Combating Environmental Irresponsibility of TNCs in Africa: An Empirical Analysis

Abstract

Environmental irresponsibility is one of the most prominent issues confronting host communities of transnational corporations (TNCs) engaged in production of economic goods and, sometimes, services. Drawing mainly on stakeholder theory, combined with legitimacy theory, this article addresses how host communities in Africa combat the challenge of environmental irresponsibility of TNCs. To illustrate the dimensions and dynamics of the challenge, this paper examines the experience of despoliation of Ogoniland by the oil giant, Shell, in Nigeria. The analysis draws attention to the significance of the role of individuals and civil society groups in securing accountability of one of the most formidable fronts of economic globalisation. The analysis is particularly relevant to the experience of environmental irresponsibility in the context of weak governance structures.

Keywords: transnational corporations, environmental irresponsibility, stakeholder theory, accountability, legitimacy theory

Introduction

The activities of transnational corporations (TNCs) involved in oil exploration in Africa have had a major impact on the environment, development and governance on the continent (Wettstein, 2010; Frynas, 2010; Yusuf, 2008). In the last one and half decades, Nigeria has witnessed unprecedented levels of violence in its Niger-Delta – the country's main oil producing area. The violence has formed part of local responses to TNCs' activities which have ostensibly been in compliance with corporate social responsibility (CSR) (Idemudia

and Ite, 2006; Yusuf, 2008; Ojakorotu, 2009). The intensity of violations of a variety of human rights by TNCs in the oil industry has been attested to by a recent Nigerian government commissioned United Nations Environment Programme (UNEP) assessment of Ogoniland, an oil producing community in Nigeria (UNEP Report, 2011). UNEP stated, among others, that 'the environmental restoration of Ogoniland could prove to be the world's most wide-ranging and long term oil clean-up exercise ever undertaken' (UNEP News Centre, 2011). It is relevant to note that Shell, the oil company that operated in the community has not only defined what it conceives as its CSR obligations, but maintained its adherence to best practices (Lambooy *et al.*, 2011) despite evidence to the contrary in the UNEP Report as well as the clamour of local stakeholders.

Civil society groups play a cardinal role in contemporary configurations of global accountability across a range of fronts; national, regional and international (Scholte, 2011). Political independence in former colonial territories and globalisation has opened up the space for civil society groups to take up protest against TNCs. This has been accentuated by the so called 'third wave of democratisation' that has swept across many developing countries (Huntington, 1991; Pretorius, 2008). Consequently, over time, there has been some global awareness of the debilitating impact of the activities of TNCs in the developing world and various attempts at seeking redress against them. In the specific context of extractive industries in Nigeria, Oshionebo has noted the significance of the activities of civil society groups to securing accountability of TNCs in the country's considerably lax regulatory environment (2007).

Drawing mainly on stakeholder theory combined with legitimacy theory, this article addresses how host communities in Africa combat the challenge of environmental irresponsibility of TNCs. The focus is on the operations of oil corporations in the context of countries with complicit regimes alongside weak and corrupt governance structures. The

experience of despoliation of Ogoniland by the oil giant, Shell, in Nigeria provides a good illustration of substantive challenges of the context and is the focus in the discussion in this piece. The rest of the paper is structured as follows: Section 2 sets out the theoretical framework of the analysis; the combination of the stakeholder theory and legitimacy theory. Section 3 discusses the environmental irresponsibility of oil corporations in Nigeria and the difficulty of securing justice in foreign and domestic contexts for such conducts. The last section presents some lessons from the Nigerian experience of the efforts at combating the environmental irresponsibility of TNCs.

Theoretical Framework: Stakeholder and Legitimacy Theories

In line with previous studies that combined stakeholder theory with other theories (Yang and Rivers, 2009) or concepts (Logsdon and Palmer 1988; Mena *et al.*, 2010) for analysing complex social phenomena, this paper further adopts legitimacy theory to examine TNCs' environmental irresponsibility and how host communities in Africa attempt to combat it with specific reference to Ogoniland.

Stakeholder Theory

In a very influential article, Donaldson and Preston (1995) have emphasised the dexterity of the stakeholder theory. They examined three interrelated but distinctive dimensions of the theory (descriptive accuracy, instrumental power and normative validity) and concluded that, although these three dimensions are supportive, the normative dimension constitutes the pivot as it is the only dimension that is capable of explaining the link between stakeholder management and corporate performance. The normative dimension holds that stakeholders are individuals or groups with 'legitimate interests in procedural and/or substantive aspects of corporate activity' and the interests of these stakeholders have 'intrinsic value' (Donaldson and Preston, 1995:67). Logsdon and Palmer (1988) contended that, for corporations to be

seen to be genuinely interested in enhancing their social performance (as opposed to using CSR to further their parochial profit maximisation objective), they must necessarily build their CSR activities on the stakeholder approach and strong ethical foundations. In similar vein, Wood (1991) articulated three fundamentals of social responsibility at the institutional (legitimacy), organisational (public responsibility) and individual (managerial discretion) levels within the context of human and organisational behaviour. Furthermore, based on evidence from the literature, Victor and Stephens discussed two theoretical (intellectual) bases of business ethics; the normative philosophy and the descriptive social science (social psychology and organisation theory). They argued that 'to ignore the descriptive aspects of moral behaviour is to risk unreal philosophy' while ignoring the normative perspective 'is to risk amoral social science'. On this account, any division between the two dimensions will exacerbate the current corporate debacle (1994: 145).

However, we align our arguments with the line of research that theorise that the stakeholder theory is appropriate for aggregating and accommodating the interests of multiple sites of impact of corporate activities. In this regard, Yang and Rivers (2009) adopted stakeholder and institutional theories to explore the CSR activities of TNCs' subsidiaries in terms of their internal and external pressures for legitimacy in their host communities, depending on the circumstances of their parent companies. Also, based on the concepts of empowerment (of the poor, consumers and communities), dialogue and constructive engagement with stakeholders, Mena *et al*. (2010), investigated ways by which corporations can improve their human right records.

