

# Revisiting corporate violations of human rights in Nigeria's Niger Delta region: Canvassing the potential role of the International Criminal Court

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### **Summary**

*The international community awakened to the bitter reality of the failure of traditional international legal system to anticipate and embrace non-state actors at the early conceptualisation of their norms. This reality relates to the fact that transnational corporations that often wreak havoc in host states appear to be outside the ambit of international law, and therefore beyond its control. However, since the last two decades, governments and international business organisations have attempted to develop initiatives to fill the perceived gap. At the same time, the academic community has engaged in a discourse about the appropriate legal framework that may be deployed to ensure that transnational corporations are confined within a defined scope of international human rights obligations. Focusing on Africa, particularly on the oil-rich Niger Delta region of Nigeria, the article aims to engage in the debate. It takes a nuanced approach to the issue, and argues that an extension of the International Criminal Court's jurisdiction to transnational corporations is imperative. This would be a meaningful way of ensuring respect and compliance with human rights obligations by transnational corporations.*

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## 1 Introduction

Capitalism, globalisation and neo-liberalism have paved the way for the emergence on the international scene of economic colossuses with quasi-legal personality.<sup>1</sup> These modern leviathans wield considerable social and political influence over countries,<sup>2</sup> in addition to their overwhelming economic leverage.<sup>3</sup> This is an apt description of present-day transnational corporations (TNCs). Of course, TNCs, through foreign direct investment in developed and developing countries, create jobs, improve technology and inject capital.<sup>4</sup> But they equally have a negative impact on the areas where they operate, particularly in poor Third World or developing countries. Frequently, their activities result in human rights violations. The abused human rights are more often than not those that fall within the international definition of economic, social and cultural rights.<sup>5</sup> I do not mean to suggest that civil and politi-

<sup>1</sup> These actors have full legal personality under the domestic law of the states where they are incorporated. At international law, however, although their existence is acknowledged, they have no legal personality as the traditional international law does not countenance non-state parties. However, to the extent that they can be parties to certain international agreements or treaties, they can be said to be quasi-legal persons. See, generally, P Malanczuk Akehurst's *modern introduction to international law* (1997) 1-7 35-48 75-81 91-108.

<sup>2</sup> M Ataman 'The impact of non-state actors on world politics: A challenge to nation states' (2003) 2 *Alternatives (Turkish Journal of International Relations)* <http://alternativesjournal.net/volume2/number1/ataman2.htm> (accessed 16 March 2011), arguing that 'MNCs challenge the state sovereignty of the host countries. Host countries may lose control over their economies. They create political and social division and prevent the development of domestic industries in host countries.' Note that MNC, which stands for 'multinational corporation', is just another way of referring to TNC.

<sup>3</sup> See, eg, MAL Miller *Third World in global environmental politics* (1995) 35, stating that 'Shell Oil's 1990 gross national income was more than the combined GNPs of Tanzania, Ethiopia, Nepal, Bangladesh, Zaire, Uganda, Nigeria, Kenya and Pakistan – countries that represent almost one-tenth of the World's population'; R McCorquodale 'Feeling the heat of human rights branding: Transnational corporations within the international human rights fence' (2001) 1 *Human Rights and Human Welfare* 1, capturing the economic strength of TNCs by revealing that 'more than half of the top 100 economies are corporations'; S Anderson & J Cavanagh 'Top 200: The rise of global corporate power' (Institute for Policy Studies) <http://www.corpwatch.org/article.php?id=377> (accessed 16 March 2011), stating that '[t]he economic clout of the Top 200 corporations is particularly staggering compared to that of the poorest segment of the world's humanity. The Top 200 corporations' combined sales are 18 times the size of the combined annual income of the 1,2 billion people (24 per cent of the total world population) living in 'severe' poverty.' See also D Kinley & J Tadaki 'From talk to walk: The emergence of human rights responsibilities for corporations at international law' (2004) 44 *Virginia Journal of International Law* 931 933.

<sup>4</sup> Kinley & Tadaki (n 3 above) 933; see also MT Kamminga 'Holding multinational corporations accountable for the human rights abuses: A challenge for the European Community' in P Alston *et al* (eds) *The EU and human rights* (1999) 533 554.

<sup>5</sup> See the International Covenant on Economic, Social and Cultural Rights, adopted 16 December 1966, GA Res 2200 (XXI), UN Doc A/6316 (entered into force 3 January 1976).

cal rights<sup>6</sup> are not tampered with by the TNCs. There have been several documented instances of TNCs' violations of human rights,<sup>7</sup> and it is not clear yet when these violations will stop or the obligations thereto responsibly be borne by misbehaving entities.

Since the last two decades, however, the emphasis has been on the adoption of corporate social responsibility initiatives, international and national in origin, to effectively address concerns regarding human rights violations by TNCs. These widely ineffective initiatives include declarations by international organisations, such as the International Labour Organisation (ILO),<sup>8</sup> the Organisation for Economic Co-oper-

<sup>6</sup> See the International Covenant on Civil and Political Rights, adopted 16 December 1966; GA Res 2200 (XXI), UN Doc A/6316 (entered into force 23 March 1976).

<sup>7</sup> Royal Dutch Shell's complicity in environmental degradation, destruction of farm-lands, intimidation, torture and murder of Ogoni people in Nigeria had been the subject of litigation. See *Wiwa v Royal Dutch Petroleum Co* 226 F 3d 88 (2000), cert denied, 532 US 941 (2001); *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001). It is also the centre of discussion in different scholarly articles: B Naanen 'Oil-producing minorities and the restructuring of Nigerian federalism: The case of Ogoni people' (1995) 33 *Journal of Commonwealth and Comparative Politics* 46; EE Osaghae 'The Ogoni uprising: Oil politics, minority agitation and the future of the Nigerian state' (1995) 94 *African Affairs* 325; JG Frynas 'Corporate and state responses to anti-oil protests in the Niger Delta' (2001) 100 *African Affairs* 27; JI Dibua 'Citizenship and resource control in Nigeria: The case of minority communities in the Niger Delta' (2005) 39 *African Spectrum* 5; and CI Obi 'Globalisation and local resistance: The case of Ogoni versus Shell' (1997) 2 *New Political Economy* 137. Recently, CNN reported that pollution and environmental adversity from the operations of oil companies in the Niger Delta are creating a 'human rights tragedy' by exposing the local people to harm from poor health and loss of livelihood. See C Purefoy 'Nigeria oil company rejects damning amnesty report' CNN.com 1 July 2009 <http://www.cnn.com/2009/WORLD/africa/07/01/nigeria.amnesty.report/index.html> (accessed 16 March 2011). Again, the case of *Doe v Unocal* 963 F Supp 880 (CD Cal 1997) captures Unocal's involvement in forced labour, torture, murder and rape of villagers in the Tenasserim region of Myanmar, formerly known as Burma. These particular human rights violations are discussed further in the following articles: TA Bridgeford 'Imputing human rights obligations on multinational corporations: The Ninth Circuit strikes again in judicial activism' (2003) 18 *American University International Law Review* 1009; and L Bowersett 'Doe v Unocal: Torturous decision for multinationals doing business in politically unstable environments' (1998) 11 *Pacific McGeorge Global Business and Development Law Journal* 361. In India, Union Carbide Corporation (UCC) of USA is behind the 1984 catastrophic gas leakage in the city of Bhopal, which resulted in about 7 000 deaths and terminal illness in hundreds of thousands of people. See Amnesty International 'Clouds of injustice: Bhopal disaster 20 years on' <http://www.amnesty.org/en/library/info/ASA20/015/2004> (accessed 16 March 2011); and U Baxi & T Paul *Mass disasters and multinational liability: The Bhopal case* (1986). Furthermore, Coca-Cola in Colombia and Phillips-Van Heusen in Guatemala have been reported to be involved in intimidation, torture, kidnapping, unlawful detention and murder of trade union members; and BHP Billiton in Papua New Guinea has also been reported to damage the environment and local people's means of livelihood. See Kinley & Tadaki (n 3 above) 934.

<sup>8</sup> See the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (1978) 17 *International Legal Materials* 422.

ation and Development (OECD)<sup>9</sup> and the European Union,<sup>10</sup> codes of conduct in national legislation or adopted by individual TNCs,<sup>11</sup> initiatives of non-governmental organisations (NGOs),<sup>12</sup> and employer associations.<sup>13</sup> Other strategies are the recent adoption of the United Nations (UN) Norms,<sup>14</sup> coupled with the resuscitation of the United States' Alien Tort Claims Act (ATCA) through case law.<sup>15</sup> However, the bottom line is that there is no single international regime of human rights law directly applicable to, and governing, transnational operations of corporations.<sup>16</sup> Indeed, as Kinley and Tadaki rightly posit:<sup>17</sup>

Despite egregious human rights abuses committed by non-state actors, international law, generally, and human rights law, in particular, is still undergoing the conceptual and structural evolution required to address their accountability.

Thus, while a legal framework to confine TNCs within a defined scope of international human rights obligations is still being developed, the

<sup>9</sup> See the OECD Guidelines for Multinational Enterprises (1976) 15 *International Legal Materials* 967.

<sup>10</sup> See European Commission Green Paper 'Promoting a European framework for corporate social responsibility' COM (2001) 366 final, 18 July 2001.

<sup>11</sup> See eg the Australian Corporate Code of Conduct Bill 2000, Parliament of the Commonwealth of Australia, The Senate (Senator Bourne), A Bill for an Act to impose standards for the conduct of Australian corporations which undertake business activities in other countries, and for related purposes; Shell International Petroleum Company 'Statement of general business principles' in *Business and human rights - A management primer* (1999).

<sup>12</sup> See eg Amnesty International *Human rights principles for companies* <http://www.amnesty.org/en/library/info/ACT70/001/1998> (accessed 16 March 2011).

<sup>13</sup> See eg the Basic Code of Conduct covering Labour Practices adopted by the International Confederation of Free Trade Unions <http://actrav.itcilo.org/actrav-english/telearn/global/ilo/guide/icftuco.htm> (accessed 16 March 2011). For nn 8 to 13, see generally CF Hillemanns 'UN norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights' (2003) 4 *German Law Journal* 1065.

<sup>14</sup> In August 2003, the United Nations Sub-Commission on the Promotion and Protection of Human Rights approved Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, by Resolution 2003/16, UN Doc E/CN.4/Sub.2/2003/L.11 <http://www.ohan.org/lh/misc/PetRegSub/uncorpnorms.htm> (accessed 16 March 2011). For a detailed analysis of this norm, see D Weissbrodt & M Kruger 'Current development: Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (2003) 97 *American Journal of International Law* 901; Hillemanns (n 13 above).

<sup>15</sup> A few examples include *Wiwa v Royal Dutch Petroleum Co* (n 7 above); *Doe v Unocal* (n 7 above); *Filartiga v Pena-Irala* 630 F 2d 886 887 (2r Circ 1980).

<sup>16</sup> Kinley & Tadaki (n 3 above) 935.

<sup>17</sup> As above.

academic community has continued with discussions on the subject.<sup>18</sup> With the focus on Africa, particularly on the oil-rich Niger Delta region of Nigeria, the article aims to engage in this debate. It takes a different approach to it, arguing that an extension of the International Criminal Court (ICC)'s jurisdiction to TNCs is imperative, and that this is an essentially meaningful way of ensuring respect and compliance to human rights obligations by TNCs. The article begins by exploring, in part II, the activities of the oil-excavating TNCs in Nigeria's Niger Delta region, bringing to the fore the way in which human rights are violated by non-state actors in this region. It proceeds by discussing, in part III, how the current legal regime, national and international alike, has been inefficient and ineffective in checking human rights abuses by TNCs. It also highlights other factors peculiar to Third World countries, and Nigeria in particular, that may have contributed to uncontrollable human rights violations by corporations. Part IV canvasses the urgency of bringing TNCs within the arms of the International Criminal Court (ICC). It discusses the factors that make this initiative possible and appropriate at this time, and shows that much may not need to be changed or amended in the ICC's structure or framework to bring this into effect. Part V concludes the article.

