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The Nigerian Niger Delta and the Invisible Hand of TREMF: Exploring the (IM)Possibility of Socio-Economic Justice Under the Un 'Ruggie' Guiding Principles

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THE NIGERIAN NIGER DELTA AND THE INVISIBLE HAND OF TREMF:
EXPLORING THE (IM)POSSIBILITY OF SOCIO-ECONOMIC JUSTICE
UNDER THE UN 'RUGGIE' GUIDING PRINCIPLES

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A THESIS SUBMITTED TO THE FACULTY OF GRADUATE STUDIES IN
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ABSTRACT

The Nigerian Niger Delta region which is home to Nigeria's large crude oil reserves, has grappled with many problems since the inception of crude oil explorations in the area over six decades ago. From environmental degradations to flagrant violation of human rights, the pitfalls of the exploration activities have hugely undermined the socio-economic wellbeing of the people and thereby causing them socio-economic injustice.

This thesis tested how, and found that, the protracted socio-economic problems in the Niger Delta exemplifies Upendra Baxi's germinal theory on the emergence (and now prevalence) of a trade-related and market-friendly (TREMFI) paradigm that supplants human rights under the paradigm of UDHR in favour of assigning more rights to global capital. It then explored the potentials of the UN 'Ruggie' Guiding Principles on Business and Human Rights in contributing towards socio-economic justice, in the light of the TREMF paradigm, in the Niger Delta.

DEDICATION

This thesis is dedicated to all the oppressed and slain people of the Nigerian Niger Delta and all the peoples of the world, oppressed and dehumanized for the purpose of assigning more rights to global capital.

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I acknowledge the unflinching support of my parents and siblings in completing this chapter of my educational life. I especially appreciate the motivation, generosity and resourcefulness of my elder brother, Dr. Chika Charles Aniekwe towards the successful completion of this study.

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CHAPTER ONE

Research Outline: Conceptual Framework and Methodology

1.1 Introduction

Nigeria is a large country¹ that is blessed with a huge amount of natural (and of course human) resources.² The most vast and lucrative of all of its natural resources is crude oil which is found in the coastal part of the country's southern region known as the Niger Delta.³ Nigeria's crude oil deposits are ranked the 10th largest proven reserve in the world; and makes Nigeria the 12th largest producer and 8th largest exporter of the product in the world.⁴ The crude oil deposits are at present, almost exclusively exploited in the Niger Delta region.

This study is necessitated by the persistence of steep social, environmental and economic pitfalls resulting from crude oil exploitation, and faced by the communities and peoples of the Niger Delta hosting them. As several reports/projects have shown, the Niger Delta environment (land, air, water and biodiversity) has suffered and continues to suffer grave depletion and pollution on account of crude oil production there.⁵ The human rights of the Niger Delta indigenes both individually and

¹ It is the largest country by population in Africa with an estimated population of 184 million people according to estimates on the Nigeria's National Population Commission website accessible here <http://population.gov.ng/>>. However other fora put Nigeria population about 9 million above the NPC estimates. See < <http://www.worldometers.info/world-population/nigeria-population/>>; <http://countrymeters.info/en/Nigeria> and < <http://www.worldometers.info/world-population/nigeria-population/>> All Accessed on January 8th 2018

² Nigeria has in abundance the following natural mineral resources; natural gas, iron ore, coal, limestone, lead, zinc, tin, niobium etc. This is according to Nigeria's official page on the OPEC website accessible here < http://www.opec.org/opec_web/en/about_us/167.htm> Accessed on 18th December 2017

³ The Niger Delta region consists of 9 Southern Nigerian States. It draws its name from the fact that this region is the delta of the River Niger, which sits on the Gulf of Guinea and the Atlantic Ocean.

⁴ See data from OPEC at < http://www.opec.org/opec_web/en/about_us/167.htm> . See also statistics from Nigerian National Petroleum Corporation at < <http://nnpcgroup.com/PublicRelations/OilandGasStatistics.aspx>> accessed on 18th December 2017

⁵ See this 2011 Report by the United Nations Environmental Protection UNEP, 'Environmental Report of Ogoniland' available at <http://www.unep.org/disastersandconflicts/CountryOperations/Nigeria/EnvironmentalAssessmentofOgonilandreport/tabid/54419/Default.aspx> Accessed on March 16th 2016

collectively (to life, food, safe environment, to peaceful protest/freedom of expression and so on) have also suffered grave abuse and or neglect as a result of crude oil exploration in the region.⁶

Empirical evidence as well as astute research outputs have shown the direct link between this praxis of gross violations of human rights and environmental safety standards (on the one hand) and the emergence (on the other hand) of steep social, environmental and economic challenges; including agitations (violent and non-violent) that they precipitate.⁷

These social, environmental and economic issues as well as their underlying human and environmental rights causes are collectively referred to in this study as, '*socio-economic problems*'; the mere existence or prevalence of which amounts to '*socio-economic injustice*'. The term '*socio-economic justice*' will therefore be employed to illustrate just solutions or remedies that address the highlighted '*socio-economic problems*'.

1.2 DEFINITION OF KEY TERMS

There are two key terms used throughout this thesis that deserve a conceptual definition. These are 'the Niger Delta' and 'socio-economic justice'.

1.2.1 The (Nigerian) Niger Delta

Nigeria runs a Presidential system of government in a pseudo-federalist arrangement headed by a President. The federating units are known as 'states' and there are 36 of those that make up the Federal Republic of Nigeria (Nigeria). These 'states' (or state governments) are the second tier of government

⁶ See for instance; Martin-Joe Ezeudu, "Revisiting Corporate Violations of Human Rights in Nigeria's Niger Delta Region: Canvassing the Potential Role of the International Criminal Court" (2011) 11 Afr Hum Rts LJ 23 And See Olubayo Oludoro "Oil Exploitation and Human Rights Violations in Nigeria's Oil Producing Communities", online: *Intersentia NV* <<http://intersentia.com/en/oil-exploitation-and-human-rights-violations-in-nigeria-s-oil-producing-communities.html>>..

⁷ See Lisa Stevens, "The Illusion of Sustainable Development: How Nigeria's Environmental Laws are Failing the Niger Delta" (2011) Vermont Law Review, Vol 36, Issue 2.

in Nigeria and they are headed by elected public officials with the designation of ‘Governor’. There is also a third tier of government known as the local government with each of the 36 state governments consisting of a differing number of such local governments.⁸ These states (and local) governments are further classified into six geo-political zones of North Central, North East, North West, South East, South South and South West.

The Nigerian Niger Delta region is constituted by the delta areas through which the river Niger flows into the Atlantic Ocean. It consists of the whole six state governments which constitute the South South geo-political zone,⁹ plus two state governments in the South East geo-political zone¹⁰ and One state in the South West geo-political zone.¹¹ The Niger Delta region makes up around 7.5% (about 75,000kmsq) of Nigeria’s overall 923, 768kmsq landmass.¹² The population of the region is estimated at about 31 million people, representing about 16% of Nigeria’s entire population¹³. The region is richly multi-ethnic and multi-lingual with over 40 ethnic groups such as the Ijaws, the Urhobos, the Kalabaris, the Ikweres, the Igbos, the Itsekiris, the Efiks, the Ibibios, the Ogonis and so on. It is a predominantly coastal region with four distinct ecological zones of mangrove, freshwater swamp forests, barrier island forests and lowland rainforests.¹⁴

⁸ For purposes of this paper, the term ‘government’ is being taken as whole and shall be deployed to refer to actions of federal, state or local government and those of the executives, legislators and/or judiciary within these aforementioned three tiers.

⁹ Akwa-Ibom, Bayelsa, Cross-River, Delta, Edo and Rivers States

¹⁰ Abia and Imo states

¹¹ Ondo State

¹² See Federal Republic of Nigeria, Ministry of Petroleum Resources, ‘National Petroleum Policy’ (Abuja, 2017) at 41 Available at < <http://www.petroleumindustrybill.com/wp-content/uploads/2017/07/National-Petroleum-Policy-Approved-by-FEC-in-July-2017.pdf>> Accessed 20th January 2018 and Kaniye S. A. Ebeku, ‘Oil and the Niger Delta People in International Law’ Resource Rights, Environmental and Equity Issues (2006)

¹³ See Federal Republic of Nigeria, Ministry of Petroleum Resources, ‘National Petroleum Policy’ (Abuja, 2017) at 41 Available at < <http://www.petroleumindustrybill.com/wp-content/uploads/2017/07/National-Petroleum-Policy-Approved-by-FEC-in-July-2017.pdf>> Accessed 20th January 2018 and Amnesty International, ‘Nigeria: Petroleum, Pollution and Poverty in the Niger Delta’ (London, 2009) at 9 Quoting the report of the Niger Delta Technical Committee, Nov. 2018 at page 102

¹⁴ The World Bank, Defining an Environmental Development Strategy for the Niger Delta’ (2006) at vi

Presently, there are about 2800 producing oil wells in the Niger Delta; spread between 33 producing companies (and 85 operating companies).¹⁵ The region, vis-à-vis the oil and gas sector, has largely contributed a minimum average of 80% to the net revenue generation of the Nigerian federation since 1974.¹⁶ This contribution however dropped to 55.4% due to the crash in global oil prices in 2014-2015,¹⁷ as well as the impact of the renewed agitation and attacks on oil facilities in the Niger Delta by the new militant group, the Niger Delta Avengers (NDA) since the later part of 2015.¹⁸

1.2.2 Socio-Economic Justice

To define socio-economic justice, the theoretical foundation of the concept of justice relevant to this discourse needs to be properly outlined. In other words, we need to first, determine how we are to understand the foundational concept of justice.

In his '*Justice as Fairness*' theory, John Rawls laid out what is arguably one of the most germinal (liberal) theoretical conception of Justice since the 20th century.¹⁹ Rawls' theory broke the polarising effect of J.S. Mill's utilitarianist views and Marx's communist construction and imposed itself somewhat as a refreshing breath of air in the field and discourse of political philosophy (cum philosophy of law). He thinks that the primary subject of justice is the ordering and organization of the basic structure of society. The Rawls' '*Justice as Fairness*' theory brought a refined perspective to, but however maintained the similar abstraction (albeit to a much higher level) of, Kant's, Hume's, Rousseau's and Locke's familiar social contract theories. It departs from Locke's personal liberty (only by its second principle)

¹⁵ Z Adangor, "The Petroleum Industry Bill 2012 and the Niger Delta Region of Nigeria: Panacea or Placebo" (2015) 38 *JL Pol'y & Globalization* [i] at 3 (48 of the text) Quoting a Department of Petroleum Resources Statistics on 2014.

¹⁶ Adangor, *supra* note 15.

¹⁷ See Central Bank of Nigeria, 'Annual Report 2015' (Abuja, 2015) available here <<https://www.cbn.gov.ng/Out/2017/RSD/Annual%20Report%202015.pdf>> at 112.

¹⁸ Increase in global oil prices and the restoration of relative peace once again, in the region, would suggest a likelihood of an increase in the sector's net revenue contribution in years 2016, 2017, 2018 and 2019.

¹⁹ Rawls J, '*A Theory of Justice*' Rev edn (Harvard University Press, 1999)

and Rousseau's social autonomy-based formulations. He however agrees with Hume in thinking that principles of justice are engrained in our basic nature as human beings.

This theory considers the kind of societal structuring individual members would agree to if all of them started from an imaginary 'original position' where 'no one knows their place in society'. All individuals would, at that 'original position', be masked by a '*veil of ignorance*' and are therefore oblivious to what endowments, talents or disabilities they may possess. The original position and *veil of ignorance* in Rawls' view, would eliminate inherent biases or penchants for marginal advantages that usually influence judgments/choices, and ensure a fair bargaining. Therefore, the question of this theory is in the form of what kind of social institutions or economic divisions or civil ordering would individuals bargain for and agree to at that hypothetical original position? Rawls believed that the outcome will be a societal ordering or organization that would be most considerate (if not favourable) to the least advantaged of that society. This in his view, represents *Justice as fairness*.²⁰

Rawls believed that the first principle of justice to emerge from this original position of bargaining would be one of equal rights and liberties.²¹ The second principle to emerge would be socio-economic Justice where:

*'social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all.'*²²

There is no gain overstating the fact that this redistributive and socio-economic equity formulations of the concept and principles of justice by Rawls, is more in alignment with the precepts of this thesis as well as the obligations created for states under the Universal Declaration of Human Rights (UDHR)

²⁰ Rawls Supra (n19) pp10 – 18. He believes this will occur by the process of 'reflective equilibrium' by which individuals balance out two or more opposing absolutist principles to arrive at a more just and equitable decision. This is how he believes society can hold in equal value competition principles such as personal liberty and equal opportunity etc.

²¹ Rawls (Supra) p52

²² Ibid n19

paradigm. Upendra Baxi had noted that the UDHR '*assigned human responsibilities to states...to construct, progressively and within the community of states, a just social order, national and global, that will at least meet the basic needs of human beings.*'²³

This redistributive aspect of Rawls' theory drew the heaviest criticisms that have been targeted at this theory till date. The most prominent of these was Robert Nozick's pragmatic libertarian theory of the social contract.²⁴ Nozick kicks against any form of interventionist or redistributive paradigm but rather advocates a 'night watchman' minimalist state-type society where rights to liberty and property will be absolute and may only be interfered with '*in order to avoid catastrophic moral horror.*'²⁵

An adoption of Nozick's model will simply amount to an adoption of the neoliberal and *Laissez faire* kind paradigm that arguably enabled the problems being discussed by this thesis in the first place. In any case, it is argued that the situations in the Niger Delta today have reached the threshold of the 'catastrophic moral horror' upon which even the Nozickian principle permits interference for redistributive purposes.

On this basis, 'socio-economic justice' in this context signifies measures, mechanisms and/or actions that are designed, in Dworkinian terms, to deal with the 'brute luck' consequences of crude oil exploration in the Niger Delta in order to foster distributive equality of resources.²⁶

²³ Baxi U, '*The Future of Human Rights*' (New Delhi 2002) at 139

²⁴ Nozick R, '*Anarchy, State and Utopia*' (Oxford, 1974)

²⁵ Nozick (Supra) at 30. For more detailed critical examination of Rawls and its critiques See also Kukathas C and Petit P, '*Rawls: A Theory of Justice and its Critics*' (Blackwell 1990) and Barry B, '*The Liberal Theory of Justice: A Critical Examination of the principal doctrines in a Theory of Justice by John Rawls*' (OUP 1973)

²⁶ Dworkin R, 'Equality of Resources' In *What is Equality* cap 2 (1981) Philosophy & Public Affairs, Vol. 10, No. 4, pp 283 - 345

1.3 THE RESEARCH PROBLEM

Crude oil accounts for over 80% of Nigeria's revenue generation and contributes over 8% to its GDP.²⁷ The importance of crude oil to the country's economy can be gleaned from this following illustration. In 2014/2015 at the crash of the global oil price, 27 out of Nigeria's 36 state governments apparently went bankrupt due to a steep decline in their respective monthly federal revenue allocation. They had to rely on a financial relief package by the federal government to meet their basic expenditures such as payment of workers' salaries.²⁸ It may not be entirely out of place therefore, to infer that without the constant revenue from crude oil, the Nigerian state in its present economic structure, may likely collapse. The above fact underscores the significance of the Niger Delta region to Nigeria and the rest of the world where oil and gas explored from its environs are put to use.

Production of crude oil in Nigeria began in 1958 shortly after its discovery in commercial quantity two years earlier in Oloibiri, a small community in the Niger Delta region. Shell-BP (as it then was), which was the sole concessionaire at the time, began production; pumping out a little over five thousand barrels (5100 bpd) per day.²⁹ Agitations resulting from environmental, social and economic concerns by the indigenes began only 8 years later. The infamous revolution by the Niger Delta Volunteer Force led by a certain Isaac Adaka-Boro (Boro) in February 1966 became the climax of such early-stage agitations.³⁰

²⁷ PWC, 'Nigeria's GDP Positive Signals for 2017', available here < <https://www.pwc.com/ng/en/assets/pdf/economy-alert-march-2017.pdf> > accessed January 28th 2018

²⁸ See The World Bank, 'Nigeria Biannual Economic Update No 1 2017' at p21 Available here <<http://documents.worldbank.org/curated/en/349511494584937819/pdf/114996-WP-P163291-PUBLIC-NEUNoFinalfromPublisher.pdf>> accessed 10th January 2018. See also Budget policy document titled 'The State of the States' (2015) available at <<http://www.yourbudget.com/wp-content/uploads/2015/11/THE-FATE-OF-STATES-Final1.pdf>> Accessed on January 18th 2018

²⁹ 'History of the Nigerian Petroleum Industry' available online at www.nnpcgroup.com accessed on 30th March 2016.

³⁰ I Okonta "The lingering crisis in Nigeria's Niger Delta and suggestions for a peaceful resolution", available at: <http://www.cdd.org.uk/resources/workingpapers/niger_delta_eng.htm> Accessed in June

The objective of the revolution it would seem from Boro's speech declaring the secession of the region, was to '*draw the attention of the world to the fact that the inhabitants of the Niger Delta were feeling very uncomfortable . . .*' with the exploitation of crude oil from its environs without any attendant benefit to them. He clarified this sentiment when he declared that '*economic development of the [Niger Delta] area is certainly the most appalling . . .*' of the other regions of Nigeria.³¹ Boro and his force were later captured, tried and convicted for treason. Little was done however, by the government at that time and its successors to address the germane issues raised by the Boro-led agitation.

Less than three decades later, the Ken Saro-Wiwa-led struggle, albeit a non-violent agitation under the auspices of the Movement for the Survival of Ogoni People (MOSOP), sprung up.³² The title of MOSOP's operations guiding-document alone, 'the Ogoni Bill of Rights' (OBoR) is instructive to understanding the crux of their agitation. The specific detail of their agitation is then captured in an eight-paragraph statement by Dr. G.B. Leton, President of MOSOP, in 1991 and contained in the OBoR. Dr. Leton spoke of a '*genocide being committed . . . by Multinational Oil companies under the supervision of the Federal Government of Nigeria*'.³³ He decried the:³⁴

*"degrading effects of oil exploration and exploitation: lands, streams and creeks are totally and continually polluted; the atmosphere is for ever (sic) charged with hydrocarbons, carbon monoxide and carbon dioxide; many villages experience the infernal quaking of the wrath of gas flares which have been burning 24 hours a day for 33 years; acid rain, oil spillages and blowouts are common"*³⁵

³¹ See Anayochukwu Agbo, 'Isaac Adaka-Boro, The Seven-Day Revolution in Nigeria' available here <<http://kayodeogundamisi.blogspot.ca/2008/02/issac-adaka-boro-seven-dat-revolution.html>> at page 1

³² Ogoni is a prominent Niger Delta tribe hosting a considerable amount of the Niger Delta Oil Exploration activities and therefore also bears a huge share of its environmental consequences.

³³ G. B. Leton, 'The Ogoni Bill of Rights' (1991) available here <<http://www.bebor.org/wp-content/uploads/2012/09/Ogoni-Bill-of-Rights.pdf>> accessed 18th January 2018. By 'genocide' it is believed that he was apparently referring to the myriad of state-sponsored and conducted extra-judicial assassination of Niger Delta community leaders, spokespersons as well as human and environmental rights activists prevalent at the time.

³⁴ Ibid n 33 at p3 para 4

³⁵ The sum of these issues raised here, as well as the killings and the other human rights and environmental degradation concerns in the Niger Delta shall be brought together under the term 'socio-economic problems/injustice' in this work.

The military government of General Sanni Abacha, with the alleged collusion of Royal Dutch Shell, were to later round up Wiwa and eight of his MOSOP comrades on 31st October 1995. They subsequently tried and executed them on 10th November 1995 (hereafter ‘the Wiwa execution’). Perhaps the Nigerian government and Abacha in killing Wiwa et al, believed it was sending a decisive and clear message that would ultimately ‘tame’ all forms of agitation by the indigenes of Niger Delta. That clearly had not been the eventual outcome as the execution inspired a proliferation of more resilient and unfortunately violent, forms of agitation by the Niger Delta people.³⁶ The Wiwa execution and the eventual violent agitation that it precipitated pushed the Niger Delta issues to the front-burner of Nigeria’s national discourse and forced the issue on the agenda of the respective governments since 1995.

The totality of all the solutions and strategy applied to these problems by the respective governments since then, has been largely inadequate. From the frequent reoccurrence of the same issues, it appears the said solutions are more directed towards ensuring a crude oil exploitation that is free from the glitches of the usual agitations than they were designed to resolve or address the underlying reasons for the agitations in the first place. The Obasanjo administration’s 13% oil revenue derivation to the Niger Delta states and its establishment of the Niger Delta Development Commission (NDDC); the Yar’Adua administration’s creation of the Ministry of Niger Delta Affairs and its grant of Amnesty (the Amnesty Initiative) to the militants of the Niger Delta region and finally, the Jonathan administration’s award of sumptuous security contracts to the erstwhile militant leaders to safeguard oil facilities, have all only brought transient successes in addressing these underlying issues. If anything,

³⁶ See this 2002 Report of the Human Rights Watch Human Rights Watch | 350 Fifth Avenue, 34th Floor | New York & NY 10118-3299 USA | t 2122904700, “The Niger Delta | No Democratic Dividend”, (22 October 2002), online: *Human Rights Watch* <<https://www.hrw.org/report/2002/10/22/Niger-Delta/no-democratic-dividend>>.

they all secured a transient agitation-free environment for the smooth operation of the crude oil business at their respective times of application.

It is not surprising that whilst these superficial efforts were in effect, more damage was being inflicted on the human rights and environment of the Niger Delta people and communities. Up until late 2016, devastating oil spillages were still being recorded.³⁷ The latest of such records affected three Niger Delta states of Bayelsa, Delta and Rivers and particularly twelve local communities.³⁸ Similarly, according to the latest World Bank report (2013-2016) on the top gas flaring countries in the world, Nigeria ranks seventh (7th) flaring a little over 8000m cubic meters of gas annually.³⁹

At that rate, it is responsible for 40% of all gasses flared in the continent of Africa; the effects of which are localized in the environment, and borne by the people, of Niger Delta.⁴⁰ In addition to those, these respective governments were also complicit in several incidents of violent crackdown against the armed militants and the wanton intimidation, framing, unlawful and indefinite detention, and extrajudicial killings of unarmed activists.⁴¹ All these ultimately lead to loss of lives and properties of many innocent and unarmed Niger Delta indigenes.

³⁷ The 2016 date refers to the last recorded/reported oil spill. It does not by no means imply that there may not have been more incidences of oil spillage since then, as these usually take time to get reported, recorded or acknowledged.

³⁸ See 'Report of Recent Oil Spills in Delta and Bayelsa States Nigeria', <<https://www.stakeholderdemocracy.org/recent-oil-spills-in-delta-and-bayelsa-states-nigeria/>> accessed 5th May 2018

³⁹ See World Bank's Report on Top 30 Flaring Countries 2013-2016 available at <http://www.worldbank.org/en/programs/gasflaringreduction#7> accessed 8 April 2017

⁴⁰ See this newspaper report on the deliberations relating to the Gas Flaring Prohibition Bill 2017 before the Nigerian National Assembly available here <<https://www.vanguardngr.com/2017/06/nigeria-accounts-40-gas-flared-annually-africa-senate/>> accessed 25th May 2018

⁴¹ See for instance the military attack on Odi (a small Niger Delta community) under Obasanjo where a number of those killed are said to be in their hundreds. See a Report by Human Rights Watch on the incident, available at <<https://www.hrw.org/legacy/press/1999/dec/nibg1299.htm>> Accessed January 15th 2018. See also this report of a full military (Air bombardment, Land and Water invasion) ordered by then/late President Yar'Adua on the Niger Delta Communities <<http://news.bbc.co.uk/2/hi/africa/8054585.stm>> Accessed 15th April 2018 and another report of military bombardment by the current administration of President Muhammadu Buhari here <<https://www.vanguardngr.com/2016/11/many-feared-dead-military-bombard-militant-camp-delta/>> Accessed April 10th 2018

The current Buhari Administration has taken what seems to be a genuine step towards solving one of the key underlying causes of the agitations – pollution! It has commissioned a project to clean the pollutions in some of the Niger Delta communities. Preliminary report seems to suggest that ‘remarkable achievements’ was being made in the first nine months of the cleaning operation.⁴² The Hydrocarbon Pollution Remediation Project (HYPREP) so far concentrates its cleaning operation in Ogoniland, which is just one of the several Niger Delta communities affected by oil Spillage.⁴³ Perhaps this cleaning project offers a glimmer of hope to the inhabitants of the other communities that are equally ravaged by oil spillages. This hope apparently does not eradicate the sufferings occasioned by these spillages and it is unlikely also to extinguish the agitations they trigger. This is even more so because it is unclear when the cleaning project is to become operational in the other affected communities.

