Access to Justice:
Human Rights Abuses Involving Corporations

NIGERIA

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Access to justice and effective legal remedies are crucial elements in the protection of human rights in the context of business activities. It is also relevant to the work of judges and lawyers who promote the rule of law and human rights. Despite its importance, access to justice is hindered by a number of obstacles unique to corporate human rights abuses. The study of state practices in providing access to justice reveals the potential of existing instruments to ensure this right. Scrutiny of state practices in this area will help the international community in its quest for new answers to the challenge of transnational corporate human rights abuse.

There is a pressing need for more effective access to justice for victims of corporate human rights abuse in Nigeria, where extractive industry – in particular oil exploitation – has had an acute effect upon the environment and human well-being. The Nigerian legal system provides only limited legal recourse to individuals claiming human rights abuse by corporations. The shortcoming consist in legal deficiencies such as the non-justiciability of economic, social and cultural rights as well as in practical causes, such as a prevalence of corruption and inadequate provision of legal aid. The study proposes a number of reforms that could improve access to justice in the country. Critical among these is the enhancement to the authority of important non-judicial mechanisms such as the National Human Rights Commission, which constitute low-cost alternatives to formal litigation. The study also suggests that procedural rules governing judicial adjudication be streamlined and clarified. Statutes specific to the oil industry, as well as those relevant to corporate organizations, should be reformed to ensure more transparency and should address themselves to the observance of human rights. Constitutional law should evolve and adapt to facilitate the justiciability of economic, social and cultural rights and constitutional provisions that apply to corporations must be more efficaciously invoked.

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Introduction

This report critically examines the judicial and non-judicial remedies available under Nigerian law to victims of human rights abuses committed with the participation of companies. It aims to achieve this by assessing the efficacy of the existing regulatory frameworks, identifying the major obstacles that victims experience in holding companies accountable for conduct in contravention of their human rights responsibilities, and outlining recommendations that should help in overcoming these obstacles.

Access to justice and availability of effective legal remedies are crucial elements in strengthening good governance in any given country, as they enhance respect for human rights by the State and its agencies, including statutory corporations and private bodies, including business corporations. With regard to corporations, the ability of individuals, especially the most vulnerable to access justice and effective legal remedies is crucial in holding corporations accountable for their human rights abuses and providing effective redress to victims. Despite this utility, access to justice in many developing countries, including Nigeria, is hindered by a number of obstacles unique to situations involving corporate human rights abuses. The study of state laws and policies in this area reveals not only the obstacles, but also the potential for existing instruments to ensure access to justice.

To contribute to the understanding of the problem and to assist in the formulation of a new agenda towards strengthening access to legal remedies for corporate human rights abuses, the International Commission of Jurists (ICJ) has undertaken a project on Access to Justice for victims of corporate human rights abuse. This project has produced a series of country studies on Brazil, Colombia, the People's Republic of China, the Democratic Republic of the Congo, India, the Netherlands, the Philippines, Poland and South Africa. The present study on the Federal Republic of Nigeria is the latest of such countries studies.

Nigeria like other resource-rich but economically developing countries upon gaining independence, made industrialisation a top priority as a means of promoting economic development and improving the quality of life of its citizenry.[1] In order to further this drive for industrialisation, successive governments attempted to create an enabling environment aimed at ensuring either the attraction of foreign investment from developed nations or the competitiveness of their industries vis-à-vis developed nations. In many instances this entailed the adoption of policies without paying adequate attention to the health and well-being of its citizens or the protection of the environment; thereby leading to human rights and environmental abuses by business corporations operating in Nigeria, including

1. See Ifeanyi Anago, *Environmental Assessment as a Tool for Sustainable Development: The Nigerian Experience*, FIG XXII International Congress, Washington D.C. USA, 19-26 April 2002, at pp. 2-4. Available at http://www.fig.net/pub/fig_2002/Ts10-3/TS10_3_anago.pdf

transnational companies (TNCs).[2] The activities of TNCs within the Nigerian oil industry are illustrative in this respect. This should not be construed to mean that the indigenous oil companies have better human rights or environmental records, nor does it imply that other industrial sectors in Nigeria do not have their own environmental and human rights abuses, as evidenced by the numerous complaints of communities living around their facilities.[3]

The above emphasis on the oil TNCs is due to the fact that the oil sector is the most vibrant industrial sector in Nigeria and accounts for over 95 per cent of exports and over 77 per cent of Federal government revenue.[4] In addition, a feature of the oil industry in Nigeria is its domination by TNCs,[5] a trend which the Nigerian Content Act,[6] and the Petroleum Industry Bill, currently before the National Assembly, is seeking to reverse.[7] This domination does not necessarily translate to the TNCs using and adhering to the same human rights and environmental standards applicable in their countries of origin. Instead, the TNCs have been accused of adopting operating standards that do not meet minimum human rights and environmental

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2. See Modupe T. Odubela & Isaac I. Omoniyi, 'Compliance Monitoring in Nigerian Industries' *Fourth International Conference on Environmental Enforcement*, p. 1. Available at http://www.inece.org/4thvol/odubela&omoniyi.pdf; and Richard L. Herz, 'Litigating Environmental Abuses under the Alien Tort Claims Act: A Practical Assessment' (2000) 40 *Vanderbilt J.I.L.* 545 at p. 547-549.

3. For example, the host community of the Kaduna industrial complex have been complaining about the unhygienic state of River Kaduna, their only source of potable water, caused by the discharge of industrial effluent and toxic water into the river by the cluster of textile mills in the complex. See Anago *op. cit.* note 1 at 8; Emeka Ezekiel, 'In Mpampe, residents contend with noise, dust' *The Punch*, Thursday, 24 June 2010, at p. 38 (detailing the environmental degrading activities of stone-mining companies in Mpampe, a satellite town in Bwari Area Council of the Federal Capital Territory (FCT), Abuja); and Simeon Nwakaudu, 'Much ado about red eyes, rice chaff' *The Guardian*, Monday, 28 June 2010, at p. 13 (detailing environmental degradation by a local rice company).

4. See Olufemi O. Amao 'Corporate Social Responsibility, Multinational Coporations and the Law in Nigeria: Controlling Multinationals in Host States' (2008) 52 (1) *Journal of African Law* 94; and Hon. John Udeh, *Petroleum Revenue Management: the Nigerian Perspective*, Workshop on Petroleum Revenue Management, (Oil, Gas, Mining and Chemical Department of the WBG and ESMAP) Washington D.C., October 23-24, 2002, at p. 2. Available at http://www.esrthinsittute.columbia.edu/igsd/STP/Oil%20revenue%20management?General%20oil%20documents/Nigeria/Nigeria%20petroluem%revenue%mana gement%20Udepaper.pdf

5. Mostly in joint partnership with the Federal Government through the Nigerian National Petroleum Corporation (NNPC). NNPC was established on 1 April 1977, under the statutory instrument-Decree No.33, now Cap. P13, Laws of the Federation of Nigeria (LFN), 2004. The corporation website shows the details of the ownership agreements for various MNCs. For example: the Exxon Mobil subsidiary is owned by NNPC (60%) and Mobil Oil (40%). Shell Petroleum Development Corporation's shareholding structure comprises NNPC (55%), Shell International (30%), Elf Petroleum (10%) and Agip Oil (5%). Chevron Nigeria Limited is owned by NNPC (60%) and Chevron Texaco (40%). Nigeria Agip Oil Company is owned by NNPC (60%), Agip Oil (20%) and Phillips Petroleum (20%). Elf Nigeria Ltd is owned by the NNPC (60%) and TotalElfFina (40%). Texaco Overseas (Nigeria) Petroleum Company is owned by the NNPC (60%), Chevron (20%) and Texaco (20%). See http://www.nnpcgroup.com/jvoperation.htm for further information.

6. See Nigerian Oil and Gas Industry Content Development Act, 2010.

7. The Bill seeks to reform the oil and gas industry in order to improve on the general efficiency of the sector. See *The Petroleum Industry Draft Bill* 2009. Available at http://www.nnpcgroup.com/Portals/0/pdf/PIBDrapftBill2008.pdf

standards in their home countries.[8] The TNCs reportedly justify adopting such operating standards arguing of the need to provide jobs and developmental opportunities for the communities.[9] The plight of the affected communities is not helped by the fact that, in most instances, the government of Nigeria is unable or unwilling to stop or control the activities of TNCs. They often point to likely job cuts and loss of revenue when asked to adopt cleaner production methods that they say would involve heavy financial expenditure and render their operations uneconomical.[10]

This study is divided into four principal sections. Section I examines the legal regimes applicable in establishing the liability of corporations for human rights abuses. This involves an analysis of relevant provisions of the Constitution, human rights laws, criminal law, environmental laws, tort law, company laws, and petroleum laws to ascertain the circumstances under which they may be invoked. Section II focuses on the judicial and non-judicial remedies available to victims of corporate human rights abuses. Section III highlights various obstacles and limitations that victims face in their quest to secure justice. It is argued that despite a fairly robust legal framework, victims' ability to seek justice is seriously undermined by these identified obstacles. The final section draws several general conclusions and outlines specific recommendations that should assist victims and the legal community to overcome obstacles to holding corporations accountable for human rights abuses in Nigeria.

The Law is stated as of June 2011.

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8. See Sam Olukoya, 'Environmental Justice from the Niger Delta to the World Conference Against Racism' *CorpWATCH* 30 August 2001, available at http://www.corpwatch.org/issues/PRT.jsp?Articleid=18; Joshua Eaton, 'The Nigerian Tragedy, Environmental Regulation of Transnational Corporations, and the Human Right to a Healthy Environment' (1997) 15 *Boston University International L.J.* 261 at 266-270; and Koriambanya S.A. Carew, 'David and Goliath: Giving the Indigenous People of the Niger Delta a Smooth Pebble – Environmental Law, Human Rights and Re-Defining The Value Of Life' (2002) *7 Drake Journal of Agricultural Law* 493 at 496-498.

9. See Browen Manby, *'The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities' (*Human Rights Watch, January 1999) p. 52-53.

10. See Anago *supra* note at 1; Alison Lindsay Shinsato, 'Increasing the Accountability of Transnational Corporations for Environmental Harms: The Petroleum Industry in Nigeria' (2005) 4 (1) *Northwestern Journal of International Human Rights* 185 at 189; Andy Rowell, 'Oil Companies Threaten Nigeria over Reform' *Oilchange International*, 24 February 2010, available at http://priceofoil.org/2010/02/24/oil-companies-threaten-nigeria-over-reforms/; and Adegoke Adegoroye, 'The Challenge of Environmental Enforcement in Africa: The Nigerian Experience' *Third International Conference on Environmental Enforcement*, at p. 49-50, available at http://www.inece.org/3rdvol1/pdf/Adegoro.pdf

1. Legal Liability for Corporations Under National Law

1.1 International Human Rights Law

Nigeria is a party to a number of international human rights and humanitarian law treaties, including regional instruments, that are of relevance directly or indirectly in establishing the liability of companies for human right abuses.[11] These include the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (acceded to on 27 July 2009); the 1949 Geneva Conventions (acceded to on 20 June 1961) which were domesticated under the Geneva Conventions Act Cap. 162, Laws of the Federation of Nigeria, 1990;[12] the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (ratified 16 October 1967); the 1966 International Covenant on Civil and Political Rights (acceded to 29 July 1993); the 1966 International Covenant on Economic, Social and Cultural Rights (acceded to 29 July 1993); the 1979 Convention on the Elimination of all Forms of Discrimination against Women and its 1999 Optional Protocol (ratified 13 June 1985 and 22 November 2004 respectively); the 1981 African Charter on Human and Peoples Rights (ratified 22 June 1983), which Nigeria has domesticated under its national law as Chapter 10 of the Laws of the Federation of Nigeria, 1990;[13] the 1989 UN Convention on the Rights of the Child (ratified 19 April 1991) and its Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, (ratified 27 September 2010) and the 1990 African Charter on the Rights and Welfare of the Child, (both the Convention and the Charter have been domesticated under the Child Rights Act, 2003); the 1984 Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment and its 2002 Optional Protocol (ratified 28 June 2001 and acceded to 27 July 2009 respectively); the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (acceded to 27 July 2009); the 1998 Rome Statute of the International Criminal Court (ratified 27 September 2001).

Regarding the applicability of these treaties in Nigeria, two observations are vital: The first is that Nigeria has not entered any reservation on ratifying or acceding to these instruments. Hence, Nigeria is bound to observe all the provisions of

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11. For the status of Nigeria's adherence to international treaties, see generally the United Nations Office of Legal Affairs' website: http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en

12. Now Cap. G3 LFN 2004. Nigeria also ratified both the 1977 Additional Protocol I to Geneva Convention; and 1977 Additional Protocol II to the Geneva Conventions on 10 October 1988. Presently, there is a Bill pending before the National Assembly that seeks to repeal the Act and to give effect within the Federal Republic of Nigeria to both the Geneva Conventions and their Additional Protocols. See Geneva Conventions and Additional Protocols Bill, HB 375, 2010.

13. Now Cap. A9 LFN 2004.

these treaties.[14] Secondly, it should be noted that despite the ratification of these treaties, they do not necessarily become effective under domestic law regulating the conduct of persons and institutions within the territory of Nigeria unless incorporated into the Nigerian body of municipal laws.[15] This is due to the fact that Nigeria follows a dualist tradition that requires incorporation by domestic legislation before the provisions of international treaties can become effective within its municipal legal system.[16] This dualism is recognised explicitly by section 12(1) of the Nigerian Constitution, which provides that no treaty between the Federation and any other country shall have the force of law except to the extent to which the National Assembly has enacted it into law. The main domestic effect of an unincorporated treaty has been that, 'they might have an indirect effect upon the construction of statutes or might give rise to a legitimate expectation by citizens that the government, in its acts affecting them, would observe the terms of the treaty.'[17]

Irrespective of whether or not Nigeria has incorporated human rights treaties under its domestic law, the country retains its international obligations to observe the provisions of the treaties, as the domestic legal arrangements of a country cannot excuse the failure to discharge treaty obligations. Nonetheless, the Supreme Court of Nigeria has held that, with the exception of the African Charter, which has been enacted into domestic law, the provisions of treaties do not currently bind any individual or corporation in Nigeria:

> *"it is therefore manifest that no matter how beneficial to the country or the citizenry, an international treaty to which Nigeria has become a signatory may be, it remains unenforceable, if it not enacted into the law of the country by the National Assembly."*[18]

Despite this, some provisions of unincorporated treaties such as the ICCPR and ICESCR have been posited in the Nigerian Constitution with varying degrees of legal significance. This is evident from the fact that the provisions of the ICCPR are reflected in Chapter IV of the Nigerian Constitution dealing with fundamental human rights, which are justiciable in Nigerian courts. Fundamental human rights in Nigeria have both vertical and horizontal application and hence bind the state, individuals and corporations.[19] On the other hand, some provisions of the ICESCR are provided as non-justiciable directive principles under Chapter II of the 1999

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14. See *op. cit.* note 11.
15. See s 12 (1), Constitution of the Federal Republic of Nigeria, Cap. C23 LFN 2004; and *Abacha v. Fawehinmi* (2000) FWLR (pt 4) 585.
16. See Kehinde M. Mowoe, 'Constitutional Law in Nigeria' (Malthouse Press Limited, 2008) p. 277-278.
17. *Supra* note 15 at 586, para. C.
18. *Ibid*, at 653, para. C (per Ejiwunmi).
19. See Emeka Polycarp Amechi, *'Millennium Development Goals (MDGs) and Policy Reform: Realising the Right to Environment in Africa'* (Saarbrucken: Verlag Dr. Müller (VDM) August 2010) 83; and E.S. Nwauche, 'Right to Privacy in Nigeria' (2007) 1 (1) *CALS Review of Nigerian Law and Practice* 63 at 88.

Nigerian Constitution.[20] As a result, it has been argued that Nigeria has not lived up to its responsibilities as a party to the ICESCR.[21]

The above position on the status of international law in Nigeria only applies to international treaties, as the Constitution is silent on the status of international customary law. However, since 'Nigeria like all Commonwealth countries practically inherited the English common law rules governing the municipal application of international law',[22] it can be argued that the English doctrine of incorporation, whereby rules of customary international law are automatically part of English law and therefore applicable in British courts provided they are not inconsistent with Acts of parliament or prior authoritative judicial decisions, should apply *mutatis mutandis* in Nigeria.[23] Hence, it is suggested that international customary law should be justiciable in Nigeria provided it is not inconsistent with the provisions of the Constitution or any other law in force in Nigeria.[24]

1.2 The Constitution

In Nigeria there is a dualist legal system comprising of English law and customary law.[25] This duality is a result of the colonial influence during its formative years and the subsequent imposition of English law.[26] Customary law includes both the laws of the indigenous population before colonisation as well as Islamic law. The latter has a wider application in the northern states of the Federation, though is not indigenous to that part of the country, and is for all practical purposes treated as customary law.[27] English law remains a major source of Nigerian law despite the existence of codified laws. The bulk of the codified laws in force at the Federal level may be found in the Laws of the Federation of Nigeria (LFN) 2004.[28] The 36 States each have legislative bodies and each has enacted legislation since 1999, which supplement the laws existing in those states before 1999. The third tier of government is the local government and each of them has a legislative council

20. *Ibid*, at 80-83.

21. See Hakeem O. Yusuf 'Oil on troubled waters: Multinational corporations and realising human rights in the developing world, with specific reference to Nigeria' (2008) 8 *African Human Rights Law Journal* 87; and Deji Olowu 'Human Rights and the Avoidance of Domestic Implementation: The Phenomenon of Non-Justiciable Constitutional Guarantees' (2006) 69 *Saskatchewan L. Rev.* 39 at 55-56.

22. F.C. Okoye, *International Law and the New African States* (Sweet & Maxwell, London, 1972) 32.

23. See Professor Akindele Babatunde Oyebode, *'Of Norms, Values and Attitudes: The Cogency of International Law'*, University of Lagos Inaugural Lecture Series 2011 (University of Lagos Press, Akoka, 2011).

24. See Elizabeth A. Oji, 'Application of Customary International Law in Nigerian Courts' (2010) *NIALS Law and Development Journal* 151; and Christian N. Okeke, 'International Law in the Nigerian Legal System' (1997) 27 *Cal. W. Int'l. L. J.* 311 at 314-315.

25. See J.O. Asein *'Introduction to Nigerian Legal System'*, 2nd ed (Ababa Press Limited, Lagos, 2005) 5.

26. *Ibid*.

27. *Ibid*.

28. There are however very many legislations that have been passed by the National Assembly since the compilation of the Laws of the Federation of Nigeria in 2004.

with powers to make laws called by-laws. There are 768 local government councils and six area councils in the Federal Capital Territory (FCT) with such legislative councils.

The Constitution is the supreme law of the land and has binding force on all authorities and persons in Nigeria.[29] It has been described by the Supreme Court as the organic law or *grundnorm* of the people, which not only provides for the machinery of government, but also provides for rights and imposes responsibilities on its constituency.[30] The rights guaranteed to Nigerian citizens under the Constitution are provided as Fundamental Rights under Chapter IV of the Constitution.[31]

1.2.1 Applicability of the Constitution: Fundamental Rights

Those rights that the Constitution identifies as Fundamental Rights, as noted above, are enforceable against the State and private individuals, including corporate bodies. Hence, the earlier judicial attitude of misconstruing the entire human rights provisions of the Constitution as only capable of being invoked against the government and its agencies is no longer tenable. The old view may have been informed by the opinion of the Court of Appeal in the case of *Federal Minister of Internal Affairs v. Alhaji Shugaba Darman*,[32] where it was observed by Karibi-Whyte JCA that:

> *"It is undoubtedly relevant to bear in mind that the provision was designed to protect the individual against the oppressive exercise of government authority and majority power. Hence the rights conferred can be enforced and avail essentially, if not entirely against governments acting through their agents"'*

This view, though largely in order, must have precipitated such rulings as in *Ategie v. Mck Nigeria Limited*,[33] where the presiding judge held that an application for the enforcement of fundamental rights could not be brought against a company under the rules even if the action alleged a breach of such rights.[34]

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29. See Nigerian Constitution *supra* note 15 at s 1. For case law affirming this, see *I.N.E.C v. Musa* (2003) 10 WRN 1; *Attorney-General of Abia State v. Attorney-General of the Federation* (2002) 17 WRN 1, (2002) 6 N.W.L.R. [pt 763] 264; and *Attorney-General of Ondo State v. Attorney-General of the Federation* (2002) 27 WLR (pt 772) 222.

30. See *Peoples Democratic Party v. I.N.E.C* (2001) 1 WRN 1.

31. These include the right to life, section 33(1); the dignity of his person, section 34(1); personal liberty, 35(1); the right to privacy, section 37; freedom of conscience, section 38 (1); freedom of expression, section 39 (1); freedom of assembly, section 40; and freedom from discrimination, section (42).

