SUSTAINABLE DEVELOPMENT AND THE RIGHTS OF THE INDIGENOUS PEOPLES OF THE NIGER DELTA: TOWARDS A LEGAL FRAMEWORK

by

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SUMMARY

This research sets to unravel the root cause of the conflict in the Niger Delta with the aim of finding a legal solution as a durable remedy. Grave violations of the indigenous peoples' human rights and irreparable environmental abuse are identified. Nigeria has no specific law for the protection of the rights of indigenous peoples and there are also no provisions for collective rights in the Constitution. With need to protect their indigenous status, Chapter two establishes the indigenous characterisation of the Ogoni and Ijaw peoples as representative of all the indigenous peoples in the Niger Delta so that they may benefit from any international indigenous peoples' rights that may accrue to them. International law forms the bedrock of indigenous peoples' rights. The two international covenants on civil, political, economic, social and cultural rights and the African Charter are the most important, incorporating the rights to self-determination, property, development and environment that provide the basic sustenance for indigenous peoples. As analysed in Chapter three, the African Commission jurisprudence on property rights established in its two dynamic decisions - *Ogoni* and *Endorois,* provide extensive precedent for all African indigenous peoples.

The conflict is grounded in issues of 'development' and 'sustainability' arising from the unsustainable exploitation of oil and gas. The thesis consequently explores the most relevant international sustainable development instruments – the Rio Declaration and the Convention on Biological Diversity together with the Agenda 21 – to support its environmental and sustainable development propositions in both Chapters two and three. Intuitively, a human development-based theory, Sen's 'capabilities' approach becomes inevitable for the enhancement of the sustainable development ideals. This approach provides choices and values for human development and poverty eradication as the primary solution for the well-being of the indigenous peoples. Chapter five proposes a legal framework on sustainable development of natural resources that could augment the existing framework in

Nigeria or be factored in as a new initiative in the absence of any extant framework. The proposed framework provides a solution to recognition of indigenous peoples for the actualisation of their capabilities and values, including how they can participate meaningfully in sustainable development, with the emphasis falling on the role of the state as duty-bearer in sustainable development.

KEY TERMS

Sustainable development, sovereignty over natural resources, international human rights, rights of indigenous peoples, right to development, capabilities approach, Niger Delta, Nigerian Constitution, African Commission jurisprudence on property rights, the legal framework.

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CHAPTER ONE

INTRODUCTION AND BACKGROUND TO THE STUDY

1.1 Introduction

The controversy generated by the term 'indigenous peoples' over the last two decades has not deterred their struggle for global recognition and protection. According to Smith, this struggle is relatively recent, having emerged in the 1970s through the struggles of the American Indian Movement (AIM) and the Canadian Indian Brotherhood.[1] This diverges from the institutional expression of the United Nations Permanent Forum on Indigenous Issues (UNPFII) that the term has prevailed generically for a long time.[2] Despite disparity as to when the term originated, the global acceptance of the term cannot be disputed. The term has since received universal acknowledgment, and as Smith further states, 'it internationalizes the experiences, the issues and the struggles of some of the world's colonized peoples'.[3] Almost all indigenous peoples the world over are original dwellers of former European colonies where the influx of European settlers side-lined the traditional landowners.

A standard definition of 'indigenous peoples' is rare, but the International Labour Organisation Convention (No169)[4] has offered some elements to qualify indigenous peoples. The most fundamental criterion for qualification is self-identification. Added to this are their traditional lifestyles; culture and a way of life which differs from that of other segments of the national population; and historical continuous habitation of a certain area – ie, before others 'invaded' or moved to the area.[5] The most important

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[1] Smith, *Decolonizing Methodologies* 7.

[2] The United Nations Permanent Forum on Indigenous Issues (UNPFII) is an advisory body to the Economic and Social Council (ECOSOG) with a mandate to discuss indigenous issues related to economic and social development, culture, the environment, education, health, and human rights. UNPFII has come a long way since its first meeting in May 2002 and a global coordination by the Expert Mechanism on the Rights of Indigenous People and the Special Rapporteur Rights of Indigenous Peoples <https://www.un.org/development/desa/indigenouspeoples/about-us/permanent-forum-on-indigenous-issues.html> accessed 17 June 2021.

[3] Smith, *Decolonizing Methodologies* 7.

[4] C169 Indigenous and Tribal Peoples Convention 1989, Convention concerning Indigenous and Tribal Peoples in Independent Countries, adopted at Geneva at the 76th International Labour Congress Session on 27 June 1989 (entry into force 5 September 1991). Nigeria has been a member state of the International Labour Organisation (ILO) since 17 October 1960 but is yet to ratify C169 (hereafter ILO C169). <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312314:NO> accessed 20June 2021.

[5] ibid. The ILO C169 does not define indigenous and tribal peoples but does provides criteria for identifying indigenous peoples.

factor is their being the original inhabitants of a region,[6] and, as a major attribute, that they are bonded to their ancestral land for their collective physical and cultural survival as a people.[7] Together, these factors might offer a viable definition of 'indigenous peoples.' But, from the perspective of the African Commission on Human and Peoples' Rights,[8] the issue of definition could be classified as 'sensitive' due to the peculiar nature of African population having a 'common heritage of aboriginality.'[9] However, the Working Group, taking its cue from the United Nations system on the principle of self-definition and recognition of self-identity of peoples, resolved to settle for a socio-psychological description and not a definition of indigenous peoples.[10] According to the African Commission on the socio-psychological description:

> The focus should be on the more recent approaches focussing on *self-definition* as indigenous and distinctly different from other groups within a state; on a *special attachment to and use of their traditional land* whereby their ancestral land and territory has a fundamental importance for their collective physical and cultural survival as peoples; on an experience of *subjugation, marginalization, dispossession, exclusion or discrimination* because these peoples have different cultures, ways of life or modes of production than the national hegemonic and dominant model. We recognize that the immediate connotation of the term often has to do with aboriginality.[11]

It is recognised that the previous term was based on 'aboriginality', while the modern analytical understanding of the term, focussed on marginalisation, cultural difference, and self-identification, is relevant and constructive for Africa. The four elements

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[6] Godoy et al, *The effect of market economy on the well-being of indigenous peoples and on their use of renewable natural resources* 4.

[7] See '1981 Martinez Cobo Study' in 'Indigenous peoples at the United Nations' <https://www.un.org/development/desa/indigenous peoples/about-us.html> accessed 7 June 2021.

[8] The African Commission on Human and Peoples' Rights (ACHPR) was established by the African Charter (OAU Doc. CAB/LEG/67/3 rev. 5, (1982) 21 ILM 58). The Commission was inaugurated in November 1987 in Addis Ababa, Ethiopia. In addition to performing any other tasks which may be entrusted to it by the Assembly of Heads of State and Government, the Commission is officially charged with three major functions – protection of human and peoples' rights; promotion of human and peoples' rights; and interpretation of the African Charter <https://www.achpr.org/>.

[9] ACHPR, Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities 3 <https://www.achpr.org/presspublic/publication?id=51> adopted by ACHPR at its 28th Ordinary Session, Benin, 2000, accessed 7 June 2021. (Hereafter the Report of the African Commission.)

[10] ibid 58. The socio-psychological description adopted by the African Commission is the result of the endless debate on the term 'indigenous peoples', and because, the term 'has a negative connotation in Africa as it has been used in derogatory ways during European colonialism and also been misused in chauvinistic ways by some post-colonial African governments'.

[11] ibid 63. The African Commission has therefore adopted the elements of identifying indigenous peoples on the Continent as it concludes that 'a strict definition of indigenous peoples is neither necessary nor desirable'. The African Commission's statement quoted here clearly sets the records straight on the issue of identification of the African indigenous peoples. Emphasis here is on the symbolic elements in the statement, such as 'subjugation', 'marginalisation', 'dispossession', 'exclusion', and 'discrimination' that afflict indigenous peoples in Africa and condemn them to abject poverty.

deduced from the description above are the guiding principles that characterise indigenous peoples. This is also the description adopted by the 1989 ILO Convention 169, known as the Convention Concerning Indigenous and Tribal Peoples in Independent Countries.[12] The principle of self-identification is most significant and is emphasised in article 1(2) which states that, 'self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply'.

Similarly, 'sustainable development' is a concept under international law and centres on peoples. In its 1987 report, the World Commission on Environment and Development (the Brundtland Commission) affirmed that the concept of sustainable development does not imply limits but could ensure continuity in meeting the needs of the present without compromising the ability of future generations to meet their own needs.[13] This sounds a note of hope for indigenous peoples and their lands. Eminent legal scholars have also described sustainable development as a comprehensive economic, social, and political process for sustainable use of natural resources and protection of the environment with due regard to the needs and interests of future generations.[14] The 1992 United Nations Conference on Environment and Development[15] confirmed the notion that peoples are at the centre of sustainable development and are entitled to a healthy and productive life in harmony with nature as declared in Principle 1 of the Rio Declaration.[16]

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[12] ibid.

[13] United Nations Report of the World Commission on Environment and Development 1987 *Our Common Future* 1. The Global Challenges 3(27) 'Sustainable Development'. (The Commission's Chairman was Gro Harlem Brundtland which is why the report is widely known as the Brundtland Commission.) See <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N87/184/67/img/N8718467.pdf?OpenElement> accessed 8 June 2021.

[14] International Law Association (ILA), Committee on the Legal Aspects of Sustainable Development – 'Fifth and Final Report 6. In 2002 at their New Delhi Conference, the ILA released the Final Report of the Committee on the Legal Aspects of Sustainable Development. The Committee was made up of international legal experts and scholars from all parts of the developing and industrialised world. This unique description of the concept of sustainable development is based on the collation of understanding of the UN Declaration on the Right to Development (1986), the Universal Declaration of Human Rights (1948), and the Stockholm and Rio Declarations (1972 and 1992) (Hereafter the ILA New Delhi) <https://www.ila-hq.org/index.php/committees>.

[15] The United Nations Conference on Environment and Development, Rio de Janeiro, Brazil, 3-14 June 1992 (UNCED). The UNCED is considered the second global conference after the first Human Environment Conference, held in Stockholm, Sweden, in 1972. The 'Earth Summit' as it is known, resulted in the decision that the concept of sustainable development was an attainable goal for all the people of the world on the local, national, regional, or international levels <https://www.un.org/en/conferences/environment/rio1992> accessed 26 June 2021.

[16] The Rio Declaration on Environment and Development is one of the outcome documents of the 'Earth Summit' 1992. Principle 1 states that: 'Human beings are the centre concerns of sustainable

The indigenous peoples of the Niger Delta are the traditional owners of the land and natural resources in the oil and gas producing region. They are typically hunter-gatherers, fishermen, and peasant farmers with cultural attachment to plants and herbs. Under the global understanding of sustainable development, they can rely on the concept to secure legislative protection for their environment, land, and natural resources. Legislative protection of the environment and climate change under sustainable development laws such as the Convention on Biological Diversity (CBD),[17] and UN Framework Convention on Climate Change (UNFCCC),[18] offer the desired protection for the rights of indigenous peoples to a healthy environment. Mismanagement and unsustainable use of natural resources portend adverse effects on the environment and contribute to climate change. Therefore, in addressing climate change, article 3(4) of the UNFCCC provides that:

> The Parties have a right to, and should, promote sustainable development. Policies and measures to protect the climate system against human-induced change should be appropriate for the specific conditions of each Party and should be integrated with national development programmes, taking into account that economic development is essential for adopting measures to address climate change.

The ensuing debate around the Brundtland Commission's conceptualisation of sustainable development has elevated the concept to a monumental phenomenon, the hope of the developing nations and indigenous peoples.[19] The progress

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development. They are entitled to a healthy and productive life in harmony with nature.' (Hereafter the Rio Declaration). See <https://undocs.org/en/A/CONF.151/26/Rev.1(vol.I)>

[17] The protection could be derived from the two prominent environmental Conventions by reliance on Nigeria's adoption and commitment to their provisional obligations, which can be assured when domesticated as national legislation. These are: the Convention on Biological Diversity (CBD), and the United Nations Framework Convention on Climate Change (UNFCCC). The CBD was signed by 150 government leaders (including Nigeria's) at the 1992 Rio Earth Summit inspired by the world community's growing commitment to sustainable development. It entered into force on 29 December 1993. The Convention recognises that biological diversity is more than plants, animals, and microorganisms and their ecosystems. It is about people and our need for food security, medicines, fresh air and water, shelter, and a clean and healthy environment in which to live. It is conceived as a practical tool for translating the principles of Agenda 21 into reality <http://www.cbd.int/convention/text/default.shtml> accessed 20 June 2021.

[18] The UNFCCC was adopted at the Rio Earth Summit in 1992, and entered into force on 21 March 1994. Currently, 195 countries (including Nigeria) have ratified the Convention. The ultimate objective of the Convention is 'stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system' <https://unfcc.int/process-and-meetings/the-convention/what-is-the-united-nations-framework-convention-on-climate-change> accessed 21 June 2021.

[19] At the outset, the Brundtland Commission had no clear-cut plan for indigenous people. But over the years, gradual knowledge acquisition opened up the space for emphatic indigenous peoples' inclusion in the concept. For example, 'No Sustainable Development Without Indigenous Peoples' IISD/SDG KNOWLEDGE HUB, 8 August 2019 <https://sdg.iisd.org/commentary/guest-articles/no-sustainable -development-without-indigenous-peoples/> ; Dominic O'Sullivan, 'Indigenous Peoples and the UN Sustainable Development Goals' IMPAKTER 28 March 2019 <https://impakter.com/indigenous-peoples-and-sdgs/> both accessed 8 June 2021.

achieved with the concept has allowed certain sustainable values and principles to be derived from it such as the original concept of economic development and environmental protection for humans, plants, animals, birds, marine ecology, ecosystems, and biodiversity as a whole. The excessive damage to the environment as a result of oil and gas exploration, production, and transportation, without regard to environmental control in the Niger Delta, invites this investigation under international sustainable development law. The resulting degradation of the environment has reduced the lives and the living standards of indigenous peoples to extreme levels of poverty. This brings to the fore the import of the current drive by the United Nations 2030 Agenda for Sustainable Development,[20] targeted at eradicating poverty in all its forms and dimensions, including extreme poverty. [21] With commitment and political will, this agenda is expected to contribute positively to the lives of the indigenous peoples in Nigeria.

1.2 Background to this study

My interest in the plight of indigenous peoples, especially those in the Niger Delta, was aroused through knowledge acquired during my master's studies while analysing risks and how project finance impacts on sustainable development in developing nations.[22] This brought the concept of indigenous peoples to the fore and how they ought to be protected, especially during infrastructural developments and natural resource extraction.[23] Here my passion to research the dilemma of indigenous peoples suffering the consequences of resource extraction in the Niger

[20] United Nations Sustainable Development Goals, Transforming our world: the 2030 Agenda for Sustainable Development. Resolution adopted by the General Assembly on 25 September 2015 A/RES/70/1 <https://digitallibrary.un.org/record/3923923?ln=en>.

[21] United Nations Sustainable Development Goals – '17 Goals to transform our world', adopted 25 September 2015 to end poverty, protect the planet, and ensure prosperity for all <http://www.un.org/sustainabledevelopment/sustainable-development-goals/>.

[22] My LLM degree in International Commercial and Business Law at the University of East Anglia (UEA) Norwich, Law School, UK, covered international financial law with project finance as my major. International project financing supports mega projects through harmonised international finance in the developed and the developing nations of the world. Project financing is concerned with the effects of development on people located around the projects and on the environment. It therefore integrates sustainable development principles for the common importance of people being central to the development projects, particularly in the oil and gas projects where miles of pipeline are laid across jurisdictions affecting, in the main, the indigenous peoples' communities. This brings to bear the need for the developing nations to promote sustainable development initiatives and strategies in all developmental programmes for the benefit of their people who are co-located with development projects particularly of the natural resources. This is the source of my concern for the indigenous peoples and the oil and gas development in the Niger Delta that led to this doctoral research.

[23] See generally Annie Dufey 'Project finance, sustainable development and human rights. Case Study 1: the Baku Tbilisi-Ceyhan (BTC) Pipeline' International Institute for Environment and Development' (IIED) (April 2009) <https://pubs.iied.org/g02486> accessed 11 June 2021.

Delta was born and fueled. The concept of indigenous peoples is wide and varied. Therefore, my emphasis on the Niger Delta is without prejudice to other indigenous peoples in Nigeria – most notably the pastoralists (the Fulani herdsmen) and indigenous peoples co-located with solid mineral-producing regions, for example, coal and lignite in South-East, bituminous sands in the West, and iron ores in Kogi State, the Nupe and Sokoto Basins, and Enugu to name a few.[24] Thus, this research concentrates on and identifies with the indigenous peoples of the oil and gas producing region of the Niger Delta as an area of particular concern.

The Niger Delta is a network of creeks interlocked within mangrove swamps drained from the natural delta of the River Niger and covering the areas to the east and west which produce oil.[25] Reports abound of indigenous people's persistent complaints of oil spills[26] that killed all the fish; [27] and their inability to farm for plantain, palm kernel, and other vegetation relied on as community food.[28] The hazards of gas flaring have caused health problems[29] such as liver damage, skin irritation in both young and old, and deformities in children.[30] The area lacks infrastructure, roads, potable water, electricity, and life's basic essentials[31] to which the government responded in 2000 with the establishment of the Niger Delta Development Commission (NDDC).[32] That notwithstanding, due to prolonged suffering, the indigenous peoples felt helpless and their youth resolved to fend for themselves by

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[24] Ajaegbu et al, *NIGERIA* 76-81.

[25] Omuta ED, 'Poverty and Environmental Quality in the Niger Delta Region: Dependence on Biomass Fuel as the Source of Household Energy', Centre for Population and Environmental Development (CPED) (CPED Monograph Series 2011) 5-7. <https://media.africaportal.org/documents/CPED_Monograph_Series_No._5_-_Poverty_and_Environment_Quality.pdf> accessed 10 June 2021.

[26] Eshiet U, 'Oil Spill: Akwa Ibom monarch demands $100m compensation from ExxonMobil' *The NATION* (4 January 2015) 59. Ibid 'Swimming in oil' AMNESTY INTERNATIONAL 'NIGER DELTA NEGLIGENCE' <https://www.amnesty.org/en/latest/news/2018/02/niger-delta-oil-spills-decoders/> accessed 12 June 2021.

[27] 'Goi….A Fishing community lost to oil spill' *The NATION* (21 March 2014) 32-33.

[28] 'Nigeria: Petroleum, Pollution and Poverty in the Niger Delta' AMNESTY International Publications 2009, 21-34. <https://www.amnestyusa.org/wp-content/uploads/2017/04/afr440172009en.pdf> accessed 10 June 2021.

[29] Adienbo and Nwafor, 'Effects of Prolong Exposure to Gas Flaring' 13. See also: Mrabure and Ohimor, 'The need for proper gas utilization' 753.

[30] Ologunorisa, 'A review of the effect of gas flaring' 249.

[31] Oviasuyi and Uwadiae, 'The Dilemma of Niger-Delta Region' 110.

[32] To this colossal neglect the government responded with the enactment of the Niger Delta Development Commission (Establishment Act) 2000 Act No 6 Laws of the Federation of Nigeria (NDDC). The NDDC provides in Part II on 'Functions and Powers of the Commission' in s 7 (1)(b) that, the Commission shall 'conceive, plan and implement, in accordance with set rules and regulations, projects and programmes 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.'

engaging in activities such as bunkering, pipeline vandalism, and crude oil theft to break the yoke of poverty.[33] Although these activities were reportedly engaged in for the survival of the indigenous communities, under Nigerian law they remain criminal acts against the state.[34] Acts of kidnapping, vandalism, and oil-pipeline bursting to syphon off petroleum products associated with militant insurgency cannot be encouraged as social acts; they are simply acts of criminality, albeit aimed at a 'contested political settlement' as Markus Schultze-kraft terms it.[35] Even after the militants were granted amnesty by the government, acts of terrorism continued.[36] Criminality has, therefore, evolved as a way of life. [37] Notwithstanding the claims that their consent was not sought, neither are they involved in the national development of these resources,[38] being on the side of the law and within the law, in contentions and agitations, is the objective of this thesis.

However, the situation in the Niger Delta has deteriorated over the years. Examples are Oguta and Ohaji-Egbema – two local government areas in Imo State which fall within the Niger Delta region. These are crude oil producing areas, but from report on a recent study, the people are suffering because oil has brought them heartache rather than relief. It is reported that they have neither electricity nor usable roads; no hospitals for when they fall ill, and no water fit for drinking.[39] There is nothing more devastating as an indictment of poverty, than these people's tale of neglect, degradation, marginalisation, and abandonment.[40]

Petroleum is the main source of Nigeria's wealth. The Nigerian government can secure and control the resources by virtue of the power of sovereign control over natural resources enshrined in the Constitution.[41] This renders the indigenous

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[33] Ajiboye, Jawando and Adisa, 'Poverty, oil exploration and Niger Delta crisis' 224.
[34] The Nigeria Security and Civil Defence Corps Act [2007 No 73] [28th June 2003] provides in Part II (f) that the Corp shall have power to arrest with or without warrant persons engaged in: (i) criminal activity; (ii) chemical poisoning or oil spillage; (iv) activity aimed at frustrating any Government programme or policy; (vi) power transmission lines or oil pipelines or equipment vandalisation; and (h) Monitor, investigate and take every necessary steps to forestall any planned act of terrorism particularly: (i) cult and ethnic militia activities.
[35]Schultze-Kraft, 'Understanding Organised Violence and Crime' 613.
[36] Iro, 'Sowing Peace, Reaping Violence'137.
[37] Olatunji Ololade, 'Where Kids grow like bruised violets – Hard, sorry life of the children of the Delta' *The Nation* (Lagos, 5 October 2013) 14.
[38] Reported in "In the Creek – Niger Delta" Dawn 2 – Nembe – Bayelsa State, *Silverbird Television* 3.00pm (28 February 2015).
[39] Okodili Ndidi, 'Much oil, no facilities' *The Nation* (Lagos, 20 February 2015) 21.
[40] ibid.
[41] Section 44(3) Constitution of the Federal Republic of Nigeria, 1999. Laws of the Federation 1990 <https://publicofficialsfinancialdisclosure.worldbank.org/sites/fdl/files/assets/law-library-files/Nigeria_Constitution_1999_en.pdf>.

peoples powerless in the face of government's hold on what rightfully belongs to them – the land and natural resources. By virtue of its sovereignty over the oil and gas, Nigeria exercises control over oil production together with the Nigerian National Petroleum Corporation (NNPC), a state oil corporation created for that purpose.[42] The NNPC's oil production is conducted in partnership with major multi-national Exploration and Production (E&P) which operates 'predominantly in the on-shore Niger Delta, coastal off-shore areas and lately in the deep waters'.[43] Through the NNPC as Nigeria's oil business corporation,[44] Nigeria has been generating wealth for all Nigerians[45] while neglecting to conserve the source of the wealth and consider environmental degradation which prevents the people from practising their occupation, and escalates poverty.[46] Undoubtedly, indigenous peoples in the Niger Delta as traditional owners of these resources in an area they have occupied since before the colonial era [47] and in fairness they deserve to benefit more than others. However, at present, an upward review in the federal allocation of revenue includes a derivation fund for the oil producing states as evidence of an improved benefit-sharing formula.[48] Generally, however, through the federal allocation disbursed to the various constituent states and local governments, all Nigerians benefit substantially from the earnings of the oil and gas production in the Niger Delta. This is illustrated, for example, by the February 2020 disbursements by the Federation

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[42] Nigerian National Petroleum Corporation (NNPC) established on 1 April 1977 <https://www.nnpcgroup.com/About-NNPC/Pages/Corporate-Information.aspx> accessed 12 June 2021.

[43] NNPC: Oil Production <https://www.nnpcgroup.com/NNPC-Business/Upstream-Ventures/Pages/Oil-Production.aspx> accessed 12 June 2021.

[44] ibid. Under NNPC Production, 'Nigeria produces only high value, low sulphur content, light crude oils – Antan Blend, Bonny Light, Bonny Medium, Brass Blend, Escravos Light, Forcados Blend, IMA, Odudu Blend, Pennington Light, Qua-Iboe Light and Ukpokiti.' All are produced from the Niger Delta on-shore and off-shore areas, the primary source of Nigeria's revenue.

[45] Imobighe, 'Paradox of Oil Wealth' - Imobighe explained the paradox in the revenue sharing/allocation formula in Nigeria for the period 1990-1996, where states outside the Niger Delta region top the allocation list as highest earners for that period. 163.

[46] Onwuka EC, 'Oil extraction, environmental degradation and poverty' - Onwuka explained that the poverty in the Niger Delta is the result of oil extraction which caused the indigenous people to become impoverished through increased environmental abuse. 655-662; Ugochukwu and Jurgen, 'Negative impacts of oil exploration on biodiversity' 139-147 - On their part, Ugochukwu and Jurgen expounded further consequences of negative impact of oil exploration on biodiversity. See also: Olusiyi, 'Socio-economic implications and environmental effects' - where Olusiyi's empirical study confirmed a strong relationship between the volume of oil spilled and the area covered by the spillage, 7-23.

[47] Na'Allah, *Ogoni agonies* 329, 'The Ogoni people were independent before 1901 and were finally absorbed into the Nigerian colony by the British in 1913.'

[48] The statutory allocation sharing formula in the Federation Account of February 2020 reveals remarkable improvement in the benefit sharing formula of the 13% derivation fund shared for the oil producing states that increases their earnings and positions most of them in the highest earner bracket. See Federation Account Allocation Committee (FAAC) <https://www.nigerianstat.gov.ng/pdfuploads/Federation_Account_Allocation_Committee_(FAAC)-_FEB_2020_Disbursement.pdf> accessed 14 June 2021.

Account Allocation Committee.[49] Notwithstanding the sums allocated by the thirteen per cent derivation funds, which remunerate the oil producing states for their ownership status and place them above most of the states in earnings,[50] a more inclusive approach to benefit sharing for indigenous peoples is advocated in this research. [51] This is analysed in this thesis and an appropriate legal framework is proposed in Chapter five.

There are nine oil producing states in the Niger Delta which constitute the member states of the Niger-Delta Development Commission. These states are: Abia, Akwa-Ibom, Bayelsa, Cross River, Delta, Edo, Imo, Ondo, and Rivers states.[52] Within these states are ethnic groups (so-termed as Nigeria has yet to acknowledge the concept of 'indigenous peoples'), based on their characterisation in terms of culture, including language, value systems, and normative behaviour, and whose members are anchored in a particular part within the state.[53] Some of the identifiable ethnic/indigenous groups across the nine states are the Urhobo, Igbo, Isekiri (Itsekiri), Isoko, Ukwani (Kwale), Izon (Ijo/Ijaw), Ilaje, Ogoni, Gokana (Kana), Andoni, Egbema, Abua (Odual),Engenni (Ngene), Degema, Qua, Abayon, Bekwarra, Etung, Nkim, Nkum, Ododop, Etsako, Uneme (Ineme) Ibibio, Okobo (Okkobor), Eket, Oron, Ibeno, Anang, and Ebana (Ebani), among others.[54]

Of these groups, the Ijaw and Ogoni peoples have been most vocal in demanding a remedy for their suffering and environmental plight through unrelenting protests and agitation since the early 1990s.[55] This resulted in conflicts with the military government of the time and led to persecution, arrests, trials, and the eventual

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[49] ibid.

[50] ibid. In the February 2020 Federation Allocation, the oil producing states received: Delta (N16,917,712,816.96) 1st; Akwa Ibom (N12,891,696,033.12) 2nd; Rivers (N12,677,853,695.23) 3rd; and Bayelsa (N12,318,796,133.30) 4th. (Bayelsa is at the bottom of the list without derivation with N2,880,140,765.98). As shown, four oil states top the allocation list as highest earners, followed by non-oil producers, Kano (N5,163,104,992.69) 5th and Lagos (N4,360,577,112.02) 6th. This is a positive indication of an improved benefit sharing formula in favour of the Niger Delta states.

[51] Gonzalez, 'Poverty, oil and corruption'509-538.

[52] Niger-Delta Development Commission (Establishment etc) Act 2000 (Act No 6 Laws of the Federation of Nigeria 12 July 2000) ss 2(1) and 4.

[53] Ajaegbu et al, *NIGERIA* 12.

[54] ibid 14-20.

[55] The Ogoni and Ijaw people persisted in their claims and demands. See generally, the Ogoni Bill of Rights presented to the Government and people of Nigeria in October 1990 <http://www.mosop.org/Ogoni_Bill_of_Rights_1990.pdf> ; and the KAIAMA Declaration by the Ijaw youths of the Niger Delta of 11 December 1998 <http://www.unitedijaw.com/kaiama.htm> both accessed 14 June 2021.

conviction and execution of Ken Saro-Wiwa and eight other Ogoni leaders in 1995.[56] The agitation has since escalated and has taken on criminal proportions at the present time.[57] This criminality has made these states 'high risk' – too high for even multinational corporations to accept. [58]

But the struggle of the indigenous peoples of the Niger Delta is considered a fight against abject poverty in the midst of plenty, and a demand that their rights as indigenous peoples be recognised, acknowledged, and institutionalised. This is the problem to which this research seeks a solution. Oil and gas production in the Niger Delta has simultaneously created poverty in the lives of the indigenous inhabitants.[59] Nigeria's geological features consist of a diversity of rocks and mineral wealth from the mountainous eastern frontiers and the wind-swept northern hinterland and the great plains on the Saharan fringe, and sediment from the Nigerian hinterland that led to the formation of the petroleum-rich Niger Delta on the vast coastline that borders Nigeria to the south.[60] Nigeria's petroleum resources occur, in the main, in the Niger Delta[61] making it the highest income earner for Nigeria.[62] The Niger Delta

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[56] ACHPR Communication 155/96: *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria* (the *Ogoni* case).(the *Ogoni Judgment* 27 October 2001) <http://www.achpr.org/communications/decisions/155.96/>.

[57] In retaliation to the neglect and poverty they have suffered, the indigenous peoples have turned to ravaging the Delta through criminal activities, but this is not the solution as the destruction shall constitute an environmental problem beyond salvage. In a newspaper interview, a Shell Petroleum Development Company official who commented on the United Nations Environment Programme (UNEP) Report on the Ogoni land said that the devastation wrought by criminals in the area may take up to half a century to clean up. It is reported that illegal refinery and bunkering are the order of the day in the Delta with criminals stealing crude oil from the pipelines in the Niger Delta. It was also reported that a tanker vessel being used caught fire and was destroyed after the crew had abandoned the vessel. The spill-over waste remains as an environmental hazard. AFP, 'Why oil theft will continue in the Niger Delta' *The Nation* (22 April 2013) 2-3; O'Neil Shola, 'Illegal Bunkering in the Niger Delta' *The Nation* (Lagos, 13 September 2013) 25.

[58] Wherever international financing is involved, risks and their mitigation are primary concerns. It is obvious that someone or an entity must bear the high risk involved in the oil production in the Niger Delta at any given time. Criminal activities perpetrated by the youths as noted in n. 58 engender high risk in that region which has become a problem for the multinational oil corporations. Meanwhile, Nigerians blame the MNCs for the unrest, while they, in turn, place the burden of risk on the doorstep of the Nigerian government. The MNCs are overwhelmed by the criminality that has ensued for generations and become a risk too high for them to bear. According to the Chief Executive of Royal Dutch Shell: 'We cannot solve community problems in the Niger Delta … that's for the Nigerian government perhaps to solve'. Shell plans to wind down its operations by terminating its onshore activity in the Niger Delta. See the report of Neil Munshi, 'Nigerians blame Shell for "community problems" in Niger Delta' *Financial Times* (8 June 2021 <https://www.ft.com/content/2ff5fe87-8621-4ab4-afa2-c8df0ecb6a97> accessed 11 June 2021.

[59] The indigenous people have difficulty earning income from their traditional occupation after years of uncleaned oil pollution. See the report of Will Ross, 'Niger Delta pollution: Fishermen at risk amidst the oil' (30 May 2013) *BBC News, Bayelsa state* <https://www.bbc.com/news/world-africa-22487099?piano-modal> accessed 21 June 2021.

[60] Ajaegbu et al, *NIGERIA* 71.

[61] ibid 76.

is equally the most biodiverse region in Nigeria.[63] Regular untreated oil spills, blatant dumping of industrial waste, and promises of development projects that are aborted midway, have, however, culminated in unresolved environmental and health problems in the region.[64] These problems, recorded and reported as far back as the early 1980s, have persisted and in fact been exacerbated[65] by the added element of criminality among the indigenous peoples themselves demanding their rights and engaging in a fight for survival.[66] The indigenous peoples have rights which are founded on the aboriginal ownership of the land and resources from which petroleum is being extracted for Nigeria. These rights are protected by international human rights law. These rights have been abused. This abuse ought to be remedied through the legal process this research seeks to analyse by filtering through all relevant international, regional, and domestic laws for the requisite protection of the

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[62] The Federation Account Allocation Committee (FAAC) published Nigeria's revenue disbursements as follows: Disbursement Series 2017: Akwa Ibom state N143.61bn and Rivers state N119.63bn as the highest allocation for 2017; Disbursement Series 2018: Delta state N213.63bn and Akwa Ibom state N202.37bn as the highest allocation in 2018. The high income is based on the 13% derivation fund for the oil producing states which reflects the extra benefit from oil production for the oil states in the Niger Delta. National Bureau of Statistics <https://nigerianstat.gov.ng/elibrary?queries[search]=FAAC&page=4&offset=30> ; <https://nigerianstat.gov.ng/elibrary?queries[search]=FAAC> accessed 16 June 2021.

[63] CKA Asangwe, 'Chapter 1 (1.1) Land, climate and vegetation'; JO Adejuwon 'Chapter 3 (3.5) Biotic Resources' in Ajaegbu et al *NIGERIA* 3-9; 91-96. The Niger Delta is described as the southernmost physiographic region of Nigeria that protrudes into the Gulf of Guinea, extending from the Benin River in the west to the Bonny River in the east, covering over 450km from west to east, and constituting about 60% of the 800km Nigerian coastline. This makes the ND an integral part of the southern lowlands described as one of the largest delta systems in the world. The expansive biodiversity of the ND covers – Coastal Lowlands of lagoons, creeks and swampy terrain, and Interior Lowland with 'sedimentary deposits of Cretaceous and Tertiary rocks of shales, coal, sandstones and clays, with abundance of limestone'. 4 Due to its tropical climate the Niger Delta enjoys a rich vegetation of forests. The ND boasts of the three forest zones, from the coast inland: the Saline water swamp; the Freshwater swamp, and the Tropical evergreen rainforest. (7-8). Thus, the biological diversity spread across the ND with all species of: reptiles, amphibians, birds, mammals, fishes, plants and fungi (95-96).

[64] A US Non-Governmental Delegation Trip Report 'Oil For Nothing: Multinational Corporations, Environmental Destruction, Death and Impunity in the Niger Delta' (6-20 September 1999) <http://www.essentialaction.org/shell/report/> accessed 21 June 2021.

[65] See n 59 above, and see generally, MAO Aluko, 'Sustainable Development, Environmental Degradation and the Entrenchment of Poverty in the Niger Delta of Nigeria' (2004) 15(1) Journal of Human Ecology 63-68.

[66] In the fight for survival, the Niger Delta people have taken their fate and the law into their own hands. Newspapers regularly report criminal activities in the region perpetrated by the Niger Delta people claiming greater right to the oil in the region. See Shola O'Neil, 'Illegal Bunkering in the Niger Delta, the Military Connection' *The Nation* (Lagos,13 Sept 2013) 25-27. The South-south Regional Editor, Shola O'Neil, examined how the huge revenue accruing from criminal activities is funding a parallel government and corrupting traditional leadership in Niger Delta communities. He traces the involvement of security agents in this heinous crime against the state. See also, Anos, 'Nigerians risk death working at illegal oil refineries' *The Nation* (Lagos, 17 Oct 2013) 2-3. According to this report, 'the boys started pipeline vandalism both because of their aggression towards the oil companies and because they saw the amount of money their communities were being offered [after company oil spills]. They went to the creeks not with guns but with the illegal refinery business.' These reports reveal the consequences of long years of unresolved protest by indigenous peoples with rights to their land and natural resources.

rights of indigenous peoples and the sustainability of the oil and gas development in the Niger Delta.

1.3 Elementary factors of the study

The elementary factors of the study are interwoven around indigenous peoples as the main concern. These factors are the international human rights and environmental laws, integrated into sustainable development to ensure that indigenous peoples enjoy all accruable rights and benefits, particularly the right to development.

1.3.1 Indigenous peoples and international instruments

The invasion, colonisation, and subjugation of peoples and their lands on all continents of the earth by the British Empire,[67] and then by Europe, destabilised indigenous cultures, lifestyles, and traditional customary governance. Furthermore, the colonisers seized the land, knowledge, and historical properties of the indigenous peoples. This unchallenged expansion of colonial domination starting in the sixteenth century and spanning over four hundred years, drastically affected the lives of indigenous peoples globally.[68] However, the need to discover 'who they are' in the wake of colonisation awakened a need to assert a sense of identity in the indigenous peoples. The people needed to establish a sense of worth as the 'sons of the soil' or 'natives' which characterised indigeneity. Hence the idea of being indigenous was born, to counteract the perceptions of colonial occupiers or new settlers.[69]

The effect of colonisation affected the indigenous peoples of North America, Asia, New Zealand, Australia, and Africa in particular, which was seen by the European colonisers as an 'exotic property' to be portioned off in the scramble for Africa. Indigenous peoples were firmly established on their lands when these first Europeans arrived in North America, Australia, New Zealand, and Africa.[70] The situation in Africa also featured white settlers in countries such as South Africa, Namibia, Zimbabwe and Angola. The issue of identifying or labelling certain groups as indigenous is, in most African states, a challenge – yet these groups exist; they

[67] Gott, *Britain's Empire* 472. During the British Empire's conquest, indigenous peoples were suppressed and neglected even by the so-called 'settlers' who later rebelled against the Empire. Empire take-overs of indigenous properties was the order of the day as happened to the East India Company which was wound up and all its possessions transferred to the British Crown. The British Empire saw gross human rights abuses including slavery, subjection, subjugation, and killings.
[68] Smith and Ward, *Indigenous Cultures* 1.
[69] ibid 6.
[70] Borch, *Conciliation Compulsion Conversion* xii.

are real and they have peculiar values that should be protected. African indigenous peoples and their counterparts in other parts of the world have values and attributes that are similar, and better protected and governed by international law.

Under international law, indigenous peoples derive protection of their rights from international human rights instruments. Initially, indigenous peoples' rights could be protected by universal instruments such as the Universal Declaration on Human Rights (UDHR),[71] the International Covenant on Economic, Social and Cultural Rights (ICESCR),[72] and the International Covenant on Civil and Political Rights (ICCPR).[73] The International Labour Organisation's Convention No 169 (ILO C169) and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)[74] are the most prominent instruments that make provisions for the protection of the rights of indigenous peoples.

1.3.2 Indigenous peoples, environmental law and sustainable development goals (SDGs)

Indigenous peoples are concerned about biodiversity and how to maintain the healthy environment through the prudent use of resources, but this is not true of those corporations involved in exploration and exploitation of petroleum resources. These 'explorers' pollute the environment with oil spills and waste natural resources though gas flaring. Sustainable development may therefore be described as 'transformational development' – a lifelong journey[75] interwoven with biodiversity and the human need for healthy living and sustainable use of natural resources.

The United Nations seek to realise human rights for all through the Sustainable Development Goals (SDGs)[76] which are integrated and indivisible, balancing the three dimensions of sustainable development: the economic, social, and

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[71] The Universal Declaration on Human Rights was proclaimed by the United Nations General Assembly in Paris on 10 December 1948, see GA res 217A (III) <http://www.un.org/en/documents/udhr/>.

[72] International Covenant on Economic, Social and Cultural Rights was Adopted and opened for signature, ratification, and access by GA res 2200A (XXI) of 16 December 1966. It entered into force on 3 January 1976 <http://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>.

[73] International Covenant on Civil and Political Rights Adopted and opened for signature, ratification, and accession by GA res 2200A (XXI) of 16 December 1966. The Convention entered into force 23 March 1976 <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

[74] United Nations Declaration on the Rights of Indigenous Peoples A/RES/61/295 of 13 September 2007<http://www.un.org/esa/socdev/unpfii/documents/drips_en.pdf>; <https://undocs.org/A/RES/61/295>.

[75] Myers, *Walking with the Poor* 3.

[76] United Nations, '17 Goals to transform the worlds' <http://www.un.org/sustainabledevelopment/> accessed 19 June 2021.

environmental. The agenda of the SDGs is to transform the world and make it a better place for all to live, touching the marginalised and vulnerable peoples more than all else. For the purpose of this research, the SDGs that specifically touch the lives of indigenous peoples are:

Goal 15: Sustainably manage forests, combat desertification, halt and reverse land degradation, halt biodiversity loss. This goal supports the need for transformative changes to restore and protect nature and bring an end to deforestation and desertification. Forests are crucial to the maintenance of life on earth and it is reported that some '1.6 billion people depend on forests for their livelihood, including 70 million indigenous people'.[77] According to Katila, Pierce Coffer, de Jong et al, forests provide ecosystem functions crucial for human welfare.[78] The authors also affirm that the 'contributions of forests to achieving the SDGs were explored before the SDGs were formally adopted',[79] and forests are linked directly or indirectly to each of the SDGs.[80] Therefore, deforestation portends a disaster of great magnitude for biodiversity, for the people who live in the forests, and for the climate. It is important to note, in general, that 'the biological diversity and ecosystems on earth are fundamental to our life',[81] more especially they are vital as homes of indigenous peoples.

Goal 12: *Ensure sustainable consumption and production patterns*. The goal here is to check the use of the natural environment and resources to limit the destructive impact on the planet.[82] The sustainable consumption and production phenomenon, if well implemented, could divorce economic growth from environmental degradation and increase resource efficiency as well as promote sustainable lifestyles. Thus, Goal 12 can be summed up as how natural resources and goods in general could be produced and consumed in ways that ensure continued availability of resources for future generations.[83] This phenomenon could also contribute substantially to poverty

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[77] United Nations, SDG Goal 15 'Life on Land' <https://www.un.org/sustainabledevelopment/biodiversity/> accessed 17 June 2021.
[78] Katila et al (eds), *Sustainable Development Goals* 10.
[79] ibid.
[80] ibid.
[81] The Sustainability Book SDG 15, Life on Land <http://sdgbook.com/2019/09/24/life-on-land/> accessed 18 June 2021.
[82] United Nations, SDG Goal 12 'Responsible Consumption and Production' <https://www.un.org/sustainabledevelopment/sustainable-consumption-production/> accessed 17 June 2021.
[83] The Sustainability Book SDG 12 'Responsible Consumption and Production <http://sdgbook.com/2019/09/24/responsible-consumption-and-production/> accessed 18 June 2021.

alleviation. The collective features of Goal 12 would therefore profoundly impact on the indigenous peoples of the Niger Delta.[84]

Goal 10: Reduce inequality within and among countries. By reducing inequality the risk of vulnerable populations such as refugees and indigenous peoples from being left behind would be reduced.[85] Inequality breeds contempt, and 'when the gap between the poor and the rich become too great in a society, it can undermine the trust between people and people's trust in those who govern'.[86] Although all seventeen SDGs are founded and grounded in the three dimensions of sustainable development – economic, social and environmental[87] – this thesis identifies the three SDGs discussed here as those that impact directly on the lives of the indigenous peoples of the Niger Delta.

The 2030 Agenda for Sustainable Development sets targets for the SDGs. At the apex is Goal 1 which, by 2030, must end poverty in all its forms everywhere – 'it is set to build the resilience of the poor and those in vulnerable situations and reduce their exposure and vulnerability to climate-related extreme events and other economic, social and environmental shocks and disasters' (1.5 – Goal 1 Targets).[88] This could be linked to the form of poverty in the Niger Delta resulting from long years of oil spills, no 'clean-ups', and gas flaring with perpetual CO_2 emission impacting on climate change. Perhaps fifteen years is somewhat unrealistic as a period within which to eradicate the type of poverty associated with environmental devastation. But unless the Nigerian government has the political will consciously to implement Agenda 2030 during the actualisation period (2015–2030), the eradication of poverty associated with environmental devastation in the Niger Delta is simply not feasible.

For a more compelling approach to achieving sustainable development, this research relies more on relevant sustainable development instruments such as the Convention on Biological Diversity (CBD) and the United Nations Framework Convention on Climate Change (UNFCCC). As discussed in this section, since indigenous peoples live close to biodiversity and the ecosystems, their lives and

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[84] ibid.
[85] United Nations SDG Goal 10 'Reduced Inequality': <https://www.un.org/sustainabledevelopment/inequality/> accessed 17 June 2021.
[86] The Sustainability Book – SDG 10 'Reduced inequalities' <http://sdgbook.com/2019/09/24/reduced-inequalities/> accessed 18 June 2021.
[87] Preamble (n 20).
[88] SDG Goal 1 <https://sustainabledevelopment.un.org/sdg1> accessed 19 June 2021.

livelihood depend solely on the health of the environment as will be explained next from the perspective of the African Commission on Human and Peoples' Rights.

1.3.3 African indigenous peoples and sustainable development

The Working Group on Indigenous Population/Communities in Africa[89] was set up by the African Commission on Human and Peoples' Rights (ACHPR) in 2000 to discuss and formulate recommendations for the protection of the human rights of the most disadvantaged, marginalised, and excluded group on the Continent.[90] Based on the international conception of the African indigenous peoples and notwithstanding the former retrogressive notion that all Africans are indigenous, it is now understood and acknowledged that indigenous peoples exist in Africa and indeed in Nigeria.

According to the indigenous peoples of Africa in the Pan African Rio+20 Declaration,[91] the Working Group will continue to define its development goals based on its cultural, social, economic knowledge, occupations, practices, and technologies in its contributions to sustainable development. Through this declaration the Group repeated its call on African governments to respect the rights of indigenous peoples towards Rio+20 and beyond, as enshrined in the CBD, the Agenda 21,[92] the UNDRIP and the ILO C169. Significantly, the Group agreed to challenge the dominant development models that have not contributed to sustainable development, poverty alleviation, and the preservation of the environment. It wants the African countries to ratify the ILO C169 which, together with the UNDRIP, should serve as a key framework. The African indigenous peoples focus their demands on

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[89] The ACHPR/Working Group on Indigenous Population/Communities in Africa was established by the African Commission at its 28th Ordinary Session in November 2000 in Cotonou, Benin. The WGIP was mandated to study the impact of the African Charter on the well-being of indigenous communities and recommend monitoring and protection procedure for the rights of indigenous communities. <https://www.achpr.org/specialmechanisms/detail?id=10>

[90] ACHPR, 'Indigenous Peoples in Africa: The Forgotten Peoples?' The African Commission's Work on Indigenous peoples in Africa (2006) – International Work Group for Indigenous Affairs, Copenhagen <http://www.achpr.org/files/special-mechanisms/indigenous-populations/achpr_wgip_report_summary_version_eng.pdf>

[91] Declaration of Indigenous Peoples of Africa on Sustainable Development and Rio+20 Arusha, United Republic of Tanzania 19 April 2012. The Indigenous People of Africa held a preparatory meeting on Sustainable Development and Rio+20 in Arusha to deliberate on the objectives, themes, and substantive matters and released the declaration. Rio+20 is the short name for the United Nations Conference on Sustainable Development held at Rio de Janeiro in June 2012 – twenty years after the 1992 Earth Summit in Rio which resulted in the original Rio Declaration <https://rightsandresources.org/blog/declaration-of-indigenous-peoples-of-africa-on-sustainable-development-and-rio20/> accessed 21 June 2021.

[92] The United Nations Conference on Environment and Development 1992 - *Agenda 21.* The document represents sustainable development orientation at its best. The Agenda is aimed at achieving developmental and environmental objectives of the global economy at both national and international levels. <https://undocs.org/en/A/CONF.151/26?Rev.1(Vol.1)>.

poverty eradication and the green economy in the context of sustainable development and aim to establish an institutional framework for sustainable development and governance.[93]

The indigenous peoples of the world – including those in Africa – have spoken with one voice and undertaken to assume the historical responsibilities to reverse centuries of predation, pollution, colonialism, the violation of rights, and genocide through the Indigenous Peoples International Declaration on Rio+20.[94] Their decision for self-determination and sustainable development is the basis for living well which is realised through secure land rights and territorial management and the establishment of vibrant community economies. For the indigenous peoples these local economies provide sustainable local livelihoods, community solidarity, and are critical components of resilient ecosystems.[95] The traditional occupation indicates their closeness to the land and environment just as most African oral traditions emphasise the relationships between their ancestors and the natural world, especially plants and animals.[96] This is promising for the indigenous peoples of Africa, but there is still a need to broaden their perspectives to accommodate the peculiar terrain of the indigenous peoples of the Niger Delta who, apart from being farmers and hunters, are primarily fishermen and fisherwomen in the dense mangrove coastline areas.

1.3.4 Indigenous peoples and the right to development

One of the fundamental rights of indigenous peoples is the right to development. The concept of development is all-encompassing. The United Nations is concerned with the integrated development of the human being, economic and social progress, and

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[93] See n 91. The declaration 'On the Green Economy in the Context of Sustainable Development and Poverty Eradication'.

[94] 'Indigenous Peoples International Declaration on Self-Determination and Sustainable Development' June 2012 Rio de Janeiro – Indigenous Peoples from all regions of the world met at the Indigenous Peoples International Conference on Sustainable Development and Self-Determination held between 17 and 19 June 2012 at the *Museu da Republica i*n Rio de Janeiro, Brazil. (Cultural Survival 19 June 2012) <https://www.culturalsurvival.org/news/indigenous-peoples-international-declaration-self-determination-and-sustainable-development> accessed 21June 2021.

[95] ibid s 3: 'Strengthening diverse local economies and territorial management'. See also 'Indigenous Peoples Release Rio+20 Declaration' (Forest Peoples, 22 June 2012) <https://www.forestpeoples.org/en/topics/sustainable-livelihoods/publication/2012/indigenous-peoples-release-rio-20-declaration> accessed 21 June 2021.

[96] Brizuela-Garcia and Getz, *African Histories* 2.

the development of all peoples. This is encapsulated in article 1(1) of the UN Declaration on the Rights to Development, 1986:[97]

> [T]he right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.

The UNDRIP[98] on its own qualifies the types of development as the 'right to develop their political, economic and social systems or institutions';[99] and then, 'determine and develop priorities and strategies for exercising their rights to development',[100] and more specifically in alignment with the principles of sustainable development, that, 'indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.'[101] The qualifying term, 'priorities' is equal to 'needs' which is the necessary factor of 'when' and 'what' to develop. This is projected in Principle 3 of the Rio Declaration which states that 'the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations'.[102]

The UN Declaration on the Right to Development proclaims the right to development as an inalienable right for all peoples. Thus, for the indigenous peoples it is important for the enjoyment of their economic, social, cultural and political liberty. The ILO C169 provides in article 7(1) for the process of development as it affects lives, beliefs, institutions, spiritual well-being, and the lands indigenous peoples occupy or otherwise use. The African Charter[103] provides for the right to development in article 22(1) that all peoples shall have the right to their economic, social and cultural development, just as other instruments generally provide for the right to exercise

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[97] United Nations Declaration on the Right to Development A/RES/41/128 of 4 December 1986. <https://undocs.org/en/A/RES/41/128>.
[98] See n 74.
[99] Art 20(1) of UNDRIP.
[100] ibid art 23.
[101] ibid art 32(1).
[102] The Rio Declaration on Environment and Development of June 1992 is a reaffirmation of the Declaration of the United Nations Conference on the Human Environment adopted at Stockholm on 16 June 1972 and sought to build on it. The Rio Declaration aimed at protecting the integrity of the global environmental and developmental system. The proclamation is contained in the 27 Principles <https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_VOL.1_Declaration.pdf>.
[103] African Charter on Human and Peoples' Rights (the African Charter) <https://www.achpr.org/legalinstruments/detail?id=49> accessed 25 June 2021.

control over economic, social and cultural development.[104] And, essentially, article 22(2) imposes responsibility on states to facilitate and create the enabling environment for the right to development to be achieved.

Development entails the process of progress, growth, or upgrading; a process taken for improvement or improved benefit. The benefit of development is not static. That is why sustainable development is an improved situation that is built by one generation which could be relied on by another. The notion that, present generations should not compromise the ability of future generations to meet their own needs is a key requirement of sustainable development which is termed 'justice to the future generations'.[105] This 'justice to the future generations' thus places a pre-emptive obligation on the present generation as a duty to the next generation. As the indigenous peoples in Nigeria have a right to development now and in the future, the essence of the right to development will be discussed later in Chapter four.

1.4 Problem Statement

Based on the explanations in the sections above, this thesis seeks to address the claims and protests of the indigenous peoples of the Niger Delta, the continuous struggle for recognition and status of these vulnerable people, who relentlessly aspire to self-government and self-determination. Their claim to indigeneity above others is not to deny others similar rights. But by embracing their identity they can adequately analyse the particularities of their suffering and seek protection under international human rights law and moral standards.[106] Fundamental to this argument is the drive for national recognition of the indigenous peoples in Nigeria to enable them to benefit from international legislative provisions such as the ILO C169, and the UNDRIP. The problem statement can be summarised as follows:

> The Niger Delta is the richest region in Nigeria, the source of Nigeria's wealth created by oil and gas production that has been instrumental in environmental degradation. The indigenous peoples as traditional owners of the natural resources generating the wealth, ought to be considered for benefit-sharing, yet they live in poverty and in unhealthy and degraded environment.

[104] Art 7(1) of ILO C169; art 20(1) of the African Charter; arts 20(1), 21(1)–(2), and 23 of UNDRIP.
[105] Mathis (ed), *Efficiency, Sustainability, and Justice* viii.
[106] *African Commission Book* – Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities DOC/OS(XXXIV)/345 88 <http://www.achpr.org/files/special-mechanisms/indigenous-populations/expert_report_on_indigenous_communities.pdf>. Also available at <https://www.achpr.org/presspublic/publication?id=51> accessed 26 June 2021.

Additionally, the indigenous peoples deserve legal recognition and for their rights to be protected under all relevant international instruments.

1.5 Point of assumptions

Nigeria operates a democratic system of government. The assumption of this thesis is for indigenous peoples of the Niger Delta to have a say in their own governance as their right to self-determination. Since Nigeria is a member of the United Nations and the African Union, and is signatory to numerous international treaties, the country has an obligation to allow her peoples, including the indigenous peoples, to benefit from all instruments of protection adopted by these bodies.

The assumptions prevail that, the indigenous peoples of Nigeria have rights to enjoy the benefits of sustainable use of their lands and natural resources both now and in the future, and that these rights are protected by international law.

1.6 Research questions

The research questions are based on how the social, economic, and environmental conditions of sustainable development and international human rights affect indigenous peoples. This will be limited to the indigenous peoples of the Niger Delta and their communities, and the need to protect their rights within the oil and gas producing region of Southern Nigeria called the Niger Delta.

This research advocates for the protection of the rights of indigenous peoples of the Niger Delta. If the indigenous peoples of the Niger Delta region of Nigeria possess the same rights as other indigenous peoples the world over, three questions arise.

- What are the available provisions under existing international human rights and sustainable development laws and instruments for the protection of the indigenous peoples of the Niger Delta?
- How can these laws bring relief to the indigenous peoples of the Niger Delta as foremost beneficiaries of the wealth drawn from the land and natural resources?
- How can these international provisions be domesticated as municipal laws or modelled into a legal framework for the rights of indigenous peoples of the Niger Delta and, by analogy Nigeria as a whole?

1.7 Objectives of the study

The aim of this research is to harness all available data on the rights of indigenous peoples and sustainable development for the benefit of the indigenous peoples, particularly in the Niger Delta, and generally in Nigeria. It will be a facilitator for the need to legislate on the protection of the rights of the indigenous peoples in Nigeria.

The objectives are as follows:

1. To ensure political and legal recognition of the indigenous peoples based on regional and international standards.
2. To evaluate the need for protection of the rights of the indigenous peoples in the Niger Delta to their traditional land and natural resources including the right to self-determination and the right to development.
3. To recommend an amendment of the provisions of the Constitution of the Federal Republic of Nigeria 1999, governing land and natural resources to reflect the interests and rights of the indigenous peoples.
4. To advocate for the ratification of ILO Convention C169 and the adoption of the UN Declaration on the Rights of Indigenous Peoples as special instruments for the benefit of the indigenous peoples in Nigeria.
5. To put forward a legal framework on sustainable development of natural resources in Nigeria.

1.8 Research methodology

This is a scientific legal research project based on the pursuit and systematisation of knowledge[107] of sustainable development principles to provide a strong platform on which the indigenous peoples could stand. The primary goal of systematisation of knowledge is to convert recognised and tacit knowledge to recognised and codified knowledge.[108] Thereafter, the knowledge is crystallised, reused, and shared to complete the process of systematisation. To this end, knowledge collection ought to be conducted in a systematic and organised manner.[109]

Jurisprudence provides the basis on which this research can conceptualise its analysis and argument. Analytical jurisprudence provides an analytical insight into

[107] Hoecke (ed), *Methodologies of Legal Research* 21.
[108] Mizoguchi and Kitamura, 'Foundation of knowledge systematization' 18.
[109] Tomiyama et al, 'Knowledge Systematization' 39.

law, thus reflecting basic disagreement over the nature of law itself.[110] The knowledge thus acquired from the research sources will be assessed, analysed and utilised based on considerations of quality. This research aims to apply the theory that interpretation is an inherent normative legal doctrine as acknowledged by many legal scholars and theorists.[111] In *Methodologies of Legal Research,* reference is made to Kelsen's theory that not only should legal doctrine investigate the logical structure of legal norms, principles, and underlying values, it should also interpret the content.[112] This thesis seeks to work through this mode in achieving its goal. The principal source of knowledge for this thesis is, therefore, a literature study of textbooks, journal materials, periodicals, newspapers, and electronic sources. Materials from other disciplines and lectures, statutes, international instruments (including soft law), legal reports, and judicial decisions will provide the authoritative sources needed to support all legal arguments.

1.9 Limitation of the study

This study has two main limitations. One, the research cannot involve any empirical interviews or location studies due to the sensitive nature of the research and the region under review. Past efforts have been treated with scepticism. Reports from reliable websites supplemented by scholarly reports, books and journals will therefore suffice. The second limitation arises from the first, that is, retrieval of data from government sources in Nigeria is difficult. This study will rely on global and national newspapers, magazines, journals, media, and most essentially, on international organisational and institutional websites.

1.10 Scope of the study

The consideration of this study is to justify the elements of the topic in the body of the thesis. The thesis will explore all principles of sustainable development that support indigenous peoples' existence. Through this exploration process, various rights of the indigenous peoples enshrined in sustainable development principles will be identified, collated, and aligned with fundamental human rights in the most relevant international human rights instruments, in particular the ICCPR and the ICESCR. Reliance is also placed on the two main indigenous peoples' rights

[110] Coyle, 'Two Concepts of Legal Analysis' 16-17.
[111] Hoecke (ed), *Methodologies of Legal Research* 58.
[112] ibid 57.

instruments – the UNDRIP and ILO C169 which are yet to be adopted or ratified by Nigeria. However, the essence of these instruments is explored in the thesis and the research conclusion as regards them is explained in the concluding chapter.

1.11 Chapter overview

Chapter one provides the introduction and background to the study. It offers a research methodology while also explaining the limitations and scope of the study. It sets out the research questions and objectives of the study to guide the research.

Chapter two presents the theoretical and conceptual framework of the thesis. Since the entire study is based on sustainable development and the rights of indigenous peoples, this chapter conceptualises these elements. The chapter lays the foundation for indigenous peoples' rights over land and natural resources under international law and the reason why sustainable development is proposed as the only appropriate mode of development that can protect those rights. For better enhancement of the rights of indigenous peoples under sustainable development, the theoretical framework most suitable is Sen's theory of freedom which will be thoroughly explored through the perspective of the capabilities approach to poverty eradication. All these factors are to be achieved within the context of sustainable development in the Niger Delta.

Chapter three explores the legal aspects of the Niger Delta conflict which is crucial to this research finding a legal solution to the conflict in the Niger Delta. The chapter covers how the human rights of the indigenous peoples can be protected under international, regional, and national human rights law. The chapter reviews the *Ogoni* case to gain a critical insight into the human rights violations and abuses that overran the Niger Delta region from the decision of the African Commission on Human and Peoples' Rights (ACHPR).

Chapter four analyses and compares the concept of state sovereignty over natural resources and indigenous peoples' permanent sovereignty over natural resources. The chapter expounds all the United Nations resolutions on the concept to argue that sovereignty is 'peoples' sovereignty' despite the resolutions asserting the sovereignty of the state. Since natural resources are the main source of wealth for African nations, the chapter takes us through the position of certain African states on the principle, and how many African nations have enshrined the concept in their

constitutions, including Nigeria's constitutional authority over the concept to the detriment of the indigenous peoples of the Niger Delta. The chapter discusses how this misunderstood conception should be reviewed in the Nigerian Constitution.

Chapter five presents the contents recommended for inclusion in a legal framework on sustainable development of natural resources in Nigeria. The vital issues compiled in this chapter are recommended for adoption in the existing framework on sustainable development, or for inclusion in policy programmes or initiatives on development.

Chapter six, the final chapter, presents the conclusions and recommendations of the thesis.

CHAPTER TWO

CONCEPTUAL AND THEORETICAL FRAMEWORK

2.1 Introduction

As explained in Chapter one, this thesis seeks to argue the need for the protection of the rights of the indigenous peoples in the Niger Delta region of Nigeria where the exploration and exploitation of petroleum has destroyed the environment and impoverished the people. This could have been avoided had the indigenous peoples had sovereignty over their natural resources. This thesis envisages that, with the indigenous peoples' permanent sovereignty over natural resources, the consequent right to development would have enabled sustainable development of the natural resources, and petroleum in particular, in the Niger Delta. Sustainable development would have supported both the present and future generations without decimating the land and environment. The aim of this thesis, therefore, is to argue for the right to permanent sovereignty over natural resources of indigenous peoples to be promoted and protected by the state, and the right to development to be realised through sustainable development of petroleum in the Niger Delta.

In this chapter, the sustainable development concept is explained and an appropriate theory that will improve the capabilities, values, and potential for human capacity development to support the concept is identified. Also in the chapter, the classification of the Niger Delta's indigenous peoples will be promoted by the identification and classification of the Ijaw and Ogoni peoples – the two major indigenous peoples in the Niger Delta region – so as to serve the interests of all indigenous peoples in the region.[113] The first part of this chapter focuses on key conceptual clarifications that explain: (a) the concept of indigenous peoples and how the Ijaw and Ogoni peoples are classified as indigenous through their history, claims, and qualification for the status of indigeneity; and (b) the concept of sustainable development and its evolution and the identification of essential elements of the protection of indigenous peoples. Sen's theoretical framework based on his 'capabilities approach' that will improve the sustainable development initiative for a people-centred development is analysed in the second part.

[113] The two indigenous groups, the Ijaw and Ogoni, will be mentioned interchangeably throughout the thesis, and the mention of each represents all indigenous peoples in the Niger Delta.

2.2 Conceptualising the rights of indigenous peoples and sustainable development

The concept and principles of the rights of indigenous peoples and the evolution of sustainable development is the focus in this first part to gain an understanding of the aim of this thesis. The exposition spans the international law origin of indigenous peoples' rights to the adoption and adaptation of sustainable development by the African Commission on Human and Peoples' Rights. This section focuses on the right to self-determination and the right to land and natural resources which encapsulate the idea of the indigenous peoples' permanent sovereignty over natural resources as the solution to the conflict in the Niger Delta. For the indigenous peoples, land and natural resources are inseparable, and the right to self-determination represents the enabling factor for the retention of ownership.

It is necessary to explain what natural resources are from the perspective of this thesis. They are things that exist freely in nature, and which contribute to both human survival and to the survival of other living things on earth.[114] Natural resources include land, rocks, forests (vegetation), water (ocean, lakes, streams, seas, and rivers), fossil fuel, fish, wild life, domesticated animals, minerals, sunlight and air, all of which form the basis of life on earth and produce the elements and materials found within our environments.[115]

As we saw in Chapter one, oil and gas are the primary natural resources of the Niger Delta. Data from the Organisation of the Petroleum Exporting Countries (OPEC) shows that Nigeria has 36 890 million barrels of proven crude oil reserves and 5 761 billion cubic metres of proven natural gas reserves.[116] Nigeria further produced 1 602 (thousand barrels per day [tb/d]) in 2018 and 1 727 (tb/d) in 2019, placing the country in the fifth position as a petroleum exporting country.[117] Evidently, Nigeria has more natural gas resources, with a record 47 827.9 million cubic metres

[114] Earth Eclipse <https://www.eartheclipse.com/environment/types-and-threats-to-natural-resources.html> accessed 18 May 2018.
[115] ibid.
[116] OPEC, Member Countries, 'Nigeria facts and figures: 2019 data' <https://www.opec.org/opec_web/en/about_us/167.htm> accessed 23 June 2021.
[117] OPEC, Annual Report 2019 Table 2 'OPEC crude oil production based on secondary sources, 2015-2019 (thousand barrels per day [tb/d]); Table 3 'OPEC crude oil production based on direct communication, 2015-2019 [tb/d] 28-29. <https://www.opec.org/opec_web/static_files_project/media/downloads/publications/AR%202019%20for%20web.pdf> accessed 23 June 2021.

marketed production of natural gas in 2019.[118] Notwithstanding the oil and gas, there are other non-renewable resources found in the Niger Delta such as clay, lead/zinc, lignite, limestone, salt, uranium, gypsum, phosphate rock, manganese, and many more.[119] These have been neglected in favour of oil production. Similarly, oil production has devastated the healthy soil for agriculture, particularly crop farming which is traditionally practised principally by the indigenous peoples as their means of subsistence.

2.2.1 Historical perspective on indigenous peoples' rights under international law

The concept of 'indigenous peoples' is part of the evolution of human rights, freedom, and democracy established by international human rights law and championed by the United Nations. Foremost is the Universal Declaration of Human Rights[120] adopted by the General Assembly on 10 December 1948 by Resolution 217 (III) based on the aims of the United Nations Charter[121] which provides in article1(3) the Organisation's dedication to promote and encourage respect for 'human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion'. The International Bill of Human Rights[122] consists of the Universal Declaration of Human Rights, [123] the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the International Covenant on Civil and Political Rights (ICCPR) and its two Optional Protocols.[124] Though, 'unlike the

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[118] ibid.

