ECONOMIC, SOCIAL AND CULTURAL RIGHTS OF HOST COMMUNITIES IN NIGERIA MINERAL AND PETROLEUM SECTORS: A COMPARATIVE ANALYSIS*

Abstract

The various mis-management reports on exploration of natural resources in solid mineral and petroleum sectors in Nigeria have been a great concern in the ways at which the people of the host communities were been deprived of their full enjoyment to ESCRs. In this respect, two legislations were enacted namely Nigerian Minerals and Mining Act (NMMA) which adopted CDA approach and Petroleum Industry Act (PIA) which provided for the use of HCDT approach to respect and protect ESCRs of the people. For implementation, NMMA used Human Rights based method while PIA incorporated financial security. However, this paper attempted to critically analyse these two main legislations to be able to determine the extent at which both NMMA and PIA have been realised effectively in protecting ESCR of the HC. A doctrinal research method was used to explore International human rights instruments, and other legal and non-legal sources for comparative analysis. Findings showed that the approaches adopted by each one of the legislations did not fully protect the rights of HC due to certain limitations discovered. The conclusion based on the findings was that PIA and NMMA would have been very effective instruments to achieve community developments and also protect the rights of the people if only CDA approach of NMMA and HCDT approach of PIA are thoroughly reviewed and incorporated together to take care of the limitations. The paper therefore recommended that both sectors should liaise properly with each other and harmonize their approaches together to complement each other for effective implementation.

Keywords: Host Community, Financial Security, Rights, Participations

1. Introduction

Natural resources are gifts of nature that can be found anywhere worldwide and which is commonly used for the comfort and benefit of mankind. It is a well known fact that if natural resources are found in abundance in a country, it will help to generate much revenue to promote the wealth base and socio-economic developments of that country.[1] Nigeria is one of such countries that is well endowed with more than 34 varieties of natural resources ranging from crude oil, natural gas, cocoa, tin, gold, lead-zinc, limestone, marble, iron ore and so on which are deposited in about 450 locations all over the 36 States of the Federation.[2] With these significant quantities of natural resources, Nigeria has become a natural resource-dependent State to the extent that 80 percent of her earnings are derived from exploration and exportation of oil and gas. Also 90 percent of her foreign exchange dealings are based on natural resources which made Nigeria to be highly recognized as one of the largest producers and exporters of oil in Africa.[3] Amazingly, despite the abundance of wealth, in Nigeria, her present position is just a paradox in the sense that her riches does not commensurate with the slow pace of socio-economy developments particularly within the host communities (HCs), which made Nigeria to be currently ranked to the position of 103 out of 116 poor countries with the standard of living of majority of the people to be far below the international poverty line of $1.90.[4] Additionally, Nigeria is tagged as one of the most polluted areas worldwide to a large extent that it has badly affected the ecological systems due to the negative activities of both the petroleum and mineral explorations and productions that adversely impacted the atmosphere, soil, surface, underground water, terrestrial and marine eco-system of HCs.[5] The continuous discharge of petroleum substances were observed to cause environmental pollution, human health hazards, socio economic problems and degradation of lands while mining activities also caused large erosions, sinkholes, public health systems, contamination of environments through the emitted chemicals.[6] The overall effects of all of these have given rise to deprivation of the peoples' human ESCR rights. A typical example was the case of lead poisoning crisis that led to the death of over 300 children in Zamfara State Nigeria due to mining activities.[7]

The main reasons adduced for all these problems are simply based on lack of proper enforcement of environmental laws and regulations to protect the environments thereby depriving the people of HCs their rights towards conducive environments and freedom to use their lands in promoting community socio- economic and cultural developments which generally lead to the outcry and violence of the people over the exploitation and mis-management of the natural resources

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[1] J. Nkwocha and O. Odubo, 'Natural Resources Exploitation and Socio- Economic Development in Nigeria (1981-2015)' [2016] (8) (1-4) *Sustainable Human Development Review*; 78-80

[2] E.N. Olowokere, E.N. and A.N Abasilim,'Rights of Host Communities to Mineral Resources for the Empowerment of Rural Dwellers in Osun State Nigeria' [2019] (10) (1) *Journal of Sustainable Technology*; 142 - 144

[3] Kadafa, A. A. 2012. 'Environmental Impacts of Oil Exploration and Exploitation in the Niger Delta of Nigeria' [2012] (12)(3) *Global Journal of Science Frontier Research Environment & Earth Sciences;* 20,21

[4] B. Nwannekanma and W. Musa, 'Nigeria's hunger level 'serious,' ranks 103 out of 121 countries *The Guardian*. (October 17 2022) <https://guardian.ng/news/nigeria/nigerias-hunger-level-serious-ranks-103-out-of-121-countries/> accessed October 1 2022

[5] Kadafa n 4

[6] I..J. Nwadialor 'Minimizing the Impact of Mining Activities for Sustainable Mined-out Area Conservation in Nigeria' [2011] (6)(2) *FUTY Journal of the Environment*; 71, 73