32. (1982) 3 NCLR 915.

33. Suit No. M/454/92.

34. See also *Aderinto v. Omojola* (1998) 1 FHCLR 101; and *Ale v. Obasanjo* (1996) 6 NWLR (Pt. 459) 384.

This reasoning has since given way and Nigerian courts are willing to enforce fundamental rights against governments, companies and private individuals. This was evident in the decision of the Court of Appeal in *Uzoukwu v. Ezeonu II*,[35] where Mamman Nasir JCA, held that the provisions of section 31(1) of the 1979 Constitution (equivalent to section 34(1) of the 1999 Constitution) prohibiting torture and inhuman and degrading treatment, were enforceable not only against government and its agents, but also against private persons. This position was affirmed by the Court in *Peterside v. IMB*,[36] where it was held that 'it is wrong in law to say that the fundamental rights guaranteed in chapter four of the Constitution can only be enforced against government but cannot be enforced by one individual against another.' Similarly, Achike JCA (as he then was) in *Onwo v. Oko*,[37] stated as follows:

> *"…It seems clear to me that in the absence of a clear positive prohibition which prohibits an individual to assert a violation or invasion of his fundamental rights against another individual, a victim of such invasion can also maintain a similar action in a court of law against another individual for his act that had occasioned wrong or damage to him or his property in the same way as an action he could maintain against the State for a similar infraction."*[38]

1.2.2 Applicability of the Constitution: Non-justiciability of Economic and Social Rights

Economic and social rights are not among the enumerated fundamental rights under Chapter IV of the Constitution. Snippets of what may amount to economic and social rights can be found under Chapter II of the Constitution dealing with Fundamental Objectives and Directive Principles of State Policy.[39] The provisions of this Chapter, although placing a mandatory duty on the State to direct its policies towards the achievement of the objectives, do not place a corresponding right on the citizens to enforce their observance by the State.[40] The reason for this state of affairs is apparent from the provisions of section 6(6) (c) of the Constitution, which states that:

> *"The judicial powers vested in accordance with the foregoing provisions of this section shall not except as otherwise provided by this Constitution,*

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35. (1991) 6 NWLR [Pt. 200] 708.
36. (1993) 2 NWLR (Pt 278) 712.
37. (1996) 6 NWLR (Pt. 456) 584 at 603.
38. See also *Okoi v. Inah* (1998) 1 FHCLR 677; *Anigboro v. Sea Trucks Ltd* (1995) 6 NWLR (Pt. 399) 35 (Freedom of Association); *Aniekwe v. Okereke* (1996) 6 NWLR (Pt. 452) 61; *Agbai v. Okagbue* (1991) 7 NWLR (Pt. 204) 391(Right to Property); and *Salubi v. Nwariaku* (1997) 5 NWLR (Pt. 505) 442 (Freedom from Discrimination).
39. *Supra* note 15 at ss 14-18.
40. See Amechi *op. cit.* note 19 at 800.

> *extend to any issue or question as to whether any act of omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution."*

This stipulation was judicially interpreted in *Okogie (Trustees of Roman Catholic Schools) and other v. Attorney-General, Lagos State*,[41] which is based on the equivalent provision of the 1979 Nigerian Constitution. The case dealt with the constitutional issues of the Plaintiffs' fundamental right under section 32(2) of the 1979 Constitution to own, establish and operate private primary and secondary schools for the purpose of imparting ideas and information, and the constitutional obligation of the Lagos State government to ensure equal and adequate educational activities at all levels under section 18(1), Chapter II of the 1979 Constitution.[42] On reference to the Court of Appeal, the Court while considering the constitutional status of the said Chapter stated:

> *"While section 13 of the Constitution makes it a duty and responsibility of the judiciary among other organs of government, to conform to and apply the provisions of Chapter II, section 6 (6) (c) of the same Constitution makes it clear that that no court has jurisdiction to pronounce on any decision as to whether any organ of government has acted or is acting in conformity with the Fundamental Objectives and Directive Principles of State Policy. It is clear therefore that section 13 has not made Chapter II of the Constitution justiciable. I am of the opinion that the obligation of the judiciary to observe the provisions of Chapter II is limited to interpreting the general provisions of Constitution or any other statute in such a way that the provisions of the Chapter are observed, but this is subject to the express provisions of the Constitution."*[43]

This reasoning was affirmed in the later case of *Adewole v. Jakande*.[44] However, the *Okogie* case suggests that the provisions of Chapter II can be made justiciable by appropriate implementation legislation provided the fundamental rights of any citizen or any other expressed constitutional provision are not infringed.[45] This position has been reaffirmed by the Nigerian Supreme Court in *Attorney-General, Ondo State v. Attorney-General, Federal Republic of Nigeria*,[46] involving the constitutional validity of the Corrupt Practices and Other Related Offences Act No. 5 of 2000 and its Independent Corrupt Practices and Other Related Offences

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41. (1981) 2 NCLR 337.
42. In pursuit of this objective, the State government purported via a circular letter dated 26 March 1980 to abolish the operation of private schools in the State. See *Okogie* case *ibid*.
43. *Ibid*.
44. (1981) 1 NCLR 152.
45. *Supra* note 41.
46. *Supra* note 29.

Commission (ICPC). Both the Act and ICPC were established to enforce observance of the Directive Principle set out in section 15(5) of the Constitution.[47] The Court held that '[a]s to the non-justiciability of the Fundamental Objectives and Directive Principles of State Policy, s. 6 (6) (c)… says so. While they remain mere declarations, they cannot be enforced by legal process but would be seen as a failure of duty and responsibility of State organs if they acted in clear disregard of them … the Directive Principles can be made justiciable by legislation'.[48]

The need for the adoption of appropriate legislation to ensure the justiciability of the provisions of Chapter II was emphasised in the same *Attorney-General of Ondo State* case by Muhammadu Lawal Uwais CJN, who, after comparing the experience of India, Ireland and other countries, underlined that every effort must be made:

> *"… to ensure that the Directive Principles are not a dead letter. Whatever is necessary is done to see that they are observed as much as practicable so as to give cognisance to the general tendency of the Directives. It is necessary therefore to say that our own situation is of peculiar significance. We do not need to seek uncertain ways of giving effect to the Directive Principles in Chapter II of our Constitution. The Constitution itself has placed the entire Chapter II under the Exclusive Legislative List. By this, it simply means that all the Directive Principles need not remain mere or pious declarations. It is for the Executive and the National Assembly, working together, to give expression to anyone of them through appropriate enactment as occasion may demand."*[49]

However, the provisions of Chapter II cannot be made justiciable only through the instrumentality of legislation alone. It should be noted that the Nigerian court's approach towards the Directive Principles was originally influenced by the initial position of the Indian Supreme Court with regard to the justiciability of Directive Principles under Part IV of the Indian Constitution.[50] The Court's decisions in the 1950s established the non-justiciability of the provisions of Part IV of the Indian Constitution relating to the Directive Principles, as a result of Article 37, which provides that the Directive principles 'shall not be enforceable by any court'.[51] Presently, the judicial position has changed in India, starting with the decision

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47. In holding that the Act and the commission were constitutional and valid, the apex court referred extensively to the Fundamental Principles in Chapter II of the Nigerian Constitution. As stated by the Court, 'it is incidental or supplementary for the National Assembly to enact the law that will enable the ICPC to enforce the observance of the Fundamental Objectives and Directive Principles of State Policy…. The ICPC was established to enforce the observance of the Directive Principle set out in S. 15(5) of Chapter II, which provides that 'The State shall abolish all corrupt practices and abuse of power'.

48. *Supra* note 29.

49. *Ibid*.

50. *See Okogie* case, *supra* note 41.

51. *See State of Madras v. Champakam Dorairajan*, (1951) AIR (SC) 226 at 252 and *Mohd Nanif Qureshi v. State of Bihar*, (1958) AIR (SC) 731.

of the Supreme Court in *Minerva Mills v. Union of India*,[52] which elevated the constitutional status of the Directive Principles. It is from the philosophy underlying the elevated status of the Directive Principles that the Supreme Court began to use them to extend the scope of Fundamental Rights, with Article 21 (Protection of life and personal liberty) being the most significant beneficiary of such judicial interpretation.[53] This innovation by the Indian Courts, in the words of an eminent Nigerian Justice, Justice Chukwudifu Oputa, has brought 'a non-violent "social revolution" by fulfilling "the basic needs of the common man" thus ushering in the "welfare state" contemplated by the Constitution.'[54] Such innovation, if adopted by Nigerian courts, has the potential of making the Directive Principles on economic and social rights justiciable, albeit without the intervention of the Legislature.

1.2.3 Application of the Constitution: Extra-territorial liability

Generally, the provisions of Chapter IV of the Constitution has efficacy for only Nigerians citizens and other persons living within its territory. Once outside Nigerian territory, citizens would apparently lose this constitutional protection, as the provisions of the Constitution may not have extraterritorial application. Hence, a corporation committing human rights abuses against Nigerian citizens abroad may not be liable under the Nigerian Constitution for such breaches of human rights.[55] The non-extraterritorial application of the Constitution was raised as a defence for an unfair dismissal in *Federal Civil Service Commission v. J.O. Laoye*,[56] where the defendant/appellant tried to justify their non-observance of the provisions of section 33(4) of the 1979 Constitution (now s 36(4), 1999 Constitution) on fair hearing before terminating the plaintiff/respondent's employment. Their argument was rejected by the Supreme Court. The basis of such rejection was not that the provisions of Chapter IV of the Constitution have extra-territorial application, but rather, that it was a lame attempt to persuade the Court to depart from the principle laid down in a long line of cases dealing with unfair dismissal occasioned by lack of fair hearing.[57]

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52. (1980) AIR (SC) 1789.
53. Shubhankar Dam & Vivek Tewary, 'Polluting Environment, Polluting Constitution: Is a 'Polluted' Constitution Worse than a Polluted Environment'? 17/3 *Journal of Environmental Law* 383, 386 (2005). See also Michael R. Anderson, 'Individual Rights to Environmental Protection in India', *in* Alan E Boyle and Michael Anderson eds., *Human Rights Approaches to Environmental Protection* 210 (Oxford: Clarendon Press, 1996) 214; and *Francis Coralie Mullin v. Union Territory of India* (1981) AIR (SC) 746 at 752-753 (interpreting the right to life).
54. Quoted in Chief Wole Olanipekun, *'Sustainability of Democracy in Nigeria'*, a Keynote Address delivered on the occasion of the NBA, Owerri Law Week, held on Wednesday 28th June, 2006, under the auspices of the Nigerian Bar Association Owerri Branch, Owerri, Nigeria, at p. 15.
55. See *Godwin Josiah v. State (1985)1* S.C. 406; and *Sofekun v. Akinyemi* (1980) 5-7 S.C.1.
56. S.C.202/87, delivered on Friday, 21 April, 1989.
57. *Ibid*.

1.3 African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act

The African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act incorporates into domestic law the provisions of the African Charter on Human and Peoples' Rights in Nigeria. Thus, the provisions of the Charter are now part of Nigerian law.[58] This Act forms part of existing Nigerian legislation recognised under the Constitution and has such effect until modified by the appropriate authority.[59] The domestication of the Banjul Charter in Nigeria would extend the corresponding obligations not only to the State (government of Nigeria), but also to private persons in Nigeria.[60] Thus, any person who considers that any of their rights, including the economic and social rights provided by the Act in relation to them, is impaired or threatened, by the conduct of the State or private individuals, they can bring an action in any of the Nigerian high courts depending on the circumstances of the case for appropriate relief.[61] The procedure to be used is the same as those provided for the enforcement of fundamental rights under Chapter IV of the Constitution. This is due to the fact that the 2009 Fundamental Rights Enforcement Procedure Rules in its preamble stated as one of its overriding objectives:[62] the purposive and expansive interpretation of both the provisions of the Nigerian Constitution (especially Chapter IV), as well as the African Charter Ratification Act, with 'a view to advancing and realising the rights and freedoms contained in them and affording the protections intended by them'.[63] Furthermore, the Rules removed any lingering doubt regarding the justiciability of the economic and social provisions of the Act, including the right to a healthy environment, by expressly defining fundamental right as including 'any of the rights stipulated in the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act'.[64]

The fact that the provisions of the Act are regarded as fundamental rights does not provide the status reserved for rights under Chapter IV of the Nigerian

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58. African Charter on Human and Peoples Rights (Ratification and Enforcement) Act, Cap. A9, Vol. 1, Laws of the Federation of Nigeria, 2004. See Nigerian Constitution, *supra* note 15; and *Abacha* case *supra* note 15 at 585G-P; 586A-C; & 653G.

59. *Ibid*, at S. 315. See also *Abacha* case, *ibid*, at 596C-E.

60. See Amechi *op. cit.* note 19 at 83-84.

61. *See Abacha* case, *supra* note 15 at 590E-H & 591A; and *Ogugu v. the State* (1994) 9 NWLR (Part 366) 1.

62. Fundamental Rights (Enforcement Procedure) Rules, 2009, entered into force on 1 December 2009, available at http://www.accesstojustice-ng.org/articles/New%20FREP%20Rules%20.pdf (Hereinafter FREP 2009 Rules).

63. *Ibid.* Para 3 (a) of the Preamble.

64. Order 1 (2). For arguments regarding the justiciability of the socio-economic provisions of the Act, *see* Yusuf, *op. cit.* note 21 at 79, 81 & 93-96 (2008); Solomon T. Ebobrah 'The Future of Economic, Social and Cultural Rights Litigation in Nigeria', 1 (2) *Review of Nigerian Law and Practice* (2007) 108; and Obiajulu Nnamuchi, 'Kleptocracy and its Many Faces: The Challenges of Justiciability of the Right to Health Care in Nigeria', (2008) 52 (1) *Journal of African Law* 15-19.

Constitution, as the provisions of the Act are subject to the provisions of the Nigerian Constitution and any other subsequent law expressly repealing or modifying the Act.[65] The effect of this is that in the event of any conflict between the provisions of the Act and that of the Nigerian Constitution, including its fundamental human rights provisions, the latter prevails.[66] It may be argued that although the provisions of the Act and the Fundamental Rights Chapter of the Nigerian Constitution complement each other,[67] the possibility of such conflict arising still exists. One example would be the conflict that may arise between oil corporations and citizens of the Niger Delta region, especially with regard to the provision of Article 24 of the Act, providing for the right to a healthy environment, and that of sections 43 and 44 of the Nigerian Constitution, providing for the right to property (in this instance, licence to flare gas).[68]

1.4 Company Law

In 1914, the Protectorates of Northern and Southern Nigeria were amalgamated. Following the amalgamation, the Supreme Court Ordinance for the entire country was passed. By section 14 of the Ordinance, the common law doctrines of equity and the statutes of general application in England on the 1 January 1900 came into force within the jurisdiction of the Court. Consequently, the English Company Law (which consists of common law principles, doctrines of equity and statutes) applicable in England and Wales, as at the date, became automatically enforceable in Nigeria.[69] Since then, various legislation has been enacted to regulate the activities of corporations in Nigeria. These laws complement established traditional common law principles of contract, tort and also company law. Essentially, they protect civil rights of corporations and establish the basis for their acts or omissions.[70] Utilisation of common law rules have, to a very significant extent, been successfully applied to adjudicate matters bordering on the civil rights and liabilities of corporations as independent legal entities, because corporations were classically recognized as civil and commercial entities. Today, the perception of corporations as mere civil and commercial entities has changed because of increased industrial and economic activities, which have introduced new

65. *See Abacha* case, *supra* note 15 at 586F-G.

66. *See* Nigerian Constitution *supra* note 15 at s 1(3). *See also Ransome-Kuti v. Attorney-General, Federation* (2001) FWLR 1677F and *Akulega v. B.S.C.S.C* (2002) FWLR 288E-F.

67. *See Abacha* case *supra* note 15 at 586D.

68. For further discussion, see Emeka Polycarp Amechi 'Litigating Right to a Healthy Environment in Nigeria: The Fundamental Rights (Enforcement Procedure) Rules, 2009, and Its Impacts in Ensuring Access to Environmental Justice.' (2010) 6 (3) *Law, Environment and Development Journal* 320 at 327-329 (Hereinafter Amechi II).

69. See the Interpretation Act Cap. 128 LFN 2004, s 32.

70. See M. Adekunle Owoade, 'Corporate Criminal Liability in Nigeria' (1997) 1 *The Nigerian Journal of Public Law* 61; and Peter Fogam 'Company Law and the Corporate Polluter: Who to Blame' in J. A. Omotola (ed.) *Environmental Law in Nigeria Including Compensation* (Faculty of Law, University of Lagos, 1990) 87.

dimensions of economic and environmental abuses and criminality unknown to the nineteenth century.[71]

The first local company law statute in Nigeria was passed in 1912 and originally applied to the local colony, but in 1917 was extended to the whole of the country.[72] By 1922 the Companies Ordinance of 1912 and 1917 had been consolidated and re-enacted with some amendments as the Companies Ordinance 1922.[73] This Ordinance was designated Companies Act in 1963 and continued to be the law regulating companies in the country until its repeal in 1968 and replacement by the erstwhile Companies Act 1968. The Companies and Allied Matters Decree (No. 1 of 1990) came into effect on 1st January, 1990.[74] CAMA was mainly based on the 1976, 1980 and 1981 Acts of the United Kingdom Companies Acts, and made highly welcome fundamental and substantial changes.[75]

In English law, from which Nigerian corporate law is derived, the development of corporations produced two main structures: the corporation sole and the corporation aggregate. The recognition of the corporation sole stems from the necessity to continue the official capacity of an individual beyond his or her lifetime or tenure of office. Whereas, the corporation aggregate is primarily a product of commercial enterprise.[76] The word "company" has no strict legal meaning, but it implies an association of persons for some common object or objects which is to carry on business for gain.[77] Such a company is a distinct legal personality, as held in *Salomon v. Salomon and Co*,[78] and has a legal personality distinct from its members.[79] Hence, it is capable of enjoying rights and privileges distinct from those of its members. Companies may be classified into the following categories: chartered companies, statutory companies and registered companies. The last category may also be classified into three sub-categories: namely a Company Limited by Shares, a Company Limited by Guarantee, and an Unlimited Company. A registered company, whether limited or not, may be private or public.[80]

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71. *Ibid*.
72. See Olajide Olakanmi (ed), *'Companies and Allied Matters Act', Cap. C20, LFN, 2004: 'Synoptic Guide'* (LawLords Publication, Abuja, 2006) 2.
73. This became Cap. 38 Laws of Nigeria 1948 edition and Cap. 37, Laws of Nigeria 1958 edition.
74. It is now Cap. 20, LFN 2004 (Hereinafter CAMA).
75. See Olakanmi *op. cit.* note 72 at 3.
76. See M.O. Sofowora, *'Modern Nigerian Company Law'* (Soft Associates, Lagos, 1992) 4.
77. *Ibid*. See also Olakanmi *op. cit.* note 72 at 4.
78. (1897) AC 22.
79. For Nigerian cases affirming this principles, see *Marina Nominees Ltd v. Federal Board of Inland Revenue* (1986) 2 NWLR (pt 20) 61; *Olufosoye v. Fakorede* (1992) NWLR (Pt. 272) 747; *Malafia v. Veritas Insurance* (1986) 4 NWLR (Pt. 38) 802; *Kurubo v. Zach. Motison (Nig) Ltd* (1992) 5 NWLR (Pt. 239) 102, *Habib Nig. Bank Ltd v. Ochete* (2001) FWLR (PT 54) 384.
80. See Olakanmi *op. cit.* note 72 at 5.

