

**Protecting African People Against Private Violators of human Rights: What Can
the New African Court of Human and Peoples' Rights do to Check the Activities of
Transnational Corporations (TNCs)?**

By

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Abstract

Most African nations clamour for Foreign Direct Investment (FDI) as a stimulant for economic development. Yet they regrettably and ostensibly disregard the fact that the profit motive which spurs the actions of TNCs may set-off the incidents that proceed economic relief. Striking the balance between the development motive of poor countries and the dividend-chase of corporate concerns could not be more daunting. Nevertheless, such a balance is necessary. In this article, we consider the human rights protection responsibilities and benefits that accrue on corporations which have assumed a trans-boundary dimension. Specific attention is accorded to the actions of Royal Dutch/Shell in Nigeria.

Introduction

The tide of globalization rages on. It has ushered novel actors unto the platform of international relations. It has equally eroded a substantial part of the capacity of weak states to act as Sovereigns exercising full independence. On the other hand, it has remarkably increased the powers of corporate bodies in their business pursuits. The processes of unilateral liberalism on the one hand and of neo-patrimonialism on the other, in most poor and destitute African states, have led to de facto privatisation of the latter. Most Third World countries today can only be able to define themselves through the prism of private international business interests. Actions of the Paris and London Clubs are sufficiently illustrative in this regard.

Analysing the rather esoteric nexus between the erstwhile oil conglomerate Elf and some African countries, Tavares (2004: 16-17) opines that the present politico-economic dispensation within most of the poor states smacks of a civil re-colonisation of Africa. This can hardly be put to question if one should observe, as does McCorquodale, that more than half of the top 100 economies of the world are corporations (2001: 21). In a

world wherein 70 per cent of trade is controlled by globe-spanning private companies (Ellwood, 1993) it is hard to shelve the ever-fresh fact that such bodies do exert immeasurable political leverage and wield untrammelled economic power wherever and whenever they decide to operate. Their power is appropriately characterised by the UN Commission for Human Rights when it submits that the turnover of certain TNCs out-par the GDPs of some of the countries in which they operate (UN ECOSOC, 2001). The document further reveals that the situation will persist in the foreseeable future given that TNCs are usually attracted to outsource as a result of the 'favourable conditions' of operating in most host nations, to wit, attractive tax conditions, cheap labour, moribund supervision of respect for human rights and the presence of an obsequious repressive domestic ruling machinery willing to 'ensure' the safety of their installations and activities.

Regardless of the fact that TNCs may have an impressive politico-economic bargaining arsenal within a given polity, experience has corroborated the fact that this has been deployed, for the most part, in realising corporate interests rather than for the concretisation of a popular and widely-acclaimed development aspirations of the poor. The desire for profits in certain cases, has led some of these corporations into arcane deals (with the Governments of receiving states) that blatantly disregard the plight of the poor at best and lead to mass and deliberately-driven massacres at worst.

The vocation of this treatise is to accept, first, that a majority of TNCs are big legal animals that easily and willingly elude the control of forensic thermostats (wherever they exist). Their hitherto undefined personality under International Law does minimal justice to remedy a worrying situation. We argue that the extant dispensation is further sustained and strengthened by the perfunctory attitude of TNCs (vis-à-vis human rights protection) as by the deficit in political will to tender palliative initiatives in that regard. The problem is serious. It begs for expedient redress. This, because the power of TNCs, backed in most cases by political will and vested nebulous interests will continue to grow at a geometrical rate while concern for human rights timidly appreciates by dismal arithmetic proportions. Our prime submission is that poor African nations are feeble and gullible

when it comes to sanctioning the debilitating violations of human rights by TNCs. The dominant trend has been to tolerate these abuses under the pretext of securing FDI – a sinew for development- so we are told. However, more often than not, such excuses have been exploited by a coterie of the local elite to twin themselves with distant TNCs in pillaging national natural resources. But is this situation reversible?

