

NON-STATE ACTORS AND HUMAN RIGHTS VIOLATIONS IN NIGERIA: AN APPRAISAL OF THE ACTIVITIES OF TRANSNATIONAL OIL CORPORATIONS IN THE NIGER DELTA REGION

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Non-state actors are categorized as entities that are participating or acting in the sphere of international relations. They do not hold the characteristics of a legal sovereign but do have some measures of control over a country's people and territories. Transnational Corporations (TNCs) are examples of non states actors with profit motives that operate in different sovereign states and continents in the world and deriving their powers most times from the laws of these states. Economists, lawyers and social scientists alike have for a number of years agreed that foreign investments like TNCs have the potential to act as a catalyst for the enjoyment or violation of human rights, particularly in developing countries. This is even more so considering that corporate investors are often not explicitly obliged under investment agreements to observe human rights even though they exert considerable power over individuals, communities and indigenous populations. Such assertions have strengthened the normative link between human rights law violations and the activities of transnational corporations like the oil companies. It is on this premise that this paper discusses how the activities of transnational oil corporations in the Niger Delta Region have led to violations of human rights and to examine how the federal government of Nigeria through legislation have empowered these transnational oil companies to engage in activities that lead directly to such flagrant human rights violations.

Keywords: Non-States Actors, Transnational Corporations, Human Rights, Violations, Nigeria

1. Introduction

It has been acknowledged that one of the most important aspects of the rise of post-1945 global capitalism has been the call for transnational corporations to conform to basic human rights principles. In November 1993, a Philadelphia law firm filed a \$1.5 billion class action suit with 46 plaintiffs from the oil-producing Orient region of Ecuador, on behalf of 30,000 Ecuadorian citizens, against Texaco Inc. The heart of the suit turned on allegations of corporate irresponsibility associated with the company's oil operations. Serious illnesses, water contamination, and ecological destruction attributed to the oil company the consequences of 20 years of drilling had.¹

Large natural resource TNCs, including oil giants like Enron,² Unocal,³ and Shell,⁴ have been dogged for years by allegations of illegal violence, forced labour, and support of armed conflicts in pursuit of their corporate interests. Similarly, private, for profit military actors, like Executive

¹ Michael J. Watts, "Righteous Oil? Human Rights, the Oil Complex and Corporate Social Responsibility" *Annual Review of Environmental Resource*. 18 July, 2005, at 9.1-9.2.

² See, Human Rights Watch, *The Enron Corporation: Corporate Complicity in Human Rights Violations* (1999), available at <<http://www.hrw.org/reports/1999/enron/>> accessed 29 July, 2012.

³ See Unocal's relationship to the Burmese military and its culpability in human rights violations associated with efforts to build the Yadana oil pipeline have been subject to a long-running Alien Tort Claims Act case in California. *Doe v. Unocal Corp* 1., 963 F. Supp. 880 (C.D. Cal. 1997) ; *Doe v. Unocal Corp.*, 110 F. Supp. 2d 1294 (C.D. Cal. 2000), *aff'd in part, rev'd in part by Doe v. Unocal Corp.*, 2002 WL 31063976 (9th Cir. 18 September, 2002), *vacated by Doe v. Unocal Corp II.*, 2003 WL 359787 (9th Cir. Feb. 14, 2003).

⁴ *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2nd Cir. 2000); *Wiwa v. Royal Dutch Petroleum Co.*, 2002 U.S. Dist. LEXIS 3293 (S.D.N.Y. 2002) (finding that plaintiffs' allegations that Shell participated in deportation, forced exile and torture of the Ogoni people in Nigeria, as part of a widespread attack, satisfied a claim for crimes against humanity under the Alien Tort Claims Act).

Outcomes and Sandline International, have participated in bloody conflicts around the world, and have often been paid through swap transactions involving mineral concessions. As private armies and as managers of mineral concessions, TNCs assume powers resembling those of states. Many of these TNCs activities have been the source of substantial allegations of human rights abuses. At other times, various TNCs have supported, funded and benefited from human rights violations perpetrated by the state. Rumour, anecdote and verified instances of sensational abuses have combined to create an impression that TNCs are beyond the reach of human rights law.⁵ The above situations at one time or the other have been experienced in the Niger Delta Region of Nigeria.

2. Definition of Transnational Corporations (TNCs)

The term “transnational corporation”⁶ refers to an economic entity or a group of economic entities operating in two or more countries, whatever the legal framework, the country of origin or the country or countries of activity, whether its activity is considered individually or collectively. Transnational corporations are legal persons in private law with multiple territorial implantations but with a single center for strategic decision making.⁷ “They can operate through

⁵ Rebecca M. Bratspies “Organs of Society: A Plea for Human Rights Accountability for Transnational Enterprises and Other Business Entities” 13 *Michigan State Journal of International Law*, 9, at 4-6 (2005).

⁶ Note that the terms “Transnational Corporations” and “Multinational Corporations” will be used interchangeably in the course of this paper. Both phrases means one and the same thing except for semantics.

⁷ Melik Özden, “Transnational Corporations and Human Rights: What is at stake in the United Nations debate over The Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights”, Brochure prepared for the CETIM’s Human Rights Program and Permanent Representative of the

a parent corporation with subsidiaries; can set up groups within a single economic sector, conglomerates, or alliances having diverse activities; can consolidate through mergers or acquisitions or can create financial holding companies. These holding companies possess only financial capital invested in stock shares through which they control companies or groups of companies. In all cases (parent company with subsidiaries, groups, conglomerates, alliances and holding company), the decision-making process for the most important matters is centralized.⁸ These corporations can establish domicile in one or several countries: in the country of the actual headquarters of the parent company, in the country where its principal activities are located and/or in the country where the company is chartered. "Transnational corporations are active in oil production services, as could be found in Niger Delta region of Nigeria, finance, communications, basic and applied research, culture, leisure etc. They operate in these areas simultaneously, successively or alternately. They can segment their activities across various territories, acting through *de*

CETIM to the United Nations in Geneva Part of a series of the Human Rights Programme of the Europe-Third World Centre (CETIM) at 8-9 Available online at <<http://www.cetim.ch/en/documents/bro2-stn-an.pdf>> accessed 29 July, 2012.

⁸ Multinational Corporation (MNCs) by which is meant corporations with affiliated business in more than one country. They have become important actors in the international arena. While corporations is deemed to have the nationality of the state where it is incorporated, the activities of MNC (or TNCs) can be global in scope, and provide significant benefits by creating wealth in states where they operate. Through their investments and trade, MNCs create jobs, produce goods and services, introduce technologies, and develop markets. While much of the increased MNCs activities since the 1990's has been among states of the developed world, a portion of that activity includes the movement of MNCs operations to the developing world to take advantage of a cheaper supply of labour and lax environmental and human rights laws. See., Sead D. Murry, *Principles of International Law*, St Paul MN: Thompson West, 2006 at 62. See also *Barcelona Traction, Light & Power Co. (Belgium v. Spain)*, 1979 I.C.J. 3, 168 (February, 5th).

facto or *de jure* subsidiaries and/or suppliers, subcontractors or licensees.⁹

3. The Niger Delta Region

The Niger Delta area in Nigeria is situated in the Gulf of Guinea between longitude 50E to 80E and latitudes 40N to 60N. It is the largest wetland in Africa and the third largest in the world consisting of flat low lying swampy terrain that is criss-crossed by meandering and anastomosing streams, rivers and creeks. It covers 20,000 km² within wetlands of 70,000 km² formed primarily by sediment deposition. It has an equatorial monsoon climate influenced by the south west monsoonal winds (maritime tropical) MT airmass coming from the South Atlantic Ocean. It is home to 20 million people drawn from nine states namely Abia, Akwa Ibom, Bayelsa, Cross River, Delta, Edo, Imo, Ondo and Rivers states with 40 different ethnic groups. This floodplain makes up 7.5% of Nigeria's total land mass. The Delta's environment can be broken down into four ecological zones: coastal barrier islands, mangrove swamp forests, freshwater swamps, and lowland rainforests. This incredibly well-endowed ecosystem contains one of the highest concentrations of biodiversity on the planet, in addition to supporting abundant flora and fauna, arable terrain that can sustain a wide variety of crops, lumber or agricultural trees, and more species of freshwater fish than any ecosystem in West Africa. The vegetation of the Niger Delta consists mainly of forest swamps. The forests are of two types, nearest the sea is a belt of saline/brackish Mangrove swamp separated from the sea by sand beach ridges. Numerous sandy islands occur with fresh water vegetation. Fresh water