The stakeholder framework provides strong support for a broad approach to TNC governance mechanisms and accountability as it emphasises balancing the interests of TNCs' shareholders, management and suppliers with the concerns of their external stakeholders including governments and host communities. Furthermore, Sir Adrian Cadbury emphasised

the need ‘to align as nearly as possible the interests of individuals, of corporations, and of society’. He noted further that the ‘the way ahead’ for the modern corporation ‘lies in ensuring that the fruits of good governance, its ability to add value, are widely and wisely shared, thus playing a positive part in the goal of the developed and developing world to alleviate poverty’ (Cadbury, 2003 p. vii).

Legitimacy Theory

There are two main forms in which legitimacy is discussed in political philosophy and legal theory; the descriptive or sociological sense and normative or legal sense. The descriptive sense essentially examines whether those who are the subject of the concerned norm, policy, institution or entity like the state or an organisation consider it to be legitimate (Meyer and Sanklecha, 2009: 2). Legitimacy in the normative sense considers whether the assumption underlying the descriptive sense of the concept is correct by investigating whether it satisfies certain conditions or prescriptions (Meyer and Sanklecha 2009: 2). Hurd defines legitimacy as ‘the normative belief by an actor that a rule or institution ought to be obeyed’ (Hurd 1999: 381). This is similar to Suchman’s definition of legitimacy in the descriptive or sociological sense, as ‘a generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions’ (1995: 574). This is the form of legitimacy in issue in the discussion that follows.

Legitimacy theory has been adopted in the literature to describe the responsiveness of corporations to local external stimuli by ‘implementing and developing voluntary social and environmental disclosure of information in order to fulfill their social contract’, a contemporary necessity for their ‘survival in jumpy and turbulent environment’ (Burlea, 2013). As a result, society’s impression and perception of the organisation (with respect to social, moral and economic interests of the local stakeholders) is taken with utmost

seriousness when it reports its activities for fear of being opposed or sanctioned by the local environment through boycott, social pressure or legislative and judicial mechanisms. Over the years, the theory has gained popularity in social, environmental and legal literature (See Dowling and Pfeffer, 1975; Lindblom, 1994; Gunningham et al., 2004; Mobus, 2005; Owen, 2008; Tilling and Tilt, 2010, Meyer, 2009).

Combining Stakeholder and Legitimacy Theories

In the context of explaining TNCs' environmental irresponsibility in Africa, the stakeholder theory is suitable for aggregating and accommodating the interests of multiple sites of impact of corporate activities. Stakeholder theory provides a foundation for identifying the various groups and individuals that are directly affected by the despoliation of the environment of host communities. This is particularly relevant in the context of the activities of extractive corporations engaged in the exploitation of natural resources like oil and gas which are prone to, and have commonly been known, to impact negatively on their host environment especially in the context of lax regulatory mechanisms and weak governance. Individuals and groups in host communities in such contexts are bound to be keenly interested in abating the despoliation of their environment and seeking necessary redress. These individuals and groups constitute a set of key stakeholders of TNCs (local stakeholders). Legitimacy theory explains how businesses such as TNCs must use their leverage responsibly in order to prevent a situation in which local stakeholders feel compelled to exercise 'their right' to 'revoke' the continuation of the former's business activities or continued existence within their environment. Legitimacy theory can be linked to TNCs' corporate social responsibility in the host communities in an attempt to identify the barriers host communities and stakeholders face in contending with the irresponsible behaviour of TNCs.

TNCs and Corporate Irresponsibility in Africa: The Nigerian Experience

Owing largely to institutional factors, the governance and regulation of TNCs is at its weakest in the 'resource-rich, but economically poor' African continent (Carmody, 2011). There is an important historical side to this. The 'scramble for Africa' both old (by the West) and new (now mainly joined by China and India, and to a lesser extent Japan and Indonesia) was, and is principally for access to natural resources (Carmody, 2011). The dominance of TNCs on the continent dates back to the colonial period (Adusei, 2009), mostly from the 16th century with the likes of the British East India Trading Company, the Royal Niger Company (later United African Trading Company), Lever Brothers (now Unilever), among others, established to engage in trade or territorial acquisition in Africa, Asia and the Americas for their home countries (Adusei, 2009; Greer and Singh, 2000). Others, especially those in the extractive industries prospecting for natural resources most prominently gold, diamonds, oil and coltan (a resource that is central to the global information technology industry) (Carmody, 2011), came on the scene mostly from the late 19th and 20th century. These include corporations such as British Petroleum, Exxon-Mobil and Shell (which is at the centre of further discussions of TNC accountability in this article). The activities of TNCs especially in the extractive industries in Africa proceeded without much scrutiny due to a number of factors which include the incidence of colonialism, poverty, political corruption,[1] weak institutional structures and the slow development of articulate and modern civil society groups on the continent.

The situation in Nigeria is typical of many former colonies commonly in the 'developing countries' socio-economic designation. After gaining independence from the United Kingdom, the country prioritised economic development as a measure for improving the quality of life of its citizens. Ironically, the drive to achieve economic competitiveness by successive administrations has sometimes meant the adoption of policies detrimental to

public well-being. Such policies have in some cases not taken account of 'the health and well-being of its citizens or the protection of the environment' resulting in 'human rights and environmental abuses by business corporations operating in Nigeria, including transnational companies (TNCs)' (ICJ, 2012:1-2).

