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HUMAN RIGHTS AND SECURITY IMPACTS OF CLIMATE CHANGE AND THE AFRICAN CLIMATE ACTION STRATEGY

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MULTINATIONAL CORPORATIONS IN NIGERIA AND THEIR IMPLICATIONS ON THE RIGHT TO WATER

By

Oluwatosin Busayo Igbayiloye,* & Olubunmi Lucy Niyi-Gafar**

Abstract

There is a constant violation of human rights by multinational corporations in developing countries. This human rights violation has increased the debate on corporate social responsibility. Multinational corporations tend to establish their companies in developing countries where poor governance, weak laws and corrupt government is prevalent. To address these problems, international instruments have emerged to hold multinational corporations accountable for violation perpetrated by them. Reports of non-governmental organizations (NGOs) and international organizations such as Amnesty International and the United Nations (UN) brought into limelight the negative impacts of the activities of these corporations on the communities where they are located. The consequences of these impacts influence certain human rights such as the right to life, the right to water and the right to health. Focusing on the right to water in Nigeria, this article highlights the challenges of access to clean water in Nigeria. It emphasizes on the absence of adequate laws protecting the human right to water in Nigeria and the opportunity these inadequate laws has created for multinational corporations like Shell in the Niger-Delta to violate human rights in general and the right to water in particular. It elaborates on corporate social responsibility, international standards and the human right to water. It suggests more stringent roles for multinational corporations towards enhancing the human right to water in Nigeria.

KEYWORDS: *human right, right to water, multinational corporations, corporate social responsibilities*

Introduction

Water as a substance is essential to the sustenance of life. It is vital to the survival of humans, plants and animals. Its absence in a community can result in death, sickness and diseases can occur when pollution or contamination of water occurs. The human right to water and sanitation has been declared legally binding by the UN Human Rights Council on September 30, 2010.¹ According to the Council, the right to water and sanitation is derived from the right to an adequate standard of living recognized in several international treaties, including the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the UN Convention on the Rights of the Child.²

The protection of human rights in the world is paramount and there are rules, treaties and mechanisms to accomplish the task. The United Nations plays a significant role in

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¹ Gaughran A., 'Business And Human Rights And The Right To Water' 106, 2012, *Am. Soc'y Int'l L. Proc.* 52-55

² Ibid.

ensuring that individuals enjoy their rights in their different locations. It adopted the Universal Declaration of Human Rights (UNDHR) and also set out the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights which are referred to as the International Bill of Human Rights. The international rules on the subject human rights compel states to respect, promote and protect human rights in their respective jurisdictions. Thus, under international human rights law, states are primarily obligated to promote and protect human rights and not violate such rights. However, businesses and transnational private actors particularly multinational corporations (MNCs) now cause serious challenges since they can also violate human rights. The consequence of this is that states are not solely saddled with the duty to protect human rights but also multinational corporations. As progress and prosperity can occur in a society as a result of the presence of multinational corporations so also can problems, economy disarray, slow or no development happen in a society.

The participation of private corporations in water and sanitation supply may imply a rise in the price of water or a discriminatory distribution of water provision that could mean a human rights abuse. On the other hand, the activities of extractive industries have a great influence on water depletion and therefore water availability.³ These corporations have been alleged of grievous harm inflicted on individuals and environment. Some of them include torture, gender discrimination, labor rights violations, death and environmental harm.⁴ The negative impacts of their activities on the rights of the people in communities of their operations cannot be over emphasized. These cases are prevalent more in developing countries where the governance and the rule of law is weak including poor mechanisms for enforcement. The actions of these corporations have denied people of rights like right to life, right to water, right to healthy life, right to education, right to self determination, right to social security, right to a good livelihood.

In response to these challenges, various standards and initiatives have been developed at the international level as guidelines on the human rights responsibilities of companies. These guidelines emphasize that businesses and no longer solely states including multinational corporations be bound to respect, promote and protect human rights. This paper focuses on the impact of the activities of multinational corporations on the right to water.

Multinational Corporations and Human Rights

Human rights refer to rights men possess because they are human and as a result they are universal and a possession that belongs to all human beings.⁵ There have been international instruments which promotes the protection of human rights. After the Second World War, the United Nations adopted the Universal Declaration of Human Rights (UNDHR) in 1948. It was the first norm to emphasize civil, political, economic, social and cultural rights at the international level. The declaration drew on earlier initiatives, such

³ Cavallo G. A., "The Human Right to Water and Sanitation: Going Beyond Corporate Social Responsibility", Vol. 29/76, 2013 *Merkourios Utrecht Journal of - International and European Law*, p 39-64, p 40

⁴ Amerson J. M., "The End Of The Beginning?: A Comprehensive Look At The U.N.'S Business And Human Rights Agenda From A Bystander Perspective", 17 2012, *Fordham J. Corp. & Fin. L.*, p. 878

⁵ Mayerfeld J., "The Democratic Legitimacy Of International Human Rights Law", 19 2009, *Ind. Int'l & Comp. L. Rev.* p.57

as those of the International Labor Organization (ILO). The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights together with their protocols were also adopted afterwards. The former covers areas on physical integrity, fairness in law, freedom of belief, speech, and association, racial or other forms of discrimination. The latter include the rights to decent work and freedom of association; social security; family life; adequate standards of living. These are the earliest and most authoritative human rights treaties and they make up the International Bill of Rights.⁶ Other treaties have also been established and they include; International Convention on the Elimination of All Forms of Racial Discrimination, Convention on the Elimination of All Forms of Discrimination against Women, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Convention on the Rights of the Child (CRC), International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, Convention for the Protection of All Persons from Enforced Disappearance, Convention on the Rights of Persons with Disabilities (CRPD). Apart from international standards on human rights, there are also regional standards; The European Convention on Human Rights adopted in 1950, the American Convention on Human Rights adopted in 1967 and the African Charter on Human and Peoples' Rights, adopted in 1981.