Moreover, because the underlying regulatory and enforcement laxities permitting the spillages have not been addressed, there are chances of more spillages reoccurring. Such reoccurrence would no doubt inflict more suffering on the people, which would in turn, instigate more agitation and can thereby undermine the gains of the current cleaning exercise. This fear is justified given that this was exactly the case with the Amnesty Initiative. This present administration terminated the program in December of 2017 after extending it by two years from its original terminal date.⁴⁴ However, the underlying socio-economic issues that fuelled the violence of the militants had still not been addressed. It was perhaps not surprising when the relative peace achieved by the Amnesty program was truncated

⁴² See the News Conference by the Hydrocarbon Pollution Remediation Project (HYPREP) on the Progress of the Cleaning here <http://ndnewvision.gov.ng/ogoni-clean-up-hyprep-gives-progress-report/> Accessed 14th April 2018

⁴³ HYPREP is the Joint Federal Government and Shell B.P Venture company in charge of the cleaning project.

⁴⁴ There is currently immense pressure on the administration to allow the program to run further. See for instance this report by Frank Ikpefan on the Nations Newspaper of 23rd January 2018, available here <<http://thenationonlineng.net/Niger-Delta-youths-to-buhari-extend-amnesty-programme/>> accessed 10th February 2018

almost immediately by the emergence of a new vicious militant group by the name of Niger Delta Avengers (NDA).

The NDA just like the others before it, demanded government's immediate remedy to address the same (or similar) socio-economic problems highlighted earlier. It has maintained its existence through the release of press statements and by sustaining its pattern of sporadic and infrequent attacks on oil installations since then.⁴⁵ This puts a big question mark on the sustainability and durability of the purported achievements of the Amnesty program.⁴⁶ These patterns of re-emergence/reoccurrence of 'old' problems in the Niger Delta situation strengthens the theory that the sustainability and durability of any solution must lie in its ability to address the underlying socio-economic problems fuelling the agitations.

Many scholars believe that the panacea to these underlying socio-economic issues lies ultimately in a supranational remedy.⁴⁷ The Wiwa execution, aside from forcing the issues of the Niger Delta into the Nigerian national discourse, also inspired conversations within the international realm. It clearly impeached the adequacy of the international human rights law regime as is currently constituted, in dealing with business-related human rights violations. It thereby also inspired an International policy and scholarly renaissance in seeking ways to address the dire effects of business corporations and their activities on human rights. Within the supranational framework of the United Nations, it reinvigorated efforts at evolving a code of conduct for Multinational and Transnational corporations (MNCs and TNCs). These efforts first led to the production of the controversial and now defunct 'UN Norms on

⁴⁵ See this Guardian Newspaper report for instance available here <<https://guardian.ng/opinion/the-threat-by-Niger-Delta-avengers/>> and accessed on April 10th 2018

⁴⁶ See Sabella O. Abidde, *Nigeria's Niger Delta: Militancy, Amnesty and the Postamnesty Environment* (Lexington London, 2017) pp69 – 128 For a more critical discourse on this point

⁴⁷ See Oyeniyi Abe, "The Feasibility of Implementing the United Nations Guiding Principles on Business and Human Rights in the Extractive Industry in Nigeria" (2016) 7 J Sustainable Dev L & Pol'y 137; Ezeudu, *supra* note 6; Evaristus Oshionebo, "Stabilization Clauses in Natural Resource Extraction Contracts: Legal, Economic and Social Implications for Developing Countries" (2010) 10 Asper Rev Int'l Bus & Trade L 1.

the Responsibilities of Transnational Corporations and Other Business Enterprises with Regards to Human Rights' (The Norm)⁴⁸ and prompted the eventual emergence of the UN 'Ruggie' Business and Human Rights 'Protect, Respect and Remedy' Framework (the framework) and its Guiding Principles (the GPs).⁴⁹

In the light of the above discussed background, it is the task of this research to assess if the UN framework and the GPs possess real potentials for the attainment of socio-economic justice for the people of the Niger Delta.

1.4 A BRIEF HISTORICAL OVERVIEW OF THE UN 'RUGGIE' FRAMEWORK AND GUIDING PRINCIPLES

The Wiwa execution, it is believed, provided the tipping point in the struggle and search for socio-economic justice by the people and communities of the oil-producing Niger Delta region of Nigeria.⁵⁰ It pushed the Niger Delta issues to the front burner of Nigerian national discourses (and it seems to have remained there), ushering in some of the significant governmental interventions in recent years such as the granting of a 13% derivation revenue to the oil-producing Niger Delta state governments in Nigeria and the creation of key government ministries (e.g. Ministry of Niger Delta Affairs) and agencies (e.g. Niger Delta Development Commission).

⁴⁸ See a. Commission on Human Rights, 'Joint Views of the IOE and ICC on the Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' UN Doc. E/CN.4. Sub. 2. 2003/NGO/44 (29th July 2003) b. D. Kinley, J. Nolan and N. Zerial, 'Reflections on the United Nations Human Rights Norms for Corporations' (2007) 25(1) *Companies and Securities Law Journal* 30 See Also Commission on Human Rights, 'Report on the Sixtieth Session (15th March – 23rd April 2003)', UN Doc. E/CN.4/2004/127, Part 1, ch. 42, p. 28, para. C

⁴⁹ United Nations Office of the High Commissioner for Human Rights, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (New York and Geneva 2011) at p.1 Available at <http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf> last accessed on January 26th 2018

⁵⁰ The term Socio-economic justice would be deployed in this work to represent that availability/attainment and enjoyment of better human rights protection/respect and environmental cleanliness/safety while socio-economic injustice would represent the lack thereof of these.

Internationally, it may have also contributed to the turning point in the international discourse on the responsibility of MNCs and TNCs, with respect to human rights given the proximity of its occurrence to some of the notable developments in the global Business and Human Rights debates.⁵¹ This was after several failures by the defunct UN Commission (and Centre) on Transnational Corporations (UNCTC) to produce an ‘acceptable’ Draft Code of conduct for TNCs in 1983, 1988 and 1993. The subsequent disbandment of the UNCTC itself by the then United Nations Secretary General, Boutros Boutros-Ghali, appeared to have diminished the prospect of regulating MNCs and TNCs on the supranational level.

However, the Wiwa execution and particularly, the alleged complicity of transnational oil giant, Royal Dutch Shell, appear to have re-enacted the expression of concerns and debates about the need to regulate the activities of MNCs and TNCs.⁵² It also mainstreamed human rights as an integral aspect of the wider concerns/debates on the need to regulate TNCs and pushed it to the forefront of that debate agenda.⁵³ The human rights angle, it can be argued, provided the effective vehicle for moving the debates and conversations forward into the realm of taking actions and seeking solutions. Because according to Baxi; “human rights languages are all that we have to interrogate the barbarism of power”.⁵⁴

⁵¹ See for instance Florian Wettstein, ‘From Side Show to Main Act: Can Business and Human Rights Save Corporate Responsibility’ in J Nolan & D. Baumann-Pauly (ed), *Business and Human Rights From Principles to Practice* (Routledge London & New York, 2016) at 78

⁵² There has been an ongoing effort within the framework of United Nations to regulate the conducts and activities of MNCs and TNCs starting from around 1972 with UN Economic and Social Council (ECOSOC) Resolution 1721 calling for ‘a study of the role of MNCs and their impact on the process of development’. See Khoury S & Whyte D, *Corporate Human Rights Violations* (2017, Routledge) c 1, pp 24 - 43

⁵³ Human Rights had not been the primary objective of the UN efforts (from the 70s) to evolve a code of conduct to regulate the activities and conducts of MNCs and TNCs. It was rather to curb their alleged Interference with sovereignty of nation-states arising from the complaint of the then Chilean Leader Salvador Allende, accusing American corporation ITT, of attempting to undermine Cuban sovereignty and instigate a military take-over. See Khoury S & Whyte D, *Corporate Human Rights Violations* (2017, Routledge) c 1, pp 24 - 43

⁵⁴ Upendra Baxi, ‘Voices of Suffering and the Future of Human Rights’ (1998) 8 *Transnat'l L. & Contemp. Probs.* 125, 170

One of such solution-seeking initiatives came by way of setting up a five-member working group in 1998 by the UN Sub-Commission on Human Rights, to ‘*draft Norms . . . on the responsibilities of transnational corporations and other business enterprises with regards to human rights*’ (the Norms).⁵⁵ There was also a parallel effort through the office of the then UN Secretary General, Kofi Annan, in the form of the Global Compact (GC) initiative which was established in 2000. The GC enjoined corporations to voluntarily adopt and abide by a set of 10 principles on human rights, labour rights, the environment and anti-corruption in their business activities.⁵⁶

The norms did not have the blessing nor imprimatur of the stakeholders (mostly the corporations and their powerful Global North home states)⁵⁷ because it attempted to impose a binding human rights obligation on corporations. Consequently, vigorous opposition was mounted against the adoption of the norms from the business community and their powerful Global North home states. Following such oppositions, the then United Nations (UN) Human Rights Commission (now the Human Rights Council) in 2005 decided to discontinue all debates relating to the controversial UN Norms.⁵⁸ This effectively ended the ‘life’ of these norms.

At the request of the Commission, the UN Secretary General appointed a Special Representative of the Secretary General (SRSG) on Human Rights, Transnational Corporations and Other Business Enterprises in the person of Harvard Professor John Ruggie.⁵⁹ The key mandate of the SRSG was to

⁵⁵ See UN Doc. E/CN.4/Sub.2/Res/1998/8 (20th August 1998), para. 4

⁵⁶ See UN Global Compact available at <<https://www.unglobalcompact.org/>> Accessed on 10th January 2018

⁵⁷ Notably the US, the UK and Australia

⁵⁸ See a. Commission on Human Rights, ‘Joint Views of the IOE and ICC on the Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights’ UN Doc. E/CN.4. Sub. 2. 2003/NGO/44 (29th July 2003) b. D. Kinley, J. Nolan and N. Zerial, ‘Reflections on the United Nations Human Rights Norms for Corporations’ (2007) 25(1) *Companies and Securities Law Journal* 30 See Also Commission on Human Rights, ‘Report on the Sixtieth Session (15th March – 23rd April 2003)’, UN Doc. E/CN.4/2004/127, Part 1, ch. 42, p. 28, para. C

⁵⁹ See UN Human Rights Resolution 2005/69, UN Doc. E/CN.4/RES/2005/69 (20th April 2005)

clarify the standards of human rights-related responsibility that transnational corporations and other business entities have.⁶⁰

In 2008, the SRSG developed the Business and Human Rights normative ‘framework’ hinged on the three pillars of ‘Protect, Respect and Remedy’ (the framework).⁶¹ The Human Rights Council (HRC) adopted this framework in the same 2008. By 2011, the SRSG evolved a set of Guiding Principles (the GPs) meant to provide guidance on how to ‘operationalize’ the three-pillar framework.⁶² The framework and GPs seemed to enjoy a much broader support amongst the stakeholders within the business community and governments in the Global North but not necessarily so within governments or states in the Global South⁶³.

The Guiding Principles were adopted by the HRC in June 2011 and a Working Group⁶⁴ who are ‘to promote the effective and comprehensive dissemination and implementation of the Guiding Principles’ was appointed.⁶⁵

The central theme of the working group’s strategy is to engage with member states and encourage them to develop, enact and update a National Action Plan (NAP) on Business and Human Rights.⁶⁶

1.5 THE RESEARCH AIMS AND OBJECTIVES

The pattern of reoccurrence and re-emergence of the agitations in the Niger Delta is suggestive of the unsustainability of the solutions and remedies so far adopted. The said unsustainability can be ascribed

⁶⁰ Ibid n2

⁶¹ See United Nations Human Rights Council, UN Doc. A/HRC/8/5. 7 April 2008

⁶² The terms ‘pillar’ and ‘framework’ shall be deployed interchangeably to refer to the ‘Protect, Respect and Remedy’ nomenclature of the UN Business and Human Rights Framework. Also, the term ‘Business Enterprises’ or “corporations” or “business(es)” shall be used in this paper holistically to represent all forms of corporations or businesses; transnational, multinational, national or by whatsoever name they are known in the business and human rights fora.

⁶³ Evidence of this apparent lack of real support by the Global South states follows from the 2014 Resolution authored by Ecuador that passed within the UN Human Rights Commission aimed at formulating a binding instrument in International Human Rights Law, to regulate the activities of TNCs and also make them accountable

⁶⁴ A Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises.

⁶⁵ Human Rights Council, ‘Human Rights and Transnational Corporation and Other Business Enterprises’, UN Doc. A/HRC/RES/17/4 (6 July 2011), para. 6(a)

⁶⁶ Office of the High Commissioner for Human Rights, ‘State National Action Plans’, accessible from <<http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx>> accessed on 30th November 2017

to the failures of the solutions themselves (or their not being designed) to address the underlying issues fuelling the agitations.⁶⁷ It follows reasonably therefore, that failing to address those underlying socio-economic problems problematizes the prospects of achieving any sustainable or durable solution to the Niger Delta agitations, be they violent or non-violent. This research attempts to contribute towards the achievement of such a solution to, not just the violence but, the underlying socio-economic problems fuelling them.

To achieve that aim, the research intends to (as it thinks there is a compelling need to so do), take a step back and aim for a shift towards a critical and more innovative study of the underlying socio-economic problems that incite the Niger Delta agitations, through the examination of the background forces (or factors) breeding them. In other words, it goes beyond merely theorizing about either the nature and forms of those underlying problems (e.g. human rights violations and environmental degradation etc.), or formulating theoretically sound but impractical solutions, to examining through the critical lens of its theoretical framework, the background forces behind the emergence and prevalence of those underlying (socio-economic) problems in the first place.

Understanding these (background) forces is the first and critical step towards evolving a truly sustainable and durable solution to the said socio-economic problems. This informed the choice of Upendra Baxi's germinal theory on the emergence of a 'trade-related, market-friendly' (TREM) paradigm of international human rights, as the key theoretical framework for this research.⁶⁸ Baxi argued that these emergent TREM paradigm of human rights, pushed by the forces of economic globalization, are supplanting the UDHR paradigm that privileged individual human beings, while

⁶⁷ Professor Ruggie believes that this is as a result of what he termed 'governance gaps' created by the forces of Capital or economic 'globalization'. See UNHRCOR, 'Protect, Respect and Remedy: A Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General [SRSG] on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie' (2008) UN Doc A/HRC/8/5. At 3

⁶⁸ See Upendra Baxi, *The Future of Human Rights* (New Delhi 2006) p 234 – 275. This theory forms the key theoretical framework for this research and is developed fully in the section on Theoretical and Methodological framework below.

assigning more rights to the MNCs and TNCs.⁶⁹ The theory is considered particularly germane because of its interconnectedness to the subject matter of this research. It is, just like this research, premised upon interrogating the impacts of market, business or trade forces (vis-à-vis economic globalisation) on the UDHR paradigm of human rights. Aside this reason of interconnectedness, there is also the reason of novelty in deploying the theory in this specific Niger Delta context to profile the forms, sources and origins of the background forces that fuel and protract the socio-economic problems in the region.

With that said, the specific objective of this research is to examine the extent to which the UN framework and the GPs are equipped or are able to make a significant (positive) contribution towards the search for socio-economic justice in the Niger Delta.

1.6 THE RESEARCH QUESTION

Given the detailed context and research problem laid out above, the specific but broad question that this thesis tackles is *“to what extent can the UN framework and Guiding Principles (GPs) play a significant role in attaining Socio-economic Justice in the Nigerian Niger Delta region?”*

This broad research question entails the following sub-questions:

- i. What socio-economic injustices exist within the crude oil exploration sector in the Nigerian Niger Delta and what gives rise to them?
- ii. What is the potential of the GPs in helping to achieve sustainable socio-economic justice in the region?
- iii. What, if any, are the likely obstacles to the successful application of the GPs in the circumstances and how may those obstacles (if any) be circumvented?

⁶⁹ Baxi note 68

- iv. What lessons emerge from the (lack of) deployment or application of the GPs in this specific Niger Delta context that support or impeach the debate for or against a binding international business and human rights treaty?

1.7 ORGANIZATION OF THE THESIS

This thesis is divided into four (4) chapters. The first chapter, chapter One (which is this Chapter) sets out the Conceptual and Methodological framework of this study. The conceptual framework discusses the research problem and the research aim and objectives. It also explains how the thesis is organised and presents an outline of the research questions. The Methodological framework part of the chapter discusses the theoretical framework and methodology of the study.

Chapter Two provides a background of the socio-economic problems/injustices occasioned by crude oil exploitation in the Niger Delta region. It then assesses how the socio-economic problems highlighted either exemplify or trouble the sub-claims that emerge from the Baxian TREMF theory. It utilises some specific actions or decisions of the Nigerian government (the executive, legislature and the Judiciary) and certain key incidents in the Niger Delta agitations as case studies.

Chapter three assesses the potentiality and prospects of the UN framework and GPs in ameliorating the lived experiences and plights (to wit socio-economic injustices) of the people and communities of the Niger Delta. In other words, this chapter attempts to answer the question of how, or in what way, can the UN framework and the GPs help to improve or achieve sustainable socio-economic justice in the Niger Delta. In doing so, it lays out the likely obstacles (if any) to the successful application of the UN framework and its GPs to the specific circumstances of the Niger Delta issues.

Chapter four, the final chapter, concludes by making recommendations on how the obstacles identified in chapter three, and the background TREMF forces identified in chapter two, may be

circumvented to achieve (howbeit minimal), socio-economic justice for the people and communities of the Nigerian Niger Delta region.

1.8 LITERATURE REVIEW

1.8.1 *Relevant Scholarly Conversations on the International Stage*

There is presently a sharp division amongst scholars, practitioners, activists and UN member states alike on what is the best way forward towards achieving a sustainable protection of human rights from the adverse impacts of business/corporate activities.

Within the UN, there is the group of nations who continue to express faith in the United Nations (UN) frameworks and the Guiding Principles (GPs).⁷⁰ They seem to see the framework and the GPs as an end in themselves. Prominent within this group are the OECD/EU member states and the US. These can also be categorized, *a la* Ruggie, as the ‘*home countries of the vast majority of the World’s transnational corporations*’.⁷¹

There is also the second group dominated by Global South states (and you may say, led by Ecuador) who are adamant about the inadequacy of the framework and the GPs and are regarding them as a means to an end at best or a continuation of business as usual or perpetuation of status quo at worst.⁷²

This group have now pushed through the passage of a UN Human Rights Council resolution for the possible formulation of “*a legally binding instrument to regulate, in international human rights law, the activities*

⁷⁰ See http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

⁷¹ J. G. Ruggie “Quo Vadis? Unsolicited Advice to Business and Human Rights Treaty Sponsors - Commentary |”, online: <<https://www.ihrb.org/other/treaty-on-business-human-rights/quo-vadis-unsolicited-advice-to-business-and-human-rights-treaty-sponsors>>.

⁷² See Mauricio Montalvo (Ecuador), (Address to the UN Human Rights Council, delivered at the Palais des Nations in Geneva, Switzerland, 16 June 2011) <webcast.un.org/ramgen/ondemand/conferences/unhrc/seventeenth/hrc110616pm3-eng.rm?start=00:13:33&end=00:16:32>; and the comments of the South African representative (UN Human Rights Council, Information Release (not an official record), ‘Council holds dialogue with Experts on summary executions, independence of judges and lawyers, transnational corporations’ (30 May 2011) <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11082&LangID=E> (accessed 3 September 2011))

of multinational corporation and other business enterprises” .⁷³ An Inter-Governmental Working Group (IGWG) has been set up and tasked with delivering on this mandate.

In the scholarly arena, there seems to be more agreement than disagreement, that the GPs are not an end in themselves.⁷⁴ Cata Backer leans towards this position in his assessment.⁷⁵ To him, the framework and GPs’ greatest achievement was their ‘*elaboration of a corporate governance framework that is meant to apply concurrently with corporate obligations under the laws of the jurisdictions . . .*’ in which the corporations operate.⁷⁶

Justine Nolan in his edited volume with D. Baumann-Pauly puts it more succinctly when he opined that “*The Guiding Principles reaffirm the relevance of all human rights to business but do not end the debate on how best to address and redress corporate violations of human rights*”.⁷⁷

Where there is a lack of consensus is on the approach or mechanism by which the desired end/goal (which is effective human rights protection from and against business-related violations) should be attained. Ruggie, while not being totally averse to the idea of a binding treaty, believes that a consistent and committed application of the GPs will go a long way towards alleviating business-related human rights violations as well as enthrone a culture of respect for human rights within corporations.⁷⁸

⁷³ Human Rights Council, UN Doc. A/HRC/26/L.22/Rev.1 (25 June 2014)

⁷⁴ See P. Simons, ‘International Law’s Invisible Hand and the Future of Corporate Accountability for Violations of Human Rights’ *Journal of Human Rights and the Environment*, Vol. 3 No. 1, March 2012, pp. 5–43; P Muchlinski, ‘Implementing the New UN Corporate Human Rights Framework: Implications for Corporate Law, Governance and Regulations’ *Business Ethics Quarterly* (2012) 22:1 p145-177 and R Blitt, ‘Beyond Ruggie’s Guiding Principles on Business and Human Rights: Charting an Embrasive Approach to Corporate Human Rights Compliance’ *TILJ* Vol 38 Issue 1

⁷⁵ Larry Cata Backer, ‘On the Evolution of the United Nations’ “Protect-Respect-Remedy” Project: The State, the Corporation and Human Rights in a Global Governance Context’ (2011) 9 *Santa Clara Journal of International Law* 37.

⁷⁶ Larry Cata Backer (Supra) at p 75.

⁷⁷ J Nolan & D. Baumann-Pauly (ed), *Business and Human Rights from Principles to Practice* (Routledge London & New York, 2016) at 44

⁷⁸ See his position Ibid n71.