[119] 'Natural Resources in Nigeria: The Full List + Locations' (Nigerian Finder) <https://nigerianfinder.com/natural-resources-in-nigeria-the-full-list-locations/> accessed 23 June 2021.

[120] The Universal Declaration of Human Rights (UDHR) was adopted by UN GA res 217A (III) of 10 December 1948 <https://undocs.org/en/A/RES/217(III)> accessed 23 June 2021. The UDHR is one of the first UN documents to elaborate on the principles of human rights mentioned in the UN Charter.

[121] The United Nations Charter. In 1945, the United Nations Conference on International Organization was held in San Francisco with representatives from fifty countries to draft the Charter of the United Nations. The delegates deliberated on the basis of proposals worked out by the representatives of China, the Soviet Union, the United Kingdom, and the United States at Dumbarton Oaks, USA between August and October 1944 <http://www.un.org/en/sections/history-united-nations/index.html> accessed 23 June 2021.

[122] Fact Sheet No 2 (Rev 1) The International Bill of Human Rights <https://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf? . The UDHR is one part of the resolution on the 'International Bill of Human Rights' (A/RES/217 (III). Following the adoption of this five-part resolution in 1948, two covenants were drafted that are also considered part of the International Bill of Human Rights. Both were adopted in 1966 <https://research.un.org/en/docs/humanrights/undhr> accessed 25 June 2021.

[123] A/RES/217 (III) adopted by a vote of 48 for, none against, and 8 abstentions <https://undocs.org/en/A/RES/217%20(III)> accessed 23 June 2021.

[124] The International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights were adopted by the UN GA res 2200A (XXI) of 16 December 1966. The first Optional Protocol to the International Covenant on Civil and Political Rights was

covenants, the UDHR is not a treaty and has not been signed or ratified by states',[125] its preamble proclaims a common standard by which all peoples and all nations may achieve the rights and freedoms it embodies by progressive measures as general principles and standards of human rights. The ICESCR and ICCPR give 'treaty authority' to the UDHR by defining the specific rights and their limitations. Indigenous peoples' rights are derived from these international instruments championed by the United Nations. Also relevant is the International Labour Organisation (ILO), one of the foremost UN agencies. These instruments form the backbone for the freedom, self-determination, and rights sought by indigenous peoples discussed below.

The adoption of the 1948 Universal Declaration of Human Rights (UDHR) symbolised the universal endorsement and adoption of a standard instrument for human rights inspired by earlier declarations of rights spanning decades. These instruments can be traced back to the Magna Carta of 1215[126] and its clauses that deal with long-standing grievances arising from the feudal society at that time;[127] the Bill of Rights of 1688,[128] or 1689,[129] and the Declaration of the Rights of Man and of the Citizen (1789).[130] The fundamental provisions in the Declaration accorded dignity and worth to all humans – old or young, male or female, black or white – and laid the solid foundation for human rights as stated in its article1 that, 'Men are born, and

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adopted by res 2200 A (XXI) of 16 December 1966 (the same resolution on the same day) as an international mechanism to deal with communications from individuals who claimed to be victims of violations of any of the rights contained in the Covenant <https://undocs.org/en/A/RES/2200(XXI)> accessed 23 June 2021.

[125] A/RES/217 (III) (n 122).

[126] 'English translation of Magna Carta' (British Library 28 July 2014) <https://www.bl.uk/magna-carta/articles/magna-carta-english-translation#> accessed 24 June 2021.

[127] Part of the specific grievances that led to the creation of Magna Carta was the 'tension between the national and international interests of the Church' which was between the King as leader and the Pope as ruler: Drew, *Magna Carta* - Chapter 1 'Magna Carta and the Church' 1.

[128] Bill of Rights [1688] <https://www.legislation.gov.uk/aep/WillandMarSess2/1/2/introduction>. Though generally referred to as 'Bill of Rights (1689)', the legislation is documented as 1688 in the UK.

[129] The UK Parliament states that the Bill of Rights 1689 is an original Act of the English Parliament that established the principles of Parliamentary Privilege. 'The main principles of the Bill of Rights are still in force today, with most being cited in legal cases. The Bill of Rights 1689 was used as a model for the US Bill of Rights 1789. Its fervency for the rights of humans influenced the United Nations Declaration on Human Rights and the European Convention on Human Rights'. UK Parliament, <https://www.parliament.uk/about/living-heritage/evolutionofparliament/parliamentaryauthority/revolution/collections1/collections-glorious-revolution/billofrights/> accessed 24 June 2021.

[130] The Editors of Encyclopaedia Britannica, 'Declaration of the Rights of Man and of the Citizens 1789' – the declaration is 'one of the basic charters of human liberties containing the principles that inspired the French Revolution'. The basic principle of the Declaration in its Article 1 is that, 'all men are born and remain free and equal in rights.' <https://www.britannica.com/topic/Declaration-of-the-Rights-of-Man-and-of-the-Citizen> accessed 24 June 2021.

always continue, free and equal in respect of their rights…..' and article 2 'the end of all political associations, is the preservation of the natural and imprescriptible rights of man; and these rights are liberty, property, security, and resistance of oppression.'[131] These principles are affirmed in article 17(1) of UDHR which provides for the right to own property individually and communally, and article 17(2) which outlaws the arbitrary deprivation of that property right.

2.2.2 International law as the bedrock of indigenous peoples' right to self-determination and to land, territories, and natural resources

In furtherance of the rights articulated in the UDHR which are to be recognised as being derived from 'the inherent dignity of the human person', the twin conventions of 1966, the ICCPR and the ICESCR jointly provide in their article 1(1) that: 'All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development'; and article 1(2) that: 'All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence'. Jointly, these provisions become the mother of the rights to be promoted and enjoyed by the indigenous peoples. Considering these conventional provisions to which Nigeria is bound, the country has a responsibility to protect and promote the rights of the indigenous peoples of the Niger Delta to freely dispose of their natural wealth and resources.

The only means by which the conventions could be applicable in Nigeria is for Nigeria, as a member state of the United Nations[132] which ratified both international covenants in 1993, to incorporate them in the Nigerian legal system through domestication. As municipal laws, the two covenants then become accessible to Nigerians for protection and judicial application. Prior to the domestication, Nigeria could consider the inclusion of certain ICCPR and ICESCR provisions in its Constitution by means of a constitutional review. However, both adoptions for municipal application require legislative processes which would meet the ICESCR's article 1(2) injunction of not allowing 'a people [to] be deprived' of their means of

[131] The Declaration of the Rights of Man and of the Citizen, 1789, National Assembly of France: <https://constitutionnet.org/sites/default/files/declaration_of_the_rights_of_man_1789.pdf>.
[132] UN GA res A/RES/1492 (XV) of 7 October 1960, 'Admission of Federation of Nigeria to the United Nations' <https://undocs.org/en/A/RES/1492(XV)>.

subsistence. The conventional provisions, particularly of the ICESCR and ICCPR, override any existing contrary principle as emphasised in the ICESCR's preamble that the 'rights derive from the inherent dignity of the human person', and in its article 25 that 'nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources'. The right to self-determination, therefore, is a right against discrimination, intended for the development of indigenous and tribal peoples in all regions of the world as expatiated by the ILO C169 – Indigenous and Tribal Peoples Convention 1989 (No 169). In its preamble, ILO C169 states that:

> [T]he developments which have taken place in international law since 1957, as well as developments in the situation of indigenous and tribal peoples in all regions of the world, have made it appropriate to adopt new international standards on the subject with a view to removing the assimilationist orientation of the earlier standards.

Through its standard provisions, the ILO C169 with the focus on the new international standard to protect their rights to self-determination, rights to land and natural resources, and right to development, has become the spearhead of international law for indigenous peoples. From the provisions of the two covenants, it can be deduced that the right to self-determination engenders the rights to land, territories, and natural resources in pursuit of the economic, social, and cultural development of indigenous peoples. This is clearly defined where article 14(1) of the ILO C169 provides that: '[T]he rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised.' Article 15(1) of the ILO C169 similarly states that: '[T]he rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of the peoples to participate in the use, management and conservation of these resources'; while article 16(1) provides that 'the peoples concerned shall not be removed from the lands which they occupy'.

The dynamism of the ILO C169 coupled with the instrumentation of the UNDRIP as the most prominent instruments for the protection of indigenous peoples, including those in Nigeria, is beyond dispute. But the failure by Nigeria to ratify one and adopt the other has continuously denied the indigenous peoples of Nigeria the benefits of their provisions. However, part of the solution being proposed in this thesis is the ratification of the ILO C169 and adoption of the UNDRIP, the two crucial instruments which provide the foundation on which the right of indigenous peoples' sovereignty

over natural resources is laid.[133] Ownership and control represent sovereignty, and that is what international law has accorded indigenous peoples as of right through these vital instruments. The ILO C169 and UNDRIP have evolved from the standard human rights foundation provided by the International Bill of Human Rights.

Importantly, to further strengthen the human rights standard established by all the international instruments earlier discussed, the element of fundamental freedom for all is captured in the Preamble to the African Charter as a reaffirmation of 'cooperation and efforts to achieve a better life for the peoples of Africa and to promote international cooperation having due regard to the Charter of the United Nations, and the Universal Declaration of Human Rights'.[134] The African Charter is totally committed to providing protection to the African peoples, empowered by international human right law, to justify their national and international protection.

The African Charter provides for both individual and collective rights, which extend to indigenous peoples. Of immense importance to the indigenous peoples are some provisions of the African Charter: article 2 – individuals enjoy all the rights and freedoms enshrined in the African Charter; article 3 – equality of all before the law; article 5 – the right to respect of dignity, recognition of legal status, and prohibition of slavery and degrading punishment; article 17 – the rights to education, cultural life, and traditional values recognised by his or her community. Article 19 opposes subjugation and domination of one tribe by another, in that it provides that: '[A]ll peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another'. The fundamental human rights of all people of the world as contained in the Charter of the United Nations and the International Bill on Human Rights, have been adopted in the African Charter in article 20 (1) which provides:

> [A]ll peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political

[133] For example, art 26(1) of the UNDRIP provides: 'Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired'; art 26(2) provides: 'Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired'; and art 26(3) provides: 'States shall give legal recognition and protection to these lands, territories and resources.'
[134] The African Charter <https://www.achpr.org/legalinstruments/detail?id=49> accessed 26 June 2021.

status and shall pursue their economic and social development according to the policy they have freely chosen.

Article 20 embodies the full expectation of the African indigenous peoples by providing for their economic, social, and cultural rights and the right to self-determination. While self-determination as an international norm available to the indigenous peoples is inalienable, the ensuing right would enable them to pursue the right in article 22(1), which guarantees all African peoples 'the right to their economic, social and cultural development with due regard to their freedom…in the equal enjoyment of the common heritage of mankind'. Thus, the combination of articles 20(1) and 22(1) grants African peoples the undeniable legal rights to economic, social, and cultural development, while article 22(2) imposes a duty on states to ensure their right to development. In other words, by these provisions the African Charter links the right to self-determination and the economic, social, and cultural rights to guarantee the right to development of the African people, and more specifically in our context, the right to development of African indigenous peoples. Additionally, the economic strength of indigenous peoples is further promoted by article 21(1) which grants the right freely to dispose of their wealth and natural resources.

Clearly, the provisions of the African Charter pre-date the two international instruments referred to above, the ILO C169 and the UNDRIP,[135] which specifically address the rights of indigenous peoples. Although Africa has and continues to face problems with the acceptance of the concept of indigeneity, the rights of African indigenous peoples deserve peculiar attention and protection. The peculiar African claim that 'all Africans are indigenous'[136] has been responsible for this refrain by Africans in earlier debates on the issue at the UN Working Group sessions.[137] This

[135] See n 74. The UN Declaration is the result of over two decades of negotiations. The UN General Assembly delayed the consideration of the adoption of the Declaration based on the objections of some African countries about language on self-determination and definition of 'indigenous people'. During the adoption of the Declaration on Thursday, 13 September 2007, the Assembly President emphasised the importance of the document for indigenous peoples, and more importantly for its human rights agenda. As a sign of acceptability, the Declaration was adopted by a majority of 144 states in favour, 4 votes against (Australia, Canada, New Zealand and the United States), and 11 abstentions (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russia Federation, Samoa, and Ukraine).

[136] ACHPR, 'Indigenous Peoples in Africa: The Forgotten Peoples?' 12.

[137] UN Economic and Social Council E/CN.4/Sub.2/AC.4/1996/2 10 June 1996 Working Paper by the Chairperson-Rapporteur, Erica-Irene A Daes on the concept of 'indigenous people'. Standard-Setting Activities: Evolution of Standards Concerning the Rights of Indigenous Peoples. African representatives failed to participate in session after session of discussions and deliberations on indigenous peoples, starting with Martinez Cobo's sessions in 1986, as they did not accept or

led Nigeria and certain other African states to abstain from voting for the adoption of the UNDRIP in 2007.[138] For this reason, many African nations have failed to promote and protect the rights of their indigenous peoples by refusing to sign the UNDRIP.

2.2.3 Concept of Indigenous peoples' permanent sovereignty over natural resources

The United Nations was the birthplace and the main forum for the development and implementation of the principle of 'permanent sovereignty over natural resources'. In the early 1950s, the General Assembly adopted several resolutions on the issue, and in 1958 it established the Commission on Permanent Sovereignty over Natural Resources to conduct a full survey of the status of the permanent sovereignty of peoples and nations over natural wealth and resources as a 'basic constituent of the right to self-determination'. By its Resolution 1803 (XVII) of 14 December 1962, the General Assembly declared that 'the right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned'.

State and nation are usually used synonymously, but there is a difference between the two. States[139] are creation of independence with defined territories, internationally recognised by other states such as the African States in the African Union. But nations are groups of peoples, with common identity of language, ancestry, social and cultural heritage, who cut across state borders. Furthermore, 'states' cannot have natural wealth and resources, because it is 'the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources'.[140] States obtain wealth and resources by coercion. Hence, the state ought not to exercise absolute sovereignty over natural wealth and resources. Under international law, as stated above, peoples are the true owners of natural wealth and resources. The violation of this right has resulted in immense protests and problems

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acknowledge the concept. The efforts of the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights ensured adequate contact with governments and organisations of indigenous people paras 2-3 (Hereafter the Daes concept of indigenous people.) <https://digitallibrary.un.org/record/236429?ln=en>.`

[138] UN DESA, United Nations Declaration on the Rights of Indigenous Peoples <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html> accessed 26 June 2021.

[139] Soanes and Hawker (eds), *Compact Oxford English Dictionary* – 'the government of a country'; Woodley (ed) *Osborne's Concise Law Dictionary* – 'the organised community; the central political authority.'

[140] Art 25 of the ICESCR.

in nations where states have forcefully acquired the natural wealth and resources of the indigenous peoples. Such is the case of Nigeria where section 44(3) of the Constitution provides:

> The entire property in and control of all minerals, mineral oils and natural gas in, under or upon any land in Nigeria ….. shall vest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly.

This provision negates the 'inherent right' of the indigenous peoples of the Niger Delta under international law. In short, the indigenous communities of the world are the true owners of natural wealth and resources. This means that all the minerals, mineral oils, and natural gas in, under, or on the land in Nigeria, particularly those of the Niger Delta, belong to the indigenous peoples.[141] This is the aim of this thesis – to establish the concept of indigenous peoples' permanent sovereignty over natural resources in Nigeria. But first, this chapter, and indeed this section of the chapter, seeks to establish the indigeneity of the peoples of the Niger Delta for purposes of claiming the rights that accrue to indigenous peoples under international law.

2.2.4 Conceptualisation of the African 'indigenous peoples'

It has become impossible to conceptualise the term 'indigenous peoples' within a single definition. The indigenous issue appears to have received its first international recognition from the ILO which adopted the term in its CO50 – Recruiting of Indigenous Workers Convention 1936 (No 50).[142] In 1957 the C107 – Indigenous and Tribal Populations Convention 1957 (No 107) was adopted, giving fully-fledge recognition to indigenous populations.[143] The term 'indigenous' has since prevailed with the ILO Convention 107 giving it a new meaning, which led to the definition problem according to Barume.[144] The Indigenous and Tribal Peoples Convention 1989 (No 169) (ILO C 169) addresses the position of indigenous and tribal peoples

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[141] Ako and Oluduro, 'Identifying Beneficiaries of the UN Indigenous Peoples' Partnership' 380-383.
[142] The Convention was abrogated by decision of the International Labour Conference at its 107th Session (2018) <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100::: NO:12100:P12100_ILO_CODE:C050:NO> accessed 26 June 2021.
[143] The Convention was adopted on 26 June 1957, with the consideration that there are indigenous and other tribal and semi-tribal populations in most independent countries at that time, who are not yet 'integrated into the national community and whose social, economic or cultural situation hinders their benefitting fully from the rights and advantages enjoyed by other elements of the population'. Preamble <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312252:NO> accessed 26 June 2021.
[144] Barume, *Land Rights of Indigenous Peoples in Africa* 25.

in independent countries and modifies the ILO C107 by asserting a more acceptable criterion of self-identification to classify, clarify, and identify indigenous peoples. In 1968, prior to the adoption of ILO C169, however, amidst all the controversies and contestation about the genuine basis for a universal definition, a definition was proposed by Martinez Cobo in the 'Report on the Study of the Problem of Discrimination against Indigenous Populations'.[145] It reads:

> 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 part 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, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems. [146]

Thereafter, a formula for identifying indigenous peoples globally emerged based, in the main, on Martinez Cobo's definition[147] and the ILO C169. The ILO C169 does not define who indigenous peoples are but each group is expected to be characterised by means of several criteria with emphasis on self-identification as a fundamental criterion. The ILO C169 states in its article 2 that: 'Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.' The UNDRIP offers no definition or identification. The efforts of the UN Working Group on Indigenous Populations (UN-

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[145] Martinez Cobo, 'Special Study Report on Indigenous Populations' (E/CN.4/Sub.2/1986/7/Add.4) <https://digitallibrary.un.org/record/133666?ln=en#record-files-collapse-header> (hereafter Cobo Special Report). Prior to this study, indigenous issues were treated under international human rights. The Cobo Special Report added a new dimension as a definition was proposed to classify with peculiarity the indigenous communities, populations and peoples. Formulating the definition was part of the agenda of the study, to give it an international outlook as much as possible bearing in mind that indigenous peoples consider themselves to be different from the other groups that exist in the general society of the nation-state in which they find themselves. Thus, the definition affirms those indigenous communities, peoples, and nations as those having historical continuity with pre-invasion and pre-colonial societies that developed on their territories.

[146] ibid. This is the only comprehensible definition for 'indigenous peoples' offered by any international institution. But it was extremely controversial and failed to be accepted by the UN Working Group on Indigenous Population unilaterally. paras 378-382.

[147] ibid. Prior to this study, indigenous issues were treated under international human rights. The Report brought another dimension as a definition was proposed to classify with peculiarity the indigenous communities, populations and peoples. Formulating the definition was part of the agenda of the study, to give it an international outlook as much as possible bearing in mind that indigenous peoples consider themselves to be different from the other groups that exist in the general society of the nation-state they find themselves in. Thus, the definition affirms those indigenous communities, peoples, and nations as those having historical continuity with pre-invasion and pre-colonial societies that developed on their territories.

WGIP) which prepared the draft Declaration, chaired by Erica-Irene Daes, summarised the concept of indigenous peoples as follows:

> Any inconsistency or imprecision in previous efforts to clarify the concept of 'indigenous' was not a result of a lack of adequate scientific or legal analysis, but due to the efforts of some Governments to limit its globality, and of other Governments to build a high conceptual wall between 'indigenous' and 'peoples' and/or 'Non Self-Governing Territories'. No one has succeeded in devising a definition of 'indigenous' which is precise and internally valid as a philosophical matter yet satisfies demands to limit its regional application and legal implications. All past attempts to achieve both clarity and restrictiveness in the same definition have in fact resulted in greater ambiguity.[148]

This thesis agrees with the idea of UN-WGIP Chairperson Daes 'that the concept of "indigenous" is not capable of a precise, inclusive definition which can be applied in the same manner to all regions of the world'.[149] In the absence of an acceptable definition, Africa's dilemma remained unresolved. African states' non-participation in the Martinez Cobo study was a setback for Africa in that, given their understanding of the concept, they could not contribute. The report recorded that many countries in which indigenous populations today live were not covered by the study, and of note was the absence of African countries.[150]

For Africans the reason is simple, they are all indigenous. Rooted in colonisation, the Latin term *indigenae* distinguishes between people born in a particular place and those – *advenae* – who arrive from elsewhere making the group to which it refers the first to exist in the particular location, as in the French term *autochtone* and the German term *Ursprung*.[151] Earlier use of the term in the European context during the late nineteenth century, affirms its root in colonisation. It was crafted at the Berlin Africa Conference of 1884–1885 in line with international practice[152] when the Great Powers, seeking to assert their control over conquered territories in Africa, made a commitment to the 'protection of indigenous populations' of Africa. Africans know they were born in Africa before the colonisers arrived, so by simple calculation they are all indigenous. This explains the poignancy of their belief, which contributed to their non-participation of Africans at preliminary UN discussions on 'indigenous issues'.

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[148] Erica-Irene Daes, Concept of indigenous people para 73.
[149] ibid para 9.
[150] Cobo Special Report 4-5.
[151] Daes, Concept of indigenous peoples para 10.
[152] ibid para 11.

African indigeneity could be conceptualised from a unique perspective which arises from their belief that no African is a 'stranger' or a 'foreigner' in Africa, unlike the general understanding that indigenous peoples are 'aborigines' or 'natives' who could be distinguished from the foreigners who invaded and occupied the land through colonial occupation. The term 'indigenous populations' in that context, was intended to distinguish between citizens of the colonial powers who invaded and settled in Africa, and those persons in Africa who were under colonial domination.

In her report, Daes explains that during the Working Group session[153] where the concept was being finalised, many observer government delegations and members of the Working Group vehemently criticised the use of the term 'indigenous' to distinguish between groups who have been neighbours for generations.[154] This reservation of many African and Asian governments was understandable as their understanding and resolve was that those who were ruling the states 'are not less native to the soil of the country as a whole than groups that are identified as "indigenous" or "tribal"'.[155] Accepting 'indigenous peoples as groups which are native to their own specific ancestral territories within the borders of the existing state, rather than persons that are native generally'[156] to the territory of the sovereign state, tends to resolve the concern over definition.[157] In the final analysis, no definition was adopted. But in adopting Daes's report, the following characteristics are considered relevant to the understanding of the concept of 'indigenous' used in this thesis. The characteristics of Daes's concept of indigenous people are:[158]

(a) Priority in time with respect to the occupation and use of a specific territory.
(b) The voluntary perpetuation of cultural distinctiveness, which may include the aspects of language, social organization, religion, and spiritual values, modes of production, laws and institutions.
(c) Self-identification, as well as recognition by other groups, or by State authorities as a distinct collectivity.
(d) An experience of subjugation, marginalisation, dispossession, exclusion or discrimination, whether or not these conditions persist.

[153] ibid para 64. The deliberations took place at the Thirteenth Session, of the Working Group on Indigenous Populations, Sub-Commission on Prevention of Discrimination and Protection of Minorities the report of which Madam Erica-Irene A. Daes now renders at the Fourteenth Session with a Working Paper on the Concept of indigenous people.
[154] ibid para 64.
[155] ibid.
[156] ibid.
[157] ibid para 65.
[158] ibid para 69.

However, the report emphasised that the above 'factors do not, and cannot, constitute an inclusive or comprehensive definition'.[159] They are expected to provide general guidance to reasonable decision making on matters concerning indigenous peoples. According to the African Commission's Working Group on Indigenous Populations/Communities, however, the above four elements 'are guiding principles to characterize indigenous peoples, not all four elements need to be present at the same time in a given situation'.[160] This has been the benchmark guiding the conceptualisation of indigenous populations in Africa.

2.2.5 African Commission and African indigenous peoples

The Report of the African Commission's Working Group on Indigenous Populations/Communities adopted by the African Commission on Human and Peoples' Rights at its 28th Ordinary Session, Benin, 2000, can be considered the official conceptualisation framework for African indigenous populations. The Working Group had done exceptionally well for Africa by bringing out this all-encompassing report which cancels all doubts about the existence of African indigenous peoples. The report acknowledges that the issue of the definition of indigenous peoples in Africa is sensitive, and that, 'except for a few exceptions involving communities that migrated from other Continents or settlers from Europe, Africans can claim to be aboriginal people of the continent and nowhere else'.[161] Consequent upon this common heritage of aboriginality, which had seen African people migrate from one part of the continent to another over centuries and which resulted in intermingling and inter-marriage, the Working Group adopted a socio-psychological description of indigenous peoples with broad criteria, affirming, as under the United Nations system, 'the principle of self-definition and recognition of self-identity of peoples'.[162]

The mode of characterisation of indigenous peoples maintained by the African Commission was further confirmed during the controversy preceding the adoption of the UNDRIP when the African countries raised concerns regarding certain defects such as the definition, the issue of self-determination, land ownership and

[159] ibid para 70.
[160] Report of the African Commission's Working Group on Indigenous Populations/Communities (DOC/OS/(XXXIV)/345) (hereafter the African Commission Report) 63.
[161] ibid 3.
[162] ibid.

exploitation of resources, and the issue of national and territorial integrity.[163] Moreover, the ACHPR Advisory Opinion on UNDRIP, detailed the African Commission's criteria as follows:

(a) Self-identification,
(b) A special attachment to and use of their traditional land whereby their ancestral land and territory have a fundamental importance for their collective physical and cultural survival as people,
(c) A state of subjugation, marginalisation, dispossession, exclusion, or discrimination because these peoples have different cultures, ways of life or mode of production than the national hegemonic and dominant model.[164]

The prescribed method for identifying indigenous peoples in Africa is also echoed in the ACHPR/ILO Overview Report.[165] The method for identifying indigenous peoples used in the research report was based on three elements – the profound extent of marginalisation suffered, self-identification, and dependence on land and natural resources for their collective survival as a people. The research further affirmed as an undeniable reality, that indigenous peoples exist in many African states across all regions of the continent, and that they face even bigger challenges as a result of African states' reluctance to acknowledge even their existence within their territories.[166]

Many African indigenous peoples face grave challenges to recognition, deprivation, and protection because African governments refuse to protect their vulnerability. This is visible in the challenge encountered by the Endorois in Kenya, whose case is registered as one of the classic examples of the African Commission's dedication to the protection of the rights of indigenous populations as grounded in the ACHPR. In *Centre for Minority Rights Development v Kenya* (*Endorois* case),[167] the African Commission made it clear that collective rights are available to indigenous peoples under the African Charter. The *Endorois* case was submitted to the African

[163] Advisory Opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples, 2007, 3-4 (ACHPR Advisory Opinion on UNDRIP). <https://www.achpr.org/presspublic/publication?id=49> accessed 28 June 2021.
[164] ACHPR Advisory Opinion on UNDRIP para 12.
[165] 'Overview Report of the Research Project by the International Labour Organization and the ACHPR on the constitutional and legislative protection of the rights of indigenous peoples in 24 African countries' ACHPR/ILO/Centre for Human Rights 2009 'An Overview Report' 15-16 <https://www.achpr.org/presspublic/publication?id=50>.
[166] ACHPR/ILO 'An Overview Report' Executive Summary v-xi.
[167] ACHPR Communication 276/03, Decision of 25 November 2009 at the 46th Ordinary Session <https://www.achpr.org/sessions/descions?id=193>.

Commission in May 2003, seeking protection against the Kenyan government for the Endorois under the articles of the African Charter.

The complainants argued that: (i) the Endorois are a 'people', a status that entitles them to benefit from provisions of the African Charter which protect collective rights; and (ii) that the African Commission has affirmed the rights of 'peoples' to bring claims under the African Charter by way of articles 20 to 24. They sought support for the retention of their rights as 'collectives' as in the Nigerian case of *Social and Economic Rights Action Center for Economic and Social Rights v Nigeria*[168] (the *Ogoni case*). The *Endorois* case relied on the decision in the *Ogoni* case, combined with the African Commission's reports discussed above. This authority informed the African Commission's Decision on the Merits which confirms that the Endorois are an indigenous community and a 'people' entitled to benefit from the provisions dealing with protective collective rights in the African Charter.[169] The decision in the *Endorois* case set the precedent that indigenous peoples exist in Africa and legitimised the standard criteria for their identification. Thus, Africa has conceptualised indigenous peoples and established the framework for the protection of their rights by means of the two ACHPR reports, and the Advisory Opinion relied on in this section, backed by the African Charter. The conceptualisation encourages African states to recognise and protect indigenous peoples as documented in the *Endorois* decision.

The status of the Ogoni as an indigenous people has also been confirmed in the *Endorois* case according them the necessary affirmation and recognition. For future characterisation of indigenous peoples in the Niger Delta and in Nigeria generally, this thesis adopts Daes's guiding factors for indigenous peoples[170] and the criteria adopted in the ACHPR Advisory Opinion on UNDRIP[171] as the standard.

2.2.6 Characterisation of the Niger Delta indigenous peoples (Ogoni and Ijaw)

[168] ACHPR Communication 155/96 (n 56).
[169] The *Endorois* case paras 162,159.
[170] Erica-Irene A Daes, The Concept of Indigenous People' para 69. At its Fourteenth Session, the Working Group on Indigenous Populations adopted these as factors which modern international organizations and legal experts (including indigenous legal experts and members of the academic family) have considered relevant to the understanding of the concept of 'indigenous'. In the final analysis, it could be observed that these factors align with most of the elements in Cobo's definition and justify the standard set by that definition.
[171] ACHPR Advisory Opinion on UNDRIP para 12.

As indicated in section 1.2 above, there are numerous indigenous groups in the Niger Delta and individual identification will be repetitious. The most appropriate approach is through collective identification that argues their rights in a representative capacity. The two major groups – the Ijaw and the Ogoni peoples – who already have documented dialogue with the Nigerian state, possess the capacity to represent all other indigenous peoples in the Niger Delta region. As Saro-Wiwa, speaking as an Ogoni leader, said before his execution, 'what the Ogoni demand for themselves, namely autonomy, they also ask for others throughout Nigeria and indeed, the continent of Africa'.[172] This is the kind of coverage required to fight a common cause. The Ogoni have always expressed their intention to protect both their own rights and the rights of other minorities in the Niger Delta.[173]

While the 2003 Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities documented the Ogoni as an indigenous people,[174] the African Commission in the *Endorois* case cited the *Ogoni* case referring to the decision in which it was established that the right to natural resources found within the traditional land of indigenous peoples vested in the indigenous peoples, thereby implicitly asserting the Ogoni's status as an indigenous people.[175]

The arguments presented in this thesis are intended to promote all indigenous peoples in the region, all of whom stand to benefit from the findings reached. The identification and characterisation of the Ogoni and Ijaw apply equally to other indigenous peoples in the region, and indeed all over Nigeria, in that the Ogoni and Ijaw already satisfy the standard requirements in the internationally recognised criteria set for them to assert their claims as indigenous peoples. Consequently, although their acknowledged status requires no further argument, for record purposes this thesis explains certain of the qualifying characteristics of the Ogoni and Ijaw indigenous peoples.

2.2.6.1 Attachment to traditional land and territory

History has it that a vast segment of the Ijaw nation was engaged in war against British interests from late in the nineteenth century to early twentieth century, fighting

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[172] Ken Saro-Wiwa, Port-Harcourt 24/12/91 in Ogoni Bill of Rights 1990 <Ogoni Bill of Rights | Movement for the Survival of the Ogoni People (MOSOP)> accessed 28 June 2021.
[173] The Ogoni Bill of Rights 1990 <OGONI BILL OF RIGHTS (bebor.org)> accessed 28 June 2021.
[174] The African Commission Report 17-18.
[175] The *Endorois* case paras 56-58,121,186 and 191.

for control of palm-oil, the main resource of the Ijaw community at that time.[176] The communal resistance was indicative of the efforts of the indigenous population to retain traditional ownership of their lands and resources, and disrupt colonial control and subjugation. Though, what the British required was a political right, which they subtly acquired as a protectorate, for the British officials to establish control needed for colonial power, they still had a greater agenda for commerce.[177] The incursion and forceful control was repugnant to the Ijaw people[178] who later observed at a conference in 2003 that:[179]

> The British succeeded in subjugating our forbearers in this war for the control of the palm-oil trade. This certainly had several devastating consequences from which we are yet to recover, as this set the precedence for the external control of our resources, our dignity and our lives. Today, we are engaged in a more sinister and far more dangerous conflict that has as its predetermined outcome the extinction of our communities as we know it.

The Ogoni are already classified as indigenous people and inhabited Ogoniland for close to 1,000 years before the British came to Nigeria in 1861.[180] The Ogoni are identified as 'a separate and distinct ethnic nationality' within the Federal Republic of Nigeria, who have inhabited the coastal plains, and terraces to the north-east of the Niger Delta for more than 500 years.[181] They lived from their traditional occupations as farmers, hunters, and fishermen, and had been demanding self-government and self-determination since the early 1990s.[182] The Ogoni's independence was

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[176] Ogele Club and INCUSA, 'A Joint Paper to the Pan Ijaw Conference' in Port Harcourt February 28 - March 2, 2003 in the KAIAMA Declaration <http://www.unitedijaw.com/kaiama.htm> accessed 28 June 2021.

[177] Meredith, *The Fortunes of Africa* 407.

[178] ibid. It is the contention of the Ijaw people that: 'British colonisation forced the Ijaw Nation to be under the Nigerian State. The division of the Southern Protectorate into East and West in 1939 by the British marked the beginning of the balkanisation of a hitherto territorially contiguous and culturally homogenous Ijaw people into political and administrative units, much to our disadvantage. This trend is continuing in the Balkanisation of the Ijaws into six states of Ondo, Edo, Delta, Bayelsa, Rivers and Adwa-Ibom states' in Nigeria. See also the Kaiama Declaration: Introduction paras a and c (n 176).

[179] Through various representations, this being one, the Joint Paper presented by the Ogele Club and INCUSA, at the Pan Ijaw Conference in March 2003, in which the people upheld the Kaiama Declaration issued by the Ijaw Youths of the Niger Delta in December 1998 at Kaiama, the people resolved to renegotiate their relationship with the Nigerian state through a Sovereign National Conference. The Sovereign National Conference was finally held in Nigeria in 2014, but it is riddled with controversies and opposition, and to date has not been released to the public. Due to the overbearing controversies, it might not after all resolve the problems of the Niger Delta.

[180] The African Commission Report 9.

[181] Movement for the Survival of the Ogoni People (MOSOP) 'Ogoni Ethnic Nationality' <http://mosop.org/2015/10/10/ogoni-ethnic-nationality/>; <Movement for the Survival of the Ogoni People (MOSOP) and Ogoni News and Resources> accessed 28 June 2021.

[182] Ogoni Bill of Rights 1990 (n 173). The Ogoni Bill of Rights containing claims for lands and protests was presented to the government of the Federal Republic of Nigeria in 1990 also includes an appeal

interrupted by the British when they were absorbed into the Nigerian colony between 1913 and 1947 when they got their own native authority after a 35-year struggle.[183] The Ogoni, through the Ogoni Bill of Rights, declared that:

- The Ogoni people, before the advent of British colonialism, were not conquered or colonized by any other ethnic group in present-day Nigeria.
- The British colonization forced them into the administrative division of Opobo from 1908–1947.
- The Ogoni protested against this forced union until the Ogoni Native Authority was created in 1947 and placed under the then Rivers Province.
- That in 1951 they were forcibly included in the Eastern Region of Nigeria where they suffered utter neglect.
- That they protested against this neglect by voting against the party in power in the Region in 1957, and against the forced union by testimony before the Willink Commission of Inquiry into Minority Fears in 1958.
- The protest led to the inclusion of the Ogoni nationality in Rivers State in 1967, which State consists of several ethnic nationalities with differing cultures, languages and aspirations.[184]

Further into the independence era, there were migrations resulting from the need to live in strategic and safe places, along with other factors such as the search for food, pasture for their livestock, and political opportunities.[185] This internal migration within the borders of Nigeria was intentional and instrumental[186] in the urbanisation of Nigerian cities and the creation of the cosmopolitan culture of mixed tribes as distinct from the local traditional people who remained in their villages. The people who stayed on in those local village communities were, in years to come, referred to as 'minorities', 'ethnic groups', or 'indigenous peoples' in that they originate from that particular region.[187] Their well-being is derived from intimacy with their natural habitat:[188] the land, natural resources, biological diversity, and their traditional identity – reflected by their culture, religion, languages, occupation, and the intrinsic knowledge of the ecology – was empowered by the rule of succession under customary law and applicable to the indigenous peoples who believe that all that had

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to the international community. Part of the demand in the Bill is for political autonomy to participate in the affairs of the Republic as a distinct and separate entity.

[183] Na'Allah, *Ogoni's Agonies* 329.

[184] Ogoni Bill of Rights, 1990 (n 173).

[185] Falola et al, *History of Nigeria 1* 19.

[186] Bolaffi et al, *Dictionary of Race* 178.

[187] ibid. 202, 'indigenous' derives from the Latin *indo* (in) and *gena* (generate) describing a person originating in a country or a region.

[188] Okechukwu et al, *Natural Resources* 2.

been passed down to them from their ancestors rightly belongs to them.[189] The indigenous peoples delight in this ancestral heritage. This explains the 'indigenous' attachment to their traditional land, territory, and natural resources.

2.2.6.2 Self-identification

The UN approach is to identify rather than define indigenous peoples as in the ILO C169. Self-identification is considered a fundamental criterion for the identification of 'indigenous peoples' who can qualify for protection under the ILO C169. This Convention expressly states in article 1(2) that: 'Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.' This provision offers a prima facie qualification for those wishing to be termed 'indigenous'.

Self-identification means that indigenous peoples are those who identify with the attributes of an indigenous group and are accepted as such by members of that group.[190] Attributes such as common ancestry, language, culture, and religious belief are important contributory factors to confirm indigeneity. Such are the effects of the Kaiama Declaration of the Ijaw nation and the Ogoni Bill of Rights whereby proclamations are made for public knowledge of who they are. The Ogoni had therefore, since 1990, self-identified as indigenous people in the Ogoni Bill of Rights, and the Ijaw people had clearly proclaimed their indigenous status in the Kaiama Declaration (1998) as representatives of the Ijaw nation who were in Kaiama 'to deliberate on the best way to ensure the continuous survival of the indigenous peoples of the Ijaw ethnic nationality of the Niger Delta within the Nigerian state'.

By their pronouncements, the Ijaw and Ogoni have identified themselves as indigenous people in the Niger Delta. Furthermore, this applies to all indigenous peoples in Nigeria who which so to be recognised. The fact remains that the indigenous peoples themselves consider the right to self-identification absolute, particularly given their antecedent and relationships with dominant majority ethnic groups, which makes it a 'Pandora's box' that states, in practice, ardently resist

[189] Nwogugu, *Family Law in Nigeria* 399. According to Nwogugu, landed property devolves on the children on the death of the intestate. This is the norm amongst all ethnic groups in Nigeria. Oniekoro, *Wills Probate Practice and Administration of Estate in Nigeria* 456 states that 'generally where the deceased is survived by children his estate is exclusively inherited by his children'.
[190] Cobo Special Study Report para 381.

opening.[191] According to Canessa,[192] the 'indigenous awakening' is flowing through all the communities, who respond with a yearning for the expression of who they are in the language of indigeneity.[193]

2.2.6.3 State of subjugation, dispossession, marginalisation and discrimination

The Ogoni people complained that since the termination of British rule, a state of marginalisation, dispossession, and exclusion had persisted, with the Ogoni's rights being usurped, misused, and abused by the majority ethnic groups, and the Ogoni feeling that Nigeria has been turned into 'hell on earth for the Ogoni and similar ethnic minorities'[194] with pressure on the land, and Ogoni rights and resources being usurped by the majority ethnic groups so consigning the Ogoni to slavery and possible extinction.[195] The Addendum to the Ogoni Bill of Rights also emphasises continued marginalisation of the Ogoni people resulting in continued dehumanisation and slow extermination that could lead to extinction. It reveals subjugation and discrimination as the rich resources of the Ogoni are siphoned by the federal government to improve the lives of other Nigerian communities and the shareholders of multi-national oil companies.[196] The continuing fear of the Ogoni is that without international intervention, they stand to be obliterated from the face of the earth.[197] They consequently appealed to the international community to 'prevail on European and American Governments to help all Ogoni people seeking protection from the political persecution and genocide at the hands of the Federal Government of Nigeria'.[198] These registered protests are factors that strengthened the characterisation of the Ogoni in fulfilment of the criteria for indigenous peoples.

Part of the reasons for the deteriorating quality of life of their people raised by the Ijaw in the Declaration are utter neglect, suppression, and the marginalisation

[191] Corntassel and Primeau, 'Indigenous Sovereignty' 349.
[192] Andrew Canessa, 'Who is indigenous?' 195. Canessa's study and report on the Bolivian indigeneity provides a good reference point for this study and for African states. The Bolivian mode of 'indigenous identification' is classic and recommended for African countries to identify and know their indigenous peoples.
[193] ibid 204.
[194] The Ogoni Bill of Rights, Foreword <Ogoni Bill of Rights (ogoninews.com)> accessed 22 April 2021.
[195] ibid para 13.
[196] ibid Addendum para E.
[197] ibid para 8.
[198] ibid 'The International Community Should' 9 (at the end of the document). This was ranked 9 in a list of 10 things the Ogoni people sought the international community to do for them.

inflicted on them by the Nigerian state and the transnational oil companies.[199] The Ijaw maintained their claims to all lands and natural resources (including mineral resources) within Ijaw territory belong to Ijaw communities, and form the basis for their survival. The British subjugated their forebears by war and continued to expose their resources, dignity, and lives to external control after they left. This the Ijaw people see as a pre-determined agenda for the extinction of their communities.[200] The Ijaw people see the Ijaw nation as a colonial territory within a brutal Nigerian state, 'hell bent on appropriating the resources within Ijaw territory for the benefit of distant lands'.[201] Generally, the Ijaw people have lost their lands to environmental pollution, thereby losing the self-sustaining capacity of their lands and rivers to feed their people.[202] Such are the facts in fulfilment of the criteria which characterise the Ijaw people as indigenous. Demands by the Ijaw and Ogoni for self-government and self-determination are a conscious effort to gain self-worth and freedom, and the consequence of years of subjugation, marginalisation, dispossession, exclusion, and discrimination,[203] which characterise indigenous peoples under the Daes concept.

According to Barume, an expert member of the ACHPR Working Group on Indigenous Populations, indigeneity in Africa has nothing to do with being native and being the first to settle on the land as was the case in other regions. It is rather the attachment to the land and natural resources contained therein and the ensuing discrimination, and marginalisation from mainstream society and self-identification of the people as indigenous that made them indigenous.[204] This has been established in this section particularly for the Ijaw and Ogoni, and also on behalf of other indigenous groups in the region. The bane of 'indigenous minority ethnic nationalities'[205] '(by whatever name called)'[206] in the Niger Delta has been subjugation and dispossession of natural resources through implementation of state policies that deny the indigenous people their rights to these natural resources.[207] The Niger Delta has been impoverished in the midst of oil wealth as a result of

[199] The Kaiama Declaration (d).
[200] Ogele Club and INCUSA, (n 176).
[201] ibid.
[202] ibid.
[203] Ikelegbe, 'Civil society, oil and conflict' 440; Obi, 'Oil extraction' 227.
[204] The African Commission Report 8.
[205] Aluko, 'Sustainable Development' 66.
[206] The Ogoni Bill of Rights 20. The Ogoni people demanded 'political autonomy to participate in the affairs of the Republic as a distinct and separate unit by whatever name called…'
[207] Ebegbulem, Ekpe and Adejumo, 'Oil Exploration and Poverty' 279.

deprivation, neglect, marginalisation, injustice, and inequity[208] resulting from decades of oil exploitation, environmental degradation, and state neglect.[209]

This thesis addresses this problem through legislative remediation regarding the rights to which indigenous peoples are entitled and could enjoy in the sustainable development of the natural resources that abound on their lands and territories. Hence, the argument for the rights of the indigenous people in the Niger Delta to participate in the development and management of these natural resources on and under their lands as prescribed by international law will be actualised in the proposal for a legal framework in Chapter five. Next to be explored is the concept of sustainable development under international law through to the African Commission's adaptation of the concept for the eradication of poverty in the Niger Delta.

2.2.7 The concept of sustainable development

The concept is an improved developmental phenomenon that emphasises an endless chain of reliance on natural resources by each evolving generation. Sustainable development is described by some scholars as a comprehensive economic, social, and political process for sustainable use of natural resources and protection of the environment with due regard to the needs and interests of future generations.[210]

2.2.7.1 Development and Sustainability

Chambers offers a simple definition of 'development' as 'good change', explaining further that 'change is continuous in what changes and how it changes and in what we see as good'.[211] The notion of 'change' emerges clearly in Webster's dictionary definition of 'development' as 'the act or process of growing or causing something to grow or become larger or more advanced', and the definition of 'develop' as 'to make available or usable', especially in the context of natural resources.[212] Merging the definitions of 'develop' and 'development' from Webster's, development of natural

[208] Ikelegbe, 'Civil society, oil and conflict' 440.
[209] Ikelegbe, 'The Economy of Conflict' 208.
[210] ILA New Delhi Conference (n 14). The Final Report of the Committee on the Legal Aspects of Sustainable Development is a unique description of the concept of sustainable development based on the collation of understanding in the UN Declaration on the Right to Development (1986), the Universal Declaration of Human Rights (1948), and the Stockholm and Rio Declaration (1972 and 1992).
[211] Chambers, 'Responsible Well-being' 1744.
[212] Merriam Webster since 1828.

resources could be defined as the process of growing to become larger through continuous changes to the point at which it is more advanced for availability and usability. 'Availability and usability' present the 'good change' advocated by Chambers' notion of development. 'Good change' could similarly be seen from the economists' point of view represented by Todaro and Smith, meaning that, which is expected to achieve 'a sustained rate of growth of income per capita'.[213]

The merging of sustainability with development provides a holistic approach through the three dimensions of the social, economic, and environment to conceptualise the theory. Development features in every sphere of life as it aims at a new stage in a changing situation[214] which is activated in sustainable development defined as the development that 'meets the need of the present without compromising the ability of the future generations to meet their own needs'.[215] With this understanding, this thesis contextualises development to flourish within the ambit of growth, advancement, improvement, and increase that meet the needs of the present generation while leaving sufficient resources for the benefit of future generations. Unlike most other theories that concentrate on economic development, sustainable development as earlier discussed, emphasises three pillars on which development can be sustained – social, environmental, and economic – which must all come together for all-inclusive growth.[216]

The Brundtland Commission standard for sustainable development[217] provides a helpful guide for this study. The notion that the present generation should not compromise the ability of future generations to meet their own needs, is a key requirement of sustainable development which is termed 'justice to the future generations'.[218] This places a pre-emptive obligation on the present generation as a duty to the next generation which, according to Solow,[219] is 'intergenerational equity'. Intergenerational equity raises a seminal question: How much of the relevant resources can the current generation consume, and how much should they leave for generations to come who, for all intents and purposes, have no say in the matter?

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[213] Todaro and Smith, *Economic Development* 1.3 'What do we mean by development' 14.
[214] Compact Oxford English Dictionary of Current English (Oxford University Press, Oxford, 2000).
[215] *Our Common Future* (Brundtland Commission) (n 13) United Nations 1987 Annex to A/42/427.
[216] See generally, United Nations World Summit Outcome 2005, A/RES/60/1 11,12 <https://undocs.org/en/A/RES/60/1>.
[217] *Our Common Future* para 27.
[218] Mathis (ed), *Efficiency, Sustainability, and Justice* viii.
[219] Solow, 'Intergenerational Allocation of Natural Resources' 141.

However, whether understood as 'justice to future generations' or 'intergenerational equity', the Rio Declaration is pre-emptive in fulfilling all generational obligations when it declares that: '[T]he right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.'[220] This right to development was better articulated at the World Conference on Human Rights held in Vienna in 1993,[221] which underscored the right of peoples to a healthy environment and to development. By applying a human rights perspective, these rights have become the rights of the peoples, including indigenous peoples, and thus available to the indigenous peoples in Nigeria generally, and in particular to those in the Niger Delta. There will be a brief discussion later in this chapter to highlight various other theories and sift through them to identify an acceptable approach that will compliment sustainable development with human inclusion and participation.

2.2.7.2 International instruments on sustainable development

In 1972 world leaders and thinkers recognised the need to harness the concern not solely for the 'environment', but also for 'human environment' at the United Nations Conference on the Human Environment in Stockholm.[222] The outcome report of the Conference – the Stockholm Declaration – expressed 'the need for a common outlook and common principles to inspire and guide peoples of the world in the preservation and enhancement of the human environment'.[223] The crucial need for a concerted effort to protect and improve the human environment arose from the long and tortuous evolution of the human race through the rapid acceleration of science and technology which has transformed the human environment. Considering the need for common principles, the Stockholm Declaration's 26 Principles serve as a framework for governments in preserving and improving the human environment. They also offer a framework for environmental action and recommendation for action at the international level for the benefit of all the people and their posterity. In her

[220] Principle 3 of the Rio Declaration on Environment and Development of June 1992 is a reaffirmation of the Declaration of the United Nations Conference on the Human Environment adopted at Stockholm on 16 June 1972 and sought to build on it. <https://www.un.org/en/conferences/environment/stockholm1972>. The Rio Declaration aims at protecting the integrity of the global environmental and developmental system. The proclamation is contained in the 27 Principles.

[221] Vienna Declaration and Programme of Action A/CONF.157/23 <https://www.ohchr.org/en/professionalinterest/pages/vienna.aspx> accessed 28 June 2021.

[222] The United Nations Conference on the Environment, 5-16 June 1972, Stockholm <https://www.un.org/en/conferences/environment/stockholm1972> accessed 29 June 2021.

[223] Declaration of the United Nations Conference on the Human Environment – the 'Stockholm Declaration' 1972, A/CONF.48/14/Rev.1 <https://undocs.org/en/A/CONF.48/14/Rev.1>

Foreword to, *Stockholm, Rio, Johannesburg,* Silva affirms the inseparability of social and environmental struggles and the existence of a global conception 'in which production, the quality of people's lives and the natural environment, must be inseparable, generating a new vision of public ethics'. [224] This assertion correctly expresses the principles in the Stockholm Declaration – the first global document to highlight this important phenomenon – which pioneered the fusion of production and the management of natural resources, and its effect on the environment.[225]

At the United Nations Conference on Environment and Development (UNCED) in 1992, exactly two decades after the Stockholm Declaration, certain important instruments on sustainable development were released. Three of these are seminal to this thesis: the Agenda 21; the Rio Declaration on Environment and Development; and the Statement of Principles for the Sustainable Management of Forests.[226]
The Agenda 21 is the second prominent instrument on sustainable development. It embodies a comprehensive plan of action for the global, national, and local operations of the organisations of the United Nations system, governments, and major groups in every area in which humans impact on the environment. It proposes a global partnership for sustainable development through the integration of environmental and developmental concerns to provide an improved standard of living for all, better protected and managed ecosystems, and a safer, more prosperous future. Since no nation can achieve this on its own, successful implementation is the collective responsibility of governments.[227] The focus of the Agenda 21 is to accelerate sustainable development in developing countries through international cooperation and related domestic policies. The full implementation of

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[224] Lago, *Stockholm, Rio, Johannesburg* Foreword by Marina Silva 11,12.
[225] Ling CY, *The Rio Declaration on Environment and Development: an Assessment Environment & Development* Series 12 (TWN - Third World Network, Penang, Malaysia 2012) <http://www.twn.my/title/end/pdf/end12.pdf>.
[226] UNCED, the 'Earth Summit' held at Rio de Janeiro, Brazil, 3-14 June 1992. The Conferences has the strong support of the UN General Assembly which at that time had 185 member states. They all addressed problems of global importance recognised by member states as having grown beyond their individual capacities for solution and required concerted international effort. <https://sustainabledevelopment. un.org/milestones/unced>. Adopted at the Summit by more than 178 governments were: Agenda 21, the Rio Declaration on Environment and Development, and the Statement of Principles for the Sustainable Management of Forests. It was also at the UNCED that the Commission on Sustainable Development (CSD) was created to follow up on the Earth Summit and to monitor and report on implementation of the agreements at the local, national, regional, and international levels. <https://sustainabledevelopment.un.org/index.php?page=view&nr=23&type=400&menu=35> accessed 29 June 2021.
[227] United Nations Sustainable Development, Agenda 21 <https://sustainabledevelopment. un.org/content/documents/Agenda21.pdf> accessed 29 June 2021

Agenda 21, the Programme for Further Implementation of Agenda 21, and the Commitments to the Rio Principles were strongly reaffirmed at the World Summit on Sustainable Development (WSSD) in 2002.[228] The Agenda 21 process marks the beginning of a new global partnership for sustainable development closely supplemented by the Rio Declaration.

The Rio Declaration on Environment and Development is the third and most relevant of the sustainable development instruments relied on in this thesis. Though classified as soft law, with its authentic principles as a foremost declaration, the Rio Declaration forms the basis for any legislation on sustainable development. As an international instrument, the Rio Declaration states in its Preamble that it aims to promote international agreements and protect the integrity of the global environmental and developmental system. The 27 Principles of the Rio Declaration adequately provide for the formulation of enabling sustainable development policies by governments at the national and local levels. Additionally, a fusion with the Stockholm Declaration generates a comprehensive sustainable development instrument highly effective for present-day application.

A close study of the two Declarations reveals cohesion and interrelated understanding. For example, while Principle 1 of the Rio Declaration states that: 'Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature'; Principle 1 of the Stockholm Declaration provides that, 'man has the fundamental right to freedom, equality, and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being'. Clearly, the two primary principles project a single common factor, 'humans' as the nucleus of their sustainable development endeavours, giving prominence to their dignity and well-being in the arena of natural resource development. This is why sustainable development and its principles are of utmost importance to the rural dwellers who are, as a rule, indigenous peoples co-located with natural resources. The formulation of a legal framework, as the goal of this thesis, requires a supporting theory that will infuse the attributes of freedom, equality, the right to development, general improvement in living conditions, dignity, and well-being as added value to sustainable development.

[228] ibid.

The three sustainable development instruments discussed above constitute 'soft law' with no binding effect but with strong commitment for high performance by member states. On the other hand, the Convention on Biological Diversity (CBD) is a treaty with 'binding force' and committed to the conservation and sustainable use of biological diversity. The CBD was inspired by the world community's growing commitment to sustainable development since June 1992 when it was opened for signature at the United Nations Conference on Environment and Development (the Rio 'Earth Summit').[229] The CBD is conceived as a practical tool for translating the principles of Agenda 21 into reality. It brings into focus the reality that biological diversity is not simply about plants, animals, micro-organisms, and their ecosystems; it is also about people and their need for food security, medicines, clean air and water, shelter, and a clean and healthy environment.[230]

Furthermore, the CBD is of great benefit to indigenous peoples by promoting nature and human well-being and offering protection to the environment as a legally binding instrument for sustainable development. Nigeria ratified the Convention in 1994 and the Cartegena Protocol in 2003. With such commitment to biological diversity, Nigeria ought to incorporate the Convention in its national legislation to allow for municipal application. Nigeria should also adapt the Agenda 21 principles in government policies, plans, and initiatives for national implementation. This, however, is a topic for subsequent chapters. Moreover, article 26 of the CBD requires the submission of periodic reports by each member state on measures adopted for the implementation and effectiveness of the provisions of the Convention in meeting the desired objectives. Nigeria is committed to this reporting in the form of the National Biodiversity Strategy and Action Plan (NBSAP) and submitted the 2015 report. The domestication of the Convention will make it a reliable and enforceable legal instrument for protecting indigenous peoples' environmental right and improving sustainable development in Nigeria.

[229] Convention on Biological Diversity (n 17); also available at <https://www.cbd.int/intro/default.shtml>.
[230] ibid.

The most recent global sustainable development commitment is the United Nations 2030 Agenda for Sustainable Development[231] launched with the 17 Sustainable Development Goals (SDGs) and 169 associated targets intended to transform the world for people and the planet during the next fifteen years. These goals are expected to address the needs of all peoples in both developed and developing countries, with emphasis on no one being left behind. According to the UN, in its broad and ambitious scope the Agenda covers the three dimensions of sustainable development – social, economic, and environmental, as well as important aspects related to peace, justice, and effective institutions. It also undertakes to end poverty and hunger in all their forms and dimensions and ensures that all human beings are able to fulfil their potential in dignity and equality and in a healthy environment.

While reaffirming commitment and emphasising that implementation would be consistent with the rights and obligations of states under international law, indigenous peoples are categorised as 'vulnerable' people who 'must be empowered' under this Agenda.[232] The Agenda acknowledges the importance of the UDHR and other international human rights instruments and the need for states to conform to the Charter of the United Nations, to respect, protect, and promote human rights and fundamental freedoms for all,[233] thereby implicitly affirming the rights of indigenous peoples under international law. The 2030 Agenda is, therefore, expected to be implemented 'for the full benefit of all, for today's generation and for future generations'. For purposes of this thesis, only those SDGs which directly affect indigenous peoples are considered below.

Goal 1 – 'End of poverty in all its forms everywhere'

According to the UN,

> Eradicating poverty is the greatest global challenge facing the world today and an indispensable requirement for sustainable development, in particular for developing countries, and that although each country has the primary responsibility for its own sustainable development and poverty eradication and the role of national policies and development strategies cannot be overemphasized, concerted and concrete measures are required at all levels to enable developing countries to achieve their sustainable development goals as related to the internationally agreed poverty-

[231] See n 20. UN Resolution A/RES/70/1 adopted 25 September 2015 'Transforming our world: the 2030 Agenda for Sustainable Development' and 'Sustainable Development Goals – 17 Goals to transform our lives'.
[232] ibid para 23.
[233] ibid para 19.

> related targets and goals, including those contained in Agenda 21, the relevant outcomes of other United Nations conferences and the United Nations Millennium Declaration.[234]

Truly, as this goal implies, a poverty eradication agenda for Africa requires peculiar measures to compliment the UN implementation agenda aimed at achieving best results through a specific regional or community-based approach in analysing the causes of poverty.

Goal 6 – Ensure availability and sustainable management of water and sanitation for all.

Water is vital for good health and this goal on water and sanitation provides links to health, food security, climate change, resilience in the face of disasters, and ecosystems.

In the understanding of this thesis, only few of the 17 SDGs impact directly on indigenous peoples' issues. Most of the SDGs are unrelated to and unconnected with the basic needs of indigenous peoples. The indigenous peoples' lands and locations are extremely rural and the goals are too urbanised to have any relevance for indigenous peoples.

Nonetheless, the United Nations encourages the full implementation of all instruments on sustainable development for,

> eradicating poverty, changing unsustainable and promoting sustainable patterns of consumption and production and protecting and managing the natural resource base of economic and social development are the overarching objectives of and essential requirements for sustainable development,' which in turn 'is a key element of the overarching framework for United Nations activities. [235]

As explained in Chapter one, although the SDGs are the latest principles, they must not be interpreted as competing with or replacing the traditional instruments. In terms of the standard set by the UN, the operationality of these goals depends solely on the commitment of UN member states. Considering the need for an all-encompassing global sustainable development agenda, the UN reaffirmed its

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[234] United Nations A/RES/67/203. Resolution adopted by the General Assembly on 21 December 2012, Implementation of Agenda 21, the Programme for the Further Implementation of Agenda 21 and the outcomes of the World Summit on Sustainable Development and of the United Nations Conference on Sustainable Development <https://undocs.org/en/A/RES/67/203>.

[235] UN GA res A/70/472/Add.1 adopted on 14 December 2015, 5, 7 <https://digitallibrary.un.org/record/814544?ln=en#record-files-collapse-header> accessed 29 June 2021.

commitment to the implementation of Agenda 21, the Programme for the Further Implementation of Agenda 21, the Johannesburg Plan of Implementation, and other internationally agreed development goals, including the Millennium Development Goals and the Sustainable Development Goals. Since 1992 the United Nations has also reaffirmed other internationally agreed goals in the economic, social, and environmental fields, as well as the outcome document of the United Nations Conference on Sustainable Development.[236]

2.2.7.3 Sustainable development and indigenous peoples

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) was adopted by the General Assembly in September 2007 a result of decades of work by the Working Group on Indigenous Populations to address issues of oppression, marginalisation, and exploitation suffered by indigenous peoples. As early as the 1992 Earth Summit, governments showed that they were able to mobilise effectively to take decisions on issues affecting the environment and sustainable development.[237] These decisions had a great impact on indigenous peoples as peoples who are very close to the environment and often co-located with natural resources. Indigenous peoples felt 'left-out' and unrepresented at the Earth Summit in Rio de Janeiro in 1992 – a time at which they had not yet gained global recognition. By 2012, however, the then newly- adopted UNDRIP provided a sound basis for indigenous peoples' representation at the United Nations Conference on Sustainable Development – Rio+20. [238]

The opportunity for indigenous peoples to make a collective contribution for themselves and by themselves came in the form of a declaration during Rio+20. The indigenous peoples of the world believe their continued existence and good life depend largely on the activation of the concept of sustainable development in all their endeavours. A pre-conference meeting was organised by indigenous peoples globally, which resulted in a declaration on 'self-determination and sustainable

[236] ibid.
[237] Ling, 'The Rio Declaration on Environment and Development', (n 225).
[238] The United Nations Conference on Sustainable Development (UNCSD) was organised in pursuance of GA res 64/236 (A/RES/64/236) held in Brazil 20-22 June 2012, <https://undocs.org/en/A/RES/64/236> to mark the 20th anniversary of the1992 UNCED held in Rio de Janeiro and the 10th anniversary of the 2002 World Summit on Sustainable Development (WSSD) in Johannesburg. The Rio+20 Conference was seen as a High Level Conference that included Heads of State and Government or their representatives. <https://www.un.org/en/conferences/environment/rio2012> accessed 29 June 2021.

development'[239] released to world leaders at the Rio+20 Conference. The declaration expressed a collective decision to assume historical responsibility of reversing centuries of predation, pollution, colonialism, the violation of rights, and genocide. The highpoint of their demand was the right to self-determination by which they could assume responsibility for their future generations. This was clearly stated as: 'Humanity has the ability to make development sustainable to ensure that it meets the needs of the present without compromising the ability of future generations to meet their own needs.'[240] This statement captures the permanent link between humans and development. It endows humanity with the ability to provide for their perpetual needs by always taking centre stage in any development – the standard of sustainable development.[241]

For appreciable human development and economic growth in the Niger Delta, the sustainable development of the oil and gas in the region must be prioritised. However, for sustainable development to be fully achieved there is need to particularise individual needs, choices, and freedoms against poverty. In light of this understanding, Sen,[242] in his work *Development as Freedom,* explains poverty, which underpins its importance to development as a freedom. From Sen's perspective, 'development in terms of expanding substantive freedoms directs attention to the ends that make development important, rather than merely to some of the means that play a prominent part in the process.'[243] Sen's theory of freedoms and capabilities is subtly adaptable to the concept of sustainable development for the enhancement of social, political, and economic growth as drivers of local, national, and regional development. Sen idealises the elements of deprivation and lack of capabilities which are better understood from the perspective of 'well-being' and 'development'. The perception of development flourishes in the context of growth,

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[239] Indigenous Peoples International Declaration on Self-Determination and Sustainable Development June 2012 Rio de Janeiro (n 95). Indigenous Peoples from all regions of the world met at the 'Indigenous Peoples International Conference on Sustainable Development and Self-Determination' 17-19 June at the Museu da Republica in Rio de Janeiro, Brazil.

[240] United Nations Report of the World Commission on Environment and Development 1987, A/42/427 *Our Common Future* Annex - Report on the World Commission on Environment and Development: 'From one earth to one world: An Overview by the World Committee on Environment and Development' para 27 'Sustainable Development' <https://digitallibrary.un.org/record/139811?ln=en> accessed 29 June 2021.

[241] Schrijver and Weiss, *International Law and Sustainable Development* 31.

[242] Sen Amartya, *Development as Freedom* Preface xiii. Sen, a philosopher and economist who focuses on human welfare has been awarded a Nobel Prize for his work on famine and poverty. As a professional economist, his book *Development as Freedom* has been a means to express his 'views on development and on making of public policy'.

[243] ibid 3.

advancement, improvement, and increase – all of which Sen's theory offers with appropriate elasticity. This thesis believes that development is determined by the quality of life enjoyed by most of the people and not solely by a nation's quantum of wealth or gross income of a nation.

The adaptation of the elements of substantive freedoms into sustainable development becomes achievable through the process of integration which has been described as the 'very backbone of the concept of sustainable development'.[244] The integration processes are enshrined in the two principal Declarations – Principle 4 of the Rio Declaration states that: 'in order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it'; and Principle 13 of the Stockholm Declaration provides that: 'States should adopt an integrated and co-ordinated approach to their development planning so as to ensure that development is compatible with the need to protect and improve environment for the benefit of their population.' And, making it still simpler, Sen's theory of freedom 'outlines the need for an integrated analysis of economic, social and political activities, which involve a variety of institutions and various interactive agencies'.[245] This, according to Sen, 'concentrates particularly on the roles and interconnections between certain crucial instrumental freedoms, including economic opportunities, political freedoms, social facilities, transparency guarantees, and protective security.'[246] The various approaches to integration explained here confirm how the process of integration is pivotal for the achievement of sustainable development.