The efforts of most national judicial systems in Africa leave much to be desired. In most systems, the judicial arm of Government is the subject of manipulation by the executive branch. An alternative could be to capitalise on the auditing capacity of a viable private sector. Yet in those systems that have heretofore provided for auditing mechanisms, like in Cameroon, public officials remain to be amenable thereto. Another option could be to institute the offices of apolitical ombudspersons. However, very little can be depoliticised in a continent wherein the democratic ideal appears to be ever so distant. The newly created African Court of Human and Peoples' Rights (ACrHPR) could provide, so we argue, an apt controlling valve. This does not suggest that its personnel would necessarily surge above the power of corporate corruption or be immune thereof. All the same, the merit of a continent-wide approach in addressing the problem is that it removes the debate from the grid of national interest, and thus minimises the adverse incidents of uncontrollable forum shopping by TNCs. The priority for the municipal and international law systems could be a lucid circumscription of the direct responsibility of TNCs under International Law. Efforts in developing their indirect responsibility via the principle of 'horizontalisation' are commendable.

The nature of TNCs and their 'variable' understanding of apposite human rights standards considerably contribute in aggravating their relative impunity before international and national tribunals (part one). However and regardless of the judicial and executive articulation of the legal obligations of TNCs in the United States and (to a lesser extent) the European Union respectively, it can be asserted that the effects of such commendable progress is constantly being confused with a litany of non-binding codes of conduct deficient of binding mechanisms (part two). In the third section of the treatise we opine that Africa is a continent in need of an efficient system that can check and

reasonably control certain debilitating excesses of TNCs. It is trite stating that the African Commission of Human and Peoples' Rights (bereft of a strong and efficient enforcement mechanism) can not sufficiently check the spree of rampant corporate-driven deregulation in most states. Such inordinate deregulation or 'race to the bottom' (Kinley and Joseph, 2002: 9) has been enshrouded by the disregard for basic human rights standards. In this light therefore, we reflect on the task that awaits the new ACrHPR in addressing the problem of TNCs as violators of human rights. In the conclusion we assert that TNCs are the primary beneficiaries of a system that honours the dignity of the people who inhabit the same.

Part One – TNCs and the contemporary human rights discourse

The responsibilities of TNCs under International Law remain a grey area. Its contours are undefined and its course is partially uncharted (Shaw, 2003: 225). As such, it is important in the present endeavour to circumscribe the nature of TNCs as it is understood under International Law. To that extent, a terse snapshot of the extant international human rights framework is essential.

A - The Nature of TNCs

TNCs are first and foremost, *private corporate moral persons* or business organisations whose objective of profit maximisation results in the extension of the activities of the corporations from the parent companies to subsidiaries based or incorporated in other countries. While the parent companies are usually registered in the countries of origin, subsidiaries subscribe to the laws of the host or receiving states. TNCs can equally be described as enterprises that control production centres and services in many countries other than that of the country that hosts the headquarters (Kamminga, 2001:573). They vary as a function of the activities in which they are engaged. Their operations range from oil exploitation, transport and trading, through mining, the provision of security services to banking and insurance amongst others. In Africa those whose activities have a conspicuous bearing on human rights are concentrated in the oil and mining industries. TNCs of the oil extraction industry that operate in some African countries include Chevron Texaco, Exxon Mobile, TotalFinaElf, Petronas and above Royal Dutch/ Shell.

The obligations of TNCs under International Human Rights Law are subject to much debate because the manner in which they are established eludes the theories that heretofore underpin a rather state-centric human rights discourse. Affirming that TNCs are neither subjects nor quasi-subjects of International Law, François Rigaux (1991:125-126) has described some of the theories that dominated post-war forensic literature on the topic. The internationalisation of state-contracts that bound states and TNCs reminisced of a liaison held together by a quasi-treaty. However, international weariness to stick to the said theory of internationalisation provoked a shift to yet another theory – delocalisation or transnationalisation of the state-contract. The latter relied on the general principles of law in order to justify adherence to international obligations by TNCs. This theory had the demerit of disregarding the laws of the host state. Today, while their rights and powers remain phenomenal, their obligations are comparatively skeletal. One of the reasons that explicate the slow pace of developing accountability for TNCs is based on an underlying fallacy that only Western companies fall short of requisite human rights standards. This point is laid to rest when one closely examines the activities of companies such as Petronas (Malaysian) and China's National Corporation in the oil fields of Sudan (*ICE Case Studies*, 2001). The fallacy fails to illuminate a comprehensive approach to an appropriate international response.