Bittle and Snider⁷⁹, Karp⁸⁰ and Deva⁸¹ were rather in disagreement with Ruggie. Bittle and Snider on the one hand, are pessimistic that the voluntarism espoused by the framework and GPs would unlikely engender any positive change in corporate cultures for better respect of human rights.⁸² Karp shared similar view when he criticized the framework and GPs' equation of the responsibility to respect human rights with the 'to do no harm' principle; arguing that in doing so, the framework had undercut its own potential for making any real impact.⁸³ Deva on the other hand believed that the framework and the GPs are more deferential to corporate interest than the interest of victims for better protection of rights. He opined that the process leading up to the evolution and adoption of the framework and GPs had undermined their potentials given their inadequate consultation of victims of corporate human rights violations.⁸⁴

Stef Khoury and David Whyte expressed similar sentiments or criticism in their work.⁸⁵ They dismissed the multi-stakeholder support purported to have been attained by the adoption of the framework and GPs as "*a Fake Consensus*"⁸⁶. They branded it a 'continuation of a business friendly agenda' which failed to fill up the 'space between the laws'⁸⁷ and which was designed more to 'reconcile' the US and the business community with the business and human rights bureaucratic

⁷⁹ S Bittle & L Snider, 'Examining the Ruggie Report: can voluntary guidelines tame global capitalism?' in *Critical Criminology*, (2013) vol. 21

⁸⁰ David J. Karp, *Responsibility for Human Rights, Transnational Corporations in Imperfect States*, (Cambridge University Press, 2014)

⁸¹ S. Deva 'Treating human rights lightly: A critique of the consensus rhetoric and the language employed by the Guiding Principles', https://www.researchgate.net/publication/287055480_Treating_human_rights_lightly_A_critique_of_the_consensus_rhetoric_and_the_language_employed_by_the_Guiding_Principles>

⁸² S Bittle & L Snider n79 pp 177-192

⁸³ David J. Karp n80 at pp 82 - 87

⁸⁴ S. Deva (Supra) ibid n81 at 83 - 84

⁸⁵ S Khoury & D Whyte, *Corporate Human Rights Violations*' (Routledge, 2017) 65 - 76

⁸⁶ Emphasis mine

⁸⁷ Adopting the term used by Michalowski and Kramer (1987) to describe the situation whereby corporations exploit the gaps between international and national legal or regulatory regimes. See Michalowski R. and Kramer R., 'The Space Between the Laws: The Problem of Corporate Crime in a Transnational Context' In *Social Problem* (1987) Vol. 34, No. 1 pp 34 -53

architecture of the United Nations.⁸⁸ In what seemed similar to the ‘space between the laws’ criticism of Khoury and White⁸⁹, Simmons, while concentrating largely on the framework’s ‘protect’ pillar, has criticized Ruggie for glossing over the “*governance gaps created by globalization*” which he (Ruggie) had himself, identified to be the ‘root cause’ of the rampant business related human rights violations.⁹⁰

Professor Ruggie had indicted globalization in his preliminary prognosis, arguing that it “*creates a permissive environment for the wrongful acts by companies*”, but failed to make any recommendations as to how the so called ‘governance gaps’ are to be addressed.⁹¹ To address this, Simons has argued for the inclusion of human rights protective clauses in the Bilateral Investment Treaties (BITs) governing the operations of the Multinational and Transnational Corporations (MNCs &TNCs).⁹²

Muchlinski, whose work centred on an analysis of the ‘respect’ framework, highlighted the difficulties imposed by the framework in the light of the primacy of shareholder model of corporate governance.⁹³ He then canvassed for “*a more stakeholder oriented approach*” to be adopted by corporate actors in their governance and regulatory schemes as a more realistic way of achieving the responsibility placed on them by the ‘respect’ framework.⁹⁴

Blitt’s recommendations centre mainly on access to remedy.⁹⁵ He foresaw that the persistent debates, advocacy and activism by civil society, as well as efforts within the UN and on the domestic fronts of

⁸⁸ Ibid n 85 at 52 - 60

⁸⁹ Ibid n 85

⁹⁰ Penelope Simons, “International Law’s Invisible Hand and the Future of Corporate Accountability for Violations of Human Rights” (2011) 3 Journal of Human Rights and the Environment at 8., ‘

⁹¹ UNHRCOR, ‘Protect, Respect and Remedy: A Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General [SRSG] on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie’ (2008) UN Doc A/HRC/8/5. At 3

⁹² Simons, *supra* note 90 at 32–40.

⁹³ See P Muchlinski, ‘Implementing the New UN Corporate Human Rights Framework: Implications for Corporate Law, Governance and Regulation’ 22 Business Ethics Quarterly 145 (2012)

⁹⁴ Muchlinski *supra* ibid n 93 at 162

⁹⁵ R Blitt, ‘Beyond Ruggie’s Guiding Principles on Business and Human Rights: Charting an Embrasive Approach to Corporate Human Rights Compliance TILJ Vol 38 Issue 1

its member nations, may end in evolving “*a more binding legal requirement on corporations to respect human rights*”.⁹⁶ He proposed what he termed a ‘third option’ whereby corporations take a more pre-emptive and proactive approach that seeks “*out higher grounds by complying with all applicable human rights treaty norms*”.⁹⁷ He cited the growing uncertainties within the judicial arena as a reason for them to do this.⁹⁸

Many of these scholarly interventions still revolve around the issue of voluntarism - the continued trust in the forthrightness of corporations to do what they are expected. This has certainly failed (so far) to yield the desired result. This lack of faith in the voluntary mechanism of the framework and the GPs may have informed the decision of some other scholars/policymakers (e.g. Nolan, Khoury, Ganesan, Pitt, Wettstein⁹⁹ and so on) to express their supports for the evolution of a binding Corporate Human Rights Treaty. They have taken the debates a step further and have ultimately aligned their views with that of the Ecuador-group state members within the UN.

In his own contribution in the Nolan/Baumann-Pauly edited volume, Pitts re-echoed the seemingly prevailing sentiment of a more expansive and interactive ‘*multi-pronged, multi-stakeholder approach*’ in the search for an effective prevention and redress mechanism for corporate human rights violations.¹⁰⁰ He however went further to opine that such approach should include ‘*hard and soft law, incentives and values and corporate culture*’.¹⁰¹

⁹⁶ R Blitt supra ibid n95 at page 57

⁹⁷ *Ibid* at p95

⁹⁸ There are pending cases across the world including one pending currently pending before the Supreme Court of the United States (*Jesner v Arab Bank*) on the applicability of the Alien Tort Statute to corporate impunity and human rights violations committed outside the US by corporations with parental presence in the US such as the Arab Bank.

⁹⁹ Who advocated the integration of the principles of Corporate Social Responsibility and that of Business and Human Rights in her contribution in J Nolan & D. Baumann-Pauly (ed), ‘*Business and Human Rights from Principles to Practice*’ (Routledge London & New York, 2016) pp 84 - 86

¹⁰⁰ J Nolan & D. Baumann-Pauly (Supra) pp 51 - 60

¹⁰¹ *Ibid* at page 60 (Emphasis mine)

Nolan was more lucid in his campaign for a binding treaty.¹⁰² After taking into account the counterpoints marshalled by those opposed to the prospect of a binding treaty, he concluded that “*neither the length of the treaty drafting process nor the complexity of the process is a sufficient reason to derail the process at this stage*”.¹⁰³ He also added that even a Business and Human Rights Treaty would need to be applied in concert with other multi-stakeholder efforts already in place or being developed.¹⁰⁴

The singular most important feature emanating from this prevalent scholarly narrative is the verdict that both the framework and the GPs are a means at best, and certainly not an end in themselves, to the menace of corporate human rights violations. Innovative attempts through extraterritorial litigation for instance, to procure accountability for corporate activities or conducts resulting in human rights violations have also largely been unsuccessful.¹⁰⁵ That lack of success lends more credence to the need and necessity of a binding treaty. These, on their own head, make the discourse of this research even more relevant in enriching the current debate on what the way forward should be.

1.8.2 Scholarly Conversations at the Domestic or National Stage

Prior and post the Guiding Principles, the issue of the Nigerian Niger Delta has remained topical among scholarly, activist and socio-economic and political conversations. Majority of the scholarly work on this subject area are primarily focused on either analysing the ways in which crude oil production impacts the lives and wellbeing of the Niger Delta people (the rights violations,

¹⁰² J Nolan & D. Baumann-Pauly (Supra) p70 - 73

¹⁰³ Ibid n 77 at page 72

¹⁰⁴ Ibid 77 at page 72

¹⁰⁵ *Khulumani v Barclay Nat. Bank Ltd*, 504 F.3d 254, 264 (2nd Cir. 2007). **For Unsuccessful judicial attempts** See *Kiobel v Royal Dutch Shell BP* in the US (about the Nigerian Ogoni 9 killing and Shell’s involvement in it. Although Shell ultimately settled out of court); See also *Bodo Community & Others v Shell Petroleum Development Company Nig Ltd* [2014] EWHC 2170 (TCC) in the UK (it is partly successful because the court ruled that the case could proceed but Shell elected to settle out of court); and also *HRH Emere Godwin Bebe Okpabi & Others v Royal Dutch Shell & Anor* [2017] EWHC 89 (TCC) and *Anvil Mining Ltd. V Association Canadienne Contre L’Impunite* N°500-09-021701-115

environmental degradations up till the violent agitations and crackdown etc) or providing conceptual or theoretical solutions to remedy the situation.

For instance, Ezeudu had explored the possibility of applying the International Criminal Court's jurisdiction/jurisprudence to check and punish the impunities committed by the oil MNCs and TNCs in the Niger Delta.¹⁰⁶ Adewumi and Olatubosun echoed similar sentiments as Muchlinski¹⁰⁷ in their call for increased stakeholder participation as a recipe for sustainable solution to the Niger Delta issues.¹⁰⁸ Ebeku has advocated for domestication and implementation of international legal frameworks such as the UN Convention on Biological Diversity (CBD) and the Kyoto Protocol to the Niger Delta context¹⁰⁹, while Nliam advocates for the "application of the precautionary principle".¹¹⁰

Rhuks Ako has made a case for the repeal or amendment of Nigeria's Land Use Act which vested radical title in all lands within the Nigerian Federation on the federal, state and local governments, as one means of restoring 'environmental justice' for the Niger Delta People.¹¹¹ Ako's position was reiterated by Oludoro who faulted an 'inadequate legal framework' for the socio-economic pitfalls in the Niger Delta and recommended granting more access and participation in decision-making processes to the people as a panacea.¹¹² Edu was of the opinion that the panacea to the Niger Delta

¹⁰⁶ Martin-Joe Ezeudu, "Revisiting Corporate Violations of Human Rights in Nigeria's Niger Delta Region: Canvassing the Potential Role of the International Criminal Court" (2011) 11 Afr Hum Rts LJ 23

¹⁰⁷ See P Muchlinski supra n93

¹⁰⁸ Afolasade A Adewumi & Adeniyi Olatunbosun, "Enhancing Stakeholder Participation in the Niger Delta Region: The Potential Contributions of the ILO Convention 169" (2015) 6 J Sustainable Dev L & Pol'y 129.

¹⁰⁹ K. S. A. Ebeku, 'Biodiversity Conservation in Nigeria: An Appraisal of the Legal Regime in Relation to the Niger Delta Area of the Country', 16(3) Journal of Environmental Law (2004): 361-75, at 366

¹¹⁰ Sylvester Oscar Nliam, 'International Oil and Gas Environmental Legal Framework and the Precautionary Principle: the Implications for the Niger Delta' [2014] 22 African Journal of International Comparative Law available <<http://www.eupublishing.com/action/doSearch?AllField=Sylvester+Oscar+Nliam&x=6&y=4>> accessed 8th March 2016

¹¹¹ Rhuks Ako, 'Nigeria's Land Use Act: An Anti-thesis to Environmental Justice' (2009) JAL (2)

¹¹² O. Oludoro, 'Oil Exploitations and Human Rights Violations in Nigeria's Oil Producing Communities' Open Journal Systems Vol. 25 No.2 (2012)

issues lay in more committed and adequate discharge of Corporate Social Responsibility by the Multinational Oil Companies.¹¹³

Zalik, had applied the illuminating ‘trilemma triangle’ theory on the future of oil propounded by Shell in its *Global Scenarios to 2025* publication to evaluate the violence triggered by the socio-economic injustice in the Niger Delta.¹¹⁴ She highlighted how the ‘*Low Trust Globalization*’ scenarios characterised by coercion, restriction and command and control measures of the state continues to undermine the ‘*Flags*’ scenario characterized by the ‘force of community’ seeking inclusion in the economic process and fairer redistribution of the socio-economic means.¹¹⁵ Building upon that theory, Egede advocated for ‘trade-offs’ between the ‘*Low Trust Globalization*’ scenario and the ‘*Flags*’ scenario in the Niger Delta so as to achieve the ‘*Open Doors*’ scenario that would be “*founded on trust of the global system and globalization process*”.¹¹⁶ He believes this could be achieved via a tripartite contractual agreement where the oil-producing communities are involved with the state and the oil MNCs, thereby giving the communities ‘a sense of ownership’ in the oil exploration venture.¹¹⁷

Lugard, in his own contribution, proffered a theoretical solution framework based on the ‘collective property’ rights theory (as opposed to the individual property rights) whereby the rights of the oil MNCs will be made subject to the ‘overriding interests of other stakeholders including host

¹¹³ O K Edu, “Corporate Social Responsibility: The Case of Multinational Oil Companies in the Niger Delta of Nigeria” (2011) 23 Sri Lanka J Int’l L 101.

¹¹⁴ Anna Zalik, *Oil ‘Futures’: Shell Scenarios and the Social Constitution of the Global Oil Market*, 41 GEOFORUM 553, 558 (2009)

¹¹⁵ Zalik (Supra) ibid n114

¹¹⁶ Hephzibah Egede; Edwin Egede, ‘The Force of the Community in the Niger Delta of Nigeria: Propositions for New Oil and Gas Legal and Contractual Arrangements’, 25 Tul. J. Int’l & Comp. L. 45, 88 (2016) at 57

¹¹⁷ See Egede Supra ibid n116 at page 87-88

communities’.¹¹⁸ Such interests would then include the overriding interest of the communities to a safe and healthy environment among other things.¹¹⁹

What emerges from this modest outline of the relevant literature is the abundance both theoretically and conceptually, of plausible solutions to the earlier discussed Niger Delta problems. The fact of the non-adoption or implementation of the said solutions by the Nigerian government to deal with what is obviously the most prominent problem militating against its economic prosperity, underlines the severity of these background forces identified as one of the key problems that inspired this research.

The originality of this research is embedded in its novel approach of applying the Baxian TREMF theory in analysing the underlying socio-economic issues in the Niger Delta. The research’s originality is also reflected in its adoption of the TREMF theory in critiquing the practical applicability of the UN framework and GPs to real-life business and human rights debacles exemplified by the Niger Delta paradigm in discourse. The application of the theory illuminates how the root cause(s) of the problems are well beyond the clichés of ‘government corruption’ and/or ‘lack of political will to act’. By so doing, it redirects the conversations and debates back to the appropriate root of the problem, from where an efficacious articulation of a solution is most likely to evolve.

Scholars who have ventured into this aspect of the Niger Delta questions (i.e. studying the underlying causes of the socio-economic issues) have always either ended up heaping the blame on the clichés of ‘government corruption’, ‘lack of political will’ or merely highlighted the effects or the forms in which the background forces manifest. Take for an instance, Abe’s work which is conceptually similar to this research in its use of the UN ‘Ruggie’ Guiding Principles in theorizing a solution to the Niger Delta

¹¹⁸ S.N. Lugard “The clash of property and environmental rights in the Niger Delta region of Nigeria | Lugard | Journal of Sustainable Development Law and Policy (The)”, online: <<https://www.ajol.info/index.php/jsdlp/article/view/140512>>.

¹¹⁹ *Ibid* at 118.

issues, falls in the former category.¹²⁰ Abe treated the UN framework and Guiding Principles as though their recommendations were sacrosanct and binding, or as though they are the first of its kind to exhort protection and respect for human rights.

Although Abe acknowledged the failures of the past international human rights instruments such as the UDHR, the International Covenant on Economic Social and Cultural Rights (ICESCR), and the International Covenant on Civil and Political Rights (ICCPR) to address the prevalent governance gaps and influence better protection of the rights of the Niger Delta people. He however, puts these failures down to ‘government corruption’ and ‘lack of political will’. This research considers the often indictment of these clichés such as ‘government corruption’ and/or ‘lack of political will’ as being the reasons behind these failures, however convenient it is to do so, to be rather too simplistic. It argues that such clichés or terms are rather the manifestations of the background forces being examined by this research which breeds the underlying socio-economic issues.

Oshionebo’s work falls into the group of scholars who analysed the effects (as opposed to the cause) by blaming the culture of corporate malfeasance in the Niger Delta on ‘Stabilization clauses’ contained in the BITs establishing the corporation’s activities.¹²¹ Similarly, Stevens’ work is another one of the works analysing the effects rather than the causes. Steven’s work decried the inadequacies of Nigeria’s environmental regulatory and legal standards in the oil and gas sector.¹²²

¹²⁰ See Oyeniya Abe, *supra* note 47.

¹²¹ Oshionebo, *supra* note 47.

¹²² Lisa Stevens, ‘The Illusion of Sustainable Development: How Nigeria’s Environmental Laws are Failing the Niger Delta’ (2012) Vermont Law Review, Vol. 36 ADDIN ZOTERO_ITEM CSL_CITATION {"citationID":"Ec3ZzPQw","properties":{"formattedCitation":"\u0000\u0220{}The clash of property and environmental rights in the Niger Delta region of Nigeria | Lugard | Journal of Sustainable Development Law and Policy (The)\u0000\u0221{}", "plainCitation":"The clash of property and environmental rights in the Niger Delta region of Nigeria | Lugard | Journal of Sustainable Development Law and Policy (The)", "noteIndex":79},"citationItems":[{"id":240,"uris":["http://www.ajol.info/index.php/jsdlp/article/view/140512>"],"itemData":{"id":240,"type":"webpage","title":"The clash of property and environmental rights in the Niger Delta region of Nigeria | Lugard | Journal of Sustainable Development Law and Policy

These effects-based analyses reflected in Oshionebo and Stevens's works must then raise key counter-questions which go to the heart of the task and objective of this research. Some of those are: why are Nigerian environmental laws and regulations inadequate (*a la Stevens*)? Why did the Nigerian government accede to contractual arrangement (i.e. the BITs) with full knowledge of the attendant consequences to its ability to fully protect the rights and interests of its people? Why does the consideration of keeping to the contractual arrangement of the BITs (to wit the stabilization clauses), even when they clearly lead to egregious rights violations, outweighs the consideration of protecting the said rights of the people? Also, since Ruggie himself acknowledged the crippling effect of globalization on the capabilities of governments to discharge their international law obligations to protect the human rights of persons within their jurisdiction,¹²³ has the UN framework and GPs remedied that and how?

Answers to these critical questions shall be gleaned from the respective critical analysis conducted in the succeeding chapters of this thesis, on the apt application of the theoretical framework now discussed below.

(The)","URL":"<https://www.ajol.info/index.php/jsdlp/article/view/140512>","accessed":{"date-parts":[["2018",6,2]]}}},"schema":"<https://github.com/citation-style-language/schema/raw/master/csl-citation.json>"}
"The clash of property and environmental rights in the Niger Delta region of Nigeria | Lugard | Journal of Sustainable Development Law and Policy (The)", online: <<https://www.ajol.info/index.php/jsdlp/article/view/140512>>.:387
¹²³ UNHRCOR, 'Protect, Respect and Remedy: A Framework for Business and Human

Rights: Report of the Special Representative of the Secretary-General [SRSG] on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie' (2008) UN Doc A/HRC/8/5. At 3

1.9 THEORETICAL AND METHODOLOGICAL FRAMEWORK

1.9.1 Theories

The key theoretical framework adopted is the Baxian theory on the emergence of a trade-related, market-friendly (TREMFM) human rights paradigm.¹²⁴ Baxi posited that human rights as enunciated by the Universal Declaration of Human Rights (UDHR) and other relevant international¹²⁵ (and national) Human Rights instruments are ‘steadily, but surely being supplanted’ by the TREMFM paradigm¹²⁶. Below is a summary of some of the sub-claims emerging from the TREMFM theory that are relevant to this research:

1. That the obligations assigned to states under the UDHR paradigm are being supplanted or replaced with a more drastically pursued obligations to liberalize market, deregulate, denationalize and all such other strategies that enhance free trades by the powerful Global North nations both directly and through the instrumentality of institutions such as the World Bank or IMF which they substantially control.
2. That the Global South states to whom these new TREMFM paradigm is directed now considers the pursuit of such trade liberalization and market efficiency obligations primal, to the detriment and at the expense of (individual or community based) human rights.
3. That in the pursuit, and as a consequence, of this trade-liberalization and market efficiency pursuits, human rights as it applies to human individuals or communities are being supplanted and diminished for the sake of assigning more rights to global capital.
4. And that this pursuit of trade liberalization and market efficiency now marks the new standard for measuring the progress (or goodness) of (majorly Global South or Third World) states. In

¹²⁴ See Upendra Baxi, *The Future of Human Rights* (New Delhi 2006) p 234 - 275

¹²⁵ For instance, the ICCPR, ICESCR, CEDAW *inter alia*

¹²⁶ Baxi supra (n124) at 234.

other words, that yardsticks such as how much protection (from political instability or social unrests) and liberalization (from regulation) these TREMF-subject states accord/offer to global capital/corporate entities are now the ultimate standards for determining their progress.¹²⁷

Fleshing these out and in the order in which they manifest, the first sub-claim postulates that powerful first world/Global North nations and the Bretton Woods institutions (which they substantially control) set a new overriding obligation or agenda for the weaker (mostly third world/Global South) states to liberalize their markets and create free trade mechanisms for global capital. This is achieved through trade agreements, economic reform advice, loan, aid and other forms of financial assistance programs and so on. By this, a new and more drastic obligation is created for the weaker (mostly third world/Global South) states. Mechanisms such as economic sanctions, Foreign Direct Investment diversion, investor-state investment dispute mechanisms (arbitration) and other diplomatic strong-arming measures are ways by which this TREMF paradigm are engendered.

Secondly, the weaker states then strive to meet the demands and expectations of the set TREMF obligation through the pursuit of pro-market efficient and pro-free-trade policies of denationalization, deregulation and disinvestment. These represent the new and overriding goal of government. That goal is then pursued somewhat inevitably through the reduction or weakening (in some cases) and total abandonment (in other cases), of the regulatory, oversight and/or supervisory roles of government in the politico-economic activities of the state.

The knock-on effect is reflected in the consequential weakness of legal and regulatory regimes in the economic sectors especially those operated by global capital. This is compounded with levity or laxity

¹²⁷ Okafor, O, 'Assessing Baxi's Thesis on an Emergent Trade-Related Market-Friendly Human Rights Paradigm: Evidence from Nigerian Labour-led Struggles,' 2007 (1) Law, Social Justice & Global Development Journal (LGD). <http://www.go.warwick.ac.uk/elj/lgd/2007_1/okafor> at 3 - 4

in enforcing the weak legal or regulatory regimes as well as sheer apathy to amend them to accommodate or take care of newer regulatory needs and challenges. By these praxes, government assumes the position of the 'soft state' that Okafor talked about while fleshing out this same theory,¹²⁸ just as it also abandons its crucial redistributive obligation under the UDHR.¹²⁹

The third step is the diminishing of human rights in the interest of global capital. When government pursues the pro-TREMF agenda (as laid out above), it ultimately abrogates, howbeit subtly, its (protective, regulatory or redistributive) roles under the UDHR paradigm. This opens up the commons (air, land, water and so on), which in most cases serve as factors of production to global capital, to unbridled exploitations in a way that undermines their utility for and access by the people (the socio-economic problems).¹³⁰ Such misuse/mismanagement/mis-exploitation, in the absence of government regulation or oversight, paves way for the emergence of social forces of regulation or oversight in the forms of agitations, protests, activisms and so on. This is perhaps the clearest illustration of the failings of the Nozick's minimalist state model of social contract, just as it fortifies the *Justice as Fairness* theory of Rawls where redistribution of the inequalities becomes inevitable.

The inevitability of the redistributive needs breeds the social forces in the absence of the state or the state's apparent softness to global capital. These social forces are by their very nature, in opposition to the TREMF agenda/paradigm. They seek to foster continued regulation where the TREMF paradigm would rather deregulate; and engender a social-form of stake or investment where the TREMF paradigm would rather have a disinvestment.¹³¹ The social forces themselves are then viewed

¹²⁸ Okafor Supra (n 127) p 4

¹²⁹ Baxi Supra at 124

¹³⁰ Note that this utility of and access to the commons are both matters of human rights as espoused under the UDHR paradigm such as a right to safe environment, right to water, right to property etc.

