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Citation for final published version:

Egede, Edwin and Egede, Hephzibah 2016. The force of the community in the Niger Delta of Nigeria: propositions for new oil and gas legal and contractual arrangements. *Tulane Journal of International and Comparative Law* 25 (1) , pp. 45-88. file

Publishers page:

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“Completed Work published in 25 TUL. J. INT’L & COMP. L. (2016-17).”

**THE FORCE OF THE COMMUNITY IN THE NIGER DELTA OF NIGERIA:
PROPOSITIONS FOR NEW OIL AND GAS LEGAL AND CONTRACTUAL
ARRANGEMENTS.**

HEPHZIBAH EGEDE¹ & EDWIN EGEDE²

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Abstract- The exploitation of oil and gas in the Niger Delta of Nigeria is the foremost source of revenue of Nigeria, reportedly providing 20% of the Gross Domestic Product (GDP), 95% of foreign exchange earnings, and about 65% of budgetary revenues of Nigeria. With this strategic position of the area and the tensions between the Federal Government of Nigeria and Multinational Corporations (MNCs) directly exploiting these resources, on the one hand, and the ethnic communities where these resources are derived, on the other, there is a need to take various steps to seek to deescalate the situation in this region. This article argues that a key way to douse tension in this region is to develop new legal and tripartite contractual arrangements with regard to the oil and gas sector that would involve a direct stake for oil producing communities in oil and gas operations in the region. It further examines some of the potential complexities that may arise if contracts are directly negotiated with the communities by the MNCs without the involvement of the Federal Government of Nigeria as the host state government.

Key words – Niger Delta; Oil and Gas; Ownership; Indigenous Peoples; Multinational Corporations; Tripartite Arrangements

I. INTRODUCTION

Multinational corporations (MNCs) have employed a number of ways to advance their business objectives in conflict resource regions, including corporate social responsibility (CSR) initiatives, undertaken through community development and social infrastructure projects. Yet, incessant community conflicts and opposition to MNCs' activities in resource rich regions of the world point to the need for new rules of engagement to deal with the phenomenon described as the 'force of the community.'³ Such communities seek to move from engagement with MNCs based on corporate philanthropy to community empowerment derived from greater participation and involvement in the control, exploitation and management of their natural resources. The execution of direct corporate-community agreements between MNCs and indigenous communities has been proposed as a key means of effective engagement with the force of the community.⁴ This of course would entail the reshaping of the current bilateral relationship between MNCs and host state governments to include local communities. It would

³ Anna Zalik, *The Niger Delta: 'Petro violence' and 'partnership development'* 31(101) REVIEW OF AFRICAN POLITICAL ECONOMY, 401-424 (2004) and Anna Zalik, *Oil Futures: Shell's 'Trilemma Triangle' and the 'Force of Community'*, Paper Presented at the Environmental Politics Colloquium, Institute for International Studies, University of California at Berkeley, (November 3, 2006), available at <http://globetrotter.berkeley.edu/bwep/colloquium/papers/Zalik2006.pdf>

⁴ See for example, Ciaran, O'Faircheallaigh, *Aboriginal – Mining Company Contractual Agreements in Australia and Canada: Implications for Political Autonomy and Community Development*, vol. XXX, nos. 1-2 CANADIAN JOURNAL OF DEVELOPMENT STUDIES, 69-86 (2010)

also involve the renegotiation of current contractual and legal structures that currently regulate this relationship. The case for the renegotiation of traditional contracts is premised on the ground that these contracts at present merely promote the objectives of MNCs and host governments, without taking into consideration the developmental needs of the ethnic communities directly hosting MNCs' operational facilities and activities. Using the Niger Delta region of Nigeria as a case-study of where the force of community has occurred, this article will explore the issues that have given rise to these propositions for new legal and contractual arrangements with regard to the oil and gas sector. The oil and gas rich region of the Niger Delta of Nigeria has been chosen because the exploitation of oil and gas in that area is the foremost source of revenue of Nigeria, reportedly providing 20% of the Gross Domestic Product (GDP), 95% of foreign exchange earnings, and about 65% of budgetary revenues of the Country. This crucial role of oil and gas in Nigeria has resulted in tensions between the Federal Government of Nigeria and MNCs directly exploiting these resources, on the one hand, and the ethnic communities where these resources are derived, on the other.⁵ This article argues that a key way to douse tension in this region is to develop new legal and tripartite contractual arrangements with regard to the oil and gas sector that would involve a direct stake for oil producing communities in oil and gas operations in the region. It further examines some of the potential complexities that may arise if such contracts are directly negotiated with the communities by the MNCs without due involvement of the federal government of Nigeria as the host state government.

II. UNDERSTANDING THE CONCEPT OF THE COMMUNITY IN THE NIGERIAN CONTEXT

Collins points out that though the concept of community is of common usage it is in reality an extremely difficult one to define as it may mean a variety of things to different people.⁶ She posits out that it may cover a diverse range of groupings such as '... a place-based

⁵ See Nigerian High Commission, London, UK website, available at <http://www.nigeriahc.org.uk/economy> Also see for a more academic analysis of this Augustine Ikelegbe, *The Economy of Conflict in the Oil Rich Niger Delta Region of Nigeria*, 14(2) NORDIC JOURNAL OF AFRICAN STUDIES, 208-234(2005). However, it must be pointed out that the principles that would be enunciated in this paper remains relevant for other natural resources in Nigeria, as it is a nation endowed with diverse natural resources, such as tin, gold, bauxite, iron ore, coal, limestone, niobium, lead and zinc, which technically are subject to the same principles as the oil and gas situation. This is particularly relevant as the Nation seeks to diversify from a mono-culture economy subject to the whims and caprices of a rather volatile international oil and gas market price.

⁶ Patricia Hill Collins, *The New Politics of Community*, 75(1) AMERICAN SOCIOLOGICAL REVIEW, 7, 10-12(2010).

neighborhood; a way of life associated with a group of people; or a shared cultural ethos of a race, national or ethnic group, or religious collectivity ...⁷ Further, Anderson, in his seminal piece, submits that all communities larger than the primordial face to face village contact are essentially imagined.⁸ He argues that: '[c]ommunities are to be distinguished, not by their falsity/genuineness, but by the style in which they are imagined.'⁹ Thus, as the concept of community is a rather imprecise one it is helpful, at this point, to seek to explore different ways in which the concept can be imagined in Nigeria and the sense in which this may be applied in the context of the so called force of the community in the Niger Delta situation.

A. Community as a Constitutional Concept

Although Anderson defines a nation as merely '...an imagined political community...',¹⁰ it is critical to first consider the notion of a community as a constitutional concept, especially for a nation, such as Nigeria, which operates a written constitution. The current Nigerian constitution is the 1999 constitution, which is regarded as the supreme law of the land, with binding force on all authorities and persons throughout the country.¹¹ The constitution is explicit that Nigeria operates a three tier system of government, namely: Federal, States (currently 36 in number) and Local Government Areas (in the case of the Federal capital, Abuja, the Area Councils), the list of States, Local Government Areas and Area Councils are specified in the first schedule of the Constitution.¹² This three tier system may be said to represent three strata of 'imagined communities.' While the Constitution unequivocally specifies the Federal, States and Local Government Areas (the Area Councils in Abuja) communities, it fails to specifically mention the various ethnic communities or groups, which by reason of colonialism and the infamous Berlin Conference 1884-1885, were brought together under what subsequently became the sovereign state of Nigeria. These ethnic communities, reported to be over 250, include those located in the Niger Delta region of

⁷ *Id.* at 11

⁸ See Benedict Anderson, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* 15 (1983) who points out that all communities larger than the primordial face to face village contact are imagined.

⁹ *Id.*

¹⁰ *Id.*

¹¹ See Section 1(1). While Section 1(3) of the Constitution states that any other law that is inconsistent with this fundamental basic law is to the extent of such inconsistency null and void.

¹² See Sections 2 and 3, as well as Schedule 1 of the 1999 Constitution.

Nigeria, such as the Ijaws, Ogonis, Urhobos, Itsekiris, Isokos, Illajes, Etches, Ndonis, Ikwerres, Andonis, Effiks, Ibibios, Edos, Ikas, and to some extent the ibos,¹³

As would be seen, as we develop arguments in this article, the Constitution explicitly recognizes certain rights to access the revenue derived from the resources located in Nigeria for what may be regarded as the specified ‘imagined’ communities, especially the Nation-State represented by the Federal government and the unit States of the Federation. It does this by vesting the Nation- State’s ownership of all minerals, minerals oils and natural gas whether located in under or upon and land or in, under or upon the territorial sea and the Exclusive Economic Zone (EEZ) of Nigeria in the Government of the Federation to be managed in a manner prescribed by the National Assembly.¹⁴ While for the unit States of the Federation, the Constitution recognizes that they receive a slice of the ‘national cake’ resulting from exploitation of natural resources through a ‘derivation formula’, currently 13% of revenue accruing to the Federation Account directly from exploitation of natural resources located within the State, specifically incorporated into the Constitution.¹⁵ In Section 162(2) it states:

“The President, upon the receipt of advice from the Revenue Mobilization Allocation and Fiscal Commission, shall table before the National Assembly proposals for revenue allocation from the Federation Account, and in determining the formula, the National Assembly shall take into account, the allocation principles especially those of population, equality of States, internal revenue generation, land mass, terrain as well as population density. *Provided that the principle of derivation shall be constantly reflected in any approved formula as being not less than thirteen per cent of the revenue accruing to the Federation Account directly from any natural resources.*” (*Italics for emphasis*)

¹³ Edwin Egede, *Human Rights and the Environment: Is there a Legally Enforceable Right of a Clean and Healthy Environment for the “Peoples” of the Niger Delta under the Framework of the 1999 Constitution of the Federal Republic of Nigeria?*, 19(1) SRI LANKA JOURNAL OF INTERNATIONAL LAW, 51, 54-55(2007) and See the Central Intelligence Agency (CIA), THE WORLD FACT BOOK(2014), available at <https://www.cia.gov/library/publications/the-world-factbook/geos/ni.html>

¹⁴ Section 44(3) of the Constitution. See *infra* Part II (A) where this is developed further.

¹⁵ See *infra* Part IVA. Also see Edwin Egede, *Who Owns the Nigerian Offshore Seabed: Federal or States? An Examination of the Attorney General of the Federation v. Attorney General of Abia State & 35 Ors Case*, 49(1) JOURNAL OF AFRICAN LAW, 73, 73-74 (2005) See also Kaniye Ebeku, *Nigerian Supreme Court and ownership of offshore oil*, 27 NATURAL RESOURCES FORUM 291-299 (2003), for an analysis of the historical context of the derivation principle.

While there have been calls for the increase of the derivation formula, with some demanding that it goes as high as 50%, especially for oil and gas producing unit States in the Niger Delta area,¹⁶ it is doubtful that this would solve the agitations by the ethnic communities. On the other hand, though the local government areas and council areas do not specifically receive any revenue allocation through the ‘derivation formula’, they do receive some share of the general revenue accruing to the Federation account under the Constitution via the States where they are located.¹⁷ Since the ethnic communities are not one of the ‘imagined’ communities explicitly mentioned in the Constitution, there is no particular provision under the Constitution for them to receive direct disbursement from the revenue generated from the resources exploited within their territory. This therefore helps to understand why there is the notion of the so-called ‘force of the community’ by some of these ethnic communities, who feel marginalized and exploited, as a result of not having direct access at least to some part of the revenue generated from resources extracted from their respective territories.

