# The Force of the Community in the Niger Delta of Nigeria: Propositions for New Oil and Gas Legal and Contractual Arrangements

Hephzibah Egede* & Edwin Egede†

*The exploitation of oil and gas in the Niger Delta is considered the foremost source of revenue of Nigeria, providing 20% of the Gross Domestic Product (GDP), 95% of foreign exchange earnings, and about 65% of budgetary revenues. With the strategic position of this area and the tensions between the Federal Government of Nigeria and multinational corporations (MNCs), directly exploiting these resources on one hand, and the ethnic communities that these resources are derived from on the other, there is a need to take various steps to de-escalate the situation in this region. To minimize resource conflicts within the region, this Article canvasses for the formulation of new tripartite oil and gas arrangements, both legal and contractual, that provide oil-producing communities with stake-holding in oil and gas operations in the region. It further examines some of the potential complexities that may arise if the MNCs directly negotiate contracts with the communities without due involvement of the Federal Government of Nigeria as the host state government.*

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* LL.B (Hons) (Benin); BL (Lagos); PhD (Cardiff) Senior Lecturer in Law, Law School, University of Buckingham, U.K. Email: hephzibah.egede@buckingham.ac.uk

† LL.B (Hons) (Benin); BL (Lagos); LL.M (Lagos); PhD in International Law (Cardiff Law School); Senior Lecturer in International Law & International Relations, Department of Politics and International Relations, Cardiff University, School of Law & Politics, U.K. Email: egedee@cardiff.ac.uk

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## I. INTRODUCTION

MNCs have employed a number of means to advance their business objectives in conflict resource regions. These measures include 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 by Anna Zalik as the "force of the community."[1] Through the force of the community, oil-producing communities demand for a greater stake-holding in oil and gas

1. Anna Zalik, *The Niger Delta: 'Petro Violence' and 'Partnership Development,*' 31 REV. AFR. POL. ECON. 401, 401-02 (2004) [hereinafter Zalik, *The Niger Delta*]; Anna Zalik, Oil Futures: Shell's 'Trilemma Triangle' and the 'Force of Community' 13 (Nov. 3, 2006) (working paper) (on file University of California Berkeley Environmental Politics Colloquium), http://globetrotter.berkeley.edu/bwep/colloquium/papers/Zalik2006.pdf.

operations that take place within their regions. They seek to move from engagement with MNCs based on corporate philanthropy, to one that is based on community empowerment and 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 is proposed as a key means of effective engagement with the force of the community.[2] Direct contractual engagement with local oil communities will entail reshaping the current contractual regimes between MNCs and host state governments. The case for renegotiating 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 that directly host the MNCs' operational facilities and activities. Using the Niger Delta region of Nigeria as a case study where this force of community has occurred, this Article will explore the issues that give rise to these propositions for new legal and contractual arrangements governing 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.[3] The 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 oil and gas resources are derived, on the other.[4] 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

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2. *See*, *e.g.*, Ciaran O'Faircheallaigh, *Aboriginal-Mining Company Contractual Agreements in Australia and Canada: Implications for Political Autonomy and Community Development*, 30 CAN. J. DEV. STUD. 69, 69-70 (2011).

3. *Economy Overview*, NIGERIAN HIGH COMMISSION, http://www.nigeriahc.org.uk/economy (last visited Nov. 4, 2016).

4. *See id.* For a more academic analysis of this issue, see Augustine Ikelegbe, *The Economy of Conflict in the Oil Rich Niger Delta Region of Nigeria*, 14 NORDIC J. AFR. STUD. 208, 208-09 (2005). However, it must be pointed out that the principles that would be enunciated in this Article remain 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.

that would involve a direct stake for oil-producing communities in the 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

This Part will discuss the concept of the community. Patricia Hill Collins, a distinguished Professor of Sociology whose work primarily covers issues related to African-American communities, points out that while 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.[5] She posits that the term "community" may cover a diverse range of groupings such as: "a place-based 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."[6] Further, Benedict Anderson, the Aaron L. Binenkorb Professor Emeritus of International Studies, Government and Asian Studies at Cornell University, in his seminal piece on "imagined" communities and nationalism, submits that all communities encompassing larger aspects than primordial face-to-face village contact are essentially imagined.[7] He argues that "[c]ommunities are to be distinguished, not by their falsity/genuineness, but by the style in which they are imagined."[8] The concept of community is a rather imprecise one; therefore it is helpful to explore different ways in which the concept can be imagined in Nigeria. This discussion will shed further light on how the force of the community is contextualized in the Niger Delta.

### *A. Community as a Constitutional Concept*

Although Anderson defines a nation as merely "an imagined political community,"[9] it is critical to first consider the notion of a community as a constitutional concept, especially for a nation such as

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5. Patricia Hill Collins, *The New Politics of Community*, 75 AM. SOC. REV. 7, 10 (2010).
6. *Id.* at 11.
7. *See* BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM 6 (Verso rev. ed. 2006) (pointing out that all communities larger than the primordial face-to-face village contact are imagined).
8. *Id.*
9. *Id.*

Nigeria that operates with a written constitution. The current 1999 Nigerian Constitution is regarded as the supreme law of the land and has binding force on all authorities and persons throughout the country.[10] The Constitution is explicit that Nigeria operates a three-tier system of government, namely: Federal, States—currently thirty-six in number, as listed in the Constitution—and Local Governments (including the Area Councils in Abuja, the federal capital territory).[11] This three-tier system may be said to represent three strata of "imagined communities."[12] While the Constitution unequivocally identifies the Federal, States, and Local Government areas, 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.[13] These ethnic communities, reported to be over 250 in number, include those located in the Niger Delta region of Nigeria, such as the Ijaws, Ogonis, Urhobos, Itsekiris, Isokos, Illajes, Etches, Ndonis, Ikwerres, Andonis, Effiks, Ibibios, Edos, Ikas, and to some extent, the Ibos.[14]

The Constitution explicitly recognizes certain rights of access to 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. The Constitution does this by vesting the Nation-State ownership of minerals, along with mineral oils and natural gas, whether they are located in, under, or upon land, or in, under, or upon the territorial sea and the Exclusive Economic Zone (EEZ) of Nigeria, to be managed by the Government of the Federation in a manner prescribed by the National Assembly.[15] Conversely, the Constitution permits individual oil-producing States of the Federation to receive a slice of the "national

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10. CONSTITUTION OF NIGERIA (1999), §§ 1(1), (3). 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.

11. *Id.* §§ 2(1)-(2), 3(1).

12. *See* ANDERSON, *supra* note 7, at 5-6.

13. *See* CONSTITUTION OF NIGERIA (1999), § 3(2)-(6).

14. 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 SRI LANKA J. INT'L L. 51, 54 (2007) [hereinafter Egede, *Human Rights and the Environment*]; CIA, THE WORLD FACTBOOK: NIGERIA (2013), https://www.cia.gov/library/publications/the-world-factbook/geos/ni.html.

15. *See* CONSTITUTION OF NIGERIA (1999), § 44(3); *see also infra* Section III.A where this is developed further.

cake" derived from the exploitation of natural resources. Through a "derivation formula" set out in the Constitution, all States of the Federation that produce natural resources are entitled to 13% of such natural resources revenues that accrues to the Federation Account.[16] Section 162(2) 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.*[17]

On the other hand, although the areas of Local Government 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, for example, through the states where they are located. In the case of the Area Councils in Abuja, revenue is received through the Federal Government.[18]

There have been calls to increase the derivation formula, with some demanding that it should go as high as 50%, especially for oil and gas-producing unit states in the Niger Delta area.[19] However, it is doubtful that this would solve the agitation of the ethnic communities. This is because the ethnic oil-producing communities are not constitutionally entitled to participate in the revenue sharing formula as set out in § 162(2) of the Nigerian Constitution. The fact that the ethnic oil-producing communities are not one of the imagined communities explicitly mentioned in the Constitution may explain why they are not included in the constitutionally framed revenue sharing regime.[20] This

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16. *See infra* Section IV.A.; *see also* 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 J. AFR. L. 73, 74 (2005) [hereinafter Egede, *Who Owns the Nigerian Offshore Seabed*]; *see also* Kaniye SA. Ebeku, *Nigerian Supreme Court and Ownership of Offshore Oil*, 27 NAT. RES. F. 291 (2003) (for an analysis of the historical context of the derivation principle).

17. *See* CONSTITUTION OF NIGERIA (1999), § 162(2) (emphasis added).

18. *Id.* § 162(5)-(7).

19. Chris Eze, *Nigeria: New Revenue Formula—Niger Delta Demands 50 Percent Derivation*, DAILY TRUST (Oct. 11, 2013), http://allafrica.com/stories/201310110635.html.

20. *See* ANDERSON, *supra* note 7, at 7.

has given rise to the force of the community, which is expressed by ethnic communities, who feel marginalized and exploited, as a result of lacking direct access to some part of the revenue generated from resources extracted from their respective territories.

Ordinarily, the three-tiered constitutional governance structure, comprising of the Federal Government, States, and Local Government areas, should adequately represent the interests of the various ethnic communities within their spheres of jurisdiction. It is expected that as the democratically elected units of government, they ought to represent the Nigerian populace (including these oil-producing communities) in the governance and management of revenue derived from the exploitation of natural resources.[21] Yet, it is questionable whether Nigeria truly has a true democratic institution, seen as representative of all the ethnic communities within the Federation. This absence of a true *demokratia*, particularly in the area of resource governance, may explain why the constitutional sharing formula and other existing legal arrangements have failed to tackle the resource conflicts in the Niger Delta, and the reason for the rise of the force of the community within the region. A key point we make in this Article is that a way to de-escalate such tensions is for these ethnic communities to obtain some sort of direct stake in the resources located within their territory—a proposition that should eventually be incorporated into the Constitution. This will entail including these ethnic communities as an additional imagined community in the Constitution. This point will be further explored within our discourse of the community as a political concept.

