] But in view of the inadequacy of existing regulatory regimes for controlling and remedying the effects of corporate activity on the environment and the local communities in developing markets, as identified by current scholarship,[145] a different vision of the company may be necessary. As Mary Stokes has argued,

> [a] different vision of company might draw upon the democratic ideal which inspires the relation of the citizen to the state. The democratic ideal asserts that those who are substantially affected by the decisions

[141] David Millon, 'New Directions in Corporate Law: Communitarians, Contractarians, and the Crisis in Corporate Law (1993) 50 Wash. & Lee L. Rev. 1373, 1388.
[142] Stephen Bottomley, 'From Contractualism to Constitutionalism: A Framework for Corporate Governance' (1997) 19 Sydney L. Rev. 277, 278.
[143] *Ibid*.
[144] Earl Latham, 'The Body Politic of the Corporation' in Edward S. Mason (ed), *The Corporation in Modern Society* (Cambridge-Massachusetts: Harvard University Press 1966) 218.
[145] Deva Surya claimed in his book Regulating Corporate Human Rights Violations, 'that existing regulatory initiatives that seek to make companies (MNC's in particular) accountable for their human rights abuses are seriously inadequate'. Deva, (n 4) 12.

made by political and social institutions in our society should be involved in the making of those decisions.[146]

The view that governance of a powerful political, economic and social institution such as the corporation should not be limited to an economic model or framework is not new. In fact, David Millon argues that the market is not a sufficient solution to all social problems[147] in contrast to the "contractarian"[148] view.[149] Stephen Bottomley for his part argues that because corporations can be categorised as political as much as economic institutions, they should be subject to political as much as economic analysis.[150] Therefore, it is argued that a vibrant alternative approach, which will ensure that power within the corporation is exercised in a way that ensures both effective performance and appropriate social accountability and responsibility, has become necessary.[151] This will require a shift from the shareholder primacy model, rooted in a 19th century legal concept of the corporation, which is totally inadequate in the emerging global business environment,[152] to a concept that encourages a wider social responsibility for the corporation and the participation in decision-making of those affected by its decisions and activities.

It is important to note that some authors have criticized attempts to conceptualise corporations' responsibility to a wider social concern as a recipe for confusion.[153] Janet Dine has identified three problems associated with wider social responsibility for the corporation as: the diffusion of goals, the absence of a yardstick to measure performance

[146] Mary Stoke, 'Company Law and Legal Theory' in W. Twining (ed), *Legal Theory and Common Law* (Oxford: B.B. Blackwell 1986) 180.
[147] Millon, (n 141) 1378.
[148] The "contractarians" see the corporation as nothing but a nexus of contract, a kind of hub for contractual (or contract-like) relationships that exists between corporate participants such as employees, suppliers, creditors, customers, and so on. And since market efficiency – that which increased the wealth of society as a whole – was achieved when individuals volutarily entered into contracts in pursuit of their self-interest, the markets should be left to determine the relations involved in a corporation, with a limited role for law. Talbot (n 42) 117-130.
[149] There are in fact many scholars who look to legal rules to structure relations among corporation's diverse constituent groups and, believing that corporate law must confront the harmful effects on nonshareholder constituencies of managerial pursuit of sharehlder wealth maximization. This group, according to David Millon has be characterised as communitarians. See Millon (n 131) 1378.
[150] Bottomley (n 142) 292.
[151] Tricker, (n 14) 25.
[152] *Ibid*.
[153] Adolf A. Berle, 'For Whom Corporate Managers are Trustees: A Note' (1932) Harv. L. Rev. 1365, 1367-8.

and the weight to be given to different interest groups.[154] However, Benedict Sheehy has forcefully challenged this view as he argues that 'contrary to the claim that stakeholder corporations cannot function because of diverse objectives, in many places the law has successfully and without undue diminution of wealth by shareholders or society, integrated stakeholder theory'.[155] According to the author,

> [w]hether one chooses to look at European corporations with their two tiered boards, or employee, creditor, and environmental liabilities placed on directors in Anglo-modelled corporations, one finds that corporations have successfully incorporated the conflicting concerns of their various constituent stakeholders in the supposedly exclusive shareholder model.[156]

The recognition and the general attention paid to other stakeholders in corporate law statutes and regulations both nationally and internationally points to the growing consensus on the new understanding of the corporation as affecting a wide range of people beyond just shareholders. As du Plessis *et al* pointed out, even though in the strict legal sense corporations remain directly accountable to shareholders, there is no doubt that recognition of stakeholder concern is not only good business, but politically expedient and morally and ethically just.[157]

Therefore, if this 'internalisation of the new understanding of companies as affecting a wide range of people is to be completed, enforcement mechanisms internal to the company are necessary'.[158] As such, the risk run by other constituents such as employees and other negative externalities that affect other "corporate outsiders" such as the environment and the local communities should no longer 'be seen as imposing external

[154] Janet Dine, Companies, *International Trade and Human Rights* (Cambridge: Cambridge University Press 2005) 223.
[155] Benedict Sheehy, 'Scrooge – The Reluctant Stakeholder: Theoretical Problems in the Shareholder-Stakeholder Debate' (2005-2006) 14 U. Miami Bus. L. Rev. 193, 223.
[156] *Ibid.*
[157] du Plessis *et a*l, (n 50) 10
[158] Dine (n 154) 277.

cost –"red tape" for the companies[159] – their risk should be managed by internal systems with an integral enforcement mechanism'.[160] This can be achieved by ensuring that the corporation is well-governed by permitting it to pursue commercial ends 'within more broadly drafted corporate statutes mandating a broader range of interests and integrating into the governance structure people whose interests more broadly represent the community of stakeholders affected by the corporation'.[161]

In view of the above, it has become imperative for Nigeria and other developing markets in a similar situation to Nigeria to exploit the participatory principle identified in chapter 4 to develop a new corporate legal regime that incorporate representatives of potential MNC human rights victims in their corporate governance structure. This is because such potential victims are those directly affected by the abuses and as such they are the group that have a greater incentive to promote human rights and environmentally friendly decision-making. It is such decisions that have the greater potential to prevent human rights and environmental abuses in developing markets.

Conclusion

The need to look after the interest of the local communities that host the operating facilities of major MNCs in developing markets cannot be overemphasised, especially in view of the growing profound effect of corporate activities on human rights and the environment in those countries. The fact that several internationally (binding and soft law) instruments emphasise public participation as a strategy for preventing human rights and environmental harm underscores the importance of the concept. However, the situation of impunity for corporate human rights and environmental abuses in developing

[159] Social costs, costs inflicted on society are not part of the costs allowed in the corporate accounting calculus and are thus treated as external to the corporation. See Ralph Estees, *Tyranny of the Bottom Line: Why Corporations Make Good People Do Bad Things* (San Francisco: Berrett-Koehler Publishing 1996) 171. Ronald Green argues that corporate law permits and promotes the on-going externalization of business cost. Ronald Green, 'Shareholders as Stakeholders: Changing Metaphors of Corporate Governance' (1993) Wash and Lee L. Rev. 1409,
[160] Dine (n 154) 277.
[161] Sheehy (n 155) 240.

markets is a clear testimony that the primary aim for the prevention concept has been largely unrealised.

There has been a preponderance of academic opinion on the best way to solve issues of corporate abuses of human rights and the environment. However, as the discussion in this chapter has shown, part of the problem to finding a solution has to do with the prevailing view that the corporation's goal is to maximize shareholder wealth, which is central to the efficiency of business. This is why the central argument in this project is that a shift from this view is imperative for developing markets because they lack the corporate support infrastructure to adequately rein in MNCs' that operate in their jurisdiction.

Thus, in the absence of efficient legal infrastructure and the lack of enforcement capacity necessary for the efficient functioning of the UK corporate governance model, this thesis proposes public participation in corporate decision-making to bridge the gap created by an inefficient legal and enforcement infrastructure. In this regard, this chapter has identified corporate governance as the fundamental basis for implementing the public participation in human rights and environmental decision-making, which is gaining currency in the human rights and environmental discourse as well as in the international regulatory discourse. Therefore, the next chapter will discuss the basis for the suggested incorporation of other stakeholders into the corporate governance structure.

6. Regulating Corporate Responsibility for Human Rights: Issues in Local Community Participation in Corporate Governance

6.1 Introduction

The view that corporations have social responsibility has gained widespread international acceptance. The development of various non-binding principles and guidelines that specify the rules on the responsibility of corporations towards society, such as the Organisation for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises (MNEs)[1] and the UN Guiding Principles (UNGPs),[2] discussed in chapter 3 attest to this. However, despite the seeming consensus on corporate responsibility of business the question remains as to how to promote socially responsible MNC conduct, especially in developing markets, so as to prevent human rights and environmental harm by MNC operations.

Discussions in Chapter 3 show a general resistance by MNCs to a binding code of conduct. As a result, the emerging regimes that seek to address corporate responsibility for human rights are often non-binding and thus unenforceable, at least formally, by reference to regular enforcement institutions, such as the courts. However, this does not imply a license for MNCs to abuse human rights and degrade the environment with impunity because the regimes provide some important safeguards. A notable example is that the involvement of potentially affected groups and other stakeholders has become a common feature in corporate codes of conduct as a means of holding MNCs accountable to human rights standards.

There are two important ways that stakeholder participation could influence corporate conduct. First, stakeholders could have direct participation in the decision-

[1] OECD Guidelines for Multinational Enterprises: Recommendations for Responsible Business Conduct in a Global Context, 25 May 2011 <http://www.oecd.org/dataoecd/43/29/48004323.pdf> (hereinafter OECD Guidelines 2011) accessed 4 January 2016.
[2] 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', A/HRC/17/31 (21 March 2011) (SRSG 'Guiding Principles').

making process through representation with a view to ensuring the avoidance of social harm. Secondly, their participation could aim to formulate and channel reasonable pressure for appropriate corporate conduct. Participation in the former could involve altering the composition of corporate boards to include representatives of non-shareholder groups, such as local communities. On the other hand, participation in the latter envisages increasing external pressure from stakeholders to make corporations comply with laws and standards. The approach to public participation in a corporation's affairs envisaged in this thesis is the participation by direct representation of potentially affected groups. The process would provide the opportunity for them to take part in decision-making over matters that affect them.

In addition to soft law instruments discussed in Chapter 3, Chapter 4 also identified some major international environmental instruments, including binding regimes that recognize the importance of the participation by communities or groups that are susceptible to harm from environmentally damaging activities, as a strategy for protecting the environment of local communities.[3] It is important to note that most human rights instruments also provide for participation, but this is with regard to civic participation in public affairs.[4] However, other existing human rights such as the right to life[5] and the right to a satisfactory environment[6] have been mobilised and reinterpreted as guaranteeing to an extent the public right to information and participation in decision-making processes.[7] Thus, it is argued that these international instruments and regulatory regimes generally provide the basis for States to develop a national legal framework for the participation of potentially affected groups in corporate affairs as envisaged in this thesis.

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[3] See chapter IV, s 4.2 and particularly the Ramsar Convention discussed in s 4.3.1 (n 68-70).
[4] UDHR Arts. 19, 21; ICCPR Arts. 19, 25 and 1969 Inter-American Convention on Human Rights Art 23.
[5] *Oneryildiz* v *Turkey* (2004) ECHR 657, paras 62 and 84-8.
[6] *Ogoniland case – Social and Economic Rights Action Centre (SERAC) and Centre for Economic and Social Rights (CESR)* v *Nigeria*, Communication No. 155/96 (Unreported, African Commission on Human and peoples' Rights, 27 October 2001) para 41.
[7] Uzuazo Etemire, *Law and Practice on Public Participation in Environmental Matters: The Nigerian Example in Transnational Comparative Perspective* (Oxon: Routledge 2016) 6.

The idea of a regulated corporate responsibility for human rights and the environment or what is commonly referred to as Corporate Social Responsibility (CSR) is not new. Tom Campbell argues that "… (CSR) thinking on corporate legal liability, … can be taken to be established matters of fact in contemporary society'.[8] This is not far from the prevailing position with regard to CSR and its regulation. Even the UNGPs and the appended commentary that seek to implement the "Protect, Respect and Remedy" Framework requires States to enact laws that 'require, promote or guide companies to respect their human rights responsibilities'.[9]

Thus, there is a duty upon states, especially those developing markets where human and environmental abuses are most prevalent, to take steps to address the abuses through legislation, including the amendment of their corporate laws. This is important to broaden their scope so as to accommodate the interests of other stakeholders and thereby, fix the problem of linking corporate irresponsibility to the structure of corporate law.[10] This is because, '[i]t is within the firm that the internal economic calculations and decisions are made – which do not include the external social costs or benefits that these decisions may impose outside the firm'.[11]

In view of the above, this chapter focuses on how stakeholder involvement in matters of human rights and the environment can become a part of the corporate legal architecture. The fact that the human rights and environmental abuses addressed in this thesis are the by-products of decisions made inside the corporation makes the argument for the involvement of stakeholder groups, especially the most vulnerable groups such as the local communities, in the corporate governance structure more compelling. As a result, this chapter will explore the possible ways to incorporate local communities into corporate

[8] Tom Campbell, 'The Normative Grounding of Corporate Social Responsibility: A Human Rights Approach' in Doreen McBarnet, Aurora Voiculescu and Tom Campbell (eds), The New Corporate Accountability: Corporate Social Responsibility and the Law (Cambridge: Cambridge University Press 2009) 529.
[9] Human Rights Council, 'New Guiding Principles on Business and Human Rights endorsed by the UN Human Rights Council' (16 June 2011), Principle 3, <http://www.ohchr.org.en/News-Events/Pages/DisplayNews.aspx?NewsID=11164&LangID=E>.
[10] Robert C. Hinkley, 'Developing Corporate Conscience' in Stuart Rees and Shelly Wright (eds), Human Rights and Corporate Responsibility – A Dialogue (Annandale: Pluto Press 2000) 287, 288-90.
[11] Eric W. Orts, *Business Persons: A Legal Theory of the Firm* (Oxford: Oxford University Press 2015) 22.

governance structures as a strategy for promoting human rights and environmentally-friendly corporate decision-making.

As a starting point, the next section reviews the relationship between the corporation and three key stakeholder groups – customers, employees and local communities. The review is aimed at identifying the protection available to each of the identified groups in the current corporate governance regime so as to demonstrate the peculiarity of the relationship between corporations and local communities that warrants their representation at board level. This will be followed by the interrogation of the socio-political and economic dynamics in the Nigerian system to underscore the necessity for local communities participation in the Nigerian context. To buttress the importance of the proposed framework, we will critically analyse some of the major efforts by the Nigerian government to address the interest of local communities. This analysis aims to reveal the shortcomings in past and present efforts as well as to provide the basis for considering other alternatives, such as the participatory approach proposed in this thesis.

6.2 Participation of Stakeholder Groups in Corporate Governance: The Case for the Representation of Local Communities on Corporate Boards

'The pervasive presence of large companies, the high incidence of corporate wrongdoing, and the scale of the possible consequence, raise important questions about how the law should be crafted to cope with the harm creating potential of business'.[12] This is a truism that reflects both the impacts of corporate activity in developing markets and the corresponding search for a regulatory regime to make companies accountable for human rights and environmental abuses in an effective manner in those markets.

Chapter 2 observed that Nigeria, the central focus of this thesis, has a plethora of laws and regulations that deal specifically with issues of human rights and the environment.

[12] John E. Parkinson, *Corporate Power and Responsibility: Issues in the Theory of Company Law* (Oxford: Clarendon Press 1993) 348.

For all that, Nigeria is still recording high incidents of serious abuses of human rights and egregious environmental degradations. This raises fundamental questions about the real problems that might be responsible for the growing corporate impunity for human rights and environmental abuses in the country.

Some commentators have attributed this situation of impunity to the weak legal environment, especially the weak, corrupt and inefficient legal enforcement regimes in developing markets. They point to the preference of human rights victims for international litigation, especially in the US under the Alien Tort Claims Act (ATCA)[13] and more recently in the UK,[14] as a consequence of the weak legal environment in developing markets.[15]

It is in view of the above that the participation of potentially affected groups in the affairs of the corporations operating in developing markets is proposed as a strategy for promoting responsible corporate decision-making and minimizing the harm-creating potential of MNCs. In this regard, we have identified the reconceptualization of corporate law to embrace other stakeholders, and in particular to incorporate the representatives of local communities in the corporate governance structure as the appropriate basis for addressing human rights and environmental issues in developing markets. Since corporate governance is the focus of the proposed reform, it is important to critically analyse the basis for the current corporate governance regimes' focus on shareholder value in order truly to understand how the underlying principles could usefully support the proposal for interest group participation in corporate affairs.

[13] *Esther Kiobel* v *Royal Dutch Petroleum Co.*, (2013) 133 S. Ct. 1659; *Doe* v *Unocal* (2002) US App LEXIX 19263, *35-*36 (9th Cir. 2002) *Wiwa* v *Royal Dutch Petroleum Co. and Shell Transport and Trading Co.*, (2000) 226 F. 3d 88.

[14] *His Royal Highness Emere Godwin Ebebe Okpabi and Others* v *Royal Dutch Shell Plc and Shell Petroleum Development Company of Nigeria Limited* [2017] EWHC 89 (TCC); *Dominic Liswaniso Lungowe and Others* v *Vedanta Resources Plc. and Konkola Mines Plc.* [2017] EWCA Civ 1528; *Bodo Community* v *Shell Petroleum Development Company (Nigeria) Ltd*, Case No. HQ11X01280.

[15] Richard Meeran, 'Access to Remedy: The United Kingdom Experience of MNC Tort Litigation for Human Rights Violations' in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect* (Cambridge: Cambridge University Press 2015) 382-3.

As matter of law, corporations must have a corporate board.[16] Apart from the German system with its two-tier board structure that permits employees representatives to sit on corporate boards,[17] corporate law in the UK and those countries (Nigeria and India amongst others)[18] that practice the UK's "shareholder supremacy" model focuses exclusively on the company and its shareholders.[19] In fact, under this model corporate governance is considered effective if it provides mechanisms for regulating the exercise of directors' powers in order to restrain them from abusing their powers, just to ensure that they focus on their primary duty 'to promote the success of the company for the benefit of its members as a whole …'.[20]

To ensure directors' fealty, only the shareholder group is granted powers under corporate law, at least in the "shareholder supremacy" model jurisdictions, to control the board of directors or review its activities. For example, the UK Companies Act 2006 (UK CA 2006) grants voting rights to shareholders,[21] including the right to vote on the appointment[22] and removal[23] of directors. In addition, it provides certain safeguards and control mechanisms for shareholders to rein in directors to ensure adequate protection for their class.[24] Under the UK CA 2006, s 994 (1), a member has powers to petition for relief against unfairly prejudicial conduct of the company's affairs. To reinforce shareholder protection, Part 30 (ss 994-999) of the Act gives the courts a very wide-ranging

[16] See the UK Companies Act 2006, which prescribes 1 director in s. 154 (1), and a minimum of 2 directors for public companies in s 154 (2). In Nigeria, The Companies and Allied Matters Act (CAMA) 2004 prescribes a minimum of 2 directors, s. 246 (1).
[17] Johannes Schregle, 'Co-determination in the Federal Republic of Germany: A Comparative View' (1978) 117 Int'l Lab. Rev. 81, 83-9.
[18] Rafael La Porta et al, 'Law and Finance' (1998) J. of Pol. Economy vol. 106 No. 61, 1113, 1136.
[19] Christine A. Mallin, Corporate governance (5th edn, Oxford: Oxford University Press 2016) 178-84.
[20] Companies Act 2006, s 172, (hereinafter UK CA 2006).
[21] Ibid., UK CA, ss 281-7. See also, in Nigeria, Companies and Allied Matters Act Cap C20 LFN 2004, 224-32, (hereinafter CAMA).
[22] Ibid., UK CA, 160. CAMA, 247-9
[23] Ibid., UK CA, 168. CAMA 262.
[24] Protection for creditors also exists under the CA 2006 and IA 1986. See s 213 and 214 Insolvency Act 1986, with regard to director's responsibility to the company's creditors, in order to ensure that a company is not involved in fraudulent or wrongful trading. See also s 172 (3) requiring directors, in certain circumstances, to consider or act in the interest of creditors of the company; and *West Mercia Safetywear Ltd v Dodd* [1988] BCLC 250. However, it is important to note that the sections cited above are only applicable when a company has entered formal insolvency proceedings and therefore differ from provisions which give control rights to shareholders. They are remedial rather than directional.

jurisdiction to remedy conduct of a company's affairs 'that is unfairly prejudicial to the interest of its members generally or of some part of its members'.[25]

Notwithstanding all the rights and powers granted to members in corporate statutes, many commentators still doubt that shareholders could meaningfully exercise control over corporate boards in view of their dispersion, which has resulted in the effective separation of ownership from control in the firm, at least under the UK model.[26] However, MNCs and their subsidiaries present a different case. The power of the parent in the MNC to control the subsidiary/subsidiaries is not in any doubt. This is because of the way MNCs are usually structured, in a pyramidal hierarchical form of ownership, where a parent company wholly owns (or holds the majority of the shares in) the subsidiary/subsidiaries and may in fact dominate their management.[27]

The common explanation for the vesting of voting and sundry rights in shareholders is that shareholders are the only corporate constituency with a residual claim, an unfixed, *ex post* claim on corporate assets and earnings.[28] This is the basis for the economic efficiency view, the one offered by Frank Easterbrook and Daniel Fischel.[29] According to this view, because of shareholders' position as the last in the corporate revenue distribution chain, they 'have the strongest economic incentive to care about the residual claim, which means that they have the greatest incentive to elect directors committed to maximizing firm profitability'.[30] Many commentators, including this author, disagree with this view. In fact, some argue that it represents the 'superficial analogy of

[25] See Part 30 (ss 994-999) CA 2006; members are sometimes permitted by the court to bring "derivative claims" in the name of the company. A "derivative claim" by a member of a company may be brought under CA 2006, part 11' Chapter 1 (ss 260-264 CA 2006. Relief on the grounds of unfairly prejudicial and oppressive conducts, derivative action and the powers of the court are also contained in CAMA ss 310-333.
[26] Adolf A. Berle and Gardiner C. Means, *The Modern Corporation and Private Property* (10th Print, New Brunswick: Transaction Publishers 2009) 4-10; Stephen M. Bainbridge, *The New Corporate Governance in Theory and Practice* (New York: Oxford University Press 2008) 4.
[27] Irit Mevorach, *Insolvency within Multinational Enterprise Groups* (Oxford: Oxford University Press 2009) 16.
[28] Bainbridge, (n 26) 50.
[29] Frank H. Easterbrook and Daniel R. Fischel, *The Economic Structure of Corporate Law* (Cambridge-Massachusetts: Harvard University Press 1996) 66-72.
[30] Bainbridge (n 26) 50

the seventeenth century between contributors to a joint stock and members of a guild …',[31] which no longer reflects the current reality.[32]

The focus of corporate boards on the shareholder constituency is primarily aimed at protecting it from economic damage that may result from opportunistic behaviour by corporate managers. This is perfectly in order but, in modern times, production processes do not pose only economic dangers. Because of the increasing use of technologies and hazardous materials by modern corporations, especially those involved in mining and manufacturing, they also pose direct and serious threats to the health of communities surrounding their plants,[33] with far reaching consequences. Some of the most often cited examples of human rights and environmental disasters that have occurred as a result of the utter neglect of the interests of other stakeholders include the Bhopal disaster and similar disasters, and other egregious environmental violations identified in Chapter 5.[34]

As a result of the growing dangers that the modern corporation poses to its neighbours and other corporate constituents, some commentators have argued that shareholders no longer have a claim to priority consideration in corporate governance systems.[35] Current scholarship identifies other stakeholder groups affected by corporate activity to include, in no particular order, employees, suppliers, customers, creditors, local communities, governments and the environment.[36] However, the following analysis suggests that local communities that host the operating facilities of MNCs are the most vulnerable group with regard to the effects of corporate activity on their environment and human rights and thus the group with the greatest incentive to promote more human rights and environmentally friendly corporate decision-making.