B – Contemporary human rights discourse

Contemporary human rights discourse reflects the Cold War state-centric dimension of the promotion and protection of fundamental rights. From the Universal Declaration of Human Rights in 1948 through the International Covenants of 1966 to the myriad of Conventions and Declarations that address specific issues, one can easily identify the target perpetrator in the state. As such TNCs perceived themselves as victims rather than violators. None the less, with their growing influence in international politics, concerns are persistently expressed as to their sensitivity to human rights issues. Greater awareness of the suppressed population in areas where TNCs operate has provoked an unprecedented clamour for their indirect and direct responsibility to be invoked in

controlling their actions which could be antithetical to the requisite human rights standards.

Most TNCs expediently subscribe to the wordings (than the spirit) of the Universal Declaration of Human Rights (UDHR). Yet their regard for specific and ‘small print’ second generation rights such as the rights to acceptable working conditions and safety measures remains unsettled. Their influence on the exercise of civil and political rights (the first generation rights) is hard to delimit. The influence that Shell has had over the Nigerian political environment is not open to equivocation. The political power of TNCs is aptly illustrated by the influence of the Australian based TNC BHP over the Government of Papua New Guinea (PNG). BHP has in recent years determined the legislative direction of the country. In certain occasions, it has specifically drafted legislation for the Government of PNG. The possibility of strategically safeguarding the interests of the company at the detriment of PNG in such a situation cannot be discounted (McCorquodale, 2001:28).

In as much as third generation human rights such as the right to development and a healthy environment are concerned, it is important to take stock of the antagonistic option elected by Big Business in the United States of America, Australia, Canada and Russia. As regards the right to a healthy environment, human rights and green groups have been greatly disillusioned by the perfunctory attitude of the said states to lean towards heightened protectionism of the major industries thereby sidelining the Kyoto Protocol (1997). TNCs have unflappable power to determine the political, social and economic direction of the people in the areas wherein they operate as well as the leverage to steer the political course of the countries of origin. All the same, some attempts have been made to legally check their actions at the international as at the national levels. We now turn our minds to some of the said extant forensic safeguards.

Part Two – International and national checks on TNCs that violate human rights

The response of the international community to the violations of human rights by TNCs has been timid. None the less and during the later part of the 1990s there was an upsurge in the reclamations that TNCs be held accountable for their actions regarding human rights. In this light therefore, ‘hard’ and ‘soft’ laws have been drafted in many international and national fora to circumscribe their actions and proscribe their potentially abhorrent attitude towards the regard for human rights standards in the poor countries where they conduct business. Some progress has been made within the UN, OECD (The Organisation for Economic Co-operation and Development) and the EU at developing soft laws that address the direct responsibility of TNCs in human rights violations. In the USA, courts have recently leant on some domestic Acts in order to engage the direct responsibility of certain corporate giants. In the paragraphs that follow we analyse some of the actions that have recently been taken by UN, the EU and the US in fostering accountability for TNCs. By reviewing what other organisations and countries have done, the prospective perspective of the ACrtHPR in this respect, would have been better served and better informed.

A – International Law (the UN) and corporate giants (horizontalization and direct responsibility)

The relative reticence of International Law to the problem of human rights violations by TNCs (Kamminga, 2001:576) is unsustainable. Over the years, the international regime has exhibited much sympathy for TNCs by specifically ascribing diplomatic protection of their interests to their national or headquarter nation: *The Barcelona Tracton Case* (Belgium v. Spain). This has simply aggravated the indifference and silence over TNCs violations by their home countries. That notwithstanding, some strides –advertent or otherwise- have been made in proscribing the potentially harmful actions of certain TNCs. As aforementioned, TNCs may be held indirectly responsible or directly so under International Human Rights Law, for their debilitating actions.

Certain hard laws have been adopted at the level of the UN to address the question of responsibility (direct or indirect) of TNCs par rapport their regard for human rights in the conduct of their business operations. To begin, there has been a crescendo of keen

interest regarding the principle of ‘horizontality’ or the ‘horizontal effect’ in International Human Rights Law. This principle has the effect of imposing responsibilities on states for the actions of those within their jurisdiction. As such, the state can be held liable in International Law for violations perpetrated by private entities, TNCs inclusive (Kinley and Joseph, 2002:8). Secondly, The Convention on the Law of the Sea, 1982, provides that states be responsible in ensuring that corporations bearing their nationalities respect and adhere to the provisions of the said Convention. The treaty widens the arm of states to control even the subsidiaries of the parent companies based abroad. Thirdly, and within the framework of the OECD, the 1997 Convention for the fight against corruption obliges states that are parties thereto, to exercise competence in the realm of combating corruption whenever it is committed abroad by companies possessing their nationalities. In this regard, arts.2 and 4 of the said convention are instructive.