[7] World Health Organisation, Nigeria: Mass Lead Poisoning from Mining Activities, Zamfara State (7 July 2010) <https://www.who.int/emergencies/disease-outbreak-news/item/2010_07_07-en > accessed 8 July 2022.

discovered on their traditional lands. To register their protests however, the people resorted to various kinds of attitudes such as vandalism, riots kidnappings and a times killing of the companies officials.[8] Nonetheless, for peace to reign in the various communities which is in line with the Amnesty International is to note that the denial of the peoples' rights is the root cause of the continuous crises witnessed and which must be properly resolved.[9] Likewise, the High Commissioner once said that human right is an integral part of peace-making, peace-keeping and peace-building. Hence, for peaceful social relationship and developments to exist between mineral/petroleum operators and the communities, the Nigerian government must look for the means and ways of respecting and protecting the rights of the people.[10] By so doing, the Nigeria Mineral and Mining Act (NMMA)[11] incorporated a mandatory community development Agreement (CDA), while the Petroleum Industry Act (PIA) [12] introduced a mandatory Host Community Development Trust (HCDT) approach. In terms of analysis, NMMA adopted Human Rights based approach for implementation of CDA while PIA adopted financial security to implement HCDT, so as to respect and promote socio economic interests of the people. Thus, this paper aims at critically analysis and compares the practices of the two approaches under the Nigerian legislations and determine their effectiveness in realizing and protecting the economic, social and cultural rights of HCs, to establish limitations if any in the two Acts that are hindering the pace of socio-economic developments of HCs thereby depriving the people of their rights and thereby make appropriate recommendations

2. Economic Social and Cultural Rights of host community: International Outlook

The International human rights legal instruments granted some rights to a group of people called the indigenous people that exist in political States. Article 1 of the ILO Convention classified indigenous people according to their descent from the population within a geographical region as those who retain common social, economic, cultural and political institutions irrespective of legal status.[13] Meanwhile, the Convention fails to categorically describe the people of HCs but rather assumed that they are same in nature because HCs also provide land for large scale businesses and other forms of activities like colonization with common identities on geographical location, class, and ethnic background with common interests that centre on destruction of their native flora and fauna. [14] From global perspectives, therefore, the indigenous people's rights in the various HCs are also recognised accordingly such as : ILO, Indigenous and Tribal Peoples Convention[15], ILO, Indigenous and Tribal Population Convention[16] and the United Nations Declaration on the Rights of Indigenous Peoples,[17] (UNDRIP), International Convention on Economic, Social and Cultural[18] (ICESCR). Similarly, at the regional level, there is the African Charter on Human and Peoples Rights.[19] From all these international conventions, however the economic social and cultural rights (ESCR) of the HC can be grouped into 3 areas such as;

Right of the people to self-determination and existence - Right to self-determination and existence involves individual's or people's collective rights to freely determine and pursue their political, economic, social, and cultural developments and status.[20] UNDRIP provides that for people to be able to exercise their right to self-determination, they must equally have rights to self –government, autonomy and be actively involved or through representatives in decision making on matters affecting both internal and external local affairs like financing autonomous functions, free participation in the use, management and conservation of natural resources, free disposal of wealth and natural resources and right to consultation by the government upon their interests over the various activities that are carried out on their lands.[21]

Right of the people to protect their culture and territorial integrity- Ideally, HCs have a civic right to a preferred culture and association but the preservation and protection of the preferred cultural identities matters most which involves the protection of the environments and ancestral shrines, provision of unfettered access to places of worship, right to free, prior, and informed consent before commencement of explorative activities, free access to various means of livelihood like good food, water etc, and other forms of government's obligations to prevent deprivation of normal subsistence. An

[8] V A Akujuru and L. Ruddock 'Incorporation of Socio-Cultural Values in Damage Assessment Valuations' Sun *Newspaper*, (24 October 2009), p.46. 14

[9]Amnesty International, Nigeria: Petroleum Pollution and Poverty in the Niger Delta (2009) https://www.amnesty.org/en/documents/AFR44/017/2009/en/ accessed 8 July 2022; p.9 ; E. Amah; An Appraisal of the Rights of the Nigeria-Delta Peoples over Natural Resource Under African Chapter on Human and Peoples' Rights [2020] (11)(2) *NAUJILJ*; 88

[10] H. Hannum, Human Rights in Conflict Resolution: The Role of the Office of the High Commissioner for Human Rights in UN Peace-making and Peace-building February [2006[(28)(1) Human Rights Quarterly; 1-8

[11] Nigerian Minerals and Mining Act, 2007

[12] Petroleum Industry Act 2021

[13] 1989 (No. 169)

[14] E. I. Amah P. F. Hemen 'Indigenous Peoples' Rights Over Natural Resources: An Analysis of Host Communities Rights in Nigeria' [2021](3)(2) *Lampung Journal of International Law*; 127