## 2 Chronicles of transnational corporations in the Niger Delta

The area generally referred to as the Niger Delta region in Nigeria comprises a number of states in the Nigerian federation. These states include Abia, Akwa Ibom, Bayelsa, Cross River, Delta, Edo, Imo, Ondo and Rivers.<sup>19</sup> They are also called oil-producing states. The region covers over 20 000 square kilometres of substantial swamp land and most

<sup>18</sup> Kinley & Tadaki (n 3 above); Kamminga (n 4 above); Bridgeford (n 7 above); Hillemanns (n 13 above); Weissbrodt & Kruger (n 14 above); CM Vazquez 'Direct vs indirect obligations of corporations under international law' (2005) 43 *Columbia Journal of Transnational Law* 927; S Joseph 'An overview of the human rights accountability of multinational enterprises' in MT Kamminga & S Zia-Zarifi (eds) *Liability of multinational corporations under international law* (2000) 75; JI Charney 'Transnational corporations and developing public international law' (1983) *Duke Law Journal* 748; R McCorquodale & P Simons 'Responsibility beyond borders: State responsibility for extraterritorial violations by corporations of international human rights law' (2007) 70 *Modern Law Review* 598.

<sup>19</sup> This is in line with sec 30 of the Niger Delta Development Commission Act, ch N86, Laws of the Federation of Nigeria, 2004, which defines the 'member states' of the Niger Delta region for which the Commission was created.

of Nigeria's coastal boundary,<sup>20</sup> and is home to a mosaic of Nigeria's minority ethnic groups, including the Andoni, Edo, Efik, Ibibio, Ijaw, Itsekiri, Ikwere, Kalabari, Ndoki, Okrika, Urhobo and Ogoni, as well as some fragments of the majority Igbo and Yoruba ethnic groups.<sup>21</sup> However, when the Niger Delta is mentioned with regard to human rights violations and conflicts in the region, reference is usually made to three of the states that host the major reserves of Nigeria's oil wealth and foreign oil TNCs, and which are home to the Ogonis, Ijaws, Itsekiris, Urhobos, Andonis, Okrikas, Ndokis and a segment of the Igbos. The three states are Bayelsa, Delta and Rivers, and are in Southern Nigeria.

Oil in commercially viable quantities was first struck in Nigeria in 1956 at Oloibiri, a community in Bayelsa state, by Shell-BP (now Shell Petroleum Development Company). Commercial exportation of oil started only in 1958.<sup>22</sup> As the first company to secure oil exploration and exploitation rights, Shell was able to establish control over the major oil reserves in Nigeria, and consolidated its lead over other oil corporations who arrived later.<sup>23</sup> Currently, Nigeria's oil industry is a playing field for more than a dozen TNCs, the majority of which are European and American companies. Besides Shell (Dutch/British owned), other major participants are Mobil (US); Chevron (US); Agip (Italy); Elf (France); and Texaco (US). Others are Ashland (US); Deminex (Germany); Pan Ocean (Switzerland); British Gas (Britain); Statoil (Norway); as well as Conoil and Dubri (which are Nigerian companies).<sup>24</sup> It is to be noted that these TNCs operate as joint ventures with the Nigerian government, represented by the Nigerian National Petroleum Corporation (NNPC) which holds Nigeria's equity stake (about 55 per cent) in most.<sup>25</sup> This form of commercial arrangement, as may be shown later in the article, has had a negative impact on the government's ability to coerce TNCs into respecting the human rights of the local people.

<sup>20</sup> LA Afinotan & V Ojakorotu 'The Niger Delta crisis: Issues, challenges and prospects' (2009) 3 *African Journal of Political Science and International Relations* 191. Please note that there is contradictory information that the Niger Delta region covers about 50 000 square kilometres in HA Saliu *et al* 'Environmental degradation, rising poverty and conflict: Towards an explanation of the Niger Delta crisis' (2007) 9 *Journal of Sustainable Development in Africa* 275 277. Even Sinden (n 29 below) 3 reports the region as covering 70 000 square kilometres. It is difficult to reconcile these figures.

<sup>21</sup> Afinotan & Ojakorotu (n 20 above). See also K Maier *This house has fallen: Nigeria in crisis* (2000) 84. However, note that Igbo and Yoruba are two of Nigeria's three major ethnic groups that include the Hausa-Fulani.

<sup>22</sup> Obi (n 7 above) 140.

<sup>23</sup> As above.

<sup>24</sup> U Idemudia 'Rethinking the role of corporate social responsibility in the Nigerian oil conflict: The limit of CSR' (2009) 21 *Journal of International Development* 1 7-8; U Idemudia 'Assessing corporate-community involvement strategies in the Nigerian oil industry: An empirical analysis' (2009) 34 *Resources Policy* 133 135.

<sup>25</sup> S Dolezal 'The systematic failure to interpret article iv of the International Covenant on Civil and Political Rights: Is there a public emergency in Nigeria' (2000) 15 *American University International Law Review* 1163 1191.

It did not take long for the gory consequences of competitive exploitation of oil to take their toll on the socio-economic life of host communities in the region. Shell in Ogoniland<sup>26</sup> alone has a network of 96 oil wells connected to five flow stations.<sup>27</sup> The consequences of what rightly may be termed 'over-exploitation' of oil in the region are the frequent oil spills which pollute the springs and rivers that provide host communities with drinking water and fish. The spills also destroy agricultural land. According to Watts,<sup>28</sup> every year roughly 300 spills occur in the Niger Delta and about 700 000 barrels of oil gush to the ground soil. In the 1970s alone, the spilling was four times more than the much-publicised Exxon Valdez spill in Alaska. Between 1985 and 1994, there were 111 spills in Ogoniland alone,<sup>29</sup> and more than 4 800 spills in Nigeria as a whole between 1970 and 2000.<sup>30</sup> Indeed, *Yale Environment 360*, a publication of Yale University, has confirmed that the April 2010 Gulf of Mexico oil spill (in Louisiana, USA), which captured the world's attention, is dwarfed by the over five decades of oil pollution in the Niger Delta.<sup>31</sup>

In addition to this, gas is flared throughout the region, round the clock, 24 hours per day, and some flares have burnt continuously for the past 40 years.<sup>32</sup> This ecological disaster is better captured in a CNN report that pollution and environmental impacts from the operations of oil-TNCs in the Niger Delta are creating a 'human rights tragedy' by

<sup>26</sup> Ogoniland is the homeland of the Ogoni people. This is where Shell has the majority of its facilities in the region. It is in Rivers State and comprises several villages or settlements. It later became the centre of gruesome violations of human rights in the whole region.

<sup>27</sup> Maier (n 21 above) 80.

<sup>28</sup> M Watts 'Resource curse? Governmentality, oil and power in the Niger Delta, Nigeria' (2004) 9 *Geopolitics* 50 68.

<sup>29</sup> Watts (n 28 above). See also A Sinden 'An emerging human right to security from climate change: The case against gas flaring in Nigeria' Social Science Research Network Electronic paper collection <http://ssrn.com/abstract=1280934> 3 (accessed 16 March 2011). This paper is now published as ch 8 in WCG Burns & HM Osofsky (eds) *Adjudicating climate change – State, national and international approaches* (2009).

<sup>30</sup> MJ Watts 'Righteous oil? Human rights, the oil complex and corporate social responsibility' (2005) 21 *AR Reviews In Advance* 9 9.16.

<sup>31</sup> E360 Digest 'Oil fouling the Niger Delta dwarfs the oil spill in the Gulf of Mexico' *Yale Environment* 8 July 2010 360 [http://e360.yale.edu/digest/oil\\_fouling\\_the\\_niger\\_delta\\_dwarfs\\_the\\_oil\\_spill\\_in\\_the\\_gulf\\_of\\_mexico/2496/](http://e360.yale.edu/digest/oil_fouling_the_niger_delta_dwarfs_the_oil_spill_in_the_gulf_of_mexico/2496/) (accessed 16 March 2011). See also J Vidal 'The Nigeria's agony dwarfs the Gulf oil spill: The US and Europe ignore it' *The Guardian* 30 May 2010 <http://www.guardian.co.uk/world/2010/may/30/oil-spills-nigeria-niger-delta-shell> (accessed 16 March 2011), arguing that '[t]he Deepwater Horizon disaster caused headlines around the world, yet the people who live in the Niger Delta have had to live with environmental catastrophes for decades'.

<sup>32</sup> A Shinsato 'Increasing the accountability of transnational corporations for environmental harm: The petroleum industry in Nigeria' (2005) 4 *Northwestern University Journal of Human Rights* 186 192.

exposing the local people to harm from poor health and loss of their livelihood:<sup>33</sup>

People living in the Niger Delta have to drink, cook with and wash in polluted water. They eat fish contaminated with oil and other toxins ... if they are lucky enough to be able to still find fish. The land they farm on is being destroyed.<sup>34</sup>

The people's lifestyle, which hinges on farming and fishing, can no longer be sustained, and there are neither alternative vocations nor suitable jobs created by the TNCs. The overall effect of these has been poverty and need, culminating in grievances.<sup>35</sup>

Human rights violations in the region took a turn for the worse since the 1990s when the local communities started group protests against the unchecked activities of TNCs that degrade their environment, causing economic losses and poor health. In 1990, youths in the Umuechem community engaged in a peaceful demonstration against the reckless devastation of their environment by Shell's operations. Shell's response was to request the government to send the state's police to deal with the protesters whom Shell considered to be threatening their staff and hindering their work. Under the guise of protecting Shell's facilities from the protesters, two lorry loads of armed anti-riot (mobile) police turned up at the scene and used tear gas and gunfire to disperse the protesters. The police returned the next day to descend on the village, killed about 80 people and destroyed 495 houses and vital crops.<sup>36</sup> Both the government and Shell are said to have admitted to funding the operation.<sup>37</sup>

Similar trends of human rights violations continued throughout the region in the years that followed. In 1990, a vocal Ogoni leader, a writer and environmentalist, Ken Saro-Wiwa, rallied his people under the Movement for the Survival of Ogoni People (MOSOP) which he

<sup>33</sup> Purefoy (n 7 above).

<sup>34</sup> Quoting A Gaughran of Amnesty International, in the CNN report by Purefoy (n 7 above). See also A Tareri 'A rights-based approach to indigenous minorities: Focus on the Urhobo and Ogoni peoples of the Niger Delta in Nigeria' in F Emiri & G Deinduomo (eds) *Law and petroleum industry in Nigeria: Current challenges (Essays in honour of Justice Kate Abiri)* (2009) 265 283.

<sup>35</sup> U Idemudia 'The changing phases of the Niger Delta conflict: Implications for conflict escalation and the return of peace' (2009) 9 *Conflict, Security and Development* 307.

<sup>36</sup> S Cayford 'The Ogoni uprising: Oil, human rights, and a democratic alternative in Nigeria' (1996) 43 *Africa Today* 183 189. See also JG Frynas 'The oil industry in Nigeria: Conflict between oil companies and local people' in JG Frynas & S Pegg (eds) *Transnational corporations and human rights* (2003) 99 104-105; Human Rights Watch 'The Ogoni crisis: A case study of military repression in Southeastern Nigeria' (1995) 7 *Human Rights Watch Report* (on Nigeria) <http://www.hrw.org/legacy/reports/1995/Nigeria.htm> (accessed 17 March 2011); Boycott Shell Essential Action 'Shell in Nigeria: What are the issues?' <http://www.essentialaction.org/shell/ issues.html> (accessed 17 March 2011).