Attempts have equally been made at international fora to directly regulate and control the actions of TNCs which could be deleterious to human rights protection. The 1982 Convention on the Law of the Sea technically and directly addresses the potentials of moral persons to appropriate resources or exercise rights over specific parts of maritime zones (Areas) (art.137(1)). In addition, it is worth mentioning that attempts were made during the drafting phase of the Statute of Rome,1998, for the establishment of an International Criminal Court, to incorporate provisions that would grant the court jurisdiction over individuals as well as corporate or legal bodies (art.23(5)). However, it was rejected during the Conference on its finalisation (Kamminga, 2001:581). Moreover, another development regarding the search for accountability regarding the human rights record of TNCs has recently witnessed an increased propensity by most municipal courts to discard the international principle of *forum non conveniens* as a ground for dismissing jurisdiction.

‘Soft laws’ have also been used on a wider scale to directly target the actions of TNCs. Such soft laws that have been evoked in this regard include UN Secretary General’s

proposal on a Global Compact¹ made at the World Economic Forum in 1999, between corporations and the civil society. Another important document is the Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights. This document was approved in August 2003 by the UN Sub-Commission for the Promotion and Protection of Human Rights. ILO's Tripartite Declaration relating to the Principles on TNCs and Social Policy (1977), UNCTAD's The Social Responsibility of Transnational Corporations (1999) and OECD Guidelines for Multinational Enterprises² (2000), are all workable, yet non-binding roadmaps for TNCs to pursue.

All the same, the present picture is reminiscent of a jigsaw in partial disarray. Given that these norms and guidelines are non-binding and that Conventions such as the Law of the Sea target only very specific sector issues, it can be hoped that a synchronised body of international rules be fashioned and tailored in a manner that goes beyond the needless hard law/soft law divide. Industrial and corporate codes of conduct are yet another adjunct to a confused regulatory topography. The challenge for the International Law Commission will be to craft binding norms (Conventions) that sufficiently reflect the diversity in the business operations in which TNCs are engaged. Organisations as the EU have exhibited a timid lead. To this, we now address ourselves.

B – The EU and its control over TNCs (horizontalization from a Community perspective)

In the following lines we examine the approach of the EU in responding to the clamour of human rights victims against the actions of TNCs. Being the domicile of a number of corporate colossi such as Royal Dutch/Shell and TotalFinaElf, the EU is no stranger to complaints against the pernicious acts of TNCs abroad. The efforts by the Community in addressing the problem have been led, not by the European Court of Justice (ECJ) but by

¹ Principle n°1 of the Global Compact states – “Businesses should support and respect the protection of internationally proclaimed human rights within their sphere of influence”.

Principle n°2 reads – “Businesses should make sure their own corporations are not complicit in human rights abuses”.

² The OECD Guidelines make provision for National Contact Points that liaise the Secretariat and the Member States in a bid to inform the former of the progress made in implementing the Guidelines.

the European Parliament (EP)³, the Commission and the Council. In 1973, the Commission forwarded a Communication to the Council on TNCs operating within the community. Therein, it sought to provide a framework for checking the actions of TNCs that had little regard for human rights (Kamminga, 2001:583). However, the effects of this were tempered by the heightened protectionism of the 1970s provoked by the oil crisis, itself a backlash of the Yom Kippur War.

The commitment of the Community was to be tested in the furnace of apartheid South Africa. In 1977, a code of conduct for corporations of the Community having subsidiaries in South Africa was passed. Its results were modest. Such was also the fate of the code of conduct of 1985. Regardless of the fact that arts.81 and 82 of the EC Treaty directly engage corporate responsibility, the main issue is that these provisions strictly aim at antitrust actions than at the acts of TNCs that disregard human rights albeit the possible link between the two. Kamminga has sought to explain the reason behind the limited strides of the Community in the area by referring to the lack of harmonized legislation on TNCs within the Community (2001:586). In as much as indirect responsibility is concerned, the ECJ has adumbrated, in the Spanish Strawberries Case,⁴ the rule that Member States can be held accountable by default or omission if they fail to adopt satisfactory measures against the illicit conduct of non-state actors operating within their jurisdiction. By extrapolation, this implies that states, signatories to the EC Treaty, can be held liable for the actions of TNCs bearing their nationalities and that breach International Human Rights Law. Nevertheless, these efforts conducted within the EU, tend to be lean and frail when juxtaposed with the fervour and alacrity with which American courts directly take on corporate giants with dismal human rights profiles.