Part II, Chapter 3 of CAMA regulates the operation of foreign corporations that intend to carry on business in Nigeria Section 54(1) provides:

> *"Subject to sections 56 to 59 of this Act, every foreign company which before or after the commencement of this Act, was incorporated outside Nigeria and having the intention of carrying on business in Nigeria shall take all steps necessary to obtain incorporation as a separate entity in Nigeria for that purpose, but until so incorporated, the foreign company shall not carry on business in Nigeria or exercise any of the powers of a registered company and shall not have a place of business or an address for service of documents or processes in Nigeria for any purpose other than the receipt of notice and other documents, as matters preliminary to incorporation under this Act."*

The effect of the above provision, as aptly argued by Orojo, 'is not only to prohibit an unregistered foreign company from carrying on business in Nigeria, but also to disable the company from exercising any of the powers of a registered company in Nigeria [in the furtherance of its business or objects].'[81] Such powers include 'all the powers of a natural person of full capacity.'[82] Hence, an unregistered foreign company cannot validly carry on business in Nigeria.[83] The phrase 'carrying on business' encompasses not every act of doing business in Nigeria, but only those that are of a repetitive, continuous or permanent character.[84]

Non-incorporation not only attracts penal sanctions, but also has the effect that any act or transaction entered into by such unincorporated foreign corporation is void.[85] However, it does not affect 'the rights and liabilities of a foreign company to sue or be sued in its name or in the name of its agent.'[86] This is based on the ground that a foreign company, that is not registered in Nigeria as a separate legal entity, is still recognised as a legal person that may sue or be sued in its corporate name in Nigerian courts.[87] This was affirmed in *Bank of Baroda v. Iyalabani Co. Ltd*,[88] where the Supreme Court held that 'it is a principle of common law and this is accepted in this country, that a corporation in another country may sue or be

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81. Hon. Dr J. Olakunle Orojo, *'Company Law and Practice in Nigeria'*, 5th ed (LexisNexis Butterworths, South Africa, 2008) 49.
82. s38 (1), CAMA *supra* note 74.
83. Orojo *op. cit.* note 81; and *E.I.I.A. v. C.I.E. Ltd* (2006) 4 NWLR (pt 969) 114 at 125, paras E-F.
84. See *E.I.I.A.* case *ibid*, at 125-126, paras G-A; and *Ritz Pumperfabrik Gmbh and Co AG v. Techno Continental Engineers and Anor* (1999) 4 NWLR (pt 598) 298..
85. *Supra* note 74 at ss 55 & 54(2) respectively.
86. s60 (b). See also *Ritz* case *supra* note 84; and *Kitchen Equip (WA) Ltd. v. Stamins Cathering Equip. Int. Ltd*, suit No. FCA/L/17/82, delivered on 28 February 1983 (Unreported).
87. See *E.I.I.A.* case *supra* note 83 at 125; *Olaogun Ent. Ltd v. SJ and M* (1992) 4 NWLR (pt 235) 361; and *NBCI Ltd v. Europa Traders Ltd* (1990) 6 NWLR (pt 154) 36.
88. (2002) 13 NWLR (pt. 948) 551.

sued in our courts. It is not uncommon that this happens in our courts.'[89] The basis of such recognition, as stated by Rhodes-Vivour JCA in *E.I.I.A. v. C.I.E. Ltd*, is 'reciprocity in international relation as no one jurisdiction is superior to the other.'[90] The essence of this provision is that it can be used to hold foreign companies accountable for their human rights abuses and other breaches committed while still unincorporated as a separate legal entity in Nigeria. Hence, it is not a bar to action or a defence in a suit for breaches or threatened breaches of fundamental rights that a foreign company is not yet incorporated under Nigeria law.[91]

1.4.1 Fiduciary duties and Liabilities of Directors under Nigerian Law

CAMA defines a director as 'including any person occupying the position of director by what ever name called.'[92] This definition is vague and does not really describe the identity or function of a director. However, indications of what amounts to a director can be found in the provisions of Part IX, Part 1 of the Act, S 244 (1) provides that 'Directors…persons duly appointed by the company to direct or manage the business of the company.' In essence, directors are those who manage the affairs of a company.[93] This assertion is in accord with the *dictum* of Sir Jessel M.R. in *RE: Forest of Dean Coal Mining Company* that 'Directors…are really commercial men managing a trading concern for the benefit of themselves and all other shareholders in it…'[94] Furthermore, section 245(1) provides that a director 'shall include any person on whose instructions and directions the directors are accustomed to act.' These persons are referred to under the Act as "shadow directors".[95] Directors are recognized as the chief executives and managers of the company and have the complete control of the company subject to the ultimate authority of the shareholders in the general meeting.[96] Sections 246-27 CAMA deal with the appointment, removal, proceedings and remuneration of directors of companies registered in Nigeria. Once appointed, a director owes both the common law duty of care, skill, and diligence, as well as a fiduciary duty to the company.[97]

The fiduciary duties, which a director owes to a company, are provided for under CAMA. It should be noted that such fiduciary duties are usually owed to the company and to the company alone.[98] The standard of conduct required in the

89. *Ibid*, at 588 (per Ogundare JSC).
90. *Supra* note 83 at 125, para. A.
91. *Ibid*, at 127, para. A-B.
92. *Supra* note 74 at s 650.
93. See *Longe v. First Bank of Nigeria Plc* (2006) 3 NWLR (pt 967) 228 at 270.
94. (1878) 10 CH. D 450.
95. *Supra* note 74 at s 650.
96. See Olakanmi *op. cit.* note 72 at 29.
97. *Ibid*.
98. See *Percival v. Wright* (1902) 2 Ch. 421.

discharge of these fiduciary duties is the observance of 'utmost good faith towards the company in any transaction with it or on its behalf.'[99] Failure to observe this utmost good faith will make the director or directors liable to the company for consequent damages thereof.[100] One of such duties is the duty to act, 'at all times in what he believes to be in the best interest of the company as a whole so as to preserve its assets, further its business, and promote the purposes for which it was formed…'[101] The question is whether a director will be acting in the best interest of the company when in the course of furthering the company's business or preserving its assets, he or she has sanctioned human right abuses or environmental degradation, such as has been alleged in relation to the activities of oil MNEs operating in the Niger Delta region of Nigeria.[102] This raises the further issue of whether the company's best interest can be furthered by abuses of human rights and environmental regulations. It can be argued that the company's best interest is not only in furthering the interests of its shareholders, but also in complying with its obligations under relevant human rights and environmental regulations in their country of operation. This is necessary in order to avoid a situation whereby the company will be distracted from pursuing its legitimate business objectives by endless litigation and attendant bad publicity, as evidenced by the suits instituted against Shell for alleged complicity in the 'judicial' execution of Saro Wiwa and other environmental activities.[103] Thus, a director sanctioning such human rights and environmental abuses may be in fact acting against the best interest of the company, and hence, in breach of this fiduciary duty.

Similarly, it is doubtful that directors will be liable for breaching this fiduciary duty by not sanctioning human rights and environmental abuses, despite the fact that such inaction may not further the company's business. Support for these arguments can be found under the provisions of the voluntary *Code of Best Practices on Corporate Governance in Nigeria*,[104] which tasked the board of directors with the responsibility of piloting the affairs of the company in 'a lawful and efficient manner in such a way as to ensure that the company is constantly improving its value creation as much as possible.'[105] It further stipulates that the directors should 'ensure that the value being created is shared among the shareholders and employees with due regard to the interest of the other stakeholders of

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99. *Supra* note 74 at s 279 (1). See also *Re: City Equitable Fire Insurance Co* (1925) Ch.D. 407.

100. See *Hrische v. Simms* (1894) A.C. 654.

101. *Supra* note 74 at s 279(3). See also *Re: Smith and Fawcett Ltd* (1942) A.C. 821.

102. For more on this allegation, see Human Rights Watch, *'The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities'* (January 1999) 154-164. Available at http://www.hrw.org/reports/1999/nigeria/new991_05.htm#P500_147118.

103. For the history and other information relating to the case, see EarthRights International, *Wiwa v. Royal Dutch/ Shell*, available at http://www.earthrights.org/legal/wiwa-v-royal-dutchshell.

104. See The Nigerian Securities and Exchange Commission, *'Code of Corporate Governance in Nigeria'* (October 2003). Available at http://www.sec.gov.lk/pdf/Corporate%20Governance%20-%20 Voluntary%20 Code%202008.pdf

105. Para. 1(b).

the company.'[106] Other stakeholders of the company include not only directors, employees, customers, regulatory authorities, but also the host community or communities.[107] The Code also provides that the function of a board of directors should include, although not be limited to, ensuring that ethical standards are maintained and the company complies with the laws of Nigeria, which invariably include its human rights and environmental laws.[108]

Other fiduciary duties of directors include: duty to exercise powers for proper purposes and not for collateral purposes;[109] duty not to fetter discretion;[110] and duty not to place themselves in a position where there is a conflict between the interest of the company and the director.[111]

1.4.2 Lifting the Veil of Incorporation and Abuse of Corporate Personality

The principle of separate legal or corporate personality, as established in the *Salomon* case and further solidified under section 37 of CAMA, is fundamental and rigidly adhered to by Nigerian courts.[112] Despite this rigid adherence, in certain circumstances, the court will disregard the corporate entity and will pierce the corporate veil to look at the individuals behind the legal façade of incorporation when the court feels that the interest of justice demands it. This was evident in *Adeyemi v. Lan & Baker (Nig) Ltd*,[113] where the Court of Appeal stated that:

> *"…there is nothing sacrosanct about the veil of incorporation…. The decision in Salomon v. Salomon must not blind one to the essential facts of dependency and neither must it compel a court to engage in an exercise of finding of facts which is contrary to the true intentions or positions voluntarily created by the parties as distinct from an artificial or fictitious one."*[114]

In such cases, 'the law goes behind the corporate personality to the individual members, or ignores the separate personality of each company in favour of the

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106. Para 1(c).
107. Para 17.
108. Para 1(c) (vi).
109. *Supra* note 74 at s 279(5).
110. s279(6).
111. s280(2).
112. See *Akande v. Omisade* (1978) NCLR 363; *Marina Nominees* case *supra* note 76;; *Union Beverages Ltd v. Pepsi Cola International Ltd and others (1994) 2 SCNJ 157; CDBI v. COBEC (Nigeria) Ltd* (2004) 12 NWLR (pt 948) 376; and *Union Bank (Nigeria) Ltd v. Penny-Mart Ltd* (pt 240) 228.
113. (2000) 7 NWLR (pt 663) 33. See also *FDB Financial Services Ltd. v. Adesola* (2000) 8 NWLR (pt 668) 170; and *International Offshore Construction Ltd. v. S.L.N. Ltd* (2003) 16 NWLR (pt.845)157.
114. *Ibid*, at 51 (per Aderemi, JCA).

economic entity constituted by a group of associated companies.'[115] When this happens, it is said that the veil of incorporation has been lifted.[116] Such circumstances, as established by the case law, include: where there is fraud or improper conduct;[117] when the company is being used to perpetuate illegality;[118] if it is in the public interest;[119] and in agency relations to avoid or evade a legal duty.[120] In addition, CAMA provides instances when the veil of incorporation may be pierced.[121] For example, section 506(1) provides that, if in the course of winding up of a company, an act has been carried on in a reckless manner or with intent to defraud, the creditors of the company or creditors of any person for any other purpose, the receiver or liquidator or contributory of the company may, if it thinks proper to do so, declare that any person who were knowingly parties to the aforesaid act be made personally liable. Also, section 290 provides for the personal liability of directors and officers for fraud.[122]

Furthermore, other legislation may also provide for the lifting of corporate veil in other appropriate circumstances. This is evident in the provisions of section 7 of the Harmful Waste (Special Criminal Provisions, etc) Act,[123] that:

> *"Where a crime under the Act has been committed by a body corporate and it is proved that it was committed with the consent or connivance of or attributable to any neglect on the part of-*
>
> *(a) a director, manager, secretary or other similar officer of the body corporate; or*
>
> *(b) any other person purporting to act in the capacity of a director, manager, secretary or other similar officer, he, as well as the body corporate, shall be guilty of the crime and shall be liable to be proceeded against and punished accordingly."*[124]

Lifting the veil of incorporation could constitute a very important instrument for holding those who used the facade of incorporation to perpetrate human rights

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115. L.C.B. Gower, *'Principles of Modern Company Law'* 5th ed. (London: Sweet & Maxwell, 1992) 112.
116. See Sofowora *op. cit.* note 76 at 34; and Olakanmi *op. cit.* note 72 at 8.
117. See *Nigerite v. Dalami (Nigeria) Ltd* (1992) 7 NWLR (pt. 253) 288; and *Gilford Motor Company v. Horne* (1933) CH. 935.
118. See *Public Finance and Securities Ltd v. Jefia* (1998) 3 NWLR (pt. 543) 602; and *Merchandise Transport Ltd v. British Transport Commission* (1962) 2 QB 173.
119. See *Daimler Co. Ltd v. Continental Tyre and Rubber Co. Ltd* (1916) 2 A.C. 307.
120. See *Re: F.G. (Films) Ltd* (1953) 1 W.L.R. 483.
121. See ss 93, 95, 548, 505, 506, 336, 316, & 631 (4).
122. See *PFS Ltd* case *supra* note 118.
123. C.H1 LFN 2004.
124. See also s 23, the Corrupt Practices and other Related Offences Act No 6 of 2003; and s 7, the Economic and Financial Crimes Commission (Establishment) Act No 1 of 2004.

or environmental abuses personally liable for their acts or omissions. Hence, in instances of human rights abuses perpetrated by corporate bodies, the court may pierce the corporate veil in order to hold both the company and the persons responsible for its management accountable for their transgressions. This is necessary as a company being a legal abstraction is dependent on its directors and managers whom, according to Denning L.J. in *Bolton (Engineering) Co. Ltd v. Graham and Sons*, '...represent the directing mind and will of the Company and control what it does....'[125] This is supported by the recent decision of the Supreme Court in *Akinwumi Alade v. Alic (Nigeria) Ltd and Anor*,[126] that:

> *"It is abundantly clear that the 2nd Respondent is responsible for the management of the 1st Respondent Company and on him fell squarely the responsibility of rendering proper accounts of the partnership business on behalf of the said 1st Respondent. It was as a result of this that the trial Court rightly looked beneath the facade and lifted the veil of incorporation to discover the thread that ties the 1st Respondent and the 2nd Respondent together as parties in conspiracy to commit fraud and committing that fraud. The 2nd Respondent is therefore jointly and severally liable with the 1st Respondent to make good all sums improperly paid out or accrued due to his failure to exercise the care necessary in the running of the 1st Respondent."*[127]

A pertinent question is whether the technique can be used by the court in holding foreign companies who are owners or shareholders in incorporated Nigerian subsidiary companies responsible for acts or omissions caused or attributable to such companies. Lifting the veil in this instance may be necessary for economic and commercial reasons or to afford victims of corporate human rights abuses more opportunities of being adequately compensated for their grievances or injuries. It would appear, by virtue of the Supreme Court decision in *Union Beverages Ltd v. Pepsi Cola International Ltd and others*,[128] that Nigerian courts in such instances, would be willing to pierce their corporate veil in order to hold each liable for the action of the other if it can be proved that the two companies are one for all intents and purposes.

However, while Nigerian courts are willing to pierce the corporate veil in civil matters, it is in the area of criminal matters that the courts have showed a general reluctance to deviate from the principle of separate legal personality principle to hold directors personally liable for criminal acts or omissions attributable to the

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125. (1934) 1 K.B 57. See also *Trenco Nig. Ltd v. African Real Estate & Investment Co. Ltd* (1978) 1 LRN 176.

126. SC.769120, Delivered on 3 December 2010.

127. See also *PFS* case *supra* note 118; and *Delta Steel (Nigeria) Ltd v. American Computer Technology Inc* (1999) 4 NWLR (pt. 597) 53.

128. *Supra* note 112.

company.[129] This was evident in *Adeniji v. the State*,[130] where the Court of Appeal held that:

> *"In all these instances… the lifting of the veil … were invariably done in civil matters where the court would, as a court of common law and equity be applying the principle of equity in the appropriate matter. Rendering a director of a company or a sole proprietor of a company criminally responsible for the act ascribable to the company would amount to applying equitable doctrine to ground a conviction in criminal law"*[131]

1.4.3 Liability for Crimes

There are three main sources of criminal law: namely the common law of crime; the respective codes, including the Criminal Code applicable in the Southern region of Nigeria,[132] and the Penal Code applicable in the Northern region;[133] and statutes enacted by the Federal and State governments. It was once considered that under the common law a company, being an artificial person, could not (except in strict liability offences i.e. offences created by statute) be convicted of a crime. The reason for this belief was both substantive and procedural. In substantive terms, a company, being an artificial person, was regarded as being incapable of having the requisite mental element or forming the intention necessary to ground a conviction.[134] The procedural issue, encapsulated in the statement of Berkerly J in *R. v. Anglo-Nigeria Tin Mines Ltd*,[135] is that 'there was no one who could be brought before the court and if necessary, placed in the dock.' The rule has slowly been eroded and replaced by a wide measure of responsibility.[136] The substantive albeit more serious issue was the belief that a company as an abstraction could not be said to have a mind capable of being guilty, and therefore could not be convicted of any offence requiring any type of *mens rea* as *actus non facit reum, nisi mens rea* (i.e. an act does not render one guilty unless the mind is guilty). This point was well illustrated in the statement of Chanel J in *Peaks, Gunston and Tee Ltd v. Ward*,[137] that:

> *"By the general principles of criminality, if a matter is made a criminal offence, it is essential that there should be something in the nature of*

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129. For a criticism of this reluctance, see E.O. Akanki 'Lifting the Corporate Veil: *Adeniji v. State in Perspective*' in E.O. Akanki (ed) *Unilag Readings in Law* (Faculty of Law, University of Lagos, 1999) 73.
130. (1992) 4 NWLR (pt 234) 248.
131. *Ibid*, at 262 (per Sulu-Gambari, JCA).
132. Cap.C38 LFN 2004.
133. Cap.P3 LFN 2004.
134. See C.O. Okonkwo (ed) *Okonkwo and Naish: Criminal Law in Nigeria* 2nd ed (Spectrum Book Limited, Ibadan, 1980) 124; and Owoade *op. cit.* note 70.
135. (1930) 10 N.L.R. 69.
136. William Glanville, *Criminal Law: the General Part* 2nd ed. (London, 1961) 124.
137. (1902) 2 K.B. 1.

> *mens rea, and, therefore, in ordinary cases, a corporation cannot be guilty of a criminal offence, nor can a master be liable criminally for an offence by his servant."*[138]

The old view broke down with the increasing proliferation of companies, as well as their involvement in relatively new and usually diverse white collar crime. At first, using the doctrine of vicarious liability, companies were held liable for offences committed by their agents.[139] This was, however, limited to crimes that fall under the exceptional categories of public nuisance, criminal libel or statutory offences.[140] Subsequently, the court developed a fiction whereby 'the states of the mind of the agents of the corporation were held to be attributable to the corporation, so that the corporation itself could be said to have committed the offences with the requisite mental element.'[141] This fictional process has been called 'the alter ego doctrine or identification',[142] or 'the Organic Theory'.[143] This process owes its development to the statement of Viscount Haldane L.C. in *Lennards Carrying Company v. Asiatic Petroleum Company Ltd*,[144] that:

> *"... a corporation is an abstraction. It has no mind of its own more than it has a body of its own; its acting and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation..."*[145]

This view was reiterated by Denning L.J. in the *H.L. Bolton* case,[146] and has been endorsed in a long line of cases including the Nigerian case of *N.N.S.C. v. Sabana and Anor*,[147] where the Supreme Court held that:

> *"A company is an abstraction. It therefore acts through living persons. But it is not the act of every servant of the Company that binds the Company. Those whose acts bind the Company are their alter ego – those persons who because of their positions are the directing mind and will of the Company, the very ego and corporate personality of the Company."*[148]

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138. *Ibid*, at 11. See also *R v. Opara* (1943) 9 W.A.C.A. 70.
139. See Okonkwo *op. cit.* note 134.
140. See Owoade *op. cit.* note 70. See also *Mousell Brothers v. London and West Railway Company* (1917) 2 K.B. 836; and *D.P.P. Western Nigeria v. Associated Press of Nig. Ltd & Anor* [1959] W.R.N.L.R. 247.
141. *Ibid*.
142. Williams *op. cit.* note 136 at 946.
143. Gower *op. cit.* note 115 at 193-198.
144. (1915) A.C. 705 (H.L.).
145. *Ibid*, at 713-714.
146. *Supra* note 125. See also *SC Houthon & Co v. Nothard Lowe & Wills Ltd* (1928) AC 1 at 10; *HMS Truculent* (1952) 22 11 ER 968; *The Lady Gwendolen* (1965) 2 AILRE 283.
147. (1988) 2 NWLR 23.
148. *Ibid*, at 29.

In addition, the doctrine has been extended to cover not only directors, but also anyone who is considered to be a responsible officer of a company including managers and company secretaries.[149] However, this doctrine is subject to two limitations in addition to the general problem of identification, i.e. whose act or omission can be imputed to the company. These include that the crime must be one which an official of a corporation is conceivably capable of committing within the scope of his or her employment, and hence, a company cannot be held liable for offences such as bigamy, rape and murder.[150] In addition, there are some crimes the punishment for which cannot be inflicted on a company, as the company is a legal creature, and can only be convicted of crimes for which a fine is the legally possible penalty.[151]

Whatever the shortcomings of the common law position, these problems are being addressed with increased legislation imposing criminal liability on corporate bodies, including section 7 of the Harmful Waste Act mentioned above, as well as the National Environmental Standards and Regulations Enforcement Agency (Establishment) Act,[152] which contains extensive provisions on the liability of corporate bodies for various environmental offences.[153] In addition, CAMA seeks to solve the problem of identification by providing for instances in which acts of members of a company can be imputed to be that of the company itself.[154] For example, section 65 provides that a company may be criminally liable for the acts of its members in general meeting, the Board of Directors, or the managing director as if the company were a natural person.

