

CHAPTER THREE

CURRENT MECHANISMS FOR SEEKING REDRESS FOR OIL POLLUTION INJURIES IN NIGERIA

3.1 Introduction

In the previous chapter, the influence of British colonial rule, laws and common law principles on the legal and regulatory framework of Nigeria's oil industry was alluded to. This has implications for the viability or otherwise of current mechanisms for seeking redress for injuries suffered as a result of oil pollution in the Niger Delta. In this chapter, specific aspects of the legal framework, currently utilized by claimants for addressing the harm caused by oil pollution will be discussed. As will be shown, while a range of options exist, current mechanisms are based mainly in common law tort actions in trespass, nuisance, negligence and strict liability. The chapter will demonstrate that the challenges faced by victims using these causes of action and the limited remedies they provide justify the need to explore other options in human rights law, which in appropriate cases may deliver better outcomes.

In over 50 years of Nigeria's active involvement in the oil industry, these common law tort actions do not appear effective enough to ameliorate the incidents of pollution. Research carried out over a period of three decades by Oyinge in 1979¹, Adewale in 1989² and Frynas in 1999³

¹ P.U. Onyige *The Impact of Mineral Oil Exploitation on Rural Communities in Nigeria: The case of Ogba/Egbema District*, PhD thesis at the Centre of West African Studies, (University of Birmingham, Birmingham, 1979), 105, 148-149, found that out of 600 unsettled compensation claims in Rivers State alone, only 6 were pending in the courts.

² O. Adewale, "Oil Spill Compensation Claims in Nigeria: Principles, Guidelines and Criteria", (1989) 33 *Journal of African Law*, 91, 93, found that of 1081 compensation claims made between 1981 and 1986, 124 claims were settled and only 24 claims went to court.

show a pattern which suggests that only a small proportion of cases arising from oil industry operations reach the courts, in a country where at least three oil spills occur daily.⁴ The consensus appears to be that the dearth of litigation is due in part to the difficulties in establishing liability as well as the very high cost of litigation, which the majority of victims could not afford, leaving them without a remedy.⁵ Even those who successfully litigate are left with a less than effective remedy as emphasis is placed on compensation and monetary awards than other injuries such as damage to their economic and social wellbeing, culture and the natural environment,⁶ which are not easily or immediately quantifiable. Monetary awards compensate against quantifiable damages, as the courts could not, for instance decree against future pollution nor warrant against latent damage to health and other impacts of oil industry activities on the people. Other options open⁷ to victims include litigation in the home state of the IOCs, which prospects are equally daunting, if not more so.

³ Frynas reported that between 1981 and 1986, only 24 suits were instituted against Shell (which is the highest as against the other oil companies), and that number rose to only about 350 in 1998. J.G. Frynas, "Legal Change in Africa: Evidence from oil-related litigation in Nigeria", (1999) 43, *Journal of African Law*, 121-150.

⁴ See P. Naagbantou, "Shell has admitted liability but has a long way to make amends", *The Guardian Newspaper*, 4 August, 2011, online at <http://www.guardian.co.uk/environment/2011/aug/03/shell-liability-oil-spill-clean-up>, (last visited on 4/08/2011). In a recent report, it was indicated that it would take 30 years to clean up the Niger Delta oil spills and cost over \$1 billion. See also UNEP, *Environment Assessment of Ogoniland* (UNEP; Kenya, 2011), online at http://www.01_fwd_es_ch01_UNEP_OEA.pdf, (last visited on 8/08/2011).

⁵ The common law is said to have a poor history in resolving environmental disputes, as these were settled mainly by reference to statutes in Victorian times. Also the development of the common law was restricted by very practical considerations that the poor often suffered most from pollution, and yet could least afford to engage in litigation relating to pollution, and had a simple choice: tolerate environmental problems or move elsewhere. See J.P.S. McLaren "Nuisance Law and the Industrial Revolution – Some Lessons from Social History", (1983) 3, *OJLS*, 155 quoted by R. Cocks, "Victorian Foundations", in J. Lowry and R. Edmunds, *Environmental Protection and the Common Law*, (Hart Publishing, Oxford, 2000), 1-26, 1-2.