However, in a slow but incremental manner, the wave of civil society activism is making inroads into developing countries in Africa and elsewhere. The nascent development of awareness about the power of civil society groups and the articulation of 'voices' of the weak and hitherto 'voiceless' host communities has manifested in various protests against perceived excesses and gross violations of human rights by TNCs in Africa (Ikelegbe, 2001; Okafor, 2006) as elsewhere across the globe (Labunska, et al 1999; Simons, 2004; Pendleton, 2004). In the Nigerian context, the weakness of the host communities derives from a number of factors including the historical factor earlier mentioned. Other factors responsible for the silencing of the voices of dissent include long years of authoritarian military rule, the 'divide and rule' tactics of both the political elite and the oil companies who sometimes induce community leaders (including traditional rulers) and pockets of restive youth groups, with gifts and contracts. These factors engendered a social environment of internal mistrust, tenuous cooperation and communal disagreements. The situation typically stymied efforts to present a united front against the Nigerian state and the powerful TNCs involved in oil exploration in the Niger Delta even where unity was important in presenting a common front to secure justice for the host communities.

As stated earlier, a major effect of TNCs' activities in Africa is their impact on the environment, development and governance leading to an overarching concern about the implications for human rights of host communities in the areas of their production operations. In the light of the wide scope of their activities, there is now an expectation that TNCs will uphold human rights of the people affected by their operations (Fasterling and Demuijnck,

2013; Preuss and Brown, 2012; Lambooy, 2011; Mena *et al*, 2010; McCorquodale, 2009; Seppala, 2009). The situation supports human rights–based approach to the regulation of the activities of TNCs but such a regime has remained highly contested and inchoate till date in the light of the non-state actor status of TNCs. The approach has been constrained by the classic rationalisation in international law that human rights instruments and the obligations arising from them are directed at states (Clapham, 2006; Deva, 2012). There is also the position that there are multiple conceptions of what corporate responsibility is or should be. The responsibility is ranged across a spectrum of accountability; from a strict perspective to a *laissez faire* or market economy commitment (Baumann-Pauly and Scherer, 2013; Yang and Rivers, 2009; McCorquodale 2009).

Those who challenge the dominance of TNCs and advocate for their public accountability point at their immense economic dominance. As Mathias Koenig-Archibugi has noted, such advocacy stems from the fact that the 'often huge economic clout' of corporations lead to their being 'widely perceived as capable of evading public control and getting away with behaviour that harms employees, consumers, vulnerable communities or the environment' (Koenig-Archibugi, 2004:235). Added to these, there are increasing pressures for more openness and accountability among TNCs. As Eweje observed, 'corporations are constantly under pressure to be more open and accountable for a wide range of actions and to report publicly on their performance in the social and environmental arenas' (Eweje, 2006: 95).

The next part of the discussion focuses on the recourse to litigation by individuals and groups in the context of state failure to regulate TNCs in the oil industry in Nigeria as a result of a number of factors including corruption among the political elite and lack of political will (Omotola, 2007: Odoeme, 2013: 742-744).

The Difficulty of Securing Justice in Foreign and Domestic Contexts

The historical context highlighted above is significant for understanding the persisting pattern of gross violations of human rights by TNCs on the continent and in other developing countries who almost invariably have a colonial legacy. It is also a major reason for the focus on Shell and Ogoniland in this article. A focus on Ogoniland is apt for, among others, it was the site - at least at some point- for the production of about half of Nigeria's oil output (Falola and Genova 2005: 128). It is also a poster-child for how the activities of TNCs in a lax regulatory environment can result in disaster for host communities and eventually, TNCs. Both elements have some pedigree in the Nigerian experience. Shell has a preeminent position in the country's oil industry due mainly to the fact of British colonial relationship with the country. As Justice Akenhead recently observed in *Bodo Community and Others v Shell Petroleum Development Company* (*Bodo v SPDC*) [2], 'Shell from the start was and continues to be the single most dominant of the independent oil companies who have exploited the oil resources of Nigeria, much of it in the Niger delta area.' [3] Indeed, the company is noted for usually being the sole operator of joint ventures for oil exploration involving other transnational oil companies operating in the country like Total Oil Exploration and Production Company, Agip Oil Company as well as the country's national oil corporation, the Nigeria National Petroleum Corporation.

Oil exploration as a commercial activity was facilitated by colonial legislation in Nigeria dating back to the statute which sought to grant exclusive licence to British firms in the country. While the search for oil started in the country in 1903, following the amalgamation of the Northern and Southern protectorates in 1914, the British government promulgated the Mineral Oils Ordinance No.17 of 1914. This piece of legislation granted a monopoly over Nigeria's mineral resources including oil, to British citizens and firms (Omeje 2006: 215, Steyn 2009: 251). In this regard, Section 6 (1) of the legislation provided that

> No lease or license shall be granted except to a British subject or to a British company registered in Great Britain or in a British colony and having its principal place of business within her majesty's dominion, the chairman and managing director (if any) and the majority of the directors of which are British subjects.

As mentioned earlier, the historical dimension is critical to understanding the debacle in Ogoniland and by extension, the Niger-Delta as a whole. The search for oil in Nigeria commenced under the auspices of colonial government which had a vested interest in maintaining a monopoly over the industry for securing not only commercial, but also military interests (Steyn 2009). The Mineral Oils Ordinance paved the way for oil prospecting by Shell/D'Arcy which started its oil exploration activities in the country in 1937 with a licence covering the whole country. A joint venture between Shell and British Petroleum (but operated by Shell) was the first to discover oil in commercial quantity in Oloibiri in January 1956 (Steyn, 2009: 266, Falola and Heaton 2008:181, Omeje, 2006: 214). Despite considerable local opposition to and political mobilisation against the operation of the oil corporation in parts of the country, Shell was able to continue its exploration activities with financial, legislative and security backing from the colonial government. As Steyn noted, while the amended Mineral Oils Ordinance stated that all land was vested in the Crown and provided for the prosecution and jailing of those who interfered with oil exploration, it also excluded any need for Shell to engage with the host communities of its exploration activities (Steyn, 2009: 262-263). This legislative and political arrangement has persisted in Nigeria's oil exploration environment with the attitude of the ruling elite, closely tracking that of the erstwhile colonial government.

