Duty of Transnational Oil Corporations in Relation Harm Caused in Countries of Operations: Alternative Mechanism for Effective Compensation

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Duty of Transnational Oil Corporations in Relation Harm Caused in Countries of Operations: Alternative Mechanism for Effective Compensation

The Case of Oil Industries in Nigeria

Ismail Idowu Salih

Abstract

Besides contributing to Nigeria’s economy and popularity, Transnational Oil Corporations (TNCs) have also contributed to the problems facing the country; for instance, the disturbances and instabilities in the Niger Delta Region. This opposing role eliminates the TNCs from ordinary bystanders and imposes a duty to act; not merely to achieve equitable balance but also to ensure the balance meets with legitimate expectation and international standard. This thesis critically examines the case of Bodo Community and others v Shell Petroleum Development Company of Nigeria Ltd., and finds the lack of agreement on the fundamental issue, unstructured settlement agreement, and lack of follow up have done nothing to improve the life of the community inhabitants. Using critical analysis method, the author advocates the need for TNCs to adopt an Alternative Corporate Resolution Initiative (ACRI) to facilitate the fulfilment of their contractual obligations, respect human rights, own up to their mistakes, provide meaningful remedy, and follow up on it.

Keywords: Transnational Corporations, Oil Companies, Nigeria, Alternative Dispute Resolution, Effective Remedy

1 JD (2018) University of Windsor. Email: salih111@uwindsor.ca
2 Bodo Community and others v Shell Petroleum Development Company of Nigeria Ltd [2014] EWHC 2170 (TCC)
1. Introduction

Nigeria is an oil and gas rich country but most of the populace earn below $1.25 a day (UN, 2016). Transnational Oil Corporations (TNCs) have used their expertise and resources to help Nigeria locate, drill, store, and export crude oil. They have also contributed to the hostilities in the Niger Delta region (US EIA, 2015), and the endemic bribery and corruption in the country (Dike, 2005; Ogundiya, 20016; Osoba, 1996). There are several TNCs in Nigeria but, Shell has been dragged to Courts more often because it is the first to start exploration and the first to drill and export oil from Nigeria (NNPC, 2016). Generally, under TNCs due diligence norm, they ought to respect human rights (including environmental rights) in the country wherein they operate (OECD, 2011; UN, 2011).

Although a disregard for due diligence or human rights does not automatically give rise to liability, where National laws warrant it and where the disregard results in injury to person(s), it is incumbent upon the TNCs to own up and take immediate remedial steps. The 2015 settlement agreement between Shell and a group of Bodo Community farmers and fishermen focus on financial award but, disregarded the need for follow up, spillage clearance, and reconciliation. This shortsightedness has resulted in the lack of improvement to the livelihood, health, and environmental condition in the Community (Nigeria Tribune 2016). While Nigeria has numerous laws purporting to protect the environment and human rights, they lack enforcement ability and mechanism. Rule of law is in short supply and access to justice is hard (Frynas, 2009). This paper aims to examine the nature of the duty owed by TNCs with a view to identifying if the duty includes making and following up on compensations. To achieve this aim, this paper asks: (1) whether TNCs have a duty to pay compensation for oil spill even when the cause of the spill is by the action of a third party, if yes, (2) what is the scope nature and scope of that duty, and from what legal obligation(s) does it derive?

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Section 2 introduces the Nigeria oil and gas sectors and discusses the pros and cons of TNCs activities in the country. Section 3 highlights the sources and extent of legal and moral duties own by TNCs to those in the proximity of their actions and inactions. Section 4 examines the compensations made by Shell in relation to human rights and environmental abuses and examines if they were adequate. Section 5 concludes the paper while section 6 deals with recommendations.

2. Factual Context

This section introduces Nigeria and highlights the country's history of oil and gas. It further examines the impact of oil and gas on the national economy and the lives of the citizens; especially those in the oil and gas rich region.