While establishing new programmes and plans for sustainable development through the SDGs, the General Assembly, in applying the principle of integration in its

> mainstreaming of the three dimensions of sustainable development throughout the United Nations system', highlighted the role of the sustainable development goals at the core of the post-2015 development agenda and their potential to inject new impetus for embracing integrated approaches to development and to marshal a range of existing policy tools and guidance for collaboration.[247]

In all these, the concept of sustainable development has not changed. Integration of the environmental, social, and economic issues ought to be kept within the range

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[244] ILA New Delhi Conference (2002) 7.
[245] Sen, *Development as Freedom xii.*
[246] ibid.
[247] United Nations General Assembly, Report of the Secretary-General A/70/75-E/2015/55.<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N15/091/89/pdf/N1509189.pdf?OpenElement>.

of enjoyment of indigenous peoples. Considerable scientific progress in the implementation agenda has advanced the concept beyond the reach of indigenous peoples. It is hoped that the technology facilitation mechanism (TFM)[248] established for the adoption of the post-2015 Development Agenda will not exclude the sustainable development needs of the vulnerable rural dwellers, in particular, of indigenous peoples. According to the 2030 Agenda for Sustainable Development, the TFM is created to support the implementation of the SDGs by facilitating multi-stakeholder collaboration and partnerships. This can be achieved through 'the sharing of information, experiences, best practices and policy advice among Member States, civil society, the private sector, the scientific community, United Nations entities and other stakeholders'.[249]

The sustainable development agenda remains indispensable in developing countries with the assertion by the United Nations that each country should take primary responsibility for its own economic and social development[250] due to the dependence of the social and economic development on the sustainable management of the planet's natural resources.[251] The interpretation of sustainable development principles into goals for the transformation of our world has been the result of the challenges exposed and commitments made at the major conferences and summits. These issues are interrelated and demand integrated solutions.[252] As the agenda affirms, 'sustainable development recognizes that eradicating poverty in all its forms and dimensions, combating inequality within and among countries, preserving the planet, creating sustained, inclusive and sustainable economic growth and fostering social inclusion are linked to each other and interdependent.'[253] Thus, sustainable development stands to benefit the indigenous peoples immensely through the economic and social development approaches to the eradication of poverty. They would equally enjoy sustained, inclusive, and sustainable economic growth and social inclusion that would end long-standing marginalisation and neglect.

[248] Technology Facilitation Mechanism, Sustainable Development Goals <https://sdgs.un.org/tfm> accessed 29 June 2021.
[249] UN GA A/RES/70/1 'Transforming our World' para 70.
[250] ibid para 41.
[251] ibid para 33.
[252] ibid para 13.
[253] ibid.

The relevant instruments to support sustainable development in Nigeria require domestic legislation. Most of the instruments mentioned in this chapter are without binding force and so require no domestication in Nigeria. But, for effective domestic application in Nigeria, those conventions and treaties that have been ratified by Nigeria must be incorporated by the National Assembly as national legislation. Backed by section 12 (1) of the Nigerian Constitution, 1999, which states that, 'No treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly', Nigeria is thus considered a dualist state in this regard.[254] However, most instruments could be adopted for implementation as national policies and programmes on sustainable development without domestication when contextured as sustainable development rules in national and state policies and action plans. Moreover, it has been argued by notable scholars such as Okorodudu-Fubara and Ekhator that international environmental conventions or treaties have been localised into environmental legislations in Nigeria using subsidiary legislation.[255] Thus, responsibility for the sustainable development agenda and its implementation rests on national governments, monitored and assessed by the High-level Political Forum on Sustainable Development and will be discussed in the second part of this chapter.

From the explication above, sustainable development in all its ramifications is clearly the best option for the development of natural resources, not only in the Niger Delta, but in Nigeria as a state. With emphasis falling on human-centred sustainable development, the need arises to source a human rights-based theory compatible with sustainable development. In sourcing the theory, its effectiveness or otherwise when evaluated, combined with its appropriateness, will assist in formulating the elements required to construct the legal framework this thesis proposes.

2.3 Theoretical Framework

As explained in the preceding section, this section of the chapter evaluates and identifies theories associated with development for the purpose of strengthening the

[254] Enabulele, 'Implementation of treaties in Nigeria and the status question' 326-341; Ekhator, 'Improving access to environmental justice' 63-79.
[255] See generally: Okorodudu-Fubara, 'Country Report: Nigeria, Legal development 2009-2011', 170; Ekhator, 'Environmental protection in the oil and gas industry in Nigeria', 196-203; Ekhator and Agbaitoro, 'Energy law and policy in Nigeria with reflection on the International Energy Charter and domestication of the African Charter'.

sustainable development initiative for the development of natural resources in the Niger Delta. The choice theory adopted is determined by the value attached to it by the people directly concerned, which is why it is important for the people to participate in development that affects them. Natural resource development differs from infrastructure development. For example, for the indigenous peoples of the Niger Delta Region infrastructure development will be of little value, despite its importance and greater value in the urban cities. Granted, the Niger Delta region also requires development, but choices will tilt more towards human, social, or environmental elements of sustainable and human development. In this light, this research supports the interpretation of development as a flexible term with historical connotations which opens a necessary path of progress that combines the ideas of necessity, choice, change which is open to influence and fundamental improvement, as reflected in a standard theory.[256] The issue now arising is the standard theory. For improved performance and actualisation of developments, theories are needed to establish a phenomenon and connect the variables.[257] Intrinsically, over the past decades development has evolved in line with different theories. In this section selected related theories are briefly assessed, and the most relevant to support a people-centred sustainable development as the main concern of this research, is fully adopted.

2.3.1 Theories of development

According to Rostow, the modernisation theory was highly influential in the 1960s. It involves the use of science and technology to advance industry and stimulate economic growth modelled on development in the wealthiest nations.[258] The theory engineers the 'take-off' for economic growth[259] which advances transformation into self-sustaining economies for the undeveloped nations through observation of a certain set of rules of development – rules which are claimed to have worked well for developed nations.[260]

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[256] Gasper, *The Ethics of Development* 25.
[257] Jacoby and Kothari, 'Bringing social theory back' 216.
[258] Royal Geographical Society, (RGS) 'Theories of development' <https://www.rgs.org/schools/teaching-resources/theories-of-development/> accessed 1 July 2021.
[259] Todaro and Smith, *Economic Development* 112.
[260] See n 258. RGS, 'Theories of development - Rostow's Economic "take-off"'.

While opposing the modernisation theory, the noted economist, Frank, advocates the dependency theory, popularised in the 1970s.[261] This is irrespective of the exploitative and neglectful intent of this theory which promotes the division of the world into a core made up of the developed countries, and a periphery consisting of underdeveloped countries.[262] Through this neo-colonial dependence model, the international capitalist system of inequality and conformity is perpetuated. The model is dominated by, and dependent on, the

> international special-interest power groups including multinational corporations, national bilateral-aid agencies, and multilateral assistance organizations like the World Bank or International Monetary Fund (IMF), which are tied by allegiance or funding to the wealthy capitalist countries.[263]

This theory exacerbated poverty in developing countries, perpetuated under-development, and created an elitist class that is being rewarded by the system.[264] This explains the rise in poverty of the rural dwellers who are, in the main, indigenous peoples – such as those within the Niger Delta – through its externally induced phenomenon of underdevelopment.

There is continuity in the global economic agenda which by the 1980s was referred to as the neoliberal theory promoted by the World Trade Organisation, the World Bank, and the International Monetary Fund, and collectively dubbed the 'Washington Consensus'.[265]

> The neoliberals argue that by permitting competitive free markets to flourish, privatizing state-owned enterprises, promoting free trade and export expansion, welcoming investors from developed countries, and eliminating the plethora of government regulations and price distortions in factor, product, and financial markets, both economic efficiency and economic growth will be stimulated.[266]

Thereafter, the globalisation theory further entrenched the neoliberal agenda, and it was soon clear that the agenda was nothing short of Westernisation of the world,[267] perfected through exportation of technology, trade, and administration. The intention was for the 'supra-state actors' to control world affairs.[268] The concept of

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[261] ibid. Andre Gunder Frank is a German-born political economist. He studied Latin America, opposed modernisation, and was prominent in the 1960s and 1970s.
[262] Todaro and Smith, *Economic Development* 124.
[263] ibid.
[264] ibid.
[265] RGS, 'Theories of development' (n 258).
[266] Todaro and Smith, *Economic Development* 128.
[267] Gasper, *The ethics of development* 32.
[268] Cohen and Kennedy with Perrier, *Global Sociology* 38.

globalisation came to the fore during the nineteenth century[269] by involving international governmental organisations that exhibited a growing need for rules and procedures to standardise cross-border transactions.[270] Globalisation is a form of Westernised development and the two significant consequences of globalisation are the 'rapidity with which the lives of all humans are becoming ever more interconnected, and the reality that societies and nations face a growing number of similar problems they cannot solve alone.'[271] Nonetheless, from Williamson's perception as the inventor of the term 'Washington Consensus', whether as the 'market fundamentalism' of President Reagan,[272] or 'neoliberalism', or 'globalisation' – or better still, 'rational economic policymaking' – the Washington Consensus can mean different things to different people. In Williamson's own words: '[T]he term is often being used in a sense significantly different to that which I had intended.'[273] Although acknowledged as a global economic reform used by the Washington-based institutions, Williamson has since expressed his doubts as to whether the term has served the intended cause – ie, 'to advance the cause of rational economic policymaking'.[274]

From the above analyses, theories of development and principles on which development could be based and projected are skewed in favour of the developed nations and have failed to realise their original goals. It has also been shown that adequate development theory and policy are difficult to formulate for the majority of the world's population who suffer from under-development, without first studying their economic and social history which led to their current condition of underdevelopment.[275] Nigerian development cannot continue to be confined to a single world economic mode. As has been shown above, what is good for the West may not be good for the East, and what is good for the North may not always be

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[269] 'A brief history of globalization' World Economic Forum <A brief history of globalization | World Economic Forum (weforum.org)> accessed 17 January 2019. The first wave of globalization (19th century to 1914) was aided by the First Industrial Revolution and ended with the outbreak of World War 1. Second and third waves of globalization: The end of World War II marked a new beginning for the global economy aided by the technologies of the Second Industrial Revolution. 1989 marked the point at which globalization became a truly global phenomenon.
[270] Gasper, *The ethics of development* 32.
[271] ibid 41.
[272] John Williamson, 'What Should the World Bank Think? 'Paper prepared as a background to the World Bank's World Development Report 2000 @ Peterson Institute for International Economics , 1 July 1999 <What Should the World Bank Think about the Washington Consensus? | PIIE> accessed 2 July 2021, 255.
[273] ibid.
[274] ibid.
[275] Chew and Lauderdale, *Theory of Methodology* 7.

suitable for the South given cultural differences and peculiar world views. This view is supported by Nussbaum who states, 'dominant theories of development have given us policies that ignore our most basic human needs for dignity and self-respect'.[276] This thesis seeks appropriate developmental values which will benefit rural indigenous peoples and their communities and enable them to bridge the gaps created by decades of failed economic theories.

2.3.2 Sustainable development: Sen's theory of freedom and poverty

Sen's theory of freedoms and capabilities can be adapted to fit the concept of sustainable development. This adaptation can influence the advancement of social, political, and economic growth as drivers of local, national, and regional development, making Sen's theory the most appropriate theory for indigenous peoples. As Sen reiterates in his book, 'with adequate social opportunities, individuals can effectively shape their own destiny and help each other.'[277] For better understanding, Sen idealises the elements of deprivation and lack of opportunities[278] through his conceptualisation of 'the perspective of freedom'.[279] Furthermore, in Alkire's view, Sen's capabilities approach has a distinct value apart from its practical contribution and empirical outworking,[280] which in the view of this thesis can be adapted to serve appropriate situations.

From Sen's perception, development should be interpreted to mean 'freedom'. But what freedom? Sen explains freedom as opportunity. These opportunities require processes that can be grouped as those: (i) which allow freedom of actions and decisions; and (ii) which people have and which are considered along with their personal and social circumstances.[281] Accessing these opportunities for freedom may be a Herculean task in any given society if those seeking opportunities are already classified as a 'minority'.

Denial of important freedoms such as political liberty and civil freedoms as well as economic freedoms (food, health, education, and other socio-economic rights) constitute restrictions on poor people in leading their lives and denying them the opportunity of taking part in critical decisions on public affairs, are repressive. In

[276] Martha Nussbaum, *Creating Capabilities* 18.
[277] Sen, *Development as Freedom* 11.
[278] ibid 15-17.
[279] ibid ch 1 'The Perspective of Freedom' 13-21.
[280] Alkire, 'Capability Approach' 116.
[281] Sen *Development as Freedom* 17.

terms of the role of human rights in development, the denial of political and civil freedoms constitutes a handicap, and attention ought to be paid to their constitutive and instrumental importance.[282] Sen tells of two major roles played by freedoms:

> Having greater freedom to do the things one has reason to value is, (i) significant in itself for the person's overall freedom, and (ii) important in fostering the person's opportunity to have valuable outcomes. Both are relevant to the evaluation of freedom of the members of the society and thus crucial to the assessment of the society's development.
>
> The second reason for taking substantive freedom to be so crucial is that freedom is not only the basis of the evaluation of success and failure, but it is also a principal determinant of individual initiative and social effectiveness. Greater freedom enhances the ability of people to help themselves and to influence the world, and these matters are central to the process of development.[283]

Notwithstanding the importance of economic growth as the barometer for healthy economy, it does not equate to development. Development is more concerned with improving the lives of the people and the freedoms they enjoy, [284] which will in turn justify the resulting economic growth – people first, then economic growth. From Sen's capabilities approach, this thesis explains the elements responsible for poverty through lack of capabilities.

2.3.2.1 The capabilities approach

Development in all its ramifications cannot be considered outside the raising of the human standard from low to high through economic and social improvement. Clark describes the emergence of the capabilities approach as the 'leading alternative to standard economic frameworks for thinking about poverty, inequality, and human development generally',[285] and making a 'good change'.

Sen describes 'deprivation of capabilities' as lack of freedom for people to lead the kind of life they value.[286] In this light, Sen's capability deprivation is responsible for poverty with claims such as: (a) poverty could simply be identified in terms of capability deprivation; and (b) low-income is not the only factor that influences deprivation of capabilities. Sen's assertion that 'the approach concentrates on deprivation that are intrinsically important (unlike low-income which is instrumentally

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[282] ibid 16-17.
[283] ibid 18.
[284] ibid 14.
[285] Clark, 'The Capability Approach: It's Development, Critique and Recent Advances' <http://www.gprg.org/pubs/workingpapers/pdfs/gprg-wps-032.pdf> 2 accessed 14 May 2017.
[286] Sen, *Development as Freedom* 87.

significant)',[287] appears paradoxical. Does it imply that low-income ought to be kept in the shadows, be incognito, while other more significant and relevant deprivations dominate the reasoning around poverty? Issues are contradictory here, and there is a need for a clearer understanding of the role of low-income in the life of the poor. Though the 'instrumentality' of low-income's significance is not defined by Sen, it could be assumed in relative perspective to regional or national poverty evaluation or global assessment under the economics of poverty,[288] but when attributed to individual living, low-income equates to poverty in the view of this thesis. This research affirms the fundamentality of low-income as deprivation of capabilities. Indeed, it is the threshold of deprivation. How do people lead the kind of lives they value when their income is low, small, or too small? Financial lack might not be the only factor, but it is the most essential factor in addressing poverty.

Intuitively, a poor person is powerless, and survival is a struggle. The intensity of deprivation of capabilities reflects in significant undernourishment (especially of children), a high mortality rate, persistent morbidity, widespread illiteracy, and other social ills.[289] This type of deprivation, facilitated by social inequality and failure of institutional responsibilities, leads to uneven development in the society. Lack of capability is lack of freedom. Improved capabilities promote a better standard of living which in turn leads to higher productivity and higher income which addresses the individual cash-flow problem. Lack of freedom among the indigenous peoples of the Niger Delta resulting from institutional neglect is responsible for non-productive lives and leads to cash-flow problems.

Sen acknowledges the extension of these capabilities to economic and social development, with reference to Adam Smith who championed the 'improvability of human capabilities'.[290] Sen asserts that the role of capability expansion lies in its being instrumental in effecting social change. As agents of change, the role of human beings reaches well beyond economic production to include social and

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[287] ibid.
[288] Morduch, 'Poverty and Vulnerability' 221-225.
[289] Sen, *Development as Freedom* 20.
[290] ibid. Chapter 12 'Individual Freedom as a Social Commitment' 294. See also Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations Books I,II, III, IV and V,* MetaLibri 2007 [digital edn] Book I 'Of The Causes of Improvement in the Productive Powers of Labour, and of the Order According to which Its Produce Is Naturally Distributed Among the Different Ranks of the People'. The book explains how monetary value is placed on human labour which represents human capabilities. <An Inquiry into the Nature ands Causes of the Wealth of Nations (ibiblio.org)> accessed 2 July 2021.

political development. Could this be the answer to the question of what we stand to gain from these freedoms raised by certain scholars?[291]

Sen's theory has been criticised for showing scant concern – as does Nussbaum's theory – for the outcome of freedom. According to Dean,[292] Sen's concept could be classified as a liberal-individualist concept which neglects three key realities: the constitutive nature of human interdependence; the problematic nature of the public realm; and the exploitative nature of capitalism. This thesis argues that Nussbaum's capabilities approach is a development on Sen's and is well-constructed to recognise the missing realities mentioned by Dean, in preparing for adaptation by society and theorists. Just as well, Alkire regards Nussbaum's approach as being more determinate, with emphasis on the legal and political, rather than socio-economic applications, and giving more distinct definitions of capability and functioning,[293] thereby making it more robust for developmental advancement.

With the improved role of human capabilities expanded and well utilised, they can be more readily appreciated as developmental values. These values promote productivity, economic growth, and individual income. And their beneficiaries – the people – can lead longer, freer, and more fruitful lives.[294] Thus, human capabilities directly influence the well-being and freedoms of peoples, and indirectly influence social change and economic production[295] when adapted to sustainable development for the benefit of the peoples.

2.3.2.2 Creating capabilities

Capabilities can be further classified as 'internal capabilities' and 'combined capabilities'. Internal capabilities are personal attributes and abilities capable of being trained and developed in interaction with the social, economic, familial, and political environment.[296] Internal capabilities can be favourably produced within a society, but that society can still deny the people the opportunity to function in accordance with those capabilities. As such, the state remains central in the final analysis of producing structures that will promote combined capabilities for the overall benefit of the people to produce appreciable developmental values that can

[291] Qizilbash, 'Sugden's Critique of the Capabilities Approach', 31-34.
[292] Dean, 'Critiquing capabilities'. 'Abstract', 261.
[293] Alkire, *Valuing Freedoms* 32.
[294] Sen, *Development as Freedom* 295.
[295] ibid 296.
[296] Nussbaum, *Creating Capabilities* 21.

promote productivity, economic growth, and individual income so adding value to the people and allowing them to live longer, freer, and more fruitful lives.[297]

Describing the element of 'functioning' as the active realisation of one or more capabilities, Nussbaum asserts that the internal capabilities added to the social, political, and economic conditions in which functioning can be chosen, make up the combined capabilities and make it possible for the people to practise their freedom.[298] Functionings are the 'being' and 'doing' things necessary for the realisation of capabilities such as enjoying good health or resting peacefully.[299] The capabilities theory is untenable as regards economic growth without the state's basic provisions and the people's cooperation, since neither can operate in isolation to achieve their goals. Hence, in order to convert capabilities into political success, capabilities must be understood. Sen terms capabilities 'substantial freedoms'; a set of opportunities to choose and to act.[300] Nussbaum adds that they are not simply a person's abilities, but also the freedoms or opportunities 'created by a combination of personal abilities and the political, social, and economic environment'.[301] This opens the way for these capabilities to be supported by the state or government. On their own capabilities can achieve nothing for the owner, they require external support. This means that the society itself has an important role to play in extracting the best moral, ethical, and professional qualities from capabilities. The state must facilitate the actualisation of the substantial freedoms of the people to act in seemingly proper ways and have reason to value and achieve a better life. In achieving this better life for themselves and by themselves, the state must listen to the people and consider the need to control and regulate excessive freedoms.

2.3.2.3 Capabilities approach and human development

Nussbaum and Sen link the capabilities approach to the idea of human rights.[302] Nussbaum further asserts that capabilities compliment and could clarify the basic concept of human rights, by emphasising 'the need for government action to protect and secure all rights'.[303] In acknowledgement of Nussbaum's human rights idea, certain scholars opined that the capabilities approach can serve as a practical

[297] Sen, *Development as Freedom* 295.
[298] Nussbaum, *Creating Capabilities* 22.
[299] ibid 24-25.
[300] ibid 20.
[301] ibid.
[302] Nussbaum, 'Supplementation and Critique' 1.
[303] ibid.

framework through which the human rights positions of individuals and groups may be evaluated and better understood.[304] Conflicting views are, however, held by some philosophers, for example, Robeyns, who on one hand objects to the 'capability approach' as a theory to explain poverty, inequality, or well-being,[305] but on the other hand describes it as a theoretical framework.[306] Most likely, Robeyns' perception of the capabilities approach sees it as a tool and a framework within which to conceptualise and evaluate the phenomena, but not as a theory. In all probability a philosophy has been established and the perception broadened through objective idealism that has been widely accepted and developed by philosophers and scholars, as shown by its divergent applications in this chapter.

While building on Sen's theory, Nussbaum idealises the importance of human development to national development. She argues that only the assessment of human development through the capabilities approach can measure national progress (development indicator), and not the country's Gross Domestic Product (GDP).[307] Usually, the GDP assessment or compilation excludes the percentage of deprived people (which more often than not, are the majority). Thus, failure to consider the negative indices of deprived people such as the number who lack basic education, or access to good healthcare, or potable water and so on, in calculating the GDP, cannot reflect a valid rating. It is the view of this thesis that a more accurate method of calculating GDP as informed by Nussbaum is necessary to determine the exact economic status of a nation. The human development factor should reflect in national development and poverty should be included in assessing national economic status. On the other hand, improved human development will result in higher productivity with individuals performing at their full potential when their internal and combined capabilities are synergised as economic tools. This reflects equally in the calculation of GDP.

From the above explanations, this thesis recommends the application of the capabilities understanding to remedy the deprivation in the Niger Delta, bearing in mind how internal capabilities will be identified, and combined capabilities achieved. According to Nussbaum, the internal capabilities as personal attributes (the fluid and

[304] Vizard, Fukuda-Parr and Elson, 'The Capability Approach' 4.
[305] Robeyns, 'The Capability Approach' 94.
[306] Robeyns Ingrid, 'The Capability Approach' *The Stanford Encyclopedia of Philosophy* (Winter 2016 Edition).
[307] Nussbaum, 'What Makes Life Good?' 18-24.

dynamic state of a person) are recognisable as the characteristics of a person – personality traits, intellectual and emotional capacities, state of physical fitness and health, internalising, learning, skills of perception, and movement.[308] This approach is the 'good change tool' needed by the Niger Delta indigenous peoples. The capabilities approach combined with principles of sustainable development as earlier discussed, can produce a comprehensive people-inclusive legal framework for the enjoyment and 'good living' by indigenous peoples not only in the Niger Delta, but in all parts of Nigeria where sustainable development is required for the development of natural resources. This possibility is explored in Chapter five.

2.3.3 The High-Level Political Forum on sustainable development and capabilities

The concept of basic capabilities is expected to facilitate the process of exercising the freedoms to acquire the individual's social, political, and economic entitlement in society. The 'combined capabilities' of a group of individuals can be used to advance greater freedom for collective social, political, and economic entitlements as conceptualised in the SDGs. The classic goal of sustainable development is exemplified in the Sustainable Development Goal 1 for Poverty Eradication – 'End poverty in all its forms everywhere'. Poverty eradication is meant to 'alleviate the suffering and build the resilience of those individuals still living in extreme poverty, in particular in sub-Saharan Africa'.[309] Thus, the totality of sustainable development is a combination of people and environment which allow every individual to live a good life in a healthy environment.[310]

The concern of the United Nations has been on the issues of sustainable development and poverty eradication. The responsibility has equally been transferred to the High-Level Political Forum (HLPF), which requires the commitment and effective participation of all members of the United Nations and of specialised agencies in the Forum. Working through the Economic and Social Council acting within its mandate under the Charter to transform the lives of all peoples, the United Nations has over the years set in motion machinery by way of major conferences and summits in the economic, social, environmental, and related fields in order to achieve a balanced integration of the three dimensions of sustainable development.

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[308] Nussbaum, *Creating Capabilities* 21.
[309] Sustainable Development Knowledge Platform – Progress of Goal 1 in 2017 <https://sustainabledevelopment.un.org/sdg1> accessed 2 July 2021.
[310] Agenda 21 Ch 1 Preamble [1.1].

To leverage on the outcomes of such conferences and summits, and co-ordinate follow-ups, the HLPF on Sustainable Development was established to replace the Commission on Sustainable Development[311] at the Rio+20 Conference.[312] The forum provides for full and effective participation of all members of the United Nations and its specialised agencies. This is in conformity with the provisions of the outcome document of the United Nations Conference on Sustainable Development, 'The Future We Want', which provided that a universal, inter-governmental, high-level political forum be established to build on the strength, experience, resources, and inclusive participation modalities of the Commission on Sustainable Development and continue with the implementation of sustainable development to avoid overlap with existing structures, bodies, and entities in a cost effective manner.[313]

By Resolution 70/299, the General Assembly reaffirmed that the HLPF on Sustainable Development would have a central role in overseeing and reviewing processes of the 2030 Agenda at the global level. [314] Committed participation by all organisations of the United Nations system is encouraged, including the Bretton Woods institutions, the World Trade Organisation, and other relevant inter-governmental organisations, to contribute within their respective mandates to the discussions of the Forum.[315] The organisational involvement can be helpful to indigenous peoples if they get involved and included in projects (agreements) that affect them, their lands, and natural resources funded by these institutions. The HLPF provides a valuable platform on which their views, demands, and claims can

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[311] See n 15. United Nations Commission on Sustainable Development was established by the UN General Assembly in December 1992 to ensure effective follow up on United Nations Conference on Environment and Development (UNCED) known as the 'Earth Summit'. In its 20 years of performance, the Commission has greatly advanced the sustainable development agenda within the international community.

[312] United Nations Conference on Sustainable Development in Rio de Janeiro from 20-22 June 2012 by Resolution A/RES/66/288 - where the decision was taken to set up the high-level political forum to follow up on the implementation of sustainable development and review progress in the commitments contained in the Agenda 21, the Johannesburg Plan of Implementation, the Barbados Programme of Action, the Mauritius Strategy, as appropriate, outcomes of various United Nations summit and conferences, including the Fourth United Nations Conference on the Least Developed Countries with their respective means of implementation, and the outcome of the present Conference – 'The Future We Want' para 84 <https://undocs.org/en/A/RES/66/288>.

[313] UN GA res A/RES/67/290 of 9 July 2013, 'Format and organizational aspects of the high-level political forum on sustainable development' 1 <https://undocs.org/en/A/RES/67/290>.

[314] UN GA res A/RES/70/299 of 29 July 2016,'Follow-up and review of the 2030 Agenda for Sustainable Development at the global level' <https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/70/299>.

[315] UN A/RES/67/290 para 17.

receive attention and offer solutions to problematic issues on sustainable development if invited or encouraged to submit to a referendum.

All members of the United Nations and its specialised agencies are members of the High-level Political Forum on Sustainable Development. Nigeria is therefore obliged to address the challenges facing her people through the implementation of sustainable development commitments and objectives. These include those related to the means of implementation within the context of the post-2015 development agenda, especially as it pertains to the indigenous peoples of the Niger Delta, within the scope of the annual schedule of implementation. The Forum meetings are expected adequately to address challenges facing developing countries, the most vulnerable countries and in particular, the least developed countries and small developing island states, landlocked developing countries, and African countries. The synergised effect and involvement of members is expected to impact on the lives of the peoples of each country represented to reflect the balanced integration of the social, economic, and environmental dimensions of sustainable development from their national perspectives.[316] Having assumed such global proportions, sustainable development has become everybody's business.

Currently, the HLPF is the United Nations' central platform for follow-up and review of the 2030 Agenda for Sustainable Development and the SDGs. The theme for the HLPF 2017 – 'Eradicating poverty and promoting prosperity in a changing world' – underpins the importance and urgency with which the global body intends to address the issue of poverty, calling the capabilities approach into play. From the HLPF's Report 2016, members' investments had been geared towards education and capacity, health and nutrition, livelihood and resilience to shocks, and increased financial inclusion as critical elements in economic and social empowerment.[317] Under scrutiny, the elements of freedoms and opportunities for the advancement of the people can be identified in the activities reported. Influenced by decisions of the nations in the HLPF Report 2016, policies and frameworks for sustainable development are being considered at national level to offer genuine hope for the poor. Thus, it is stated in the Report that:

[316] UN A/RES/67/290 paras 11-12.
[317] United Nations, Economic and Social Council, 'Report of the High-level political forum on sustainable development convened under the auspices of the Economic and Social Council at its 2016 session' E/HLPF/2016/8 of 16 August 2016 <https://www.un.org/ga/search/view_doc.asp?symbol=E/HLPF/2016/8&Lang=E>.

> [P]rosperity goes beyond economic growth, as determinants of well-being include social and psychological factors such as the pursuit of meaning and participation in society, and our ability to flourish as human beings. Decoupling economic growth from environmental degradation while ensuring social equity lies at the basis of sustainable development.[318]

How the states will 'decouple economic growth from environmental degradation' is yet unclear, but the HLPF 2016 stands as a beacon of hope for the poor, particularly the indigenous peoples in Nigeria in that Nigeria, like the other member states, must observe the decisions directed at poverty eradication. With indices such as 'well-being', 'social and psychological', and 'pursuit of meaning and participation in society', the Forum has imbibed capabilities of human development into sustainable development. And, the capabilities option will inculcate the human insight needed for durable economic growth. This is further captured in the report where it is stated that:

> Awareness of the 2030 Agenda at the global level needs to be translated into action at the national level. Creating ownership of the Sustainable Development Goals and their interlinkages *will require building on national and local contexts, values and cultures, avoiding the use of blueprints*……. Local and subnational level governments will be critical for implementation and for developing road maps and guiding principles for coordination and monitoring at multiple levels. They have the front role to play *in securing the safety, well-being and livelihoods of communities,* including by providing basic services.[319]

From the above statement, national policies should serve as instruments of encouragement, promotion, and facilitation of the traditional occupations of those indigenous peoples inhabiting the lands in communities where development takes place. The people should be embraced, and value added to them through their involvement and participation in developments taking place on their lands. The actualisation of the capabilities option for the indigenous peoples of the Niger Delta lies in their ability to use their full potential to earn good incomes for themselves, and to live the lives they want and have reasons to value. Traditionally, they are farmers, fishermen, hunters, and craftsmen and women (canoe making). Environmental degradation has impacted negatively and become a major deprivation for the practise of these occupations as combined capabilities. This has allowed poverty to gain hold and reign supreme in the region.[320]

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[318] ibid Summary 2/25.
[319] ibid 3/25. Author's emphasis in italics.
[320] Will Ross, (n 59). The video reveals the depth of poverty in the Niger Delta Region.

This capabilities option is to augment the argument for freedom, choices and values as inherent rights of indigenous peoples which had hitherto been entrenched in international instruments that promote the rights of indigenous peoples such as the ILO C169, Agenda 21 and the Rio Declaration, the Banjul Charter, and the UNDRIP. The capabilities approach as the most appropriate theory to actualise the full potential of the sustainable development of the natural resources in the Niger Delta cannot be overemphasised. The need to allow the people to live a prosperous life in a healthy environment necessitates the making of a development policy influenced by freedom and choice, whereby the people will be allowed to use their potential optimally for their own benefit, and indirectly for the good of the society. The state has a duty to promote the full realisation of the freedoms potential. Referring to adequacy among civilised and thriving nations, Smith asserts in the *Wealth of Nations* that even the lowest and poorest, if they are frugal and industrious, are likely to enjoy a greater share of the necessaries and conveniences of life.[321] Economic growth and sustainable development are indicative of the greatest improvement in the productivity of labour, combined with skill, dexterity, and judgement, well directed or applied to yield the effect of division of labour. [322] Allowing individual freedoms to operate at full capacity through the enablement and support of combined capabilities can yield great political, social, and economic growth. The next section will examine what informs Nigeria's economic policies to date, and how that has impacted on indigenous peoples.

2.4 Nigeria's economic status

The advanced capitalist democracies of the world, particularly the USA and the West in general, observed a specific mode of regulation that synchronised their economies socially and politically for achieved development.[323] They depended on and promoted global economic trends, for example, the neoliberal order of the Washington Consensus, which rested on the US-led international market order of Bretton Woods.[324] The trend, based on the liberalisation of trade and financial markets, witnessed international capital movements and swings in exchange rates (US dollars and the pound Sterling). Nigeria has been stuck with the Washington

[321] Sutherland, *Adam Smith* 8.
[322] Sutherland, *Adam Smith* Book 1, 11.
[323] Clark, *Global Financial Crisis and Austerity* 42.
[324] ibid 44.

Consensus and neoliberalism (and to an extent, globalisation) from its inception, that is, from independence.

The Bretton Woods system was created as an international economic policy to foster economic stability and prosperity in the post-war world.[325] The two world institutions created to operate the Bretton Woods system are: the International Monetary Fund (IMF) to monitor exchange rates and loan reserve currencies to nations with trade deficits;[326] and the International Bank for Reconstruction and Development (IBRD), commonly known as the World Bank, to provide underdeveloped nations with needed capital.[327] These institutions have transformed over the years. The Bretton Woods system dissolved formally in 1973, and from mid-1970s, the IMF had to respond to balance of payment difficulties confronting many of the world's poorest countries, and create a new concessional loan program called the Structural Adjustment Facility which was succeeded by the Enhanced Structural Adjustment Facility in December 1987.[328] Intuitively, the adjustment agenda had grave consequences for developing economies raising the question of the efficacy of monetary control in Africa.

According to the IMF, the Structural Adjustment Program (SAP) was initiated to help poor countries, but one must ask whether it has not simply sunk these countries into still greater debt? As President Nyerere reiterated in 1985 at a meeting of the Royal African Society in London, 'the debts and debt service charges of the Third World countries have reached levels which threaten the banking system and financial centres of the world'.[329] At that time, Tanzania was among the 25 poorest countries of the world in terms of per capita GNP.[330] The strict regime of conditionality-lending applied by the World Bank and IMF was unable to bring real economic growth in Africa.[331] The interest rates charged by the Washington institutions were so high that even the Europeans complained of 'the effects of it on US deficits and consequent

[325] Office of the Historian, Department of State, United States of America <https://history.state.gov/milestones/1937-1945/bretton-woods> accessed 10 June 2017.
[326] International Monetary Fund, Cooperation and reconstruction (1944-71) <https://www.imf.org/external/about/histcoop.htm> accessed 10 June 2017.
[327] Office of the Historian, Department of State, United States of America.
[328] International Monetary Fund, The end of the Bretton Woods System (1972-81).
[329] Nyerere, 'Africa and the Debt Crisis' 490.
[330] ibid.
[331] Matthewman Joshua, 'The Bretton Woods Institutions and Development Partnerships' <http://www.e-ir.info/2012/02/08/the-bretton-woods-institutions-and-development-partnerships/> accessed 5 June 2017.

high world interest rates'.[332] If Europeans were complaining, how did Africans feel? According to Nyerere, 'but we - the poor' (referring to African nations categorised as 'poor') also had to pay those interest rates, and worse still, 'we pay from our poverty not from abundance'. Nigeria has continuously struggled with debt payments in order to stimulate her economy. The stringent IMF SAP was introduced to Nigeria at the end of the oil boom era when, in mid-1985, Nigeria accepted a bridging loan of about US$5 billion from IMF conditional upon the SAP.[333] The SAP was a policy that effectively eroded whatever remained of the oil boom era, and, 'for the oil communities that were already adversely affected by the reckless exploitation of crude oil, SAP magnified their jeopardy'.[334] This inadvertently confirms Nyerere's assertion as Nigeria is bound to pay the 'high world interest rates' of the IMF loan that has continued to deepen the country's poverty status.

This thesis is not inclined to blame the colonial rulers for Nigeria's economic woes, but rather lays it at the door of Nigerian rulers who have failed at different times since independence in 1960, to adopt any dynamic economic policy for the development of Nigeria. Even if Nigerian economic patterns are faulted on the nature of the political economies the British carved for Nigeria from the colonial era till the late colonial phase which ended with independence in 1960,[335] Nigerians have had the opportunity to improve economically and developmentally since independence, as it falls upon them to do, but they could not act together. Nigeria's development journey has thus been irregular. Nigeria has a history of unstable political structures, with its democratic attempts marred intermittently by military dictatorships which have resulted in fragmented economic growth.

With such an economic status, it has been suggested that Nigeria qualifies as a neo-patrimonial state, ie, a state characterised by clientelistic, corrupt, or predatory tendencies far from the modern lego-rational states considered essential for industrialisation.[336] According to Atul Kohli:

> While a 'pure' neopatrimonial state is probably rare in the real world, the case of Nigeria comes close, in terms of all the characteristics noted: use of state resources for private aggrandizement, widespread corruption (famously squandering and misusing Nigeria's abundant oil resources), bureaucratic incompetence, and having

[332] Nyerere, 'Africa and the Debt Crisis' 490.
[333] Douglas and Okonta, 'Ogoni People of Nigeria versus Big Oil' 154.
[334] CEDCOMS, *Oil and Violent Conflicts in the Niger Delta* 2.
[335] Kohli, *State-Directed Development* 291.
[336] ibid 393.

> the state disconnected from society, making it difficult for state elites to mobilize internal resources and in turn enhancing their dependency on the vicissitudes of oil revenues. State-led development lacking purpose or capacity thus repeatedly turned into development disasters.[337]

Nigeria might have passed the neo-patrimonial test or attained the status, but this thesis argues that the theory does not adequately account for Nigeria's developmental failure. Neo-patrimonial state might be partially responsible for Nigeria's failure to adopt a coherent and stable development agenda. It also explains Nigeria's poor implementation of development plans. Even when it had the plans, they never really produced results because the political will has always been plagued by corruption. This goes a long way to explain why Nigeria has failed the capitalism or neoliberalism tests. However, it does not explain, for example, why African states – and Nigeria in particular – have elected to approach governance from a neo-patrimonial perspective.

This state of affairs may be part of Nigeria's failed economic growth, but it is not the primary reason. A more compelling factor affecting Nigeria's failed economic growth is the issue of national identity. National identity is defined as the acceptance by a body of people that they belong together.[338] Nigeria's fragmented identity cannot be laid at the door of the colonialists, although they perfected the strange marriage of the Northern and Southern protectorates which forced over 250 ethnic groups into the Nigeria nation in 1914.[339] After this point, however, it was up to the ethnic groups to work out the modalities of unity through submission and integration for the good of all – something they failed to achieve.[340] For example, the plight of the indigenous peoples of the Niger Delta has been attributed to orchestrated marginalisation perfected by political manipulation by the majority tribes.[341] With such ethnic disparity, ethnic imbalance sets the tension so high that competition triumphs over cooperation making it impossible to establish a coherent development agenda. Neo-patrimonial tendencies feed off a weak national identity with the ruling elite of the dominant ethnic groups at the helm of national affairs controlling Nigeria's resources. When personal need trumps national need there can be little impact on national development.[342] Herein lie ethnic alliances and complexities – attributes of failed

[337] ibid 394.
[338] Emerson, *From Empire to Nation*.
[339] Falola and Heaton, *A History of Nigeria* 6.
[340] Library of Congress, Country Profile - Nigeria July 2008 3-4.
[341] Soala, *The Political Economy of Oil and Gas in Africa* 252.
[342] Obi, *The Changing Forms of Identity* 10.

development. The more appalling truth is that the consumption of the oil wealth by the elite denied the real owners, the indigenous peoples of the Niger Delta, the wealth, development, and prosperity due to them from their natural resources. There is need for positive correlation between poverty of the indigenous peoples and the accruable wealth of oil and gas in the Niger Delta which can best be resolved through sustainable development.

2.5 Niger Delta indigenous peoples' permanent sovereignty over natural resources and sustainable development

Nigeria's economic status cannot be fully discussed without the most cogent issue of the right of indigenous peoples to permanent sovereignty over natural resources. Intrinsically, the indigenous peoples of the Niger Delta have no reason to be poor. By virtue of the principle of the 'indigenous peoples' permanent sovereignty over natural resources', they ought to be in control of their natural wealth and resources. According to Daes, the principle is:

> Peoples and nations must have the authority to manage and control their natural resources and in doing so to enjoy the benefits of their development and conservation.[343]

The concept was promoted for the economic benefit of the newly-independent states who have 'the legal authority to combat and redress the infringement of their economic sovereignty arising from oppressive and inequitable contracts and other arrangements orchestrated by other states and foreign companies'.[344] Thus, the state was expected to provide territorial protection for the peoples. The principle does not transfer ownership of the natural resources from the peoples to the state. Essentially, the state represents a territorial demarcation between one territory and another for the preservation of the peoples' sovereignty over their natural resources. In other words, the indigenous peoples still retain ownership – the state merely provides territorial protection from external aggression or external control post-independence. For this reason, 'the principle was and continues to be an essential precondition to a people's realization of its right to self-determination and its right to development'.[345] The indigenous peoples of the Niger Delta, backed by the right to permanent sovereignty over natural resources, can enjoy the right to self-determination and the right to development which can be effectively advanced by the

[343] United Nations Economic and Social Council, E/CN.4/Sub.2/2004/30 13 July 2004 para 6.
[344] ibid.
[345] ibid.

capabilities approach as earlier discussed. This is how sustainable development as the core developmental concept will adequately provide for the enjoyment by the indigenous peoples of the Niger Delta of their rights to lands, territories, and natural resources. Poverty has deprived the indigenous peoples the enjoyment of even the basic rights to life, health, family, and a healthy environment. Rhetorically then, is sustainable development the solution to poverty?

2.6 Poverty and sustainable development in the Niger Delta

Concern over sustainable development has identified poverty as the root cause of human deprivation and instability in most nations of the world which limits much-desired developmental progress. Poverty can only be adequately alleviated by the promotion and protection of human rights and the right to development in any given society. Therefore, for sustainable development to succeed there must be a sincere concern for poverty eradication on the part of the state. As reported in the UNDP Human Development Report 2015, 'overcoming the existing human deprivations and addressing the emerging human development challenges will require optimal use of the world's human potentials'.[346]

According to Jahan,[347] development should be people-centred and must be of the people, for the people, and by the people. The need for a people-centred framework for natural-resource development in Nigeria is paramount. Part of the objectives of the UNDP Human Development Report is to make policies, evaluate policies, monitor doubts, and influence and change policies. The report further identifies sustainable work that promotes human development 'while reducing and eliminating negative side effects and unintended consequences, as a major building block of sustainable development'.[348] The UNHDR 2015 thoroughly addressed issues on political impact of human development on sustainable development, and provides guides for deliberations on regional, national and local development strategies, by prescribing the use of the same theoretical tools and framework.[349] It is noteworthy to observe that the concerted effort by the United Nations is geared towards poverty eradication. This is clear from the two significant reports: the Report of the High-level

[346] UNDP, Human Development Report 2015: 'Work for Human Development' Ch 2 'Human development and work: progress and challenges' 55 <2015_human_development_report_0.pdf (undp.org)>.
[347] ibid.
[348] ibid Foreword iii.
[349] Robeyns, 'The Capability Approach in Practice'. Pt 1, Three Theoretical Specifications, 352- 358.

Political Forum on Sustainable Development 2016; and the UNDP Human Development Report 2015, both aim at poverty eradication. Nigeria is expected to slot into these plans.

2.7 Conclusion

The element of 'fundamental freedom' proclaimed in all the international law instruments – the UDHR, the Charter of the United Nations, and the African Charter, supports the claim to freedom by the indigenous peoples and their rights to protection. The indigenous peoples steadfastly demand freedom from oppression, subjugation, exclusion, marginalisation, and other such vices. They do not necessarily agitate for secession, but rather for the freedom to determine what suits them best based on the choices and values in each society. It is therefore pertinent to judge this phenomenon in respect of the claims of indigenous peoples to their lands, territories, and natural resources as an approach that does not conflict with their desire for self-determination.[350] The solution lies in the indigenous peoples' permanent sovereignty over natural resources as stated earlier in the chapter. This will be the focus of the thesis going forward.

The arguments in this chapter have been pursued to identify the appropriate theories that can provide the basic protection required by the indigenous peoples of the Niger Delta where the unsustainable development of natural resources has impoverished both the environment and the people. Development is expected to bring improvement under whatever circumstances not to result in or be blamed for poverty as is the case in the Niger Delta. As discussed above, developmental failure is looming in the face of lack of empowerment of the people based on the 'internal and combined' capabilities in Sen's approach. Sustainable development remains the best option for the development of oil and gas and to limit its attendant devastating environmental consequences through sustainable use of the resources.

Development can only be beneficial when it aims to improve lives based on 'needs' and not to score political goals. Development can only be all-encompassing if the people at the centre of the development are fully involved. For this reason, the call by this thesis is for Nigeria to consider repealing its laws that deprive the indigenous people of the inherent right to lands, territories, and natural resources.

[350] Obi, 'Oil extraction' 225.

The aim of this thesis is to proffer a legal solution to the devastating conflict in the Niger Delta region caused by the destructive exploitation of the natural resources in the region. The next chapter will analyse the root causes of the protests by the indigenous peoples and, in order to buttress the need for legal remediation, identify the fundamental issues and stakeholders responsible.

CHAPTER THREE

LEGAL ASPECTS OF THE NIGER DELTA CONFLICT

3.1 Introduction

The legal aspect of the Niger Delta conflict is rooted in human rights violations and environmental abuse. The exploration and exploitation of oil in Nigeria has not been well regulated to reduce environmental pollution from spillages. The people, being unprotected, have been exposed to severe environmental risks and deprived of general wellbeing and enjoyment of life despite available national environmental legislation. Generally, under the rule of law all peoples have the right to protection determined by specific international standards for implementation and enforcement by all sovereign nations. Human rights standards in regional and international treaties make it mandatory for Nigeria to protect its entire population, including the indigenous peoples of the Niger Delta. The analysis in this chapter of the legal aspects of the Niger Delta conflict explores the relevant international instruments on human rights and the environment, as well as regional human rights instruments available to the Nigerian people particularly for collective rights that can protect the indigenous peoples of the Niger Delta. This will expose the genesis of uncontrollable protests against the violation of human rights. The discussion then moves to available national legislation and the ineffectiveness of legislative provisions in protecting human rights, notably the economic, social, cultural and environmental rights. Additionally, the chapter discusses the non-availability of redress mechanisms in Nigeria which compelled the Ogoni people to seek redress at the African Commission on Human and Peoples' Rights.

The chapter is divided into five analytical sections. The first explores core international human rights and sustainable development instruments to establish the international standards for environmental and human rights protection required in the Niger Delta. The section also features Nigeria's commitment to the sustainable development agenda. The second section explores the African regional human rights instrument – the African Charter on Human and Peoples' Rights – through an exposition on African jurisprudence on property rights analysed in the context of cases before the African Commission. The third section explores extant Nigerian legislation on human rights and the environment, with the Nigerian Constitution as the core human rights domestic instrument. The limitation or inadequacy of the

Constitution in its provision for fundamental rights within the scope of civil and political rights, and its lack of provision for economic, social, and cultural rights is considered. The fourth section reviews the decision of the African Commission on Human and Peoples' Rights in *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria,*[351] (hereafter the '*Ogoni* case'). The fifth section covers the generic protests resulting from violations of the environmental and human rights of the indigenous peoples in the Niger Delta as evidenced by the *Ogoni* case. It also discusses the consequences of uncontrolled environmental pollution resulting in escalated vandalism by the Niger Delta youths. From the discussions, expositions, and analyses in these sections, the next section pulls things together in a proposition on a legal solution for the legal issues raised.

3.2 International human rights and sustainable development laws for the protection of indigenous peoples in the Niger Delta

The philosophy of Jacques Maritain[352] explains that man's right to existence, to personal freedom, and to the pursuit of perfection in his moral life, belong, strictly speaking, to natural law; and that imperceptible transitions exist between natural law, the Law of Nations and positive law.[353] On the other hand, in the reasoning of Freeman, natural law principles are objective moral principles that depend on the nature of the universe and discoverable by reason.[354] Yet, the first rule of reason according to Thomas Aquinas is natural law – which regards all humanly enacted laws as in accord with reason to the extent that they derive from natural law.[355] Further, natural law strives to establish moral norms and values in the society, believing it to be a rational foundation for moral judgement.[356] Hence, Maritain agreeing with Aquinas's views on enacted laws, pointed out that it is by virtue of natural law that the Law of Nations and positive law take on the force of law and impose themselves on the human conscience.[357] This explains the basis of the natural law influence in positivist human rights law.

The conjunction of this reasoning, according to Freeman, indicates that one of the most significant contemporary characteristics of jurisprudence is the coming together

[351] ACHPR, Communication 155/96 of 27 October 2001.
[352] Jacques Maritain, *Stanford Encyclopedia of Philosophy* <https://plato.stanford.edu/entries/maritain/> accessed 2 April 2021; Perry, 'The Philosophy of American Democracy' 501-503.
[353] Freeman, *Lloyd's Introduction to Jurisprudence* 146.
[354] ibid 80.
[355] ibid 135, 136.
[356] ibid 80.
[357] ibid 146.

of positivism and natural law, and that 'positivists today are less positivistic than they were very few years ago'.[358] This harmonious characteristic of positivism and natural law creates a dynamism which, according to Maritain, allows the rights of human persons to take political and social form in the community.[359] The dynamism is evident in the UDHR which recognises in its Preamble, 'the inalienable rights of all members of the human family' thereby establishing the universal human rights instrument as a common standard of achievement for all peoples and all nations. The basis or ground for human rights is a normative moral principle which, according to Gewirth, 'serves to prove or establish that every human morally ought, as a matter of normative necessity, to have the necessary goods as something to which he or she is personally entitled, and which he can claim from others as his due'.[360] Further explanation shows that human rights exist, or more appropriately, persons have human rights, when there is social recognition and legal enforcement of all persons' equal entitlement to the necessary goods.[361] The universal nature of human rights guide legislation, implementation, and enforcement to conform to international human rights law.

Thus, law protects human rights. Availability and accessibility of the law guarantee protection. Protection of human rights is a global affair; hence, the concern of all nations of the world to work together and harness resources for unified human rights protection under international human rights law. Based on the Statute of the International Court of Justice, the sources of international law are: international conventions, international custom, and general principles of law.[362] Conventions, as treaties, are created as written agreements between states in terms of which participating states bind themselves legally to act in a particular way or maintain particular relations between themselves.[363]

International law could also be derived from custom, which is neither written down nor codified, and survive by what Shaw termed 'an aura of historical legitimacy'[364] which custom could be a dynamic source of law effected by actual practice and

[358] ibid 119.
[359] ibid 146.
[360] Gewirth, 'The Epistemology of Human Rights' (1984) 189.
[361] ibid.
[362] Article 38 of the Statute of the International Court of Justice <https://www.un.org/en/about-us/un-charter/statute-of-the-international-court-of-justice>.
[363] Malcolm Shaw, *International Law* 68.
[364] ibid.

opinion juris of states.[365] Though international treaties and customary law form the backbone of international human rights law, other instruments, such as declarations, guidelines, and principles adopted at the international level are contributors to its understanding, implementation, and development.[366] International treaties on human rights are a prelude to human rights ideals of both the United Nations and other international organisations, thus, for this study, the most relevant.

3.2.1 International human rights instruments and their applicability in Nigeria

According to international law scholars, the United Nations drove the universal human rights movement through the 'four-tiered normative edifice'.[367] The United Nations is a universal body uniting all nations of the world bound by the Charter of the United Nations, which Fassbender[368] describes as the constitution of the international community in its entirety. 'The UN Charter is an instrument of international law, and UN Member States are bound by it. The UN Charter codifies the major principles of international relations, from sovereign equality of States to the prohibition of the use of force in international relations',[369] and covers all topics in international law.[370] Nigeria was admitted to membership in the United Nations on 7 October 1960, and on 30 April 1998 it adopted the declaration recognising the compulsory jurisdiction of the International Court of Justice in all legal disputes in accordance with article 36 paragraph 2 of the Statute of the Court making Nigeria a committed member of the United Nations.

The foundation of international law as the bedrock of universal human rights is laid down in Chapter two. The discussion here is restricted to human rights treaties as they relate to the political, economic, social, cultural, and environmental rights arguments for the protection of the indigenous peoples of the Niger Delta. The international human rights instruments adopted by the international community since 1945 have given legal form to inherent human rights, growing the body of international human rights.[371] Most prominent is the UDHR with its dynamism of

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[365] *Continental Shelf, Libya v Malta* [1985] ICJ Rep 13, ICGJ 118 (ICJ 1985).
[366] United Nations Human Rights, Office of the High Commissioner 'Professional Interests: International Human Rights Law' <http://www.ohchr.org/en/professionalinterest/Pages/InternationalLaw.aspx> accessed 3 July 2021.
[367] Steiner, Alston, Goodman, *International Human Rights in Context* 137.
[368] Fassbender, *The United Nations Charter as Constitution of the International Community*.
[369] United Nations, *United Nations Charter* <https://www.un.org/en/about-us/un-charter>.
[370] Fassbender, 'The United Nations Charter as Constitution of the International Community' 532.
[371] See n 366. United Nations Human Rights: 'Professional Interests - International Human Rights Law'.

positivism and natural law. The UDHR has become an integral part of customary international law and has therefore assumed the binding force in addition to its principles being taken up in most international instruments and regional and national legislation. This may be ascribed to its declaration that human rights should be protected by the rule of law and that fundamental human rights should promote social progress and better standards of living. This has essentially laid the foundation for the basic civil, political, economic, social and cultural rights that all humans should enjoy in larger freedom. Practical effect has been given to these rights by the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the International Covenant on Civil and Political Rights (ICCPR), both adopted by General Assembly Resolution 2200 A (XXI) of 16 December 1966.

The Declaration and Covenants have had a profound influence on the thoughts and actions of individuals and governments the world over.[372] Two Optional Protocols to the ICCPR[373] and one to the ICESCR[374] have been adopted by the General Assembly. While Nigeria ratified and acceded to both Covenants on 29 July 1993, it has not adopted any of the three Protocols.

Failure to adopt the Protocols to Conventions has serious implications. For instance, article 1 of the Optional Protocol to the ICCPR and article 1(2) of the ICESCR Protocol provide that: 'No communication shall be received by the Committee if it concerns a State Party to the Covenant which is not a Party to the present Protocol'. Article 2 provides that, 'communications may be submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a State Party, claiming to be victims of a violation of any of the economic, social and cultural rights set forth in the Covenant by that State Party'. The provisions of the Protocols which are intended for State Parties to the Protocol, enable the Human Rights Committee as the supervisory mechanism, to receive communications from individuals claiming to be victims of violations of any of the rights set out in the Covenants. [375]

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[372] Fact Sheet No 2 (Rev1) 'The International Bill of Human Rights' <http://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf>.

[373] First Optional Protocol adopted in 1966 and the Second for the abolition of death penalty adopted on 15 December 1989.

[374] Adopted on 10 December 2008.

[375] There are ten human rights treaty bodies comprising committees of independent experts who monitor implementation of the core international human rights treaties. Each state party to a treaty has an obligation to take steps to ensure that everyone in the state can enjoy the rights set out in the treaty. The Human Rights Committee on the ICCPR monitors implementation of the International Covenant on Civil and Political Rights and its optional protocols; Committee on Economic, Social and

The provisional dynamics of international human rights laws has an extensive range that protects all categories of people. The ICESCR and ICCPR contain rights derived from the inherent dignity of the human person and can truly protect the indigenous peoples. The Preamble to the ICESCR asserts that, 'the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant'. Article 1 provides for the right to self-determination and the right freely to dispose of natural wealth and resources. Article 12 provides for the right to physical and mental health; and article 25 reaffirms the inherent right of all peoples to enjoy and utilise their natural wealth and resources fully and freely.

Although the ICESCR makes no express mention of 'indigenous peoples', the mention of 'all peoples' in this treaty can be seen to include groups, indigenous peoples, minorities or communities within an independent territory, or even stateless people. Both the ICCPR and ICESCR provide in their article 1 for the right to self-determination and the right freely to dispose of natural wealth and resources. The relativity of the two Covenants as well as other international human rights laws to the indigenous peoples is acknowledged in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) where article 1 emphasises full enjoyment of all human rights and fundamental freedoms as a collective or as individuals. This relativity is viewed by Barnabas as 'legal weight'[376] attached to the right of indigenous peoples for the UNDRIP, probably due to its persuasive status. However, it might not necessarily be a legal weight since the international human rights law is available to all peoples, even in the absence of the UNDRIP. The non-adaptation of the UNDRIP by most African States has not hindered it legal impact, nor has the non-domestication of the two International Covenants affected their applicability in regional litigations. Moreover, UNDRIP would only be meaningful in a national legal system that recognises the existence of indigenous people.[377]

Cultural Rights (CESCR) monitors implementation of the International Covenant on Economic, Social and Cultural Rights, and Committee on the Elimination of Racial Discrimination (CERD) monitor implementation of the International Convention on the Elimination of All Forms of Racial Discrimination (1965).

[376] Barnabas, 'The Legal Status of the United Nations Declaration on the Rights of Indigenous Peoples' 255.

[377] See generally -Kadiri, 'The Rights of Indigenous People in Oil Producing Communities'

Ultimately, these international provisions are incorporated in the African continental instrument, the African Charter on Human and Peoples' Rights[378] (the African Charter) – which is ratified by all African State Parties as a regional treaty for the protection of all African peoples, particularly indigenous peoples. The embodiment of civil, political, economic, social, and cultural rights in the African Charter has had a tremendous effect as will be shown in the next section, and later in the review of the *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria* (the *Ogoni case*) in section three.

Under international law, respect for national sovereignty requires states to resolve their internal problems and protect their people. Though, the international human rights and environmental conventions which Nigeria has ratified bind the country as a State Party to give effect to all provisions contained therein, the incorporation of the conventions in Nigeria's domestic legislation will allow claims and redress in Nigeria's national courts. Nigeria is a State Party to the two leading international human rights Covenants – the ICCPR and the ICESCR. The two treaties have been ratified but are yet to be domesticated as provided for in section 12(1) of the Nigerian Constitution. Under the heading 'Implementation of treaties', the Constitution provides:

> No treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.

The fulfilment of this provision will afford the Nigerian people the benefits of the application of both the ICCPR and the ICESCR in domestic human rights adjudication. Although, the adoption of some of the human rights – principally from the UDHR and ICCPR - in the Nigerian Constitution shows good intentions on the part of Nigeria, the fact remains that, the eleven rights that have been cherry-picked are grossly inadequate for the protection of all the people in Nigeria most especially, the indigenous peoples. Failure to wholesomely incorporate the ICCPR and ICESCR as municipal laws in the Nigerian legal system is a great disservice to the people of

[378] See n 103, The African Charter on Human and Peoples' Rights. Reference for the promotion of international co-operation regarding the Charter of the United Nations and the Universal Declaration of Human Rights is contained in article 3(e) of the Constitutive Act of the African Union and Preamble of the African Charter. The provisions of these international instruments gave substance to the African instruments such as in the Constitutive Act's Preamble which is 'determined to promote human and people's rights, consolidate democratic institutions and culture, and to ensure good governance and the rule of law' among its state members.

Nigeria. Above all, the economic, social, and cultural rights in the ICESCR are of great importance to the indigenous peoples.

We turn now to the international law and instruments on sustainable development and their applicability in Nigeria.

3.2.2 International sustainable development instruments and their applicability in Nigeria

The global partnership for sustainable development that considered a balanced and integrated approach to question of the environment and development, emerged from the 1992 Earth Summit where Agenda 21 was adopted as a wide-ranging blueprint for action to achieve sustainable development worldwide.[379] The global consensus and political commitments at the highest level reflected in the Agenda 21 were designated the utmost responsibility of governments for successful implementation.[380] The cooperation in development and the environment was expected to be carried out in accordance with the capacities and priorities of countries and regions while fully respecting all the principles in the Rio Declaration on Environment and Development which was the second document adopted at the Summit. The foundations for sustainable development were firmly laid in Agenda 21, the Rio Declaration, and three legally binding conventions – the Convention on Biological Diversity (CBD), the United Nations Convention to Combat Desertification (UNCCD), and the United Nations Framework Convention on Climate Change (UNFCCC). These three conventions operate through the Conference of the Parties, which has underlined the need for improved collaboration in order to promote synergy and reduce duplication of activities.[381]

Nigeria's signature and ratification of the three Rio Conventions are supported by its commitment to the Conference of Parties for the environmentally sustainable development required in Nigeria. As the dynamics of land, climate, and biodiversity are intimately connected, it is envisaged that the effective implementation of the Rio Conventions can meet the complex environmental challenges through an integrated

[379] See nn 15, 226. Earth Summit, UNCED Rio de Janeiro, 3-14 June1992.
[380] See n 227. Agenda 21 Preamble 1.3.
[381] See nn 15, 17, 18. The three Rio Conventions on Biodiversity, Climate Change, and Desertification derive directly from the 1992 Earth Summit. Two of the three have direct impact on the issue of the indigenous people in the Niger Delta, the Convention on Biodiversity and the United Nations Framework on Climate Change, which were signed by Nigeria on 13 June 1992 and ratified on 29 August 1994. The Conventions operate through the Conference of the Parties, which is made up of all the State Parties to the Convention, as the decision-making body for the Convention. The Conference of Parties for each Convention is established by the Convention: CBD, art. 23 and UNFCCC, art. 7.

approach and optimal use of natural resources. That may be considered Nigeria's expectation in ratifying the three legally binding conventions. With the exception of the UNCCD, [382] which does not directly concern this thesis in resolving the conflict in the Niger Delta, if the mechanisms designed for the CBD and UNFCCC are appropriately managed by Nigeria, maintaining and restoring ecosystems will engender benefits for both the carbon sequestration and storage, biodiversity conservation, and sustainable use.[383] Nigeria signed both the UNFCCC and the CBD on 13 June 1992 and ratified both on 29 August 1994.

Nigeria joined the Conference of Parties (COP) for the CBD on 27 November 1994 and ratified the Cartagena Protocol to the CBD on 13 October 2003, and the COP to the Cartagena Protocol on 1 February 2012. Nigeria also ratified the Kyoto Protocol to the UNFCCC on 10 December 2004 and the Paris Agreement on 16 May 2017.

Under the UNFCCC, report has it that global gas flaring has declined since 2017.[384] This represents a positive indicator of environmental cleansing if Nigeria's gas flaring in the Niger Delta can be seen as part of the decline. According to the Ministry of Petroleum Resources, Nigeria flares an excess of 800 million standard cubic feet of gas a day from 178 flare sites.[385] The harm done to humans, animals, and the environment by the tons of CO_2 emissions released annually in the Niger Delta with serious harmful impact from uncombusted methane and black carbon emissions, cannot be quantified – it contributes to climate change and constitutes a waste of energy resources.[386] The essence of Nigeria's involvement with the international community is to take an active part in the COP activities to make a meaningful impact on its people and lands with such important biodiversity and climate change decisions reached at those conferences.

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[382] 'About the Convention: United Nations Convention to Combat Desertification' <https://www.unccd.int/convention/about-convention> accessed 3 July 2021.

[383] Editorial, 'Synergies between the Convention on Biological Diversity (CBD) and the United Nations Framework Convention on Climate Change (UNFCCC)' *Biota Neotrop* 2009 <http://www.biotaneotropica.org.br> accessed 23 August 2018.

[384] United Nations Climate Change, Report 23 July 2018 'Global Gas Flaring Declined in 2017 After Years of Growth'. The data was released by the Global Gas Flaring Reduction Partnership (GGFR), a World Bank-managed organization comprising governments, oil companies, and international institutions working to reduce gas flaring. Nigeria is a partner. <https://unfccc.int/news/global-gas-flaring-declined-in-2017-after-years-of-growth> accessed 3 July 2021.

[385] Toyin Akinosho, "Nigerian Government to Conduct A Bid Round For Flare Gas" Africa Oil & Gas Report – Section: Gas Monetization July 16, 2018 <https://africaoilgasreport.com/2018/07/gas-monetization/nigerian-government-to-conduct-a-bid-round-for-flare-gas/> accesses 23 September 2021.

[386] See n 384. UN Climate Change Report 23 July 2018.

Since the adoption of the Sustainable Development Goals in September 2015, Nigeria has continued to demonstrate its commitments to achieving the global goals through leadership and ownership of the implementation process.[387] According to the United Nations, the most effective means of achieving the goals in Nigeria is through the commitment of the UN, working closely with the government of Nigeria to provide technical supports that would ensure that the SDGs are efficiently and effectively implemented. The UN works closely with the Office of the Senior Special Advisor to the President on SDGs (OSSAP-SDGs) and presently implementing 190 Key Activities across Nigeria.[388] As the United Nations informs with graphics how it contributes to the Sustainable Development Goals in Nigeria,[389] it is obvious that the implementation of SDGs is a government function that may require no formal legal regime.

On the other hand, the implementation of the sustainable development goals and principles in international sustainable development instruments could be legally more effective through legal frameworking and incorporation into the national legal system as discussed by Ladan[390] and Okon.[391] Additionally, Inegbedion and Umoru,[392] Oniemola and Tasie,[393] Ekhator *et al*,[394] and Ajibo *et al*.[395] further analysed the legal framework and implementation of SDGs and sustainable development mechanisms and its barriers and prospects in Nigeria

Imperatively, Nigeria's commitment to environmentally sustainable development is actualised in the Environmental Impact Assessment Decree 1992 (EIA) Laws of the Federation of Nigeria derived from article 14 of the CBD. This is also in compliance with CBD - COP 6 Decision VI/7 issued as a guideline for Environmental Impact Assessment Legislation and/or Process. It defines environmental impact assessment as 'a process of evaluating the likely environmental impacts of a proposed project or

[387] United Nations in Nigeria – "How the UN is supporting the Sustainable Development Goals in Nigeria" <https://nigeria.un.org/en/sdgs> accessed 12 January 2022.
[388] ibid.
[389] ibid.
[390] Ladan, 'Achieving Sustainable Development Goals ' 42.
[391] Okon, 'The legal status of sustainable development in the Nigerian environmental law'.
[392] Inegbedion and Umoru, 'The legal framework for the implementation of the sustainable development goals in Nigeria' .
[393] Oniemola and Tasie, 'Engendering Constitutional Realization of Sustainable Development in Nigeria' 159.
[394] Ekhator, Miller and Igbinosa, 'Introduction', *Implementing the Sustainable Development Goals in Nigeria: Barriers, Prospects and Strategies.*
[395] Ajibo, Itanyi *et al*, 'Sustainable development enforcement conundrum in Nigeria: challenges and way forward' 195.

development, taking into account inter-related socio-economic, cultural and human-health impacts'.[396] This holds the potential of being the best thing to happen in the Niger Delta as regards the monitoring and evaluation of petroleum development. However, the EIA law is yet to have a meaningful effect in achieving the desired environmentally sustainable development in Nigeria.