The Criminal Code, however, makes no explicit provision concerning the criminal liability of corporations as distinct from that of the individual liability of the members, and hence, the exact extent of corporate liability under the Code is vague.[155] Despite this omission, it has been argued by Professor Okonkwo that:

> *"There is no special legal reason why in principle a corporation should not be convicted under the Criminal Code. Practically every offence in the Code begins with the words "any person who…" the meaning of "person"*

149. See *Lady Gwendolen* case *supra* note 146; *Daimler* case *supra* note 119; *DPP v. Kent and Contractors Ltd* (1944) KB 146; *R. v. I.C.R. Haulage* (1944) 1 K.B. 551; *Moore v. Bresler* (1944) 2 All E.R. 515; and *Mandillas & Karabries and Anor v. Commissioner of Police, Western Region* (1958) W.R.N.L.R. 147. But see *Tesco Supermarkets Ltd v. Natrass* (1972) AC 153 (Where the House of Lords held that the act of a store manager was not the act of the company itself).

150. See Fogam *op. cit.* note 70 at 95; Owoade *op. cit.* note 67 at 75; and Okonkwo *op. cit.* note 134 at 127.

151. *Ibid*.

152. No 92 of 2007 (Hereinafter NESREA Act).

153. *Ibid*, at ss 20-27.

154. *Supra* note 74 at ss 65-67.

155. Okonkwo *op. cit.* note 134 at 124.

> *as defined in section 3 of the old Interpretation Act "included any company or association or body of persons corporate or unincorporated…."*[156]

This assertion, however, does not fully resolve the issue of imposing certain punishments for offences imputed to companies under the Criminal Code, especially when the only option involves death or imprisonment. A review of the Criminal Code is necessary to provide for options of fines for companies implicated in the commission of offences such as rape and murder. This is necessary for holding companies that committed or are implicated in the commission of crimes such as rape, torture and murder and other violent offences liable. It has been used as an instrument to quell popular demands for better environmental and human rights practices criminal liable for their offences as principal offenders or accessories.[157] A precedent for such course of action has been established in the United States case of *State v. Leigh Valley R. Co*, where a company was found guilty of manslaughter by a New Jersey Court.[158]

Companies are not liable in Nigeria for conduct implicating offences under the International Criminal Court (ICC) Statute. Although Nigeria ratified the ICC Statute on 27 September 2001, the implementing legislation, the Rome Statute (Ratification and Jurisdiction) Bill 2006 has not been enacted yet. It is also unclear if companies would be liable for grave breaches of the four Geneva Conventions under the Geneva Convention Act, despite its extraterritorial effect, as the punishments prescribed under the Act involve only the death sentence or fourteen (14) years imprisonment for grave breaches involving wilful killing of protected persons and other grave breaches respectively.[159] Beyond this hurdle, there are no conceptual problems to companies being held liable under the Geneva Conventions Act, and there are sufficient grounds for review of this Act to ensure it applies also to corporations.

1.5 Civil liability for Tort

Companies may also be liable for damages under the law of tort for acts committed or attributable to their servants or agents. Tort law in Nigeria is based on the English common law rules. These rules of tort, along with other common law rules, that were in force in England as at 1 January 1900, as noted above, constitute Nigerian Law.[160] However, the remedies offered by these rules in instances of corporate human rights abuses are available essentially to an individual claim-

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156. See also *A.G. (Eastern Region) v. Amalgamated Press* (1956-57) I E.R.L.R. 12; and *R v. Service Press Ltd* (1952) 20 N.L.R. 96.

157. See generally, Okonkwo *op. cit.* note 134 at 156-183. For the classes of principal offenders, see s 7, Criminal Code Act *supra* note 132.

158. (1917) 90 N.J.L. 372.

159. *Supra* note 12 at art 3.

160. See Interpretation Act *supra* note 69.

ing damages for infringement of his or her private rights. It will be instructive to examine some of the torts that are relevant in holding companies accountable for their human rights abuses. This is necessary, as most environmental and some human rights complaints against TNCs and other companies operating in the lucrative Nigerian oil sector are still grounded in tort.

1.5.1 Negligence

Negligence is 'the breach of a legal duty to take care which results in damages undesired by the defendant to the plaintiff.'[161] It is not every act of carelessness or negligence that will be actionable under the tort of negligence. As stated by Lord Wright in *Lockgelly Iron & Coal Co. v. McMullan*, '... negligence means more than heedless or careless conduct, whether in omission or commission, it properly connotes the complex concept of duty, breach and damage thereby suffered by the person to whom the duty was owed.'[162] There are three elements to the tort: a duty of care owed by the defendant to the plaintiff; breach of that duty by the defendant; and damage to the plaintiff resulting from the breach.[163] Proving these elements is a question of fact, not law. Thus, each case is decided subjectively on a case-by-case basis. This position was reiterated in *Silas Osigwe v. Unipetrol and Anor*,[164] following *Kaila v. Jarmakani Trans. Ltd*, [165] and *Ngilar v. Mothercat Ltd*.[166] The landmark cases regarding the use of the tort of negligence to hold companies liable for breach of duty of care can be seen in *Mon v. Shell-BP*,[167] and *Seismograph Service v. Mark*.[168]

However, proving negligence, especially in oil-related litigation cases, can be particularly difficult, as the plaintiff must be able to convey in technical or scientific terms how an oil company has violated a pre-existing duty of care towards them.[169] Achieving this requires the deployment of expert witnesses, a service most litigants are unable to afford. In most cases plaintiffs will be unable to demonstrate the link between the damages suffered and the negligent act or omission of the defendant. The *Seismograph* case[170] is a primary example of a case that was dis-

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161. W.N.H. Rogers, *Winfield & Jolowicz on Tort* (Sweet & Maxwell, London, 1988) 91.

162. (1934) A.C. 1 at 25.

163. See *Silas Osigwe v. Unipetrol & Anor* (2005) 6 W.R.N 97. *Umudje v. Shell B.P. Company* (Nig.) Ltd (1975) 11 S.C 155; *Koya v. U.B.A Ltd* (1997) 1 NWLR (Pt. 481) 251; and *Umar v. Ahungwa* (1997) 1 NWLR (Pt. 483) 601.

164. *Ibid*, at116.

165. (1961) All NLR 747.

166. (1999) 13 NWLR (Pt 636) 626.

167. (1970-1972) 1 RSLR 71.

168. (1993) 7 NWLR 203.

169. See Jedrzej George Frynas, 'Legal Change in Africa: Evidence from oil-related litigation in Nigeria' (1999) 43 *Journal of African Law* 123-124; and Taiwo Osipitan 'Problems of Proof in Environmental Litigation' in Omotola (ed) *op. cit.* note 70 at 115-117.

170. *Supra* note 168.

missed on the basis that the plaintiff had failed to establish that the damage to his fishing nets from a seismic boat constituted a breach of a duty of care towards him and thereby negligence. It is clear from the plaintiff's argument in this case that he was owed a duty of care by the Seismograph company after its boat 'tore' through his fishing net. Anticipating what a court will deem to be an unreasonably negligent act or a violation of an acceptable standard is extremely difficult for plaintiffs lacking the sufficient legal background or resources to prove their case in evidential terms. Another difficulty regarding proof of causation arises in instances of multiple polluters within an industrial area, which makes it impossible to pinpoint the company responsible for the damage suffered.[171]

The most successful negligence cases appear to be those where the courts have held that the defendant holds a clear duty of care to the plaintiff in the conduct of their operations, which if breached, constitutes an unmistakable act of negligence. Oil spill cases, like the one seen in the *Mon* case, are likely to succeed on this basis as the burden of proof falls on the defendant, who must show that their operations constituted no harm to the plaintiff. Evidence may not be sought from the plaintiff in these cases as the legal principle of *res ipsa loquitor*, (which literally means the 'facts speak for themselves') is invoked. [172] The doctrine will come into operation:

(a) On the proof of the happening of an unexplained occurrence;

(b) When the occurrence is one which could not have happened in the ordinary course of things without negligence on the part of somebody other than the plaintiff;

(c) The circumstances point to the negligence in question being that of the defendant rather than of any other person.[173]

This principle was seen in the *Mon* case when the Court declared that '[n]egligence on the part of the defendants has been pleaded and there is no evidence of it. None in fact is needed, for they must naturally be held responsible for the results arising from an escape of oil which they should have kept under control.'[174] However, the maxim has its limitations when applied to the environmental tort of negligence because, as aptly observed by Professor Osipitan, '…due to the financial powers, potential defendants in environmental law suits are in vantage

171. Osipitan *op. cit.* note 169 at 93.

172. Frynas *op. cit.* note 169 at 124.

173. See *Onwuka v. Omogui* (1992) 3 NWLR (Pt. 230) 393; and *Royal Ade (Nig.) Ltd v. N.O.C.M Co. Plc* (2004) 21 W.R.N 1.

174. *Supra* note 167.

positions to procure the services of experts to give uncontradicted evidence in rebuttal of the presumption of Negligence.' [175]

1.5.2 Nuisance

The success of public or private nuisance claims against corporations in Nigeria is uncertain, due to reluctance within the court system to assign damages to individuals or communities as a whole.[176] Nuisance claims can be made if the activities of a corporation cause interference with the enjoyment of public or private rights over lands.[177] Private claims are more likely to succeed on this basis if the plaintiff can prove that the damage to their property and way of life was the direct result of the company's operations.[178] In spite of its attraction, the utility of private nuisance is limited by the burden of proof imposed on the plaintiff as first, he or she has to prove that the defendant's act caused damage to him,[179] failure to prove this causal link will be detrimental to the case.[180] The plaintiff must also prove that the defendant was unreasonable in the use of the defendant's premises. This requirement strikes a balance between the competing rights of the plaintiff and the defendant.[181] In environmental cases, especially those concerning oil pollution, the court considers reasonable use of property by the defendant against the backdrop of the social utility of the defendant's conduct.[182] Hence, 'the suitability of the defendant's activity, the impracticability of preventing the interference, the extent of the harm done to the plaintiff's property, and the social value of the right interfered with, are relevant factors in determining reasonable or unreasonable use of property.' [183]

The requirement of reasonable use of land does not apply to action in public nuisance. Once there is an injury to the enjoyment of property, an action is obtained irrespective of whether or not the use of the land by the defendant had been objectively reasonable.[184] Previously, action in public nuisance was constrained by the plaintiff having to prove special or peculiar damage suffered by him or her or in the alternative, instituting the action with the consent of the Attorney-General.[185]

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175. *Op. cit.* note 169 at 118-119. See also *Seismograph Services Ltd v. Akpruoyo* (1974) 6 SC 119 at 136; and *Seismograph Services Ltd v. Ogbeni* (1976) 4 SC 85.
176. Frynas *op. cit.* note 169 at 125.
177. *Ibid.*
178. See *Abiola v. Ijeoma* (1970) 2 ALL NLR 768; and *Tebite v. Nigerian Marine and Trading Company Ltd* (1971) UILR 432.
179. Taiwo Osipitan 'A conspectus of Environmental Law in Nigeria' (1997) 1 *The Nigerian Journal of Public Law* 85 at 91 (Hereinafter Osipitan II).
180. See *Akporuvo* case *supra* note 175.
181. See Osipitan II *op. cit.* note 179.
182. *Ibid*.
183. *Ibid*.
184. *Richard v. Lothian* (1913) AC 263.
185. *Amos v. Shell-BP* (1974) 4 ECSLR 436; and *Lawani v. Nigerian Portland Cement Co. Ltd* (1977) SC 345.

Presently, this is no longer necessary by virtue of the Supreme Court decision in *Adediran and Anor v. Interland Transport Limited*.[186] That decision held that, under Section 6(6)(b) of the 1979 Constitution of Nigeria (now 1999 Constitution), a private person may commence an action in public nuisance without the consent of the Attorney-General and without joining him or her as a party. The liberalization of this rule has greatly enhanced the right of victims of environmental pollution to seek judicial remedy in Nigeria.[187] Although some authors view the tort of public nuisance as playing only a residual role in the control of pollution, because this is now the subject of extensive statutory control,[188] the poor law enforcement record of public officials in Nigeria will provide continued relevance to the tort of public nuisance for use by litigants to protect the enjoyment of public rights over land.

1.5.3 Strict Liability Rule in *Ryland v. Fletcher*

The notion of strict liability in tort is longstanding or, to be more accurate, the notion that liability in tort is not necessarily strict is relatively modern.[189] The most important instance of strict liability, and perhaps the strictest, namely, the rule in *Rylands v. Fletcher*,[190] was avowedly propounded by Blackburn J., upon the old rule in cattle trespass, which is at least as old as 1353. The rule in *Rylands v. Fletcher* is that 'the person who brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it at his perils, and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape.'[191] Since its formulation, the rule has made a significant impact in tort, especially in the sphere of environmental litigation.[192] A plaintiff wanting to rely on the Rylands rule must not only prove non-natural use of land by the defendant, but also, must prove the escape of materials or objects from the defendant's land to his or her own land.[193] Proving a non-natural use is usually a stumbling block to the plaintiffs' reliance on this rule. This is due to the fact that although the concept is 'associated with some special use bringing with it increased danger to others and must not merely be ordinary use of land or such as is proper for the benefit of the community, nevertheless, non-natural use of land changes from time to time depending on the circumstances.'[194] Presently, it appears that an unusual, extraordinary or outlandish use of land will come within the meaning

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186. (1992) 9 NWLR (pt 214) 155.
187. See Osipitan II *op. cit.* note 179 at 90.
188. For example, see Oludayo G. Amokaye, *'Environmental Law and Practice in Nigeria'* (University of Lagos Press, Akoka, Lagos, 2004) 41.
189. *Clerk & Lindsell on Torts*, 13th ed (London, Sweet & Maxwell, 1969) 75.
190. (1866) L.R.1 Ex. 265.
191. *Ibid*, at 279-280.
192. Osipitan *op. cit.* note 169 at 124.
193. Osipitan II *op. cit.* note 179 at 91.
194. *Ibid*, at 91.

of this concept.[195] Nigerian courts have consistently held that storage of crude oil and its waste amounts to a non-natural use of land.[196] Thus, in *Shell Petroleum Company of Nigeria Ltd v. Anaro & Ors*,[197] the Court of Appeal held the accumulation of crude oil in a waste pit to be a non-natural use of land.

Another limitation of the *Rylands* rule is that it aims at the protection of property and not persons, and hence, will not avail persons who suffer injuries as a result of the negligent conduct of companies or their agents.[198] Despite these limitations, the rule has been invoked successfully against corporate polluters especially those within the Nigerian oil sector. This was illustrated by *Umudje v. Shell-BP Petroleum Company of Nigeria Ltd*,[199] a case involving an escape from the defendant's oil waste dump, causing damage to the plaintiff's ponds, lakes and farmlands. It was held by the Supreme Court that 'it is now generally accepted that a person who diverts a natural stream or cause the same to become blocked and in this way diverts its natural course does so at his peril, and is liable to any damage caused by the failure of his work to contain the diverted streams, although there was no negligence on his part.'[200]

1.6 Liability under other body of law

1.6.1 Environmental Law

The principal environmental legislation in Nigeria is the NESREA Act.[201] The Act which is a framework legislation, not only created NESREA as the principal agency tasked with environmental standards, regulations, rules, laws, policies and guidelines,[202] but also created statutory liabilities for companies in the areas of air quality and atmospheric protection, protection of the ozone layer, noise pollution, water pollution, effluent limitation, land resources and watershed quality, and discharge of hazardous substances.[203] With regard to the latter, where the discharged hazardous substances constitute harmful waste, the provisions of the Harmful Waste Act shall apply.[204] This statutory liability is a matter for state enforcement, a fact with some implications for the remedies available to private

195. See *Cambridge Water Works v. Eastern Counties Leather Plc* (1994) 1 ALL ER 53.

196. See *Umudje* case *supra* note 163; *Shell Petroleum Development Company of Nigeria v. Ambah* (1999) 3 NWLR. (Pt 593) 1; *Shell Petroleum Development Company of Nigeria v. Adamkue* (2003) 11 NWLR (pt 832) 533; and *Shell Petroleum Development Company of Nigeria v. Tiebo II* (1996) 4 NWLR (pt 445) 657.

197. (2000) 23 WRN 111.

198. See *Read v. Lyons* (1947) AC 156.

199. *Supra* note 163.

200. *Ibid*, at 159 (Per Idigbe JSC).

201. *Supra* note 152.

202. Ss 1 (1) & 2.

203. Ss 20-27.

204. s27 (5).

individuals which are discussed in the next section. Under NESREA, an officer of the Agency has the power to enter premises to determine if provisions of the Act or regulations made thereunder are being breached.[205] It is an offence to obstruct an officer in the performance of duties.[206] A director, or any other person in charge of the company, guilty of discharging hazardous substances into the environment is deemed liable to be proceeded against and punished accordingly, except if he 'proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.' [207] This is quite different from the strict criminal liability of a director, manager or other similar officer of a company breaching the provisions of the Harmful Waste Act.[208] Furthermore, the Harmful Waste Act provides for strict civil liability for damages arising from the dumping of hazardous wastes in Nigeria.[209]

The National Oil Spill Detection and Response Agency Act, which establishes the National Oil Spill Detection and Response Agency (NOSDRA) as the responsible agency for the detection and response to all oil spillages in Nigeria,[210] provides for the liability of oil spillers for failure to report such spillage as well as failure to clean up the impacted site.[211]

1.6.2 Petroleum Law

The Oil in Navigable Waters Act[212] prohibits both the discharge of certain oil from Nigerian Ships in prohibited sea areas created under the 1954 International Convention for the prevention of pollution of the Sea by Oil as amended in 1962, and when breached, holds the owner or master of the vessel liable.[213] It further prohibits the discharge of oil into Nigerian Waters and when breached, holds the following classes of person liable:[214] the master or owner of the vessel if the discharge has come from a vessel; the occupier of the land if the discharge has come from land; and where the discharge is from apparatus used for transferring oil from or to a vessel, the person in charge of the apparatus.[215] In addition, the owner or master of a ship is liable under the Act for not fitting the vessel with equipment as designated by the Minister that will help in preventing or reducing the discharge

205. s31.
206. s32.
207. s27(3).
208. *Supra* note 123 at s 7.
209. s12.
210. Act no 15 of 2006.
211. s6(2).
212. Cap. O6 LFN 2004.
213. s1.
214. s3.
215. *Ibid*.

of oil or oil wastes into the sea.[216] Other offences in which the owner or master of a vessel will be liable under the Act include the failure to keep records of oil matters and failure to report the presence of oil in harbour waters.[217] The offence of failure to provide oil reception facilities falls on the harbour authority, [218] in this instance, the Nigerian Port Authority, which is charged with the administration of Nigerian sea ports. [219] However, the efficacy of the liability regime under the Act has been weakened by the various defences under the Act.[220] For example, for the offence of discharging oil into prohibited seas and Nigeria's territorial waters, it is a defence if the owner or master of the vessel is able to prove that the discharge was for the purpose of securing the safety of any vessel, or of preventing damage to any vessel or cargo, or of saving life; in consequences of damage to the ship; and by unavoidable leakage.[221]

The liability regime under Oil Terminal Dues Act that prohibits the discharge of oil or mixture containing oil from any pipeline or vessel into any part of the Nigerian sea[222] is same as that provided in section 3 of the Oil in Navigable Waters Act.[223] The Oil Pipeline Act requires the holder of a pipeline permit to take all reasonable steps to avoid unnecessary damage to any land entered upon and any buildings, crops or economic trees thereon.[224] It is an offence under the Act for anyone to operate a pipeline without a licence in Nigeria.[225] Any officer guilty of this offence is also liable for removing such pipeline and ancillary installations as well as 'mak[ing] good any damage done to any land by such removal.'[226] In addition, the holder of a licence is liable to compensate any person whose land or interest in land is injuriously affected by the exercise of the rights conferred by the licence; any person suffering damage by reason of any neglect on the part of the holder or his agents, servants or workmen to protect, maintain or repair any work structure or thing executed under the licence; and any person suffering damage as a consequence of any breakage of or leakage from the pipeline or an ancillary installation.[227] The Petroleum (Drilling and Production) Regulations made under

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216. s5.
217. Ss 7 & 10.
218. s8.
219. See The Nigerian Port Authority Act Cap. N126 LFN 2004.
220. For a criticism of these defences, see Akin Ibidapo-Obe, 'Criminal Liability for Damages Caused by Oil Pollution' in Omotola (ed) *supra* note 70 at 239-244.
221. See generally s 4 of ONWA *supra* note 212.
222. The Oil Terminal Dues Act Cap. O8 LFN 2004.
223. *Supra* note 212 at s 6.
224. Cap. O7 LFN 2004.
225. s7 (4)-(5).
226. s7(6)-(7).
227. s11(5).

the Petroleum Act,[228] makes licensee or lessee liable for failure to adopt the best of operational procedures in the pursuit of their objective.[229]

1.6.3 Labour Law

Strictly speaking, legal mechanisms concerning corporate liability for infringements of civil and political rights are better established in Nigeria through the existence of labour and trade union law. For example, workers hold the right to form or belong to any trade union and bargain collectively.[230] Forced labour and child labour is prohibited,[231] a minimum wage has been set,[232] and every employer is, under section 7(1) of the Labour Act, obliged to give to an employee not later than three months written particulars of the terms of employment (This latter provision has in fact been breached often by corporations with impunity). However, the US State Department observed in its 2008 Country Reports on Human Rights Practices that trade union law specifies only a narrow range of activities in which unions may legally engage.[233] By restricting the right to strike to matters pertaining to conditions of work, pay and/or breach of contract, national law in this area does not meet the standards set by the International Labour Organisation regarding the right to strike over national economic policy.[234] The legal protection of workers that choose to strike or seek judicial review of their grievances is also weak. According to the US State Department, failure of the Courts to ensure due process in these procedures is commonplace, as is the risk of stiff fines and/or prison sentences for failing to conform to the conditions set for trade union action. There are also no laws prohibiting retributive action against strikers.[235] However, in order to obtain a fuller picture of the severity of these problems, an investigation into the success rates of cases concerning workers rights and the levels of compensation received is necessary.