Nigeria have taken steps to ensure the protection of individual human rights and also prevent abuse of the rights. The government through the 1999 Constitution⁷ grants certain political, economic, social, and educational rights⁸. It is the supreme law of the state. The nation is party to a number of United Nations treaties and has ratified and domesticated some of the major human right treaties which are still very much effective till date.⁹ Nigeria is a signatory to the African Charter on Human and Peoples' Rights, which has been inducted into the municipal law of the country and subsequently incorporated into its domestic law through the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Decree¹⁰ and its provisions including economic, social and cultural rights are justiciable can be enforced through the procedure provided under the Nigerian constitution.¹¹ This was implemented by the Nigerian Supreme Court in *Abacha v Fawehinmi*¹² where the court held that "... the African Charter, which is incorporated into our municipal law, becomes binding and our courts must give effect to it like all other laws falling within the judicial powers of the courts".

⁶ Hamman R. and Schild C., "Business and Human Rights in South Africa: Context and Recommendations for Pro-active Engagement", Summary of a report commissioned by the National Business Initiative 2008, http://www.nbi.org.za/Lists/Publications/Attachments/69/Business_Human_Rights_in_SA.pdf, (accessed 20 February 2015).

⁷ Constitution of Federal Republic of Nigeria 1999 (CFRN).

⁸ Ibid Sections 15-18

⁹ Osunmuyiwa O. O., 'Transnational Corporations And Corporate responsibility: Environmental Law And Human Rights Damage In Nigeria' 2012, i-rep.emu.edu.tr:8080/jspui/bitstream/11129/314/1/Osunmuyiwa.pdf, (accessed 28 March 2015).

¹⁰ Cap 10 vol. 1 LFN 1990.

¹¹ Agbakoba v Director State Security Services, (1994), 6, NWLR, 475; Amao O. O., 'Corporate Social Responsibility, Multinational Corporations And The Law In Nigeria: Controlling Multinationals In Host States', *Journal of African Law*, vol. 52, no. 1, 2008, http://www.researchgate.net/publication/228295192_Corporate_Social_Responsibility_Multinational_Corporations_and_the_Law_in_Nigeria_Controlling_Multinationals_in_Host_States, (accessed 28 March 2015).

¹² *Abacha v Fawehinmi*, 2000, 6, NWLR, Pt 600, 228.

Multinational corporations (MNCs) as a concept can be referred to as 'transnational corporations' (TNCs) and 'multinational enterprises' (MNEs). It has been described as, "An aggregate of corporate entities, each holding its own juridical identity and national origin, but each in some way interconnected by a system of centralized management and control, normally, exercised from the seat of primary ownership".¹³

The United Nations norms on responsibilities of Transnational Corporations and Other Business Enterprise with regard to Human Right in Paragraph 20 refer to the concept as 'transnational corporation'. It states that,

"the term 'transnational corporation' refers to an economic entity operating in more than one country or a cluster of economic entities operating in two or more countries whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively".¹⁴

Globalization in developing countries by businesses including corporations may come along with richness and opportunities and on the other hand cause problems.¹⁵ Corporations have increased and they have extended their operations across states. They can be a major instrument to the development and progress of the community or state wherein they are located. They can contribute to the economy of such state by increasing or pulling it down by virtue of the enormous amount of wealth and power they possess. MNCs are vital tools in the process of globalization.¹⁶ In order to protect human rights adequately, there is the need to hold them accountable for their actions which has resulted in the movement for a legal regime for this purpose. In the development of international law, international corporate responsibility continues to be major issue in the protection of human rights. Non-governmental organizations like Amnesty International, individuals and stakeholders including organizations like the United Nations have reacted to the serious violations perpetuated by these companies and agitated for international regulation to hold companies responsible.¹⁷ These organizations and the media have reported and recorded several violations of human rights by corporations. Cases involving such violations includes Shell in Ogoniland in Nigeria, Union Carbide in Bhopal, India where massive leak of methyl isocyanides gas occurred,¹⁸ Nike and Reebok in Asia.¹⁹ Hence,

¹³ Wallace C.D., 'The Multinational Enterprise and Legal Control: Host State Sovereignty of Economic Globalisation The Hague', Martinus Nijhoff, 2002

¹⁴ United Nations Norms on Responsibilities of Transnational Corporations and Other Business Enterprise with regard to Human Right, U.N. Econ. & Soc. Council (ECOSOC), Sub-Comm'n on Promotion & Prot. of Human Rights, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/L.8 (Aug. 7, 2003) see Backer L. C., 'On the Evolution of the United Nations' 'Protect-Respect-Remedy' Project: The State, the Corporation and Human Rights In A Global Governance Context' <http://ssrn.com/abstract=1619939> (accessed 20 February 2015).