¹³¹ For a detailed analysis of the role of social pressures/forces in regulation see Kagan R, Gunningham N & Thornton D, 'Explaining Corporate Environmental Performance: How Does Regulation Matter' (2003) *Law & Society Review*, Vol. 37, No. 1, pp 22-29. and Morag-Levine N, 'Abortion in Israel: Community, Rights and the Context of Compromise' (1994) *Law & Society Review*, Vol. 28, No. 5

by government and other Pro-TREMF counterparts (MNCs, TNCs, Bretton Woods Institutions and the powerful first world states) as ‘problems’ that needs tackling, instead of the underlying issues that gave rise to their emergence such as lack of regulation and the mismanagement of resources among other vices. This brings about a clash; whereby the soft state must then protect the agents of global capital from the consequences of the redistributive efforts of the social forces. Driving it home, this is the construct that creates the ‘internal hardness’ phenomenon which translates into incidents of human rights abuses (e.g. reflected in the crackdowns, anti-resistance laws and other measures) deployed by the soft states and geared towards (*a la* Okafor) “*de-legitimizing the human rights-based practices of resistance of its own citizens*”.¹³²

Lastly, and most important of all, the fourth sub-claim highlights the implementation and enforcement mechanisms of the TREMF agenda. The ‘good’ or ‘progressive’ states are now those that show commitment to the TEMF agenda, by protecting global capital from the social forces of regulation highlighted above. These come by way of commendation or endorsement or condonation of the anti-human rights actions of the government in pursuance of the TREMF agenda. The condonations are usually by way of silence or turning blind eyes to the human rights atrocities of a government by the TREMF initiators (i.e. the Bretton Woods Institutions and powerful Global North nations).

This TREMF theory is the key lens for the critical analysis of the Niger Delta socio-economic issues. It will also form the bedrock for the critique of the practicality of the UN framework and GPs in effecting real positive impact on the lived experiences, in terms of socio-economic justice, of victims such as the Niger Delta people.

In addition to TREMF theory, other theoretical frames that were applied include soft law theory in international law, Rajagopal’s critical theory on (judicial) interpretation and application of the human

¹³² Ibid n127 at 4

rights texts in a way that suggests ‘a pro right but anti-poor’ praxis,¹³³ Makau Wa Mutua’s metaphorical theory on the grand International human rights narrative pitting ‘Savages’ on the one side and ‘Victims and Saviours’ on the other.¹³⁴ Other theories on the UN framework and GPs¹³⁵ and on corporate social responsibility were equally deployed in discharging the task of this research.¹³⁶

1.9.2 Methodology

The methodology of this research work includes the synthesis of readily available data (both electronic and hard copies) to highlight the socio-economic issues in the Niger Delta. This study is fundamentally critical in nature. Its brand of critique is a hybridisation of De Souza Santos’ ‘reconstructive critique’ with the more common approach of synthesizing, adopting or re-echoing previous deconstructive analysis done on the subject matter of oil, human rights and the environment in the Niger Delta.¹³⁷ The “reconstructive critique” methodology links back to the fundamental objective underpinning this research which is to be both tactful in identifying the underlying problems (i.e. the TREMF paradigms) and equally innovative in the evolution and recommendation of solutions.

This ultimately shaped this research to be a multi-disciplinary (or interdisciplinary at least) study, requiring the synthesis of a wide breadth of materials from law, to politics, international development, health, environment and so on. These materials were both primary and secondary and were sourced

¹³³ Balakrishnan Rajagopal, “Pro-Human Rights but Anti-Poor? A Critical Evaluation of the Indian Supreme Court from a Social Movement Perspective” (2007) 8:3 Hum Rights Rev 157, online: <<https://link.springer.com/article/10.1007/s12142-007-0004-8>>. This will be applied mainly in critiquing the judicial attitude towards the socio-economic plight of the Niger Deltans

¹³⁴ Makau W Mutua, ‘Savages, Victims, and Saviors: The Metaphor of Human Rights’, SSRN Scholarly Paper ID 1525547 (Rochester, NY: Social Science Research Network, 2001). This theory will be deployed for a metaphoric and satiric critique of the filibusterous attitude of the OECD, EU and US (in other word, first world nations) to the progress of a binding Human Rights Treaty.

¹³⁵ See for instance Simons, *supra* note 37.

¹³⁶ E.g. Muchlinski’s Stakeholder theory to Human Rights and Corporate Social Responsibility. See P Muchlinski, ‘Implementing the New UN Corporate Human Rights Framework: Implications for Corporate Law, Governance and Regulation’ 22 Business Ethics Quarterly 145 (2012)

¹³⁷ Bonaventura De Souza Santos, ‘*Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition*’ (New York, Routledge 1995) p 7

from online/electronic and hardcopy/desk collections. The Primary sources are largely legal in nature such as the constitution, case laws, national pieces of legislation as well as international and regional legal instruments. These primary sources provide concrete and definitive positions of the laws and policies in this subject area.

The secondary sources include textbooks; journal articles; reports from reputable international and non-governmental organisations; reports of relevant government ministries, departments, agencies and so on. These sources provide the most objective, reliable and consistent illustration for a key part of this research's scrutiny which is the official behaviour/attitude of the Nigerian government (both past and present) to the Niger Delta socio-economic problem. They also, aside validating the multi or inter-disciplinary nature of this research, reflect the width and breadth of its considerations and analysis which must speak to the credibility of the respective arguments and findings of this research. As they are more subjective in nature; representing mostly individual (as in journal articles) or organisational (such as World bank reports etc) positions, this research cautiously sourced and utilized only those secondary materials that can withstand the most rigorous tests of credibility.

This decision to use readily available data/materials for this research is mainly informed by the availability and accessibility of such relevant materials relating to the Niger Delta socio-economic issues online.

CHAPTER TWO

Whose Hand is that: Examining the role of the TREMF Paradigm in the Socio

Economic Injustice in the Niger Delta

2.1 Abstract

This chapter provides a brief background of the socio-economic problems in the Niger Delta and assesses how they exemplify or trouble Upendra Baxi's germinal theory on the emergence of a trade-related and market-friendly (TREFM) human rights paradigm.¹³⁸ This chapter does not, however, delve all that much into an expository or evaluative analysis of the Niger Delta's socio-economic (environmental or human rights) issues. In line with the aim and objectives of this thesis, it is rather concerned with applying the TREFM theory to the outlined and very well-known issues facing that area of Nigeria, with a view to exemplifying or rebutting the TREFM theory, as represented by its earlier summarized sub-claims.

2.2 The Impacts of Oil Exploration in the Niger Delta

Studies and empirical evidence have shown that crude oil exploitation impacts the people and communities of the Niger Delta region in two major adverse ways: environmental degradation and human rights violations.¹³⁹ These impacts have been thoroughly studied and laid out in many academic and policy papers published over the years by both individuals¹⁴⁰ and governmental/non-governmental

¹³⁸ Upendra Baxi, *The Future of Human Rights* (New Delhi 2006) p 234 - 275

¹³⁹ See for instance Kaniye S. A. Ebeku, 'Oil and the Niger Delta People in International Law' Resource Rights, Environmental and Equity Issues (2006) and Lisa Stevens, 'The Illusion of Sustainable Development: How Nigeria's Environmental Laws are Failing the Niger Delta' (2011) Vermont Law Review, Vol 36, Issue 2

¹⁴⁰ See the following scholarly works for instance: 1. Kaniye SA Ebeku, "Niger Delta Oil, Development of the Niger Delta and the New Development Initiative: Some Reflections from a Socio-Legal Perspective" (2008) 43:4 Journal of Asian and African Studies 399, online: <<https://doi.org/10.1177/0021909608091974>> 2. Martin-Joe Ezeudu, "Revisiting Corporate Violations of Human Rights in Nigeria's Niger Delta Region: Convassing the Potential Role of the International Criminal Court" (2011) 11 Afr Hum Rts LJ 23; 3. Adangor, *supra* note 9; 4. Evaristus Oshionebo, "Stabilization Clauses in Natural Resource Extraction Contracts: Legal, Economic and Social Implications for Developing Countries" (2010) 10 Asper Rev

institutions cum organizations.¹⁴¹ To that end, the discussion in this section on the impacts of crude oil exploration, is only a modest analysis to lay the foundation for their utilization in testing the Baxian TREMF theory.¹⁴²

2.2.1 ***The Environmental Impacts***

The National Petroleum Policy document approved and released by the Federal Government of Nigeria in mid-2017 identified six major adverse environmental impacts associated with crude oil exploration in the Niger Delta as:¹⁴³

1. Oil Spills
2. Gas Flaring and Venting
3. Discharge of chemical waste derived from crude oil related processes
4. Contamination of water bodies
5. Soil and land contamination
6. Depletion of biodiversity and destruction of farmlands¹⁴⁴

These (non-exhaustive) environmental impacts have continued to catalyze a chain reaction and vicious circle of other more drastic pitfalls for the people and communities of the Niger Delta region. They have had a direct adverse impact on the sustenance and livelihood of the Niger Delta people. The Niger Delta is an archetypical Nigerian society/community which depends largely on their environment (Soil, forest and water bodies) for their sustenance and livelihood. One Report has

Int'l Bus & Trade L 1; 4. Oyeniyi Abe, "The Feasibility of Implementing the United Nations Guiding Principles on Business and Human Rights in the Extractive Industry in Nigeria" (2016) 7 J Sustainable Dev L & Pol'y 137.

¹⁴¹ such as Nigeria's federal government's National Petroleum Policy document available here <<http://www.petroleumindustrybill.com/wp-content/uploads/2017/07/National-Petroleum-Policy-Approved-by-FEC-in-July-2017.pdf>> and the World Bank's (WB), Human Rights Watch's (HRW) and Amnesty International's (AI) numerous study publications on this subject matter

¹⁴² Baxi supra n 138

¹⁴³ National Petroleum Policy (supra) Available at < <http://www.petroleumindustrybill.com/wp-content/uploads/2017/07/National-Petroleum-Policy-Approved-by-FEC-in-July-2017.pdf>> Accessed 20th January 2018

¹⁴⁴ National Petroleum Policy (Supra) at 43

documented that over 60% of the entire Niger Delta families are sustained either through farming or fishing or a combination of both.¹⁴⁵

It can then be deduced that these adverse impacts of crude oil exploitation undermine the survival and livelihood of the host communities. It exacerbates the prevailing effects of poverty and deepens the inequality of the Niger Delta inhabitants in comparison to other Nigerians. The corollary is simply that, in the light of these gruelling difficulties, sustenance is made significantly (if not substantially) more difficult for inhabitants of the Niger Delta. The situation is exacerbated by the fact that Nigeria has very few effective social security support or assistance programs.

These negative impacts on the Niger Delta's environment have also had the reasonably foreseeable and harmful consequences on the healthcare of the inhabitants. A 2017 research report issued by researchers at the University of St. Gallen has found a link between oil spillages and infant mortality in the Niger Delta.¹⁴⁶ According to their findings, new born babies are more likely to die in the first month of their life if their mothers lived near an oil spill site before conception.¹⁴⁷

Audrey Gaughran, former Director of Global Issues and Research at Amnesty International, put the causal chain of this issue into perspective when she explained that:

*“[P]eople living in the Niger Delta have to drink, cook with and wash in polluted water. They eat fish contaminated with oil and other toxins . . . After oil spills the air they breathe smells of oil, gas and other pollutants. People complain of breathing problems and skin lesions . . .”*¹⁴⁸

¹⁴⁵ United Nations Development Programme (UNDP), Niger Delta Human Development Report, 2006, p74.

¹⁴⁶ See research of report here <https://www.cesifo-group.de/DocDL/cesifo1_wp6653.pdf> also reported in the Guardian Newspaper UK of 6th November 2017 and available here <https://www.theguardian.com/global-development/2017/nov/06/Niger-Delta-oil-spills-linked-infant-deaths> both accessed 20th April 2018

¹⁴⁷ Ibid n146

¹⁴⁸ Amnesty International, 'Nigeria: Pollution has created Human Rights Tragedy in the Niger Delta' (Abuja, June 2009) available here <<https://www.amnesty.org/en/press-releases/2009/06/nigeria-amnesty-international-says-pollution-has-created-human-rights-tr/>> Accessed 18th February 2018

Another study also showed that water-related diseases in Nigeria are most endemic and acute in the Niger Delta as compared to other areas of the country.¹⁴⁹ Water-related diseases are said to account for over 80% of all reported diseases in the Niger Delta region.¹⁵⁰ It is apparent from these illustrations that these environmental impacts resulting from crude oil exploitation also undermine the health of the Niger Delta inhabitants significantly.

With health challenges come some attendant economic and social costs (such as costs of treating illnesses, the lack of physical fitness to work, and inability to provide for self or family, and so on). In Nigeria, and mostly in the rural areas which the Niger Delta region largely qualifies as, the cost of medical treatment is commonly and largely borne by individual patients. Such costs add more economic burden on the affected persons, just as the indirect consequences of adverse environmental impacts on their overall means of sustenance are exacerbated.

There are also other long-term and less obvious consequences of these environmental impacts. Firstly, gas flaring is believed to be a notable cause of the large-scale destruction of the mangrove swamps and the rainforest ecological zones found in the Niger Delta.¹⁵¹ Secondly, the long-term consequence of these degradations, especially at its current unabated and unbridled state, can spread far beyond the Niger Delta region to other communities.¹⁵² Indeed, global warming, which can result from gas flaring, would leave no community both near and far from the Niger Delta untouched. The expansion of these problems, with their attendant consequences to a much larger national and even global population may prove as difficult to contain as the problems in the Niger Delta themselves.

¹⁴⁹ Sabella O. Abidde, *Nigeria's Niger Delta: Militancy, Amnesty and the Postamnesty Environment* (Lexington London, 2017) pp 38 – 40, quoting the NDDC's 2006 Niger Delta Regional Development Plan Report at page 91

¹⁵⁰ Ibid n149

¹⁵¹ See Generally Anthony Oso Bisong, *The Effects of Natural Gas Flaring on Climate Change in Nigeria* (Society of Petroleum Engineers, 2014); "Gas Flaring and Global Warming", online: <<http://www.global-greenhouse-warming.com/gas-flaring-and-global-warming.html>>; Stephen C Nwanya, "Climate change and energy implications of gas flaring for Nigeria" (2011) 6:3 Int J Low-Carbon Tech 193, online: <<https://academic.oup.com/ijlct/article/6/3/193/680774>>.

¹⁵² Sabella O. Abidde, (Supra) p 42

Thirdly, these adverse environmental impacts create a chain reaction; where the economic and social pitfalls they bring about in turn instigate vices that in themselves further undermine livelihoods, peace, security and overall wellbeing in the region and beyond.¹⁵³ Those vices (such as oil-theft, oil pipeline and other facilities vandalism etc) then pave the way, justifiably or not, for the usual high-handed interventions by the state (i.e. Nigeria's federal security agents); which then lead to a whole different set of dire socio-economic vicious circle such as extra-judicial killings, treatments akin to torture and inhuman/degrading treatments of the Niger Delta people.

2.2.2 The Human Rights Violations

For clarity, as it is used here, the expression 'human rights' refers to the legal rights, entitlements and values guaranteed in the various international,¹⁵⁴ regional/continental¹⁵⁵ and national¹⁵⁶ human rights instruments. For this same purpose, primacy is accorded to the international, then the regional/continental and then, the national legal regimes, in that hierarchal order.

These instruments include the African Charter on Human and Peoples' Rights (The African Charter), which was adopted in 1981 by the then Organisation of African Unity (OAU), now known as the African Union (AU), and which came into force in 1986.¹⁵⁷ In compliance with its dualist legal system, Nigeria ratified and re-enacted the African Charter into its domestic body of laws.¹⁵⁸ It was the first international human rights instrument to recognize a safe and healthy environment as a human right.¹⁵⁹

¹⁵³ Speaking of vices such as such as oil-theft, oil pipeline and other facilities vandalism as well as violent and non-violent agitations in the Niger Delta

¹⁵⁴ Such as the Universal Declaration of Human Rights (UDHR) 1948, International Covenant on Civil and Political Rights (ICCPR) 1966, International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966 and so on.

¹⁵⁵ Such as the African Charter on Human and Peoples Rights (The African Charter) 1981

¹⁵⁶ The Constitution of the Federal Republic of Nigeria 1999 (As amended), The African Charter Act and other body of national laws and legislation

¹⁵⁷ Now African Union (AU)

¹⁵⁸ As the African Charter on Human and Peoples' Rights Act (Ratification and Enforcement) Act, Cap A9, Laws of the Federation of Nigeria 2004 by virtue of section 12(1) of the Constitution of the Federal Republic of Nigeria 1999 (As Amended)

¹⁵⁹ Article 24 of the Charter provides for a right to 'a general satisfactory environment favourable to . . . development'

The International Covenant on Economic, Social and Cultural Rights (ICESCR) also contains an obligation on state-parties to take steps that will ensure the achievement “of all aspects of environmental and industrial hygiene” for their citizens.¹⁶⁰

The preceding section highlighted the adverse environmental impacts of oil exploration in the Niger Delta, which includes the recently discovered link between oil spillages and infant mortality.¹⁶¹ It also pointed to the prevalence of water-borne diseases in the region, as well as the problems of waste contamination (of air, water and lands) and gas flaring. These are all evidence, however modest, that the environment in the Niger Delta is neither “satisfactory” (according to the duty imposed by Article 24 of the African Charter) nor “hygienic” (as required by Article 12 (2) (b) of the ICESCR).

Thus, the state of the Niger Delta’s environment, undermines the economic, physical and social development of the Niger Delta peoples as guaranteed under the Charter.¹⁶² For sure, the adverse environmental impacts highlighted above violate the human right to ‘a general satisfactory environment favourable to [the] development’ of the people of Niger Delta.¹⁶³

Furthermore, a report by Amnesty International has distilled the other main heads of human rights that are violated as a result of crude oil production (or activities incidental or ancillary to it) in the Niger Delta.¹⁶⁴ They are:¹⁶⁵

¹⁶⁰ See Article 12 (2) b

¹⁶¹ See the research at n146

¹⁶² Article 24 (Supra)

¹⁶³ This is also a right provided in Article 12 of the ICESCR (supra)

¹⁶⁴ Amnesty International, ‘Nigeria: Petroleum, Pollution and Poverty in the Niger Delta’ (Abuja 2009), available online here <<https://www.amnestyusa.org/wp-content/uploads/2017/04/afr440172009en.pdf>> and accessed 4th April 2018

¹⁶⁵ Ibid n164 at 10

*“Violations of the right to an adequate standard of living, including the right to food – as a consequence of the impact of oil-related pollution and environmental damage on agriculture and fisheries, which are the main sources of food for many people in the Niger Delta.”*¹⁶⁶

*Violations of the right to gain a living through work – also as a consequence of widespread damage to agriculture and fisheries, because these are also the main sources of livelihood for many people in the Niger Delta.”*¹⁶⁷

*Violations of the right to water – which occur when oil spills and waste materials pollute water used for drinking and other domestic purposes.”*¹⁶⁸

*Violations of the right to health – which arise from failure to secure the underlying determinants of health, including a healthy environment, and failure to enforce laws to protect the environment and prevent pollution.”*¹⁶⁹

*The absence of any adequate monitoring of the human impacts of oil-related pollution – despite the fact that the oil industry in the Niger Delta is operating in a relatively densely populated area characterized by high levels of poverty and vulnerability.”*¹⁷⁰

*Failure to provide affected communities with adequate information or ensure consultation on the impacts of oil operations on their human rights.”*¹⁷¹

*Failure to ensure access to effective remedy for people whose human rights have been violated.”*¹⁷²

¹⁶⁶ Enshrined in Article 25 of the Universal Declaration of Human Rights (UDHR) and Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)

¹⁶⁷ See Article 23.1 of the UDHR, Article 15 of the African Charter, Article 6 (Part III) of the ICESCR

¹⁶⁸ Article 14.2 (h) of the Convention on Elimination of all Forms of Discrimination Against Women (CEDAW), Article 24 of the Convention on the Rights of the Child (CRC), Article 28 (2) of the Convention on the Rights of Persons with Disabilities (CRPD). This right was also impliedly upheld/acknowledged by the International Centre for Settlement of Investment Disputes (ICSID) in its decision in the *Bivater Gauff Ltd. v Government of Tanzania* dispute, where although it found in favour of *Bivater*, it however did not award any monetary damages to it due to the paramountcy of public interest in a safe drinking water.

¹⁶⁹ Implicit in Article 25 of the UDHR. See also Article 12 of the ICESCR and Article 18(1) of the African Charter.

¹⁷⁰ See Article 24 of the African Charter (Supra) and Article 12 of the ICESCR

¹⁷¹ See Article 9 of the African Charter

¹⁷² Article 8 of UDHR (Supra), Article 7 of the Charter (Supra),

In addition to these set out violations, there are pockets of other human rights infringements occasioned by crude oil exploitation in the Niger Delta area. For instance, Article 21 of the African Charter provides for a right of a people “to freely dispose of their wealth and natural resources”. It goes ahead to indicate that “[T]his right shall be exercised in the exclusive interest of the people” and that “[I]n no case shall a people be deprived of it”. Although it impliedly places this obligation in the hand of the ‘state’ to exercise on behalf of the people (as it seems by sub 4 of the Article), it does however charge the state to “eliminate all forms of foreign economic exploitation . . . so as to enable their peoples to fully benefit from the advantage derived from their national resources”.¹⁷³

This Article 21 right is violated frequently and flagrantly in the Niger Delta situation. For example, the African Commission on Human Peoples Rights (The African Commission) in the case; *Social and Economic Rights Action/Centre for Economic and Social Rights v. Nigeria* (the *Ogoni Case*)¹⁷⁴ held that the Nigerian government flagrantly and massively breached these rights of the Ogoni people in the manner with which it runs the crude oil business and appropriates its earnings.¹⁷⁵

There is also the violation of the right to property ownership of the Niger Delta people and communities.¹⁷⁶ This is enabled by a piece of national legislation known as the Land Use Act (LUA).¹⁷⁷ According to the Supreme Court of Nigeria (SCON) in *Abioye v Yakubu*,¹⁷⁸ the Act did the following to individual and customary land ownership in Nigeria:

¹⁷³ Article 21 (5) of the Charter (Supra)

¹⁷⁴ (2001) AHRLR 60 (ACHPR 2001)

¹⁷⁵ For a detailed report and analysis of the case’s outcome; see Dinah Shelton, “Decision Regarding Communication 155/96 (Social and Economic Rights Action/Centre for Economic and Social Rights v. Nigeria)”, 96 A.J.I.L., 2002, p. 937 at para 58

¹⁷⁶ Provided for in Article 17 of the UDHR (Supra) and Article 14 of the African Charter (and implied in Article 21 of the same charter) and section 43 of the Constitution of the Federal Republic of Nigeria 1999 (as amended)

¹⁷⁷ Land Use Act 1978 Cap 202, Laws of the Federation of Nigeria 1990

¹⁷⁸ (1991) 5 NWLR (pt 190) 130

1. It removed the radical title in land from individual Nigerians, families and communities and vested the same in the Governor of each states of the Nigerian federation.
2. It removed the control and management of lands from family/community heads and vests them in the same Governor of each state.¹⁷⁹

Therefore, ownership of lands by the Niger Delta people (as in the case of every other Nigerian anyways) is ultimately not permanent and is subject to the desires and decisions of the state Governor/government. By section 28 of the Act, the Governor may at any time expropriate personal or communal lands ‘*in the overriding public interest*’. Such interests were further explained to include “*the requirement of the land for mining purposes or oil pipelines or for any purpose connected therewith*”¹⁸⁰. Ako puts this in perspective by opining that:¹⁸¹

“... *the inhabitants of the [Niger Delta] region may be dispossessed of their land whenever their land is required for oil production, making them tenants-at-will of the oil industry on land they have owned and inhabited for centuries*”.¹⁸²

This is essentially what the people of Niger Delta have faced for decades since the discovery of crude oil in their environs. The effect of the said section 28 (supra) is that it has radically removed both the right and the means by which the Niger Delta people may ‘*freely dispose of their wealth/resources*’ and vested it in the Governor or government of the state. What is more, the LUA enjoys constitutional status, thereby making it impossible to be amended or repealed without going through the full and difficult procedure of constitutional amendment under Nigerian law.¹⁸³

¹⁷⁹ Per Andrew Obaseki JSC (*OBM*) at 223, paras (d) – (g)

¹⁸⁰ See Land Use Act 1978, s28

¹⁸¹ Rhuks Ako, ‘Nigeria’s Land Use Act: An Anti-thesis to Environmental Justice’ (2009) JAL (2)

¹⁸² *Ibid* n182 at 296.