Ogoniland is an area of about 1,000 square kilometres situated in the Rivers State of Nigeria and located in the Niger-Delta. The Niger-Delta is regarded as 'one of the 10 most important wetland and coastal marine ecosystems in the world' with extensive oil deposits (Amnesty

International 2009: 9). Oil has been the major income earner for Nigeria for more than four decades. The main occupation of the over eight hundred thousand people of the oil rich community is farming and fishing. However, Ogoniland has suffered numerous incidents of oil spillage and oil well fires over the past decades (UNEP Report, 2011: 22-24).

Ogoniland presents an egregious example of environmental degradation. There was relatively high media coverage of the 2010 British Petroleum (BP) Gulf of Mexico spill in the United States which was no doubt a major case of environmental pollution with serious implications for local communities in the area. However, a much less publicised but, by far, worse experience of environmental degradation has been ongoing in the Niger-Delta region of Nigeria for over four decades as exemplified by the experience of Ogoniland. The situation has led to uprisings; loss of lives and properties within the region particularly from 1999 till date following on the political transition from military to civil rule in the country. The assessment conducted by UNEP (mentioned earlier), confirmed the level of environmental damage resulting from Shell's oil exploration activities in Ogoniland was severe and virtually unparalleled elsewhere. According to the report, the soil as well as groundwater has suffered deleterious effects of oil contamination. Its conclusion states, in part, that

> pollution of soil by petroleum hydrocarbons in Ogoniland is extensive in land areas, sediments and swampland. Most of the contamination is from crude oil although contamination by refined products is also found at three locations.

In effect, neither farmers nor fishermen (and women) could earn their living in the community thereby pauperising a vast majority of the population. Rather than promote social well-being and development, oil exploration in Ogoniland (and other parts of the Niger-Delta) has brought tears and sorrow, environmental degradation, ecological disaster, poverty and disease (Idemudia 2009: 318, UNEP 2011).

The level of environmental degradation and violations of human rights resulting from the exploration of oil in Ogoniland moved the community to protest and demand compensation for the despoliation. The peaceful protests of the Ogoni community was mobilised under the banner of the Movement for the Survival of Ogoni People (MOSOP) led by famous author and human rights activist, Ken Saro Wiwa. The protests forced Shell to stop further exploration activities in Ogoniland in 1993. Accounts of what followed have become well-known and it suffices to provide only a very brief recap here.[4] The main response of the government was the militarisation of Ogoniland and the killing of unarmed protesters (Yusuf 2008: 83-85; Idemudia 2011: 318-319). It is alleged that Shell took an active role in brutal repression of local protesters by Nigeria's military rulers in the 1990s. Shell was also implicated in the 1995 trial, conviction and execution of the '*Ogoni Nine*'[5] in breach of due process.

The trajectory of the cases emanating from the experiences of host communities with transnational oil corporations in the Niger-Delta closely connects with Koenig-Archibugi's views (2014) on concerns about public accountability of TNCs. The Ogoni people in the course of their struggle to rein in the power of the oil giant Shell, found that the Alien Torts Statute (ATS) has been useful as a mechanism for securing accountability of TNCs originating from, or with operations in the United States. From 1996, a series of cases was instituted by relatives of the *Ogoni 9*, under the ATS against Shell in the United States. The ATS provides that any district court of the United States 'shall have original jurisdiction on any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.'[6] The agitations of the Ogoni, thanks to the efforts of local political activists, had come to the attention of others in the United States especially, but also in Europe (Falola and Genova 2005: 127-129; Falola and Heaton 2008: 238). With the support of the Centre for Constitutional Rights (CCR), Earth Rights International (ERI) and a

number of other human rights attorneys, the cases were instituted by the petitioners 'to hold Shell accountable for human rights violations in Nigeria, including summary execution, crimes against humanity, torture, inhuman treatment and arbitrary arrest and detention' (CCR, 2009; see also Amnesty International, 2009: 4). Three of those cases, *Wiwa v. Royal Dutch Petroleum, Wiwa v. SPDC, and Wiwa v. Anderson* (*Wiwa v Shell*) are of interest in this discussion as they involve the group referred to here as the '*Ogoni 10*' who include Ken Saro Wiwa's son.[7]

On 8 June 2009, Shell announced a settlement in lieu of the *Ogoni 10* withdrawing their claims. Shell agreed with the petitioners to pay them US$15.5m (£9.7m) but did not admit any liability on the claims. Rather, Shell described the settlement as a 'humanitarian gesture… a compassionate payment to the petitioners and the estates they represent in recognition of the tragic turn of events in Ogoniland' emphasising further that 'Shell had no part in the violence that took place' (Shell Global, 2009). The settlement was also to cover the petitioners' litigation costs (including counsel's fees) with part also to be devoted to the establishment of a trust fund for the Ogoni community at the request of the petitioners. However, the larger dispute between the Ogoni people and Shell remains as the Ogoni 10 and their attorneys made clear they were not speaking for the Ogoni people (Center for Constitutional Rights, 2009).

As a result of the agitations and campaigns by human rights groups, environmentalists and the press, the Dutch Parliament resolved to hold a public hearing on the operations of its oil giant, Shell in January 2011. At the hearing, it emerged that Shell was not willing to provide a response to how it was utilising its 'bargaining power' in its high-level contacts with Nigerian politicians and authorities to encourage sustainable development and curb corruption (Lambooy, et al., 2011: p. 25 - 26). Shell insisted that such disclosure will harm

its business interests. It also admitted delaying or refusing to obey Nigerian courts decisions or fines emanating from them because these were 'unfair' (Lambooy, et al., 2011: p. 25 - 26).