<sup>37</sup> Boycott Shell Essential Action (n 36 above).

formed that year in conjunction with other Ogoni leaders.<sup>38</sup> MOSOP became a vanguard organisation for the awareness and mobilisation of the Ogoni people. Although at first MOSOP appeared to be concerned solely with environmental protests, it eventually turned into an ethnic organisation that championed the Ogoni cause – economical, political and otherwise. The theme of MOSOP's campaign has been to address the Ogoni people's grievances outlined in their manifesto: the Ogoni Bill of Rights (OBR), which they drew up and made available to federal government and the entire Nigerian public. These include the clean-up of oil spills; the reduction of gas flaring; fair compensation for lost land, income, resources and life; a fair share of profits gained from oil drilled at their expense; and self-determination.<sup>39</sup>

On 4 January 1993, just at the beginning of the UN Year of Indigenous People, MOSOP held a mass rally at the Ogoni village of Bori. About 300 000 people were in attendance at the rally, out of the estimated half a million Ogoni population.<sup>40</sup> The demonstrators at the rally demanded what was expressed in the Ogoni Bill of Rights. Leaders of the demonstration were arrested but later on released.<sup>41</sup> The mass protests continued in February and March of the same year, but not without increasing police harassment and arrests. In April, about 10 000 Ogoni engaged in another peaceful demonstration at a construction site (in Biara), where Willbros, an American corporation, bulldozed farmland to lay Shell's pipelines. As usual, government security forces were summoned, this time around the soldiers. They arrived and opened fire on the crowd, wounding 11 people.<sup>42</sup>

As Ogoni protests continued, MOSOP leadership began to have disagreements regarding the organisational structure and strategies for actualising the objectives of the movement. Fundamental disagreement resulted over a controversial decision by the movement to boycott the Nigerian presidential elections of 12 June 1993, leading to the resignation of Dr Garrick Leton and Chief Edward Kobani as MOSOP's President and Vice-President respectively.<sup>43</sup> Ken Saro-Wiwa who, in connection with MOSOP protests, was imprisoned for 31 days

<sup>38</sup> Human Rights Watch *The price of oil: Corporate responsibility and human rights violations in Nigeria's oil-producing communities* (1999) 124.

<sup>39</sup> Cayford (n 36 above) 189. See also K Saro-Wiwa *Genocide in Nigeria: The Ogoni tragedy* (2005) 93.

<sup>40</sup> Naanan (n 7 above) 63.

<sup>41</sup> Cayford (n 36 above) 189-190.

<sup>42</sup> Cayford (n 36 above) 190. See also *Human Rights Watch Report* (n 36 above); S Kretzmann 'Nigeria's "drilling fields": Shell Oil's role in repression' <http://www.assatashakur.org/forum/afrikan-world-news/21226-shell-oil-game-oil-game-nigeria.html> (accessed 17 March 2011); S Pegg 'The cost of doing business: Transnational corporations and violence in Nigeria' (1999) 30 *Security Dialogue* 473 476. Pegg's work indeed presents case-by-case details of the experiences of the Ogoni people at the joint hands of the Nigerian government and Shell.

<sup>43</sup> *Human Rights Watch Report* (n 36 above).

on charges of seditious intent and publication and unlawful assembly, was *in absentia* elected President.<sup>44</sup> Meanwhile, protests against Shell continued, coinciding, however, with the wide-spread lawlessness in the region as a result of the cancellation of the June presidential elections. The government responded with a heavy military crackdown and escalated repression. There were several brutal attacks on Ogoni villages, leaving hundreds of people dead and thousands homeless.<sup>45</sup> Shell and the Nigerian government blamed the raids on what they framed as ethnic clashes between Ogonis and the neighbouring ethnic groups, including the Andoni, in July 1993, the Okrika in December 1993, and the Ndoki in April 1994.<sup>46</sup> Professor Claude Ake, who was appointed by government to investigate the July 1993 alleged inter-communal clash, had this to say:<sup>47</sup>

I do not think it was purely ethnic clash, in fact there is really no reason why it should be an ethnic clash and so far as we could determine, there was nothing in dispute in the sense of territory, fishing rights, access rights, discrimination treatment, which are the normal cause of these clashes.

He further explained that '[o]ne could not help getting the impression that there were broader forces which might have been interested in perhaps putting the Ogonis under pressure, probably to derail their agenda'.<sup>48</sup> Professor Ake's observations were corroborated by a Human Rights Watch reporter's interview with soldiers who painted a clear picture of their participation in the secret military raids on Ogoniland in 1993, designed to appear as inter-ethnic clashes.<sup>49</sup> The following is an excerpt from what one of the soldiers said:<sup>50</sup>

When we arrived at the assembly point, they suddenly changed the orders. They said we were going across to attack the communities who had been making all the trouble ... I heard people shouting, crying. I fired off about one clip, but after the first shots I heard screaming of civilians, so I aimed my rifle upwards and didn't hit anyone.

Another soldier had been on duty with the Nigerian contingent to the ECOMOG peace-keeping force in Liberia but returned to the Niger Delta when his unit was ordered to return home in order to crush a supposed Cameroonian invasion. He explained that when they arrived in Ogoniland, they were instructed to shoot everyone who crossed their path. He followed this instruction until he realised that those they attacked were Nigerian civilians. This particular soldier further explained that when he entered the bush, he learnt from the Ogoni people that

<sup>44</sup> As above. See also Civil Liberties Organisation *Ogoni: Trials and travails* (1996) 51.

<sup>45</sup> Cayford (n 36 above) 190.

<sup>46</sup> *Human Rights Watch Report* (n 36 above).

<sup>47</sup> As above. See also Civil Liberties Organisation (n 44 above) 19.

<sup>48</sup> *Human Rights Watch Report* (n 36 above).

<sup>49</sup> As above.

<sup>50</sup> As above.

they believed among themselves that they had been attacked by the Andoni people.<sup>51</sup>

In 1994, more fierce violations of human rights were unleashed on the Ogoni people. On 21 May 1994, four prominent Ogoni leaders, including the former Vice-President of MOSOP, Chief Edward Kobani, were attacked by a mob and beaten to death. The murders occurred in a meeting of the Gokana Council of Chiefs and Elders, at the palace of Gbenemene Gokana, a traditional chief in Giokoo, which is an Ogoni village.<sup>52</sup> Following the earlier-mentioned disagreement in the MOSOP leadership, two opposing factions emerged in the movement. The murdered four men were among those leaders considered to be government collaborators by some members of MOSOP.<sup>53</sup> However, the immediate chain of events leading to their murder has been a source of big controversy.<sup>54</sup> The controversy borders on whether the murder of the four Ogoni leaders was engineered by Ken Saro-Wiwa and his cohorts, or whether their deaths were the aftermath of a spontaneous violent riot that broke out in connection with agitation by a large crowd gathering for a meeting.<sup>55</sup>

However, on 22 May 1994, the day following the four murders, Ken Saro-Wiwa and Ledum Mitee, then President and Vice-President of MOSOP, were arrested and detained. Later that day, the Military Administrator of Rivers State, Colonel Dauda Komo, reinforced and despatched to Ogoniland the Rivers State Internal Security Task Force, created in January that year to quell communal violence.<sup>56</sup> The soldiers 'then embarked on a series of raids on Ogoni villages in which the whole communities were collectively punished for their real or imputed association with MOSOP. Over the next several months, the Task Force reportedly raided at least 60 towns and villages in Ogoniland.'<sup>57</sup> According to a Human Rights Watch report, the raids on Ogoni villages became almost a nightly occurrence during the summer of 1994. The soldiers shot indiscriminately, beat up villagers, including children and the elderly, extorted 'settlement fees', and raped women, looted and burnt houses.<sup>58</sup> They also arrested and detained some of the villagers.<sup>59</sup>

<sup>51</sup> As above.

<sup>52</sup> As above. See also Civil Liberties Organisation (n 44 above) 64.

<sup>53</sup> *Human Rights Watch Report* (n 36 above).

<sup>54</sup> As above.

<sup>55</sup> DL Orage 'The Ogoni question and the role of the international community in Nigeria' in AR Na'Allah (ed) *Ogoni's agonies: Ken Saro-Wiwa and the crisis in Nigeria* (1998) 41; W Boyd 'Death of a writer' in Na'Allah (above) 49 53.

<sup>56</sup> *Human Rights Watch Report* (n 36 above).

<sup>57</sup> As above.

<sup>58</sup> As above.

<sup>59</sup> As above.

The reality of the mayhem meted out on the Ogoni people is that the Nigerian government, in conjunction with Shell, capitalised on the unfolding tensions in Ogoniland to attempt to stamp out or annihilate a people who were threats to unhindered oil exploitation. This fact is decipherable from the statement of Colonel Paul Okuntimo, then the leader of the Rivers State Internal Security Task Force. According to Okuntimo, 'Shell operations are still impossible unless ruthless military operations are undertaken for smooth economic activities to commence'.<sup>60</sup> He then recommended that 400 soldiers undertook what he termed 'wasting' operations against the Ogoni people and put pressure on the oil companies for 'prompt' payments to support the cost of the operation.<sup>61</sup> Okuntimo openly described his strategy as 'psychological warfare'.<sup>62</sup>

Meanwhile, Saro-Wiwa, Ledum Mittee and several other Ogoni leaders and activists arrested during the raids, were held for several months before being charged. In November 1994, a three-man special tribunal, which included an army lieutenant-colonel, was appointed by the Nigerian military government to try them. The tribunal was constituted under the Special Tribunal (Offences Relating to Civil Disturbances) Edict, 1994, as enabled by the Civil Disturbances (Special Tribunal) Decree of 1987.<sup>63</sup> This Edict prescribed the death penalty for capital offences committed in connection with civil disturbances. It also prescribed the same death penalty for offences which were previously not punishable by death, including attempted murder. By two separate charges, in February and March 1994, Saro-Wiwa, Mittee and eight other Ogoni leaders were arraigned before the tribunal.

The outcome of the trial, which was condemned by the legal community as a sham and a travesty of justice, was the conviction and sentence to death of Saro-Wiwa and eight of his associates. Mittee was, however, acquitted.<sup>64</sup> The judgment of this tribunal was not subject

<sup>60</sup> Cayford (n 36 above) 192.

<sup>61</sup> As above.

<sup>62</sup> As above. See also I Okonta *When citizens revolt: Nigerian elites, big oil and the Ogoni struggle for self-determination* (2008) 233.

<sup>63</sup> *Human Rights Watch Report* (n 36 above).

<sup>64</sup> As above. For more analysis on the Ogoni trial, see AA Idowu 'Human rights, environmental degradation and oil Multinational companies in Nigeria: The Ogoniland episode' (1999) 17 *Netherlands Quarterly of Human Rights* 161 177-180; OC Okafor 'International law, human rights, and the allegory of the Ogoni question' in EK Quashigah & OC Okafor (eds) *Legitimate governance in Africa: International and domestic legal perspective* (1999) 509. There was another separate trial of 19 other Ogoni activists. For unknown reasons, their trial never received wide media publicity like that of Saro-Wiwa and eight others. To understand in more detail the Ogonis' experience in Nigeria, and the environmental, political and legal dimensions of their struggle, see Okonta (n 62 above) 216-251; and CR Ezetah 'International law of self-determination and the Ogoni question: Mirroring Africa's post-colonial dilemmas' (1996-1997) 19 *Loyola of Los Angeles International and Comparative Law Journal* 811.

to appeal. On 10 November 1995, the nine convicted Ogoni leaders, including Saro-Wiwa, were hanged amidst pleas for clemency from within Nigeria and by the international community.<sup>65</sup> However, the tyrannical Nigerian regime was not spared from international protests and sanctions. The Commonwealth, strongly influenced by South Africa, took the unprecedented step of suspending Nigeria. Also, the United States and member states of the European Union pulled their ambassadors and envoys from Nigeria.<sup>66</sup>

Shell is the largest oil corporation in the world and, as such, its economic and political influence is huge.<sup>67</sup> For instance, Shell was a major sanctions breaker during the apartheid years in South Africa.<sup>68</sup> It is no wonder then that it did not intervene on behalf of the Ogoni leaders, but only passed a comment after their conviction that 'it is not for a commercial organisation to interfere with the legal processes of a sovereign state'.<sup>69</sup> However, Shell was to recant this statement later on, probably after receiving a barrage of criticism. It stated that it 'would now modify its previous policy of non-interference, despite its earlier refusal to intercede and prevent the Nigerian regime's hanging of Ken Saro-Wiwa'.<sup>70</sup>

The execution of the 'Ogoni Nine', as it is popularly known, did not stop the continuing human rights violations in the region. Instead, it provoked more violent protests by militant youths, not only in Ogoniland but, this time, in the whole of the Niger Delta region. Their *modus operandi* has been the hostage taking of oil workers and the blowing up of oil facilities.<sup>71</sup> An organisation formed by the ethnic Ijaw people and known as the Movement for the Emancipation of Niger Delta (MEND) is typical of present-day protests.<sup>72</sup> Besides the cases of Shell in Umuechem and Ogoniland, there are several other instances of military repression of oil-related protests at the instance of TNCs in other Niger Delta communities.<sup>73</sup>

For the sake of space, this article does not intend to elaborate on them all. Suffice it to mention that, like Shell, Chevron regularly uses state security forces that include army, navy and police, supposedly for

<sup>65</sup> CE Welch 'The Ogoni and self-determination: Increasing violence in Nigeria' (1995) 33 *Journal of Modern African Studies* 635.