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[31] Abram Chayes, 'The Modern Corporation and the Rule of Law' in Edward S. Mason (ed), *The Corporation in Modern Society* (Cambridge-Massachusetts: Harvard University Press 1966) 41.
[32] Philip I. Blumberg, *The Multinational Challenge to Corporate Law: The Search for a New Corporate Personality* (New York: Oxford University Press 1993) ix.
[33] Ralph Nader, Mark Green and Joel Seligman, *Taming the Giant Corporation* (New York: W. W. Norton & Company Inc. 1976) 130.
[34] Chapter V, s. 5.2, (n 31-3).
[35] Marvin A. Chirelstein, 'Corporate Law Reform' in James W. McKie (ed), *Social Responsibility and the Business Predicament* (Washington D.C.: The Brookings Institution 1974) 67.
[36] Mallin, (n 19) 74-7.

The emphasis on a special right for local communities in this thesis is based on two related factors that underpin the relationship between corporations and stakeholders. First, different relationships with the corporation have different characteristics. They may be voluntary or involuntary, and may be direct or indirect.[37] Relationships with shareholders and sundry stakeholders who do business with the corporation such as customers, creditors, suppliers and labour are mostly voluntary. The obligations that flow from such a relationship are direct and protected by statute or under contract.[38] Shareholders are protected under corporate law, insolvency law protects creditors, and customers and suppliers are protected under contract too.[39] Employment law, contracts and pension agreements protect labour. Relationships with local communities are the direct opposite. They are mostly involuntary and obligations that flow therefrom are indirect because they are not necessarily specified under statute or under contract.[40]

Second, relationships with the corporation could be determinable or permanent. Voluntary relationships with corporations are always determinable. For example, a shareholder who is dissatisfied with the activities of a corporate board may take the exit option by selling his shares, and a worker is free at any time to resign his appointment. However, the relationship between the corporation and local communities is mostly of a permanent and inescapable nature.[41]

In view of the above, it is important to further review the interaction between the business corporation and stakeholder groups. This is with a view to identifying the degree to which corporate managers give priority to the interest of different stakeholder groups, as a basis for determining their vulnerability to the social impacts of corporate activities, especially with respect to their impact on human rights and the environment. As a basis for this review, we adopt the definition of stakeholders offered by Edward Freeman as 'all

[37] Thomas Donaldson, *Corporations & Morality* (Englewood Cliff: Prentice-Hall Inc. 1982) 32.
[38] *Ibid*.
[39] It is acknowledged that other forms of regulations, such as consumer protection laws also protect customers.
[40] Donaldson, (n 37), 32.
[41] Andrew Crane, Dirk Matten and Laura J. Spence (eds), *Corporate Social Responsibility: Readings and Cases in a Global Context* (2nd edn, Routledge 2014) 292.

of those groups and individuals that can affect, or are affected by, the accomplishment of organizational purpose'.[42]

This review will draw on the stakeholder salience theory developed by R. K Mitchell *et al* in which they identify three attributes, one or more of which a group must possess in order to be recognised as a stakeholder group, as '(1) the stakeholder's *power* to influence the firm, (2) the *legitimacy* of the stakeholder's relationship with the firm, and (3) the *urgency* of the stakeholder's claim on the firm'.[43] This is important because it will reveal two important factors that will determine the vulnerability of the different stakeholder groups, i.e. whether the group affects or is affected by the accomplishment of organizational purpose. If a stakeholder can affect the corporation, i.e. if the corporation depends on the stakeholder, the stakeholder may be more likely to exert some influence on the corporation and is thus less vulnerable.

This review will be limited to three stakeholder groups – customers, employees and local communities. This is for two reasons. The first is because there is limited space available to discuss all the stakeholder groups identified above. Secondly, the selected stakeholders are arguably the only major groups for whom corporate law and related legislation, at least in the shareholder supremacy model jurisdictions, do not provide mechanisms through which they can hold corporate decision makers to account. Unlike the customers, employees and local communities, the Nigerian CAMA[44] and the India Companies Act 2013 (India CA)[45] empowers creditors to take action where a company is near insolvency or of doubtful solvency.[46] Such statutory guarantees provide the opportunity for the concerned stakeholder groups to address issues that affect their interests. This invariably makes them less vulnerable than the groups under review.

[42] R. Edward Freeman, *Strategic Management: A Stakeholder Approach* (Cambridge: Cambridge University Press 1984) 25.
[43] R. K. Mitchell, B. R. Agle and D. J. Wood, 'Towards a Theory of Stakeholder Identification and Salience: Defining the Principle of Who and What Really Counts' in Andrew Crane, Dirk Matten and Laura J. Spence (eds), *Corporate Social Responsibility: Readings and Cases in a Global Context* (2nd edn, Routledge 2014) 169.
[44] Se the winding up provisions, ss 457-85, CAMA.
[45] Sections 271-303, CA 2013.
[46] Winding up is regulated in the UK under the *Insolvency Act* 1986 Chapter 45.

6.2.1 Customers

Customers are very important stakeholders because they invest money in corporations through their purchases. Only a few corporations could actually exist without customers because they are the ones that buy the goods and use the services they provide.[47] The demands of customers have been described as the most important constraint over companies operating in a market economy.[48] This puts customers in a special position in their relationship with corporations. As a result, corporations have greater incentive to protect the interests of their customers. Customers also have a number of opportunities through which they can resist corporate misconduct in addition to the protection they enjoy under various consumer protection statutes.[49] This makes them less vulnerable and arguably less in need of further protection under corporate law.

Although we acknowledge the important position of customers as corporate stakeholders, because of their diversity (as they transcend national boundaries in this era of globalization) it is logical to argue that they do not fit the institutional form proposed in this thesis for recognising stakeholder interests for two reasons. First, there is no unanimity of interest for all the customers. In the words of Craig Smith, ethical purchasers have political, religious, spiritual, environmental, human rights, social and other motives for the choices they make.[50] The divergence of interests is at variance with the specific concern about corporate human rights abuses and environmental degradation, which the suggestion for stakeholder representation in this thesis seeks to address. Second, the institutional form proposed here is aimed at addressing corporate abuses of human rights and the environment in developing markets. Thus, in view of the global spread of

[47] Ralph Estees, *Tyranny of the Bottom Line: Why Corporations Make Good People Do Bad Things* (San Francisco: Berrett – Koehler Publishers 1996) 154.
[48] Eric Batstone, 'Industrial Democracy and Worker Representation at Board Level: A Review of the European Experience' in Eric Batstone and Paul Davies, *Industrial Democracy: European Experience* (London: Her Majesty's Stationery Office 1976) 19.
[49] The UK for example, has Consumer Rights Act 2015, 2015 C. 15 and Sales of Goods Act 1979, 1979 C. 54; see also Consumer Protection Council Act Cap C. 25, Laws of the Federation of Nigeria (LFN) 2004.
[50] N. Craig Smith, 'Consumers as Drivers of Corporate Social Responsibility' in Andrew Crane et al, *The Oxford Handbook of Corporate Social Responsibility* (Oxford: Oxford University Press 2009) 285.

corporate customers, it may be difficult (if not impossible) to identify the appropriate jurisdiction from which to elect their representatives.

6.2.2 Employees

Employees have a considerable stake in the corporation that makes their adequate protection imperative. For example, employee safety could be in danger where the corporation fails to exercise reasonable standards in its operations.[51] Employees' pension and share schemes could be jeopardised when corporate managers behave irresponsibly and opportunistically, and the corporation fails as a result. One notable egregious instance occurred with the collapse of Enron, where the company's employees, whose pension plans had been heavily invested in the firm as an incentive measure, resulted in all their investment being wiped out overnight.[52]

The examples above provide enough reasons to argue for employee involvement in the overall governance framework of the corporation. Some continental European jurisdictions have long recognised the important stake that employees' have in corporations and provides for their participation in corporate governance. For employee participation in corporate governance, the German "Co-determination" regime is usually the common reference point in Continental Europe. It is important to note that co-determination is not peculiar to Germany, as other Continental European jurisdictions such as France, Belgium, Norway, and Sweden also practice variants of it.[53] It is also important to note that the Japanese system permits the participation of other stakeholder groups including the employee group, under the *keiretsu* system.[54]

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[51] The application of inferior technology and safety standards could have disastrous consequences for the employees as it happened in the 1984 Bhopal gas leak. See Surya Deva, *Regulating Corporate Human Rights Violations: Humanizing Business* (Oxon: Routledge 2014) 152-174.
[52] John Armour and Joseph McCahery, 'Introduction' in John Armour and Joseph McCahery (eds), *After Enron: Improving Corporate Law and Modernising Securities Regulation in Europe and the US* (Portland: Hart Publishing 2006) 2.
[53] J. Bautz Bonanno, 'Employee Codetermination: Origins in Germany, Present Practice in Europe, and Applicability in the United States ((1976-1977) 14 Harv. J. on Legis 947, 966-78
[54] John Groenewegen, 'Institutions of Capitalism: American, European, and Japanese Systems Compared' (1997) vol. XXXI No. 2 J. of Economic Issues 333, 337.

It is argued that, unlike local communities, employees have many opportunities through which their interest in the corporations could be protected. First, employment is a contract between an individual employee and the corporation that normally comes with conditions. This provides the opportunity for individual employees to negotiate their conditions of work. It is acknowledged that the conditions for such negotiations may not always be perfect, especially where there are many potential employees chasing few vacancies. However, the fact that employment conditions are often provided for in labour legislation[55] makes the employment contract a veritable layer of protection for employees.

Second, there is unfettered opportunity for the employee in most cases to join a "trade union". This right is usually protected by statute,[56] and it is especially important for employees in jurisdictions where workers do not participate in management because membership of a trade union provides another layer of protection for the employee. Finally, employees have a right to leave employment even for no reason in search of better working conditions, provided due notice is given as required by law.[57]

It is important at this point to put the stakeholder representation proposed in this thesis in perspective because the corporate human rights abuses addressed constitute a derivative of environmental degradation. Therefore, although human rights abuses per se are a major concern for labour, environmental-degradation-induced human rights abuses of themselves are generally not a core concern of labour.

In addition, one of the main reasons for proposing interest group participation in corporate affairs is to bridge the information gap that currently exists between some corporate stakeholders and corporate managers. In this regard, the position of labour inside the firm affords them access to information and the opportunity to discuss how the firm is being run. They also have some opportunities to express their desires directly to

[55] See ss 13-19 Labour Act, Cap 198 Laws of the Federation of Nigeria (LFN) 1990 (hereinafter Nigerian Labour Act); see also the UK Employment Rights Act 1996 Cap 18 (hereinafter Employment Rights Act).
[56] Nigerian Labour Act, s 9 (6); see also s 23, Employment Protection (Consolidation) Act 1978, Cap 44 (hereinafter Employment Protection Act).
[57] Labour law Act, s 11; s 86 Employment Rights Act.

the board of directors and top management,[58] which provides a potential source of influence for them in many countries. This is the basis for their classification as insiders with some determinative power over the direction of the corporation.[59]

Thus, it is argued that the employee group is meaningfully protected under the current structure given the opportunities they have to always reach management. This is because it is not envisaged that interest-group representatives in the proposed regime may have the power to exercise absolute control but rather to create the opportunity for them to have access to information which is currently denied them so that they can potentially be more influential in their positions as informed board members.[60]

6.2.3 Local Communities

> [l]ocal communities have a number of interests in the companies that operate in their region. ... companies will be employing large numbers of local people and it will be in the interest of sustained employment levels that the companies in the locality operate in an efficient way. Should the company's fortunes start to decline, then unemployment might rise and could lead to part of the workforce moving away from the area to seek jobs elsewhere. ... However, *local communities will also be concerned that companies in the area act in an environmentally friendly way because the last thing they want is pollution in local rivers, in the soil, or in the atmosphere generally*.[61] It is therefore in the local community's interest that companies in their locality continue to thrive, but do so in a way that takes account of local and national concerns.[62]

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[58] Margaret M. Blair and Lynn Stout, 'A Team Production Theory of Corporate Law' (1999) 85 Va. L. Rev. 247, 314.
[59] Jennifer Hill, 'Public Beginnings and Private Ends – Should Corporate Law Privilege the Interests of Shareholders?' (1998) 9 Aust. J. Corp. L. 21, 37; citing Clyde W. Summers, 'Codetermination in the United States: A Protection of Problems and Potentials' (1982) 4 J. Corp. L. & SEC. REG. 155, 170.
[60] Chirelstein, (n 35) 68.
[61] Emphasis added.
[62] Mallin (n 19) 76.

From the above one can observe that the interests of local communities in corporations that operate in their community are multifarious. As a result, some commentators have identified local communities as peculiar stakeholders that are required to be taken into serious consideration in corporate decision-making.[63] One important thing that is worthy of note from Mallin's view above is, to borrow from R. K. Mitchell *et al*, that local communities have high legitimacy as corporate neighbours, i.e. they have a legitimate claim on the corporation.

However, the main problem is that they lack the power to influence the firm because they lack access to management, which is why their claims lack the urgency that will make corporate managers give them priority.[64] Therefore, unless in highly publicised cases of disaster, local communities do not generally get the attention of corporate managers.[65] In addition, unlike employees and customers, local communities are a group about whose fundamental interests corporations, especially MNCs, are least likely to have a clear understanding, because their connection to the corporation's activities is essentially circumstantial or accidental.

In view of the above, it is argued that local communities that play host to MNCs in developing markets are the most vulnerable group in the "corporate forest".[66] This is for two reasons. The first is their lack of power to influence management. Thus, even when they have urgent and legitimate claims, such as the case of oil spill in the Niger Delta, they can only rely on the advocacy of other powerful stakeholders, or on the benevolence and voluntarism of the firm's management, to satisfy their claims.[67]

Secondly, the fact that the relationship between local communities and business corporations is of a more permanent nature raises a fundamental concern. Once the relationship with a local community is established with the location of the firm in the

[63] Crane, Matten and Spence (n 41) 292.
[64] Mitchell, Agle and Wood, (n 43) 169.
[65] Crane, Matten and Spence, (n 41) 292.
[66] This term was used by Eric Orts to describe the different groups and interests that have claims in, or against the corporation. Eric W. Orts, 'The Complexity and Legitimacy of Corporate Law' (1993) 50 Wash. & Lee L. Rev. 1565, 1576-7.
[67] Mitchell, Agle and Wood, (n 43) 192.

neighbourhood, the community is tied to the corporation, since it is unlikely to relocate overnight. Besides, for a variety of reasons the corporation could relocate, leaving behind a degraded environment. The local communities on the other hand are permanently tied to the community which is usually their ancestral homes in most developing markets.

In addition, even when the environmental conditions in their community may be appalling, they cannot exercise the option to relocate because they generally lack the financial capacity necessary to undertake such a venture. Thus, with a relationship of a permanent nature and the general lack of access to the corporation and its management, local communities are left with only the option of pursuing their claims against powerful MNCs through the courts. The weak, corrupt and inefficient legal enforcement system associated with developing markets ensures that the local communities there, which consist of mostly uneducated and poor farmers, are unable to get justice. This plainly exacerbates their vulnerability.

It is in view of the above that we argue for a paradigm shift, i.e. adopting a process that focuses on *preventing* corporate abuses of human rights and the environment, rather than relying simply on the current remedial approach to dealing with such violations. This is the basis for the suggestion of corporate governance as the fundamental basis for implementing the participation of stakeholder groups in human rights and environmental decision-making, and corporate law as the legal framework for its actualization.

Thus, a restructuring of relations among the corporations' diverse constituent groups is proposed for developing markets. In this regard, their corporate law must depart from the current Anglo/American corporate law and governance models, which recognise only two decision-making elements – the general meeting of members, and the board of directors comprising of officers elected by members. This is important because as Bernard Black and Reinier Kraakman point out;

> [d]eveloped country corporate laws also reflect the idiosyncratic history of their country of origin. They are not necessarily efficient at home, let

> alone when transplanted to foreign soil. Moreover, in many emerging markets, corporate law must serve a second and central goal that is less pressing in mature market economies ... thus, corporate law must be designed substantially from the scratch to work within the infrastructure available in an emerging market.[68]

The authors argue that 'corporate law is context-specific even if the problems it must address are universal'.[69] In addition, the fact is that corporate law in developed markets combines with other market and cultural constraints, such as the courts, to control corporate managers. These institutions are often weak or absent in developing markets. Because corporate law in those developed jurisdictions has evolved in tandem with supporting legal institutions, their "market" can fill the regulatory gaps that the Anglo/American corporate law model leaves behind, unlike the undeveloped laws and inefficient legal enforcement institutions that exist in developing markets.[70]

6.3 Economic Development and the Politics of Stakeholder Participation: The Case of Nigeria

Chapter 1 identified the restiveness in the Niger Delta and the need to address it as one of the factors that prompted this research.[71] It is for this reason that we propose the participation of local community representatives in corporate affairs with a view to making them an integral part of the company. It is argued that representation at board level may guarantee to a large extent that issues that affect local communities, such as concerns about human rights and the environment, may receive the due attention of the corporate board. Even though we identified the German corporate governance system as an important stakeholder model that possesses the basic principles that could usefully

[68] Bernard Black and Reinier Kraakman, 'A Self Enforcing Model of Corporate Law' (1995-1996) Harv. L. Rev. 1911, 1923.
[69] *Ibid*., 1914.
[70] *Ibid*.
[71] Chapter I, s. 1.2.4.

support the proposed framework, the focus of that model is upon labour rather than local communities. Therefore, it is important to explore the socio-economic and political environment in Nigeria to underscore the relevance of the proposed framework for Nigeria and other developing markets in similar situation to Nigeria.

The Niger Delta region of Nigeria has attracted global attention in recent decades for two related reasons – the abuse of the environment and human rights of the local communities by oil MNCs, and the endemic conflict between the local communities and the oil MNCs. The importance of the Niger Delta in this context cannot be overemphasised because it is home to the Niger Delta people and the source of their livelihood on the one hand, and the source of Nigeria's crude oil and host to the oil MNCs operating in the country on the other.

Notwithstanding the above, the Delta's locals are poorly integrated into the main economic activity conducted in the region. This is despite the fact that the participation of the local indigenous population is a core requirement of Goal 1 of the Strategic Plan 2009-2015 concerning the wise use of wetlands to deliver on promoting the conservation of wetlands as mandated by Art 3(1) of the Ramsar Convention.[72] Apart from the fact that Nigeria is a party to the Ramsar Convention, the case for the participation of local communities is made more compelling because of the growing insecurity in the region, discussed below.[73] It suffices to note here that conflict in the Niger Delta has been attributed to the fact that the Nigerian government and oil MNCs take most of the economic benefit from the oil industry activities in the Niger Delta, which also generate external costs that are borne almost entirely by local communities.[74]

Although this thesis is about local community participation in corporate affairs in Nigeria and developing markets generally, the focus on the Niger Delta is appropriate because the region is the major economic hub in Nigeria as crude oil accounts for most of

[72] Handbook 7, Participatory Skills (4th edn. Ramsar Handbooks 2010) 5.
[73] See 6.3.3.
[74] Olalekan Adekola *et al*, 'Inequality and Ecosystem Services: The Value and Distribution of Niger Delta Wetland Services' (2005) 12 Ecosystem Services 42-54, 52.

the national government's export earnings and budgetary revenue.[75] This makes the extractive sector the appropriate focus for the proposed framework for local community participation since the regime advocated is aimed at addressing environmental degradation and human rights abuses committed by MNCs in developing markets.

Addressing these abuses through local community participation has become especially important given the scale of resource exploitation, which is set to grow following discoveries of major energy and mineral reserves in many developing markets.[76] This is in addition to countries, such as Nigeria, seeking foreign investment in the solid minerals sector.[77] The creation of a Ministry of Solid Minerals in Nigeria is an indication that mining activities in Nigeria may likely become a major country-wide activity with the expected environmental and human rights implications.[78]

To understand why the participation of local communities in matters of economic development is important in a country like Nigeria, a good starting point will be to understand its socio-political and geographical make up. This will provide a basis for understanding how national economic issues (including human rights and environmental issues in the Niger Delta) have been addressed in the country, and why the current social problems have persisted despite all the government efforts discussed below.