⁹ Development and International Economic Co-operation: Transnational Corporations Annex: Proposed Text of the Draft Code of Conduct of Transnational Corporations", at 5, E/1990/94 in *Economic and Social Council, Official Records, 1990, Supplement No. 1, United Nations, New York, 1991.*

swamps gradually supersede the mangrove on the landward side. More than 70% of Nigeria's crude oil and gas production is from the area. The region produces over 90% of Nigeria's foreign earnings through oil exploration activities. It plays host to most of the upstream and downstream oil related industries and non oil related industries that release tons of pollutants into the ecosystems. The pollution from the Niger Delta on a scale could be regarded as one of the worst among similar delta areas in the world.¹⁰

4. Origin of the Activities of TNCs in Niger Delta Region

The origin of the activities of TNCs in Niger Delta region of Nigeria can be effectively traced to 1956. In that year, Shell British Petroleum (now Royal Dutch Shell)¹¹ discovered crude oil at Oloibiri, a village in the Niger Delta, and commercial production began in 1958.¹² Today, there are over 606 oil

¹⁰ Godson Rowland Ana, "Air Pollution in the Niger Delta Area: Scope, Challenges and Remedies" at 181-182.

¹¹ The Royal-Dutch/Shell groups of companies is an Anglo-Dutch group, the holding companies who own the group being The Shell Transport and Trading Company PLC (UK) and Koninklijke Nederland (Royal Dutch Petroleum Company: Netherlands). These two holding companies own 40 per-cent and 60 per-cent respectively of the following three subsidiaries, which are themselves holding companies for further operating subsidiaries: - Shell Petroleum NV (Netherlands) - Shell Petroleum Company LTD (UK) - Shell Petroleum Inc. (USA).

¹² The discovery of oil in commercial quantities by this company kindled the interests of other oil companies in the late 1950s including Mobil Exploration Nigeria Limited, an affiliate of the American Socony-Mobil Oil Company. Other MNCs were to join with the independence of the country in 1960. These included Tennessee Nigeria Inc. (1960), an affiliate of the American Tennessee Gas Transmission; Nigerian Gulf Oil Company (1962), an affiliate of American Gulf Oil Company; and Nigerian AGIP Oil Company (1962), an affiliate of the Italian government-owned ENI. The Nigerian oil industry is dominated by the major oil multinationals operating a joint venture with the state through the Nigerian National Petroleum Corporation (NNPC). These multinational companies are Shell Petroleum Development Company (SPDC), Chevron

fields in the Niger Delta, of which 360 are on-shore and 246 off-shore. Nigeria is rated as one of the largest oil producer in Africa and the sixth largest in the world, averaging 2.7 million barrels per day (bbl/d) in 2006. Nigeria's economy is heavily dependent on earnings from the oil sector, which provides 20% of GDP, 95% of foreign exchange earnings, and about 65% of budgetary revenues.¹³ Claims against Royal Dutch/Shell reveal a broad range of human rights problems perpetuated by a Transnational Oil corporation. Whereas the first set of claims involves abuses committed by security forces that are either contracted, requested by, or otherwise acting with the awareness of the corporation, the second set of cases pertains to more general allegations of corporate insensitivity to environmental pollution, and welfare of the indigenous communities where they carry out their exploration and support of repressive policies in the host country.¹⁴

Nigeria Limited (CNL), Mobil Producing Nigeria Unlimited (MPNU), Nigerian Agip Oil Company Limited (NAOC), Elf Petroleum Nigeria Limited (EPNL), and Texaco Overseas Petroleum Company of Nigeria Unlimited (TOPCON). Apart from these oil companies that operate joint ventures with the Nigerian National Petroleum Corporation (NNPC) there are others that also operate in Nigeria's oil industry. These include Pan Ocean Oil, British Gas, Tenneco, Deminex, Sun Oil, Total and Statoil, all of which operate alongside numerous other local firms. (See Victor Ojatorotu and Ayo Whetho., "Multinational Corporations and Human Rights Abuses: A case study of the Movement for the Survival of Ogoni People and Ijaw Youth Council of Nigeria". Available online at., <<http://rsmag.org/wp-content/uploads/2008/06/multinational200802.html>> accessed on 6th August, 2012).

¹³ P.C., Nwilo and O.T, Badejo., "Impacts and Management of Oil Spill Pollution along the Nigerian Coastal Areas". p.4 Available online at <http://fig.net/pub/figpub/pub36/chapters/chapter_8.pdf> accessed 6th August, 2012.

¹⁴ Though, according to Onosode, oil exploitation in Nigeria dates back to 1903 when the colonial government set up the Mineral Survey Corporation. In 1907, the Nigerian Bitumen Corporation was formed and it drilled 15 shallow wells in the old Abeokuta Province between 1908 and 1910, but no discoveries were made. In 1937, Shell d'Arcy had the whole country as a concession block and between 1937 and 1939 it

5. Transnational Corporations: Its Dominance on Host States and the Human Rights Implications

Although the modern TNCs has its roots in the East and West Indies traders of the mercantilist era of 16th to 20th centuries,¹⁵ the term *Transnational Corporation* first appeared in 1960. Distinguishing between portfolio and direct investment, Lilienthal first used the term to refer to "such corporations...which have their home in one country but which operate and live under the laws of other countries as well".¹⁶ Two major features are associated with TNCs: first, their activities involve more than one nation; second they are responsible for most foreign direct investment (FDI). For Dunning¹⁷, therefore, any corporation that engages in FDI and owns or controls value-adding activities in more than one country is a multinational corporation¹⁸ or transnational

carried out preliminary subsurface geological investigations. After the interruption caused by the Second World War, the first well (Imo-1) was drilled in 1951 to a depth of 3,422 metres without oil. It was in 1956 that the first successful well, Oloibiri-1 was drilled with production capacity of 4,000 bbls/day in 1958, which put the Niger Delta firmly on the path of oil production. See., Tari Dadiowei, "Environmental Impact Assessment and Sustainable Development in the Niger Delta: The Gbarain Oil Field Experience", Niger Delta Economies of Violence., Working Paper No. 24 of 2009 6:49, (See also O. Onosode, Selected Speeches and Presentations (1995 – 2001) in B.A., Chokor (ed). *Environmental Issues and Challenges of the Niger Delta: Perspectives from the Niger Delta Environmental Survey process*. Lagos: CIBN Press Limited, 2003 at 74-77, 86).

¹⁵ UNCTAD., *World Investment Report 2000: Cross-Border Mergers and Acquisition and Development* New York and Geneva: United Nations, 2002 at 2.

¹⁶ S. J., Kobrin, "Sovereignty at Bay: Globalization, Multinational Enterprise and International Political System" in A. Rugman, and T. Brewer, (eds)., *The Oxford Handbook of International Business*, Oxford: Oxford University Press., 2001 at 1.

¹⁷ J.H. Dunning, *Multinational Enterprises and the Global Economy* Addison Wesley New York 1996 at 34.