2.1 The Nigerian Oil and Gas sectors

Nigeria is a county on the coast of West Africa with a population above 186 Million people (UN, 2016). Although Nigeria is rich in natural resources such as petroleum, gas, tin, iron ore, coal, limestone, niobium, lead, zinc, and arable land (OPEC, 2016), its economy concentrates mainly around the oil and gas sector (IMF, 2016) that accounts for about 35% of gross domestic product (GDP), 75% of the country’s consolidated budgetary revenues, and 95% of total exports revenue (World Bank Group, 2016). As the largest oil producer in Africa and the 12th largest world oil producer (BP, 2016). In 2015, Nigeria exported about 1.98 million barrels per day (b/d) of crude oil to countries around (US EIA, 2016). Nigeria is also the African largest producer of Liquefied Natural Gas (LNG) and the world's fourth-largest exporter of LNG (IGU, 2015). The history of Nigeria oil and gas started around 1908 when the Nigerian Bitumen Company, a subsidiary of a German Company (Frynas, 2000:9) and the British Colonial Petroleum began oil exploration in the southwest of Nigeria. The inability of the German company to return to Nigeria after the First World War allowed D’Arcy Exploration Company and Whitehall Petroleum to obtain license in 1923.
Shell D’Arcy, a subsidiary of the Royal Dutch/Shell Group was granted license to explore in 1936 and in 1938, the license was upgraded to an exclusive monopoly covering the whole mainland Nigeria (Steyn, 2009: 260). In 1955, a concession was granted to Mobil, a subsidiary of the Socony-Mobil Oil Company to explore areas in the Northern part of the country where oil was never found. In 1956, Shell D’Arcy successfully drilled oil at Oloibiri in the Niger Delta. Thereafter, Shell D-Arcy changed its name to Shell-BP Petroleum Company of Nigeria Limited. The drilling capacity improved to commercial level of 5,100 b/d in 1958. This allowed the corporation to begin the first shipment of oil from Nigeria; paying Petroleum Profit Tax (PPT) and Royalty to the Government paying to the Government (NNPC, 2016).

Since Nigeria gained independence in 1960, exploration rights in onshore and offshore areas was granted to other foreign TNCs including Mobil 1961; Tenneco (Texaco) 1961; Gulf Oil and Amoseas (Chevron) 1961. Further licenses were issued to Azienda Generale Italiana Petroli (AGIP) in 1962, Société Africaine des Pétroles (SAFRAP) in 1962 (renamed Elf Nigeria Limited in 1974); ENI in 1964; Philips Oil Company, a subsidiary of Oando Energy Resources in 1965; and Pan Ocean Oil Corporation in 1972 (Ite, Aniefiok E., et al. 2013). Several Indigenous companies were also licensed between 1990 and 1991 (Ariweriokuma, 2008: 82). Owing to the United Nations resolution on "Permanent sovereignty over natural resources", the Nigeria Government enacted the Petroleum Act 1969 to assert state ownership and control of oil and gas sectors. The Nigerian National Oil Corporation (NNOC) created in 1971 as the national corporation was renamed the Nigerian National Petroleum Corporation (NNPC) in 1977.

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4 It is unclear why Shell D’Arcy decided to change its name just few months after major oil discovery. One may suggest the inclusion of BP could signify an intention by the then British administrator to assert British trademark on the discovery.
The Nigerian Enterprises Promotion Decree \(^5\) (NEPD) of February 23, 1972, empowered NNPC to acquire equity interest in the TNCs operations. This led to the first partitioning agreement and the creation of a joint venture (JV) or Joint Operating Agreements (JOA). Under the JV, the NNPC enters Production Sharing Contract (PSC) with the TNCs to hold jointly, oil processing license or oil mining license and facilities as a “public liability corporation” by contributing to the cost of operations and sharing the benefits or losses on equity basis (taxes, royalties, and profit margin). When TNCs operates under JVs, they do so as State representatives. Perhaps this could explain why under s.11 (2) of the Petroleum Act (PA) 1969, the Federal Court in Abuja has jurisdiction to determine any issue arising from TNCs licenses; whereby effectively ousting arbitration Court’s jurisdiction. All parties to the JV also sign a memorandum of Understanding (MOU) detailing their ongoing financial obligation of the TNCs to Nigerians.

The NNPC did not sign JV with indigenous companies who were required to sign production agreement with the TNCs. The Nigerian civil war, Biafra war (1967 – 1970) that significantly affected the eastern part of the country slowed down oil production (Luciani, 2011). After the war, several commercial oil were discovered across the Niger Delta. The increase in crude oil export allowed Nigeria to become a member of the Organization of Petroleum Exporting Countries (OPEC) in 1971. OPEC advocates for environment and support sustainable development. All member of the cartel are signatories to the United Nations Framework Convention on Climate Change (UNFCCC) and are obliged to give environmental protection a priority (OPEC, 2016).