C – US courts and the responsibility of TNCs

³ After the Bhopal disaster in India, the EP via Resolution OJ, 1985, C/12 84, called on the Commission to ensure that TNCs instructed their subsidiaries to apply the same standards in the said subsidiaries in a manner consistent with the standards upheld in the parent companies in Europe.

⁴ 1977, C-265/95.

In a move reminiscent of the law on Universal Competence in Belgium, US courts have recently had the occasion to decide some cases with considerable foreign elements and a connecting factor in the US. Specific Acts have been used by American courts to address the problem of human rights violation by TNCs. Notable amongst these are the Alien Tort Claims Act (1789), the Torture Victim Prevention Act and the Racketeer Influenced and Corrupt Organisations Act. The first of these commonly referred to simply as ATCA has provoked interests, concerns and adverse opinions from a cross-section of both the civil and corporate societies as well from the Department of Justice.

The Alien Tort Claims Act (ATCA) grants, in the words of the statute, “original jurisdiction of 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”. Thus it is an adjectival prescription with limited substantive direction. Yet, it has been accorded the most plastic and flexible of interpretations by US federal district courts in cases such as *Doe/Roe v. Unocal* (2001), *Flores v. Southern Peru Copper Corporation* (2000), *Bowoto v. Chevron* (1999), *Bono, et al., v. Union Carbide Corporation and Warren Anderson* (1999), amongst others. The statute has subsequently been interpreted as authority according foreign individuals (and private legal persons) the right to bring certain tort suits in the federal courts of the US. ATCA has been extended to apply to human rights violations by agents of foreign nations occurring outside the United States: *Filiartiga v. Pena Irala*; *Sosa v. Alvarez Machain*. The Act has been held to be applicable to violations of certain core principles of human rights by private individuals and corporations (Sebok, 2004).

While its origins remain subject to much controversies,⁵ it is widely believed that Congress prescribed the rule as a measure to combat high seas piracy by providing victims a legal remedy to recover stolen property. The US Congress, by this move, hoped at the time to reassure European states and investors alike that the newly-established USA would not serve as an abode for pirates and assassins.⁶ As noted above, it has recently served as a sword for many people to attack alleged perpetrators of human rights

⁵ Warren Richey, *When can Foreigner sue in US courts?*, in Christian Science Monitor, 30th March 2004

⁶ See *International Journal of Corporate Sustainability*, 2003.

– whether these are natural or moral entities. Many non-US citizens (but who are therein resident), have used the Act as an avenue to settle certain scores with some TNCs, the activities of which, negatively intrude on the rights of persons and communities in the host states. Some Africans have equally invoked the spirits of ATCA as the means to access justice in a number of US federal district courts. Cases brought under the statute with substantial African connecting factors include, *Wiwa v. Royal Dutch Petroleum* (1996), *Wiwa v. Anderson* (2001), *Abdullahi v. Pfizer* (2201), *Presbyterian Church of Sudan v. Talisman Energy Co. Inc.*, and *Tachiona et al., v. Mugabe, et al.* The first of the enumerated cases attracted much media attention. To better understand the application of ATCA to this specific landmark it is important to take a step back and examine the circumstances in which the case arose.

The case was filed in the US by Owens Wiwa after the hanging of the Ogoni writer and activist, Kenule Saro-Wiwa by the Nigerian authorities in November 1995. The Ogoni people of Babbe, Gokana, Ken-Khana, Nyo-Khana and Tai all inhabit the area around the Niger Delta of Nigeria whose lands are the source of about 90 per cent of Nigeria's oil wealth. They have always expressed their concerns on the un-equal geo-ethnic partitioning of proceeds from Nigeria's oil wealth (Okafor, 1999:511-512). In 1990 the Ogoni Kingdoms inhabiting the Delta region endorsed the Ogoni Bill of Rights that recounted the extent to which they had been marginalised, from the colonial to the post-colonial era. After a prolonged period of passive resistance and the use of peaceful options to rest their case, events came to a head in May 1994 when four prominent Ogonis perceived to be pro-Government stooges and pro-Shell barons were brutally murdered by a mob at a rally held in Giokoo. The repost of the Abasha junta was to speedily create the Oil Minerals Producing Areas Development Commission (OMPADEC). This was rejected by the Ogoni activists who called for greater political participation of their people in decision making as a solution to their problems. In the meantime and soon after the assassination of the four Ogoni elite, Nigerian forces arrested key leaders of the Movement for the Survival of the Ogoni People or MOSOP. Its leader, Ken Saro-Wiwa, was equally remanded to custody. After a guilty verdict was pronounced, Ken Saro-Wiwa and nine other activists were executed in November 1995.