¹⁸ Abdulai Abdul-Gafaru, "Are Multinational Corporations Compatible With Sustainable Development?" *The Experience of Developing*

corporation. The period 1970-2000 saw an enormous growth of activity by transnational corporations. While only 7,000 TNCs existed in 1970,¹⁹ there were as many as 63,000 parent firms with around 690,000 foreign affiliates by the year 2000²⁰. TNCs have been expanding not only numerically but also financially. In 1998, the annual revenues of the top five corporations more than doubled the gross domestic product (GDP) of the 100 poorest countries in the world.²¹

The sheer size and enormous economic power of TNCs means they have the capacity to influence development policy. Due to the perceived benefits associated with them, political and economic decisions by elected governments are increasingly made to provide favourable environments for the investment and marketing needs of TNCs. Consequently, corporations are sometimes able to influence the domestic policy outcomes of host developing countries by threatening to move jobs overseas. This often raises questions about whether corporate power enables TNCs to effectively undermine human rights by circumventing domestic environmental standards and statutory laws. Moreover, the fear that firms will move jobs overseas and the calculation of the effect that this could have on the economy, can influence the degree to which developing countries will impose environmental regulations on multinational enterprises thereby giving way

Countries Georgia Tech Centre for International Business Education and Research Working Paper Series 2007-2008 Working Paper 001-07/08. Paper Prepared for the Conference on Multinational Corporations and Sustainable Development: Strategic Tool for Competitiveness – Atlanta, October 19 - 20, 2006 at 6-8., Available online at <<http://www.ciber.gatech.edu>> accessed 30 July. 2012

¹⁹ E. Kolodner, "Transnational Corporations: Impediments or Catalysts of Social Development?" *Occasional Paper No. 5, World Summit for Social Development*, Geneva 1994 at 2.

²⁰ UNCTAD *World Investment Report 2000: Cross-Border Mergers and Acquisition and Development* New York and Geneva: United Nations 2000 at 37.

²¹ *Id.*, at 3.

to free heaven for the operations of TNCs and subsequently unchallenged violations by them.²²

Again, as trade liberalization, privatization, and deregulation have fostered the expansion of business worldwide, experts have lamented that the nation-state as an organizational entity is declining in power²³ and that future international legal efforts to increase human rights protection should attempt to bypass the state altogether.²⁴ The nature of businesses with operations spanning more than one country (called "Transnational Corporations," or "TNCs"), consists of more than 60,000 firms and more than 800,000 subsidiaries, not including the millions of suppliers, subcontractors, and distributors that constitute their production chains.²⁵ For these entities, "territory is not the cardinal organizing principle or national interests the core driver." Yet traditional state methods of regulating corporate activity remain largely territorial, leading many to believe that domestic law's ability to enforce human rights norms has been effectively thwarted.²⁶ However, the increasing power and mobility of corporations is hardly a phenomenon that state actors are powerless to

²² J. Clapp, "Transnational Corporations and Global Environmental Governance", in P. Dauvergne, (ed.), *Handbook of Global Environmental Politics* (Northampton, MA: Edward Elgar). 2005 at 1.

²³ Christen Broecker., "Better the Devil You Know": Home State Approaches to Transnational Corporate Accountability", *International Law And Politics* (Vol. 41:159) 165-167 (2008).

²⁴ See David Kinley & Junko Tadaki, "From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law", 44 *Vermont Journal of International Law* 931, 933 (2004) (arguing that the current state-based framework of international human rights law is inadequate to regulate powerful non-state actors, and proposing direct international legal regulation of transnational corporations).

²⁵ See John Ruggie, *American Exceptionalism and Global Governance* 14 (John F. Kennedy School of Government, Working Paper No. RWP04-006, 2004).

²⁶ Beth Stephens, "The Amoral of Profit: Transnational Corporations and Human Rights", 20 *Berkeley Journal of International Law* 54 (2002)

address. While the structure of TNCs does allow them to move their operations between worldwide facilities, making them slippery regulatory targets,²⁷ their innovative structure is not the sole factor contributing to their substantial freedom from state regulation. Rather, domestic political systems have either chosen to relinquish their control over businesses that operate in a global space or have simply neglected to exert control beyond their borders in the first place. Many business leaders have enormous economic and political power, allowing them to exercise political influence that is disproportionate to their numbers and to lobby for favourable regulatory schemes in the states that would otherwise be best positioned to control them.²⁸ Certainly, such business interests profoundly affect the behaviour of host states as well as home states, as the leaders of the host states often face considerable pressure to create an attractive environment for foreign investment.²⁹ Yet business actors also exert powerful influences over home states, incentivizing them to structure the relations between their domestic investors and their foreign hosts in ways that

²⁷ Claudio Grossman & Daniel D. Bradlow, "Are We Being Propelled Towards a People-Centered Transnational Legal Order?", 9 *American University Journal of International Law and Policy* 1, 8 (1993) ("The fact that they have multiple production facilities means that TNCs can evade State power and the constraints of national regulatory schemes by moving their operations between their different facilities and the world."). Again, apart from using the armed forces to maintain peace in the Niger Delta, the Nigerian government uses the oil pipeline Act of 1956, the Petroleum Act of 1969 and the Land Use Act of 1978, the Treason and Treasonable offences Decree of 1993 (now an Act of the National assembly) to intimidate and harass the Niger Delta peoples.

²⁸ Surya Deva, "Acting Extraterritorially to Tame Multinational Corporations for Human Rights Violations: Who Should 'Bell the Cat'?", 5 *Melbourne Journal of International Law* 37 (2004) (discussing the use of extraterritorial laws to regulate multinational corporations in the context of human rights).

²⁹ Erin Elizabeth Macek, *Scratching the Corporate Back: Why Corporations Have No Incentive to Define Human Rights*, 11 *Minnesota Journal of Global Trade* 101, 103-4 (2002).

heavily favour the former.³⁰ The influence of business actors on state policies is similarly reflected at the international level, where states are often unwilling to support mechanisms that would constrain the actions of their own nationals abroad.³¹ As a result of the political and economic power of business actors, TNCs operating in capital-importing countries are frequently able to infringe upon the human rights of the citizens of their host states with virtual impunity.³²

6. Transnational Corporations and Human Rights

Although the term “human rights” is generally understood in reference to states, all human rights can potentially be violated by non-state actors, i.e. corporations.³³ By human

³⁰ Beth Stephens, “The Amoralism of Profit: Transnational Corporations and Human Rights”, 20 *Berkeley Journal of International Law*, 54 (2002), at 58 (“Economic power carries with it a growing political clout. Corporations play influential direct and indirect roles in negotiations over issues ranging from trade agreements to international patent protections to national and international economic policy.”)

³¹ *Id.*, at 81.

³² Jana Silverman and Alvaro Orsatti., “Holding Transnational Corporations Accountable for Human Rights Obligations: The Role of Civil Society”, *Social Watch* 31. Available online at <http://www.socialwatch.org/sites/default/files/silverman-orsatti2009_eng.pdf>, accessed 30th July, 2012. Business enterprises, particularly transnational companies, are typically private, non-governmental entities subject only to national laws in either the country where the company has its headquarters or in the host countries where the company has investments. Even though these companies may have significant presence in multiple countries, they are not technically considered to have international legal status, which is limited to states and certain intergovernmental organizations such as the European Union and the UN. This means that by and large they have not been subject to the rights and obligations of international law, including international human rights law.

³³ Ratner, R. Steven, “Corporations and Human Rights: A Theory of Legal Responsibility,” *Yale Law Journal*, Vol. 111, (2001), at 509. Ratner gives examples of how TNCs may violate or contribute to violations of human rights which create duties exclusively on states, such as civil and political rights.

rights we refer to those human rights recognized by customary international law and international treaties.³⁴

In recent years, greater attention has been paid to the role of commercial entities in violent contexts whose activities may, directly or indirectly, implicate issues of human rights or international humanitarian law.³⁵ International human rights law establishes a set of norms and obligations that are mainly enforced in relations among states or between states and their citizens.³⁶ Unlike states, private commercial corporations are generally not treated as bearing direct human rights obligations under international law; human rights law applies only in a limited way to these corporations.³⁷ Similarly, international humanitarian law, although increasingly applied to non-state actors, has yet to be applied directly to privately-owned companies.³⁸ At the domestic level, most countries do not have national legislation establishing the extra-territorial duties of corporations with respect to human rights. Domestic

³⁴ Natalya S. Pak and James P. Nussbaumer, "Beyond Impunity: Strengthening The Legal Accountability Of Transnational Corporations For Human Rights Abuses", *Hertie School of Governance, Berlin, Working Papers No. 45* October, 2009 at 9.