¹⁸³ The Constitutional Amendment Procedure is laid down in section 9(2) of the Constitution of the Federal Republic of Nigeria 1999 (As Amended)

Even from a cursory look at these laid-out rights violations, it becomes apparent how the exploitation of crude oil militates against the socio-economic wellbeing of the Niger Delta people. The existence of crude oil in the area makes them twice as likely (or maybe more) to be victims of land and resource expropriation than other Nigerians. The result of these expropriations is that the Niger Delta people are forced to survive on scarcer resources (land, water, forest, biodiversity and so on) than other Nigerian communities with no mineral deposits in their environs. The Pollution of their environment exacerbates the socio-economic injustices that they experienced, in that it further limits both the quantity¹⁸⁴ and quality¹⁸⁵ of the resources available to them for sustenance or survival.

In the light of all these, and as was laid out in the aims and objectives of this thesis, it becomes imperative to launch a critical inquiry into why all these violations have existed and persisted unbridled for so many years.

2.3 TREMF Theory and the Socio-Economic Problems in the Niger Delta Area of Nigeria

This section interrogates what roles (if any) the emergence of the ‘trade-related, market-friendly’ (TREMF) paradigm of human rights has played in the development of the socio-economic problems highlighted above. Recall that Baxi had argued that human rights under the paradigm of the Universal Declaration of Human Rights (UDHR) is ‘*steadily, but surely being supplanted*’ by the TREMF paradigm.¹⁸⁶ From that theory emerged four (4) sub-claims summarised in chapter one.

Those sub-claims will be deployed to analyse the socio-economic problems described above, to determine the extent to which the TREMF theory is exemplified and/or troubled by the already discussed human and environmental rights situations in the Niger Delta.¹⁸⁷

¹⁸⁴ e.g. amount of unpolluted lands water, fishes available to the people for use

¹⁸⁵ e.g. the fertility of land, safety of the water and hygiene or healthiness of the seafoods

¹⁸⁶ Upendra Baxi, ‘*The Future of Human Rights*’ (New Delhi 2006) p 234 - 275

¹⁸⁷ Baxi supra (n186) at 234.

2.3.1 Sub-claim One: The Bretton Woods Institutions and Global North States as Authors of the TREMF Agenda/Paradigm

The underlying basis of this sub-claim is that powerful (mostly Global North) nations and (or through) the Bretton Woods Institutions have tended to create a supervening trade-liberalization agenda for the weaker and mostly Global South nations.¹⁸⁸ This agenda is usually created through the instrumentality of trade agreements/treaties, economic stimulus packages, economic reform or restructuring advice, financial relief or financial assistance agreements and their attendant conditionalities, etc. The power imbalances that exist between North and South countries and peoples quickly transform this agenda into an obligation or responsibility (on the part of the South), policed by certain international institutions and the Global North through the mechanisms of stabilization clauses¹⁸⁹, economic, trade or political sanctions, investor-state arbitration processes and its enforcement mechanisms and so on. With all those sources of pressures and the gruelling consequence of defiance, the so-called weaker states tend to aim to meet the obligation/responsibility through the pursuit of market efficiency via the three interrelated mechanisms of Deregulation, Denationalisation and Disinvestment (the 3Ds).

Within this framework, it is seen as fundamental to the successful implementation of these 3Ds mechanism that more freedom, more rights and more protections are assigned to the agents of global capital (i.e. the Multinational Corporations a.k.a MNCs and Transnational Corporations a.k.a TNCs) with little or no corresponding duties/responsibilities. This fundamental feature of the 3Ds problematizes the prospects of advancing or protecting human rights (for individuals or communities) in the sense envisaged under the UDHR paradigm. This is because under the UDHR, the state (*a la* Baxi) *'is assigned human responsibilities . . . to construct . . . a just social order . . . that will at least meet the basic*

¹⁸⁸ Baxi *supra*

¹⁸⁹ For a detailed Analysis of the effect of Stabilization clauses in this respect, see generally Oshionebo, *supra* note 13.

needs of human beings’; like water, food, healthy environment, work etc.¹⁹⁰ To adequately discharge that responsibility, the state ought to play a central regulatory, control and re-distributive role akin to the Rawlsian postulations under his second principle of justice.¹⁹¹ Whereas under the TREMF paradigm, the state is to free up markets and adopt a minimalist and ‘night watchman’ role as espoused under Nozick’s theory.¹⁹² Therefore the role envisaged for the state under the UDHR paradigm is much more robust but runs counter to that it is assigned under the emergent TREMF paradigm.

In Nigeria, economic reform was the channel through which the TREMF paradigm was implemented and operationalized. Its strong onset can be traced to the Structural Adjustment Program (SAP), brokered by Britain and the US, authored by the Bretton Wood Institutions (i.e. the IMF and World Bank) and then introduced into Nigeria in 1986 by the military government of General Ibrahim Babangida.¹⁹³ Sharp increases in oil revenue in the early 70s motivated Nigeria to venture into a public investment program in infrastructure and social services. This drove government spending to a very high level, relying almost exclusively on revenue accruing from the oil and gas sector without any corresponding effort to equally develop and grow revenue from the non-oil sectors. It was no surprise that the crash of the global oil prices in the early 80s put a drastic strain on the economic and social wellbeing of the nation and its people.

The Structural Adjustment Program (SAP) that the then Babangida regime adopted was touted to be the panacea to the economic woes confronting the nation-state at the time. The blanket summary of the SAP’s stated objective *“was to help promote economic efficiency and private sector development as a basis for*

¹⁹⁰ Baxi Supra

¹⁹¹ Rawls J, *‘A Theory of Justice’* Rev edn (Harvard University Press, 1999) pp 10-18

¹⁹² See Norzick R, *‘Anarchy, State and Utopia’* (Oxford, 1974) at 30

¹⁹³ For Analysis of the SAP, see generally Ihonvbere, J O (1993) ‘Economic Crisis, Structural Adjustment and Social Crisis in Nigeria’ *World Development* 21, pp 141- 158, at p 143 (hereafter “Economic Crisis”); and Mosley, P (1992) ‘Policy-Making without Facts: A Note on the Assessment of Structural Adjustment Policies in Nigeria, 1985-1990’ *African Affairs* 91, pp 227-240 at pp 228-230

improving prospects for long-term growth".¹⁹⁴ As said, Britain played a key role in propagating and advancing the SAP. Former British Prime Minister, Margaret Thatcher,¹⁹⁵ made this clear in Lagos, during her visit to Nigeria in 1988. Speaking of Gen. Babangida, she said:¹⁹⁶

*"I have great admiration for the leadership he is giving here and for the courageous way in which he is tackling the economic problems of the country and for the (SAP) agreement which he has just reached with the IMF, and we are very pleased that we in the United Kingdom have been able to help"*¹⁹⁷

Reduction of debts/borrowing and balance of payment deficits, as well as achieving a robust fiscal responsibility for the nation, no doubt became very necessary at the time. These goals can only be achieved through a corresponding increase in revenue generation, the bulk of which is dependent on the petroleum sector. A target was set to increase oil production capacity to 2.5mb/d and raise reserves to 20 billion barrels by mid 1990s (this deadline was later readjusted to 1998).¹⁹⁸ The key role the sector plays in the economic direction and stability of the country made it the primary sector for the implementation of the pro-market liberalization and pro-TREMF policies of the SAP.

Since the success of the SAP policies is hinged on the creation of a corresponding market-friendly environment, the corollary is that the Nigerian government introduced free trade policies of disinvestment and deregulation in its petroleum sector. This was aimed at encouraging the foreign MNCs in the sector to expand their investments.¹⁹⁹ Under the disinvestment policy, the Nigerian

¹⁹⁴ The World Bank, 'Nigeria Structural Adjustment Program: Policies, Implementation and Impact (May, 1994) at vii available here <<http://documents.worldbank.org/curated/en/959091468775569769/pdf/multi0page.pdf>> accessed 10th May 2018

¹⁹⁵ Who herself was a fierce advocate of the TREMF/neoliberal policies of deregulation, disinvestment and denationalization and well known for her own ruthless battle and subsequent dismantling of the trade unions in the UK

¹⁹⁶ See Transcript of Mrs. Thatcher's Speech here <<https://www.margaretthatcher.org/document/107608>> Accessed 10th May 2018.

¹⁹⁷ Emphasis mine

¹⁹⁸ Ibid n194 at 53

¹⁹⁹ One can see all the fingerprints of the Thatcher pro-TREMF and anti-organized opposition policies on this program as the Nigerian government vehemently clamped down on trade unions and other forms of collective/organized opposition groups.

National Petroleum Corporation (NNPC)²⁰⁰ began to shed (and sell) their equity ownership in the oil exploration joint ventures it had with the oil MNCs from a 60% to a 55% holding.²⁰¹

In order to deregulate, new MOUs were signed between the NNPC and the oil MNCs in July 1991 with incentives such as granting the MNCs bonuses for net additions to proven reserves, increasing their guaranteed profit margin from \$2.0 USD to \$2.5USD per barrel and revising the formulae for determining the price at which the government allows them (the MNCs) to sell their crude.²⁰² Another additional incentive saw the relaxation of the already fragile regulatory frameworks and enforcement mechanisms in the oil and gas sector by the government. This caused oil spills and other adverse impacts of exploration to shoot through the roof, with no remediation, cleaning nor consequences (in terms of legal enforcement) for the spilling corporations.²⁰³

The imposition of the TREMF agenda and obligations carried on to successive administrations under different forms, guises and aliases (e.g. Economic Reform Plan, Economic Reform Agenda, Transformation Agenda and so on). Under the civilian administration of Chief Olusegun Obasanjo, it was broadly known as the Economic Reform Plan (ERP) and designated the National Economic Empowerment and Development Strategy – NEEDS during the administration’s second tenure.²⁰⁴ Upon resumption of its second term in office, the administration shaped up for the implementation of these pro-TREMF policies perhaps, by picking a Nigerian renowned World Bank top executive, in the person of Dr. Ngozi Okonjo-Iweala, as its Finance Minister and Professor Chukwuma Soludo, a World Bank affiliate and consultant, as the Governor of Nigeria’s Central Bank. These institutions,

²⁰⁰ This is the government agency/corporation exercising government’s control of the oil and gas sector

²⁰¹ The World Bank, ‘Nigeria Structural Adjustment Program: Policies, Implementation and Impact (May, 1994) at 55

²⁰² Ibid n 201 at 53

²⁰³ Sabella O. Abidde, (Supra) at page 41 -42

²⁰⁴ For the IMF’s and WB’s inspiration and support of the Economic Reform Program, see IMF (2005) ‘Semi-Annual Staff Report under Intensified Surveillance: Nigeria’ IMF Country Report No. 05/37, <<http://www.imf.org/external/pubs/ft/scr/2005/cr0537.pdf>> 28November 2007 p 1 accessed 4th February 2018

the Finance ministry and the Central Bank, are the two most critical determinants and formulators of Nigeria's economic policies and strategies.

Buoyed by these personnel and supports, the administration began the implementation of the recommended pro-TREMF policies under its NEEDS/Economic Reform Plan (ERP) in two strategic ways.²⁰⁵ Firstly, it began with its aggressive privatization and disinvestment programs, packaged as one of the key pillars of the NEEDS program. This received the unflinching support of the powerful Global North nations through the Bretton Woods institutions they control.²⁰⁶ The World Bank admitted this much when it declared in its Nigerian Country Assistance Evaluation report (1998 – 2007) that:

*“[A]nother element of Bank's involvement in the private sector was providing for the [Nigerian] government's privatization program under which most commercial state-owned enterprises were privatized”.*²⁰⁷

Despite the wave of unrest, untold hardships and consequential human rights violations following from the government's crackdown on labour and civil society protesters against the disinvestment and privatization programs,²⁰⁸ the IMF still adjudged those an “excellent progress”.²⁰⁹

²⁰⁵ See Okafor, O, ‘Assessing Baxi's Thesis on an Emergent Trade-Related Market-Friendly Human: Rights Paradigm: Evidence from Nigerian Labour-led Struggles,’ 2007 (1) Law, Social Justice & Global Development Journal (LGD) at page 5; available online at <http://www.go.warwick.ac.uk/elj/lgd/2007_1/okafor> Accessed 10th October 2017

²⁰⁶ See World Bank's "policy document in support of the Obasanjo's administration ERP, titled, ‘Nigeria Privatization Support Project’ available online here <<http://documents.worldbank.org/curated/en/427751468759334875/pdf/multi0page.pdf>> Accessed 23rd of April 2018

²⁰⁷ The World Bank, ‘Nigeria Country Assistance Evaluation 1998 -2007’ available in pdf online at <<https://www.oecd.org/countries/nigeria/47886664.pdf>> at 14, accessed January 31st 2019

²⁰⁸ For details of the labour and civil society protests that greeted the privatization programs, See Okafor, O, *ibid* at 68

²⁰⁹ The IMF, ‘Nigeria: First Review Under the Policy Support Instrument—Staff Report; Staff Statement; Press Release on the Executive Board Discussion; and Statement by the Executive Director for Nigeria’ available online in pdf at <<https://www.imf.org/external/pubs/ft/scr/2006/cr06180.pdf>> p 8

Secondly, it also embarked on the deregulation of the oil downstream sector; a new responsibility which inevitably gave rise to the further abandonment of the paradigm of human rights espoused in the UDHR and the International Bill of Rights.²¹⁰

This praxis of deregulation and privatization (i.e. denationalization and disinvestment) as well as market efficiency and trade liberalization have become the hallmark of the economic policies of successive Nigerian governments, including the present one. Excerpts from the recently published National Petroleum and Gas Policy documents, issued by the current Buhari administration underscore this point.²¹¹ While the Petroleum Policy's mission statement was to '*maximize the production and processing of hydrocarbons*', that of the Gas policy was to make Nigeria '*... an attractive gas-based industrial nation ...*'²¹²

A combined reading of the two underlined key words speak to the objective of pursuing pro-TREMF agenda in the Nigerian oil and gas sector. The mission to 'maximise' production would be backed by the creation of a corresponding 'favourable environment' that would stimulate that outcome. As the analysis in the next section would reveal, this 'favourable environment' is usually created by the state relaxing (or abandoning) its regulatory obligations while also providing firm protection against any 'obstructions' to the free operations of the oil MNCs.²¹³ In this specific Niger Delta context, such protections are typically carried out by way of crackdowns on agitation against the incidence of pollution and human rights violations in the oil exploration process in that region; a typical example

²¹⁰ See World Bank's policy document in support of the Obasanjo's administration NEEDS program, titled, 'Nigeria Privatization Support Project' available online here <<http://documents.worldbank.org/curated/en/427751468759334875/pdf/multi0page.pdf>> Accessed 23rd of April 2018

²¹¹ Federal Republic of Nigeria, Ministry of Petroleum Resources, 'National Petroleum Policy' (Abuja, 2017) at 41 Available at < <http://www.petroleumindustrybill.com/wp-content/uploads/2017/07/National-Petroleum-Policy-Approved-by-FEC-in-July-2017.pdf>> Accessed 20th January 2018

²¹² Supra n 193 at p16 and p14 respectively. Emphasis was supplied by me.

²¹³ This is when the state is said to have acquired the "soft states" status or syndrome, as expounder fuller in the next section

being the execution of the late Ogoni leader, Ken Saro-Wiwa (hereafter ‘the Wiwa execution’), and other instances discussed in the later part of this chapter.²¹⁴

On the other hand, the prospect of making the nation’s gas industry ‘attractive’ alludes also to entrenching the free-trade and free-market policies or agenda. This is also typically pursued by implementing pro-TREMF praxis of market liberalization (i.e. relaxed regulations, minimized control or interference by government, and the suppression of any anti-exploration agitation of the host communities).

The illustrations above point to the partial imposition of the obligation to implement TREMF on one Global South State. The subsequent sections of this chapter will attempt to shed further light on the specific ways in which the TREMF theory is exemplified in the Nigerian (Niger Delta) context.

2.3.2 Sub-claim Two: The Pursuit of Market Efficiency and the Acquisition of the ‘Soft States’ Status/Syndrome

The key argument of this TREMF sub-claim is that states, on taking on the onus of implementing the TREMF paradigm, pursue free-trade and adopt market-efficient policies to the benefit of global capital while at the same time, resiling to a great extent from their human rights obligations under the UDHR. This is what earns them the ‘soft states’ status *a la* Okafor and triggers what I would term the ‘soft states’ syndrome.²¹⁵ The syndrome refers to the praxis of adopting policies that assign more collective rights to, and becoming softer towards, global capital (MNCs and TNCs). In the same vein, they ignore or neglect their regulatory and re-distributive roles for the enhancement and advancement of human rights of its citizens under the paradigm of the UDHR. The postulation of this sub-claim is

²¹⁴ This is the phenomenon described further in this thesis as the “internal hardness syndrome”.

²¹⁵ See generally Obiora Okafor’s essay, fleshing out the TREMF theory in: Okafor, O, ‘Assessing Baxi’s Thesis on an Emergent Trade-Related Market-Friendly Human Rights Paradigm: Evidence from Nigerian Labour-led Struggles,’ 2007 (1) Law, Social Justice & Global Development Journal (LGD) at 4

closely interlinked with that of the third sub-claim, in that the supplanting and diminishing of human rights of the people are a direct consequence of the ‘soft state’ status or syndrome of government.

The postulation above holds true in the Niger Delta situation where government’s actions, are often tailored largely towards protecting the interests of the oil MNCs as opposed to those of the Niger Delta peoples and communities. There are countless measures targeted towards enhancing and promoting the interests and operations of the oil MNCs. For instance (from the perspective of an Executive action in this regard), the Amnesty Program (AP) initiative of the Nigerian Federal Government is credited with being hugely instrumental to achieving the relatively peaceful atmosphere that currently exists in the Niger Delta region. However, critics have argued that it was offered with an overriding objective of facilitating optimal production of crude for the oil MNCs by quelling the armed conflict which stands as the biggest obstacle to that objective.²¹⁶

The AP which is modelled after the prevailing peace-building models generally used by the United Nations was hinged on the Disarmament, Demobilization and Reintegration (DDR) initiative. However, as Davidheiser & Nyiayaana rightly pointed out, any DDR program “*is expected to comprise only the preliminary phases of a much broader process of addressing root causes that initially motivated the combatants*”.²¹⁷ For lacking the intent nor framework addressing the root causes of the armed agitation, Omadjohwoefe wrote off the AP as having little or nothing to do with providing ‘*sustainable solution to the unabated damage done to the Niger Delta Environment*’ by the exploration activities.²¹⁸

The counter or a pro-Nigerian government position to this argument will be that it created a special government ministry for the Niger Delta alongside its offer of Amnesty (i.e. the federal Ministry of

²¹⁶ For an extensive critical analysis of the Amnesty Program, see Mark Davidheiser & Kiale Nyiayaana, ‘Demobilization or Remobilization? The Amnesty Program and the Search for Peace in the Niger Delta’ (2010) African Security Journal

²¹⁷ Ibid n216 at 44

²¹⁸ Ogege Samuel Omadjohwoefe, “Amnesty Initiative and the Dilemma of Sustainable Development in the Niger Delta Region of Nigeria” (2011) 4:4 Journal of Sustainable Development 249, online: <<http://www.ccsenet.org/journal/index.php/jsd/article/view/10634>>.

Niger Delta Affairs). The ministry's role in the words of the late Nigerian President and the initiator of the AP, is to "coordinate . . . efforts to tackle the challenges of infrastructural development, environment protection and youth empowerment in the [Niger Delta] region".²¹⁹ However, the ineffectiveness of the ministry in making any real or meaningful impact in addressing the very well-known underlying problems causing these agitation (environmental and human rights problems) is the Achilles heel of any such counter-argument or narrative. The ministry was created in 2008, but the first attempt at cleaning the hazardous oil spillages in the Niger Delta only began in 2017, almost a decade after its creation. Even still, the cleaning process (discussed earlier in chapter one) is moving at a rate that seriously questions and undermines the government and its MNC counterpart's real intent in seeing the cleaning through.

Another action that may be presented as a counter to the narrative of government's lack of intent to address the root causes of the Niger Delta agitation may be some legislative efforts at regulating the activities of the oil MNCs with pieces of legislations such as the National Environmental Standards Regulation Enforcement Agency (NESREA) Act and the National Oil Spill Detection and Response Agency (NOSDRA) Act.²²⁰ The NESREA Act was enacted in 2007 (at a time the Niger Delta issues were very much on the forefront of national and international concerns), however, it was stripped of the power to enforce the environmental legislation or to investigate and prosecute environmental infringements by the oil MNCs and in the oil and gas sector in general.²²¹ Similarly, the National Oil Spill Detection and Response Agency (NOSDRA) Act which came into force in 2006, embodies the same flaw in that this 28-section-long legislation, contains no provision empowering the agency to undertake enforcement actions against those responsible for oil spillages.

²¹⁹ This Day Newspaper, 'Why We Created Niger Delta Ministry by Yar'Adua (Lagos, 12th September 2008) available online here <<https://allafrica.com/stories/200809120002.html>> Accessed 15th December 2018

²²⁰ The NESREA Act was enacted to repeal the Federal Environmental Protection Agency (FEPA) Act and to take over its mandate

²²¹ See sections 7, 8, 24, 29 and 30 of the NESREA Act prohibited the agency's operations and activities from extending into the oil and gas sector

Although the agency has a mandate to collect a fine of up to a million naira for *'failure to clean up the impacted [oil spillage] site, to all practical extent including remediation'*, the legislation gives it no power of enforcing this payment²²². This raises salient questions such as: how must it then deal with cases of non-compliance and/or wilful negligence to pay or “clean up impacted oil sites”? Perhaps, this incapacity on the part of the agency is why there is no recorded instance that the agency has ever applied the relevant section 6 (3) provision of the law to the numerous cases of uncleaned and ‘unremediated’ oil spillages that has occurred in the Niger Delta, at least, since the enactment of the legislation and consequent creation of the agency in 2006. To drive this point home; the Bodo Community oil spill is one of such examples which happened twice; in 2008 and in 2009.²²³ The spills were serious enough to draw the ire of international observers²²⁴ and substantial enough to ground a law suit in the UK (for which Shell later settled out of court with the community).²²⁵

These loopholes in both the NESREA and NOSDRA acts leave regulation and enforcement powers in the petroleum sector under the purview of the NNPC. Bear in mind that the NNPC is the Nigerian state-owned oil company that represents the state’s ultimate interest in the sector which the forgoing analysis have shown to be largely, the optimization of crude oil production and the eventual attainment of market efficiency in the sector. Aside that, NNPC is itself involved in oil exploration and therefore, possesses significant stakes in the exploration activities of the other major oil MNCs given that they operate on a Joint Venture agreement with the corporation. This raises serious questions and red flags

²²² See section 6 (3) of NOSDRA Act

²²³ See report by the Business and Human Rights Resource Centre available at <<https://business-humanrights.org/en/shell-lawsuit-re-oil-spills-bodo-community-in-nigeria>> accessed January 15th 2018

²²⁴ Amnesty International were among a retinue of International NGO that helped put pressure on Shell probably prompting it to settle

²²⁵ *Bodo Community and Others v Shell Petroleum Development Company of Nigeria Limited* [2014] EWHC 2170 (TCC)

of a conflict of interest, strongly supported by the myriads of avoidable environmental pollution cases that are down to weak regulatory oversight.²²⁶

In the judicial arm of government, this ‘soft state’ syndrome is all-too-often reflected in their adjudication and application of legal principles, rules and norms to the advantage and protection of the oil MNCs. Two cases are highlighted below to drive this assertion home.