¹⁵ Graham D. and Woods N., 'Making Corporate Self-Regulation Effective In Developing Countries World Development', Vol. 34, No. 5, 2006, p. 868-883.

¹⁶ Isa F. G., *Privatisation and Human Rights in the Age of Globalisation*, Intersentia nv 2005, p 23

¹⁷ Richter J., *Holding Corporations Accountable: Corporate Conduct, International Codes* Palgrave p.8

¹⁸ Ruggie J.G., *Just Business- Multinational Corporations and Human Rights*, 1st ed, London, W.W. Norton, 2013, p 6.

¹⁹ Surya D., 'Human Rights Violations by Multinational Corporations and International Law: Where from Here?' 19 2003, *Connecticut Journal of International Law* 1-57, <http://ssrn.com/abstract_id=637665> accessed on 20 February 2014

international standards which include soft laws, initiatives and guidelines emerged and they emphasize that business and multinational corporations bears the duty of protecting human rights.

2.1 MULTINATIONAL CORPORATIONS AND HUMAN RIGHTS UNDER INTERNATIONAL LAW

An initiative referred to as the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises was prepared by a working group by the Sub-Commission on the Promotion and Protection of Human Rights of the Economic and Social Council (ECOSOC), in a resolution dating back to 1998.²⁰ Its mandate was to make recommendations and proposals concerning the working methods and activities of transnational corporations (TNCs), in order to ensure a correlation with the economic and social objectives of their host countries and promote human rights.²¹ Fundamentally, these norms impose directly on companies under international law and have the same range of human rights duties under treaties they have ratified by States 'to promote, secure the fulfillment of, respect and ensure respect of and protect human rights.' This proposal triggered a deeply divisive debate between the business community and human rights advocacy groups while evoking little support from Governments. The Commission declined to act on the proposal.²² Thus, the Norms Draft till date only remains as a reference of the effort to develop a normative framework.²³ In the effort to develop a working set of rules by the UN, directly binding on multinational corporations to a set of mandatory obligations, the Norms were eventually based on principles of the direct application of human rights norms to multinational corporations and on a system that used binding contracts to create a global network of human rights obligations enforceable against multinational corporations. These efforts were criticized, especially by developed states that believed the Norms proposal threatened both sovereignty and current international law. In the end, the Norms project was abandoned.²⁴

The Tripartite Declaration is another initiative which lays down guidelines for MNCs, governments, employers' organizations, and workers' organizations.²⁵ This declaration which was recently revised in 2000, consists of a set of principles intended to guide MNCs regarding employment, training, conditions of work and life and industrial relations, some of which are inspired in the Universal Declaration of Human Right.²⁶ Though most of the guidelines in this declaration, deal with labor rights in areas such as

²⁰ Regil Á. J. de, 'Business and Human Rights Towards a New Paradigm of True Democracy and the Sustainability of People and Planet or Rhetoric Rights in a Sea of Deception and Posturing: The good old formula of changing so that everything remains the same...!', <http://www.jussempir.org/Resources/Corporate%20Activity/businessandhumanrights.html>, (accessed 19 August, 2015).

²¹ Bachmann S. O. V. and Miretski P. P., 'Global Business and Human Rights - The UN 'Norms On The Responsibility of Transnational Corporations and Other Business Enterprises With Regard To Human Rights': A Requiem' <http://ssrn.com/abstract=1958537> (accessed 18 April 2015).

²² Human Rights Council Seventeenth Session, Report of the Special Representative of the Secretary- General on the issue of human rights and transnational corporations and other business enterprises A/HRC/17/31 21 March 2003 www.ohchr.org/EN/Issues/TransnationalCorporations/Pages/Reports.aspx accessed on 02 June, 2014.

²³ de Regil op cit.

²⁴ Backer L. C., 'On the Evolution of the United Nations' 'Protect-Respect- Remedy' Project: The State, the Corporation and Human Rights In A Global Governance Context' <http://ssrn.com/abstract=1619939> (accessed 20 February 2015).

²⁵ Surya D., op cit.

²⁶ de Regil op cit.

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²⁷ *ibid.*

²⁸ *ibid.*

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³² *ibid.*

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employment, training, industrial relations, conditions of work and life, nevertheless, paragraph eight makes specific reference to human rights, providing that all of the parties concerned "should respect the Universal Declaration of Human Rights and the corresponding International Covenants adopted by the General Assembly."²⁷ Its provisions are reinforced by core and priority ILO conventions and recommendations. The Declaration urges MNCs to apply its voluntary principles to the greatest extent possible.²⁸ A third initiative is the Global Compact which was proposed by the UN Secretary General in 2000 and launched at the World Economic Forum as "a value-based platform designed to promote institutional learning."²⁹ The standards aim is to reflect the norms as laid out in the Universal Declaration of Human Rights, the ILO's Tripartite Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development and the United Nations Convention Against Corruption.³⁰ It originally had nine principles in the areas of human rights, labor, and the environment, to which the principle to fight corruption was later added.³¹ The UN Global Compact seeks to promote responsible corporate practices through a variety of engagement mechanisms, including learning, dialogue and projects. The Global Compact is grounded in universally accepted declarations and conventions, which has enabled strong support in developing countries. The Compact carries a significant degree of authority and weight given the UN's international and intergovernmental character even though it is voluntary and there is no strict adherence to its principles. The majority of its participants are from non-OECD countries³².