³⁵ Dana Weiss & Ronen Shamir., "Corporate Accountability to Human Rights: The Case of the Gaza Strip", *Harvard Human Rights Journal / Vol. 24*, 2011 at 155-157.

³⁶ *Kiobel v. Royal Dutch Petroleum*, 621 F.3d 111 (2d Cir. 2010); Andrew Clapham, "Human Rights Obligations of Non-State Actors" 96 (2006); Mark Gibney *et al.*, "Transnational State Responsibility for Violations of Human Rights", 12 *Harvard Human Rights Journal* 267, 295 (1999); Carlos M. Vazquez, *Direct vs. Indirect Obligations of Corporations under International Law*, 43 *Columbia Journal of Transnational Law* 927, 932-33 (2005).

³⁷ David Kinley & Junko Tadaki, *above*, note 24, at 931, 934-35.

³⁸ See *Kadic v. Karadzic*, 70 F.3d 232 (2nd Cir. 1995); see; Nils Rosemann, "The Privatization of Human Rights Violations Business Impunity or Corporate Responsibility? The Case of Human Rights Abuses and Torture in Iraq", 5 *Non States Actors and International Law*. 77, 89 (2005); See also Michael N. Schmitt, "Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees", 5 *Chicago Journal of International Law* 511, 519 (2005).

laws that apply to corporations in their home states do not ordinarily regulate corporate activities in host states.³⁹ At the same time, human rights norms in host countries, especially in developing ones, “may be heavily compromised by the economic considerations of the host state’s unbalanced relationships with transnational corporations.” As a result, there is a relative legal vacuum concerning corporate human rights obligations in host countries in general... This vacuum and potential ways of addressing it have been at the heart of the recently proliferating literature on the human rights obligations of corporations.⁴⁰

7. Human Rights Violations in Niger Delta Region

Violations of the human rights of the local populace can be seen as one of the major undoing of the people of Niger Delta region. Oil companies like Chevron, Shell, Agip, Mobil and the other Western Oil Companies have been very unfair

³⁹ The term “home state” here refers to the country where the corporation is incorporated, whereas “host state” refers to any other country where the corporation operates. The commercial activities of corporations beyond the boundaries of their home-states raise the issue of the extraterritorial application of human rights treaties. See generally Theodor Meron, “Extraterritoriality of Human Rights Treaties”, 89 *American Journal of International Law* 78 (1995). For an analysis of states’ human rights responsibilities incurred as a result of extraterritorial violations by corporations, See Robert McCorquodale & Penelope Simons, “Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law”, 70 *Modern Law Review* 598 (2007).

⁴⁰ Emeka Duruigbo, “Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges”, 6 *Northwestern University Journal of International Human Rights* 228 (2008); See also David Weissbrodt, *Business and Human Rights*, 74 *U. R. CIN. L. REV.* 55, 55 (2005); see also Peter W. Singer, *War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law*, 42 *Columbia Journal of Transnational Law* 521 (2004).

to the people of the region. The human rights of the people are constantly violated by the oil companies acting in tandem with the government with their repressive security forces or machinery. Perhaps, examples of military and security activities carried out in the past might help to buttress this assertion. For instance, in attempt to suppress the Isaac Boro rebellion in 1966 which started as a campaign for fair deal or control of the oil wells by the people of Niger Delta. Nigerian government reacted by deploying troops which terrorized entire communities including raping of innocent women. Boro was considered to be a threat to the free exploitation of the petroleum resources in the Niger Delta.⁴¹ Boro himself, along with his lieutenants: Nottingham Dick and Samuel Owonanu were tried for treason and sentenced to death, but the Nigerian civil war broke out before they were to be executed. Instead of execution, the trio were conscripted into the Nigerian army where Isaac Adaka Boro met his death.⁴²

In 1987, the Iko Community in Akwa Ibom State was extensively brutalized by a team of Nigerian Mobile Police Force, at the request of Shell. In 1992, at the insistent of Shell, some youth were killed in Bonny during a peaceful demonstration against the activities of the oil company.⁴³ In January 1993, the crisis over environmental pollution and economic marginalization from the oil industry reached its peak when 300,000 Ogoni led by Ken Saro-Wiwa protested against Shell Oil. In no time, Saro-Wiwa was falsely accused

⁴¹ ICE., "Case Study: Ogonis and Conflict; Factsheet on the Ogoni Struggle" at 5 available online at <<http://www.insular.com/~tmc/politics/africa/ogoni.fact.html>> accessed on 23 July, 2012.

⁴² Atakpu. L., "Resource-Based Conflicts: Challenges of oil Extraction in Nigeria", Paper Presented at Benin City, Nigeria on a European Conference Hosted by the German EU Council Presidency 2007 Berlin, between 29 and 30 March, 2007, at 9.

⁴³ A. A., Brisibe, "African Tradition "The Identity of a People: With special Focus on Globalization & Its Impact in the Niger Delta" C.O.O.L Conference, Boston, U.S.A, March 18, 2001, at 5.

of inciting members of MOSOP to kill four Ogoni elders. He and eight other fellow compatriots were arranged for trial, by a kangaroo military tribunal, set up by the despotic and repressive government of General Sanni Abacha, for the murder of the Ogoni four, convicted, and hanged in November 1995. However, "his more likely "crime" is his effort to organize the Ogoni ethnic minority to stop destruction of their homeland caused by operations of Shell and Chevron, the multinational oil companies, and seek compensation for his people's lost farmland and fisheries".⁴⁴

On January 11, 1999, Ijaw women who were engaged in a peaceful demonstration and marginalization of their people in Port Harcourt were violently tear-gassed, beaten, stripped, and detained by a combined team of policemen and soldiers.

The event of September 9 and 11, 1999, in which about 100 soldiers deployed from Elele Barracks and joined hands with the police saw to the destruction of the Black Market area of Yenagoa, Bayelsa State. They had their marching orders to shoot at sight. The combined team of police and soldiers went from house-to house in search of people to arrest. Anyone found running was shot-on-sight. People who jumped into the river to escape were sprayed with bullets. "A group of soldiers and police in violation of the law they swore to protect, "the life and properties of Nigerian citizens", jumped into three speed-boats, cornered the young boys who were trying to swim to safety, to avoid the venomous assault and sprayed them with bullets.⁴⁵ Also, the Warri wars of 2003 were allegedly instigated by the activities of some oil companies and Nigerian Naval officers.⁴⁶

⁴⁴ ICE *above*, note 41, See also International Herald Tribune: "Oil Companies in Niger Delta Facing Growing List of Dangers" available online at www.ihf.com/articles/2007/04/22/news/oil.php accessed on 2nd August, 2012.

⁴⁵ Atakpu. L., *above*, note 42 at 9.

⁴⁶ A.A., Brisibe, *above*, note 43 at 6.