Nigeria is a federal state consisting of 36 states and 774 local government areas (LGAs).[79] This means that political power and the resources (revenue) of the country is shared between the Federal Government, the State Governments and the LGAs.[80] The principles governing fiscal administration in Nigeria date back to the pre-independence period. Commentators have identified the three guiding principles in Nigeria's revenue

[75] Chapter I, (n 95).
[76] Adekola *et al*, (n 74) 43.
[77] 'Nigerian Government Renames Solid Minerals Ministry, Approves New Mining Roadmap' 31 August 2016 (Abuja: Premium Times).
[78] 'Nigerian Govt. Targets 10% GDP for Solid Minerals – Fayemi', Premium Times (Abuja, 16 March 2016).
[79] The Constitution of Federal Republic of Nigeria 1999 (as amended), ss 2 & 3.
[80] *Ibid.,*

sharing system between 1946 and the mid-1960s as derivation, need, and fiscal autonomy, with the derivation principle being the most prominent of the three.[81]

The implication of the derivation principle is that states are entitled to revenue from the central pool in strict proportion to their contribution to the pool. According to S. R. Akinola and Ayo Adesopo, the philosophy behind this principle is to provide compensation for the residents of a particular area from where particular revenue is generated who may have suffered one way or another in terms of external costs in the form of pollution or other undesirable consequences arising from the economic activity that generate the revenue.[82] To underscore the necessity for communities to benefit from economic activities in their community, derivation was fixed at 100 percent in the 1950s. This was however, reduced to 50 percent in 1960. The advent of military rule in 1966[83] brought about a consistent decline of the derivation percentage to the States as successive Federal Military Government's reduced the revenue to States from the central pool to 45 percent in 1969, 20 percent in 1975, 1.5 percent in 1982 (under a civilian government), and 1.0 percent in 1990.[84]

It is important to note that during the time before the military intervention and subsequent designation of the constituent parts of Nigeria as States in 1967 (they were called regions before this time),[85] agriculture was the mainstay of the Nigerian economy and the major contributors to activities in that sector were the major tribes of Hausa in the North, Ibo in the East and Yoruba in the West of the country. The period of the revenue allocation decline to the constituent parts coincides with the period that oil became the mainstay of the nation's economy.

Incidentally, oil is produced in the minority Niger Delta region. This has led to the view, especially among Niger Delta elites, that derivation as a principle of revenue

[81] S. R. Akinola and Ayo Adesopo, 'Derivation Principle Dilemma and National (Dis)Unity in Nigeria: A Polycentric Planning Perspective on the Niger Delta' (2011) Vol. 4 No. 5 J. of Sustainable Dev. 251, 252.
[82] *Ibid*.
[83] B. O. Nwabueze, *A Constitutional History of Nigeria* (Ikeja: Longman 1982) 161-2.
[84] Akinola and Adesopo, (n 81) 252.
[85] Nwabueze, (n 83) 179.

allocation has continued to be deliberately suppressed since crude oil became the mainstay of the country's wealth simply because the main contributors of the oil wealth are the minorities.[86] The debate about the politics of resource allocation is outside the scope of this thesis, but it suffices to state that the derivation principle remains the main principle for revenue allocation in Nigeria and that it is its inefficient administration that is the basis for the agitations and protestations in the Niger Delta.

The need to address the agitations and protestations for a more efficient resource allocation and the development of the Niger Delta, as well as concerns about issues of environmental degradation in the region, has long been recognized by the government. There have been several government initiatives in this regard but discussion here will focus on two statutory agencies created to address the Niger Delta development challenges – the Oil Mineral Producing Areas Development Commission (OMPADEC)[87] and Niger-Delta Development Commission (NDDC).[88] References will be made to other initiatives, such as the amnesty regime for Niger Delta militants. This is with a view to identifying the factors responsible for the restiveness in the region, and to underscore the importance of the proposed framework as an alternative to past and present initiatives.

6.3.1 Oil Mineral Producing Areas Development Commission (OMPADEC)

OMPADEC was established in 1992 by the administration of the then Military President, General Ibrahim Babangida. As the name implies, the Commission is concerned with the development of the oil mineral producing areas – the Niger Delta. The objective of the Commission according to s 2 of the OMPADEC Decree 1992, includes:

> (a) to receive and administer the monthly sums from the allocation of the Federation Account in accordance with confirmed ratio of oil production in

[86] Akinola and Adesopo, (n 81) 252, citing Melford Okilo, 'Derivation: A Criterion of Revenue Allocation' (1980), a paper presented at the Postgraduate Seminar, Command and Staff College, Jaji.
[87] Oil Mineral Producing Areas Development Commission Decree No. 23, 1992.
[88] Niger-Delta Development Commission (Establishment etc.) Act 2000 Act No. 6, Laws of the Federation of Nigeria.

> each State – (i) for the rehabilitation and development of oil producing areas, (ii) for tackling ecological problems that have arisen from the exploration of oil minerals; (b) …; (c) to consult with the relevant Federal and State Government authorities on the control and effective methods of tackling the problem of oil pollution and spillages; (d) to liaise with the various oil companies on matters of pollution control; (e) …; (f) to consult to the Federal Government through the President, the State, the Local Governments and oil mineral producing communities regarding projects, services and all other requirements relating to the special fund; (g) to render annual returns to the President, Commander – in – chief of the Armed Forces and copy the State and Local Governments on all matters relating to the special fund; … .

The control of the Commission (both administrative and financial) lies with the President in view of the fact that he has the exclusive powers to appoint the Chairman and other members of the Commission,[89] as well as the power to remove any member of the Commission from office if, 'he is satisfied that it is not in the interest of the Commission or the interest of the public that the member should continue in office'.[90] With regard to the control of the finances of the Commission, the OMPADEC Decree provides that the funds of the Commission shall be managed in accordance with rules made by the President.[91] In addition, the President may also stipulate conditions for the award of contracts by the Commission,[92] and make regulations generally for the purpose of giving effect to the provisions of the Decree.[93] The Decree also provides that the President 'may give to the Commission directives of a general nature or relating generally to matters of policy with regard to the exercise by the Commission of its functions and it shall be the duty of the Commission to comply with the directives'.[94]

[89] OMPADEC Decree 1992, s 3 (2).
[90] OMPADEC Decree 1992, s 4 (4).
[91] Ibid., s 8 (3).
[92] Ibid., s 10.
[93] Ibid., 14.
[94] Ibid., s 15.

A general critique of all the initiatives will be undertaken later. They will be considered together because, apart from the fact that the guiding principles for the initiatives are the same, their purpose is also the same since they are all concerned with development of the Niger Delta. However, it is important to point out some of the provisions in the enabling Decree that may hinder, or that were indeed responsible for the Commission's general failure to deliver on its mandate to contribute to the development of the Niger Delta.[95]

The first is the concentration of control in the hands of the President of Nigeria, who is far away from the region for whose benefit the Commission was created. It is difficult to see how the President can understand the needs of the people sufficiently well as to be able to exercise his powers (especially the power over the award of contracts) judiciously. The local communities have no say in matters concerning the Commission's operations. The States and LGAs, who are closer to the communities have no participatory rights under the enabling Decree. Even though the Decree provides for the Commission to consult all tiers regarding projects etc.,[96] the provision in s 3 (5) that '[t]he Commission shall not be subject to the direction, control and supervision of any other authority or person in the performance of its functions under the Decree other than the President, Commander – in – chief', means that the operations of the Commission are largely subject to his discretion. This is despite the fact that the funds for the Commission actually belong to the oil producing communities in line with the principle of derivation.

6.3.2 Niger Delta Development Commission (NDDC)

The condition that existed in the Niger Delta that prompted the establishment of OMPADEC, such as youth restiveness in the region, assumed a more dangerous and troubling dimension before the return of political power to politicians in 1999. In fact, by

[95] Olubayo Oluduro, *Oil Exploration and Human Rights Violations in Nigeria's Oil Producing Communities* (Cambridge: Intersentia Publishing Ltd 2014) 189; Emeka Duruigbo, 'Managing Oil Revenues for Socio-Economic Development in Nigeria: The Case for Community-Based Trust Fund' (2004-2005) 30 N. C. J. Int'l & Com. Reg. 121, 139.
[96] OMPADEC Decree s 2 (f).

1999 the situation in the Niger Delta had grown beyond its usual description as youth restiveness to include armed attacks and outright criminality. The region at this time had become rife with vices, such as oil-worker hostage taking, blockage of oil facilities, and oil pipeline vandalism.[97] This was the situation that the new civilian administration of Chief Olusegun Obasanjo had to deal with in 1999, in addition to the growing demand for resource control.[98] This situation prompted the new administration to introduce a Bill to establish the Niger Delta Commission early, upon assuming office in 1999. Although the Bill was met with strong opposition from the non-oil producing States' members in the national assembly, it was eventually passed in July 2000.

Although the NDDC Act repealed the OMPADEC Decree and vested all the assets of OMPADEC in the NDDC,[99] it replicated most of the Decree's provisions, with minor improvements. The functions and powers of the NDDC[100] mirror the objectives of OMPADEC and include, to 'formulate policies and guidelines for the development of the Niger Delta, area';[101] 'implement all the measures approved for the development of the Niger-Delta area by the Federal Government and the member States of the Commission';[102] 'tackle ecological and environmental problems that arise from the exploration of oil mineral in the Niger-Delta area and advise the Federal Government and the member States on the prevention and control of oil spillages (sic) gas flaring and environmental pollution-';[103] 'liaise with the various oil mineral and gas prospecting and producing companies on all matters of pollution prevention and control …' .[104]

Apart from the similarity in the functions of the two Commissions, they are also similar in many other respects. For example, the power to appoint and remove the members of the NDDC also resides with the President, Commander in Chief of the Armed

[97] Uwafiokun Idemudia, 'Oil Extraction and Poverty Reduction in the Niger Delta: A Critical Examination of Partnership Initiatives' (2009) 90 J of Bus. Ethics 91, 92.
[98] Oluduro, (n 95) 191.
[99] NDDC Act, s 28.
[100] Ibid., s 7.
[101] Ibid., (1) (a).
[102] Ibid., (e).
[103] Ibid., (h).
[104] Ibid., (i).

Forces under the NDDC Act. However, the appointment of members of the NDDC board is subject to the confirmation by the Senate, in consultation with the House of Representatives.[105] The NDDC Act provides for Chairmanship of the board of the NDDC to rotate amongst the nine member States of the Commission.[106] The same rotation principle is applicable to the office of the Management Committee of the NDDC,[107] which shall comprise the Managing Director and two Executive Directors who must be indigenous to oil producing areas.[108]

Even though the President does not enjoy the same wide powers of control under the NDDC Act as provided in the OMPADEC Decree, his powers of control under the NDDC Act remain extensive. In addition to his power to appoint and remove the members, the President may still 'give to the Commission directives of a general nature or relating generally to matters of Policy with regard to the performance by the Commission of its functions and it shall be the duty of the Commission to comply with the directives'.[109]

One remarkable difference between the two Commissions is in the area of funding. Unlike the OMPADEC, the funds for the NDDC comes from three main sources – the Federal Government, the State Governments of the Niger Delta, and the oil MNCs.[110] The Act provides that the Commission shall be paid 'from the Federal Government, the equivalent of 15 percent of the total monthly statutory allocation due to member states of the Commission from the Federation Account; this being the contribution of the, Federal Government to the Commission-';[111] '3 percent of the total annual budget of any oil producing company operating, on shore and off shore, in the Niger-Delta area; including gas processing companies';[112] '50 percent of monies due to member States of the Commission from the Ecological Fund',[113] … .

[105] Ibid., s 2 (2) (a).
[106] Ibid., 4.
[107] Ibid., s 4.
[108] NDDC Act, s 12.
[109] Ibid., s 23.
[110] Ibid., 14 (1).
[111] Ibid., s 14 (1) (a).
[112] Ibid., (b).
[113] Ibid., (c).

Notwithstanding the difference in the source of funding for the two Commissions, it is argued that the problem identified with OMPADEC earlier also generally affects the NDDC, namely, the general lack of powers on the part of the beneficiaries to propose what they might consider a more appropriate developmental project for their community or the power to question a non-performing NDDC board member, even though he may be from their state.

6.3.3. Post-NDDC Developments in the Niger Delta: New Government Initiatives and Emerging Issues

There is ample evidence that government's initiatives, such as the establishment of the OMPADEC and the NDDC and other sundry arrangements created to address oil pollution and the general poverty ravaging the Niger Delta, have not accomplished the intended results. The renewed hostilities and general insecurity that erupted around the end of Chief Obasanjo's administration was a clear reminder of this failure. At the beginning of 2009, the effect of the rising insecurity in the Niger Delta on the national economy had become apparent. The revenue from crude oil sales had plummeted from a monthly average of about N330bn (U.S $2.2bn)[114] recorded in 2008, to about N150bn (U.S $1bn) in January 2009.[115]

The deployment of a "military task force" team to the Niger Delta to protect oil facilities did not prevent the militant attacks. Many attempts by the military team to apprehend the militants were directed at innocent community residents as the militants would have disappeared into the creeks before the team could reach the scene of the disturbance. For example, the military operation in Gbaramatu, an Ijaw clan in the south

[114] During that period, the Nigerian Naira exchanged for about 150 Naira to U.S $1.
[115] Akinola and Adesopo, (n 81) 254.

of Warri, Delta State, left about 2,000 persons dead, mostly the elderly as well as women and children.[116]

In view of the bad publicity generated by such operations, the government decided on the amnesty option to secure the disarmament of the militants in order to halt the slide in government revenue. As a result, the government set up the Presidential Panel on Amnesty and Disarmament of the militants in the Niger Delta on 5th May 2009. The government subsequently accepted the report presented by the Panel and consequently granted amnesty in August 2009 to all militants who would drop their weapons and embrace the amnesty program.[117] The immediate result of the acceptance of amnesty by over 26,000 of the ex-militants was a sharp increase in Nigeria's oil production from 800 to 2.3 million barrels per day.[118]

There was remarkable improvement in security in the Niger Delta, as well as in government revenue, in the aftermath of the amnesty programme, which was, of course, its objective. However, later events would show that the focus of the programme on government revenue, rather than addressing the fundamental issues of environmental degradation and neglect of the Niger Delta, was misplaced. The main issue in the Niger Delta has been the distrust between the local communities and the other major stakeholders, especially the government and the oil MNCs. The Niger Delta issue has always been between the local communities on one side, and the government and the oil MNCs on the other. The fact that the amnesty programme did not address the lack of trust between the two sides manifested at an early stage in the programme.

On the part of the so-called militants, the fact that they did not fully trust the government can be inferred from the total numbers of arms they surrendered. A total of 26,356 militants reportedly embraced the amnesty programme. However, only '1,798

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[116] S. Adebayo, 'Niger Delta: We have Lost Over 2,000 Persons – Gbaramatu Kingdom' Saturday Punch (Lagos, 23 May 2009) 10.
[117] See Oluduro, (n 95) 202-3; see also Drew Hinshaw, 'Niger Delta Amnesty Program Fails to End Militancy' *The Wall Street Journal* (New York September 4 2012) <http://www.nigerdeltalpolitics.wordpress.com/2012/09/04/nigeridelta-amnesty-program-fail-to-end-militancy> accessed March 24, 2017.
[118] Oluduro, (n 95) 204, citing a Federal Government Report.

rifles, 1,981 guns of various types, 70 RPGs, 159 pistols, one spear and six cannons were returned'.[119] This certainly does not represent the total quantity of arms and ammunitions used by over 26, 000 fighters.

Regarding the government, it is obvious from the beginning that this programme was not intended as a permanent solution to the Niger Delta problem because of its exclusive focus on the militants and their leaders. There was no clear enabling law guiding it. Besides, the programme simply 'entailed taking the militants into demobilisation camps, retrieving their illegally acquired arms; paying them allowances and sending them for skill acquisition training abroad'.[120] Their leaders, such as Asari Dokubo and "Government" Tompolo Ekpumopolo, were subsequently awarded security surveillance contracts.[121] For example Dokubo, the leader of the Niger Delta Peoples Volunteer Force (NDPVF), earned about U.S $9mn annually from a pipeline surveillance contract.[122]

Under the amnesty programme, the larger Niger Delta community did not matter as the socio-economic problem of the area was not part of its remit. This has led to questions about the sustainability of the programme, with some commentators arguing that putting money into the pocket of disarmed youths will only encourage militancy. This appears to be the case, because, as will be seen from the analysis below, there has already been a resurgence of militancy in the Niger Delta. Thus, even though the government has expended an estimated N260bn (U.S $1.5bn)[123] on the amnesty programme, it has so far failed to end militancy in the Niger Delta.[124] This makes it imperative to devise a system that addresses the rights of the Niger Delta communities to participate in the management of the development of their region. This is because, '[e]xperience has shown that

[119] Oluduro (n 95), citing D. Agbo, 'Arms Recovered from Ex- Niger Delta Militants Destroyed' Legal Oil, 29 May 2011.
[120] Ajayi Olowo, 'Ex-Militants: Amnesty of Travesty?' Legal Oil, 24 August 2012, <http://www.legaloil.com/NewItem.asp?DocumentIDX=1345839396&Category=news> accessed 23 December 2016.
[121] See Hinshaw, (n 117).
[122] Temitayo Odunlami *et al*, 'Multi-Billion Naira NNPC Contracts Create Tension in Ex-Militants Camps' Daily Trust, 22 March 2015 <http://www.dailytrust.com.ng/sunday/index.php/top-stories/19991-multi-billion-naira-nnpc-contracts-create-tension-in-ex-militants-camps> accessed 3 May 2017.
[123] The government has budgeted about ₦68bn (U.S $120mn) annually for the program since 2010 and, it is estimated to cost the government ₦20bn (U.S. $50mn) in the 2016 budget. See Nosa Akenzua, 'Ex-Militants Threaten War Over Alleged Amnesty Budget Slash' 16 December 2015 (Lagos: The Punch) 7.
[124] Hinshaw, (n 117).

management regimes that involve a variety of stakeholders – and especially local residents and indigenous communities – tend to be more sustainable than those which developed in the absence of local involvement'.[125]

6.4 General Critique of the Initiatives and the Emerging Issue: the Basis for Local Community Participation on Corporate Boards

The initiatives discussed above demonstrate the government's (and oil MNCs operating in the region) interest in the affairs of the Niger Delta communities. There are structures in the Niger Delta to show that the OMPADEC and the NDDC[126] have indeed contributed to development in the region. However, the fact that there is a resurgence of militancy in the region is an indication that either the development initiatives are inadequate or that they do not necessarily address the main issues to the satisfaction of the local communities. The exemption of Nigeria from the recent agreement by the member countries of the Organisation of Petroleum Exporting Countries (OPEC) to cut production in order to stabilize the global oil market underscores the resurgence of militancy in the Niger Delta, and its devastating effect on the national economy. The increasing wave of militancy and oil industry facility attacks has come with a huge revenue loss estimated at about US $14bn annually.[127]

It is instructive that Nigeria was exempted from the OPEC production cut alongside Iran and Libya,[128] two other countries with peculiar circumstances. The exemption of Iran is to allow the country to make up for its long absence from the global oil market as a result of UN sanctions imposed on the country. Libya, on the other hand, was exempted because of the country's inability to participate in the global oil market because of the

[125] Alex de Sherbinin and Gordon Claridge, 'Involving Local Communities and Indigenous People in Wetland Management – a Resource Paper', Handbook 7, participatory Skills (4th edn. Ramsar Handbooks 2010) 25
[126] NDDC, Projects and Programs at <http://www.nddc.gov.ng/projectsandprograms.html> accessed 30 December 2016.
[127] See the discussion on the current impact of militant attacks in chapter I, (n 107 & 8).
[128] Nayla Razzouk, Angelina Rascouet and Golnar Motevalli, 'OPEC Confounds Skeptics, Agrees to First Oil Cuts in 8 Years' Bloomberg LP [US] at <http://www.bloomberg.com/news/articles/2016-11-30/opec-said-to-agree-oil-production-cut-as-saudis-soften-on-iran> accessed 24 September 2017.

terrorist activities that have engulfed the country since the overthrow of President Muammar Gadhafi. According to Emmanuel Ibe Kachikwu, Nigeria's Minister of State for Petroleum, Nigeria was exempted to allow the country to recover from the losses suffered as a result of the militancy in the Niger Delta.[129] However, there are still doubts that Nigeria may be able to meet the 2.2 million barrels' production per day on which the 2017 budget is based.[130] This is because of the unease in the region as a result of activities of the militants. The call for dialogue on the Niger Delta made by the President of Nigeria in his 2016 Christmas day message to Nigerians underscores the insecurity in the region.[131]

The problem in the Niger Delta is more about who gets what. The fact that the resources from oil exploration accrue to the whole country, and only a very small percentage (13 percent) is allocated to the states that bear the burden of environmental damage, is generally perceived as an injustice amongst the Niger Delta people.[132] The problem with this concerning the issues addressed in this thesis is the fact that the local communities have no say in how the 13 percent derivation is administered. Meanwhile, the so-called Niger Delta elites are demanding more allocation to the region. They argue that when agriculture was the mainstay of the country's economy the derivation to the host regions was 100 percent and that it remained reasonably high at 50 percent throughout the period, even though the operations that produced the national income at that time did not generate serious environmental and human rights consequences such as is the case with oil exploration.[133]

In addition to the perceived injustice of the 13 percent derivation, the initiatives aimed at addressing the Niger Delta developmental problems do not make provision for local community participation. The local communities are simply expected to receive

[129] 'Why Nigeria was Exempted from OPEC's Output Cut' – Petroleum Ministry, 2 December 2016 (Lagos: Daily Vanguard).
[130] Sebastine Obasi *et al*, 'Buhari's 2017 Budget Shows Hatred for Education – ASUU, 14 December 2016 (Lagos: Daily Vanguard)
[131] Olalekan Adetayo, 'Let us Talk, Buhari Tells N'Delta Militants' 26 December 2016 (Lagos: The Punch) 7.
[132] Akinola and Adesopo (n 81) 252.
[133] Itse Sagay, 'Nigeria: Federalism, the Constitution and Resource Control' (2001), Text of the speech delivered at the fourth sensitization programme organized by the Ibori Vanguard at the Lagoon Restaurant, Lagos, 19 May 2001, cited by Akinola and Adesopo, (n 81) 253.

whatever development project is brought to their area irrespective of what might be their preferred interests.