Another is the Organization for Economic Cooperation and Development's Guidelines for Multinational Enterprises ('OECD Guidelines,' or "the Guidelines"). This is the only corporate responsibility instrument formally adopted by state governments. The OECD Guidelines are recommendations addressed to enterprises operating in OECD countries. However, corporations are encouraged to extend good practices throughout the universe. The Guidelines form part of a broader and balanced instrument of rights and obligations – the OECD Declaration on International Investment and Multinational Enterprises.³³ Standing out in this framework are the National Contact Points (NCPs), which are considered part of the responsibility of the member States, to set them up for undertaking promotional activities, handling inquiries and contributing to the solution of problems which may arise in this regard.³⁴ The OECD adopted Guidelines for Multinational Enterprises in 1976, which were most recently revised in 2011, and which provide "nonbinding principles and standards for responsible business conduct in a global context

²⁷ *ibid.*

²⁸ *ibid.*

²⁹ The UN Global Compact Office and The OECD, 'The UN Global Compact and the OECD Guidelines for Multinational Enterprises: Complementarities and Distinctive Contributions' 2005 <http://www.Oecd.Org/Corporate/Mne/34873731.Pdf>, (accessed 1 January, 2015).

³⁰ Nolan J., 'The United Nations' Compact With Business: Hindering or Helping the Protection of Human Rights?' 2005 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1003702, (accessed 11 September 2015).

³¹ de Regil, p.18

³² *ibid.*

³³ Jernej L. C., 'Corporate Responsibility for Human Rights: A Critical Analysis of the OECD Guidelines for Multinational Enterprises' 2008 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1317263&download=yes, (accessed 11 September 2015).

³⁴ de Regil.

consistent with applicable laws and internationally recognized standards".³⁵ The guidelines consist of a series of principles and norms for responsible business conduct in the areas of Human Rights, transparency, corruption, taxes, labor and environmental relations and consumer protection, on a strictly voluntary basis.³⁶ The OECD Guidelines are not formally binding; they establish an investigatory procedure that allows the 'National Contact Points' in OECD countries to investigate allegations that companies have breached the Guidelines.³⁷

A recent initiative is the United Nations Framework for Business and Human Rights and the Guiding Principles. This framework was the culmination of efforts of Professor John Ruggie. After, being appointed as the Special Representative to the former Secretary General Kofi Annan, Ruggie was given the mandate in 2005 and later renewed in 2007 to provide a code as regards human rights and transnational corporations and also other business enterprises. He was also required to provide concrete guidance regarding the obligations of states and responsibilities of businesses, to elaborate on the scope and content of corporate responsibility, to explore effective remedies to corporate abuses, and to continue his work in a broadly consultative manner.³⁸ Afterwards, he presented the 'Protect, Respect, Remedy', the three pillar Framework. The first pillar emphasize the responsibility of States parties to human rights treaties which is the duty to protect citizens against the acts of third parties that violate human rights. The concept of 'third parties' have been stated to include companies by academic literature, human rights treaties bodies' and courts.³⁹ The second and third refers to the "corporate responsibility to respect" human rights, which means that business enterprises should act with due diligence to avoid infringing on the rights of others and to address adverse impacts and enhance "access to remedy" for victims with which they are involved.⁴⁰ The framework and Guiding Principles do not create new legal obligations but represent a clarification and elaboration of the existing standards but focuses on tackling the effect of business activities on human rights where there are no rules.⁴¹ They equally serve as template for subsequent instruments on human rights.⁴²

³⁵ The Trade Union Advisory Committee, 'OECD Guidelines for Multinational Enterprises: Recommendations for Responsible Business Conduct in a Global Context' 2012, <http://www.tuaoecdmguidelines.org/Docs/TradeUnionGuide.pdf>, p. 3.

³⁶ de Regil.

³⁷ Bonnitcha J., 'The UN Guiding Principles on Business and Human Rights: the implications for enterprises and their lawyers' http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2165221 (accessed 11 September 2015).

³⁸ Mares R., 'Business and Human Rights After Ruggie: Foundations, the Art of Simplification and the Imperative of Cumulative Progress', <http://rwi.lu.se/app/uploads/2012/06/Business-and-human-rights-After-Ruggie.pdf> (accessed on 28 March 2015).

³⁹ Lambooy T., Varner M. A. and Argyrou A., 'The Corporate Responsibility To Remedy (3rd Pillar Ruggie Framework) Analysis of the corporate responses in three major oil spill cases: Shell - Nigeria; BP - US (the Gulf); Chevron - Ecuador' 2011, <http://ssrn.com/abstract=1953190>, (accessed 9 July 2015).

⁴⁰ Ruggie J., 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises', www.ohchr.org/documents/issues/business/A.HRC.17.31.pdf, (accessed 6 February 2014).

⁴¹ Simons P. C., 'International law's invisible hand and the future of corporate accountability for violations of human rights' papers.ssrn.com/sol3/papers.cfm?abstract_id=1933426, (accessed 20 February 2015).

⁴² Reflections on Universal Declaration of Human Rights: A Fiftieth Anniversary Anthology (Barend Heijden & Bahia Tahzib-Lie eds, 1998 cited in Dada J. A., 'Human Rights under the Nigerian Constitution: Issues and Problems' Vol. 2, No. 12, 2012 *International Journal of Humanities and Social Science*, p. 33).

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It is important to note that these initiatives are not legally binding on States but serve as guidelines.