Nevertheless, to Nigeria's credit, on the global platform of sustainable development, the country has been very active. In its first report on the 'Implementation of the SDGs – 'A National Voluntary Review, 2017' – to the United Nations Department of Economic and Social Affairs (DESA), Nigeria recorded its successes and challenges in implementing the SDGs. Such actions create a good impression of Nigeria's willingness to protect the environment by actualising the programmes of the SDGs. A second report was published in June 2020. The report is expected to indicate a remarkable improvement of SDGs implementation,[397] given Nigeria's zeal for success. The report, 'NIGERIA: Integration of the SDGs into National Development Planning – A Second Voluntary National Review', (VNR) June 2020, identified Nigeria's focus on current development priorities and objectives of the present administration. The VNR 2020 report relied on past evaluations of the seven priorities which are: poverty (SDG 1); inclusive economy (SDG 8); health and well being (SDG 3); education (SDG 4) gender equality (SDG 5); enabling environment of peace and security (SDG 16) and partnerships (SDG 17). Though the systemic attempt of using evaluation represents an innovation in the VNR context of assessing SDGs, but as observed in the report itself, 'Nigeria should strengthen the evidence-based planning and accountability mechanisms at State level for accelerating the decade of action'[398] that is, 2021-2030. This is because the Niger Delta environment is still engulfed by complete environmental pollution and devastation, yet to reflect any significant change in spite of the elaborate SDG programmes enumerated in these reports. However, in developing an impactful sustainable development proposition in Chapter five, this thesis relies on certain of the basic principles expounded in the section.

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[396] Convention on Biological Diversity, COP 6 Decision VI/7- Guidelines for Incorporating Biodiversity-Related Issues into Environmental Impact Assessment Legislation and/or Process and in Strategic Environmental Assessment.

[397] See the 'Introduction' Ekhator, Miller, Igbinosa (eds) *Implementing the Sustainable Development Goals in Nigeria: Barriers, Prospects and Strategies.*

[398] 'Nigeria's 2020 Voluntary National Review (VNR) on Sustainable development Goals (SDGs)-Main Message' Microsoft Word - Nigeria_FINAL_Nigeria's 2020 VNR_Main Messages_30042020 (683) (un.org) accessed 25 January 2022.

Back to international human rights, the next section addresses Africa's regional instrument – the African Charter on Human and Peoples' Rights – and its profound benefit to the Nigerian people as Africans.

3.3 African Regional Human Rights Instrument – The African Charter

The principal regional human rights instrument in Africa is the African Charter on Human and Peoples' Rights.[399] Nigeria was committed to the creation of this treaty from the onset. History has it that the first Congress of African Jurists constituted for the purpose of drafting the Charter was held in Lagos, Nigeria in 1961. At this gathering the Congress adopted a declaration known as the 'Law of Lagos' calling on African governments to adopt an African convention on human rights with a court and a commission.[400] Nigeria signed the African Charter on 31 August 1982, and ratified it on 22 June 1983, while the Protocol to the African Charter on Human and Peoples' Rights on the establishment of the African Court on Human and Peoples' Rights was ratified on 20 May 2004.

Although, this thesis seeks protection for all human rights for Nigerians generally, and specially for the indigenous peoples of the Niger Delta, as pointed earlier, the focus is on the rights of indigenous peoples to property, that is, the rights freely to dispose of their wealth and natural resources, and to development.

3.3.1 The African Charter and African Commission's jurisprudence on property rights

The right to property in this chapter focusses on the ownership of land and its contents. The study of the two landmark decisions of the African Commission evidenced effective regional human rights authority on indigenous peoples' right to property including the land and natural resources.[401] The two cases discussed are:

(i) the *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria* (*Ogoni* case);[402] and

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[399] The African Charter on Human and Peoples' Rights was adopted by the Organisation for African Unity (OAU) Assembly on 28 June 1981 in Nairobi, Kenya, and came into force on 21 October 1986. By 1999, the African Charter had been ratified by all member states of the OAU. It is known as the 'African Charter' and also referred to as the 'Banjul Charter'. The Protocol to the African Charter on Human and Peoples' Rights on the establishment of the African Court on Human and Peoples' Rights was adopted in 1998 and entered into force on 25 January 2005. <https://www.achpr.org/legalinstruments/detail?id=49> accessed 3 July 2021.

[400] See generally: 'History of the African Charter' <www.achpr.org/instruments/achpr/history/>.

[401] SSenyonjo, 'Responding to Human Rights Violation in Africa' 10.

[402] ACHPR Communication 155/96 of 27 October 2001 (n 56).

(ii) the *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya* (*Endorois* case).[403]

We turn first to the *Endorois* case. This case centred on the Endorois community in Kenya. It was alleged that the government of Kenya forcibly removed the Endorois from their ancestral lands around Lake Bogoria in the Baringo and Koibatek Administrative Districts, and in the Nukuru and Laikipia Administrative Districts within the Rift Valley Province of Kenya. This was done without proper prior consultations and adequate and effective compensation. The Endorois alleged this to be in violation of the African Charter, the Constitution of Kenya, and international law. The Endorois also claimed that the process of forceful eviction from their traditional land violated not only the Endorois community's property rights, but also severed their spiritual, cultural, and economic ties with the land.

On the other hand, in the *Ogoni* case, the Ogoni people alleged environmental degradation and health problems suffered by the Ogoni people through contamination of the environment due to the abuse of oil exploitation in Ogoniland within the Niger Delta region of Nigeria. The Ogoni claimed that the oil consortium responsible for the exploitation had violated applicable international environmental standards, and that the brute force applied by the Nigerian military and security forces created a state of terror and insecurity driving the Ogoni people from their lands and making it impossible for them to return to their communities. This was the eviction pattern used in the forced acquisition of Ogoni land and destroyed their farmlands, rivers, crops, and animals.

In the two cases, eviction from land by use of brute force deprived both the Endorois and the Ogoni indigenous peoples of the enjoyment of their lands and by implication, their natural resources. From these two cases and others that are reviewed later, forced eviction appears to be the primary weapon used by African states to deprive indigenous peoples of their lands and natural resources.

Of utmost importance for the protection of indigenous peoples' right to property are two vital principles established by the African Commission in the *Ogoni* and *Endorois* cases: the duty of state; and the right of the people as collective rights. The African Commission relied heavily on other regional human rights decisions to establish these points.

[403] ACHPR Communication 276/03 of 25 November 2009.

First, in the *Ogoni* case, the Commission emphasised the duty of states to protect their citizens, not only through appropriate legislation and effective enforcement, but also by protecting them from damaging acts that may be perpetrated by private parties as enshrined in article 21 of the African Charter as the right of peoples freely to dispose of their wealth and natural resources. In reaching this decision, the Commission relied on the Inter-American Court of Human Rights' judgment in *Velasquez Rodriguez v Honduras*[404] on the detrimental effects of acts of impunity. The court in the *Velasquez* case held that, 'when a state allows private persons or groups to act freely and with impunity to the detriment of the rights recognised, it would be in clear violation of its obligations to protect the human rights of its citizen particularly, the indigenous people.[405] The Commission also relied on the judgment of the European Court of Human Rights in *X and Y v Netherlands*[406] where it was decided that authorities have obligations to ensure that 'the enjoyment of the rights is not interfered with by any other person'.[407] These decisions address the issue of the state's protection of indigenous peoples from damaging acts perpetrated by private parties.

Additionally, the African Commission relied on the provisions of the ICESCR in the *Ogoni case* by citing its article 2(1) which provides that states should guarantee the rights recognised in the Covenant by all appropriate means, 'including particularly the adoption of legislative measures'.[408] The adoption of legislative measures translates as the domestication of the instrument. Here the Commission drew the attention of the state to its obligation to actualise the provision due to its binding force. The African Commission envisaged that domestication would make the ICESCR an applicable law in Nigeria so allowing the indigenous peoples' collective right to property to be protected.

Secondly, in the *Endorois* case, strong reliance was placed on the *Ogoni* case in which it was decided that 'rights of peoples' are 'collective rights', and that the African Commission can adjudicate the rights of a people as a collective, and that the people are entitled to bring their claims collectively under the relevant provisions

[404] Inter-American Court of Human Rights Judgment of 17 August1990, Series C No 9/ Judgment July 21, 1989 Series C No 7.
[405] ibid.
[406] Judgment, Case No 16/1983/72/110, App No 8978/80 (A/91), ECHR 4 (1986) 8 EHRR 235 1HRL 51 (ECHR 1985), 26th March 1985 European Court of Human Rights (ECtHR).
[407] The *Ogoni* case para 57.
[408] ibid para 48.

of the African Charter.[409] In the *Endorois* case, the African Commission identified the right to property as a unique right of the indigenous peoples, recalling that the European Court on Human Rights (ECHR) had recognised that property rights could include economic resources and rights of the applicants over their common land. Equally clear from the *Endorois* case is that:

> The first step in the protection of traditional African communities is the acknowledgement that the rights, interests and benefits of such communities in their traditional lands constitute 'property under the Charter and that special measures may have to be taken to secure such property rights.[410]

In reaching its decision on the Endorois' 'rights to property', the Commission relied on the Inter-American Court decisions in the *Moiwana v Suriname*[411] and *Saramaka v Suriname,*[412] and notably on the *Saramaka* case because it bore particular relevance for the *Endorois* case. In the *Saramaka* case the Inter-American Court disagreed with the state of Suriname that the Saramaka could not be considered a distinct group of people just because a few members did not identify with the larger group. Further relying on the *Saramaka* case, the African Commission set out how the failure to recognise an indigenous/tribal group becomes a violation of the 'right to property'.[413] Pointing to similarity and relevance of the *Saramaka* case to the *Endorois* case, the Commission held that the Endorois could be defined as a distinct tribal group that could enjoy the right to property in a distinctly collective manner which differed from that of the Tugen sub-tribe or the larger Kalenjin tribe.[414] The African Commission further relied on the European Court decision in *Dogan and others v Turkey*[415] and the Inter-American Court decision in *The Mayagna (Sumo) Awas Tingni v Nicaragua.*[416] Further reliance by the *Endorois* case on the *Awas Tingni* case, was that the Inter-American Convention protected property rights in a sense that included the rights of members of the indigenous communities within the framework of communal property and that possession of the land should suffice for

[409] The *Endorois* case para 75.
[410] ibid para187.
[411] Judgment of 15 June 2005, Inter-Am Ct HR (Ser C) No 124 (2005).
[412] Series C No 172 [2007] IACHR 5 (Judgment of 28 November 2007) (*Saramaka* case).
[413] The *Endorois* case para192.
[414] ibid paras159–161.
[415] Applications no 8803-8811/02, 8813/02, and 8815-8819/02 Judgment, Strasbourg 29 June 2004, European Court of Human Rights.
[416] Inter-American Court of Human Rights Judgment of 31, 2001, Inter-Am Ct.H.R.(Ser.C) No.79 (2001).

indigenous communities lacking real title to obtain official recognition their rights over that property.[417]

In his contribution, Gilbert noted that the provisions of article 21 of the American Convention on Human Rights as applied by the court in the *Awas Tingni* case, meant that the property right rule 'protects the right to property in a sense which includes, among others, the rights of members of the indigenous communities within the framework of communal property'.[418] Thus, by adapting the property rule in *Awas Tingni*, the African Commission interpreted article 14 of the African Charter to protect indigenous peoples' property right in Africa in both the *Ogoni* and *Endorois* cases. However, the best form of guarantee for the indigenous peoples' land right and ownership will be 'an international instrument on the human right to land' as suggested by Gilbert,[419] which will influence land legislation and land reforms at the national level highlighting the peculiar interest of the indigenous peoples in their lands. The human rights values embedded in regional human rights treaties have granted considerable relief to indigenous peoples' claims to their land over the past years as earlier mentioned. Hence, the human rights approach being suggested may provide the much-needed tool to ensure the cultural and economic value of land of the indigenous peoples are recognised, and that the right of peoples over their lands are respected as a fundamental right.[420] In this thesis the property right is conceived to include both land and natural resources.

According to the African Commission:

> Land alienation and dispossession, and dismissal of customary rights of the indigenous people to land and other resources, has led to an undermining of the knowledge systems through which indigenous peoples have sustained life over the centuries and it has led to a negation of their livelihood systems and deprivation of their resources. This is seriously threatening the continued existence of indigenous peoples and is rapidly turning them into the most destitute and poverty stricken. This is in serious violation of the African Charter (articles 20, 21 and 22) which states clearly that all peoples have the right to existence, the right to their natural resources and property, and the right to their economic, social and cultural development.[421]

[417] The *Endorois* case para190.
[418] Jeremie Gilbert, 'Indigenous Rights in the Making' 211.
[419] Jeremie Gilbert, 'Land right as human rights' 129.
[420] ibid.
[421] "The human rights situation of indigenous peoples in Africa - Land" *Indigenous Peoples in Africa: The Forgotten Peoples?* 17. The African Commission's Work on Indigenous Peoples in Africa, 2006.

From this text, the African Charter provides a legal framework for the promotion and protection of human and peoples' rights in Africa[422] which covers both individual and collective rights. This opens up the collective rights available to sections of the populations within nation states through reading the term 'peoples' to include indigenous peoples and communities.[423] The development of the jurisprudence of the African Commission as recorded in the following human and peoples' rights cases attests to the achievements of the African Charter. Certain compelling jurisprudential phenomena that are in conformity with the importance the Commission attaches to the protection of indigenous peoples' rights, have been discussed in cases reviewed above and will be referenced in the cases to be reviewed in what follows.

3.3.1.1 *Sudan Human Rights Organisation et al v The Sudan*[424] (*Darfur* case)

The *Darfur* case involved the violation of human rights by the Republic of Sudan against the indigenous Black African tribes in the Darfur region (Western Sudan) consisting of members of the Fur, Marsalit, and Zaghawa tribes. The two Communications submitted on behalf of the Darfur people to the African Commission contained virtually identical allegations of gross, massive, and systematic violations of human rights. Darfur is the largest region in the Sudan with an estimated population of five million. The combined allegation was violation of articles 2– 6, 7(1), 9, 12(1), 13(1), 14, 16, 18(1) and 22 of the African Charter by the Republic of Sudan.

The complaints were that since 2003, thousands of Black indigenous tribes in Darfur had been forcibly evicted from their homes, communities, and villages by government forces that attacked villages, injuring and killing civilians, raping women and girls, and destroying homes.[425] The forced evictions and destruction of housing and property in the Darfur region violated the right to property in article 14 of the

[422] Banjul Declaration on the 25th Anniversary of the African Charter on Human and Peoples' Rights (2006).
[423] See n 421: *Indigenous Peoples in Africa: The Forgotten Peoples?* 20.
[424] ACHPR, Communication 279/03 and 296/05 (i) the Sudan Human Rights Organisation et al *v* The Sudan (the SHRO Case) submitted by the Sudan Human Rights Organisation (London), the Sudan Human Rights Organisation (SHRO Canada), the Darfur Diaspora Association, the Sudanese Women Union in Canada, and the Massaleit Diaspora Association, and (ii) *Centre for Housing Rights and Evictions v The Sudan (the COHRE Case*) submitted by an NGO based in Washington DC. While the first Communication of SHRO Canada was received at the Secretariat of the African Commission in September 2003, the second Communication from COHRE was received in January 2005. (Hereafter the *Darfur* case.) <https://www.achpr.org/sessions/descions?id=190>.
[425] The *Darfur* case para 111.

African Charter. The complainants relied on the African Commission's decision in the *Ogoni* case. The Ogoni decision held that forced evictions by government forces and private security forces were infringements of article 14, and that the right to adequate housing is implicitly guaranteed by articles 4, 16 and 18(1) of the African Charter.[426]

For the admissibility argument, the ECHR's jurisprudence in *Akdivar and Others v Turkey*[427] was applicable because of similarity of the conditions in that case to the condition prevailing in Darfur where the conflict between the government and rebel forces led to the rampant destruction of housing. The African Commission relied on the European Court's ruling in the *Akdivar* case which held Turkey responsible for the violations perpetrated by both its own forces and the rebel forces based on its duty to both respect and protect human rights.[428] In its decision in the *Darfur* case, the African Commission took Sudan's general denial of the allegations into account. Sudan also contended that the communication was no longer relevant at that time since most of the issues raised had been addressed by the President of the Republic, and that the Darfur Peace and Cease-fire Agreement entered into by the parties had brought about a considerable improvement in the security situation. That notwithstanding, the Commission addressed the allegations of violations and held that the Republic of Sudan had violated articles 1, 4–6, 7(1), 12(1) and (2), 14, 16, 18(1) and 22 of the African Charter.

3.3.1.2 African Commission's interpretation of 'a people'

The *Darfur* case raised the jurisprudential question: 'Who are a people?' The question arose from the allegation of a violation of article 22 of whom could be referred to as 'a people' in the context of the African Charter. According to the Commission, the right to economic, social, and cultural development in article 22 is a collective right endowed on a people. Do the people of Darfur region constitute a 'people' in the context of the African Charter?[429] With an elaborate analysis defining the content of the peoples' right or 'a people', the African Commission asserted that 'in some cases groups of "a people" might be a majority or a minority in a particular State. Such criteria should only help to identify such groups or sub-groups in the

[426] The *Darfur* case para 116.
[427] (Article 50) [1998] ECHR 25, Strasbourg, 1st April 1998.
[428] The *Darfur* case para122.
[429] ibid para 218.

larger context of a State's wholesome population'[430]. However, 'in addressing the violations committed against the people of Darfur, the Commission found that the people of Darfur in their collective are "a people" as described under article 19. They do not deserve to be dominated by a people of another race in the same state'.[431] They have suffered collective punishment prohibited by international law and viewed by the Commission as a violation of article 22.

The African Commission continued to advance its jurisprudence on the African minority and indigenous peoples' demand for protection as observed in the above interpretation of persons who qualify to be grouped as 'a people'. It further clarified the concept by declaring that:

> It is unfortunate that Africa tends to deny the existence of the concept of a 'people' because of its tragic history of racial and ethnic bigotry by the dominant racial groups during the colonial and apartheid rule. The Commission believes that racial and ethnic diversity on the continent contributes to the rich cultural diversity, which is a cause for celebration. Diversity should not be seen as a source of conflict, and it is in that regard that the Commission was able to articulate the rights of indigenous people and communities in Africa.[432]

Overall, the conflict in Darfur could be seen as a punitive military campaign of massive proportions, violating not only the economic, social, and cultural rights, but other individual rights of the Darfurian people.

3.3.1.3 *Nubian Community in Kenya v The Republic of Kenya* [433] (*Nubian* case)

The *Nubian* case is an important decision on the violation of property rights. In the early 1900s, the Nubians were conscripted as soldiers into the colonial British King's African Rifles Regiment from their original home in the Nuba Mountains in the central area of the Republic of the Sudan. They were then referred to as British subjects and after the expedition, were not returned to their original home but left in Kenya. They were left hanging and unsettled in Kenya. They lived in the Kibera slums of Nairobi, and in Bondo, Kisumu, Kibos, Mumias, Meru, Isiola, and Mazeras in Mombasa as well as the Eldama Ravine, Tange-Kibigori, Sondu, Kapsabet, Migori and Kisii areas.

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[430] ibid paras 219 –220.
[431] ibid para 223.
[432] ibid para 221.
[433] ACHPR, Communication 317/2006. The Communication was filed by the Open Society Justice Initiative (OSJI) and the Institute for Human Rights and Development in Africa' (IHRDA) on behalf of the Nubian community of Kenya (the complainants) against the Republic of Kenya and was received at the African Commission Secretariat on 23 January 2006. (Hereafter the *Nubian* case.) <https://www.achpr.org/sessions/descions?id=229>.

They have known no other home since then and Kibera has become the ancestral homeland for Nubians in Kenya. Since Kenyan independence in 1963, successive governments have maintained that Nubians are aliens and refused to accept their property rights in Kibera, forcibly evicting them from their homes and claiming that Kibera was government land.[434] Kenyan Nubians' lack of an ancestral homeland in Kenya is one of the reasons for denying them Kenyan citizenship, which in turn has been responsible for a refusal to recognise their property rights.[435] The highpoint of the allegations projects the deliberate, systematic, and sustained denial of identity papers to the Nubian community and their non-recognition as Kenyan citizens, has resulted in their being denied basic services and forced into dire poverty. Although they qualify for Kenyan citizenship under the Kenyan Constitution, the denial of Kenyan passports and national identity cards has excluded them from the accruable benefits of citizenship.

3.3.1.4 Forced eviction – opposition tool against property right

The primary allegation of the Kenyan Nubians was government's refusal to recognise their property rights based on the historical refusal to grant then Kenyan citizenship. The Kenyan Nubians sought recognition of their collective property rights in Kibera 'in order to protect themselves against further forced evictions and encroachments, which threaten their cultural survival, and on the basis that, without a homeland in Kenya, the Nubian community effectively does not exist'.[436] It should be noted that Kenya's denial of the ancestral homeland and citizenship status to the Nubians held the potential of rendering them stateless.[437] The African Commission found in the *Nubian* case that forced eviction was in violation of article 14 of the African Charter which provides that evictions must be carried out 'in accordance with the law'.[438] Deciding on forced eviction in the *Nubian* case, the African Commission emphasised that:

[434] The *Nubian* case para 83.
[435] ibid para 84.
[436] ibid para 85.
[437] One of the expert submissions during the *Nubian* case was the *amicus* submission by the Allard K Lowenstein International Human Rights Clinic, Yale School of Law, that provided a review of the Nubian Communication on 'nationality and statelessness'. The Clinic concludes by submitting that if the facts in the present Communication are proven, the Commission should find that the Kenyan government has deprived the Nubians of their implied right to a nationality or find that Kenya employs discriminatory administrative practices that deny the Nubian people effective nationality and render them stateless. The *Nubian* case paras 111–117.
[438] The *Nubian* case para 91.

> Forced evictions often lead to personal and collective trauma, resulting in the loss of livelihoods, the destruction of social networks and other devastating effects. Forced evictions dismantle what individuals and communities have built, sometimes over a long period of time, plunging families and communities into misery. To be constantly faced with the prospects of forced evictions, as is the case with the Nubians of Kibera is one of the worst forms of injustices that individuals, families and communities can be exposed to.[439]

Therefore, the Commission concluded that evictions were carried out without due process of law and in total disregard of Kenya's international human rights obligations. With the historical antecedent of the Nubian occupation of Kibera that dates to 1904, and the inextricable links to the land which constitutes the only homeland they had ever known, forceful evictions amount to deprivations of peaceful enjoyment of property. The right to property in article 14 ensures, amongst other things, the peaceful enjoyment of property by indigenous peoples in Africa, together with protection from arbitrary eviction,[440] which serves as the most potent tool by which to dispossess, displace, disorganise, deny, and deprive the indigenous peoples of property. Forced eviction[441] has generally been the tool of choice in violating the right to property and other consequential violations of the rights of the indigenous peoples.

For indigenous peoples the devastation wrought by forceful eviction is both spiritual and physical. In the opinion of Wachira, indigenous peoples the world over seek to identify and use the available global mechanisms and standards to protect their fundamental human rights,[442] which explains the dynamic role of the African Commission in protecting these fundamental rights. Nevertheless, the Nigerian state attempts to mitigate its acts of eviction through domestic legislation providing that all lands are government land[443] so enabling Nigeria's sovereignty over land and natural resources through the compulsory acquisition law.[444] In terms of this

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[439] ibid paras162,163.
[440] Pretoria Declaration on Economic, Social and Cultural Rights in Africa (2004) para 5.
[441] The African Commission has consistently relied on the United Nations Committee on Economic, Social and Cultural Rights' definition of 'forced eviction' as 'the permanent removal against the will of individuals, families and/or communities from the homes and/or lands which they occupy without the provisions of, and access to appropriate forms of legal or other protections'. The *Ogoni* case para 63 and the *Nubian* case para 91.
[442] GM Wachira, 'Indigenous Peoples' Rights to Land and Natural Resources' 298.
[443] Land Use Act (1978) CAP L5 Laws of the Federation 2004. The Act vests all land in the territory of each state (except land vested in the Federal Government or its agencies) solely in the Governor of the state.
[444] Constitution of the Federal Republic of Nigeria 1999. Section 44(3) provides that: 'Notwithstanding the foregoing provisions of this section, the entire property in and control of all minerals, mineral oils and natural gas in, under or upon any land in Nigeria or in, under or upon the territorial waters and the

legislation, and backed by constitutional provisions, the government has absolute authority over or against its people, even by forced eviction.

3.3.1.5 *African Commission on Human and Peoples' Rights v Republic of Kenya*[445] *(Ogiek case)*

The *Ogiek case* is the most recent and the first indigenous people's case to be adjudicated upon by the African Court on Human and Peoples' Rights.[446] In this case, the Court found a number of violations of the African Charter in the government dealings with the eviction of the Ogiek population from the Mau Forest in Kenya.[447] The Ogiek found the denial of their identity as the most excruciating violation since all other rights could only be enjoyed when their true identity is recognised and honoured

In the case, the Ogiek contended that the failure of the Kenyan government to recognise the Ogiek as an indigenous community denied them the right to communal ownership of land as provided in article 14 of the African Charter. The Ogiek further complained that,

> the eviction and dispossession of their land without their consent and without adequate compensation, and the granting of concession of their land to third Parties mean that their land has been encroached upon and they have been denied benefits deriving therefrom.[448]

The response of the Kenyan government to these allegations was non-committal. The government exonerate itself from any form of illegality by claiming that, the Ogieks are not the only tribe indigenous to the Mau Forest, hence they cannot claim exclusive ownership to the Mau Forest; that the title for all forest in Kenya (including the Mau Forest), other than private and local authority forest, is vested in the State.[449] So, there are private forests. This confirms the contention of the Ogiek of their land being conceded to Third Parties. Another disturbing contention of the Kenyan government was the claim that the Ogiek had been required to move out of

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Exclusive Economic Zone of Nigeria shall vest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly.' This law is the centre point of argument in this thesis.

[445] African Court on Human and Peoples' Rights Application 006/2012 *African Commission on Human and Peoples' Rights v Kenya (merits)* (2017*)* 2 AfCLR 9 [Hereinafter the *Ogiek case*].

[446] Ssenyonjo, 'Responding to Human Rights Violations in Africa' 31.

[447] Akinkugbe and Adebayo, 'The African Court of Human and Peoples' Rights Decision in the *Ogiek* case'

[448] The *Ogiek* case para114.

[449] ibid para 120.

the forest since the colonial administration when the Mau Forest was tagged 'protected conservation area'.[450]

The government of Kenya ought to provide answers to these queries – (i) the Ogiek community should move out to where? (ii) were they provided alternative settlement with commensurate compensation that would enable them to move out? How can the government of Kenya justify the concession of the Ogiek's land to third parties? The acts of the government of Kenya truly smirks of prejudice, oppression, subjugation and inequality. All because the Ogiek are one of the most vulnerable people in Kenya. The Ogiek claimed to have been living in the Mau Forest 'for generations since time immemorial and that their way of life and survival as a hunter-gatherer community is inextricably linked to the forest which is their ancestral land'.[451] Herein lies the need to ascertain the indigeneity of the Ogiek which the African Court did.

3.3.1.6 The Ogiek as an indigenous population

The Court observed that most of the allegations made by the Ogiek was on the need to determine whether they constitute an indigenous population or not. This identity problem therefore required a judicial determination. To set the records straight for the Ogiek's status as indigenous people in Kenya, the Court (i) relied on the criteria to identify indigenous populations of the African Commission Working Group on Indigenous Population/Communities;[452](ii) drew inspiration from the United Nations Special Rapporteur on Minorities[453] and deduced that,

> for the identification and understanding of the concept of indigenous populations, the relevant factors to consider are the presence of priority in time with respect to the occupation and use of a specific territory; a voluntary perpetuation of cultural distinctiveness, which may include aspects of language, social organisation, religion and spiritual values, modes of production, laws and institutions; self-identification as well as recognition by other groups, or by State authorities that they are a distinct collective; and an experience of subjugation, marginalisation, dispossession, exclusion or discrimination, whether or not these conditions persist.' [454]

In the O*giek case,* the African Court endorsed the identification criteria set by the African Commission in the *Endorois* case as the 'normative standards to identify

[450] ibid.
[451] ibid para 103.
[452] ibid para 105.
[453] ibid para 106.
[454] ibid para 107.

indigenous populations in international law'.[455] The Court also appropriates the identification process with the provisions in articles 60 and 61 of the African Charter, 'which allows it to draw inspiration from other human rights instruments' as it has done in this Application.[456] The Court therefore gave recognition to 'the Ogiek as an indigenous population that is part of the Kenyan people having a particular status and deserving special protection deriving from their vulnerability'.[457]

This vulnerability had been a tool of injustice by which the rights of the Ogieks in articles 1,2,4,8,14,17(2) and (3),21 and 22 of the African Charter were allegedly violated.

On the merits, the Court ruled that the government of Kenya violated articles 1,2,8,14,17(2) and (3),21 and 22 of the African Charter. The Court ordered the government of Kenya to take all appropriate measures within a reasonable time frame to remedy all the violations established and to inform the Court of the measure taken within six months from the date of the judgment which was on 26 May 2017.

3.3.1.7 The prominence of African Commission at the African Court

A significant observation in the *Ogiek* case is the identifiable role of the African Commission in promoting, protecting and defending the rights of the indigenous populations/communities in Africa. The role became obvious in the pioneering effort of the African Commission to secure justice for the Ogiek indigenous people. This role though novel, was challenged by the government of Kenya who questioned the status of the African Commission as "Applicant" in the *Ogiek* case. The Kenyan government as Respondent contended with the jurisdiction of the African Commission and the African Court. First, Kenya contended that, rather than the Commission filing the application before the Court,[458] it 'ought to have drawn the attention of the Assembly of the Heads of State and Government of the African Union (AU)'.[459] In response, the Commission submits that, bringing to the attention of the Assembly of Heads of State and Government of the AU, 'a special case which reveals the existence of a series of serious or massive violations of human rights, is not a prerequisite for referring the matter to the Court and is only one avenue

[455] Ibid para 108.
[456] ibid.
[457] ibid para 112.
[458] SSenyonjo, 'Responding to Human Rights Violations in Africa' 31-40.
[459] The *Ogiek* case 'Respondents's Objection' para 48.'

provided under Article 58 of the Charter.'[460] The Commission further reiterated that, with the establishment of the Court, it now has the additional option of referring matters to the Court, as the Court complements the Commission's protective mandate pursuant to article 2 of the Protocol.[461] In line with what the Commission has asserted, the Court affirms that,

> where the Commission files a case before the Court pursuant to Article 5(1) (a) of the Protocol, Article 3(1) of the same provides no additional requirements to be fulfilled before this Court exercises its jurisdiction. Article 58 of the Charter mandates the Commission to draw the attention of the Assembly of Heads of State and Government where communications lodged before it reveal cases of series of serious or massive violations of human and peoples' rights. With the establishment of the Court, and in application of the principle of complementarity enshrined under Article 2 of the Protocol, the Commission now has the power to refer any matter to the Court, including matters which reveal a series of serious or massive violations of human rights. The Respondent's preliminary objection that the Commission did not comply with Article 58 of the Charter is thus not relevant as far as the material jurisdiction of the Court is concerned.[462]

Kenya further contended the jurisdiction of the Commission since the original complainants before the Commission lacked standing as they had no authority to represent the Ogieks, nor were they acting on their behalf.[463] The Commission citing its own jurisprudence, submits that,

> it has adopted the *actio popularis* doctrine which allows anyone to file a complaint before it on behalf of victims without necessarily getting the consent of the victims. For this reason, the Commission was seized with the Communication in November 2009 by two of the complainants: CEMIRIDE and OPDP, which are Non-Governmental Organisations (NGOs) registered in Kenya. The Applicant states that the latter works specifically to promote the rights of the Ogieks while the former has Observer Status with the Commission, and therefore both were competent to invoke the jurisdiction of the Commission. [464]

According to the African Court on this jurisdictional contest,

> the personal jurisdiction of the Court is governed by Article 5(1) of the Protocol which lists the entities, including the Applicant, entitled to submit cases before it. By virtue of this provision, the Court has personal jurisdiction with respect to this Application. The argument adduced by the Respondent according to which the original complainants had no standing to file the matter before the Commission and to act on behalf of the Ogieks is not relevant in the determination of the personal jurisdiction of the Court because the original complainants before the Commission are not the

[460] ibid para 50.
[461] ibid para 50.
[462] ibid para 53.
[463] ibid para 56.
[464] ibid para 57.

> Parties in the Application before this Court. The Court does not have to make a determination on the jurisdiction of the Commission.[465]

The above submissions of the Commission and verdict of the Court establish the fundamental role of the African Commission, living up to its statutory obligation as defender of human and peoples' rights, particularly the rights of the vulnerable indigenous population and communities in Africa. The general contention in the *Ogiek* case is the use of forceful eviction to dispossess the Ogiek of their ancestral land in violation of their property right in articles 14 of the African Charter. And, high on their demand is the restitution of that ancestral land.[466] Kenya generally contended the authenticity of the Ogieks' claim to ownership of land in the Mau Forest that the Forest was a protected conservation area on which they were encroaching and the Ogieks were required to move out of the forest, hence the series of evictions issued to them.[467] This evidently was a violation of the property right of the Ogieks as dealt with by the Court.

As a jurisprudential principle of the African Commission, established in the *Endorois case,*[468] the African Court in the *Ogieks' case* also emphasised that the property right in article 14 may apply to groups or communities as well as can be individual or collective.[469] Essentially, the Court gave a classical conception of this right that, the right to property usually refers to three elements namely; 'the right to use the thing that is the subject of the right (*usus*), the right to enjoy the fruit thereof (*fructus*) and the right to dispose of the thing, that is, the right to transfer it (*abusus*).'[470] The Court made it clear that, 'without excluding the right to property, in the traditional sense, this provision places greater emphasis on the rights of possession, occupation, use/utilization of land.'[471] The Court further relied copiously on the United Nations Declaration on the Right of Indigenous Peoples (UNDRIP) 2007, to explain the relevance of article 14 of the African Charter to the indigenous people as done in this *Ogieks* case.[472]

From the discussions above, the violations of the right to property and the yearning of indigenous peoples to own their land and natural resources without the spectre of

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[465] ibid para 58.
[466] ibid [Order E(i)] para 43.
[467] ibid paras 120-121.
[468] See nn 410 and 428.
[469] The *Ogiek* case para 123. See - Claridge, 'Litigation as a Tool for Community Empowerment' 5.
[470] The *Ogiek* case para 124.
[471] ibid para 127.
[472] ibid paras 125-131.

forceful eviction by delegated authority, is a fundamental human-rights issue that requires a human rights approach for solution.[473] Such human rights approach could further promote the indigenous peoples' dignity and worth if introduced into the land policy document produced by the African Union – *Framework and Guidelines on Land Policy in Africa*. [474] Described as a 'commitment by African governments in land policy formulation and implementation and a foundation for popular participation in improved land governance',[475] reframed with a human right approach, it can serve the African peoples better.[476] As such, any guideline for policy making by the African Union should be seen to protect the greater number of the African peoples and particularly the interests of minorities and indigenous peoples' fundamental land rights.[477] Ultimately, coding the economic, social and cultural rights into regional multilateral treaties in Africa could be more impactful in the peoples' protection of these rights within the concerned states.[478]

3.3.2 An overview of the African Commission's jurisprudence on property rights

The right to property is rooted in land dispossession and deprivation of natural resources. And the African Commission jurisprudence systematically protects the fundamental human rights of the indigenous peoples associated with this right as shown in the cases discussed above. The decisions of the African Commission (in the cases discussed) are indicative of the Commission's protection of the rights of indigenous peoples, and at the same time, developing the law on state's obligations to promote and protect those rights. Furthermore, since property right embodies land tenure and ownership of natural resources of indigenous peoples in Africa, the protection needs to be addressed within a mind-set of human rights maintenance/development.

Apart from the right to property, the right freely to dispose of wealth and natural resources, as provided for in article 21 of the African Charter, is another profound right of indigenous peoples touched on in the cases reviewed. In *Cabinda v*

[473] Ekhator, 'Sustainable Development and the African Union Legal Order'.
[474] "Framework and Guidelines on Land Policy in Africa – Land Policy in Africa: A Framework to Strengthen Land Rights, Enhance Productivity and Secure Livelihoods" (AU-ECA-AfDB Consortium, Addis Ababa, 2010).
[475] Land Policy in Africa xi.
[476] Abioye, 'Advancing Human Rights through Environmental Rule of Law in Africa'.
[477] Ekhator, 'Sustainable Development and the African Union Legal Order'
[478] Maluwa, 'Reassessing Aspects of the Contribution of African States to the Development of International Law' 327.

Angola,[479] the African Commission echoed its jurisprudence on article 21 of the Charter as established in the *Ogoni* and *Endorois* cases,[480] where violation was traced to the colonial era when human and material resources in Africa were exploited for the benefit of powers from outside the continent.[481] Though, this is still prevalent in post-colonial Africa but now favouring groups within the state, the Commission imposes an obligation on the states to protect their citizens from external exploitation by foreign economic powers,[482] by ensuring that those groups and communities – directly or through their representatives – are involved in decisions relating to the disposal of their wealth.[483] As was held in the *Ogoni* case, the African Commission still asserts in the *Cabinda* case that, although the state has the right to exploit natural resources in its territory, article 21 of the African Charter 'presupposes that right is held in trust for the people'.[484] The natural resources occur in a specific place or community where traditional indigenous peoples as dwellers ought to be entitled to ownership of the land and its resources. Thus, it can be argued that holding land in trust should reflect and influence the indigenous peoples on whose land the natural resources are located. That does not exclude all other people in the State from participating in the economic benefits arising from the land in that the government will still be managing the natural resources but now with the participation of the traditional indigenous peoples. This will allow the indigenous peoples to protect their right to development under article 22 of the African Charter.

The whole gamut of indigenous peoples' concerns was captured by the African Commission in a 2016 Resolution[485] where it recalled the relevant provisions of the African Charter, particularly articles 21 and 22. In that resolution, the African Commission recognised the right of all peoples to their economic, social, and cultural development, and the right freely to dispose of their wealth and natural resources, as well as the duty of States to ensure the exercise of these rights. Additionally, the African Commission expressed deep concern for the forced evictions of indigenous

[479] ACHPR, Communication 328/06. The complaint was brought on behalf of the people of Cabinda (victims) in September 2006. (Hereafter the *Cabinda* case.) <https://www.achpr.org/sessions/descions?id=247>.
[480] ibid para129.
[481] ibid; *Ogoni* case para 56.
[482] *Cabinda* case para129; the *Ogoni* case paras 57–58.
[483] *Cabinda* case para 129; *Endorois* case paras 268, 291.
[484] *Cabinda* case para 132.
[485] Resolution on Indigenous Populations/Communities in Africa ACHPR/Res.334 (Ext OS/XIX) 2016 adopted 25 February 2016 by the African Commission on Human and Peoples' Rights Meeting 19th Extra-Ordinary Session 16 to 25 February 2016 in Banjul, The Islamic Republic of The Gambia <https://www.achpr.org/sessions/resolutions?id=250>.

peoples from their ancestral lands and territories so subjecting them to increased poverty and often to inadequate, weak, and insubstantial legal and institutional frameworks to address social and economic disparities. It was resolved in the 2016 Resolution that States should stop and prevent the forced eviction of indigenous populations and communities from their ancestral lands and territories. Furthermore, States were called upon to adopt policies and laws that will secure the rights of indigenous peoples to own, control, and manage their ancestral lands in the forests and protected areas, and to respect and promote the rights of indigenous peoples to security and ownership of their ancestral lands, the right to development, and the right to their culture and language.

Intrinsically, the African Commission has persistently maintained that Member States have the duty under article 1 of the African Charter, 'to recognise the rights duties and freedoms enshrined in chapter 1' – ie, the chapter on human and peoples' rights. This duty to recognise translates into the responsibility of the State to respect, protect, promote, and fulfil any of the rights guaranteed by the African Charter.[486] As a State Party to the African Charter, Nigeria has a responsibility to respect, protect, promote, and fulfil all the rights in the Charter including the economic, social, and cultural rights enshrined in articles 14–18, 21 and 22.[487] State Parties are expected to adopt legislative and other measures to give full effect to the economic, social, and cultural rights in the Charter using all available national resources.[488] For in effect, legislative enactment can only have a meaningful impact in a country through an effective regulatory structure; and interpretation and enforcement can only be achieved through an accessible judicial system.[489] If these are available, individuals and groups in the State can call upon the judicial and regulatory structures to seek domestic remedies in the event of violations of their rights.

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[486] Violation of art 1 was found against the Government of Kenya in the *Endoroi*s and the *Nubian* cases. Though art 1 was held to have been violated by the Nigerian government in the *Ken Saro-Wiwa* case (Communication 137/94-139/94-154/96-161/97 *International PEN, Constitutional Rights Project, Civil Liberties Organisation and Interights (on behalf of Ken Saro-Wiwa Jnr) v Nigeria)*, it was not held to have been violated in the *Ogoni* case. It was also held to have been violated in the *Darfur* case.

[487] Pretoria Declaration on Economic, Social and Cultural Rights in Africa (2004),Preamble <https://www.achpr.org/legalinstruments/detail?id=35>.

[488] ibid para 2.

[489] Ekhator, 'Sustainable Development and the African Union Legal Order'

Nigeria has not incorporated the economic, social, and cultural rights in its Constitution. The State legislation tends to 'speak the mind' of the State with little or no provision for the exclusive and treasured right to property, including ownership of natural resources, of the indigenous peoples or minorities. For example, even the scant mention of the right to immovable property in section 44 in the Nigerian Constitution, includes the caveat in subsection 3 on 'compulsory acquisition'. While this thesis argues for absolute ownership of land and natural resources for indigenous peoples, it does so cautiously in that unless the right to land is first claimed, the right to natural resources loses meaning. With the Land Use Act of 1978, Nigeria established absolute control over land. Notwithstanding this national legislation, as Gilbert suggests, 'a human right approach that involves an international instrument on the human right to land'[490] might provide the solution. The African Charter is already available for this purpose. In one of its reports, the African Commission reiterated its response to the call of indigenous populations in Africa who wish to exercise their rights within the institutional framework of the nation-state to which they belong.[491] Land legislation and land reform in Nigeria can be achieved only by way of a legal framework distinct from the Constitution and which embodies the African Charter and its established jurisprudence. Meanwhile, the current Nigerian Constitution falls short in its human rights provisions which limits its adherence to the legislative promotion and protection of human rights in obligatory fulfilment of international treaties. This is discussed in the following section.

3.4 Nigerian legislation on human rights and the environment

The Nigerian Constitution governs human rights promotion and protection in Nigeria. The human rights provisions in the Constitution are set out in two chapters, one chapter identified as 'fundamental rights', and the other as 'fundamental objectives and directive principles of State policy'.

3.4.1 *The Nigerian Constitution and fundamental rights*

[490] Gilbert, 'Land right as human rights' 129.
[491] Report of Research and Information Visit to the Democratic Republic of the Congo 2009, Working Group on Indigenous Populations/Communities and Minorities in Africa. 10. The African Commission on Human and Peoples' Rights adopted this report at its 49th Ordinary Session, 28 April – 12 May 2011 <https://www.achpr.org/states/missionreport?id=55>.

Distinctly titled 'fundamental rights' in Chapter four of the Constitution of the Federal Republic of Nigeria 1999, Nigeria opts to promote and protect fundamental rights rather than human rights. There is a distinct difference between these two concepts. While the concept of human rights and its emergence as international law has been discussed in the previous section, we seek to explain the difference here. Fundamental rights, according to Nasir JCA in *Uzoukwu v Ezeonu II,*[492] remain in the realm of domestic law and are fundamental because the fundamental law of the country – the Constitution – guarantees them. On the other hand, human rights entail an international overview. In *Bobade Olutide & Ors v Adams Hamzat & Ors,*[493] Denton-West JCA, described human rights as moral principles or norms that monitor standards of human behaviour which are protected as legal rights in municipal and international law. Clearly, the Nigeria Constitution makes no provision for the universally conceptualised 'human rights' but restricts itself to fundamental rights.

A study of Chapter IV of the 1999 Constitution on 'Fundamental Rights' shows the listed provisions as extractions of the basic political and civil rights in the UDHR and the ICCPR. The fundamental rights listed in Chapter IV are: the right to life (s 33); the right to dignity of human person (s 34); the right to personal liberty (s 35); the right to a fair hearing (s 36); the right to private and family life (s 37); the right to freedom of thought, conscience, and religion (s 38); the right to freedom of expression and the press (s 39); the right to peaceful assembly and association (s 40); the right to freedom of movement (s 41); the right to freedom from discrimination (s 42) and, the right to acquire and own immovable property anywhere in Nigeria (s 43).

Notwithstanding their classification as 'fundamental rights',[494] in the Nigerian Constitution, these are the human rights recognised in international law simply as the civil and political rights, also termed 'first generation rights'.[495] Other generations of human rights, called Vasak's categorisation of rights by Wellman and Alston are: the 'second generation' including the economic, social, and cultural rights of the ICESCR; and the 'third generation' that comprises the right to development, right to a healthy environment, and the right to peace – which are symbiotically collated as

[492] 1991 6NWLR [Pt 200] 708.
[493] 2016 LPELR-26047 (CA).
[494] Ali, 'The Legal Concept of the Fundamental Right' 62.
[495] Alston, 'A Third Generation of Solidarity Rights'.

'solidarity rights'[496] and are missing from the Nigerian Constitution. However, space does not permit a discussion of this categorisation in this thesis.

3.4.2 *Fundamental Objectives and Directive Principles of State Policy in the Nigerian Constitution*

The constitutional provisions in Chapter II on fundamental objectives and directive principles of state policy, are aimed primarily at state practice and administration. Section 13 of the 1999 Constitution provides that government and its three branches are responsible for observing the provisions of Chapter II. It further lists what it refers to as 'the duty and responsibility of all organs of government, and of all authorities and persons, exercising legislative, executive or judicial powers, to conform to, observe and apply the provisions' contained in the Chapter. The provisional content of the fundamental objectives in sections 13–24 of the Constitution lists the objectives as – political (s 15), economic (s 16), social (s 17), educational (s 18), foreign policy (s 19), and environmental (s 20). Although the Nigerian Constitution does not acknowledge any of the relevant international instruments, the fundamental objectives can be traced back to these instruments thereby reducing human rights to 'fundamental objectives and directive principles of State policy'. [497] These objectives can in no way be categorised as rights.[498] This researcher reasons that fundamental objectives as government obligations created by the Constitution could only be discharged at the discretion of those assigned with the responsibility. Hence, objectives are not subjected to strict compliance or defined international standard as is the case with human rights.[499]

The drafters of the Nigerian Constitutions could not have been ignorant of the implications of failing to include economic, social, cultural, environmental rights and the right to development in the Constitution. It is a wilful omission and denial of the people's human rights; more so when those rights have been reduced to fundamental objectives and directive principles under state administration. On the

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[496] Wellman, 'Solidarity, the Individual and Human Rights' 639; Alston ibid 307.
[497] Oleghe, 'Nigeria's Ratification of International Human Rights Instruments' 8-11.
[498] Dada, 'Human Rights under the Nigerian Constitution' 36.
[499] OHCHR, International Human Rights Law. According to the United Nations, the accepted fundamental norms of human rights that everyone should respect and protect are attained from international human rights law. Respect for human rights requires the establishment of the rule of law at the national and international levels. Essentially, it is mandatory that, 'through ratification of international human rights treaties, Government undertake to put into place domestic measures and legislation compatible with their treaty obligations and duties'. Hence, Nigeria is expected to legislate human rights as human rights in the Constitution and not as fundamental objectives <OHCHR | International Law> accessed 3 July 2021.

contrary however, Duru's justiciability of the fundamental objectives, asserts that Chapter II of the Constitution was correctly included for the benefit of the great majority of Nigerian people, particularly the poor and vulnerable.[500] This view might reflect the drafters' intention. Such views allow insight into the reasoning of the drafters of the 1979 and 1999 Nigerian Constitutions. More intriguing is Duru's reference to Chapter II objectives as 'socio-economic rights'[501] but they are not so presented in the 1999 Constitution. Contrary to Duru's view, reducing economic, social, cultural, and environmental rights to objectives cannot be considered justiciable under the 1999 Constitution in that they neither protect the people, nor can they be claimed as rights.[502] The only mode of justiciability for the fundamental objectives in Chapter II is through the discretionary power of the state,[503] though, Babalola in his scholarly opinion reasoned that, 'other provisions of the Constitution as well as statutes can make Chapter II provisions justiciable.' [504]

Fundamental objectives cannot replace human rights. By statutory provisions the Nigerian Constitution renders the social and economic rights non-justiciable, but the African Charter regards such rights as justiciable as evidenced in the cases reviewed above. In that respect, the African Charter, having become law in Nigeria, has rectified Nigeria's constitutional inadequacy. Also addressing the justiciability of social and economic rights, Olomojobi is doubtful that the social and economic rights are not as protected by international law as are the civil and political rights.[505] He does, however, agree that the ICESCR and the African Charter epitomise international and regional interests as regards the rights they embody.[506] Whatever the contention, as discussed in sections 3.2 and 3.3 above, this thesis takes the approach that human rights are protected by international and regional law as entitlements of the people which governments must respect, promote, and protect, and with which they must not interfere; they are 'potentials' capable of being claimed as collective rights. Fundamental rights, on the other hand, fall to individuals, and as Osaghae puts it, individual rights may be necessary but not sufficient to manage

[500] Onyekachi Duru, 'The Justiciability of the Fundamental Objectives and Directives Principles of State Policy Under Nigerian Law 1 <http://ssrn.com/abstract=2140361> accessed 12 November 2018.
[501] ibid.
[502] See generally - Olayinka, 'Implementing the Socio-Economic and Cultural Rights in Nigeria and South Africa'.
[503] Oleghe, 'Nigeria's Ratification of International Human Rights Instruments and the Question' 11-13.
[504] Babalola, 'The Right to a Clean Environment in Nigeria' 11.
[505] Yinka Olomojobi, 'The Nature of Human Rights & Civil Liberties from the Nigerian Perspective 5-6 <http://ssrn.com/absract=2906639> accessed 12 November 2018.
[506] ibid 5.

ethnic conflicts[507] such as those in the Niger Delta. As signatory to the relevant international human rights instruments, Nigeria cannot claim ignorance of the applicability and justiciability of those instruments,[508] but will rather promote abroad what it does not practice at home.[509]

It could be that Nigeria prioritised its responsibilities regarding fundamental rights by listing them as such, and placing others as objectives as underlined by Asante's question as to 'whether every aspect of human rights needs necessarily be accorded equal status in Africa? Or whether a developing African nation could not determine its own priorities of political and social values unfettered by the preferences of the western world?'[510] To these queries, one could easily reply in the affirmative as the African Charter has established the required international status for the benefit of African people. Human rights are founded in international law and state compliance for optimal domestic benefit need not be underrated. The next section discusses the African Charter as an embodiment of all human rights applicable in Nigeria[511] to fill the vacuum created by the inadequacy of the country's treatment of human rights.

3.4.3 *Domestication of the African Charter on Human and Peoples' Rights in Nigeria*

The African Charter, though a regional treaty, qualifies as international human rights treaty which binds all the member nations to promote and protect human rights and basic freedoms on the African continent.[512] The essence of international human rights law is for each state to provide means of protection for its people through the application of international law rules within its jurisdiction.[513] The promotion and protection of human rights require the establishment of the rule of law at both

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[507] Osaghae, 'Human Rights and Ethnic Conflict Management' 185.
[508] Federal Republic of Nigeria, 'A Brief Human Rights History of Nigeria', National Action Plan for the Promotion and Protection of Human Rights in Nigeria (2006) 8 <https://www.ohchr.org/Documents/issues/NHRA/nigeria.pdf>.
[509] Philip Aka, 'Origin and Evolution of Human Rights in Nigeria's External Relations' 2014 National Conference of Black Political Scientists (NCOBPS) <https://ssrn.com/abstract=2334925> accessed 10 October 2018.
[510] Asante, 'Nation Building and Human Rights' 87.
[511] Ekhator, 'Environmental Justice Under ACHPR: NGOs in Nigeria' - "Status of the African Charter in Nigeria" 69.
[512] ibid.
[513] Shaw, *International Law* 128, 129. The applicability is achieved by two means at common law, (i) the 'doctrine of transformation, which maintains that, before any rule or principle of international law can have any effect within the domestic jurisdiction, it must be expressly and specifically 'transformed' into municipal law by the use of the appropriate constitutional machinery such as an Act of parliament, or, as in the case of Nigeria, an Act of National Assembly; and (ii) the 'doctrine of incorporation', which holds that international law is part of the municipal law which requires no interposition of a constitutional ratification procedure. While the incorporation applies to adoption of customary international law, the transformation approach applied to treaties.

international and national levels.[514] The State is expected to achieve this as a duty under international law if the ratified treaties are to make meaningful impact on the lives of the local people.[515] These States' duties and obligations can be achieved by the transformation of ratified treaties into municipal legislation, which is generally referred to as domestication.

In its Preamble, the African Charter reaffirms its commitment to achieve a better life for the peoples of Africa and to 'promote international co-operation, having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights'. The African Charter affirms Member States' 'adherence to the principles of human and peoples' rights and freedoms contained in the declarations, conventions and other instruments adopted by the Organisation of African Unity,[516]the Movement of Non-Aligned Countries and the United Nations'.[517] It also recognises 'on the one hand, that fundamental human rights stem from the attributes of human beings, which justifies their national and international protection, and on the other hand that the reality and respect of peoples' rights should necessarily guarantee human rights'.[518]

The Charter underlines the essence of the right to development and the fact that civil and political rights are inseparable from economic, social, and cultural rights in their conception as well as their universality and the satisfaction of economic, social, and cultural rights as a guarantee for the enjoyment of civil and political rights. The contiguity of the African Charter, the Charter of the United Nations, and the UDHR endows the African Charter with the status of binding international law.[519]

The transformation of ratified treaties engenders municipal relevance for protection of rights in the various States and is explained by the United Nations Human Rights Council (UNHRC) thus:

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[514] See n 366. United Nations Human Rights, 'Professional Interests - International Human Rights Law'.
[515] Maluwa, 'Reassessing Aspects of the Contribution of African States to the Development of International Law' 327.
[516] The Organisation of African Unity (OAU) is now, the African Union (AU), established by art 2 of the Constitutive Act of the African Union, Lome, Togo, 2000.
[517] Preamble to the African (Banjul) Charter on Human and Peoples' Rights adopted 27 June 1981, OAU DOC CAB/LEG/67/3 rev. 5, (1982) 21 ILM 58, entered into force 21 October 1986.
[518] ibid.
[519] The African Commission on Human and Peoples' Rights refers to the African Charter as 'an international human rights instrument that is intended to promote and protect human rights and basic freedoms in the African continent' <http://www.achpr.org/instruments/achpr/>. As a multilateral treaty, the African Charter has binding force on several nations, albeit within the African continent. Therefore, it has regional and international status.

> International human rights law lays down obligations which States are bound to respect. By becoming parties to international treaties, States assume obligations and duties under international law to respect, to protect and to fulfil human rights. The obligation to respect means that States must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires States to protect individuals and groups against human rights abuses. The obligation to fulfil means that States must take positive action to facilitate the enjoyment of basic human rights.[520]

This statement raises the question of how States can take positive action to facilitate the enjoyment of the basic human rights enshrined in all applicable and relevant human rights instruments, especially where a domestic legal system fails to remedy human rights abuses. The UNHRC further asserts that:

> Through ratification of international human rights treaties, Governments undertake to put into place domestic measures and legislation compatible with their treaty obligations and duties. Where domestic legal proceedings fail to address human rights abuses, mechanisms and procedures for individual complaints or communications are available at the regional and international levels to help ensure that international human rights standards are indeed respected, implemented, and enforced at the local level.[521]

The enforcement of ratified treaties at local level, that is, within the individual States, can only be effected through the process of domestication known as doctrine of transformation. The doctrine means that,

> before any rule or principle of international law can have any effect within the domestic jurisdiction, it must be expressly and specifically transformed into municipal law by the use of the appropriate constitutional machinery, such as an Act of Parliament.[522]

In the light of the established international law process, and by virtue of the 'Implementation of treaties' provision in section 12 (1) of the Nigerian Constitution, the African Charter, with all its international law attributes, was domesticated in Nigeria. The enactment by the National Assembly transformed the African Charter to the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act.[523] The African Charter has the capacity to protect the rights of all African peoples, including the collective rights of the indigenous peoples as seen in the *Ogoni* and *Endorois* cases. As an Act of the National Assembly, the African Charter Act is law in Nigeria and its provisions are enforceable in Nigerian courts (and if that

[520] ibid.
[521] ibid.
[522] Shaw, *International Law* 129.
[523] African Charter Act Ch A9 Laws of the Federation of Nigeria 1990, Ch 10 LFN 1990(No 2 of 1983.

fails, at the African Court on Human and Peoples' Rights).[524] Section 251(1) of the 1999 Constitution further confers Nigerian courts with jurisdiction to hear matters relating to this Act of the National Assembly as evidenced in the Nigerian case of *Governor of Ebonyi State & Ors v Hon Justice EI Isuama.*[525]

In that appeal case the respondent, as applicant in the lower court, relied on the African Charter on Human and Peoples' Rights as Nigerian Law under Cap.10 Laws of the Federation of Nigeria 1990, in asserting his original complaint on the nature of his removal from office as a human rights violation. In the lower court, the applicant (respondent in the present appeal) argued that although the rules and remedies of the African Charter were not stated in the application, resort could be had to the Charter when appropriate. Also, that the unlimited jurisdiction of the Federal High Court based on the provision of section 251 of the 1999 Constitution of Nigeria, extends jurisdiction to other laws that have been domesticated by providing that, 'to such other jurisdiction as may be conferred … by an Act of the National Assembly …' The presiding judge in the Appeal Court reiterated that he did not see why the respondent (Justice Isuama), 'should not avail himself of all remedies provided by the law of our land in our statute book to stoutly approach the court and assiduously with gusto and unction persuade the court to grant him the remedy he seeks'.

Dismissing the appeal, the court saw no reason why it could not be accepted that the African Charter has opened a window of opportunity for an applicant to invoke its provisions, especially in so serious a matter as the removal of the Chief Judge of a state in Nigeria. The court also failed to see why the respondent could not have recourse to all remedies provided by the law of the land and supplement his quest for justice by reliance on various laws for the attainment of realisable justice.[526]

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[524] The African Court was established by virtue of art 1 of the Protocol to the African Charter on Human and Peoples' Rights which was adopted by Member States of the then Organisation of African Unity (OAU) in Ouagadougou, Burkina Faso, in June 1998 and came into force on 25 January 2004. Although, 30 state parties, including Nigeria, had ratified the Protocol as at February 2018, only 8 of these have made the declaration recognizing the competence of the court to receive cases from NGOs and individuals. The eight are: Benin, Burkina Faso, Cote d'Ivoire, Ghana, Mali, Malawi, Tanzania, and the Republic of Tunisia. The members that have ratified the Protocol are: Algeria, Benin, Burkina Faso, Burundi, Cameroon, Chad, Cote d'Ivoire, Comoros, Congo, Gabon, Gambia, Ghana, Kenya, Libya, Lesotho, Mali, Malawi, Mozambique, Mauritania, Mauritius, Nigeria, Niger, Rwanda, Sahrawi Arab Democratic Republic, South Africa, Senegal, Tanzania, Togo, Tunisia and Uganda. <www.afircan-court.org/en/> accessed 26 February 2018.

[525] CA/E/163/2004; 3PLR/2003/82 (CA); (2003)6 NWLR (Pt.975).

[526] CA/E/163/2004; 3PLR/2003/82(CA) Lead Judgment delivered by Ignatius Chukwudi Pat Acholonu JCA.

The *Isuama* case illustrates the willingness of Nigerian courts to exercise unlimited jurisdiction for the protection of the Nigerian people. The African Charter Act is available to fill the gap in the human rights provisions of the Nigerian Constitution. The African Charter is set to address group protection that individual rights cannot address. Clearly, the African Commission's decisions reviewed in section 3.3 above reveal the interconnectivity by synchronisation of all human rights – civil, political, economic, social, and environmental, as well as the right to development – to protect indigenous peoples.

Of essence to the objective of this thesis is the protection of the right to healthy environment in article 24 which provides that, 'all peoples shall have the right to a general satisfactory environment favourable to their development'. With the hindsight that section 20 of the 1999 Constitution focuses on protection and improvement of the environment, fact remains that it is an environmental objective and not a right. Intuitively therefore, the impact of article 24 of the African Charter on the justiciability and enforceability of the right to environment in Nigeria is highly required for environmental adjudication.[527] Scholarly debates on this issue express variant views and opinion. For instance, Atsegbua *et al*[528] in their opinion do not agree that article 24 of the African Charter makes environmental rights justiciable or enforceable in Nigeria. But, Etemire,[529] Ekhator[530] and Ako *et al*[531] on the other hand suggest that notwithstanding section 20 of the Nigerian Constitution, article 24 of the African Charter is enforceable and justiciable in Nigeria, and that article 24 is not in conflict with the law in Nigeria but guarantees and ensures environmental protection in Nigeria. The latter argument is the stand of this thesis.

Therefore, under the African Charter all human rights work together for the good of all peoples, including indigenous peoples. With the African Charter as law in Nigeria, there is a 'silver lining on the horizon' for indigenous peoples and their environment to be protected and assurance of a remedy in any incidence of violation, in the Nigerian courts. Still on protection of human rights, environmental protection is the

[527] The Supreme Court decision in *Centre for Oil Pollution Watch v Nigerian National Petroleum Corporation* [2019] 5 NWLR 518.
[528] Atsegbua, Akpotaire and Dimowo, *Environmental Law in Nigeria: Theory and Practice*
[529] Etemire, 'The Future of Climate Change Litigation in Nigeria' 158-170.
[530] Ekhator, 'Improving access to environmental justice under the African Charter on Human and Peoples' Rights' 63-79.
[531] Ako, Stewart and Ekhator,'Overcoming the (Non)justiciable Conundrum' 123-141.

foundation on which sustainable development will be grounded in the Niger Delta, hence, we consider next the environmental legislation in Nigeria.

3.4.4 *Environmental protection legislation in Nigeria*

The right to a healthy environment is the most violated human right in the Niger Delta. Environment covers the air, land, and waters. This section highlights existing Nigerian environmental legislation to assess its adequacy or otherwise. Nigeria has two pieces of national legislation and two international treaties ratified and domesticated, available for environmental protection in the Niger Delta.

The National Oil Spill Detection and Response Agency (Establishment) Act (NOSDRA) 2006, as its name implies, sets up a monitoring agency for swift detection of oil spills and institutional action to prevent or limit extensive damage. The NOSDRA is expected to be always fully prepared to carry out its functions efficiently to protect the oil producing areas such as the Niger Delta. The Agency is also tasked with developing an Oil Spill Contingency Plan for Nigeria, and by implication, the Niger Delta region where extensive oil production generates oil spills. The NOSDRA is a specialised agency established for a specific purpose and needs to cover all oil-producing regions if it is to achieve meaningful success.

Similarly, the two international conventions ratified and domesticated by Nigeria: the International Convention on Civil Liability for Oil Pollution Damage (Ratification and Enforcement) Act 2006, and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971 as amended (Ratification and Enforcement) Act 2006, are directed specifically at oil pollution. These two Acts are aimed at holding polluters responsible and liable for pollution and can complement the functioning of the NOSDRA. While the NOSDRA is responsible for early detection and limitation of pollution, the international instruments ensure the liability of the errant polluters within Nigeria's borders are quantified monetarily and pollution duly paid for. The combined functioning of these three Acts could have ameliorated the excesses of the multinational polluters in the Niger Delta and saved the lives and living of the indigenous peoples who fell victim to oil spills and pollution.

For its part, the National Environmental Standards and Regulations Enforcement Agency (Establishment) Act 2007 (NESREA) stands alone as Nigeria's most viable environmental institution covering all aspects of the environment. The NESREA

bears 'responsibility for the protection and development of the environment, biodiversity conservation and sustainable development of Nigeria's natural resources in general…'[532] Its general coverage of natural resources includes oil and gas. Indeed, the composition of the Governing Council includes 'a representative of the Oil Exploratory and Production Companies in Nigeria' and three persons to represent public interest.[533] Ideally, from all the provisions, the three persons representing 'public interest' should have been the indigenous peoples of the Niger Delta. In the view of this thesis, every concern regarding oil and gas in the Niger Delta which excludes the indigenous peoples' participation is unsustainable. Ironically, in this Agency law Nigeria contradicts itself, thereby plunging itself into controversy as to its commitment to sustainable development. For example, the oil and gas sector is excluded from the Agency's control. This exclusion renders the oil and gas a no-go area for the Agency,[534] and as Ogbodo puts it, the Agency lacks jurisdiction over environmental matters emanating from the oil and gas sector.[535] The controversy lies in why Nigeria includes 'a representative of the Oil Exploratory and Production Companies in Nigeria' but refuses to include the oil and gas sector for regulation and control in NESTREA. One must ask what purpose the representative will serve on the Governing Council. Furthermore, there is need to resolve other conflicting provisions in the legislation which affect the oil and gas sector and makes NESREA an unstable agency for the realisation of sustainable development in all sectors.[536]

The ineffectiveness of these existing national laws is obvious from the condition of the Niger Delta's environment. There is therefore a need to revisit these environmental agencies – NOSDRA and NESREA – must be revisited to analyse and understand why they have failed as they are indeed failed institutions. This issue is not discussed further in this thesis. However, lack of effective regulation and control of pollution in the Niger Delta got a remedy boost that could effectively address and curtail the human rights violations and abuses by the government and oil companies as discussed next.

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[532] NESREA Part 1 s 2 'Objectives of the Agency'.
[533] ibid s 3, 'Establishment and composition of Council'. See, in particular, s 3(1)(c)(vii)(e).
[534] ibid s 8 (k), (l), (m), (n), and (s), 'Powers of the Agency'.
[535] Gozie Ogbodo 'National Environmental Standards and Regulations Enforcements Agency (NESREA) Act – A Review' <http://www.nigerianlawguru.com/articles/environmental%20law/NATIONAL%20ENVIRONMENTAL%20STANDARDS%20AND%20REGULATIONS%20ENFORCEMENT%20AGENCY%20(NESREA)%20ACT,%20A%20REVIEW.pdf> accessed 18 April 2021.
[536] Agbazue, Anih and Ngang, 'Role of Nesrea Act 2007', 33-34.