2.2 Benefits of Multinational Oil Corporations

TNCs have made notable positive contributions to the development and economy of Nigeria (Dele et al., 2015). Without the direct involvement of the TNCs, Nigeria could not have discovered, explored, drilled, or exported crude oil (Ite, 2013). The country simply lacks the technology and expertise to engage in such venture. Oil discovery, drilling and trading allowed Nigeria to join OPEC, and ranked it amongst the most popular nation in Africa (World Bank Group, 2016). Job creation is another positive contribution made by TNCs. A statement on Shell’s website claims more than 90% of the people who designed and built the highly important Bonga North West project were Nigerian. Further, Shell claims it created the LiveWIRE initiative as an Ogoni-specific program to encourage youths in the area to shun ‘illegitimate sources of income such as illegal refining of crude oil in favour of job training’. Since the initiative was commissioned in 2003, Shell claims to have facilitated the training of 6,350 youths in entrepreneurship skills, business planning, and management; 50 per cent of whom have been assisted to become business owners and employers. Shell further prides itself with issuing Scholarships to Nigerian.

It claims to have partnership with NNPC to design Cradle-to-Career program and has awarded full-board six-year secondary school scholarships to 110 students from Nigeria’s six geo-political zones. Chevron complies with its MOU obligation by establishing RDCs. The corporation claims to have teamed up with local partners to establish Nigeria’s first Advanced Technology Center for Subsurface Studies that was opened in 2002. Chevron also asserts to have paid a sum of $200,000 for the construction and equipment of the Biotechnology Centre of the Federal University of Technology in Yola. Mobil Producing Nigeria (MPN) provides annual scholarship awards to 500 undergraduate students in Nigerian universities. MPN has also help

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to improve the healthcare services in Nigeria by spending almost $15 million dollars on malaria eradication programs mainly in the Niger Delta; and maintaining ongoing projects on HIV/AIDS awareness and prevention. Both MPN and Esso claim to be involved in many indigenous community development projects such as the reconstructing and equipping the Ofu-Obi general health and maternity care center in Anambra state. By implication, TNCs financial contributions could give rise to legitimate expectation and constitute a legal duty to provide care and support. In R v Browne, the Ontario Court of Appeal held a verbal promise made by an accused to take care of the deceased constitutes a binding agreement enforceable in law. Thus, while every moral obligation such as philanthropic act may not necessarily give rise to a legal duty, but if the communities rely on TNCs goodwill promises, those promises could give rise to enforceable legal obligation. It could also extend the liability to their parent companies under the Cape PLC v Chandler principle.

2.3 Detriments of Multinational Oil Corporations

Along with positive contributions, TNC operations in Nigeria have created important disadvantages to the environment, community security, health, and livelihood of the citizens. This section bears some expansion. The key issues prominent in literature relate to oil spills, gas flares, and waste bungling (Ite et al., 2003). While these problems apply generally to the country, they specifically depict the situation in the Niger Delta. Of the 606 oil fields in the Niger Delta, 355 are on-shore and 251 are offshore (see fig 1). 23 oil wells, including the first Nigerian oilfield discovered by Shell in 1978 have been abandoned due to low performance or militant actions (NNPC, 2016). Aging infrastructures and poor facilities

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10 R v Browne (1997), 116 (3d) 183 ONCA
11 See R v Instan [1893] 1 QB 450
12 Cape PLC v Chandler [2012] EWCA Civ 525
13 There have been incidences of oil spillage in Lagos state that is outside the Niger Delta. Oil Wells have also been dug in Anambra State; also outside the Niger Delta. See NIPC (accessed November 30, 2016) online <http://www.nipc.gov.ng/oil&gaspage.html>
maintenance create condition for oil to escape (see fig 2). Militant activities also disrupt oil production and affect Nigeria economy (US EIA, 2016). Aside from opportunist criminals who debunk oil, disenfranchised locals seeking a share of the wealth have mounted several attacks on oil installation across the region; causing extensive damages and environmental disasters (Shell, 2016) (See fig 3).

**Figure 1 – Oil Wells**


**Figure 2 – Extent of Oil Damage to part of the Niger Delta**

Source: UNEP 2011

**Figure 3 – Shell’s record of Monthly Oil Spills Incidents in Nigeria**

Source: Shell Nigeria
3. Legal and Moral Duties of Transnational Oil Corporations

To determine the scope of TNCs obligation, this section examines the relevant National Laws and International Authorities, and considers various schools of thought.

3.1 National Law

Far from being inadequate, Nigeria has several laws that purport to compel TNCs to respect human rights and the environment, and compensate those affected by their activities. While these laws are good on paper, they are hardly enforced. Nigeria Constitution\(^\text{14}\) asserts state sovereignty over its natural resources. Rider to Article 12, international treaties are applicable once ratified by the National Assembly. Article 20 imposes a duty on the State to protect citizens and the environment. Human Rights Charter is enshrined within Articles 33-44.