Developed countries are taking steps in the restriction of violation of human rights by businesses and multinational corporations. Companies have also included codes of conduct in their operations to ensure the protection of human rights. In the United States of America, the Alien Tort Claim Act ATCA has been useful in the prosecution of transnational corporations who have aided and abetted governments in carrying out gross human rights. The Case of *Wiwa v. Shell*⁴³ was instituted via this act. The ATCA Act is derived from the 1789 judiciary act, and seeks to give redress for any violation of customary international law like torture, piracy.⁴⁴ The importance of the Act has been seen in cases of corporate practices in the developing world. It is used to drag multinational corporations to the court on litigation matters concerning human rights abuses.

Although Nigeria has established laws to promote and protect human rights, there are no national laws that restricts businesses and corporations from the violation and abuse of the rights of its citizens. This is a major challenge for the country. However, corporate Social Responsibility has emerged in Nigeria. This was as a result of the Ogoni Crisis in the Niger delta. According to an author, the concept of corporate social responsibility, "entails that companies should map out and give effect to specific programmes in accordance with a well defined social policy".⁴⁵

Years after the Ogoni crisis, the CSR bill was introduced in the National Assembly to establish a CSR commission. The commission's goal was to guarantee that companies respect the human rights of members of the communities of their operations. It also aim to make contributions towards the economic, social and environmental progress of the affected communities in accordance with the country's international obligations. However, the provision that caused controversy was the one that states that businesses should allocate a portion of their annual profit to CSR activities which is 3.5 per cent. Notwithstanding, CSR has become widely accepted in Nigeria to mean corporate contributions to socioeconomic development.⁴⁶

An Overview of the Human Right to Water

Water has been confirmed a human right by the United Nations General Assembly in 2010. The human right to water entails access to a minimum quantity of 25 liters per person per day. This water is expected to be clean and available at the time of need. Water has not always been considered a human right. Debates on whether water is a human right or merely a derivate right culminated in the UN's Resolution of 2010, following the interpretation of articles 11 and 12 of the ICESCR of 1966. The Committee on Economic

⁴³ *Wiwa v Royal Dutch Petroleum Co* (2000) 226, F.3d 88, 105 and 12, 2d Cir.. See also, Saro-Wiwa K., 'Nigeria in crisis: Nigeria, oil and the Ogoni' *African Political Economy*, vol. 22, no. 64, 1995, p. 244-246.

⁴⁴ Ruggie J.G, *Just Business- Multinational Corporations and Human Rights*, op cit, p 12.

⁴⁵ Asada D., 'Corporate Social Responsibility of Companies and Sustainable Development in Nigeria: Recent Trends and Lessons From Other African Countries' p 2, https://www.researchgate.net/publication/265446575_Corporate_Social_Responsibility_of_Companies_and_Sustainable_Development_in_Nigeria_Recent_Trends_and_Lessons_From_Other_African_Countries accessed on 17 June 2013.

⁴⁶ Osunmuyiwa O. O., 'Transnational Corporations And Corporate responsibility: Environmental Law And Human Rights Damage In Nigeria' 2012, op cit.

Social and Cultural Rights however had interpreted provisions of the International Covenant on Economic Social and Cultural right⁴⁷ via General Comment 15 as including the right to water.⁴⁸ This interpretation further brought about discussions which termed the right to water as a 'derivative right' which was not binding.⁴⁹ This position was however changed by the resolution of the United Nations General Assembly which affirmed it to be a human right.⁵⁰

Recognition of the Human Right to Water Under International Law

The human right to water owes its source to international human rights laws. Following interpretations of United Nations documents, United Nations conferences, a deeper interpretation of other human rights such as the right to life, and the affirmation via a resolution of the United Nations General Assembly, water (and sanitation) came to be recognized under international human rights law and various national laws as a human right.⁵¹ The provisions of the human right to water were first identified explicitly under the CRC and CRPD United Nations instruments wherein access to water was considered for children and persons with disabilities.

Before the human right to water was given international recognition via the adoption of General Comment 15, the first document to make provision for the right of access to water explicitly was the Covenant on the Elimination of all forms of Discrimination against Women.⁵² There have been United Nations conferences (before and after the adoption of CEDAW) which sought to promote access to water at both national and international level.⁵³ The human right to water evolved from a series of conferences and a gradual recognition and acceptance that the human right to water cannot be separated from other rights. The human right to water thus developed from a deeper interpretation of other rights and the understanding that those rights would not exist without water.⁵⁴ Firstly, human rights are rights inherent to all human beings, whatever their nationality, origin, language, colour or any other status. These rights are said to be interrelated, interdependent and indivisible.⁵⁵

Secondly, human rights are inalienable which means that they belong to individuals and are not granted by the state.⁵⁶ Human beings are entitled to them by the mere virtue of being human beings. For example, everyone has a right to life as recognised both under international human rights law and under various national legislations; no one can also

⁴⁷ Art 11 and 12 of the ICESCR.

⁴⁸ General Comment 15 is an interpretative document by the committee on economic and social rights who are human rights experts. Their interpretations are persuasive but not legally binding. See also Bulto (2011) THE EMERGENCE OF A HUMAN RIGHT TO WATER IN INTERNATIONAL HUMAN RIGHTS LAW 12 *Melbourne International Law Journal* 2 fn 1.