1.6.4 Consumer Protection Council Act

Under Nigeria's consumer protection regime, victims of certain abuses involving corporations may seek redress and get remedies through the Consumer Protection Council. Section 6(1) equates the right of the consumer to that of a community where it provides that 'a consumer or community that has suffered a loss, injury or damage as a result of the use or impact of any good, product or service may make

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228. Cap. P10 LFN 2004.

229. Reg. 25.

230. Trade Unions Act Cap. T14 LFN 2004.

231. Labour Act Cap. L1 LFN 2004.

232. National Minimum Wage (Amendment) Act 2005.

233. US State Department, *Nigeria: 2008 Country Reports on Human Rights Practices* (Washington DC: Bureau of Democracy, Human Rights, and Labour, 2008) 41.

234. *Ibid*.

235. *Ibid*.

a complaint in writing to or seek redress through a State Committee". Although the definition of 'consumer' in section 32 reflects an individualized approach, the provisions of section 6(1) can ground access to members of communities who have suffered human rights abuses.

2. Legal Remedies for Corporate Human Rights Abuses

2.1 Constitutional Remedies

The Constitution guarantees the right of any person whose fundamental rights have been infringed or threatened in any State to apply to the High Court in that State for appropriate redress.[236] The Chief Justice of Nigeria may make rules with respect to the practice and procedure on the enforcement of fundamental rights in high courts.[237] Such rules of procedure are provided under the FREP 2009 Rules,[238] which replaced the 1979 Rules under which the enforcement of fundamental rights became problematic in Nigeria. As noted above, the FREP 2009 Rules also cover the rights under the African Charter Ratification Act among the judicially enforceable fundamental rights in Nigeria, thereby widening the scope of rights that can be used by victims of human rights abuses against the offending companies. In essence, litigants do not need to rely only on the onerous tort rules to vindicate their rights, including economic and social rights. In addition, application will help avoid the type of situation witnessed in *Ike Opara and others v. Shell Petroleum Development Company Ltd and others*,[239] where the Federal High Court, despite the precedent laid down in the *Abacha* case, held that the provisions of the African Charter Ratification Act cannot be enforced under the 1979 Fundamental Rights Enforcement Procedure. The justiciability of economic and social rights is further evidenced by the overriding objectives of the FREP 2009 Rules, which include *inter alia* the purposive and expansive interpretation of both the provisions of the Nigerian Constitution (especially Chapter IV), as well as the African Charter Ratification Act with 'a view to advancing and realising the rights and freedoms contained in them and affording the protections intended by them.'[240]

The FREP 2009 Rules also liberalise the *locus standi* rule that had hitherto been a major constraint to the institution of public interest human rights litigation,[241] by expressly mandating the Court to 'encourage and welcome public interest litigations in the human rights field and no human rights case may be dismissed or struck out for want of *locus standi*.'[242] The Rules further expanded the class of

236. *Supra* note 15 at s 46(1).

237. s46 (3).

238. *Supra* note 62.

239. Suit No FHC/PH/CS/518/2005. Delivered on 29 September 2006 (Unreported).

240. Para. 3(a), preamble to the Rules *supra* note 62.

241. For example, the Court in *Oronto-Douglas v. Shell Petroleum Development Company Ltd and 5 Others*, Suit No. FHC/CS/573/93, delivered on 17 February 1997 (Unreported) (Dismissed the plaintiff's claim for want of *locus standi*).

242. Para. 3(e), preamble to the Rules, *supra* note 62.

persons that can bring action in instances of human rights violation to include: anyone acting in his own interest; anyone acting on behalf of another person; anyone acting as a member of, or in the interest of, a group or class of persons; anyone acting in the public interest; and association acting in the interest of its members or other individuals or groups.[243] Hence, by virtue of these provisions, human rights activists, advocates, NGOs and others can now validly bring actions to enforce the fundamental rights of persons affected by the activities of companies in Nigeria.[244]

FREP 2009 Rules also provide for an easier mode of commencing fundamental rights enforcement actions by dispensing with the requirement of obtaining leave of the court before instituting a fundamental rights enforcement action as stipulated under the 1979 Fundamental Rights (Enforcement Procedure) Rules.[245] It should be noted that this stipulation, which was strictly adhered to by the courts,[246] not only occasioned delays in the process, but also, led to the widespread practices of judges dabbling into the merits of the main application. This in turn led to many deserving cases for the enforcement of fundamental rights not being heard in court.[247] Under FREP 2009 Rules, applicants are only required to commence such action using any originating process accepted by the Court. The application must be accompanied by a statement, an affidavit in support, and a written address.[248]

The High Court in considering fundamental rights enforcement actions 'may make such order, issue such writs and give such directions as it may consider appropriate for the purposes of enforcing or securing the enforcement of the aggrieved person's fundamental rights under the Constitution and the African Charter Ratification Act.[249] Such redress or remedy may include damages, restitution, declaration, payment of cost, compensation, guarantee of non-repetition, rehabilitation, and injunction.[250] Declaration is often applicable for the pronouncement of the court with respect to the unconstitutionality/unlawfulness of the

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243. *Ibid*.

244. *Ibid*.

245. S.I. 1 of 1979. Available at http://www.nigeria-law.org/FundamentalRights(EnforcementProcedure) Rules1979.htm

246. For example, see *The Registered Trustees of Faith Tabernacle Congregation Church Nigeria and Ors v. Ikwechegh* (2001) 1 CHR 423 at 424.

247. See Anthony O. Nwafor, 'Enforcing Fundamental Rights in Nigerian Courts – Processes and Challenges' (2009) 4 *African Journal of Legal Studies* 1 at 8-10; and Justice Chima Centus Nweze *The New regime of human rights litigation in Nigeria: Old Rights; New Enforcement Strategies*, Paper presented at presented under the aegis of Access to Justice, Abuja, Nigeria, 25 May 2010, at pp25-26.

248. *Supra* note 62 at order II (2)-(5).

249. s46 (2) of the Nigerian Constitution *supra* note 15; and Order XI, FREP 2009 Rules *supra* note 62.

250. See *Ransome-Kuti supra* note 66 at1645, para. 4; *Jonah Gbemre v. Shell Petroleum Development Company of Nigeria and 2 Others*, Suit No. FHC/B/CS/53/05, delivered on 14 November 2005, (Unreported); and *Abacha* case *supra* note 15.

violation of the individual fundamental rights.[251] In cases of deprivation of the liberty of the applicant, the court may order the applicant's release from custody and may give injunctive relief against future incarceration in respect of the same issue.[252] Damages/compensation are awarded by the court, albeit infrequently. But in several cases, such as *Olisa Agbakoba v. SSS*,[253] the court not only awarded declaratory and injunctive relief, but also awarded damages, because in fundamental rights cases, the law presumes that damages flow naturally from the injury suffered by the applicant as a result of the infraction of his rights.

2.2 Specialised Remedies in Other Branches of the Law

2.2.1 Administrative Law

The actions of officers and staff of a statutory corporation or companies in which the Federal or any State Government has controlling interests are subject to principles and rules of administrative law, as such officers are regarded as public officers under the Nigerian Constitution.[254] Hence, their decisions will be subject to review for administrative fairness and may be invalidated by the Court if fair procedure has not been followed.[255] The power of judicial review of public or administrative powers and acts is usually exercised by the Court at the application brought by or on behalf of an aggrieved person by virtue of the provisions of section 46 of the 1999 Constitution.[256] Judicial review enables the court to review administrative acts or decisions to determine, *inter alia*, their regularity, constitutionality, legality, and rationality.[257] In reviewing the acts or decisions, the court may grant one or more of the following remedies: declaration of rights;[258] order of *mandamus*, which commands the performance of a public duty which a person or body is bound to perform;[259] order of *certiorari*, in order to inquire into the legality

251. See *Abacha* case *supra* note 15; and *Okogie* case *supra* note 41.

252. (1998) 1 HRLRA 252. See also *Shugaba op. cit.* note 32; and *Fawehinmi v. Abacha* (1996) 9 NWLR (pt 475) 710.

253. *Ibid*. at 268.

254. *Supra* note 15 at para 14, part II, Fifth Schedule.

255. See *PHMB v. Ejitagha* (2000) 11 NWLR (pt 677) 154; *WAEC v. Mbamalu* (1992) 3 NWLR (pt 230) 481; *Obot v. CBN* (1993) 8 NWLR (pt 310) 140; and *Adeniyi v. Governing Council, Yabatech* (1993) 6 NWLR (pt 300) 426.

256. See *Abacha* case *supra* note 15; and *Director, SSS v. Agbakoba* (1999) 3 NWLR (pt 595) 314.

257. See *Abdulkarim v. Incar Nig. Ltd* (1992) 7 NWLR (pt 251) 1.

258. See *Adeniyi* case *supra* note 255; *Okogie* case *supra* note 41; and *LPDC v. Fawehinmi* (1985) 2 NWLR (pt 7) 300.

259. See *Agbakoba* case *supra* note 252; *Shitta v. Federal Public Service Commission* (1981) 1 SC 40; and *Fawehinmi v. Akilu* (1987) 4 NWLR (pt 67) 797.

of the decision of the corporation;[260] order of injunction, prohibiting the corporation from doing a specified act;[261] and award of damages.[262]

2.2.2 Company Law

Under the CAMA, there is no provision for the protection or promotion of human rights of individual or employee against the company except with regard to the derivative actions – an action of minority shareholder intended to protect the company. In section 300, the court may grant declarations or injunctions for individual members of the company against actions that are *ultra vires* the company or actions in breach of the company's article of association or actions in breach of the rights of individual shareholder. Nigerian companies typically do not have a policy of promoting and protecting human rights, so the actions of directors or employees in abusing human rights might not be considered to be a breach of the fiduciary duty that a director owes to the company. Applying section 301(1) under personal and representative action, a member of the company is not entitled to damages in an action to enforce his or her rights against the company, and only an injunction or declaration are available forms of relief.

2.2.3 Labour Law

The judicial remedies available for unfair dismissal or termination of employment are damages, injunction and prerogative remedies, and reinstatement. [263] With regard to the latter, in an action for wrongful dismissal of the employee from employment, the court may order reinstatement of the employee, provided the contract of employment is such that it is governed or regulated by statutes, not in an ordinary master and servant relationship.[264] Where it involves a master and servant relationship without a statutory flavour, the court will not make the declaration of termination or dismissal of the employee null and void.[265]

In instituting an action for wrongful dismissal, the basic principle is that the action cannot be initiated under the fundamental rights enforcement procedure. This was evident in the *Peterside* case,[266] where the Court of Appeal, in holding that there is no constitutional right to employment, stated that 'a party cannot by operation of his own whims and caprices expand the frontiers of constitutional rights beyond the anticipations of the Constitution as no person can read into the Constitution

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260. See *Denloye v. Medical and Dental Practitioners Disciplinary Tribunal* (1968) 1 ALL NLR 298.

261. See *Governor of Lagos State v. Ojukwu* (1986) 1 NWLR (pt 18) 621.

262. See *Shugaba* case *supra* note 32; *Agbakoba* case *supra* note 249; and *Alaboh v. Boyes & Anor* (1984) 5 NCLR 830.

263. See generally Oladosu Ogunniyi, *Nigerian Labour and Employment Law in Perspective*, 2nd ed (Folio Publishers Limited, 2004) 290-318.

264. See *Osisanya v. Afribank* (2007) MJSC (VOL4) 128.

265. *Ibid*. See also *Katto v. CBN* (1999) 6 NWLR 607.

266. *Supra* note 36 at 279.

what is not there.' However, the position would be different where dismissal has implicated one of the constitutional rights or rights under the African Charter Ratification Act. Hence, where the dismissal was based on the refusal of the employee to work under inequitable and unsatisfactory conditions contrary to article 15 of the Act, it may well be that an action for wrongful dismissal can be instituted under the Fundamental Rights Enforcement Procedure.[267]

Where an employee suffers bodily injury in the course of his employment, he or she may be entitled not only to compensation under section 24 of the Workmen Compensation Act,[268] but also to damages for pain and suffering. In *C & C Construction Company limited v. Okhai*,[269] the Supreme Court awarded the respondent damages for pain and suffering after ruling that the remedies under section 24 of the Workmen Compensation Act could not have adequately compensated the victim/respondent.[270] Such action can also be brought under the Fundamental Rights Enforcement Procedure if the injury has been as a result of working in inequitable and unsatisfactory conditions, as the African Charter Ratification Act guarantees the right to work under equitable and satisfactory conditions.[271]

2.2.4 Environmental law

The NESREA Act and Harmful Waste Act do not provide for remedial steps to be undertaken by companies in the event of the pollution or degradation of the environment by companies. Under these Acts persons do not have the right to sue for damages or compensation for acts or omissions violating their provisions. However, the Harmful Waste Act provides for civil liability for any damage caused as a result of dumping or depositing of harmful waste in Nigeria. The enforcement of this liability against the polluting corporation lies not with the person suffering the damage, but rather with the body tasked with the enforcement of the Act, namely NESREA. Presently, there is no evidence that the provision has been effectively enforced, especially as it relates to the indiscriminate dumping of harmful waste in Nigeria. This poor record is not specific to NESREA, as its predecessor, the Federal Environmental Protection Agency (FEPA), did not effect any record of compelling payment of compensation by persons discharging hazardous substances into the environment.[272] The only recourse left to the victims may be in compelling the agency to order the polluter to compensate the victims of his

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267. See *Anigboro* case *supra* note 38.

268. Cap. W6 LFN 2004.

269. (2004) 2 MJSC 134. The decision of the Supreme Court is the final decision and every court and persons are bound by it except the principles stated therein are overruled in subsequent decision.

270. Currently, the Employees Compensation Act 2010 has repealed the Workmen's Compensation Act because its incapability of meeting the needs of workers who suffer injury or death.

271. *Supra* note 2 at art 15.

272. See Nelson E. Ojukwu-Ogba 'Legal and Regulatory Instruments on Environmental Pollution in Nigeria: Much Talk, Less Teeth' (2006) 8/9 *International Energy law & Taxation Review* 201 at 204.

pollution.[273] This occurred in *Mobil Producing Nigeria Unlimited v. Lagos State Environmental Protection Agency*,[274] where the plaintiffs/respondents intended for FEPA be compelled to order the defendant/appellant to pay compensation to the communities affected by the oil spill at Mobil's Idoho Qua Iboe oil terminal which devastated the coastal areas of Akwa Ibom State, Nigeria. The case was inconclusive as the Supreme Court remitted the matter back to the Federal High Court.[275]

This deficiency and the general poor enforcement record of agencies tasked with the enforcement of environmental regulations in Nigeria militates in favour of the provisions of these laws to be amended in order to provide for public interest litigation in instances of breach of their provisions. Presently, it is only the National Environmental (mining and Processing of Coals, Ores, and Industrial Minerals) Regulations,[276] that provide for the right of any person or group of persons to bring an action in court to prevent, stop or control the contravention of its provisions.[277] This provision is not contained in any other regulation made under NESREA Act,[278] and hence, is not of general application. Thus, until Nigerian environmental regulations have been amended as suggested above, the only recourse left to persons affected by violation of their provisions is either to rely on the onerous tort rules with their limitations, or in the provisions of article 24 of the African Charter Ratification Act.

2.2.5 Petroleum Law

As with environmental law, remedies under the various laws regulating the petroleum industry are enforceable by a state agency, in this case the Department of Petroleum Resources (DPR). Considering the interest of the State through its agency, the Nigerian National Petroleum Corporation (NNPC) in the exploration and exploitation of oil, it is doubtful that the DPR will mobilise the adequate political will needed to enforce the provisions of these regulations against defaulting oil companies. It is only the Oil Pipelines Act that provides for right of access to

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273. Such right of action is implicit in the provisions of section 32 (1) of erstwhile Federal Environmental Protection Authority Act, Cap. F10 LFN 2004.

274. (2001) 8 NWLR. (Pt 715) 489 (CA).

275. (2003) FWLR (Pt 137) 1029 SC (For decision of the Supreme Court remitted the matter back to the Federal High Court for retrial).

276. S.I. 31 of 2009.

277. Reg. 8(4).

278. These include the National Environmental (Sanitation and Wastes Control) Regulations, S.I. 29 of 2009; the National Environmental (Chemicals, Pharmaceuticals, Soaps and Detergent Manufacturing Industries) Regulations, S.I. 36 of 2009; the National Environmental (Food, Beverages and Tobacco Sector) Regulations, S.I. 33 of 2009; the National Environmental (Textiles, Wearing Apparel, Leather and Footwear Industry) Regulations, S.I. 34 of 2009; the National Environmental (Wetlands, River Banks and Lake Shores Protection) Regulations, S.I. 26 of 2009; the National Environmental (Watershed, Hilly, Mountainous and Catchment Areas) Regulations, S.I. 27 of 2009; the National Environmental (Ozone Layer Protection) Regulations, S.I. 32 of 2009; the National Environmental (Noise Standards and Control) Regulations, S.I. 35 of 2009; and the National Environmental (Permitting and Licensing Systems) Regulations, S.I. 29 of 2009.

court for private individuals. However, this right is limited to disputes concerning the amount of compensation payable under any provision of the Act.[279]

2.3 Non-Judicial Remedies

2.3.1 Public Complaints Commission – Ombudsman

The Public Complaints Commission (Nigeria's Ombudsman) is a quasi-judicial body with independent status established by the Public Complaint Commission Act.[280] The duties of the Commission, as evident from its mandate, extend to investigating and conducting research, either by *suo moto* or on complaint by a member of the public, any administrative actions taken by governmental Ministries/Departments/Agencies (MDA's), statutory corporations, private companies and any officer or servant of these bodies.[281] It is also empowered to review the administrative procedures of any court of law in Nigeria.[282] The administrative actions that the Commission is mandated to investigate are those that will occasion injustice to any citizen of Nigeria or those resident in Nigeria.[283] These include actions which are, or appear to be: contrary to any law or regulation; mistaken in law or arbitrary in the ascertainment of fact; unreasonable, unfair, oppressive or inconsistent with the general functions of administrative organs; improper in motivation or based on irrelevant considerations; unclear or inadequately explained; or otherwise objectionable.[284] The Commission's duties are therefore geared towards preventing maladministration and to a considerable degree, corruption in society.[285] In discharging its duties, the Commission 'shall have access to all information necessary for the efficient performance of its duties under this act, and for this purpose may visit and inspect any premises belonging to any person or body mentioned in subsection (2) of this section.'[286]

The Commission provides its services at no cost to the complainant. The remedies it can provide after due consideration of a complaint include: recommending further consideration of the matter; a modification or cancellation of the offending act; an alteration of the offending regulation or ruling and furnishing of full reasons behind a particular administrative or other act; and prosecution of a person

279. s19.

280. Cap. P37 LFN 2004, at ss 1(1) & 5(5). The Act, which was modelled after the Netherlands model of Ombudsman Institution, was adopted based on the report and recommendations of the 1975 Oputa Panel. See Public Complaint Commission (PCC), *Annual Report* (Abuja, 2010), available at http://publiccomplaintsnigeria.org/Annual_Report.php.

281. s5(1).

282. s5 (2).

283. *Ibid*.

284. *Ibid*.