The Nigerian National Petroleum Corporation (NNPC) Act [1977 No. 33] Ch. 320 1990 established the Nigerian National Petroleum Corporation as National Oil Corporation, prescribes a 12 months’ limitation period for claims against NNPC (s.2). This could explain why despite the JV agreement, it is difficult to join the Government as a party in TNCs wrongdoings.\(^\text{15}\) The Petroleum Act 1969 as amended by the Petroleum Act 2004 is a key legislation relieves Shell-BP of its dominance in the oil and gas sector. Section 1 allows the Government acquire all equities in oil and gas. The Act invests enormous power on the Minister of Petroleum Resources. For instance, s.2 allows the Minister to issue oil exploration license (OEL), oil-prospecting license (OPL), and oil mining lease (OML), monitor, control, and sanction TNCs.\(^\text{16}\)


\(^{16}\) In Malabu Oil and Gas Limited v The President and Commander in Chief, Federal Republic of Nigeria & ORS (2009) LPELR- CA/A/99/M/06, the Minister who had earlier withdrawn a license under s.24 power returned the license before the case could be heard.
The Minister is also empowered under s.9 to make regulation relating to the running of the oil and gas sector. Amongst the regulations made by the Minister under s.9 are,

a. **Minerals Oil (Safety) Regulations of April 11, 1962**

   Regulation 7 states that all drilling, production, and other operations shall conform to good oilfield practice; and that TNCs must follow of the Institute of Petroleum Safety (IPS) Codes, the American Petroleum Institute Codes (API), or the American Society of Mechanical Engineers (ASME) Codes.

b. **Petroleum Regulations of March 8, 1967**

   Regulation 13 strictly prohibits discharge of oil products into waters.

c. **Petroleum (Drilling and Production) Regulations [1969, No. 69]**

   Regulation 15 gives licensees the rights to cut down and clear timber and undergrowth; to make roads; to appropriate and use water found in the relevant area and to collect and impound, construct, dismantle, or remove anything that may hinder the exercise of the license. In addition, r.23 allows the licensees to disrespect the communities fishing rights so long as compensation is made to those affected. Nonetheless, licensees are obliged under r.15 (1) (f) (ii), upon termination or prior cessation or completion of work in the relevant area, to safeguard the area reasonably. Obligation is also imposed on licensees by r.25 to adopt all practicable precautions, including the provision of up-to-date equipment, to prevent the pollution of inland waters, and take step to end it if it does happen. Similarly, regulations 37-42 oblige the licensees to carry out their operations in accordance with good oilfield practice; take steps to prevent oil spillage.

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17 Per the International Association of Oil and Gas Producers (OGP, 2010), the term ‘good oilfield practice’ is a loose term capable of being defined by the standard appropriate and relevant to use for the task in question and in the circumstances of the project. Thus, even though the latter part of the law referred to the American code, the standard applicable to a similar project in and around the USA may not be the exact standard applicable to the Nigerian project.
3.1.1 Environmental Related Laws (Act of parliament, and Regulations)

a) **Environmental Impact Assessment (EIA) Decree [1992 No. 86], CAP E12, LFN 2004** – Makes environmental impact assessment a mandatory process before TNCs embark on new projects.

b) **Harmful waste (special Criminal Provisions) [1998 No. 42], CAP H1, LFN 2004**
   Under this Act, it is a serious offence to carry, deposit and dump harmful waste on any land, territorial waters; except due diligence can be shown.

c) **National Environmental Standards and Regulation Enforcement Agency (NESREA) Act 2007** – This Act replaces the Federal Environmental Protection Agency (FEPA) Act, and gives the Federal Ministry of Environment the power to enforce environmental laws, standards, and regulations in the country.

d) **National Oil Spill Detection and Response Agency (Establishment) Act [2006, no. 15]** - Establishes the National Oil Spill Detection and Response Agency to implement Government policies on National Oil Spill Contingency Plan. Under s. 6(2), TNCs must report oil spill incidence within 24 hours and begin immediate containment and clearance process

e) **Oil Pipelines Act of October 5, 1956, CAP 07, LFN 2004**
   Section 11 (5) obliges licensees to pay compensation to any person whose land has been tampered with and those who has been negligently injured.

3.2 International Authority

This section examines foreign authorities that are applicable to TNCs in Nigeria.