<sup>66</sup> Cayford (n 36 above) 196.

<sup>67</sup> 'Shell game in Nigeria' *The New York Times* 3 December 1995 <http://www.nytimes.com/1995/12/03/opinion/shell-game-in-nigeria.html> (accessed 18 March 2011).

<sup>68</sup> As above.

<sup>69</sup> As above.

<sup>70</sup> As above. See also C Marecic 'How many wrongs does it take to make a human right?' (1997) 22 *Vermont Law Review* 201 228.

<sup>71</sup> See, eg, 'Nigeria oil militants kidnap Scot' BBC News 6 April 2009 <http://news.bbc.co.uk/2/hi/africa/7986202.stm> (accessed 18 March 2011).

<sup>72</sup> DV Kemedi 'Nero's folly' in E Kashi & M Watts (eds) *Curse of the black gold: 50 years of oil in the Niger Delta* (2008) 190.

<sup>73</sup> *Human Rights Watch Report* (n 36 above).

the protection of facilities, but often against civilian protests, and pays them in addition to their government salaries. Chevron personnel have been reported to lead and supervise the security forces in the course of their duties. Chevron equally provides its leased helicopters and boats for the transportation of the armed men, and has the capacity to investigate and order the removal of any misbehaving officer, but rarely exercises this power to check human rights abuses by these officers.<sup>74</sup>

### 3 Nigeria's inefficient regulatory regime for transnational oil corporations

For the purpose of this discussion, environmental laws, regulations and policies in Nigeria are most relevant. Until 1988,<sup>75</sup> when the Federal Environmental Protection Agency Act (FEPA Act)<sup>76</sup> was enacted, there was no distinct environmental regulatory regime in Nigeria. Every minister in the federal government had responsibility for environmental protection and enforcement in his ministry's areas of influence. In a similar fashion, the inspectorate of the Nigerian National Petroleum Corporation took charge of environmental monitoring and enforcement in the nation's petroleum industry as a whole. Under the FEPA Act, the Federal Environmental Protection Agency (FEPA) was established and charged with the responsibility for the protection of the environment in Nigeria, and has the powers, among others, to articulate the national policy for environmental protection and planning. Crucially, the FEPA Act prohib-

<sup>74</sup> N Bassey 'The oil industry and human rights in the Niger Delta' written testimony before the United States Senate Judiciary Subcommittee on Human Rights and Law (28 September 2008) <http://www.earthrights.org/files/Documents/Nnimotestimony9.24.08.pdf> (accessed 18 March 2011).

<sup>75</sup> A national environmental emergency situation that occurred in 1988 led to the promulgation of the Environmental Protection legislation. A vessel, MV Baruluk, from Italy, berthed at Koko Port in the then Bendel State (now Delta State) and discharged 561 imported containers of toxic waste product. See E Arubi 'N39 million relief for Koko toxic waste victims 21 years after' *allAfrica.com* 4 April 2008 <http://allafrica.com/stories/200804041094.html> (accessed 18 March 2011). See also SF Liu 'The Koko incident: Developing international norms for the Transboundary Movement of Hazardous Waste' (1992-1993) 8 *Journal of Natural Resources and Environmental Law* 121. In reaction to this incident, the Nigerian federal government promulgated the Harmful Waste (Special Criminal Provisions, etc) Decree 42 of 1988 (now Harmful Waste (Special Criminal Provisions) Act, ch H1, Law of the Federation of Nigeria, 2004) and the Federal Environmental Protection Agency Decree 58 of 1988 (now the Federal Environmental Protection Agency Act, ch F10, Laws of the Federation of Nigeria, 2004).

<sup>76</sup> Ch F10, Laws of the Federation of Nigeria, 2004.

its the discharge of harmful quantities of any hazardous substance into the air or upon land and waters of Nigeria.<sup>77</sup>

In 1999, however, FEPA was merged with some other relevant federal departments to form the Federal Ministry of Environment, Housing and Urban Development (FME), but without an appropriate enabling law on responsibility issues. Much later, the National Environmental Standards and Regulations Enforcement Agency Act, 2007 (NESREA Act) was enacted.<sup>78</sup> This Act repealed and replaced the FEPA Act, and in place of FEPA created a new agency, the National Environmental Standards and Regulations Enforcement Agency (NESREA), which became a parastatal under the FME. Subsidiary legislation<sup>79</sup> made under the FEPA Act is still in force. NESREA, like the former FEPA, is responsible for enforcing environmental laws, regulations and standards towards deterring people, industries and corporate bodies from polluting and degrading the environment. It administers the NESREA Act and, like the repealed FEPA Act, the NESREA Act equally criminalises and increasingly punishes environmental pollution with the imposition of fines not exceeding N1 000 000 (one million Naira) (roughly US \$6 630) and a prison term of five years. In the case of a corporate body, there is an additional fine of N50 000 (fifty thousand Naira) (roughly US \$330) for every day the offence persists.<sup>80</sup>

Other relevant legislation worthy of mention here are the Environmental Impact Assessment Act (EIA Act);<sup>81</sup> the Harmful Waste (Special Criminal Provisions) Act (HWSCP Act);<sup>82</sup> and the National Oil Spill Detection and Response Agency Act, 2006 (NOSDRA Act). The EIA Act, administered by FME, sets out the procedures and methods for ensuring prior consideration of environmental impact assessments on projects, whether public or private. It prohibits the undertaking or authorisation of any project without prior evaluation of its environmental impact, and it gives FME the authority to monitor and certify the environmental assessment on projects. There is also a legal liability for the breach of any provisions of the Act.<sup>83</sup> The HWSCP Act is basically

<sup>77</sup> See JP Eaton 'The Nigerian tragedy, environmental regulation of transnational corporations, and the human right to a healthy environment' (1997) 15 *Boston University International Law Journal* 261 283- 285, where the provisions of this Act are discussed in more detail.

<sup>78</sup> For some critical analysis of this legislation, see DK Derri & SE Abila 'A critical examination of the National Environmental Standards and Regulations Enforcement Agency (Establishment) Act, 2007' in Emiri & Deinduomo (n 34 above) 1.

<sup>79</sup> These include the National Environmental Protection (Effluent Limitation) Regulations; the National Environmental Protection (Pollution Abatement in Industries and Facilities Generating Waste) Regulations; and the National Environmental Protection (Management of Solid and Hazardous Waste) Regulations.

<sup>80</sup> See sec 27 of the Act.

<sup>81</sup> Ch E12, Laws of the Federation of Nigeria, 2004.

<sup>82</sup> Ch H1, Laws of the Federation of Nigeria, 2004.

<sup>83</sup> See sec 60.

a penal legislation. It prohibits the carrying, dumping or depositing of harmful waste in the air, land or waters of Nigeria without lawful authority. It prescribes punishment of life imprisonment as well as the forfeiture of land or anything used to commit the offence. Where an offence is committed by a corporate entity, the Act also punishes any conniving, consenting or negligent officer of the corporation. The Act also provides for the civil liability of an offender to a victim from the offending act.<sup>84</sup> The NOSDRA Act creates the National Oil Spill Detection and Response Agency, which is responsible for the co-ordination and implementation of the National Oil Spill Contingency Plan. The Act provides that an oil spiller is required to clean up affected sites.<sup>85</sup>

On the other hand, although the flaring of gas is generally prohibited, it is nonetheless allowed under section 3 of the Associated Gas Re-Injection Act,<sup>86</sup> if a ministerial consent certificate has been lawfully issued. Under this legislation, the Minister can issue consent to an oil corporation to flare gas if he is satisfied that the utilisation or re-injection of the gas is inappropriate or unfeasible in a particular field or fields. Where the Minister issues such consent, he would require the corporation to pay a specified amount of money, and further meet specified conditions according to the requirement of section 1 of the Associated Gas Re-Injection (Continued Flaring of Gas) Regulations, 1984.<sup>87</sup>

As far-reaching as these regulations may appear, however, they failed to check the egregious environmental degradation by the oil TNCs in the Niger Delta. They are in fact largely ignored and scarcely enforced.<sup>88</sup> The reason for this is not difficult to ascertain. The government has pecuniary interests in the TNCs by virtue of their joint venture arrangement. Enforcing an environmental regulatory policy that entails significant spending which would reduce revenue or profit, is not in the least a priority for the partners. This is because expenditure by the corporations is appropriately apportioned to the government as well. This inclination not to reduce profit also explains why the initial pipelines laid by these corporations at the beginning of oil extraction in Nigeria have not been replaced with modern ones. Being weak and dilapidated, these pipelines regularly spill oil. The statement of an

<sup>84</sup> See secs 6, 7 & 12 of the Act.

<sup>85</sup> There is other legislation, both federal and state legislation, on environmental protection in Nigeria, but this will not be considered in this article in order not to digress from its main focus. Even the Nigerian Criminal Code (ch C38, Laws of the Federation of Nigeria, 2004) punishes for environmentally-related offences to the extent that it covers offences ranging from water fouling to the use of noxious substances. See particularly secs 245- 248 of this Code. For a more detailed analysis of criminal sanctions on environmental pollutions, see Idowu (n 64 above) 172-177.

<sup>86</sup> Ch A25, Laws of the Federation of Nigeria, 2004.

<sup>87</sup> This regulation is made pursuant to the provisions of the Associated Gas Re-Injection Act.

<sup>88</sup> Eaton (n 77 above) 282. See also K Omeje 'Petrobusiness and security in the Niger Delta, Nigeria' (2006) 54 *Current Sociology* 477 494.

unnamed activist in the Niger Delta interviewed by Kenneth Omeje vividly captures this:<sup>89</sup>

Most of these companies' oil pipelines were laid in the 1960s and 1970s, and our fathers who are in their old age now will tell you (because they participated as labourers in laying them) that they have never seen these pipelines replaced. The pipelines are made of metals which have a maximum lifespan of about 15 years. Yet they have been on our land for 20, 30, 40 years. It is quite natural they will rust. More so, because some of our terrains are swampy, the pipelines could even have a shorter lifespan. The companies do not replace them before expiration, which causes the spillage. I do not say there could not be cases of sabotage. They are quite rare — and the common feature in these cases is that it (*sic*) involves refined products, not raw materials (crude oil).

Even if these environmental regulations as highlighted above are enforced, the sanctions they prescribe are considered a mere pittance to financially-towering oil TNCs.<sup>90</sup> For instance, the managers of these corporations can easily 'opt to pay the daily fine and defer cleanup to some later undetermined time, instead of defraying cleanup costs at the time of the spill to the detriment of short term profits'.<sup>91</sup> Idemudia has also argued that 'fines for violating the gas flaring legislations are fixed at insignificant rates so that oil MNCs can continue to flare gas and pay a fine, as opposed to adhering to the law'.<sup>92</sup> The best way to describe the attitude of the oil corporations in the Niger Delta is 'go to Rome and do like Romans'.<sup>93</sup> They latched on the virtual non-regulatory Nigerian environment to abuse human rights. Eaton rightly observed that many countries have seen more success in regulating the environmental practices of the same oil TNCs that inflict havoc upon the Niger Delta in Nigeria. He goes further to acknowledge that many of Shell's activities in Nigeria would be illegal if they were to happen in other parts of the world.<sup>94</sup>

There are several initiatives undertaken by TNCs to portray themselves as socially-responsible corporations. These range from building schools, hospitals and boreholes, to road construction, the provision of which often lacked community involvement and a sense of ownership,

<sup>89</sup> K Omeje 'Oil conflict in Nigeria: Contending issues and perspectives of the local Niger Delta people' (2005) 10 *New Political Economy* 321 327.