### *B. Community as a Political Concept*

The historical landscape of Nigeria is traceable back to colonialism, which brought together different ethnic groups to make up the sovereign state of Nigeria. This has led scholars, notably Peter Ekeh, a renowned scholar of African politics and history, to theorize on the concept of "two publics" in Nigeria. Ekeh explains these two publics as follows:

> [T]here 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

21. On May 29, 1999, Nigeria resumed its status as a democratic State once again after several years of military rule. 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." Robert A. Dahl, *Democracy*, ENCYCLOPEDIA BRITANNICA, http://www.britannica.com/topic/democracy (last visited Nov. 4, 2016).

> 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 characteristic 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.*[22]

In the foregoing text, Ekeh pinpoints two imagined political communities. The first is the civic public, centered on the Westphalian state system, introduced into Africa through its colonial legacy. This civic public is constituted by institutional and political structures of governance. In Nigeria, it is the Westphalian state system that is constitutionally vested with sovereignty over natural resources. Ekeh's second imagined political community is the primordial public, focused on the ethnic community where the individual comes from, with individuals having more allegiance to their communities as opposed to the Westphalian state political structure.

The recurring resource conflicts in the oil and gas-producing region in the Niger Delta demonstrate a disconnection between these two communities, especially in the area of natural resource governance. The emergence of the force of the community can be seen as a response from the primordial public, which, rightly or wrongly, believes that it is excluded from natural resource management and decision making. This has led the ethnic groups within the primordial public to agitate for some kind of stake in the resources exploited from their territory under a broad, rather nebulous, phrase of "resource control."[23]

Like most theories, Ekeh's civic-primordial public distinction suffers from the obvious danger of generalization and over-simplification of the rather complex situation in post-colonial Africa. Clearly, not all of post-colonial Africa's challenges may be traced back to the civic-primordial public dichotomy. Further, this dichotomy does not explain

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22. Peter Ekeh, *Colonialism and the Two Publics in Africa: A Theoretical Statement*, 17 COMP. STUD. SOC'Y & HIST. 91, 92 (1975).

23. Rhuks Ako, *The Struggle for Resource Control and Violence in the Niger Delta*, *in* OIL AND INSURGENCY IN THE NIGER DELTA: MANAGING THE COMPLEX POLITICS OF PETRO-VIOLENCE 42 (Cyril Obi & Siri Aas Rustad eds., 2011).

why, in a number of cases, certain leaders in Africa who eventually emerge as Presidents, Prime Ministers, and Governors, etc., do not necessarily take tangible steps to develop their respective ethnic communities during their tenure.[24]

Notwithstanding, the civic-primordial dichotomy does serve as a rationale and a beneficial theoretical toolkit to help explain the current resource conflicts in the Niger Delta. It demonstrates that a key cause of these conflicts is associated with the non-participation of the primordial public in resource control and governance under the current constitutional structures. Further, it provides valuable insight into what may be regarded as a theoretical paradox. First, as we see from the discourse above of community as a constitutional concept, ownership of natural resources is vested in the Federal Government of Nigeria. Second, the derivation principle set out in the 1999 Constitution has been formulated for the benefit of natural resource producing States of the Federation who are considered the duly elected representatives of the Nigerian people. Yet, it is somewhat paradoxical that these ethnic communities do not regard their duly elected officials as adequately representing their interests with regard to resource control and fiscal disbursements.

However, the Ekeh's civic-primordial dichotomy provides some explanation for this lack of confidence in the Westphalian state political structures. It identifies the distrust that communities within the primordial public have towards civic public institutions that they consider to be diametrically opposed to their needs.[25] Bruce Berman,[26] a well-known scholar of African politics, in his works on ethnicity and democracy building, explains that the idea of the two publics in Ekeh's analysis helps us to appreciate where social trust is situated—the primordial rather than the civic.

### *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 those of Faulkner, the American writer and Nobel Prize laureate, as the invisible living force

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24. *See* Claude Ake, *What Is the Problem of Ethnicity in Africa?*, 22 TRANSFORMATION 1, 5-6 (1993) (pointing out that ethnicity is sometimes manipulated by the political elites for their selfish purposes).

25. *See* Ekeh, *supra* note 22, at 106-08.

26. *See* Bruce Berman, *Ethnicity, Bureaucracy & Democracy: The Politics of Trust*, *in* ETHNICITY AND DEMOCRACY IN AFRICA 38, 47 (Bruce Berman et al. eds., 2004).

that exerts its influence over individuals within its structures.[27] It operates in a "non-coercive space that regulates autonomous individuals through freely chosen, agreed-to and peaceful relations."[28]

In this regard, the force of community has theoretically developed through a bottom-up approach, rather than prescriptive state control. There are questions as to whether the force of community is completely devoid of direct state control, since there is an inter-penetration between state and community spheres.[29] It is pivotal that these discussions of the 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. However, this Article does not seek to provide an exhaustive treatise of African communalism, but merely to contextualize how the force of community concept may operate in contested natural resource regions, such as the Niger Delta. While there is no singular construction of what constitutes community in Africa, 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.[30] Works such as Ekeh's 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.[31] Thus, communities within the region will identify more with the primordial public than the so-called civic public state. Again, this is why the force of community has evolved in the Niger Delta and why resource control is considered a core aspiration of oil-producing communities.[32] While the quest for greater participation in control of the region's mineral resources 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 redistributional objectives

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27. *See* CLEANTH BROOKS, WILLIAM FAULKNER: THE YOKNAPATAWPHA COUNTRY 52-53 (1963).

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

29. *Id.*

30. Augustine Shutte, *Umuntu Ngumuntu Ngabantu: An African Conception of Humanity*, 5 PHIL. & THEOLOGY 39, 42 (1990).

31. *See* Ekeh, *supra* note 22.

32. *Id.* at 108.

of protecting the interests of the primordial public against exploitation by the civic public.[33]

Although discussions of how the force of community has developed in the Niger Delta are largely derived from social science literature, the concept is also important in legal research. This is because the concept of the force of the community clarifies why many oil-producing communities within the Niger Delta are displeased with the current legislative and contractual framework that governs the control and management of mineral resources extracted from the region. The evolution of the force of community in the Niger Delta, and its anti-oil protests, are legitimate responses to the marginalization of the primordial public within oil-producing communities who have had their landholding and mineral ownership rights transferred to the civic public Nigerian state.[34] This point will be developed further in this Article by considering in more detail the current legal framework governing the ownership and control of mineral resources in Nigeria.[35] First, it is vital to consider other constructions of the force of community, particularly those that have emerged within the business discourse. These constructions are critical as the force of community in the Niger Delta is not only a reaction to the marginalization of the primordial public by a civic public national state, but also a response to the impact of globalization exemplified by the commercial activities of MNCs.

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

Beyond the constructions of the force of community developed in social science literature, other interpretations of this phenomenon have emerged in business discourse.[36] Unlike the social science interpretations of the force of community that primarily focus on the synergy between community and state control to the exclusion of other stakeholders, the business discourse literature identifies the significance of trade-offs between the Nation-State, the MNCs, and the community, to achieve suitable outcomes that would promote efficiency in natural resource

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33. Zalik, *The Niger Delta*, *supra* note 1, at 410.

34. *Id.* at 401; Jedrzej G. Frynas, *Corporate and State Responses to Anti-Oil Protests in the Niger Delta*, 100 AFR. AFF. 27, 32 (2001) [hereinafter Frynas, *Anti-Oil Protests in the Niger*].

35. *Infra* Part III.

36. Anna Zalik, *Oil 'Futures': Shell's Scenarios and the Social Constitution of the Global Oil Market*, 41 GEOFORUM 553, 558 (2009) [hereinafter Zalik, *Oil Futures*].

exploitation.[37] The need for such trade-offs, and the adverse effect of failing to achieve a compromise between the Nation-State, MNCs, and the community, are illustrated by the Ken Saro-Wiwa incident in 1995.[38] The then military government of Nigeria executed Ken Saro-Wiwa, a leader of the Movement for the Survival of Ogoni People (MOSOP), an environmental advocacy group for the Ogoni community. MOSOP demanded social and environmental justice from the Nigerian government and the MNCs involved in the exploitation in the Ogoniland, notably Shell. Shell was criticized for being complicit in this execution, and this criticism had a significant impact on their business operations in the Ogoni region of the Niger Delta[39] In response, Shell was forced to change its business model in relation to exploitation and engagement in conflict prone regions like the Niger Delta. In its Global Scenarios 2025 report, Shell explores three forces that interact in the course of resource exploitation: the force of market incentives, the force of communities, and the force of coercion or regulation by the State. These three forces are geared toward three different objectives: efficiency, social cohesion and justice, and security, respectively.[40] The diverse objectives of these forces raises a dilemma, or, more specifically, according to the Shell report, three dilemmas (or a "trilemma"), in achieving a balance between these three objectives. The report adopts this Trilemma model approach to interpret the force of community and to explain how it competes with the other forces.[41] It examines how the demands of these competing forces could be reconciled by setting out potential future scenarios. The scenarios set out in the Shell report require trade-offs that obtain some kind of balance with regard to the tripartite objectives of achieving efficiency, social cohesion and justice, and security.

As Zalik points out in her discourse on the Shell Trilemma model, the trade-offs are best illustrated in a two wins, one loss option. She argues that the loss area within the Trilemma model is the Force of the Community, which often has to give way to goals of market efficiency,

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37. *See* SHELL, SHELL GLOBAL SCENARIOS TO 2025, THE FUTURE BUSINESS ENVIRONMENT: TRENDS, TRADE-OFFS AND CHOICES 11 (2005), http://www.shell.com/content/dam/shell/static/future-energy/downloads/shell-scenarios/shell-global-scenarios2025summary2005.pdf.

38. *Id.*; *see* Richard Boele et al., *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 DEV. 74, 81 (2001).