3.4.5 Environmental protection litigation in Nigeria

Justice in legal remedy surfaced for the protection and maintenance of healthy environment in the recent landmark decision of the Supreme Court of Nigeria in the *Centre for Oil Pollution Watch v Nigerian National Petroleum Corporation (2018)* case.[537] This decision provides the most desired legal precedent on which future litigations would rest as the alternative approach to resolving the perennial environmental devastations and degradation suffered by indigenous peoples in the Niger Delta.

The original action brought by the Centre for Oil Pollution Watch – a Non-governmental Organisation (NGO) - was for the reinstatement, restoration and remediation of the impaired and contaminated environment in Acha autonomous community in Isukwuato Local Government Area of Abia State among other claims. At the Appeal Court,[538] the Respondent, NNPC raised an objection of 'lack of requisite *locus standi* to institute an action', against the Appellant, COPW. NNPC claimed COPW has neither suffered damage nor been affected by the injury allegedly caused to the Acha Community as alleged. On the ground that the COPW lacks *locus standi* the case was dismissed at the Appeal Court.[539] Moving to the Supreme Court, the fundamental issue for determination is on the position of the law with *locus standi* to maintain an action for public interest. As evident in this case and prior to this time, there has been standing constraints, limiting NGOs to access the courts to prevent or seek remedy for pollution.[540] But with the Supreme Court decision in this case, Anozie and Wingate envisage that environmental NGOs are now able under the law, to institute action to prevent or remedy environmental pollution in Nigeria.[541]

On the applicable law on environmental protection in Nigeria, where the lower Courts have failed to uphold justice despite available applicable laws, the Supreme Court relied on those laws to determine in favour of environmental protection in Nigeria. The SC relied on article 24 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act; sections 20 and 33(1) of the Nigerian Constitution, 1999 and section 17(1) of the Oil Pipeline Act to interpret the

[537] SC.319/2013 In the Supreme Court of Nigeria, 20 July 2018; 5 NWLR [PT.1666] 518.
[538] (2013) LCN/5875 (CA).
[539] CA/L/413/2008, 28 January 2013.
[540] Anozie and Wingate, 'NGO standing in petroleum pollution litigation in Nigeria' 490-497.
[541] ibid.

submissions presented and determine the case. This included the scholarly submissions of the *amici curiae* on 'Extending the scope of *locus standi* in relation to issues on environmental degradation: the case of NGOs'. It could be deduced that the Supreme Court sets the law on representative application as practised at the African Commission on Human and Peoples' Rights' cases involving indigenous peoples as analysed in the section 3.3.1 of this thesis.

Following the effort of the Supreme Court in making way for environmental justice, a national environmental law is urgently required. Section 20 of the Nigerian Constitution mentions environmental objectives which has no justiciability for environmental protection as has been explained in section 3.4.2 above. But as suggested by Babalola, its justiciability depends either on another provision of the Constitution, or an Act of the National Assembly enacted around the subject.[542] Intrinsically, in the absence of a national environmental law, the African Charter stands as the best law to protect human rights, environment and sustainable development in Nigeria because of its superlative international and regional status. Yet, Nigeria needs a national environmental law that deals with the peculiar environment issues in different parts of the country that are not accommodated in the African Charter.

Undoubtedly, the absence of justiciability of the socio-economic rights in Nigeria especially as it pertains to environmental health and protection, and inadvertently, to the promotion of sustainable development, has been addressed by this landmark decision. As Ekhator reiterates in his contribution to this legal achievement, the reliance of the Supreme Court of Nigeria on the African law rejuvenates the existence of the African Charter as a domestic Nigerian law that could be relied on for the protection of economic, social and cultural rights and the promotion of sustainable development in Nigeria.[543] As a judicial precedent, it is an ice-braker. And as Ekhator reiterates, it is the first time 'that the Nigerian Supreme Court stated that right to the environment can be justiceable in Nigeria'[544] and loosening the NGOs from the bondage of judicial ineffectiveness of '*locus standi'* in environmental matters in Nigeria.[545]

[542] Babalola, 'The Right to a Clean Environment in Nigeria' 11.
[543] Ekhator, 'Sustainable Development and the African Union Legal Order' 21.
[544] ibid.
[545] ibid.

In the democratic dispensation, where government institutions, regulations and control fail, the only justiceable option left is law and legal practice. As Etemire deduced, 'it has been argued that the practice of law can move things forward and initiate much needed legal developments'.[546] This legal development is recorded with the COPW decision that has opened a wide path to litigation opportunity for the benefits of indigenous peoples in the Niger Delta particularly the sustainable development litigation. Before now, this path had been stampeded by what Etemire described as 'a judicial attitude that has privileged the economy over the environment'.[547] But the environment should be healthy for the economy to develop.

The COPW case has now opened the path to future climate change and sustainable development litigations in Nigeria. Part of the allegations of the COPW as Appellant in the case was that the Respondent (NNPC) 'was negligent in both the causation and containment of the oil spillage'.[548] Institutional failure could be recognised in the claims of the Appellant. Institutional failures can no longer be endured as there is need for general review to encapsulate the essence of environmental protection in the oil and gas region of the Niger Delta. Suffice to say that had these institutions mentioned in the section above and others like them not failed, the environmental devastation in the Niger Delta could not have deepened to the level it did as will be disclosed in the next section in the *Ogoni* case.

3.5 The *Ogoni* case:[549] human rights violations in the Niger Delta

As earlier reviewed in section 3.3.1, the African Commission's decision in the *Ogoni* case has become a jurisprudential beacon for the promotion and protection of human rights in Africa. However, the history of protests for the protection of rights preceded the *Ogoni* case. Indeed, the *Ogoni* case was inevitable in the face of the riotous protests that erupted after the death of Ken Saro-Wiwa and other Ogoni leaders in 1995 at the hands of the Abacha military regime.[550] Up until then the struggle of the Ogoni people to defend their rights occasioned the launching of the Movement for the Survival of the Ogoni People (MOSOP) in 1990. The MOSOP and

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[546] Etemire, ;The Future of Climate Change Litigation in Nigeria' 159.
[547] ibid 160.
[548] Babalola, 'The Right to a Clean Environment in Nigeria' 10.
[549] ACHPR, Communication 155/96: *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria* – Done at the 30th Ordinary Session held in Banjul, The Gambia, 13-27 October 2001.
[550] ACHPR, Communications 137/94-139/94-154/96-161/97*: International PEN, Constitutional Rights Project, Civil Liberties Organisation and Interights (on behalf of Ken Saro-Wiwa Jnr) v Nigeria*.

Saro-Wiwa became heroes of the struggle, motivating the indigenous peoples throughout the Niger Delta and encouraging them at his execution by his dying statement: 'Lord, take my soul. But the struggle continues.'[551] Indeed, the struggle did not stop and has become more violent than during the Saro-Wiwa protest days. According to Douglas and Okonta, the massacres and executions 'only hardened the resolve of the oil-producing communities to put an end to a system that has brought them so much pain, poverty, and death'.[552]

By December 1996, after the execution of Saro-Wiwa and others (1995), it became clear that the Nigerian military had been invited by Shell to 'help put down disturbances in its Ogoni concession area' to facilitate the recovery of five of its oil fields in the area.[553] Brute force by the military was the instrument of choice in suppressing and forcibly evicting the vulnerable indigenous peoples and communities in the region. The Nigerian security forces' involvement in violations and rights abuses was thus entrenched in the Niger Delta. The calculated aggression against the indigenous peoples of the Niger Delta prompted a probe into who bore the responsibility to protect them. Nigeria could not simultaneously violate and protect the peoples' rights. Thus, in the absence of justice under the Nigerian judicial system, the Ogoni people headed for the African Commission on Human and Peoples' Rights to seek redress.

3.5.1 *Brief outline of the Ogoni case*

In the communication, the Ogoni alleged that the military government of Nigeria, through the state oil company – the Nigerian National Petroleum Company (NNPC) which is the majority shareholder in the Shell Petroleum Development Corporation (SPDC) – had been directly involved in oil production.[554] The multinational Exploration and Production (E & P) companies of which the SPDC is one, operate predominantly in the on-shore Niger Delta in joint partnership with the NNPC.[555] Although the multinationals in Nigeria operate under a concession system with the NNPC being the concessionaire, they still operate in partnership with the NNPC

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[551] Earth Rights International, 'Lord, take my soul. But the struggle continues' <https://www.earthrights.org/blog/stories-resistance-and-resilience-world-day-indigenous-peoples> accessed 22 July 2017>.
[552] Douglas and Okonta, 'Ogoni People of Nigeria versus Big Oil' 156.
[553] ibid.
[554] The *Ogoni* case Communication 155/96 para 1.
[555] Nigerian National Petroleum Corporation (NNPC), Upstream Ventures, Oil Production <Oil Production (nnpcgroup.com)> accessed 4 July 2021.

under Joint Operating Agreements (JOAs) or Production Sharing Contracts (PSCs).[556] Hence, the partnerships render the NNPC as liable as the multinationals.

The Ogoni also alleged that the oil production caused environmental degradation and health problems for the Ogoni people because of environmental contamination.[557] The contamination of water, soil, and air was alleged to have serious short- and long-term health impacts including, 'skin infections, gastrointestinal and respiratory ailments, increased risk of cancers, and neurological and reproductive problems'.[558] The Ogoni complained that the failure of the oil corporations to maintain their facilities was condoned by the Nigerian government,[559] resulting in avoidable oil spills within the proximity of villages in violation of international environmental standards. The Nigerian government neither monitored operations of the oil companies nor required safety measures as standard procedure within the industry in consonance with international environmental and pollution instruments. Condoning such atrocities, 'the government has participated in irresponsible oil development that has poisoned much of the soil and water upon which Ogoni farming and fishing depended'.[560]

Further allegations involved violations of international environmental standards by the oil companies through disposal of toxic wastes into the environment and local waterways, and failure to maintain facilities that caused avoidable spills in local communities.[561] This resulted in wanton destruction of farmlands, rivers, crops, and livestock creating hunger, starvation, and malnutrition among some of the Ogoni communities.[562] The Ogoni contended that their survival depended on their land and farms that had been destroyed – first, by oil pollution, and second, by direct involvement of government in brutalities inflicted not only on individuals but also on the Ogoni community as a whole. The African Commission also witnessed this devastation during a fact-finding mission to Nigeria between 7 and 14 March 1997.[563]

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[556] ibid.
[557] The *Ogoni* case para 1.
[558] ibid para 2.
[559] ibid para 3.
[560] ibid para 9.
[561] ibid para 2.
[562] ibid para 9.
[563] The *Ogoni* case para 67.

3.5.2 Procedure for admissibility

As a result of the denial of justice in Nigerian courts, the Ogoni people sought redress at the African Commission of Human and Peoples' Rights. The exhaustion of domestic remedy rule was a conditional requirement for admissibility of the communication.[564] According to Shaw, the requirement of the rule 'encourages states to solve their own problems according to their constitutional procedures before accepted international or regional mechanisms may be resorted to'.[565] The *Ogoni* case satisfied the exhaustion rule. Interpreting this clause on the admissibility of the *Ogoni case*, the African Commission explained that domestic courts are encouraged to decide cases before bringing such cases to an international forum to avoid judicial contradictions. But, in a situation where a right is not adequately addressed in domestic law to the extent that it is unlikely to be heard, there cannot be effective remedies, [566] or any remedies at all.[567] In the case of Nigeria, this ought not to be so because, as analysed in section 3.4.3 above, the African Charter has since its incorporation in 1990 been Nigerian law applicable in Nigerian courts to protect the human rights of Nigerian people. This fact was confirmed by the African Commission in the *Ogoni* case when it asserted that, 'the Federal Republic of Nigeria has incorporated the African Charter into its domestic law with the result that all the rights contained therein can be invoked in Nigerian courts including those violations alleged by the Complainants'.[568]

The aberration caused by the military rule in Nigeria hindered justice, with the suspension of the 1979 Constitution and rule by decree with ouster clauses.[569]

In the absence of the Constitution, the military ruled Nigeria with no respect for democratic principles and the rule of law. This explains the extended abuses and violations in the Niger Delta that stretched over various military regimes and which

[564] ibid paras 35-42
[565] Shaw, *International Law* 254.
[566] In the absence of effective remedies as in the *Nubian* case reviewed in section 3.3.1 above, a standard exception to the rule of exhaustion of domestic remedies under the African Charter was established and the Nubian Communication became admissible. See ACHPR, Communication 317/2006 *The Nubian Community in Kenya v The Republic of Kenya* [55]-[56].
[567] The *Ogoni* case para 37.
[568] ibid para 41.
[569] ACHPR, Communications 137/94-139/94-154/96-161/97 *International PEN; Constitutional Rights Project; Civil Liberties Organisation and Interights (on behalf of Ken Saro-Wiwa Jnr.) v Nigeria* paras 74-76.

only ended with the regime of General Abdulsalami Abubakar in 1999.[570] The African Commission affirmed that when the Ogoni communication was received in March 1996, the military government in Nigeria had enacted various decrees ousting the jurisdiction of the courts. This act deprived the people in Nigeria of the right to seek redress against the government's violation of the people's human rights in Nigerian courts. The African Commission was of the view that in such instances, and as in the communication of the *Ogoni* case, no adequate domestic remedies existed. The Commission therefore declared the communication admissible.[571]

The African Commission's decision addressed the pollution and environmental degradation that had reached a level unacceptable to human life, with an appeal to the government of Nigeria to ensure the protection of the environment, health, and livelihood of the people of Ogoniland.

3.5.3 The violated rights in the Ogoni case

The *Ogoni* case revealed how the Nigerian government was complicit in gross violations of the following provisions in the African Charter.

Article 21 – the right to free disposal of wealth and natural resources; article 16 – the right to physical and mental health; and article 24 **–** the right to satisfactory environment favourable to development. These rights were violated by Nigeria contrary to its Charter obligations and international human rights principles when it allowed private actors – the oil companies – to destroy Ogoniland and wreak havoc on the wellbeing of the Ogoni people.[572] It was further alleged that Nigeria had failed to protect the Ogoni population from harm caused by the NNPC-Shell Consortium in that it had used its security forces to facilitate the damage. It also failed to provide or permit studies of potential or actual environmental and health risks resulting from the oil operations[573] in violation of the African Charter's right to health and to a healthy environment. These rights impose obligations on Nigeria to take reasonable and other measures to prevent pollution and ecological degradation, to promote

[570] Abasiattai MB, 'Nigeria Under The Military, 1966-1979 and 1984-1999', 47. The Ogoni crisis became severe during the military regime of General Sani Abacha (1993-1998) during which time the Ogoni leaders were executed in 1995, and the Ogoni people took their case to the African Commission on Human and Peoples' Rights in 1996 seeking justice.
[571] The *Ogoni* case paras 41, 42.
[572] ibid para 58.
[573] ibid para 50.

conservation, and to secure an ecologically sustainable development and use of natural resources.[574]

Article 14 – the right to property; article 16 – the right to health; and article 18(1) – right to family life. Taken together, these rights are the basics necessary for the enjoyment of life. The Nigerian government's actions in destroying Ogoni houses and villages by brute force through obstruction, harassment, beatings, and in some cases, the shooting and killing of innocent citizens who had attempted to return to rebuild their ruined homes, constitute serious violations of human rights.[575] The actions violated the right to property, which obstructed the enjoyment of the right to family life and exposed the Ogoni people to both mental and physical illness. The combined effect of articles 14, 16 and 18 provide for the right to adequate housing, which imposes the right to protection against forced eviction. Drawing inspiration from the Committee on Economic Social and Cultural Rights, the African Commission defined the term 'forced eviction' as: 'the permanent removal against their will of individuals, families and/or communities from the homes and/or which they occupy, without the provision of, and access to, appropriate forms of legal or other protection'.[576] Also:

> Wherever and whenever they occur, forced evictions are extremely traumatic. They cause physical, psychological and emotional distress; they entail losses of means of economic sustenance and increase impoverishment. They can also cause physical injury and in some cases sporadic death… evictions break up families and increase existing levels of homelessness. In this regard, General Comment No. 4 (1991) of the Committee on Economic, Social and Cultural Rights on the right to adequate housing states that, 'all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats.' (E/1992/23, annex III. Paragraph 8(a)). The conduct of the Nigerian Government clearly demonstrates a violation of this right enjoyed by the Ogonis as a collective right.[577]

This part of the Commission's decision proves that 'compulsory acquisition' and 'forced eviction' are contrary to international human rights law. Any form of acquisition must be consensual, through negotiation, and subject to free, prior and informed consent.

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[574] ibid para 52.
[575] ibid para 62.
[576] ibid para 63.
[577] ibid.

Article 4 – the right to life; article 16 – the right to health; and article 22 – the right to economic, social and cultural development - every situation of violation involving wellbeing and enjoyment of life includes the right to physical and mental health. The Ogoni people argued that the combination of the rights in articles 4, 16 and 22 created the implicit 'right to food'. According to the African Commission, the minimum core of the right to food requires that the Nigerian government should not destroy or contaminate food sources or frustrate the indigenous peoples' efforts to feed themselves.[578] There was no longer a guarantee of food security as government security forces had destroyed food sources so violating all three rights that guarantee the right to food. The right to food is inseparably linked to the dignity of human beings and is therefore essential for the enjoyment and fulfilment of a variety of other rights such as health, education, work, and political participation.[579] The combination of the rights in articles 4, 16 and 22 are referred to as the 'explicitly protected rights' which the Nigerian government trampled, and in the process also trampled on the 'right to food implicitly guaranteed'.[580]

Article 2 – the right to enjoy all rights and freedoms recognised and guaranteed in the African Charter. Clearly, the predicament in which the Ogoni found themselves barred them from enjoying the rights and freedoms guaranteed in the African Charter.

3.5.4 Summary of the African Commission's decision

The Nigerian (military) government did not contest the allegations brought on behalf of the Ogoni people. During the procedure for acceptance of the Communication, there were repeated deferments of consideration by the Ordinary Sessions of the African Commission. These were to allow a response from the Nigerian government on all pending Communications and on the Ogoni Communication then before the Commission. The Ogoni Communication was subsequently set down for decision to be held during the 27th Ordinary Session of the African Commission. Yet again, it was deferred several times till the 30th Ordinary Session held in Banjul, the Gambia, from 13 to 27 October 2001 where the African Commission reached a decision on the merits of the *Ogoni* case Communication. The decision in this case was taken in October 2001, and the Federal Republic of Nigeria was held in violation of the

[578] ibid paras 65, 66..
[579] ibid para 65.
[580] ibid para 64.

African Charter articles 2, 4, 14, 16, 18(1), 21 and 24. The rights entrenched in the violated articles of the Charter listed above are the rights: to life and living; against forced eviction from homes, shelters and communities; to health; to a healthy environment; to land and natural resources.

In 2000, the Nigerian government recognised the decision in the *Ogoni* case. The response, sent by the new civilian government, was through a Note Verbale referenced 127/2000 submitted to the 28th session of the African Commission in Cotonou, Benin. In it Nigeria admitted the violations committed, stating that 'there is no denying the fact that a lot of atrocities were and are still being committed by the oil companies in Ogoni land and indeed in the Niger Delta area'.[581] To this the Commission responded that:

> Governments have a duty to protect their citizens, not only through appropriate legislation and effective enforcement but also by protecting them from damaging acts that may be perpetrated by private parties. This duty calls for positive action on the part of governments in fulfilling their obligation under human rights instruments.[582]

The Nigerian government also reported on action it had taken in respect of all the communications filed against it – including that of the Ogoni. The Nigerian government admitted the 'gravamen of the complaints' and explained the remedial measures being taken by the new civilian administration.[583] The poor governance of the military regime is, in this instance, exposed by the undertaking by the democratically-elected government acting in accordance with the rule of law to honour both treaty and statutory obligations crucial to human rights protection in Nigeria.

The *Ogoni* case is examined in the light of the provisions of the African Charter and relevant international and regional human rights instruments and principles.[584] The case characterised the legal aspect of the conflict in the Niger Delta as general violations of basic and human rights, both implicit and explicit. The violations affected all communities and indigenous peoples in the region. In accordance with international human rights instruments – and the African Charter on Human and Peoples Rights, in particular – the indigenous peoples of the Niger Delta deserve protection from persecution by both government and private parties. Considering the

[581] ibid para 42.
[582] ibid para 57.
[583] ibid paras 27-30.
[584] ibid para 49.

enormity of the violations recorded in the *Ogoni* case, the next section explores occurrences and actions that constitute generic protests by the indigenous peoples in the Niger Delta.

3.6 The generic protests caused by human rights violations in the Niger Delta

The generic protests by the indigenous peoples in the Niger Delta are the consequences of the human and environmental neglect, and human rights violations detailed in the preceding section. The generic protests which remained unaddressed were responsible for the current conflict situation in the Niger Delta. The totality of all the violations amount to a violation of article 2 of the African Charter which provides for the enjoyment of the rights and freedoms recognised and guaranteed in the Charter by every individual. The continued violations of the rights of the indigenous peoples of the Niger Delta, have caused grave damage to the environment and severely restricted the peoples' potential to exercise their occupations and so earn an income. This led to persistent protest actions by the indigenous peoples for the freedom to enjoy their land and natural resources. The resistance of indigenous peoples to dispossession of their land and communities – which represented their cultural heritage and social identity[585] – led to the generic protests.

A brief history of the discovery of oil in Nigeria captured by Omofonmwan and Odia,[586] tells us that in 1956, at Oloibiri,[587] the community in Otuabagi/Otuogadi in the Oloibiri district of the Brass Division in the Niger Delta region, discovered crude oil, which is fundamental to the world economy. That same year, oil production reached commercially viable levels and Shell-BP (as it was then known) undertook its first shipment marking the end of a 30-year search for crude oil by the company. It is interesting – or perhaps ironic – to note that today:

> The community – Oloibiri – where crude oil was first discovered in commercial quantity is in socio-economic doldrums – No more oil, no money, and no infrastructure. No drumbeats, no singing, no dancing just echoes of a time past. Today, poverty rules where oil once flowed and the people have as a vestige only echoes of a time past. The only reminder that this place has the singular honour of producing the country's first crude oil is the 'Christmas Tree' as it is known, which stands forlorn and weather beaten.[588]

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[585] African Commission, *Land Policy in Africa* 24.
[586] Omofonmwan and Odia, 'Oil Exploitation and Conflict' 28.
[587] NNPC Business <http://nnpcgroup.com/NNPCBusiness/UpstreamVentures/OilProduction.aspx> accessed 15 November 2018.
[588] Omofonmwan and Odia 'Oil Exploitation and Conflict' 28.

This quotation paints a picture of neglect and abandonment after human and environmental violations of the land and the community. Since then, this form of uncontrolled violation has persisted causing devastation in the Niger Delta region and culminating in the current conflict as will be unfolded hereafter.

3.6.1 Consequences of uncontrolled environmental pollution

The early oil exploration of the 1960s and 1970s recorded no major environmental hazards because it was controlled and the oil companies had a relationship – albeit modest – with the indigenous peoples on the basis of which compensation for any damage to property was paid promptly.[589] However, the first major spillage occurred during the civil war when many of the oil installations were bombed, including the old Port Harcourt refinery, which resulted in significant pollution of the Bonny River and the adjoining creeks of Okrika, Ogu, Bolo, and Wakama-Ama.[590] The pollution was significant, but the federal government responsible for the bombing failed to pay any compensation to the affected communities and also did not clean-up the pollution.[591] The subsequent escalation of environmental decay suited the oil companies who were neither regulated nor controlled in their exploration activities.

Escalating the environmental pollution in the Niger Delta can be laid at the door of Shell. Shell was reported to have contaminated the Delta's water supplies and in 1998 drinking water samples from five sites in the Niger Delta revealed that the total petroleum hydrocarbon (TPH) count in all five, ranged from 250 to 37 500 times in excess of the legally accepted standard in the European Union.[592] Shell was also reported to have caused a massive oil spill and explosion in 1970 in the Ogoni village of Ebubu. An Ogoni man affected by the environmental devastation, lamented that the oil spill and explosion had killed his entire family, including his siblings, his parents, and his best friends.[593] Aided by government troops, Shell which owned the pumping station that went up in flames, promptly erected a wall around the explosion site and sealed off access to the area. This persisted till 1999 – close on 30 years – and the site is yet to be cleaned.[594] Such had been the pattern of suffering of the indigenous peoples who believe that Shell Oil in particular, waged ecological and

[589] Oluduro, *Oil Exploitation and Human Rights Violation* 100.
[590] Soala *Political Economy of Oil and Gas in Africa* 246.
[591] ibid.
[592] Douglas and Okonta, 'Ogoni People of Nigeria versus Big Oil' 155.
[593] Mander and Tauli-Corpuz, *Paradigm Wars* 152 (showing the picture of the man).
[594] ibid.

economic war against them in the Niger Delta for over 60 years aided by the Nigerian government.[595] The peoples' persistent protests against persecution, wilful neglect, and the indifference of the Federal Government to pollution, was largely ignored.[596]

Oil pollution occurred on both land and sea with spills from ruptured pipes, or during maintenance and accidental well blow-outs.[597] The severely polluted environment was left unproductive which led to poor living conditions that prevented the indigenous peoples from earning income to meet the basic needs of life[598] or educate their children.[599] This low standard of living created emotional stress and frustration which erupted in protests for better living conditions.[600] Gas-flaring was a further environmental hazard in the Niger Delta, and Nigeria was unable to stop the oil companies from this wasteful and devastating practice.[601] Oil spills and gas-flaring are not unusual during petroleum exploration and exploitation. In the Niger Delta, they resulted in pollution because oil regularly spilled into the creeks, waters, swamps, and land, causing colossal damage to the ecosystem.[602] The health hazards were insurmountable and on-going with a high incidence of respiratory diseases such as aggravated asthma and coughs as well as eye diseases such as eye irritation, cataracts, and glaucoma.[603]

Indigenous leaders in the Niger Delta first reported the consequences of this ecological destruction and government apathy to the international community at the World Conference of Indigenous Peoples on Environment and Development during the Rio Earth Summit in June 1992.[604] The combination of the human and environmental rights provides for the well-being of the people in any community; the

[595] ibid 153.
[596] Akasike Chukwudi, 'FG has neglected N'Delta pollution' *The PUNCH* (Port Harcourt, 8 June 2015) 9; Jim Lobe, 'People versus Big Oil: Rights of Nigerian Indigenous People Recognized' (1 July 2002) <http://fpif.org/authors/jim-lobe/> accessed 20 July 2017.
[597] Soala, *Political Economy of Oil and Gas in Africa* 246.
[598] Ikelegbe, *Oil, Environment and Resource Conflicts in Nigeria* 7.
[599] Soala, *Political Economy of Oil and Gas in Africa* 250.
[600] Ikelegbe *Oil, Environment and Resource Conflicts in Nigeria* 28/29.
[601] Na'Allah, *Ogoni's Agonies* 350.
[602] Ikelegbe, *Oil, Environment and Resource Conflicts in Nigeria* 23.
[603] ibid.
[604] Douglas and Okonta, 'Ogoni People of Nigeria versus Big Oil' 155.

violation of these rights has serious consequences as revealed by the UNEP Report on Ogoniland.[605]

Regrettably, the environmental catastrophe that led to uncontrolled devastation in the Niger Delta failed to be regulated, controlled, or mitigated by available national environmental legislation such as the NOSDRA – which was aimed at early detection and control – and NESREA enacted to ensure comprehensive environmental and sustainable development protection. Neglect and non-performance by these institutions led to an unhealthy environment with oil spills and pollution destroying the land and biodiversity that turned the communities into wastelands. This notwithstanding, the indigenous peoples were unwilling to abandon their land. As Saro Pyagbara states: 'The land on which they live and the rivers which surround them are viewed by them not just as natural resources for exploitation but with deep spiritual significance',[606] and that, 'as the abode of our ancestors from where they oversee our lives, it is also a god and we revere it as such'.[607] Therefore, to the indigenous peoples, ancestral land is spiritual inheritance which they will always defend, as will be discussed next.

3.6.2 The conflict: people's force and government's counterforce

The conflict in the Niger Delta was based on serious protest actions resulting from land and environmental pollution which prevented the adult population from engaging in farming or fishing in order to earn an income and raise their families. This condition led to frustration and opened the youth in the region up to violent acts for survival which, in turn, resulted in large-scale grassroots mobilisation,[608] termed militarism and terrorism.[609] The ensuing conflict became a strategy for drawing attention to the existing 'social, political, economic and cultural anomalies in the Niger Delta,'[610] with the determination to defend themselves from further violations while demanding control over their resources as a solution.

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[605] UNEP, 'Environmental Assessment of Ogoniland (2011)'. The Assessment covered contaminated land, groundwater, surface water, sediment, vegetation, air pollution, public health, industry practices, and institutional issues.
[606] Legborsi Saro Pyagbara, 'Adverse Impacts of Oil Pollution on the Environment and Wellbeing of a Local Indigenous Community: The Experience of the Ogoni People of Nigeria' United Nations Department of Economic and Social Affairs, Division for Social Policy and Development 3.
[607] ibid.
[608] CEDCOMS, *Oil and Violent Conflicts in the Niger Delta* 2.
[609] See generally - Madubuko, 'Environment Pollution: The rise of militarism and terrorism in the Niger Delta' 1-11.
[610] ibid.

Violations of human rights identified as the primary root-cause form the legal aspect of the conflict in the Niger Delta. The remedy lies in the rule of law and respect, promotion, and protection of all the economic, social, cultural, and environmental rights of the indigenous peoples of the Niger Delta. Violations caused deprivation and led to immense suffering that had a deep psychological effect on the youth leading to a general feeling of negativity. This negativism resulted in violent acts of sabotage, the theft of crude oil and petroleum products by drilling holes in product and crude oil pipelines so causing large-scale oil spillages.[611] For the youth this meant survival and solution to their living conditions. The survival intent turned the region into what Ikelegbe describes as a region wallowing in 'repression, militarization, violence, socio-economic disruption, damaged social services, carnage and insecurity of lives and property in addition to degradation and devastation of its land and water and consequently livelihood sources'.[612] This relentless agitation by the youth were intended to call a halt to stop the economic exploitation of their resources, but it is clear that violence cannot remedy violations, oppression, marginalisation, and denial.

Worse still was the excessive application of reprisal force by a government which was expected to protect the peoples. This marked a failure on the part of the Nigerian government to protect the lives and property of the indigenous peoples in the Niger Delta and thus, escalated the conflict. Mobilizing all available forces, it was reported that the Nigerian Air Force joined the government force in 2016 when it was deployed with 'additional aircraft to aid the ongoing military operation in the Niger Delta against militancy, economic sabotage, and other forms of criminality in the region'.[613] It was also reported that Nigeria's Vice-President described 'pipeline vandals' in the Niger Delta as terrorists who should be severely dealt with and not tolerated. Their actions succeeded in paralysing national gas supplies and resulted in Nigeria losing thousands of barrels – some 250 000 barrels per day.[614] This, he stated, warranted the deployment of force to curtail the popular aggression. No doubt, so colossal a loss of revenue on a daily basis could paralyse Nigeria's

[611] Soala, *Political Economy of Oil and Gas in Africa* 246, 247.
[612] Ikelegbe, *Oil, Environment and Resource Conflicts in Nigeria* 7.
[613] Fidelis Soriwei, 'Militancy: RAF deploys more fighter aircraft in N'Delta' *Saturday PUNCH* (Abuja, 4 June 2016) 8.
[614] Femi Asu and Ovie Okpare, 'Again, militants blow up Shell Forcados pipeline' *Saturday PUNCH* (Abuja, 4 June 2016) 29.

economy which is almost entirely dependent on oil income.[615] Still more worrying, however, was the prospect of Nigeria losing its market share to other OPEC members.[616] Consequently, the steps against vandalism taken by the government were intended to uphold the rule of law and to protect national infrastructure and other citizens from violent attacks from the aggrieved youth of the Niger Delta. Vandalism does not accord with the projected solution in this thesis, though the actions by the youth were not completely unjustified. Nevertheless, the underlying solution requires democratic intelligence, diligence, and a legislative remedy if it is to impact on the endemic problems facing the Niger Delta – force is not the answer.

As violence begets violence, the intensity of government reprisal attracted further recalcitrance from the indigenous peoples whose youths mobilised for the radical agenda of self-determination, control over resources, effective regulation of the oil industry, and abolition of the 'obnoxious' legislation that conferred such rights on the state.[617] The youth in the Niger Delta carried out reprisals through acts of rebellion and vandalism. According to Ariweriokuma Soala, vandalism is a common term used in the Nigerian oil and gas industry to describe the deliberate act of sabotage targeted at oil and gas plants.[618] To this end the youth acquired and made varieties of gadgets to drill holes in product and crude-oil pipelines.[619]

The actions and reactions of the youth attracted military reprisals which led to excessive brutality, killing, torture, rape, and injury for many people, even resulting in the total destruction of the entire Odi community which was razed to the ground in October 1999.[620] Meanwhile, throughout the tit-for-tat violence in the region, the oil companies were protected against the Delta peoples by the 'Mobile Police'. It should come as no surprise, therefore, that, according to Anna Zalik, 'in the Niger Delta Shell is the state'.[621] Expectations that the shift from military to civilian government would defuse tensions in the Niger Delta was proven wrong when President Obasanjo took over from the military in May 1999. By October 1999 he had deployed

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[615] Ogundele Bolaji, 'Pipeline vandals are like terrorists – Osinbajo' *The NATION* (Warri,16 April 2016) 50.
[616] Femi Asu, 'Nigeria risks losing oil buyers to Iran, S'Arabia' *The PUNCH* (Port Harcourt31 May 2016) 25.
[617] Nwajiaku-Dahou Kathryn, 'The political economy of oil 'rebellion' in Nigeria's Niger Delta' 2012 (39)(132) *Review of African Political Economy* 302.
[618] Soala, *Political Economy of Oil and Gas* 247.
[619] ibid.
[620] ibid.
[621] Anna Zalik, '"Petro Violence" and "Partnership Development"' 406.

ferocious troops to raze the town of Odi. The operation, which was executed by the security forces specially deployed to the Niger Delta, is described by Michael Watts as 'governmentality, oil and power in the Niger Delta'.[622] Thus, retaliation by Ijaw militants escalated as they went on a rampage detonating several occupied oil installations and prompting the closing down of the operations of certain oil companies.[623]

The use of greater force to resolve conflicts by attacking vulnerable people and communities as happened in the Odi massacre,[624] advanced the cause of retaliatory vandalism and encouraged the establishment of new militant groups in the Niger Delta – avengers advocating total destruction as can be seen in the recent spate of attacks on the nation's oil and gas installations.[625] And so, the use of greater force became a vicious cycle deepening the crisis with 'increasing ungovernability of the oil fields'.[626] The oil companies raised the alarm and called for a stop to the Niger Delta youths' destruction of oil facilities – the youths that were becoming more aggressive and more determined to cripple oil production by vandalising installations, pipelines, wellheads, and other national assets.[627]

Overwhelmed by suffering, oppression, and frustration, the indigenous peoples in the Niger Delta lost trust in government protection and now demand total control over their resources.[628] The agitation for resource control had been ongoing since the inception of the civilian regime in 1999, as the state governors and political leaders of the oil-producing areas and their people (as the Niger Delta indigenous peoples are sometimes referred to) embraced it jointly.[629] Demand for resource control is the antidote to what the African Commission described as 'the destructive and selfish role played by oil development in Ogoni land, closely tied to repressive tactics of the Nigerian government, and the lack of material benefits accruing to the local population'.[630] This brings the focus back to article 21 of the African Charter which provides for people freely to dispose of their wealth and natural resources. This right

[622] Watts, 'Resource Curse?' 50.
[623] ibid 51.
[624] Omeje, 'Conflict & Evolving Politics' 431.
[625] ibid.
[626] Watts, 'Petro-insurgency or Criminal Syndicate?' 637.
[627] Utebor Simon, Yenagoa, 'Stop vandalising oil facilities, Agip tells N'Delta youths' *The PUNCH* (Yenagoa, 4 May 2017) 32.
[628] Akasike Chukwudi, 'Niger Delta wants 100% resource control – Briggs' Sunday Interview, *Sunday PUNCH* (Port Harcourt, 23 July 2017) 12.
[629] Oluduro, *Oil Exploitation and Human Rights Violation* 101.
[630] The *Ogoni* case [55].

can be achieved only in conjunction with the right to property since, as we have seen above, all human rights are interconnected. Thus, for peace and security to return to the Niger Delta, the combination of the right to land and natural resources, which is a property right, and the right to development must be accessible to release the disposal of wealth. These rights are included in the economic, social, and cultural rights being sought for the protection of indigenous peoples of the Niger Delta under the African Charter. The following section considers the modalities of when the right to property is invoked and the Niger Delta indigenous peoples are in control of their resources, how the right to a healthy environment and good health will equally be available to protect against oil pollution and its dire consequences.

3.7 Legal solutions to issues in the Niger Delta conflict

Respect for human rights requires the establishment of the rule of law at the national and international levels as part of state's obligation to protect individuals and groups against human rights abuses.[631] It means that human rights can only thrive in a democracy under the rule of law where these rights enjoy superior status than all other legal rights in the system of government.[632] As noted throughout this chapter, for peace and security to return to the Niger Delta region, the economic, social, cultural, and environmental rights of the indigenous peoples must be promoted and protected. Through violations of such basic rights as the rights to life, physical and mental health, property, a healthy environment, to freely dispose of wealth and natural resources, and the right to development, this endemic human and environmental catastrophe has destroyed the region. The underlining remedy for the legal aspects of the Niger Delta conflict lies in the political will of the Nigerian state to address the human rights inadequacies that have contributed to the grand abuse and violation of rights in the Niger Delta during the past three decades.

Under international law the State of Nigeria is expected to protect its people as provided for in the international instruments discussed in sections 3.2 and 3.3 above. The International Covenant on Economic, Social and Cultural Rights is of particular importance to this thesis as regards the protection of the rights of indigenous peoples as it states in its Preamble that:

[631] United Nations Human Rights 'Professional Interests - International Human Rights Law'.
[632] Ali, 'Legal Concept of the Fundamental Right' 62.

> State Parties to the Covenant must consider: (i) in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, and (ii) States should consider its obligation under the Charter of the United Nations to promote universal respect for, and observance of human rights and freedoms.

The African Commission emphasised this concept in the *Ogoni* case when it asserted that,

> internationally accepted ideas of the various obligations engendered by human rights indicate that all rights, both civil and political rights, and social and economic, generate at least four levels of duties for a State that undertakes to adhere to a rights regime, namely the duty to respect, protect, promote and fulfil these rights.[633]

This requires States, and in this case Nigeria, to fulfil the rights and freedoms freely undertaken under the various human rights regimes.[634] Naturally, when the expectations of a people for protection from their country fails, and when the people are subjugated and suffer arrant violations of their human rights, they react to defend themselves by all available means as the exposition in this section has shown.

Furthermore, Nigeria should allow individuals and groups to seek redress from the international mechanisms of the human rights treaty bodies by ratifying the Optional Protocols to both Covenants as analysed in section 3.2.1. Above all, Nigeria should endeavour to protect the rights of all peoples, both individuals and groups, particularly the indigenous peoples of the Niger Delta as it professes to do in the National Action Plans (2006 and 2009-2013).[635]

3.8 Conclusion

The outcome of this chapter on the legal aspects of the Niger Delta conflict reveals that international and regional human rights instruments adequately provide for the protection of all peoples, including indigenous peoples. Human rights protection are rooted in treaties, agreements, principles, and customs that emerge from the Charter of the United Nations and the Universal Declaration of Human Rights, and most significantly in the two international Covenants, the ICCPR and ICESCR. But of particular importance to Nigerian human rights protection is the African Charter, now domesticated as a Nigerian legislation. Meanwhile, as Nigeria has duly ratified most

[633] The *Ogoni* case paras 44-47.
[634] ibid.
[635] Federal Republic of Nigeria, 'A Brief Human Rights History of Nigeria' National Action Plan for the Promotion & Protection of Human Rights in Nigeria (2006) 3.

of the international human rights instruments, it cannot but observe its duty to respect, promote, and protect the rights of the people. The African Charter operates on two levels: it is an international law instrument which applies at the regional level, but also effective at the national level through its incorporation in the municipal law of African nations.

The African Charter is the principal point of reference for interpreting the legal aspects of the conflict in the Niger Delta within the paradigm of the human rights violated as articulated in the *Ogoni* case and subsequently in the *Endorois* case. The Nigerian Constitution as the core human rights law in Nigeria, appears inadequate for the protection of the basic human rights in the ICCPR and ICESCR – and in particular, the economic, social and cultural rights. Nigeria renders the economic, social, and cultural rights ineffective by reducing them to fundamental objectives that have no force as rights. However, the African Charter provides Nigeria with an effective legal weapon for the defence of the rights of not only the general populace, but the indigenous peoples in particular, who have suffered serious violations and abuse in the Niger Delta.

This chapter has provided an understanding of the legal issues surrounding the unending protest actions of the indigenous peoples against oil and gas exploitation and development that has led to violent conflicts in the Niger Delta. This serves as the foundation on which the last two chapters of the thesis is built. From this chapter, it is clear that a solution for the Niger Delta conflict lies in: (i) indigenous peoples' ownership of natural resources; and (ii) the right to development of the indigenous peoples. The right to development will be most effective when promoted through sustainable development, integrated with other human rights.

The African Commission has founded its jurisprudence on indigenous peoples' right to property on the human rights provisions in the African Charter. In the following chapter – Chapter four – the thesis thoroughly expounds on indigenous peoples' sovereignty over natural resources. This will further drive home the argument for the unquestionable status of ownership over natural resources of the indigenous peoples of the Niger Delta in line with the aim of this thesis. Chapter five presents a proposal of what a legal framework on sustainable development of natural resources should contain.

CHAPTER FOUR

INDIGENOUS PEOPLES' SOVEREINGTY OVER NATURAL RESOURCES

4.1 Introduction

The concept of permanent sovereignty over natural resources is derived from colonial ideology used extensively to control the conquered people and their territories in all parts of the world. In Africa, after the Berlin Conference in 1884, 'international law designed and espoused by the imperial powers deemed indigenous territories to be *terra nullius* because they viewed the indigenous peoples as insufficiently similar to themselves'.[636] Still on the move to discover and conquer more territories, in1893, the United States conquered Hawaii, and by 1898, the entire land of Hawaii and all its resources had been taken over by the US. The Hawaiians remained homeless even after Hawaii became a state in 1959. At the centenary of the conquest of the Hawaiian Kingdom on 3 January 1993, the Hawaiians offered a prayer for all indigenous peoples from the Americas, to Canada, to New Zealand, to Australia, to Hawaii, and to Africa. The Hawaiians believe that all indigenous peoples share the cry of Hawaiians:

> Lord, we remember all indigenous peoples of the world who are exploited and marginalised, the forces of oppression that trample native peoples and the unjust systems which break the spirit of native peoples and rob us of our rights and dignity.[637]

This Hawaiian prayer speaks the mind of indigenous peoples the world over, including the Ogoni of the Niger Delta who were forcefully evicted from their land leading to the death of many Ogoni and their prominent leaders, including Ken Saro-Wiwa in 1995. This is the colonial origin of the natural resources' conquest exploited by the colonial masters for profit and transferred to incoming independent states in Africa.

Thus, indigenous peoples, with particular reference to those in the Niger Delta in Nigeria, have endured large-scale oppression, dispossession, and deprivation as was seen in the previous chapters. The protests from different groups, and the Niger

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[636] Okonkwo, 'Indigenous Rights' 355-384,358.

[637] Stephens and Reeves, *Constitutions: Indigenous Peoples* 36. This prayer was the high point of the mourning process of the Hawaiians who were conquered by United States in 1893 and who by 1898 had taken over the entire land and resources. In 1993 they mourned their dispossession at the Saint Andrew's Episcopal Cathedral in Honolulu which they decorated with black fabric and for four days the Hawaiian flag flew without the accompanying Stars and Stripes over government offices in Honolulu. That prayer was said on 3 January 1993 at the service to commemorate the 100th anniversary of the overthrow of the Hawaiian Kingdom.

Delta peoples in particular, are indicative of the demand by indigenous peoples of the return of all that has been taken from them by force. The aim of this chapter is to argue for recognition and acknowledgment of indigenous peoples' permanent sovereignty over their natural resources which is the only means by which their demands can be fully realised.[638]

This chapter explores important resolutions and domestic legislation regulating natural-resource governance in Nigeria. The chapter is presented in two parts. Part 1 examines various resolutions on the principle of state sovereignty over natural resources, adopted, in the main, by the developing countries at the United Nations between 1952 and 1973. Seminal in this regard is the UN General Assembly Resolution 1803 (XVII) of 1962 on Permanent Sovereignty over Natural Resources'.[639] The first part will also consider the effect of this principle on African States. Part 2 analyses the argument for indigenous peoples' permanent sovereignty over natural resources and the need to review the Nigerian Constitution to ameliorate the absolutist effect of the constitutional embodiment of the principle.

4.2 Concept of State sovereignty over natural resources

The joint effort of the developing countries at the United Nations from the 1950s till late 1970s on the issue of sovereignty over natural resources, may be summarised as the will of developing countries to be in firm control of their resources and, at the same time, control the concomitant process of 'appropriate compensation' for expropriation by foreign investors through domestic legislation as stipulated in the UN General Assembly Resolution 1803 (XVII).[640] Essentially, the resolution was intended to create a smooth take-over for the 'successor States and Governments in respect of property acquired before the accession to complete sovereignty of countries formerly under colonial rule'.[641] However, it is more convincing to view the Resolution 1803 as more concerned with international economic co-operation and

[638] This position follows the view of Dr Erica-Irene A Daes, who is undoubtedly one of the main protagonists in the significant progress achieved over the last four decades in relation to recognising indigenous peoples as subjects of international law. She was the Chair of the Working Group on Indigenous Populations (1984-2001) and one of the drivers behind the development of an international standard for the protection of the rights of indigenous peoples and their full inclusion in UN process related to their rights <https://www.iwgia.org/en/focus/global-governance/2487-in-memory-of-ericairene-daes> accessed 23 April 2019.
[639] UN GA res 1803 (XVII) 'Permanent sovereignty over natural resources' A/RES/1803 (XVII) at the 1194th plenary meeting, 14 December 1962.
[640]ibid arts 3-4.
[641] ibid Preamble.

dealings between the developed and the developing countries which, according to it, 'must be based on the principles of equality and of the right of peoples and nations to self-determination',[642] than converting it to a municipal legal rule .

During the late 1950s and early 1960s, the smooth take-over by an independent successor State was expected to compel processes of nationalisation, expropriation, or requisitioning necessary for the recovery of property from the developed countries.[643] The exploration, development, and disposal of the natural resources was at that time, almost exclusively under the control of developed countries – the former colonial rulers – for whom Resolution 1803 held little benefit. As Escarcena puts it, 'gaining control over natural resources was one of the main motives that drove European States like Portugal, Spain, the Netherlands, the U.K., France, and later Germany and Italy to colonise overseas territories throughout the world.'[644] Thus, it can be deduced that the purpose of Resolution 1803 is first and foremost to recover external control from the developed countries and transfer that control to the developing countries. Resolution 1803 is not aimed at internal dispossession of ownership of natural resources held by the 'indigenous peoples' within the state as is clearly stated in article 2:

> The exploration, development and disposition of such resources, as well as the import of the foreign capital required for these purposes, should be in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable with regard to the authorization, restriction or prohibition of such activities.

This provision concretises the property right as the right of the peoples – ownership should be retained by the peoples and nations who constitute the State.

However, the dissatisfaction of developed countries regarding the status of Resolution 1803 emerged clearly from the voting pattern during the adoption of UN General Assembly Resolution 3171 (XXVIII) of 1973[645] which is reflected as 108 votes in favour, 1 against, and 16 abstentions – including the USA and ten Western European countries.[646] Meanwhile, General Assembly Resolution 3171 is meant to confirm the inalienable right of each State to the full exercise of national sovereignty

[642] ibid.
[643] ibid art l4.
[644] Escarcena, *Indirect Expropriation* 27.
[645] UN GA res 3171 (XXVIII) 'Permanent sovereignty over natural resources' A/RES/3171(XXVIII) at the 2203rd plenary meeting of 17 December 1973.
[646] Escarcena, *Indirect Expropriation* 30.

over its natural resources including those found on land or in the sea. This is affirmed in article 1 which provides for:

> the inalienable rights of States to permanent sovereignty over all their natural resources, on land within their international boundaries as well as those in the sea-bed and the subsoil thereof within their national jurisdiction and in the superjacent waters.

The resolutions are therefore intended to transfer jurisdictional authority from the former holders to the newly independent states. The next few paragraphs will consider the trajectory of relevant UNGA resolutions from the 1950s and the purpose for which each was adopted by the General Assembly, up till the 1973 resolutions that fully- entrenched state sovereignty over natural resources.

The UN General Assembly Resolution 523 (VI) of 12 January 1952[647] drew global attention to the need to support under-developed countries to recover their rights over natural resources and freely to determine the use of those natural resources in order to 'place them in a better position to further the realization of their plans for economic development in accordance with their national interest …'.[648] In the understanding of this thesis, the term, 'in accordance with their national interests', can be interpreted as a national democratic arrangement for the administration of natural resources to promote national growth while at the same time protecting the property rights of indigenous owners from external aggression. Additionally, Resolution 523 was aimed at 'integrated economic development and commercial agreements' by which 'commercial agreements' would be facilitated to boost international trade and expand the world economy. At the time of its making, the uneasy relationship between Latin American countries and the USA was escalating at the United Nations. Consequentially, their persistent demand for national sovereignty, sovereign equality, and non-intervention, as well as the primacy of national law and domestic courts[649] hastened the adoption of Resolution 626 (VII) on 21 December 1952.[650]

[647] UN GA res 523 (VI) 'Integrated economic development and commercial agreements' A/RES/523 (VI) of 12 January 1952.
[648] UN GA res 523 Preamble para 1.
[649] Nicolaas Schrijver, *Sovereignty over Natural Resources* 32.
[650] UN GA res 626 (VII) 'Right to exploit freely natural wealth and resources' A/RES/626 (VII) of 21 December 1952.

Between Resolutions 523 and 626 was Resolution 637 (VII) of 16 December 1952.[651] The haste with which Resolution 626 was adopted only five days after Resolution 637, indicated the desire to move from the human-rights foundation of the right of peoples and nations to self-determination which was a prerequisite for the full enjoyment of all fundamental human rights as contained in the Preamble to Resolution 637, to a more profound and authoritative disposition of state sovereignty. The fervour of the developing countries at the UN General Assembly to assert the principle of permanent sovereignty over their national natural resources resulted in the adoption of Resolution 626 which signalled the genesis of the branding of the principle of sovereignty as 'the nationalization resolution of the Seventh General Assembly session'.[652] In its Preamble, Resolution 626 recalled past deliberations of the General Assembly that the right freely to use and exploit natural wealth and resources was inherent in the sovereignty of peoples, and thus, recommended in its article 1 that states exercise the same right. Resolution 626 spearheaded the principle of permanent sovereignty over natural resources and aimed at aligning human rights in the correct perspective by placing the 'right of peoples' before the 'right of states'. The position of this thesis as regards sovereignty in light of this understanding is that the human-rights origin of the sovereignty principle cannot be faulted, and the human rights of peoples cannot be exchanged or suppressed by state supremacy or sovereignty.

Meanwhile, pressure for freedom and independence intensified in most African and Latin American territories then still under colonial domination that resulted in the adoption of Resolution 1314 (XIII)[653] in 1958. This resolution also established the Commission on Permanent Sovereignty over Natural Resources to 'conduct a full survey of the status of permanent sovereignty over natural wealth and resources as a basic constituent of the right to self-determination'.[654] Furthermore, it was decided that:

> [I]n the conduct of the full survey of the status of the permanent sovereignty of peoples and nations over their natural wealth and resources, due regard should be paid to rights and duties of states under international law and to the importance of

[651] UN GA res 637 (VII) 'The right of peoples and nations to self-determination' A/RES/637 (VII) A-C at the 403rd plenary meeting of 16 December 1952.
[652] Schrijver, *Sovereignty over Natural Resources* 32.
[653] UN GA res 1314 (XIII) 'Recommendations concerning international respect for the rights of peoples and nations to self-determination of12 December 1958.
[654] ibid para 1.

> encouraging international co-operation in the economic development of under-developed countries;[655]

This provision was not aimed at the internal reorganisation of natural-resource ownership within the states. The Commission was expected to come up with guidelines in terms of which states could guard against overbearing external influence. One of the insidious legacies of the colonial powers from European states like Portugal, Spain, the Netherlands, the United Kingdom, France, and later Germany and Italy, was excessive control over the natural resources of the colonised overseas territories throughout the world[656] and Resolution 1314 was bound to curtail their excesses. Prior to this, UN General Assembly resolutions exhibited the universalisation of international law that served the 'imperial endeavour' by the imperial powers to further conquer the world[657] through overbearing common rules encouraging international co-operation 'to further the expansion of the world economy' as stated in the Preamble to Resolution 523. By so doing, international law favoured the superiority of the then imperial colonial powers over indigenous communities[658] – a position they were reluctant to relinquish.

Undoubtedly, Resolution 1314 promoted the 'right of peoples' as human rights through reference in its Preamble to the two covenants (then in draft form) that provided for people's 'permanent sovereignty over their natural wealth and resources'.[659] Both Covenants – the ICCPR and the ICESCR – provide for individual and collective protection of the rights of all peoples, and states are mandated to promote the realisation of and respect for the right to self-determination.[660] Hence, the inclusion of the 'permanent sovereignty over their natural wealth and resources' was directed at the collective ownership of natural resources by peoples. The Covenants equally asserted that freedom could only be enjoyed 'if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights'.[661] Furthermore, they affirmed that all peoples have the right to self-determination which allows them freely to determine their political status and freely to pursue their economic, social, and cultural

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[655] ibid.
[656] Escarcena, *Indirect Expropriation* 27.
[657] Gilbert and Doyle, 'A New Dawn Over the Land 5.
[658] ibid.
[659] UN GA res 1314 Preamble para 1.
[660] The two International Covenants, the ICCPR and ICESC were adopted by UN GA res 2200A (XXI) of 16 December 1966 in their twin art 1.
[661] ibid both Preambles.

development.[662] The rights and duties of States under international law is, therefore, to protect the permanent sovereignty of peoples and nations over their natural wealth and resources,[663] not to assume sovereignty over natural resources.

The importance of these two covenants to the arguments for the right of the indigenous peoples of the Niger Delta has been established in Chapters two and three of this thesis. What remains is to narrow this down to the right of indigenous peoples to permanent sovereignty over their natural wealth and resources, and the right freely to pursue their economic rights in that regard. On the adoption of Resolution 1314 in 1958, the newly independent Member States of the United Nations were anxious to be involved and take decisions on their own economic well-being. Exuberated by the liberty of decolonisation and their interdependence as States within the international legal systems, the newly independent States were catapulted into the mainstream of international law formulation. Drawing strength from one another, they focussed their attention on the formulation of rights and obligations of States.[664] Though their initial concern was to exert their new-found independence as a 'New World' against the 'former mother countries in old Europe', the newly independent States soon changed their emphasis to the 'regulation of political, cultural, and, in particular, economic cooperation'.[665]

With their more positive approach to the functions of international law,[666] the new States started to exert a stronger influence and, between December 1958 and December 1960 when more States had gained independence and joined the United Nations, a shift in orientation and strategy regarding sovereignty over natural resources emerged clearly. During this period, more African countries gained their independence including Nigeria (1960), Ghana (1957), Democratic Republic of the Congo (1960), Cote D'Ivoire (1960), and many more that were classified as the 'economically less developed countries of the world' in Resolution 1515.[667] Obviously, the large number of 'economically less developed countries' became a source of concern for the economically most developed countries. This warranted a new UN General Assembly resolution – Resolution 1515 (XV). The concern

[662] ibid twin article 1.
[663] UN GA res 1314 art 1.
[664] De Waart, 'Permanent Sovereignty' 308.
[665] ibid 308.
[666] ibid 309.
[667] UN GA res 1515 (XV) 'Concerted action for economic development of economically less developed countries' of 15 December 1960.

translated into economic opportunities for the newly independent states as Resolution 1515 called for the reaffirmation of established principles in the Charter of the United Nations with regard to international economic and social co-operation. Resolution 1515 emphasised the need to accelerate the economic and social advancement of these less-developed countries of the world thereby contributing to safeguarding their independence and helping to close the gap in standards of living between more- developed and less-developed countries.[668]

Thereafter, the 'concerted action for economic development of economically less developed countries' of Resolution 1515, brought a dynamic shift away from the right of peoples and nations to self-determination and permanent sovereignty over their natural wealth and resources. This shift was highlighted in Resolution 1314 as a recommendation that the 'sovereign right of every State to dispose of its wealth and its natural resources should be respected in conformity with the rights and duties of States under international law'.[669] The determination of the developing countries to retain sovereignty over their natural resources in conformity with the rights and duties of States under international law as stipulated in Resolution 1515, became clearly incontestable for developed countries. But not so with the rights of peoples and nations to self-determination, which remained highly contestable despite the shift in thinking. The shift from 'right of peoples' to 'sovereign right of every State' was subsequently confirmed in 1962 by Resolution 1803. This resolution established the concept of State sovereignty and affirmed in its Preamble that the creation and strengthening of the inalienable sovereignty of States over their natural wealth and resources reinforces their economic independence. Resolution 1803 became the darling of the developing countries as is analysed elsewhere in this chapter.

Meanwhile, in 1973, Resolution 3171 (XXVIII) strongly reaffirmed the inalienable right of States to the full exercise of permanent sovereignty over natural resources. The resolution strengthens the developing nations in taking effective control of all their natural resources by recalling and relying on a number of resolutions previously adopted by the General Assembly, such as: Resolutions 1803 (XVII); 2158 (XXI);[670] 2386 (XXIII);[671] 2625 (XXV);[672] 2692 (XXV);[673] and 3016 (XXVII)[674] and Security

[668] ibid art 1.
[669] ibid art 5.
[670] UN GA res 2158 (XXI) 'Permanent sovereignty over natural resources' of 25 November 1966.
[671] UN GA res 2386 (XXIII) 'Permanent sovereignty over natural resources' of 19 November 1968.

Council Resolution 330 (1973*),*[675] all relating to permanent sovereignty over natural resources. The combined effect of these resolutions was acceptable to the States and resulted in the adoption of the principle of State sovereignty over natural resources by most developed and developing countries. Seen as the reflection of an evolution in state practice and *opinio juris,* according to Pereira and Gough, it also led to the principle being accorded the status of customary international law.[676] State practice has been further strengthened by the legal recognition given to the principle through its incorporation in numerous national constitutions.[677] Most African States followed this practice of incorporating sovereignty of natural resources in their municipal law – albeit with negative consequences in some States, Nigeria being a notable example. This is pursued further in sections 4.3, and 4.4 below. The next section considers how the principle of State sovereignty is misunderstood and misconstrued.

4.3 State sovereignty misconstrued

From the analysis above, it can be seen that permanent sovereignty over natural resources was originally 'peoples' sovereignty' as opposed to 'state' sovereignty. The permanent sovereignty over natural resources agenda started at the behest of developed countries, most of whom were former colonial powers. The developing countries, however, manipulated the situation to their benefit. Some of the resolutions contain ambiguous texts, mixing states with peoples and nations in contextualising the principle of sovereignty over natural resources. The confusion arising from the texts of these resolutions is well articulated by Schrijver when he states that:

> States are said to have the right 'freely to use and exploit' and 'exercise effective control over the natural resources and their exploitation"; countries and nations have

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[672] UN GA res 2625 (XXV) 'Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations' of 24 October 1970.
[673] UN GA res 2692 (XXV) 'Permanent sovereignty over natural resources of developing countries and expansion of domestic sources of accumulation for economic development' of 11 December 1970.
[674] UN GA res 3016 (XXVII) 'Permanent sovereignty over natural resources of developing countries' of 18 December 1972.
[675] UN SC res S/RES/330 (1973) of 21 March 1973 'Consideration of Measures for the Maintenance and Strengthening of International Peace and Security in Latin America in Conformity with the Provisions and Principles of the Charter' decisions and resolutions adopted at the 1695th to 1704th meetings of the Security Council held in Panama City from 15 to 21 March 1973.
[676] Pereira and Gough, 'Natural Resource Governance' 461.
[677] ibid.

> the right 'freely to dispose and determine the use of' and peoples have the right 'freely to use and exploit' their natural wealth and resources.[678]

Clearly, the rights overlap. Such was the confusion wrought by the developing states in their attempts to formulate the most appropriate resolutions to secure effective control over natural resources in their domain, that the rights became ever more complex. The complexities indicate that all have the right to do the same thing with their natural resources, but that there is a need to determine who has the greatest right.

4.3.1 *The philosophy of state sovereignty*

Thomas Hobbes described the State as 'that great Leviathan' – a fictitious man to whom the citizens relinquish their liberty in exchange for protection and defence.[679] According to Hobbes's philosophy, the purpose of government is to enforce law and protect the citizenry. The notion of law enforcement as a primary duty of the State might be responsible for the conversion of the state sovereignty principle into the national law of some African States as discussed in section 4.4.

Maritain, on the other hand, described the state as that part of the body politic especially concerned with the maintenance of law, the promotion of the common welfare and public order, and the administration of public affairs. For him, the state should in no way be termed 'sovereign'.[680] He further asserts that the state has a primary duty as regards justice, which should be exercised only in the manner of an ultimate supervision in a body politic and just in its inner structure, to enjoy topmost supervising authority.[681] Maritain further explains the notion of State as follows:

> The notion of moral or collective personality in which 'personality' has a proper analogical value – applies to the people as a whole in a genuine manner: because the people as a whole (a natural whole) are an ensemble of real individual persons and because their unity as a social whole derives from a common will to live together which originates in these real individual persons. Accordingly, the notion of moral or collective personality applies in a genuine manner to the body politic, which is the organic whole, composed of the people. As a result, both the people and the body politic are subjects (or holders) of rights: the people have a right to self-government; there is a mutual relationship of justice between the body politic and its individual members. But that same notion of moral personality does not apply to the State

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[678] Schrijver, *Sovereignty over Natural Resources* 249.
[679] The Great Philosopher – Thomas Hobbes <https://oregonstate.edu/instruct/phl201/modules/Philosophers/Hobbes/hobbes_social_contract.html> accessed 2 August 2019.
[680] Jacques Maritain, *Man and the State* 12, 24.
[681] ibid 24.

> (which is not a whole, but a part or a special agency of the body politic), except in a merely metaphorical manner and by virtue of a juridical fiction. The State is not a subject of rights.[682]

Thus, reasoning along with Maritain, this thesis deduces that the sovereignty of the people and of nations is a fundamental human right not transferable to the state. This reasoning likewise resonates with the perception of Donnelly who describes sovereignty as 'an absolutist conception of exclusive territorial jurisdiction that was fundamentally antagonistic of international human rights'.[683] The perception of sovereignty as the fundamental right of the people and nations can be further concretised by Maritain's explanation that:

> The rights of the people or of the body politic are not and cannot be transferred or given over to the State … as the State represents the body politic (in the external relations of the latter with the other bodies politic), 'the State' is a merely abstract entity which is neither a moral person nor a subject of rights. The rights ascribed to it are no rights of its own; they are the rights of the body politic.[684]

Although the state is the ultimate supervisory authority, it is not a natural right which the state can possess on itself. This authority is received by the state from the body politic, that is, from the people.[685] Thus, 'man is not for the State, but the State is for man'.[686] Man takes his position in society on the basis of natural law which, according to the Justinian's *Institute* means that, 'the laws of nature which are observed amongst all people being established by a divine providence, remains ever fixed and inimitable'.[687] In line with divine providence, Thomas Aquinas philosophised that, 'the natural law contains all that makes for the preservation of human life, and all that is opposed to its dissolution'.[688] Maritain further deduced in musings on natural law as the source of human rights, that 'the right to the private ownership of material goods pertain to natural law, in so far as mankind is naturally entitled to possess for its own common use the material goods of nature.'[689] Thus, the human rights of peoples derived from divine providence of natural law that existed before the sovereign state and cannot be considered wholly transferable to

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[682] Maritain, *Man and the State* 16.
[683] J Donnelly, 'State Sovereignty' 225.
[684] See n 682, 16.
[685] ibid 24.
[686] ibid.
[687] MDA Freeman *Lloyd's Introduction to Jurisprudence* 131.
[688] ibid 134.
[689] ibid 146.

the state, not even under the intricacy of Hobbes's 'social contract' by which people give up some individual liberty in exchange of some common security.[690]

State sovereignty is the creation of a social contract in terms of which individuals transfer their natural rights to the State. This generally occurs on independence in order to actualise common dominion over specified territory. However, not all natural rights of the individuals can be transferred. Human rights are inalienable and the State cannot compel the transfer of the fundamental human rights of the people. The legal nature of fundamental rights is captured in the Nigerian Court of Appeal decision in *Bobade Olutide & Ors v Adams Hamzat & Ors* where Denton-West JCA held that human rights are moral principles or norms which describe standards of human behaviour, regularly protected as legal rights in municipal and international law, and are commonly understood as inalienable fundamental rights.[691] By virtue of the Charter of the United Nations and the Universal Declaration of Human Rights the inalienability of human rights is undisputable by the state and the state has a primary duty to protect human rights which, according to Maritain, should be exercised only in the manner of ultimate supervision in a body politic within inner structures that involves the functioning of government.[692]

State sovereignty operates through the government and there are profound distinctions between the two. The concept of sovereignty can be defined on one hand, as the 'supreme authority within a territory' and the state as 'the political institution in which sovereignty is embodied'.[693] In a different mode, sovereignty can be defined as 'the possession of supreme (and possibly unlimited) normative power and authority over some domain'.[694] State sovereignty over territorial jurisdiction, ultimately required for international political, economic, cultural and environmental co-operation, is not being questioned in this thesis, nor is the functionality of government which is described as 'those persons or institutions through whom that sovereignty is exercised'.[695] The contention is the peoples' unlimited sovereignty that ought not to be denied and converted through constitutional democracies to unlimited state sovereignty.

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[690] See n 678. Thomas Hobbes.
[691] Court of Appeal of Nigeria CA/AK/80/2014, (2016) LPELR – 26047 (CA).
[692] See n 679.
[693] P Daniel, 'Sovereignty' the Abstract.
[694] Waluchow W, 'Constitutionalism' sec 2 - 'Sovereign versus Government'
[695] ibid.