It is true that, since OMPADEC, the management of the government agencies in charge of Niger Delta development has always been statutorily in the hands of the indigenous people of the area. Both the Decree establishing OMPADEC[134] and the NDDC Act[135] provides that their chairman must be an indigenous person from the Niger Delta States. The Federal Government has adhered strictly to this principle in making the appointments to the Commission. However, the problem is that the appointments are made by the President who may make such appointments based on his own political interest. This may be the case because, according to Olubayo Oluduro, appointments to the board of the agencies are mostly used to compensate ruling party members and settle political scores.[136]

Another problem associated with the initiatives is that they do not pay sufficient attention to the underlying issues of environmental degradation and human rights abuses. For example, both the NDDC and the OMPADEC before it, have tackling ecological and environmental problems, and liaising with the oil producing companies on matters of pollution control, as part of their mandate.[137] However, neither of these agencies has power under any law to craft regulation in order to achieve this mandate or to enforce any law or even impose sanctions for the breach of environmental laws.[138]

6.4.1 Addressing the Issues in the Niger Delta Conflict

From the discussion above, it would appear that the current political structure of Nigeria and the country's fiscal administration system, which places the government and the oil MNCs on one side as managers of national resources and the dispensers of development

[134] OMPADEC Decree, s 3.
[135] NDDC Act s 4 & 12.
[136] Oluduro, (n 95) 194-4.
[137] OMPADEC Decree, s. 2 (a) (ii); NDDC Act, s. 7 (1) (i).
[138] Duruigbo (n 95) 137.

initiatives, and the local communities as mere recipients, is at the heart of the conflict in the Niger Delta. Thus, as Olalekan Adekola *et al* suggests, a more participatory decision making by the government and corporate sector may be a crucial step in developing more sustainable management of the Niger Delta.[139] Given the economic interest of the government and the oil MNCs, and their commitments so far to the development of the Niger Delta[140] which have yet to bring about peace in the region, it makes sense to try other alternatives, including a new initiative that would accommodate the Niger Delta representatives in decision-making over matters that affect them.

The growing demand for a more inclusive arrangement in the management of the resources of the Niger Delta underscores the need for more integration of local communities in economic development programmes in the region. On the 1 November 2016, the Pan Niger Delta Forum (PANDEF), an umbrella body of monarchs, leaders and stakeholders in the region, visited the Nigerian President in Abuja, where they presented to the President a sixteen-point demand of the Niger Delta people.[141] One of their demands, which has expectedly generated a lot of comment[142] is demand No. 12, stated in the following words:

> Inclusive Participation in Oil Industry and Ownership of Oil Blocs:
>
> The sense of alienation of Niger Delta indigenes from the resources of their land, will continue, until there are affirmative actions that guarantee the involvement of the communities in the ownership and participation in the Oil and Gas industry. We therefore urge the Federal Government to

[139] Adekola *et al*, (n 74) 52.
[140] All the major operators in the Niger Delta, such as Shell Petroleum Development Company (SPDC), Exxon Mobil, Chevron Texaco Nigeria, Nigerian Liquefied Natural Gas (NLNG) also contribute to infrastructural development and improvements in educational facilities and other social services in the region, see ChevronTexaco, 2002 ChevronTexaco Corporate Responsibility Report: Integrity and Learning in an Evolving World 10 (2003), at <http://www.chevrontexaco.com/cr_report/download_report.asp>. accessed 23 December 2016; Nigeria LNG Limited, 'Facts and Figures on NLNG 2016; Royal Dutch Shell Plc., Sustainability Report 2015. See generally the study by Emeka Duruigbo, (n) 150-160.
[141] Olalekan Adetayo, 'Niger Delta Leaders Meet Buhari, Demand Oil Block Contracts' 2 November 2016 (Lagos: the Punch) 10.
[142] Dele Sobowale, 'Giving PANDEF a Bad Name in Order to Destroy it' Sunday Vanguard (Lagos, 20 November 2016)

enunciate policies and actions that will address the lack of participation as well as imbalance in the ownership of Oil and Gas Assets.

All the initiatives discussed above are designed and managed by the government, which has a vested interest in the operations of the oil MNCs. However, the common argument by the Niger Delta leaders has been that the country should go back to the old revenue sharing formula, especially the pre-military era allocation of 50 percent and above to the states.

The problem with this argument is that it merely focuses on more control of resources without any serious consideration about how the resources will benefit the poverty-stricken people of the Niger Delta in whose interest they seek to control the resources. While it appears fair that more resources should go to the regions that suffer from the environmental effects of corporate activities, it is argued that greater justice lies in ensuring that oil MNCs operate more responsibly and thereby minimize environmental harm. Thus, it is also important to pay more attention not only to how the resources can be managed efficiently but also to the sustainability of the Niger Delta.

In this regard, even though it is agreed that a focus on the derivative principle is important, it is more important to review how decisions are made concerning not only how resources are utilised but also how those factors that create environmental damage are addressed. Thus, in view of the growing calls for dialogue and resource control, it is important to put the Niger Delta political and social imperatives in perspective in order truly to understand why the participation of local communities in the economic activities undertaken in their community may be a useful alternative approach towards resolving the Niger Delta conflict.

6.4.2 The Clamour for Resource Control and Niger Delta States Resource Management in Perspective

Participation in decision-making is important for those affected by the decisions because it offers them the opportunity to protect and promote their own interests. This underscores the argument by the NDDC State parties that 'there is no legal basis for their continued contribution to a Commission that is an appendage of the Presidency and outside their sphere of influence'.[143] This is an important argument because it is coming from those persons who have been in charge of administering the resources of the Niger Delta states, and it raises the important question about who should really control the resources that the Niger Delta elites are clamouring for. If the so-called Niger Delta leaders and elites consider control or influence or participation vital to ensuring the equitable distribution of resources amongst stakeholders, it follows that any initiative that seeks to address the Niger Delta question must include the local communities themselves.

Therefore, the clamour by the elites for resource control, or an increase in the State's share from the common fund, may not really serve the interest of the local communities because the State's allocation is controlled by politicians in the State capitals. In view of the rampant corruption, especially at the State level, it makes sense to argue for more involvement of those who pay the price for environmental degradation in the decision-making process as a strategy for ensuring a more environmentally friendly outcome.

Although a detailed analysis of corruption amongst the political class is outside the scope of this thesis, it is important to highlight a few cases of corruption involving some of the individuals who have managed the resources of some Niger Delta States between 1999 and 2007. Diepreye Alameyeseigha, the former governor of Bayelsa States, was sentenced by a Federal High Court in Abuja after pleading guilty to charges of corruption in 2005.[144] Lucky Igbinedion, the former governor of Edo State, was sentenced by a

[143] Oluduro, (n 95) 194.
[144] Suit No. FHC/U328C/05.

Federal High Court in Enugu after pleading guilty to charges of corruption in 2008.[145] James Ibori, the former governor of Delta State, was sentenced by Southwark Crown Court in the UK after pleading guilty to charges of fraud and laundering of corruption proceeds.[146] The cases above provide a strong basis for the argument to put the administration of Niger Delta resources in the hands of the local communities who truly bear the burden of environmental degradation in the region.

6.5 The Imperatives for Local Community Participation in Corporate Affairs in Nigeria

Although the proposal for interest group participation in this thesis focuses on participation on corporate boards, it is important to note that the demand for local community participation, especially the demand for resource control and the participation of Niger Delta people in the economic development of their region date back to the 1960s, beginning with the declaration of the Niger Delta Republic (Kaima declaration) in 1966 by the group led by one Isaac Adaka Boro.[147]

However, the idea of local community participation envisaged here is not about local communities sharing corporate profits or generally controlling the resources from oil and gas activities in the Niger Delta. Instead, it is about local communities in the region having access to information about management plans at the earliest possible time, and participating in the decision-making concerning those plans. This is to ensure that all the relevant interests are consulted and involved and given proper consideration in management plans for economic development.[148] This is important because, 'participation in the decision-making process creates a sense of "ownership" in the decision itself'.[149]

[145] Suit No. FHC/EN/6C/2008.
[146] Ademola Oni *et al*, 'Ibori Freed, FG Begins Ex-Delta Governor's Extradition Process' 28 December 2016 (Lagos: Punch) 7.
[147] Beloveth Odochi Nwankwo, 'The Politics of Conflict Over Oil in the Niger Delta Region of Nigeria: A Review of the Corporate Social Responsibility Strategies of the Oil Companies' (2105) American Journal of Education Research vol. 3 No. 4 383, 385.
[148] Handbook 18, Managing Wetlands, 4th edn. Ramsar Handbooks, 25.
[149] Elena Blanco and Jona Razzaque, *Globalisation and Natural Resources Law: Challenges, Key Issues and Perspectives* (Cheltenham: Edward Elgar Publishing Limited 2011) 28.

The need to seek an alternative approach for addressing the Niger Delta problem has become imperative because the general insecurity in the region is a no-win situation for all the parties interested or participating in corporate activities there, whether as local community residents, the oil corporation undertaking exploratory activity or the government that depends on the revenue from oil exploration. Instances of corporate human rights abuses and environmental degradation by MNCs in the Niger Delta are well documented.[150] The revenue loss from activities of militants, such as vandalism of oil pipelines and theft of crude oil have economic implications for both the Nigerian government and the oil MNCs. This is in addition to the cost of repairs for vandalised pipelines and other damaged facilities.[151] The estimated revenue loss from activities of militants, is estimated to be about US$14bn annually.[152] The estimated cost of just one January 2016 attack on some gas and oil pipelines was put at US$395,000 per day plus about US$600,000 to repair the damages.[153]

In view of the above, there are good reasons for the oil MNCs to care about the situation in the region, especially because of the effect of the disruptions and attacks on corporate profit. Although it has not been possible to acquire specific data on the profit of individual oil MNCs, the reports of Shell's global operations[154] and earnings provides a useful basis to assess the company's operations in the Niger Delta region and thus underscore the importance of the resolution of the conflict in the region to the oil MNCs.

According to the report, Africa was responsible for 15 percent of Shell's global output between 2012 and 2016. During this period Africa's revenue contribution was about US$41.683bn out of the company's global revenue earning of about US$266.840bn.

[150] See the United Nations Environmental Programme (UNEP) 2011 Report on the Niger Delta at <http://www.unep.org/nigeria> accessed 2 March 2015.
[151] Okolobo, 'SPDC Declares Force Majeure on Forcados Export' (Shell, News and Media Releases, 30 September 2015) <http://www.shell.com.ng/aboutshell/media-centre/news-and-media-releases/production-updates/spdc-declares-force-majure-on-forcados-export.html>. Accessed 30 August 2016; John Vidal, 'Niger Delta Oil Pipeline Vandalism Estimated to Cost $14bn a Year' 10 November 2015 (Lagos: The Guardian) 1.
[152] John Vidal, 'Niger Delta Oil Pipeline Vandalism Estimated to Cost $14bn a Year' The Guardian, November 10, 2015, <http://www.theguardian.com/environment/2015/nov/10/niger-delta-oil-pipeline-vandalism-estimated-to-cost-14bn-a-year>. accessed February 5, 2016.
[153] *The Vanguard*, 'Renewed Rumpus in Niger Delta' (Lagos, 26 January 2016), 1.
[154] Shell Investors' Handbook 2012-2016, <http://www.reports.shell.com/investors-handbook/2016/servicepages/downloads-centre.html> accessed 9 May 2017.

Nigeria produced 74 percent of Africa's contribution to the company's global oil production and 51 percent of Africa's contribution to its global natural gas production.[155] This is instructive because Shell is just one of the major Oil MNCs operating in the Niger Delta[156] and it is in fact the major target of the protests and violent attacks against oil MNCs in the region. [157]

The point here is that the oil MNCs also have a major stake in the Niger Delta, which makes it a matter of enlightened self-interest for *all* the parties involved in the region to seek ways to end or substantially minimize the conflict there. For the oil MNCs, to end the conflict in the Niger Delta would obviously be a better alternative than dealing with the current persistent incidence of oil-worker hostage taking, blockage of oil facilities and oil pipeline vandalism in the Region. Maintaining environmental and human rights integrity in the Niger Delta will also bring to an end or minimize the backlash and bad publicity that comes with abuses of the environment and human rights of the local communities with the attendant damage to corporate reputations and its negative impact on corporate profit.[158]

It is important to note that those who actually benefit from the persistent conflict in the Niger Delta are the local politicians and their counterparts in the civil service. The oil MNCs have no control over how the different tiers of government spend their allocation from the oil revenue, yet they are blamed for the underdevelopment of the region, and they bear a major cost of the Niger Delta conflict by way of loss of corporate profit.[159]

Achieving peace in the Niger Delta is also important to the government in view of the loss of revenue arising from attacks on oil facilities. The current economic recession in Nigeria has been attributed to the conflict in the Niger Delta,[160] which has made it

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[155] *Ibid*.
[156] Joblanda Africa, 'Top 10 Oil and Gas Companies in Nigeria' 14 November 2015 <http://www.joblanda.com/top-10-oil-and-gas-companies-in-nigeria/> accessed 9 May 2017.
[157] Sol Picciotto, 'Rights, Responsibilities and Regulation of International Business' (2003-2004) 42 Colum. J. Transnat'l L. 131, 140.
[158] *Ibid*.
[159] See chapter 1, (n 107 & 8).
[160] Michael Eboh, 'How Petroleum Sector Drove Nigeria into Economic Recession' 2 January 2016 (Lagos: Daily Vanguard).

impossible for the country to meet its OPEC allocated quota. To address the issues linked to crude oil production and Nigeria's economy, the government has been taking a few commendable steps with regard to the oil industry. The first step was the partial deregulation of the downstream sector, aimed at attracting more investment into the sector. The second is the exit from the joint venture cash calls (JVCCs).[161] This is aimed at minimizing government involvement, boosting investment in the sector and raising daily production. It is envisaged that the exit from the JVCCs will bring about a reduction in crude oil unit technical costs (UTCs).[162]

It is commendable that the government is taking steps to address the issues of oil production and the Nigerian economy, especially to minimize the involvement of politicians and civil servants in the main revenue generating sector through the exit from the JVCCs. However, it is argued that government action is also required to minimize the involvement of the local politicians and their civil service counterparts in the management of the resources meant for the Niger Delta people. Creating the opportunity for local communities to participate in the affairs of the oil MNCs will further minimize government's participation in this regard. This is particularly important in view of the enormous cost of the conflict in the Niger Delta to the government and fact that the insecurity in the region has been identified as the major reason that Nigeria is in a recession.

The Federal Government's interest with regard to peace in the Niger Delta cannot be overemphasised. Addressing the interest of local communities in the region has been identified as a major process for bringing about peace in the region. Therefore, political will is required on the part of government to promote peace in the region through local community involvement in economic activities there as a strategy for building a synergy between the oil MNCs and their host communities. It is important to state that this is the time to bring the legislation for local community participation forward in view of the focus of the present administration on anti-corruption. The fundamentality of oil revenue to the

[161] *Ibid*.
[162] *Ibid*.

Nigerian economy and its importance to both the oil MNCs and the local communities makes achieving peace in the Niger Delta imperative. This makes the participatory approach worth considering.

It is true that the Federal Government has started to take steps towards building this synergy with the recent directive that oil MNCs move their headquarters to the Niger Delta.[163] This has been one of the major demands of the Niger Delta people. However, it is argued that just moving their headquarters does not necessarily affect how decisions concerning how the affairs of the Niger Delta people will be taken inside the corporation. It is the participation of the representatives of the local communities in the decision-making process that can more effectively guarantee that their interests are given due consideration at board level. This will engender trust between these two critical stakeholders and create a sense of ownership in the communities. More importantly, winning the support of the local communities may come with the added value of denying the militants the important support they get from the communities and thereby substantially diminish their capacity to carry out attacks on oil facilities.

Conclusion

The discussion in this chapter underscores the relevance of the emerging global consensus about the importance of participation by communities or groups that are susceptible to harm from environmentally damaging activities, as a strategy for promoting human rights and environmentally friendly decision-making. We have identified the local communities that play host to MNCs as the most vulnerable group affected by corporate externalities. This makes them the group with the greatest incentive to nominate corporate decision-makers who will promote environmental and human rights-friendly decision-making.

[163] Dennis Udoma, 'FG Directs Oil Companies to Relocate Headquarters to Niger Delta' 3 March 2017 (Lagos: Daily Vanguard).

In the case of the Niger Delta, we noted that the socio-political and economic environment in the region makes the participation of local communities in corporate decision-making processes necessary as a strategy for addressing the Niger Delta conflict. Although various initiatives have been put in place by the Nigerian government to promote development in the region, they have not yielded the desired results. Consequently, the restiveness and insecurity in the area has continued unabated. This underscores the importance of the participation of local community representatives in corporate decision-making as an alternative means of addressing the problem.

7. Issues in Local Communities in Nigeria and the Proposed Framework for Local Community Representation on Corporate Boards

7.1 Introduction

Corporate law has been identified in this thesis as the appropriate platform for the participation of local communities in matters of economic development. Therefore, it is important to consider how the proposed regime can achieve meaningful participation in that regard. Since the main focus of this chapter is the framework for local community participation in corporate governance and its importance in the Nigerian context, a good starting point for developing such framework is to understand how the participation of other stakeholders other than corporate shareholders operate in that regard. Therefore, a brief analysis of the German co-determination is undertaken, Germany being the reference stakeholder jurisdiction, to identify how the underlying principles could support the framework for participation of other interest groups, such as local communities.

The participation of local communities in corporate governance will no doubt have a profound effect on the current corporate governance models discussed in the previous chapter, especially the "shareholder primacy" model represented by the US and the UK (and also practiced in our reference developing market jurisdiction, Nigeria), as well as on the interests of other corporate stakeholders. As a result, this chapter will also interrogate issues concerning their participation in corporate governance. This is aimed at identifying the appropriate corporate governance model that could accommodate local community board representation in such a way that will 'allow the optimal balancing of company performance and company function by taking into account the requirements of the non-economic environment'.[1]

[1] Gunther Teubner, 'Corporate Fiduciary Duties and Their Beneficiaries: A Functional Approach to the Legal Institutionalization of Corporate Responsibility' in Klaus J. Hopt and Gunther Teubner (eds), *Corporate Governance and Directors' Liabilities: Legal, Economic and Social Analyses on Corporate Social Responsibility* (Berlin: Walter de Gruyter 1985) 165.

To further support the validity of the proposed framework we will discuss the relevance of existing norms to the framework, and its benefit to both the Nigeria government and the oil MNCs operating in the Niger Delta region. This may also demonstrate how and why the proposal could win the support of the corporations and the approval of the Nigerian government.

7.2 Framework for Local Community Representation and the Role of Corporate Law

As stated above, Germany is the major reference jurisdiction for external stakeholder participation in management at board level,[2] therefore, it makes sense to explore the German co-determination system as a means of identifying potential implications for other corporate stakeholders and as a possible template for the proposed governance model discussed below. The German system permits at least one stakeholder group – labour – to sit on German corporate boards alongside the directors.[3] Although the origin of the German co-determination regime is linked to the Co-determination Act of 1951 and the Works Constitution Act of 1952, the Co-determination Act of 1976[4] is the major regime in this regard. The Act provides for a two-tier board structure of a supervisory board and a management board. It provides for employees to constitute one-half of the supervisory board of German companies that employ over 2000 people.[5]

The importance of co-determination as a regime for protecting the interests of the employee group lies in the part that the employees play under the system based on the following criteria – the link between the represented group and their representatives, the influence of the represented group over their representatives, and the responsibilities and functions of the representatives in a given corporation. The interests represented under the German system are clear, since the main objective of the co-determination regime is

[2] J. Bautz Bonanno, 'Employee Codetermination: Origin in Germany, Present Practice in Europe, and Applicability in the United States (1976-1977) 14 Harv. J. on Legis 947, 949.
[3] Christine A. Mallin, *Corporate Governance* (5th edn, Oxford: Oxford University Press 2016) 20.
[4] Bonanno, (n 2) 954.
[5] s 1, Law of May 1976, (1976) BGBI 1 1153.

to secure the position of the worker within the enterprise.[6] The representatives are elected from amongst the employee group and they are elected to serve on both the supervisory board and the management board. In addition, an employee representative is also appointed to the management board as a personnel director.[7] Two different bodies are responsible for the appointment of supervisory board members under the codetermination regime. The shareholders appoint their own representatives while labour is strictly responsible for appointing employee representatives on the supervisory board.[8]

There are several provisions in the 1976 Act that give labour a strong voice in a German corporation. For example, appointment to the management board requires approval by a two-thirds majority of the supervisory board.[9] In addition, the labour representative on the management board, the so-called personal director (*Arbeitsdirektor*), may only be appointed or removed upon the approval of a majority of the employee representatives on the supervisory board.[10] The equal representation on the supervisory board and the requirement of a super majority for the approval of the management board ensures that labour maintains a strong voice in the management of a German corporation. This is because the co-operation of labour is required for the approval of the management board, given the parity representation at supervisory board level.[11]

The strong labour representation on German corporate boards comes with some responsibilities for labour too. This is because sharing in management decision-making implies sharing in the responsibility arising from the decisions jointly taken.[12] In this regard, both the shareholder-elected board members and their labour-elected counterparts have a primary responsibility to look after the interests of the corporation.[13]

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[6] Bonanno, (n 2) 950
[7] *Ibid*., 953
[8] Codetermination Act, s 9.
[9] *Ibid*., s 31.
[10] Bonanno, (n 2) 953.
[11] *Ibid*., 955.
[12] Johannes Shregle, 'Co-determination in the Federal Republic of Germany: A Comparative View' (1978) 117 Int'l Lab. Rev. 81, 84.
[13] Eric Batstone, 'Industrial Democracy and Worker Representation at Board Level: A Review of the European Experience' in Eric Batstone and Paul Davies, *Industrial Democracy: European Experience* (London: Her Majesty's Stationery Office 1976) 14.