But how does Royal Dutch/Shell come into the story?

Royal Dutch/Shell is a company that has been involved in the exploitation, transportation and trading of the oil extracted from the Niger Delta. It is widely believed that Shell condoned or colluded – with the military regime - (financially and logistically) in supporting the perpetration of atrocities by the River State Internal Security Task Force that was established by the military to ensure security in the region (Okafor, 1999:514). Did Shell assist the forces with full knowledge that they would violate the rights⁷ of the Ogoni people? Was Shell an accomplice to these acts? Recourse to redress such contentious conundrums was anathema at the height of the Abacha rule⁸. In the Wiwa Cases like in most of the ATCA hearings, two fundamental issues raised by the court have been; a determination of the standard to test for causation, and the requisite standard necessary to pierce the veil that separates the parent company from its subsidiaries⁹.

In addressing the second issue relating to the corporate veil in the Unocal case (*supra*), Judge Victoria Gerrard Chaney concluded that Unocal was not the “alter ego” of the subsidiaries that built and operated an oil pipeline in Yadana, Myanmar (*Associated Press*, April 2004). It is widely expected that the US Supreme Court will clarify the confines of the first point later in the summer of 2004.

Despite the fact that ATCA has been deployed to target Big Business interests that disregard human rights, concerns have been expressed that the statute could be

⁷ Violations included forced displacements, floggings, rape, looting, indiscriminate shootings and extra-judicial killings.

⁸ This point is evoked in the modified statement of claim of the plaintiffs prepared for : *Owens Wiwa, Blessing Kpuinen and Jane Doe v. Royal Dutch Petroleum Company and Shell Transport & Trading Company, p.l.c* (1997)

⁹ It is important to elucidate the reason and forensic basis for bringing the case to a US court. Besides the wide jurisdictional allowance in ATCA, the principles of agency were invoked by the representatives of the plaintiffs. Attorneys noted specifically in their statement of claim that Royal Dutch/Shell is a group that includes two holding companies, to wit, Royal Dutch Petroleum Company and Shell Transport & Trading Company. Royal Dutch/Shell has been the sole owner of Shell Petroleum, Inc., which is registered under the laws of Delaware with offices in Houston, Texas and equally does business in New York. Counsels were of the opinion that Shell USA has been the agent of Royal Duct/Shell hence the competence of the District Court of New York was not open to question. The connection between Royal Dutch/Shell and Nigeria is that the former wholly owns Shell Petroleum Company Ltd., a holding company which in turn owns Shell Petroleum Development Company of Nigeria Ltd. (SPDC), a corporation doing business in Nigeria.

detrimental to US corporate interests abroad and that Congress should either define its contours or scrap it off the legislative rolls. President Thabo Mbeki of South Africa and his predecessor, Nelson Mandela, have been critical of US lawyers who use ATCA to target TNCs that supported the apartheid regimes of South Africa. Their fears are that such cases could provoke reversed outsourcing or a trend of pseudo-investment whereby the TNCs (perceived as fundamental pillars for development in South Africa) will simply leave the country¹⁰. ATCA has equally received caustic strictures from the US business community. Commenting in *International Chamber of Commerce*, Thomas Niles, president of US Council for International Business noted, inter alia,

Misuse of the Alien Tort Statute has begun to spin out of control in the federal courts. Not only does this clog up our judicial system, it threatens to make it virtually impossible for companies, foreign or American, to invest anywhere in the world for fear that they will be subject to frivolous lawsuits in US courts (26th January 2004).