<sup>90</sup> AK Akujobi 'The effectiveness of criminal sanctions under environmental law in Nigeria' in Emiri & Deinduomo (n 34 above 337 346), concluding that 'the penalties for infringement on environmental laws are laughable and grossly inadequate particularly when one thinks of the effect and consequences of the degradation of the environment and huge profits made by the polluters on their business'.

<sup>91</sup> Eaton (n 77 above) 288.

<sup>92</sup> Idemudia 'Rethinking the role' (n 24 above) 7.

<sup>93</sup> What is implied here is that, instead of being exemplar of civility, regulatory compliance and adherence to industry best practices which they uphold in their home states, the TNCs in Nigeria chose to exhibit corporate malfeasance that apparently fits into the political atmosphere, even when it creates grave human rights havoc.

<sup>94</sup> Eaton (n 77 above) 283.

and which spur inter-community conflict.<sup>95</sup> In any case, the supposed corporate social responsibility efforts do not and cannot make up for the atrocious human rights violations on their part.

It is interesting to note also that the foregoing human rights violations unfolded even when there are other legal regimes, local and international, that provide for the peoples' individual and collective human rights in all its definitions and ramifications. Apart from the Nigerian Constitution,<sup>96</sup> the following international legal instruments, to which Nigeria is a state party, recognise and guarantee the human rights of the local people of the Niger Delta: the Universal Declaration of Human Rights (Universal Declaration);<sup>97</sup> the African Charter on Human and Peoples' Rights (African Charter);<sup>98</sup> the International Covenant on Civil and Political Rights (ICCPR);<sup>99</sup> and the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>100</sup> The rights to development and a healthy environment are essentially provided for in the African Charter<sup>101</sup> and ICESCR.<sup>102</sup>

A good analysis of the violations of the rights of the communities of the Niger Delta under the African Charter is made in the ruling of the African Commission on Human and Peoples' Rights (African

<sup>95</sup> Idemudia 'Rethinking the role' (n 24 above) 9.

<sup>96</sup> See ch IV generally, but particularly secs 33, 34 and 43 of the Constitution of Federal Republic of Nigeria 1999 (1999 Constitution) relating to rights to life, dignity of the human person and the right to property. Besides making bold provisions for the first generation of human rights in ch IV, the Constitution in sec 20 provides that the state shall protect and improve the environment and safeguard the water, air and land, forest and wild life of Nigeria. The right provided for under this section (the right to a healthy environment derivable from the obligation of the state to protect and improve the environment) is not justiciable by reason of sec 6(6)(C) of the same Constitution, which purports to oust the court's jurisdiction from entertaining any question or matter arising from sec 20. The legal implication of this provision is that no one can successfully bring an action against the Nigerian government by relying on the said constitutional provisions. This perhaps explains why the people of the Niger Delta could not bring an action against the federal government in redress of their environmental damages.

<sup>97</sup> Adopted by the United Nations General Assembly on 10 December 1948, UN GA Res 217A (III), UN GAOR, 3rd sess UN Doc A/810 (1948).

<sup>98</sup> This is an African treaty adopted in Nairobi, Kenya, by the Organisation of African Unity (now African Union) Assembly of Heads of State and Government on 27 June 1981 OAU Doc CAB/LEG/67/3 Rev 5; C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2010) 29, and came into force on 21 October 1986. It became part of Nigeria's domestic law by virtue of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, ch A9, Laws of the Federation of Nigeria, 2004). Art 22 of this Charter, eg, provides that all people shall have the right to economic, social and cultural development. Arts 4, 16 and 24 also make provisions relating to the right to a clean and healthy environment.

<sup>99</sup> See n 6 above.

<sup>100</sup> See n 5 above.

<sup>101</sup> See arts 22 & 24. The rights to life and integrity of the human person, property, the enjoyment of the best attainable state of physical and mental health and the right to family life are also provided for in arts 4, 14, 16 and 18(1) respectively.

<sup>102</sup> See art 12.

Commission)<sup>103</sup> in *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria (SERAC case)*.<sup>104</sup> This communication arose out of the military repression in Ogoniland (highlighted in part II above) around the mid-1990s, and was filed on behalf of the Ogoni people by SERAC and CESR, who are Lagos and New York-based NGOs respectively.

Articles 21 and 24 of the African Charter, particularly, were found by the African Commission to have been violated by the Federal Republic of Nigeria. Article 21 provides for the right of the people to freely dispose of their wealth and natural resources, which right shall also be exercised in the exclusive interest of the people, and the people shall not be deprived of it.<sup>105</sup> It further provides that state parties (Nigeria in this case) shall undertake to eliminate all forms of foreign economic exploitation, particularly that practised by international monopolies, so as to enable their people to fully benefit from the advantages derived from their natural resources. Article 24, on the other hand, provides that all people shall have the right to a generally satisfactory environment favourable to their development.<sup>106</sup>

In view of these provisions, the Commission found that the military government of Nigeria failed to protect the Ogoni people from the activities of oil TNCs operating in the Niger Delta. In other words, the government failed to monitor or regulate the operations of oil TNCs and, in doing so, paved the way for the corporations to exploit oil reserves in Ogoniland;<sup>107</sup> furthermore, that the government in its dealings with the corporations did not involve the Ogoni communities in decisions that affected the development of Ogoniland.<sup>108</sup> The African Commission equally observed the importance of a clean and safe environment that is closely linked to economic and social rights in so far as the environment affects the quality of life and the safety of the individual, and concluded that living in an environment degraded by pollution was unsatisfactory.<sup>109</sup>

Although on technical grounds the oil TNCs were not pursued directly in this case, nonetheless the decision exposed the human rights violations arising from their operations, and the Nigerian government was held responsible for failing to put them under control. Thus, finding that the government of Nigeria violated articles 2, 4, 14, 16, 18(1), 21 and 24 of the African Charter, the African Commission appealed to the

<sup>103</sup> This is a quasi-judicial organ of the AU with the responsibility of monitoring, promoting and protecting human rights and collective peoples' rights throughout Africa as well as interpreting the African Charter and considering individual complaints of violations of the Charter.

<sup>104</sup> (2001) AHRLR 60 (ACHPR 2001). This case was decided at the Commission's 30th ordinary session, held in Banjul, The Gambia, from 13 to 27 October 2001.

<sup>105</sup> SERAC decision (n 104 above) para 55.

<sup>106</sup> SERAC decision (n 104 above) para 52.

<sup>107</sup> SERAC decision (n 104 above) paras 56, 57 & 58.

<sup>108</sup> SERAC decision (n 104 above) para 55.

<sup>109</sup> SERAC decision (n 104 above) para 51.

government to ensure the protection of the environment, health and livelihood of the people of Ogoniland by taking several steps, including stopping all attacks on Ogoni communities and leaders by the security forces; ensuring adequate compensation to the victims of human rights violations; undertaking a comprehensive clean-up of lands and rivers damaged by oil operations; ensuring that appropriate environmental and social impact assessments are prepared for any future oil development; and that the safe operation of any further oil development is guaranteed through effective and independent oversight bodies for the petroleum industry.<sup>110</sup> Ten years on, and the appeals by the African Commission have not yet been complied with by the Nigerian government, thus underlining the point that Third World host states of the TNCs are incapable of controlling the corporations' activities.

A more recent decision of a domestic court will help to drive home this point: the case of *Mr Jonah Gbemre v Shell Petroleum Development Company, Nigerian National Petroleum Corporation (NNPC) and the Attorney-General of the Federation*<sup>111</sup> before Justice CV Nwokorie, at the Federal High Court, Benin Division. The applicant in the case had sought the following relief:

- (i) a declaration that the constitutionally-guaranteed fundamental rights to life and dignity of the human person provided for in sections 33(1) and 34(1) of the Constitution of the Federal Republic of Nigeria, 1999, and reinforced by articles 4, 16 and 24 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Cap A9, Vol 1, Laws of the Federation of Nigeria, 2004, inevitably include the right to a clean, poison-free and healthy environment;
- (ii) a declaration that the actions of the first and second defendants in continuing to flare gas in the course of their oil explorations and production activities in the applicant's community are a violation of the applicant's fundamental rights to life (including a healthy environment) and dignity of the human person guaranteed by sections 33(1) and 34(1) of the Constitution of the Federal Republic of Nigeria and reinforced by articles 4, 16 and 24 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Cap A9, Vol 1, Law of the Federation of Nigeria, 2004;
- (iii) a declaration that the failure of the first and second defendants to carry out an environmental impact assessment in the applicant's community concerning the effects of their gas flaring activities is a violation of section 2(2) of the Environmental Impact Assessment Act, Cap E12, Vol 6, Laws of the Federation of Nigeria, 2004;
- (iv) a declaration that the provisions of sections 3(2)(a) and (b) of the Associated Gas Re-Injection Act, Cap A25, Vol 1, Laws of the Federation of Nigeria, 2004, and section 1 of the Associated Gas Re-Injection (Continued Flaring of Gas) Regulations, 1984, under which the continued flaring of gas in Nigeria may be allowed, are inconsistent with the applicant's rights to life and/or dignity of the human person enshrined in sections 33(1) and 34(1) of the Constitution of the Federal Republic of Nigeria, 1999 and articles 4, 16 and 24 of the African Charter on

<sup>110</sup> SERAC decision (n 104 above) concluding para.

<sup>111</sup> Suit FHC/CS/B/153/2005 (unreported).

Human and Peoples' Rights (Ratification and Enforcement) Act, Cap A9, Vol 1, Laws of the Federation of Nigeria, 2004, and are therefore unconstitutional, null and void by virtue of section 1(3) of the same Constitution; and

(v) an order of perpetual injunction restraining the first and second defendants by themselves or by their agents, servants, contractors or workers or otherwise howsoever from further flaring of gas in the applicant's said community.

In its judgment of 14 November 2005, the Court granted the above. In bold and clear terms, it restrained the respondents from further flaring gas in the applicant's community, with an injunction to take immediate steps to do this. The Court specifically ordered the Attorney-General of the Federation to immediately set in motion the necessary processes for a speedy amendment of the Associated Gas Re-injection Act and the Regulations made thereunder in order to quickly bring them in line with the provisions of chapter 4 (covering human rights) of the Constitution.<sup>112</sup>

About five years after this judgment, the situation is still much the same in Niger Delta communities. However, the National Assembly in July 2009 passed a new bill, the Gas Flaring (Prohibition and Punishment) Bill, 2009, which sets 31 December 2010 as the final date for stopping gas flaring in Nigeria. Under this Bill, oil corporations that fail to meet the deadline should pay twice the price of gas flared in the international market.<sup>113</sup> Whether the new legislation will be enforced in a manner different from the way other environmental legislation and regulations in Nigeria have been enforced so far is a different matter. Indeed, the law is now in force, yet its impact has not been felt within the affected communities.

#### 4 Transnational corporations and the International Criminal Court

Customary international human rights law developed in order to protect individuals from oppressive and abusive actions of the state. Perhaps a failure to recognise or contemplate *ab initio* that powerful non-state actors such as TNCs could violate human rights may be attributed

<sup>112</sup> A full and detailed analysis of this case can be found in the *Oxford Reports on International Law* – ILDC 924 (NG 2005). The full text of the original judgment of the court is also available at <http://www.climatelaw.org/cases/case-documents/nigeria/ni-shell-nov05-judgment.pdf> (accessed 19 March 2011).