[15] ILO ITPC (No. 169) 1989

[16] ILO (Convention 107)1957

[17] UNDRIP 2007

[18] ICESCR 1966

[19] ACHPR 1981

[20] See ICESCR n 1; Article 1, ACHPR n 19 Article 20

[21] Articles 14,15,6, ILO (169) n 15; Article 3 UNDRIP.n17

example to buttress this idea is that of Endorios Community in Kenya, where the African Commission supported the indigenous community over their claim to free access to their ancestral territory with the motive of securing subsistence and livelihood. This is considered sacred and inextricably linked to the cultural integrity of the community and its traditional way of life.[22] Therefore, the forceful displacement of the Endorois community from their ancestral land was purely violation of rights to cultural integrity based on freedom to religion (article 8), right to culture (article 17), and access to natural resources (article 21) of ACHPR.[23]

Right of the people to socio-economic development – the word development is a paradigm shift, which begins from simple economic growth over to socio-economic developments. Development therefore 'comprehensively covers economic, social, cultural and political processes that focus on constant improvements of the well-being of the entire population.'[24] Undoubtedly rights to economic social and cultural development are indeed very essential and regarded as the cornerstone of the overall developments in a community.[25] To really, enjoy this right, governments and other actors must ensure that indigenous people have easy access to their basic needs such as means of good livelihood in the provisions of drinking water, food, education, employment, health care services, and conducive environments.[26] Specifically, the United Nation identified 17 sustainable developmental goals for all States in the realization of social economic cultural rights.[27] In the case of Ogoniland as an example, the African Commission properly held the view that the destruction and contamination of food and sources of water as a result of the explorative activities of the oil companies was a breach of right to ESC developments as contained in Article 22 and 24 of ACPHR by the Nigerian government.[28]

3. Economic Social Cultural Rights of host community in Nigeria: General Overview

Essentially, ESCRs are quite recognized in the various municipal legal systems, but they may not be at the same level with the civil and political rights. In some countries, ESCRs are considered as justiciable rights and in some like Nigeria particularly, the protection and promotion of ESCRs are considered as State duties within the legal and policy spheres. In Nigeria, however ESCRs is like a guide in formulating and implementing State policies and programs of governance which somehow made the realization of socioeconomic rights of the HC difficult. Chapter 2 of the Nigerian Constitution states that protecting the environment and safeguarding water, air, land forest and wildlife as well as sustaining social economic developments of the HC are thus the duties and obligations of States and not viewed as fundamental rights of the people as explained in chapter 4 of the Constitution. In other words, the obligations are not really enforceable because of the non-justiciable clause in section 6(6c) that ousted the jurisdiction of judicial powers over such matters relating to chapter 2 in the Constitution.[29] Notwithstanding, the non-justifiability clause in section 6(6)(c) of the Constitution is neither total nor sacrosanct because this subsection provided a leeway stating that 'except as otherwise provided in the Constitution', meaning that if the Constitution provides otherwise, then it may make the section or sections in Chapter 2 justiciable. Then ESCRs can be made enforceable when there are legislations to actualize the provisions in chapter 2 whenever the provisions of the legislations are challenged[30] or where chapter 2 infringes on chapter 4 of the Constitution.[31] Incidentally, ESCRs are justiciable in the provisions of ACHPR [32] and as Nigeria is a signatory to the Charter by ratifying and domesticating ACHPR as a municipal legislation which therefore make these rights enforceable[33] and thus provide guidelines for the people of HC to realise and protect their rights in Nigeria.

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[22] ACHPR n 19, Articles 2, 14-18, 20-22, 24 Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya 276/2003, African Commission on Human and Peoples' Rights, (4 February 2010) < https://www.refworld.org/cases,ACHPR,4b8275a12.html> accessed 19 November 2022

[23] ibid

[24] Declaration on the Right to Development: Resolution/Adopted by General Assembly 1986 A/RES?41/128 < http://www.un.org/documents/ga/res/41/a41r128.htm > accessed 19 June 2018; Preamble Para 2 the United Nations Declaration of the Right to Development (UNDRTR)

[25] A.K. Sengupta Conceptualizing the Right of Development for the Twenty- First Century in *Realizing the Right to development* **(**UN Publications, 2013) 69, 70

[26] United Nations Human Rights, Economic, Social and cultural rights <https://www.ohchr.org/en/human-rights/economic-social-cultural-rights > accessed 12 July 2022

[27] United Nations Department of Economic and Social Affairs Sustainable Development https://sdgs.un.org/goals accessed 12 July 2022

[28] F. Coomans, The Ogoni Case before the African Commission on Human and Peoples's [2003] (52)(3) International and Comparative Law Quarterly 74-750.

[29] Constitution of the Federal Republic of Nigeria 1999 as amended

[30] *Attorney General of Ondo State v Attorney General of the Federation & ors.* (2002) 9 NWLR pt.772)222

[31] See *Archbishop Anthony Olubunmi Okogie & ors v Attorney General of Lagos State* (1981) 1 NCLR 218.