As discussed above, the ATS appears to be a promising legislation for challenging the virtually overwhelming power of TNCs in the jurisdiction from which the largest number of TNCs, particularly oil corporations, originates. However, the corporations seem to have struck back, halting the moves towards firmly holding them accountable. Specifically, the 2013 decision in *Kiobel et.al v. Royal Dutch Petroleum Co. et.al (Shell)*[8] has now severely limited opportunities for relying on it to secure justice against TNCs (Wuerth 2013: 604). *Kiobel* was instituted in 2002 by 12 Ogoni victims/relatives led by a widow of one of the *Ogoni Nine*. The crux of the case for the petitioners (now residing in the United States after securing political asylum as legal residents) is that Shell (its Dutch, British holding companies and joint Nigerian subsidiary, in concert and individually) aided and abetted the Nigerian government in committing violations of the law of nations in Nigeria to wit: extrajudicial killings; crimes against humanity; torture and cruel treatment; arbitrary arrest and detention; violations of the right to life, liberty, security and association; forced exile and destruction of property. The District Court dismissed some of the claims leaving only those regarding crimes against humanity; torture and cruel treatment; arbitrary arrest and detention. On appeal, the Court of Appeal of the Second Circuit dismissed all the complaints of the petitioners on the basis that the law of nations does not recognise corporate liability. The case finally ended up on further appeal to the United States Supreme Court.

The US Supreme Court, after hearing oral arguments from the parties then framed an additional question for them to address it on: 'whether and under what circumstances courts may recognize a cause of action under the Alien Tort Statute, for violations of the law of nations occurring within the territory of a sovereign other than the United States.' It was the US Court's decision on this question that appears to have closed the window of opportunity

previously afforded disempowered petitioners like the Ogonis to seek justice in the US against powerful TNCs. Upholding the Court of Appeal's decision, the US Supreme Court held that there is a presumption against the extra-territorial application of the ATS unless the facts 'touches and concerns' the United States with 'sufficient force.' It held that in this case, the parties and relevant conduct complained about lack sufficient ties to the United States for the ATS to confer jurisdiction on a court in that country. It stated that entertaining the claims of the petitioners would amount to a violation of the international law principle of sovereignty. It is instructive to note, however, that despite agreeing with the judgment of the court, Justice Breyer made the critical point in his concurring judgment that the ATS 'was enacted with "foreign matters" in mind. The statute's text refers explicitly to "alien[s]," "treaties and the law of nations."' Justice Breyer further stated, quite rightly, that many countries allow plaintiffs to bring actions against their own nationals based on unlawful conduct that took place abroad.

Before the public hearing in the Dutch Parliament (in 2011) mentioned earlier, four Nigerian farmers and fishermen from three different villages located in three different States in the Niger-Delta region had sued Shell in courts of the Netherlands way back in 2008. The claims were for oil spills that occurred in 2004, 2005 and 2007. One of the plaintiffs, not surprisingly, was from Ogoniland. As was the case in the United States, the plaintiffs were supported by civil society groups involved in environmental protection and especially the Amsterdam-based Vereniging Milieudefensie (Friends of the Earth Netherlands), a Dutch organisation established with the objective of worldwide promotion of environmental care. Milieudefensie joined as a co-plaintiff in each of the cases.

Two cases involving Ogoniland cases were instituted by Barizaa Dooh, a farmer and fisherman in Goi village, Ogoniland[9] and Milieudefensie in *Dooh & Milieudefensie v Royal Dutch Shell, & SPDC*[10] before the District Court of The Hague. The consolidated

proceedings were in respect of an oil spill from the underground oil pipeline of Shell Petroleum Development Company (Royal Dutch Shell's wholly owned subsidiary) near the village of Goi on 10 October 2004. The leak was from an almost 46-centimeter long narrow opening in the steel pipeline wall and was provisionally closed on 12 October 2004. Shortly after the spill, an oil fire also occurred near Goi. A Joint Investigation Team (JIT) – which was comprised of SPDC representatives, Nigerian government agencies and the nearby village of Mogho – investigated the oil spill on 12 and 13 October 2004. The JIT report stated that an estimated 150 barrels of oil had spilled from the oil pipeline near Goi and that it was due to sabotage. The SPDC and government representatives signed the report but the community representatives did not. On 8 December 2004, the state government (Rivers State) issued a notice barring SPDC from carrying out all the scheduled clean-up work due to oil spills in Ogoniland until further notice. After a period of negotiations from November 2006 to August 2007– reportedly at the expense of SPDC–, a group of 27 Nigerian contractors performed the remediation work in the vicinity of Goi.

The plaintiffs led evidence to challenge the claim that the spill was caused by sabotage as claimed in the JIT report. They also sought a declaration that Royal Dutch Shell and SPDC carry out remediation that was in line with international standards as the previous one was inadequate. They further sought a declaration that SPDC had committed a tort against Dooh as a result of the oil spill and demanded compensation. The crux of the case for the Plaintiffs was that SPDC failed to comply with its duty of care to produce oil in a careful manner and prevent oil spills from occurring. This duty of care also exists in areas over which SPDC has no control, such as Ogoniland.[11] In addition, SPDC failed to adequately respond to the oil spill. As a result, SPDC was liable under Nigerian law for negligence, nuisance, or trespass to the property of the plaintiffs. As to the justification for including the Royal Dutch Shell in the case, the plaintiffs contended that the parent companies of SPDC failed to comply with their

duty to induce the latter to prevent this oil spill near Goi in 2004, to adequately respond to it and to adequately clean up the oil pollution. Royal Dutch Shell was also obliged to ensure that SPDC had sufficient financial resources and technical expertise to adequately perform these activities. In addition, Royal Dutch Shell failed in not issuing SPDC guidelines on best practices and ensuring compliance with them. According to the plaintiffs, the parent companies; Royal Dutch Shell, Shell Petroleum and Shell T&T were aware of the problematic situation of oil spills in Nigeria and that, in many respects, they interfered with, and exercised influence on, SPDC's activities in Nigeria from The Hague and London. Shell denied any wrong-doing and also maintained that, following a 2005 reorganisation, Royal Dutch Shell and the other two parent companies could not be held liable for the activities of Shell Development Company; the Nigerian subsidiary.