⁴⁹ Gleick (1998) 1 *Water Policy* 490.

⁵⁰ General Assembly A/65/254 See fn 1 above.

⁵¹ Resolution A/64/L.63/Rev. 1 and Add. 1

⁵² Adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979 (hereafter CEDAW).

⁵³ Cano in his article discussed comprehensively the United Nations Conferences on water as well as the decisions and recommendations towards the realisation of access to water. See Cano (1981) 51 *Journal of Hydrology* 381-392.

⁵⁴ A right to life for example has been argued cannot be guaranteed if there is no adequate source to sustain life. See Alvarez in Piccolotti and Taillant (eds) (2003) 72.

⁵⁵ www.ohchr.org/en/issues/pages/whatarehumanrights.aspx accessed 21 June 2014.

⁵⁶ United Nations Population Fund (2005) <http://www.unfpa.org/resources/human-rights-principles> accessed 8 April 2015; See also the Art 1 UDHR.

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⁶⁴ Chap 4

survive without water to drink. It therefore follows that water is a basic need which is essential for human survival and also to live a dignified life.⁵⁷

The Human Right to Water in Nigeria

Considering the international guidelines on the human right to water, it can be argued that water in Nigeria is not a human right. A human right to water entails a minimum quantity of water available and accessible to everyone. This water should be from an improved source such as public stand pipe. Although water is a human right under international law, in Nigeria however water is not seen or treated as a human right. Access to water as a human right has never been adjudicated upon by any court of law in Nigeria except in cases where water in forms of rivers or wells are being polluted and in such matters clean water is mentioned as a requirement of a healthy environment.⁵⁸

For a natural resource such as water, which bothers on the very existence of life, the provisions of the water law at federal level in Nigeria are too trivial to guarantee clean water for domestic use and a life worthy of human dignity.⁵⁹ Federal laws such as the 1999 Constitution and Water Resources Act of 1993 should adequately protect domestic water in Nigeria; however this is not the position. In other words the current water status in Nigeria amongst other utility services cannot provide the infrastructure required for social and political development.⁶⁰ This is because water supply systems are unreliable and underdeveloped.⁶¹ In spite of the efforts of the federal government on water reforms in Nigeria, the key issue which is domestic water is still been relegated as against the agricultural or irrigational uses of water which the federal law protects. Perhaps this is one of the major reasons the pains inflicted by multinational companies have thrived in Nigeria as there are no adequate laws to challenge their activities of contaminating the rivers and streams to which the poor people have access to.

There are two main laws in Nigeria which are expected to cover these exigencies – the Constitution and the Water Resources Act.

The 1999 CFRN like any other states' Constitution is supreme with its provisions having binding force on all authorities and persons throughout the Federal Republic of Nigeria.⁶² The Nigerian Constitution was described in the case of *Kalu v Odili* as 'an instrument of government under which laws are made and are not mere Acts or law and the construction which the court will give to a constitutional provision must be such that will serve the interest of the Constitution and best carry out the subject and purpose and give effect to the intention of the framers'.⁶³

The Nigerian Constitution contains the bill of rights⁶⁴ with the provisions of water (as an environmental objective) under *fundamental objectives and directive principles of state*

⁵⁷ WHO/WSH/WWDD/TA.10 (Feb. 2001) World Water Day 2001: water health and human rights 1. Found at http://www.who.int/water_sanitation_health/en/humanrights.html accessed 9 October 2013.

⁵⁸ *Gbemre v SPDC* (2005).

⁵⁹ National Water Policy 2004

⁶⁰ Hall D. (2006). 'Water and electricity in Nigeria' *PSIRU Reports* p 3.

⁶¹ Hall (2006) *PSIRU Reports* p3.

⁶² Sec 1 (1) CFRN.

⁶³ See (1992) 5 NWLR (Pt.240) 130 at 156

⁶⁴ Chap 4 CFRN

policy.⁶⁵ The occupation of the provision on water in this part of the constitution makes it non-justiciable. Socio-economic rights are not justiciable in Nigeria. The debate on socio-economic rights and its non-justiciability is centred on the competency and or unwillingness of the adjudicating body to entertain such a matter in court.⁶⁶ However in determining the extent of the application of fundamental objectives and directive principles of state policy, on political objectives⁶⁷ the presiding Judge in the case of *Attorney General of Ondo State v Attorney General of Federation*⁶⁸ states;

'it has been argued that the fundamental objectives and the directive principles of state policy are meant for authorities that exercise legislative, executive and judicial powers only and therefore any enactment to enforce their observance can apply only to such person in authority and should not be extended to private persons, companies or private organizations. This may well be so, if narrow interpretation is to be given to the provisions, but it must be remembered that we are here concerned not with the interpretation of a statute but the constitution which is our organic law or grundnorm. Any narrow interpretation of its provisions will do violence to it and will fail to achieve the goal set by the constitution.'⁶⁹

On the issue of water, the Constitution provides that 'the state shall protect and improve the environment and safeguard the water, air and land, forest and wild life of Nigeria.'⁷⁰ Although the Constitution does not specify what water it shall 'safeguard'. An assumption on Nigerian water resources generally would not be a bad start as surface water in Nigeria are polluted and this is what a large percentage of Nigerians have access to for their domestic use. This provision would have seen the beginning of the human right to water in Nigeria as protecting water from pollution is an essential criterion of the human right to water. However the provision of section 20 of the Constitution is curtailed by the earlier provision of section 6 of the constitution which sets out the powers of the judiciary. Section 6 lists out the judicial powers and sets out limits on the powers of the Judiciary in adjudicating upon issues or questions relating to the fundamental objectives and directive principles of state policy which is found in Chapter II of the Constitution. It provides that the powers vested in the judiciary;

'shall not, except as otherwise provided by this constitution extend to any issue or question as to whether any act or 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'⁷¹

⁶⁵ See Chap 2 CFRN.