It is important to acknowledge that there has been some criticism of the German co-determination regime, especially regarding its effect on other stakeholders and on a company's business policy. In their suggestion for board restructuring to accommodate other stakeholder interests, Nader *et al* did not propose interest group participation on corporate boards primarily because of what they considered a major defect of the German co-determination regime. According to them '[l]abor representatives apparently are indifferent to most problems of corporate management that do not affect labour. They seem as deferential to operating executive management as present American directors are'.[14]

Limitation of space do not allow for a more detailed critique of the German co-determination: however, it is important to state that studies of the German system by experts after Nader *et al*'s critique rebut the claims by Nadal *et al* and other critics. In his 1976 survey of European experience with industrial democracy and worker representation at board level prepared for the Bullock Committee,[15] Eric Batstone observed that German labour directors do not take advantage of board position to redefine corporate objectives or challenge management strategy but generally support programmes such as investment that will strengthen the position of the company.[16] He states further that even though they sometimes make use of board representation as a means of protecting traditional employee interests in pay, conditions, and job security, they do it within the context of the broader company interest.[17]

Despite the criticisms there is hardly any doubt that the German co-determination regime has had a profoundly positive impact on productivity in the German economic

[14] Ralph Nader, Mark Green and Joel Seligman, Taming the Giant Corporation (New York: W. W. Norton & Company Inc. 1976) 124.
[15] The Bullock Committee was set up 3 December 1975 by the then Secretary of States for Trade, Peter Shore, 'to consider ways of extending industrial democracy in the private sector of industry' in the UK. See the preface to Batstone (n 13) 19.
[16] *Ibid*., 25
[17] *Ibid*., 25-6.

system[18] as well as on industrial relations in the country.[19] The effective participation of labour in the governance of German corporations provides an ideal ground for an industrial relations system based on cooperation.[20] The trust between labour and management engendered as a result of the involvement of labour in the management of German firms is considered a major factor responsible for organizational stability in German corporations.[21] This is particularly important in today's globalized environment where the knowledge, creativity and skill of labour is required to survive intense global competition in which organizational flexibility is considered a key factor. It is instructive that German and Japanese corporations have been adjudged as being more successful than other industrialized jurisdictions in achieving this flexibility.[22]

The importance of co-determination as a strategy for promoting co-operation within the enterprise cannot be overemphasised. It is important to note that bringing labour within the management structure and making their interests an integral part of the company satisfies the underlying idea of co-determination, which is to provide a rational means of handling and settling disputes at the enterprise level.[23] This is especially important to the discussion here, given that we have identified the participation of local communities at board level as a strategy for promoting responsible corporate decision-making and thus preventing corporate abuses of human rights and the environment in developing markets. There is a clear symmetry between this strategy and the principles that underpin the co-determination regime. It is on this basis that we propose to explore the option of a corporate legal framework that would draw on the principles of co-determination by developing a corporate board participatory regime involving local

[18] Franziska Boneberg, 'The Economic Consequences of One-third Co-determination in German Supervisory Boards: First Evidence for the Service Sector from a New Source of Enterprise Data' (2010) No. 177 University of Luneburg Working Paper Series in Economics, 1. <http://www.leuphana.de/institute/ivwl/publikationen/working-papers.html>. Accessed 14 December 2016
[19] Bonanno (n 2) 959.
[20] S. R. De Silva Elements of Sound Industrial Relations System (International Labour Organisation ACT/EMP Publications 1998) 1.
[21] *Ibid*., 4.
[22] *Ibid*.
[23] Batstone, (n 13) 25-6.

community representatives in corporate decision-making, especially for developing markets.

7.3 A Corporate Governance Solution[24]

A framework for the participation of non-shareholder groups in corporate governance in countries like Nigeria will inevitably require a re-modelling of their corporate legal architecture for reasons discussed below. A corporation is a non-natural person. As a result, it can only make decisions and act through natural persons, and Nigeria's Companies and Allied Matters Act (CAMA)[25] provides that '[a] company shall act through its members in general meeting or its board of directors …'.[26] According to s 79 CAMA, a member is a shareholder who shall hold at least one share. The directors on the other hand, 'are persons duly appointed by the company to direct and manage the business of the company'.[27] Thus, subject to provisions in the company's articles, the business of the company shall be managed by the board of directors.[28] Under CAMA, members have exclusive authority to appoint directors[29] as well as the power to discipline or even to dismiss them.[30] Directors are further required under the Act to act at all times in the interest of the company for the benefit of its members.[31]

Given the focus of the Nigeria's corporate legal regime on the shareholder class, matters of general concern to other stakeholders (including local communities), such as issues of human rights and the environment, may not always receive adequate board attention. Additionally, members of a local community may lack the power to influence the firm in their community because they lack access to management.[32] Thus, the goal of

[24] This coinage was used by Janet Dine in Janet Dine, *Companies, International Trade and Human Rights* (Cambridge: Cambridge University Press 2005) 276.
[25] Companies and Allied Matters Act, Cap C20 LFN 2004.
[26] *Ibid*., s 63 (1).
[27] CAMA, s 244 (1).
[28] *Ibid*., s 63 (3)
[29] *Ibid*., ss 247-8
[30] *Ibid*., s 262.
[31] *Ibid*., s 279.
[32] See the discussion on (n 64), Chapter 6.

the proposed participatory framework is to ensure that matters of concern to local communities are taken seriously at board level and not as a strategy to undermine the profit motive of members.

To incorporate local communities' representatives will require a review of CAMA. Since the Act is divided into parts, it will require the amendment of Part 3 to create a two-tier board structure and the inclusion of additional provisions that will provide for the duties of directors, their appointments and other matters incidental thereto. This is important to bring about a corporate governance structure that will provide the basis for an effective participation of local community representatives.

However, since MNCs operate in developing markets through their subsidiaries, the new framework will be primarily concerned with those subsidiaries and, perhaps the MNC as a shareholder. This is based on the fact that incorporation in Nigeria is mandatory for corporations that seek to undertake any business activity in the country, and s. 54 of CAMA permits a MNC to incorporate a subsidiary in Nigeria to carry on its business functions. Thus, the proposed framework does not regulate the MNC per se, except with regard to its involvement in the subsidiary.

The underpinning principle of the proposed framework is the balance of interests, i.e. balancing the interest of business corporations' right to operate without unlawful interference and to make profit, and their host communities' right to a healthy environment and respect for and protection of their human rights. In this regard, the stakeholder model envisaged in this thesis mirrors the German co-determination regime with a two-tier board structure of a supervisory board and a management board.[33]

Unlike the German system, where labour representatives participate in both the management and the supervisory board, the represented group under the proposed framework are the local communities that host MNCs and they are expected to participate only on the supervisory board. The management board will be composed exclusively of

[33] Co-determination Act, Law of May 1976, (1976) BGBI 1 1153.

shareholder elected representatives and they will have exclusive authority to manage the corporation. The supervisory board, as the name implies, will play a supervisory role as discussed below.

Having identified local communities as the protected group in the proposed participatory framework, it is important that the framework meets the other three criteria for effective representation already identified under the German co-determination regime – the representatives' link to the represented group, the authority of the represented group to appoint and discipline their representatives, and their prescribed functions. To ensure effective participation, the supervisory board will be composed of equal numbers of shareholder elected representatives (who, in the case of global operating corporations, is usually the parent MNC) and local community elected representatives.

To achieve a meaningful representation of local communities by this group, the local community members will have the exclusive right to vote on matters of the appointment and control, including dismissal, of their elected representatives. This is important to counterbalance the position of other board members, such as executive and non-executive directors, who are primarily controlled by shareholders under Nigeria's current corporate legal regime.[34]

Since the focus of the proposed regime is on restructuring the current corporate legal architecture, it makes sense to investigate the structures on different levels within the Nigerian system, such as the country's political structure and the structure of the communities. This is with a view to identifying, first, the place of local communities in the current Nigerian political structure, and secondly, to identify the appropriate groups within the country's communities structure that could provide adequate representation. This analysis will provide the legitimate basis to appoint a particular group ahead of others.

[34] CAMA, s 63 (5) & 262.

7.3.1 Nigeria's Political and the Structure of Nigerian Communities

As discussed in chapter 6, Nigeria is federal state consisting of 36 states and 774 local governments.[35] Thus, the Nigerian political structure consists of the federal, states and local governments. These are the recognised bodies involved in the country's administration at different levels. Even the agencies created to address the Niger Delta challenges, such as the OMPADEC and the NDDC operate based on the current political structure.[36] The implication is that local communities are left out of the country's general administration. This is part of the problems addressed in this thesis with a view to bringing them into decision-making at least concerning matters that affect their lives.

Even though the local communities are not part of the Nigeria's political structure, they are nevertheless an important unit in the country's system because they constitute the political unit called Nigeria. This is the basis for our argument to formulate a new corporate structure that is based on public/interest group participation as a strategy for bringing them into the administration of the matters that affect them.

It is important to note that the local community as envisaged in the proposed framework is the community that hosts the operational facility/facilities of the corporation. In the Nigerian context, a community may comprise several villages and cover a wide geographical area, an example being the Bodo community that won £55m in compensation against Shell in a UK court.[37] Bodo is a community of about 49,000 people spread across 35 villages covering about 90 square kilometres in Gokhana Local Government Area of Rivers State.[38]

There are larger communities in the Niger Delta also, such as Eleme community that hosts Nigeria's Petrochemical Industry. Eleme has a population of about 190, 000 and covers about 138 square kilometres. It is such communities for which we seek

[35] Chapter 6, (n 79).
[36] Ibid., 6.3.1 & 6.3.2.
[37] *Bodo Community* v *Shell Petroleum Development Company (Nigeria) Limited*, Case No. HQ11X01280.
[38] Onyedimmakachukwu Obiukwu, '5 Things You Should Know about the Bodo Community and its $83m Shell Compensation' Ventures Africa, 7 January 2015,< http://www.venturesafrica.com/5-things-you-should-know-about-the-bodo-community-and-their-83-million-shell-compensation/>. accessed 17 March 2017.

representation on corporate boards. However, since the primary focus of the proposed framework is prevention of environmental and human rights abuses, it is important to bear in mind that a particular corporation may operate in multiple locations or its activities may affect other people beyond the particular community where it is located. This will form the basis to guide the operation of the proposed framework as discussed below since the size and operation of any corporation will determine the size of its supervisory board.[39]

Unlike Nigeria's political structure that consists of levels of government, Nigeria's communal political setting consist of groups that represent different interests within the community. This peculiarity deserves further treatment here because of its importance to the proposed electoral college, discussed below. The first and probably the highest authority amongst the groups is the council of elders headed by the king, a chief or clan head (traditional ruler). The Eleme community discussed above is headed by the Oneh Eh Eleme (Chief of Eleme).[40] The council of elders normally consist of all the elders from over 70 years of age, the chiefs, and heads of all the villages that make up the community. They are in charge of local community administration and they are so recognised under State laws [41] and even Local Government By-laws.

The church community is another strong community in the Nigerian community system. The political leadership of Nigerian churches is vested in the President of the Christian Association of Nigeria (CAN). CAN has local units in the states, the LGA's, and in local communities. It is the local community units that organize and co-ordinate the affairs of Christians in the communities. The Muslims also have a similar organization, the Nigerian Supreme Council of Islamic Affairs (NSCIA), which is headed by the Sultan of Sokoto.[42] Unlike the council of elders which preside over most community matters, the religious groups are the authority of first instance in matters concerning their members.

[39] See s. 7.3.3.
[40] Ethnography, Eleme Socio-political System, <http://www.eleme.org.uk/ethnograhy/society.html> accessed 17 March 2017.
[41] See for example Obas & Chiefs of Lagos State Laws Cap 138, Laws of Lagos State of Nigeria, 1994; Council of Traditional Rulers, Laws of the Bendel State of Nigeria 1976 Cap 47 (this law is applicable to Edo and Delta States).
[42] The Constitution of the Nigerian Supreme Council of Islamic Affairs, s. 15.

The major importance of this group is that it is the only group that consists of indigenous and non-indigenous members of every community in Nigeria. Thus, it provides a basis for representation of affected persons who may not have a voice in the community on account of their being non-indigenes.

The youth wing of every community is also a very important group as the security arm of the council of elders. This group consists mostly of indigenous young people of the community. They are in charge of implementing decisions made by the council as well as organising community labour. The importance of participation of the youth group cannot be overemphasised. Even Principle 21 of the Rio Declaration emphasises the necessity of the participation by youths in decision-making processes concerning matters that affect their community.

The women's group is another important group in Nigeria's community structure. This is the group that is mostly unrepresented within the other groups discussed above. This makes them more vulnerable as issues concerning them are less likely to receive the due attention from other groups. In fact, their vulnerability has been recognised by the Committee on Economic Social and Cultural Rights in its recent General Comment 24.[43] The Committee identifies the group as one of the groups often disproportionately affected by the impact of business activities. As a result, State Parties are required to address the specific impacts of business activities on women, and incorporate a gender perspective into all measures to regulate business activities that may adversely affect their enjoyment of economic social and cultural right.[44] Since the women group co-ordinate affairs of women in the community, Nigeria will be fulfilling its obligation under the Covenant (ICESCR) with the involvement of the group in the proposed legal framework. This, in addition to the fact that women are mostly underrepresented in the Nigerian community system makes their participation in the proposed legal framework imperative.

[43] Economic and Social Council (ECOSOC), Committee on Economic, Social and Cultural Rights, General Comment 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, E/C.12/GC/24.
[44] *Ibid*., 8.

The four groups identified above represent the basic structure of a Nigeria community. Their involvement in the proposed framework will provide a legitimate basis for adequate community representation. Since the proposed framework is aimed at addressing corporate human rights and environmental abuses in the communities concerned, their participation in corporate decision-making is likely to promote a more human rights and environmentally-friendly decision-making in that regard.

7.3.2 Appointment of Supervisory Board Members and Incidental Matters

Even though the proposed regime mirrors the German co-determination system, the dissimilarity in the relationship between corporations and labour on the one hand, and that between corporations and local communities on the other, as the identification of different groups in a Nigerian community above has shown makes a modification of the German system imperative. Thus, having identified the groups that represent the basic structure of a Nigerian community, it is important to examine how a "local community co-determination" system would be structured under a modified Nigerian corporate governance framework.

The appointment of shareholders' representatives on the supervisory board will follow the usual procedure under the current regime of nomination by members and approval by a majority of shareholders. However, the appointment of local community representatives would involve a more rigorous process that will culminate in formal election of the representatives. For their election, the collegiate electoral system will be adopted under the proposed framework. First, there will be an electoral college comprising delegates to be drawn from four sources: (1) the council of elders, (2) the church community, (3) the youth groups, and (4) the women's group. Reliance on these existing structures will make the process less cumbersome since these four groups already have recognised platforms and they are the core groups that provide leadership at community levels in Nigeria.

These four groups have developed mechanisms for organising their elections over the years so that it will be unnecessary to re-invent the wheel. Therefore, each group would elect their own delegates using their established procedures. However, these elections will be subject to the rules governing elections in Nigeria regarding voting age for participation in elections, which is 18 years.[45] Each group is also expected to have equal number of delegates who will be members of the electoral college board under the proposed framework.

The issue of constituency is vital to successful representation because a supervisory board member that has no root in the local community represented is more likely to work for his personal interest rather than the interest of the represented community. Qualification to stand for election as a community board representative will be based on two factors. The first is that the candidates must have a direct root in the community, i.e. they must be indigenous members of the community and, secondly, every candidate must possess a minimum of a university degree in the relevant field.[46]

The process of appointment to the position of community representative will begin with an advertisement for the position by the corporation concerned. Interested candidates will be directed to apply to each electoral college group for sponsorship. Only the candidates sponsored by these groups will be qualified to stand for election to represent the community. This is a way of ensuring that the candidates have a root in the community as well as to create the necessary connection between the candidate and the sponsoring group. This connection is expected to create the link between a MNC and the local community through the representatives.

However, for the election, each group will be expected to sponsor four candidates for every candidate required. This will provide an opportunity for the electoral board members to make an informed choice because all the members will be required to cast their vote amongst all the candidates sponsored by the four groups individually. The

[45] Section 12 (1) (a), Electoral Act 2010 Cap E6 Laws of the Federation 2010.
[46] See p. 251, (n 49) below for a discussion on the academic qualification of local community representatives.

candidate with the highest number of votes in each group will be declared the nominee from the group. This is to make it possible for the different groups to have equal representation.

The involvement of the corporation itself in this entire process will be limited to advertising the position and providing financial and logistical support. Members of the electoral college board are the only ones qualified to vote to elect the candidates. The electoral body itself will comprise members to be appointed from the international Non-Governmental Organisation (NGOs) that have been active in the Niger Delta, such as Amnesty International and Friends of the Earth. Established relationships with the communities concerned will form the basis for such appointments. Some NGOs have played active part in facilitating access to international litigation for some Niger Delta communities.[47] It is such track record that will guide the appointment of the NGOs. Appointing such NGOs to this role will help to avoid regulatory capture. However, details of the procedure would be regulated by the corporate law.

To ensure stability in the governance of the corporation the appointment of local community representatives would be for a fixed term of four years, renewable for a second and final term of four years. The electoral college board members, on the other hand, will serve a single term of ten years to ensure stability in the process. In the case of death of a member of the electoral college, the group that lost the member will be required to provide a replacement who will also go through the same process as discussed above.

However, to prevent cosiness and compromise between the local community representatives and the executive board, or with shareholder representatives on the supervisory board, the local communities will have a right under the framework to recall their representatives for non-performance or even for no reason. In this regard, a 75 percent vote of all the electoral board will be required to recall a representative. The

[47] Audrey Gaughran, 'Shell's Niger Delta Pollution: the Good, the Bad and the Ongoing Quest for Justice' (Livewire: Amnesty's Global Human Rights Blog) <http://www.livewire.amnesty.org/2013/02/01/shells-niger-delta-pollution-the-good-the-bad-and-the-ongoing-quest-for-justice/comment-page-1> accessed 18 February 2017.

participation of local communities in the election and dismissal of their representatives is important because it provides the basis to ensure their fealty to the communities represented, since their mandate is strictly tied to the local community's interest.

7.3.3 The Scope of the Community Representative Regime, Remuneration of Representatives and Related Matters

The proposed framework is not expected to apply to all corporations because it is not all corporations that have the potential to cause damage to the environment and the health of local communities. Therefore, the application of "local communities' co-determination" under the proposed regime will be limited to those corporations that operate in the areas that are usually listed under EIA regimes, such as mining, chemical production, extraction of petroleum and natural gas etc.[48]

Another major factor that would guide the operation of the regime in this regard is the size of the corporation involved. The supervisory board is expected to be composed of a minimum of eight members, comprising four each of local community representatives and shareholder representatives. However, larger corporations should have larger supervisory boards so that they can provide effective supervision but every supervisory board will comprise of equal numbers of shareholders' and local communities' representatives.

The issue of community representation deserves further analysis here because a particular corporation may be operating in more than one location. In this case, representation on the board of such corporations will be drawn from the various locations. Since we have identified size, complexity of operations and the potential to cause human rights and environmental harm as the major determinants for corporate supervisory board

[48] See for example, the Aarhus Convention, art 6 and 7; the Nigeria Environmental Impact Assessment Act provides a Mandatory Study List (specified in the Schedule to the Act), see chapter II, s. 2.2.3.2, (n 113).

size, it follows that corporations that operate in multiple locations will have larger board size.

Thus, the various communities that host the operating facilities of a particular corporation will have equal numbers of supervisory board members. For example, if eight local community supervisory board members are required on the supervisory board of a corporation that operates in two communities, each group of the four groups identified above will have one member to represent them since each community in this case will be represented by four members. The implication is that a group from a given community may not have more than one representative on a corporations' supervisory board where the corporation operates in multiple locations. It is argued that the effect of the representation is the same since the common goal is to address abuse of human rights and the environment. What is important in each case is that affected communities are represented which is the goal of the proposed framework. However, the process for their election will follow the procedure discussed above for every community.

This combined representation raises the probability of conflict between different communities represented. It is argued that there is likely to be minimal conflict in this regard because the interests represented is common to all the communities, given that the purpose of their representation is to oversee those decisions that have the potential to generate human rights and environmental harm. Ensuring that such occurrences are prevented within their individual communities and other communities that might be affected will form part of their responsibilities as discussed below.

The local community supervisory board members, and indeed all the supervisory board members, are expected to be adequately remunerated. Although we have identified a first degree as the minimum academic qualification required for candidates for the position of local community representative, it is important to emphasise further that the representatives have the requisite expertise in relevant fields. In this regard, the position of local community representative on the supervisory board would be based on expertise in areas of production, science and technology, and environmental science because

matters within their authority are more likely to be those that have an impact on the environment and the health of the communities. It is expected that a person with a background in chemistry or in environmental engineering would possess the relevant expertise necessary to supervise activities in a chemical company or a petroleum mining company.[49]

Another area of expertise that might be necessary is the law profession. Since part of the local community representatives' functions discussed below, include ensuring that corporations comply with extant laws, at least one lawyer might be required to sit on the supervisory board as one of the community representatives to guide the board in their deliberations in this regard. The major problem that may arise from seeking expertise at this level is that there is a limited supply of such experts. Therefore, candidates for this position could include, to borrow from Christopher Stone, semi-retired executives, retired civil servants, and academics who might be able to share their time between the business of the corporation and their other engagements.[50]

In view of the paucity of experts, a local community representative could be elected to serve on the board of more than one company but no more than two. This might require that local community representatives would be engaged on a part-time basis and meet on an ad hoc basis when issues within their purview are due for consideration or whenever there are emergencies requiring their attention either from the company or the local community itself.

Operating on an ad hoc basis will make it possible to spread the available hands to cover the corporations, as well as attract qualified academics who would have to arrange half loads with their institutions.[51] Although local community representatives (and, of course, the supervisory board) will not be engaged as full-time board members, their appointment would be structured to make it possible for them to have full access to a

[49] Thomas Donaldson, *Corporations and Morality* (Englewood Cliff: Prentice-Hall Inc. 1982) 193.
[50] Christopher D. Stone, *Where the Law Ends: The Social Control of Social Behaviour* (New York: Harper & Row 1975) 160.
[51] *Ibid*.

company's facilities and be able to interact with management and staff to be able to effectively review the management board's activities. However, this is only as it concerns matters within their purview.

There are possible implications in having people with this level of expertise sit on corporate boards, and in fact, having them sit on multiple boards. The first is the cost implication regarding the cost of running the proposed structure. Secondly, there may be genuine concerns about its impact on a company's business operations, especially how commercial confidentiality could be preserved.