[32] See African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Cap. A9, Laws of the Federation of Nigeria, 2004, Section 1

[33] see also the ECOWAS Community Court (by virtue of being a member state of ECOWAS, the ECOWAS's Supplementary Protocol, Article 9(4) A/SP.1/01/05 of 19 January 2005, Nigeria has a duty to honour any human rights and the African Court of Human Rights. see also *Abacha v. Fawehinmi* 6 NWLR (pt. 660) 228

Realising ESCRs of the Host Communities through Community Development Agreement under NMMA

NMMA remains the only active Act on mining of solid mineral resources in Nigeria. The NMMA consists of some provisions and strategies which facilitate the successful realization and protection of rights of the HC.[34] In a bid to promote mutually beneficial relationships between the titleholders/ Companies and their HC, the Act introduces a novel practice called community development agreement (CDA) which is made mandatory for all companies/title-holder that want to carry out mining activities in the area. The conditions state that the title holders must first negotiate and enter into a mutual developmental agreement with the people of the HCs who will be affected by the mining activities. In which case, CDA becomes legally binding on all the negotiations that address matters on community developments,' although the legal structure, content, and scale of CDAs vary upon where the project is to be carried out, types of communities involved,[35] and applications of both international and domestic legal regimes, which provide for some specific obligations to fulfil. In other words, CDA has no actual model of agreement which is suitable for all contracts. In spite of these varieties however, CDAs still share many common and fundamental characteristics and purposes. [36] Nonetheless, CDA is a very good mechanism for community developments and the engagements are often used in extractive companies to engage with landowning communities so as to avoid or minimize local conflicts, and also ensure total well-being of the people. Therefore, CDA is used as a social licence to operate by the title-holders/ companies particularly in Nigeria which requires the community's consent and support for a project and agrees on how well it will engage or affect the HCs throughout the life cycle of the proposed project to properly protect their environment, land and culture.

Meanwhile, Section 116 (1) of the NMMA thus provides that:

> Subject to the provisions of this section, the Holder of a Mining Lease, Small Scale Mining Lease or Quarry Lease shall prior to the commencement of any development activity within the lease area, conclude with the host community where the operations are to be conducted an agreement referred to as a Community Development Agreement or other such agreement that will ensure the transfer of social and economic benefits to the community

Alongside, subsection (2) of section 116 stipulates that 'the Community Development Agreement shall contain undertakings with respect to the social and economic contributions that the project will make to the sustainability of such community'. This by implication states that the purpose of CDA is to provide and contribute towards the social and economic development of HC. Therefore, CDA must properly address matters relating to social economic developments which consist of educational scholarships, employment opportunities, contributory supports, infrastructural developments as well as maintenance of projects like health and community services, water and power supply procedures for environmental and socio-economic management as well as local governance enhancement. Essentially, economic, social and cultural rights are privileges, freedoms and entitlements that the HC need to live a life of dignity. Thus, in the process of providing these needs, the rights of the people are also been fulfilled. Along the line, CDA paves the way for the HC to be able to identify and manage their interests in line with their own expectations from the investment projects, which in no small measure will contribute to their social, economic growths and localise developments. Ideally, the role of CDA is to give the HC a sense of existence and self- determination according to UNDRIP.

Implementation of CDA towards protecting Host Community ESCR in Nigeria

Towards the successful implementation of CDA, NMMA proffers a significant Human right standard/principle approach known as free, prior, and informed consent (FPIC). The concept of FPIC recognises the indigenous people's inherent and prior rights to their lands and resources by exercising legitimate authority on the third parties/mining companies to enter into equal and respectful relationship with the people which must be based on the principle of informed consent. FPIC is well recognised in the many intergovernmental organizations, international conventions and human rights laws in varying degrees in the laws of the States.[37] The most necessary condition in the community FPIC oblige the governments and, where possible the companies to make sure that the HCs are adequately informed about the proposed projects, probable positive and negative impacts, and ensure their consent free from any pressure or interference prior commencement of the projects,[38] NMMA specifically establishes this in section 116 which state that the holder of a mining lease either in small scale or quarry lease must prior to the commencement of any activity within the HC ensure that CDA is properly concluded. So, applying the mandatory CDA before carrying out any mineral activity serves as a social licence for having the HC FPIC.[39] This is in sharp contrast to the formally adopted 'traditional needs approach' where developments were provided solely by the government, without proper consultation with the people about their actual needs or recognize their fundamental rights. Human right based approach (HRBA) to development on the other hand which has put into

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[34] Chapter 4, CFRN n 29

[35] C.O 'Faircheallaigh, Community Development Agreements in the Mining Industry: An Emerging Global Phenomenon, [2012] **(**44)**(**2) *Community Development;* 1,6

[36]M.Itagaki, M. Ramírez & A. Setiaji, Community Development Agreements in Agricultural Land Investments: Lessons Learned from Extractive Industries. [2017] **(**WORKING PAPER) **(**study 80B-WP.1**)** *UNIDROIT* 6,7,8