In its judgment delivered on 30 January 2013, the District Court of The Hague, contrary to the objection of Royal Dutch Shell and SPDC, determined that, at the procedural level, it had jurisdiction to hear the cases. It reasoned that the claims against both companies have the same legal basis. Even more importantly, it noted there has been an international trend to hold parent companies of multinationals liable in their own country for the harmful practices of foreign (sub-) subsidiaries, in proceedings which the foreign (sub-) subsidiary involved was also joined as a party. As far as the District Court was concerned, 'the *forum non conveniens* restriction no longer plays any role in today's international private law.'

However, the District Court dismissed all the substantive claims of the plaintiffs. It held that under Nigerian law, the parent companies in The Hague and London did not commit any tort of negligence and could not be held liable for the (in) actions of their subsidiary. Among others, the District stated that it came to this conclusion because the businesses of the parent companies and SPDC are not essentially the same; the parent companies formulate general policy lines from The Hague and/or London and are involved in worldwide strategy and risk

management. SPDC, it stated, is involved in the production of oil in Nigeria. It would be unreasonable to fix a duty of care on a parent company of an international group of oil companies in respect of the people living in the vicinity of oil pipelines and oil facilities of (sub-) subsidiaries. This according to the District Court would create a duty of care in respect of a virtually unlimited group of people in many countries. The Court also held that the spill was caused by sabotage, so SPDC was not liable either under the Nigerian Oil Pipelines Act.

By far the most indicative instance of the growing awareness of the adoption of external judicial means to seek justice for environmental despoliation in the Niger-Delta is the more recent case of *Bodo v SPDC* referred to above. The landmark case commenced in the United Kingdom in 2011 and involved over 15,000 claimants from Bodo community, Ogoniland. It involved several representative-type claimants including claims on behalf of children. The claimants sued Shell in the High Court of England and Wales, for massive crude oil spills said to have occurred in 2008 and 2009 due to alleged equipment failure. Despite notice of the spills to Shell, the corporation did not take any action to remedy the situation. The oil spills, according to the claimants, severely impacted Bodo Creek covering an area of 9,230 hectares devastating marine life with the mangroves in the area largely destroyed. The damage includes high levels of hydrocarbons in water, sediment and tissue samples which exceed both Nigerian and international legal standards for hydrocarbons contamination rates by a significant margin. They also called in aid, the UNEP Report mentioned earlier. The claimants sought damages at common law and statutory compensation under Nigerian law. A Joint Investigation Team report stated that the spills were indeed due to equipment failure. Shell reportedly offered £4,000 (four thousand pounds sterling) for the damage.

On 3 August 2011, Shell publicly admitted liability a little over four months after the case was instituted, stating the corporation would settle the claims out of court under Nigerian law. But that settlement was not to come until January 2015. Shell offered the sum of $83 million

(eighty three millions dollars) to be shared by the over 15,000 claimants affected by the spills and the community. Shell stated it was committed to cleaning up Bodo and surrounding areas affected by the spills which the corporation claimed was hitherto delayed by the division within the community.

A major point of interest regarding the foregoing cases is the challenge posed by the attempt to secure accountability of Shell for its activities in Ogoniland and the wider Niger-Delta by local stakeholders. This challenge remains a continuing issue both for state and society in Nigeria. It is noteworthy that Shell had made strenuous efforts to have the cases dismissed through various motions and appeals including advertence, in each of the cases to the doctrine of *forum non-conveniens*. *Forum non-conveniens* has been rightly described as a 'a judicial doctrine that allows a trial judge to dismiss a case, even though parties have met jurisdictional and venue requirements, when trial in another forum is more convenient and just' (Ismail, 1991). In these cases, Shell argued in various forms, but basically to the same issue, that the convenient forum for the litigation was Nigeria not the United States or the Netherlands as the case may be. The benefit of hindsight suggests this is a well-considered ploy to evade accountability. TNCs are aware that despite widespread abuses, litigation against them remains rare in host state jurisdictions to which they are referred. A number of factors, which can be summed up as weak institutional arrangements, are responsible for the situation. Inadequacies of substantive and procedural legislation for litigation, weak judicial remedies, corruption in the legal system, near-absence of *pro-bono* legal services and the absence of legal aid (Ismail, 1991; Business and Human Rights Resource Centre, 2012; Omoteso and Mobolaji, 2014) combine to limit the prospects of legal action against TNCs in many host states in the developing world. TNCs, being prominent and well-informed operators in that environment, are aware and take advantage of these factors to undermine efforts at securing their accountability.