Ordinarily the three tier communities – Federal, unit-States and local government areas/council areas, as the case may be – explicitly mentioned in the Constitution should adequately represent the interest of the various ethnic communities within their sphere of jurisdiction, in respect of, amongst other things, revenue derived from the exploitation of resources within the respective territories of such ethnic communities, since under the Constitution they are meant to be democratically elected representatives of the people.¹⁸ But does Nigeria truly have a *demos* consisting of the various ethnic communities in Nigeria that regards the various constitutional communities populated by apparently elected representatives as validly reflecting ‘power to the people’ with regard to resource disbursement and benefits? As we explore in the next section looking at community as a political concept, we see a disconnect between the communities explicitly recognized in the Constitution, which constitute the Westphalian State structure, and the ethnic communities leading the latter, notably those in the Niger Delta area, where the bulk of Nigeria’s national

¹⁶ Chris Eze, *Nigeria: New Revenue Formula - Niger Delta Demands 50 Percent Derivation*, DAILY TRUST NIGERIAN NEWSPAPER (11 October 2013), available at <http://allafrica.com/stories/201310110635.html>

¹⁷ See Sections 162(5), (6) and (7) of the 1999 Constitution.

¹⁸ Nigeria on the 29th of May, 1999 resumed its status as a democratic State once again after several years of military rule. As would be recalled, the word ‘democracy’ is derived from the Greek word *dēmokratia* that encompasses two words – *demos* (meaning People) – and - *kratia* (meaning power or rule), in essence meaning ‘power to the people.’

revenue is derived from exploitation of oil and gas, to agitate for some kind of stake in the resources exploited from their territory under a broad rather nebulous phrase of ‘resource control.’¹⁹ A key point we therefore make in this article is that a way to deescalate such tensions is for these ethnic communities to have some sort of direct stake in the resources located within their territory, a proposition which should eventually be incorporated into the Constitution, thereby including ethnic communities as an additional ‘imagined community in the supreme law of the land.

B. Community as a Political Concept

The historical landscape of Nigeria traced back to colonialism and the lumping together of a number of ethnic groups to make up the Sovereign State of Nigeria has led scholars, notably Ekeh, to theorize on the concept of two publics in Nigeria. Ekeh points out that:

“...there are two public realms in post-colonial Africa, with different types of moral linkages to the private realm. At one level is the public realm in which primordial groupings, ties, and sentiments influence and determine the individual’s public behaviour. I shall call this the primordial public because it is closely identified with primordial groupings, sentiments, and activities, which nevertheless impinge on the public interest. *The primordial public is moral and operates on the same moral imperatives as the private realm.* On the other hand, there is a public realm which is historically associated with the colonial administration and which has become identified with popular politics in post-colonial Africa. It is based on civil structures: the military, the civil service, the police etc. Its chief characteristics is that it has no moral linkages with the private realm. I shall call this the civic public. *The civic public in Africa is amoral and lacks the generalized moral imperatives operative in the private realm and in the primordial public.*”²⁰

He pinpoints here two ‘imagined’ political communities – the so-called civic public, on the one hand, centered around the Westphalian structures introduced by the ‘colonial masters,’ along with its accompanying institutional and political structures, and, on the other hand, the primordial public focused on the ethnic community where the individual comes from, with such individual having more allegiance to the latter. Obviously, like most theories, Ekeh’s so-called civic- primordial public distinction suffers the obvious danger of generalization and over-simplification of the rather complex situation in post-colonial Africa. Clearly not all

¹⁹ Listening to various discussions of this concept there appears to be a lack of clarity on whether this is intended to cover resource ownership or merely greater participation by ethnic communities in whose territory the resource is derived.

²⁰ Peter Ekeh, *Colonialism and the Two Publics in Africa: A Theoretical Statement* 17(1) COMPARATIVE STUDIES IN SOCIETY AND HISTORY, 91, 92(1975)

post-colonial Africa's challenges may be traced back to the civic-primordial dichotomy. Further this dichotomy does not explain why in a number of cases certain leaders in Africa, who eventually emerge as Presidents, Prime Ministers, and Governors etc., do not necessarily during their tenure take tangible steps to develop their respective ethnic communities.²¹ Notwithstanding, the civic-primordial dichotomy does serve as a rational and beneficial theoretical toolkit to help to understand the current agitation of ethnic communities in the Niger Delta for a better deal in resource disbursement under the existing constitutional structures. Further, it provides valuable insight into what may be regarded as theoretical paradox. First, as we see from the discourse above of community as a constitutional concept, that ownership of natural resources are vested in the Federal Government of Nigeria and the derivation principle benefits resource-rich States, populated by apparently duly elected representatives of the Nigerian people. Is it not somewhat paradoxical that these ethnic communities should not regard such duly elected officials as adequately representing their interest with regard to resource control and fiscal disbursement? Ekeh's civic-primordial dichotomy helps to shed some light on this. As Berman points out, the idea of the so-called two publics in Ekeh's analysis mainly helps us to appreciate where social trust is situated – the primordial rather than the civic.²²

C. Conceptualizing the Force of the Community

The force of community springs from grass-root activities and collective solidarity. It is described in works, such as Faulkner, as the invisible living force that exerts its influence over individuals within its structures.²³ It operates in a '*non-coercive space that regulates autonomous individuals through fully chosen, agreed to and peaceful relations.*'²⁴ In this regard the force of community is seen to have developed through a bottom up approach rather than prescriptive state control. But it has been questioned whether the force of community is completely devoid of direct state control since there *is an inter-penetration between state and community spheres.*²⁵ What is, however, worth noting is that these critical discussions on the

²¹ See for instance, Claude Eke, *What is the Problem of Ethnicity in Africa* 22 TRANSFORMATION, 1-14, (1992) who points out that ethnicity is sometimes manipulated by the political elites for their selfish purposes.

²² Bruce Berman, *Ethnicity, Bureaucracy and Democracy: The Politics of Trust*, in Bruce Berman, Dickson Eyoh, and Will Kymlicka(eds.), *ETHNICITY AND DEMOCRACY IN AFRICA*, 38, 47 (2004).

²³ Cleanth Brooks, *WILLIAM FAULKNER: THE YOKNAPATAWPHA COUNTRY*, 499(1963).

²⁴ George, Pavlich, *The Force of Community* in Heather Strang and John Braithwaite, (eds) *RESTORATIVE JUSTICE AND CIVIL SOCIETY*, 56, 57 (2001).

²⁵ *Id.*

force of community or community control are construed from Western perspectives and as such they may not fully represent how the force of community has developed in other regions of the world such as sub-Saharan Africa. It is thus beneficial to examine briefly the force of community from African perspectives of communalism. This article does not seek to provide an exhaustive treatise of African communalism but merely seeks to contextualize how the force of community may operate in contested natural resource regions such as the Niger Delta. While there may be no one singular construction on what constitutes community in Africa, it is clear that group solidarity as described by the Zulu maxim *umuntu ngumuntu ngabantu* (*a person is a person through other persons*) is an important part of African consciousness.²⁶ Works, like Ekeh, as pointed out somewhere above, establish that the group solidarity in post-colonial Sub-Saharan Africa extends beyond mere allegiance to the civic public national state but to a primordial public represented, by family and ethnic groupings. Thus communities within the region would identify more with the primordial public than the so-called civic public state. It has been argued that Ekeh's two publics does provide some explanation as to how the force of community has evolved in the Niger Delta and why resource control is considered a core aspiration of oil producing communities.²⁷ While the quest for greater participation in the control of mineral resources in the region has been expressed in some part in armed conflict and contraband oil trade, these activities of the force of community when understood in the light of the two publics can be seen as having re-distributional objectives of protecting the interests of the primordial public against exploitation by the civic public.²⁸

Although these discussions on how the force of community has developed in the Niger Delta are largely derived from social science literature, they do shed some light on the anomalies in the current legislative and contractual framework governing the control and management of mineral resources that are extracted from this region. In reality, it can be argued that the evolution of the force of community in the Niger Delta and its anti-oil protests is a legitimate response to the marginalization of the primordial public within oil producing communities who have had their landholdings and mineral ownership rights transferred to the civic public

²⁶ Augustine Shutte, *Umuntu Ngumuntu Ngabantu: An African Conception of Humanity*, 5(1) PHILOSOPHY AND THEOLOGY 39, 46 (1990).

²⁷ Ekeh, *Supra* note 20 at 108 and Zalik, *Supra* note 3 at 12

²⁸ Zalik *Id.*

Nigerian State.²⁹ This point shall be developed further in this article when considering in more details the current legal framework governing the ownership and control of mineral resources in Nigeria.³⁰ Before moving on to explore this point further, it is vital here to consider other constructions of the force of community particularly those that have emerged within the business discourse. This is critical as the force of community in the Niger Delta is not only a reaction to the marginalization of the primordial public by a civil public national state, but also a response to impact that globalization exemplified by the commercial activities of large multinational companies (MNCs).

D. Corporate Constructions of the Force of the Community: the Shell Trilemma Model

Beyond the constructions of the force of community developed in the social science literature; other interpretations of this phenomenon have emerged in business discourse.³¹ Unlike the social science interpretations of the force of community which primarily focuses on the synergy between community and state control to the exclusion of other stakeholders, the business discourse literature further identifies the significance of trade-offs between the nation-state, the MNCs and the community in order to achieve suitable outcomes that would promote efficiency in natural resource exploitation.³² The need for such trade-offs, and the adverse effect of a failure to achieve trade-offs between the nation State and the MNCs, on the one hand, and the community, on the other hand, may be illustrated by the well-known Ken Saro-Wiwa incidence in 1995. Here the then military government of Nigeria arranged for the execution of Ken Saro-Wiwa, who was one of the leaders of the Movement for the Survival of Ogoni People (MOSOP), agitating for social and environmental justice for the Ogoni community from the Nigerian government and the MNCs, notably Shell, involved in exploitation in the Ogoniland. Shell was regarded as being complicit in this execution and this had a serious impact on their business operations leading them to withdraw for a while

²⁹ *Id.* and Jędrzej Frynas, *Corporate and state responses to anti-oil protests in the Niger Delta*, 100 AFRICAN AFFAIRS, 27, 32 (2001).