39. Boele et al., *supra* note 38, at 81.

40. *Id.*

41. *Id.*

coercion and regulation.[42] The Shell report further explains how this "two wins one loss option" operates in oil and gas exploitation. In its report, Shell lays out three possible future scenarios, stressing that these were not meant to be forecasts, but merely an enumeration of credible alternatives of the future.[43]

The first of the future different scenarios set out by the report is the Low Trust Globalization scenario (a "prove it to me" world).[44] 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. Another future scenario is the "Flags" scenario ("follow me" world).[45] 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 it be 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, there is the "Open Doors" scenario (a "know me" world), a world founded on trust both in the global system and the globalization process.[46] It is based on pragmatism and cooperation being the most efficient ways 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.[47] 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 outcomes that pit one apex of the triangle against another. Rather, the report shows that the Trilemma model is best explained through the two wins or one loss option.[48] Yet, as Zalik explains, the loss area that occurs in this trade-off is the Flags scenario, or the force of community.

We argue that the recurring resource conflicts in the Niger Delta have partly arisen because the two wins or one loss option, expounded in the Shell Trilemma model, has to a large extent benefitted the market

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42. *Id.*; Zalik, *Oil Futures*, *supra* note 36, at 557-58.
43. SHELL, *supra* note 37, at 11, 13.
44. *Id.*
45. *Id.* at 13.
46. *Id.*
47. *Id.*
48. *Id.* at 11.

efficiency and security objectives of the civic public above the needs of ethnic communities situated within the primordial public. The focus on market efficiency and security, which trades off for social and community cohesion, is a contributory factor to the resource conflicts in the Niger Delta. In response to the rise of the force of community, MNCs such as Shell have considered the Open Doors scenario characterized by incentives and bridges as the preferred option.[49] 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.

The adoption of the Open Doors scenario is seen as an effective way of combatting the force of community in the Flags scenario on energy production. This is because, as stated earlier, the force of community in some oil-producing regions is characterized by insecurity and conflict, fueled by community agitation and protests. This is why the Niger Delta, a key region of Shell's operations, is held up as one of the worst cases 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 to declare *force majeure* due to production shut-ins.[50] While the MNCS seem to be inclined toward an Open Doors approach in dealing with the force of the community, the Nigerian state has adopted the Low Trust Globalisation approach, which focuses on security and prescriptive regulation.

However, the Ken Saro Wiwa incident clearly shows the shortcomings of adopting this legalistic command-and-control approach to the force of the community. The challenge with this approach is that it ignores social cohesion and justice. This ultimately leads to further community unrest and instability, which would eventually have an adverse impact on efficiency.[51] The Niger Delta region thus provides a prime example of how the force of community can affect energy production for better or for worse. In order to further understand the force of the community's impact in the oil-rich Niger Delta, it is

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49. Zalik, *Oil Futures*, *supra* note 36, at 558.

50. Jean Balouga, *The Niger Delta: Defusing the Time Bomb*, INT'L ASS'N FOR ENERGY ECON. (IAEE Energy Forum), First Quarter 2009, at 9, https://www.iaee.org/documents/newsletterarticles/109balouga.pdf; Zalik, *The Niger Delta*, *supra* note 1, at 406-07.

51. Boele et al., *supra* note 38, at 81.

necessary to provide a *précis* of the dynamics of control and ownership of natural resources in the region.

## 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 of social justice and the political inclusion of Niger Delta communities in the management and control of oil and gas resources is not a novel movement. Nigerian federal legislation, such as the Petroleum Act of 1969, the Land Use Act of 1978, and other expropriatory legislation have been strongly criticized,[52] as they are often seen as hindering the sustainable development of the region and affecting the right of indigenous communities to fully participate in resource ownership and management. In particular, the Land Use Act, promulgated in 1978, which nationalized all landholding in Nigeria and vested it in 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.[53] 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.[54] The current 1999 Constitution prohibits the repeal of this legislation except by a vote of no 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 no less than two-thirds of all the Nigerian States.[55] Further, Section 44(3) of the 1999 Constitution strengthens the legislative and constitutional case for Nigerian State ownership of oil and gas resources in the Niger Delta and other regions within the territory when it states that:

> [T]he 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 Economic Zone of Nigeria shall vest in the

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52. Rhuks T. Ako, *Nigeria's Land Use Act: An Anti-Thesis to Environmental Justice*, 53 J. AFR. L. 289, 296 (2009); *see generally* Frynas, *Anti-Oil Protests in the Niger*, *supra* note 34, at 30-31.

53. *See* Ako, *supra* note 52, at 296-99.

54. *Id.*

55. CONSTITUTION OF NIGERIA (1999), § 315(5)(a)-(d).

> Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly.[56]

Other legislation that governs the Nigerian oil and gas industry, such as the Petroleum Profits Act of 1959 as amended, Nigerian Liquefied Natural Gas (LNG) Act of 1990 as amended, the Oil Pipelines Act of 1978, and the Oil in Navigable Waters Act CAP 337 of 1990, also reinforce federal ownership of mineral resources within the Niger Delta.[57] Revisiting the earlier arguments by Ekeh and Zalik on the force of the community and the conflict between the two publics that has arisen in post-colonial African societies,[58] we see a legislative framework that validates subordinating the primordial public's rights of oil-producing communities to the rights of the amoral civic public that derives authority and legitimacy from 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 how mineral resources within their communities are exploited. This raises 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.[59] This is because unlike the primordial public, the Nigerian State's amoral civic public does not share the local concerns, nor does it have direct political and moral linkage with the communities within this region.[60] 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.[61]

Accordingly, the worst case Flag scenario, 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 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

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56. *Id.* § 44(3).

57. Petroleum Profits Tax Act No. (15) (1959) (Nigeria) (as amended); Nigeria LNG (Fiscal Incentives, Guarantees and Assurances) Act (1990) Cap. (N.87) (Nigeria); Oil Pipelines Act (1990) Cap. (338) (Nigeria); Oil in Navigable Waters Act (1990) Cap. (337) (Nigeria).

58. *See* Zalik, *The Niger Delta*, *supra* note 1, at 401; *see also* Ekeh, *supra* note 22, at 92.

59. *See* Zalik, *Oil Futures*, *supra* note 36, at 562-63.

60. *See* Berman, *supra* note 26 at 47.

61. Frynas, *Anti-Oil Protests in the Niger*, *supra* note 34, at 32; Zalik, *Oil Futures*, *supra* note 36, at 553.

host oil-producing communities within the Niger Delta to decide how their mineral resources should be exploited. We argue that this lack of legal recognition of community rights over mineral resources is a key driver of the community tension within this region. However, the Nigerian State has, in several legislative and judicial reforms, attempted to widen and strengthen community participation in the oil and gas industry, even if it has not addressed the issue of contractual reforms with the same commitment.[62] Before considering this point any further, we consider below the conceptualization of the primordial public as indigenous peoples under international law.

### *B. International Law*

This Section will explore whether the various Niger Delta ethnic communities qualify as indigenous persons under international law, and if they do qualify, whether they have permanent sovereignty or ownership over natural resources.

#### 1. Niger Delta Ethnic Communities as Indigenous Peoples

The concept of indigenous peoples in the African continent is contested.[63] Unlike other jurisdictions such as Australia, Canada, New Zealand and the United States, some have argued that Africa's colonial experience was not centered on the idea of "aboriginality and foreign settlers."[64] However, a better view is that this concept does exist in Africa.[65] In an early 1999 article, Professor Weissner, a renowned

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62. *Infra* Part IV.

63. 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 6-10, 84-109 (2011).

64. *Advisory Opinion of the African Commission on Human and People's Rights on the United Nations Declaration on the Rights of Indigenous Peoples*, AFR. COMMISSION HUM. & PEOPLES' RTS. 3-4 (May 2007), http://www.achpr.org/files/special-mechanisms/indigenous-populations/un_advisory_opinion_idp_eng.pdf [hereinafter ACHPR, *Advisory Opinion*].

65. The traditional definition incorporating the aboriginality/second "foreign" settler approach 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 ethnic identity . . . social institutions and legal systems.

James R. Martinez Cobo (Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities), *Study of the Problem of Discrimination Against*

scholar on indigenous peoples, hinted that the concept of indigenous peoples was not unknown to the African continent.[66] After some ambivalence about whether the concept of indigenous peoples, as traditionally defined, existed in Africa, the African Commission established a Working Group of Experts on Indigenous Populations/Communities in 2000.[67] The Working Group was mandated to explore this issue.[68] 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 upon legal definition of indigenous peoples, the Working Group shunned the need to have some form of generic universal definition for this concept. It also was not prepared to accept that the 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.[69] 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:

> [T]heir 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

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*Indigenous Populations*, U.N. Doc. No. E/CN.4/sub.4/1986/7/Add.4, ¶ 379 (1987). In the same vein, Anaya refers to indigenous peoples as:

> [T]he living descendants of pre-invasion inhabitants of lands now dominated by others. Indigenous peoples, nations, or communities are culturally distinctive groups that find themselves engulfed by settler societies born of the forces of empire and conquest. . . . They are indigenous because their ancestral are embedded 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.

S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 3 (2nd ed. 2004).

66. Siegfried Wiessner, *The Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 57, 89, 91-92 (1999).

67. *Working Group on Indigenous Populations/Communities in Africa*, AFR. COMMISSION HUM. & PEOPLES' RTS., http://www.achpr.org/mechanisms/indigenous-populations/ (last visited Nov. 4, 2016).

68. *See id.*

69. *See* AFR. COMM'N HUMAN & PEOPLE'S RIGHTS, REPORT OF THE AFRICAN COMMISSION'S WORKING GROUP ON INDIGENOUS POPULATIONS/COMMUNITIES 62-64, DOC/OS (XXXIV)/345 (May 14, 2003), http://www.achpr.org/files/special-mechanisms/indigenous-populations/expert_report_on_indigenous_communities.pdf [hereinafter ACHPR, REPORT].