3.2.1 United Nations

The Universal Declaration of Human Rights (UDHR) 1948 enshrines basic human rights on every individual worldwide applies mainly to the States,\(^\text{18}\)

**Article 3:** Everyone has the right to life, liberty, and security of person.

\(^{18}\) The International Court of Justice recognises Corporations as legal persons to which the principles of Human Rights apply. There is no reason such view cannot apply to civil cases. See Evaristus, Oshionebo, Regulating Transnational Corporations in Domestic and International Regimes: An African Case Study (Toronto: University of Toronto Press, 2009) at 3
Article 5: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 8: Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him

Article 17: (1) Everyone has the right to own property (2) No one shall be arbitrarily deprived of his property.

Article 30: Nothing in this Declaration may be interpreted as implying for any State, group, or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

It follows from Article 30 that the duty to respect human right is a general duty, which provides that the individual including TNCs must comply with. Although Nigeria as a signatory to the declaration has incorporated Human Rights in its constitution, human rights abuses remain a widespread practice in the country (Freeman et al, 2000). Further to this, the International Covenant on Civil and Political Rights (ICCPR) 1966 obliges States to promote, uphold, and protect human rights of the individuals,

Article 1 (3): States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination.

Article 2 (2): [e]ach State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

The preamble to the International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966 provides that the signatory states covenant to promote universal respect for, and observance of, human rights and freedoms. However, Article 2(3) allows developing States to water-down the provision of this covenant. This could be regarded as a loophole in the law.
Further soft laws that regulate the affairs of States and Corporations regarding human rights include the United Nations Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework 2011. There are two categories to this law. The first category relates to the active duty of states to protect while the second category deals with the responsibility of TNCs. The key aspect that relates to TNCs is contained within s.5(2) of the principle that relates to Corporate Responsibility to respect Human Rights,

A. Foundational Principles:

(11) Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others

(13) The responsibility to respect human rights requires that business enterprises:

   (a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;

   (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.

B. Operational Principles

(17) In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. Human rights due diligence:

   (c) Should be ongoing, recognizing that the human rights risks may change over time as the business enterprise’s operations and operating context evolve.

3.2.2 Africa

African Charter on Human and Peoples Rights 1981

  Article 24: All peoples shall have the right to a general satisfactory environment
Article 28: Every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance. Noticeably, in addition to the role of the State, the individuals (including corporation) has obligation to respect human rights and safeguard it.

3.2.3 OECD

i. **OECD Guidelines for Multinational Enterprises 2011 Edition**

These non-binding principles set standards for responsible business conduct with the aim of promoting positive contributions of enterprises to economic, environmental, and social progress. Enterprises (TNCs) are obliged to:

1. Contribute to economic, environmental, and social progress
2. Respect the internationally recognized human rights
3. Encourage local capacity building through close co-operation
4. Encourage human capital formation
5. Refrain from seeking exemptions to human rights, environmental, etc.

**The Duty to Consult:**

14. Engage with relevant stakeholders in order to provide meaningful opportunities for their views to be taken into account in relation to planning and decision making for projects or other activities that may significantly impact local communities.

3.2.4 European Union (EU)

Whilst Nigeria is not a member of the EU, Shell parent company, the Royal Dutch Shell is an Anglo Dutch company with origins in the Netherland and head office in the UK. Directive 2013/30/EU establishes minimum safety requirements to prevent offshore accidents and to limit their consequences for the marine environment and coastal economies if they do occur.
### 3.3 Moral Duty for Wrongdoers to follow up on Compensatory Award

Immanuel Kant Groundwork for the Metaphysics of Morals (1785) treated morality and law differently. Yet, legal principles can be based on moral values (Kant et al., 2002). Moral principles relate to what the public perceives as good or bad action. Normative ethics explain moral standards that regulate right and wrong conduct (Mackie, 1977). Consequentialists’ normative ethical theory provides that whether an act is morally right or wrong will depends on the consequences of that act, Utilitarian based their decision on the ability of the matter in question to produce happiness. Common to these philosophical stands is the need to do good by act or by consequence. Beauchamp and Childress (2001) postulate four moral principles of respect for peoples’ autonomy, justice, non-maleficence, and benevolent. If TNCs respect peoples’ autonomy, they would not put anyone in dangerous situations. By failing to prevent oil spill and failing to clear it, the principle of justice and non-maleficence become engaged. The principle of benevolent creates ongoing duty such that remedy will only be adequate if the tortfeasor removes the injurious agent, pay compensation, and follow it up with a view to enabling reconciliation.

### 4. Analysis

“The question of how best to regulate corporate activity to prevent extraterritorial violation of human rights has been the subject of extensive, often heated debate, and remains unsettled.” ¹⁹ Before proceeding to the question of legal duty, this section examines two compensations made by Shell to Nigerian plaintiffs for adequacy and effectiveness.