285. See PCC Annual Report *op. cit.* note 280.

286. See PCC Act *supra* note 280, at s 5 (2).

if it discovers that a crime has been committed.[287] The services provided by the Commission could be of great benefit to victims of corporate human rights abuses, who most often are under-privileged and hence, cannot afford access to judicial remedies.[288] It is also attractive to affluent victims who may not have the patience to endure the frequent adjournments of cases in the Nigerian court system.[289]

There are, however, significant limitations to the remedies offered by the Commission: First, it lacks jurisdiction in matters 'in which the complainant has not, in the opinion of the Commissioner, exhausted all available legal or administrative remedies.'[290] This means that in many cases of violations, instead of being able to take a complaint directly to the Ombudsman to seek a quick and inexpensive resolution, a claimant will first have to take their case through the court or arbitration process.[291] Labour matters may be the exception to this, as the PCC regularly deals with cases regarding wrongful termination of service.[292] Secondly, the Commission is not allowed to investigate any matter 'relating to any thing done or purported to be done in respect of any member of the Armed Forces in Nigeria or the Nigeria Police under the Nigerian Army Act, the Navy Act, the Air Force Act, or the Police Act, as the case may be.'[293] Hence, victims of human rights abuses by the Nigerian Security forces aided or abetted by a corporation may be excluded from the services offered by the Commission. Thirdly, the Commission may not investigate any matter in which the complainant has no personal interest.[294] This provision precludes NGOs and other public interest bodies from bringing complaints of corporate human rights abuses to the attention of the Commission. Finally, the Commission has no explicit enforcement power under the Act. This limitation, as decried by the Commission:

> *"has posed an ominous stance in the realization of its goal and attributed to its failure to address the issue of unresponsive officials. Often times these officials have had to question the extent to which the Commission would go if they remain adamant and fail to take any action as recommended."*[295]

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287. s7.
288. See PCC Annual Report *op. cit.* note 280; and Peter Akpochafo, 'More Nigerians patronise complaint commission for redress' *Nigerian Pilot*, 8 June 2011, available at http://www.nigerianpilot.com/?q=content/more-nigerians-patronise-complaint-commission-redress.
289. *Ibid*.
290. PPC Act *supra* note 280 at s 6(1).
291. See Bennett A. Odunsi, *The Role of the Ombudsman in Nigeria* (The Essdwin Mellen Press, 2007) 97.
292. *Ibid*.
293. PCC Act *supra* note 280 at s 6(1).
294. *Ibid*.
295. See PCC Annual Report *op. cit.* note 280.

2.3.2 The National Human Rights Commission

The National Human Rights Commission of Nigeria was established as an independent corporate body by the Nigerian Human Rights Commission Act of 1995 as amended.[296] The Commission has been accredited by the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights as being in compliance with the Principles relating to the Status of National Institutions (Paris Principles).[297] The mandate of the Commission, which was recently expanded by virtue of the 2010 Amendment Act, extends *inter alia* to: dealing with all matters relating to the promotion and protection of human rights guaranteed under the Nigerian Constitution, United Nations Charter, the Universal Declaration of Human Rights, and all international and regional human rights instruments to which Nigeria is a party; monitoring and investigating all alleged cases of human rights violations in Nigeria and making appropriate recommendations to the Federal Government for the prosecution and such other appropriate actions; assisting victims of human rights violations and seeking appropriate redress and remedies on their behalf; organising local and international seminars, workshops and conferences on human rights issues for public enlightenment; undertaking research and educational programmes and such other programmes for the promoting and protection of human rights; receiving and investigating complaints concerning violations of human rights and making appropriate determination; referring any matter of human rights violation requiring prosecution to the attorney-general of the Federation or a State as the case may be; or with the leave of the court, intervening in any proceeding involving human rights violations.[298]

In the exercise of its mandate, the Commission is empowered *inter alia* to: conduct investigations and enquiries in such manner as it may consider necessary; institute any civil action on any matter it deems fit in relation to the exercise of its functions, make determination as to the damages or compensation payable in relation to any violation of human rights where it deems this necessary in the circumstances of the case; and do other things as are necessary, conducive, incidental, or expedient to the discharge of its functions.[299] It also has power to summon and interrogate any person, body or authority to appear before it for the purpose of public enquiry aimed at the resolution of a complaint of human rights violation; issue warrant to compel the attendance of a person who refuses or neglects to attend such public enquiry; and compel any person, body, or

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296. No 22 of 1995, ss 1 (1)-(2) & 6(3). Amended by the National Human Rights Commission (Amendment) Act, 2010.

297. Accreditation status as at August 2011 is available at http://www.ohchr.org/Documents/Countries/NHRI/Chart_Status_NIs.pdf.

298. s5.

299. s6(1).

authority to furnish information in his or her custody relating to any matter under its investigation.[300]

The expanded mandate and powers of the Commission has made it a viable alternative forum for obtaining redress by victims of corporate human rights abuses, especially the poor and vulnerable. The NHRC is an inexpensive forum and, unlike the PCC, the NHRC is now empowered not only to make in appropriate circumstances determination regarding damages payable for corporate human rights abuses, but also, to institute legal action against corporations for such abuses. In addition, the complaint procedure has been liberalised, as the Commission allows the following classes of person to bring a complaint before it: any person acting on his/her own behalf; any person acting on behalf of another who cannot act in his/her own name; any person acting as a member of or in the interest of a group or a class of persons; and an association acting in the interest of its members.

Perhaps the major challenges before the Commission, in view of its expanded mandate, are the shortages of funding,[301] and the need to secure the good-will of the office of the Attorney-General to co-operate with the Commission in the prosecution of corporations involved in human rights abuses.

300. s6(2).

301. The fund of the commission is now a charge on the consolidated revenue fund of the Federation. See s12.

3. Obstacles to Accessing Justice

The ability of victims to seek redress for a violation of these rights is generally undermined by a series of structural or systemic factors relating to the primacy of the rule of law and the independence of the judiciary in Nigeria.

3.1 Access to courts and legal representation

In Nigeria, access to courts and legal representation for victims of corporate human rights abuses ultimately depends on the ability of the victims in procuring the requisite financial resources to file court process as well as to afford legal services. Hence, access to courts and legal representation in Nigeria is at least partly driven by socio-economic factors.[302] One of these socio-economic factors is poverty. Presently, poverty is widespread in Nigeria despite the abundance of natural resources. This is evident from the fact that it regularly occupies the bottom places in the United Nations Development Programme (UNDP) quality of life index.[303] Poverty has an adverse effect on access to courts and legal representation by negatively affecting the ability of victims to retain lawyers and use legal institutions, as well as offsetting the opportunity cost generated by being away from income-generating activities in the course of the litigation.[304] As aptly observed by Michael Anderson, '...it is litigants and their lawyers who determine which disputes will reach the courts, when and how often courts will be petitioned, and how intensively conflicts will be pursued.'[305] The effect of poverty in hindering victims of human rights abuses from having access to courts and legal representation may have been mitigated by the recognition of public interest litigation under Nigeria's legal system. However, the fact that most NGOs and other public interest bodies/individuals are located in urban areas, which most often are far from the poor rural areas where abuses often occur, may deny victims of the benefits of public interest litigation.

One key element of the solution lies in the effective operation of the Legal Aid scheme in Nigeria. The essence of the scheme, established by the Federal Government under the Legal Aid Council Act,[306] was to enable impecunious Nigerians to bring their suits and conduct their defence at the expense of the State. However, the capacity of the scheme in enabling poor rural victims of cor-

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302. Michael Anderson, *Access to Justice and Legal Process: Making Legal Institutions Responsive to Poor People in the LDC*, Paper for Discussion at WDR Meeting, 16-17 August 1999, at pp. 9 & 18. Available at http://siteresources.worldbank.org/INTPOVERTY/Resources/WDR/DfiD-Projectpapers/anderson.pdf (Hereinafter Anderson II), accessed in July 2011.

303. For example, see United Nations Development Programme (UNDP), *'Human Development Indices: A Statistical Update'* (New York: UNDP, 2008) 27.

304. Amechi *op. cit.* note 19 at 112.

305. *Op. cit.* note 302 at 9.

306. Cap. L9 LFN 2004.

porate human rights abuses to bring their claims to court is limited, as the Legal Aid Council that manages the Scheme has not been able to establish enduring structures in each local government area in the country. The main contributory factor to this state of affairs is chronic underfunding.[307] According to the Director-General of the Legal Aid Council of Nigeria, 'except for the first five years of the operation of the scheme, the government has not lived up to expectation. The scheme has been under-funded over the years and has had a low priority on the national agenda.'[308] Perennial underfunding is also likely to affect the impacts of the NHRC, despite its expanded mandate and powers, in ensuring access to judicial remedies for victims of corporate human rights abuses.[309]

Even where recourse to the Legal Aid Scheme, NHRC, and public interest NGOs and bodies are easily available, the lack of awareness of their legal rights by many poor rural victims of corporate human rights abuses has limited access and the use of remedial measures in court.

3.2 The exercise of jurisdiction

Section 36 (1) of the 1999 Constitution provides for the right to a fair hearing within a reasonable time by a competent court or tribunal. This right is not subject to restriction or limitation. However, a court is competent to decide questions only if it has jurisdiction.[310] Jurisdiction, in this sense, refers to the legal competency of a court to hear and determine judicial proceedings. Jurisdictional competency must be present over subject persons, whether they are legal or natural persons, and over the subject matter of the dispute.[311] Jurisdiction is fundamental and lack of it is fatal to any proceeding, as it will render such proceeding void.[312] Rules of jurisdiction are determined first by the Constitution, which allocates power to specific courts,[313] and then, within this scheme, by the National Assembly.[314] However, both the Constitution and legislation enacted by the National Assembly are not exhaustive and the courts have the power to interpret or develop rules

307. See Mrs Uju Aisha Hassan Baba, *'An Overview of the State of Legal Aid Scheme in Nigeria – Pre-1991'*, Paper presented at Open Society Justice Initiative Legal Aid Meeting, London, 18 January 2007, at p. 1.

308. *Ibid*, at 2.

309. See Mrs K.F. Ajoni, *'My Experience in Driving the Mandate of the National Human Rights Commission of Nigeria and the Challenges Of NHRI's In The African Sub Region'*, Paper presented at the Conference for Commonwealth National Human Rights Institutions, Marlborough House, London, 26-28 February 2007, at pp. 7-8.

310. See *Western Steel Works Ltd v. Iron and Steel Workers Union* (1986) 3 NWLR (pt 301) 617.

311. See *Otukpo v. John* (2000) 8 NWLR (pt 669) 507.

312. See *Madukolu v. Nkemdilim* (1962) 1 ALL NLR 587; and *Sanusi v. Ayoola* (1992) 2 NWLR (pt 265) 275.

313. For example, see ss 232-233 (Supreme Court's original and appellate jurisdiction); 239-240 (court of Appeal original and appellate jurisdiction) 251 (Federal High Court jurisdiction) and 272 (state high court jurisdiction).

314. For example, see the Supreme Court (Additional Original Jurisdiction) Act 2002; and Federal High Court Act Cap. 134 LFN 1990.

on jurisdiction as the interests of justice require. The conditions under which a court may assume jurisdiction were laid down by the Supreme Court in *Madukolu v. Nkemdilim*,[315] as follows:

(a) The court must be properly constituted as regards numbers and qualification of the members of the bench and no member is disqualified for one reason or another;

(b) The subject matter of the case must be within the court's jurisdiction and there must not be any feature in the case which prevents the court from exercising jurisdiction;

(c) The case before the court must be initiated by due process of law and upon fulfilment of any condition precedent to the exercise of jurisdiction.

A failure to meet any of these three conditions could vitiate the proceedings.[316] Defect in jurisdiction is determined from examining the claim of the plaintiff.[317] Hence, a plaintiff must make sure that the court in which they seek to commence an action has jurisdiction over the parties, the subject matter, geographical location and other considerations.[318] The issue of jurisdiction may be raised at any time of the proceedings, including during appeal for the first time without leave,[319] and the court is bound to decide on the issue once it has been raised.[320] Jurisdiction of a court may be affected by factors constituting barriers to accessing justice.

3.2.1 Impediments to Jurisdiction – *Forum non conveniens*

Forum non conveniens is a common law doctrine whereby courts may refuse to take jurisdiction over matters where there is a more appropriate forum available to the parties. As a doctrine of conflict of laws recognised under Nigerian laws, it applies between courts in different jurisdictions in the same country, and is a mechanism for ensuring that the most suitable court has jurisdiction over a matter in the interest of all the parties and for the ends of justice.[321] This doctrine is usually called into operation when the court has to exercise its discretionary

315. *Supra* note 312.

316. *Ibid*. See also *Ajao v. Popoola* (1986) 5 NWLR (Pt.45) 802.

317. See *Government of Gongola State v. Tukur* (1989) 4NWLR (pt 117) 592; and *Egbuonu v. B.R.T.C.* (1997) 12 NWLR (pt 531) 29.

318. See D.I. Efevwerhan & P.C. Okorie 'Commencement of Actions' in A.F. Afolayan & P.C. Okorie (eds) *Modern Civil Procedure Law* (Dee-Sage Nigeria Limited, Lagos, 2007) 102.

319. See *Yusuf v. Co-operative Bank Ltd* (1994) 7 NWLR (pt 359) 679; and *Ozomo v. Oyahkire* (1985) 1 NWLR (pt2) 195.

320. See *Okafor v. Attoney-General of Anambra State* (1991) 6 NWLR (pt 200) 659; and *Barclays Bank v. Central Bank of Nigeria* (1976) 6 SC 175.

321. See *Broad Bank of Nigeria Ltd v. Alhaji S. Olayiwola & Sons Ltd & Anor*, S.C. 288/2002, delivered on 14 January 2005.

power to grant leave for service of writ of summons, or originating summons out of jurisdiction. In such instances, the court may refuse to grant such leave if it is of the opinion that 'the person sought to be served outside the jurisdiction can be conveniently tried elsewhere.'[322] The doctrine may also be invoked as a mechanism to halt proceedings by a defendant who must show that he or she would suffer a great inconvenience if the trial was held in a particular jurisdiction.[323] This was implicit in *Broad Bank of Nigeria Limited v. Alhaji S. Olayiwola & Sons Limited and Anor*, where the Supreme Court, in refusing to set aside the decision of the High Court granting the Plaintiff/Appellants leave to serve the defendant/respondent out of jurisdiction, stated that: 'the respondents have not complained that they would suffer a great inconvenience if the trial was held in Lagos High Court and in any case it is, as in this case, for the court to exercise its discretionary power to determine the *forum conveniens*. There is nothing to show adopting the abstract issue of technicality that the respondents would be adversely affected by the irregularity committed.'[324]

The Federal High Court and the State High Court have concurrent jurisdiction in human rights matters that do not implicate the administration or management and control of the Federal Government, or any of its agencies, or falls into matters within the jurisdiction of the Federal High Court, as contemplated under section 251 of the Nigerian Constitution. Hence, there is a real possibility in appropriate cases of either court invoking this doctrine. It should be noted that while different High Courts in different States may have concurrent jurisdiction over a matter, the doctrine will not apply, as the litigation of human rights abuses under FREP 2009 Rules can only be undertaken in 'the State where the infringement occurs or is likely to occur.'[325] However, the legal position would be different where the victim decides to rely on the tort rules or any other process besides the FREP 2009 Rules to raise a claim against the company abusing his or her rights. This is because two State High Courts may have concurrent jurisdiction over the matter, as most High Courts' rules of civil procedures provide that actions can only be commenced where the defendant resides or carries on business or where the cause of action has arisen.[326]

The application of the doctrine may constitute a hindrance to a victim suing a corporation for human rights harm as the doctrine disproportionately favours the defendants, especially when the Court decides that factors such as the location of the evidence and the witnesses, the applicable law, and the nature of the

322. *Ibid*.

323. *Ibid*.

324. *Ibid* (Per Pat-Acholonu, JSC).

325. Order II, Rule 1, FREP 2009 Rules *supra* note 62; and s 46 (1), Nigerian Constitution *supra* note 15.

326. See Order 2, Rule 3, the High Court of Lagos (Civil Procedure) Rules 2004; Order 9, Rule 3, the High Court of the Federal Capital Territory (Civil Procedure) Rules, Abuja 2004; and Order 10, Rule 3 the High Court of Kano (Civil Procedure) Rules 1988.

alternative forum, militate against the exercise of jurisdiction. In fact, it can be argued that the doctrine mainly favours the defendant, as the plaintiff is prevented from instituting an action in a court of concurrent jurisdiction that may provide more favourable conditions, such as 'damages awarded on a higher scale; a more complete procedure of discovery; a power to award interest; a more generous limitation period.'[327]

3.2.2 Impediments to jurisdiction – Jurisdictional dichotomy

The jurisdiction of both the Federal High Court and the State High Court are outlined in sections 251 and 272 of the 1999 Constitution respectively.[328] By virtue of these provisions, the hitherto unlimited jurisdiction enjoyed by the State High Court under section 232 of the 1979 constitution has been removed. The result is that the State High Court cannot entertain matters in respect of which the Federal High Court is conferred with exclusive jurisdiction under section 251.

The effect of this dichotomy in jurisdiction on the victim's ability to attain access to justice is better illustrated by *Shell Petroleum Development Company (Nig.) Ltd v. Isaiah*.[329] A summary of the facts of this case is that sometime in July 1998, a tree fell on the appellant's pipeline carrying crude oil from the production head to the flow station. The tree dented the pipeline and the appellant employed a contractor to repair the pipeline. In the course of the repairs and in the attempt to replace the dented portion of the pipeline, noxious crude oil freely flowed into the respondents' dry land, swamps and streams called Miniabia, causing pollution and damage. The respondents maintained that the appellants had not constructed an oil trap to contain the spillage and no other precautions had been taken by the appellants. The spillage adversely affected the respondents in the use of their land, swamps and streams. The respondents sued the appellants at the High Court of Rivers State, Isiokpo, claiming compensation for loss of marine and domestic life, damages for negligence and damages sustained under the Rule in *Rylands v. Fletcher.* The appellants denied liability and pleadings were filed and exchanged. At the conclusion of the hearing the Court awarded N22 Million to the respondents in damages. Dissatisfied, with the decision of the High Court, the appellant appealed to the Court of Appeal and raised the issue of jurisdiction. The Court of Appeal dismissed the appeal and the appellant further appealed to the Supreme Court and again raised the issue of jurisdiction. In determining the appeal, the Supreme Court considered Section 7(1) of the Federal High Court (Amendment Act), 1991; Section 30 (1) (0) of the Constitution (Suspension and Modification)

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327. See *Spiliada Maritime Corp v. Consular Ltd. Subnom Spiliad* (1987) AC 460 (Per Lord Dunedin).

328. *Supra* note 15.

329. (2001) 11 NWLR (pt 723) 168.

Decree No. 107 of 1993; and Section 251 (1) (n) of the 1999 Constitution. The Supreme Court held:

> *"Oil spillage from an oil pipeline is a thing associated with, related to, arising from or ancillary to mines and mineral, including oil fields, oil mining, geological surveys and natural gas as provided in Section 7 (1) and (2) of Decree No. 60 of 1991. Therefore by the provisions of Section 7 (1) (p) of that Decree which came into operation on 26th August, 1993 by virtue of Section1 (a) of Decree No. 16 of 1992, the High Court lacks the jurisdiction to hear and determine any suit arising therefrom."* [330]

The consequence of this decision is to compel all prospective plaintiffs in Rivers State, for example, to approach the Federal High Court in Port Harcourt to adjudicate their grievances, no matter how remote their communities may be from Port Harcourt. The problem of jurisdictional dichotomy is more pronounced where there is no judicial division of the Federal High Court in their State, as they would have to bring their claim before the division of the Federal High Court administratively responsible for the State instead of a State High Court.[331] The effect of this jurisdictional dichotomy is that most people whose rights have been adversely affected, especially those associated with the activities of the oil industry in Nigeria, who are often located in the rural areas of the State, will not have the financial resources to institute and diligently prosecute enforcement actions at the Federal High Court.[332]

3.2.3 Impediments to Jurisdiction – Statutes of Limitation

There are laws that operate as bars to jurisdiction by limiting the period under which a victim can bring actions against an alleged rights abuser. Hence, in commencing a proceeding against a corporation, a victim will need to take cognisance of the fact that such action must be brought within the time limit prescribed by the statute of limitations, otherwise it will be statute-barred.[333] The rationale for the statute of limitations is based on the public policy that there should be an end to litigation.[334] When an action is statute-barred, the victim's right of action, right of enforcement, and right of relief is removed, leaving him or her with a bare or empty cause of action which cannot be enforced.[335] As recently stated by the Supreme Court in *Alhaji Jibrin Hassan v. Dr Muazu Aliyu and Others*,[336] '[t]he effect

330. *Ibid*. at 173.

331. Order 11 (1), FREP 2009 *supra* note 62.

332. See generally Amechi II *op. cit.* note 68 at 331-332.

333. See *Fred Egbe v. Adefarasin* (1985) 1 NWLR (pt 3) 549 at 568-569; and *Alhaji Jibrin Hassan v. Dr Muazu Aliyu & others*, SC. 170/200, delivered on 16 July 2010.