[37] ILO ITPC n 15, article 15, 16

[38] See *Endorois Welfare Council v. Kenya*; *n 22*

[39] P. Akper, A Legal Analysis of Community Development Agreements as a Tool for Enhancing Social Licence to Operate for Mining Companies in Nigeria. [2017] (8) (1) *The Gravitas Review of Business & Property Law,*

consideration the rights of the people towards attainment of their development. On this note, HRBA tries to analyse the inequalities that lie in the heart of developmental issues like, neglect of HC environments to pollution, discriminatory practices and unjust distributions of benefits that impede developments and the HC rights.[40] Applying this approach therefore is a way of considering and allowing developmental activities to be guided by legal values and principles of human rights which are referred to as 'PANEL' that is, participation, accountability, non-discrimination, empowerment and legality, with the aim of promoting the values of equity, justice, and freedom in the society.[41]

To buttress the above point, however section 117 specifies that CDA must provide consultative and monitoring frameworks through which the community must participate in the planning, management, monitoring and implementation of all activities spelt out under the agreement. Instead of been a passive recipient of any kind of development, the HCs therefore become the key actors over their own developments and are thus empowered to take vital decisions By so doing there will be better understanding about the community's needs and interests that will help the investor/company and the government to address the socio economic developments and the full realization of the rights of the people.[42] Moreover, NMMA has subjected CDA to mandatory and legally binding agreement that must be reviewed every five years. This by implication means that the agreement should be conducted before any mineral activity takes place and once it is signed, it becomes legally binding and can be rightly enforced in cases where both parties fail in their obligations. Thus, reviewing CDA every 5 years also helps to sustain developments because it will serve as accountability measure and reminder to the companies to be very cautious of the impacts their activities will subsequently be making on the environments, so as to devise remedies to apply when things go wrong.[43]

Limitations of CDA under NMMA in Nigeria

Besides lots of grievances and applications of enforcement mechanisms that are key factors to strengthen the impetus of companies' proper implementation of agreements, the case of CDA in terms of implementation appears to be a little difficult due to lack of proper identification in the Act as to what HC represents concerning those that are properly qualified as stakeholders as this will help to know who to contact or who to represent the community in ensuring that CDA is properly conducted, if preparatory work is faulty, there is the likelihood of some fundamental errors arising particularly in areas the where the HCs are unable to present well-educated representatives to serve as effective negotiators and follow-up properly every stage of the agreement in ensuring that all the terms in CDAs are fulfilled or where agreement clauses are vaguely presented and to indicate where specific obligations should exist, or where they have been breached. When effective representatives are lacking, the communities usually find it difficult to enforce agreements or get remedies as it becomes difficult for them to access a reliable legal system to seek redress thereby making it difficult to protect their ESCR.[44] Apart from these preliminary challenges, the most challenging limitation is on the interest of the Nigeria government that is well focused on exploration of oil and gas than the mining of solid minerals as its major source of foreign exchange income. The inability of the government to diversify her economy led to the various forms of neglect on solid mineral exploration which only attracts small scale businesses only even though solid minerals are commonly available in large quantities across the country.[45] As a result, there are no enforcement regulations to guide the tile-holder/mining companies' in their various activities, which permeates different types of illegal practices without any intention of contributing financially towards community developments while even the existing small scale businesses of artisanal miners provide limited financial resources to fulfil all the obligations and terms of CDAs as contained in section 116.[46] This therefore deprived the HC of sustainable developmental benefits from such wealth extractive activities of minerals located on their lands. Even though there are small benefits to offer, they are far too less compared with the magnitude of harm done to the environments and so, realising, protecting and fulfilling ESCRs towards maximum enjoyment of the HC may not be easily feasible. It thus becomes necessary to establish strong financial security which is very reliable and constantly available for full implementation of CDA.[47]

In view of the various testimonies coming from the HC, it is rather unfortunate that the title-holders/companies are still reluctant towards protecting and respecting the rights of the HC by their incessant flouting of the terms in the CDA, such like, seeking the HCs consents which is frequently neglected before commencement of mining activities all in the name of

[40]Australian Human Rights Commission: Human right Based Approaches <https://humanrights.gov.au/our-work/rights-and-freedoms/human-rights-basedapproaches#:~:text=A%20human%20rights%20based%20approach,barriers%20to%20realising%20their%20rights.> accessed 30 July 2022

[41] Ibid

[42]C.Hill, S.L.White & M. Simon, Guide to free prior and informed consent [2014], < http://resources.oxfam.org.au/pages/view.php?ref=1321&search=%21collection145&order_by=relevance&sort =DESC&offset=0&archive=0&k=0edfe94f91&curpos=10>. Accessed 12 June, 2022

[43] NMMA n 11 s 116 (15)

[44] M. Itagaki, M. Ramírez and A. Setiaji n 37

[45]M. Elton, E. Mikel, and I Taiwo, Problems and Strategies for Exploration of Solid Mineral Resources in Nigeria.[2020](4)(8) *International Journal of Research and Innovation in Social Science* 485