#### 4.1 Compensations Paid by Shell for its activities in Nigeria

In a 1996 claim concerning the death of Ken Saro-Wiwa and other Ogoni leaders, the plaintiffs relied on the US extraterritorial jurisdiction under the U.S.C § 1350

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Alien Torts Statute to argue before the New York District Court that Shell was complicit in the execution of the activists by the Nigeria Government. After 13 years of extensive legal arguments, on June 8, 2009, Shell reached a $15.5m out of court settlement with the plaintiffs.  

While we were prepared to go to court to clear our name, we believe the right way forward is to focus on the future for Ogoni people, which is important for peace and stability in the region.

In Bodo Community v. SPDC, the plaintiffs, a group of fishermen and farmers from the Bodo Community in the Niger Delta alleged that they suffered losses due to oil spillage by Shell. The plaintiffs averred that on August 28, 2008 a fault to Shell equipment caused damage to the Trans Niger Pipeline that conveys 180,000 b/d oil to the Shell' export terminal at Bonny on the coast. The incident led to about 4,000 b/d oil spills into the swamp. The second spillage on December 7, 2008 also resulted from damage to the same pipeline but with a more devastating effect. When the Plaintiffs approached Shell for compensation, they were offered £4,000, which they rejected. Thereupon, the plaintiffs launched a claim with the High Court in London. After years of lengthy legal arguments, Mr. Justice Akenhead ruled the Court has jurisdictions to hear the claim. The ruling prompted Shell to make £55 ($83.3) million out of court settlement on January 7, 2015. £20 million was to be set aside as community trust and £35 ($53.1) million for the 15,600 plaintiffs.

4.2 Shortfalls in the Compensations

The money paid to the plaintiffs in the Saro-Wiwa case cannot remedy the damage that was done but; serves as a form of justice. Concerning Bodo Community, Amnesty International business and human rights campaigner, Jon Westby who visited the Community on 11 March 2015, just two months after the award noticed,

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20 See Wiwa v Royal Dutch Petroleum Co, 2002 U.S. Dist. LEXIS 3293
22 Bodo Community v Shell Petroleum Development Company of Nigeria Ltd Claim No. HQ11X01280
23 Bodo Community v Shell Petroleum Development Company of Nigeria Ltd [2014] EWHC (TCC)
This is by far my happiest visit. For the first time in seven years, the people here are getting their lives back on track. Today, Bodo is a hive of activity. People are building new homes, or fixing up their old ones. Many young men seem to be driving brand new motorcycles. Children are back in school, running around the sports field in their bright blue uniforms. 24

Yet, less than two years after the windfall, the reality kicked in. The better conditions the community had hoped for became an illusion; and the oil spillage at the center of the lawsuit remained unclear. Worst still, the whereabouts of the £20 (§30.4) million that was meant for community trust became unclear. In an Amnesty international (2015) report, the chairman of the village chiefs, Sylvester Kobara said the chiefs are “setting up a community-run foundation [the trust] to pay for clean drinking water, new roads, and improve Bodo’s health and education facilities”.25 But, it has emerged,

[T]hat [US $30 million trust fund] has also now been distributed to individuals. It was a huge windfall for people who were until then living hand to mouth.26

The handling of the award raises many questions most of, which are at the center of this paper. At issues are concerns relating to the determination of the plaintiffs and beneficiaries, selection of representatives, creation of trust, management of the award, mode of disbursement, transparency, and the lack of follow up. Nigeria system of governance allows customary rule to thrive alongside democratic system of government (Crowther and Ikime, 1970). Chiefs and village heads can organize their communities and represent community interests as required (Olowu and John, 1996; Blench et al., 2006).

25 Amnesty International, Nigerian community waits for oil spill cleanup, Mark Dummett, 14 April 2015
26 Nigerian Tribune, ‘Here, oil money goes into wrong hands, Oil clean up pledge divides Niger Deltans’, July 02, 2016
However, the reliance on the Bodo Community village head and chiefs to handle the trusts fund without any scrutiny or monitoring is fundamentally flawed; especially in a country that is tainted with corruption (Eweje, 2007). It is clear from the summary of claim 27 that the Bodo Community comprised of 35 villages whose inhabitants traditionally depend upon subsistence fishing and farming. This community and its surrounding villages have a population of 49,000 people. The oil spills affect the communal lands, creeks, rivers, and swamps, which are vital to the entire community for their health, livelihood, and transportation. A UNEP Report (2011) that confirms the severity of the oil spillage advises the Government and Shell to create an Environmental Restoration Fund (ERF) with an initial capital of US$1 billion to cover the first five years of the clean-up project. One therefore wonders how the village head and chiefs came up with the figure of 15,600 claimants; disregarding the plights of the rest of the populace. A report on the Ottawa Citizen Journal 28 by Jesse Winter who made a visit to the Bodo Community raises serious questions on the trusts management.