Hobbes's 'social contract' ideology might have influenced constitutional democracies whereby the people's sovereign authority is expected to be ultimate and unlimited and the government bodies – the legislature, executive and judiciary – through whom the sovereignty is exercised on the people's behalf, are constitutionally limited and subordinate.[696] Unlimited sovereignty could be presumed to remain with the people who, according to this line of reasoning, have the normative power to void the authority of their government should it exceed its constitutional limitations under constitutional democracy. But the immediate concern of this thesis is how constitutional limitation can be assessed in relation to state sovereignty over natural resources. This, as Gilbert suggests, may be achieved 'with some form of accountability'[697] that can provide a subtle attempt at assessing constitutional limitation in order to guarantee people's unlimited sovereignty over natural resources. Further as regards constitutional democracies' relativity to resource utilisation, which has perpetuated the concept of state sovereignty over natural resources by means of the 'public-trust' doctrine, there is need for a more dynamic approach to promote and protect peoples' inalienable fundamental rights and their unlimited sovereignty over their natural resources. However, for this thesis, emphasis is on how the concept pertains to the unlimited sovereignty of indigenous peoples over their natural resources

The public-trust doctrine, originating in Roman law and taken up by English common law, has now become common law in a number of countries, notably the USA,[698] with versions of the doctrine operating in every American state.[699] According to Sagarin and Turnipseed, the concept was originally used to protect public rights in fishing, navigation, and commerce in US navigable waters which included the Great Lakes and coastal waters.[700] But currently, drawing from the Cornell Law School definition that, 'the principle that certain natural and cultural resources are preserved for public use, and that the government owns and must protect and maintain these resources for the public's use',[701] it is clear that the concept has evolved. As Lazarus argues, the trust doctrine originated with the notion of sovereign ownership

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[696] ibid.
[697] Gilbert, 'The Right to Freely Dispose of Natural Resources' 314, 315.
[698] Frier, 'The Roman Origins of the Public Trust Doctrine' 641.
[699] Ryan, 'A Short History of the Public Trust Doctrine and its intersection with Private Water Law' 142.
[700] Raphael Sagarin and Mary Turnipseed, 'The Public Trust Doctrine' 475.
[701] Public Trust Doctrine definition: Cornell Law School – Legal Information Institute [LII] <https://www.law.cornell.edu/wex/public_trust_doctrine> accessed 6 July 2021.

of certain resources in trust for the sovereign's citizens.[702] A good example of the doctrine is captured in America, where the notion of sovereign ownership in trust originated as 'state authority' possessing 'state ownership of the beds of navigable waters in their sovereign capacity',[703] where the state possessed special powers over water resources, but also owed certain enforceable duties to the public. Even then, the trust's sovereign capacity for ownership was not limited to navigable waters and their beds but included land resources with trust duties that included responsibility to ensure that resources were not wasted.[704] But, the doctrine 'has evolved over the years to emerge as one of the core principles for the judiciary to substantiate the legitimacy of governmental action that interferes with the use by the general public of natural resources'.[705]

The doctrine is squarely rooted in property law[706] absorbing sovereign ownership in property rights, the efficacy of which is determined by such concerns as, ownership boundaries, existence of public access to resources, and easements.[707] The doctrine had been used to increase governmental authority over trust resources in the USA,[708] exceeding constitutional limitations. As the concept generally relates to natural resources, the environment, wildlife,[709] and such other ecological-management elements,[710] there are divergent interests and controversy and disputes that inevitably arise in the applications and interpretation of the doctrine.[711] On the other hand, the Indian perception of the doctrine adds basic value to this common-law doctrine which is part of its jurisprudence.[712] In India, the public-trust doctrine serves two purposes: 'it mandates affirmative state action for effective management of resources and empowers citizens to question ineffective

[702] Lazarus, 'Changing Conceptions of Property' 631-632.
[703] ibid 637.
[704] ibid 640.
[705] The Lawyers and Jurists, 'Doctrine of Public Trust' para 1. <DOCTRINE OF PUBLIC TRUST | The Lawyers & Jurists> <lawyersnjurists.com> accessed 5 July 2021.
[706] Lazarus, 'Changing Conceptions of Property' 642.
[707] ibid 641, 642.
[708] 'Public trust doctrine' Cornell Law School, Legal Information Institute [LII] <https://www.law.cornell.edu/wex/public_trust_doctrine> accessed 6 July 2021.
[709] 'The Public Trust Doctrine: Implications for Wildlife Management and Conservation in the United States and Canada' The Wildlife Society, Technical Review 10.01 September 2010. <https://wildlife.org/wp-content/uploads/2014/05/ptd_10-1.pdf> accessed 6 July 2021.
[710] Sagarin and Turnipseed, 'The Public Trust Doctrine' 473-496.
[711] Sax, 'The Public Trust Doctrine' 471.
[712] Karthik SA and Tanvi Kapoor, 'The Doctrine of Public Trust and Environmental Protection in India' Government of Kerala, Forest and Wildlife Department, (13 November 2007) 4. <PUBLICATION NO (kerala.gov.in)> accessed 5 July 2021.

management of natural resources'.[713] The second purpose mentioned in the Indian legal system constitutes an essential factor in the robust justiciability of the doctrine, which is intended as a check on government excesses.

South Africa, like India, follows an advanced application of the doctrine.[714] But, as Van der Schyff reiterates, 'the notion challenges the known concepts of "ownership" and "property" in South African jurisprudence'.[715] The same challenge is encountered in other African countries where the doctrine has indirectly been adapted in the legal system for application to natural resources. Such is the case with Nigeria. The trusteeship systems are reminiscent of abuses, typical of former colonies during the last century, according to Daes, [716] an authority on the rights of indigenous peoples. In her Final Report on 'Indigenous peoples' permanent sovereignty over natural resources'[717] Daes states that certain states – Canada and the USA, for example –established a trusteeship system which held and managed some or all indigenous peoples' resources, but that the system was grossly mismanaged and abused.[718] Nigeria exercises its sovereign ownership, which can be termed trusteeship over minerals, oil, and gas, through section 44(3) of the 1999 Constitution which is discussed in section 4.5. State sovereignty has deprived indigenous peoples of land and natural resources and Daes's suggestion in 2001 that the recognition of the human rights of indigenous peoples demands the return of all lands and resources taken from indigenous peoples[719] can be considered appropriate justification for the injustice. Daes's suggestion appears to reflect the appropriate remedy for indigenous peoples' long-standing loss of sovereignty over natural resources and protection of their property right which is a human right. Furthermore, the 21st century natural resources governance, as Pereira and Gough termed it,[720] should reflect concerted act of restitution to the indigenous peoples for past dispossessions and human rights violations.

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[713] ibid 3.
[714] Sagarin and Turnipseed, 'The Public Trust Doctrine' 475.
[715] Van der Schyff, 'Unpacking the Public Trust Doctrine 124.
[716] Daes, 'Indigenous peoples' permanent sovereignty over natural resources' (IPPSNR), Final Report of the Special Rapporteur E/CN.4/Sub.2/2004/30,13 July 2004.
[717] ibid.
[718] ibid para 37.
[719] Daes, Final Working paper prepared by the Special Rapporteur on 'Indigenous peoples and their relationship to land: Prevention of Discrimination and Protection of Indigenous Peoples and Minorities' E/CN.4/Sub.2/2001/21 of 11 June 2001 para 9.
[720] Pereira and Gough, 'Permanent Sovereignty over Natural Resources in the 21st Century' 451.

From the philosophical analysis in this section, the State is described as the 'Leviathan' which has taken the liberty of the people and must protect and defend them in return. The State is also described as that part of the body politic which bears the primary duty to ensure justice through its supervision of the body politic. The sovereignty of the State is described as a notion of exclusive territorial jurisdiction, while the sovereignty of the people is a fundamental human right derived from natural law, which cannot be transferred to the state but must be protected by municipal and international law.[721]

The next two subsections analyse the contradictions that engulf the legal status of state sovereignty and permanent sovereignty of indigenous peoples over natural resources to establish the difference.

4.3.2 *State sovereignty and UN Resolution 1803 (XVII)*

So far, the analysis has offered an understanding that state sovereignty had been incorrectly set as the standard for domestic application which gave rise to internal conflict in affected states such as Nigeria. Karol Gess[722] correctly addressed the issue of wrong application from a legal point of view, when she explains the real content of the principle in Resolution 1803. According to her, the resolution is a positive reaffirmation of four basic principles of international law: (1) payment of compensation in the event of the taking of rights and property; (2) payment of compensation in accordance with international law and standards; (3) investment agreements between states and private parties have binding effect; and (4) arbitration agreements between states and private parties are binding.[723] This view confirms that Resolution 1803 is a reaffirmation of the rights of peoples and nations to permanent sovereignty over natural resources established by earlier UN General Assembly resolutions as explained in the previous section.

On the other hand and firmly supporting the State sovereignty agenda, Schrijver notes that it was the decolonisation process that shifted the emphasis to 'peoples' and 'self-determination', which gradually faded, and shifted to 'developing countries', and by the 1970s, to 'all states' as primary subjects of the right to permanent sovereignty.[724] He therefore concluded that 'the term nation has lost its relevance as

[721] See nn 678, 679, 692 and 693.
[722] Karol N Gess, 'Permanent Sovereignty' 398.
[723] ibid 448.
[724] Schrijver, *Sovereignty over Natural Resources* 7.

a subject of the right to permanent sovereignty',[725] and that, 'States were free to do with their natural resources whatever their governments saw fit'.[726] Such assertions about the principle are clearly issues of international law and international relations between States and are embodied in the principle that one State may not interfere in the domestic affairs of another States in any form. Indeed, the governance of natural resources within a State is a matter of domestic politics. This means that States ought to apply the declarations in Resolution 1803 to other States as directed, not impose it on the people within the State. In support of people's sovereignty, Armstrong opines that nation-states reserve the right to exploit their natural resources and are unlikely easily to surrender this right.[727] For O'Keefe, Resolution 1803 embodies 'a highly dubious legal content' which represents 'an attempt to give legal force and validity to what is essentially a political goal' and that the validity of the concept as a legal principle is doubtful.[728] Hence, by textual distortion of the contents of the resolution, States have misinterpreted the principle and set it as a 'default', as Armstrong suggests whilst affirming O'Keefe's view that Resolution 1803 is a complex international political document to promote an economic world order which has been 'largely ineffective'.[729] The consequences of this 'default' approach and its ineffectiveness, is discussed further in section 4.4.

Meanwhile, the influence and effect of the term 'State' was highlighted by the newly-independent States in the early 1960s. These States' zeal for economic advancement made it wholly adaptable to their cause for the 'New World' against their former 'mother' countries in Europe.[730] Although generally, UN resolutions have no binding effect, the potential gross benefit to the world economic order moved the majority of countries to adopt the principle in one form or the other in their constitutions as economic policies for their national development.[731] The 'adoption mode', as Daes points out in her Final Report on 'Indigenous Peoples' Permanent Sovereignty over Natural Resources (IPPSNR)', has asserted 'State ownership of natural resources as a general practice amongst State Members of the United

[725] ibid 9.
[726] ibid 8.
[727] Armstrong, 'Against "permanent sovereignty"' 130, 135.
[728] O'Keefe 'The United Nations and Permanent Sovereignty over Natural Resources' 245.
[729] ibid 275.
[730] De Waart 'Permanent Sovereignty' 308.
[731] See n 727. 248.

Nations'.[732] In her contribution to the debate, Barrera-Hernandez affirmed that States have captured the totality of the concept to the exclusion of the people 'as a notion based strictly on an economic/utilitarian interpretation'.[733] This affirms the faulty conceptualisation reiterated in Daes's Final Report on IPPSNR Annex II, that 'the existence of these provisions creates an important challenge to reconciling the interests of State, and the scope of indigenous peoples' permanent sovereignty over their natural resources'.[734]

Indigenous peoples have come a long way in their struggles – first, the struggle to identify as peoples,[735] initially tabled at the United Nations by Bolivia in 1949;[736] and now, the struggle for recovery of their lands and natural resources. In Daes's Final Report on IPPSNR, the dispossession of the lands of the indigenous peoples, captioned 'the doctrine of dispossession', had been linked to the doctrine of conquest and discovery that occurred during the colonisation of indigenous territories.[737] The universalisation of international law was principally a consequence of imperial expansion during the period of conquest and discovery in past centuries, and applies generally to States in their relationship with each other.[738] International law thereby became an important tool in the hands of the colonial powers who turned it into a central vehicle in the dispossession of indigenous peoples.[739]

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[732] Daes, 'Analysis of International Law Concerning Permanent Sovereignty Over Natural Resources and Indigenous Peoples" Annex II to Final Report on IPPSNR E/CN.4/Sub.2/2004/30/Add.1 para 10.
[733] Barrera-Hernandez, 'Sovereignty over Natural Resources' 44.
[734] Daes, Annex II: Examples of State Constitutions are: '*Constitution of Suriname (1987) art 41:* 'Natural riches and resources are property of the nation and shall be used to promote economic, social and cultural development. The nation has the inalienable right to take complete possession of its natural resources in order to utilize them to the benefit of the economic, social and cultural development of Suriname'; *Constitution of the Philippines (1987) art XII*: 'National Economy and Patrimony' s 2: 'All lands of the public domain, waters, mineral, coals, petroleum, and other minerals oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, and other natural resources are owned by the State …. The exploration, development, and utilization of natural resources shall be under the full control and supervision of the State'; *Constitution of the Federal Republic of Nigeria (1999) ch IV, art 44(3):* 'Notwithstanding the foregoing provision of this section, the entire property in and control of all minerals, mineral oils and natural gas in, under or upon any land in Nigeria or in, under or upon the territorial waters and the Exclusive Economic Zone of Nigeria shall vest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly'; and, *Constitution of Namibia (1990) ch XI 'Principles of State Policy' art 100 [Sovereign Ownership of Natural Resources]*: 'Land, water and natural resources below and above the surface of the land and in the continental shelf and within the territorial waters and the exclusive economic zone of Namibia shall belong to the State if they are not otherwise lawfully owned.' para 10.
[735] Stamatopoulou, 'Indigenous Peoples', 72.
[736] ibid 66.
[737] Daes, Final Report on IPPSNR paras 22-25.
[738] Higgins, *Problems and Process* 12.
[739] Gilbert and Couillard, 'International Law and Land Rights in Africa', 48.

Furthermore, the conceptualisation of the misconstrued principle of State permanent sovereignty over natural resources has institutionalised what Barrera-Hernandez terms, 'alien economic interests within a country'.[740] In other words, the States' usurpation of sovereignty subjugated the people and their land delivering both into the hands of foreigners. The usurpation plan originated, in all probability, from the assumption that indigenous peoples posed relatively little threat to States' domination and conquest which led to their assimilation, annihilation, oppression, and weaknesses as described by Stamatopoulou,[741] and, additionally in the case of Nigeria, legally non-existent.

However, the deliberate misinterpretation of the principle of 'permanent sovereignty over natural resources' by a number of authoritarian regimes and governments of developing countries – most notably in Africa – does not render the principle ineffective; it merely establishes it as a one-way ticket for States to monopolise natural resources to the exclusion of the people. As has been argued earlier, State sovereignty does not trump peoples' sovereignty. This is clearly articulated in Daes's Final Report where she asserts that the term 'sovereignty' could be applied to indigenous peoples' ownership without in the least diminishing or contradicting the 'sovereignty of the State'.[742] This does not pitch the indigenous peoples against the State but calls for collaboration through development. Indigenous peoples are not in competition with their States but require recognition of their ownership status of natural resources and development which must be protected as human rights by the States.

4.3.3 *Indigenous peoples' permanent sovereignty*

Permanent sovereignty describes the power to rule or govern a specific jurisdiction accorded former colonies which, through the process of decolonisation, became independent. But all States have this power. Explaining its applicability to indigenous peoples, Daes states that the use of this term in reference to indigenous peoples within States does not imply that the indigenous peoples have the status of independent States, because States' territorial integrity must be respected. However, the term sovereignty is not limited to independent States in that it can also

[740] Barrera-Hernandez, 'Sovereignty over Natural Resources' 44.
[741] Stamatopoulou, 'Indigenous Peoples' 60.
[742] Erica-Irene A Daes, United Nations Economic and Social Council, 'Prevention of Discrimination and Protection of Indigenous Peoples' Final Report of the Special Rapporteur, Erica-Irene A Daes E/CN.4/Sub.2/2004/30, 13 July 2004 para 30.

be used in reference to various governing authorities within a State without in any way diminishing the sovereign status of that State. Therefore, it is in this sense that 'sovereignty' is used regarding indigenous peoples – it refers to the right to manage, govern, or regulate the use of their resources by the indigenous peoples themselves, by individuals, or by others.[743]

Sovereignty can also be interpreted as a permanent, inalienable human right accruing to indigenous peoples making 'permanent sovereignty' an attribute of indigenous peoples' permanent ownership.[744] Furthermore, the word 'permanent', according to the Report, 'is intended to emphasize that indigenous peoples particularly are not to be deprived of their resources as a consequence of unequal or oppressive arrangements, contracts or concessions'.[745] From this it can be deduced that the obsession with State sovereignty is a violation of the inalienable rights of indigenous peoples. As international law applies to States in their relationships with one another,[746] States cannot justify the domestic adoption or application of an international law principle that has no binding force – such as the principle of sovereignty over natural resources – to deprive indigenous peoples of their lands and resources. Our next line of discussion considers the incorporation of the principle in the constitutions of many African countries. This applies, in particular, to minerals, mineral oils, and natural gas in the resource-rich countries where one frequently encounters the incorporation of absolute sovereignty over natural resources as national law.

4.4 State practice regarding permanent sovereignty in Africa

African countries misunderstood the reasoning behind the UN General Assembly resolutions that eventually established the principle of state sovereignty over natural resources such as Resolution 1803 through to Resolution 3171 as earlier discussed in this chapter. As explained in sections 4.1 and 4.2 above, state sovereignty is intended, principally, for State-to-State economic co-operation as embodied in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. The resolutions were directed at one State's interaction with other States and serve as cautions, guidelines, and restrictions. Such is the caution recalled in Resolution

[743] Erica-Irene A Daes, Final Report on IPPSNR para 46.
[744] ibid 47.
[745] ibid.
[746] Higgins, *Problems and Process* 12.

3171 that 'no state may use or encourage the use of economic, political, or any other type of measures to coerce another state in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from its advantages of any kind'. The principle of State sovereignty is intended neither for the 'nationalisation' of the people's property, nor for the subjugation or dispossession of the people's natural resources, as is currently state practice in many African countries that have incorporated the principle in their constitutions.

4.4.1 *Sovereignty principle as law in selected African countries*

Focus now shifts to minerals, mineral oils or petroleum, and natural gas as the specific natural resources of interest in this thesis as we gravitate towards the expected solution to the conflicts in the Niger Delta. These resources are of paramount importance to the resource-rich countries in Africa who by constitutional supremacy have turned all to State property. A glossary of the constitutional provisions of some African countries shows how the principle of permanent sovereignty over natural resources has become State permanent sovereignty over minerals, mineral oils (petroleum), and natural gas in those countries. Notwithstanding the state practice in most African countries where natural resources become State property to the absolute exclusion of the people, Uganda represents an exception to the practice.

The Constitution of the Republic of Uganda (2006)[747] article 244 on Minerals and Petroleum provides that:

> (1) Subject to article 26 of this Constitution, the entire property in, and the control of, all minerals and petroleum in, on or under, any land or waters in Uganda are vested in the Government on behalf of the Republic of Uganda. (2) Subject to this article, Parliament shall make laws regulating – (a) the exploitation of minerals and petroleum; (b) the sharing of royalties arising from mineral and petroleum exploitation; (c) the conditions for payment of indemnities arising out of exploitation of minerals and petroleum, and (d) the conditions regarding the restoration of derelict lands. (3) Minerals, mineral ores and petroleum shall be exploited taking into account the interest of the individual landowners, local governments and the Government.

As stated in article 244, the Ugandan law on minerals and petroleum recognises peoples' ownership of those resources and the importance of inclusive development and benefit-sharing for all parties concerned. The fact that groups are not specifically

[747] Amended by the Constitution (Amendment) Act, Act 11/2005 and the Constitution (Amendment) (No 2) Act 21/2005. <Constitution of the Republic of Uganda | Ulii> accessed 7 July 2021.

mentioned should not be a barrier for communities or indigenous peoples because article 24(3) as an ambient provision will protect their property right when combined with article 237(1) which provides that:

> Land in Uganda belongs to the citizens of Uganda and shall vest in them in accordance with the land tenure systems provided for in this Constitution, and (4) that, On the coming into force of this Constitution – (a) all Uganda citizens owning land under customary tenure may acquire certificates of ownership in a manner prescribed by Parliament; and (b) land under customary tenure may be converted to freehold land ownership by registration.

These constitutional provisions, though not expressly aimed at the indigenous people in Uganda, can be applied to them. In addition, the Constitution of the Republic of Uganda provides for the all-inclusive sustainable development of land and natural resources,[748] and it is inevitable that where sustainable development is practised the rights of indigenous peoples will be protected. The Ugandan Constitution is distinctly designed for the benefit of all human rights associated with sustainable development, especially the economic, social, and cultural rights of the people of Uganda.

The Constitution of the Republic of the Congo of 2015,[749] unequivocally and solemnly reaffirmed in its Preamble affirmed, 'its permanent right of inalienable sovereignty over all the national wealth and the natural resources as fundamental elements of its development'. Similarly, the Constitution of the Democratic Republic of the Congo of 2005 (DRC),[750] provides in article 9 that, 'the State exercises a permanent sovereignty notably over the soil, the subsoil, the waters and the forests, over the air, rivers, lakes, and maritime spaces of the Congo as well as over the Congolese territorial sea and over the continental shelf'. While adopting sovereignty status, the DRC Constitution makes provision in article 58 for the state to exercise the duty of redistributing 'the wealth equitably and to safeguard the right to development'. But the only justifiable means of achieving an equitable redistribution is to recognise, establish, and assess the ownership status of the people co-located

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[748] ibid XXVII, The environment: '(i) The State shall promote sustainable development and public awareness of the need to manage land, air and water resources in a balanced and sustainable manner for the present and future generations. (ii) …the State shall take all possible measures to prevent or minimise damage and destruction to land, air and water resources resulting from pollution or other causes. (iv)The State, including local governments shall – (b) promote the rational use of natural resources so as to safeguard and protect the biodiversity of Uganda.'

[749] Congo (Republic of the) Constitution of 2015. 'Its capital is Brazzaville' (article 1) <(anonymous)(constituteproject.org)>; <https://www.constituteproject.org/constitution/Congo_2015.pdf?lang=en>

[750] Congo (Democratic Republic of the) Constitution of 2005 with Amendments through 2011. <(anonymous)(constituteproject.org)>; <http://extwprlegs1.fao.org/docs/pdf/cng128142.pdf>

with these resources, and then to duly quantify the status to reflect in the benefit-sharing.

The Constitution of the Republic of Angola (2010)[751] provides in article 16 on natural resources that,

> the solid liquid and gaseous natural resources existing in the soil and subsoil, in territorial waters, in the exclusive economic zone and in the continental shelf under the jurisdiction of Angola shall be the property of the state, which shall determine the conditions for concessions, surveys and exploitation, under the terms of the Constitution, the law and international law.

The Angolan constitutional provision appears absolute. The provision accords no recognition to human connection to the lands on which the solid liquid and other resources are located. The Angola constitutional provision closely resembles Nigeria's constitutional provision on minerals, mineral oils, and natural gas.

Section 44 of the Constitution of the Federal Republic of Nigeria (1999)[752] which addresses the compulsory acquisition of property, provides for state sovereignty over minerals, mineral oils, and natural gas as follows:

> (3) Notwithstanding the foregoing provisions of this section, the entire property in and control of all minerals, mineral oils and natural gas in, under or upon any land in Nigeria or in, under or upon the territorial waters and the Exclusive Economic Zone of Nigeria shall vest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly.

Prior to the 1999 Constitution, the 1978 Land Use Act had converted all land in Nigeria to state land by vesting all land forming the territory of each constituent state in the governor of the state. The federal government and its agencies have land vested within the states as well as all the land within the federal capital territory. Hence, all land in Nigeria is by virtue of these provisions state property.

The Congolese [Brazaville], Angolan, and Nigerian Constitutions exercise absolute sovereignty over property rights. The Angolan Constitution of 2010, and the even more recent Constitution of the Republic of the Congo 2015, ought to have reflected the 'people's' contestation over their land and natural resources. The Nigerian Constitution of 1999 was a product of the authoritarian military regime, and it is

[751] Republic of Angola, National Assembly, Constitution of the Republic of Angola, Luanda 21 January 2010 <http://extwprlegs1.fao.org/docs/pdf/ang72591ENG.pdf>.
[752] Constitution of the Federal Republic of Nigeria 1999 <https://publicofficialsfinancialdisclosure.worldbank.org/sites/fdl/files/assets/law-library-files/Nigeria_Constitution_1999_en.pdf>.

expedient that the Nigerian Constitution be reviewed or a new constitution enacted, to reflect more concern for the people and their economic, social, and developmental rights as propounded in this thesis – not only as a solution to the Niger Delta conflict, but as a general law governing minerals, mineral oils, and natural gas, or all natural resources.

The Constitution of the Republic of Ghana, 1996,[753] provides in article 257(1) that: 'All public lands in Ghana shall be vested in the President on behalf of, and in trust for, the people of Ghana.' The Ghanaian Constitution states clearly which lands are 'public lands',[754] but still asserts in article 257 (6) that,

> every mineral in its natural state in, under or upon any land in Ghana, rivers, streams, water courses throughout Ghana, the exclusive economic zone and any area covered by the territorial sea or continental shelf is the property of the Republic of Ghana and shall be vested in the President on behalf of, and in trust for the people of Ghana.

This provision, like that of the Nigerian Constitution, superimposed sovereignty over all lands within its jurisdiction, without exception. But the Constitution of Ghana still leaves room to manoeuvre for the country's indigenous peoples when certain other articles in the Constitution are considered alongside the provisions on 'public lands'. One thinks here of article 267 on 'Stool and Skin Lands and Property' and article 268 on 'Protecting Natural Resources' which requires 'Parliamentary Ratification of Agreements Relating to Natural Resources'. Granted, therefore, that ratification will be determined by the performance of Parliament, which as representative of the people, must consult the people for whom the land is held 'on behalf of, and in trust for,' as provided for in article 257, and not impose its decisions on the people.

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[753] The Five Hundred and Twenty-Seventh Act of the Parliament of the Republic of Ghana, 'The Constitution of the Republic of Ghana (Amendment) Act, 1996. An Act to amend the Constitution of the Republic of Ghana. Date of Assent 16 December 1996. <Constitution of the Republic of Ghana (aripo.org)> <https://www.constituteproject.org/constitution/Ghana_1996.pdf?lang=en>.

[754] ibid Ch 21 'Land and Natural Resource: Public Lands'. Article 257(2) provides: 'For the purposes of this article, and subject to clause (3) of this article, "public lands" includes any land which, immediately before the coming into force of this Constitution, was vested in the Government of Ghana on behalf of, and in trust for, the people of Ghana for the public service of Ghana, and any other land acquired in the public interest, for the purposes of the Government of Ghana before, on or after that date.' Article 257(3) provides: 'For the avoidance of doubt, it is hereby declared that all lands in the Northern, Upper East and Upper West Regions of Ghana which immediately before the coming into force of this Constitution were vested in the Government of Ghana are not public lands within the meaning of clauses (1) and (2) of this article.' Article 257(4) provides: 'Subject to the provisions of this Constitution, all lands referred to in clause (3) of this article shall vest in any person who was the owner of the land before the vesting, or in the appropriate skin without further assurance than this clause.' And art 257(5) provides: 'Clauses (3) and (4) of this article shall be without prejudice to the vesting by the Government in itself of any land which is required in the public interest for public purposes.'

Furthermore, the Constitution of Kenya (Revised Edition 2010)[755] reflects 'a people-concerned' outlook on land ownership, though it holds on to vital minerals and mineral oils. On the classification of land, article 61 (1) provides that 'all land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals.' Land is further classified as public, community, or private in article 61(2). However, article 62(3) states that: 'Public land classified under article 62(1)(f) to (m) shall vest in and be held by the national government in trust for the people of Kenya and shall be administered on their behalf by the National Land Commission'. Included in article 62(1) are: (f) all minerals and mineral oils as defined by law; (j) the territorial sea, the exclusive economic zone and the seabed; (k) the continental shelf; and (l) all land between the high and low water marks; among other listed natural resources.

As can be observed, the undertaking that resources shall 'vest in' and 'be managed' or 'be held in trust' for the people has become the norm among African states reflecting the public trust doctrine discussed in section 4.2(a) above. However, Kenya's provision for community land in its 2010 Constitution indicates another positive dimension in general land ownership in Africa.

Article 63(1) provides for community land by stating that: 'Community land shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest.' Article 63(2)(d) describes community land as land that is: '(i) lawfully held, managed or used by specific communities as community forests, grazing areas or shrines; (ii) ancestral lands and lands traditionally occupied by hunter-gatherer communities.'

Though constitutional ownership options of community land are provided for indigenous peoples in Kenya, one wonders how the exploitation of the minerals and petroleum discovered on those community lands would be governed. However, with the current community land provisions, the Endorois community and other indigenous peoples in Kenya can contemplate seeing justice for past injustice based on the now more accommodating and people-friendly Kenyan Constitution governing

[755] Kenya's Constitution of 2010 <https://www.constituteproject.org/constitution/Kenya_2010.pdf?lang=en>.

land claims.[756] Moreover, the National Land Commission should be able to provide a clear understanding of the 'trust' element involved in natural-resource ownership in Kenya. Thus, Kenya, Uganda, and Ghana indicate in their Constitutions, responsiveness to peoples and communities, though subtly reflecting the principle of state sovereignty.

However, a good study of the Constitution of the Republic of South Africa (1996)[757] reflects nothing like those of the Congo, DRC, Nigeria, or Angola, nor does it reflect a strict incorporation of state sovereignty over natural resources. What it does is to offer a unique approach by consolidating all resources through different sources and groups to work for the good of the country. On property rights, the South African Constitution under the Bill of Right in Chapter two, section 25(2) provides that:

> Property may be expropriated only in terms of law of general application (a) for a public purpose or in the public interest, and (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

Most important is section 25(3) which states that: 'the amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances'. The SA provision for compensation, can be interpreted as giving back in quantum, what has been taken from the people, based on relevant circumstances which include: the history of the acquisition and use of the property; the market value of the property; the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and the purpose of the expropriation. Above all, considerations for equitable assessment include natural resources, and that, property is not limited to land. These constitutional provisions distinguish equity as core value of the law of the people, contrary to the arbitrariness in most of the other African constitutions. Though, the SA provision in section 25 appears fair in composition, justice would only be accomplished if, and when, the law is judiciously implemented to favour all peoples, particularly the indigenous peoples.

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[756] The Constitution of the Republic of Kenya 1963 (as Amended to 2008) was applicable during the *Endorois* case. <http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CI/ WPFD2009/pdf/Kenyan_ constitution_amended_2008.pdf>.

[757] Constitution of the Republic of South Africa1996 (Date of Promulgation 18 December 1996, Date of Commencement 4 February 1997) <https://www.gov.za/sites/default/files/images/a108-96.pdf> <Constitution of the Republic of South Africa [No. 108 of 1996] (www.gov.za)>.

Noteworthy also is the fact that few countries in Africa are committed to the promotion and protection of indigenous peoples. Specific reference to international human rights law in constitutions appears to be seen as a commitment that the countries attach to the doctrine of human rights and fundamental freedoms. Such is the Constitution of the Republic of Cameroon of 1972 (with Amendments to 2008)[758] which affirms in its Preamble, its

> attachment to the fundamental freedoms enshrined in the Universal Declaration of Human Rights, the Charter of United Nations and the African Charter on Human and Peoples' Rights, and all duly ratified international conventions relating thereto, in particular, to the following principles: (1) all persons shall have equal rights and obligations. The State shall provide all its citizens with the conditions necessary for their development; (2) *the State shall ensure the protection of minorities and shall preserve the rights of indigenous populations in accordance with the law*.[759]

From its constitutional perspective, Cameroon does not imbibe the principle of state sovereignty, instead, it legitimises ownership to mean 'the right guaranteed every person by law to use, enjoy and dispose of property', and notes that there shall be no deprivation unless for public purposes and subject to the payment of compensation under conditions determined by law.[760]

From the constitutional provisions analysed in this section only few countries in Africa relieve their people of the burden of State authority and ownership of natural resources. The imposition of State sovereignty over natural resources has for the past four decades been responsible for resource conflicts involving the indigenous peoples. These peoples continually seek redress from the African Commission as expounded in section 3.3.1 of this thesis, and the Commission has been consistent in its decisions on indigenous peoples' ownership of natural resources and the right to development based on the African Charter on Human and Peoples' Rights.

4.4.2 *African Commission's position on wealth and natural resources*

Regional and international human rights law project certainty on the human rights of peoples to natural wealth and resources. UN General Assembly Resolution 1314, discussed in section 4.2 above, has a wide scope of operation that includes conducting a full survey of the status of the basic constituents of the right to self-determination with due regard to the rights and duties of states under international

[758] Constitution of the Republic of Cameroon 1972 <http://confinder.richmond.edu/Cameroon.htm (icrc.org)>.
[759] Cameroon Constitution of 1972 with Amendments through 2008, Preamble (my emphasis).
[760] ibid para 19.

law. Resolution 1314 at the time of its adoption aware that the two draft Covenants were in the making, was expected to provide for the right of peoples and nations to self-determination and to include 'permanent sovereignty over their natural resources' which has now become a reality. The original purpose expressed and entrenched in article I of Resolution 1314 was that 'the permanent sovereignty of peoples and nations over their natural wealth and resources' would form a basic constituent of the right to self-determination, and that the State would have rights and duties under international law to encourage international co-operation in economic development. With the understanding of the original purpose as explained, credence is given to the arguments expounded in sections 4.1 that there is a resolute shift from the right of peoples to state sovereignty, and the contention in section 4.2 that state sovereignty is misconstrued.

The African Commission has continued to resist the shift from the right of peoples to State sovereignty over natural resources through its reliance on the two international Covenants reflected in the African Charter's article 21 which provides that 'all 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.' This human right provision is sourced from article 1(2) of the ICESCR which provides that 'all peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.'

Article 21 of the African Charter provides for the right of 'all peoples' freely to dispose of their wealth and natural resources. This is a right of disposal of the natural resources which are the property of the people. The right to property is enshrined in article 14 of the African Charter as discussed in Chapter three. It is the economic development of the natural resources that manifests in wealth. The African Commission has established two vital principles for the protection of indigenous peoples' right to property as we saw in Chapter three section 3.3.1. First, the *Ogoni* case emphasised the duty of the state to protect its citizens, not only through appropriate legislation and effective enforcement, but by protecting them from damaging acts that may be perpetrated by private parties as enshrined in article 21 of the African Charter regarding the right of peoples to freely dispose of their wealth

and natural resources. Second, the *Endorois* case identified the right to property as a right unique to the indigenous peoples and recognised that the property right could include economic resources and rights over the common land of the indigenous peoples.

In the *Front for the Liberation of the State of Cabinda v Republic of Angola*[761] (the *Cabinda* case) the African Commission relied heavily on its earlier decisions in the *Ogoni* and *Endorois* cases. The Commission further interpreted the term 'peoples', as contained in article 21 of the African Charter, to mean either the entire people of a given state, or a distinct 'peoples' within the State. The Commission found that in the first context, article 21 of the African Charter empowers a State party to exercise the guaranteed right free from interference from any other African or non-African States with particular regard to article 21(4) and (5) which speaks to State Parties.[762] Furthermore, in the *Cabinda* case, the Commission held that a 'peoples' within an existing State can be beneficiaries of the right in article 21 to the extent of the duty it imposes on the State to ensure that the resources are effectively managed for the sole and equal benefit of the entire peoples of the States, thereby asserting the constitutional grandstanding and the principle of trust – that the rights are 'held in trust for the people'.[763]

Thus, the African Commission relied on its decisions in the *Ogoni* case – that the State has the right to exploit natural resources in its territory – and now in the *Cabinda* case – that the right is held in trust for the people and that the State has a duty to involve representatives of its peoples in decision concerning the management of national wealth and natural resources. The African Commission consequently held that although the right to natural resources is a right of 'peoples', States can hold the resources in trust for the peoples and freely exploit the resources on behalf of the people but with the involvement of the representatives of the people. Held in trust or not, the people have been continually denied their rights, opportunities, and benefits accruing from the natural resources through the States' exploitation of the principle of sovereign authority. In anticipation of the solution to be proposed in this thesis, it is necessary to understand what the deprivation and denial cost the indigenous peoples. This is discussed in the following section.

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[761] ACHPR, Communication 328/06, done at Banjul, the Gambia, during the 54th Ordinary Session of the African Commission on Human and Peoples' Rights, 22 October to 5 November 2013.
[762] ibid para 130.
[763] ibid paras 131, 132.

4.4.3 *Capability and opportunities denied by state sovereignty*

The generic protest actions by the indigenous peoples of the Niger Delta discussed in Chapter three, identified arbitrary violations of human rights as the primary cause of the conflict. Essentially, violation of the property right occasioned by dispossession, deprivation, and violent acquisition of land, minerals, mineral oils, and natural gas of the indigenous peoples of the Niger Delta led to endless protests and demands for redress which constitute the bedrock of the Niger Delta conflict. The ownership debate must be resolved before any development programme which will include all stakeholders, and especially the indigenous peoples, can be finalised legally and legitimately.[764] The ownership of minerals, mineral oils, and natural gas as the property right of indigenous peoples in the Niger Delta is the pivot on which this research rests and which this chapter establishes. At this point it has been established that State sovereignty over natural resources is a principle misunderstood and misconstrued by certain African States that have incorporated the principle as law in their constitutions.

State absolutism has an overpowering effect on indigenous peoples as the true owners of the resources seized by force by their governments. More relevant to human dignity, is the realisation of state practice in terms of which government – controlled by ethnic majorities and the elite class – take decisions on what belongs to these vulnerable groups while totally excluding them and so violating their human rights and fundamental freedoms in the process. As Sen puts it – and which this thesis supports – the States acted as 'authoritarian bosses'[765] in clear violation of freedom. These authoritarian bosses violated the rights to economic, social, cultural, and environmental development, when they forced the community of indigenous peoples to leave their land and natural resources with no opportunity for choice either to leave freely or to negotiate their departure or participate in the development agenda – which had, in any event, already been imposed on the land. A plausible accounting of opportunities can include presenting options and the recognition of free choice, neither of which occurred. The denial of opportunity was absolute in that the indigenous peoples were not only forced to do something chosen by another but were in fact forced to act in a way they would not otherwise have chosen to act freely.

[764] Aladeitan, 'Ownership and Control of Oil, Gas and Mineral Resources in Nigeria' 159.
[765] Sen, 'Human Rights and Capabilities' 153.

Sen reasons that the concept of opportunity is often invoked in the context of human rights and can be best understood from the perspective of capability – ie, the opportunity to achieve valuable combinations of the human condition, that is, whatever a person is able to do or become.[766] Thus, the idea of 'capability' assists in understanding the opportunity aspects of freedom and human rights. The importance of this argument lies in establishing what caused the violations of human rights and fundamental freedoms of the indigenous peoples in the Niger Delta. Human rights were violated because opportunities were denied by the imposition and execution of State sovereignty over the communities and indigenous peoples of the Niger Delta without allowing them to do the things that were of value to them as a community or people. For example, recognition of their right to property would have empowered them to exercise their right to development. Violations of other human rights – to life, to physical and mental health, to property, to a healthy environment, to freely dispose of wealth and natural resources, and the right to development – denied the indigenous people choices to achieve what they value in life according to the capability-based approach.

From the preview of selected African States and their Constitutions presented earlier in this Chapter, we can infer that a review of African constitutions is necessary to resolve the fundamental issue of the misconception of sovereignty over minerals, mineral oils, and natural gas which, in the case of Nigeria, deprive the Niger Delta indigenous peoples of their right to and enjoyment of property. The review is undertaken in the light of all aspects discussed, not only in the last two sections, but in all sections of this chapter. This will enable us to offer a suitable projection of indigenous peoples' ownership of natural resources under the Constitution of Nigeria. The following section considers the need for a review of the Nigerian law on minerals, mineral oils, and natural gas and includes an examination of the relevant Constitutional provision.

4.5 Sovereignty over mineral resources and Nigerian law

This section analyses Nigeria's constitutional provision, putting into perspective the 1960, 1979 and 1999 Constitutions to view the depth of the misconception of the principle and explore other relevant Nigerian laws that govern natural resources. As has been analysed earlier in sections 4.3.2 and 4.3.3, 'the principle of permanent

[766] ibid.

sovereignty over natural resources is a fundamental right of states as well as of peoples' as Tyagi puts it.[767] In Nigeria, sovereignty governance of natural resources is directed more towards the oil and gas than solid mineral galvanising the constitutional provision directly on the petroleum industry.[768]

4.5.1 *Nigerian constitutional provisions on mineral resources*

In the previous section, state practice regarding permanent sovereignty in Africa was explained. It has been shown that many African countries incorporate the principle into their constitutions and Nigeria is one of them. Nigeria asserted its sovereignty specifically over minerals, mineral oils, and natural gas under Fundamental Rights in Chapter IV in both the 1979 and 1999 Constitutions of the Federal Republic of Nigeria. In the 1979 Constitution, section 40, and in 1999 Constitution section 44, both provide for Compulsory Acquisition of Property, and both, in sub-section (1), provide that:

> No moveable property or any interest in any immovable property shall be taken possession of compulsorily and nor right over or interest in any such property shall be acquired compulsorily in any part of Nigeria except in the manner and for the purpose prescribed by a law that, among other things –
>
> a. requires the prompt payment of compensation therefor; and
> b. given to any person claiming such compensation a right of access for the determination of his interest in the property and the amount of compensation to a court of law or tribunal or body having jurisdiction in that part of Nigeria.

Both in sub-section (3) provide that:

> Notwithstanding the foregoing provisions in this section, the entire property in and control of all minerals, mineral oils and natural gas in, under or upon any land in Nigeria or in, under or upon the territorial waters and the Exclusive Economic Zone of Nigeria shall vest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly.

Since the provisions of both Constitutions have the same content, for ease of discussion the 1999 Constitution sections will be used to represent both in this section.

In comparison with section 44(1), section 44(3) is discriminatory and set to deprive certain people of their natural resources within the zones listed. Additionally, situating this section under Fundamental Rights in the Constitution has two

[767] Tyagi, 'Permanent Sovereignty over Natural Resources' 588
[768] Bagia and Dike,'The Principle of Permanent Sovereignty over Natural Resources' 1-19.

implications: (1) that the compulsory acquisition of property in section 44(3) is an absolute right of the government which does not attract any form of compensation, and which cannot be challenged; and (2) the National Assembly is the sole manager of the listed property – minerals, mineral oils, and natural gas. On a literal interpretation, however, the property right is that of the Federal Government of Nigeria, but the National Assembly determines how it will be managed.

An examination of these provisions that make no room for any form of compensation raises some queries: What happens where minerals or mineral oil is spontaneously discovered in a private family compound or in the centre of a city? Would the government not pay compensation? In all likelihood, there would be some form of compensation by force of law within the same human rights section.[769] But, not so for the indigenous peoples whose lands are taken in the Niger Delta. These smacks of double standards are highly discriminatory. More challenging is the fact that the Constitution is silent as regards collective rights under which the indigenous peoples could seek redress.

Back to the provision, the onus lies on the National Assembly as elected representatives of the Nigerian people who are expected to make laws for the well-being and good governance of all Nigerians, to act responsibly towards the Nigerian people – and in our scenario, specifically towards the affected people in all regions where this provision applies. By interpretation of section 44(3), the people's representatives in the National Assembly are expected to make laws that will spell out how the acquired land and resources could be fairly managed taking into consideration the original owners who are still 'living' or 'existing' on those lands. The law is presented as if no life exists on the specified land and on this basis no provision is made for relocation, resettlement, or compensation. Therefore, as is clear from the forced evictions in the Niger Delta, assuming that the land is uninhabited simplifies any form of compulsory acquisition. In the same section of the Nigerian Constitution – sections 44(1) and 44(2) on Compulsory Acquisition of Property – provision is made for prompt payment of compensation to those whose

[769] The Constitution provides for such redress in s 46(1): 'Any person who alleges that any of the provisions of this Chapter has been, is being or likely to be contravened in any State in relation to him may apply to a High Court in that State for redress.' As such, there is every likelihood the 'city person' who alleges contravention of his or her right to movable or immovable property might be compensated.

properties are acquired. This law is discriminatory, unfair, and violates the rights of those affected by section 44(3).

Fundamental rights are human rights of people that need to be protected by the State; and as Ali argues, 'fundamental rights depend upon the fundamentality of the law which guarantees and protects them against invasion by government'.[770] Section 44(3) cannot be considered a fundamental right as the state cannot seek protection from its own actions. Including this property right under fundamental rights is in my view, misplaced. Ali further asserts that 'fundamental rights constitute a limitation upon the powers of the Government and its organs and any legislative or executive action', and 'infringing these rights could be declared invalid by the courts in exercise of their powers of judicial review of legislation'.[771] And, as expounded and philosophised in section 4.3.1, 'the rights of the people and the body politic are not and cannot be transferred or given over to the State'.[772]

In his contribution, Sax reiterated that although 'the state apparently did protect public uses, no evidence is available that public rights could be legally asserted against a recalcitrant government'.[773] This is cause for concern if section 44(3) is considered within the scope of the public-trust doctrine. More especially, as Sax further asserts, since when the State asserted its sovereignty over natural resources it had not yet been established whether the public have an enforceable right to prevent infringement of the public interest[774] – ie, when government disregards constitutional limitations. Hence, there ought to be 'a special burden of justification on government'[775] for its imposition of sovereign authority under trusteeship.[776]

The only provision under which to challenge the infringement of rights in Nigeria, is section 46(1) of the Constitution which provides that 'any person who alleges that any of the provisions of this Chapter has been, is being or likely to be contravened in any State in relation to him may apply to a High Court in that State for redress'. Since forced acquisition is listed under fundamental rights, there is need to know whose right is being infringed in section 44(3) – the right of the state or the right of the people? It is clear that the redress mechanism in section 46(1) does not apply to

[770] Ali, 'Concept of the Fundamental Right' 62.
[771] ibid 63.
[772] See n 684.
[773] Joseph Sax, 'The Public Trust Doctrine' 475.
[774] ibid.
[775] ibid 491.
[776] Blumm and Guthrie, 'Internationalizing the Public Trust Doctrine' 741-808.

section 44(3) which, after all, remains an exception to the rule under fundamental human rights and an exclusion clause that misdirects the concept of human rights, violates the right of the people, and at the same time seeks to protect the State itself under the doctrine of trusteeship.

Above all, as earlier mentioned, the provision on compulsory acquisition of minerals, mineral oils, and natural gas denies the existence of any human on the specified territories to represent the land as barren. However, as was shown in Chapter three, the Niger Delta was not barren; it was full of living indigenous peoples.

4.5.2 *Constitutional denial of indigenous peoples' existence: discrimination*

Nigeria's failure to acknowledge the existence of people already living on the natural-resource zones acquired by force – historically, the indigenous peoples – amounts to a betrayal of the original landowners of the 'petroleum-rich Niger Delta'.[777] The historical antecedents of the Niger Delta indigenous peoples' protests date back to pre-colonial days, when the Niger Delta played a crucial role in the Nigerian economy. This was a time when, according to Nigerian history,

> its ports and rivers provided access for the British to penetrate the Nigerian hinterland, the gateway for the trade in slaves, and later export commodities such as palm produce, timber, rubber and even groundnut and cotton from the distant northern parts of Nigeria. The potentates who ruled Niger Delta city-States and neighbouring kingdoms were also the sentinels that guarded the lucrative trade routes of the Niger Delta.[778]

After independence, the indigenous peoples continued to live on their native lands. The people of the Niger Delta exercised and exhibited sovereignty over land and natural resources which predates the resources mentioned in section 44(3) as not man-made, they are natural phenomena and the Niger Delta just happened to have the largest concentration of them in Nigeria. The intrigues and complexities of the applicability of sovereignty over natural resources in Nigeria triggered scholarly debates with divergent views expressed by writers such as Amokaye,[779] Ozioko and Oraegbunam,[780] Abegunde and Eniola,[781] with more emphasis being laid on its impact on the development of oil and gas in the Niger Delta.

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[777] Petters SW, 'Geological Background' 71.
[778] Petters SW, 'Conservation And Development Of The Niger Delta' 197.
[779] Amokaye, 'Sovereignty and Jurisdiction over Offshore Natural Resources' 1.
[780] Ozioko and Oraegbunam,'The Jurisprudence of Economic Sovereignty; 103-114.
[781] Abegunde and Eniola, 'The Impact of State Sovereignty on the Right of Indigenous Peoples' 16.

However, in the view of this thesis, failure of both the 1979 and 1999 Nigerian Constitutions to recognise the existence of the people in that region amounted to injustice. Section 44(3) denied their existence because no mention was made of people on the land at the time of acquisition; nor was mention made of moving any people to other locations, or of 'compensation' for their being deprived of the use of their lands and resources as provided for other people's property under section 44(1). The historical existence of the indigenous peoples in the Niger Delta before the arrival of the colonial rulers, cannot be denied[782] and this requires maximum constitutional recognition and legislative amendment by the National Assembly.

The Nigerian Constitution is also contradictory. Section 17, under the 'Social Objectives' (which are actually denied social rights but termed 'objectives') section of the Constitution, calls into question the efficacy of section 44(3). Nigerians are expected to enjoy equality of rights and obligations under section 17(2) which provides that:

> (a) every citizen shall have equality of rights obligations and opportunities before the law; (b) the sanctity of the human person shall be recognised and human dignity shall be maintained and enhanced; (c) governmental action shall be humane, and above all else (d) exploitation of human and natural resources in any form whatsoever for reasons other than the good of the community shall be prevented; and (e) the independence, impartiality and integrity of courts of law, and easy accessibility thereto shall be secured and maintained.

Section 17(2)(a)(b) and (c) could have taken care of the existence, recognition, and integrity issues of the indigenous peoples on the affected acquired lands, but it is not a right and cannot be claimed. Similarly, section 17(2)(d) also provides that, 'exploitation of human and natural resources in any form whatsoever for reasons other than the good of the community shall be prevented', but exploitation has been going on against the good of the community in the Niger Delta and has destroyed the

[782] ibid. The historical ownership of natural resources dates back to pre-colonial days when the Niger Delta played a crucial role in the Nigerian economy. 'Its ports and rivers provided access for the British to penetrate the Nigerian hinterland; the gateway for the trade in slaves, and later export commodities such as palm produce, timber, rubber and even groundnut and cotton from the distant northern parts of Nigeria. The potentates who ruled Niger Delta city-States and neighbouring kingdoms were also the sentinels that guarded the lucrative trade routes of the Niger Delta. They either received or resisted British mercantilism and imperialism. But through negotiations, the Europeans, principally the British secured the co-operation of the rulers of the Niger Delta city-States, who then became the middlemen in the slave and palm oil trade. Participatory continuity is what their descendants in present day petroleum-rich Niger Delta seem to be clamouring for. Whether for peaceful resolution of the unrest in the Niger Delta, or for environmental protection and development, the human factor has a crucial role to play.' This is the human factor that Nigeria missed out in its legislative claims and acquisition of what rightfully belongs to the Niger Delta people. 197.

entire land and environment. Finally, section 17(2)(e) provides that 'the independence, impartiality and integrity of courts of law is granted', but no one is in a position to determine the extent this law could run because it is tied to High Court rules – and in Nigeria each state has its distinct High Court rules.

These are fundamental contradictions in the 1999 Constitution of the Federal Republic of Nigeria that require amendment or review. Meanwhile, the abandoned 1960 Nigerian Constitution represents a more cohesive and humane law which needs to be revisited and possibly re-enacted with a few modifications.

4.5.3 *The 1960 Nigerian Constitution: The need to revisit*

Section 134 of the 1960 Constitution of the Federation of Nigeria provides a clue to the issues of minerals, mineral oils, and natural gas examined in this chapter. Section 134 on 'Mining royalties and rents' provides that:

> (1) there shall be paid by the Federation to each Region a sum equal to fifty per cent of - (a) the proceeds of any royalty received by the Federation in respect of any minerals extracted in that Region; and (b) any mining rents derived by the Federation during that year from within that Region. (2) The Federation shall credit to the Distributable Pool Account a sum equal to thirty per cent. (a) the proceeds of any royalty received by the Federation in respect of minerals extracted in any Region; and (b) any mining rents derived by the Federation from within any Region. (3) For the purposes of this section the proceeds of a royalty shall be the amount remaining from the receipts of that royalty after any refunds or other repayments relating to those receipts have been deducted therefrom or allowed for. (4) Parliament may prescribe the periods in relation to which the proceeds of any royalty or mining rents shall be calculated for purposes of this section. (5) In this section "minerals" includes mineral oil. (6) For the purposes of this section the continental shelf of a Region shall be deemed to be part of that Region.

Section 134(6) did not even deprive regions of ownership of the continental shelf. The provision shows the humane attribute and all-inclusiveness of this specific Constitution which cared totally for all the people's interest in ownership of their natural resources and made sure no one was left out. The 1960 Constitution ensured that the right to wealth and natural resources was retained by the people; although the state had the authority to monitor exploitation. The Federation retained its share of the royalties derived from exploitation and distributed it to the Regions as stipulated. Every aspect of the resource formula was explicitly detailed in the Constitution for public knowledge, including all receipts, deductions, and payments to the Regions. Additionally, section 135 provided for the distribution of funds in the

Distributive Pool Account, albeit unequally, as it must have been based on certain agreed factors. These provisions and many others that depict Nigeria as a Federation made up of autonomous regions are not found in the 1999 Constitution.

Nigeria gained its independence in 1960 and joined the United Nations as the 'Federation of Nigeria'.[783] The 1999 Nigerian Constitution confirms Nigeria as a Federation in section 2(2) which provides that: 'Nigeria shall be a Federation consisting of States and Federal Capital Territory.' Nigeria ought to be an active Federation, governed through federalism, with a Federal Constitution similar to the 1960 Constitution. The reason for Nigeria's abrupt switch from the true and viable 1960 Federation Constitution, to a constitution for a totally different form of state under the 1979 Constitution, and revised in 1999, is unclear but it is perhaps significant that both the 1979 and the 1999 Constitutions were products of military regimes.

Most of the content of the 1960 Constitution remains viable to ensure the people's inclusion in governance. The 1960 Constitution served a good purpose and took care of the rights of all peoples in Nigeria by granting them regional autonomy. This could be adapted for use by the 'component-states' structure currently applied in Nigeria. The 1960 Constitutional content will provide solid, basic principle for a new constitution or the much-needed constitutional review in Nigeria. With this in view, it is the considered opinion of this thesis that Nigeria has everything to gain from reverting its previous constitutional order under the 1960 Constitution – in particular as regards its treatment of natural resources, its emphasis on autonomy, and the principle of benefit sharing. The old constitutional order allowed each region in the Federation to take care of its own commerce. Intrinsically, within the smaller governmental autonomy, the indigenous peoples were easily identified and recognised. They were afforded opportunities to exercise their rights and make choices for what they valued most, and economic development became the business of all.

4.5.4 *Related Nigerian Law on Mineral Resources*

In this section, relevant Nigerian laws and institutions dealing with minerals, mineral oil, and gas are discussed to establish their institutional role in oil and gas development and identify the impact they ought to have made in ameliorating the

[783] UN GA res A/RES/1492 (XV) 893rd plenary meeting 7 October 1960.

developmental and environmental abuses that led to the Niger Delta conflict. The laws would reveal to what extent Nigeria effectively adopted the principle of sovereignty over natural resources especially concerning petroleum development.[784]

First is the Nigerian Minerals and Mining Act of 2007, a re-enactment of the Minerals and Mining Act of 1999,[785] intended to refine the sovereignty over minerals, mineral oils, and natural resources provisions in the 1999 Nigerian Constitution. Chapter 1 on 'Minerals, Exploration, Mining and Quarrying' is a restatement of section 44(3) of the 1999 Nigerian Constitution. Section 1 in part 1 on 'Ownership and Control of Minerals' states that:

> (1) the entire property in and control of all Mineral Resources in, under or upon any land in Nigeria, its contiguous continental shelf and all rivers, streams and water courses throughout Nigeria, any area covered by its territorial waters or constituency and the Exclusive Economic Zone is and shall be vested in the Government of the Federation for and on behalf of the people of Nigeria. (2) All lands in which minerals have been found in commercial quantities shall, from the commencement of this Act be acquired by the government of the federation in accordance with the provisions of the Land Use Act.

The Minerals and Mining Act 2007 consolidates state authority over the mineral resources based on the Land Use Act of 1978, which was enacted to convert all land in Nigeria to state land. Though the Minerals and Mining Act 2007 provides for compensation for exploited land, the law makes no provision for communities on the mining location which may impact the indigenous peoples positively. Hence, they have no consideration for compensation for their dispossessed lands as provided for in section 107. This section reads:

> A holder of Mineral title may, in addition to any other amounts payable under the provision of this Act and subject to valuation report by a Government licensed valuer, pay to the occupier of land held under a State lease or the subject of right of occupancy – (a) reasonable compensation for any disturbance of the surface rights of the owner or occupier and any damage done to the surface of the land on which the exploration or mining, is being or has been carried; and (b) in addition pay to the owner of any crop, economic tree, building or work damaged, removed or destroyed by the older of the mining title or by any of its agents servants, compensation for the damage, removal or destruction of the crop, economic tree, building or work.

[784] Bristol-Alagbariya, ' Duties in Permanent Sovereignty over Natural Wealth and Resources' 95-100.
[785] Nigerian Minerals and Mining Act 2007 [2007 Act No 20]. An Act to repeal the Minerals and Mining Act No 34 of 1999 and Re-enact the Nigerian Minerals and Mining Act 2007 for the purpose of regulating all aspects of the exploration and exploitation of solid minerals in Nigeria, and for related purposes [29 March 2007]. Enacted by the National Assembly of the Federal Republic of Nigeria.

However, this research is not unduly concerned with compensation, the argument is for total involvement of the indigenous peoples as core owners of the resources discovered on their lands.[786] They must be included in the development process and benefit-sharing as is discussed in section 4.6 below. According to the sovereign control of the Federal government, all wealth is the property of the Federal government which created an important agency to monitor the wealth transparently.

Second is the Nigeria Extractive Industries Transparency Initiative (NEITI), established by the Nigeria Extractive Industries Transparency Initiative Act of 2007[787] in the main, to monitor revenue receipts and accountability. The primary objectives of the NEITI are described as:

> (a) to ensure due process and transparency in the payments made by all extractive industry companies to the Federal Government and statutory recipients; (b) to monitor and ensure accountability in the revenue receipts of the Federal Government from extractive industry companies; (c) to eliminate all forms of corrupt practices in the determination, payments, receipts and posting of revenue accruing to the Federal Government from extractive industry companies; (d) to ensure transparency and accountability by government in the application of resources from payments received from extractive industry companies; and (e) to ensure conformity with the principles of the Extractive Industries Transparency Initiative.[788]

These objectives are refined instructions of high international standard. By this time, it has become patently clear and obvious that corruption has devoured all the income accruable from petroleum and natural gas production in Nigeria, and thus, it has failed to deliver.

Third is the Nigerian National Petroleum Corporation (NNPC), Nigeria's own petroleum company established under the Nigerian National Petroleum Corporation Act 33 of 1977. The NNPC is empowered to engage in all commercial activities relating to the petroleum industry, and to enforce all regulatory measures relating to the general control of the petroleum sector in Nigeria.[789] It is worth noting that by this Act, Nigeria ensures total control from exploration and exploitation to development and commercialisation of the minerals, mineral oils, and natural gas in

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[786] Abegunde and Eniola, 'The impact of State Sovereignty on the Right of the Indigenous Peoples' 16-30.
[787] Nigeria Extractive Industries Transparency Initiative (NEITI) Act 2007 [ACT 2007 No 36]. An Act to Provide for the Establishment of the Nigerian Extractive Industries Transparency Initiative (NEITI) and for Related Matters. [28 May 2007] Enacted by the National Assembly of the Federal Republic of Nigeria.
[788] ibid art 2.
[789] Nigerian National Petroleum Corporation Act, Ch 320, Laws of the Federal Republic of Nigeria, 1990.

Nigeria,[790] but should that be the practice?[791] How the wealth accrued and dealt with is the prerogative of the Federal Government without any recourse to the principle of trust as explained earlier in this chapter. Nigeria's dependence on oil informs the need to perpetuate State sovereignty over natural resources from 'ownership orientation to governance orientation'[792] as Manjiao Chi explains. This in turn determines the absolutist mode of development that engages the foreign investments strategies of the multinational oil corporations for optimal revenue returns solely for the federal government.[793]

While the Minerals and Mining Act 2007 and the NNPC are directly involved in exploitation and production within the extractive industry, the Nigeria Extractive Industries Transparency Initiative (NEITI) aims to improve development through good governance which should be equitable.[794] Equitable governance lies at the heart of the development process and determines the impact of the extractive industries' contribution to sustainable poverty reduction. On equitable governance, Adangor opines that, the exclusion of the oil and gas producing communities and states from the management of natural resources would impact them adversely.[795] Essential for good governance is transparency of revenue payments from the extractive industries to government.[796] Revenue inflows must be transparently accounted for, disclosed, and used appropriately. The 'Publish What You Pay' agenda of the Extractive Industries Transparency Initiative (EITI) that promotes revenue transparency in the extractive industry has been adopted by Nigeria's NEITI.[797] It remains for the NEITI to publish information on Nigeria's extractive industries' revenue in a consistent and useful way. Transparency is intended by Nigeria, and it must be upheld by proactivity of its institutions. The concept of an EITI, if well applied, can neutralise the absolutism of ownership and development that excludes the indigenous peoples and has led to the conflict in the Niger Delta.

[790] Hobe, 'Evolution of the Principle' 1-14.
[791] Bagia and Dike, 'The Principle of Permanent Sovereignty over Natural Resources' 1-19.
[792] Chi, 'From Ownership-Orientation to Governance-Orientation' 97-124.
[793] See generally: Thomashausen, '(Foreign) Investment Strategies in Africa' 155-172.
[794] Adangor, 'Proposals for Equitable Governance' 213.
[795] ibid 214.
[796] World Bank Group, *Striking A Better Balance* – The World Bank Group and Extractive Industries – WORLD BANK GROUP MANAGEMENT RESPONSE 17 September 2004. paras 5, 9,12.
[797] ibid paras 9,12.

4.6 Mineral resources: property right of indigenous peoples

It is important at this point to make a case for the indigenous peoples' struggle for ownership and control of oil and gas in the Niger Delta, for recognition and protection. This research has so far enumerated salient arguments for indigenous peoples' right over minerals, mineral oils, and natural gas in Nigeria. Reasoning with Onifade, there is need to know 'what rights citizens actually have over natural resources'.[798] The ownership aspiration of the indigenous peoples does not call for the exclusion of the federal government from exploitation, development, and management. In essence, the peoples are calling for the affirmation of the ownership status of the indigenous peoples in the Niger Delta[799] and the freedom to assert their rights to free, prior, and informed consent before decisions are made concerning the resources, either for exploitation or development. As Onifade asserts, the rights of citizens over natural resources are embedded in the doctrine of peoples-based permanent sovereignty over natural resources which may be domestically driven by common ownership and environmental justice claim.[800]

4.6.1 *Understanding the sensitivity of indigenous peoples*

The argument in this thesis, and particularly this chapter, is that sovereignty over natural resources and the inherent right to development are traditionally the 'property' of the indigenous peoples and should remain so. On indigenous people's sovereignty, Rombout contributes that 'indigenous peoples possess elements of sovereignty predating the existence of the larger political order in which they live' and they are sovereign because 'they retained their own systems of government and decision making, which are usually quite distinct from the governmental system of the larger political order',[801] which has been analysed in sections 4.2 and 4.3 above. In order to enjoy the freedom granted by sovereignty, state policies or developmental programmes must not impose outsiders on the indigenous peoples and their lands.

In Nigeria, state policies and government are the domain of the ruling class. And the ruling class in Nigeria comprises those major tribes that dominate the minorities and

[798] Onifade, 'Peoples-Based Permanent Sovereignty Over Natural Resources' 343-368.
[799] Abegunde and Eniola, 'The Impact of State Sovereignty on the Right of the Indigenous Peoples' 16-30.
[800] See n 796.
[801] Rombout, *Having a Say* 55.

the unrecognised indigenous peoples. A good explanation of the objectives of the ruling class is given by Sagay as follows:

> (i) establish that Nigeria Communities have no identity outside the British colonial legacy; (ii) show that the Nigerian Federal State is the successor of the British colonial master; (iii) it follows that the Federal State is now the colonial master of Nigerian Nationalities and Communities, and (iv) since the Federal State was handed over to the Hausa-Fulani, it further follows that the Hausa-Fulani are the current colonial masters of the Nations of Nigeria, and therefore, like any other slave master, the owner of resources of the slaves. For slaves, insert Southern Nigeria with special emphasis on the Niger Delta.[802]

As Sagay asserts, so do Alagoa and Tamuno, that the sovereign control and administration given to the dominant ethnic groups was a deliberate scheme by Britain that led to the resentment of domination and neglect.[803] Hence, for the ruling class in Nigeria, sovereignty over natural resources is defensible – Niger Delta oil and gas wealth becomes 'the national cake' that must be shared.[804] Alagoa and Tamuno further assert that, River State (one of the nine oil-producing states in the Niger Delta region, out of the 36 states that make up Nigeria) accounts for some 50 per cent of oil in Nigeria, and of the oil income that accrues to the Federal Government, only some seven per cent falls to the states.[805] When one links the low return to the state from oil revenue with the massive ecological destruction suffered by the state from oil production, a clear picture of injustice emerges.[806] Therefore, the cry for justice echoes through the Niger Delta: justice for recognition, and for fundamental and environmental rights' violation.