The first is the case of *Shell v Isaiab* which was the first (reported) case on the issue of oil spillage to go all the way before Nigeria’s highest court, the Supreme Court of Nigeria (hereafter; SCoN)²²⁷. In this case, the plaintiffs/respondents commenced an action seeking remedy for the alleged pollution from the exploration activities of the Defendants/Appellants. The matter was commenced at the High Court of Rivers State pursuant to Decree No. 16 of 1992 which had restored jurisdiction to state high courts (such as the Rivers State High Court) to hear and determine cases pertaining to oil and gas and other mining related activities. Decree 16 thereby suspended the exclusive jurisdiction conferred on Federal High Courts by Decree No. 60 of 1991 on oil and gas related subject matters. However, midway into the hearing of this case (and motivated by the institution of this case as conspiracy theorists had alleged), a new decree, Decree No. 107 of 1993, was promulgated, which again ousted the jurisdiction of State High Courts on these sorts of subject matters and restored the exclusive jurisdiction of the Federal High Courts to hear and determine them. Following the age-long SCoN principle ‘*that the law applicable to an action is the law existing when the cause of action arose*’,²²⁸ the Rivers State High Court sustained its jurisdiction and went on to determine the dispute and (rightly) awarded damages against the oil MNC.

²²⁶ See this 2009 report by Amnesty International at n 24; which confirmed this conflict of interest and its impediment of the NNPC’s regulatory functions. See generally section one of the report, caps 1 – 2; pp 7 - 20

²²⁷ Suit No SC.75/1997

²²⁸ See *Adesina v Kola* (1993) 6 NWLR (Pt. 298) 182 at 185

However, the SCoN dealt a big blow to the success of the plaintiff's case when it departed from its own age-long principle to hold strangely, that Decree No. 107 of 1993, having ousted the jurisdiction of state high courts generally on oil and gas subject matters, had affected the jurisdiction of River State High court to determine the matter. This was irrespective that the cause of action had arisen, and the trial commenced way before Decree No. 107 came into force.²²⁹ By this singular decision, all cases determined by State high courts against oil MNCs pursuant to Decree 16 of 1992, for that 9 year-period between the time of promulgation of the Decree (1992) and the time of handing down this judgment (in 2001), were defeated on the basis of this questionable pro-TREMF-paradigm technicality. Again, this is another flagrant instance where accountability mechanisms, this time through the judicial processes are being adjusted to the benefit of global capital.

The said judgment resulted in nine (9) years of egregious human rights violations and catastrophic environmental degradation going by without any form of remedy on their merits, being accorded the victims. All cases of similar subject matter commenced at, or determined by, state High Courts had to be abandoned as an aftermath of the depraving judgment of the SCoN. The concept of *Locus Standi*' was another major technicality that the courts adopted in supplanting UDHR paradigm cum the socio-economic rights of the people while projecting the pro-TREMF paradigm. The concept was so narrowly interpreted and applied to the effect that only direct victims of oil-related mishaps (who are usually too poor, uneducated and lacking in means to institute and maintain actions in court) that must bring actions to seek remedy for such mishaps. Aside such direct victims, anyone else is termed a meddling interloper and the cases struck out or dismissed for a lack *Locus standi* on the part of the non-directly affected plaintiff.²³⁰

²²⁹ Per Uthman Mohammed JSC

²³⁰ See for instance the case of *Oronto Douglas v Shell* [1999] 2 NWLR prt 591. Mr. Douglas, a community leader and activist had instituted an action against Shell over a spillage resulting from one of its pipelines, but the case was defeated upon

The reasoning behind such TREMF-instigated and pro-global capital decisions may well be explained by the basis for the decision in this second case of *Allar Iron v Shell B.P.*²³¹ The trial court refused to grant an injunction against the Defendant/Respondent's environmentally-damaging exploration activities on the reasoning that the utility in the crude oil exploration activity outweighed any environmental safety or human rights concerns of the Plaintiff/Applicants.²³² Basically, the need to attain market efficiency was considered primal to the need to protect or enhance the human, environmental or socio-economic rights of the people.

By and large, these illustrations underscore and exemplify the postulations of this sub-claim that trade liberalization and market efficiency (and other TREMF Paradigms) have been and are being pursued in the Niger Delta, to the detriment of the individual and/or collective socio-economic rights of the people. The analyses and instances highlighted all through this section are classic indications that the Nigerian state is deeply symptomatic of the "soft states" syndrome. The reason for this may be further gleaned from the postulation of the fourth sub-claim, that the attainment of these TREMF ideals has become the new standard by which a 'good' or 'progressive' state is determined.

On the basis of the forgoing analysis, the TREMF theory and particularly this TREMF sub-claim, now assists us to understand the real reasons behind the seeming lack of effort on government's part to resolve the protracted socio-economic issues in the Niger Delta, beyond the clichés and rhetoric of 'corruption' and 'lack of political will' that are always cited for that.

Shell's preliminary objection to his *locus standi* to bring the matter since the spillage never affected him directly. The court agreed with Shell and dismissed the matter.

²³¹ *Allar Iron v Shell B.P.* Unreported Suit No. W/89/71 in the Warri High Court.

²³² *Ibid* at n 231

2.3.3 Sub-claim three: The Supplanting of Human Rights by the state vis-à-vis the ‘Internal Hardness’ Syndrome

This sub-claim of the theory posits that the emergent TREMF paradigm instigates the protection of the ‘collective human rights’ of global capital at the expense of human rights of individuals or communities.²³³ From the preceding analysis done of the other sub-claims, the corollary is that violations of the human rights of human beings are the inevitable consequence of pursuing the implementation of the TREMF paradigm. For instance, the need to secure market efficiency and ‘maximize’ crude oil exploration is directly linked to the problems of ineffective or lax regulation and enforcement of environmental standards as well as brutal crackdown on the ensuing agitations; all of which amount by and large, to socio-economic rights violations.

This is the phenomenon that Okafor described as the ‘*reproduction of a core of internal hardness*’ within the so called ‘soft states’ (i.e. ‘the internal hardness’ syndrome).²³⁴ In other words, the ‘soft states’, weak in enforcing laws/regulations and protecting the human rights interests of its own citizens, hardens itself to suppress and decimate the attempts of its citizens to resist the unbridled activities of global capital and the devastating impacts they have on them. The attendant syndrome as Baxi succinctly put it, is usually characterised by the states “*de-legitimizing the human rights-based practices of resistance of its own citizens*”.²³⁵

Nigeria was infested with the ‘soft states’ syndrome on the adoption of Structural Adjustment Program in 1986 and as it adopted other forms of economic reforms by the subsequent administrations. In a bid to achieve the targeted increase in its crude oil production capacity as well as encourage more

²³³ See Okafor’s essay on TREMF (supra) n215

²³⁴ Ibid n 215

²³⁵ Ibid n215 at 4

investment by the oil MNCs following its SAP,²³⁶ it adopted measures such as laxity in enforcement of environmental laws and regulations in its petroleum sector; leading to the proliferation of oil-related environmental pollutions and degradations in the region. Unsurprisingly, these prompted acts of resistance and growing agitation within the Niger Delta; crystalizing into the formation of the Movement for the Survival of Ogoni People (MOSOP) by Wiwa *et al* in 1990.²³⁷

The government of Ibrahim Babangida at the time unleashed violent crackdown on the Ogoni activists prompting the President of MOSOP at the time, to allege that they were being visited with ‘*genocide*’.²³⁸ As reported in the earlier chapter, the subsequent military regime of General Sanni Abacha took the ‘internal hardness’ syndrome a notch higher, when he rounded up 9 MOSOP members including Ken Saro Wiwa, tried them before a military tribunal set up for that purpose and subsequently executed them on 10th November 1995 (the Wiwa execution).²³⁹

This ‘internal hardness’ syndrome surely did not end with the military rule. The elected government of Chief Olusegun Obasanjo (and all the subsequent administrations)²⁴⁰ continued with the TREMF paradigm and the praxis of brutal clampdown on and suppression of, the human rights of the Niger Delta people to life, to protest and so on. A 2002 report of Human Rights Watch (HRW) had noted a failure of the Nigerian government upon return to democracy in 1999 to address ‘*decades of neglect*’ of the Niger Delta people and their socio-economic interests.²⁴¹ That failure is indicative of the

²³⁶ Ibid 201 at pp 54 - 58

²³⁷ The centrepiece of MOSOP’s agitation is socio-economic and environmental Justice. See MOSOP’s operating document titled the Ogoni Bill of Rights, produced at their formation in 1990 and accessible here <<http://www.bebor.org/wp-content/uploads/2012/09/Ogoni-Bill-of-Rights.pdf>> accessed 10th April 2018.

²³⁸ See ‘Statement by Dr. G.B. Leton OON JP’ contained in the Ogoni Bill of Rights Ibid n 94 at p3

²³⁹ See one of the numerous reports on the Wiwa execution here <<http://www.dw.com/en/why-nigerian-activist-ken-saro-wiwa-was-executed/a-18837442>> accessed 7th May 2018

²⁴⁰ Even then Candidate Buhari that opposed deregulation and removal of fuel subsidy has adopted it upon assuming office (although it was recently discovered that it continued to make unappropriated subsidy payments well into 2017)

²⁴¹ Human Rights Watch, ‘Nigeria, The Niger Delta: No Democratic Dividend’, (Oct. 2002) Vol 14. No 7(A)

persistence of the ‘soft states’ syndrome and the pursuit of market efficiency by the subsequent democratic governments.

During the same Obasanjo’s administration, the not-so-widely reported but albeit, ruthless massacre and wanton destruction of properties in a small Niger Delta community of Odi reflects the persistence of the TREMF paradigm and the ‘internal hardness’ syndrome in particular, well into civilian rule.²⁴² Remonstrations against steep environmental degradations in their community led to an altercation between the indigenes of Odi, an oil company and members of the Nigerian Police. Unverified reports claimed that some policemen or soldiers were killed during the altercations. On that basis, the Obasanjo government deployed a detachment of the Nigerian Army combat personnel to the community. The Soldiers burnt all houses in the community (but for the church, bank and healthcare centre) and killed an uncertain number of unarmed civilians.²⁴³

These two instances²⁴⁴ (during Military and civilian governments) are probably the most apposite (although extreme) exemplifications of this sub-claim. The broader inference is that the socio-economic rights of the citizens are supplanted by the most brutal and crude means possible, mostly in order to protect and expand the collective rights of global capital. There is also the strategy of mass criminalization of many of the agitating youths, leading to wanton and indiscriminate arrests and indefinite detentions. This is reflected in the many high-profile arrests and prosecutions of key figures of the Niger Delta agitation such as Asari Dokubo and Henry Okah.²⁴⁵

²⁴²See Report “Bombing: Delta community sends SOS to Buhari, NASS”, online: <<https://newtelegraphonline.com/2017/05/bombing-delta-community-sends-sos-buhari-nass/>> Available online here <<https://newtelegraphonline.com/2017/05/bombing-delta-community-sends-sos-buhari-nass/>> and accessed January 20th.

²⁴³ The number of those killed are said to be in their hundreds. See a Report by Human Rights Watch on the incident, available at <<https://www.hrw.org/legacy/press/1999/dec/nibg1299.htm>> Accessed January 15th 2018

²⁴⁴ Wiwa *et al's* execution and the Odi Massacre

²⁴⁵ See *Dokubo Asari v Federal Republic of Nigeria* (2006). See also *Henry Okah v Federal Republic of Nigeria* (2007) on charge No. FHC/ABJ/ Cr/ 178/2007

Incidents of military invasions and aerial bombardment of Niger Delta communities persists well into the present administration of Muhammadu Buhari.²⁴⁶ These are actions that are geared towards ensuring the uninterrupted operation of the oil MNCs while paying little or no attention to the genuine and legitimate human rights-based grievances or concerns of the Niger Delta people.

There may be the argument or inquiry into whether the case studies/instances cited above amounted to assigning more rights to MNCs or merely led to the securing of the rights of the oil MNCs (as contained in their Oil Prospecting Licenses or OPLs). Assuming but not conceding that this was a case of the later, it still does not hurt nor disturb the credibility of the TREMF postulations or theory. However, it is worth noting here that the rights granted by the OPL are not and have never been absolute. Such rights are meant to be exercised subject to the regulatory requirements that legislate against environmental degradation/pollution (the cardinal underlying reason for the agitations/protests) and subject to, or while respecting, the rights of others (especially the Niger Delta people and communities) to a safe environment guaranteed under the Nigerian Constitution²⁴⁷ and various applicable human rights instruments²⁴⁸.

2.3.4 Sub-claim Four: ‘Soft States’ as the New ‘Progressive’ States

This sub-claim postulates that there is a corresponding emergence of a new measurement paradigm for the progressiveness of states, which has enabled the prevalence of Pro-TREMF paradigm thoughts and actions in mostly the Global South, in Nigeria and even the rest of the world. The success recorded by the TREMF paradigm in countries like Nigeria can be predicated on this shift in the paradigm or standards of measuring the progressiveness of (mostly) Global South states. As Baxi has

²⁴⁶ See Report note 101 Available online here <<https://newtelegraphonline.com/2017/05/bombing-delta-community-sends-sos-buhari-nass/>> and accessed January 20th.

²⁴⁷ Constitution of the Federal Republic of Nigeria 1999 (as amended), s 20

²⁴⁸ Such as the UDHR, ICCPR, ICESCR, The African Charter, the Nigerian Constitution and other national and international instruments.

stated, under the 'TREM' paradigm, the progressiveness of a state is now '*measured by standards other than those provided by the endless human rights normativity*'.²⁴⁹ In other words, the progress of States is now measured in accordance with their successes or failures in implementing the 'TREM' paradigm. The end, in the case of the 'TREM' paradigm, apparently justifies the means; and this means includes many significant instances of gross human and socio-economic rights violations.

To this end, it suffices to state that under the 'TREM' paradigm, states are commended for effectively implementing the emergent 'TREM' paradigm which inevitably requires or compels them to violate human rights of their human citizens. The corollary here is that human rights violations or suppression by states in their bid to implement the 'TREM' paradigm are effectively condoned. The only factors taken into account by this new progress measuring standards can be summarized in the following manner:

- i. how open/free/accessible a state makes its markets for agents of global capitalism
- ii. how much they protect global capital from social or political 'unrests' (usually in the forms of pro-human rights protests or agitations)
- iii. how much control they give to global capital and how less regulated they leave their operations/activities and so on.

For these reasons, and *a la* Baxi, the plight of the subaltern becomes relegated to the background of irrelevancies, while global capital flourishes.²⁵⁰ Empirical evidence has shown that the consequences of implementing the emergent 'TREM' paradigm (as have been discussed in the preceding sections) are that the socio-economic wellbeing of the people is significantly undermined.

²⁴⁹ U Baxi, *The Future of Human Rights* (2nd edn, OUP, New Delhi 2006) 252

²⁵⁰ *Ibid* n249

Mrs. Thatcher confirmed this shifting standard of measurement when she lauded the Babangida regime as being ‘*courageous*’ for adopting and implementing the SAP²⁵¹. Bear in mind, however, that this was a military dictatorship, notorious on its own merits, for poor human rights records and against which credible allegations of the state-sponsored killings of journalists, activists and opposition leaders had been made.²⁵² Mrs. Thatcher remarked further that:²⁵³

*“[T]hese (economic) problems do not go away but, nevertheless, they do require boldness and courage to tackle and under President Babangida the Government of Nigeria has displayed that courage and we wish the programme every success and we are prepared to play our full part in it.”*²⁵⁴

This praise-laden remark supports the argument, albeit on a modest scale, that to the proponents of the TREMF paradigm, the determining yardstick for measuring the progress or growth or efficiency of a state/government is its success or achievements in implementing the TREMF paradigm. This prevailing new standard gives rise to the ‘studied ignorance or wilful acceptance’ phenomenon which Okafor applied to interrogate the condoning attitude of the TREMF proponents to problems of gross human rights abuses often occasioned by the implementation of the TREMF paradigm.²⁵⁵

This shifting standard of progress measurement had shaped, if not totally influenced the Nigerian government’s actions in the Niger Delta context. Under both Babangida and Abacha, and prior to the Wiwa execution, Nigeria continued to enjoy the support and co-operation of its Global North (or first world) trading partners even as human rights were being trampled upon in the implementation of the pro-TREMF policies. It was only after it went ahead in November 1995 and in defiance to pleas from around the world, to execute Wiwa *et al* that significant reactions emerged from the trading partners.

²⁵¹ See Mrs. Thatcher’s Speech Supra n195

²⁵² For instance; the assassination of prominent investigative Journalist, Dele Giwa. See report here <<https://www.vanguardngr.com/2016/10/dele-giwas-assassination-the-verdict-of-history/>> Accessed 7th March 2018

²⁵³ Ibid n 195

²⁵⁴ Emphasis mine

²⁵⁵ Okafor (Supra)

In other words, the tipping point was the execution of the activists. The trading partners only reacted by withdrawing their ambassadors and imposing trade sanctions after, and probably only because of, the execution. This is suggestive and supportive of the argument, that there was an implied support (or at least condonation) of the gruesome clampdowns on rights which eventually lead up to the execution of the activists. Gerald LaMelle, then Deputy Executive Director at Amnesty International had described the Clinton Administration's reaction to the entire Wiwa saga as '*tepid and slow*'.²⁵⁶ These 'tepid and slow' reactions (or lack of reaction altogether) raise the probability that perhaps, had the regime not gone to the extreme with the Wiwa execution, business may have remained quite usual between Nigeria/the Abacha regime (with its abysmal human rights records at the time), the Bretton Woods Institutions and Nigeria's foreign economic partners.

More supportive of the reasoning above is the fact that Obasanjo, Yar'Adua, Jonathan and now Buhari invaded Niger Delta communities at some point and caused countless deaths/losses and that these actions never provoked any significant reaction or condemnation from Nigeria's powerful trade partners (first world nations). The reasonable deduction to make from these facts is that indeed there is an altered standard of measuring progressiveness within mostly Global South states. These silences or condonations underscore how the UDHR paradigm of human rights, and the roles states are meant to play in its implementation have been supplanted by (and subordinated to) the emergent TREMF Human Rights paradigm.

The silence or lack of robust condemnation on the part of the more powerful Global North countries (and the Bretton Woods Institutions) enables or emboldens the onslaughts unleashed on human rights as espoused in the UDHR and other relevant human rights instruments. They also support the

²⁵⁶ CNN, 'Nigeria Executes 9 Activists; The World Outraged' See Report Here <<http://www.cnn.com/WORLD/9511/nigeria/>> Accessed 10th April 2018. Note however that President Clinton had called the Nigerian ruler and pleaded for clemency on behalf of the convicts.

argument that attaining the TREMF's ideals (to wit protecting global capital from social and political unrest among others) are the new standards by which a progressive state is determined. In other words, that the obligation to protect and/or advance the UDHR paradigm of human rights have become less relevant.

2.3.5 Chapter Two Summary

This chapter has highlighted the socio-economic challenges faced by the Niger Delta people of Nigeria, which have arisen from the exploration of crude oil in their communities. It has applied the Baxian TREMF theory to illuminate some of the 'background forces' fuelling these age-long socio-economic problems and militating against the prospects of evolving a truly durable and sustainable solution to address them. The theoretical analysis has demonstrated that the emergence and prevalence of a 'trade-related, market friendly' (TREFM) policies and obligations (amidst some other factors not the subject of this research's enquiry) are at the heart of the protraction of the Niger Delta's socio-economic problems and the failure to adequately redress them.

The UN 'Ruggie' 'Protect, Respect and Remedy' Framework and its Guiding Principles (GPs) are the latest in a long line of instruments deployed to address business and human rights issues. The next chapter assesses how the application of the 'Ruggie' framework, and the GPs may assist in achieving a sustainable amelioration of the socio-economic problems in the Nigerian Niger Delta.

CHAPTER THREE

A Critical Analysis of the Prospects of Socio-Economic Justice under the UN “Ruggie”

Guiding Principles (in the Light of TREMF) in the Nigerian Niger Delta

3.0 Introduction

This chapter assesses the potential of the UN “Ruggie” framework and the recommendations of its Guiding Principles (GPs) on Business and Human Rights to contribute toward the attainment of socio-economic justice in the Niger Delta. It examines both the potential and real impacts of the ‘Protect, Respect and Remedy’ pillars respectively, in the light of the highlighted prevalence of the TREMF paradigm in the Niger Delta region. In the grand scheme of this thesis, it provides answer to two subsets of the research question asking what, if any, are the likely obstacles to the successful application of the GPs in the Niger Delta region and what lessons may be learnt from the deployment or application of the GPs in the specific context of the Niger Delta socio-economic problems.

The analysis takes an individual consideration of each of the “Protect, Respect and Remedy” pillars and their respective GPs and assess their prospects in making practical contributions towards the attainment of socio-economic justice in the Niger Delta.

3.2 The Protect Framework

The ‘**Protect**’ framework reiterates the state’s duty flowing from its obligations under international human rights law *‘to respect, protect and fulfil the human rights of individuals within their territory and/or*

jurisdiction’.²⁵⁷ The ‘Protect’ duty was expounded with the aid of ten (10) Guiding Principles.²⁵⁸ The framework and its GPs are by no means, a binding human rights instrument but it (the foundational principle to be precise) did still make it clear that the states’ duty is one of a ‘must’ to protect against human rights violations by third parties, such as business enterprises.²⁵⁹

However, the analyses conducted in chapter two of this thesis support a conclusion that the Niger Delta socio-economic problems (and arguably, most if not all, other business and human rights related problems across the globe) are as a result of impediments placed by the superseding TREMF Paradigms (i.e. the market efficiency and trade liberalization agenda) on the ability and willingness of the Nigerian State to respect, protect and fulfil the human rights and fundamental freedoms of the Niger Delta people (i.e. the root problem). Ruggie himself had in his 2008 report admitted that:²⁶⁰

*‘[t]he root cause of the business and human rights predicament today lies in the governance gaps created by globalization—between the scope and impact of economic forces and actors, **and the capacity** of societies to manage their adverse consequences’.* (Emphasis supplied)

He went further to that assert these gaps create a ‘permissive environment for the wrongful acts by companies of all kinds without adequate sanctioning or reparation’.²⁶¹

Whether you want to adopt the ‘TREMF root-problem’ theory of this thesis or Ruggie’s own ‘root cause’ theory presented above, they are coterminous in positing that there is a force; an invisible hand if you like, that is impeding states’ ability or willingness to fulfil their duties to protect the human rights

²⁵⁷ United Nations Office of the High Commissioner for Human Rights, ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’ (New York and Geneva 2011) at p.1 Available at <http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf> last accessed on January 26th 2018

²⁵⁸ Ibid n 257; pages 3 - 13

²⁵⁹ Ibid n257 at 3

²⁶⁰ UNHRCOR, ‘Protect, Respect and Remedy: A Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General [SRSG] on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie’ (2008) UN Doc A/HRC/8/5 at 3

²⁶¹ Ibid n 260

of their citizens from violations arising from the conducts and activities of global capital under international human rights law. To this thesis, they are the TREMF forces manifesting in the form of the limiting conditions and contents of the Joint Venture Agreements (JVAs) between the MNCs and State-owned Oil Corporation, (the Nigeria National Petroleum Corporation) as well as the Oil Prospecting Licenses (OPL) granted by the Nigerian state, to the oil MNCs and TNCs operating in the Niger Delta, such as the stabilization clauses.²⁶² These are then policed by threats or acts of capital flights and are enforced using the mechanism of international arbitration.²⁶³

Therefore, a fair way to assess the potential or prospects of the framework and GPs is by examining what more leverage they can offer the Nigerian government so as to make it better able to effectively regulate the activities of the oil MNCs and TNCs that have been serially proven, to be inimical on the most part, to the socio-economic wellbeing of the Niger Delta people.²⁶⁴

The principal argument here is that the ‘Protect’ framework and its GPs have contributed little (if anything), other than rehashing the well-known obligation of states under International (Human Rights) Law to protect and fulfil the human rights of its citizens. This position is taken for two major reasons. The first reason is the SRSG’s failure to at least, include a role for binding international human rights obligations in regard to corporations, despite it being within the purview of his mandate to do so.²⁶⁵ This is a failure that raises significant legitimacy concerns about the SRSG’s work at least, in the

²⁶² On the perils of Stabilization Clauses, see Evaristus Oshionebo, “Stabilization Clauses in Natural Resource Extraction Contracts: Legal, Economic and Social Implications for Developing Countries” (2010) 10 *Asper Rev Int’l Bus & Trade L* 1.