In these circumstances, a lot of local communities in the Niger Delta have been sacked. Fire has consumed thousands of innocent people in the course of instigated communal conflicts. Life has become caustic at best since the coming of the oil companies who have wrought pains, massive destruction and death of unqualified magnitude on the Niger Deltans.⁴⁷ The people of the region viewed all these violations, assaults and marginalization because they belonged to ethnic minority groups in the Nigerian Federation, too negligible to be protected by the constitution.⁴⁸

8. Environmental Rights Problems Associated with TNCs

The social and environmental costs of oil production by transnational oil corporations have been very extensive. They include destruction of wildlife and biodiversity, loss of fertile soil, pollution of air and drinking water, degradation of farmland and damage to aquatic ecosystems, all of which have caused serious health problems for the inhabitants of areas surrounding oil production. It is ironical that environmental regulations which are common practice in developed nations are often not followed due to the lack of power, wealth and equity of the affected communities. As a result, oil companies often evacuate inhabitants from their homelands, further marginalizing them. The system of oil production in Nigeria is skewed in favour of the multi-nationals and government elite who are the direct recipients of oil production revenue. As a result of environmental damage brought about by the activities of the oil companies, environmental problems like erosion; flooding; land degradation; destruction of natural ecosystem;

⁴⁷ Atakpu. L., *above*, note 42 at 10.

⁴⁸ H.T., Ejibunu, "Nigeria's Niger Delta Crisis: Root Causes of Peacelessness", EPU Research Papers, Issue 07/07 *European University Center for Peace Studies (EPU)*, Stadtschlaining/Austria 2007) Presentation of 2007, at 9-20.

fisheries depletion caused by dredging ; toxic waste into the rivers etc, etc are common phenomenon in the region. The local people can no longer take to farming and fishing which are their major occupations. As a result of the impact of oil activities on the environment and the ecosystem of the region, the United Nations warned in a report that “the degree and rate of degradation are pushing the Delta towards ecological disaster”.⁴⁹ The oil multinationals contributes significantly to the environmental destruction of the Niger Delta through the following ways:

- a. **Oil Spillage:** Oil spillage is a major problem in the region. The indigenes and the environment suffer from oil spillage and lack of coordinated efforts by the oil companies and the federal government to clean up as soon as oil spillage takes place. According to Etim,⁵⁰ a spillage from a pipeline owned by the Shell Petroleum Development Company (SPDC) in the Karama Community of Okordia/Zarama Local Government Area of Bayelsa State in June 2003 caused enormous economic and environmental damage and hardship to the area. The spillage was not properly cleaned and the indigenes were not evacuated by the oil company. Community leaders in the area alleged that SPDC awarded the contract for cleaning the spillage to a company that did not do an effective job, thereby resulting in fires and destruction of the ecosystem. According to Cayford as quoted in Abdulai Abdul-Gafaru., “the incidence of oil spills in the Niger Delta is exceptionally high; 40% of all of Shell’s oil spills between 1982 and 1992 occurred in the Niger Delta despite the fact that Shell drilled for oil in twenty-eight different countries during the same

⁴⁹ Nigerian Oil, “Curse of the Black Gold” Available online at <<http://www7.nationalgeographic.com>> accessed on 29 July, 2012.

⁵⁰ ICE *above*, note 41.

period". One significant consequence of the numerous oil spills has been the lost of mangrove trees. Once a major source of soil stability, Nigeria's mangrove forests now find it difficult to survive the oil toxicity due to Shell's operations. The increasing oil leaks have largely destroyed the breathing roots of the mangroves, killing off parts of the forest.⁵¹

- b. Gas Flaring: Just as the Western oil corporations are inflicting untold hardship on the citizens of the Niger Delta by engaging in oil exploratory activities with total disregard for the political and economic sensibilities of the people, they are also wrecking the fragile ecosystem of the region through uncontrollable gas flaring. Gases flaring takes place 24 hours and some have been burning for over 50 years, thereby resulting in the release of hydrogen sulphide (sour gas). Hydrogen sulphide produces sulfur oxides and when sulfur oxides mix with oxygen and water in the atmosphere, they produce acid rain. Acid rain causes innumerable negative effects on the world, particularly the people and the environment. Gas flaring is a frequent occurrence in the Niger Delta. In the year 2000, 95% of extracted natural gas was flared in Ogoniland, a section of the Niger Delta, compared to a mere 0.4% flared in the entire US.⁵² The consequences of

⁵¹ See Abdulai Abdul-Gafaru., *above*, note 18 at 17. See also., Jonathan Sagay; Zephaniah Osuyi Edo; and Lucky Avweromre., "Environmental Degradation and the Dilemma of Sustainable Development: Implication for Environmental Security in the Niger Delta Region". *Journal of Environmental Sciences and Resource Management*, Volume 3, Cenresin Publications of March 2011, at 22. Available online at <<http://www.cenresinpub.org/pub/ENVIRONMENTAL%20DEGRADATION%20AND%20THE.pdf>> accessed on 8th August, 2012.

⁵² Abdulai Abdul-Gafaru., *above*, note 18 at 16. See also Shinsato, A. L., "Increasing the Accountability of Transnational Corporations for Environmental Harms: The Petroleum Industry in Nigeria", *Northwestern University Journal Human Rights Law*, Vol. 4:1, 2005 at

gas flares on the ecology, climate and local inhabitants are alarming. Gas flaring contributes to acid rain which poisons potable water, stunts crop growth, and damages the ecosystem.⁵³ Moreover, the extremely high levels of carbon dioxide and methane gases that are released into the atmosphere is a significant source of global warming.

A Report by the American Central Intelligence Agency (CIA) indicated that “everyday, eight million cubic feet of natural gas are burned off in flares that light the skies across the Delta, not only driving off 5 cms, hunting the fishing and poisoning the agriculture, but contributing to global warming”. Thus, the oil companies are not only destroying the Niger Delta, they are also contributing to global warming. A statement by MOSOP on the effect of gas flaring on the people of Ogoni would show how it has negatively affected the life of the people. It reads: “The once beautiful Ogoni country side is no more a source of fresh air and green vegetation. All one sees and feels around is death.”⁵⁴

9. How Land and Oil Mineral Legislation in Nigeria Laid Foundations for Human Rights Violations in the Niger Delta by TNCs

Under Nigerian law, local communities have no legal rights to oil and gas reserves in their territory.⁵⁵ Moreover, their

7., See also Essential Action and Global Exchange., “Oil for Nothing: Multinational Corporations, Environmental Destruction, Death and Impunity in the Niger Delta” 2000, Section 1., Available online at <http://www.essentialaction.org/shell/Final_Report.pdf> accessed: 27 July, 2012.

⁵³ Multinational Corporations, Environmental Destruction, Death and Impunity in the Niger Delta” Available online at: <http://www.essentialaction.org/shell/Final_Report.pdf> accessed on 27th July, 2012

⁵⁴ Factsheet on the Ogoni Struggle <<http://www.insular.com/~tmc/politics/africa/ogoni.fact.htm>> accessed 1st August, 2012.

⁵⁵ Constitution of Federal Republic of Nigeria, 1999, Chapter 4, Section

security of tenure and the protection of the right to an adequate standard of living, including housing, food and water, have been compromised by both Constitutional provisions and a number of laws that give precedence to oil operations in terms of access to land.⁵⁶

Section 44 of the 1999 Constitution states that “the entire property in and control of all minerals, mineral oils and natural gas in, under or upon any land in Nigeria or in, under or upon the territorial waters and the Exclusive Economic Zone of Nigeria shall vest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly.” Under the 1978 Land Use Act, all land is vested in the Governor of the State and it is lawful for the Governor “to revoke a right of occupancy for overriding public interest”. Overriding public interest includes “the requirement of the land for mining purposes or oil pipelines or for any purpose connected therewith.”⁵⁷ Communities living on the land cannot prevent this from occurring, and there is no provision in the law for consultation. Provisions within the Petroleum Act and the Oil Pipelines Act empower the Federal Government to grant access and use rights in relation to land for the purposes of oil prospecting and mining. Once a company has been given a permit, licence or lease the state government has to give access to the land. The communities are compensated according to a formula that primarily assesses value based on “surface goods”

44 (3) states: “Notwithstanding the foregoing provisions of this section, the entire property in and control of all minerals, mineral oils and natural gas in under or upon any land in Nigeria or in, under or upon the territorial waters and the Exclusive Economic Zone of Nigeria shall vest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly”.