Paradoxically, in instances where the institutions of the state have moved against TNCs to secure accountability, the latter have resisted and denounced those moves by questioning their credibility. TNCs have adopted an attitude of calling into question the legitimacy of regulatory and accountability measures instituted against them by declaring concerned organs of government like courts and parliament corrupt, and then neglecting or refusing to comply with their decisions. In this regard, it is relevant to note that the UNEP Report has rightly noted that the longstanding nature of environmental problems occasioned by frequent oil spills accords a 'prominent role' to the Nigerian judiciary in dealing with emergent claims for compensation and even punishment of 'oil-related offences and crimes' (UNEP Report 2011: 36). In practice, however, claims for compensation and, or even trials for oil-related offences have been so few and unrepresentative of the severity of the problems arising from oil exploration activities in the Niger-Delta. Even in the few cases where the judiciary has been enlisted for accountability, the oil corporations have denounced such interventions. A good example is Shell's failure to stop gas flaring in the Niger-Delta as ordered by a Nigerian court (Haritz, 2011) in *Jonah Gbemre v Shell Petroleum Development Company of Nigeria and 2 Others* (*Gbemre*).[12] The applicants had brought the action on the grounds that gas flaring by Shell in their community has led to the release of toxins poisons and pollutes the environment. The toxins negatively impact the health, lives and livelihood of the people including the destruction of their farmlands and crops. The petitioners further contended that members of the community were exposed to higher risks of premature death, respiratory diseases; painful breathing, chronic bronchitis, decreased lung functions, asthma and even cancer. The community was successful in its case for an injunction to halt the flaring and a declaration that it was illegal. Shell, however, failed to meet the terms of the judgment which required it to phase out the flaring (Climate Justice, 2007). It insisted the court did not follow proper procedure in deciding the case and appealed the decision (Black 2013). Symptomatic

of the institutional deficiencies mentioned earlier, the appeal has not proceeded to substantive hearing or judgment, more than eight years on. Nothing has come of the case except that the High Court judge who heard it was stopped from hearing contempt charges against Shell for non-compliance with the judgment and transferred from the jurisdiction. Shell has been noted for perfecting the art of denying any wrongdoing, delaying and ultimately derailing already fragile judicial processes in developing countries in various bids to avoid liability (Kaufman, 2010). In 2010 for instance, Shell immediately appealed a decision requiring it to pay compensation for oil spills in an area of its operation stating that soldiers had caused the leak at a time it was not operating in the area during the Nigerian civil war; over four decades earlier.[13]

Given the dynamics described above, proceeding against TNCs within the current legal regime is an immensely frustrating experience for victims in their host communities in developing countries. The inequality of arms, as between the economically and socially disadvantaged victims from usually remote parts of developing or (even underdeveloped) countries against a TNC is simply unconscionable. Consider, for example, the experience of the *Ogoni 10* mentioned earlier. Following the settlement of the claims by Royal Dutch/Shell in *Wiwa v Shell*, the petitioners in their public statement referred to this harrowing aspect of their struggle

> Justice in these cases is not a level playing field – the odds are stacked in favour of the corporations and this case highlights the need to level the legal playing field in issues like access to justice as well as the regime of rights and responsibilities that govern the global economy (Centre for Constitutional Rights, 2009).

The cases of the Nigerian fishermen and farmers commenced in 2008 and Shell adopted various tactics that led to considerable delay of the proceedings. These included refusal to

produce documents allegedly in its possession which could substantiate the claims of the plaintiffs, challenging the jurisdiction of the courts in all three cases, objection to continuation of one of the cases on the basis that there was another case pending in Nigeria of similar purport, objection to Milieudefensie being party to the case, and so on. Shell lost virtually every ancillary application it brought in this regard but its tactics ensured that judgment was only delivered in 2013. Dooh, the Ogoni plaintiff had meanwhile died in the course of the case and was substituted by his heirs. Even the claimants in *Bodo v Shell* considered a landmark case against Shell in many respects, suffered the same fate. While the case was the first to have proceeded to hearing before Shell settled (in *Ogoni 10* Shell settled the plaintiffs in lieu of a hearing of the claims on the eve of the hearing), the claimants did not secure the settlement until seven years after the incident. Many other individuals and communities have remained in waiting for justice for Shell and other TNCs' environmental irresponsibility in Nigeria and elsewhere in Africa.

Conclusion

Oil prospecting proceeded with active support of the colonial government for British firms with virtually no consultation with the people and communities where exploration was carried out. Local opposition to oil exploration activities was sometimes violently repressed. Successive Nigerian governments soon after independence in 1960 – predominantly military regimes from 1966 through to 1999 – took up the gauntlet where the British colonial governments left off. They applied mainly the same or similar legislation on and political tactics in the governance of the oil extraction regime. The situation was made worse for oil producing communities by the fact that oil had quickly become the country's main foreign exchange earner with the central government keen to ensure a smooth flow of oil money into

its coffers. Any opposition to the activities of the TNCs involved in oil exploration was deemed subversive to national economic interests. Nevertheless, the environmental problems arising from the operations of international oil companies in the Niger-Delta remain a major challenge in the country.

Following the path of previous relevant studies that combined stakeholder theory with other theories or concepts (Logsdon and Palmer, 1998; Yang and Rivers, 2009; Mena *et al.*, 2010), this study combined stakeholder theory with legitimacy theory to assess TNCs' environmental irresponsibility and how host communities in Africa attempt to combat it. It finds that host communities, as TNCs' key stakeholders, do not perceive the operations of TNCs as desirable or appropriate thereby putting their sociological legitimacy to question. They hold the impression that TNCs care less about the social wellbeing and economic interests of the local stakeholders and this has led to bitter opposition, social unrest and litigations instituted by the local stakeholders. Worse still, despite the agitations of these local stakeholders (as individuals and groups), the responsiveness of TNCs to fulfilling their 'social contract' with their host communities remain grossly unsatisfactory.

From the perspective of legitimacy theory, many, if not most TNCs have failed to use their leverage responsibly and local stakeholders have felt the need to exercise 'their right' to 'revoke' the continuation of the TNCs' (Shell's, to be particular) business activities or continued existence within their environment. Ironically too, TNCs involved in oil exploration activities like Shell have in turn questioned the legitimacy of a number of measures designed to secure their accountability for harm occurring in the course of their operations. The outcomes of the agitations of various individuals and groups to secure justice against the powerful oil corporations operating in the Niger Delta may appear to be marginal. Still, it is relevant that the efforts of the Ogoni and the Niger-Delta environmental advocacy

groups as key stakeholder groups forced Shell to suspend its oil exploration activities in Ogoniland since 1993. Shell decided to pull out of the area completely in 2013.