³⁰ *Infra* Part III

³¹ Anna Zalik, *Oil 'futures': Shell scenarios and the social constitution of the global oil market* 41(4) GEOFORUM, 553, 554 (2010)

³² See Shell, *Shell Global scenarios to 2025: The future business environment: trends, trade-offs and choices* (2005), available at <http://www.shell.com/content/dam/shell/static/future-energy/downloads/shell-scenarios/shell-global-scenarios2025summary2005.pdf>

from Ogoniland with the obvious impact on business efficiency and profits.³³ There was therefore a need for Shell to change its business model in relation to exploitation and engagement with the relevant community. The Shell Global Scenarios 2025 report, for example, explores three forces that interact in the course of resource exploitation, namely: force of market incentives, force of communities and force of coercion or regulation by the State, with these three forces, geared towards three different objectives of efficiency, social cohesion and justice, and security respectively.³⁴ These three different forces seeking to achieve such diverse objectives thus raises a dilemma or more specifically according to the Shell report three dilemmas(or the so-called trilemma) on how to achieve a balance between these three objectives. The report adopts this so-called trilemma model approach to interpret the force of community and to explain how it competes with the other forces. It examines how the demands of these competing forces could be reconciled by setting out potential future scenarios that would appreciate the need for trade-offs to achieve some kind of balance with regard to the tripartite objectives of efficiency, social cohesion and justice, as well as security.³⁵

In the report Shell lays out three possible futures scenarios (or future worlds), stressing that these were not meant to be forecasts, but merely an enumeration of credible alternatives for the future, especially since the 9/11 terrorist attack on the USA and the Enron infamy. The future different scenarios set out by the report with certain identified features are, namely the Low Trust Globalization scenario (a ‘prove it to me’ world). This is a skeptical world which places emphasis on regulation and compliance. It is steeped in legalism with a dominance of efficiency and security sometimes at the expense of social cohesion and justice. Secondly, the Flags scenario (‘follow me’ world). This is a fragmented and polarized world where people are dogmatic about their own causes and are very keen to express and promote their own identity whether in terms of group/religion/nation/club etc. Here the people distrust the elites and even others who do not share their identity. In this scenario the focus is on security and social cohesion with little or no regard for market efficiency. Thirdly, the Open doors scenario (a ‘know me’ world), a world founded on trust both in the global system and the

³³ Richard Boele, Heike Fabig and David Wheeler, *Shell, Nigeria and the Ogoni, A Study in Unsustainable Development: The Story of Shell, Nigeria and the Ogoni People – Environment, Economy, Relationships: Conflict and Prospects for Resolution*, 9 SUSTAINABLE DEVELOPMENT, 74-86 (2001)

³⁴ Shell, *Supra* at note 32

³⁵ *Id.* and Zalik, *Supra* at note 3.

globalization process. It is based on pragmatism and cooperation being the most efficient way to engage with and deal with future problems. Here the government is unobtrusive and maintains trust and security in a subtle manner using incentives, as well as soft power, rather than direct regulation. This world sees efficiency and social cohesion as the main focus.³⁶ In utilizing the trilemma model, the Shell report assumes that it is not viable to focus on a utopian outcome that satisfies the demands of all three competing forces or in the reverse to focus on utopian outcomes that pit one apex of the triangle against another. Rather, it asserts that the better approach is to capture the trade-offs necessary to achieve a “two wins or one loss” scenarios that appeal to a broader coalition of actors in the global energy sector.³⁷

While Oil MNCs, such as Shell, involved in futures scenarios have not explicitly stated which scenario is most suited for their operations, it has been argued that the ‘open doors’ scenario characterized by incentives and bridges appears to be their preferred option.³⁸ Not only does the ‘open doors’ scenario provide stimulus for energy production, in the case of the force of community, it also provides a triple bottom line approach where civil society groups can work in tandem with companies to address community and investor aspirations in natural resource production. On the other hand, the force of community in the ‘flags’ scenario may be viewed as having a negative effect on energy production since it is characterized by insecurity and conflict fuelled by community agitation and protests. The Niger Delta, a key region of Shell’s operations has been held up as one of the worst case of the trilemma’s ‘flag’ scenario due to the fact that the force of community has hampered oil shipment contractual obligations and forced oil MNCs within the region to declare force majeure due to production shut-ins.³⁹ The region thus provides a prime example of how the force of community can affect energy production for better or worse. In order to understand the force of the community’s impact in the oil rich Niger Delta, it is necessary to provide a précis of the dynamics of control and ownership of natural resources in the region. Also, the low trust globalization, as can be seen from the Ken Saro Wiwa incidence, is also problematic because ignoring social cohesion and justice would eventually have an adverse impact on

³⁶ Shell, *Id.*

³⁷ *Id.*

³⁸ Zalik, *Supra* at note 31 at 562-563.

³⁹ Jean Balouga, *The Niger Delta: Defusing the Time Bomb* FIRST QUARTER (INTERNATIONAL ASSOCIATION FOR ENERGY ECONOMICS), 8-11, (2009), available at <https://www.iaee.org/documents/newsletterarticles/109balouga.pdf> and Zalik, *Supra* note 3 at 401-424.

efficiency.⁴⁰

III. OWNERSHIP AND CONTROL OF MINERAL RESOURCES IN THE NIGER DELTA – APPLICABLE LAWS

A. Nigerian Domestic Law

The call for a fair and equitable legal framework to address legitimate community concerns for social justice and political relevance of Niger Delta communities in the management and control of oil and gas resources is not new. Criticism has been made of Nigerian Federal legislation such as the Petroleum Act of 1969, the Land Use Act of 1978 and other expropriatory legislation seen as hindering the sustainable development of the region and affecting the right of indigenous communities to fully participate in resource ownership and management.⁴¹ In particular, the Land Use Act promulgated in 1978, which nationalized all landholding in Nigeria vesting it with the Nigerian State, is seen by most scholars as one of the key ways in which the Nigerian State exercises its ownership rights over oil and gas resources in the Niger Delta region to the detriment of the interests of oil producing communities in the region.⁴² This Act although initially promulgated as a military decree has received constitutional fiat in subsequent Nigerian constitutions such as the 1979, 1989 and 1999 constitutions.⁴³ The current 1999 constitution prohibits the repeal of this legislation except by the vote of not less than two-thirds majority of all the members of both houses of the National Assembly and the resolution of the Houses of Assemblies of not less than two-thirds of all the States in Nigeria.⁴⁴ Further section 44(3) of the 1999 Constitution strengthens the legislative and constitutional case of the Nigerian state ownership of oil and gas resources in the Niger Delta and other regions in Nigeria when it states that:

“..the entire property in and control of all mineral, mineral oils and natural gas, in under or upon any land in Nigeria or in, under or upon the territorial waters and the Exclusive Zone of Nigeria shall vest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly.”

⁴⁰ Boele etc. *Supra* note 33.

⁴¹ See generally Frynas, *Supra* at note 29 and Rhuks Ako, *Nigeria's Land Use Act: An anti-thesis to environmental justice*, 53(2) JOURNAL OF AFRICAN LAW, 289-304(2009).

⁴² For e.g. see Ako, *Id.* at 293-303.

⁴³ *Id.*

⁴⁴ See s.315 (5) of the Nigerian 1999 Constitution.

Other legislation governing the Nigerian oil and gas industry such as the Petroleum Profits Act 1959, Nigerian Liquefied Natural Gas (LNG) 1990 as amended, the Oil Pipelines Act 1978 and the Oil in Navigable Waters Act CAP 337 of 1990 also further reinforce federal ownership of mineral resources within the Niger Delta. Revisiting the earlier arguments by Ekeh and Zalik on the conflict between the two publics that have arisen in post-colonial African societies,⁴⁵ it can be argued that what we see is a legislative framework that validates the subordination of the rights of the primordial public situated in oil producing communities to those of the amoral civic public which derives its authority and legitimacy through the State. A consequence of the transfer of property rights to the amoral civic public as expressed in the Nigerian State is that the primordial public associated with local communities is unable to control or decide how mineral resources within their communities are exploited. Following from this are concerns that the amoral civic public Nigerian State is aloof to the social and environmental impacts that mineral exploitation has had on local communities in the Niger Delta. This is because unlike the primordial public, it may be argued that the amoral civic public expressed through the Nigerian State does not share the local concerns or have direct political and moral linkage with the communities within this region. This is seen in the context of the Nigerian State repression of community protests arising from environmental and economic damage caused to local communities by oil operations.⁴⁶ Accordingly the worst case ‘flag’ scenario of the force of community described in the Shell trilemma model can be seen as the natural and inevitable reaction of host indigenous communities to the Nigerian Federal State’s disproportionate control and ownership of the resources. This means that any negative impact that the force of community has on the commercial operations of investing oil MNCs should be attributed to the inadequate constitutional, legislative and contractual recognition of the rights of host oil producing communities within the Niger Delta to decide how their mineral resources should be exploited. This lack of legal recognition of community rights over mineral resources can therefore be seen as key driver of the community tension within this region.

But it is all not negative criticism for the Nigerian State as it has in several legislative and judicial reforms attempted to widen and strengthen community participation in the oil and gas

⁴⁵ See notes 27 and 28 above

⁴⁶ Frynas, *Supra* note 29 at 49

industry even if it has not addressed the issue of contractual reforms with similar commitment.⁴⁷

B. International Law

This section would seek to explore if the various Niger Delta ethnic communities qualify as indigenous persons under International Law, and whether as such they have permanent sovereignty or ownership over their natural resources.

1. Niger Delta Ethnic Communities as Indigenous Peoples

The concept of indigenous peoples in the African continent has been contested because of concerns with regard to the absence of aboriginality and subsequent foreign settlers, as seen in other places such as Australia, Canada, New Zealand and the USA, in the context of Africa. However, the better view is that this concept does exist in Africa.⁴⁸ For instance, the renowned legal scholar on indigenous peoples, Professor Weissner, in an article written as far back as 1999, though suggesting that little was known about indigenous peoples in Africa, was not prepared to deny that this concept was present in the African continent.⁴⁹ After some ambivalence about whether the concept of indigenous peoples existed in Africa, the African Commission established in 2000 a Working Group of Experts on Indigenous Populations/Communities mandated amongst other things to explore whether or not indigenous

⁴⁷ *Infra* Part IV

⁴⁸ The traditional definition incorporating the aboriginality/second 'foreign' settler approach can be seen in the JR Martinez – Cobo Report of the Study of the Problem of Discrimination against Indigenous Populations, UN Doc. No. E/CN.4/sub.2/1986/7/Add.4, at para.379 which defines the concept as follows: 'Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their cultural patterns, social institutions and legal systems.' In the same vein, Anaya who refers to indigenous peoples as: '...the living descendants of pre-invasion inhabitants of lands now dominated by others. [They] are culturally distinctive groups that find themselves engulfed by settler societies born of the forces of empire and conquest ... They are indigenous because of their roots are imbedded in the lands in which they live, or would like to live, much more deeply than the roots of more powerful sectors of society living on the same lands or in close proximity. Furthermore, they are peoples to the extent they comprise distinct communities with a continuity of existence and identity that links them to communities, tribes or nations of their ancestral past.' See James Anaya, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW*, 3 (2004). Also on the contested nature of indigenous persons in Africa see generally Felix Mukwiza Ndahinda, *INDIGENOUSNESS IN AFRICA: A CONTESTED LEGAL FRAMEWORK FOR EMPOWERMENT OF 'MARGINALIZED' COMMUNITIES*, (2011)