⁵⁶ Amnesty International, “Nigeria: Petroleum, Pollution and Poverty in the Niger Delta” Amnesty International Publication, June, 2009 AFR 44/017/2009, at 24.

⁵⁷ See, the Land Use Act 1978, Cap. L5 Laws of the Federation of Nigeria (LFN) 2004, which regulates ownership rights and tenure system of landholding; (Sections 28 (1) and 28 (2) (c) and 28 (3) (b)).

lost.⁵⁸ These are buildings, crops, economic trees and access to fishing grounds. The compensation calculations do not appear to consider the long term implications of loss of access to critical livelihood resources.

Moreover, the Land Use Act bars courts from addressing any concerns about the amount or adequacy of compensation paid to people who lose access to their land under the terms of the Act.⁵⁹ The combination of the Constitutional Provisions on oil and gas, the Land Use Act and aspects dealing with the oil laws of Nigeria has given sweeping powers to the government to expropriate land for use by the oil industry without due process or adequate compensation, in contravention of its international human rights obligations, in particular the right to an adequate standard of living.⁶⁰ The provisions of these laws, which significantly undermine communities' security of

⁵⁸ Under the Land Use Act, 1978: if a right of occupancy is revoked for purposes related to mining and oil, the occupier is entitled to compensation under the appropriate provisions of the relevant Mining or Oil laws. Section 36 of the Petroleum Act states: "holder of an oil exploration licence, oil prospecting licence or oil mining lease shall, in addition to any liability for compensation to which he may be subject under any other provision of this Act, be liable to pay fair and adequate compensation for the disturbance of surface or other rights to any person who owns or is in lawful occupation of the licensed or leased lands." Section 20 of the Oil Pipelines Act, 1959 (Cap O7, LFN 2004) states: "If a claim is made under subsection (3) of section of 6 of this Act, the court shall award such compensation as it considers just in respect of any damage done to any buildings, lion crops or profitable trees by the holder of the permit in the exercise of his rights there under and in addition may award such sum in respect of disturbance (if any) as it may consider just." In practice the tendency has been to focus compensation calculations on the surface goods lost under the headings of crops, economic trees and buildings.

⁵⁹ Section 47 (2) states: "No court shall have jurisdiction to inquire into any question concerning or pertaining to the amount or adequacy of any compensation paid or to be paid under this Act."

⁶⁰ Article 11 of the UN International Covenant on Economic, Social and Cultural Rights GAR 220A of 16 December, 1966, entered into Force on 3rd January, 1976.

tenure, also create the legal foundations for oil companies to operate without due regard for the impacts of their operations on human rights. For example, holders of leases and licenses and permits to survey under the Petroleum Act, Oil Pipelines Act and subsidiary legislation are entitled to engage in a range of activities—from cutting down trees and other vegetation, to dredging without any adequate safeguards in terms of the impact of these activities on the environment and associated livelihoods of the communities.⁶¹ The result is conflict between

⁶¹ Oil Pipelines Act 1959 (Cap O7, LFN 2004), Section 5(1): “A permit to survey shall entitle the holder, subject to the section 6 of this Act, to enter together with his officers, agents, workmen and other servants and with any necessary equipment or vehicles, on any land upon the route specified in the permit or reasonably close to such route for the following purposes –

- (a) to survey and take levels of the land;
- (b) to dig and bore into the soil and subsoil;
- (c) to cut and remove such trees and other vegetation as may impede the purposes specified in this subsection; and
- (d) to do all other acts necessary to ascertain the suitability of establishment of an oil pipeline or ancillary installations, and shall entitle the holder, with such persons, equipment or vehicles as aforesaid to pass over land adjacent to such route to the extent that such may be necessary or convenient for the purpose of obtaining access to land upon the route specified.” Section 6(3) of the same Act states: “The holder of a permit to survey acting under the authority of section 5 of this Act shall take all reasonable steps to avoid unnecessary damage to any land entered upon and any buildings, crops or profitable trees thereon, shall make compensation to the owners or occupiers for any damage done under such authority and not made good.” Section 11 states: “A licence shall entitle the holder, his officers, agents, workmen servants with any necessary equipment or vehicles, subject to the provisions of sections 14, 15 and 16 of this Act, to enter upon, take possession of or use a strip of land of a width not exceeding two hundred feet or of such other width or widths as may be specified in the licence and upon the specified in the licence, and thereon there over or there under construct, maintain and operate an oil pipeline and ancillary installations. A right to object is provided under Section 9 of the Act: “Any person whose land or interest in land may be injuriously affected by the grant of a licence may within the period specified for objections lodge verbally or in writing at one of the specified addresses notice of objection stating the interest of the objector and the grounds of objection.”

the communities and the oil companies over land. Companies depend on land because the oil is beneath it, while communities depend on land for farming and fishing.⁶² However, in almost every respect; the human rights of the people of the Niger Delta have been undermined by the laws enacted to allow oil and gas extraction to occur.

10. Constitutional Guarantees of Rights Violated by Transnational Oil Corporations in Nigeria

It is an irony that some of the rights violated by the TNCs in connivance with the Federal Government of Nigeria as part of their oil operation activities in the Niger Delta Region are rights constitutionally guaranteed by the same Government of Nigeria for which the operators of this constitution have vowed to protect in taking their oath of office. For example, the right to life is enshrined under section 33 of the constitution and it provides that, "Every person has a right to life, and no one shall be deprived intentionally of his right, save in execution of the sentence of a court in respect of criminal offence of which he has been found guilty in Nigeria".⁶³ Again Section 34 provides that; "every individual is entitled to respect for the dignity of his person, and accordingly- no person shall be subjected to torture, or to inhuman or degrading treatment, no person shall be held in slavery, or servitude; and no person shall be required to perform forced or compulsory labour".⁶⁴ Section 35 stipulated that, "every person shall be entitled to his personal liberty and no person shall be deprived of such liberty... except in accordance with a procedure permitted by law,⁶⁵ while section 43 and 44 made provisions for the right to

⁶² G. F. Frynas., *Oil in Nigeria: Conflict and Litigation between Oil Companies and Village Communities*, Transaction Publishers, 2000, at 170.

⁶³ Constitution of the Federal Republic of Nigeria, 1999, Section 33(1)

⁶⁴ *Id.*, Section 34 (1).

⁶⁵ *Id.*, Section 35 (1).

acquire and own immovable property anywhere in Nigeria,⁶⁶ and “no movable property or any interest in an immovable property shall be acquired compulsorily in any part of Nigeria except in the manner for the purpose prescribed by law that, among other things:

- a. requires the prompt payment of adequate compensation, therefore, and
- b. gives to any person claiming such compensation a right of access for the determination of his interest in the property and the amount of compensation to a court of law or tribunal or body having jurisdiction in that part of Nigeria”.⁶⁷

These provisions of the Nigerian constitution should be married with the series of human rights violations perpetuated by the government security forces and security agents contracted by the transnational oil corporations from the when Nigeria army crushed the Adaka Boro rebellion in 1966 which was a campaign among his kinsmen for fair deal or control of the oil wells by the people of Niger Delta till the killing of Ken Saro Wiwa in November, 1995 for campaigning for the environmental rights of the Ogoni's and further stopping the continued destruction of their homeland caused by operations of Shell and Chevron among others. Over these years, the government has engaged in wanton killing, rape, brutality, forced exile and torture, unlawful arrest and detention of community youths in the Niger Delta for peacefully challenging the unhealthy operations of transnational oil corporations in the region. Furthermore, a lot of local communities in the Niger Delta have been sacked and buildings destroyed by security forces in either reprisal attacks or deliberate action based on

⁶⁶ *Id.*, Section 43.