As was shown in Chapter three, justice sought through the judicial process is a difficult task because of the dearth of applicable and relevant laws. Though the African Charter on Human and Peoples' Rights is applicable in Nigeria and can to a great extent provide a legal remedy, the indigenous peoples are yet to be recognised in Nigeria and they also have an advocacy role to play for their recognition. Therefore, the effective approach for justice according to this thesis, is: (i) individual and collective identification campaign by the indigenous peoples in the country to mobilise for national recognition (ii) a strong campaign by the indigenous peoples,

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[802] Itse Sagay, 'Nigeria: federalism, the Constitution and resource control' 6 <http://www.nigerdeltacongress.com/narticles/nigeria_federalism_the_constitut.htm16/7/2008> accessed 31 August 2018.
[803] Alagoa and Tamuno, *Land and People of Nigeria* 145.
[804] Erikson and Hagstromer, *Chad* 11.
[805] See n 801.188.
[806] ibid.

supported by NGOs and other interest groups, for constitutional review so as to incorporate their recognition and right to land and natural resources, (the idea of a review can be replaced by pressure for the adoption of an updated version of the 1960 Constitution of Federation of Nigeria to replace the 1999 Constitution – the preferred option of this thesis); and (iii) actualisation of the right to development by inclusion, participation, and involvement in all aspects of sustainable development of the natural resources (proposed for the legal framework in Chapter five).

The Nigerian indigenous peoples can seek institutional restitution from international institutions such as the World Bank which has strategic initiatives for poverty eradication – albeit achievable only through government involvement and support. This forms the subject for discussion in the next section.

4.6.2 *Indigenous peoples and the World Bank*

The World Bank's position on indigenous peoples' rights to land and natural resources is that of a major stakeholder in the development of natural resources. The World Bank position is highly influential within the UN system and the global economy as the world financier of the extractive industries in both the resource-rich countries and countries with substantial resources. With such overwhelming attributes and influence on governments and multinational corporations that run the industries, the World Bank can assume the position of a prime promoter of sustainable development, particularly in the extractive industries, but this has not been the case.

In its 'Striking a Better Balance*:* World Bank Group Management Response', the World Bank highlighted and endorsed two fundamental messages:

> (1) Extractive industries can contribute to sustainable development, when projects are implemented well and preserve the rights of affected people, and if the benefits they generate are well-used; and (2) there is continuing role for the Bank Group in supporting Extractive Industries provided its involvement supports poverty reduction and sustainable development.[807]

From these messages, although the World Bank has no control over national legislation, it is obvious that it has the capacity to impact on governments the consideration and recognition of indigenous peoples' concerns as original owners and co-habitants of land and natural resources.

[807] WBG, *Striking a Better Balance* Executive Summary, iii.

This capacity to impact could be inferred from the World Bank's 2004 'Management Response' on 'Protecting the Rights of Peoples Affected by EI Investments' where it expressed that it fully supports 'the importance of protecting the rights of those who are affected by EI projects that the WBG supports' and that it 'will only support EI projects that have the broad support of affected communities (including Indigenous Peoples communities)'.[808] Though the World Bank emphasised that the support does not mean a veto power for individuals or any group, it does mean that, 'the Bank Group requires a process of free, prior and informed consultation with affected communities that leads to broad support by them of the project.'[809] If acted upon, these are dynamic indicators of change to the protection of the rights of indigenous peoples.

As an integral part of the Bretton Woods Institutions that influenced most of Africa's economic development strategies, the WBG found its way into African countries via the advanced capitalist economies which, according to Babatunde, was 'a way of enhancing economic performance of the continent.'[810] The World Bank's remedial initiative is highly appropriate and welcome for the sustainable development of extractive resources in Nigeria. The economic failure recorded by African countries since their independence from the foreign development strategies requires reconsideration, which is presumed to be what the World Bank proposed in its '*Striking a Better* Balance*'.* The reconsideration might be taken as the individual effort of the World Bank to correct the mistakes of the past committed against the resource-rich countries and countries with substantial resources,[811] not only in Africa, but all over the world, whose resources have been unduly over exploited and abused.

According to the World Bank, resource-rich countries are those in which extractive industries account for more than 50 per cent of government revenue. Nigeria is one of twelve African states that meet this criterion.[812] Thus, for the African countries, the importance of state sovereignty cannot be overemphasised, prompting the dire need to legitimise the principle. Such is the case of Nigeria that adopted the sovereignty principle in its Constitution.

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[808] ibid 7.
[809] ibid.
[810] Babatunde, 'Africa's Growth and Development Strategies' 151.
[811] WBG, *Striking a Better Balance* 2.
[812] ibid.

4.7 Restitution or restoration: The need for a constitutional review in Nigeria

The Federal Republic of Nigeria is a Federation[813] of former kingdoms, empires, states, nations, and autonomous communities.[814] This explains why the 1960 Constitution of the Federation of Nigeria still stands as the authentic representation of the people's will. The ideal of sovereignty over natural resources in the 1999 Constitution first features in the economic objectives of the Nigerian state in section 16(1)(a) which provides that:

> The State shall within the context of the ideals and objectives for which provisions are made in this Constitution (a) harness the resources of the nation and promote national prosperity and an efficient, a dynamic and self-reliant economy.

Promoting 'national prosperity' through a 'self-reliant economy' in a federation such as Nigeria requires a democratic process that allows the people in their different regions or states within the federal arrangement to control and manage their individual resources and contribute to the centre, learning from the durable process of the American Federalism.[815]

Similarly, section 16(1)(b) of the Constitution states that:

> The State shall control the national economy in such manner as to secure the maximum welfare, freedom and happiness of every citizen on the basis of social justice and equality of status and opportunity.

When this section is read in conjunction with section 44(3) it reveals fair treatment of the indigenous peoples. Securing 'the maximum welfare, freedom and happiness of every citizen' can truly be achieved under the social order, but not at the expense of a particular group of people from a particular region if it is to pass as 'social justice'.

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[813] Nigeria was admitted to the United Nations as the 'Federation of Nigeria' A/RES/1492 (XV) of 7 October 1960.

[814] Itse Sagay, 'Nigeria: federalism, the constitution and resource control' 6 <http://www.nigerdeltacongress.com/narticles/nigeria_federalism_the_constitut.htm.16/7/2008> accessed 31 August 2018.

[815] Boaz, 'Property Rights and the Constitution' 348,349. A clear understanding of a Federation is the American Federalism in respect with property rights as detailed by Boaz in the *CATO Handbook for Policymakers*. The USA federalism is the acceptable and adoptable mode for many other States who confess this mode. Government power is not general powers, but the Executive Power that can only be exercised legitimately 'insofar as it is used to secure rights, and only insofar as its use respects the rights of others'. 'The Constitution establishes a government of delegated, enumerated and thus limited powers …..leaving most powers to the states or the people, as the Tenth Amendment makes clear. If we are to abide by constitutional principle, then we have to recognize that whatever power the federal government has to secure rights is limited to federal territory,' American federalism is the most acclaimed form of federalism which allows autonomy and economic independence, which Nigeria claims to emulate. However, the closest thing Nigeria has to true federalism is the 1960 Constitution of the Federation of Nigeria which is highly recommended by this thesis for Nigeria's re-consideration and adoption.

The national economy derived from such group of people cannot be shared based on 'equality of status and opportunity' and still be termed 'social justice'. For justice and fairness, the status of sharing and opportunity cannot be equal because the resources harnessed for the national economy belong to a specific group – the indigenous peoples – and not to all the people.

Clearly, the indigenous peoples are being treated unfairly for the benefit of others. If Nigeria seeks to benefit all its people, it should be willing to defend the 'Fundamental Objectives and Directive Principles of State Policy provisions for Social Order' in section 17(1) which provides that: 'the State social order is founded on ideals of Freedom, Equality and Justice'; and section 17(2)(a) which states that: 'every citizen shall have equality of rights, obligations and opportunities before the law'. But, when section 17(2)(d), which provides that: 'exploitation of human and natural resources in any form whatsoever for reasons other than the good of the community shall be prevented' is read alongside section 44(3), there appears no cohesion. It is therefore clear that the intention of section 17(2)(d) has been trumped by the autocracy of section 44(3) with the indigenous peoples as the affected victims.

However, this unfairness can be remedied, and the indigenous peoples freed from victimisation and deprivation, if and when the constitutional provisions are amended to reflect the values and choices attached to the indigenous peoples' ownership of the mineral resources under consideration. Essentially, Nigeria's 1960 Constitution embodies attributes that respond to peoples' needs through regional autonomy that represents the symbol of true federalism which Nigeria adopted at independence. If it had been sustained or improved upon, it would have been capable of resolving the issues at stake in this contestation of ownership of mineral resources. It is highly recommended by this research that Nigeria considers improving on the 1960 Constitution as the acceptable Constitution for the Nigerian Federation. Nigeria can fruitfully also be guided by lessons from the long-standing federalism of the USA. The CATO *Handbook for Policymakers*, describes American federalism in relation to property and how the federal government exercises one of the enumerated powers – the power of eminent domain.[816] The eminent domain power is evident in state practice regarding minerals, mineral oil, and gas in Nigeria.

[816] ibid. 350. The *CATO Handbook* explains the effect of eminent domain power as: 'when government acts not to secure rights but to provide the public with some good – wildlife, habitat, or a viewshed or historic preservation - and in doing so prohibits or "takes" some otherwise legitimate use,

Most of the actions of the Federal Government of Nigeria involving minerals, mineral oils, and natural gas are exercised as acts of eminent domain which sets limitations on the human rights of indigenous peoples. In the *Ogoni* case it was argued that Nigeria exercised its authority to produce oil, but the repressive and destructive actions of the military governments, along with the lack of material benefits for the local Ogoni population, constituted a violation of article 21 of the African Charter.[817] Daes subsequently affirmed the human rights of indigenous peoples in her Final Report on 'Indigenous Peoples' Permanent Sovereignty'. She states that,

> even lawful State authority must be exercised in a manner that protects and respects human rights … the State's legal authority over lands and resources of indigenous peoples may be sharply limited where these lands and resources are critical to the human rights of the indigenous peoples.[818]

For example, in the practice of executing State policy as described above in section 17 of the 1999 Constitution, the Federal Government will apply the power of eminent domain and expropriation powers in the interests of the public.

As the state has undertaken that every citizen shall have equal of rights, obligations, and opportunities, one group must not suffer for other groups to benefit grossly. It is time to consider the legal obligations of the State of Nigeria to the indigenous peoples of the Niger Delta, and to pay what is owed to them. At this point, therefore, one can repeat Daes's principal question: '[W]hether under any circumstances a State should exercise the State's power of eminent domain to take natural resources from an indigenous people for public use while providing fair and just compensation.'[819] This thesis says 'no'. Fair and just compensation for natural resources is difficult to determine because they are evolving resources in which the indigenous peoples have property rights. Therefore, for the indigenous peoples, the only means to guarantee satisfaction of the property right in natural resources is by restitution and promotion of the right to development of their natural resources, in fulfilment of

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then it is acting in part, under the eminent domain power and it does have to compensate the owner for any financial losses he may suffer. The principle here is quite simple: the public has to pay for the goods it wants, just like any private person would have to. Bad enough that the public can take what it wants by condemnation; at least it should pay rather than ask the owner to bear the full cost of its appetite…there is an old-fashioned word for that practice: it is "theft" and no amount of rationalization about "good reasons" will change that. Even thieves, after all, have "good reasons" for what they do.'

[817] Daes, Final Report on IPPSNR para 49.

[818] ibid paras 49, 50.

[819] ibid para 48. It was reported that indigenous peoples' representatives have argued in the Working Group on the draft United Nations declaration of the Commission on Human Rights that States should never compulsorily take indigenous lands or resources even with payment of compensations.

Nigeria's Social Order for equality of rights, obligations, and opportunities under section 17.

4.8 Conclusion

Sections 4.1, 4.2 and 4.3 of this chapter expounded on the concept of state sovereignty and resolved that the human rights origin of the sovereignty principle as contained in Resolution 523 (VI) and 626 (VII), both adopted in 1952, can neither be faulted nor suppressed by the absolute state sovereignty guarantee contained in Resolution 1803 (XVII). The resolve of this chapter is not for indigenous peoples in the Niger Delta to exercise absolute sovereignty over the minerals, mineral oils, and natural gas in their region, but to participate as original owners of the land and natural resources, and latterly as stakeholders, in all that concerns these resources. This includes exploration and exploitation, concessions and project agreements, and equitable benefit-sharing. This thesis supports the views of Cambou and Smis that from a human-rights perspective, state legislation must be reviewed with measures relating to indigenous people's rights to land and natural resources being the main consideration. [820] The review must also take account of international human rights law and more specifically the standards provided by the ILO C169 and the UNDRIP[821]

Further analyses, arguments, views, and propositions in sections 4.4, 4.5 and 4.6 make it clear that the solution to the conflict in the Niger Delta lies in the national recognition of the existence of indigenous peoples in the region and a parliamentary review of the 1999 Constitution of the Federal Republic of Nigeria to reflect this existence. The existence of indigenous peoples embodies rights and freedoms that Nigeria must recognise, promote, and protect. The absolutism of state sovereignty over natural resources as enshrined in the 1999 Nigerian Constitution makes this impossible. State sovereignty over natural resources has been misunderstood by many States in Africa, and as state practice, it has been constitutionally imposed to deprive the people of their property right to land and natural resources. This state practice converts all natural resources to State property in violation of article 21 of the African Charter which provides for the right of all peoples freely to dispose of their wealth and natural resources. The African Commission's jurisprudence – in

[820] Cambou and Smis, 'Permanent Sovereignty over Natural Resources' 375.
[821] ibid.

particular its findings in the *Ogoni* and *Endorois* cases – demands that States hold natural resources in trust for the peoples.

The aim of this research is to propose a legal solution to the protracted conflict over minerals, mineral oils, and natural gas in the Niger Delta. The primary solution emerging from the research so far and fully argued in this chapter, rests in a constitutional review that will reflect indigenous peoples' existence and human rights over their land and oil and gas in the Niger Delta. In support of this solution is Daes's conclusion on indigenous peoples' permanent sovereignty over natural resources. She asserts that:

> The expropriation of indigenous lands and resources for national development is a growing and severe problem. Development projects are frequently undertaken on indigenous lands and territories without indigenous consent or even consultations. In many countries, there is a need for general framework legislation to recognize and give legal protection to indigenous lands and resources. In some countries, there is a need to reform the relevant sections and clauses of the Constitution in order to achieve a desirable level of legal protection for indigenous lands and resources. [822]

Section 44(3) of the Constitution and Chapter IV on fundamental rights appear inappropriate and discriminatory. In the view of this research, there is every probability of undemocratic influence in the drafting of both the 1979 and 1999 Constitutions of the Federal Republic of Nigeria which were drafted during the military era and aimed at seizing sovereignty over minerals, mineral oils, and natural gas. Both Constitutions differ markedly from the 1960 Constitution drafted and enacted through a democratic process. This imposition of sovereignty over mineral resources has dispossessed the people of their land contrary to the colonial judicial decision in *Amodu Tijani*[823] where it was held that the land belongs to the indigenous peoples (natives), and any domestic law seeking to deal with them must recognise their ownership of land and natural resources. This decision can still hold sway for the indigenous peoples as judicial precedent and *ratio decidendi*.

The ultimate, legitimate, and effective protection of the rights of indigenous peoples must be enshrined in the Constitution. Therefore, this thesis calls for a parliamentary review of the 1999 Nigerian Constitution, to include a bill of rights which entrenches sound economic, social, and environmental rights in addition to improving civil and

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[822] Daes, Annex III 'Relevant Conclusions, Guiding Principles and Recommendations From the Working Paper on Indigenous Peoples and Their Relationship to Land' paras 7,10.
[823] *Amodu Tijani v The Secretary, Southern Provinces* His Majesty's Privy Council, before, Viscount Haldane and Lords Atkinson and Phillimore (11 July 1921).

political rights, and repealing in its entirety, state sovereignty over minerals, mineral oil, and natural gas. In the interim, there is an urgent need for a constitutional review. The onus lies on Nigerian lawmakers at the National Assembly, who have the responsibility of making good laws to fervently consider a constitutional review that would accommodate natural resources ownership and related issues. This exercise should draw on and improve upon natural resources related provisions in the former 1960 Constitution. Nevertheless, the best option is the enactment of a new Nigerian Constitution. In the event of the 1960 Constitution not being adopted and improved upon, the making of the new Constitution should be people-factored. A Constitution that will involve representatives of all peoples in Nigeria. Such people-made constitution would serve the interests of the greatest number of the Nigerian people.

Finally, the appropriate way by which the indigenous peoples can enjoy their property right in natural resources is through the exercise of their right to development of those resources. The right to development, as an inalienable right inextricably linked to sustainable development, is the human rights approach to peace and security in the Niger Delta. Therefore, the inclusion and participation of the indigenous peoples in every aspect of the development of oil and gas, achievable mainly through sustainable development, is the most effective solution to the conflict in the Niger Delta. In the next chapter, the thesis proposes what should be included in a legal framework for sustainable development of natural resources.

CHAPTER FIVE

THE LEGAL FRAMEWORK ON SUSTAINABLE DEVELOPMENT OF NATURAL RESOURCES: A PROPOSAL

5.1 Introduction

Chapter five presents a few of the essential elements argued in this thesis as a proposal to improve the existing legal framework on sustainable development in Nigeria, which will be beneficial to the indigenous peoples not only in the Niger Delta, but all indigenous peoples across the country. The proposal is presented in four interrelated and interconnected sections which form the pillars for the sustainable development structure for the well-being of the peoples of the Niger Delta.

The first section deals with the recognition of indigenous peoples for the actualisation of sustainable development and identifies three important elements of recognition. First, the legal recognition needed to rectify the constitutional omission as to the existence of indigenous peoples on the lands compulsorily acquired for oil and gas exploration and exploitation in the Niger Delta. The second addresses the social elements; while the third proposes the economic recognition necessary for indigenous peoples' participation and inclusion in all development projects that affect them. The three elements of recognition are interrelated. This section analyses how the legal, social, and economic recognition can be achieved and their importance for the inclusion of indigenous peoples in the sustainable development of oil and gas in the Niger Delta.

The second section explains the integration of sustainable development and the capabilities of indigenous peoples. Capabilities, as Sen's theory earlier discussed in section 2.3.2, are freedoms and choices by which people pursue their individual development. This section explores how capabilities provide indigenous peoples with the necessary choices and opportunities to become the focus of concern and to enjoy the social and economic benefits from all developmental projects in their communities. Therefore, this section proposes that people are at the centre of sustainable development. The section compares Nigeria's failed attempts with other sustainable development initiatives to identify the 'missing link' and the gaps which need to be addressed in future initiatives.

The third section deals with the meaningful participation of indigenous peoples in sustainable development. As in the second section, the emphasis here is on placing at the centre of development – the crucial element in the goal sought to be achieved by the proposed framework. Meaningful participation is the key to the involvement of the people in all development that affects or impacts on their lives. To make it factual and practicable, the section relies on sustainable development principles in the Rio Declaration and the African Commission's decision in the *Endorois* case. Thus, an acceptable standard of the principles of sustainable development is proposed and needs to be fully embraced in Nigeria.

The fourth section deals with the role of the State as a duty-bearer of sustainable development. The State has the onerous task of piloting the sustainable development agenda through to a successful conclusion – in short, implementation and realisation depend on the State. This section sets out some salient issues which the State must address if it is to succeed in its role as duty bearer. The State provides legislation, plans, policies, and programmes to guide, improve, and authenticate all its initiatives so that the fundamental rights and freedoms of the individuals can be duly protected in the cause of achieving the goals of development and ensuring that they are sustainable. This section proposes that the State should provide, promote, and enforce law that aim at achieving sustainable development while at the same time protecting the human rights of indigenous peoples during the process of actualising their involvement in sustainable development of oil and gas in the Niger Delta.

It is strongly recommended that the proposals in this chapter be included in Nigeria's national plans, programmes, and policies on development in order to ensure that such developments are sustainable.

5.2 Recognition of indigenous peoples for the actualisation of sustainable development

As discussed extensively in Chapter two, the recognition of indigenous peoples as owners of the land and natural resources in the Niger Delta is crucial to sustainable development. Not all the people living in the Niger Delta can lay claim to being 'indigenous', but those who can prove their ancestry and identity as 'native' according to established principles in international law qualify for this status. Native people with traditional and ancestral attachment to land, who have persistently held

their land in the face of all circumstance – eg, the current conditions in the Niger Delta – can be termed 'indigenous people(s)'. The existence of indigenous peoples is nowhere acknowledged in the Nigerian Constitution. Notable here, is section 44(3) which strips them of all rights and property. As indicated in Chapter four in addressing the constitutional denial of indigenous peoples' existence, their identity was completely obliterated. This has led to unrest on the part of the peoples who are seeking to establish some form of legitimacy for their existence as was shown in Chapter three where we discussed prolonged conflict in the region.

The Ogoni and Ijaw peoples – representing the Ilaje and all other groups who identify as indigenous peoples of the Niger Delta – have been identified as indigenous peoples by both the United Nations[824] and the African Commission,[825] the time is ripe for the Nigerian State to follow suit. Based on the self-identification of the Ogoni in the Ogoni Bill of Rights of 1990, and the Ijaw in their KAIAMA Declaration of 1998, their characterisation is established in section 2.2.6 of Chapter two above, and their indigenous status confirmed on the basis of the African Commission's criteria in the Advisory Opinion to the African Union as explained in section 2.2.5 as follows:

(d) Self-identification,
(e) A special attachment to and use of their traditional land whereby their ancestral land and territory have a fundamental importance for their collective physical and cultural survival as people,
(f) A state of subjugation, marginalisation, dispossession, exclusion, or discrimination because these peoples have different cultures, ways of life or mode of production than the national hegemonic and dominant model.

Additionally, in the *Endorois* case the African Commission, through its Working Group of Experts on Indigenous Populations/Communities, introduced a further set of four criteria by which to identify indigenous peoples as

> the occupation and use of a specific territory; the voluntary perpetuation of cultural distinctiveness; self-identification as a distinct collectivity, as well as recognition by other groups; an experience of subjugation, marginalisation, dispossession, exclusion or discrimination.[826]

These two sets of criteria for identifying indigenous peoples in Africa provided by the African Commission, are sufficiently broad to accommodate the indigenous peoples of the Niger Delta. The Ijaw and Ogoni peoples offer a perfect fit and have self-

[824] See: Daes, 'Nature and Scope of the Right of Indigenous Peoples to Own, Use, Control, and Manage their Lands, Territories, and Resources' - E/CN.4/Sub.2/2004/30 para 49.
[825] See generally: sections 2.2.5 and 2.2.6 in Chapter 2.
[826] *Endorois* case para150.

identified as indigenous peoples in Nigeria. Consequently, the African Commission in the *Endorois* case provided a broad base on which indigenous peoples can stand and claim recognition and protection of their basic human rights and fundamental freedoms.[827] The African Commission also asserted that the term 'indigenous' is 'not intended to create a special class of citizens but rather to address historical and present-day injustices and inequalities'.[828] The Commission claimed it to be, 'the sense in which the term has been applied in the African context by the Working Group on Indigenous Populations/Communities of the African Commission',[829] and in the context of the African Charter, 'the Working Group notes that the notion of "peoples" is closely related to collective rights'.[830] These are compelling attributes on which the indigenous peoples in the Niger Delta can base their claim for recognition.

Therefore, these characterisations and attributes by the African Commission and the Working Group of Experts on Indigenous Populations/Communities of the African Commission are compelling criteria necessary for recognition – and all have been met by the indigenous peoples of the Niger Delta. Consequently, the indigenous peoples of the Niger Delta are fit and proper subjects for the term 'indigenous'. This is therefore proposed as the starting point for the resolution of the conflict in the Niger Delta.

Recognition, in turn, is crucial to the attainment of the collective rights synonymous with indigenous peoples. And for this thesis, three types of recognition are proposed – legal, social, and economic recognition. These are linked to the three 'generations' of rights promoted by the African Charter: civil and political rights, economic social and cultural rights, and group and peoples' rights.[831]

5.2.1 *Legal recognition*

As earlier noted, the omission of recognition for indigenous peoples from the Constitution called for attention and it is through the Constitution that this oversight can be remedied. This calls for an amendment of section 44(3) of the 1999 Constitution of the Federal Republic of Nigeria which institutes the principle of state sovereignty over natural resources through the forced acquisition of the lands,

[827] ibid para148.
[828] ibid para149.
[829] ibid.
[830] ibid.
[831] ibid.

minerals, and mineral oil of the indigenous peoples of the Niger Delta. The legal recognition of the indigenous peoples in the Nigerian Constitution will heal the hurt and pain resulting from the denial of recognition.

The international law in the ICESCR's Preamble refers to rights derived from the 'inherent dignity of the human person', thus, the indigenous peoples of the Niger Delta cannot be denied existence on those lands forcefully acquired, as they also have inherent dignity as human persons to claim all accruable rights to their existence as such. Furthermore, joint article 1(1) and (2) of the ICCPR and ICESCR provide that, 'in no case may a people be deprived of its own means of subsistence'. This applies to 'indigenous people' as 'a people', in the interpretation of the African Commission in the *Dafur* case analysed in section 3.3.1.2, Chapter three above. In that case, the African tribe in the Dafur region in the Sudan faced gross violation of their human rights, including forced eviction from their homes. This raised the question: 'Who are a people?' to which the African Commission answered with reference to article 19 of the African Charter. The decision on article 19 underscored the provision on economic, social, and cultural development in article 22 as a collective right of the peoples. Thus, the indigenous peoples should not be deprived of their natural resources as their means of subsistence, and the rights attached to their being accorded dignity as human persons should be given legal recognition in the Nigerian Constitution. Through legal recognition in the Constitution, their human rights will be guaranteed based on international human rights law which is the bedrock of indigenous peoples' right to self-determination and their right to land, territory, and natural resources.

The legal recognition of all the indigenous peoples co-located with minerals, mineral oil, and natural gas in the nine states that constitute the Niger Delta,[832] will fill the gap created by deprivation, denial, marginalisation, and neglect that led to the conflict in the Niger Delta. It will equally serve as the foundation on which the social and economic recognition entrenched in the state's policies, plans, and programmes on the sustainable development of natural resources will be built.

[832] The nine oil-producing states in Nigeria are: Akwa Ibom, the largest oil producer with 31.4%(504 000 BPD); Delta 21.56% (346,000 BPD); Rivers 21.43% (344,999 BPD); Bayelsa 18.07% (290,000 BPD); Ondo 3.74% (60,000 BPD); Lagos 2.64% (40,000 BPD); Edo 2.06% (33,000 BPD); Imo 1.06% (17,000 BPD); Abia 0.68% (11,000 BPD), all located in the Niger Delta region. Available at Climate Scorecard: <https://www.climatescorecard.org/2019/05/nigeria-relies-on-oil-despite-having-large-coal-reserves/> also available at Oil producing states in Nigeria (2021) <https://nigerianinfopedia.com.ng/oil-producing-states-in-nigeria/> accessed 2 April 2021.

5.2.2 *Social and economic recognition*

The spill-over effect of the constitutional or legal recognition is social and economic recognition. Social and economic recognition is attributable to indigenous peoples' peculiar social, cultural, and spiritual way of life rooted in their lands, their relationships, and their interaction with natural resources and the environment. In Chapter two, we characterised the Ogoni and Ijaw peoples of the Niger Delta as 'indigenous people'. This laid the foundation for other groups who may self-identify as indigenous people in Nigeria – and particularly in the Niger Delta which is the focus in this research.

Furthermore, economic recognition engenders sustainable-development benefits to impact on the lives and well-being of the indigenous peoples through the three dimensions of economic, social, and environmental rights. Additionally, economic recognition requires the inclusion and participation of indigenous peoples in developments going on in their communities in fulfilment of their property right as established in the arguments in this thesis. This will fill the gap of subjugation, marginalisation, dispossession, exclusion, and discrimination which the indigenous people have suffered over the past few years in the Niger Delta. The combination of legal, economic, and social recognition here proposed will ensure that indigenous peoples enjoy the three generations of rights enshrined in the African Charter – civil and political rights, economic, social and cultural rights, and group and peoples' rights as discussed in the previous section. This, too, as proposed in this thesis, should be provided in the Nigerian Constitution.

Among the second and third generations of rights are the right to a healthy environment and to development respectively, which, as discussed in Chapter two under the 'concept of sustainable development', have become the rights of peoples, including indigenous peoples. This same section, together with the Rio and Stockholm Declarations – both in their Principle 1 – project 'humans' as the nucleus of sustainable development, making their dignity and well-being a significant factor in the arena of natural-resource development. For this reason, Nigeria is encouraged to recognise and support the identity, culture, and interests of indigenous peoples to ensure their effective and meaningful participation in sustainable development which assuredly will improve the lives of the indigenous peoples of the Niger Delta and entrench their social and economic recognition.

5.2.3 *Essence of indigenous peoples' recognition in sustainable development*

The proposition of legal, social, and economic recognition for indigenous peoples is crucial to achieving sustainable development, not only in the Niger Delta but in Nigeria generally. As established in Chapter four, the right to natural resources is the right of peoples, and it ought to be endorsed as such in the Nigerian Constitution. Ironically, instead of being listed as peoples' right, it is listed under the fundamental rights in the Constitution, intended to be acquired by force for the benefit of the State. This act constitutes a violation as, generally, human persons have rights and States have a duty to protect those rights, including the right to natural resources of the people in Nigeria. It is not correct to list a right accruing to the people as a State's right. This absolutist tendency is discussed in Chapter four section 4.3.1 where in accordance with Maritain's philosophy, it is established that sovereignty of the people is a fundamental human right that cannot be transferred to the state.[833] This is a mistake which demands an amendment to the Constitution. Thus, all economic, social, cultural, and developmental rights are peoples' rights and must be listed under the fundamental rights in the Nigerian Constitution.

Consequently, as permanent sovereignty over natural resources vests in the people, as argued in Chapter four, recognition should be given in the Constitution to the people as owners of the natural resources. As in Hobbes's philosophical 'Leviathan',[834] discussed under 'philosophy of State Sovereignty' in section 4.3.1 of Chapter four above, Nigeria ought to have limited itself to enforcing the law and protecting the peoples, and not override the rights of the peoples by force of law as is the effect of the provision in the Constitution. This principle of international law is stated in Chapters three and four above, in discussing the African Commission's jurisprudence which has established two principles governing the protection and enforcement of indigenous peoples' right to property. There can be no protection without recognition. The existence of indigenous peoples on the lands on which natural resources are discovered, which hitherto has been expunged from all related legislation as explained in Chapter four above, should be acknowledged and legally recognised. This will fill the gap that has been created by the dearth of recognition and protection and open the way for an enhanced recognition of indigenous peoples

[833] Maritain, *Man and the State* 16, 24.
[834] Hobbes, *Leviathan, Or, The Matter, Form, and Power* 'The Introduction' 1-2.

and their rights to the land and natural resources. This will entitle them to inclusion and participation in the development of those natural resources as necessities for sustainable development.

It is expedient, however, first to consider legal recognition of the existence of the indigenous people as traditional owners and occupiers of the lands and natural resources mentioned in section 44(3) of the 1999 Constitution of the Federal Republic of Nigeria. It will be just and fair to acknowledge that indigenous peoples were the owners of this property, although the federal government of Nigeria has the power under the 1999 Constitution to acquire the natural resources. This can be fairly effected by means of a constitutional review as provided for in section 9(2) and (3) of the Nigerian Constitution. A review of and/or amendment to section 44(3) of the Constitution to provide for the distinct and clear recognition of indigenous peoples as part of the Nigerian polity, and to recognise the ownership of and connection to their lands (all that is on top of, within, and under the lands) is necessary in order to lay a foundation for better protection of the rights of these groups of people. It is however notable, and is pointed out in this chapter, that although this thesis sets out to remedy the deprivations suffered by the indigenous peoples of the Niger Delta, the resulting proposals will be available to all indigenous peoples with the same need in Nigeria. All indigenous peoples in Nigeria deserve full recognition and protection of all human rights.

The consequence of the legal recognition discussed above is that there will be social and economic recognition, which will then accord ownership of lands and natural resources to all peoples within their ancestral communities. This can be further protected in the Constitution. An example where this has been achieved is article 244 of the Constitution of the Republic of Uganda (2006) which, in addressing Minerals and Petroleum provides that:

> (1) Subject to article 26 of this Constitution, the entire property in, and the control of, all minerals and petroleum in, on or under, any land or waters in Uganda are vested in the Government on behalf of the Republic of Uganda.
>
> (2) Subject to this article, Parliament shall make laws regulating –
>
> > (a) the exploitation of minerals and petroleum.
> > (b) the sharing of royalties arising from mineral and petroleum exploitation.
> > (c) the conditions for payment of indemnities arising out of exploitation of minerals and petroleum, and
> > (d) the conditions regarding the restoration of derelict lands.

> (3) Minerals, mineral ores and petroleum shall be exploited taking into account the interest of the individual landowners, local governments and the Government.

Notwithstanding the similarity between this provision and section 44(3) of the Nigerian Constitution, the two can be distinguished in that the Republic of Uganda refers to land ownership in its Constitution thereby according the people recognition – albeit without specifically referring to 'indigenous peoples' as such or indicating how their lands should be dealt with. It accords landowners property rights through recognition in the Constitution. What this infers is a form of partnership based on legal recognition, which entrenches justice and fairness alongside the right to property and makes constitutional provision for compensation and benefit-sharing. In this way landowners receive the recognition due to them and their interests adequately protected.

A further example can be found in the Constitution of the Republic of South Africa, 1996, where the property right is addressed in The Bill of Rights – Chapter 2, section 25(2) and (3). The sub-sections mandate the state to pay 'just and equitable' compensation which reflects an equitable balance between the public interest for which the land is being acquired, and the interests of those affected. The South African Constitution does not provide for the acquisition of land by force, and also does not single out minerals, mineral oils, and natural gas as natural resources for compulsory acquisition. In section 25(2)(*a*) the provision is germane to expropriation of property intended for a public purpose or in the public interest. Public interest is further explained in section 25(4)(*a*) to include the nation's commitment to land reform and to reform to bring about equitable access to all South Africa's natural resources. And, whatever the expropriated property is being used for, section 25(2)(*b*) provides for compensation for those affected, as to the amount and time and manner of payment, that must be agreed to, or approved, or decided by a court. This points to a mutual settlement for the use of property without force.[835]

What emerges from the South African constitutional provision is the recognition accorded the human person, including provision for the protection of his or her interests within that law. This consideration is balanced on the understanding of the

[835] This section on compensation is crucial for the protection of human rights of the affected people and communities whose lands are being explored for mineral resources. This is what this thesis advocates for inclusion in the Nigerian Constitution. On its own, compulsory acquisition of mineral resources is gross violation, and non-compensation of such acquisition an additional violation. The Nigerian Constitution requires a fundamental review because expropriation without compensation is a gross violation of human rights. Nigeria requires subtlety in its provisions on natural resources taking a cue from the South African Constitution. This constitutional review is recommended by this thesis.

protection of property right projecting the equilibrium of legal, social, and economic recognition that supports sustainable development. Nigeria should be guided by these constitutional arrangements in preparing a more comprehensive and acceptable human rights chapter in its Constitution that must include the economic, social, property, development and environmental rights necessary for achieving sustainable development. This will be of great benefit to the indigenous peoples, even if their rights are not directly included in the Constitution and align with the essence of the recognition of indigenous peoples in sustainable development.

In light of the proposal in this section, the Nigerian Land Use Act of 1978 requires mention. Failing a repeal of the Act, it should be reviewed to reflect the ownership status of all ancestral community land which reflects freehold tenure that primarily includes indigenous community lands. The law should detail a process of negotiation and endorsement for land and natural resources with indigenous communities whenever land needs to be acquired for public use by the state.

It should be noted that what is proposed in this section, and generally in this chapter, stand as fillers to build up and improve the lacunae in any existing legal framework to meet acceptable global standards for the sustainable development of natural resources. It also offers valuable guidelines for national development policies and programmes aimed at the sustainable development of natural resources that should include indigenous peoples in Nigeria. This section intends to establish an effective mode of the legal, social, and economic recognition of indigenous peoples as one of the pillars necessary to realise sustainable development of natural resources in Nigeria.

5.3 Integrating sustainable development and the capabilities of indigenous peoples

The concept of sustainable development reveals that it is an improved developmental phenomenon with an endless chain of reliance on natural resources, giving it an edge over and above previous developmental theories as discussed in Chapter two. This thesis contextualises development as flourishing within the ambit of growth and advancement for all succeeding generations. Notwithstanding the enormity of programmes and reports on sustainable development, Nigeria's unregulated exploitation and production of oil and gas has been detrimental to its economic growth and the well-being of its people – and in particular, the indigenous peoples of the Niger Delta. As discussed in Chapter two, the well-being of the

indigenous peoples can only be fully realised once sustainable development is integrated under Amartya's capabilities approach. The legal framework proposed provides content for achieving the sustainable development of natural resources with the aim of filling identified developmental gaps in existing national initiatives. The framework will also promote durable initiatives for co-operation in good faith between the state and indigenous peoples, in a spirit of partnership in fulfilling the principles of sustainable development in the Niger Delta.[836] The integration of capabilities represents the second pillar crucial to the sustainable development structure proposed in this chapter.

5.3.1 *Nigeria's attempt at sustainable development: the missing link*

In the absence of an exclusive legal framework on sustainable development, or an environmental legislation, Nigeria has over the years packaged most of its sustainable development initiatives in various national programmes and agenda in an attempt to meet its commitment to the global sustainable development vision and goal. But there is a missing link. The following review of three earlier Nigerian initiatives helps to identify the missing link in the way of achieving the desired goal.

5.3.1.1 'The 2016 Change Agenda'[837]

The Agenda was expected to be a citizen's guide to understanding the Federal Government's policy on how it intends to match the budget with the intended development programme for that year. The Agenda was expected to present a clear view of the vision, operations, and means of processing the number of measures undertaken, and how they would be implemented in the 2016 budget. The Agenda represented a notable endeavour by the government and a sound attempt at fulfilling its economic development and social inclusion programme for the year 2016. The Agenda aimed to have a positive impact for the peoples of Nigeria in that it was intended 'to create a more diversified, sustainable and inclusive economy which releases the latent potential of our people, communities and natural resource endowments across the nation's federating States'.[838] It could, therefore, have introduced change by setting out how the budget for that administrative year would

[836] Rio Declaration Principle 27.
[837] 'The 2016 Change Agenda: A Citizen's Guide to Understanding FGN Economic Policy & The 2016 Budget and Strategic Implementation Plan for the 2016 Budget of Change', Ministry of Budget & National Planning, April 2016.
[838] ibid 1.0 Introduction 15.

be expended and fully executed. Thus, it truly intended a change, but it failed to achieve that change because, it did not reach nor impact the people that need it most, the indigenous people, who have rights and interests in the natural resources.

The Agenda also represented a laudable and novel gesture by a Nigerian government, designed to inform the public of the proposed economic policy and spending. But the Agenda entirely excluded any role for the people or how they would be impacted by the development through, for instance, what it classified as 'Policy Fundamentals'. Four main areas were categorised as policy fundamentals of which 'Critical Infrastructure' was one, with 'Public Private Partnerships' (PPPs) as a sub-category.[839] Now, the issue of concern here is that under PPPs involving mega projects, the land and communities of indigenous peoples would have been affected, but no mention was made of how they were to be protected anywhere in the Agenda. Another interesting category that could answer for capabilities and choices of indigenous peoples in sustainable development was the 'Social Inclusion & Job Creation', with sub-categories 'Inclusive Growth', 'Wealth Creation', and, 'Targeted Poverty Reduction Initiatives'. These initiatives ought to have been targeted at particular groups for effective inclusion and meaningful participation, which the Agenda failed to mention.

This review has simply picked certain of the critical contents of the Agenda to reveal areas that would have directly impacted on the lives of indigenous peoples, the poor, and other vulnerable groups, but failed to do so. For the purpose of implementing a development agenda which is intended to be sustainable, Nigeria should include and specifically identify those peoples and groups within the immediate vicinity, who have peculiar needs as primary beneficiaries of such plans and initiatives, and who inevitably will be affected by such development. That is the missing link.

5.3.1.2 The Nigeria Economic Recovery and Growth Plan 2017-2020 (ERGP)[840]

In its vision, the ERGP claimed to provide 'a blueprint for the type of foundation that needs to be laid for future generations, and focuses on building the capabilities of the youth of Nigeria …'[841] Although the ERGP's focus on preparing future generations

[839] The 2016 Change Agenda, 'Reflating & Repositioning the Economy for Change' 8.
[840] Nigeria Economic Recovery and Growth Plan 2017-2020 (ERGP) <https://www.tralac.org/documents/resources/by-country/nigeria/1806-nigeria-economic-recovery-and-growth-plan-2017-2020-march-2017/file.html> accessed 11 October 2020.
[841] ibid 14.

to take over and 'take the country into the future'[842] is directed at the youth, the youth should not have been the sole beneficiaries of the economic recovery plan in that in its vision national growth involves and should include other vulnerable minorities and groups. Any attempt to grow the economy should be all-encompassing and fully inclusive of these groups in order to achieve the desired 'sustainable accelerated development'[843] envisaged in the Growth Plan – bearing in mind that most Nigerians fall below the poverty line.[844] Nigeria can then advance to change its 'national economic trajectory in a fundamental way'[845] through a socially inclusive economic initiative that reduces poverty and creates jobs for most of the vulnerable people.

It is the view of this thesis that the best approach to achieve growth and economic recovery is by means of capabilities, where the needs, values, and choices determine human development; and human development, in turn, serves to promote sustainable development. Thus, the capabilities approach can justify the ERGP initiative of 'Investing in our people'.[846] While it should be acknowledged that the initiative is intended to improve access to quality and affordable healthcare and education, to foster social inclusion and promote job creation, and also to protect the environment, it has limitations. The issues raised in the review constitutes some of the limitations. Though, with dedicated implementation, this initiative could have improved the general well-being of the Nigerian people, especially if it was implemented to the benefit of the indigenous peoples in the Niger Delta who are in dire need of economic recovery and growth. However, the Growth Plan must be commended as a laudable effort on the part of the Federal Government. Though it terminated in 2020, it deserves to be continued as a growth plan for annual implementation. Therefore, this thesis recommends a renewal or extension with a view to include the attributes and factors identified in this section and in this chapter

5.3.1.3 The Nigeria Vision 20:2020 (NV20:2020)[847]

The NV20:2020 released its First National Implementation Plan (NIP-1) covering the period 2010–2013.[848] The Plan stated Nigeria's vision of becoming the economy

[842] ibid.
[843] ibid 'Petro Violence' and 'Partnership Development' 25.
[844] ibid.
[845] ibid.
[846] ERGP 99.
[847] NIGERIA VISION 20:2020, Abridged Version 12 December 2010 <https://nigerianstat.gov.ng/pdfuploads/Abridged_Version_of_Nigeria%20Vision%202020.pdf> accessed 15 October 2020.

ranked twentieth in the world by the year 2020.[849] The NV20:2020 registered two broad objectives: to 'make efficient use of human and natural resources to achieve rapid economic growth'; and to 'translate the economic growth into equitable social development for all citizens'.[850] In the view of this thesis, those objectives cannot be achieved without the participation, or the free, prior, and informed consent of the indigenous peoples as owners of those natural resources. Though, the NV20:2020 is presented as a national vision, it projects plans and initiatives for development that embrace sustainable development principles in all its forms. It is also aligned to achieving the United Nations Millennium Development Goals (MDGs) by its 2015 deadline while striving to attain its vision by 2020 as part of its 'Plan Thrust'.[851] However, the gap of making indigenous peoples the central concern of such development projections need to be fulfilled before Nigeria can achieve the desired goal – this is the missing link.

Furthermore, with the intended projection of being among the world's best economies, Nigeria's developmental aspiration is not in doubt. Thus NIP-1 rested on three pillars: guaranteeing the productivity and well-being of the people; optimising key sources of economic growth; and fostering sustainable social and economic development.[852] This aspiration clearly shows that Nigeria is well aware of the sustainable development rules and principles but avoids particularity regarding certain groups of people who are crucial to the realisation of the aspiration, and whose rights need to be protected. Best economies are possibly achievable if and when the right of the people to development is well protected through participation and involvement in developments that affect them.

Consequently, with the experience of hindsight, the dynamism of the NV20:2020 was thoroughly proclaimed in the NIP-1 with the intention of ensuring its successful implementation by reviewing experiences of previous national plans and strategies and learning from the 'inherent weaknesses in [their] implementation and execution'.[853] It is hoped that in the future, all national plans and initiatives for

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[848] ibid. The 1st NV20:2020 National Implementation Plan (2010-2013) Volume 1: The Vision and Development Priorities; Volume II: Sectoral Plans and Programmes; Volume III: Sectoral Plans and Programmes, May 2010.
[849] The 1st NV 20:2020 NIP: Volume I, Executive Summary viii.
[850] NIGERIA VISION 20:2020 – Abridged Version 'Section One: What is Nigeria Vision 20:2020?' 2.
[851] The 1st NV20:2020 NIP Volume 1 *ix.*
[852] The 1st NV20:2020 NIP 3.2 'Goals and Strategies' 38.
[853] The 1st NV20:2020 NIP 'Review of Experiences in Implementing Previous National Plans and Strategies' 60, 61.

sustainable social and economic development will shine the light on all categories of peoples.

From the above analysis, it is clear that Nigeria promotes visionary initiatives in the expectation of achieving a sound economy, good governance, and sustainable development as vehicles by which to transform the social and economic lives of its citizens. Nigeria has failed to recognise that if development is to be sustainable, people must be at its centre – even more so when the development involves natural resources. In this light, Nigeria is encouraged to address the developmental gap by prioritising human development and capabilities as crucial factors in the achievement of sustainable development and all its laudable initiatives – in short, it must 'fix' the missing link.

In an endeavour to fix the missing link, it is important to note that in Chapter four above, we found that indigenous peoples are not in competition with the state; all they seek is for the state to recognise and acknowledge their ownership of natural resources and their right to development. The recognition here proposed is the only way in which the peoples' sovereignty over natural resources can be aligned with the development initiated by the government as reflected in the Federal Government's agenda. Thus, the integration of the capabilities of indigenous peoples into oil and gas development in the Niger Delta requires serious consideration – if taken up in the law it will ultimately ease the tension and fill the gap of mistrust and deprivation in the Niger Delta.

The legislative acceptance of indigenous peoples' rights over their natural resources, argued and established in various chapters of this thesis, and proposed in this chapter, will, if actualised, set Nigeria on the path to achieving its collective developmental aspiration. Finally, based on the conceptualisation of sustainable development and the Sustainable Development Goals (SDGs) principles in Chapter two, and the goal of this thesis to propose a legal framework, it is important for Nigeria to integrate the legal, social, and economic recognition of indigenous peoples in all future development plans and strategies[854] as reviewed in this section, and improve implementation using the legislative instruments discussed in the following section.

[854] Ngang, 'Sustainable right to development governance of natural resources in Africa'

5.3.2. *Legislative requirements for sustainable development in Nigeria*

Integration of environmental protection and development is the backbone of sustainable development as established in Chapter two under the concept of sustainable development. The viable implementation of sustainable development requires certain legal instruments, some of which are discussed in this section.

5.3.2.1 National Environmental Law[855]

As a priority, Nigeria should enact a national environmental law to reflect the environmental and developmental context of its peculiar environment. This law should be adaptable to the Niger Delta environmental requirements for purposes of oil, gas, and minerals development,[856] and be both applicable and enforceable in the pursuit of justice in Nigerian Courts.

This thesis acknowledges Nigeria's efforts at protecting the environment through legislative enactments. Notable among the legislation that established environmental regulatory agencies are the National Environmental Standards Regulations and Enforcement Agency (Establishment) Act 2007 (NESREA) and National Oil Spill Detection and Response Agency Act 2006 (NOSDRA), earlier discussed in section 3.4.4, which would have been strong institutions for the promotion of healthy environment in Nigeria had they been autonomous in their operations. Other relevant Nigerian legislation on environmental protection, identifiable with this research are: the Environmental Impact Assessment Act (Cap E12 LFN 2004)' (EIA) meant for promoting sustainable development; Nigerian Minerals and Mining Act 2007, which repealed the Minerals and Mining Act No. 34 of 1999; Harmful Waste (Special Criminal Provisions etc) Act (Cap H1 LFN 2004).; Endangered Species (Control of International Trade and Traffic) Act (Cap E9 LFN 2004); National Park Services Act (Cap N65 LFN 2004); and Water Resources Act (Cap W2 LFN 2004).

Nigeria's sense of duty for good environment prompts the making of policies on the environment. The most recent being the National Policy on the Environment (Revised 2016) (NPE 2016)[857] which revised the 1999 version that revised the first

[855] Rio Declaration Principle 11, 'States shall enact effective environmental legislation…'.
[856] Rio Declaration Principle 11, 'Environmental standards, management objectives and priorities should reflect the environmental and developmental context to which they apply…'.
[857] NIGERIA: National Policy on the Environment (Revised 2016) http://extwprlegs1.fao.org/docs/pdf/nig176320.pdf

national policy of 1991. In its introduction, the NPE 2016 explains that the revision becomes necessary 'in order to capture emerging environmental issues and concerns' and its purpose 'is to define a new holistic framework to guide the management of the environment and natural resources of the country' [858]

The enactment of the above-mentioned legislation and the national policy on environment is derived from section 20 of the Constitution as confirmed in the NPE 2016 that,

> In addition to the existing 1991 and 1999 draft policy documents, this Policy derives its strength from the fundamental obligation for the protection of the environment as stated in section 20 of the Constitution of the Federal Republic of Nigeria 1999 which provides that the "State shall protect and improve the environment and safeguard the water, air and land, forest and wild life of Nigeria". In addition, Nigeria is party to several international treaties and conventions governing environmental issues. It is on the combined thrust of these instruments that the National Policy on the Environment rests. "[859]

From the above statement, it is clear Nigeria is not unmindful of the non-inclusion of the economic, social and cultural rights which includes the environmental right as human rights in the constitution. For the government, the execution of the policy provides the needed environmental protection to which some scholars agree. For example, Ugoh and Ukpere supports that 'the federal government through its various environmental policies have intervened towards ameliorating the agony of the oil communities'.[860] But making policies and not promoting human rights has grave consequences. Some of these consequences have been identified by some scholars such as Ogunba who noted that, 'it is indeed regrettable that serious environmental deterioration continues in the form of marine and groundwater pollution, in spite of national and state environmental policies, NESREA and its numerous regulations, and other environmental laws.'[861] This could be associated with the non-inclusion or involvement of the concerned people in its orientation.[862] Similarly, Wonah complained of 'the undemocratic and corrupt nature of the Nigerian state' which

[858] ibid "Introduction" 6.
[859] ibid.
[860] Ugoh and Ukpere, 'Environmental Policy in Nigeria'151.
[861] Ogunba, 'An Appraisal of the Evolution' 693.
[862] Eneh and Agbazue, 'Protection of Nigeria's Environment' 490-497.

rendered impotent the environmental policy that makes the achievement of sustainable development seem like a mirage.[863]

While according to NPE 2016, the policy goal is 'to ensure environmental protection and the conservation of natural resources for sustainable development', and its strategic objective is 'to coordinate environmental protection and natural resources conservation for sustainable development',[864] they remain what they are, programmes for action with no enforceable legal implications. In other words, they are not laws and are not contestable in the Court.

Policy is a guideline for actions, it is not law, and as Lowi ascribes, 'law is formal; policy is real'.[865] Further distinction shows that - 'Policy is the outlines of what a government is going to do and what it can achieve for the society as a whole….. Laws are set standards, principles, and procedures that must be followed in society. Law is mainly made for implementing justice in the society.' [866] Lowi also offers some explanations between the two that, 'in a democracy, "law" sounded too official, unilateral, hierarchical, authoritative, and bordered on authoritation. Policy appeared softer, more human, and not as divine.'[867] And that, "law" seems not only too authoritarian for a democracy, but also too close to permanent for a liberal state.'[868] Perhaps, that explains the reason why governments prefer policies to law – flexibility. Further on the nexus between policy and law, Lowi differentiates that, there would be certain degree of distance between the formal "law" and the real "policy". But in all situations,

> 'most of all in democratic governments, the distance between the formal and the real can be taken as an operational definition of illegitimacy. Policy is the informal side of government, the real statement of what government actually does. But policy should be tolerated, not embraced, and even so, tolerated only as long as it knows its place: as the servant of the formal rule of law.'[869]

Therefore, sifting through the arguments, this thesis concludes that law is a necessity. The law will hold down the government to its duties and responsibilities. More importantly, an environmental law as legal authority to the people and the state will produce healthy and satisfactory environment.

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[863] See generally: Wonah, 'The State, Environmental Policy ' 25-40.
[864] ibid '3. Goals, Objectives and Guiding principles' 12.
[865] Lowi, 'Law vs. Public Policy' 500.
[866] See: 'Law v Policy, What's the Difference?' <Law vs Policy. What's the Difference? – Career & Internship Center | University of Washington (uw.edu)> accessed 31 January 2022.
[867] See n 863. 499.
[868] ibid.
[869] ibid 501.

An all-inclusive environmental law would provide both human right and environmental protection to the people. Environmental protection is a human right and its promotion, implementation and enforcement are attainable by the binding force of law, the environmental law. Environmental law is expected to provide legal backing for sustainable development. Regardless of the efficacy of environmental and sustainable development policies, an enabling law would still be required to enhance the enforceability and justiciability, the law being the legal means of attaining justice.

The environmental law should be an embodiment of provisions that protect right to healthy environment. As a human right, provided for in article 24 of the African Charter, the right to a healthy environment is the entitlement of the indigenous peoples of the Niger Delta.[870] This becomes even more compelling in light of the duration of the unhealthy environmental conditions with which they have had to contend with, despite having reported the ecological destruction of their environment to the international community during the Rio Earth Summit in June 1992.[871] This environmental distress involving unregulated environmental issues, uncontrolled environmental pollution, land destruction, and disregard of the Rio Report, resulted in devastating consequences captured in the UNEP Report on Ogoniland[872] and cannot be allowed to continue. As sustainable development cannot be achieved without environmental protection, which constitute an integral part of the development process, and cannot be considered in isolation, the national environmental law will serve a good purpose. The envisages national environmental law will provide the required protection enforceable in a court of law.

5.3.2.2 National Law on Liability and Compensation for Pollution and Environmental Damage[873]

The Niger Delta is the epicentre of environmental decay resulting from land, air, and water pollution. If international law recognises the need to compensate for pollution, then the indigenous peoples of the Niger Delta are entitled to compensation and

[870] Chenwi, 'The Right to a Satisfactory, Healthy, and Sustainable Environment in the African Regional Human Rights System'.
[871] Douglas and Okonta, 'Ogoni People of Nigeria versus Big Oil' 155.
[872] UN Environment Programme: Environment assessment of Ogoniland Report.
[873] Rio Declaration Principle 13, 'States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage…'.

Nigeria should enact a law to that effect. As municipal law, national liability and compensation legislation should focus on the victims of pollution and other environmental damage resulting from exploration, exploitation, and pipeline transportation of oil and gas. The compensation must be in line with international standards for compensation resulting from pollution such as in the conventions on pollution and compensation that Nigeria has ratified and domesticated[874] for the maritime and bulk carriage of oil.[875] The standard of such compensations must restore the 'victims' and the communities to the position they were in before the pollution. The 'polluter pays' principle should apply to the pollution of the Niger Delta. Nigeria must be ready and willing to protect the indigenous peoples and their communities from the polluters by promoting the internalisation of environmental costs and the use of economic instruments to apply the principle that, 'the polluter should, in principle, bear the cost of pollution'.[876] The fact that international law provides for cases of pollution to be compensated,[877] and there are established cases where such compensation has been awarded,[878] shows that the indigenous peoples of the Niger Delta are also entitled to compensation for any damage to their environment. It is the duty of the Nigerian state to ensure such a legal regime is in place.

[874] According to Rio Declaration Principle 13: 'States shall also cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction.' Such are the international liability and compensation laws listed in the next footnote.

[875] International law created on liability and compensation for oil pollution from ships, which Nigeria has domesticated are: (a) International Convention on Civil Liability for Oil Pollution Damage (Ratification and Enforcement) Act 2006 – (Convention of 1969, thereafter amended in 1976 and 1992) this Act ensures that compensation is available to persons who suffer damage caused by pollution resulting from the escape or discharge of oil from ships; (b) International Convention on the Establishment of An International Fund for Compensation for Oil Pollution Damage 1971 As Amended (Ratification and Enforcement) Act 2006 – the Convention applies to damage caused in the territory including the territorial sea of a contracting state; (c) International Convention for the Prevention of Pollution from Ships 1973 and 1978 Protocol (Ratification and Enforcement) Act 2007.

[876] Rio Declaration, Principle 16. The 'polluter-pays' principle makes it mandatory for polluters to bear all responsibility for damages they cause.

[877] *Assuranceforeningen Gard Gjensidig v The International Pollution Compensation Fund* [2014] EWHC 1394 (Comm) (07 May 2014); *Landcatch Ltd v International Oil Pollution Compensation Fund* [1999] Scot SC 116 (19 May 1999). Nigeria is party to the Convention that established the International Fund for Compensation for Oil Pollution Damage, as listed in fn 760 above, and her people must benefit from the established fund as evidenced in these two cases. Nigeria must encourage indigenous groups and others as victims of oil pollution to process their claims against damages by making available the enabling legal resources and aid in the country.

[878] *Turkevei Tejtermelo Kf v Orszagos Kornyezetvedelmies Termeszetvedelmi Fofelugyeloseg* (Environment-Air Pollution-Judgment) [2017] EUECJ C-129/16 (13 July 2017).

Sustainable development is directed, in particular, at the environmentally vulnerable to prioritise their special situations and needs.[879] The indigenous peoples of the Niger Delta qualify for this special treatment.

5.3.2.3 Reduction and Elimination of the Unsustainable Pattern of Production and Consumption of Oil and Gas[880]

Though soft law, the Rio Declaration has strong persuasive force in the implementation of effective sustainable development. There should be a legal provision on the elimination of unsustainable patterns of production and consumption of oil and gas in the Niger Delta. This is the process of integration discussed in Chapter two for the required integration of environmental protection into development as required for sustainable development. The newly enacted Petroleum Industry Act, 2021[881] is to provide legal, governance, regulatory and fiscal framework for the Nigerian Petroleum Industry, the development of Host Communities and other related matters. The PIA will take over the Nigerian National Petroleum Corporation Act, 1977[882] within a specified time and assume all its responsibilities. Hitherto, the NNPC had been the sole controller of oil and gas industry in Nigeria, in whom all issues relating to exploration, exploitation, and regulation were concentrated. The NNPC had the duty of

> (i) exploring and prospecting for, working, winning or otherwise acquiring, possessing and disposing of petroleum; (ii) refining, treating, processing and generally engaging in the handling of petroleum for the manufacture and production of petroleum products and its derivatives.[883]

As under the Constitution, the human persons within the vicinity of exploitation enjoyed no recognition in NNPC's legal apparatus. The NNPC law as it were, did not recognise human persons' existence in those fields being explored and exploited, especially the indigenous peoples who must be treated as development partners. This crucial gap is expected to be filled in the functions of the new PIA within the provisions for Host Communities Development.[884] In order to achieve sustainable development and a higher quality of life for the indigenous peoples in the

[879] Rio Declaration, Principle 6.
[880] ibid Principle 8.
[881] Petroleum Industry Act, 2021 (Act No. 6) enacted by the National Assembly of the Federal Republic of Nigeria, 6 August 2021.
[882] Nigerian National Petroleum Corporation Act 33 of 1977 – Chapter 320 Laws of the Federal Republic of Nigeria, 1990.
[883] NNPC Act s 5.
[884] See n 879 – 'Chapter 3 Host Communities Development'.

host communities, the Petroleum Industry should eliminate unsustainable patterns of production and consumption of oil and gas.[885] Furthermore, through its regulatory function it should impose the same responsibility on oil corporations involved in Nigeria's oil production. This is a sustainable development principle intended to control excessive production patterns with cumulative environmental damages that fail to be checked due to weak institutional environmental regulations as observed in the Niger Delta. The sustainable development principles mentioned in this section is strongly recommended for adoption and implementation by the Petroleum Industry on assumption of its national duty of oil and gas development and regulation in Nigeria.

5.3.2.4 Environmental Impact Assessment (EIA)

The EIA is a further sustainable development principle by which to assess whether a project will have a significant adverse impact on the environment [886] and how to avoid such devastation or mitigate the hidden risks. The Environmental Impact Assessment Act, 1992[887] is based on article 14 of the Convention on Biological Diversity (CBD) and complies with CBD-COP 6's Decision VI/7 which serves as a guideline for environmental impact assessment legislation and/or process.[888] The Act indicates Nigeria's commitment to sustainable development as explained in Chapter three. It is important here to emphasise the need for proper implementation of this process through efficient application of the EIA to achieve the desired sustainability of all natural resource development projects in Nigeria. Had it been meaningfully implemented, the EIA process could have substantially prevented the environmental devastation in the Niger Delta. As the results of an EIA are subject to the decision of a competent national authority, strong institutional will is required to ensure successful implementation as evidence of compliance with this important principle of sustainable development. There is, therefore, a clear need to strengthen the institution responsible for environmental impact assessment to ensure sustainable development in Nigeria.

[885] Rio Declaration Principle 8.
[886] ibid Principle 17.
[887] Environmental Impact Assessment Decree No 86 of 1992.
[888] Convention on Biological Diversity, COP 6 Decision VI/7, 'Guidelines for Incorporating Biodiversity-related Issues into Environmental Impact Assessment Legislation and/or Process and in Strategic Environmental Assessment'.

5.3.2.5 Environmental rule of law for achieving sustainable development

Within the context of sustainable development, the rule of law is an enabling process for viable and durable environmental protection. The environmental rule of law which is here proposed as Nigeria's ultimate environmental driver, by which and through which sustainable development can be fully actualised, focuses on and addresses the harm caused by the fragmented state of environmental governance which ensures compliance with, and give life to environmental legislation.[889] The definition of environmental rule of law has three components: law should be consistent with fundamental rights; it should be developed inclusively; and it should mandate compliance and be fairly applied to promote accountability in both theory and practice.[890] When applied in the environmental context, the environmental rule of law is defined as holding 'all entities equally accountable to publicly promulgated, independently adjudicated laws that are consistent with international norms and standards for sustaining the planet'.[891] Herein lies the recommendation of this thesis for Nigeria, to address 'the full range of environmental challenges including climate change, biodiversity loss, water scarcity, air and water pollution, and soil degradation'.[892]

Environmental law requires more than theory, it must demand effective compliance and conform with international human rights law. [893] The environmental rule of law is designed to ensure effective implementation of environmental legislation. To this end, the government should –

- Incorporate the environmental rule of law components into its environmental legislation and apply them in the environmental context in development policies and plans. In this way the environmental rule of law can hold all entities involved with environmental legislation and regulations equally accountable for environmental protection and sustainable biodiversity.
- Integrate the peculiar and critical environmental needs of the Niger Delta and the elements of the rule of law, so building a foundation for

[889] UNEP (2019) Environmental Rule of Law, First Global Report 8.
[890] ibid.
[891] ibid.
[892] ibid 9.
[893] Abioye, 'Advancing Human Rights through Environmental Rule of Law in Africa'.

environmental governance that protects rights and enforces fundamental obligations.[894]

- Underpin the four pillars of sustainable development – economic, social, environmental, and peace,[895] which are crucial to the realisation of sustainable development.[896]
- The national institutions responsible for implementing environmental and related legislation should be strengthened to enforce all environmental legislation and ensure compliance by applying the environmental rule of law.

In its First Global Report on the Environmental Rule of Law (2019) the UN affirms that, 'without environmental rule of law, development cannot be sustainable'.[897] The Nigerian government should exercise the political will to drive the environmental rule of law which has the following seven distinguishing characteristics[898] –

- Critical human health and welfare can be achieved through the environmental rule of law by adherence to environmental standards, procedures, and approaches which are set out in the legislation, and by ensuring that clean air, clean water, and a healthy environment are available to the people and their communities. Most crucial to the welfare of the people is respect for and protection of their rights to access to and use of land, water, forests, and other resources which can serve to advance livelihoods, food security, and enhance their personal integrity.
- The environmental rule of law is intentionally multidimensional, and cuts across many forms of law and norms. These include social and customary norms of villages, national legislation, and voluntary standards adopted by

[894] ibid.
[895] The four pillars are enshrined in the 2030 Agenda for Sustainable Development.
[896] UNEP Environmental Rule of Law para 1.1.1. 'Trends' 2, 3. Nigerian environmental laws exist only on paper because government implementation and enforcement are either inadequate, ineffective, or unavailable. As in many other developing countries, Nigeria prioritises macroeconomic development when allocating government funds and setting priorities. 'This results in environment ministries that are under resourced and politically weak in comparison to ministries for economic and natural resources development,' Due to lack of the culture of environmental compliance aided by the perception that environmental rules will slow down or impede development, 'with too little consideration of the ways in which environmental rules contribute to sustainable development over the long term' with the resultant effect of marginalising and underfunding the environmental ministries. Additionally, framework environmental laws often lack key provisions required for effective implementation, with no specifications on concrete outcomes and set objective goals against which to measure the laws' performance. Only a few countries such as Kenya and South Africa, have adapted their laws to more closely reflect domestic conditions and priorities.'
[897] UNEP Environmental Rule of Law 1.
[898] ibid 10-13.

companies. It spans many levels of governance – from the customary governance of indigenous peoples and rural populations to subnational, national, regional, and international government regulation – cutting across and penetrating multiple governmental agencies and ministries' operations on several levels of government.

- The environmental rule of law is shaped by and responds to significant political, economic, and social dynamics specific to natural resources – the 'tragedy of the commons' and the 'resource curse'. This means that the wealth associated with significant natural resources is often a curse rather than a blessing because the extraction of the resources is diverted to foster corruption, rent seeking, and inequitable distribution of the proceeds. This, in turn, leads to political strife, instability, and armed conflict. Nigeria should, therefore, invoke and enforce key elements of the environmental rule of law – most notably, transparency, participation, accountability, and benefit sharing – to prevent this 'resource curse'.
- The environmental rule of law protects the duties humans owe non-human species and resources. This can be achieved through management of the environment which draws on the moral and ethical duties humans owe non-human species and resources to ensure the survival of many species which depend on the success of environmental rule of law. To save the species, Nigeria can follow the practice of other countries that have extended legal rights or legal 'personhood' to natural resources, such as rivers and protected areas, to reflect the importance they hold for their customs and cultures.
- Public involvement in environmental decisions and legislation is crucial to the environmental rule of law and Nigeria should follow a policy of strict compliance because:
    - This is crucial as the livelihood and welfare by a great number of human communities depend on natural resources, while all living organisms depend for their survival on clean air and water.
    - Disadvantaged populations and indigenous communities who depend on natural resources for subsistence and cultural identity experience severe pollution and environmental degradation.
    - The public can ensure project adherence to required environmental standards and procedures, and equally assist in monitoring compliance

and supporting enforcement based on the need and particularity of their interests in protecting their health, livelihoods, and welfare.