⁴⁹ Siegfried Wiessner, *The Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 *Harvard Human Rights Journal*, 57, 89 (1999)

populations/communities exist in Africa.⁵⁰ In the subsequent report adopted in 2003 the Working Group affirmed that indigenous peoples did indeed exist in Africa. Due to the absence of an internationally agreed legal definition of indigenous peoples it chose to shun the need to have some form of generic universal definition for this concept. It also was not prepared to accept that the so-called aboriginal and subsequent foreign settler element, which generally does not exist in the context of Africa, was essential to identifying the existence of indigenous persons in the African situation.⁵¹ The Working group preferred to rely on generic criteria to identify indigenous peoples in Africa, who they pointed out were mostly, though not exclusively, groups of hunter-gatherers or former hunter-gatherers and groups of pastoralists, which they summarized as follows:

‘...their cultures and ways of life differ considerably from the dominant society and their cultures are under threat, in some cases to the extent of extinction. A key characteristic for most of them is that the survival of their particular way of life depends on access and rights to their traditional land and the natural resources thereon. They suffer from discrimination as they are being regarded as less developed and less advanced than other more dominant sectors of society. They often live in inaccessible regions, often geographically isolated and suffer from various forms of marginalisation, both politically and socially. They are subject to domination and exploitation within national political and economic structures that are commonly designed to reflect the interests and activities of the national majority. This discrimination, domination and marginalisation violates their human rights as peoples/communities, threatens the continuation of their cultures and ways of life and prevents them from being able to genuinely participate in deciding on their own future and forms of development.’⁵²

The stance of the Working group has been endorsed by the Advisory Opinion of the African Commission on Human and Peoples Rights on the United Nations Declaration on the Rights of Indigenous Peoples.⁵³ The Niger Delta ethnic groups, who are minority groups in Nigeria, a number of whom are fishermen and farmers, occupations that are intrinsically tied up to their way of life and require access to their lands and the rivers etc., with their way of life truncated by the activities of the MNCs, which has devastated farm lands and polluted the

⁵⁰ See ACHPR/Res 51(XXVIII) adopted by the African Commission at its 28th Ordinary Session held in Cotonou, Benin, 23 October to 6 November, 2000, available at <http://www.achpr.org/mechanisms/indigenous-populations/>

⁵¹ See ACHPR/Res. 65 (XXXIV) Report of the African Commission’s Working Group of Experts on Indigenous Populations/Communities, available at http://www.achpr.org/files/special-mechanisms/indigenous-populations/expert_report_on_indigenous_communities.pdf

⁵² *Id* at 60.

⁵³ Paras 9-13, Adopted by the African Commission on Human and Peoples’ Rights at its 41st Ordinary Session held in May 2007 in Accra, Ghana, available at http://www.achpr.org/files/special-mechanisms/indigenous-populations/un_advisory_opinion_idp_eng.pdf.

rivers, have been said to fit into the category of indigenous peoples.⁵⁴ The Working group, for instance, had given the Ogonis of the Niger Delta area of Nigeria as an example of pastoralist and agro-pastoralist indigenous peoples in Africa.⁵⁵ Further, the rather comprehensive International Labour Organisation (ILO) and African Commission on Human and Peoples' Rights (ACHPR) overview report of the constitutional and legislative protection of the rights of indigenous peoples in 24 African States, while acknowledging that it was not providing an exhaustive list of indigenous peoples in Africa, also identified the Ogonis, as well as the Ijaws, of the Niger Delta as indigenous peoples.⁵⁶ Although, these reports highlight what we may regard as 'high profile' indigenous peoples in the Niger Delta area, such as the Ogonis and Ijaws, there is no logical reason why the status of indigenous peoples should not be extended to other ethnic groups in the Niger Delta who could also be said to satisfy the generic criteria set out by the Working group to be regarded as indigenous peoples.⁵⁷ With the ethnic communities in the Niger Delta falling under the category of indigenous peoples could they have some type of sovereignty over natural resources located within their respective territories under international law?

2. *Niger Delta Ethnic Communities' Permanent Sovereignty over Natural Resources as Indigenous Peoples.*

Traditionally, the idea of permanent sovereignty over natural resources was state centered.⁵⁸ However, there has been in recent times a trend in international law towards championing the permanent sovereignty of indigenous peoples over natural resources within their territory.⁵⁹

⁵⁴ For an excellent analysis of how the Niger delta ethnic communities fit into these criteria see Rhuks Ako and Olubayo Oluduro *Identifying Beneficiaries of the UN Indigenous Peoples' Partnership (UNIPP): The Case for the Indigenes of Nigeria's Delta Region*, 22(3) AFRICAN JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW, 369, 380-383 (2014).

⁵⁵ See ACHPR Report, *Supra* note 51 at 9

⁵⁶ ILO/ACHPR, THE RESEARCH PROJECT BY THE INTERNATIONAL LABOUR ORGANIZATION AND THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS ON THE CONSTITUTIONAL AND LEGISLATIVE PROTECTIONS OF THE RIGHTS OF INDIGENOUS PEOPLES IN 24 AFRICAN COUNTRIES, 7 (2009), available at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_115929.pdf

⁵⁷ Ako and Oluduro, *Supra* note 54 at 383.

⁵⁸ See for e.g. General Assembly resolution 1803 (XVII) of 14 December 1962, "Permanent sovereignty over natural resources" and the 1974 Charter on the Rights and Duties of States, General Assembly Resolution 3281(XXIX) of 12 December 1974.

⁵⁹ For an interesting analysis of this trend see Emeka Duruigbo, *Permanent Sovereignty and Peoples' Ownership of Natural Resources in International Law*, 38 GEORGE WASHINGTON INTERNATIONAL LAW REVIEW, 33, 38-67(2006).

The Special Rapporteur to the United Nations Commission on Human Rights' Sub-Commission on the Promotion and Protection of Human Rights, Erica-Irene A. Daes, in her final report on Indigenous peoples' permanent sovereignty over natural resources, as one of her conclusions stated:

“Though indigenous peoples' permanent sovereignty over natural resources has not been explicitly recognized in international legal instruments, this right may now be said to exist. That is ... the right exists in international law by reason of the positive recognition of a broad range of human rights held by indigenous peoples, most notably the right to own property, the right of ownership of the lands they historically or traditionally use and occupy, the rights to self-determination and autonomy, the right to development, the right to be free from discrimination, and a host of other human rights.”⁶⁰

The idea of indigenous peoples' permanent sovereignty over natural resources is not intended to create competing claims to sovereignty as between the State and the indigenous peoples located within the State. Neither is it intended to confer upon indigenous peoples the ownership of natural resources if the domestic laws of the State, as in the case of Nigeria, declare that such ownership lies with the government. Miranda points out that that “[t]he importance of recognizing a “people’s” right to sovereignty over natural resources is that “people” may seek to hold States accountable under international law for the misuse of such natural resources.”⁶¹

This appears to recognize a shift from the concept of absolute sovereignty, whereby the government of the State could do whatever it liked with its natural resources, to some kind of qualified sovereignty – sovereignty with responsibility - that allows the indigenous peoples in whose territory such resources are mined to demand that the government manages the resources properly, exploiting it for the maximum benefit of such peoples.⁶² It is instructive, that the major treaty dealing with issues related to indigenous persons, the Convention Concerning Indigenous and Tribal Peoples in Independent Countries (No.169) 1989, which entered into force on 5 September, 1991, states as follows:

1. The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.

⁶⁰ Para.55 of Economic and Social Council, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, Fifty-sixth session, Prevention of Discrimination and Protection of Indigenous Peoples: Indigenous peoples' permanent sovereignty over natural resources. Final report of the Special Rapporteur, Erica-Irene A. Daes, E/CN.4/Sub.2/2004/30 of 13 July 2004

⁶¹ Lillian Aponte Miranda, *The Role of International Law in Intrastate Natural Resource Allocation: Sovereignty, Human Rights, and Peoples-Based Development*, 45 VANDERBILT JOURNAL OF TRANSNATIONAL LAW, 786, 805, (2012).

⁶² See for e.g. Duruigbo, *Supra* note 59 at 65-67.

2. In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.

However, it is interesting to note that only 22 States have so far ratified this Convention. Nigeria is notably absent as one of the ratifying States and thus technically not bound by this treaty.⁶³ Furthermore, there is no evidence that this treaty could be regarded as reflecting customary international law because it lacks the requisite state practice and *opinio juris*.⁶⁴ Then again, scholars like Anaya and Kingsbury, identify a human rights dimension to the right of indigenous peoples' over their natural resources.⁶⁵ For instance, the African Charter of Human & Peoples Rights states that '[a]ll peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.'⁶⁶ This right is an absolute right since 'in no case shall a people be deprived of it.' Furthermore, the provision emphasizes that this right shall be exercised 'in the exclusive interest of the people' Although, the Charter does not define the term 'peoples,'⁶⁷ what is nevertheless clear is that it is meant to be distinct from the State.⁶⁸ Baldwin and Morel point out that from the practice of the institutions set up under the framework of the African Charter it would appear that 'peoples' may cover a spectrum including the entire people in a country as a collective, a group of people who are a distinct ethnic group within a State and

⁶³ See http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314
Also see Arts.26 and 34 of the Vienna Convention on the Law of Treaties 1969

⁶⁴ See North Sea Continental Shelf Cases, [1969] ICJ Rep. 3 and Case Concerning Military and Paramilitary Activities Against Nicaragua(Merits), [1989] ICJ Rep.14

⁶⁵ James Anaya, *Divergent Discourses about International Law, Indigenous Peoples, and Rights over Lands and Natural Resources : Towards a Realist Trend*, 16 COLORADO JOURNAL OF INTERNATIONAL LAW, 237-258(2005) and Benedict Kingsbury, *Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law*, 34 N.Y.U JOURNAL OF INTERNATIONAL LAW AND POLITICS, 189; 193-202 (2001-2002).

⁶⁶ See Art.21 (1). See also common Art. 1(2) of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

⁶⁷ Ndahinda, Supra note 48 at 191 and 193

⁶⁸ See art.21 of the African Charter which by referring to 'peoples' in Paragraphs 1 and 2 and to 'States Parties' in Paragraphs 4 and 5, shows that these two concepts are not used interchangeably, but are meant to be distinct.

even indigenous peoples.⁶⁹ It is thus broad enough to cover the distinct ethnic groups in the Niger Delta.

Over the years the jurisprudence of the African Commission, in cases such as the Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria[the Ogoni decision] and the Centre for Minority Development and Minority Rights Group International (on behalf of the Endorois Welfare Council) v. Kenya [Endorois decision] have sought to elucidate the nature of the right of peoples under Article 21 and the obligation imposed on State Parties under this provision.⁷⁰ In the Ogoni decision the African Commission found that the facilitation of the Nigerian government of the destruction of Ogoniland and its inaction in protecting the Ogoni people from the devastating acts of private actors, especially the MNCs as they exploited for oil, was a violation of Article 21 of the African Charter.⁷¹ It stated:

‘The Complainants also allege a violation of Article 21 of the African Charter by the government of Nigeria. The Complainants allege that the Military government of Nigeria was involved in oil production and thus did not monitor or regulate the operations of the oil companies and in so doing paved a way for the Oil Consortiums to exploit oil reserves in Ogoniland. Furthermore, in all their dealings with the Oil Consortiums, the government did not involve the Ogoni Communities in the decisions that affected the development of Ogoniland. The destructive and selfish role-played by oil development in Ogoniland, closely tied with repressive tactics of the Nigerian Government, and the lack of material benefits accruing to the local population, may well be said to constitute a violation of Article 21.’⁷²

The subsequent Endorois decision of the African Commission, whilst construing the Ogoni decision, though without referring to a specific paragraph in the latter decision, stated that ‘... it is instructive to note that the African Commission decided in *The Ogoni case* that the right to natural resources contained within their traditional lands vested in the indigenous people.