Contrary to the claim that each of the 15,600 plaintiffs will be paid Canadian $4,000, one informant who was considered as key witness in the original claim stated that she received Canadian $8000; while about 16 men also claimed, they received Canadian $8000 - $11000 each.29 Although the story cannot be verified, it raises serious doubt whether some of the acclaimed 15,600 plaintiffs ever received payment, and if they did; how much they were paid. Shell is familiar with the Niger Delta region and it must be obvious to the corporation that a proper trusts dispensation mechanism was necessary. The Federal or State Government should have stepped in to ensure the trusts are properly managed.

27 Bodo Community v. SPDC, Claim No. HQ11X01280
28 Winter, Jesse, How a poor Nigerian Town got Shell to pay for oil Spill, Jesse Winter, Ottawa Citizen, November 6, 2015
29 Ibid.
Nevertheless, there is a lack of trust between the community inhabitants and their leaders; as well as between the community and the government. BP quick response to the April 20, 2010 Deepwater Horizon oil spill to the Gulf of Mexico sets standard for reasonable TNCs. Following the oil spill, BP established the Gulf Coasts Claim Facility (GCCF) to receive and process claims by those affected. BP quickly deposited $29 billion into a trust fund for the partial settling of claims relating to the spill. This is even though the US Oil Pollution Act 33 U.S.C. SS 2712’13 (2006) caps such deposit at $75 million. BP also commenced immediate clearance of the spillage and remained pro-active. Based on the Bodo Community case history, the Court should have remained seized of the matter until the settlement agreement is fully implemented. In McKinnon v. Ontario (Ministry of Correctional Services), following the ruling that the respondent discriminate against the claimant, the tribunal who awarded compensation remain seized of the matter to ensure the respondent implement its recommendations. The Supreme Court upheld the power of the tribunal to exercise such discretion.

Similarly, in Doucet-Boudreau v. Nova Scotia (Minister of Education), a trial judge who found that a provincial Government dragged its feet in providing school facilities and programs issued an Order to that effect and retained jurisdiction to hear reports on the status of the Government efforts. The Supreme Court of Canada rejected the challenge mounted by the Government that the Court does not possess such a supervisory power. Accordingly, Shell should have followed up on the compensation award and/or the court should have issued an Order to that effect and remain seized of the matter.

30 Chris Kay & Ed Kiernan, Cash Can't Fix the Nigeria Village Ruined by Shell’s Oil, BLOOMBERG, March 3, 2016
4.3 Duty to Provide Effective Remedy

This section attempts to explain what an effective remedy is, and examines if and how that definition includes the act of following up on compensation.

4.3.1 What is an effective remedy?

The term effective remedy is commonly associated with human rights violation (Gallagher, 2010). Article 12 of the UN Basic Principles and Guidelines on the Right to a remedy provides that victims of human rights abuses must have access to effective judicial remedy. In Jawara v The Gambia, the African Commission on Human and Peoples' Rights states that,

A remedy is considered available if the petitioner can pursue it without impediment; it is deemed effective if it offers a prospect of success, and it is found sufficient if it is capable of redressing the complaint. [Para 32]

Further, the Council of Europe guide to good practice in respect of domestic remedies relates that,

A remedy is only effective if it is available and sufficient. It must be sufficiently certain not only in theory but also in practice, and must be effective in practice as well as in law, having regard to the individual circumstances of the case. [Para 12]

Thus, to ensure a remedy is effective, the guilty party must consider the impact of the damage on the plaintiff, and the general effect on the community. In the Bodo Community case, an effective remedy will include the clearance of the oil spill and the monitoring of the award to ensure a legal trust is created.

4.3.2 Legal Basis of TNCs Duty to Provide Effective Remedy

Article 8 UDHR 1948 provides that everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights.