- Availability of necessities as the public access to information, meaningful participation in decision making, and access to justice and when required, to obtain free, prior, and informed consent without hindrance, is particularly important to the environmental rule of law.

- The environmental rule of law avoids differing timescales. Environmental management decisions about natural resources and the health of ecosystems can affect many generations into the future, leading to a timescale of many centuries that must be subject to sound checks and balances by the environmental rule of law because:
  - these decisions are often irreversible due to their impact on the survival of a species, the use of a finite resources, or a potential tipping point such as the volume of greenhouse gases emitted into the atmosphere which can cause cascading changes;
  - the environmental rule of law involves intergenerational equity and people yet to be born; and
  - emphasis must be on the adaptability and dynamic environmental legislation and institutions in that environmental legislation often lags behind environmental threats which feed on dynamic and rapidly evolving technologies and behaviours that impact on the environment.
- When there is definite uncertainty regarding environmental matters which raises more questions than answers and government action is still required irrespective of the circumstance, the environmental rule of law terms the situation 'decision making in the face of significant uncertainty'. When facing significant uncertainty, government is required to offer uncertain decisions, for example: (i) the development of adaptive management which provides a framework for action in situations surrounded by uncertain data and understanding; and (ii) resort to the precautionary principle which provides that 'when confronted with a lack of information, actions should be taken that err on the side of precaution rather than increasing risk'.[899]

The 2012 UNEP Report to the UN Permanent Forum on Indigenous Issues confirms that 'some arears, which appear unaffected on the surface, are severely

[899] UNEP, Environmental Rule of Law 13.

contaminated underground and action to protect human health and reduce the risks to affected communities should occur without delay'[900] because 'the pollution from over 50 years of oil operations in the Ogoni Delta in Nigeria has penetrated further and deeper than expected'.[901] This is an evidence of the global concern for the indigenous peoples of the Niger Delta which Nigeria must address through viable environmental legislation backed-up by the environmental rule of law.

Gross violation of environmental law should be prevented by the environmental rule of law in Nigeria – the country must not undermine the sustainable development initiatives it has undertaken to uphold. Taking a cue from the 2012 declaration of the United Nations Environment Programme's Governing Council that 'the violation of environmental law has the potential to undermine sustainable development and the implementation of agreed environmental goals and objectives at all levels and that the rule of law and effective governance play an essential role in reducing such violations',[902] Nigeria should steadfastly implement all the environmental issues raised in this proposed legal framework to achieve its sustainable development goals. For instance, the environmental rule of law has its peculiar benefit described as the ultimate goal of shifting behaviour 'onto a course toward sustainability by creating an expectation of compliance with environmental law coordinated between government, industry and civil society'.[903] Hence, Nigeria needs to adopt the environmental rule of law for sustainable development. In addition, Nigeria should adopt the environmental rule of law[904] to ensure the democratic implementation of environmental law, and 'to give effect and force to environmental law, for the advancement of the attendant public health, environmental, human rights, economic, and social benefits envisioned by environmental laws'.[905]

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[900] Report of the United Nations Environment Programme (UNEP) submitted at the 11th Session of the United Nations Permanent Forum on Indigenous Issues (UNPFII) 7-18 May 2012 <https://www.un.org/esa/socdev/unpfii/documents/2012/session-11-UNEP.pdf> para 8.
[901] ibid.
[902] UNEP Environmental Rule of Law, 13. See generally also, Governing Council of the United Nations Environmental Programme 'Proposed Medium Term Strategy for the Period 2014-2017' Report of the Executive Director UNEP/GC.27/9, 9 January 2012 <http://undocs.org/UNEP/GC.27/9> accessed 9 September 2020.
[903] ibid 13.
[904] ibid 9, [1.1.3].
[905] ibid Introduction.

5.3.2.6 Integrating the right to development and sustainable development

The Nigerian Constitution and the fundamental rights discussed in Chapter three reveal the failure of Nigeria to acknowledge and include all categories of human rights in its Constitution – only the civil and political rights are included, thereby disregarding all other human rights such as: the right to development, the right to a healthy environment, and the right to peace. This renders the Constitution inadequate for the protection of all fundamental human rights. Notwithstanding the absence of the economic, social, and cultural rights in the Constitution which means it cannot be called upon for the protection of the indigenous people in the Niger Delta, the African Charter on Human and Peoples' Rights Act of 1990 is expected to be involving, reliable and applicable. Since the Courts in Nigeria were lukewarm to endorse the African Charter Act as discussed in *Isuama* case in section 3.4.3 of Chapter three, the Ogoni were left with no option than to seek protection from the African Commission on Human and Peoples' Rights. This is strikingly illustrated in the *Ogoni* case, where the African Charter on Human and Peoples' Rights provided the needed fundamental human rights' protection as discussed in section 3.5 of Chapter three above. There is, therefore, an urgent need to include all categories of human rights – and especially the economic, social, and cultural rights of the CESCR – in the Nigerian Constitution. And in this regard the right to a healthy environment and the right to development stand out as most important for the sustainable development path advocated in this thesis.

In order to fill the gaps hindering the achievement of sustainable development in Nigeria, the right to development must be made available and promoted to facilitate the fulfilment of the developmental and environmental needs of present and future generations.[906] This right should be reflected in all future development plans and programmes in Nigeria. The country needs to adopt an integrated and co-ordinated approach to its developmental planning as provided in Principle 13 of the Stockholm Declaration - an approach in terms of which the process of integration within the human rights perspective integrates the right of people to a healthy environment into

[906] Principle 3 of the Rio Declaration on Environment and Development of June 1992 is a reaffirmation of the Declaration of the United Nations Conference on the Human Environment adopted at Stockholm on 16 June 1972 and sought to build on it. The Rio Declaration aimed at protecting the integrity of the global environmental and developmental system. The proclamation is contained in the 27 Principles <http://www.unep.org/Documents.Multilingual/Default.asp?documentid=78&articleid=1163> accessed 20 August 2016.

the right to development in order to achieve the much desired sustainable development in the Niger Delta.

5.3.3 *Sustainable development and the capabilities approach to indigenous people's development*

The full realisation of human rights and fundamental freedoms in development can be integrated with Sen's development theory as freedom, achievable through the capabilities approach which is aimed at assisting individuals to develop their potential and exercise choices through the opportunities available to them. The social and economic disparities resulting from the denial of the inalienable human right to development and its attendant fundamental freedoms, constitute a denial of the peoples entitlement 'to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized' as envisioned in the UN resolution on the right to development.[907] This section features opportunities and choices as capabilities to fill the wide gap created by denial of the rights and freedoms of the indigenous peoples of the Niger Delta. The indigenous peoples of the Niger Delta have, to date, not been seen as central to the exploitation of oil and gas in their region and have suffered hugely as a result of that neglect.

The state is responsible for creating opportunities based on the capabilities of indigenous peoples to allow them to realise their choices, values, and freedoms so as to promote and enhance their dignity and wellbeing through all forms of training and empowerment as part of their right to development. The capabilities approach grants human beings the liberty to do whatever they are best at doing, to give them values for good life and wellbeing, encouraged and assisted by the State. This is what this section intends to achieve. Detailed below is a set of choices expected to fill the gaps created by lack of capabilities and choices. This should be included in national legislation, policies, plans, and programmes on natural resources development.

5.3.3.1 Capabilities as freedom

Sen's approach to human development promotes freedom as an essential factor in achieving sustainable development and focuses on human beings is the proposed content in this section. Crucial to the advancement of sustainable development, as

[907] UN res 41/128 'Declaration on the Right to Development' art 1(1).

discussed in Chapter two, the capabilities approach is the theoretical interpretation of Sen's 'development as freedom' from which two major roles for freedom have emerged.

- The first role is that the people should be accorded the freedom to do things they have reason to value, that is: (i) things that are significant in themselves for the person's overall freedom; and (ii) things that are important in fostering the person's opportunity to achieve valuable outcomes. The two sets of value are highly relevant in the evaluation of freedom that will achieve holistic development in the Niger Delta crucial to the assessment of the region's development.
- The second role is that freedom is not only the basis of the evaluation of success and failure, but also determines the individual's initiative and social effectiveness in that 'greater freedom enhances the ability of people to help themselves and to influence the world, and these matters are central to the process of development'.[908]

5.3.3.2 Capabilities for decision making

Sen's roles of freedoms in development should be appreciated and adopted to promote economic growth in the Niger Delta. For instance, the concept of freedom empowers decision making and indigenous peoples should be invited to participate in national decision making on the development of natural resources in their domain. Indigenous peoples should likewise be permitted to make decisions on issues that concern them, or individuals should make decisions about needs, choices, and the desire not to be poor. The greater freedom embodied in decisions and choices that people make, empower them to help themselves and bring meaning to their lives. This should not be denied the indigenous peoples of the Niger Delta. Since development is quantified and assessed within the ambit of individual and collective societal growth, advancement, improvement, and increase which the flexibility of Sen's capabilities theory offers. Such decision-making capabilities are proposed for inclusion in all development programmes in Nigeria.

The indigenous peoples will experience 'freedom' once they are permitted to determine how to spend all funds accruable to them as benefits from their oil and gas resources. This is proposed by this thesis. The thesis proposes that the State

[908] Sen, *Development as Freedom* 18.

devote its spending in the Niger Delta to improving human and communal development, especially with funds derived from oil and gas benefits. Although, this thesis does not support Nigeria's current benefit-sharing model, it argues that the 13% of revenue from the Federation Account distributed to the oil-producing states,[909] should in essence be channelled back to the indigenous communities as traditional owners of oil and gas[910] to develop both them and their communities. The indigenous peoples deserve to enjoy these benefits as the determining factor in development is the quality of life of majority of the people and not solely the quantum of state wealth or gross national income.

5.3.3.3 Capabilities enables the choice of housing:

The UN independent expert on the right to development[911] made valuable contributions during the *Endorois* case before the African Commission. While reacting to Kenya's contention regarding its statutory responsibility as a duty bearer, the expert asserted that 'development is not simply the state providing, for example, housing for particular individuals or peoples, development is instead about providing people with the ability to choose where to live'.[912] For the indigenous peoples of the Niger Delta, survival has been the name of the game in the light of the denial of their existence in the Constitution which meant that the issue of providing them with a choice of where to live never arose. As explained in Chapter three under the generic protests resulting from violations of their human rights, the denial of their existence lies at the heart of all violations. All rights were denied them particularly the right to development that enhances capabilities, which includes the choice of housing. The choice of housing is crucial to the survival of indigenous peoples and can, as explained above, only be realised once they have been accorded full recognition together with all fundamental rights available to protect them.

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[909] Matthew Ogune, 'Niger Delta states deserve more than 13% derivation, says Okowa' *The Guardian* (Abuja, 16 March 2020) <https://guardian.ng/news/niger-delta-states-deserve-more-than-13-derivation-says-okowa/> accessed 29 November 2020.

[910] Deji Elumoye, 'Nigeria: Omo-Agege Flays Diversion of 13 Percent Derivation Funds By Oil-Producing States' *This Day*, (Abuja 5 November 2020) <https://allafrica.com/stories/202011050942.html> accessed 30 November 2020.

[911] United Nations Human Rights – Expert Mechanism on the Right to Development: <https://www.ohchr.org/EN/Issues/Development/EMD/Pages/Expert-Mechanism-on-the-Right-to-Development.aspx> The Expert Mechanism is composed of five independent experts on the Right to Development. With resounding thematic expertise on the right to development, the Expert Mechanism identifies and shares best practices with Member States and promote the implementation of the right to development globally.

[912] *Endorois* case [278].

Furthermore, as the UN independent expert in the *Endorois* case further emphasised, '....the state or any other authority cannot decide arbitrarily where an individual should live just because the supplies of such housing are made available…' and that, '[f]reedom of choice must be present as a part of the right of development'.[913] It is important that Nigeria understands the value of choice of housing for indigenous peoples in the Niger Delta, and enshrines it in future legislation and initiatives associated with development of oil and gas. Choice is a right of the people which the State should protect by providing the opportunity for the people to choose and decide where to live on their land in harmony with nature and in a healthy environment suitable for human habitation.[914] The indigenous peoples of the Niger Delta should be allowed to enjoy the choices embedded in the right to development.

5.3.3.4 Capabilities enable the choice of residency and occupation

Indigenous peoples should be granted capabilities that enable choices of where to live and work. The African Commission reiterated in the *Endorois* case that forced eviction of the Endorois from their land gave them no choice because it reduced their capabilities leaving them with no opportunity to benefit from the game reserve.[915] The same mode of attack by forced eviction ran through the Niger Delta region wherever petroleum was found. Although backed by the Nigerian Constitution, the forced eviction of the indigenous peoples from their own land is highly undemocratic, and more of a military exercise as analysed in Chapter three under 'The conflict: people's force and government's counterforce'.

A far more democratic legal process would have allowed negotiations and dialogue which would have enabled the choice of location that would accommodate the indigenous peoples' traditional occupation and quelled the protests over neglect and abandonment. On the whole, lack of capabilities is a violation of the right of peoples to development, in this case, the indigenous peoples of the Niger Delta. Lack of choice negates the guarantee of the right to development and one of the conditions that can strengthen this guarantee is that indigenous peoples should not be coerced,

[913] ibid.
[914] See generally, Clark David, 'The Capability Approach' In his research paper, Clark David thoroughly analyses Sen's concept on capabilities that takes care of the choices open to people. While Clark enumerates the values of Sen's capabilities approach, he sets the critiques alongside for good argument. From all indications, the concept is prone to flexibility and a convenient degree of internal pluralism that give room to different modes of application.
[915] *Endorois* case para 279.

pressured, or intimidated in their choices of development. Their free and informed consent indicates choice, opportunity, and capability. All these are issues for consideration during the participatory process for development projects to be discussed later.

5.3.3.5 The economic, cultural, and physical wellbeing of the indigenous peoples

The economic, cultural, and physical wellbeing of the indigenous peoples is entrenched in the form of capabilities listed below. These represent the choice of a good life through good education and good health, fundamental rights that should not be denied the indigenous peoples of the Niger Delta and which the government of Nigeria should ensure.[916]

- Community education in indigenous language

  Teaching indigenous people in their native language at the primary school level will provide them with basic learning skills that will help facilitate the transition to secondary school level. At the secondary level, the children will be introduced to the official national language, which is English, but still follow some of their courses in their native language. The English language prepares those wishing to continue to tertiary and university education in readiness for joining the workforce in the oil industry in their domain to meet employment quotas. Importantly, provision must also be made for adult education by the Ministry of Education for those within the indigenous communities who desire such knowledge. The choice of the State teaching children in indigenous language is a choice that enables indigenous peoples maintain their indigenous identity. Indigenous peoples cherish and hold their culture in high esteem, and language – being the first indicator of native identity – the indigenous peoples do not want their children lost in another language to the detriment of their own. Learning in mother-tongue makes learning for the indigenous peoples smooth and fast. If a different language is introduced, it may do two things: (i) reduce the urge to learn in that some people experience difficulties in mastering a new language; and (ii) extends the time of learning and slows down communication with the people and

[916] The general well-being of the indigenous peoples is entrenched in the development of their capacity and capabilities as topically analysed by: Tony Beck and Cathy Nesmith, 'Building on Poor People's Capacity' and Martha C Nussbaum, 'Capabilities as Fundamental Entitlements' secs 2 and 3,36-43. The capabilities approach provides a solid foundation on which choices and values can be built and developed for the wellbeing of the people.

aiding their development. The indigenous peoples are jealous of all aspects of their lives and are consequently unwilling to forego what is dear to them which includes their languages. Hence, the choice of indigenous language in teaching and learning is fundamental to the human development of indigenous peoples.

- Skills Acquisition and Empowerment

  The government should take a keen interest in human development for capabilities of the indigenous people. As regards their traditional indigenous skills such as canoe making, fishnet making and mending, basket weaving, it is important for government to provide opportunities for the development of such skills to take them to the next level. The skills improvement should include science and technology skills in mobile communication and computing, which should be encouraged among the youth to build their technological capacities and discourage them from migrating to the cities. And, to offer the indigenous peoples of the Niger Delta, all available choices for a better life, government should encourage the telecommunication industries to move into the region and offer their services to all indigenous communities to allow them to communicate with other parts of Nigeria.

  The government should take their cue from the African Commission's assertion that

  > it is not sufficient for the Kenyan authorities merely to give food aid to the Endorois. The capabilities and choices of the Endorois must improve in order for the right to development to be realised.[917]

  This principle applies equally to the indigenous peoples of the Niger Delta. Development or the benefit it brings is not about sharing food with the people but giving them the means to build a livelihood so that farmers can farm and fishermen can fish to earn their living. Skills acquisition and empowerment, backed by financial support, engenders core poverty eradication agenda that will ensure sustainable livelihood and entrepreneurial opportunities, as well as creating avenue for productive resources in the Niger Delta.
- Physical and Mental Health Care

[917] *Endorois* case para 283.

Well-equipped primary health care centres, and maternal care units with ante- and post-natal facilities for mother and childcare should be located within close proximity of the communities in the Niger Delta region as a choice for good health and healthy living. The health centres should fall directly under the Federal Government to ensure adequate funding, preferably as part of the NDDC. To facilitate communication between the care workers and the indigenous peoples, health officers posted to the communities should be encouraged to learn the local dialects.

- Indigenous Employment Rights

  Employment rights for indigenous peoples are the right to development coupled with opportunities in local project companies as the first port of call. Primarily, the unskilled work in the oil corporations belongs, as first choice, to the indigenous peoples in the project location as this work does not require specialised academic qualifications. It will afford the indigenous youth an opportunity to work, promote their sense of worth, and leave them with less time to participate in violent forms of protest. Additionally on employment, and in line with their social responsibility, the oil corporations should reserve a fixed quota of their skilled labour force for the indigenous peoples. Better still, a board membership for an elected representative of the indigenous peoples could also be fruitfully considered as part of the inclusion process. This would see the indigenous peoples as partners in development. Overall, strengthening the employment right of the indigenous peoples – and the youth in particular – will provide them with choices in filling the gaps created by neglect, marginalisation, denial, and violation that has been growing by the day through violent protest action.

- Quality Higher Education

  The benefits accruable to the Niger Delta from oil and gas resources should principally be directed to benefit the poor and helpless in the region by providing sound education for their children up to the university level. The State in conjunction with the Representative Council of Indigenous Peoples, (see section 5.4.7 below) should establish special secondary and tertiary schools for the children of indigenous peoples in order to accelerate their assimilation process to satisfy the special needs, programmes, and courses-in-demand for employment opportunities created by their right to employment within the oil companies. These schools should focus on equipping the people

with the core competencies they require to be able to exercise their choice and capabilities in the region and beyond. This will bridge the gap and fill the vacuum for indigenous peoples' employment opportunities in the region, at both state and federal levels.

- Citizens' Rights Care Centre (CRCC)

  There should be centres at designated locations spanning the entire Niger Delta region for consultations on the violation of indigenous peoples' human rights within the region. This process will help build trust in the proposed new development agenda which turns on the promotion and protection of all human rights and fundamental freedoms. With the involvement of the government, and after due recognition has been accorded the indigenous peoples and the Constitution amended to include economic, social, and cultural rights, the CRCC will be most effective if created in affiliation with the National Human Rights Commission (NHRC), giving it a legitimate status. Thus, all cases of violations of indigenous peoples' human rights on their lands and in their communities, are brought first to the CRCC and, if proven worthy, are forwarded to the NHRC for further legal action. This will standardise and stabilise the redress mechanism imposed on the NHRC.

All that has been discussed in this section would improve the productivity and general wellbeing of indigenous peoples while at the same time encouraging the government to involve them in development that concerns them in their communities in order to eradicate poverty and improve their living standards. As eradication of poverty is pivotal to the solution of the conflict in the Niger Delta, and the three pillars of economic, social, and environmental integrated into sustainable development are intended to ensure poverty eradication for all, the enabling capabilities and choices are enumerated in the next section.

5.3.4 *Capabilities and choices for eradicating poverty in the Niger Delta*

Deprivation of capabilities amounts to lack of freedom for people to lead the kind of lives they value.[918] This translates into poverty rooted in deprivation of capabilities. For the poor in the Niger Delta, staying alive is a daily struggle. Nigeria has no particular plan to eradicate poverty in the Niger Delta but has rather opted for the general agenda NV20:2020 which mentions guaranteeing a high standard of living

[918] Sen, *Development as freedom* 87.

and quality of life to its citizens. This is beyond the comprehension of a poor person in the Niger Delta because not all citizens require the same kind of attention – more so, as some citizens already enjoy a high standard of living and appear to be getting more. But the poor and the extremely poor who cannot afford two meals, or even one meal, a day require urgent and peculiar attention.

One of the action points of the NV20:2020 reads 'investing in human capital to transform the Nigerian people into active agents for growth and national development'.[919] Since investment in human capital can only be achieved through the capabilities and choices made available in the form of opportunities created by the State, the action point should have been aimed at investing in human capabilities to identify, involve, and include the different groups of Nigerian people as active agents for growth in national development. For example, through government initiatives and agenda, coupled with human capital programmes, Nigeria can invest in the poor by making choices and opportunities available to them. Therefore, the thesis recommends the following to eradicate poverty in the Niger Delta.

5.3.4.1 Poverty Reduction Strategy of the World Bank

The World Bank has a mission on poverty reduction and sustainable development which focuses on ensuring that development projects it is involved in must respect the dignity, human rights, economies, and cultures of indigenous peoples.[920] The Bank acknowledges the inextricable link of indigenous peoples to 'the lands on which they live and the natural resources on which they depend',[921] which was inadvertently relied on in the *Endorois* case.[922] Hence, all projects proposed for World Bank financing and that affect indigenous peoples, will as the requirements set by the Bank require a social assessment by the borrower and further that at each stage of the project the borrower should engage the indigenous people's communities in a process of free, prior, and informed consultation.[923] This is an

[919] The Nigerian Vision 20:2020, 'How will NV20:2020 Transform the Economy?' 3.
[920] Operational Manual OP 4.10, 'Indigenous Peoples' July 2005. Revised April 2013, para 1.
[921] ibid para 2.
[922] *Endorois* case para 123.
[923] Operational Manual OP 4.10, 'Project Preparation' para 6. There are more in OP 4.10, Annex C, 'Indigenous Peoples Planning Framework July 2005' and BP 4. 10, 'Indigenous Peoples July 2005', Revised April 2013. Due to limitations, not all the standards can be detailed here.

acceptable standard this thesis recommends for Nigeria. And it is expected that the World Bank will 'walk its talk'.

However, notwithstanding its policies to address issues of international poverty, the World Bank as one of the Bretton Woods institutions has had its claims disputed.[924] For instance, while the World Bank claimed that 'the gap between the haves and the have-nots is in the process of being narrowed', the UN and its agencies disagreed, pointing out that, 'the rich/poor divide is growing wider'.[925] This prompts a rethink about the World Bank's poverty reduction strategy which could fall victim to the 'organisational hypocrisy trap' as explained by Weaver.[926] This trap may hamstring the World Bank when it comes to enforcing its rules regarding indigenous peoples or eradicating poverty in the third world and thwart its efforts to execute new agendas or initiatives.[927] In that case, the World Bank is torn between whether it should 'placate multiple political masters with heterogeneous preferences',[928] or fight the cause of the poor.

However, Nigeria should be cautioned against expecting help from outsiders – eg, the World Bank – in its quest to eradicate poverty in the country. The World Bank may propose, but Nigeria must execute willingly and effectively. The World Bank's *Operational Manual for Indigenous People* is recommended to Nigeria for guidance in developing a strategy to reduce poverty, as it did for the African Commission in the *Endorois* case.[929] Nigeria is encouraged to adopt standards and processes in the Manual to ease the burden of poverty in the lives of the indigenous peoples of the Niger Delta who are suffering as a result of Nigeria's negligence and neglect in the oil and gas development processes in the Niger Delta.

5.3.4.2 Capabilities-driven poverty eradication standards

For Nigeria to empower the indigenous peoples of the Niger Delta and raise their standard of living, the following capabilities-driven poverty eradication standards are proposed:

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924 Therein, 'Beyond the North-South divide' 723-742, 728.
925 ibid 727.
926 Catherine Weaver, *Hypocrisy Trap* ch 2, 19.
927 ibid 19.
928 ibid 4-5.
929 *Endorois* case para 123.

- Basic social services and social protection systems should be provided to support those who cannot support themselves financially in the Niger Delta.
- The state should set up a Poverty Eradication section within a proposed Empowerment and Skill Acquisition Centre in each indigenous community where officials dealing with poverty eradication will counsel individuals on the best approach to take in tackling poverty to ensure improved wellbeing and for the social and psychological upliftment of the people and community.
- Signs of poverty are rife in the communities of the Niger Delta. The terrain has polluted lakes and creeks where the indigenous peoples can no longer engage in fishing for income or even to feed their families. The mangrove areas are also heavily contaminated by crude oil that has leaked from damaged rigs and pumps. This has driven away the crabs, shrimps, oysters, periwinkles, and crayfish with which the indigenous women have traditionally traded. Above all, the decimated farms and contaminated drinking wells in the communities must be rehabilitated if the lives of the people are to break free of extreme poverty. This responsibility falls on those financial borrowers of the World Bank earlier mentioned in the Operation Manual OP 4.10 on Indigenous Peoples. With Nigeria as Africa's biggest oil exporter, and the largest natural gas reserves on the continent, we agree with the World Bank's recommendations as international financier of Nigeria's development projects since 1958, that to eradicate poverty in the Niger Delta the indigenous peoples should 'benefit from more inclusive development policies'[930] that embrace sustainable development of oil and gas in all its ramifications. Indeed, as owners of land and natural resources that enrich Nigeria, the indigenous peoples of the Niger Delta ought not to be poor. The fact that they are points to Nigeria's development failure which this thesis seeks to redress.
- Every indigenous community in the nine states that make up the Niger Delta should be represented on the Board of the NDDC. This will reduce gross corruption and eradicate the process of 'government appointees'. The funds earmarked for the NDDC should be used to fund grassroots human and capabilities development, and community development which emphasises

[930] The World Bank in Nigeria, An Overview. The World Bank is helping to fight poverty and improve living standards for the people of Nigeria with more than 130 IBRD loans and IDA credits since 1958. <https://www.worldbank.org/en/country/nigeria/overview> accessed 23 March 2020.

special educational facilities and technological advancement as proposed in this chapter.

Integrating sustainable development and the capabilities of indigenous peoples as discussed in this section, projects capabilities as a pillar of support in actualising sustainable development not only in the Niger Delta, but for Nigeria generally. Essentially, people must be the central concern for sustainable development to succeed – people are the missing link identified in the earlier review of 'Nigeria's attempt at sustainable development'. The outcome of the review is recommended to serve as guide for future plans and programmes on development in Nigeria.

5.4 Meaningful participation of indigenous peoples in development[931]

The primary principle of sustainable development situates people as the central concern[932] and that is why it is the appropriate mode of development to sustain durable economic growth. The failure to recognise people as the centre of concern in development led to the conflict in the Niger Delta in which protest actions by the affected indigenous peoples has become generic as discussed in Chapter three. The generic protest actions that spread through the Niger Delta region fuelled militancy among the youth who claimed neglect, marginalisation, exclusion, dispossession, violation, denial, and a subtle agenda of annihilation of the indigenous peoples. The militant protests elicited scant response to the human and environmental degradation and demands urgent government action. The legal solution proposed by this thesis is a permanent option that will establish the necessary legal structures which will survive any government. As proposed in this chapter, the solution requires the dedicated application of the principles of sustainable development and of the environmental rule of law, and especially, the meaningful participation of indigenous peoples in development.

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[931] According to Rio Declaration Principle 22: 'Indigenous people and their communities, and other local communities, have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.' Principle 23 states that, 'the environment and natural resources of people under oppression, domination and occupation shall be protected'. These two principles combined place the indigenous people at the centre of the development of natural resources, entitled to inclusion and meaningful participation.

[932] Rio Declaration Principle 1 declares: 'Human beings are at the centre of concerns for sustainable development.' Therefore, when preparing the development of a project, the primary consideration should be how it will affect the people in that locality. Secondly, the project planners should then involve the people in the planning because they have deep knowledge of the biodiversity and the environment that will be useful to the development. That is how and why the people are at the centre of any development if it is to be sustainable.

Sustainable development that will affect the lives of the indigenous peoples positively should embrace full participation and inclusion of indigenous peoples in all oil and gas development projects on their lands and in their communities. For Nigeria to achieve a fully inclusive economic development, it should embrace the elements of sustainable development established in Chapters two and three of this thesis. This should be supplemented by recognition of the status of the indigenous peoples as owners of their lands and natural resources as canvassed in Chapter four. The ownership status of the indigenous peoples is stated in the *Ogoni* case and affirmed in the *Endorois* case in which the African Commission reiterated that 'in the *Ogoni* case, the right to natural resources contained within their traditional lands is also vested in the indigenous peoples, making it clear that a people inhabiting a specific region within a state could also claim under article 21 of the African Charter'.[933] Ownership entails the owner being aware and involved in whatever concerns its property. Therefore, one of the most efficacious principles of sustainable development – the principle of participation – is highlighted in this section as the headlight with which Nigeria will see its path clearly to achieve sustainable development as the only appropriate mode of developing oil and gas in the Niger Delta, which, as stated above, is the property of the indigenous peoples. In what follows some means of effecting meaningful participation for sustainable development, are proposed.

5.4.1 *Nigeria should include meaningful participation terms in its development policies*

As we have seen, the bane of Nigeria's development policies and initiatives has been the omission of 'people'. This is contrary to the principle of sustainable development which places people at the centre of development. A good example of Nigeria's policy document is the 2016 Change Agenda in which it is clearly stated that:

> [U]ltimately, growing the national economy must be a shared responsibility between the federal, state and local governments. Natural resource endowments are fairly widely dispersed around the country. Efforts will be made to even out development around the country, including collaboration between the different tiers of government as well as investors and development partners.[934]

[933] The *Endorois* case para 255; the *Ogoni* case paras 56-58.
[934] The 2016 Change Agenda, 'Social Inclusion & Job Creation' 04 IV.

The initiative focuses on collaboration with entities but not with the people. The Agenda was also expected to make disciplined, consistent, measurable, and sustainable progress grounded in the six pillars: economic reforms; infrastructure; social development; governance; security; and environment and state/regional development. But nowhere in the Agenda is reference made to indigenous peoples or even local people within areas where development is to be located.

Another initiative which excluded 'people' from all the processes is the ERGP earlier reviewed in this chapter. In it, the government claimed consistency with the aspirations of the SDGs given 'that the initiatives address its three dimensions of economic, social and environmental sustainability issues'.[935] This growth plan is expected to terminate at the end of 2020 but appears not to have achieved most of the sustainable development ideals it proclaims. One obvious reason for this is the non-inclusion of people as the central concern, particularly the indigenous peoples as a peculiar interest group in the Niger Delta oil and gas economic zone. There can be no sustainable development of oil and gas in the Niger Delta without the involvement of the indigenous peoples.

This thesis strongly recommends that Nigeria should recognise the indigenous peoples without any further delay and formally regulate their participation in development plans at all levels. Every stage of development should engage the meaningful and productive participation of the people, particularly in monitoring, which is crucial to the success of oil and gas development. In the Niger Delta, the peculiar knowledge of indigenous peoples will guide the implementation of policy, regulations, and the environmental rule of law, and it should be properly acknowledged and included in all plans and programmes.

5.4.2 *Participation must be at all levels of development*

Sustainable development requires that environmental issues are best handled with full participation of the people who are involved in and concerned within that environment.[936] For participation to be meaningful, it must be at all levels, that is, national, state, local, and at the project site/location. The State must consider and take responsibility for the level of education of the indigenous participants. A

[935] The ERGP, Introduction 24-25. 'The ERGP aims to restore sustained economic growth while promoting social inclusion and laying the foundation for long-term structural change'.
[936] Rio Declaration Principle 10: 'Environmental issues are best handled with the participation of all concerned citizens, at the relevant level.'.

situation where the government representatives, who have a high level of literacy, deal with the indigenous representatives, who are both illiterate and have a very different understanding of property use, and ownership ideas, creates inequality and a rocky playing field.

5.4.3 *Public information and awareness of development within the community*

The national environmental programme must provide public information concerning the environment in which development is taking place. Meaningful participation of the indigenous peoples in development within their communities must allow them access to all environmental information, including that relating to hazardous materials being generated by the development.[937] The people must participate fully in decision-making processes at every important stage of the project in their community. Participation ensures exchange of information which will facilitate the success of the development.

5.4.4 *Information and publication in local indigenous language*

The State has the onerous duty of facilitating and encouraging public awareness and participation, particularly of the people in the community, by making information available to them in their local indigenous languages.

5.4.5 *Indigenous Women must participate meaningfully in sustainable development*

Women play a vital role in environmental management and development and their active participation is essential if sustainable development is to be achieved.[938]

5.4.6 *Youth participation: crucial to sustainable development in the Niger Delta*

The energy, zeal, creativity, ideals, and courage of the youths in the Niger Delta should be directed towards development not destruction. The Niger Delta youths must be engaged in meaningful participation to be able to understand the need for their patience and partnership in order to achieve sustainable development and

[937] Rio Declaration, Principle 10: 'At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes.' .

[938] Rio Declaration, Principle 10: 'Women have a vital role in environmental management and development. Their full participation is therefore essential to achieve sustainable development'. This typically applies to indigenous women who are co-located with natural resources and their development.

ensure a better future for present and future generations[939] – especially in those areas that impact directly on their lives rather than those of the community at large.

5.4.7 *Participation demands elective representation*

There is need for meaningful participation through elected representatives, as opposed to selected or appointed representatives. Thus, a duly elected Representative Council of Indigenous Peoples should be established and registered for indigenous peoples' participation especially in national decision making. The Council must be recognised by the government and should be made up of representatives of those indigenous peoples who have identified themselves as such in all the nine states which make up the Niger Delta. Representation should be by election and the process must be fair and be acknowledged to be fair.

5.4.8 *Benefit-sharing decisions should involve the Representative Council of Indigenous Peoples*

Essentially, State should consult the elected representatives for all collective decisions concerning their affairs. It is not enough for States to force a process of sharing on the indigenous communities. The agreed benefits and how to enjoy them must be the prerogative of the indigenous peoples, collectively for each specific community.

5.4.9 *Meaningful participation promotes the right to self-determination*

The right to self-determination of indigenous peoples is the entry point to their political, economic, social, and cultural development. This right enhances indigenous peoples' rights to own, use, develop, and control the lands, territories, and resources they own and occupy in fulfilment of sustainable development. As the Endorois argued in their case, choice and self-determination include the ability to dispose of their natural resources in any way the community deems fit. This can be exercised through meaningful participation in projects that affect them; but to do this they require a measure of control over their land.[940] This is also true of the indigenous peoples of the Niger Delta who will gain control over their land and natural resources by exercising their right to self-determination. The right to self-determination is the licence by which indigenous peoples become actively involved

[939] Rio Declaration, Principle 21.
[940] *Endorois* case para 129.

in sustainable development, and this right must be allowed to operate through the will of the indigenous peoples to participate fully in decision making regarding their lands and natural resources, their environment, and how they choose to live 'healthy and productive lives in harmony with nature'[941] within their communities. The right to self-determination is opposed to discrimination and is not intended to compete with the government/state in the realm of governance. The right to self-determination of the indigenous peoples should, therefore, be honoured and respected by the government and by other sectors of society.

5.4.10 *Free, prior and informed consent (FPIC)*

Free, prior and informed consent is an essential participatory principle for the involvement of indigenous peoples in major development projects. The FPIC should be executed in good time, and well before the impending project to allow the indigenous peoples to contribute to shaping the policies and assert their interests and role in the project. They should not be 'informed of the impending project as a *fait accompli'* which will not give the indigenous peoples 'an opportunity to shape the policies or their role'[942] in the project. Consultation with indigenous peoples on any development or investment projects that will have a major impact on their communities must be directed at securing their free, prior, and informed consent, and must take place in accordance with their customs and traditions.[943]

5.4.11 *Consultations*

Consultation is the means by which participation should be sought, and consultation with the community should be conducted in accordance with the customs and traditions of the community concerned, and 'in good faith, through culturally appropriate procedures and with the objective of reaching an agreement'.[944] During consultations the indigenous representatives must be fully informed of all agreements relevant to the projects and participate in developing aspects that are crucial to the indigenous peoples and their communities. The State should take note that inadequate consultations can lead to discontent and protest actions which may threaten the project as a whole. This is the African Commission's standard of

[941] Rio Declaration, Principle 1.
[942] *Endorois* case para 281.
[943] ibid para 291.
[944] ibid para 289.

consultations[945] which Nigeria must fulfil for effective and meaningful participation. This entails indigenous peoples and their communities being given opportunities to shape the policies and their role in development projects that impact on them. The situation in the Niger Delta offers a 'textbook' example in this regard.

5.4.12 *Indigenous peoples' capabilities expectations from participation*

In the Niger Delta, meaningful participation by the indigenous peoples will be aligned with their need to enjoy their lands and territories, and the development of the natural resources on those lands. Participation means being part of what is happening. Therefore, for the indigenous peoples, meaningful participation in development on their lands is rooted in the 'capabilities options', and in values and choices that accompany participation. There is fulfilment in participation; without the participation of the indigenous peoples, poverty will continue to flourish in the region through absolute neglect and lack of understanding of their needs.

5.4.13 *Participation is fulfilment of the right to development*:

Compliance with the human right to participation[946] is in fulfilment of the right to development which 'includes, active, free and meaningful participation in development' as stated by the African Commission in the *Endorois* case,[947] which will enable the indigenous peoples meet the needs of their present and future generations. In its compliance with international human rights law, Nigeria should endeavour to respect, protect, and fulfil[948] its commitment to indigenous peoples' right to development by securing their meaningful participation through consultations. As argued in this section, meaningful participation in development allows indigenous peoples' capabilities and choices to be fulfilled by opening opportunities and so empowering the realisation of their right to development.[949]

5.4.14 *Participation is the human right of indigenous peoples*:

Participation is a right accruing to peoples and the State has a duty to promote it – notwithstanding State supremacy or State sovereignty. As the human right origin of

[945] ibid para 281.
[946] UNGA A/HRC/23/36 para 83.
[947] *Endorois* case para 283.
[948] E/C 12/GC/21 para 48.
[949] *Endorois* case para 283.

permanent sovereignty over natural resources cannot be gainsaid, the indigenous peoples should be allowed to enjoy the right to participation as the human right in property which must be promoted and protected by Nigeria.

Having relied solely on sustainable development principles in the Rio Declaration and the African Commission's judgment in the *Endorois* case, this section emerges as a strong pillar that is highly recommended to support the sustainable development structure in Nigeria. The pillar provides the grand support for the interconnectivity and interrelationship of indigenous peoples through various means, with development that affect or impact their lives as noted in the introductory section.

5.5 The role of the State as duty bearer of sustainable development

As noted in the introductory section above, the four pillars are interconnected and interrelated, but most importantly, the third pillar – meaningful participation – must rest firmly on this last pillar – on the role of the State as duty bearer. Indeed, this section sets out details on how to achieve sustainable development by addressing the requirements of other sections and turning them into legislation, policy and plans; able to provide, protect, and enforce such law for the actualisation of sustainable development in Nigeria.

5.5.1 *Duty of the State to recognise indigenous peoples*

Nigeria has a primary duty to recognise the indigenous peoples of the Niger Delta as recommended in the first section. In terms of section 17 of the 1999 Constitution of the Federal Republic of Nigeria, in executing State policy, the State has a statutory duty to ensure that every citizen enjoys equal rights, obligations, and opportunities. This means that one group or sector in society must not be made to suffer lack of benefit – often grossly – than any other group or sector. Therefore, it is timely that Nigeria considers its legal obligations to the indigenous peoples of the Niger Delta and grant them statutory recognition, and ensure the promotion and protection of their rights and freedoms that will enable them to enjoy equitable opportunities, choices, values, and capabilities on their lands and their extractive resources. The indigenous peoples deserve legal recognition – ie, constitutional recognition as proposed in the first section of this chapter – and inclusion in all relevant national plans and policies on sustainable development of natural resources proposed in subsequent sections. In addition, the State should accord the indigenous peoples social and economic recognition by assisting them to pursue that which they value,

in order to enhance their individual and collective development, growth, and wellbeing within their regions.

5.5.2 *Human rights protection is the duty of the State*

The Nigerian government has the sovereign responsibility under international law to provide, promote, and protect all the human rights of all people in Nigeria. The exposition in Chapters three and four on international human rights and sustainable development legislation, as well as the African Charter, and the Nigerian Constitution, as relevant legal instruments for the protection of the indigenous peoples in the Niger Delta, revealed the *lacunae* in the Nigerian constitution when it comes to the protection of its indigenous peoples. This inadequacy renders the Constitution unsuited to redressing violations of economic, social, cultural and environmental rights – it was this that compelled the Ogoni to seek redress before the African Commission on Human and Peoples Rights in 1996 through the *Ogoni* case.

For adequate protection of all human rights in Nigeria, as discussed and recommended in Chapters three and four above, this thesis offers two proposals. First, the domestication of the two international Covenants on human rights, the ICCPR and the ICESCR and their Protocols which have been duly ratified by Nigeria; and second, an amendment to the Nigerian Constitution to include all the economic, social, and cultural rights, together with an amendment to the section on forced acquisition of mineral resources (s 44 (3)) which deprived the indigenous peoples of the Niger Delta all their human rights. The Nigerian Constitution being the supreme law of the country, should enshrine all available human rights provisions for the total protection of the Nigerian people. Justice will then be guaranteed, and the Constitution will serve as a redress mechanism for all the people of Nigeria, and, for the indigenous peoples of the Niger Delta who have been battered by human rights violations by both the State and oil corporations in their territories.

5.5.3 *State to protect indigenous people's right to property*

Once the indigenous peoples have been duly recognised, the State should promote and protect the rights of the indigenous peoples to their property – lands, territories, and natural resources – relying on articles 1(1) and (2) of both the CESCR and ICCPR which provide that 'in no case may a people be deprived of its own means of

subsistence'. Nigeria should assume the responsibility of embracing the indigenous peoples' claim to land and natural resources which the African Commission asserted in its decision in the *Ogoni* case, and reiterated in its decision in the *Endorois* case, 'that a people inhabiting a specific region within a state can claim the protection of Article 21'[950] of the African Charter. As such, Nigeria has a duty to protect the rights of the indigenous peoples freely to dispose of their natural resources bound by the African Commission's jurisprudence and the cited provisions of international and regional human rights law.

5.5.4 *State to protect the right to development*[951]

The indigenous peoples' right to development derived from their permanent sovereignty over their natural resources under international law should be protected. In order to meet the developmental and environmental needs of present and future generations of indigenous peoples, the Rio Declaration provides that a State must protect this right. This right is enshrined in article 22 of the African Charter and was endorsed by the African Commission in the *Endorois* case, setting the standard for the fulfilment of this right as: '[A] government must consult with respect to indigenous peoples especially when dealing with sensitive issues as land.'[952] Nigeria must facilitate the right to development as entrenched in the African Charter to increase the capabilities of indigenous peoples and ensure that the indigenous peoples 'are not coerced, pressured or intimidated in their choices of development'.[953] The government should also ensure that, both in content and in implementation, all development agendas project freedom of choice as part of the right to development.[954]

5.5.5 *State has responsibility to protect the environment*

Environmental protection is the responsibility of the State,[955] and the State has a duty to enact national environmental legislation to that end.[956] In the process of

[950] *Endorois* case para 267.
[951] Rio Declaration, Principle 3.
[952] *Endorois* case para 281.
[953] ibid para 279.
[954] ibid para 278.
[955] Environmental protection is the essence of sustainable development. Under the Rio Declaration all the Declarations are for state environmental actions. Some of the state actions are: Principle 2, State to exploit resources pursuant to their environmental and developmental policies; Principle 3, meeting developmental and environmental needs of the peoples; Principle 4, environmental protection is an integral part of development; Principle 6, the environmentally vulnerable to be given special priority; Principle 7, global partnership for the conservation, protection, and restoration of the

implementing environmental protection, the State will be able to address gross environmental negligence and promote the right to a healthy environment of the indigenous peoples of the Niger Delta. The Niger Delta's indigenous peoples deserve a clean and healthy environment just as other people in different areas of Nigeria. For instance, sustainable development cannot be entrenched unless the State cleans up the Ogoniland and other parts of the Niger Delta as recommended by the UNEP in its report on Ogoniland, while at the same time the State should ensure the human rights of the indigenous peoples are protected.

5.5.6 *Nigeria has a responsibility to promote indigenous peoples' elected representatives' participation in sustainable development*

This form of all-inclusive and participatory development will stabilise the tension in the region by bringing the people into governance on matters that concern them and their lands. The representatives should be elected by the indigenous peoples for inclusion and participation in development projects in the oil and gas sector, community by community. This will eradicate the existing representation by government appointees who are selected to serve the interest of the government while representing the indigenous peoples. An important aspect of participatory representation which may be considered is to bring all indigenous peoples in a region together, community by community, to establish an indigenous council in which elected representatives from each community are identified and recognised to participate in development affecting their communities. This elective mode is proposed by this thesis for the formation of the Representative Council of Indigenous Peoples. This Council will be the only authentic body to make decisions for the indigenous peoples in the Niger Delta after due process and consultation.

5.5.7 *Nigeria has a duty to provide access to judicial and administrative remediation*

The exploration and exploitation of mineral resources in the Niger Delta involve various stakeholders raising the possibility of disagreement on legal issues. Therefore, the government has the statutory responsibility to provide effective access to judicial and administrative proceedings, including redress and remedy. To

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health and integrity of the Earth's ecosystem; and Principle 10, environmental issues to be best handled through partnership of all citizens at all relevant levels. From the Declaration, environment and development are one, they cannot be separated and must be protected together to achieve sustainable development. Thus, any state that desires good economic growth, must be ready and willing to protect the environment and protect the people in that environment.

[956] Rio Declaration, Principle 11.

this end, all the relevant international legal instruments that provide human rights and environmental protection should be made available by the government to be applied in lawsuits and tribunals involving foreign parties, which is inevitable in oil and gas disputes.

5.6 Conclusion

This proposal has been set out in four sections as the pillars that support the sustainable development legal framework recommended by this thesis. The four pillars are mutually supportive and indivisible as the foundation on which sustainable development in Nigeria should be built if it is to offer a lasting legal solution to the conflict in the Niger Delta. At the same time, if endorsed and adopted by Nigeria, this proposal will bring effective changes to the lives of indigenous peoples and provide the needed legal basis for their wellbeing as a result of their legal, economic and social recognition.

Furthermore, the content in this proposal will augment whatever development plans are available in Nigeria to conceptualise or standardise sustainable development of natural resources within the country. Lack of conceptualisation of sustainable development in plans and policy has resulted in the failure of development in Nigeria, including specifically, failure to address different group needs differently. This is contrary to the concept of sustainable development. People should be at the centre of development, and their needs, aspirations, values, and choices should underpin the planning of development projects. This way, the oil and gas development projects in the Niger Delta will be people-centred, economically and socially durable, and will enable a healthy environment for the greater benefit of all people, and the indigenous peoples in particular.

CHAPTER SIX

CONCLUSIONS AND RECOMMENDATIONS

6.1 Introduction

The aim of this thesis, as stated in Chapter one, is to provide answers to the following three questions:

- What provisions are available under existing international human rights law and sustainable development legislation and instruments for the protection of the indigenous peoples of the Niger Delta?

- How can these provisions bring relief to the indigenous peoples of the Niger Delta as the principal beneficiaries of the wealth from the land and natural resources?

- How can these international provisions be domesticated to form part of Nigeria's municipal law or modelled into a legal framework to protect and promote the rights of the indigenous peoples of the Niger Delta and, by analogy, all the peoples of Nigeria?

Two objectives are drawn from the answers to these questions: to ensure the political and legal recognition of the indigenous peoples based on regional and international standards; and to evaluate the need for protection of the rights of the indigenous peoples of the Niger Delta to their traditional land and natural resources, through their rights to self-determination and development. Having analysed, argued, and discussed and presented conclusions in response to the research questions and in fulfilment of the objectives of this thesis in each chapter, this concluding chapter presents a summary of all the chapters, the conclusions reached in the thesis, and recommendations for a solution to the thesis problem.

6.2 Summary of thesis chapters

Chapter one of the thesis sets out the methodology used in researching the solution to the conflict in the Niger Delta through its topic on sustainable development and the rights of indigenous peoples. The chapter identifies the research questions and objectives based on the basic factors of the study, and facts gathered from the Niger Delta background study which explains the conflict. Chapter two covers the whole gamut of the rights of indigenous peoples and sustainable development, including

the conceptualisation of indigenous peoples' permanent sovereignty over natural resources as a right that draws on their rights to self-determination and development. This chapter conceptualises the indigeneity of the Niger Delta people and establishes the characterisation of the Ogoni and Ijaw as indigenous peoples, to represent all other Niger Delta indigenous peoples. In its findings, it resolves that, unsustainable development has impoverished both the environment and the people which points to sustainable development as the best option for the development of oil and gas in the Niger Delta.

Chapter three, which addresses the legal aspects of the Niger Delta conflict, explores the mode of identifying and establishing the legal implications and offering an appropriate legal solution. The chapter finds that all categories of rights accruing to the indigenous peoples should be respected and protected – but in particular, the right to development which arises from the indigenous peoples' ownership of natural resources. This can be actualised through the integration of principles and rules of sustainable development and human rights in the development of natural resources. To enable proper assimilation of this legal process as a solution, Chapter four examines the intricacies of 'state sovereignty over natural resources' and 'permanent sovereignty over natural resources' which are considered by this thesis to be the prerogative of indigenous peoples. In so doing, Chapter four establishes what it terms the 'misunderstood conception of state sovereignty' in most Africa States – including Nigeria – a misunderstanding which is then formalised in constitutional provisions. Therefore, the chapter reiterates the need for cohesion between peoples' sovereignty and State sovereignty. The way in which to achieve this cohesion – which forms part of the legal solution to the conflict in the Niger Delta – is through meaningful participation and the inclusion of indigenous peoples in the sustainable development of oil and gas in the region.

For the effective actualisation of the all-inclusive, participatory, and people-oriented development of oil and gas in the Niger Delta, this thesis emphasises the need for a legal framework for the sustainable development of natural resources. To ensure this, Chapter five proposes some important elements which should form part of the framework. These include the legal recognition of indigenous peoples; integration of sustainable development and the individual and combined capabilities of the indigenous peoples; and the need to promote meaningful participation by indigenous peoples in sustainable development. The thesis further urges that, while the

legislative process for the drafting of a legal framework is under consideration, the content proposed in Chapter five be taken up in existing national development agendas, programmes, and initiatives, updating them through the inclusion of these vital elements of sustainable development for meaningful impact in Nigeria.

6.3 Thesis conclusions

In this research it has been found that the indigenous peoples are at the centre of the conflict in the Niger Delta. Their struggles with generic protests against poverty and in demand for their rights as indigenous peoples to be recognised and acknowledged, to enable them to participate in and enjoy the wealth of their natural resources has been established. Through this research, it has also been established that indigenous peoples possess aboriginal rights over the land and resources being exploited in the Niger Delta, and that these rights have been persistently abused, notwithstanding their protection under international human rights law.

The wider conclusions reached in this thesis are set out in what follows.

6.3.1 *Political and legal recognition of the indigenous peoples*

Political and legal recognition must be accorded the indigenous peoples of the Niger Delta. The Ogoni and Ijaw are indigenous peoples in the Niger Delta and have been characterised and recognised as such by the African Commission,[957] and they in turn represent other indigenous peoples in the Niger Delta for the purpose of the argument in this thesis. Proof of indigeneity of the Niger Delta peoples is part of the fulfilment of the thesis objectives. Importantly, the thesis has established that the dispossessed peoples of the Niger Delta are indigenous peoples who have rights to be protected. Backed by the African Charter, the precedent-setting decision in the *Endorois* case confirmed that indigenous peoples exist in Africa and that African States should recognise and protect them. Similarly, by virtue of the *Endorois* case, the Ogoni people are affirmed and recognised as indigenous peoples. The Ogoni in this research represent the entire body of the indigenous peoples of the Niger Delta. For this reason, the legal recognition accorded the Ogoni applies equally to all indigenous peoples in the Niger Delta. Nigeria is therefore called upon to recognise the indigenous peoples of the Niger Delta and protect all the rights that fall to them

[957] See: Section 2.2.6 nn 174, 175.

under relevant international instruments. It further recommends the domestication of these instruments in Nigeria's national law.

The thesis identifies that the essence of gaining legal recognition and protection for their rights lies not in the indigenous peoples establishing a parallel government or challenging Nigeria's sovereignty. Rather, the indigenous peoples must be empowered to enjoy economic, social, and cultural development through the right to self-determination granted them for the benefit of present and future generations, and as partners in all development in Nigeria which impacts on them. The legal recognition recommended in this thesis requires a constitutional provision, and this, in turn, implies a constitutional review. In this way the thesis has fulfilled its objective of establishing the political and legal recognition of indigenous peoples in Nigeria based on regional and international standards. It has also identified the importance of protecting indigenous peoples' rights to self-determination and development.

6.3.2 *Human rights protection and fundamental freedom*

By virtue of Nigeria being a member state of the United Nations, and in accordance with the principles enshrined in the Charter of the United Nations, Nigeria should recognise the inherent dignity and equal and inalienable rights of all its people – and particularly in this context, the indigenous peoples of the Niger Delta. In line with its UN membership, Nigeria is expected to protect its people in accordance with relevant international human rights instruments – most notably the ICCPR and ICESCR. The ICESCR is found by this thesis to be of peculiar importance to the indigenous peoples as it is directed at the promotion of universal respect for and observance of the human rights and freedoms of indigenous peoples through the collective protection of their economic, social, and cultural rights.

In the findings of this thesis, the fundamental freedom proclaimed in international human rights instruments, the UDHR, the UN Charter, and the African Charter mirror the claims for freedom by the indigenous peoples in the Niger Delta. What the indigenous people seek is freedom from oppression, subjugation, exclusion, marginalisation, and other such vices, not freedom for self-determination, for secession, or political independence within Nigeria's sovereign territory as explained in the thesis. The indigenous peoples demand and deserve the fundamental freedom to determine what suits them best based on their choices and values. For guaranteed protection of all human rights and the granting of fundamental freedom

to the indigenous peoples of the Niger Delta, the domestication of the two Covenants is recommended.

6.3.3 *Environmental protection and sustainable development*

Further, regarding the protest action by the indigenous peoples, the thesis found that sustainable development of the natural resources provides the appropriate developmental solution. The thesis also found that effective reliance on international human rights by integrating them into the sustainable development principles, can provide the required protection for the indigenous peoples and their rights to lands and natural resources in the region.

When combined, international human rights law promotes sustainable development. This thesis found that Nigeria needs to incorporate sustainable development ideals in its existing national plans, programmes, and strategies, with emphasis on human beings as the focal point. It also concludes that the indigenous peoples form the central concern for sustainable development in the Niger Delta. Therefore, the rights to their lands, natural resources, and environment can only be protected through their inclusion and participation in the development projects on their lands and in their communities.

6.3.4 *Required: A legal framework on sustainable development incorporating the capabilities approach*

The success of sustainable development lies in engendering a concerted concern for poverty eradication, when capabilities, human rights, and elements of sustainable development are integrated, to enable individual freedoms to operate at full capacity through the enablement of and support for combined capabilities. The omission of these elements has been responsible for the failure of development recorded in the Niger Delta region resulting from an imminent lack of freedom and opportunities for the indigenous peoples, and the improvement of 'internal and combined' capabilities as articulated by Sen[958] and advanced by Nussbaum.[959]

The thesis found that the application of the 'capabilities understanding' provides the desired remedy for the deprivation in the Niger Delta by relying on the internal and combined capabilities. Internal capabilities are personal attributes, recognisable as

[958] See: section 2.3.2.1 in Chapter 2, 'The Capabilities approach'
[959] ibid.

the characteristics of a person, his or her personality traits, intellectual and emotional capacities, fitness and health, internalising, learning, skills of perception, and movement. The combined capabilities in synergy with sustainable development will invigorate the indigenous peoples through participation at every stage of oil and gas development to yield great political, social, and economic growth. This combination is a prerequisite for the enjoyment and good life and living standards for the indigenous peoples, not only in the Niger Delta but in all parts of Nigeria where sustainable development of natural resources is required.

The capabilities approach, together with the principles of sustainable development discussed in Chapter two, provide valuable insights for a comprehensive people-inclusive legal framework. The capabilities approach is an appropriate tool for change for the indigenous peoples of the Niger Delta. Linking it to the principles of sustainable development offers an antidote for the extreme poverty ravaging the region. As the appropriate solution to the conflict in the Niger Delta, this thesis recommends a legal framework for the sustainable development of natural resources which incorporates the peoples' participation in every aspect of oil and gas development. To this end, the thesis proposes in Chapter five, the most essential elements to be reflected in the framework.

6.3.5 *Domestication of international law for the protection of indigenous peoples*

As regards the important question of the domestication of international law for the advancement of indigenous peoples' rights, the thesis found that the concept of 'indigenous peoples' is part of the evolution of human rights, freedom, and democracy for which the international human rights instruments offer the necessary inalienable protection globally as explained in Chapters two and three. As a Member State of the United Nations, Nigeria is obliged to provide human rights protection for all its people. Although the human rights provisions in Chapter IV of the 1999 Nigerian Constitution (Fundamental Rights) reflect partial domestication, the absence from the Constitution of the economic, social, and cultural rights associated with collective rights, results in the protection available to Nigeria's people proving inadequate. This generation of rights should be made available to all the people of Nigeria, but especially the indigenous peoples, as a matter of urgency.

Therefore, the perspective from which this thesis considers the domestication of international law is purely that of complete protection for the rights of indigenous

peoples in the face of inadequate constitutional human rights provisions, especially the missing second and third generation rights and the non-availability of national environmental legislation to protect their environmental rights as discussed in Chapter three sections 3.2.1 and 3.4.

6.4 Thesis recommendations

The following recommendations, drawn from all the chapters in this thesis, concretise the expected solution to the conflict in the Niger Delta.

6.4.1 *Political and legal recognition of indigenous peoples in the Niger Delta*

Actualising indigenous peoples' protection in the Niger Delta is possible only once their existence as the traditional owners and occupiers of territory and its natural resources mentioned in section 44(3) of the 1999 Constitution of the Federal Republic of Nigeria, is legally recognised.

The State and other stakeholders must recognise the traditional inhabitants of the Niger Delta region as indigenous peoples both politically and legally. This will allow them to reap the benefits from and protection of the human rights and development due to them under international law. The legal and political effect of this recognition should be evidenced by granting them the freedom to make choices that they value in respect of their land, territory, and natural resources as an acceptable approach to self-determination.[960] Self-determination for the indigenous peoples in the Niger Delta also implies their being allowed to be part of any decision-making entity on natural resources within their communities. This informs the political and legal recognition aspirations of the indigenous peoples.

6.4.2 *Need for legislative review of the Constitution*

The thesis recommends a review of the 1999 Constitution of the Federal Republic of Nigeria as follows:

- Amendment of the 1999 Constitution of the Federal Republic of Nigeria, Chapter IV on Fundamental Rights to incorporate all categories of human rights, particularly second-generation rights which include economic, social, and cultural rights, and third generation rights which include the right to development, to a healthy environment, and to peace (the solidarity rights). To

[960] Cyril Obi, 'Oil extraction' 225.

reflect its new scope, a chapter in the Constitution titled 'The Bill of Rights' is proposed.

- Replacement of section 44(3) with a new section titled 'Sovereignty over natural resources'. In this new section Nigeria can assert its sovereign right to exploit its natural resources and recognise the property right of the indigenous peoples as traditional owners of the land which is supported by a participatory right in the development of all natural resources.

6.4.3 *Compensation provision in the Constitution*

A sub-section in the new section on natural resources should be inserted to allow for compensation, resettlement, and restitution as relief for the indigenous peoples found on the land. The choice of relief lies entirely with the indigenous peoples who should be consulted prior to the expropriation. Compensation should be two-fold. One, compensation for the expropriation of the natural resources payable to all indigenous peoples and their communities. Two, compensation should be paid to those who agree to resettlement before the development commences. Resettlement cannot be imposed; it must be voluntary because it cannot be reversed. It should be free and carried out by the government. Restitution should apply to all indigenous peoples, both those who agree to be resettled and those who elect to remain on their land. The indigenous peoples who decide to stay on their land qualify for restitution, and should be protected from injury and health hazards. Restitution restores the property right of the indigenous peoples to their natural resources. Whether through resettlement or living on their traditional land, indigenous peoples are entitled to all the privileges attached to the rights to property, particularly benefit-sharing and meaningful participation.

6.4.4 *Enactment of national legislation on environmental law*

Nigeria needs a home-grown national environmental Act that will protect the country's peculiar environment, ecosystem, and biodiversity from abuse and neglect. This environmental Act should be supported by the recognition and application of environmental rule of law for achieving sustainable development as discussed in Chapter five. Enforcement and compliance with the environmental legislation can be regulated and monitored by existing environmental agencies and institutions, or Nigeria can create specific agencies for the environmental rule of law.

6.4.5 *Domestication of international law*

Although in the view of some, the international instruments repeatedly mentioned throughout the thesis may seem to have been domesticated in the Nigerian legal system, they do not appear to be having the desired effect as regards the indigenous peoples. Therefore, for the protection of the collective rights of indigenous peoples, this thesis still recommends the effective domestication of the two international covenants which affirms that all peoples have the right to self-determination and allow them freely to determine their political status and freely pursue their economic, social, and cultural development which is crucial to the general wellbeing of indigenous peoples. This, in the considered view of this thesis, can be achieved through the legislative process provided for under the 'Implementation of treaties' in section 12(1) of the 1999 Constitution of the Federal Republic of Nigeria, to provide a complete and unhindered protection for indigenous peoples in Nigeria.

6.4.6 *Adoption of UNDRIP and ILO C169 ratification*

For the peculiar benefits of indigenous peoples as discussed in Chapter three, this thesis agrees with Cambou and Smis that from the human rights perspective, national legislation must be reviewed as regards measures relating to indigenous peoples' rights to land and natural resources.[961] During the review process international human rights law, and more specifically the standards provided by ILO C169 and the UNDRIP, must be considered.[962] This thesis therefore recommends the ratification of ILO C169 and adoption of the UNDRIP to serve as key legal instruments and part of the framework for the promotion and protection of the interests of indigenous peoples in Nigeria. The ratification will promote collective benefits for indigenous peoples in Nigeria and further reassure the indigenous peoples of the Niger Delta of government's interest in promoting their well-being.

6.4.7 *Required: A legal framework*

In line with its objectives, this thesis proposes a legal framework on sustainable development of natural resources to ensure the political and legal recognition of the indigenous peoples and the protection of their rights to land and natural resources. The framework will further ensure the exercise of the rights of the indigenous

[961] Cambou and Smis, 'Permanent Sovereignty Over Natural Resources' 375.
[962] ibid.

peoples to self-determination and to development through their effective and meaningful participation in those developments that concern them. It is recommended that the proposed legal framework be integrated with the capabilities approach as the appropriate theoretical framework, combined with human development ideas that form the basic elements of human concern.

Chapter five has set out salient contents for the recommended legal framework. This includes a participatory right for the promotion and protection of the economic, social, and cultural rights of indigenous peoples in Nigeria. Nigeria is encouraged to adopt the framework proposed in Chapter five which encompasses the essential principles of sustainable development in international law.

6.5 New perspectives for research

The thesis has covered the contents within the scope of this research, but certain crucial issues keep recurring which fall beyond the scope of this study. Two of these issues are mentioned here for future researchers to consider for the benefit of the indigenous peoples.

6.5.1 *Characterisation of other indigenous peoples in Nigeria*

Falling beyond the scope of this research is the urge to give other indigenous peoples in Nigeria the opportunity to be identified and recognised, which can be properly justified through independent research. It will be of great benefit to the unknown, vulnerable, and ultimately disadvantaged peoples, who are unaware of their 'indigenous' status – especially those co-located with solid minerals and those living in the forests, on the mountaintops, and pastoralists. To this end, consultations and research for indigenous characterisation and identification throughout Nigeria is being contemplated. The process will be guided by the international concept of indigenous peoples and the characterisation criteria adopted by the African Commission as the standard established in this thesis.

At the international level, in analysing the concept of 'indigenous', Daes makes it clear that, 'indigenous people should be thought of as groups which are native to their own specific ancestral territories within the borders of the existing state, rather than persons that are native generally to the region in which the state is located',

thereby establishing criteria as guiding principles for indigenous peoples.[963] Notice should be taken of this fact.

For its part, in its 2007 Advisory Opinion the African Commission adopted the criteria as the favoured approach in identifying the principal characteristics of Africa's indigenous communities.[964] This is the most credible means of achieving the anticipated characterisation of indigenous peoples in Nigeria. Additionally, the African Commission clarified doubts or misgivings that:

> In Africa, the term indigenous populations or communities is not aimed at protecting the rights of a certain category of citizens over and above others. This notion does not also create a hierarchy between national communities, but rather tries to guarantee the equal enjoyment of the rights and freedoms on behalf of groups, which have been historically marginalised.[965]

This African Commission statement affirms the reasoning behind this research as an attempt to bridge gaps and mend fences arising from the marginalisation of indigenous peoples in the Niger Delta. This necessitates further characterisation of all indigenous peoples in Nigeria and opens a new perspective for research into improved life and living standards.

6.5.2 *National Council of Indigenous Peoples of Nigeria*

Another area that requires research but falls outside the scope of this study, is the possibility of motivating the indigenous peoples to elect dedicated representatives to form a National Council of Indigenous Peoples of Nigeria. This Council will be responsible for all national and international dealings on behalf of the Nigerian indigenous peoples. The modalities formulated will boost the morale of the indigenous peoples and encourage them to speak out and be self-reliant. Some of the duties of this Council will be participation in decision making and policy making in matters concerning their land, resources, and development at international, regional, national, and local levels.[966] The Council should be committed to the promotion of

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[963] E/CN.4/Sub.2/AC.4/1996/2 Working Paper by the Chairperson, Rapporteur, Erica-Irene A Daes on the concept of 'indigenous people' [64], [69].
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both political and legal recognition of Nigerian indigenous peoples in order to establish their status as a group deserving of protection.

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