> 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 marginalization, 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 marginalization violates their human rights as peoples/communities, threatens the continuation of their cultures and ways of life and prevent them from being able to genuinely participate in deciding on their own future and forms of development.[70]

The stance of the Working Group was endorsed in the Advisory Opinion of the African Commission on Human and Peoples Rights on the United Nations Declaration on the Rights of Indigenous Peoples.[71]

According to this opinion, the Niger Delta ethnic minority groups fit into the category of indigenous peoples.[72] In identifying these communities as indigenous peoples, the opinion took into account that the fishing and farming occupations of these communities are intrinsically tied to their way of life. It also accepted that as a part of this way of life, the communities require access to their lands and rivers. The Working Group identified the Ogonis of the Niger Delta area of Nigeria as an example of pastoralist and agro-pastoralist indigenous peoples in Africa.[73] Further, the comprehensive International Labour Organisation's (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 twenty-four African states has identified the Ogonis and Ijaws of the Niger Delta as indigenous peoples.[74]

Although these reports highlight what we may regard as "high profile" indigenous peoples in the Niger Delta area, like the Ogonis and

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70. *Id.* at 60.

71. ACHPR, *Advisory Opinion*, *supra* note 64, at 3-4.

72. For an excellent analysis of how the Niger Delta ethnic communities fit into these criteria, see Rhuks T. Ako & Olubayo Oluduro, *Identifying Beneficiaries of the UN Indigenous Peoples' Partnership (UNIPP): The Case of the Indigenes of Nigeria's Delta Region*, 22 AFR. J. INT'L COMP. L. 369, 379-83 (2014).

73. ACHPR, REPORT, *supra* note 69, at 9.

74. INT'L LAB. ORG. [ILO] & AFR. COMM'N ON HUMAN & PEOPLE'S RIGHTS [ACHPR], OVERVIEW REPORT OF THE RESEARCH PROJECT BY ILO AND ACHPR ON THE CONSTITUTIONAL AND LEGISLATIVE PROTECTIONS OF THE RIGHTS OF INDIGENOUS PEOPLES IN 24 AFRICAN COUNTRIES, at ii (2009), http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_115929.pdf.

Ijaws, there is no logical reason why the status of indigenous peoples should not be extended to other ethnic groups in the Niger Delta. This is because the ILO/ACHPR overview report acknowledges that its identification of African indigenous peoples is not necessarily exhaustive.[75] Thus, by implication, the meaning of African indigenous peoples can be further expanded to include other groups that satisfy the generic criteria provided by the Working Group. This leads to the next question: whether ethnic communities that are identified as indigenous peoples can be granted sovereignty rights over natural resources under international law?

This is an important point, as, arguably, the way of life of these communities has been adversely impacted by the oil and gas activities of oil MNCs. These activities have devastated farm lands and polluted rivers, leading to the rise of the force of the community and the Flags scenario described in Shell's report. It is therefore necessary to consider whether oil-producing communities, as indigenous peoples, should be accorded sovereignty rights over mineral resources within the region.

### 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.[76] However, there has recently been a trend in international law toward championing the permanent sovereignty of indigenous peoples over natural resources within their territories.[77] 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, stated as one of her conclusions:

> 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

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75. *Id.* at 4; Ako & Oluduro, *supra* note 72, at 379.

76. *See* G.A. Res. 1803 (XVII), at 15-16 (Dec. 14, 1962).

77. For an interesting analysis of this trend, see Emeka Duruigbo, *Permanent Sovereignty and Peoples' Ownership of Natural Resources in International Law*, 38 GEO. WASH. INT'L L. REV. 33, 36 (2006).

> 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.[78]

The idea of indigenous peoples' permanent sovereignty over natural resources is not intended to create competing claims to sovereignty between the state and the indigenous peoples located within a state. Nor 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. Lilian Aponte Miranda, a specialist on indigenous peoples' rights, points out that "[t]he importance of recognizing a 'peoples' right to sovereignty over natural resources is that 'peoples' can seek to hold states accountable under international law for the misuse of natural resources."[79]

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. This will provide indigenous peoples, in whose territory such resources are mined, the right to demand that the civic state manage resources properly and only exploit resources for the maximum benefit of such peoples.[80] It is instructive that the major treaty dealing with issues related to indigenous persons, the ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries (No. 169) 1989, entered into force on September 5, 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.
>
> 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

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78. Erica-Irene A. Daes (Special Rapporteur of the Working Group on Indigenous Populations), *Indigenous Peoples' Permanent Sovereignty Over Natural Resources*, ¶ 55, U.N. DOC. E/CN.4/Sub.2/2004/30 (July 13, 2004).

79. Lillian Aponte Miranda, *The Role of International Law in Intrastate Natural Resource Allocation: Sovereignty, Human Rights, and Peoples-Based Development*, 45 VAND. J. TRANSNAT'L L. 785, 805 (2012).

80. *See* Duruigbo, *supra* note 77, at 67.

> 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.[81]

However, it is interesting to note that only twenty-two states to date have ratified this Convention. Nigeria is notably absent as one of the ratifying states, and thus technically is not bound by this treaty.[82] Furthermore, there is no evidence that this treaty would be regarded as reflecting customary international law because it lacks the requisite state practice and *opinio juris*.[83] Then again, leading scholars on indigenous rights in international law like S. James Anaya and Benedict Kingsbury, identify a human rights dimension of the right of indigenous peoples over their natural resources.[84] For instance, the African Charter of Human and 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."[85]

This right is an absolute right since the Charter categorically states that "in no case shall a people be deprived of it."[86] Furthermore, the provision emphasizes that this right shall be exercised "in the exclusive interest of the people."[87] Although the Charter does not define the term "peoples,"[88] it is nevertheless clear that it is meant to be distinct from the state.[89]

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81. Convention Concerning Indigenous and Tribal Peoples in Independent Countries art. 15, June 7, 1989, 28 I.L.M. 1384.

82. Vienna Convention of the Law of Treaties arts. 26, 34, May 23, 1969, 1155 U.N.T.S. 331; *see Ratifications of C169-Indigenous and Tribal Peoples Convention, 1989 (No. 169)*, INT'L LAB. ORG., http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314 (last visited Nov. 4, 2016).

83. *See* Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 179 (June 27); North Sea Continental Shelf (Ger./Neth./Den.), Judgment, 1969 I.C.J. Rep. 3, ¶¶ 61-63, 77, 83 (Feb. 20).

84. James Anaya, *Divergent Discourses About International Law, Indigenous Peoples, and Rights over Lands and Natural Resources: Towards a Realist Trend*, 16 COLO. J. INT'L ENVTL. L. & POL'Y 237, 237-58 (2005); Benedict Kingsbury, *Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law*, 34 N.Y.U. J. INT'L L. & POL. 189, 193-202 (2001).

85. *See* African Charter of Human and Peoples' Rights, art. 21, Jun. 27, 1981, 1520 U.N.T.S. 219; *see also* International Covenant on Economic, Social and Cultural Rights art. 1, Dec. 16, 1966, 993 U.N.T.S. 3.

86. Afr. Charter of Human and Peoples' Rights, *supra* note 85, art. 21.

87. *Id.*

88. NDAHINDA, *supra* note 63, at 191, 193.

89. *See* Afr. Charter of Human and Peoples Rights, *supra* note 85, art. 21 (referring to "peoples" in paragraphs 1 and 2 and to "States Parties" in paragraphs 4 and 5, which shows that these two concepts are not used interchangeably, but are meant to be distinct).

Clive Baldwin and Cynthia Morel's work[90] on the African Charter points out that within the practice of the institutions set up under the framework of the African Charter, the term "peoples" covers a spectrum of groups. These groups include: the entire people in a country as a collective, a group of people who are a distinct ethnic group within a State, and even indigenous peoples.[91] The term is thus broad enough to cover the distinct ethnic communities in the Niger Delta.

Over the years, the jurisprudence of the African Commission, in cases such as the *Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria* [the Ogoni decision] and the *Center 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.[92] In the Ogoni decision, the African Commission found that the facilitation of the Nigerian government of the destruction of Ogoniland and the government's inaction to protect 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.[93] 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

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90. Clive Baldwin & Cynthia Morel, *Group Rights*, *in* THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS 244-50 (Malcolm Evans & Rachel Murray eds., 2nd ed. 2008). The fact that the rights of peoples under the African Charter are justiciable have been affirmed by various African Commission on Human Rights decisions. *See* Katangese Peoples' Congress v. Zaire, Communication 75/92, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶ 3 (Oct. 1995), http://www.achpr.org/files/sessions/16th/comunications/75.92/achpr16_75_92_eng.pdf; The Social and Economic Rights Action Centre for Economic and Social Rights v. Nigeria [Ogoni Decision], Communication 155/96, Afr. Comm'n H.P.R., ¶ 3 (Oct. 27, 2001), http://www.achpr.org/files/sessions/30th/comunications/155.96/achpr30_155_96_eng.pdf; The Ctr. for Minority Rts. Dev. and Minority Rts. Group v. Kenya [Endorois Decision], Communication 276/03, Afr. Comm'n H.P.R., ¶ 150 (Nov. 25, 2009), http://www.achpr.org/files/sessions/46th/comunications/276.03/achpr46_276_03_eng.pdf; African Commission on Human and Peoples' Rights v. Kenya, No.006/2012, Order of Provisional Measures, Afr. Ct. H.P.R., ¶ 20 (Mar. 15, 2013), http://www.refworld.org/pdfid/5151b1522.pdf.

91. Baldwin & Morel, *supra* note 90, at 244-50.

92. AFR. COMMISSION ON HUM. & PEOPLES' RTS., http://www.achpr.org/ (last visited Nov. 4, 2016).

93. *See* Ogoni Decision, Communication 155/96, Afr. Comm'n H.P.R., ¶¶ 55, 58.

> 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.[94]

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.[95] This decision made clear that people inhabiting a specific region within a state can claim the protection of Article 21.[96]

This decision further pointed that under Article 21(2) of the African Charter, the relevant state party has an obligation in the case of spoliation to provide restitution or adequate compensation to the affected indigenous peoples.[97] These foregoing decisions support the argument that international law does recognize that indigenous peoples can exercise qualified sovereignty over their natural resources. The African Charter has been ratified by 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. The Charter rights have been brought into force by the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act CAP 10 LFN 1990.[98]

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94. *Id.* ¶ 55.

95. *Id.* ¶ 267.

96. Endorois Decision, Communication 276/03, Afr. Comm'n H.P.R., ¶ 267 (Nov. 25, 2009).

97. *Id.* ¶ 268.