The concerns of Niles is not hard to explain when one considers the point that as at 2003, plaintiffs using ATCA had sued more than 50 TNCs doing business in the developing countries, alleging more than 200 billion dollars in actual and punitive damages (*Interpress Services*, 29 July 2003). The US Department of Justice has joined in the chorus of castigating ATCA. The current Administration has affirmed that ATCA could undermine the efforts on the GWOT or the Global War on Terror. Moreover, not only are there floodgates concerns but the Department equally desires to ensure that the hands of the Supreme Court are kept off the realm of foreign policy given that ATCA has been widely interpreted in a manner as to target state agents of alien Sovereigns. It should be noted that ATCA cases hinging on other Sovereigns may be deleterious for US foreign policy options. Such was the argument used in the suit filed against President Mugabe (*supra*).

None the less, Human Rights Watch has insisted in a slot entitled *Myths and Facts about the Alien Tort Claims Act*¹¹ that most of the arguments highlighted above are untenable and invalid. On the argument regarding foreign policy concerns, the organisation intimates that courts carefully weigh whether or not such suits harm US foreign policy

¹⁰ Their positions on the matter contrast with the stance of Archbishop Desmond Tutu.

¹¹ <http://www.hrw.org/campaigns/atca/myths.htm>

interests and that the State Department is routinely seized of such matters for clarifications in situations of doubt. With respect to the point that ATCA suits discourage investments the NGO is quick to retort that ATCA cases have not deterred TNCs in their resolve to pursue business opportunities. For example, despite ATCA cases brought against Shell in 1997, it embarked on an 8.5 billion dollars Nigerian investment program scheduled to run for about ten years. Another valid argument that Human Rights Watch tenders is that victims of host states who often lack (or are deprived of) efficient judicial systems, have been offered a seldom and vibrant opportunity via the ATCA mechanism, to seek justice denied them in their countries. Furthermore and to neutralise the floodgates argument, the group notes that as at 2003, only 25 suits had been filed against companies. They collate this figure against the 250,000 civil proceedings commencing annually in the US federal courts and 15 million civil suits filed in state courts. Opining that courts have approached ATCA suits with caution, the human rights group argues further that at least eight of the 25 cases have been dismissed before proceeding to trial and that no damages had been awarded as at 2003.

We deduce two points from the Wiwa cases. First, local courts or courts in countries that host the subsidiaries of TNCs usually come under daunting corporate pressure and vested political interest that are totally detached from the plight of the poor majority. As such courts may either be unable or unwilling or both, to leap straight into the faces of TNCs that disregard human rights or abet Governments that do as much. The second point is that external jurisdiction as conferred by ATCA or the Belgian law on Universal Competence is a possible option that could be used to deter certain TNCs. However, the sustainability of such systems or access to the same is hardly guaranteed. An alternative route could be to address complaints to an African court with transnational remit grounded on consensus.

The ACrthPR presents a rare occasion and opportunity upon which Africans (individuals and groups) ought to capitalise. Political will to make the machine work is indispensable. The prospects and potentials of the newly established ACrthPR in playing a key role as a

check on TNCs that violate human rights can only be promising. It is to this latter submission that we now escort our minds.

Part Three – The Potentials of the ACrtHPR in sanctioning TNCs that violate human rights

The African Commission on Human and Peoples' Rights (The Commission) was also seized of the Wiwa case. The hearings were equally based on the facts as brought under ATCA. In *International PEN, Constitutional Rights, Interrights au nom de Ken Saro Wiwa Jr. et Civil Liberties Organisation of Nigeria c/ Nigeria*¹² the Commission ruled against the Nigerian Government that there had been a violation of arts. 5, 6, 7, 9(2), 10(1), 11, 16 and 26 of the African Charter on Human and Peoples' Rights. Yet it was its silence on the role of Shell that is unsettling. To our minds the hearings revealed two interesting points.

First, the Commission remained faithful to its state-centric approach towards the protection of human rights. As such, it simply looked *over* the role of non-state corporate actors such as TNCs (Shell and Chevron) in the perpetration and/or abetting of the said human rights scandals. This non-comprehensive approach to human rights betrayed the Commission's myopia in realising that in some African polities (such as Nigeria-specifically in the 1990s), which were in a state of *perpetual transition*, succeeding juntas simply rendered futile the engagements and responsibilities of their predecessors. This picture was in stark contrast with the relative continuity enjoyed by the TNCs that operated in the oil sector. Some would retort that the Commission only had a specific mandate to apply the Charter and nothing more. But this opinion is insular given that it falls short of appreciating the fact that the Commission had a flexible mandate and remit to constrict and expand its province within the terms of the Charter - as it saw fit. It decided to allow formidable chances for change to slip off. An open interpretation of arts 2 and 5 of the Charter that proscribes torture and accords the right over the disposition of

¹² See *Compilation des Decision Sur Les Communications de la Commission Africaine des Droits de l'homme et des Peuples*, 1994-2001, Institut pour les Droits Humains et le developpement (IDHD)

wealth to the people, respectively, - could have been rendered in such a manner as to target states as well as non-state private violators such as TNCs.