<sup>113</sup> See S Ojeifo 'Gas flaring – Senate passes Prohibition Bill' *This Day* 3 July 2009 <http://www.thisdayonline.com/nview.php?id=147722> (accessed 19 March 2011).

to the fact that only states were players in the international arena.<sup>114</sup> However, international law leaves states with the obligation to control and restrain within their territories the activities of non-state actors that violate human rights.<sup>115</sup> It is not in doubt that several states do not have what it takes to live up to this obligation. Weak Third World countries that see these human rights violations through the extra-territorial activities of foreign corporations within their domain, as in the case of Nigeria highlighted above, do not have the economic and political will to bring TNCs under control.<sup>116</sup> The situation is further exacerbated by the systemic corruption often associated with Third World countries, of which Nigeria is not an exception.<sup>117</sup>

At one time it was thought that where a host state is unwilling or incapable of reacting appropriately to human rights abuses, the home state of the corporation may have a crucial role to play ensuring that corporate abuses do not go unpunished,<sup>118</sup> and some home states have attempted to use extra-territorial legislation to achieve this end. Belgium, for instance, had an unsuccessful trial with its 'universal competence' human rights law by which Belgian courts could try cases of alleged violations of human rights by anyone, against anybody and anywhere in the world.<sup>119</sup> The United Kingdom also proposed a bill to impose social, environmental and human rights obligations on corporations registered in the UK and their directors, with respect to their activities at home or overseas. However, this did not translate into legislation.<sup>120</sup>

<sup>114</sup> AC Cutler 'Critical reflections on the Westphalian assumptions of international law and organisations: A crisis of legitimacy' (2001) 27 *Review of International Studies* 133, arguing that the 'Westphalian-inspired notions of state-centricity, positivist international law, and "public" definitions of authority are incapable of capturing the significance of non-state actors, like transnational corporations and individuals, informal normative structures, and private, economic power in the global political economy'. See also Malanczuk (n 1 above) 1, arguing that 'only states could be subjects of international law, in the sense of enjoying international legal personality and being capable of possessing international rights and duties, including the rights to bring international claims'.

<sup>115</sup> McCorquodale & Simons (n 18 above) 598 599.

<sup>116</sup> I Fuks 'Sosa v Alvarez-Machain and the future of ACTA litigation: Examining bonded labour claims and corporate liability' (2006) 106 *Columbia Law Review* 112 117 n 37, arguing that developing countries are reluctant to bring TNCs under control because of their power over the flow of capital and jobs that the TNCs have and the ease with which either or both can be moved in relatively short period of time in the event of a country falling out of favour with the TNCs.

<sup>117</sup> F Khan 'Understanding the spread of systemic corruption in the Third World' (2008) 6 *American Review of Political Economy* 16; O Fagbadebo 'Corruption, governance and political instability in Nigeria' (2007) 1 *African Journal of Political Science and International Relations* 28 35.

<sup>118</sup> See J Ruggie 'Protect, respect and remedy: A framework for business and human Rights' (2008) 3 *Innovations: Technology, Governance, Globalisation* 189.

<sup>119</sup> Kinley & Tadaki (n 3 above) 940.

<sup>120</sup> Kinley & Tadaki (n 3 above) 942.

It appears that only the United States of America has made a meaningful difference in the use of extra-territorial legislation to regulate TNCs. The Alien Tort Claims Act<sup>121</sup> (ATCA) empowers the USA district court to hear civil claims of foreign citizens for injuries arising from actions that violate the law of a nation or a treaty of the United States.<sup>122</sup> This Act has been utilised to some extent,<sup>123</sup> but its application has often been limited by jurisdiction and *forum non-conveniens* arguments and restrictive interpretations.<sup>124</sup> Also, apart from these, it is restricted to suits in the USA and has no universal application that can adequately deal with wider human rights violations. Not even soft law initiatives<sup>125</sup> could fill the vacuum. For instance, the 2003 UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights<sup>126</sup> can appropriately be described as a 'lame tiger' because, although referred to as 'binding', it is voluntary. Its provisions are not enforceable on a TNC. What the current position amounts to is that reliance on a state-based framework for controlling TNCs is tantamount to turning a blind eye to human rights abuses arising from their operations.<sup>127</sup>

It is against this backdrop that the article argues that extending the jurisdiction of the ICC to TNCs has become imperative in order to cut down the extent of, or to deter, human rights abuses. There is no doubt that the manner of atrocities committed by Shell in Ogoniland, for instance, cannot be substantially distinguished or removed from the definition of crimes over which the ICC currently has jurisdiction. Articles 5, 6, and 7 of the ICC Statute make it clear that crimes against humanity which, among others, include murder, rape, torture and attacks directed against any civilian population, such as were committed with the complicity of Shell and other TNCs in the Niger Delta, are punishable under the Statute.

A critical mind may want to ask why Third World countries, including Nigeria, have not of their own accord employed a corporate criminal regime to effectively punish or stop TNCs from human rights violations

<sup>121</sup> This statute is alternatively referred to as the Alien Tort Statute (ATS). It is part of the Judiciary Act of 1979, ch 20 para 9(b), 1 Stat 73, 77 (codified as amended at 28 USC para 1330 (2000)). See Fuks (n 116 above) 112.

<sup>122</sup> Kinley & Tadaki (n 3 above) 939.

<sup>123</sup> See *Doe v Unocal Corp* 963 F Supp 880 (CD Cal 1997) 110 F Supp 2d 1294 (CD Cal 2000); *Doe 1 v Unocal* 395 F 3d 932 (9th Cir 2002) 395 F 3d 978 (9th Cir 2003); *John Doe 1 v Unocal* 403 F 3d 708 (9th Cir 2005). Unocal Corporation was held liable for human rights violations of its subsidiary company in Myanmar. See also *Beanal v Freeport-McMoran Inc* 197 F 3d 161, 161 (5 Cir 1999). See generally Fuks (n 116 above) 118-119. For other cases, see MA Pagnattaro 'Enforcing international labour standards: The potential of the Alien Tort Claims Act' (2004) 37 *Vanderbilt Journal of Transnational Law* 203.

<sup>124</sup> S Joseph *Corporations and transnational human rights litigation* (2004) 83-99.

<sup>125</sup> See nn 8, 9, 10, 13 & 14 above.

<sup>126</sup> See n 14 above.

<sup>127</sup> Kinley & Tadaki (n 3 above) 1021.

without seeking the assistance of the ICC. The truth is that, like some Western common law jurisdictions that have corporate criminal regimes, Nigeria, for instance, recognises this concept but has not effectively put it to use as machinery for seeking justice against corporations. Corporate criminal liability is well established in Nigeria's jurisprudence. This is anchored in common law's organic theory of the corporation, which has been the hallmark of Nigeria's company statutory and case law.<sup>128</sup> Leaving aside the company statutory and case law, generally, section 18(1) of the Interpretation Act,<sup>129</sup> as well as chapter 1 of the Criminal Code<sup>130</sup> defines a 'person' as including a corporation, with the implication that all legal rules and offences applicable to 'a person' also applies to a corporation.

Section 65(1)(a) of the Companies and Allied Matters Act of 1990 (CAMA)<sup>131</sup> provides that a corporation shall be criminally liable for the acts of its members in a general meeting, its board of directors or of its managing director to the same extent as if it were a natural person. Paragraph (b) of the same sub-section, however, underscores the sacrosanctity of corporate criminal liability in Nigeria by indicating that a corporation shall still be criminally liable notwithstanding that the offence in question was committed in the course of an activity or a business not authorised by its memorandum; thus foreclosing the use of the *ultra vires* argument as a defence in any criminal proceedings against a corporation.<sup>132</sup>

The section 65 provisions are in any case a codification of Nigeria's pre-CAMA case law.<sup>133</sup> Worthy of note is the case of *Ibadan City Council v Odunkale*,<sup>134</sup> where the Supreme Court held that the mental state of a director, being the mind and will of a corporation, may be attributed to the corporation itself in order to ground corporate liability. In effect, corporations in Nigeria have been convicted of offences that include sedition,<sup>135</sup> knowingly publishing a false statement,<sup>136</sup> the violation

<sup>128</sup> C Okoli 'Criminal liability of corporations in Nigeria: A current perspective' (1994) 38 *Journal of African Law* 35; JA Dada 'The organic theory as a basis of corporate liability' (1998) 4 *Current Jos Law Journal* 219.

<sup>129</sup> Ch I23, Laws of the Federation of Nigeria, 2004.

<sup>130</sup> Ch C38, Laws of the Federation of Nigeria, 2004. See also Okoli (n 128 above) 39.

<sup>131</sup> Ch C20, Laws of the Federation of Nigeria, 2004.

<sup>132</sup> Okoli (n 128 above) 37-38.

<sup>133</sup> *Lennard's Carrying Company v Asiatic Petroleum* (1915) AC 705 713-714, *per* Viscount Haldane; *Bolton v Graham* (1956) 3 All ER 624 630, *per* Lord Denning; *A-G (Eastern Region) v Amalgamated Press* (1956-1957) 1 ERLR 12; *James v Mid-West Motors Limited* (1978) NSCC 536 550, *per* Aniagolu JSC; *Mandilas and Karaberis Limited & Another v Inspector-General of Police* (1958) 3 FSC 20.

<sup>134</sup> (1979) 3 UILR 490.

<sup>135</sup> *R v Zik Press Ltd* (1947) 12 WACA 202.

<sup>136</sup> *Amalgamated Press* case (n 133 above).

of mining law,<sup>137</sup> stealing by fraudulent conversion,<sup>138</sup> and intentionally harbouring prohibited goods contrary to the import prohibition order.<sup>139</sup> A post-CAMA decision of the Court of Appeal today represents a succinct statement of Nigerian jurisprudence on corporate criminal liability. The court in *Adeniji v State* clearly enunciated:<sup>140</sup>

There is no doubt therefore that the company could be made liable criminally for the actions of natural persons in control or with necessary authority and who are regarded as the alter ego of the company and such natural persons could be treated as the company itself. Corporations being a legal fiction can only act and think through their officials and servants. For the purpose of imposing criminal liability upon corporations other than vicarious responsibility, the conduct and accompanying mental state of senior officers, acting in the course of their employment, can be imputed to a corporation.

By implication of this decision, senior officers of a corporation, who are not necessarily the directors, can attract criminal sanctions for the corporation. But it is instructive to note that *Adeniji's case* also stated that a corporation could not be held criminally liable at the same time as the responsible officer, such that once the culpable conduct of an officer has been imputed to the corporation which is then found guilty, the officer is absolved from guilt.<sup>141</sup> In other words, the court failed to uphold the doctrine of 'lifting the veil' in a criminal case. 'Lifting the veil' is an age-long common law principle enshrined also in criminal case law,<sup>142</sup> and particularly observed by the Supreme Court in *Mandilas and Karaberis Limited and Another v Inspector-General of Police*.<sup>143</sup> Besides receiving criticism from scholars,<sup>144</sup> the decision on this issue may not represent the supreme law in the country by reason of judicial precedence. There has been an earlier Supreme Court decision (*Mandilas and Karaberis Limited*) to the contrary.

In any event, CAMA provides the grounds for holding oil TNCs criminally liable for their corporate malfeasance in the Niger Delta, which are the aftermath of officially-authorised actions. And there seems in theory to be no obstacle in prosecuting them. The same is the case

<sup>137</sup> *R v Attorneys for Anglo-Nigerian T in Mines Ltd* (1926) 9NLR 69.

<sup>138</sup> *Mandilas and Karaberis Limited's case* (n 133 above)

<sup>139</sup> *Board of Customs and Excise v Amaechi* (1978) 4 FRCR 169. See also L Ali *Corporate criminal liability in Nigeria* (2009) 127.

<sup>140</sup> (1992) 4 NWLR (Pt 234) 248 261, *per* Sulu-Gambari JCA.

<sup>141</sup> n 140 above, 262-263.

<sup>142</sup> *DPP V Kent & Sussex Contractors Ltd* (1944) KB 46; *R v ICR Haulage Ltd* (1944) KB 551.