334. See Amokaye *op. cit.* note 188 at 677.

335. *Ibid*.

336. *Supra* note 333.

of a statute of limitation on the action of a plaintiff therefore is that it takes away the right of the plaintiff to institute the action but leaves him with his cause of action intact, though without the right to enforce same or right to judicial relief.'[337] Time begins to run from the date that the cause of action accrued.[338] Limitation of action does not arise from an act of parties and the question of limitation of action is not a matter of practice and procedure; it is rather a matter of law as contained in the relevant statutes.[339] Hence, once an action is statute-barred, the only order that the court can make is one of dismissal, since nothing in law can operate to revive the plaintiff's right of action already extinct.[340]

Under the Limitation Law of Lagos State,[341] an action founded on tort may not be brought after the expiration of six years from the date on which the cause of action accrued.[342] However, where the tort involves a personal injury to the plaintiff or any other persons, the limitation period is three years from the date on which the cause of action accrued, or date of knowledge (if later) of the injured person.[343] Where the tort was committed by a public servant, by virtue of the Public Officers Protection Act,[344] it must be commenced within three months after the cause of action has accrued.[345] The cause of action accrues within the next three months after the act, neglect or default complained of, or in the case of continuance of damage or injury, within three months after cessation.[346] However, the public officer cannot claim such protection where he or she acts outside the scope of his authority or without a semblance of legal justification.[347]

The period of limitation is determined by reference to the writs of summons and statement of claim alleging when the wrong, which has enabled the plaintiff a cause of action, was committed and by comparing the date with the date on which the writ of summons was filed. If the time on the writ is beyond the period allowed by limitation law, then the action is statute barred. However, this must be specifically pleaded by the defendant, otherwise the defendant will be stopped from

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337. *Ibid*, at 26.

338. *Eboigbe v. NNPC* (1994) 5 NWLR (Pt.347) 649.

339. *Ibid*, at 269, para. 6. See also *Kaycee v. Prompt Shipping Company Ltd* (1986)1 NWLR (Pt.15) 192; and *Raleigh Industries Limited v. Nwaiwu* (1994) 4 NWLR (Pt.341) 771.

340. *Ibid*, at 270, para. 3.

341. s9(1), Cap. 118, Laws of Lagos State, 1994. Note that most states in Nigeria have adopted their limitation laws replacing the English Limitation Act of 1623, which is a statute of general application in Nigeria. It is left for individual claimant to find the provisions of the Limitation law applicable in the State where the cause of action arose.

342. See *Aremo II v. Adekanye* (2000) 14 NWLR (pt 686) 15; and *Julius Berger v. Omogui* (2001) 6 SC 187.

343. s9 (2) Limitation Law of Lagos State *supra* note 341.

344. Cap. P41 LFN 2004.

345. s2 (a).

346. *Ibid*.

347. Ss 27-28. See also *C.B.N v. Okojie* (2004) 10 NWLR (pt. 882) 448 at 523; *Nwankwere v. Adewunmi* (1966) All NLR 119 at 124; *Offoboche v. Ogoja Local Government* (2001) 16 NWLR (pt 739) 458.

raising it as a defence.[348] The applicability of the statutes of limitation to human rights matters is now in doubt, as FREP 2009 provides that 'an application for the enforcement of fundamental rights shall not be affected by any limitation statute whatsoever.'[349] However, this provision will only apply to claims brought under the FREP 2009 Rules and not to those brought under the rules of tort and any other procedure.

3.2.4 Impediments to Jurisdiction – Pre-action Notice

Pre-action notice, mostly stipulated in statutes setting up government corporations and agencies, refers to the time frame within which any person having any grievance against these corporations may bring an action against them. The rationale behind pre-action notice is not necessarily to enable the affected corporation to prepare its case, but rather to see whether the matter may be settled out of court.[350] The negative effect of jurisdiction is that courts are required to decline jurisdiction over any action brought outside the period prescribed by the relevant statutes for giving notice of the injury to the defendant.[351] The result is that the offending party is shielded from being proceeded against, even though an action may be ripe for litigation. A typical example of a provision prescribing pre-action notice is section 12(2) of *the Nigeria National Petroleum Act*,[352] which provides that:

> *"No suit shall be commenced against the corporation before the expiration of a period of one month after written notice of intention to commence the suit shall have been served upon the corporation by the intending plaintiff or his agent; and the notice shall clearly and explicitly state the cause of action, the particulars of the claim, the name and place of abode of the intending plaintiff, and the relief which he claims."*

Although the validity of the requirement of pre-action notice with regard to the constitutional right of access to court has been upheld by Nigerian courts on various occasions,[353] the requirement has been subjected to stringent criticism by some learned commentators, who question their constitutional validity in view

348. See *Oyebamiji v. Lawson* (2008) 10 MJSC 154 at 165 Paras E-F; *Iheanacho v. Ejiogu* (1995) 4 NWLR (Pt 389) 324; and *Allen v. Otubeko* (1997) 5 NWLR (Pt 506) 638.

349. *Supra* note 62, at Order 3 Rule 1.

350. See Niki Tobi 'Environmental Litigation' in Struan Simpson & Olanrewaju Fagbohun (eds), *Environmental Law and Policy* (Law Centre, Faculty of Law, Lagos State University, 1998) 178 at 191.

351. See *Abakaliki Local Government Council v. Abakaliki Rice Mills Owners Enterprises of Nigeria* (1990) 6 NWLR (pt. 155) 182; *University of Ife v. Fawehinmi Construction Co. Ltd* (1991) 7 NWLR (pt. 201) 26; *Nigerian Cement Company Ltd v. Nigerian Railway Corporation & Anor* (1992) 1 NWLR (pt 220) 747; and *Obeta and Anor v. Okpe* (1990) 1 NWLR (pt 220) 747.

352. *Supra* note 5. See also s 32(1), NESREA Act *supra* note 152.

353. See Abakaliki Local Government Council case *supra* note 351; and Obeta case *supra* note 350 at 448.

of the express provisions of the constitution.[354] As aptly observed by Honourable Justice Karibi Whyte:

> *"it is difficult to justify the validity of this provision vis-à-vis the provision of section 1(3) and section 36(1) of the Constitution. These two sections read together with sections 6(6)(b) and 46(1) of the Constitution show that section 12(2) of the NNPC Act … [are] clearly in conflict with the 1999 Constitution and void to the extent of its inconsistency therewith."*[355]

3.2.5 Impediments to Jurisdiction: Extra-Territorial Jurisdiction

There is no statute conferring on Nigerian courts extra-territorial jurisdiction to consider civil cases concerning human rights-related abuses by Nigerian companies outside the territory of Nigeria. Persons outside the territory of Nigeria cannot enforce their human rights in Nigerian courts, as both the Constitution and African Charter Ratification Act are considered to have extraterritorial effects. The effect of this is that companies cannot be tried or have damages awarded against them in Nigerian courts for their actions constituting human rights abuses against Nigerian citizens or foreign nationals outside the territory of Nigeria. Where such abuse constitutes a crime, Nigerian Courts can only assume jurisdiction if a part of the offence capable of being committed by a corporation has been committed within the country.[356] The Geneva Conventions Act which is the only statute explicitly imposing extraterritorial jurisdiction for crimes committed outside Nigeria, as earlier noted, may not apply to companies given the only penalties established by law are prison or death (see Section 1.4 above).

Successful Cases and Arguments

Gbemre v. Shell[357]

The plaintiff brought the action on behalf of himself and the Iwherekan community in Delta State. In the action, supported by three NGOs, Friends of the Earth (Nigeria), Climate Justice Programme (United Kingdom), and Environmental Rights Action, he claimed *inter alia* that the flaring of gas by the company within the Iwherekan community constituted a violation

354. For example, see Chief Wole Olanipekun (SAN) *'Access to Justice and Legal Process: Making the Legal Institutions Responsive'*, Paper delivered at a Public Lecture Organized by the Honourable Justice Kayode Eso Chambers, Faculty of Law, University of Lagos, Nigeria, on Wednesday, 17th Day of June, 2009, at p. 33 (Hereinafter Olanipekun II).

355. See A.G. Karibi-Whyte, 'Constitutional Foundations of the Powers of the Court' (2003) *Journal of the Nigerian Bar Association* 154 at 161.

356. *Queen v. Patrick Osoba* (1961) All N.L.R. 237.

357. *Supra* note 250.

of the right to life and human dignity under the constitution of the Federal Republic of Nigeria 1999, and articles 4, 16 and 24 of the African Charter. For its part, the first defendant denied it was flaring gas in the Iwherekan community. It further argued that in all events, gas flaring was authorised by section 3 of the Associated gas Re-Injection Act and section 1 of the Associated Gas Re-injection (Continued Flaring of Gas) Regulations 1984.

In its judgment, the Federal High Court held that the actions of the MNC in flaring gas were illegal and in violation of the constitutionally guaranteed fundamental rights to life and human dignity as contained in sections 33(1) and 34(1) of the Constitution, as well as articles 4, 16, 24 of the African Charter. In upholding the claim, the Federal High Court ordered Shell to stop gas flaring. An important aspect of the decision is the Court's voiding of sections of the Associated Gas Re-injection Act and Regulations relied upon by the first defendant for being inconsistent with the applicants' constitutional rights.

3.3 Evidence and information gathering

In the above discussion of tort claims relating to negligence, it was apparent that one of the main obstacles faced by victims in bringing a successful case to court arises from difficulties relating to evidence gathering and the associated costs. Corporations usually have a natural advantage over plaintiffs in these circumstances, as they have access to scientific experts, laboratory tests and lawyers that are unattainable for most claimants (even those with the support of legal aid or non-governmental organisations). This could be especially difficult when transnational corporations are involved. The requirement for the admissibility of scientific evidence places a victim, who as a plaintiff bears the burden of proof, at a significant disadvantage to companies.[358] Section 135 of the Evidence Act provides that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. The onus is on the plaintiff to prove his or her case on the preponderance of evidence.[359] On the issue of the admissibility of scientific evidence, the Plaintiff's evidence can be rebutted by the defendant company which may hire the services of experts in the particular field in question in order to rebut the evidence given to support the plaintiff's case. This was evident in *Ogiale v. Shell*,[360] where the defendant company also hired the services of the experts who gave evidence in support of the company to disprove the expert opinion given by the

358. See *Osipitan op. cit.* note 169 at 115-125.

359. See *Ogiale v. Shell* (1997) 1 NWLR (pt 480) 148.

360. *Ibid*.

plaintiff. This is a source of serious disadvantage for the Plaintiff, as the Defendant companies either have their own laboratories or have sufficient resources to hire the services of the required expert. In such instances, the court usually relies on the expert evidence adduced by the defendants to disprove fault or causation,[361] and most often rules in favour of the defendants.[362]

A good example is the Supreme Court decision in *Seismograph Services Ltd v. Akpruoyo*,[363] a case where the respondent alleged damages to his building in the course of the appellant's seismic operation. The respondent failed to call any expert evidence in support of the causal link between the damages and the appellant's seismic operation as alleged. The appellant called a seismologist who gave unchallenged evidence that the appellant's operations did not cause the damages allegedly suffered by the respondent. In reversing the decision of the lower court that the appellant was liable to the respondent for damages, the Supreme Court held that the learned trial judge ought to have accepted and acted upon the unchallenged expert evidence.[364] The Court further declared that:

> *"The evidence of the 4th defence witness is that of an expert. He knows the soil and therefore his opinion is relevant and deserved consideration. We think that, since such expert opinion has not been challenged, it could have been considered as the only evidence on the issue of liability so far as the seismic operations are concerned."*[365]

The burden of gathering evidence is made more cumbersome by the fact that there is no right of access to information held by government statutory corporations and private companies except private companies providing services, performing public functions or utilising public funds.[366] This effectively denies a litigant the opportunity of accessing information gathered or held by both statutory corporations and private companies in pursuing his or her claim.

3.4 Obstacles during the Court Proceedings – Delays and Unreasonable length of proceedings

It is a well-accepted maxim that justice delayed is justice denied. This is particularly true in Nigerian courts, where inordinate delays in the prosecution of cases has made litigation a very expensive and tortuous process for victims of

361. *Ibid.* See also *Ogbeni* case *supra* note 175; and *Akpruovo* case *supra* note 175.

362. *Ibid*. See also *Chinda and 5 others v. Shell-BP Petroleum Development Company* (1974) 2 RSLR 1; and *Shell Petroleum Development Company v. Chief W. W. Amachree and 5 others* (2002) FWLR 1656.

363. *Supra* note 175.

364. *Ibid*.

365. *Ibid*, at 136 (per Sowemimo, JSC).

366. See the definition of 'public institution' under section 31 of the Freedom of Information Act, 2011.

human rights abuses.[367] This inordinate delay is caused by a combination of factors including, most importantly, lawyers employing delaying tactics to frustrate victims, who, in most cases, might be compelled to accept the modest sum offered as compensation, rather than prosecuting the case to its final conclusion. Such tactics include filing court processes out of time, thereby contributing to the unacceptable situation whereby the issuance of court process and service, which should not take more than a matter of days, now takes months and even years in many of Nigerian courts.[368] This was illustrated in *SGBN v. Aina*,[369] where the proceedings of a High Court on land matters was set-aside on appeal on the ground of non-service of hearing notice. It should be noted that the suit was filed in 1991, while the Ruling of the High Court was delivered on 3 April 1996. The Court of Appeal heard the appeal and judgment was delivered on 8 July 1999. Other methods often used by counsel to precipitate undue delay in the prosecution of cases may constitute reckless use of *ex-parte* applications, abuse of court processes, misuse of the right to stay proceedings, seeking or applying for frivolous adjournments and misuse of out of court settlement.[370] The use of delaying tactics has been judicially disapproved. In *Dapianlong v. Dariye*,[371] the Supreme Court, per Onnoghen JSC, held:

> *"I have to put it on record that the desire of the judiciary to curb the now notorious attitude of some legal practitioners ad politicians faced with very bad cases to employ delay tactics to either defeat the ends of justice or postpone the evil day, needs the encouragement of all well meaning legal practitioners, particularly the very senior members o the profession."*

Also in *U.T.B v. Dolmetsch Ltd*,[372] the Supreme Court stated:

> *"Once again we are faced with a very unfortunate situation in which an action commenced in February 1997 is yet to go beyond the stage of pleadings ten years after, due to interlocutory appeals on interim order of injunction. In the instant case, appellant kept on changing his case as to why the ex parte order of injunction ought to be discharged from one court to the other. Meanwhile, the substantive action still pends at the Federal High Court, Enugu when it would have benefited both parties if all the money and energy had been directed at the hearing and determination of the substantive action. Legal practitioners need to review their approach to legal practice particularly in company matters since the economy of Nigeria currently is private sector driven and needs our support*

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367. See Olanipekun II *op. cit.* note 354 at 9-10.

368. *Ibid*, at 12.

369. [1999] 9 NWLR (Pt. 619) 415.

370. See Olanipekun II *op. cit.* note 354 at 13-19.

371. (2007) 8 M.J.S.C140, particularly at page 192 paragraph G.

372. (2007) 8 M.J.S.C. 1, particularly at page 19, paragraphs G-A.

and encouragement to create and sustain an enabling environment for it to grow properly."

3.5 Obstacles during the Court Proceedings – Restrictive Procedural Rules

The various rules of court play a dominant role in adjudication of cases, and hence, are vital to ensuring access to justice for litigants. These rules regulate procedure from the commencement of actions up to judgment. Even after judgment, the rules play a vital part in realization of the judgment objective during execution. Hence, where the rules are rigid and inflexible, they may end up denying access to judicial remedies to victims of corporate human rights abuses. An example of such a restrictive rule is provided under the Lagos High Court Civil Procedure Rule 2004, which stipulates that whenever a case is struck out, a penalty of two-hundred (200) Naira per day must be paid to the court before the matter is relisted. Where the plaintiff does not have the necessary money, the case, however favourable to the plaintiff, cannot proceed. This was evident in *James Akpakpan v. Nigerian Breweries PLC*,[373] where the plaintiff sued for the payment of his gratuity after serving the company for over six years. The company raised technical defences and the matter went to trial, but due to the inadvertence of the plaintiff counsel the matter was struck out in April 2008. Now the cost of relisting the suit would be over N200, 000 representing N200 penalty from 20 April 2008 till date. The same penalty is applicable where the defendant files his defence or any process out of time or where plaintiff delays in taking a particular step in the proceeding.[374]While this may have a positive effect in discouraging delaying tactics, it may be prejudicial to genuine plaintiffs facing difficulties that prevent them from acting expeditiously.

3.6 Obstacles external to the court process – Enforcement of Judgments

Enforcement of judgments is the final stage in the judicial process after the legal right, claim or interest has been determined by way of judgment in favour of the successful party. It is therefore the person who has obtained the final order in his or her favour who has the interest in enforcing the judgment. A judgment may require the payment of money or require a person to do or abstain from carrying out a particular act or acts. Thus, it behoves the winning party to take some preliminary steps to invoke the machinery of the court in various ways to enforce the court order to secure the benefit of his success in litigation. The basic function of enforcement is to provide the judgment creditor with the fruits of the judgment, to obtain for him or her due satisfaction, compensation, restitution,

373. Suit No LD/1754/2004. It was handled by the Civil Liberties Organisation (CLO) but due to paucity of funds, the matter could not be re-listed and the plaintiff has not received justice.

374. Order 9 Rule 5 of the Lagos High Court Civil Procedure Rule *supra* note 326.

performance or compliance with what the court has granted by way of remedy.[375] It is elemental that the judgment or order of the court must be obeyed or complied with, otherwise the authority of the court would be diminished and the legal order would suffer a breakdown[376] The court generally does not have the power and the machinery to act on its own to enforce or police its judgment, therefore, the party who will benefit must invoke the process.

In Nigeria, every process of enforcement of judgment involves fresh, independent and separate proceedings to effectuate the judgment. Hence, the selection of the mode of enforcement is predicated on the nature of remedy granted by the court. Judgment may be declaratory or executory. The former merely proclaims the existence of a legal relation but contains no specific order to be carried out by, or enforced against, the defendant.[377] It cannot be executed without further reference to the court. On the other hand, in an executory judgment, the court declares the rights of the parties and then proceeds to direct the judgment debtor to act in a certain way.[378] Whatever the nature of the judgment, the power of the court to enforce and ensure compliance with them is founded in section 6(6)(a) of the 1999 Constitution, which provides that "the judicial powers of the court shall extend notwithstanding anything to the contrary in this Constitution to all inherent powers and sanctions of the courts of law." In addition, section 287(1)-(3) of the Constitution provides that the decisions of the Federal High Court/High Court of the State, the Court of Appeal and the Supreme Court shall be enforced in any part of the federation by all authorities and persons, and by courts with subordinate jurisdictions. Provisions relating to the enforcement of judgment are copiously provided for in the Sheriff and Civil Process Act,[379] and Judgment Enforcement Rules made pursuant to the Act and Sheriff and Civil Process Laws of the States.

In Nigeria, there is no overwhelming evidence that judgments, once given against companies for human rights abuses, are flagrantly disobeyed, and hence, it is unlikely litigants will be denied the fruits of their labour as a result of direct disobedience of court orders. In any event, disobedience of court orders by companies are rare, as Nigerian Courts have often invoked their coercive power to ensure that the party in whose favour the judgment was given enjoys the benefits of the

375. Chief Afe Babalola, *'Enforcement of Judgement'* 3rd ed (Ibadan, 2004) 1.

376. *Ibid*; and V.M. Aondo 'Enforcement of Judgement' in Afolayan & Okorie (ed) *op. cit.* note 318 at 290.

377. See *Gbemre* case *supra* note 250.

378. See *Akunnia v. Attorney-general of Anambra State* (1977) 5 S.C. 161.

379. Cap. 407 LFN 2004.

decision.[380] The court's attitude towards the disobedience of its orders was aptly reiterated in *Mobil Oil (Nig) Ltd v. Assan*,[381] where the Supreme Court stated that:

> *"It is the plain and unqualified obligation of every person against or in respect of whom an order is made by a court of competent jurisdiction to obey it, unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends to even cases where the person affected by an order believes it to be irregular or even void. A party who knows of an order whether null or void, regular or irregular, cannot be permitted to disobey it."*[382]

Despite the above position of the court, companies, against which orders or judgments have been rendered, have employed various indirect tactics to frustrate the successful victim from enjoying the fruits of his labour.[383] One such tactic is to appeal the judgment and apply to the court for an order of a stay of execution which will put the execution of the judgment on hold pending the determination of the appeal filed.[384] Ordinarily, this would not present much problem, as the general principle is that courts do not make a practice of depriving a successful litigant of the deserved fruits of a judgment.[385] In practice, parties do not wait to obtain the order of the court staying the execution of the judgment. Upon the filing of the application for stay of execution, a party generally ensures that the pendency of the application for stay is brought to the notice of the judgment creditor, as well as the Sheriff, by the service of the motion papers on them. In law, once a party has had notice of such processes, the party is bound to stay the action until the determination of the motion on notice. Such tactic was used by the defendants in the *Gbemre case* thereby leading to the perpetuation of the *status quo* concerning gas flaring in the Iwherekan Community with adverse consequences for the health and wellbeing of the inhabitants.[386] A similar technique

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380. For example, see 'Vitafoam, Vono MDs May Go to Jail' PM News, 2 December 2010, available at http://pmnewsnigeria.com/2010/12/02/vitafoam-vono-mds-may-go-to-jail/; and 'Skye bank MD jailed for disobeying court order' Channel News, 5 July 2011, available at http://www.channelstv.com/global/newsdetails.php?nid=27725&cat=Business.