The second point is that of the Commission's weak legal teeth. This problem can be analysed from two perspectives. On the one hand the body lacked the sufficient resources to implement its rulings (Ankumah, 1996:196-197). On the other, the instability and institutional breakdown in most of the states served as a pretext to flout the decisions of the organ.

The newly created ACrthPR cannot afford the luxury of mimicking the mistakes of the Commission. The timid and complacent option of the Commission vis-à-vis the sanctioning of TNCs that violate human rights, contrasts the relative progress made in other areas (America, Australia and Europe) on this specific issue. The Protocol¹³ that established the court explicitly provides in art.3 that the court has jurisdiction in interpreting and applying the Charter. Its competence regarding amicable dispute settlement encoded in art.9 can be invoked by TNCs to avoid protracted and expensive suits which may result in an event of the court applying art.27 pertaining to its powers to award fair compensation or reparation in the aftermath of a violation.

The task of executing the orders of the court has been conferred on the Council of Ministers: art.29. However, mindful of the fact those politicians (members of the said Council of Ministers) may have their own agenda, excesses and weaknesses and cognisant of the fact that states may evoke the dubious argument of resource deficits as reasons for not implementing court decisions, certain options are worth considering. The court could be assigned a wing or unit of independent bailiffs and a limited number of special judicial police forces pulled from committed member states. A team of independent prosecutors should be elected by the judges. This team ought to be accorded the charge of prosecuting, promoting and protecting human and peoples' rights. It will not be too ambitious a plan to entirely scrap off the Commission and introduce a panel of

¹³ Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court of Human and Peoples' Rights, 9 June 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (HI)

the aforementioned independent prosecutors in its place. The merits of such a scheme are not small. Also, the non-permanent nature of the duties of judges is worrying. Permanent presence will allow them to closely monitor and adjudicate as and when necessity dictates. Very difficult reforms need to be worked out that would reflect the mutations of our fast-globalising and globalized world. The idea of ‘only the state is violator’ should be discarded. A comprehensive approach is vital. The African Court of Human and Peoples’ Rights represents a beacon of hope in this regard.

Conclusion – It is entirely in the interest of TNCs to respect human rights

In the terse presentation above, we have reviewed the responsibilities of private persons –TNCs - in the respect of International Human Rights Law. We have analysed the position of International Law, the approach of the EU and the options chosen by some courts in the US in addressing the complaints of victims against the violation of human rights by Big Businesses. We equally asserted that the establishment of the ACrtHPR represents a rare and rich opportunity for peoples, states and TNCs alike to proffer their concerns before this hallowed instance of justice. Be that as it may, the onus rests on academics and other stakeholders to make TNC directors understand that it pays to respect human rights and that human rights is good for business (Mushlinski, 2001:38). The erstwhile UN Human Rights Commissioner, Mary Robinson, is on record for having opined that “business needs human rights and human rights needs business”.¹⁴

The implications of such a statement are not hard to seek. First, the goodwill of companies is a function of a solid reputation. Companies need not sully their market potentials in the quagmire of meaningless acts of human rights violations. The media is always fast to pounce on TNCs with untidy profiles once they are in possession of prejudicial material. Quoted companies often experience a plummet in their share values on stock markets as soon as reports are revealed that suggest sordid activities.

¹⁴ Mary Robinson, *The Business Case for Human Rights*, in Financial Times Management; Visions of the Ethical Business (London; Financial Times Professional, 1998, 14)

Companies that treat their workers humanely with respect and dignity constitute a focal point of attraction to aspiring workers. The reverse holds true for corporations that disregard human rights. Furthermore, a corporation that respects its consumers, its employees and the local population will gain their respect and win their unblemished protection.

All in all, TNCs need to be comforted by the idea that the long term benefits of respecting human rights considerably set off any apparent bogus short and medium term cost of the same. But is it not said that he who takes the bonus takes the onus?

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