98. CONSTITUTION OF NIGERIA (1999), § 12. 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 June 22, 1983, and was domesticated by the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act (1990) Cap. (10) (Nigeria). *See Ratification Table: African Charter on Human and Peoples' Rights*, AFR. COMM'N ON HUM. & PEOPLES' RTS., http://www.achpr.org/instruments/achpr/ratification/ (last visited Nov. 4, 2016); Afr. Charter of Human and Peoples' Rights, *supra* note 85, art. 65. Several 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. *See*, *e.g.*, Abacha vs. Fawehinmi [2000] 6 NWLR 228, 357 (Nigeria); *see also* Edwin Egede, *Bringing Human Rights Home: An Examination of the Domestication of Human Rights Treaties in Nigeria*, 51 J. AFR. L. 249, 249-84 (2007).

There is, therefore, an obligation of the Nigerian government, under international and domestic law, to ensure that the indigenous peoples in the area are consulted and participate in decisions regarding the exploitation of resources in the Niger Delta.[99] By the same token, the domestication of the African Charter into Nigerian law also imposes an obligation on the Nigerian state to ensure that exploitation of mineral resources in indigenous communities is carried out in an appropriate manner, which prevents private actors from causing harm and devastation to the fundamental resources that are vital to the survival of these communities. Likewise, indigenous communities within the Niger Delta may seek compensation from the Nigerian state and private actors for any spoliation that occurs in the course of the mining and exploitation of natural resources within their regions.[100]

Although the domestication of the African Charter into Nigerian law has, in theory, provided a spectrum of rights for indigenous oil communities in the Niger Delta, the reality on the ground is significantly different. This is because the Nigerian state has been extremely slow in preventing the despoliation of the land and fundamental resources of the Niger Delta region.[101] Equally, the Nigerian state is yet to decisively implement the African Commission's decision in the Ogoni case discussed above.[102] However, the Nigerian state has recently launched a clean-up program in Ogoniland in response to the United Nations Environment Program's (UNEP) Environmental Assessment report of Ogoniland.[103] It is instructive that UNEP, in its report, does not appear to

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99. Endorois Decision, Communication 276/03, Afr. Comm'n H.P.R., ¶ 268 (Nov. 25, 2009).

100. For some details on the type of environmental spoliation in the Niger Delta area due to mining activities, see Egede, *Human Rights and the Environment*, *supra* note 14, at 57-61.

101. *See* FED. REPUBLIC OF NIGERIA, NIGERIA'S 5TH PERIODIC COUNTRY REPORT ON THE IMPLEMENTATION OF THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS IN NIGERIA 114-15 (2014), http://www.achpr.org/files/sessions/14th-eo/state-reports/5th-2011-2014/staterep5_nigeria_2013_eng.pdf (listing the establishment of the Ministry of the Niger Delta in 2008, the adoption of the Nigeria Extractive Industries Transparency Initiative (NEITI) Act of 2007 and the Nigeria Oil and Gas Industry Content Development Act of 2010, as its only achievements towards complying with Article 21). This merely repeats word for word what had been stated earlier. *See also* FED. REPUBLIC OF NIGERIA, NIGERIA'S 4TH PERIODIC COUNTRY REPORT ON THE IMPLEMENTATION OF THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS IN NIGERIA 78-9 (2011), http://www.achpr.org/files/sessions/50th/state-reports/4th-2008-2010/staterep4_Nigeria_2011_eng.pdf.

102. Alan Boyle, *Human Rights and the Environment: Where Next?, in* ENVIRONMENTAL LAW DIMENSIONS OF HUMAN RIGHTS 224 (Ben Boer ed., 2015).

103. U.N. ENV'T PROGRAMME [UNEP], ENVIRONMENTAL ASSESSMENT OF OGONILAND (2011), http://postconflict.unep.ch/publications/OEA/UNEP_OEA.pdf [hereinafter UNEP, OGONILAND].

reference the African Charter, especially Article 24 which provides peoples with the right to "general satisfactory environment favorable to their development."[104] This important article on the right to a clean environment (alongside Article 21) was extensively discussed in the African Commission in its Ogoni decision.[105] It is remarkable that the UNEP report on *Ogoniland* does not reference Article 24 of the African Charter as a basis for its recommendations to the Nigerian state to clean up Ogoniland. The UNEP report discusses the domestic legal framework related to the environmental management of oil and gas exploitation without any reference to the domestication of the African Charter, which provides peoples with the right to clean environment.[106] It is not clear why this is the case or why the Nigerian state has chosen to remediate environmental harm in Ogoniland based on a non-binding UNEP report, rather than on the basis of the decision obtained against it at the African Commission. It is left to be seen whether the clean-up of the Ogoni land on the terms of the UNEP report which is non-binding, will necessarily assuage the concerns of the force of the community. The UNEP's website mentions that the Nigerian state has put in place the "financial and legal frameworks" to implement the recommendations of the UNEP report.[107] It is unclear whether draft legislation is being developed or if the implementation of this report is based on the existing legal framework. The next Part of this Article will consider the legal framework regarding natural resource management in the Niger Delta.

## IV. LEGISLATIVE, JUDICIAL AND CONTRACTUAL PERSPECTIVES ON OWNERSHIP AND MANAGEMENT OF MINERAL RESOURCES OF OIL-PRODUCING COMMUNITIES IN THE NIGER DELTA

The preceding Parts of this Article have shown that the force of community as manifested in the Niger Delta poses a challenge to market efficiency and security in the energy industry. This is due to its contribution to social unrest, armed insurgency, and inter-community conflict in the region.[108] While there is extensive literature on resource conflicts arising from the ownership of natural resources in the specialist

104. *Id.*

105. Ogoni Decision, Communication 155/96, Afr. Comm'n H.P.R., ¶¶ 50-53 (Oct. 27, 2001).

106. UNEP, OGONILAND, *supra* note 103, at 36.

107. *Nigeria Launches $1 Billion Ogoniland Clean-up and Restoration Programme*, UNEP (June 2, 2016), http://www.unep.org/newscentre/default.aspx?DocumentID=27076&ArticleID=36199.

108. *See supra* Part II.

fields of international human rights, politics and governance, corporate social responsibility, development and security studies, and environmental management,[109] there does not appear to be the same level of discussion on the role that law, regulation, and contract negotiation have played in the mobilization of the force of community in resource conflicts. There is, of course, academic literature on the role that law plays in shaping the force of community in the Niger Delta, but these discussions have largely focused on its legislative formulation.[110] The literature appears to be more limited to the impact that the contractual framework negotiated between international oil companies and the Nigerian federal state has had on indigenous communities and in their aspirations to participate more fully in the management and control of mineral resources extracted from their region.[111] 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 through the restructuring of the legislative framework, but also through a re-engineering of the current contractual structures that govern natural resource exploitation and production in resource-rich regions such as the Niger Delta. These are important points considering that the current fiscal regime of mineral revenue allocation does not allow for direct community stake-holding and participation.

### *A. Judicial Perspectives on Fiscal Participation in Mineral Revenue Allocation*

As previously stated, the current constitutional and legislative framework[112] governing the petroleum industry in Nigeria vests exclusive

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109. HUMAN RIGHTS WATCH, THE PRICE OF OIL: CORPORATE RESPONSIBILITY & HUMAN RIGHTS VIOLATIONS IN NIGERIA'S OIL PRODUCING COMMUNITIES, HRW Index No. 1-56432-225-4 (Jan. 1999), https://www.hrw.org/reports/1999/nigeria/nigeria0199.pdf; Kaniye S.A. Ebeku, *Niger Delta Oil, Development of the Niger Delta and the New Development Initiative: Some Reflections from a Socio-Legal Perspective*, 43 J. AFR. & ASIAN STUD. 399, 399-435 (2008); Egede, *Human Rights and the Environment*, *supra* note 14, at 57-61; *see generally* Beloveth Odochi Nwankwo, *The Politics of Conflict Over Oil in the Niger Delta Region of Nigeria: A Review of the Corporate Social Responsibility Strategies of the Oil Companies*, 3 AM. J. EDUC. RES. 383 (2015).

110. *See*, *e.g.*, Kenneth Omeje, *The Rentier State: Oil Related Legislation and Conflict in the Niger Delta, Nigeria*, 6 CONFLICT, SECURITY & DEV. 211 (2006); *see also* Nelson E. Ojukwu-Ogba, *Legislating Development in Nigeria's Oil Producing Region: The N. D. D. C. Act Seven Years On*, 17 AFR. J. INT'L & COMP. L. 136 (2009).

111. *See* Egede, *Human Rights and the Environment*, *supra* note 14, at 57-61; *see also* Ebeku, *supra* note 109, at 399-435.

112. CONSTITUTION OF NIGERIA (1999), § 44(3); *see also supra* Section III.A.

ownership of mineral resources to Nigerian Federal Government. The current 1999 Constitution also permits oil-producing states within Nigeria to participate in the sharing of centrally collected mineral revenues through an arrangement known as the "derivation principle."[113] 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 of whether littoral states that 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 Nigerian Supreme Court ruled that the bed of the territorial sea, an exclusive economic zone and continental shelf, "belonged" to the Nigerian Federal Government, rather than to the littoral states.[114] In this regard, the Federal Government was to apply the derivation principle only to onshore resources.[115]

A political resolution between the Nigerian Federal Government and the littoral oil-producing states led to the legislative enactment of the Allocation of Revenue (Abolition of Dichotomy in the Application of the Principles of Derivation Act) of 2004.[116] 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

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113. *See supra* Section IV.A.; FESTUS O. EGWAIKHIDE ET AL., FEDERAL PRESENCE IN NIGERIA: THE 'SUNG' AND 'UNSUNG' BASIS FOR ETHNIC GRIEVANCE 32 (2009).

114. *See* Att'y Gen. of the Fed'n vs. Att'y Gen. of Abia State & 35 others [2002] 6 NWLR (Nigeria).