[46] NMMA n 12

[47] I. Oramah and ors, Artisanal and small-scale mining in Nigeria: Experiences from Niger, Nasarawa and Plateau states September [2015](2)(4)The Extractive Industries and Society 3,4

bribery and corruption and rather than penalizing defaulters, they are always hiding under the umbrella of security services provided by the Nigerian security agents which serve as their bodyguards.[48] There are no noticeable enforcement mechanisms adopted for implementation because section 71 of the Act specifies only a pre-condition that CDA should be concluded before granting mining licence for commencement of mineral activities without other provisions on how to resolve matters that may arise from the title-holders failure to implement CDA. This trend is very common in the mining sector because of lack of explicit sanctions/penalties for defaulters or mandatory commitments

Another loophole discovered in NMMA is where both parties do not agree or reach a deadlock over some issues. The Act, directed that such unresolved issues be referred to the Minister and no other alternative. Although it is not bad by asking a third party like the Minister to intervene but in view of his various positions as the Minister of Mines and Steels development who serve as an agent of the government in his responsibilities on administrative and developmental matters in the mining sector together with his vested interests in the development of the sector for national economic growth.There is therefore a high tendency therefore for the Minister to be biased in decision making and may rather prefer to favour the titleholder/ mining companies at the detriment of the interests of the HC. This has made it difficult if not impossible for the Minister to resolve the conflicts judiciously in favor of the HC. Without any other alternative for the HC to seek redress they are therefore been deprived of their rights and freedom to participate in matters that boarder on their interests.[49]

Realization of ESCRs by the Host Community Development Trust under Petroleum Industry Act

PIA is a recently formulated Act to repeal the outdated Petroleum Act of 1969, and remains the only legislation that regulates the exploration of oil production in Nigeria. PIA is credited for its great support towards the development of HC. Chapter 3 of the Act introduces Petroleum host community development (PHCD) with the main objectives of providing direct social and economic benefits from petroleum operations to HC to foster sustainable developments and also enhance mutual co-existence between the HC and the licensee/lessees.[50] In applying PIA, Section 235 provides for introduction of host communities development trust (HCDT) to settlors/oil companies for the benefits of the HCs in which they operate. The HCDT is about raising a fund called The Host Community Development Trust Fund (Trust Fund) which should be sourced through contributions from various means like the settlor, donations, gifts, grants or honoraria, and interests accrued are to be paid to the trust fund as reserve. The important condition in Section 240 of the act states that every settlor is mandated to contribute 3% of its operating expenditure from upstream petroleum operations of each preceding calendar year to HCDT and in sections 256 & 257 that the fund must be tax-exempt, while the settlors' contributions should be deductible from the hydrocarbon tax and the companies' income tax respectively.[51]

Basically, HCDT is established with the intension of financing and executing various projects for sustainable developments of the HC, such as to advance and propagate educational developments, and support local initiatives in promoting security, healthcare and economic empowerment opportunities and so on. It is noteworthy that failure to incorporate/ establish HCDT at the expected time is counted as enough ground for revocation of the settlor's license/lease[52] In this wise, it is quite evident that HDCT is actually meant to provide social and economic benefits from petroleum operations to the HC which can be termed as fulfilling the rights of the HCs and also providing them with benefits from the proceeds of the natural resources located on their lands. The Act equally directed that all assessments carried out by these settlors should be transformed to community development plan and must be properly based on social, environmental and economic perspectives that really help to identify the specific needs of the affected communities and be able to devise appropriate strategies to address these needs. By so doing, the rights of the people to social economic development are been fulfilled.

Implementation of HCDT to protect the rights of HCs in Nigeria

Prior to the enactment of PIA, the HC development initiatives, in use were based on voluntary Memoranda of Understanding (MOU) to negotiate with the settlors/oil companies, but due to its voluntariness and non- binding effects of the agreements, which resulted in non- enforcement of the terms of the contract or weak institutions of legal actions for non-compliance. Similarly, the various establishments of the compensation scheme initiatives by the government starting with the Niger Delta Development Board (NDDB) of 1961 till the Niger Delta Development Commission (NDDC) of 2000 as well as the derivative funds obtained from 13% of oil revenue from the Federation Account (though the Constitution did not categorically state that 13% of the revenue should be paid towards the development of HC). All these compensations schemes practically ended in huge failure to cater for the developments and full realization of HC's ESCR.[53] To this effect, PIA made a compulsory provision for the establishment of a trust fund and be controlled solely by the Settlors/companies

[48] Greg Odogwu, The Rage of Nigerian Mining Host Communities *The Punch* (17 October 2019) <https://punchng.com/the-rage-of-nigerian-mining-host-communities/ >accessed 20 July 2022
[49] Section 116 (14)
[50] PIA n 12
[51] Ibid
[52] Ibid s. 238
[53] M.J.D Akpan, Petroleum Industry Act in Nigeria: an Analysis of the Impact of the Novel Host Communities Development Trust Provisions [2021] (9) (7) Global Journal of Politics and Law Research Vol.9, No.7; 30-46

themselves to be able to formally create a binding MOU, and legalise the corporate social responsibility (CSR) obligations of providing adequate financial security for socio-economic developments of local areas.[54]