⁶⁹ Clive Balwin and Cynthia Morel, *Group Rights* in Malcolm Evans and Rachel Murray(eds.), *THE AFRICAN CHARTER ON HUMAN AND PEOPLES’ RIGHTS: THE SYSTEM IN PRACTICE 1986-2006*, 2nd edition.(2008), 244; 245-250. The fact that the rights of peoples under the African Charter are justiciable have been affirmed by various African Commission on Human Rights decisions such as *Katangese Peoples’ Congress v. Zaire*, Communication 75/92; *The Social and Economic Rights Action Centre for Economic and Social Rights v. Nigeria*, Communication 155/96 [the Ogoni decision]; *The Centre for Minority Rights Development (on behalf of the Endorois Community) v. Kenya*, Communication 276/2003[the Endorois decision] and the African Court of Human Rights in the case of *African Commission on Human and Peoples’ Rights(on Ogiek Community of the Mau Forest) v. Kenya*, Application No.006/2012 (Order of Provisional Measures)[the Ogiek Case].

⁷⁰ Available at <http://www.achpr.org/>

⁷¹ See Paras. 55 and 58 of the Ogoni decision, *Supra* note 69

⁷² Para.55, *Id.*

This decision made clear that a people inhabiting a specific region within a state can claim the protection of Article 21.⁷³ This decision further pointed that under Article 21(2) of the African Charter there is an obligation on the part of the relevant State Party to the Charter in the case of spoliation to provide restitution or adequate compensation to the affected indigenous peoples.⁷⁴

The African Charter has been ratified by the Nigeria and its provisions have been domesticated, as required by Section 12(1) of the Nigerian Constitution, so it is legally binding on the Nigerian government.⁷⁵ There is therefore an obligation upon the Nigerian government, under International Law and Domestic Law, to ensure that the indigenous peoples in the area are consulted and they participate in decisions with regard to exploitation of resources in the Niger Delta.⁷⁶ They also have an obligation to ensure that any such exploitation for mineral resources on the land of the indigenous peoples in the Niger Delta are carried out in an appropriate manner to avoid devastating acts by the private actors involved in such mining activities that would result in a loss of access to fundamental resources that are critical for their survival as farmers and fishermen. In addition, they have an obligation to provide adequate compensation to the indigenous communities therein for any spoliation which occurs in the course of the mining of ‘their’ natural resources.⁷⁷ It does appear that not much has been done in this regard for the indigenous peoples in the Niger Delta under Article 21 of the Charter.⁷⁸

⁷³ Para. 267 of the Endorois decisión, *Supra* note 69

⁷⁴ Para.268, *Id*

⁷⁵ Section 12(1) of the 1999 Nigerian Constitution states that: ‘No treaty between the Federation and any other country shall have the force of law to the extent to which any such treaty has been enacted into law by the National Assembly.’ The African Charter was ratified by Nigeria on 22nd June 1983[see <http://www.achpr.org/instruments/achpr/ratification/>] and was domesticated by the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Chapter 10, Laws of the Federation of Nigeria 1990. Severally decisions of the Nigeria Courts, including the highest Court of the land – the Supreme Court – have affirmed the legality, validity and enforceability of the African Charter in Nigeria. For an analysis of one of such landmark cases, Abacha vs. Fawehinmi [2000] 6 NWLR (Part 660) 228, see Edwin Egede, *Bringing Human Rights Home: An Examination of the Domestication of Human Rights Treaties in Nigeria* 51(2) JOURNAL OF AFRICAN LAW, 249-284 (2007).

⁷⁶ Para. 268 of the Endorois decision, *Supra* note 69.

⁷⁷ For some details on the type of environmental spoliation in the Niger Delta area due to mining activities see Egede, *Supra* note 13 at 57-61.

⁷⁸ See the Federal Republic of Nigeria’s 5th Periodic Country Report: - 2011-2014 on the Implementation of the African Charter on Human and Peoples’ Rights in Nigeria, (Produced by the Federal Ministry of Justice, Abuja, 2014) pp.114- 115, http://www.achpr.org/files/sessions/14th-eo/state-reports/5th-2011-2014/staterep5_nigeria_2013_eng.pdf , lists the establishment of the Ministry of the Niger Delta in 2008, the adoption of the Nigeria Extractive Industries Transparency Initiative (NEITI) Act 2007 and the Nigeria Oil and Gas Industry Content Development Act 2010, as its only achievements towards complying with Article 21. This merely repeats word for word what had been stated earlier in Nigeria’s 4th Periodic Country Report: - 2008-2010

IV. LEGISLATIVE AND JUDICIAL INITIATIVES WITH REGARD TO OWNERSHIP AND MANAGEMENT OF MINERAL RESOURCES OF OIL PRODUCING COMMUNITIES IN THE NIGER DELTA.

We see, somewhere above, that the force of community in the Niger Delta is seen as posing a challenge to market efficiency and security in the energy industry due to its contribution to the social unrest, armed insurgency and inter-community conflict in the region.⁷⁹ While there is extensive literature in such fields as law and human rights, politics and governance, corporate social responsibility, development and security studies and environmental management and governance on the dynamics of community agitations within this region,⁸⁰ there appears not to be the same level of discussion on the role that regulation and contract negotiation have played in the mobilization of the force of community within this region. Even where there are academic discussions on the role that law and regulation plays in shaping the force of community in the Niger Delta, these discussions have largely focused on legislative formulation and not so much on the impact that the contractual framework negotiated between international oil companies and the Nigerian federal state has had on indigenous communities in their aspirations to participate more fully in the management and control of mineral resources that are extracted from their region.⁸¹ A key concern of this article is therefore to focus on whether the indigenous communities' struggle for social justice and political relevance in resource control is best resolved not only by the restructuring of the legislative framework, but also by a re-engineering of the current contractual structures governing natural resource exploitation and production in resource rich regions such as the Niger Delta.

A. Fiscal Participation in Revenue Allocation

As pointed out somewhere above, the current constitutional and legislative framework governing the petroleum industry in Nigeria vests ownership of mineral resources in the

on the Implementation of the African Charter on Human and Peoples' Rights in Nigeria, (Produced by the Federal Ministry of Justice, Abuja, 2011) pp.78-79

⁷⁹ See Part II above.

⁸⁰ Human Rights Watch, *THE PRICE OF OIL: CORPORATE RESPONSIBILITY AND HUMAN RIGHTS VIOLATIONS IN NIGERIA'S OIL PRODUCING COMMUNITIES* (1999); Kaniye Ebeku, *Niger Delta Oil, Development of the Niger Delta and the New Development Initiative: Some Reflections from a Socio-Legal Perspective*, 43 (4) *JOURNAL OF AFRICAN AND ASIAN STUDIES*, 399-435, (2008) and Egede, *Supra* note 13 at 57-61.

⁸¹ See for e.g Egede and Ebeku, *Id.*

Nigerian Federal Government. Furthermore, as again pointed out previously, notwithstanding that the Federal Government has statutory and constitutional ownership of mineral resources, previous constitutions, as well as the current 1999 Constitution, allow oil producing states within Nigeria to participate in the sharing of centrally collected mineral revenues through an arrangement known as the 'derivation principle'.⁸² Whereas earlier constitutions governing the first Republic extended the derivation principle to revenue accruing from both onshore and offshore resources, it was predominantly restricted by the Distributable Pool Account Decree 13 of 1970 and the Offshore Revenue's Decree No 9 of 1971 to revenue derived from onshore resources. Decree No 9 in particular vested all offshore oil revenues of the territorial waters and the continental shelf adjoining littoral states to the Nigerian federal government. Subsequent Nigerian constitutions, including the current 1999 constitution did not expressly address the issue on whether littoral states, which coincidentally host many of the host oil producing communities, could participate in offshore oil revenues through the derivation principle. This constitutional uncertainty eventually led the Nigerian federal government to seek judicial interpretation on whether the derivation principle applied to offshore mineral resources revenues. In the landmark case of the Attorney General of the Federation v Attorney General of Abia State & 35 others, the Supreme Court ruled that the bed of the territorial sea, exclusive economic zone and continental shelf belonged to the Nigerian federal government rather than the littoral states. In this regard, the Federal Government was to apply the derivation principle only to onshore resources.⁸³ This decision from Nigeria's highest court understandably did little to reduce the worst case 'flag scenario' from the Shell trilemma of the force of community within the Niger Delta seeking for greater fiscal autonomy and control over the mineral resources within the region. A political resolution between the Nigerian federal government and the littoral oil producing states concerned led to the legislative enactment of the Allocation of Revenue (Abolition of Dichotomy in the Application of the Principles of Derivation Act) 2004. This Act allowed littoral states for the purposes of revenue sharing to claim two hundred meter water depth Isobaths contiguous to these states. Although the oil producing states were partially satisfied with this legislation, non-oil producing states challenged its constitutional legitimacy in the Supreme Court. The validity of the 2004 legislation was upheld by the Supreme Court in a decision seen as having a moderating effect

⁸² See Part IVA *infra* and Festus Egwaikhide., Victor Isumonah & Olumide Ayodele, FEDERAL PRESENCE IN NIGERIA: THE 'SUNG' AND 'UNSUNG' BASIS FOR ETHNIC GRIEVANCE, 32 (2009).

⁸³ For a critique of this decision see Egede, *Supra* note 15 at 73-93

on its previous 2002 decision which had rigidly upheld federal ownership of resources within the Nigerian offshore seabed.⁸⁴ Notwithstanding some misgivings as to whether the Act went far enough to address all the concerns for fiscal autonomy, the legislation has to some extent tried to resolve the onshore and offshore distinction in revenue sharing, a critical tension point in the relations between oil producing states and the Nigerian federal government. However, from the discussion on the dynamics between the so-called civic and the primordial publics, it is doubtful that the oil producing communities within the oil producing States would in reality regard the individual state governments of the oil producing states in which they are located as legitimately representing or safeguarding their interests as ‘trustees’ of the derivation fund received by the latter. An option would be to allow the oil producing communities to have direct fiscal participation in revenue allocation with regard to derivation. The oil producing community could be allowed to have a percentage of the revenue derived from oil and gas produced from the territory in which the community is located. This revenue could be channeled to each particular community through some kind community corporate body, similar to the Mackenzie Valley Aboriginal Pipeline Corporation (MVAPC), a corporate entity that represents the interest of affected Aboriginal peoples affected by the proposed Mackenzie Valley Gas Project in Canada.⁸⁵ The Community Corporation would mainly be constituted by members nominated by the particular oil producing community and would be required to use the revenue received from the derivation sharing formula to embark on what the community regards as priority developmental projects. The main challenge with direct participation by oil producing communities in the derivation fund is that this would require constitutional amendment – a process that is rather cumbersome and long drawn.⁸⁶

⁸⁴ See *A-G of Adamawa State & Ors v, A-G of the Federation & Ors* (2005) 18 NWLR (Part 958) 581. This action was dismissed by the Supreme Court as lacking merit.