115. For a critique of this decision, see Egede, *Human Rights and the Environment*, *supra* note 14, at 73-93.

116. Allocation of (Abolition of Dichotomy Revenue in the Application of the Principle of Derivation) Act (2004) Cap. (A87), § 1 (Nigeria).

validity of the 2004 legislation was upheld by the Supreme Court in a decision seen as having a moderating effect on its previous 2002 decision, which had rigidly upheld federal ownership of resources within the Nigerian offshore seabed.[117] Notwithstanding some misgivings as to whether the Act went far enough to address all the concerns of 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. The earlier discussion on the dynamics between the civic and the primordial publics demonstrates that oil-producing communities do not necessarily regard elected oil state representatives as legitimate trustees who represent or safeguard their interests in the management and use of derived funds from the Federation Account.[118]

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 type of community corporate body, similar to the Mackenzie Valley Aboriginal Pipeline Corporation (MVAPC), a corporate entity that represents the interests of affected Aboriginal peoples impacted by the Mackenzie Valley Gas Project in Canada.[119] 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 drawn out.[120] The Nigerian state has, however, made some legislative

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117. *See* Att'y Gen. of Adamawa State & Others v. Att'y Gen. of the Fed'n & Others [2005] 18 NWLR 581, 593 (Nigeria). This action was dismissed by the Supreme Court as lacking merit.

118. *See* Egede*, Who Owns the Nigerian Offshore Seabed, supra* note 16, at 73-74*; see also supra* Section III.A where this is developed further.

119. *See Aboriginal Pipeline Group (APG),* MACKENZIE VALLEY GAS PROJECT, http://www.mackenziegasproject.com/whoWeAre/APG/APG.htm (last visited Nov. 4, 2016); *see also infra* Part VI for further discussions on the possibility of a tripartite arrangement between the Nigerian State, the MNCs, and the host communities.

120. CONSTITUTION OF NIGERIA (1999), § 9.

attempt towards sustainable development for the Niger Delta, which is discussed below.

### *B. Legislative Initiatives Towards Sustainable Community Development in the Niger Delta*

As far back as 1959, a provision was made in the Nigerian Constitution's Amendment No.2, Order in Council, to establish the Niger Delta Development Board. 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 by international agricultural advisers as having *"no clear idea of its objectives."*[121] 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.[122] 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. The Commission also has other responsibilities set out in Section 7 of the Act. They include the conception, planning, and 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. These legislative initiatives, particularly the NDDC Act, are seen as a step in the right direction in addressing the worst Flag case scenarios of the force of community within this region.

Even so, 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

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121. *See* JEDRZEJ GEORG FRYNAS, OIL IN NIGERIA: CONFLICT AND LITIGATION BETWEEN OIL COMPANIES AND VILLAGE COMMUNITIES 48-9 (2000) (quoting a confidential report of one A.R. Melville, an agricultural adviser at the British Ministry of Overseas Development).

122. Kaniye Ebeku, *Oil and the Niger Delta People: The Injustice of the Land Use Act*, 35 VERFASSUNG UND RECHT IN UBERSEE 201, 201-31 (2002).

projects within the region. The NDDC is broadly constituted by oil-producing state representatives. But as the Ekeh's two publics model demonstrates, these state representatives are not necessarily considered as legitimate representatives of oil-producing communities. This explains why calls have been made for a wider representation of oil-producing communities in the NDDC.[123] Apart from inadequate local representation, the NDDC is also faulted for structural anomalies due to the lack of effective control mechanisms of good governance and transparency in its operations. Consequently, despite several years since establishment, the NDDC is seen to have not fully succeeded in its tasks of reconstructing the Niger Delta region or fostering its sustainable development.[124]

Although the criticism of the NDDC is not unfounded, it has recorded some measured success in the region through the construction of certain infrastructures.[125] 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, the NDDC's success is limited in tackling the worst case Flags 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 forty member Mittee technical committee, tasked with the responsibility of conducting a review of existing Niger Delta reports and advising the Nigerian state on the appropriate steps

123. *Id.*; Frynas, *Anti-Oil Protests in the Niger*, *supra* note 34, at 39.

124. Ben E. Aigbokhan, *Reconstruction of Economic Governance in the Niger Delta Region in Nigeria: The Case of the Niger Delta Development Commission*, *in* RECONSTRUCTING ECONOMIC GOVERNANCE AFTER CONFLICT IN RESOURCE-RICH AFRICAN COUNTRIES—LEARNING FROM COUNTRY EXPERIENCES 241, 269 (Karl Wohlmuth ed., 2008) (ebook), http://www.iwim.uni-bremen.de/publikationen/pdf/W040.pdf.

125. *News and Events*, NIGER DELTA DEV. COMMISSION, http://www.nddc.gov.ng/newsandevents.html (last visited Nov. 4, 2016).

necessary to develop the region. The Mittee Committee's report[126] recommended, *inter alia*, increasing the derivation percentage for oil-producing states as a confidence-building measure and the disarmament of militant youths coupled with the establishment of a Youth Employment Scheme. Almost simultaneously, the Federal Government set up the Ministry of Niger Delta Affairs which, for effective coordination, absorbed the NDDC as one of its parastatals.[127] Since its inception over eight years ago, the Ministry of Niger Delta Affairs has failed to provide significant positive contributions to oil-producing communities.[128]

The failure of the Ministry to positively impact oil-producing communities may be attributable to the "top to bottom approach to development." There is no clear evidence that the local communities within the Niger Delta were actively involved in its formation or in deciding its mandate.[129] To some extent, a top-to-bottom approach has also been adopted by the Nigerian state in its implementation of an amnesty program[130] for penitent Niger Delta militants. The first stage of the amnesty program focused on the disarmament of militants while its current stages focus on their rehabilitation and integration. The amnesty program recently encountered some gridlock due to the announcement by the Buhari Government that it intended to reduce the program funding by 70%.[131] It is unclear whether the oil-producing communities were involved in the decision-making process regarding the government's plans to reduce the funding of the amnesty program. This may explain the reemergence of incidents of attacks on oil and gas installations. Moreover, it is doubtful if token payments to erstwhile militants under an amnesty program would adequately address the core concern of oil

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126. Sylvanus Abila & Damfebo K. Derri, *Sustainable Development Issues in the Niger Delta*, *in* LAW AND PETROLEUM INDUSTRY IN NIGERIA: CURRENT CHALLENGES 262-63 (Festus Emiri & Gowon Deinduomo eds., 2009).

127. *Id.* at 262.

128. *Eight Years After Creation, Niger Delta Ministry Completes Only One Project—Minister*, PREMIUM TIMES (Aug. 8, 2016), http://www.premiumtimesng.com/news/top-news/208270-eight-years-creation-niger-delta-ministry-completes-one-project-minister.html.

129. *About MNDA*, MINISTRY NIGER DELTA AFF., http://nigerdelta.gov.ng/index.php/the-ministry/our-structure (last visited Nov. 4, 2016); Abila & Derri, *supra* note 126, at 263.

130. *See Niger Delta Amnesty Program*, OFF. SPECIAL ADVISER TO PRESIDENT NIGER DELTA, http://osapnd.gov.ng/index/ndap (last visited Nov. 4, 2016); *see also* Ukoha Ukiwo, *The Nigerian State, Oil and the Niger Delta Crisis*, *in* OIL AND INSURGENCY IN THE NIGER DELTA: MANAGING THE COMPLEX POLITICS OF PETRO-VIOLENCE 17-27 (Cyril Obi & Siri Aas Rustad eds., 2011) (ebook).

131. *Nigeria To Resume Payments to Oil Militants in the Niger Delta*, BBC (Aug. 2, 2016), http://www.bbc.co.uk/news/world-africa-36953269.

communities, which is direct stake-holding in fiscal federalism and resource control.[132]

This point is also addressed in the United Nations Development Program (UNDP)'s Niger Delta Human Development Report 2006.[133] The UNDP report is more wide-ranging than the subsequent UNEP environmental assessment report on Ogoniland. Yet the Nigerian government does not appear to have fully engaged with this report. The UNEP report sets out a sevenfold agenda for the development of the Niger Delta, including a component that focuses on governance based on democracy, participation, and accountability. It identifies that the bane of the Niger Delta is not only limited to environmental degradation, but is also connected to the under-development of the region. The recommendations of this report, if fully implemented by the Nigerian state, would be a step in the right direction. It is yet to be seen whether the Nigerian government will implement this report with the same enthusiasm as it did with the UNEP report. The failure to implement this comprehensive report on the development of the Niger Delta may result in further exacerbation of the ongoing conflicts in the Niger Delta.

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

The rather limited success of state-run projects such as OMPADEC, NDDC, and the Ministry of Niger Delta affairs to develop the region has compelled some oil MNCs to undertake development projects in this region. This corporate delivery of developmental projects in the Niger Delta is undertaken through the mechanism of corporate social responsibility (CSR). Jedrzej Frynas discusses the limited role that CSR can play in tackling the social and developmental needs of the regions in which MNCs operate.[134] His work further shows that CSR activities carried out in the Niger Delta have been more focused on addressing the social impacts of the industry, rather than the environmental impacts and microeconomic issues created by the inflow of oil revenues.[135] While there is evidence that shows that CSR practices within the oil and gas

132. Abila & Derri, *supra* note 126, at 263.

133. U.N. DEV. PROGRAMME [UNDP], NIGER DELTA HUMAN DEVELOPMENT REPORT (2006), http://hdr.undp.org/sites/default/files/nigeria_hdr_report.pdf [hereinafter UNDP, NIGER DELTA REPORT].

134. Jedrzej G. Frynas, *Corporate Social Responsibility in the Oil and Gas Sector*, 2 J. WORLD ENERGY L. & BUS. 178, 181 (2009).

135. *Id.* at 181-82.

industry have led to voluntary improvements in environmental performance, much of this data has emerged from other jurisdictions outside the Niger Delta region. However, the industry has 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.[136] 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 examine the nature of these agreements and whether they can be considered binding contractual agreements, akin to those negotiated between mining companies and indigenous communities in Australia and Canada.