36 Council of Europe (COE), Guide to good practice in respect of domestic remedies (adopted by the Committee of Ministers on 18 September 2013, Directorate General Human Rights and Rule of Law Council of Europe, 2013
Further, both Article 1 (3) ICCPR 1966 and Article 2 (2) ICESCR 1966 provides that the State should facilitate legal remedy. Although these laws only have vertical effect (Alvarez, 2011), when TNCs exercise States’ rights under the JV, the law should apply to them. International business lobby strongly rejected an earlier attempt by the Human Rights Council to introduce a standard under which TNCs could be held liable for human rights abuses. The Council has however reconstituted a new panel that is currently examining the possibility of introducing a harm law that will bind on TNCs. Nonetheless, the Harmful waste (special Criminal Provisions) 2004 and regulation 13 of the PR 1967 prohibits discharge of oil products into waters through any means. Regulation 7 of the Minerals Oil (Safety) Regulations of April 1962 requires that TNCs activities must conform to good oilfield practice. Shell claimed the source of oil spillage the Bodo Community case was sabotage but,

The exact proportion of oil spills in the Niger Delta that are caused by sabotage, as opposed to equipment failure, corrosion or human error, cannot be determined because the data on the causes of oil spills in the Niger Delta have never been subject to any independent or effective monitoring or verification.

Shell was aware of its aging pipeline by chose to ignore it in contravention of Nigerian Laws. Regulation 15 (1) (f) (ii) PDPR Act 1969 clearly obliges licensees to safeguard their areas of activities. Shell failed to secure the damaged pipeline. Shell pollutes the environment contrary to r. 25 PDPR 1969; s. 6(2) Oil Pipelines Act 2004; and in disregard for the Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN) guidelines of the Department of Petroleum Resources (DPR); whereby casting doubt on Shell adherence to due diligence.

37 Evaristus, Oshionebo, Supra note 17 at 3
40 Nigerian Television Authority (NTA), Shell Petroleum ignored Pipeline warning for years causing Oil Spills in Niger Delta, Court Documents reveal,
4.3.2.1 Due Diligence V. Corporate Social Responsibility:

According to UNGP (2011), these soft laws that guides the actions of TNCs is fundamental that TNCs respect human rights, take adequate measures to prevent harm, and compensate those affected by their activities. Nigerian laws refer to ‘good oilfield practice’ that is consistent with APS, API or ASME. While industrial standards are soft laws, once adopted or indicated under the contract for oil exploration they become hard laws that can be used in Court to show due diligence. When a party holds itself out or professes to have a standard; it shall be judge by that standard. While CSR can be used to appease continued investment by shareholders, it fell short of showing due diligence record. Environmental protection, a key aspect of due diligence is not one of the criteria that is considered whilst rating a corporation CSR record. Nonetheless, because Shell commits itself to sustainable development, a model of its CSR; that standard must hold it.

5. Conclusion

The determination of whether TNCs have quasi-state title is a matter of fact (Ratner, 2001). This paper has shown that the nature of the JV agreement that TNCs in Nigeria signed with the Government allows them to exercise powers, which ordinary incorporated foreign or national companies cannot exercise. It therefore makes sense to conclude that TNCs in Nigeria and any TNC operating under similar contract around the world have a duty not just to respect, but also to protect human rights and the environment. This duty extends to the provision of effective remedy and follows up with a view to reconciliation. Alternatively, in their capacity as multinational corporations, TNCs have both legal and moral duty to provide remedy to those affected by their actions and inactions. The legal duty to compensate under s.11 (5) (c) of the Oil Pipelines Act is sufficiently clear.

41 See Bolam v Friern Hospital (1957) 1 WLR 583
Where injury has resulted, TNCs must take active steps as responsible corporations that they portray themselves to be as per their CSR and code of conduct; to remedy the wrong. Although the State bears the responsibility to provide access to justice, and enforcement, where that duty has been failed, TNCs are not absorbed of their obligation under national and international law to provide the injured party with remedy that is meaningful, deliverable, and measurable. The establishment of the GCCF by BP to address the Gulf Coast oil spillage is a typical example of initiative that TNCs can make out of their own volition. While remedies made to individuals may not be followed. Trust Fund is a live program, which cannot be ignored but; be given adequate attention and thoughtful consideration.

6. Recommendation

It is accepted that alternative dispute resolution is not a substitute for the Courts. However, considering the cost and stress of litigation, it is just right that innocent victims of TNCs activities should be given the best opportunity to seek redress. While the duty to establish alternative dispute, resolution lies with the Nigeria Government as advised by the OECD Guidelines, the superb response of BP to the Deepwater oil spill shows that TNCs should not wait for the Government before doing what is right. The ACRI contemplated in this paper goes beyond establishing a compensation board. It involves the establishment of grassroots reconciliation body that can perform ongoing assessment of the impact of TNCs activities in the Niger Delta region, make recommendations for oil spill cleanup, and follow up on it. This body should be empowered to award compensations to those who suffer because of TNCs activities. Where a community trust is warranted, the body should be able to put in place the legal mechanism under which such trust would be managed and accounted for. By so doing, TNCs will improve their image thereby, creating a harmonious relationship between foreign investors and the community.