⁸⁵ Information on the Mackenzie Valley Gas Project available at <http://www.mackenziegasproject.com/whoWeAre/APG/APG.htm> See *Infra* Part V for further discussions on the possibility of a tripartite arrangement between the Nigerian State, the MNCs and the host communities.

⁸⁶ Section 9(1)(2) and (3) of the 1999 Constitution states: “(1). The National Assembly may, subject to the provision of this section, alter any of the provisions of this Constitution. (2) An Act of the National Assembly for the alteration of this Constitution, not being an Act to which section 8 of this Constitution applies, shall not be passed in either House of the National Assembly unless the proposal is supported by the votes of not less than two-thirds majority of all the members of that House and approved by resolution of the Houses of Assembly of not less than two-thirds of all the States. (3) An Act of the National Assembly for the purpose of altering the provisions of this section, section 8 or Chapter IV of this Constitution shall not be passed by either House of the National Assembly unless the proposal is approved by the votes of not less than four-fifths majority of all the members of each House, and also approved by resolution of the House of Assembly of not less than two-third of all States.”

B. Legislative Initiatives towards Sustainable Community Development in the Niger Delta

As far back as 1959, provision was made in the Nigerian (Constitution) (Amendment No.2) Order in Council to establish the Niger Delta Development Board (HC Deb, 1959). The Board was formally constituted in 1961 and amongst other things was responsible for implementing agricultural projects within the region. However, its effectiveness in delivering sustainable lasting development to communities within the region was questioned and seen by international agricultural advisers as having “*no clear idea of its objectives*”.⁸⁷ More development initiatives for the Niger Delta followed through the promulgation of the Oil Mineral Producing Areas Development Commission (OMPADEC) Decree by the then military government in 1992 to facilitate sustainable development in the region. The OMPADEC initiative failed primarily due to inefficiency and corruption and also as a result of the inadequate local representation in the planning and execution of projects.⁸⁸ It was subsequently replaced by the Niger Delta Development Commission Act (NDDC) 2000. The NDDC Act established a statutory body known as the Niger Delta Development Commission which was tasked with the duty to formulate policies and guidelines for the development of the region. Its other responsibilities as required under section 7 of the Act include the conception, planning and the implementation of projects and programs for the sustainable development of the Niger-Delta area in the field of transportation including roads, jetties and waterways, health, education, employment, industrialization, agriculture and fisheries, housing and urban development, water supply, electricity and telecommunications. While these legislative initiatives, particularly the NDDC Act, are seen as positive steps to seek to address the worst flag case scenarios of the force of community within this region, the NDDC like its predecessor bodies has been criticized for the inadequate representation of indigenous local communities in its decision making process and implementation of development plans and projects within the region. It has been strongly argued that even though the NDDC may have representatives from oil producing state Government; provision should have been made for direct participation from the oil producing

⁸⁷ See Jędrzej Frynas, *OIL IN NIGERIA: CONFLICT AND LITIGATION BETWEEN OIL COMPANIES AND VILLAGE COMMUNITIES*, 48-49 (2000), quoting a confidential report of one A.R. Melville, an agricultural adviser at the British Ministry of Overseas Development.

⁸⁸ Kaniye Ebeku, *Oil and the Niger Delta People: The Injustice of the Land Use Act*. 35(2) VERFASSUNG UND RECHT IN UBERSEE, 201-231, 2002

communities.⁸⁹ Apart from inadequate local representation, the NDDC has been faulted for structural anomalies and is seen as lacking effective control mechanisms to ensure transparency in the administration. Consequently despite several years of establishment, the NDDC is seen not to have fully succeeded in its tasks of reconstructing the Niger Delta region or fostering its sustainable development.⁹⁰ Although the criticism of the NDDC is not unfounded, it has recorded some measured success in the region through construction of infrastructure such as roads and jetties. However, the efficacy of the NDDC is beclouded by the fact that its enabling Act failed to provide a system where its actual beneficiaries- the local communities could effectively participate in its decision making process, hence its limited success in tackling the worst case flag scenario of the force of community within the region.

C. Current Soft Laws and Policy Measures on the Development of the Niger Delta

Realizing that past legislative initiatives set out in the hard law have, to some extent, been limited in the full accomplishment of sustainable development in the Niger Delta, the Nigerian State has also adopted soft law and policy initiatives to positively engage with the force of community within the Niger Delta; these initiatives include the establishment in 2008 of the 40-member Mittee technical committee tasked with the responsibility of conducting a review of existing Niger Delta reports and in advising the Nigerian State on what appropriate steps should be undertaken to develop the region. The Mittee Committee in its report recommended, inter alia, increasing the derivation percentage for oil producing states as a confidence building measure and the disarmament of youths, coupled with the establishment of a Youth Employment Scheme.⁹¹ Almost simultaneously, the Federal Government set up the Ministry for the Niger Delta Affairs which for effective coordination had to absorb the NDDC as one of its parastatals.⁹² These policy measures have yielded some positive dividends in ameliorating the worst case flag scenarios of the force of community, highlighted in the Shell Scenarios. For instance, the initiation of the amnesty programme by the government of late President Umaru

⁸⁹ Id. and Frynas, *Supra* note 29 at 39

⁹⁰ Ben Aigbokan, *Reconstruction of Economic Governance in the Niger Delta Region in Nigeria: The Case of the Niger Delta Development Commission* in Karl Wohlmuth, (ed.), RECONSTRUCTING ECONOMIC GOVERNANCE AFTER CONFLICT IN RESOURCE RICH AFRICAN COUNTRIES – LEARNING FROM COUNTRY EXPERIENCES, 241-279 (2008), available at <http://www.iwim.uni-bremen.de/publikationen/pdf/W040.pdf>

⁹¹ Sylvanus Abila & Damfebo Derri, *Sustainable development issues in the Niger Delta* in Festus Emiri & Gowon Deinduomo (eds) LAW AND PETROLEUM INDUSTRY IN NIGERIA: CURRENT CHALLENGES (ESSAYS IN HONOUR OF JUSTICE KATE ABIRI), 262-263 (2009).

⁹² *Id* at 262.

Yar'adua has largely achieved the first of its objectives of disarming the Niger Delta youth insurgency.⁹³ However, it is doubtful that these measures would address the fundamental concern of the primordial public of oil communities which has to do with direct stake in fiscal federalism and resource control.⁹⁴ Further, as with previous development bodies constituted by the Nigerian government to tackle the developmental concerns of the Niger Delta, the creation of the ministry is seen as a “*top bottom approach to development*” in that there is no clear evidence that the local communities within the Niger Delta were actively involved in its formation or in deciding its mandate.⁹⁵ It is therefore questionable whether the Ministry and the NDDC will achieve any better success than other interventionist development bodies like OMPADEC similarly tasked with effecting the sustainable development of the Niger Delta region. Notwithstanding these reservations, there is still much to be lauded about the ministry and the NDDC since its establishment should ensure that developmental needs of the region is discussed at the highest level of decision making of the Nigerian government and hopeful this should translate into concrete policy measures beneficial to the development of the region.

Notwithstanding that the judicial, legislative and policy initiatives of the Nigerian State have yielded some positive results in addressing the worst case flag scenarios of the force of community in the Niger Delta, environmental degradation and underdevelopment within the region still persists.⁹⁶ The limited success of state run projects in the development of the region has led to a growing involvement of Oil MNCs in the delivery of developmental projects. Corporate action in this regard is undertaken through the mechanism of corporate social responsibility which is discussed in the section below.

⁹³ See The Federal Government of Nigeria Niger Delta Amnesty Programme (NDAP), available at <http://nigerdeltaamnesty.org.ng/> and Okoha Ukiwo, *The Nigerian State, Oil and the Niger Delta Crisis* in Cyril Obi and Siri Rustad (eds.), *OIL AND INSURGENCY IN THE NIGER DELTA: MANAGING THE COMPLEX POLITICS OF PETRO-VIOLENCE*, 17-27 (2011).

⁹⁴ Abila & Derri, *Supra* note 91 at 263

⁹⁵ Federal Ministry of Niger Delta website, available at <http://www.ndm-ng.com/> and Abila & Derri, *Id.* at 262-263

⁹⁶ See Oscarline Onwuemenyi, *Group urges Buhari to address environmental degradation in N'Delta*, NIGERIAN GUARDIAN NEWSPAPER, (May 20, 2015), available at <http://www.nguardiannews.com/2015/05/group-urges-buhari-to-address-environmental-degradation-in-ndelta/> where the Ijaw Youth Council is reported to have urged the then President-elect(now President) Muhammadu Buhari to address the issue of environmental degradation in the Niger Delta. Also see Shola Omotola., *From the OMPADEC to the NDDC: An Assessment of State Responses to Environmental Insecurity in the Niger Delta*, *Nigeria* 54 (1) AFRICA TODAY, 73-89 (2007) and Shell, *Supra* note 32.

V. REVISITING CORPORATE SOCIAL RESPONSIBILITY AND ITS INTERACTION WITH THE FORCE OF COMMUNITY.

In tandem with the legislative and judicial reforms discussed above, international oil companies, the other key stakeholders in the Oil and Gas industry in Nigeria have employed Corporate Social Responsibility (CSR) as a way of addressing the force of community's demands in the Niger Delta region. Frynas has identified the main CSR concerns that oil and gas companies have had to address within this region as the environmental and social impacts of the industry and the macro-economic issues created by the inflow of oil revenues.⁹⁷ Interestingly, it will appear that much of the CSR activities carried out in the Niger Delta has been more in the area of addressing the social impacts of the industry rather than the environmental impacts and micro-economic issues created by the inflow of oil revenues. While there is evidence that shows that CSR practices within the oil and gas industry have led to voluntary improvements in environmental performance much of the data on how CSR practices have improved environmental performance has emerged from other jurisdictions, outside the Niger Delta region.⁹⁸

However, the industry has more recently shifted from its traditional CSR approach that limits efforts to community development schemes such as the building of hospitals, roads, schools, boreholes and the provisioning of micro-credit schemes to more concrete forms of engagement that recognize the right of local communities to be involved in the decision making process on how mineral resources are exploited within their region.⁹⁹ This new form of corporate engagement with local communities is depicted in the negotiation of direct corporate-community agreements between MNCs and indigenous communities in the Niger Delta. The next two sections of this article examines the nature of these agreements and whether they can be considered as binding contractual agreement akin to those negotiated between mining companies and indigenous communities in Australia and Canada.

⁹⁷ Jędrzej Frynas, *Corporate social responsibility in the oil and gas sector*, 2(3) JOURNAL OF WORLD ENERGY LAW & BUSINESS, 178, 181(2009).