However with PIA, settlors are compelled to carry out the following obligations; incorporate HCDT, contribute towards the trust fund, determine matrix for distribution of trust fund, Set-up Board of Trustees (BOT), interact with HC to conduct needs assessment on development matters. These obligations however directly provide a link for stakeholder's relationship between the HCs and the settlors/companies. This helps to strengthen the bond between both parties and make the settlors to highly respect and acknowledge the HCs as important stakeholders unlike before the Act when the two parties were at extreme ends with no direct link except through the government as intermediary.[55] The Act mandates the settlors to consider the interests of the HC first before making any resource-management decisions and on the other way round, the HCs are strongly warned not to cause any act of vandalism, sabotage or civil unrest that may cause damages to the petroleum and designated facilities or disrupt production activities within the HC. It further states that if such problems persist, then the communities will have to forfeit their entitlements to the extent of bearing the costs of damages done.[56]

Limitations of HCDT to protect ESCRs of host communities

In the first instance, PIA uses the traditional need based approach towards development (TNBA) and the main feature of TNBA is that decisions on HC developments are made solely by government/settlor without active participation of the people. This kind of upper hand accorded the settlors, without providing sufficient rooms for the HC's participation is a major limitation to HCDT. PIA provides settlors the powers to make important decisions which otherwise cut off the communities from decision-making processes. In the process of establishing the trust fund and managing the projects, the Act calls for the establishment of a BOT, advisory and management committees and be managed exclusively by the settlors as sole authorities to appoint, determine composition, qualifications, and removal of any member of BOT, the procedure for meetings, remunerations and appointment of any person of interests to them who may not necessarily be an indigenous person to be co-opted as members of the BOT. this kind of attitude is considered as great insubordination on the part of the HC and an act of deprivation.[57]

In terms of geographical locations, the Act authorises the settlors to make the final decisions in respect of which areas to be considered for community developments. This is contained in section 241, where it states that dispensation of HCDTF must exclusively be followed for implementation upon applicable of the host communities' development plan (HCDP) submitted by the settlors. The plan consists of the needs assessments undertaken by the settlors only and later transformed into the HCDP. More so, it is expected that settlors should give matrix to BOT for distribution of Funds to the HCs.[58] In this way also, the settlors are empowered to determine which communities are to receive from the Trust and the amount of benefit to receive without checkmating the settlor's excesses by allowing HC to make free and tangible contributions towards their personal developments. Along the line, PIA has failed considerably to provide for proper review of the submitted HCDP by thoroughly monitoring the activities of the settlors in the process of conducting the needs assessment, and again, PIA does not provide the means for HC to seek justice by challenging the decisions of the settlors on various developmental issues. Hence if a settlor fails to fulfil the actual needs of the communities, and not sanctioned immediately definitely leads to wastage of funds and efforts through duplication of projects that subsequently lead to deprivation of the people's rights.

Another limitation arises from the fact that PIA made provision only for means of establishing social economic development using a trust-fund but fails to provide ways for the HC to exercise their rights to self- determination comprising of right to self-government, participation in management and conservation of their territories and environment,[59] when as a matter of fact, human rights are indivisible but interrelated and not isolated. Whether it be of a civil, cultural, economic, political, social or environmental in nature, they are all inherent in human dignity. So, realization of one right at the expense of the other indirectly deprives the HC of all the rights, which at the end brings dissatisfaction.[60] More importantly, the word 'consultation' in the Act appears vague and ambiguous in line with Inter-American Court of Human Rights decision in the case of *Saramaka People v. Suriname*,[61] which differentiates clearly between situations where FPIC can be directly applied and where mere consultations are only appropriate. The Court applied two tests to differentiate between the two.

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[54] ibid

[55] I. Naibbi1 and M. Chindo, Mineral Resource Extractive Activities in Nigeria: Communities Also Matter! [2020] (8) *Journal of Geoscience and Environment Protection*, 212-229; see also G.P. Neugebauer Indigenous People as Stakeholders: Influencing Resource-Management Decisions Affecting Indigenous Community Interests in Latin America [2003] (78)(1227) New York University Law Review; 1231

[56] PIA n 12 s 200

[57] Ibid s. 242, 244, 247, 249

[58] Ibid s. 245

[59] ILO (169) Article 14, 15, 6, UNDRIP. Article 3

[60] See Gabcikovo –Nagymaros project, Judge Weeremamtry of the ICJ opined that the protecting the environment matters a lot because enjoyment of other globally recognised human rights are dependent on the protection of the environment.

[61] Saramaka people v Suriname judgement preliminary Objections, Merits, reparation and Costs serious C No. 172 < http://www.corteidh.or.cr> inter-American Court of Human Rights November 28, 2007.