²⁶³ See this report of a research commissioned by the SRSG and conducted under the auspices of the IFC on the effect of Stabilization clauses on states’ ability to effectively protect against corporate human rights violations. A Shemberg, ‘Stabilization Clauses and Human Rights: A Research Project Conducted for IFC and the United Nations Special Representative to the Secretary-General on Business and Human Rights’ (2008) <[www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/p_StabilizationClausesandHumanRights/\\$FILE/Stabilization+Pa per.pdf](http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/p_StabilizationClausesandHumanRights/$FILE/Stabilization+Pa per.pdf)> (accessed 3 September 2011).

²⁶⁴ This point has been robustly argued in chapter two of this thesis, as well as several reports, findings and judgments supporting this assertion, many of which have also been cited in various parts of this thesis

²⁶⁵ See UNHRCOR, ‘Mandate of the Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and other Business Enterprises’ Res 8/7 (18 June 2008) UN Doc A/HRC/RES/8/7, [4(a)–(c)].

view or from the perspectives of the people in the Global South; who represents the major demographic of victims of the most egregious business-related human rights violations.²⁶⁶

Having himself identified the role of global capital (or globalization as he chose to call it), and the challenges of ‘capacity’ that ‘societies’ or states have in dealing with the impacts of the governance gaps that the said global capital creates, the eventual failure or refusal of the SRSG to elaborate a role for a binding corporate human rights obligation amounts to a betrayal of his mandate of some sort. It is one of the shortcomings of the framework and its Guiding Principles that exposes them to legitimate indictment as being no more than an exercise in further broadening the frontiers of the Trade-Related and Market-Friendly (TREM^F) paradigms of human rights that Baxi espoused.²⁶⁷

The second reason is that whether deliberately or inadvertently; the SRSG may have by his choice of language in drafting the Guiding Principles (lingua-imprecision), watered down the pertinence of certain actions recommended to states by the GPs as a way of fulfilling their duty to protect. A striking instance is the use of ‘should’ in direct contrast to ‘must’ as the action word for nine (9) out of the ten (10) Guiding Principles for the ‘Protect’ framework.²⁶⁸ Baxi had argued and quite rightly that ‘[c]larity of communication . . . is a most crucial resource for promotion and protection of human rights’.²⁶⁹ Deva had also observed this ‘imprecision’ in the choice of language by the SRSG; noting that:²⁷⁰

*” [L]anguage is critical to human rights, because it embodies the basic ethos of human rights and . . . has also been one of the lenses for critiquing the politics of inclusion and exclusion in the human rights discourse”.*²⁷¹

²⁶⁶ Penelope Simmons explored this line of argument in her article; “International Law’s Invisible Hand and the Future of Corporate Accountability for Violations of Human Rights” (2011) 3 *Journal of Human Rights and the Environment* at 19 - 29

²⁶⁷ U. Baxi, *The Future of Human Rights*, 2nd edn (Oxford University Press, 2006)

²⁶⁸ The Cambridge Online Dictionary gave these following uses of ‘Should’ 1. ‘used to show when something is **likely** or **expected**’ 2. Used to express that the action of the main verb is **probable** 3. Used to express that it is **necessary, desirable or important** to perform the action of the following verb (Emphasis by the author). Available online here <<https://dictionary.cambridge.org/dictionary/english/should>> Accessed last on 14th May 2019

²⁶⁹ U. Baxi, *The Future of Human Rights*, 2nd edn (Oxford University Press, 2006), 8. See also, on the power politics and perils surrounding the language of human rights, *ibid.*, xix–xx.

²⁷⁰ S. Deva 'Treating human rights lightly: A critique of the consensus rhetoric and the language employed by the Guiding Principles' (2011)

²⁷¹ *Ibid* n270 at 91

It is argued that this has a somewhat reductionist effect on the obligations flowing from such GPs. This rises from the fact that the foundational principle (GP 1) of the 'Protect' framework used 'must' as its operational verb. The switch from a 'must' to a 'should' not only presents a problem of precision but also has the potential to undermine or diminish (howbeit modestly), the significance of those set of Guiding Principles predicated on 'should' in contrast to the one predicated on 'must'. Also, the language dynamics readily avails those nine GPs to a diluted or diminished interpretation. With Nigeria being notorious for its 'soft states syndrome'²⁷², this lingua-imprecision arms it with an excuse to treat duties/obligations flowing from those set of GPs as either being discretionary or those of which they have been accorded margins of appreciation.

On the above note, one can understand why some critiques argue that the frameworks and GPs may have set the clock back on developing a robust response to the menace of corporate human rights violations.²⁷³ However, this thesis will not go as far as taking such a stand, as it believes that the framework and its GPs create a formidable building block, for future discussions, and further elaboration of the expectations and duties of corporations with respect to human rights even without expressly making any such provisions.²⁷⁴

As with all non-binding international normative instruments, the framework and GPs have only enunciated business and human rights best practices (at best) that if implemented by the Nigerian state, have the potentials of improving the socio-economic situations of the Niger Delta people. However, the crux has always been how to get 'soft states' like Nigeria, who abdicates their human rights obligations in pursuit of trade liberalization and market efficiency policies to embrace and or

²⁷² This is a term employed by this thesis to describe the phenomenon whereby states, on taking on the onus of implementing TREMF policies to the benefit of global capital, at the same time abdicates their responsibilities to ensure the respect and fulfilment of human rights by those agents of global capital.

²⁷³ For instance, Deva n270

²⁷⁴ By Resolution 26/9 of 2014, the UN Human Rights Council has established an open-ended intergovernmental working group tasked with elaborating "an internationally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises". See Human Rights Council, UN Doc. A/HRC/26/L.22/Rev.1 (25 June 2014)

implement such normative frameworks. It is my considered view that there is little (or nothing) in the Protect framework or its Guiding Principles that incentivizes a pro-TREMF paradigm state like Nigeria to abide by its international human rights duties and obligations to the Niger Delta people more than the extent it did under the other numerous human rights normativity. Neither the framework nor its GPs enhances Nigeria's immunity to the sweeping effects of the TREMF paradigm. Rather than increase Nigeria's leverage to stand up to the debilitating effects of the TREMF forces, loopholes such as the lingua-imprecision highlighted above may have armed it with gateways to continue to evade its obligations to diligently and effectively enhance the socio-economic wellbeing of the Niger Delta people. The underlying research to this thesis did not find any credible evidence to show or suggest an improvement in the usual lackadaisical enforcement and regulation praxes of the Nigerian state, to the activities of the oil MNCs and TNCs operating in the Niger Delta.²⁷⁵

3.3 The Respect Framework

The '**Respect**' framework illuminates the **responsibility** of business enterprises to respect human rights. The foundational principle of the 'Respect' Framework states that:

"[Corporations' responsibility to respect human rights] exists independently of States' abilities and/or willingness to fulfil their own human rights obligation and . . . it exists over and above compliance with national laws and regulations protecting human rights".²⁷⁶

This assertion presented in the foundational principle is perhaps the single most important pronouncement of the framework and the Guiding Principles. It settles (to an extent) the debate

²⁷⁵ Aside the establishment of a draft National Action Plan on Business and Human Rights in 2017, there is no single recommendation flowing from the framework of its Guiding Principles that has been implemented by the Nigerian State. Document available online here <<https://globalnaps.org/wp-content/uploads/2017/11/nhr-national-action-plan.pdf>> Accessed on 10th May 2019.

²⁷⁶ *Ibid* n260 at 13

around whether business enterprises have any human rights responsibility that goes beyond obedience to existing national laws. The consensus (manufactured or not)²⁷⁷ and massive endorsement²⁷⁸ that it received from the corporate community presents, at the very least, a legitimate goodwill and building block towards a more robust corporate human rights accountability.

Another remarkable innovation of the Guiding Principles was its recommendation for businesses to conduct Human Rights Due Diligence (HRDD) assessments “in order to identify, prevent, mitigate and account for how they address their adverse human rights impacts”.²⁷⁹ It recommends pre-emptive impact assessments (GP 18), involvement of and consultations with groups at risk of rights violation, feedback/findings integration (GP 19) as well as a progress monitoring/tracking mechanism (GP 20), among other commendable recommendations around this point.²⁸⁰ The requirement to consult or involve groups at risk is a commendable element that has the potentials of guaranteeing the objectivity of the HRDD assessments.

²⁷⁷ This is the crux of Deva’s critique of the framework and the Guiding Principles in his article ‘Treating Human Rights Lightly . . .’ n 270 above

²⁷⁸ see for example the International Organisation of Employers, (Address to the UN Human Rights Council, delivered at the Palais des Nations in Geneva, Switzerland, 31 May 2011) <webcast.un.org/ramgen/ondemand/conferences/unhrc/seventeenth/hrc110531am1-eng.rm?start=01:59:04&end=02:02:45> (accessed 3 September 2011), who ‘Supports the approach taken in the principles to elaborate the implications of existing standards and practice into practical guidance rather than seeking to create new international legal obligations or seek to assign legal liability’. See also the range of letters from business actors endorsing the Guiding Principles, including Coca Cola (Statement by Edward Potter (Personal Communication 26 May 2011) <www.global-businessinitiative.org/SRSGpage/files/Guiding%20Principles%20Endorsement%20from%20Coke.pdf> (accessed 3 September 2011)); and Total (Statement by Peter Herbl (Personal Communication 23 May 2011) <www.global-business-initiative.org/SRSGpage/files/Total%20S%20A%20letter%20to%20John%20Ruggie.pdf> accessed 3 September 2011)). On the 2008 framework, see for example, International Chamber of Commerce, International Organization of Employers & Business and Industry Advisory Committee to the OECD ‘Joint Initial Views of the International Organisation of Employers (IOE), the International Chamber of Commerce (ICC) and the Business and Industry Advisory Committee to the OECD (BIAC) to the Eighth Session of the Human Rights Council on the Third report of the Special Representative of the UN Secretary-General on Business and Human Rights’ (Report) (May 2008) <www.reports-and-materials.org/Letter-IOE-ICC-BIAC-re-Ruggie-report-May-2008.pdf> (accessed 3 September 2011).

²⁷⁹ See n 260; Guiding Principle 17

²⁸⁰ See n 260; Guiding Principles 18 -20

Guiding Principle 20 implied a disclosure responsibility on corporations.²⁸¹ It recommended that corporations verify the effectiveness of their response to adverse human rights impacts identified in the HRDD Assessments through *inter alia* “*feedback from internal and external sources, including affected stakeholders*”.²⁸² This is one way that vital information about corporate human rights violations can become more readily available for different reasons; ranging from education to research and even for litigation and other efforts aimed at greater corporate accountability for adverse human rights impacts. The optimism being expressed here is mitigated by the fact that the framework and its Guiding Principles are all but binding on the corporations and there is no enforcement mechanism in place to ensure that they are implemented.

As if the non-binding nature of the recommendations are not enough, Guiding Principle 3d went a step further to water down the duty of states with respect to requiring or demanding these disclosures from corporations.²⁸³ In addition to its use of the less-emphatic action word ‘should’; it only requires to the states ‘to encourage, and where appropriate require, business enterprises to communicate how they address human rights impacts’.²⁸⁴ This, once more, feeds into the lingua-imprecision shortcoming of the GPs (as highlighted above) and seems to support Deva’s position that the framework and GPs, to a large extent, [treated] human rights lightly.²⁸⁵

Aside the argument that the use of ‘should’ de-emphasizes the imperativeness of the recommended obligation, the imprecise phrasing of Guiding Principle 3d is a recipe for indolence on the part of states, in the pretext of only ‘encouraging’ disclosure or their outright abdication from requiring disclosure from corporations on the ground that it is not appropriate to do so. It remains a

²⁸¹ Ibid n 260 at 23

²⁸² Ibid n 260, GP 20 at 23

²⁸³ Ibid n 260 at p5

²⁸⁴ Ibid n 260

²⁸⁵ Ibid n 270.

conundrum what factors or circumstances the SRSG thought would make it inappropriate to demand or require a corporation whose activities have been found to have an adverse human rights impact to disclose how that impact is being addressed. This qualification could again provide support, howbeit modestly, to why the framework and its GPs may be susceptible to insinuations of propagating the ‘trade-related and market-friendly’ (TREMFF) agenda.

There is no available concrete evidence of improvements in the conduct of the oil MNCs operating in the Niger Delta with respect to their responsibility to respect human rights. If anything, the oil MNCs and TNCs are doubling-down in frustrating efforts intended to bring them to account through extra-territorial litigations for instance. In *HRH Eze Godwin Okpabi & Ors v Royal Dutch Shell*; Royal Dutch Shell successfully mounted a challenge (in the English Court of Appeal) that the English Courts lacked the jurisdiction to hear the case against its Nigerian subsidiary Shell Petroleum Development Corporation (SPDC) over catastrophic oil spillages in the Niger Delta communities of Ogale and Bille.²⁸⁶

It is noted that there are cleaning operations that are currently ongoing in some polluted Niger-Delta communities. However, it must be highlighted that those were not a product of voluntary and thoughtful conduct on the part of the relevant TNCs but the result of another hard and long fought litigation against Shell in an English Court.²⁸⁷ Shell opted to settle that instant case out of court in

²⁸⁶ [2018] EWCA Civ 191. Appeal on this case is however pending before the Supreme Court of the United Kingdom (UKSC). The UKSC had put hearing on this matter on hold to decide another case on significantly similar point of Law *Lungowe & Ors v Vedanta & Anor* [2019] UKSC 20 in which Lord Briggs (with whom all the other Law Lords agreed) held (obiter) and to the optimism of the Litigants in the *Okpabi* case that 1. The categories of cases where a parent company might owe a duty of care to third parties harmed by the activities of its subsidiaries transcends the two circumstances where the parent company (a) has effectively taken over management of, or (b) given relevant advice to the subsidiary (*AAA v Unilever PLC* [2018] EWCA Civ 1532) and 2. That the consideration of where access to substantive justice will avail a litigant trumps all the other considerations in determining the appropriate forum to try cases involving parent company and its subsidiary domiciled in different jurisdictions.

²⁸⁷ *Bodo Community & Others v Shell Petroleum Development Company Nig Ltd* [2014] EWHC 2170 (TCC)

2015 after the court rejected its preliminary objection.²⁸⁸ Shell also went back to court in 2018 and failed in their attempt to block the community's option to return to court should their terms of settlement not fully complied with by Shell.²⁸⁹

The fact that it was only through (extra-territorial) litigation that Shell got to accept responsibility and began to remedy its egregious violations in these Niger Delta communities probably adds to the strength of the case in favour of a legally binding instrument, as the ultimate panacea for corporate human rights violations.

3.4 The Remedy Framework

The '**Remedy**' framework and Guiding Principle 25 in particular, mandates states²⁹⁰ to ensure the availability of, and access to, '*judicial, administrative, legislative and other appropriate means*' of redress for business-related human rights violations within the states' '*territory and/or jurisdiction*'.²⁹¹ The relevant mechanisms need to be effective. To widen access to such effective remedies, the Guiding Principles (GPs) also recommended that states establish or ensure the availability of equally effective and accessible non-judicial and non-state remedy mechanisms.²⁹² Business enterprises are admonished to establish '*effective operational-level grievance mechanisms*' for early and direct remedy to victims impacted by their operations.²⁹³

²⁸⁸ See report here online < <https://www.reuters.com/article/us-nigeria-delta-environment/anger-seethes-on-margins-of-historic-clean-up-in-nigerias-delta-idUSKBN1D81WF>> Last accessed on 14th May 2019

²⁸⁹ Report available online here < <https://www.reuters.com/article/us-shell-nigeria-spill/nigerias-bodo-community-claims-win-over-shell-after-latest-uk-court-ruling-idUSKCN1IP2SP>> Last accessed on 14th May 2019

²⁹⁰ Here; 'must' was used as opposed to 'should'

²⁹¹ note 260 at 27.

²⁹² *Ibid* n260 at 31 -33

²⁹³ note 260 at 31 GP 29. The Guiding Principle also recommended that other extra-legal corporate human rights advancement efforts, such as human rights monitoring and evaluation standards (set through 'Industry, multi-stakeholder and other collaborative initiatives') should include effective remedial mechanisms

Guiding Principle 26 charges states ‘to ensure the effectiveness of domestic judicial mechanisms’ for redressing business related human rights violations.²⁹⁴ To do this, states are to ensure that they eliminate or ‘reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy’.²⁹⁵ Clearly the Guiding Principles recognizes that there is a difference between the availability of remedial mechanisms and access to them.

The principal mechanism for the redress of human rights violations in Nigeria is usually through the court/judicial system. By a combined effect of sections 6 (6) and 46 of Nigeria’s constitution, the high court (and other courts of coordinate jurisdiction) has jurisdiction to hear matters concerning human/fundamental rights.²⁹⁶ There has been slow but steady growth of other alternative dispute resolution mechanisms such as mediation, conciliation and arbitration in Nigeria from the last decade. However, these are rarely applied to causes relating to human rights.

As already highlighted, the Guiding Principle made a distinction between availability and access of the ‘remedy’ mechanisms. Now, in terms of availability, there are state and federal high courts in all 36 states of Nigeria and the Federal Capital Territory (FCT). The state high courts are usually fairly sited/located on an even spread to enhance access by the rural communities/population.

The introduction of the Fundamental Rights Enforcement Procedure Rules 2009 in Nigeria made giant efforts in eliminating some of the notable barriers towards litigating human rights violations in Nigeria. Amongst other reforms, it eliminated the time limitation barrier and introduced a limitless period for bringing human rights actions.²⁹⁷ It also eliminated the bottleneck around the mode of commencement of action such that human rights enforcement actions may now be commenced by

²⁹⁴ *Ibid* n260 at 29

²⁹⁵ *Ibid* n260 at 29

²⁹⁶ Constitution of the Federal Republic of Nigeria 1999 (As Amended)

²⁹⁷ See Order 3 Rule 2 of the FREP Rules 2009

any of the established modes.²⁹⁸ The filing fee was also reduced by over 300% from what it used to be under the 1979 FREP Rules.

The giant strides of the FREP 2009 rules notwithstanding, there are still some notable legal and practical barriers towards an effective judicial human rights enforcement in Nigeria; which even the advent of the framework and its GPs have not influenced their removal. There are the legal bottlenecks of jurisdiction and *locus standi*²⁹⁹, which links into other practical barriers such as accessibility of the courts.

The Supreme Court of Nigeria (SCoN) in the case of *Adetona and Ors v Igele General Enterprises* have essentially ousted the jurisdiction of state high courts to entertain human rights issues arising from crude oil.³⁰⁰ It held thus:

*[A} High Court of a state shall lack jurisdiction to entertain matters of fundamental rights, although brought pursuant to section 46(2) of the Constitution where the alleged breach of such matters arose from a transaction or subject matter which fall within the exclusive jurisdiction of the Federal High Court as provided by section 251 of the Constitution”.*³⁰¹

Section 251 (n) of the Constitution grants exclusive jurisdiction to the federal high courts on matters relating to ‘mines and minerals (including oil fields, oil mining, geological surveys and natural gas)’.³⁰² The corollary is therefore that human rights violations relating to oil mining and/or natural gas, on the authority of the *Adetona* (Supra) lies within that exclusive jurisdiction of the federal high court.³⁰³

²⁹⁸ Be it writ, originating summons or motion. See Order 2 Rule 1 of the FREP Rules 2009

²⁹⁹ In *Oronto Douglas v Shell* [1999] 2 NWLR Part 591; the plaintiff approached the court to require the respondents to comply with an Environmental Impact Assessment requirement of their gas liquification project. However, the case was defeated on the technicality that the plaintiff lacked locus standi because he did not hail from the community where the project was taking place and neither has he shown any potential harm to himself.

³⁰⁰ (2011) 7 NWLR. This judgment has essentially overruled the former and more favourable position in *Grace Jack v Federal University of Agric. Makurdi* (2004) 5 NWLR (Pt. 865) 208

³⁰¹ Per Ibrahim Tanko Muhammad JSC at page 45 -47 at para A – G of *Adetona case* (Supra)

³⁰² Constitution of the Federal Republic of Nigeria 1999 (As amended)

³⁰³ *Adetona and Ors v Igele General Enterprises* (2011) 7 NWLR

Federal high courts are situated in the capital cities of the respective 36 Nigerian states and the highbrow city centre of the capital city, Abuja. The capital-cities of the 36 Nigerian states are usually a significant distance from its surrounding towns, communities or villages; most of where these crude oil explorations happen. In the particular context of the Niger Delta, bear in mind that they grapple with some of Nigeria's worst infrastructural challenges.³⁰⁴ This is in addition to the fact that most communities in the area are riverine and so rely on local water-based means of transport such as by canoes, jetties, boats etc.³⁰⁵

The location factor may only be appreciated in the light that the federal high court now has exclusive jurisdiction to entertain crude oil related human rights cases.³⁰⁶ This is therefore where the location and localization policy of the federal high courts becomes a practical impediment to access for victims. This is also bearing in mind the high cost of legal services in Nigeria and the substantial disparity in the economic wherewithal of the victims compared to the oil MNCs and TNCs.

Distance aside, there is also the prevailing feeling (be it rightly or wrongly) that some (if not most) federal judges are deferent to the policy body-languages of the executive which is usually pro-the oil MNCs. A perfect paradigm of this is the trial, conviction and sentencing to death in the Wiwa (supra) trial. Although General Sanni Abacha was the ultimate villain of their execution, however a federal judge and indeed the immediate past Chief Judge of the Federal High Court was the indelicate tool used by the Abacha government (as Judge of the military tribunal) to achieve its aim of a death sentence.³⁰⁷

³⁰⁴ Adangor, Z. "The Petroleum Industry Bill 2012 and the Niger Delta Region of Nigeria: Panacea or Placebo" (2015) 38 *JL Pol'y & Globalization* [i]

³⁰⁵ *Ibid* n304

³⁰⁶ *Ibid* n304

³⁰⁷ Justice Ibrahimauta was appointed Acting Chief Judge of the Federal High Court in 2011 and subsequently the substantive Chief Judge until his retirement in 2017. See this report by Sahara Reporters at <<http://saharareporters.com/2011/03/16/ken-saro-wiwa-killer-judge-becomes-acting-chief-judge-nigeria>> Accessed on 25th January 2018

Another factor seriously hampering access to this judicial remedy is the lack of an effective right-based approach to accessing legal aid in Nigeria. A former chairman of Nigeria's Legal Aid Council was quoted in a 2016 Newspaper interview as advocating for Legal Aid '*to be elevated to the level of a fundamental right*'.³⁰⁸ Even if this is made possible; the other unspoken snag is that legal services provided by the Legal Aid Council are mostly substandard, inadequate and unfit for the sort of complex issues that usually underline the human rights violations in discourse.³⁰⁹ This is because of the obvious challenges that the council face such as funding, and dearth of expertise as a number of the council's lawyers are usually inexperienced and new to the profession.³¹⁰

Aside the issue of access, the Nigerian Judicial system is notorious for its snail-speed rate of handling cases. There is also the lack of trust and confidence, as well as the corruption that has impugned the public's perception of the judiciary. This perception may have even deepened following the recent ouster and conviction of former Chief Justice, Walter Onnoghen on corruption related offences³¹¹ and the 2016 raid of some high-profile judicial officers by Nigeria's secret police on allegations of corruption.³¹² These developments have a knock-on effect on the willingness of victims to seek redress.