Concerning the cost implication, it is adequate remuneration that is likely to attract people with character and relevant expertise. Thus, supervisory board members will be adequately remunerated. However, the remuneration of supervisory board members should be commensurate with their expertise and the time commitment they are expected to make. This might appear to impose a huge financial cost on corporations, but the cost is arguably reasonable if we consider the fact that the goal of this regime is to address those matters that generate conflict in the Niger Delta, which has brought huge losses to the oil MNCs and the Nigerian government. Therefore, the cost of operating the proposed structure could only be determined by comparing the expenses of running it with the savings from eliminating or considerably minimizing the conflict in the Niger Delta, which as stated earlier cost about US$14bn annually.[52] Thus, it would appear clear that the costs associated with the proposed structure would offset this amount.

Secondly, as stated earlier, community supervisory board members are expected to participate only on the supervisory board since the management board is exclusive to shareholder elected representatives.[53] There is no recourse to a company's commercial undertakings by supervisory board members. Their duty as discussed below is just to monitor how management deal with issues of human rights and the environment,

[52] See chapter 6, (n 153 and 5).
[53] Section 7.3.

something like supervising environmental impact assessment.[54] Thus, the fact that a few qualified supervisory members may be permitted to serve on more than one company's board is unlikely to cause any breach of commercial confidentiality since commercial issues are clearly outside their remit.

7.3.4 Functions and Responsibilities of the Supervisory Board

The supervisory board, as the name implies, is intended to supervise the management board and oversee certain aspects of its activities. This will involve two broad functions – assessing the environmental impact of proposed activities by the company and ensuring that the management board complies with extant legislation with regard to proposed projects and in the award of contracts and staff employment. With regard to assessing the environmental and human rights impacts of new projects, the supervisory board will have general powers to approve new projects envisaged and proposed by the management board after due consideration of matters such as the quality of equipment proposed for the project, emission control mechanisms, and similar issues that are likely to have direct impact on the environment. It would require a 75 percent majority to approve such projects. The 75 percent approval threshold will apply to all supervisory board decisions. The purpose is to ensure that a management board proposal wins the support of a sufficient number of local communities' representatives before the corporation could undertake them.

The other area where the local community representatives are expected to play a prominent role is regarding compliance with existing laws and regulations. Compliance with extant laws in the area of contract awards and employment is likely to promote youth employment and economic development. For example, compliance with the Nigerian Oil and Gas Industry Content Development Act 2010 (Local Content Act 2010) will be useful in this regard. The Local Content Act provides that all operators and project promoters in

[54] See s. 7.3.4, below.

the oil and gas sector 'shall maintain a bidding process for acquiring goods and services which shall give full and fair opportunity to Nigerian indigenous contractors and companies'.[55] It also provides that,

> [t]he award of contract shall not be based solely on the principle of the lowest bidder where a Nigerian indigenous company has capacity to execute such job and the company shall not be disqualified exclusively on the basis that it is not the lowest financial bidder, provided the value does not exceed the lowest bid price by 10 percent.[56]

Section 28 of the Act provides that '[s]ubject to section 10 (1) (b) of this Act, Nigerians shall be given the first consideration for employment and training in any project executed by any operator or project manager in the Nigerian oil and gas industry'. This is instructive because compliance with the provisions of Nigerian laws, such as the Local Content Act 2010, will promote both youth employment and economic development. The engagement of Nigerian youths by the oil and gas companies, and the involvement of local companies that may take advantage of the provisions of the Local Content Act to engage in oil and gas related business activities, is likely to considerably reduce the number of unemployed youths available for recruitment by militant groups.

To make the participation of local community representatives meaningful in this regard, new contracts involving new employees and suppliers will be laid before the supervisory board. It will be the responsibility of the supervisory board to approve such contracts if they are satisfied that the management board has complied with the requirements of extant legislation, such as the Local Content Act. The 75 percent approval threshold will also apply in this regard.

Since the main purpose of granting participatory right to local community representatives is to promote environmental and human rights integrity, it is important to address how their participation will be regulated to not only promote this goal but to also

[55] Local Content Act, s 15.
[56] *Ibid*., s 16.

achieve a truly symbiotic relationship as envisaged under the new framework. In this regard, local community representation on corporate boards will come with some responsibilities, similar to those of management boards' duties to the company and its members under the current Nigerian corporate legal regime. However, unlike the management board that focuses primarily on promoting the interest of the company and its members, the focus of local community representatives will be to promote the interests of the local communities within the context of the broader company interest.

In this regard, a local community representative will have a general obligation to promote best practices with respect to the operations of the respective company with a view to minimizing environmental harm. In furtherance of this obligation, the local community representative will stand in a fiduciary relationship with the community as well as distant communities that might be affected by the company's operations with regard to the impact of its operation on the environment. Thus, a local community representative,

(1) must act at all times in what he believes to be the best interest of the community.

(2) must exercise his powers for the purpose for which they are specified.

(3) must avoid conflicts of interest-

(a) must not receive any payment from the company in excess of his prescribed remuneration,

(b) must not engage in any contract or transaction with the company outside his mandate for personal gains.

(5) must not fetter his discretion to vote in a particular way.

(6) must exercise reasonable care, skill and diligence in the discharge of his functions.

The consequence of breach of any of the above will include, (a) a re-call in accordance with the procedure discussed above, and (b) the breach of the fiduciary obligations will in addition to (a), be redressed in the same way as any other breach of fiduciary duty owed

by executive directors under the current Nigerian CAMA, including the duty to account for any profits made in breach of duty.

There are two important ways that discharging the responsibility to promote best practices in the company's operations will promote human rights and environmental integrity. The first is with regards to their primary function of assessing the environmental impact of proposed activities to prevent harm to the environment and second is with respect to remediation when the harm has occurred. In both cases, the local community representatives could rely on the technical guidance elaborated in Ramsar Handbooks for implementing the concept of wise use of wetlands with regard to EIA[57] and wetland restoration.[58] This is especially relevant given the fact that the extractive sector is the major source of environmental abuses in Nigeria, and Contracting Parties are required to apply the guidance on EIA 'in order to ensure that it adequately addresses direct and indirect impacts on wetlands of the exploration, development, operation … phases of extractive industrial activities'.[59] Thus Nigeria, in applying the guidelines elaborated in the Ramsar guidelines, will not only be addressing its environmental problems, it will also be fulfilling its obligations under the Convention.

The responsibility to ensure the fealty of local community representatives will belong to the electoral board. In this regard, the new regime will provide for certain reports and disclosures concerning supervisory board meetings and activities to be made to the electoral board. This is to ensure that the electoral board provides adequate oversight of the supervisory board activities with a view to ensuring that their representatives discharge their responsibilities in accordance with their mandate to promote human rights and environmental integrity.

Thus, the company must keep records of resolutions and meetings of the supervisory board. This record will follow the same procedure of keeping records of

[57] Resolution X.17.
[58] Resolution VIII.16.
[59] Resolution X.26.

resolutions and meetings under the current regimes.[60] The book containing records of such proceedings of the supervisory board will be kept at the registered office of the company, and be open to inspection by members of the electoral board. The procedure for such inspection and the procedure for enforcing compliance, as well as the penalty for non-compliance, will follow the same procedure under CAMA with regard to the inspection of minutes' book of proceedings in general meetings and meetings of directors.[61] However, a breach of any of the above procedures will activate the clauses on recall and enforcement of fiduciary duties.

In addition, the local community representatives will meet formally with the electoral board at least twice annually. The meeting could be initiated by either the representatives or the electoral board members requisitioning a meeting. Where it is the representatives that requisition the meeting, at least two of their numbers must sign the notice of the meeting. In the case of the electoral board members, 20 percent of their number will be required to sign the notice of meeting. In each case the meeting must be held not later than 21 days after the notice of meeting has been issued.

To achieve the maximum interaction necessary for effective oversight by the electoral board, the representatives and the electoral board could also meet informally or call emergency meetings to address new developments that need not wait for the bi-annual meeting. For example, if there is an accidental leak of crude which affects the community, the representatives would need to properly inform the board about the leak, and efforts by the company to redress the situation. This type of inside knowledge will bridge the communication gap that currently exists between oil MNCs and their host communities and thus prevent the resort to self-help, such as engaging in protests and carrying out attacks on oil MNC facilities by the natives.

[60] See for example, CA 2006, s 355; CAMA s 241.
[61] CAMA, s 242.

Finally, the support of local communities has been identified as the major reason for the sustained militancy and crude oil theft in the Niger Delta.[62] Pipeline vandalism and crude oil theft is associated with the illegal refining that is being carried on in the region. The oil MNCs pipelines are the major source of crude supplies to those illegal refineries.[63] The point here is that it is not possible that the owners of the farms or the locals behind whose homes these illegal refineries are located are unaware of their existence. They do not report these illegal activities to the authorities because they feel cheated by the government and the oil MNCs. The proposed framework is intended to resolve situations like this and engender a sense of ownership by creating access for the local communities to reach the oil MNCs through their representatives.

It is important to note that pipeline vandalism is also a major source of oil spill in the Niger Delta.[64] As a result, it will become part of the responsibilities of the representatives' sponsors to watch out for activities that might affect the company's business. The representatives themselves will keep in touch with their sponsors to ensure that they effectively monitor their farms and their neighbourhood, and report any illegal activity to their representatives. The responsibility of the natives in this regard is intended to achieve two outcomes. The first is that the vigilance of the community members will substantially reduce incidents of pipeline vandalism and the pollution that flow therefrom. It will also create employment opportunities for the youth population in the Niger Delta.

It is argued that putting the protection of the oil facilities in the Niger Delta in the hands of the locals will be a better alternative than the award of surveillance contracts to ex-militants. The local community board members are arguably in a better position to organise such a process with the local community leaders to achieve better results. Therefore, the new approval by the Federal Government for the renewal and re-award of pipeline protection contracts[65] to ex-militants is a misplaced strategy and an indication

[62] See chapter I, (n 110).
[63] *Ibid*.
[64] See for example Shell's Oil Spill Data Report in which it blames sabotage and theft as the main source of oil spills <http://www.shell.com.ng/sustainability/environment/oil-spills.html> accessed 2 August 2017.
[65] Soni Daniel, 'FG Okays New Package for Niger-Delta' 20 March 2017 (Lagos: Daily Vanguard).

that the government is mostly concerned about a quick fix that could bring about steady oil production. This is the same approach that guided the grant of amnesty to the militants in 2009.

The problem with this is that the ex-militants are the same people engaged in the illegal activities. The grant of amnesty and the award of the pipeline protection contracts did not end militancy because new groups emerged to make the same demands.[66] Unlike the current approach, the proposed framework will effectively engage the affected communities who have interests in the wellbeing of their community and it will provide the appropriate impetus for them to ensure the safety of the facilities that will bring development to their community.

In addition to the pecuniary benefits that may come with service to the companies in their neighbourhood, there are other benefits that the proposed framework can bring to the local communities too. For example, meeting with their representatives will afford them the opportunity to discuss development projects that might be useful to the community. Thus, instead of the current practice of MNCs devising CSR projects that may seem appropriate to them,[67] the local community supervisory board members would be able to take the views of their communities back to the company. This way, the company will be in a better position to make informed decision about such projects.

However, to effectively perform their functions, the representatives must be given unfettered access to the facilities of the company to enable them to carry out a proper assessment of the impacts that a proposed activity might have not only on their community, but also on other communities that may be some distance away. The representatives will have a personal responsibility in this case to ensure that neighbouring or distant communities are protected. The representatives will be personally liable where their negligence or failure to undertake proper environmental assessment causes damage

[66] Francis Sadhere, 'Activist Opposes Pipeline Protection Contracts for Ex-Militants' The Authority Newspaper <http://www.authoritynqr.com/2017/03/Activist-opposes-pipeline-protection-contracts-for-ex-militants> accessed 03 May 2017.
[67] Emeka Duruigbo, 'Managing Oil Revenues for Socio-Economic Development of Nigeria: The Case for Community-Based Trust Fund' (2004-2005) 30 N. C. J. Int'l & Com. Reg. 121, 168.

to another community. This might be framed in the manner of fiduciary duties under the proposed framework.

7.4 Conclusion

Having identified the local communities that host the operating facilities of MNCs in the last chapter as the most deserving of representation at the corporate board level, it makes sense to identify the effect of their representation on other corporate stakeholders, especially the government and the shareholders (who may be the MNC in the case of a subsidiary). The German co-determination regime is considered the appropriate template for the proposed public participation framework, Germany being the common reference jurisdiction for other stakeholder participation at the corporate board level.

However, to accommodate local community representatives on a Nigerian corporate board will require the modification of the Nigerian corporate governance regime. This is important for two reasons. The first is that Nigeria operates a governance model that focuses almost exclusively on corporate shareholders, unlike the German model that accommodates other corporate stakeholders. Second is the dissimilarity in the relationship between corporations and labour on the one hand, and that between corporations and local communities on the other. This is the basis for developing a blueprint for the proposed participatory structure, and the next chapter addresses the implications of local community representation at the corporate board level in Nigeria.

8. Concluding Remarks

Instances of violations of human rights and the environment in developing markets by MNCs are very well documented. However, holding MNCs to account, legally, for harm arising from their developing-markets operations has been generally regarded as a major challenge.[1] This has created a situation of impunity for human rights and environmental abuses by MNCs in developing markets. Three key factors have been identified as the major reasons why MNCs remain unaccountable for violations of human rights and the environment – the mismatch between the modern MNC structure and the rules of corporate law, the insensitivity of the governments in developing markets to the plight of human rights victims, and the lack of access to judicial remedies for human rights victims.[2]

These factors encourage, in different ways, the wanton human rights abuses and destruction of the environment of local communities, such as the case of the Niger Delta region of Nigeria. The long period of environmental degradation and social damage to the Niger Delta has been identified as the major factor responsible for the emergence of militant groups and the general insecurity in the region. It is with a view to addressing the emerging social problems in Nigeria that this thesis seeks a new approach to addressing human rights and environmental problems in Nigeria, and other developing markets in similar situation to Nigeria. Thus, the choice of Nigeria is not only because the country represents a global signpost of oil spills and environmental degradation, but also because the corporate impunity for human rights and environmental abuses in the country has generated a major social problem.

We identified the participation by potentially affected groups in corporate decision-making as the appropriate procedure for addressing the problem of corporate human rights

[1] Richard Meeran, 'Access to Remedy: The United Kingdom Experience of MNC Tort Litigation for Human Rights Violations' in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge: Cambridge University Press 2015), 378.
[2] Michael K. Addo, 'Human Rights and Transnational Corporations – an Introduction' in Michael K. Addo (ed), *Human Rights Standards and the Responsibility of Transnational Corporations* (The Hague: Kluwer Law International 1999); Surya Deva, *Regulating Human Rights Violations: Humanizing Business* (Oxon: Routledge 2104), 24-45; Meeran, ibid.

and environmental abuses in developing markets. We also identified local communities as the most deserving of representation at the corporate board level in Nigeria because they are the group that is most vulnerable to human rights and environmental impacts of the activity of oil MNCs, especially with regard to their operations in the Niger Delta. However, apart from the local communities, the Nigerian government and the oil MNCs are also important stakeholders in the oil and gas sector.

Oil and Natural gas are the dominant foreign exchange earners for Nigeria and a major contributor to its budgetary revenue.[3] With regard to the oil MNCs, Shell's 2016 report shows that Nigeria and specifically the Niger Delta contributes about 10 percent to its global earnings.[4] This underscores the importance of Nigeria's oil industry operations to the oil MNCs and the Nigerian government. Because of the considerable economic importance of the oil and gas operations in the Niger Delta to these two important stakeholders it is also important to address how the proposed legal framework developed to solve the problem of local communities will be beneficial to them and thereby deliver a win-win situation to all the major stakeholders.

The insecurity in the Niger Delta, which is caused by the activities of the militants constitutes a major problem to the Nigerian government because of its impact on the national economy. The fact that the Nigerian government is constantly establishing development institutions and sundry initiatives aimed at addressing the problem in order to improve oil production attest to this. This invariably makes the proposed framework that aims to address the security challenges potentially a highly effective alternative to the current efforts.

The prospect of achieving peace in the Niger Delta makes the proposed framework deserving of government's consideration and approval. However, the impact of the proposed regime on the oil corporations might be different because, apart from the

[3] See chapter 1, (n 95 and 97).
[4] Shell Investors' Handbook 2012-2016, <http://www.reports.shell.com/investors-handbook/2016/servicepages/downloads-centre.html> accessed 9 May 2017.

economic implications it has corporate governance implications too, which is why it is important to identify how the proposed framework will promote their economic and other interests.

It is important to note that profit has been identified as the motivation for foreign investment in developing markets. MNCs invest in these markets through their subsidiaries, which are necessarily incorporated in the case of Nigeria, as Nigerian companies in accordance with the requirements of CAMA. It is instructive that Nigeria's corporate legal regime requires the managers of a Nigerian corporation to at all times promote the interest of the company for the benefit of its members as a whole.[5] Even though dispersed shareholding is the norm in Nigeria's major corporations (as a result of the country's common law origin), MNCs and their subsidiaries present a different case because MNCs are most often the sole or dominant shareholder in their subsidiary/subsidiaries, which affords them the opportunity to exercise full control over their management.[6] Thus, given their majority shareholding and control over the management of their subsidiary/subsidiaries, it is certain that a parent MNC will be the major beneficiary of their success.

However, because other interests may be affected by the operations of the company, such interests must be taken into consideration while making the decisions relevant to the conduct of their operations: disregarding those interests could generate adverse consequences, such as the re-emergence of militant groups in the Niger Delta who claim that their attack on oil production facilities in the Niger Delta is in reaction to the environmental degradation by MNCs operating in the region.

MNCs do not set up their operations in developing markets with a view to abusing the human rights and degrading the environment of local communities. However, because these are some of the unintended outcomes of their operations, it is important to put a system in place that will effectively address the abuses when they occur or, more

[5] CAMA, s. 279.
[6] See the discussion on the structure of MNC/subsidiary, chapter 5, (n 28).

importantly, prevent them from occurring in the first place. In view of the weaknesses in the legal environment in developing markets, preventing the abuses is the option proposed in this thesis, and participation in corporate decision-making by local community representatives is the proposed mode of achieving this objective. It is argued that such participation will be beneficial to the oil MNCs operating in the Niger Delta in two important ways.

Before discussing the benefits of local communities' representation on corporate boards in Nigeria it is important to point out how such representation may engender a more responsible MNCs conduct. Even though the focus of the representation is prevention, it is not in all cases that human rights and environmental harm could be prevented. In situations where the harm has occurred, the option for the corporation concerned is remediation. When the corporation fails in this regard, the affected community might seek legal redress. We have identified how the weak and inefficient legal enforcement infrastructure in Nigeria and other developing markets have made redressing corporate human rights abuses difficult, as result of which there is a general preference for international litigation by corporate human rights victims.

There have been significant challenges for human rights victims claiming overseas. The first challenge emanated from a ruling in the case of *Esther Kiobel* v *Royal Dutch Petroleum Co*.,[7] where the United States' Supreme Court rule that corporations are not part of the defendants envisaged under Alien Tort Claims Act (ATCA). According to the court, 'no corporation has ever been subject to any form of liability (whether civil, criminal, or otherwise) under customary international law of human rights'.[8] This ruling effectively diminished the potential of ATCA as a regime for holding MNCs legally accountable for abuses of human rights and the environment in developing markets. As a result, the UK[9] has emerged as a more viable alternative for claimants seeking redress

[7] (2010) 621 F. 3d 111.
[8] *Ibid*., 188.
[9] *His Royal Highness Emere Godwin Ebebe Okpabi and Others* v *Royal Dutch Shell Plc and Shell Petroleum Development Company Nigeria Limited* (2017) EWHC 89 (TCC); *Dominic Liswaniso Lungowe and Others* v *Vedanta Resources Plc and Konkola Copper Mines Plc* [2016] EWHC 975 (TCC); *Bodo Community* v *Shell Petroleum Development Company of Nigeria* (2014) EWHC 1973 (TCC).

for human rights and environmental abuses committed by subsidiaries of MNCs registered in or operating from a UK headquarters.

However, there is a developing challenge in the UK for MNC human rights victims. Establishing the connection between the local operations by an MNC's subsidiary and the MNC itself has become a major challenge. In the recent case of *Godwin Bebe Okpabi and Others* v *Royal Dutch Plc*,[10] the court concluded that 'there is simply no connection whatsoever between the claims brought by the claimants, who are Nigerian citizens, for breaches of statutory duty and/or in common law for acts or omissions in Nigeria, by a Nigeria company'.[11] The claim thus fails as a result. The lack of access to justice for MNC human rights victims creates a situation of impunity for corporate human rights abuses. This is the basis for suggesting the participation of local communities' representation with a view to promoting human rights and environmentally friendly decision-making and thereby injecting human rights responsibility into corporate decision-making.

The participation of local communities' representatives on corporate boards will arguably address some of the problems identified above, especially regarding connecting a MNC to the harm created by its subsidiary. This is because such participation could bring about a more diligent implementation of existing human rights instruments, especially regarding the requirement of due diligence under the UN Guiding Principles (UNGPs). It is instructive that Principle 17 provides that, '[i]n order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence'. This is the basic responsibility of the proposed supervisory board. The implication is that the participation of local community representatives might engender a diligent implementation of this requirement and thus promote a more responsible corporate conduct.

To prevent and mitigate adverse human rights impacts, Principle 19 requires that 'business enterprises should integrate the findings from their impact assessments across

[10] *Okpabi's* case (n 9).
[11] Para 119.

relevant internal functions and processes, and take appropriate actions'. Because of the involvement of local community representatives in the impact assessment process the knowledge of the result of the assessment and the duty to address it will be open to all the parties related to the subsidiary (including a parent MNC) because of integrating the findings. Therefore, when human rights or environmental damage occurs, which the corporation fails to address, the parent MNC is unlikely to be able to effectively rely on the lack of connection to the damage as was the case in *Okpabi*. Thus, the proposed legal framework will promote MNCs compliance with existing instruments.

Having identified how international instruments could induce compliance on the part of the MNCs, it is also important to identify the benefits to them to produce the envisaged win-win situation. First, it is important to re-emphasise that the proposed framework seeks to address the social and security challenges in the Niger Delta. This will have positive economic implication for the oil MNCs because resolving the security challenges will naturally lead to a rise oil production. Consequently, it will address the problem of loss of revenue from oil pipeline vandalism and crude oil theft. Secondly, participation of local community representatives will assist the MNCs in discharging their human rights obligations and assuming their responsibilities, thus mitigating any reputational risks that may be associated with abuses of human rights and the environment within their sphere of influence.