⁶⁷ *Id.*, Section 44 (1).

the command operations of top security officers working for the government and the oil companies in violation of Section 43(1) of the Nigerian Constitution, 1999. Section 44(1) of same constitution prohibits compulsory acquisition of property but this section continues to be violated by oil companies by virtue of the combined provisions of Section 5 (1) and 6 of the Oil Pipelines Act and section 47(2) of the Land Use Act, 1978 which states that: "No court shall have jurisdiction to inquire into any question concerning or pertaining to the amount or adequacy of any compensation paid or to be paid under this Act."

Section 20 of the Constitution of Nigeria provides for environmental objectives and it states that, "the state shall protect and improve the environment and safeguard the water, air, and land, forest and wild life of Nigeria".⁶⁸ So the state is under responsibility to protect the environment of Nigeria in the face of violation of the rights to decent environment by the transnational oil corporations. It is not an excuse that this responsibility is not under Fundamental Human rights provisions of the constitution which are enforceable in the courts of law. States which have given each other undertakings to respect, protect and promote human rights in the form of international human rights conventions must implement this self-imposed obligation in national legislation. In 1986 a group of human rights experts in the United Nations specified this responsibility of states in the so-called Limburg principles. These specify that states have: a duty of respect: the state is obliged to refrain from infringement of rights; a duty of protection: the state must protect rights against infringements by third parties (like TNCs); a duty of implementation: the state must ensure complete realisation of human rights where this is not already the case.⁶⁹

⁶⁸ *Id.*, Section 20.

⁶⁹ Confederation of German Employers' Associations (BDA)., "Human Rights and Multinational Enterprises Possibilities and Limits of What Business Can Do"(BDA: Berlin, May 2008) at 10.

Notwithstanding, states responsibility to promote and protect human rights, companies clearly also have a role to play in supporting and disseminating human rights. The Universal Declaration of Human Rights calls on every individual and every organ of society, which obviously includes Transnational Corporations and other business players, to contribute to the realisation of human rights.⁷⁰ The Universal Declaration of Human Rights, in which the obligation to promote respect for human rights and to secure their universal and effective recognition and observance is addressed not only to states but also to 'every individual and every organ of society', a formulation wide enough to encompass private corporations.⁷¹ By so doing, multinational enterprises are meeting their moral and economic obligation to promote worldwide realisation of human rights and to contribute to their recognition through observance. Hence in April 2008, the UN special representative John Ruggie proposes a concept for human rights and companies which he broke down into three principles: protect, respect and remedy: Protect:⁷² it is the duty of the state to protect the people within its borders against human rights infringements by non-state players.

⁷⁰ *Id.*, See also Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3rd Session, 1st Plenary Meeting., U.N. Doc. A/810 (Dec. 12, 1948), Article 29(1). Although not legally binding at the time it was adopted, many argue that "subsequent state practice has transformed it into a document considered by many to be a statement of customary international law."

⁷¹ Peter T. Muchlinski., *Human Rights and Multinationals: Is there a Problem?* *International Affairs* 77, 1 (2001) 31:48 at 40. See also Amnesty International Dutch Section and Pax Christi International, *Multinational Enterprises and Human Rights* (Utrecht, November 1998), at 33–34.

⁷² UN. Human Rights Council, *Protect, Respect and Remedy: A Framework for Business and Human Rights*. Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises., UN doc. A/HRC/8/5, April 7, 2008, available online at <<http://www2.ohchr.org/english/bodies/hrcouncil/8session/reports.htm>> accessed on 5th August, 2012.

Respect: it is the duty of companies to respect human rights and to put in place the management structures necessary to this end. Remedy: judicial and non-judicial grievance mechanisms need to be developed and reinforced in order to improve defence against human rights infringements.⁷³

Though section 20 of the Constitution of Nigeria, 1999, is under fundamental objectives and directive principles of state policy and thus not justiciable and enforceable by courts of law but judicial pronouncement on matters of environmental pollution due to oil spillage and gas flaring in the Niger Delta region abound and has become judge made laws that could be argued as enforceable like provisions of the extant constitution of Nigeria. A classical for illustration is the case of *Gbemre v. Shell Petroleum Development Corporation of Nigeria Ltd and Ors.*,⁷⁴ in which a strong judicial precedence was established. This case was brought by Jonah Gbemre on behalf of himself and the Iwhereken Community in Delta State, in the Niger Delta area of Nigeria against Shell Petroleum Development Company Nigeria Ltd, the NNPC and the Attorney General of the federation. The case was brought under the fundamental rights enforcement procedure in the Nigerian constitution, alleging violations of both constitutional provisions and the African Charter. The plaintiffs claimed that the oil exploration and production activities of Shell, which led to incessant

⁷³ Confederation of German Employers' Associations (BDA), *above*, note 69 at 12. See also John Ruggie, *Business and Human Rights: The Evolving International Agenda*, 4 (John F. Kennedy School of Government Working Paper RWP07-029, June 2007), *available online at* <<http://ksgnotes1.harvard.edu/Research/wpaper.nsf/rwp/RWP07-029>> accessed on 6th August, 2012. John Ruggie, Standards and Practices- Guiding Principles for Business and Human Rights, Ethical Corporation (Oct. 2007), www.ethicalcorp.com/content.asp?ContentID=5353> accessed 6th August, 2012.

⁷⁴ *Jonah Gbemre v Shell Petroleum Development Corporation of Nigeria Ltd and Or.*, (Suit No FHC/ B/CS/53/05, Federal High Court, Benin Judicial Division, 14 November 2005).

gas flaring, had violated their rights to life and the dignity of the human person under Sections 33(1) and 34(1) of the Constitution of Nigeria, 1999 and Articles 4, 16 and 24 of the African Charter.⁷⁵ The plaintiffs alleged that the continuous gas flaring by the company had led to poisoning and pollution of the environment which exposed the community to the risk of premature death, respiratory illnesses, asthma and cancer. They also alleged that the pollution had affected their crop production thereby adversely affecting their food security. They claimed that many of the natives had died and many more were suffering from various illnesses. The community was therefore left in a state of gross underdevelopment. The defendants opposed the case on several grounds, including that those articles of the African Charter do not create enforceable rights under the Nigerian fundamental rights enforcement procedure. However they failed to follow up their arguments during the proceedings due to procedural issues.

The judge therefore proceeded to judgment without any findings of fact... In its judgment, the court held that the constitutionally protected rights include rights to a clean, poison-free, pollution-free environment and that the actions of Shell in continuing to flare gas in the course of its oil exploration and production activities in the plaintiffs' community violated their right to life and/or the dignity of the human person under the constitution and the African Charter. Even though there is no apparent justiciable right to a "clean poison-free, pollution-free and healthy environment" under the Nigerian constitution, the court relied on a cumulative use of constitutional provisions with the provisions of the African Charter (especially Article 24) to recognize and apply a fundamental right to a "clean poison-free, pollution-

⁷⁵ African (Banjul) Charter on Human and Peoples' Rights, adopted June 27, 1981, O.A.U Doc CAB/LEG/67/3 Rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October, 1986. Articles: 4, 16 and 24.

free and healthy environment”... The implication of this decision is that there is a possibility of resorting to the African Charter for rights which are not available under national law. The plaintiffs’ counsel further argued that the provisions of the Associated Gas Re-injection Act (Continued Flaring of Gas Regulations) 1984 and The Associated Gas Re-Injection (Amendment) Decree No 7 of 1985 which allow for continuation of gas flaring are inconsistent with the right to life (which includes the right to a healthy environment) guaranteed under the constitution. The court agreed with this argument and held that legislation permitting flaring of gas in Nigeria, with or without permission, is inconsistent with the Nigerian constitution and, therefore, unconstitutional. The court therefore directed the Attorney General of the federation and the minister of justice to take steps to amend relevant legislations governing gas flaring to bring them in line with provisions on fundamental rights under the Nigerian constitution. The significance of this is that fundamental rights protection is held as an objective which other regulations must meet in order to be valid under the law. This clearly invalidates the discretion given by extant legislation to the government to permit gas flaring as it deems fit. The court consequently restrained the company from further gas flaring in the plaintiffs’ community.⁷⁶