³⁰⁸ M Agbanuche-Mbu, J Igbanoi and T Soniyi, 'Legal Aid Should be Elevated to the Level of Fundamental Right' (This Day Newspaper, Lagos Nigeria) Published May 10 2016 and accessible here <<https://www.thisdaylive.com/index.php/2016/05/10/legal-aid-should-be-elevated-to-the-level-of-a-fundamental-right/>> Accessed on January 20th 2018

³⁰⁹ U Ukong, 'Poor Nigerian lack Access to Justice-Legal Aid' (Nigerian Pilot Newspaper, Lagos Nigeria) Published July 22nd 2017 and available here <<http://nigerianpilot.com/poor-nigerians-lack-access-to-justice-legal-aid-council/>> Accessed on 20th January 2018

³¹⁰ *Ibid* n137. The present Director General of the Council alluded to this fact when she stated that "... lawyers are not enough to attend to the needs of the indigent persons in a country of over 170 million. . ."

³¹¹ In *Federal Republic of Nigeria v Hon. Justice Walter S.N. Onnoghen* (2019). He has since resigned after Nigeria's apex Judicial regulatory body, the National Judicial Council (NJC) unanimously found him wanting on allegations of corruption levelled against him. He is however appealing his conviction before the Nigerian Superior Courts. See report here <<https://punchng.com/breaking-cct-convicts-onnoghen-sacks-him-as-cjn/>> Accessed last on 12th May 2019.

³¹² Most of the charges were however either dropped or lost in court (on technicalities). See detailed report of raid here <<http://saharareporters.com/2016/10/08/full-details-nigerian-secret-police-raid-federal-judges-revealed>> Accessed January 28th 2018

There is also the perception that, giving the spate of arrest and trial of judges in Nigeria, the executive has begun a process of intimidating the judiciary and is now (more or less) able to get the judiciary to do whatever the executive demands. In a country like Nigeria where events of the past and empirical evidence show how closely interlinked the state (federal government) is with the oil MNCs, it is not difficult to see, in an environment of purported judicial subjugation as currently exists in Nigeria, why access to effective remedy might be an allusion.³¹³ This may not be unconnected to why many Niger Delta communities are placing their hopes in extra-territorial litigation rather than approach a Nigerian court.³¹⁴

With all these litany of barriers and impediments to accessing remedy in Nigeria; there is nothing upon diligent research for the purpose of this thesis, that point to any serious or significant reforms that are being undertaken by the Nigerian state for the purpose of widening access to remedy or making the available remedial mechanisms more effective either generally and of its own volition or particularly for business-related human rights violations, in adherence to the recommendations of the UN framework and its Guiding Principles.

3.5 Summary of Chapter Three

This chapter has argued essentially that the lingua-imprecision of, and the voluntary nature of the responsibilities assigned to corporations by, the Framework and Guiding Principles, as well as some peculiar problems relating to access to remedy generally in Nigeria, mean that the UN framework and Guiding Principles on Business and Human Rights may have contributed little or nothing to improving the socio-economic wellbeing of the Niger Delta people. The next chapter, which is the

³¹³ A modest pointer to this theory is the case of *Shell v Isaiah* extensively analyzed in Chapter Two

³¹⁴ See cases such as *Kiobel v Royal Dutch Petroleum* (2013) 569 US; *In Bodo Community and Others v Shell Petroleum Development Company of Nigeria Limited* [2014] EWHC 2170 (TCC) and *HRH Bebe Okpabi and Ors v Royal Dutch Shell PLC & Anor* [2017] EWHC 89 TCC

final chapter of this thesis will conclude by summarizing the key points of the analyses done so far as well as offer recommendations on the nagging issue of how best to effectively deal with the menace of corporate human rights violations globally and particularly within the Niger Delta context.

CHAPTER FOUR

Summary and Recommendations: Ways Forward for Socio-Economic Justice in the Niger Delta.

4.0 Summary of the Thesis

This chapter summarizes the arguments developed in this thesis, as outlined in chapters one to three. Following this precis, it proffers recommendations on the most effective and realistic ways of achieving sustainable corporate human rights accountability on the global space, which will in turn, improve the possibilities of attaining socio-economic justice for the people of the Niger Delta.

Chapter one laid out the major problem this research intended to tackle. It outlined a historical background of the crude oil exploration in the Niger Delta and the attendant pitfalls, by way of environmental degradations and human rights violations, that have characterised the exploration of the said crude oil since inception. Going by the provisions of Article 12 (2) b of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and Article 24 of the African Charter on Human and Peoples Rights (the Charter),³¹⁵ these environmental degradations were subsumed into the more nuanced Niger Delta human rights violation discursivity; and given the term socio-economic injustice.

Applying the Rawls theory of Justice,³¹⁶ the thesis defined socio-economic justice (the opposite of socio-economic injustice) as “*measures, mechanisms and/or actions that are designed to deal with the consequences of crude oil exploration in the Niger Delta in order to foster distributive equality of resources*”.³¹⁷ This definition frames the analyses in the rest of this thesis.

³¹⁵ Both of which establishes right to a healthy and satisfactory environment

³¹⁶ Rawls J, ‘*A Theory of Justice*’ Rev edn (Harvard University Press, 1999)

³¹⁷ Chapter one p 8

The same chapter one also defined the scope of the research and breadth of the analyses conducted in the thesis and outlined the research questions that animate it. These questions, once again, are:

- i. What socio-economic injustices exist within the crude oil exploration sector in the Nigerian Niger Delta and what gives rise to them?*
- ii. What is the potential of the GPs in helping to achieve sustainable socio-economic justice in the region?*
- iii. What, if any, are the likely obstacles to the successful application of the GPs in the circumstances and how may those obstacles (if any) be circumvented?*
- iv. What lessons emerge from the deployment or application of the GPs in this specific Niger Delta context that support or impeach the debate for or against a binding international business and human rights treaty?*

Chapter Two dealt with questions (i) and (iii). In answering question (i); It gave a vivid outline of the various rights violations (amounting therefore to socio-economic injustice) going on as a result of crude oil explorations in the Niger Delta. It separately adumbrated the environmental-based violations, and the other actions amounting to violations of human rights in the orthodox sense, as provided for in the various international, continental and national human/fundamental rights normative and legislative instruments.³¹⁸

In answering research question (iii); a number of theses (four sub-claims), emanating from Upendra Baxi's theory on the emergence (or prevalence as it now seems) of a trade-related and market friendly (TREM) paradigm of human rights, were deployed to explain the relationship between the prevalence of these socio-economic injustices and the Nigerian government's seeming failure or inability to address them.

³¹⁸ Such as rights to food, water; right to freedom of expression, assembly and protest; rights to ownership of property and procedural rights in the allocation and use of own resources etc

It argued that the Nigerian government, as with most Global South governments, has caught the fever occasioned by its fidelity to the TREMF paradigm; which is aimed at entrenching market efficiency and trade liberalization at almost any cost. The assumption of this type of obligation is usually sold to Global South governments as the ultimate panacea for the crippling economic woes that they too often experience. Adherence to this TREMF paradigm is all-too-often made a pre-condition for trade with, and sometimes for aid and grants from, the powerful nations of the Global North. Even their receipt of the economic stimulus packages offered by the Bretton Woods institutions is equally all-too-often preconditioned on their adherence to the TREMF paradigm; to the extent that even if these governments wanted, they could not afford not to toe that line.

Chapter two traced Nigeria's adherence to the TREMF paradigm back to when it negotiated and adopted the Structural Adjustment Program (SAP) in 1986, under the regime of then Military Head of State, General Ibrahim Babangida. It showed that starting from then, successive Nigerian regimes/administrations have pursued policies in facilitation of this market efficiency and trade liberalization (which are key elements of the TREMF paradigm). This was done mostly by the adoption of the 3-Ds of disinvestment, deregulation and denationalisation(privatisation) – a praxis that earns them the status of a 'soft state'.³¹⁹

A state qualifies as a 'soft state' when it neglects or abdicates its redistributive role (*a la* Baxi), which is '*to construct . . . a just social order . . . that will at least meet the basic needs of human beings*' under the paradigm of the Universal Declaration of Human Rights (UDHR) and other numerous human rights normativity.³²⁰ According to the arguments made in chapter two, the Nigerian state has done so through its weak, and sometimes non-existent, regulatory oversight and enforcement mechanisms

³¹⁹ This is a term employed by this thesis to describe the phenomenon whereby states, on taking on the onus of implementing TREMF policies to the benefit of global capital, at the same time abdicates their responsibilities to ensure the respect and fulfilment of human rights by those agents of global capital.

³²⁰ Baxi U, '*The Future of Human Rights*' (New Delhi 2002) at 139

against the activities of the multinational and transnational oil companies (MNCs and TNCs) operating in the Niger Delta.

In furtherance of these efforts, the government too often meets attempts by the people to demand or assert their legitimate human rights (be it via protests or advocacies), with stiff and brutal clampdowns; often resulting in horrific and egregious human rights abuses such as the Wiwa execution perpetrated by the Abacha regime and the destruction of Odi community by the Obasanjo administration. These incidences of rights violations are regarded a ‘necessary evil’ as evidenced by the ‘studied ignorance or wilful acceptance’ of ‘the saviours’ – the powerful Global North states that hitherto masqueraded as the arch-custodians of universal human rights.³²¹

Chapter Two further argued that Global North states, usually turn blind eyes to the egregious rights violations that tend to characterize the operation of the TREMF Paradigm. This usually means that in their eyes, a state’s human rights record matters much less than the degree or rate of its successes in implementing the TREMF policies. To that end, TREMF essentially becomes the new yardstick for measuring or determining state progress. This paradigm shift in the measurement of state progress, the chapter argued, bolsters the weak regulatory frameworks, near-lack of enforcements and egregious rights violations which characterize socio-legal life in the Niger Delta region. This is because to Nigeria and similar states; market efficiency and trade liberalization have become more of a superior policy objective to pursue than the protection or enhancement of human rights.

With these points in mind, chapter three set out to provide answers to research questions (ii) and (iv).

In answering question (ii), a critical analysis of the UN framework (the framework) and its Guiding

³²¹ Wakau Wa Mutua’s metaphor of the ‘saviors’ is being adopted here to refer to the powerful Global North States (and the Bretton Woods Institutions) who seems to push the narratives of human rights more than most but are in this case, the propagators of the TREMF Paradigms giving rise to the TREMF paradigm that essentially undermines the Human Rights as theorised under the paradigm of the UDHR; thereby qualifying also as ‘the savages’ in this case, if the race factor in the definition of a savage is discounted. See Mutua W, ‘Savages, Victims and Saviours: The metaphor of Human Rights’ (2001) Harvard Int.Law Journal, Vol 42 for a full analysis of this metaphor.

Principles (GPs) on business and human rights was conducted. Bearing in mind the analysis done in chapter two on the role of TREMF paradigm in the Niger Delta situation, the potential of the framework and Guiding Principles in making a meaningful impact on the attainment of socio-economic justice in the Niger Delta was systematically explored.

In relation to the 'Protect' Framework, it was argued in that chapter that the GPs made no novel contribution other than to rehash the long well-known duties of states to protect human rights within their territories. It was also argued in that chapter that the choice of the language used in parts of the GPs may have diminished the import of some of the actions that states are essentially required to take in fulfilling their obligations to protect human rights under international law. It made reference to the use of 'must' as the action word in GP 1 and then the subsequent switch to 'should' for the rest of the GPs under the protect framework and argued that this can open the door to a diluted or diminished implementation, or even non-implementation of those GPs by states; on the argument that the use of 'should' presupposes that they have discretions or margins of appreciation in implementing or abiding by them.

On the 'Respect' Framework; it found that the framework and GPs have the potential to contribute to the attainment of socio-economic justice in the Niger Delta, only to the extent that the oil TNCs operating in the area sincerely abide by the recommendations of the Guiding Principles. It, however, found no evidence that could suggest an active implementation of the GPs recommendations in the Niger Delta. It argued that if anything, the behaviour of most of the oil TNCs, particularly Shell, in the litigations it has recently faced in the UK over oil spillage in the Niger Delta,³²² are more indicative of a resort to the old approach of repressing and frustrating the efforts of the communities at making

³²² Viz: the Bodo Community oil spill Case and the Ogale/Bille (i.e. *Okpabi v Shell*) case

them accountable, than it is of any shift/change towards a more human rights-friendly or human rights compliant approach.

Under the ‘Remedy’ framework, an in-depth analysis of the encumbrances to accessing the available remedial mechanisms in Nigeria generally, and particularly for the Niger Delta people was conducted. The well-documented problems of the Nigerian judicial/court system (viz slow-pace, corruption and lack of independence) were reiterated. Some structural barriers to access to effective remedies (such as judicial interpretations of key legal concepts such as *jurisdiction*³²³ and *locus standi*³²⁴) were also discussed. It concluded that there was no evidence to point towards any structural or systemic reform of the Nigerian judicial system in response to the recommendations of the ‘Remedy’ framework and the GPs.

All the findings in chapter three culminate in an answer for research question (iv); to the effect that so much as the framework and GPs hold promise (where implemented) of improving the adverse human rights impacts of corporate activities, the ultimate panacea lies in a binding human rights instrument as is being currently explored based on UN resolution 26/9 of 2014.³²⁵ The only evidence of a positive action by an oil TNC in the Niger Delta vis-à-vis, cleaning of the oil spill communities, was a result of a court action. The Nigerian state of itself, has not initiated any process or improved on existing mechanisms to secure a more just socio-economic order in the Niger Delta. These points coupled with the structural problems highlighted in relation to access to judicial remedy in Nigeria,

³²³ Per *Adetona v Igele Enterprises* [2011] 7 NWLR ousting the jurisdiction of High Courts of the various states of the federation to entertain human rights cases relating to mining (i.e. petroleum) and vesting same exclusively on the Federal High Court.

³²⁴ Per *Oronto Douglas v Shell* [1999] 2 NWLR Part 591; here locus standi was not narrowly interpreted that only the direct victims of socio-economic injustice (poor and uneducated in the most case), can bring actions to demand remedy.

³²⁵ Resolution 26/9 of 2014 refers to the UN Human Rights Council resolution (advocated by the Republic of Ecuador and co-signed by the Republic of South Africa) that established an open-ended intergovernmental working group tasked with elaborating “an internationally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises”. See Human Rights Council, UN Doc. A/HRC/26/L.22/Rev.1 (25 June 2014)

strongly support the case for a binding human rights instrument to regulate the activities of TNCs and other business enterprises in my opinion.

4.1 Recommendations on the Proposed Binding Treaty

Having adopted a stand in favour of a binding instrument, clarification is needed as to what exactly is being advocated for with respect to such binding instrument. I concur with the prevailing argument that the duty to protect human rights should primarily remain that of the political state. However, the extent and contours of this duty with respect to corporate activities, is what a binding instrument needs to elaborate on.

Any such binding instrument needs to re-emphasize the universality of human rights and the corresponding universality of the duty or obligation or responsibility to protect and respect them. In other words, a binding business and human rights instrument should create an overarching universal duty (with no territorial or geographic limit) on states to protect and on corporate entities to respect human rights. This would mean on the one hand, that all states will have equal duties to protect human rights against violations or adverse human rights impacts flowing from the activities of business entities. To this end, the duty of a host state and that of a home state will be complementary and somewhat commensurate.

On the other hand, the responsibility of business enterprises to respect human rights will, as the GPs propounded, be interpreted over and above the minimalist provisions in the respective national laws where they operate. This in practice will entrench an extra-territorial uniform standard of responsibility, regulation and enforcement. The consequence of this universal approach to the imposition of duties, obligations and responsibilities, is that enforcement would also have to be universal. The implication of a truly universal business and human rights enforcement paradigm will be that the barriers currently placed by the concept of geographic jurisdiction (or *forum convenience*) on

attempts to enforce human rights obligations against corporations (via litigation), will be eliminated. This means that in the case of violations, remedies or redress can be sought against a corporate entity from or at every or any jurisdiction where it has corporate existence.³²⁶

This treaty should also elaborate on the ‘sphere of influence’ concept under the GPs and need to use the conduct of Human Rights Due Diligence (HRDD) and Impact Assessments (HRIAs) by a parent company to deduce the full extent of its subsidiaries impacts on Human Rights. The requirement to conduct the HRDDs and HRIAs should be developed as a compulsory requirement that raises a conclusive legal presumption that a parent company knows the full extent of the impacts the business activities of its subsidiary have on human rights. The expectation based on the concept of ‘sphere of influence’, is that such parent companies owe a binding duty/responsibility (under this binding instrument) to leverage on their sphere of influence over the subsidiary, to straighten or streamline the subsidiary’s activities to become human rights compliant.

The corollary therefore becomes that the hackneyed legalistic argument of separate legal personalities (of a parent company from its subsidiary company) will no longer suffice to limit or absolve a parent company from liability for human rights violations by its subsidiary. This is based on the presumption that the parent company knows (or ought to know) the full extent of its subsidiary’s activities and the impact that its operations have on human rights (because of the HRDD and HRIA it is expected to conduct). Consequently, its failure to properly apply its sphere of influence to remedy such adverse human rights impacts, under this proposed binding regime, should amount to a breach of its legal responsibility. To this end, as opposed to the separate legal personality defence; the proper and diligent

³²⁶ See Treaty Alliance’s elaboration of this concept in their report titled ‘Enhance the International Legal Framework to Protect Human Rights from Corporate Abuse’ available online here <<https://static1.squarespace.com/static/53da9e43e4b07d85121c5448/t/590a4cd029687f2f54e6519c/1493847249469/2nd+Statement.pdf>> Last accessed on 21st May 2019

use of its sphere of influence as described above will then be what limits a parent company from incurring liability for any violations of the human rights of third parties by their subsidiaries.

The recent and pending business-related human rights cases in the UK such as *Vedenta*³²⁷ and *Okpabi*³²⁸ would have proceeded on their merits without the rigours and encumbrances posed by geographic and jurisdictional challenges, had this model of binding regime being recommended here been in force.

4.2 Recommendations Towards Attaining Socio-Economic Justice in the Niger Delta

The greatest challenge to attaining socio-economic justice for the Niger Delta people is the aura of invincibility that the lax regulatory and enforcement praxis of the Nigerian state has bestowed on the oil MNCs and TNCs. It is submitted that once the jurisdictional/territorial barriers to regulation and enforcement are broken, as is being recommended here, corporate entities operating in the Niger Delta will sit-up, even to the extent of self-regulating.

Aside the hurdle of the considerable high cost involved in bringing extra-territorial litigation, the model accountability mechanism recommended here holds the best promise for entrenching real and practical change in the conduct of business corporations in the Niger Delta. However, a good way to go around the encumbrance of cost is to include in any such binding legal instrument on Business and Human Rights, that the state's duty to protect, vis-à-vis their duty to provide access to remedy, also includes a duty to provide legal aid.

³²⁷ *Lungowe & Ors v Vedenta & Anor* [2019] UKSC 20 in which Lord Briggs (with whom all the other Law Lords agreed) held (obiter) while deciding the jurisdictional challenge mounted by the parent company/Appellant, Vedenta on grounds of forum convenience; that 1. The categories of cases where a parent company might owe a duty of care to third parties harmed by the activities of its subsidiaries transcends the two circumstances where the parent company (a) has effectively taken over management of, or (b) given relevant advice to the subsidiary as was propounded by Lord Justice Sales in *AAA v Unilever PLC* [2018] EWCA Civ 1532) and 2. That the consideration of where access to substantive justice will avail a litigant trumps all the other considerations in determining the appropriate forum to try cases involving parent company and its subsidiary domiciled in different jurisdictions.

³²⁸ *HRH Emeré Godwin Okpabi v Shell* [2018] EWCA Civ 191

While keeping the hope and faith for the emergence of this binding instrument, and in the manner and form believed to best serve the justice of the situation under study, here are some other recommendations that can ameliorate the present Niger Delta socio-economic problems in the interim.

There is a need to urgently and rigorously amend some of the national pieces of legislation relevant to this discourse. The two prominent (or notorious) ones are the Land Use Act and the Companies and Allied Matters Act (CAMA).³²⁹

The Land Use Act has been shown to be a major obstacle to the full enjoyment of the relevant rights by the people of Niger Delta. Its constitutional status makes working around it hugely problematic. It is therefore recommended that the Act be amended and extricated of its constitutional status so that the process of its repeal and amendment is made less onerous and more plausible. This way, the offensive and repressive parts of the Act can be surgically repealed or at least, amended. Such amendments will be a big step towards the attainment of the Article 21 rights (and other rights) under the African Charter for the Niger Delta people and communities.

Under CAMA, nowhere in its current eighteen (18) parts in force and in the bill seeking to repeal and re-enact it, is mention made of the term 'human rights'. In other words, none of the 18 parts of the CAMA has a provision placing a responsibility on business entities to respect human rights. A cursory reading of the preamble to Part X of the current Act; "protection of minorities against illegal and oppressive conducts" may (mis)lead one to think that this is a provision that lends itself to the protection of human rights. However, it only provides for the protection of 'minority shareholders' from any illegal or oppressive conducts of the majority.³³⁰

³²⁹ Cap C 59; Laws of the Federation of Nigeria, 1990. This is the piece of legislation in Nigeria that governs most things relating to business corporations, from their incorporation, to their powers, rights, duties and obligations.

³³⁰ See sections 299 to 330

In the light of these shortcomings, and the important role the statute plays in the regulation and conduct of corporations in Nigeria generally, it is important to take full advantage of the ongoing (or future) repeal and amendment of the Act, to insert pro-human rights protective clauses and provisions. For instance, sections 314 and 315 that provides for grounds upon which a corporation may be investigated can be altered to include allegations of human rights violations as one of them. It should also widen the category of persons who can request investigation of a company in section 314, to include “members of the public, in the public interest” on grounds or concerns of human rights violations. The statute should empower the corporate regulatory agency, the Corporate Affairs Commission (CAC), to ensure human rights compliance via mechanisms such as fines, bringing criminal and civil actions against human rights infringing corporations and up to dissolution of the corporation for the more egregious violations or abuses.

The Nigerian Government also needs to pursue key reforms in the Legal Aid to provide funding for business related human rights litigations, as an offshoot of their duty to protect. It also needs to extend such reforms to the Nigerian Legal Aid Council itself, to enhance access to, as well as improve the quality and standard of the assistance rendered by, the council. It is also recommended that the requisite declaration recognizing the competence of the African Court on Human and Peoples’ Rights to receive and adjudicate cases of Nigerian citizens be made by the Nigerian state so as to widen options and access for victims.³³¹

Lastly and in the light of various policy gaps highlighted, government should in the meantime, step up effort to develop a National Action Plan/legislation on business and human rights, that comprehensively addresses the socio-economic injustice in the Niger Delta, in line with the UN

³³¹ See Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of the African Court of Human and Peoples’ Rights; Articles 5, 6 and 34

framework and the Guiding Principles. The passage of the relevant provisions of the long-proposed Petroleum Industry Bill (PIB) should be expedited as they hold significant promises for the alleviation of some of the root problems of socio-economic injustice in the region.³³²

The National Judicial Council (NJC) should ensure (as an appointment, training and retraining policy) that there is a sizable number of judges and applicants to judicial offices who have extensive knowledge and practice of (international) human rights law.³³³ This is to ensure that the Judiciary has capable hands who can understand human rights beyond the minimalist provisions contained in the fundamental rights section (chapter 4) of the Nigerian constitution and who can show an appreciation of the plights and consequences faced as a result of the activities of the oil TNCs, by the people of Niger Delta in their interpretation and application of the law in this circumstance.

All these measures, if applied, are more likely to ensure greater accountability on the part of the corporations for the adverse impacts of their activities on human rights generally. This is because the measures recommended are bound to enhance shareholders' approach to regulation; which is a regulation evenly exercised by both government, the corporations themselves, civil society organizations and most importantly, the vulnerable people most at risk of rights violations on accounts of the activities of business entities, such as the Niger Delta indigenes as they suffer the blights and brunt of these adverse impacts first hand. The principal advantage of the model treaty advocated here is that it liberalizes, through this universal/extra-territorial enforcement paradigm, the onus of regulation such that a failure, refusal or abdication of governments/states on accounts of the debilitating TREMF paradigm, will no longer prove fatal to the objective of ensuring corporate accountability for human rights violations.

³³²such as establishment of 'Petroleum Host Communities Fund' and 'Environmental Remediation Fund'

³³³ NJC is Nigeria's Judicial Appointment body

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