The second benefit deserves further discussion because of its importance in the context of oil MNCs operation in the Niger Delta. In this regard, it is important to note that the proliferation of corporate social responsibility (CSR) codes by MNCs is not, as some commentators suggest, prompted by simple altruism but is rather a matter of enlightened self-interest.[12] The development of CSR codes which commentators trace to the 1990s has been attributed to the backlash from corporate scandals involving some

[12] Robert J. Liubicic, 'Corporate Codes of Conduct and Product Labelling Schemes: The Limits and Possibilities of Promoting International Labor Rights Through Private Initiatives' (1998-1999) 30 Law & Pol'y Int'l Bus. 111, 114; S. Pichiotto, 'Rights Responsibilities and Regulation of International Business' (2003-2004) 14 Colum. J. Transnat'l L. 131, 139.

major MNCs. It is instructive that one of the often-cited examples is the outrage against Shell's role in the execution of Ken Saro-Wiwa and eight of his Ogoni kinsmen in 1996.[13] The Saro-Wiwa incident led to Shell adopting explicit CSR policies, codes and reports, beginning with the Shell Report of 1998.[14]

In view of the above, one of the benefits of the proposed regime for MNCs is that it provides an opportunity for a new approach to CSR that accords with the new corporate governance strategy as embodied in the enlightened shareholder value (ESV) concept, which has gained statutory recognition as a strategy for addressing the social and environmental impact of corporate activity. CSR codes have become an avenue for MNCs to promote their compliance with human rights and environment standards. As indicated above, Shell has a website dedicated to its CSR undertakings. This is a conscious effort to avoid the scandals and public outrage that human rights and environmental abuses in developing markets generate.

Participation in supervisory board by local community representatives in Nigeria's corporate boards is one way of shifting the concept of corporate governance away from the narrow shareholder value to a more central focus on the interest of shareholders and other stakeholders. Under the proposed framework, the management board which comprises only shareholder elected members have the exclusive authority to manage the corporation. The supervisory board is to oversee only the aspects of the boards activity that are likely to have human rights and environmental impact. This means that the principal obligation of management is to look after the interest of shareholders, which in this case is the parent MNC. This is consistent with the concept of ESV, i.e. equating the company with the interest of the MNC but recognizing that due consideration needs to be given to the interest of local communities.

[13] *Ibid*., 140.
[14] The Shell Report 1998, Profits and Principles – Does there Have to be a Choice? <http://www.shell.com/sustainability/sustainability-reporting-and-performance-data/sustainability-report/previous/_jcr_content/par/expandablelist/expandablesection_332888471.stream/145415766> accessed 24 February 2017.

The duty of the supervisory board is to monitor how management deal with issues of human rights and the environment. Since developing markets do not have a developed community of institutional investors to monitor management, the supervisory board will fill that gap. This is because it is in the enlightened self-interest of shareholders to monitor how management deal with such issues because the failure to take them into consideration may prejudice the maximization of shareholder wealth. In the case of developed markets, the efficient legal enforcement and regulatory institutions ensures that corporations pay a price for environmental abuse, but in a country like Nigeria the militants are playing that role unofficially. This is part of what the proposed framework seeks to address.

Thus, the participation of local community representatives provides an opportunity that could be exploited by companies like Shell as part of their CSR by publishing it on their website. Such public acknowledgement that the communities where MNCs operate in Nigeria are responsible for feeding into decisions on those activities that can affect human rights and the environment will enhance their public image.

The implication of the participation of local communities for a company like Shell and other oil MNCs operating in Nigeria cannot be overemphasised because, even when local community representatives are compromised and bad decisions are made that cause human rights and environmental harm, the MNC will not be wholly to blame. Thus, the MNC is shielded from the backlash that may arise from the bad decisions leading to harm to local communities. This is unlike the current process of addressing environmental issues in the Niger Delta where the oil MNCs make contributions to the development of the region that are often misappropriated by the politicians but where blame continues to be attributed solely to the MNC.

Therefore, in view of the problems that the Nigerian government and the oil MNCs have had to deal with lately with regard to the insecurity in the Niger Delta, which has created serious economic problems in addition to the reputational damage that environmental destruction has created for the oil MNCs, the proposed framework provides

an opportunity to address these challenges. The prospect of achieving peace in the Niger Delta is a major factor that can generate the necessary support for the proposal because peace in the region is a "win-win" situation for all the major stakeholders.

Incorporating local community representatives at the corporate board level is proposed as an alternative to the current initiatives, especially those government initiatives that addresses the Niger Delta problems through third party representation. This approach is aimed at promoting local community interests. This will minimize third party participation, especially appointed officials who have exploited the oil MNCs and their host communities over the years. Thus, unlike participation under the EIA regimes that pitches the oil MNCs against local communities, participation in corporate governance by local community representatives would create an atmosphere of co-operation between the oil MNCs and their host communities as corporate insiders. This is likely to bring about the much needed but elusive peace to the Niger Delta region.

Bibliography

Books, Book chapters and Reports

Abbot C, 'Environmental Command Regulation' in Richardson B and Wood S, (eds), *Environmental Law and Sustainability* (Portland: Hart Publishing 2006).

Addo M, (ed) *Human Rights Standards and the Responsibility of Transnational Corporations* (Hague: Kluwer Law International 1999).

--, 'Human Rights and Transnational Corporations – An Introduction' in M. Addo, Human Rights Standards and the Responsibility of Transnational Corporations (Hague: Kluwer Law International 1999).

Ajomo M A, 'An Examination of Federal Laws in Nigeria' in Ajomo M A and Adewale O (eds), *Environmental Law and Sustainable Development in Nigeria* (NIALS 1994).

Alston P (ed), *Non-State Actors and Human Rights* (Oxford: Oxford University Press 2005).

Amnesty International, *Nigeria: Petroleum, Pollution and Poverty in the Niger Delta* (London: Amnesty International Publications 2009).

Anderson M R, 'Human Rights Approaches to Environmental Protection: An Overview' in Boyle A E and Anderson M R (eds), *Human Rights Approaches to Environmental Protection* (Oxford: Clarendon Press 1996).

Andreopoulos G, Arat Z and Juviler P (eds), *Non-State Actors in the Human Rights Universe* (Bloomfield: Kumarian Press 2006.

Anton D and Shelton D, Environmental Protection and Human Rights (Cambridge: Cambridge University Press 2011).

Armour J, 'Enforcement Strategies in UK Corporate Governance: A Roadmap and Empirical Assessment' in Amour J and Payne J (eds) *Rationality in Company Law: Essays in Honour of DD Prentice* (Portland: Hart Publishing 2009).

Armour J, Hansmann H, Kraakman R and Pargendler M, 'What is Corporate Law?' in Kraakman R, Armour J, Davies P, Enriques L, Hansmann H, Hertig G, Hopt K, Kanda H, Pargendler M, Ringe W and Rock E*, Anatomy of Corporate Law: A Comparative and Functional Approach* (3rd edn, Oxford: Oxford University Press 2017).

Armour J and McCahery J 'Introduction' in Armour J and McCahery J (eds), *After Enron: Improving Corporate Law and Modernising Securities Regulation in Europe and the US* (Portland: Hart Publishing 2006).

Armour J and McCahery J (eds), *After Enron: Improving Corporate Law and Modernising Securities Regulation in Europe and the US* (Portland: Hart Publishing 2006).

Armour J and Payne J (eds) *Rationality in Company Law: Essays in Honour of DD Prentice* (Hart Publishing 2009).

Bainbridge S, *The New Corporate Governance in Theory and Practice* (New York: Oxford University Press 2008).

Batstone E, 'Industrial Democracy and Worker Representation at Board Level: A Review of the European Experience' in Batstone E and Davies P, *Industrial Democracy: European Experience* (London: Her majesty's Stationery Office 1976).

Batstone E and Davies P, *Industrial Democracy: European Experience* (London: Her majesty's Stationery Office 1976).

Beckers A, *Enforcing Corporate Social Responsibility Codes* (Oxford: Hart Publishing 2015)

Berle A A and Gardiner M C, *The Modern Corporation and Private Property* (10th Print, New Brunswick: Transaction Publishers 2009)

Bilchitz D and Deva S 'The Human Rights Obligations of Business: A Critical Framework for the Future' in Deva S and Bilchitz D (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect* (Cambridge: Cambridge University Press 2015).

Birnie P, Boyle A and Redgwell P, *International Law and the Environment* (3rd edn, Oxford: Oxford University Press 2009).

Blanco E and Razzaque J, *Globalization and Natural Resource Law: Challenges, Key Issues and Perspectives* (Cheltenham: Edward Elgar Publishing Limited 2011).

Bloomfield S, Theory and Practice of Corporate Governance: An Integrated Approach (Cambridge: Cambridge University Press 2013).

Bodansky D, Brunnee J and Hey E, (eds), *The Oxford Handbook of International Environmental Law* (Oxford: Oxford University Press 2008).

Bowman M, Davies P and Redgwell C (eds), Lyster's International Wildlife Law (2nd edn, Cambridge: Cambridge University Press).

Blumberg P I, *The Multinational Challenge to Corporate Law: The Search for a New Corporate Personality* (New York: Oxford University Press 1993).

Boyd D, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (Vancouver: UBC Press 2012).

Boyle A, 'Human Rights or Environmental Rights? A Reassessment' in Shelton D (ed), *Human Rights and the Environment* vol. 1 (Cheltenham: Edward Elgar Publishing Limited 2011).

Boyle A and Anderson M, (eds), *Human Rights Approaches to Environmental Protection* (Oxford: Clarendon Press 1996).

Bruch C, (ed), *The New "Public": The Globalization of Public Participation* (Environmental Law Institute 2002).

Bruch C and Filbey M, 'Emerging Global Norms of Public Involvement' in Bruch C, (ed), *The New "Public": The Globalization of Public Participation* (Environmental Law Institute 2002).

Buergenthal T and Murphy S, *Public International Law in a Nutshell* (4th edn, St Paul: Thomas/West 2007).

Campbell T, 'The Normative Grounding of Corporate Social Responsibility: A Human Rights Approach' in McBarnet D, Voiculescu A and Campbell T, *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge: Cambridge University Press 2009).

Chayes A, 'The Modern Corporation and the Rule of Law' in Mason E S (ed), *The Corporation in Modern Society* (Cambridge-Massachusetts: Harvard University Press 1966).

Chaytor B and Gay K R (eds), *International Environmental Law and Policy in Africa, Environment and Policy* vol. 36 (Kluwer Academic Publishers 2003).

Chirelstein M A, 'Corporate Law Reform' in Mckie J W (ed), *Social Responsibility and the Business Predicament* (Washington D.C.: The Brookings Institute 1974).

Clark M, *Regulation: The Social Control of Business between Law and Politics* (Macmillan Press Ltd 2000).

Collins L, 'The United Nations, Human Rights and the Environment' in Grear A and Kotze L, (eds), *Research Handbook on Human Rights and the Environment* (Cheltenham: Edward Elgar Publishing Limited 2015).

Commission on Human Rights, 'Interim Report of the Special Representative of the Secretary General on the Issues of Human Rights and Transnational Corporations and other Business Enterprises', E/CN.4/2006/97 (22 February 2006).

Communication from the European Commission, 'Corporate Social Responsibility: A Business Contribution to Sustainable Development', COM(2002)347.

Crane A, Matten D and Spence L J (eds), *Corporate Social Responsibility: Readings and Cases in a Global Context* (2nd edn, Oxon: Routledge 2014).

Derek F Mayson S and Ryan P*, Mayson, French and Ryan on Company Law* (33rd edn, Oxford: Oxford University Press 2016).

Deva S, *Regulating Corporate Human Rights Violations: Humanizing Business* (Oxon: Routledge 2014).

Deva S and Bilchitz D (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect* (Cambridge: Cambridge University Press 2015).

Dine J, *The Governance of Corporate Groups* (Cambridge: Cambridge University Press 2000).

--, Companies, *International Trade and Human Rights* (Cambridge: Cambridge University Press 2005).

Donaldson T, *Corporations and Morality* (Englewood Cliff: Prentice-Hall, Inc. 1982).

du Plessis J J, Hargovan A, Bagaric M and Harris J, Principles of Contemporary Corporate Governance (3rd edn, Cambridge: Cambridge University Press 2015).

Easterbrook F H and Fischel D R, *The Economic Structure of Corporate Law* (Cambridge-Massachusetts: Harvard University Press 1996).

Ebbesson J *et al*, *The Arhus Convention: Implementation Guide* (2nd edn, New York: United Nations 2014).

Ellis J and Wood S, 'International Environmental Law' in Richardson B and Wood S, (eds), *Environmental Law for Sustainability* (Portland: Hart Publishing 2006).

Estees R, *Tyranny of the Bottom Line: Why Corporations Make Good People Do Bad Things* (San Francisco: Berrett-Koehler 1996).

Etemire U, *Law and Practice of Public Participation in Environmental Matters: The Nigerian Example in Transnational Comparative Perspective* (Oxon: Routledge 2016).

Fagbohun O, *The Law of Pollution and Environmental Restoration: A Comparative View* (Lagos: Odade Publishers 2010).

Freeman R E, *Strategic Management: A Stakeholder Approach* (Cambridge: Cambridge University Press 1984).

Frynas J, 'The Oil Industry in Nigeria: Conflict between Oil Companies and Local People' in Frynas J and Pegg S, (eds), *Transnational Corporations and Human Rights* (New York: Palmgrave Macmillan 2003).

Frynas J and Pegg S, (eds), *Transnational Corporations and Human Rights* (New York: Palmgrave Macmillan 2003).

Goodhart M, 'Human Rights and Non-State Actors: Theoretical Puzzles' in Andreopoulos G, Arat Z and Juviler P (eds), *Non-State Actors in the Human Rights Universe* (Bloomfield: Kumarian Press 2006.

Gower L C B, *Gower's Principles of Modern Company Law* (5th edn, London: Sweet & Maxwell 1992).

Grear A and Kotze L, (eds), *Research Handbook on Human Rights and the Environment* (Cheltenham: Edward Elgar Publishing Limited 2015).

Hannigan B, *Company Law* (4th edn, Oxford: Oxford University Press 2016).

Hansmann H, *The Ownership of Enterprise* (Cambridge: Belknap Press of Harvard University 1996).

Hinkley R C, 'Developing Corporate Conscience' in Rees S and Wright S (eds*), Human Rights and Corporate Responsibility – A Dialogue* (Annandale: Pluto Press 2000).

Hopt K J and Teubner G (eds), *Corporate Governance and Directors' Liabilities: Legal, economic and Social Analysis of Corporate Social Responsibility* (Berlin: Walter de Gruyter 1985).

Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, A/HRC/17/31 (21 March 2011).

--, 'Protect, Respect and Remedy: A Framework for Business and Human Rights', A/HRC/8/5/ (7 April 2008).

--, 'Business and Human Rights: Towards Operationalizing the "Protect, Respect and Remedy" Framework', A/HRC/11/13 (22 April 2009)

Hunter D, Salzman J and Zaelke D, *International Environmental Law and Policy* (3rd edn, New York: Foundation Press 2007).

Hurst H W, *The Legitimacy of the Business Corporation in the Law of the United States 1780-1970* (Charlottesville: The University of Virginia Press 1970).

International Labour Organisation (ILO), *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy* (4th edn, Geneva: International Labour Office 2006).

Jagers N, 'Will Transnational Private Regulation Close the Gap?' Deva S and Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect* (Cambridge: Cambridge University Press 2015).

Joseph A and Mcbeth A, *Research Handbook on International Human Rights Law* (Cheltenham: Edward Elgar Publishing Limited 2010).

Keay A, *The Enlightened Shareholder Value Principle and Corporate Governance* (Oxon: Routledge 2014).

Kodilinye G and Aluko O, *Nigerian Law of Tort* (2nd edn, Ibadan: Spectrum Law Publishing 1999).

Korten D C, *When Corporations Rule the World* (San Francisco: Kumarian Press Inc. and Berrett-Koehler Publishers, Inc. 2001).

Kraakman R, Armour J, Davies P, Enriques L, Hansmann H, Hertig G, Hopt K, Kanda H, Pargendler M, Ringe W and Rock E, *The Anatomy of Corporate Law: A Comparative and Functional Approach* (3rd edn, Oxford: Oxford University Press 2017.

Latham E, 'The Body Politic of the Corporation' in Mason E S (ed), *The Corporation in Modern Society* (Cambridge-Massachusetts: Harvard University Press 1966).

Lopez C, 'The "Ruggie Process" from Legal Obligations to Corporate Social Responsibility?' in Deva S and Bilchitz D (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect* (Cambridge: Cambridge University Press 2015).

Malemi E O, *Law of Tort* (1st edn, Lagos: Princeton Publishing Co. 2008.

Mallin C A (ed) *Handbook on International Corporate Governance: Country Analysis* (2nd edn, Edward Elgar Publishing Limited 2011).

--, *Corporate Governance* (5th edn, Oxford: Oxford University Press 2016).

Mason E S (ed), *The Corporation in Modern Society* (Cambridge-Massachusetts: Harvard University Press 1966).

McBarnet D and Schmidt, 'Corporate Accountability Through Creative Enforcement: Human Rights, the Alien Tort Claims Act and the Limits of Legal Impunity' in McBarnet D, Voiculescu A and Campbell T,, *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge: Cambridge University Press 2009).

McBarnet D, Voiculescu A and Campbell T, *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge: Cambridge University Press 2009).

McCorquodale R, 'Non-state Actors and International Law' in Joseph A and Mcbeth A, *Research Handbook on International Human Rights Law* (Cheltenham: Edward Elgar Publishing Limited 2010).

McGregor L, 'Corporate Governance in South Africa' in Mallin C A (ed) *Handbook on International Corporate Governance: Country Analysis* (2nd edn, Edward Elgar Publishing Limited 2011).

Mckie J W (ed), *Social Responsibility and the Business Predicament* (Washington D.C.: The Brookings Institute 1974).

McLaughlin S, *Unlocking Company Law* (Oxon: Routledge 2015).

Meeran R, 'Access to Remedy: The United Kingdom Experience of MNC Tort Litigation for Human Rights Violations' in Deva S and Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect* (Cambridge: Cambridge University Press 2015).

Mevorach I, *Insolvency within Multinational Enterprise Groups* (Oxford: Oxford University Press).

Mitchell R K, Agle B R and Wood D J 'Towards a Theory of Stakeholder Identification and Salience: Defining the Principle of Who and What Really Counts' in Crane A, Matten D and Spence L J (eds), *Corporate Social Responsibility: Readings and Cases in a Global Context* (2nd edn, Oxon: Routledge 2014).

Muchlinski P M, *Multinational Enterprises and the Law* (2nd edn, Oxford: Oxford University Press 2007).

Nader R, Green M and Seligman J, *Taming the Giant Corporation* (New York: W. W. Norton & Company Inc. 1976).

Nnadozie K, 'Environmental Regulation of the Oil and Gas Industry in Nigeria' in Chaytor B and Gray K R (eds), *International Environmental Law and Policy in Africa, Environment and Policy* vol. 36 (Kluwer Academic Publishers 2003) 115.

Nwabueze B O, *A Constitutional History of Nigeria* (Ikeja: Longman 1982).

Obayanju B and Obaseki M (eds), *Defending the Environment: The Role of Environmental Impact Assessment* (Benin City: Environmental Rights Act 2009).

Oluduro O, *Oil exploration and Human Rights Violations in Nigeria's Oil Producing Communities* (Cambridge: Intersentia 2014).

Omoregbe Y, *Oil and Gas in Nigeria* (Lagos: Malthouse Press Ltd 2001).

Orts E W, *Business Persons: A legal Theory of the Firm* (Oxford: Oxford University Press 2015).

Parkinson J E, *Corporate Power and Responsibility: Issues in the Theory of Company Law* (Oxford: Clarendon Press)

Parry R, 'Directors' Duties Within the United Kingdom' in Tully S (ed), *Research handbook on Corporate Legal Responsibility* (Cheltenham: Edward Elgar Publishing 2005).

Pathak R S, 'The Human Rights System as a Conceptual Framework for Environmental Law' in Weiss E B (ed), Environmental Change and International Law (United Nations University Press 1992).

Pring G and Noe Y, 'The Emerging International Law of Public Participation Affecting Global Mining, Energy and Resource Development' in Zillman D, Lucas A and Pring G, (eds), *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources* (Oxford: Oxford University Press 2002).

Razzaque J, 'Right to a Healthy Environment in Human Rights Law' in Baderin M A and Ssenyonjo M (eds), *International Human Rights Law: Six Decades after the UDHR and Beyond* (Ashgate Publishing Company 2010).

Rees S and Wright S (eds*), Human Rights and Corporate Responsibility – A Dialogue* (Annandale: Pluto Press 2000).

Reinisch A, 'The Changing International Legal Framework for Dealing with Non-State Actors' Alston P (ed), *Non-State Actors and Human Rights* (Oxford: Oxford University Press 2005).

Richardson B and Wood S, (eds), *Environmental Law for Sustainability* (Portland: Hart Publishing 2006).

Roberts A and Kingsbury B, United Nations, Divided World (2nd edn, Oxford: Clarendon Press 1996).

Sand P, 'The Evolution of International Environmental Law' in Bodansky D, Brunnee J and Hey E, (eds), *The Oxford Handbook of International Environmental Law* (Oxford: Oxford University Press 2008).

Sands P, Peel J. Fabra A and Mackenzie R*, Principles of International Environmental Law* (3rd edn, Cambridge: Cambridge University Press 2012).

Shade J, *Business Associations in a Nutshell* (3rd edn, St Paul: Thomas/West 2006).

Shelton D, 'Introduction' in Shelton D, (ed), *Human Rights and the Environment Volume* 1 (Cheltenham: Edward Elgar Publishing Limited 2011).

--, *Human Rights and the Environment Volume* 1 (Cheltenham: Edward Elgar Publishing Limited 2011).

--, *Advance Introduction to International Human Rights Law* (Cheltenham: Edward Elgar Publishing Limited 2014).

Smith A, *The Wealth of Nations* Books I-III (Middlesex: Penguin Books 1982)

Smith R K M, *Textbook on International Human Rights Law* (Oxford: Oxford University Press 2014).

Stec S and Casey-Lefkowitz S, *The Arhus Convention: An Implementation Guide* (New York: UN 2002).