<sup>143</sup> See n 133 above.

<sup>144</sup> Okoli (n 128 above) 42-43.

with NNPC.<sup>145</sup> It is thought that the complexity factors (such as touching on causation, burden of proof and extra-territorial informational need), which are often argued as complicating the prosecution of TNCs, may not be in issue in the peculiar case of the Niger Delta where the crimes in question are location-specific and involve the physical and direct application of force to the people.<sup>146</sup> The complexity factors are not of general application, therefore, and depend on the typology of industry and the nature of the crime involved. They are best associated with TNCs in the health, pharmaceutical, financial and securities industries.<sup>147</sup>

Criminal prosecution is the highest level of state reprimand against an offending entity. Consequently, the joint venture alliance (and sometimes production-sharing contracts) between the Nigerian state (represented by NNPC) and the oil TNCs raises the question as well as suggesting why the Nigerian state has not mustered the courage to apply the strictest level of sanctions against entities in which it has vested an economic interest. While there is scope for private prosecution under Nigerian law, its application still lies much in the hands of the state who, through the office of the Attorney-General, must grant an official fiat before such private undertaking can commence.<sup>148</sup>

It may be recalled that it is in part the failure of states to rise above political and economic considerations and visit justice on atrocities committed within their territories that necessitated the creation of the

<sup>145</sup> While the prosecution of a government-owned corporation is tantamount to crown prosecuting crown, and as such difficult to conceptualise, the Nova Scotia Court of Appeal in *R v Canada* (Minister of Defence) (1993) 125 NSR (2d) 208 para 21 (NSCA) has clarified that as no one, including government and its departments, is above the law, it is entirely appropriate to prosecute government, especially where such prosecution is to punish an action that is particularly destructive to the environment (which is exactly the same case as in the Niger Delta). The Court explained this as follows: 'The respondents argued that the prosecution of Her Majesty in Right of Canada by Her Majesty in Right of Canada creates an absurdity. While there may be conceptual difficulties, these must yield to the principle that Her Majesty in Right of Canada or a Province is not above the law. When a statute that Parliament has made binding upon Her Majesty is violated in her name and on her behalf, the declarative effect of a finding of guilt is more important than the penalty imposed. This is particularly true when the statutory violation consists of an act destructive to the environment. Decoste J dealt with a similar argument in the *Environment Canada* case (*Department of the Environment, Canada v Department of Public Works, Canada* (1992) 10 CELR (NS) 135 (C.Q.)).' Indeed, prosecution of a government corporation is not a novel phenomenon in Canada. The Alberta Ministry of Justice and Attorney-General, eg, has a well-established procedure for doing this, which particularly involves a private counsel conducting the prosecution. This is available at [http://justice.alberta.ca/programs\\_services/criminal\\_pros/crown\\_prosecutor/Pages/prosecuting\\_crown.aspx](http://justice.alberta.ca/programs_services/criminal_pros/crown_prosecutor/Pages/prosecuting_crown.aspx) (accessed 20 March 2011).

<sup>146</sup> Ali (n 139 above) 193-194.

<sup>147</sup> As above.

<sup>148</sup> See secs 174(b) & 211(1)(b) of the 1999 Constitution; sec 342 of the Criminal Procedure Act, ch C41, Laws of the Federation of Nigeria, 2004; *Fawehinmi v Akilu* (1987) 11/12 SCNJ 151 or (1987) 4 NWLR (Pt 797) 832; and *Attorney-General of Anambra State v Nwobodo* (1992) 7 NWLR (Pt 256) 711.

ICC, not that the states do not have appropriate criminal regimes for the designated offences. *A fortiori*, the necessity of subjecting TNCs to the jurisdiction of the ICC is canvassed not because host states such as Nigeria do not have appropriate corporate criminal regimes, but because the use of such domestic criminal regimes to secure justice for victims of these crimes is seemingly undermined by factors that relate to political and economic considerations, as well as corruption.

The ICC is a permanent tribunal established to prosecute individuals for genocide, crimes against humanity and war crimes. Crimes of aggression will also fall under its jurisdiction after 1 January 2017.<sup>149</sup> The Court came into being on 1 July 2002, the date on which its founding treaty, the Rome Statute of the International Criminal Court,<sup>150</sup> entered into force. The Statute was adopted at a diplomatic conference in Rome on 17 July 1998. Although the Court may take its proceedings anywhere in the territory of state parties, its official seat and headquarters are in The Hague, Netherlands. The jurisdiction of the ICC extends to crimes committed on or after 1 July 2002 and only to cases where the accused is a national of a state party, where the alleged crime took place within the territory of a state party; or where a situation is referred to the Court by the United Nations Security Council.<sup>151</sup>

Essentially, the ICC complements existing national judicial systems and only exercises its jurisdiction where a national jurisdiction is unwilling or unable to investigate or prosecute designated crimes.<sup>152</sup> This is the idea encapsulated in the ICC's 'complementarity principle'.<sup>153</sup> Some scholars have attempted to give a narrow interpretation to this principle by arguing that the underlying intention of the Rome Statute

<sup>149</sup> At the Review Conference of the Rome Statute concluded on 11 June 2010 in Kampala, Uganda, the Conference adopted a resolution by which it amended the Rome Statute so as to include a definition of the crime of aggression. But the actual exercise of jurisdiction over this offence by the ICC is subject to a decision to be taken after 1 January 2017 by the same majority of state parties, as required for the adoption of an amendment to the Statute. See International Criminal Court 'Review Conference of the Rome Statute Concluded in Kampala' <http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/press%20releases%20%282010%29/review%20conference%20of%20the%20rome%20statute%20concludes%20in%20kampala> (accessed 20 March 2011). See, particularly, the text of the Assembly of States Parties (ASP) Resolution RC/Res 6 adopted at the 13th plenary meeting on 11 June 2010, [http://www.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/RC-Res.6-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf) (accessed 20 March 2011).

<sup>150</sup> The treaty is also referred to as the International Criminal Court Statute or just the Rome Statute.

<sup>151</sup> Arts 12 & 13.

<sup>152</sup> Art 17. See, generally, I Cameron 'Jurisdiction and admissibility issues under the ICC Statute' in D McGoldrick *et al* (eds) *The Permanent International Criminal Court: Legal and policy issues* (2004) 65; International Criminal Court 'ICC at a glance' <http://www.icc-cpi.int/menus/icc/about%20the%20court/icc%20at%20a%20glance/icc%20at%20a%20glance?lan=en-GB> (accessed 20 March 2011).

<sup>153</sup> MM El Zeidy *The principle of complementarity in international criminal law: Origin, development and practice* (2008) 157.

is to encourage national jurisdictions to prosecute international crimes so that, unless there is a total or substantial collapse or unavailability of a state's national judicial system, the 'unwilling' or 'unable' condition in article 17 cannot be said to have been met to warrant prosecution by the ICC.<sup>154</sup> This narrow interpretation is untenable. Rather, the cardinal objective of the Rome Statute is to annihilate international crimes by ensuring that every identified conduct that amounts to the designated crimes are surely, efficiently and effectively dealt with. The implication of a narrow interpretation is to provide room for national jurisdictions to use clogging political machinery to undermine the Rome Statute. For instance, a state party with no intention to prosecute ICC crimes committed within its territory may argue that it has a judicial system capable of carrying out investigation and prosecution, so as to keep the ICC off the case, yet take no action itself.

Darryl Robinson, who himself drafted the text of article 17, has explained that the real test in the complementarity principle is to determine whether a state is investigating or prosecuting a case or has done so. Where there are no such national efforts at all, then the case becomes admissible for prosecution by the ICC.<sup>155</sup> In other words, on the occasion of a state's inaction or in the absence of a national proceeding, a case falls for prosecution by the ICC.<sup>156</sup> The explanation of the draftsman appeals to common sense. The unwillingness or inability on the part of a state can only be deciphered by inaction or scarcity of national proceedings.

Nigeria is a state party to the Rome Statute. It signed the treaty on 1 June 2000 and ratified it on 27 September 2001.<sup>157</sup> The treaty's implementation legislation, the Rome Statute of the International Criminal Court (Ratification and Jurisdiction) Bill, was passed by the National Assembly on 19 May 2005.<sup>158</sup> However, the legislation is yet to come into force as it has not yet received presidential assent.<sup>159</sup> Notwithstanding the lack of presidential assent, the facts of the endorsement and ratification of the treaty are enough for the ICC to exercise immediate

<sup>154</sup> NN Jurd 'Some lessons on complementarity for the International Criminal Court Review Conference' (2009) *South African Year Book of International Law* 28 29-30. See also NN Jurd 'The prosecutorial interpretation of the complementarity principle: Does it really contribute to ending impunity on national level?' (2010) 10 *International Criminal Law Review* 73.

<sup>155</sup> D Robinson 'The mysterious mysteriousness of complementarity' (2010) 21 *Criminal Law Forum* 67 68. For more discourse on complementarity, see MA Newton 'Complementarity: Domestic jurisdiction consistent with the Rome Statute of the International Criminal Court' (2001) 167 *Military Law Review* 20.

<sup>156</sup> Robinson (n 155 above) 102.

<sup>157</sup> See the official website of the Coalition for the International Criminal Court, <http://www.iccnow.org/?mod=country&iduct=128> (accessed 21 March 2011).

<sup>158</sup> AM Jimoh 'Senate ratifies International Criminal Court treaty' *The Guardian* 20 May 2005 <http://groups.yahoo.com/group/Naija-news/message/3723> (accessed 21 March 2011).

<sup>159</sup> See n 157 above.

jurisdiction over international crimes committed within Nigerian territory.

The fundamental reason for considering that the ICC is appropriately positioned to act also as a criminal court for TNCs is that the ICC is an uninterested third party (unassociated with neither the host nor home state) to whom grievances of human rights violations can be lodged by victims. It would thus be in a position to act without being influenced by any form of economic considerations that often dominate the decisions of the current state officials to check the atrocious activities of the TNCs. Another attractive feature is that the ICC is a permanent body and has developed procedures for receiving complaints, investigating and prosecuting crimes, and is already accustomed to the imposition of fines, the confiscation of the proceeds of crime and reparations for victims.<sup>160</sup> Thus, the ICC will face little difficulty in devising an appropriate and uniformly-acceptable system of sanctions for TNCs.

A challenge to extending the ICC's jurisdiction to TNCs, however, is the issue of the non-recognition of corporate criminal liability by some state parties to the treaty, also the reason behind the failure at the Rome Conference to extend the ICC's jurisdiction over corporations. The original draft ICC Statute contained a proposal in article 23 that brings corporations within the jurisdiction of the Court. The provisions are the following:<sup>161</sup>

- (5) The Court shall also have jurisdiction over legal persons, with the exception of states, when the crimes committed were committed on behalf of such a legal person or by their agencies or representatives.
- (6) The criminal responsibility of legal persons shall not exclude the criminal responsibility of natural persons who are perpetrators or accomplices in the same crimes.

This proposal was eventually dropped from the body of the Statute as the majority of the delegates failed to support it, especially those delegates whose national law did not recognise corporate criminal liability. These delegates were particularly concerned about the uncertainty created by the proposal on the operation of the ICC's complementary jurisdiction when the concept of corporate criminal liability was unknown in their national laws.<sup>162</sup> In other words, the delegates were bent on avoiding a situation where it could be argued that because a state failed to prosecute a corporation, the ICC automatically descends on the corporation by virtue of article 17. The prevailing opinion therefore was that granting the ICC jurisdiction over corporations when corporate criminal liability was not recognised in all the state parties had the effect of rendering the complementarity principle in the Statute

<sup>160</sup> K Haigh 'Extending the International Criminal Court's jurisdiction to corporations: Overcoming complementarity concerns' (2008) 14 *Australian Journal of Human Rights* 199 200.

<sup>161</sup> Quoted from Haigh (n 160 above) 202.