⁹⁸ Ibid at pp.181-182

⁹⁹ See Robert Wasserstrom and Susan Reider, *Anthropologists, Corporate Responsibility and Oil in Ecuador and Nigeria* 4(1) INTERNATIONAL JOURNAL OF BUSINESS ANTHROPOLOGY, 77, 83(2013)

A. The Emergence of Corporate – Community Agreements in the Niger Delta- a current reality or myth?: the General Memorandum of Understanding (GMoU) System

Major oil and gas companies operating in the Niger Delta such as Shell and Chevron have employed the Global Memorandum of Understanding (GMoU) system in their engagement with local communities. These agreements are normally executed between an oil company and a group of local communities.¹⁰⁰ For instance Chevron in Nigeria describes the GMoU model as: “... a new approach to community engagement in the Niger Delta” and identifies that this “gives communities a greater role in managing their development” with the aim of bringing peace and stability to those parts of the Niger Delta where the company operates.¹⁰¹ This raises questions on the status of GMoUs and whether it has any binding status under law. Clearly, although, the GMoU is viewed by both the industry and the local communities as an agreement, the key question is whether it creates legally binding terms and conditions against the parties to the agreement? While it is claimed that unlike the previous approach of community engagement that the GMoU allows communities to take the key decisions and to drive the community development there is no evidence to establish that it is a legally binding document.¹⁰² Generally, though a Memorandum of Understanding (MoU) sets out the parties’ understanding of a proposed relationship, in many instances, its intent is not to set out binding terms and conditions as this would normally be implemented by a subsequent contract. The parties usually envisage an MoU as a preliminary document for more detailed negotiations which will lead eventually to a final binding contract.¹⁰³ Consequently under English law, and the law of most common law jurisdictions of which Nigeria is a part, MOUs are generally not considered as legally binding except they have clauses that are sufficiently certain, such as legally binding confidentiality or break-up fees clauses or if they have been supported by consideration or if the parties have expressly or implicitly agreed that the MOU should be legally binding.¹⁰⁴ It is doubtful that the GMoUs executed between oil companies and local

¹⁰⁰ Uwafiokun Idemudia, *Corporate partnerships and community development in the Nigerian Oil industry: Strengths and limitation, Markets, Business and Regulation Programme*, PAPER NO.2, UNITED NATIONS RESEARCH INSTITUTE FOR SOCIAL DEVELOPMENT 1,10 (2007), available at [http://www.unrisd.org/80256B3C005BCCF9/\(httpAuxPages\)/D7737BEE64BC48B0C12572C90045372E/\\$file/Idemudia.pdf](http://www.unrisd.org/80256B3C005BCCF9/(httpAuxPages)/D7737BEE64BC48B0C12572C90045372E/$file/Idemudia.pdf)

¹⁰¹ See CHEVRON IN NIGERIA CORPORATE RESPONSIBILITY REPORT, 5, 13 (2013), available at http://www.chevron.com/documents/pdf/2013_NigeriaCR_Report.pdf

¹⁰² See SHELL IN NIGERIA: IMPROVING LIVES IN THE NIGER DELTA BRIEFING NOTE, (April 2014), available at <http://s08.static-shell.com/content/dam/shell-new/local/country/nga/downloads/pdf/2014bnotes/improving-lives.pdf>

¹⁰³ Richard Christou, *BIOLER PLATE: PRACTICAL CLAUSES*, 4th edition, 37, (2005)

¹⁰⁴ *Id*

communities contain such terms, which for instance may be evident in the MoUs that international oil companies execute with national oil companies prior to the execution of the final contractual documentation.¹⁰⁵ But then it may be argued that the premise on which the oil companies have negotiated these GMoU with local communities was essentially based on the CSR approach of promoting social responsive behavior in corporate activities within local regions; rather than on negotiating binding business terms with these communities, since ownership and control of the natural resources is vested with the Federal Government and not the local communities. Consequently it may be maintained that despite the industry's claims that the GMoU model empowers local communities by facilitating greater participatory processes, such MoUs are not formally designed to have any legal weight.

It is certainly not unusual to have corporate-community agreements that are legally binding. For instance, agreements executed between mining companies and aboriginal communities in Countries, such as Canada and Australia are considered as legally binding.¹⁰⁶ Yet, it must be pointed out that the objective of the latter agreements is not just to enable local communities to determine what community projects should be initiated, but that these aboriginal communities should directly share in the wealth generated from mining activities and be involved in the decision-making on which mines should be developed and operated.¹⁰⁷ Then again there are limitations to having a legally binding GMOU system that seek to transfer economic benefits. First, because they are negotiated primarily between companies and local communities who lack ownership rights over mineral resources, these Agreements are unable to effectually provide for wealth participation clauses in favor of the communities unless the Federal Government of Nigeria, which has legal and constitutional rights to ownership and control of minerals, is also a party to these agreements.¹⁰⁸ Thus, unlike the aboriginal mining

¹⁰⁵ For e.g. in an MOU between the National Oil Corporation of Kenya and Eastern Echo DMCC for a proposed joint collaboration which was entered into on the 26th of July 2013, it was stated an the onset that the MOU 'is not intended to be legally except as specifically set out below' and it specifically identified the clauses that were intended to be legally binding, available at <http://www.cofek.co.ke/Western%20Geco%20-%20National%20Oil%20Corporation%20of%20Kenya%20-%20July%202013.pdf>

¹⁰⁶ O'Faircheallaigh, Supra note 4 at 69-86 and Ciaran O'Faircheallaigh, CORPORATE – ABORIGINAL AGREEMENTS ON MINERAL DEVELOPMENT: THE WIDER IMPLICATIONS OF CONTRACTUAL ARRANGEMENTS, Paper delivered to the Rethinking Extractive Industries Conference, York University, Toronto, 2-5 (5-7 March 2009), available at <http://www.yorku.ca/erlac/EI/papers/O'Faircheallaigh.pdf>.

¹⁰⁷ O'Faircheallaigh, CORPORATE-ABORIGINAL AGREEMENTS ON MINERAL DEVELOPMENT ETC, *Id.*

¹⁰⁸ *Infra* Part VI for discussion on this type of tripartite Agreements.

agreement model where aboriginal communities are entitled to receive royalties directly from mining companies, local communities in the Niger Delta are unable to directly utilize the GMOU system as a way to direct access to the economic gains of oil and gas extraction within their territory without the direct participation of the Federal Government of Nigeria.¹⁰⁹

In 2007 the Nigerian Minerals and Mining Act was enacted and it provides for Community Development Agreements (CDAs), which are meant to transfer ‘social and economic benefits’ to the host communities are required to have binding legal effect.¹¹⁰ However, this legislation excludes Petroleum from the ambit of this legislation and so legally binding CDAs are not applicable to oil and gas mining operations,¹¹¹ and thus this would not meet the yearnings and aspirations of the force of community in the Niger Delta for greater participatory rights over the exploitation of oil and gas mineral resources located in their respective communities.

Even so, it must be noted that despite the obvious benefits of the aboriginal mining agreement model, it still has some shortcomings similar to the non-binding GMOU system in that there are concerns on whether aboriginal communities have the necessary technical skills to negotiate specialized agreements with large mining companies and whether such negotiation process which in many instances falls outside state controlled community planning may have a detrimental effect on government expenditure to the region.¹¹² Moreover, similar to the terms of the GMoU, the aboriginal mining agreement model contains specific provisions which require the communities to support the project and to refrain from opposing it during the environmental impact assessment stage.¹¹³ Although, the requirement that local communities should support the project is understandable if they are to be seen as partners to the project, this requirement may end up causing unintended adverse consequences for these communities.

¹⁰⁹ See discussion on ownership of mineral resources in Nigeria at Part III above.

¹¹⁰ See Act No.20 of 2007, Sections 116-117, especially 116(5).

¹¹¹ See Section 164 of the Act which defines “Minerals” or “Mineral Resources” as “any substance whether in solid, liquid or gaseous form occurring in or on the earth, formed by or subjected to geological processes including occurrences or deposits of rocks, coal, coal bed gases, bituminous shales, tar sands, any substances that may be extracted from coal, shale or tar sands, mineral water, and mineral components in tailings and waste piles, but with the exclusion of Petroleum and waters without mineral content.” Petroleum under Section 15(1) of the Nigerian Petroleum Act Cap. 350, Laws of the Federation of Nigeria 1990 is defined as “mineral oil (or any related hydrocarbon) or natural gas as it exists in its natural state in strata, and does not include coal or bituminous shales or other stratified deposits from which oil can be extracted by destructive distillation.”

¹¹² O’Faircheallaigh, *Supra* note 107 at 13-14.

¹¹³ *Id* at p.6

For instance, because a particular local community has contractually agreed to support a particular project, it may be regarded as having restricted its rights to access to environmental justice through the judicial and regulatory system if such project, in the long run, ends up causing environmental degradation within their regions.¹¹⁴ Notwithstanding these concerns, the aboriginal mining agreement model does have worthwhile provisions that may be considered in any proposed reform of the contractual framework governing the oil and gas industry in Nigeria.

In the next section we examine whether there needs to be a complete restructuring of the current legal framework, which will allow for the restructuring of the legislative and contractual ownership of mineral resources in Nigeria, and provide the appropriate framework for the adoption of some form of tripartite mining agreement in the oil and gas industry in Nigeria between the Federal Government of Nigeria representing the State, the relevant MNCs and the local communities. Recent policy measures, as we would see in the next section, do indicate that the Nigerian Government is not averse to a situation where indigenous communities are able to directly participate in wealth generated from the exploitation of mineral resources.

VI. TOWARDS A TRIPARTITE CONTRACTUAL AGREEMENT BETWEEN THE NIGERIAN STATE, MULTINATIONAL OIL CORPORATIONS AND LOCAL COMMUNITIES.