Stiglitz J, *Globalization and its Discontents* (London: Penguin Books 2002).

Stoke M, 'Company Law and Legal Theory' in Twining W (ed), *Legal Theory and Common Law* (Oxford: B. Blackwell 1986).

Stone C D, *Where the Law Ends: The Social Control of Social Behaviour* (New York: Harper & Row 1975).

Stout L, *The Shareholder Value Myth: How Putting Shareholders First Harms Investors, Corporations, and the Public* (Berrett-Koehler Publishers, Inc. 2012).

Talbot L, *Progressive Corporate Governance for the 21st Century* (Oxon: Routledge 2013).

Teubner G, 'Corporate Fiduciary Duties and their Beneficiaries: A Functional Approach to the Legal Institutionalization of Corporate Responsibility' Hopt K J and Teubner G (eds), *Corporate Governance and Directors' Liabilities: Legal, economic and Social Analysis of Corporate Social Responsibility* (Berlin: Walter de Gruyter 1985).

The Company Law Steering Group, *Modern Company Law for a Competitive Economy* (London: DTI, 2001).

Tricker B, *Corporate Governance: Principles, Policies, and Practices* (3rd edn, Oxford: Oxford University Press 2015).

Tully S (ed), *Research handbook on Corporate Legal Responsibility* (Cheltenham: Edward Elgar Publishing 2005).

Twining W (ed), *Legal Theory and Common Law* (Oxford: B. Blackwell 1986).

United Nations Conference on Trade and Investment (UNCTAD), *World Investment Report 1996*, New York and Geneva: UN, 1996.

Vogel D, *The Market for Virtue: The Potential and Limits of Corporate Social Responsibility* (Washington D. C: Brookings Institute Press 2006).

Welling B, *Corporate Law in Canada: The Governing Principles* (London, Ontario: Scribblers Publishing 2006).

Williams P C, 'The Environmental Impact Assessment Act and Processes as an Environmental and Livelihood Advocacy Tool' in Obayanju B and Obaseki M (eds), *Defending the Environment: The Role of Environmental Impact Assessment* (Benin City: Environmental Rights Act 2009).

Winter G (ed), European Environmental Law: A Comparative Perspective (Aldershot: Dartmouth 1996).

Zillman D, 'Introduction to Public Participation in the Twenty-first Century' in Zillman D, Lucas A and Pring G, (eds), *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources* (Oxford: Oxford University Press 2002).

Zillman D, Lucas A and Pring G, (eds), *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources* (Oxford: Oxford University Press 2002).

Articles and Essays

Acevedo M T, 'The Intersection of Human Rights and Environmental Protection in the European Court of Human Rights' (1999-2000) 8 N.Y.U. Envtl. L.J. 437.

Adekola O and Mitchell G, 'The Niger Delta Wetlands: Threat to Ecosystem Services, their Importance to Dependent Communities and Possible Management Measures' (2011) Int'l J. of Biodiversity Science, Ecosystem Services and Management vol. 1, 50.

Adekola O, Mitchell G and Grainger A, 'Inequality and Ecosystem Services: The Value and Social Distribution of Niger Delta Wetland Services' (2015) Ecosystem Services 42.

Akinola S R and Adesopo A, 'Derivation Principle Dilemma and National (Dis)Unity in Nigeria: A Polycentric Planning Perspective on the Niger Delta' (2011) vol. 4 No. 5 J of Sustainable Dev. 251.

Berle A A, 'For Whom Corporate Managers are Trustees: A Note' (1932) Harv. L. Rev. 1365.

Black B S, 'Legal and Institutional Preconditions for a Strong Securities Market' (2001) 48 UCLA L.R.781.

Black B and Kraakman R, 'A Self Enforcing Model of Corporate Law (1995) Harv. L. Rev. 1911.

Blair M M and Stout L, 'A Team Production Theory of Corporate Law' (1999) 85 Va. L. Rev. 247.

Bonanno J B, 'Employee Codetermination: Origins in Germany, Present Practice in Europe, and Applicability in the United States (1976-1977) 14 Harv. J. on Legis 947.

Bowman M J, 'The Ramsar Convention Comes of Age' (1995) Netherlands International Law Review XLII, 1.

Boyle A, 'Human Rights and the Environment: Where Next?' (2012) 23 EJIL 3, 613.

Bradley C A, 'The Cost of International Human Rights Litigation' (2001) Chi. J. Int'l L. 457

Bratspies R, '"Organs of Society": A Plea for Human Rights Accountability for Transnational Enterprises and other Business Entities' (2005) vol. 1 Michigan State Journal of Int'l L. 9.

Broecker C, '"Better the Devil You Know": Home State Approaches to Transnational Corporate Accountability' (2008-2009) 41 N.Y.U. J. Int'l L & Pol. 159.

Clapp J. 'Global Environmental Governance for Corporate Responsibility and Accountability' (2005) vol. 5 No. 3 Massachusetts Institute of Technology 23.

Dadiowei T, 'Environmental Impact Assessment and Sustainable Development in the Niger Delta: The Gbarian Oil Field Experience' (2009) *N. D.* Eco of Violence Working Paper 2.

Duruigbo E, 'Managing Oil Revenues for Socio-Economic Development in Nigeria: The Case for Community-Based Trust Fund' (2005-2005) 30 N.C.J. Int'l & Com. Reg. 121.

Ekpu A O, 'Environmental Impact of Oil on Water: A Comparative Overview of the Law and Policy in the United States and Nigeria' (1995-1996) 24 Denver J. Int'l L. & Pol'y 55.

Erhagbe E O, 'Are Environmental Rights Human Rights' (2002) vol. 3 University of Benin Journal of Private and Property Law 65.

Garfield A E, 'Special Issues on the Corporate Stakeholder Debate: The Classical Theory and its Critics' (1995) 43 AM. J. Comp. L. 150.

Giuliani E and Macchi C, 'Multinational Corporations' Economic and Human Rights Impacts on Developing Countries: A Review and Research Agenda' (2014) 38 Cam. J. of Economics 479.

Green R, 'Shareholders as Stakeholders: Changing Metaphors of Corporate Governance' (1993) Wash and Lee L. Rev. 1409.

Groenewegen J, 'Institutions of Capitalism: American, European and Japanese Systems Compared' (1997) vol. 31 No. 2 J. of Economic Issues 333.

Hill J G, 'Public Beginnings, Private Ends – Should Corporate Privilege the Interest of Shareholders?' (1998) 9 Australian J. of Corp. L. 21.

Idemudia U, 'Oil Extraction and Poverty Reduction in the Niger Delta: A Critical Examination of Partnership Initiatives' (2009) 90 J. of Bus. Ethics 91.

Ienlanya S A, 'A Critical Examination of the Attitude of the Nigerian Courts in the Proof of Environmental Pollution in Oil Related Litigation' (2010) vol. 1 No. 1 University of Benin Law Journal 273.

Jochnick C, 'Confronting the Impunity of Non-State Actors: New Fields for Promoting Human Rights' (1999) 21.1 Human Rights Quarterly 56.

Kameri-Mbote P and Cullet P 'Biological Diversity Management in Africa: Legal and Policy Perspective in the Run-up to WSSD' (2002) 11 (1) RECIEL 38.

Keay A, 'Comply or Explain in Corporate Governance Codes: in Need of Greater Regulatory Oversight' (2014) Legal Studies vol. 34 No. 2, 279.

La Porta R, Lopez-De-Silanes F, Shleifer A and Vishny R W, 'Legal Determinants of External Finance' (1997) The Journal of Finance vol. 52 No. 3 1131.

--, 'Law and Finance' (1998) J. of Pol. Economy vol. 106 No. 61, 1113.

La Porta R, Lopez-De-Silanes F and Shleifer A, 'Corporate Ownership Around the World' (1999) The Journal of Finance vol. 54 No. 2 471.

Millon D, 'New Directions in Corporate Law: Communitarians, Contractarians, and the Crisis in Corporate Law' (1993) 50 wash. And Lee L. Rev. 1373.

Morgera E, 'An Environmental Outlook on the OECD Guidelines for Multinational Enterprises: Comparative Advantage, Legitimacy, and Outstanding Questions in the Lead Up to the 2006 Review' (2005-2006) 18 Geo Int'l Envtl. L. Rev. 751.

Murphy S D, 'Taking Multinational Corporate Codes of Conduct to the Next level' (2004-2005) 43 Colum J. Transnat'l L. 389.

Okukpon A O, 'Tort Law and the Protection of the Individual Against Industrial Pollution' (2001-2002) vol. 1 No. 1 University of Benin Law Journal 99.

Omaka C A, 'Environmental Law and Human Rights: The Natural Nexus' (2005) vol 1 No. 1 Journal of Law and Diplomacy 17.

Orts E, 'The Complexity and Legitimacy of Corporate Law' (1993) 50 Wash. & Lee L. Rev. 1565.

Owoyemi J O, 'An Overview of Health Hazards of Oil Spill in Niger Delta Region of Nigeria' (2011) vol. 1 No. 2 Nigerian Journal of Food, Drug and Health Law 67.

Pallemaerts M, 'International Environmental Law in the Age of Sustainable Development: A Critical Assessment of the UNCED Process' (1996) 15 Journal of Law and Commerce 623.

Picciotto S, 'Rights, Responsibilities and Regulation of International Business' (2003-2004) 42 Colum. J. Transnat'l L. 131.

Pillay S, 'And Justice for All? Globalization, Multinational Corporations, and the Need for Legally Enforceable Human Rights Protection' (2003-2004) 81 U. Det. Mercy L. Rev. 489.

Pound R, 'A Theory of Social Interests' in Papers and Proceedings of American Sociological School, May 1921.

Redmond P, 'Transnational Enterprise and Human Rights: Options for Standard Setting and Compliance' (2003) 37 Int'l L. 68.

Roe M J, 'German Codetermination and German Securities Markets' (1998) 5 Colum. J. Eur. L. 199.

Rowan-Robinson J, Ross A, Wilton W and Rothnie J 'Public Access to Environmental Information: A Means to What End?' (1996) 8 (1) J. Environmental Law 19.

Ruggie J G, 'American Exceptionalism, Exemptionalism and Global Governance' (2004) J. F. Kennedy Sch. Of Govt. Working Paper No. RWP04-006.

--, 'Business and Human Rights: The Evolving International Agenda' (2007) vol. No. 4 The A.J. of Int'l L. 819.

Ruggie J and Nelson T 'Human Rights and the OECD Guidelines for Multinational Enterprises: Normative Innovations and Implementation Challenges' (2015) Corporate Social Responsibility Initiative Working Paper No. 66 Cambridge, MA 1.

Schregle J, 'Co-determination in the Federal Republic of Germany: A Comparative View' (1978) Int'l Lab. Rev. 81.

Sheehy B, 'Scrooge – The Reluctant Stakeholder: Theoretical Problems in the Shareholder-Stakeholder Debate' (2005-2006) 14 U. Miami Bus. L. Rev. 193.

Shelton D, 'Human Rights, Environmental Rights and the Right to Environmental' (1991) 28 Stan Envtl L. J. 103.

Stavrinides Z, 'Human Rights Obligations under United Nations Charter' (1999) 3 Int'l J. Hum. Rts. 38.

Stephens B, 'The Amorality of Profit: The Transnational Corporation and Human Rights' (2002) 20 Berkeley J. Int'l Law 45.

Werner W, 'Corporate Law in Search of Its Future' (1981) 81 Colum. L. Rev. 1611.

Williams C A and Conley J M, 'An Emerging Third Way? The Erosion of the Anglo-American Shareholder Value Construct' (2005) 38 Cornell Int'l LJ. 493.

Internet Sources

African Development Bank, 'Integrated Environmental and Social Impact Assessment Guidelines(October2003) http://www.afdb.org.fileadmin/uploads/afdb/Documents/Policy-Documents/Integrated%20Environmental%and%20Social%20Impact%20Assessment%Guidelines.pdf> accessed 14 February 2017.

Amnesty International, 'Nigeria: Petroleum, Pollution and Poverty in the Niger Delta' (2009 Report) <http://www.amnesty.org/en/library/asset/AFR44/017/2009/en/e2415061-da5c-44f8-a73c-a7a476621d/afr440172009en.pdf> accessed 20 February 2017.

--, 'Nigeria: Hundreds of Oil Spill Continue to Blight Niger Delta' <http://www.amnesty.org/.../hundreds-of-oil-spill-continue-to-blight-niger-delta> accessed 13 August 2016.

--, 'Shell's Niger Delta Pollution: the Good, the Bad and the Ongoing Quest for Justice' <http://www.livewire.amnesty.org/2013/02/01/shells-niger-delta-pollution-the-good-the-bad-and-the-ongoing-quest-for-justice/comment-page-1> accessed 18 February 2015.

Anderson S and Cavanagh J, 'Top 200: The Rising of Corporate Power' (Institute of Policy Studies, Washington D.C: New Press 2000) <http://www.corpwatch.org/trac/corner/glob/ips/top200.html> accessed 19 February 2017.

Armour J and Gordon J N, 'The Berle-Means Corporation in the 21st Century' (2008) WorkingPaper<http://www.law.yale.edu/documents/pdf/Intellectual_Life/Armour_BerleMeansCorp091021.pdf> accessed 20 April 2017.

Bawden T, 'Gulf of Mexico Oil Spill: BP Finally gets Disaster Closure with $18.7bn Payout' <http://www.independent.co.uk/news/business/news/gulf-of-mexico-oil-spill-bp-finally-gets-disaster-closure-with-187bn-payout-10362877.html> accessed 20 April 2017.

BBC News, 'Bangladesh Factory Collapse Toll Passes 1,000' (10 May 2013) <www.bbc.co.uk/news/world-asia-22476774> accessed 30 March 2017.

--, '1995: Nigeria Hangs Human Rights Activist' (1 November 1995) <http://www.news.bbc.co.uk/onthisday/hi/dates/stories/november/10/newsid-2539000/2539561.stm> accessed 26 January 2015.

--, 'Volkswagen: The Scandal Explained' (10 December 2015) <http://www.bbc.co.uk/news/business-34324771> accessed 20 April 2017.

Bloomberg LP [US] 'OPEC Confounds Skeptics, Agrees to First Oil Cuts in 8 Years' <http://www.bloomberg.com/news/articles/2016-11-30/opec.said-to-agree-oil-production-cut-as-saudis-soften-on-iran> accessed 24 December 2016.

Channels Television, 'Dateline Abuja' (3 January 2013) <http://www.channelstv.com/programmes/dateline-abuja> accessed 7 January 2017.

ChevronTexaco, 'ChevronTexaco Corporate Responsibility Report' <http://www.chevrontexaco.com/cr_report/download_report.asp> accessed 23 December 2016.

Christian Aid, Amnesty International and Friends of the Earth, 'Flagship of Failure? The UK's Implementation of the OECD Guidelines and Approach to Corporate Accountability' (November 2005), <http://www.christianaid.org.uk/images/F1167PDF.pdf> accessed 14 February 2017.

Daily Trust, 'Multi-Billion Naira NNPC Contract Creates Tension in Ex-Militants Camps' (Abuja, 22 March 2015) <http://www.dailytrust.com.ng/sunday/index.php/top-stories/19991-multi-billion-naira-nnpc-contracts-create-tension-in-ex-militants-camps> accessed 3 May 2017.

Ethnography, 'Eleme Socio-political System' <http://www.eleme.org.uk/ethnography/society.html> accessed 17 March 2017.
European Commission, 'An Analysis of Policy References made by Large EU Companies to Internationally Recognised CSR Guidelines and Principles' (March 2013), <http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr/csr-guide-princ-2013_en_pdf> accessed 14 February 2014.
Food and Agriculture Organisation of the United nations (FAO), 'International Treaty on Plant Genetic Resources for Food and Agriculture' (FAO 2001) <www.fao.org/3/a-i0510e.pdf> accessed 17 March 2017.
Human Rights Council, 'New Guiding Principles on Business and Human Rights endorsed by the UN Human Rights Council' (16 June 2011) <http://www.ohchr.org.en/News-Events/Pages?DisplayNews.aspx?NewsID=11164&LangID=E> accessed 14 February 2017.
Human Rights Watch, 'The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities' (January 1999) <http://www.pantheon.hrw.org/reports/1999/nigeria/nigeria0199.pdf> accessed 19 March 2016.
Human Rights Watch & Center for Human Rights and Global Justice, 'On the Margins of Profit: Rights at Risk in the Global Economy' (February 2008) <http://www.hrw.org/reports/2008/bhr0208/bhr0208webwcover.pdf> accessed 19 March 2016.
International Chamber of Commerce 'Brief on Globalization' (November 2000) <http://www.iccwbo.org/Data/Policies/2000/ICC-brief-on-globalization> accessed 5 December 2016.
Joblanda Africa, 'Top 10 Oil and Gas Companies in Nigeria' http://www.joblanda.com/top-10-oil-and-gas-companies-in-nigeria/ accessed 9 May 2017.
Mulbert P, 'Corporate Governance of Banks after the Financial Crisis – Theory, Evidence, Reform' <http://papers.ssrn.com/so13/papers.cfm?abstract_id=1448118> accessed 22 September 2016.
Mustapha J, 'What is G20 and How does it Work' <http://www.telegraph.co.uk/business/0/what-is-the-g20-and-how-does-it-work> accessed 27 January 2016.
Niger Delta Development Commission (NDDC), 'Projects and Programs' <http://www.nddc.gov.ng/projectsandprograms.html> accessed 30 December 2016.
Olowo A, 'Ex-Militants: Amnesty of Travesty?' (24 August 2012) <http://www.legaloil.com/NewItem.asp?DocumentIDX=1345839396&Category=news> accessed 23 December 2016.
Organisation for Economic Co-operation and Development (OECD), 'Making Codes of Corporate Conduct Work: Management Control Systems and Corporate Responsibility' (OECD Publishing 2001/03), <http://dx.doi.org/10.1787/525708844763> accessed 14 February 2017.
--, '*Recommendations for Responsible Business Conduct in a Global Context* (OECD Publishing 2011) <http://www.oecd.org/dataoecd/43/29/48004323.pdf> accessed 26 September 2016.
--, 'OECD Guidelines for Multinational Enterprises' (OECD Publishing: OECD Guidelines 2011) <http://dx.doi.org/10.1787/978926115415-en> accessed 14 February 2017.
Shell 'Sustainable Report' (2013) http://www.reports.shell.com/sustainable-report/2013/servicepages/downloads/files/entire_shell_sr13.pdf> accessed 7 March 2017.

--, 'SPDC Declares Force Majeure on Forcados Export' <http://www.shell.com.ng/aboutshell/media-centre/news-and-media-releases/production-updates/spdc-declares-force-majeure-on-forcados-export.html> accessed 30 August 2915.
--, 'Investors Handbook' <http://www.reports.shell.com/investors-handbook/2016/servicepages/downloads-centre.html> accessed 9 May 2017.
--, 'Oil Spill Data Report' <http://www.shell.com.ng/sustainability/environment/oil-spills.html> accessed 2 August 2017.
The Authority Newspaper, 'Activist Opposes Pipeline Protection Contracts for Ex-Militants' <http://www.authorityngr.com/2017/03?Activist-opposes-pipeline-protection-contracts-for-ex-militants> accessed 3 May 2015.
The Guardian, 'Shell and Nigeria have Failed on Oil Clean-up, Amnesty Says' (Lagos, 4 August 2014) <http://www.theguardian.com/environmental/2014/aug/04/shell-nigeria-oil-pollution-clean-up-amnesty> accessed 12 March 2016.
--, 'Niger Delta Oil Pipeline Vandalism Estimated to Cost $14bn a Year' (Lagos, 10 November 2015) http://www.thegardian.com/environmental/2015/nov/10/nider-delta-oil-pipeline-vandalism-estimated-to-cost14bn-a-year> accessed 5 February 2016.
The Nation, 'Bayelsa Polls: Tension as Delta, Rivers Militants Regroup' (Lagos, 27 December 2015) <http://www/thenationonline.net/bayelsa-polls-tension-as-delta-rivers-ex-militants-regroup> accessed 27 December 2016.
The Wall Street Journal, 'Niger Delta Amnesty Program Fails to End Militancy' (New York, 4September2012) http://www.nigerdeltapolitics.wordpress.com/2012/09/04/nigerdelta-amnesty-program-fail-to-end-militancy> accessed 24 March 2016.
United Nations Conference on Trade and Development (UNCTAD), World Investment Report 2014, New York: United Nations 2014. <http://www.unctad.org/en/PublicationLibrary/wir2014_en.pdf> accessed 14 February 2017.
United Nations Environmental Programme (UNEP), 'Report on the Niger Delta' (2011 <http://www.unep.org/nigeria> accessed 23 March 2017.
United Nations Educational Scientific and Cultural Organisation, 'Convention Concerning the Protection of the World Cultural Heritage' (UNESCO 1972) <whc.unesco.org/archive/cpnvention-en.pdf> accessed 17 March 2017.
UN Institute for Training and Research (UNITAR) 'Rio Principle 10 National Profile and Action Plan Project' <http://www.unitar.org/ksi/rio-principle-10-national-profile-and-action-plan-project> accessed 14 April 2017.

Vanguard, 'PWC Projects Nigeria's Economy to Rank Top 10 in 2050' (Lagos, 18 March 2016) ,http://www.vanguardngr.com/2016/03/pwc-projects-nigerias-economy-rank-top-10-2050> accessed 26 March 2016.

Vanguard, 'Community to Loose Land for Bunkering Activities – Navy' (Lagos, 28 December 2015) <http:///www.vanguaardngr.com/2015/12/communities-to-loose-land-for-bunkering-activities-navy> accessed 28 December 2015.

Ventures Africa, '5 Things You Should Know about the Bodo Community and its $83m Shell Compensation <http://www.venturesafrica.com/5-things-you-should-know-about-the-bodo-community-and-their-83-million-shell-compensation/> accessed 17 March 2017.

World Bank, 'Operational Manual: Operational Policies (January 1999) <http://www.env.go.jp/earth/coop/document/10-eiae-7.pdf> accessed 14 February 2017.

Newspaper Reports

Adesomoju A, 'Oil Spill: 32 Years After, Supreme Court Orders Shell to pay N30m Compensation' The Punch (Lagos, 6 June 2015).