<sup>162</sup> Haigh (n 160 above) 203.

impracticable.<sup>163</sup> The proposal was further opposed because of concerns about how the indictment would be served, the representation of the corporation, the presentation of evidence and how corporate intent would be deciphered.<sup>164</sup>

I am inclined to agree with Kyriakakis that the complementarity principle in the Rome Statute would not be threatened by a proposal to extend the ICC's jurisdiction to corporations. The arguments canvassed as the basis for opposing the extension of the jurisdiction of ICC to TNCs, are untenable. Indeed, complementarity concerns were merely used as a cover for states' anxiety about how competing tension between state sovereignty and the international criminal justice would be resolved if the ICC's jurisdiction stretched to TNCs.<sup>165</sup>

A number of UN conventions have already recognised corporate criminality at the international level. The United Nations Convention for the Suppression of the Financing of Terrorism,<sup>166</sup> the United Nations Convention Against Transnational Organised Crime and its Protocols,<sup>167</sup> and the United Nations Convention Against Corruption<sup>168</sup> all recognise international corporate criminal liability.<sup>169</sup> Unlike the ICC Statute, these Conventions give each state party the liberty to determine how it holds a legal person to account for its actions that contravene the Conventions. This may be by means of either criminal, civil or administrative proceedings. The logical implication of these Conventions, as Haigh clearly explains, is that it enables state parties to recognise corporate criminality at the international level, even if the state does not recognise such corporate criminal liability under its domestic law.<sup>170</sup> This approach thus gives room for international treaties that recognise and regulate international corporate criminal conduct to be settled, irrespective of differences in states' national legal systems regarding the notion of corporate criminality.<sup>171</sup> Haigh further stresses that a state which does not recognise corporate criminal liability under its

<sup>163</sup> As above. See also K Ambos 'General principles of criminal law in the Rome Statute' (1997) 10 *Criminal Law Forum* 1 7.

<sup>164</sup> Haigh (n 160 above) 203.

<sup>165</sup> J Kyriakakis 'Corporations and The International Criminal Court: The complementarity objection stripped bare' (2008) 19 *Criminal Law Forum* 115 118 142. See also Haigh (n 160 above) 205.

<sup>166</sup> Adopted by the United Nations General Assembly in Resolution 54/109 of 9 December 1999.

<sup>167</sup> Adopted by the United Nations General Assembly in Resolution 55/25 of 15 November 2000 and opened for signature at the High-Level Political Signing Conference held in Palermo, Italy, 12-15 December 2000. It is also referred to as the Palermo Convention.

<sup>168</sup> Adopted by the United Nations General Assembly in Resolution 55/61 of 4 December 2000.

<sup>169</sup> Haigh (n 160 above) 206.

<sup>170</sup> As above.

<sup>171</sup> As above.

domestic law may still be a party to the Conventions and, by taking appropriately effectual civil or administrative action against a corporation, may comply with its obligations under the Conventions.<sup>172</sup>

The positive impact of the Conventions discussed above upon the present ICC debate is that, as corporate criminal liability has already been recognised in those Conventions, it is no longer an entirely new concept to international law or to state parties that opposed its introduction into the Rome Statute. The example from those Conventions may be copied for the Rome Statute. However, to give each state party leave to determine the way in which it will hold a corporation to account for its criminal actions that breaches the Statute would produce a similarly poor result as the present situation, because it boils down to leaving the regulation of the activities of TNCs in the hands of states. But I consider that striking a middle ground to this would suffice.

A provision extending the ICC's jurisdiction to corporate entities should be reintroduced in the Rome Statute with an option for state parties to ratify the Statute as a whole (that is, including the part of the Statute that extends the ICC's jurisdiction to corporations) or in part (excluding the part of the Statute that extends the ICC's jurisdiction to corporations). Thus, where a state party ratifies the Statute as a whole, TNCs within its territory become subject to the ICC and can be prosecuted at the ICC if they fall short of the expectations of the Rome Statute. In such an event, weak Third World countries like Nigeria would ratify the Statute as a whole. Where this happens, the ICC will be at liberty, under the complementarity principle, to swing into action where Nigeria fails to prosecute the TNCs' malfeasance.

Haigh equally suggests an exception-based approach to extending the ICC's jurisdiction to corporations.<sup>173</sup> By this approach, the ICC's jurisdiction may be extended to all corporations but with specific exception for corporations incorporated in states the domestic laws of which do not recognise corporate criminality. The pitfall of this approach, however, is that it would create an absurd scenario. For instance, two different TNCs registered in two different countries violate human rights in a Third World country like Nigeria, which amounts to a crime under the ICC Statute. If the domestic law of the home state of one of the corporations recognises corporate criminal liability and it is not recognised in the domestic law of the home state of the other corporation, then two different outcomes will emerge following the exception-based approach. One corporation would face prosecution at the ICC while the other will not. This outcome would not be welcomed.

Again, the other concerns raised by the delegates at the Rome Conference<sup>174</sup> who were opposed to extending the ICC's jurisdiction

<sup>172</sup> As above.

<sup>173</sup> Haigh (n 160 above) 211.

<sup>174</sup> This refers to the international conference in Rome at which the ICC Statute was deliberated.

to corporations, that is to say, the concerns about how indictments would be served, the representation of the corporation, the presentation of evidence and how corporate intent would be deciphered, are without substance. These issues are minute and peripheral matters that can easily be fixed by adapting a range of domestic laws.<sup>175</sup> As well, supposing there is inconsistency, a *lacuna* in the provisions, or friction between international law (the Statute) and the domestic law of a state party on these issues, devising an appropriate compromise would not be a difficult task.

Regarding corporate intent, for instance, a good compromise can be seen in an articulated proposal for ICC jurisdiction over juridical persons, contained in a Working Paper presented by the French delegation at the Rome Conference. It reads as follows:<sup>176</sup>

5 Without prejudice to any individual criminal responsibility of natural persons under this Statute, the Court may also have jurisdiction over a juridical person for a crime under this Statute.

Charges may be filed by the prosecutor against a juridical person, and the Court may render a judgment over a juridical person for the crime charged if:

- (a) the charge filed by the prosecutor against the natural person and the juridical person alleges the matters referred to in sub-paragraphs (b) and (c); and
- (b) the natural person charged was in a position of control within the juridical person under the national law of the state where the juridical person was registered at the time the crime was committed; and
- (c) the crime was committed by the natural person acting on behalf of and with the explicit consent of that juridical person and in the course of its activities; and
- (d) the natural person has been convicted of the crime charged.

For the purpose of this Statute, 'juridical person' means a corporation whose concrete, real, or dominant objective is seeking private profit or benefit, and not a state or other public body in the exercise of state authority, a public international body or an organisation registered and acting under the national law of a state as a non-profit organisation

6 The proceedings with respect to a juridical person under this article shall be in accordance with this Statute and the relevant Rules of Procedure and Evidence. The prosecutor may file charges against the natural and juridical persons jointly or separately. The natural person and the juridical person may be jointly tried.

<sup>175</sup> Eg, the Nigeria's CAMA at secs 78 and 65 makes provisions relating to the service of processes on a corporation, and establishment of corporate intent respectively.

<sup>176</sup> A/Conf/183/WGGP/L5Rev2, 3 July 1998. But see A Clapham 'The question of jurisdiction under international criminal law over legal persons: Lessons from the Rome Conference on an International Criminal Court' in Kamminga & Zia-Zarifi (n 18 above) 139 150; C Chiomenti 'Corporations and the International Criminal Court' Global Working Paper 01/05, Symposium: Transnational Corporations and Human Rights, New York University Law School, New York [http://www.law.nyu.edu/global/workingpapers/2005/ECM\\_DLV\\_015787](http://www.law.nyu.edu/global/workingpapers/2005/ECM_DLV_015787) (accessed 21 March 2011).

If convicted, the juridical person may incur the penalties referred to in article 76. These penalties shall be enforced in accordance with the provisions of article 99.

The above proposal presents a much-desired compromise. It is also encouraging, considering that it comes from a civil law jurisdiction. It is an indication that if there is a 'will' to advance corporate criminality under international law, differences in national laws will not pose any significant obstacles. The Rome Statute turned seven on 1 July 2009, and as such became due for general amendments and reviews.<sup>177</sup> Consequently, a Review Conference was held in the summer of 2010 which yielded some positive results. The Conference particularly adopted a resolution by which it included the crime of aggression within the scope of the ICC's jurisdiction.<sup>178</sup> Although the issue of corporate criminal liability was not discussed by the Conference, it is thought that with the door opening for amendments or reviews, corporate criminal liability will secure a place within the body of the Rome Statute in the future.

There appears to be a serious element of international politics and/or protection of economic interests in the whole ICC process. It was no big issue to negotiate the three UN Conventions mentioned above that recognise corporate criminal liability at the international level. They specifically serve the interest of the Western economic bloc. Transnational organised crime, terrorism and its financing, specifically, are crimes that are often targeted at Western economies. Those Conventions do not only target individual actors, but they equally punish any corporation that is used as a cover or shield in perpetrating those crimes. A serious commitment to combat and suppress those crimes drove the making of those Conventions.

It has been different altogether when it came to punishing corporations, national and transnational alike, whose atrocious operations amount to what can ordinarily be described as offences within the definitions of the ICC Statute. Corporate violations of human rights in poor Third World host states by Western-owned TNCs can only be checked and punished by extending the ICC's jurisdiction to these entities. The only reason why the initiative to take this step fails is that the human rights violations take place in poor Third World countries who are not members of the Western economic bloc, and the corporations involved represent and advance the economic interests of the same Western economic bloc.<sup>179</sup>

<sup>177</sup> Chiomenti (n 176 above) 6.

<sup>178</sup> See n 149 above.

<sup>179</sup> The double standard of the industrialised Western world is the reason why these nations fail to use extraterritorially the same legal regime that they use at home to enforce corporate integrity among their TNCs. See J Clough 'Punishing the parent: Corporate criminal complicity in human rights abuses' (2007-2008) 33 *Brook Journal of International Law* 899. Australia may be taking the lead in attempting to punish corporations for criminal activities outside Australia when it introduced new

## 5 Conclusion

TNCs are no doubt crucial non-state actors on the international scene. The negative impact of their activities manifests itself in wide-scale and grave abuses of human rights. The hapless citizens bear the worst of these human rights abuses. Despite their enormous economic activity and the amount of literature that has been produced on them, there is still no single legal instrument that regulates their activities meaningfully. The Niger Delta region of Nigeria is known for, and indeed is, a metaphor for human rights abuses by oil TNCs. The Nigerian government, as is the case in many other countries around the globe, has failed to bring these corporations to book. It is proposed, therefore, that a stronger institution, the ICC, is ideally positioned to salvage the situation. The ICC's jurisdiction can be appropriately extended to corporations. The International Court has developed established procedures for prosecuting crimes. Apart from being a permanent body, it prosecutes suspects of its own accord when states turn a blind eye to criminal activities in their territories or are unable to act. This is the correct approach to stamp out or reduce the large-scale human rights abuses in the Niger Delta.<sup>180</sup>

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provisions for prosecution of ICC offences within the Australian Commonwealth Criminal Code. See J Kyriakakis 'Australian prosecution of corporations for international crimes' (2007) *Journal of International Criminal Justice* 1.

<sup>180</sup> It may be interesting to highlight that a totally different approach to dealing with the transnational corporations' excesses in African host states has been suggested by E Oshionebo in his recent book *Regulating transnational corporations in domestic and international regimes: An African case study* (2009). He particularly advocates for what I may call 'social partnership'. His thesis as summarised is that '[o]verall, this book acknowledges the mutual interdependence of business and society put proceeds on the premise that the amelioration of ongoing abuses must be at once bilateral and cultural. That is, both TNCs and host African state governments must reject the *status quo* and work to forge a sustainable future for Africa. Respect for human and environmental rights must become core values in the African business arena and African states.

A rejection of the *status quo* should start with the adoption of new attitudes geared towards positive outcomes. New attitudes might involve the pluralisation of regulation, in terms of mechanisms, strategies, and actors. Individual members of society, whether shareholders, investors, workers, consumers, communities, organisations, if organised and informed, have the capacity to influence corporate behaviour' (12).