⁶⁶ For an overview of this debate see Stanley Ibe (2007) 'Beyond Justiciability: Realising the promise of socio-economic rights in Nigeria' 7 *African Human rights Law Journal* 225-248; Liebenberg S. 'The protection of economic and social rights in domestic legal systems' in A Eide et al (eds) *Economic, social and cultural rights* (2001) 55, 60.

⁶⁷ See Section 15 of the CFRN and in particular (5) which states that 'the State shall abolish all corrupt practices and abuse of power'. The applicants argument was that the legislature cannot make laws in this regard as the provision was found under the chapter II of the constitution – directive principles of

⁶⁸ (2002) 9 NWLR (pt 772) 222 (hereafter *AG Ondo v AG Fed*)

⁶⁹ See also *Nafiu Rabi v Kano State* (1980) 8-11 AC 130.

⁷⁰ Sec 20 CFRN.

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⁷² Sec 16 (2)

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A provision for protection of the environment shows that the state has positive objectives towards ensuring an improvement of the environment in general but placing a caveat in the form of section 6 (6) (c) and putting such an important provision under chapter II of the Constitution nullifies the intention of government in this regard. Particularly when it specifies that the judiciary cannot adjudicate on such matters.

Furthermore, chapter four of the Constitution houses the bill of rights but does not make any provision for the right to water. In other words water as used in the Constitution may or may not refer to potable water and if it in fact refers to water resources generally (and as such inclusive of potable water), such provision does not adequately address the issue of access to potable water. Section 16 seems to address the issue of food albeit inadequately when it states that 'the state shall direct its policy towards ensuring suitable and adequate food for all citizens'.⁷² It however cannot be enforced as it also falls under Chapter II of the Constitution which is not justiciable.

In Nigeria, socio-economic rights are not justiciable.⁷³ These rights are embedded under Chapter II of the Constitution of the Federal Republic of Nigeria 1999. The Supreme Court (which is the apex court in Nigeria) in the case of *Attorney General of Ondo v Attorney General of the Federation* held that 'directive principles can be made justiciable by legislation'.⁷⁴

The Economic Community of West Africa Courts (hereafter ECOWAS Court) in the case of *Gbemre v Shell Petroleum Development Company-Nigeria Limited* found for the applicants a violation of their right to environment⁷⁵ in spite of the fact that it was not guaranteed under the Constitution of Nigeria.⁷⁶ In this case the applicants applied for the enforcement of their fundamental right to life and dignity of the human person as guaranteed in section 33 and 34 of the CFRN as well as articles 4, 16 and 24 of the African Charter.⁷⁷ Oba notes that the African Charter was incorporated into the Nigerian domestic law in 1983 through the African Charter on Human and Peoples' Rights (Enforcement and Ratification) Act.⁷⁸ The court thus found that these rights – to life and human dignity - inevitably included the right to clean poison-free, pollution-free healthy environment.⁷⁹ The court further explains that the burning of gas by flaring contributes adversely to the environment by emitting carbon dioxide and methane which causes warming of the environment, pollutes their food and water.⁸⁰ The court further notes that the gas flaring causes acid rain and this rain acidifies the lakes and streams and damages vegetation.⁸¹ Although the court did not in particular mention the right to water perhaps because the right to water had not been recognised then, it however understood that water

⁷²Sec 16 (2) (d) CFRN.

⁷³Sec 6 (6) (c) CFRN.

⁷⁴(2002) 9 NWLR (pt 772) 222.

⁷⁵(2005) AHRLR 151 (hereafter *Gbemre v SPDC*).

⁷⁶Section 20 of the CFRN provides for the environmental objective of the state and this objective like all other objectives

to life and health was important when it mentioned that the pollution of the same was a violation of the human right to environment.⁸² The Court took the African Charter into cognizance, having observed that the Charter is domestically enforceable in Nigeria.⁸³

Effects of Multinational Corporations on the Right of Water

The right to water includes the right to maintain access to existing water supplies necessary for the enjoyment of the right, and the right to be free from contamination of water supplies. Where the water system on which people rely is contaminated, the government must act to ensure that an alternative source of clean water is provided.⁸⁴ The impact businesses and corporations can have on the human right to water can occur in certain ways.⁸⁵ The impact can occur where such corporation takes part in providing water services. It could also occur where the corporation uses water in a particular community especially where the supply of water is low in which the implication is that there is a competition between the corporation and other users. Furthermore, the impact on water can occur where the operation of a corporation results in the pollution and contamination of water.

In Nigeria, Niger Delta is an example of a region with records of human right abuses caused by the operations of MNCs like Shell, Chevron, Mobil in the area. It consists of both wetlands and dry lands and it covers about 70,000sq.kilometres.⁸⁶ It is a location with large concentration of oil extracted by the oil corporations and the Nigerian government, and the major area that produces oil in the country.⁸⁷ It is also a region where conflicts exist particularly between the oil companies and the local people.⁸⁸ It has attracted the attention of human right activists, non-governmental organizations around the world. Reports and researches by NGOs like Amnesty International exposed serious violations of human rights in the area. The extraction and exploration of oil in the area has led to the destruction of the environment, oil spillage, pollution of the water, health issues, flooding and washing away of the soil, death of plants and animals.