11. Conclusion

In the face of weak regulatory framework to check the activities of transnational corporation for human rights violations in the Niger Delta region of Nigeria, The Government of Nigeria should strengthened it regulatory

⁷⁶ See also Olufemi O Amao., “Corporate Social Responsibility, Multinational Corporations and the Law in Nigeria: Controlling Multinationals in Host States”, *Journal of African Law*, 52, 1 School of Oriental and African Studies. (2008), 89–113, at 110-111.

mechanism by enacting effective human rights laws to curb human rights violations this is because business enterprises, particularly transnational companies, are typically private, non-governmental entities subject only to national laws in either the country where the company has its headquarters or in the host countries where the company has investments. Even though these companies may have significant presence in multiple countries, they are not technically considered to have international legal status, which is limited to states and certain intergovernmental organizations such as the European Union and the UN. This means that they are not subject to the rights and obligations of international law, including international human rights law.⁷⁷ Oil companies in Nigeria are under Federal jurisdiction. The Federal government is both a partner in all oil activities through NNPC, and is required by Federal law to enforce environmental compliance of oil operations through the Department of Petroleum Resources. This situation has resulted in the government inadequately regulating oil pollution while at the same time being part to much of the Delta... The major constraints impending reduced oil pollution are

- (i) the conflict of interest for the Federal government being both a partner in oil activities and the regulatory body.
- (ii) no requirement for community participation in planning and development of oil activities.
- (iii) very limited ability of regulatory institutions to monitor pollution.

⁷⁷ Jana Silverman and Alvaro Orsatti., "Holding Transnational Corporations Accountable for Human Rights Obligations: The Role of Civil Society", *Social Watch* 31 at 1:3.

⁷⁸ Tari Dadiowei., *above*, note 14 at 33:49, see also, World Bank, "Defining an Environmental Development Strategy for the Niger Delta Industry

- (iv) low compensation rates for damage to property; and
 - (v) lack of enforcement of environmental regulations.⁷⁸
- There is a practical need for home states to control the activities of their corporations when host states like Nigeria prove unwilling or unable to do so because of lax laws or revenue accrue from the operations of these TNCs .

The transnational oil corporations in the Nigeria should be made accountable for human rights violations committed by them, their subsidiaries or contractors in their operational bids in the Niger Delta. Extraterritorial avenues such as the Alien Tort Claims Act should be invoked where the action is a grave violation of customary international law.⁷⁹ This was exemplified in the case of *Wiwa v. Royal Dutch Petroleum Co.*⁸⁰ where it was held that TNCs are liable for human rights abuses occurring in the context of their business activities abroad.

The Home governments of TNCs should become proactively engaged in compelling their oil companies to change their

and Energy Operations Division West Central Africa Department. World Bank Report Vol 1. 1995 at 53.

⁷⁹ ATCA cases are pursued under customary international law. Under customary international law, natural persons (individuals) have a duty not to violate fundamental or peremptory norms (including piracy, aircraft hijacking, forced labour, genocide, war crimes and crimes against humanity). This has led some to conclude that: "To the extent that individuals have rights and duties under customary international law and international humanitarian law, multinational corporations as legal persons have the same set of rights and duties. ATCA is an example of a national jurisdiction treating corporations in the same way as natural persons with regard to international customary law. (See Ramasastry "Corporate Complicity: From Nuremberg to Rangoon, An Examination of Forced Labour Cases and their Impact on the Liability of Multinational Corporations", 20 *Berkeley Journal of International Law* (2002) 91, 96, 101).

⁸⁰ *Wiwa v. Royal Dutch Petroleum.*, above, note 5.

corruptible, exploitative, destabilizing, intimidating, instigating, brutalizing, and destructive business practices in Niger Delta. While the Government of Nigeria and the Transnational Oil Corporations should use their diplomatic and economic leverage to persuade Niger Deltans or the host communities in the event of conflict with the business practices of the oil companies without using military means to solve problems which eventually result in fatal casualties involving loss of lives and properties. Efforts should be made by Nigerian government to end gas flaring by oil companies, through legislation, In Europe and America, gas flaring has been eliminated. It is, therefore, recommended that the directive that gas flaring should stop in Nigeria by 2008 should hold or be complied with by all the stakeholders.⁸¹

Observing the provisions of Universal Declaration of Human Rights, and the International Covenants on Human Rights⁸² as the set standards in operations of the TNCs in Niger Delta is greatly recommended. There is a need to spell out clearly for transnational corporations in Nigeria what these human rights instruments require of their firms. The United Nations (UN) Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, adopted by the UN Sub-Commission on Human Rights in 2003, set out with some degree of specificity the human rights responsibilities of companies. Transnational Oil companies should actively promote the realisation

⁸¹ H.T., Ejibunu, "Nigeria's Niger Delta Crisis: Root Causes of Peacelessness", EPU Research Papers, Issue 07/07 *European University Center for Peace Studies (EPU)*, Stadtschlaining/Austria 2007) Presentation of 2007, pp.33-34.

⁸² International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), Article 6(1), U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *opened for signature* 16 December, 1966 and the International Covenant on Economic, Social, and Cultural Rights, G.A. Res. 2200A (XXI), U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 UNT.S. 3, *opened for signature* Dec. 16, 1966.

of human rights in business transactions. In the context of the corporate social responsibility (CSR), they accept responsibility for implementation of human rights. With their own voluntary initiatives, multinational enterprises try to make a contribution to better implementation of human rights partly in the framework of public-private partnerships or jointly with non-governmental organisations. TNCs should create platforms to give all employees the possibility to set out their views on how human rights policy, including compliance with social standards within the undertaking, can be better implemented. Oil companies in Niger Delta should engage in dialogue with governments for better implementation of human rights and work locally in contact with national administrative agencies for more effective enforcement of

⁸³ The OECD Guidelines for Multinational Enterprises recommends that firms “respect the human rights of those affected by their activities consistent with the host government’s obligations and commitments.” OECD Guidelines for Multinational Enterprises 19 (2000), *available online at* <<http://www.oecd.org/dataoecd/56/36/1922428.pdf>> accessed 7th of August, 2012. For example, the OECD created complaint mechanisms called “National Contact Points” to which individuals may bring complaints against businesses subscribing to the OECD Guidelines, and tasked its Investment Committee with overseeing National Contact Points (NCP) performance.

⁸⁴ The ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy proclaims that all parties, including multinational enterprises, “should respect the Universal Declaration of Human Rights and the corresponding international Covenants.” International Labour Organisation, Tripartite Declaration of Principles Concerning Multinational Enterprises & Social Policy 3, 8 (2000), *available online at* <<http://www.ilo.org/public/english/employment/multi/download/english.pdf>> accessed 7th August, 2012.

⁸⁵ Confederation of German Employers’ Associations (BDA), *above*, note 69 at 13-14. The UN Global Compact, is a voluntary initiative established in 2000 with over 2,300 participating businesses. The Global Compact encourages its members to implement ten principles touching on human rights, labour standards, environmental, and anti-corruption practices within their “spheres of influence” by sharing and adopting good practices. The Global Compact asks businesses to “respect the protection

social standards in their spheres of activity. Finally, oil companies operating in Nigeria should align their actions on voluntary commitments to a range of internationally agreed principles and instruments dealing with human rights.

Examples are the OECD guidelines for multinational enterprises,⁸³ the ILO tripartite declaration concerning multinational enterprises and social policy⁸⁴ and the Global Compact.⁸⁵

of internationally proclaimed human rights" within their sphere of influence, "make sure that they are not complicit in human rights abuses," and to respect the four fundamental labour rights principles adopted by the ILO. See the U.N. Global Compact, Available online at <<http://www.unglobalcompact.org/AboutTheGC/theTenPrinciples/index.html>> accessed 7th August, 2012. (See also., Christen Broecker., *above*, note 23., at 169-170).