The Nigerian Government has been reported to have expressed an interest in allowing for direct participation of local communities by mooted the idea of transferring ten percent of its stakeholding in existing JVAs with multinational corporations to local communities.¹¹⁵ In October

¹¹⁴ *Id*

¹¹⁵ With JVAs one of the partners is generally designated the operator and all the parties are expected to share in the cost of operations (cash call obligations). Usually each partner is able to lift and separately dispose of its interest share of production, subject of course to the payment of any outstanding profit tax and royalty. There are currently six joint venture Agreements between the Federal Government of Nigeria (represented by its National Oil Corporation – the Nigerian National Petroleum Corporation (NNPC) – and foreign owned oil companies, namely: (i) A JVA with Shell Petroleum Development Company of Nigeria Limited (Shell) as operator. The Parties to the JVA are NNPC (55 percent), Shell (30 percent), Elf (10 percent) and Agip (5 percent) and operates largely onshore on dry land or in the mangrove swamp; (ii) JVA with Chevron Nigeria Limited (Chevron) as operator between NNPC (60 percent) and Chevron (40 percent) with fields located in the Warri region west of the Niger river and offshore in shallow water; (iii) JVA with Mobil Producing Nigeria Unlimited (Mobil) as operator between NNPC (60 percent) and Mobil (40 percent) which operates in shallow water off Akwa Ibom state in the South Eastern Delta. Mobil also holds a 50 percent interest in a Production Sharing Contract (PSC) for a deep water block further offshore; (iv) A JVA with Nigerian Agip Oil Company Limited (Agip) as operator between NNPC (60 percent), Agip (20 percent) and Phillips Petroleum (20 percent) which produces mostly from small onshore fields; (v) JVA with Elf Petroleum Nigeria Limited (Elf) as operator

2009, the late President Yar’adua led Federal Government announced plans to give oil communities this stake in onshore JVA arrangements as one of the gestures to seek to reduce the militancy in the Niger Delta.¹¹⁶ However, not much has been done in this regard since such tripartite joint venture agreement would require legislative backing. There have been some discussions to include its terms in the draft Petroleum Industry bill currently before the Nigerian National Assembly. This is because the bill is designed to effect critical reforms to the current legal framework for the Petroleum industry including the negotiation of a new fiscal regime for oil and gas exploration. However, it is uncertain if the promise of a ten percent equity stake-holding for oil producing communities will finally be included into the bill before it is passed considering that it is already facing stiff opposition from international oil companies due to its controversial fiscal reforms.¹¹⁷ In the copy of the Petroleum Industry Bill available to the authors (there have been different versions as it has travelled through the legislative arm) there is no mention of this ten per cent stake in existing JVA. All that the Bill does is to create a fund known as the Petroleum Host Communities Fund (PHC Fund), which is to be utilized in the development of the economic and social infrastructure of the communities within the petroleum producing area. Here the upstream petroleum producing company would be required to remit on a monthly basis ten per cent of its net profit into the Fund.¹¹⁸ There is nothing fundamentally innovative about this model as it merely introduces the usual top-down paternalistic approach that the government has previously adopted through such platforms as

between NNPC (60 percent) and Elf (40 percent) which produces both on and offshore and (vi) JVA with Texaco Overseas Petroleum Company of Nigeria Unlimited (TOPCON) as operator between NNPC (60 percent), Texaco (20 percent) and Chevron (20 percent) currently producing from five offshore fields. Information available at <http://www.nnpcgroup.com/NNPCBusiness/UpstreamVentures.aspx>

¹¹⁶ See analysis of this gesture by the Transnational Crisis Project and the United States Institute of Peace, *Something or Nothing: Granting Niger Deltans a “stake” in oil to reduce conflict*, NIGERIA POLICY PAPER, (14 October 2010) available at <http://www.usip.org/sites/default/files/Nigeria/00026419.PDF>

¹¹⁷ Malte Liewerscheidt, *Nigeria: any chance of progress on the Petroleum Industry Bill?*, AFRICAN ARGUMENTS (2014), available at <http://africanarguments.org/2014/06/19/nigeria-any-chance-of-progress-on-the-petroleum-industry-bill-by-malte-liewerscheidt/>

¹¹⁸ See sections 116-118 of the Petroleum Industry Bill, available at <http://www.nigeria-law.org/Legislation/LFN/2012/The%20Petroleum%20Industry%20Bill%20-%202012.pdf> Note section 118(5) which states “Where an act of vandalism, sabotage or other civil unrest occurs that causes damage to any petroleum facilities within a host community, the cost of repair of such facility shall be paid from PHC Fund entitlement unless it is established that no member of the community is responsible.” First, it is interesting that this legislation focuses on the net profit of the upstream petroleum producing company, most of which are MNCs. Obviously, this would raise issues of whether this amounts to expropriation without adequate compensation contrary to International Law and the Nigerian Constitution. See Ian Brownlie, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW*, 6th edition, 508-527, (2003) and section 44 of the Nigerian Constitution 1999. Furthermore, this provision, in the view of the authors, is a potential ‘time bomb’ that would encourage a blame game culture between the MNCs and the Communities as to who is responsible for the vandalism, sabotage or other civil unrest that results in damages to the petroleum facilities that would further alienate the communities. In addition, it is not clear who has the burden of establishing that ‘no member of the community is responsible’?

the OMPADEC, NDDC, and Niger Delta Ministry. It does not, in the view of the authors, provide that ‘ownership’ right for the ethnic communities that the more radical proposal of a ten per cent stake in the existing JVAs would entail and therefore is unlikely to adequately address ongoing agitations of the force of community within the Niger Delta. The idea of a ten per cent stake in existing JVAs which is more innovative would probably stand a better chance of getting the primordial public to feel they have an ‘ownership’ stake in ensuring that petroleum facilities within their communities are protected and that production is not disrupted.

However, there are certain issues that arise out of what would in essence be tripartite Contractual Arrangements between the Nigerian State, Multinational Corporations and Local Communities. First, it is important to query whether any such proposal should take into account the onshore/offshore distinction established in the Nigerian Supreme Court decision in the Attorney General of the Federation v Attorney General of Abia State which interpreted, for the purposes of the derivation principle, the offshore seabed and the resources therein as belonging to the Federal Government and not the littoral coastal states where oil producing communities are situated.¹¹⁹ It is questionable why the Federal Government would restrict communities equity stake-holding to only onshore JVAs even if it can be argued that this would still be lucrative since of the 606 oil fields in the Niger Delta, 355 are onshore while the remaining 251 are offshore.¹²⁰ However, the long term prospects of offshore operations surpassing the current output from onshore operations remains feasible and it is doubtful if the agitations of the force of community will be resolved by the continued application of the onshore/offshore dichotomy in any proposed equity participation sharing schemes for oil producing communities, particularly when it can be argued that the whole intent of the Allocation of Revenue (Abolition of Dichotomy in the Application of Principle of Derivation) Act 2004 was meant to make, at least to an extent, the onshore/offshore distinction immaterial. Further, it is unclear how contractual mechanisms necessary to effect the equity participatory framework for local communities will operate. Would this be brought about by the principle of novation whereby a new party, the oil producing communities, is added to the contractual framework? But then novation would normally involve the substitution of a new contract for an existing

¹¹⁹ Attorney-General of the Federation vs. Attorney-General of Abia State & 35 ors(2002) 6 NWLR(Part 764), p.542

¹²⁰ See Nigerian National Petroleum Corporation website, available at <http://www.nnpcgroup.com/nnpcbusiness/businessinformation/oilgasinnigeria/developmentoftheindustry.aspx>

contract either between the same parties or completely new parties.¹²¹ But in this case it is not clear if a new contractual framework is being contemplated or a mere variation of the terms of the existing agreements with the new party, the oil producing communities, enjoying the ten per cent stake from the Federal Government's share? This may appear to inconsequential, but a critical aspect of the JVA arrangement is the cash call obligation of each joint venture partners. In transferring a share of its equity stake-holding to oil producing communities would the Nigerian government also be transferring the equivalent percentage of its cash call burdens to these communities or would it continue to carry the cash call obligations of the communities, as well? By transferring a percentage of its stake-holding to these communities is it envisaged by the Federal Government that these communities would merely be third party beneficiaries who stand to benefit from a contract, but yet in real contractual terms are unable to enforce its terms due to the fact that they are not in actuality parties to the contract?¹²² These are obviously vital contractual issues that would need to be addressed if any promise for equity participation is to provide any meaningful rights for local oil producing communities.

Recently, there is been a shift in Nigeria from JVAs to a different type of Production contract, the Production Sharing Contracts (PSCs), due to difficulties faced by the Federal government in meeting its cash call obligations under the JVAs.¹²³ The idea of a typical PSC is for the MNC, as contractor, to bear all the exploration and production risks and costs in return for it being allowed to recoup its costs from a stipulated share of the production.¹²⁴ Although, the PSCs, unlike the JVAs, would exclude the complication of dealing with cash call obligations vis-à-vis the local communities in any proposed equity stake by the latter, it still raises issues, just like JVAs, of what exactly is the nature of the contract and the consequential legal implications as discussed above in relation to JVAs.

¹²¹ L. Sealey and R., Hooley, *COMMERCIAL LAW: TEXT, CASES AND MATERIALS*, 4th edition, 939 (2008).

¹²² Tina Starke, *NEGOTIATING AND DRAFTING CONTRACT BOILERPLATE*, 102, (2003).

¹²³ Femi Asu, "Poor Funding threatens NNPC Joint Ventures", *NIGERIAN PUNCH*, (April 6, 2015), available at <http://www.punchng.com/business/business-economy/poor-funding-threatens-nnpc-joint-ventures/>

¹²⁴ See Yinka Omorogbe, *THE OIL AND GAS INDUSTRY: EXPLORATION & PRODUCTION CONTRACTS*, 60-63, *The Oil and Gas Industry: Exploration & Production Contracts* (1997) and Nigerian Deep Offshore and Inland Basin Production Sharing Contracts Act No.9 of 1999 as amended by Act no.26 of 1999

As has been mentioned in the previous section, although guidance may be sought from aboriginal Agreements on resource exploitation in places like Canada, the situation of Nigeria is quite different and more complex because of the ownership structure of natural resources, which is wholly vested in the Federal Government.¹²⁵ However, what is crucial, along the line of aboriginal mining agreements, is that such equity participation in the JVAs would have to include clearly defined clauses that provides local communities with contractual powers which enables them to have greater say in how the JVAs are operated within their territories. This, it is argued, will increase the commitment to improved environmental performance of these JVAs and will also have a knock on effect of reducing community agitations as the community will be seen as owning the projects right from the onset since they have equity participation in the JVAs. But, as has been stated in the preceding section, care must however be taken to ensure that the inclusion of this contractual term does not result in restrictions to access to environmental justice as has occurred in the case of aboriginal mining agreements in Canada and Australia.

VII. CONCLUSION

This article has explored the approaches and responses employed by the Nigerian Federal State and international oil companies to the negative flag case scenarios, as identified by the Shell scenarios, posed by the force of community in mineral resource rich developing regions such as the Niger Delta. While this article acknowledges that some of the legislative and judicial reforms which have been targeted to enhance the development of the Niger Delta region, along with corporate initiatives such as the Global Memorandum of Understanding (GMOU), are steps in the right direction to address some of the legitimate concerns of the force of community, it identifies some shortcomings with these approaches. It further explores the possibility of a restructuring of the contractual framework, along the line of Canadian aboriginal mining agreements, but which is negotiated at a tripartite level involving the Nigerian Federal Government, MNCs and local oil communities. While this is an innovative option to cause the local oil communities to have some sense of ‘ownership’ of the oil and gas exploration and production activities with their respective territories, it recognizes that this would entail the redefining of contractual relationships in the Nigerian oil and gas industry,

¹²⁵ See Davies Ward Phillip & Vineberg LLP, ACQUIRING CANADIAN PUBLIC OIL AND GAS COMPANIES: GUIDE FOR FOREIGN INVESTORS AND INVESTMENT BANKS, 14-19, (2010), available at [http://www.dwpv.com/images/Acquiring_Canadian_Public_Oil_and_Gas_Companies_1st_ed_\(E\)_ewlr.pdf](http://www.dwpv.com/images/Acquiring_Canadian_Public_Oil_and_Gas_Companies_1st_ed_(E)_ewlr.pdf) ,

undertaken side by side with further radical reforms of the legislative framework that would enable the vesting in local oil producing communities actual and direct participatory rights in mineral resource ownership and thus provide them with some level of fiscal autonomy. The direct stake of these communities through tripartite agreements between the federal government, the MNCs and the local communities would go a long way in providing a strong just and equitable legal framework that will empower local communities in assuming greater responsibility of the management of mineral resources in the Niger Delta region.