### *A. The Emergence of Corporate-Community Agreements in the Niger Delta—A Current Reality or Myth?: The General Memorandum of Understanding System (GMOU)*

Major oil and gas companies operating in the Niger Delta, such as Shell and Chevron, have employed the global memorandum of understanding system (GMOU) in their engagement with local communities. These agreements are normally executed between an oil company and a group of local communities.[137] For instance, Chevron, in Nigeria, describes the GMOU model as: "a new approach to community engagement in the Niger Delta to high grade local participation in determining the needs [the Chevron] programs should address," 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.[138] This raises questions

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136. *See* Susan Reider & Robert Wasserstrom, *Anthropologists, Corporate Responsibility and Oil in Ecuador and Nigeria*, 4 INT'L J. BUS. ANTHROPOLOGY 77, 83 (2013).

137. Uwafiokun Idemudia, *Corporate Partnerships and Community Development in the Nigerian Oil Industry: Strengths and Limitation*, U.N. RES. INST. FOR SOC. DEV., Markets, Business and Regulation Programme Paper No. 2, 10 (Mar. 2007), http://www.unrisd.org/80256B3C005BCCF9/(httpAuxPages)/D7737BEE64BC48B0C12572C90045372E/$file/Idemudia.pdf.

138. *See* CHEVRON, 2014 CORPORATE RESPONSIBILITY REPORT CHEVRON IN NIGERIA 7 (2014), https://www.chevron.com/-/media/chevron/shared/documents/2014_NigeriaCR_Report.pdf.

as to the status of the GMOU, and whether it has any legally binding force. 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 for the parties to the agreement. Unlike the previous approach of community engagement, the GMOU allows communities to make key decisions and to drive the community development. Yet, there is no evidence to establish that it is a legally binding document.[139] Generally, 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 eventually lead to a final binding contract.[140] 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 when 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 that the parties have expressly or implicitly agreed that the MOU should be legally binding.[141] It is therefore doubtful that these GMOUs executed between oil companies and local communities contain such terms,[142] which may be otherwise evident in the MOUs that international oil companies (IOCs) execute with national oil companies (NOCs) prior to the execution of the final contractual documentation.

Unlike the MOUs negotiated between IOCs and NOCs, GMOUs negotiated between IOCS and local communities are essentially based on the CSR approach of promoting social responsive behavior in corporate activities within local regions. 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

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139. *See* SHELL, SHELL IN NIGERIA: IMPROVING LIVES IN THE NIGER DELTA (April 2014), http://s08.static-shell.com/content/dam/shell-new/local/country/nga/downloads/pdf/2014bnotes/improving-lives.pdf.

140. RICHARD CHRISTOU, BOILERPLATE: PRACTICAL CLAUSES 37 (4th ed. 2005).

141. *Id.*

142. For example, 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 at the onset that the MOU "is *not* intended to be legally binding except as specifically set out below" and it specifically identified the clauses that were intended to be legally binding. Memorandum of Understanding between Eastern Echo DMCC and National Oil Corporation of Kenya (Jul. 31, 2013), http://www.cofek.co.ke/Western%20Geco%20-%20National%20Oil%20Corporation%20of%20Kenya%20-%20July%202013.pdf.

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.[143] Unlike the Niger Delta GMOUs, these corporate-community agreements not only enable local communities to determine what community projects should be initiated, they also allow these communities to directly share in the wealth generated from mining activities. The corporate-community agreements in these jurisdictions also allow local communities to participate in the decision-making on the mines to be developed and operated.[144] In Nigeria, there are constitutional limitations to having a legally binding GMOU system that seeks to transfer economic benefits to oil-producing communities. This is because these agreements are negotiated primarily between companies and local communities who lack ownership rights over mineral resources. Accordingly, these agreements cannot effectually provide for wealth participation clauses in favor of the communities. For agreements of this nature to have legal sanction, the Federal Government of Nigeria, which has legal and constitutional rights to ownership and control of minerals, must be a party to these agreements.[145] Thus, unlike the aboriginal mining 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 gain direct access to the economic gains of oil and gas extraction within their territory without the direct participation of the Federal Government of Nigeria.[146]

In 2007 the Nigerian Minerals and Mining Act was enacted. It states that Community Development Agreements (CDA), which are meant to transfer "social and economic benefits" to the host communities, are required to have binding legal effect.[147] However, this legislation excludes petroleum from its ambit, and so legally binding CDAs are not

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143. O'Faircheallaigh, *supra* note 2, at 69-86; Ciaran O'Faircheallaigh, Corporate-Aboriginal Agreements on Mineral Development: The Wider Implications of Contractual Arrangements 2-5 (Mar. 5-7, 2009) (paper delivered at the York University Rethinking Extractive Industries Conference) [hereinafter O'Faircheallaigh, *Corporate-Aboriginal Agreements*].

144. O'Faircheallaigh, *Corporate-Aboriginal Agreements*, *supra* note 143, at 2-5.

145. *See infra* Part VI for discussion on this type of tripartite Agreements.

146. *See supra* Part III for discussion on ownership of mineral resources in Nigeria.

147. *See* Nigerian Minerals and Mining Act No. (20) (2007) Cap. (A479), § 116-17 (Nigeria).

applicable to oil and gas mining operations.[148] The non-applicability of CDAs to oil and gas extraction, therefore, does not meet the yearnings and aspirations of the force of community in the Niger Delta for greater autonomy over its oil and gas mineral resources.

Even so, it must be noted that despite the obvious benefits of the aboriginal mining agreement model, it still has some shortcomings similar to those of the non-binding GMOU system in that there are concerns as to whether aboriginal communities have the necessary technical skills to negotiate specialized agreements with large mining companies, and whether such negotiation processes, which in many instances fall outside state-controlled community planning, may have a detrimental effect on government expenditure in the region.[149] Moreover, similar to the terms of the GMOU, the aboriginal mining agreement model contains specific provisions that require the communities to support the project and to refrain from opposing it during the environmental impact assessment stage.[150] 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. Where a particular local community has contractually agreed to support a particular project, it will be considered as having restricted its rights to access to environmental justice through the judicial and regulatory system in cases where the project results in environmental harm.[151] 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.

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148. *See id.* § 164, 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.

The Petroleum Act defines "petroleum" as "mineral oil (or any related hydrocarbon) or natural gas as it exits in its natural state in strata, and does not include coal or bituminous shale's or other stratified deposits from which oil can be extracted by destructive distillation." Petroleum Act (1990) Cap. (350), § 15 (Nigeria).

149. O'Faircheallaigh, *Corporate-Aboriginal Agreements*, *supra* note 143, at 13.

150. *Id.* at 6.

151. *Id.*

In the next Part, we examine whether there needs to be a complete restructuring of the legislative and contractual regimes governing ownership of mineral resources in Nigeria. We propose reforms to the current framework which would allow for the adoption of a tripartite mineral agreement in the oil and gas industry in Nigeria involving three parties—the NOC representing the Nigerian state, the relevant MNC and the local communities.

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

In the past, the Nigerian government expressed an interest in allowing direct participation of local communities in onshore oil and gas extraction. The government had mooted the idea of transferring 10% of its stake-hold in its existing JVAs with multinational corporations to local communities.[152] This was done in October 2009, when the Federal Government, led by the late President Yar'adua, 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.[153] However,

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152. On JVAs: "One of the partners is designated the operator. The NNPC reserves the right to become an operator. All parties are to share in the cost of operations. Each partner can lift and separately dispose its interest share of production subject to the payment of Petroleum Profit Tax (PPT) and Royalty." *Joint Venture Operations*, NIGERIAN NAT'L PETROLEUM CORP., http://www.nnpcgroup.com/NNPCBusiness/UpstreamVentures.aspx (last visited Nov. 4, 2016). There are currently six joint venture agreements between the Federal Government of Nigeria—represented by the Nigerian National Petroleum Corporation (NNPC)—and foreign owned oil companies, detailed as follows: (1) JVA with Shell Petroleum Development Company of Nigeria Limited (SPDC) as operator and 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"; (2) JVA with Chevron Nigeria Limited (CNL) 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"; (3) JVA with Mobil Producing Nigeria Unlimited (MPNU) as operator "between NNPC (60 percent) and Mobil (40 percent) [which] operates in shallow water off Akwa Ibom state in the southeastern delta. . . . Mobil also holds a 50 percent interest in a Production Sharing Contract (PSC) for a deep water block further offshore. . ."; (4) A JVA with Nigerian Agip Oil Company Limited (NAOC) as operator "and owned by NNPC (60 percent), Agip (20 percent) and Phillips Petroleum (20 percent) [which] produces mostly from small onshore fields"; (5) JVA with Elf Petroleum Nigeria Limited (EPNL) as operator "between NNPC (60 percent) and Elf (40 percent) [which produces] both on and offshore"; and (6) JVA with Texaco Overseas Petroleum Company of Nigeria Unlimited (TOPCON) as operator " and owned by NNPC (60 percent), Texaco (20 percent) and Chevron (20 percent) currently produc[ing] . . . from five offshore fields." *See id.*

153. For analysis of this gesture, see Aaron Sayne, Transnational Crisis Project, Something or Nothing: Granting Niger Deltans a "Stake" in Oil To Reduce Conflict (Oct. 14,

not much has been done in this regard since such a tripartite joint venture agreement would involve significant legislative and constitutional reform and may also be affected by contractual rules, such as the doctrine of privity of contract.

This may explain why this idea was replaced by plans to establish a statutory Petroleum Host Community Fund funded by monthly contributions by MNCs.[154] A draft Petroleum Industry Bill (PIB) was meant to bring this fund into force, but regrettably, the bill was never enacted. It has, however, been replaced by the Petroleum Industry Governance Bill (PIGB) of 2016, which is currently before the Nigerian National Assembly. Remarkably, the 2016 bill does not include the Petroleum Host Community Fund. The non-inclusion of the fund in the current bill has been found to be unsatisfactory as it deprives oil-producing communities from participating in the governance and management of the natural resources.[155] This is because the initial fund formulated under the PIB was meant to be utilized for the development of the economic and social infrastructure of the communities within the petroleum-producing area. There appears to be 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 the OMPADEC, NDDC, and Niger Delta Ministry. It does not, in the view of the authors, provide that "ownership" right to the ethnic communities. The earlier proposal to provide

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2010) (Nigeria policy paper) (on file with U.S. INST. OF PEACE), http://www.usip.org/sites/default/files/Nigeria/00026419.PDF.