Even powerful global actors sometimes backed by normative legitimacy may find that the need for securing sociological legitimacy is almost ranks quite close, if not at par with the relevance of normative legitimacy. Shell's normative legitimacy stepped in historical advantage and decades of operations did eventually give way in the face of local opposition to its perceived irresponsible conduct with regard to its environmental practices. This is an important issue for TNCs whose immense clout, though clearly not in doubt, requires they secure legitimacy with their local host communities especially in the context of extractive commercial engagements. Shell's experience in Ogoniland brings to the fore the significance of the role of sociological legitimacy. While it was (and remains backed by normative legitimacy in its overall operations in Nigeria), its deficient sociological legitimacy led to its ceasing operations in Ogoniland with continuing repercussions more than a decade on.

While they have been largely failed by the governments and state institutions including the judiciary of their countries, the efforts of local communities (as key stakeholders operating as individuals, or groups) are gradually yielding results. Despite the fact that only one of the cases against Shell in the Netherlands succeeded,[14] the involvement of farmers from other parts of the Niger-Delta in those cases is noteworthy. The cases constitute an interesting milestone in efforts of victims in the region to secure a remedy against the oil giant outside Nigeria's shores; a sign of the expanding recourse to this strategy across the Niger-Delta. Such efforts have attracted the interests of international bodies and environmental rights groups who have accorded the local stakeholders substantial moral and legal support necessary to draw the attention of the world to their plight. This, in turn, is beginning to hold the oppressive hands of TNCs and making them pay for their environmental atrocities

notwithstanding TNCs' drive to escape justice by exploiting 'legal forms' – the letters of the law– rather than its spirit.

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[1] Involvement in high level corruption and financial malpractices has been a major issue of concern regarding the activities of TNCs around the world and with particular reference to their activities in developing world. A most recent report of the High Level Panel on Illicit Financial Flows commissioned by the African Union/United Nations Economic Commission for Africa (AU/ECA) Conference of Ministers of Finance, Planning and Economic Development presents details of how the continent remains 'a net creditor to the rest of the world' losing over $50 billion. See UNECA *Report of the High Level Panel on Illicit Financial Flows from Africa High Level Panel on Illicit Financial Flows* 2015: 2. A major source of the illicit financial flows is the financial malpractices of TNCs. The report states that TNCs operating in Africa engage among others in over-invoicing of imports and under-invoicing of exports particularly in the natural resources sector; easily the largest economic sector in Africa, mis-invoicing of services and intangibles like fees for intellectual property, professional services and intra-group loans, unequal contracts, secret contracts with the collusion of national elites to evade tax. To cite just one example, the report found that in 2008, a TNC was granted a mining concession for an ore mine in Guinea that has the potential to generate revenues of about $140 billion within a period of twenty years for only $165 million. A new government terminated the concession on several grounds including allegations of corruption 'following the discovery that 'half of the rights to the concession had been sold to another multinational for $2.5 billion' (UNECA, 2015: 31). The report is available at: http://www.uneca.org/sites/default/files/PublicationFiles/iff_main_report_26feb_en.pdf

[2] [2014] EWHC 1973 (TCC)

[3] *Bodo v Shell* para. 5

[4] It was for instance an important part of the Communication to the African Charter on Human and People's Rights *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (*SERAC* case) (2001) AHRLR 60 (ACHPR 2001).

[5] Ken Saro-Wiwa, John Kpuinen, Dr Barinem Kiobel, Saturday Doobee, Nordu Eawo, Daniel Gbokoo, Paul Levera, Felix Nuate and Baribor Berain,

[6] 28 U.S.C. § 1350 (2006)

[7] Lucky Doobee, Monday Gbokoo, David Kiobel, Karalolo Kogbara, Blessing Kpuinen, James N-nah, Friday Nuate, Ken Saro-Wiwa Jr., Michael Vizor and Owens Wiwa.

[8] No. 10-1491

[9] Barizaa Dooh actually died on 12 January 2012 before the case was concluded and judgment delivered on the cases in 2013.

[10] Two separate cases later consolidated and heard together: *Barizaa Manson Tete Dooh and Vereniging Milieudefensie v Royal Shell Dutch PLC & Shell Petroleum Development Company of Nigeria Ltd* C/09/337058 / HA ZA 09-1581; *Barizaa Manson Tete Dooh and Vereniging Milieudefensie v Shell Petroleum N.V. &The Shell Transport and Trading Company Ltd* C/09/365482 HA ZA 10-1665 4 30 (January 2013).

[11]It is important to note in this regard that while Shell stopped oil prospecting in Ogoniland, its operations there continued in many respects like the fact of its underground pipelines which still actively transported oil to other parts of the country, one of which was in issue in this case. It also had several oil well-heads in Ogoniland that have not been demobilised there.

[12] *Mr Jonah Gbemre (for himself and representing Iwherekan Community in Delta State, Nigeria) v Shell Petroleum Development Company Nigeria Ltd, Nigerian National Petroleum Corporation and Attorney-General of the Federation* Suit FHC/B/CS/53/0, AHRLR 151 (NgHC 2005)

[13] See Clara Nwachukwu 'Shell appeals N15.4bn Oil Spill Penalty' *Vanguard* (8 July 2010) Retrieved 11 November, 2014
http://www.vanguardngr.com/2010/07/shell-appeals-n15-4bn-oil-spill-penalty/

[14] Incidentally, this was one that involved another part of the Niger Delta and not Ogoniland.