The first test centres on the use of 'scale' of projects and the second test uses the magnitude of the 'impact' made on the indigenous lands. It was concluded then that development/investment projects which are measured on 'large scale' and with 'significant impact' require FPIC of the affected HCs which is equivalent to veto right.[62] By not allowing the people of the HC to actively participate in various developmental matters affecting them and to merely consult automatically leads to depriving the HC's right which is an oversight in the Act. Hence, to allow settlors only to fulfil legal obligations does not support the main purpose for which the Act was enacted in terms of community developments.[63]

4. Comparative Analysis of the Effectiveness of NMMA and PIA

The comparative analysis of NMMA and PIA, in protecting the ESCR of HCs in the mineral/petroleum sectors in Nigeria, clearly shows that the mechanisms adopted by these two Acts appear to be relevant and effective but carry few limitations. For instance, the incorporation of a mandatory CDA between the HCs and the mineral title holders adopted HRBA, which is premise on normative framework that promotes recognition and protection of fundamental rights standards in the execution of projects during decision-making processes. The elements of HRBA consist of effective participation, accountability, equality, transparency and empowerment as contained in the United Nations directives which are known as best practices for realizing and protecting the rights of the HC.[64] HRBA ensures that the interests and concerns of the minorities are identified and well-addressed by the government based on empowering the rights-holders, to know their rights and be able to apply them properly in holding the government/third parties strictly liable for all the human rights obligations. Along the line, the duty bearers (companies/state government) are thus forced to do the needful in ways and manners with which the rights of the HC are made realizable, respected and protected which really helped to build a strong system in which rights-holders are encouraged to participate in various matters and receive the necessary supports to ensure accountability on the part of the duty-bearers.[65] In the same vein, PIA is a very good instrument and well- appreciated because it provides for financial security and establishes a mandatory commitment towards implementation of HC development in establishing HCDT. The HCDT requires all settlors to compulsorily maintain financial security to be able to achieve their CSR which considerably builds potentials for the protection and fulfilment of ESCR towards the development of HC. With the realisation that developments are possible only when funds are available, PIA ensures therefore that adequate funds are sourced and reserved to meet implementation costs which makes implementation easy and serve as financial sustainability.

Besides the highlighted benefits from both Acts, there remains a big and common problem of enforcement to resolve which serve as a great limitation. There are no specific provisions for clear directives to follow on how proper implementation can be achieved. NMMA recommends that if any failure occurs in reaching absolute conclusion with CDA, it merely directs that such matters should be referred to the Minister for resolution. Here is the Minister whose political interests may not allow him to take appropriate decisions in favor of HCs and since no other alternative is provided for resolution, then automatically this may lead to deprivation of the people's rights to sustainable developments. Along the line, PIA too does not provide the necessary mechanisms for the people to seek justice by challenging the decisions of the settlors on developmental activities. If at the end, the settlors fail to fulfil their real obligations to the communities, the settlors can thus go scot-free without been sanctioned or penalized which provided a leeway for them to fulfil legal obligations only without achieving the main purpose for which the Act was enacted.[66]

5. Conclusion and Recommendation

ESCR is considered as an important and essential right of the HC for sustenance and development. To protect this right therefore, PIA established financial security and NMMA adopted active participation of indigenous people through HRBA. Findings showed that these two approaches have some advantages and limitations towards the successful implementations/fulfilment of HC's ESCRs. HRBA lacks financial security to accomplish its tasks properly whilst ideas can easily be borrowed from HCDT approach of PIA. In the same vein, HCDT approach lacks active participation of the HC for adequate implementation and this pracrice too can be borrowed from PIA meaning that both approaches can easily complement each other that is when a stable financial security is incorporated with the people's enabling powers to freely participate in developmental matters. This will however provide a good turning point for the people of the HC in both sectors to effectively protect their ESCRs. It is hereby recommended that the two Acts should be properly reviewed and ideas harmonised together to take care of the deficiencies found in the Act. Also the concerned parties should be given enough freedom to explore various avenues to seek redress when been deprived of their rights without subjecting them to the excessive power of the settlors or the biased decisions of the Minister for effective implementation of ESCRs of the host communities.

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[62]Agnieszka Szpak, The Right of Indigenous Peoples to Self-Determination: International Law Perspective [2018] (59) *Athenaeum Polish Political Science Study* 189

[63]SDN The Petroleum Host and Impacted Communities Development Bill <https://www.stakeholderdemocracy.org/wp-content/uploads/2018/12/HCB-11.12.18-JB.pdf > accessed 17 June 2022

[64]E.Wilson, What is Benefit Sharing? Respecting Indigenous Rights and Addressing Inequities in Artic Resource Projects [2019] (8) (74) Resource MDPI; 2,1,3

[65]Human Right Careers, What is Human Right-Based Approach? <https://www.humanrightscareers.com/issues/what-is-a-human-rights-based-approach/> accessed 12 October 2022.

[66] SDN n 63