154. *See* Petroleum Industry Bill (2012) § 116-18 (Nigeria). 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." *Id.* 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 514-15 (6th ed. 2003); *see also* CONSTITUTION OF NIGERIA (1999), § 44. 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. BROWNLIE, *supra*. In addition, it is not clear who has the burden of establishing that "no member of the community is responsible."

155. *National Assembly Removes Host Communities Fund from PIB*, MARINE & PETROLEUM NIGERIA (Apr. 4, 2016), http://marineandpetroleum.com/content/national-assembly-removes-host-communities-fund-pib*; Oil Producing Communities Reject PIB Without 10% Host Fund*, THISDAY (May 4, 2016), http://www.thisdaylive.com/index.php/2016/05/04/oil-producing-communities-reject-pib-without-10-host-fund/.

communities with a direct 10% equity stake-holding in existing host state agreements (HSAs) would have provided these communities with ownership stake in mineral extraction. It would also have implemented Agenda 2 of the UNDP Niger Delta Human Development report, which mandates that governance in the Niger Delta should be based on democracy, participation and accountability.[156] We argue that providing communities with substantive participation in mineral exploitation can help foster social cohesion and justice, and enhance market efficiency and security within the Niger Delta. This is because when communities feel they have a sense of stake-holding, they will have an incentive to protect the facilities and ensure that the production is not disrupted or jeopardized.

However, there are certain issues that arise out of what would, in essence, be tripartite contractual arrangements between the Nigerian state, MNCs, and local communities. First, there is the issue of whether it is necessary for a proposal for a tripartite agreement between the Nigerian state, MNCs, and oil-producing communities to engage with the principle of onshore/offshore dichotomy governing oil and gas exploitation in oil-producing regions in Nigeria.[157] This is germane because the government's initial proposal to provide communities with equity participation in its JVA stake-holdings was restricted to onshore assets, excluding offshore assets. There is currently an estimated number of 606 oil fields in the Niger Delta: 355 are onshore, while the remaining 251 are offshore.[158] It can therefore be argued that, although initials plans to transfer 10% equity holding to oil-producing communities was a positive measure on the part of the government, the proposed onshore-offshore dichotomy would have created some problems. The Niger Delta is a mature basin and its offshore basin is considered to be more viable than its on-shore holdings. The offshore fields are considered to have long-term prospects which would surpass the current output of onshore operations.[159] It is therefore doubtful, if the government seeks to reintroduce the proposal to provide oil communities

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156. UNDP, NIGER DELTA REPORT, *supra* note 133, at 153-55.

157. Att'y Gen. of the Fed'n vs. Att'y Gen. of Abia State & 35 others [2002] 6 NWLR (Nigeria).

158. *See Development of Nigeria's Oil Industry*, NIGERIAN NAT'L PETRO CORP., http://www.nnpcgroup.com/nnpcbusiness/businessinformation/oilgasinnigeria/developmentoftheindustry.aspx (last visited Nov. 4, 2016).

159. *Vast Energy Research Waiting To Be Unlocked in Nigeria*, OXFORD BUS. GROUP , https://www.oxfordbusinessgroup.com/overview/vast-energy-reserves-waiting-be-unlocked-nigeria (last visited Nov. 4, 2016).

with an equity participation sharing scheme, that the agitations of the force of community will be resolved by the continued application of the onshore-offshore dichotomy.

Although the issue of equity participation by indigenous communities is currently moot, it is still important to consider the contractual mechanisms that will apply to an equity participatory regime for local communities. For example, would the Nigerian government have had to assign a portion of its holdings to the communities? If this is the case, then preemption rights may apply, whereby MNCs would have the first right to purchase any equity interests before they are assigned.[160] Another issue would be whether the "moot" equity participation for oil-producing communities can be facilitated by the principle of novation. This envisages a situation where the new party, in this case, the oil-producing community, is added to the contractual framework. But then, novation would normally involve the substitution of a new contract for an existing contract, either between the same parties or completely new parties.[161] Had the proposed equity participation been formalized, it is unclear if a new contractual framework was contemplated, or if it was meant to be a mere variation of the terms of the existing agreements. This may appear inconsequential, but a critical aspect of the JVA arrangement is the cash-call obligation of each joint venture partner.[162] In transferring a share of its equity stakeholding 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? The initial government plan to confer oil-producing communities with equity participation in oil and gas exploitation was confined to JVAs. But it is noteworthy that Nigeria also utilizes another HSA model known as the Production Sharing Contract (PSC).

The PSC has become the Nigerian state's preferred choice due to its difficulties in meeting its cash-call obligation under existing JVAs with MNCs.[163] The idea of a typical PSC is for the MNC, as the contractor, to

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160. R.J. CLEWS, PROJECT FINANCE FOR THE INTERNATIONAL PETROLEUM INDUSTRY 25 (2016) (ebook).

161. LS SEALEY & RJA HOOLEY, COMMERCIAL LAW: TEXT, CASES AND MATERIALS 939 (4th ed. 2009).

162. CLEWS, *supra* note 160, at 115.

163. Femi Asu, *Poor Funding Threatens NNPC Joint Ventures*, SWEET CRUDE REP. (Apr. 6, 2015), http://sweetcrudereports.com/2015/04/06/poor-funding-threatens-nnpc-joint-ventures/; Madaki O. Ameh, The Shift from Joint Operating Agreements to Production Sharing Contracts in the Nigerian Oil Industry: Any Benefits for the Players? (2006) (unpublished paper).

bear all the exploration and production risks, as well as costs, in return for it being allowed to recoup its costs from a stipulated share of the production.[164] 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 the exact nature of the contract is, and its consequential legal implications, as discussed above.

Finally, had the mooted equity participation stake been implemented, it may have been impacted by the privity of contract rule. Questions may arise as to whether local communities could be conferred with a benefit or assume obligations from, a contract to which they were not an original party.[165] The doctrine of privity of contract was approved by the House of the Lords in the case of *Dunlop Pneumatic Tyres Co. Ltd. v Selfridge and Co. Ltd.*[166] It held that a person could not benefit from a contract or assume obligations under it, except if he is a party to it. This rule was approved in the Nigerian case of *Chuba Ikpeazu v African Continental Bank*.[167] However, there are exceptions to this rule, including the concept of agency, the establishment of a trust, and the role of collateral contracts. Other exceptions are set out in Contract (Rights of Third Parties) 1999, which, in Section 1(1) confers on a third party the right to enforce a term of a contract if the contract itself expressly provides that he may. This English statute, however, does not have direct application in the Nigerian legal system, but may be treated as persuasive authority. A detailed treatise of the doctrine of privity of contract and its exceptions is beyond the scope of this Article. However, this doctrine has been discussed in this Article to show why it may be difficult for oil-producing communities to be conferred with contractual benefits in existing JVAs or PSCs in Nigeria.

These contractual challenges may explain why the Nigerian government abandoned this plan and replaced it instead with a proposal to establish a Petroleum Host Community Fund funded by monthly contributions from MNCs, which has not been included in the 2016 PIGB legislation. While the preferred approach is for the Nigerian state to adopt community-corporate agreements, like those obtainable in Canada and

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164. *See* YINKA OMOROGBE, THE OIL AND GAS INDUSTRY: EXPLORATION & PRODUCTION CONTRACTS 60-63 (1997); Deep Offshore and Inland Basin Production Sharing Contracts Decree No. (9) (1999) Cap. (A515), § 8 (Nigeria).

165. TINA L. STARK, NEGOTIATING AND DRAFTING CONTRACT BOILERPLATE 102 (2003).

166. Dunlop Pneumatic Tyre Co., Ltd. v. Selfridge & Co., Ltd. [1915] AC 847 (HL) (appeal taken from [1914] W.N. 59) (Eng.).

167. Chuba Ikpeazu v African Continental Bank Ltd. [1965] 1965 NMLR 374 (Nigeria).

Australia,[168] it is important to note that Nigerian situation is somewhat different and more complex than those jurisdictions. This is due to its constitutional framework that confers state ownership over natural resources. Fundamental constitutional and legislative reforms will have to be made to allow for the adoption of agreements in Nigeria that are akin to Australian aboriginal mining agreements or Canadian corporate-community agreements. The authors propose that such constitutional and legislative reforms, despite the obvious challenges, are the right step forward in the long run. It is the view of the authors that an equity stake in the mining agreements would give such ethnic communities a sense of ownership in the natural resources exploited in their territory.

## VII. CONCLUSION

This Article has explored the approaches and responses employed by the Nigerian Federal Government 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 that have aimed to enhance the development of the Niger Delta region, along with corporate initiatives such as the 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, similar to the approach of Canadian aboriginal mining agreements, but negotiated at a tripartite level, involving the Nigerian Federal Government, MNCs, and local oil communities. This innovative option would provide local oil-producing communities with a sense of "ownership" of the oil and gas exploration and production activities within their respective territories. While such arrangements would necessarily entail radical, far-reaching constitutional and legislative reforms, it is the view of the authors, that in the long run, providing such local oil-producing communities with direct participatory rights would go a long way in providing a strong, just, and equitable legal framework. This would give such communities a sense of

168. *See* DAVIES WARD PHILLIP & VINEBERG LLP, ACQUIRING CANADIAN PUBLIC OIL AND GAS COMPANIES: A GUIDE FOR FOREIGN OIL AND GAS COMPANIES, FOREIGN INVESTORS AND INVESTMENT BANKS 14-19 (1st ed. Feb. 2010), https://www.dwpv.com/en/Resources/Publications/2010/Acquiring-Canadian-Public-Oil-and-Gas-Companies-A-Guide-for-Foreign-Oil-and-Gas-Companies-Foreign-Investors-and-Investment-Banks.

ownership that would contribute immensely in quelling the agitations of the force of the community.