381. (1995) 8 NWLR (pt 412) 129.

382. See also *Ibrahim v. Emien* (1996) 2 NWLR (pt 430) 322.

383. See Jonathan Kaufman, 'Stop Oil Companies from Denying, Delaying, and Derailing Local Justice' *EarthRights International*, 13 July 2010. Available at http://www.earthrights.org/blog/stop-oil-companies-denying-delaying-and-derailing-local-justice.

384. Note that Order 11 Rule 14 of the Judgment (Enforcement) Rules Cap. 407 LFN 2004, empowers the court to stay execution of the judgment either absolutely or on such terms as it may think just, if it appears just and reasonable to do so.

385. See V.O. Ashii 'Interim Orders Pending Appeal' in Afolayan & Okorie (ed) *op. cit.* note 318 at 317.

386. For more on this, see Climate Justice Programme, *'Shell Fails to Obey Court Order to Stop Nigeria Flaring, Again'*, Press Release, 2 May 2007, available at http://www.climatelaw.org/media/2007May2/; and Carl Collins Ogunshola Oshodi, 'Improper Abandonment Of Oil' NigeriansinAmerica, 14 August 2010, available at http://www.nigeriansinamerica.com/articles/4403/5/Improper-Abandonement-Of-Oil/Page5.html.

was employed in denying the plaintiffs in *Chief Pere Ajunwa and Anor v. Shell I*,[387] from enjoying the fruits of their successful litigation. At the time of writing, both cases are before the Court of Appeal, with Shell appealing the rulings.

Using appeals and other indirect tactics to delay or frustrate successful victims of corporate human rights abuses from obtaining relief, including damages, is especially apparent in instances where the government has interest in the operation of the defendant corporations, like TNCs operating in the oil sector. This was exemplified by the *Gbemre* case, where events that occurred after the Federal High Court delivered its decision frustrated the plaintiffs and can only be attributed to State interference. First, after the expiration of the 'stay of execution' ordered by the presiding judge, Justice Nwokire, the plaintiffs appeared in Court, but none of the defendants or their representatives attended. It was discovered then that the judge had been removed from the case, having been transferred to another court in Katsina and the court file was not available.[388] Similarly, at the Court of Appeal's hearing on Shell and NNPC's jurisdiction appeal, it was discovered that the case had been wrongly adjourned by court staff without any notice to the applicant or his lawyers. Although the leading judge said that the reason for this would be investigated and the person responsible disciplined,[389] nothing further has been heard publicly. These developments prompted Peter Roderick, co-Director of the Climate Justice Programme, an NGO that is taking an active role in pursuing the prosecution of the case, to state that:

> *"Many disturbing aspects have emerged during the progress of the Iwherekan case. First, Shell's lawyers pull out as many delaying tactics as possible in the court, even trying to get the judge kicked off the case before it has barely started. Shell then fails to comply with the court order to stop flaring. And now, after the judge has extended the period of time for Shell to stop flaring, they ignore the order again and don't even turn up in court… To add to this, the fact that the judge has been removed from the case, transferred to the north of the country, and there have been problems with the court file for a second time, suggests a degree of interference in the judicial system which is unacceptable in a purported democracy acting under the rule of law."*[390]

The question of human rights abuses by corporations will often involve the State, especially in instances of issuance of licences, project approval or, as in environmental law, where a statute envisages enforcement by the government alone and a victim's remedy accordingly lies against the State. In this regard, the ability of

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387. Suit No FHC/YNG/CS/3/05, delivered on 24 February 2006 (Unreported) (Popularly known as the Ijaw Aborigines of Bayelsa State case).

388. See Climate Justice Programme *op. cit.* note 386.

389. G. Enogholase, 'Benin Court Registrar under Investigation', *Vanguard*, 27 September 2006.

390. Quoted in Climate Justice Programme *op. cit.* note 386.

the courts to enforce judgments against the State is important, especially where the State is heavily involved in the activities of the corporation in question.[391] Obedience by the State towards the judgments of the Court, no matter how inimical they are to the economic interest, cannot be overemphasised as such attitude is vital in ensuring not only access to justice for victims of human rights violation, but also, in 'characterising a Government as responsible and conducting its affairs in accordance with the Rules of Law.'[392] Presently, what is being experienced in Nigeria is a persistent practice by the Government to select which judgments or orders of court to obey and which should not be obeyed.[393] This practice according to Chief Wole Olanipekun 'has been the bane of adjudication in Nigeria and indeed a major cause of the delay and denial of justice.'[394]

3.7 Obstacles to non-judicial remedies

The major obstacle to accessing the non-judicial remedies offered by both PCC and NHRC is the perennial underfunding by the State. Inadequate funding, which cuts across virtually all State agencies in Nigeria, affects the ability of these agencies in procuring adequate manpower and equipment necessary for the effective discharge of their mandates.[395] The effect of this is that these agencies are restricted to maintaining offices at the Federal Capital Territory (FCT) and state capitals with virtually no or a skeletal presence at the local government level where they are especially needed. For example, the NHRC maintains only six (6) zonal offices in the six geo-political zones of the country, while the PCC has a much better outreach by establishing offices in the thirty-six States of the Federation and F.C.T., as well as five zonal offices in each State of the Federation. The virtual absence of these agencies at the local government level in turn adversely affects the accessibility of these agencies for victims of abuses, especially those resident in the rural areas.[396]

Another obstacle relates to the ignorance or low awareness of the citizens of their rights, as well as the activities of these agencies.[397] Recently, the PCC in decrying

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391. *Ibid*.

392. See *Doma v. Ogiri* [1998] 3 NWLR (Pt 541) 252.

393. See Patience Ogbo, 'Disregard for court rulings worries lawyers' Next, 12 July 2011, available at http://234next.com/csp/cms/sites/Next/News/Metro/5730623147/disregardfor_court_rulings_worrieslawyers.csp; and Justice Ignatius Pat-Acholonu 'Disobedience of Court Orders, Form of Intimidation' Paper delivered in March, 2006 at the Faculty of Law, Olabisi Onabanjo University Ago Iwoye, available at http://www.nigerianlawregistry.com/disobedience.php.

394. See Olanipekun II *op. cit.* not 354 at 23.

395. See PCC Annual Report *op. cit.* note 280; and Ajoni *op. cit.* note 309.

396. See Obi Chinedu Okafor and Shedrack C. Agbakwa, 'On Legalism, Popular Agency and "Voices of Suffering": The Nigerian National Human Rights Commission in Context' (2002) 24 (3) *Human Rights Quarterly* 662 at 714.

397. See *Ajoni op. cit.* note 309.

this situation of low awareness about human rights and the activities of the commission stated as follows:

> *"Since most of the inhabitants of the Local Government Areas are illiterate persons, they do not even know their constitutional rights and the ways and manners to ventilate their grievances. Thus, some of them know close to nothing about an organization like the Public Complaints Commission. The psychology of an average rural folk is to resign to fate in the face of oppression. He leaves his oppressor in the hands of God. In cases where he has been pushed to the wall, he reacts by taking the law into his hands. That explains the reason for several communal clashes in most rural areas in recent times. This also accounts largely for the youth restiveness being presently experienced in the Niger Delta region."*[398]

398. See PCC Annual Report *op. cit.* note 280. See also Jethro Ibileke, 'Public unaware of complaint commission's activities' *Next*, 4 July 2011. Available at http://234next.com/csp/cms/sites/Next/Home/5726584-146/story.csp.

Conclusion and Recommendations

This study shows that despite various serious shortcomings, Nigerian law does offer the possibility of effective remedy to certain victims of certain corporate human rights abuses. The effect of these shortcomings is reflected in the generally low frequency of litigation against corporations involved in human rights abuses in the country, the small number of cases that reach a satisfactory conclusion for the plaintiffs, and serious problems in the enforcement of rulings, or more generally, decisions. This assertion is not negated by the fact that there are many instances of successful tort claims in Nigerian courts against corporations for human rights and environment-related abuses, despite the obvious limitations of the rules. But an assessment of the facts and circumstances of abuse shows that there could be many more cases and most human rights abuses by businesses still continue without effective remedies.

Most of the human rights litigation against businesses is either self-sponsored by affluent individuals or sponsored through community efforts. In rare instances, litigation may be pursued under a benefit-sharing agreement with lawyers, usually with the expectation of large monetary compensation, or pay-off from oil companies. This perhaps explains the substantial turnover of tort-based suits against oil companies, in contrast with the minimal prosecution of such suits against other companies operating in other sectors of Nigeria economy. Overcoming the shortcomings associated with access to justice for corporate human rights abuses will require the State undertaking structural reforms, as well as the active participation of various actors including the state, its agencies, the court and public interest organisations. To achieve this objective, the Government must adequately fund State institutions in the dispensation of justice as well as those involved in promoting access to justice such the judiciary, the PCC, NHRC, and the Legal Aid Council. It should also take steps that implement the recommendations given below.

Constitutional and statutory reforms

An amendment of Chapter II of the Constitution should be seriously considered in order to incorporate economic and social rights as among the constitutionally recognised rights in Nigeria. Such incorporation, as argued above, is necessary to avoid a situation where a company might invoke its constitutionally recognised right to property to defeat a victim's claim regarding, for example, the right to health or a satisfactory environment under the African Charter Ratification Act.

The Constitution should also be amended in order to relieve the Federal High Court of some of its vast areas of jurisdiction, which currently constitutes a barrier to victims of corporate human rights violations, as its judicial divisions are not evenly located in every state of the Federation. Even if located in a particular state, the

sitting of the court in the state capital makes it inaccessible and cumbersome for victims of corporate human rights abuses. The need for unburdening the Federal Court of its vast jurisdiction was recently advocated for by Chief Wole Olanipekun, who aptly argued that:

> *"A situation whereby a Constitution decrees and compels someone who wants to institute a proceeding against the Federal Government or any of its agencies to go to Federal High Court is bizarre, illogical, unfair and unreasonable. … The only decent way out is also to unburden the Federal High Court of the vast, but unusual and untraditional jurisdiction conferred on it in a Federal set up."* [399]

In the area of human rights, there is the need for the government, at both the federal and state levels, to work towards the incorporation of all ratified human rights treaties into Nigerian municipal law. The effect of such incorporation, as earlier noted, is that these treaties become justiciable in Nigerian courts. The necessity of this incorporation cannot be over-emphasised since human beings are ultimately the beneficiaries of human rights treaties,[400] and it is not acceptable that, after ratifying such treaties, Nigeria does not take steps to incorporate them into its municipal law, where they can be relied upon in defence of human rights and in holding any body including TNCs accountable for human rights abuses.

In addition, Nigeria's environmental legislation, especially the NESREA Act, should be reviewed and amended in order to incorporate the right to a healthy environment as well as public interest litigation in instances of environmental degradation. This revision becomes necessary in view of the low enforcement rates amongst governmental agencies charged with the protection of the environment in Nigeria. Such amendment will put Nigeria in the league of other environmentally innovative African countries, such as South Africa and Kenya, that provided for the right to environment and public interest litigation in their various framework environmental legislation.[401] It might be contended that such amendment is superfluous in view of the provisions of the African Charter Ratification Act providing for the right to environment, as well as that of the FREP 2009 Rules recognising public interest litigation. However, these provisions have their drawbacks in the general protection of the environment, as they may only be invoked when environmental degradation has violated any of the rights under the Act or in Chapter IV of the Constitution.

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399. See Chief Wole Olanipekun (SAN), 'How to Fix the Judiciary' *Newswatch*, 28 September 2008. Available at http://www.newswatchngr.com/editorial/prime/special/10928215627.htm.

400. See Konstantin Korkelia, 'New Challenges to the Regime of Reservations Under the International Covenant on Civil and Political Rights' (2002) 13 *European Journal of International Law* 349.

401. Preambular paragraphs 1 & 5, and Part III, Chapter 7, National Environmental Management Act 107 of 1998; and s 3(1) Environmental Management and Coordination Act No. 8 of 1999 of South Africa and Kenya respectively.

The following statutes should be reviewed to make them more relevant and address the exigencies of modern times:

- The Criminal Code, which was enacted at a time when the involvement of corporations in abuses of human rights was not envisaged, should be reviewed to provide for corporate criminal liability in instances where a corporation has ordered or aided or facilitated the commission of serious, including violent, crimes as a means of furthering its business interest. Admittedly, a corporation being a legal entity cannot be imprisoned or sentenced to death. However, this limitation can be overcome by the imposition of heavy fines. Such imposition becomes necessary in view of the human rights abuses as well as alleged criminal activities of companies operating within the Nigerian oil sector, because, as stated by the Indian court in Supreme Court in *Standard Chartered Bank v. Directorate of Enforcement*:[402]

  > *"The corporate bodies, such as a firm or company undertake a series of activities that affect the life, liberty and property of the citizens. Large-scale financial irregularities are done by various corporations. The corporate vehicle now occupies such a large portion of the industrial, commercial and sociological sectors that amenability of the corporation to a criminal law is essential to have a peaceful society with stable economy."*

- Laws providing for limitation periods should be reviewed, and revised, especially in instances of environmental degradation, where the negative impact on human health and the environment may not be immediately apparent, as well as those providing for pre-action notice to ensure their compatibility with the constitutional guarantees of fair trial and the right of action in the determination of civil rights and obligations.

- The Nigerian Evidence Act, needs to be reviewed and revised in respect of tort litigation implicating human rights and environmental abuses.[403] The burden of proof in such tort claims should be made lower than the burden of proof in the normal civil suits in order to relax the heavy burden usually placed on victims to prove causation.[404] This is necessary as victims still rely on tort rules to litigate human rights abuses associated with environmental degradation and may continue to do so as Nigerian jurisprudence

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402. (2005) 4 SCC 530 at 550. This decision overruled *Assistant Commissioner v. Velliappa Textiles Ltd* (2003) 11 SCC 405. Note the statement of the dissenting judge in Velliappa case that '[i]t will be wholly wrong to allow a company to go scot-free without even being prosecuted in the event of commission of a crime only on the ground that it cannot be made to suffer part of the mandatory punishment.' *Ibid*, at 428.

403. See Olanipekun II *op. cit.* note 354 at 33.

404. See Osipitan II *op. cit.* note 179 at 100-101.

on using the provisions of statute to litigate environmental abuses is still undeveloped.

- Laws such as the Associated Gas Re-injection Act and regulations made thereunder[405] should be abrogated, as they are in conflict with the enjoyment of fundamental rights under the Constitution and the African Charter Ratification Act.[406]

- The Companies and Allied Matters Act (CAMA) must be reviewed and revised to ensure that the criteria and qualification or disqualification standards for directorship of a company include strict adherence to the promotion and protection of human rights of both employees and others in the operating environment. CAMA should stipulate that there be provisions in the article or memorandum of association of any company relating to compliance with all relevant standards of human rights in Nigeria.

Reform in Court Rules of procedure

Inflexible court procedural rules, as earlier noted, can constitute obstacles to accessing judicial remedies for victims of corporate human rights abuses. Hence, there is the need for the State to review the various high court rules in order to facilitate access to judicial remedies. On a positive note, the FREP 2009 Rules have made crucial improvements in the area of access to justice to litigants in Nigeria by removing some of the obstructions, such as the requirement of seeking the permission of the court before application for the enforcement of human rights can be made to the High Court.[407] In addition, the Rule has fixed the relevant fees at the lowest amount to be paid at the filing of the process thereby enhancing the possibility of victims of corporate human rights abuses accessing judicial remedies.[408] On the contrary, other rules of court have not been adapted to this philosophy, and hence, access to courts under these rules is still restrictive and majority of prospective litigants are being excluded.

Court procedural rules can and should be used as a means of avoiding the delaying tactics and other unreasonable methods employed by lawyers to frustrate court proceedings or execution of judgment. FREP 2009 Rules have made several innovations to facilitate the expeditious hearing of a human rights matter.[409] It is also gratifying to note that some States have reviewed their High Court Rules in order to facilitate faster process of judicial adjudication. These new Rules provide for the frontloading of witness statements whereby such statements are filed

405. Cap. A25 LFN 2004; and AGRA Regulations, S.1. 43 of 1984.

406. See *Gbemre* case *supra* note 250.

407. Order 2 Rules 2 &3, FREP 2009 Rules *supra* note 62.

408. *Ibid*, at Appendix A.

409. See *Supra* note 62 at order IV, VI-XII.

when the suit is also being filed. Thus, during trial, the witness will only enter the witness box and adopt his written depositions on oath as his evidence in the case. The witness will then be cross-examined by the opposing counsel. Another innovation in the new Rules is the introduction of written addresses. Lawyers to the parties are expected to reduce the argument in a case into writing and file it at the court. This is applicable to both final addresses and motions generally.[410]

Development of Non-Judicial Remedies

Victims of corporate human rights abuses sometimes resort to the informal justice sector to achieve redress for their complaints. This does not mean that the court system is not effective, but because of the heavy evidential burden placed on the victim to prove their case, as well as the frequent adjournments and other delays associated with the court system, non-judicial mechanisms are desirable and they should be encouraged as a complement to judicial remedies. Where non-judicial remedies are available, courts must retain jurisdiction to consider cases where the non-judicial remedies are ineffective and there should be judicial review of the performance of non-judicial mechanisms. Non-judicial remedies are available in forms such as: arbitration, mediation, and other formal alternative dispute resolution bodies, and statutory commissions like the ombudsman (PCC) and NHRC. These bodies sometimes employ less expensive and less burdensome methods of arbitration, conciliation and adjudication to ensure justice for parties before them or complainants. Presently, labour, aviation and other related issues are resolved via arbitration and mediation, while there are many successful cases of the PCC and NHRC intervening to ensure justice for victims of corporate human rights abuses.[411] Therefore, the Nigerian government should consider and adopt measures to ensure that the accessibility to these mechanisms are redefined and made predictable, that remedies are effective and have force of law such as an arbitral award, and the cost should be minimal, while procedural obstacles are removed or minimized. Reliable and sufficient funding should also be made available to such mechanism.

The development and strengthening of administrative and other non-judicial monitoring and remedial mechanisms is essential. Administrative agencies responsible for oversight and regulation in the environmental sector must be independent and have sufficient resources to carry out their work especially in areas where the oil industry operate (National Oil Spills Detection and Response Agency, Ministry of Environment and Department for Petroleum Resources).[412] At the same time there should be increased public oversight and accountability of these bodies to ensure that public officials carry out their jobs in a proper manner.

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410. For an example, see order 3 Rule 2, & Order 31 of the Enugu State High Court (Civil Procedure Rules) 2006.

411. See PCC Annual Report *op. cit.* note 280; Akpochafo *op. cit.* note 288; and Ajoni *op. cit.* note 309.

412. Counting the costs: Corporations and Human Rights Abuses in the Niger Delta, Platform, October 2011, p. 52.

Active encouragement of the non-governmental sector, and protection of human rights defenders

Promoting access to justice cannot be left only to the state and its agencies. The non-governmental sector can play a substantial role in enhancing and promoting access to justice for victims of corporate human rights abuses. For example, non-governmental organisations (NGOs) like the Civil Liberties Organisation (CLO), the Socio-Economic Rights Action Campaign (SERAC), Committee for the Defence of Human Rights (CDHR), Environmental Rights Action/Friends of the Earth (ERA/FoE), and the Socio-Economic Rights and Accountability Project (SERAP) are not only involved in dissemination of information regarding human rights and its abuses by government agencies, and statutory and private corporations in Nigeria, but also, sometimes provide free legal services to indigent victims of such abuses. Such organisations should be encouraged by the State, giving them statutory allocation as practised by the United Kingdom Charity in England. This is necessary so as to enable their effective role in complementing the activities of statutory agencies such as the Legal Aid Council, Ministry of Justice, and National Human Right commission.

Lawyer's organisations and more generally human rights defenders should be:

- Provided adequate and prompt protection by State officials in situations where private parties or other public officials aided and abetted by private economic actors threaten or harass them in the exercise of the work;
- Leading partners within national and international networks of collaboration between Nigerian NGOs and grass-roots and international groups and experts to enable increased capacity and quality in litigation and proposals of legal reform.

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