In most of the sections of the Niger Delta, there is hardly suitable water for drinking since water is drawn directly from the streams, rivers and creeks. Amnesty International revealed that oil spills, waste water, toxic waste was released into the rivers and streams. Oil pollution is a major experience in the area. These acts have had a tremendous impact on the right to water and also health.

Also, Gas flaring is an activity usually performed by corporations in the region. This results in acid rain and it does have a serious impact on the areas in Niger Delta including the fact that it denies the people drinkable rainwater.⁸⁹

⁸² See para 7 (c) and par 9 and 14 *Gbemre v SPDC*

⁸³ AA Oba (2004) 4 AHRLJ 280; see also *Ogugu and others v The State* (1994) 9 NWLR pt 366 1.

⁸⁴ Gaughran A, p. 53

⁸⁵ Ibid.

⁸⁶ Ebegbulem J. C., Ekpe D, Adejumo T. O, 'Oil Exploration and Poverty in the Niger Delta Region of Nigeria: A Critical Analysis', Vol. 4 No. 3; March 2013, *International Journal of Business and Social Science* p 279

⁸⁷ Ojaborotu V., Whetho A, 'Multinational Corporations and Human rights Abuses: A Case Study of the Movement for the Survival of Ogoni people and Ijaw Youth Council of Nigeria', <http://rsmag.nfshost.com/wp-content/uploads/multinational200802.html> accessed on 29 January, 2016

⁸⁸ Ibid.

⁸⁹ 'Oil For Nothing: Multinational Corporations, Environmental Destruction, Death and Impunity in the Niger Delta'. Report from Essential Action and Global Exchange A U.S. Non-Governmental Delegation Trip Report, January 25, 2000, <http://www.essentialaction.org/shell/report/section3.html> accessed on 4 March 2015.

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Furthermore, there is the absence of natural aeration which leads to the death of organism in the water. This in turn results to reduction of fish in the area. The consumption of fish affected by the activities of the oil corporations in the coastal areas leads to the poisoning of the indigenes. According to statistics, more than 60,000 oil spills have been recorded and more than 2 million barrels have been released into the eco system of the region for more than forty years of oil exploration in Nigeria.

Therefore, the indigenes of the Niger-delta are left with alternative of the importation of portable water as a result of lack of pipe borne water.⁹⁰

Apart from the challenges caused by extraction of oil, there is that of lack of data and information on the quality of water and in respect of the protection of the right to water particularly in the affected communities. The collection, analysis, and publication of information are critical to ensuring that human rights are protected in many contexts. In its recognition of the significance of acquiring information on the right to water, the UN Committee on Economic, Social and Cultural Rights stated that people should have access to information on water sources and the environment.⁹¹ Oftentimes, collection and analysis of data and information is usually gathered by non-governmental organization or international organization like the UN. A study was performed on oil pollution in one area of the Niger Delta in 2011 by United Nations Environment Programmed (UNEP) and was published after 14 months of scientific research. It was disclosed that the ground water in Ogoniland was polluted. These problems have increased the spread and persistence of abuse of the right to water in the Niger Delta.⁹²

Another challenge is poor legal framework and the restrictions placed on the holders of license and permit is limited. Hence protection of the rights of the communities like economic, political and civil rights is being denied. Consequently, the right to water, good food, health and environment is adversely affected. Under the Nigerian law⁹³, corporations have the right to explore and extract resources like oil and gas. Thus, they are permitted to dig, drill and establish installations. If there are adequate laws on ground, corporations will be restricted and cautioned in their use and pollution of water. The right to water is well recognized under international law but poor attention has been drawn to it in Nigeria.

Recommendations and Conclusion

There is a need for a strong legal framework to adequately protect the right of water in Nigeria. It is necessary that Nigeria as a nation should recognize water as a human right which should be protected from third party infringement. A violation of the human right to water also needs to be treated like a violation to the right to life. In other words stringent measures need to be taken when a right to water is infringed upon. The reason for this is not farfetched as water itself is life and no living organism can survive without it. Nigeria is a signatory to many of the International human rights instrument that protect the right to

⁹⁰Human Rights Watch (1995) "The Ogoni Crises in Nigeria: A Case of Military Repression in South- Eastern Nigeria, Osunmuyiwa O. O., op cit.

⁹¹Gaughran A., p. 55

⁹²Gaughran A., p. 54

⁹³Petroleum Act of 1969 with amendments in 1973, 1979, 1995 and 1996, and Oil Pipeline Act CAP 07, LFN 2004, amended in 1965

water or from which the human right to water was derived however Nigeria does not recognize water as a human right neither does it protect water in that regards via the laws and implementing bodies. This lacuna makes it easier for multinational corporations to commit acts of violation by polluting the waters communities' access for their domestic use.

It is also necessary for the government of Nigeria to lay down direct regulations to restrict multinational corporations from abusing the human right to water and other rights in the communities of their operations and the country at large. These regulations will also emphasise that they recognize and protect human rights in the country and invariably penalize them where they do otherwise.

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