⁶ See M. Bowman, "The Definition and Valuation of Environmental Harm: An Overview", online at <http://www.fds.oup.com/www.oup.co.uk/pdf/0-19-92557-3/pdf>, (last accessed on 24/12/2011).

⁷ A number of statutes such as the Land Use Act, 1978, the Petroleum Act, 1969, the Oil Pipelines Act, 1969 and the Environmental Impact Assessment Act, 1992, the NESREA Act, 2007, the NOSDRA Act, 2006, all include provisions for compensation or penalties for oil pollution, but these are invoked either in aid for quantifying or assessing compensation payable to victims (which in most cases are less than the recommended rates) or include provisions which if properly applied are tools in the hands of regulators to monitor or penalize erring Operators. There are also criminal sanctions provided by the criminal code for the most egregious pollution cases, but is rarely used in Nigeria. See E. Emeseh, *Regulatory and Institutional Framework for Enforcing Criminal Liability for Environmental Damage: A Study of the Oil Industry in Nigeria*, PhD Thesis (University of Dundee; Scotland, 2005).

As a result of the limits and challenges of common law actions, a gap appears to exist, since the remedies⁸ provided by these methods of seeking redress have failed over the years to ameliorate, let alone curb, the menace of oil pollution in the Niger Delta. If anything, the incidents of pollution and human rights violations have increased over the years, with the result that the Niger Delta has degenerated into an impasse in which the oil producing communities are pitched against the Government and the IOCs operating in the area. The ramifications of this impasse is far-reaching, not least for attracting a growing theory that while the majority ethnic groups in Nigeria who hold political power, are free to live in a relatively healthy environment and enjoy the fruits of oil wealth produced from the Niger Delta, the minority and indigenous groups in the Niger Delta who bear the brunt, are left to wallow in poverty and face environmental cataclysm and selective victimization by the Nigerian Government.⁹

The chapter examines the current mechanisms for seeking redress for oil pollution injuries, in two broad sections. The first section discusses the common law tort actions, while foreign litigation will be discussed in the second section. In discussing the common law tort actions, it

⁸ Damages under the common law follow a fourfold typology of measuring interests, including 'expectation interest' (used to place the plaintiff in the position he would have been in had the contract been performed), 'reliance interest' (intended to restore to the plaintiff any losses suffered as a result of the defendant's breach of duty and measured by an amount that will put the plaintiff in the position he would have been in had the wrong not been done), 'restitution' (intended primarily to strip the defendant of any gains earned as a result of the wrong), or 'retribution' (intended to punish the defendant or to deter certain conduct). Each of these measures protects and promotes a different form of justice, and the choice of remedy in any situation will turn on the court's assessment of the legitimacy of the interests asserted by the parties and the purposes of the law in the circumstances. See J. Cassels and E. Adjin-Tettey, *Remedies: The Law of Damages*, Second Edition (Irwin Law Inc.; Toronto, 2008), 6-7.

⁹ See T. Agbola and M. Alabi, "Resource Development, Environmental Injustice and Selective Victimization: A Case study of the Niger Delta Region of Nigeria", in J. Agyman, *et al*, *Just Sustainabilities: Development in an Unequal World*, UNDP Niger Delta Human Development Report, (Earthscan Publications; London, 2003), 269-288. The recent UNEP Report on the Niger Delta admitted that the findings underline that there are, in a significant number of locations, serious threats to human health from contaminated drinking water, to concerns over the viability and productivity of ecosystems. In addition, that pollution has perhaps gone further and penetrated deeper than many may have previously supposed. See also P.K. Inokoba and D. L. Imbua, "Vexation and Militancy in the Niger Delta: The Way Forward", (2010) 29(2), *Journal of Human Ecology*, 101-120. For a recent discussion on this topic and the link between environmental degradation and security, see E. Emeseh, "The Niger Delta Crisis and the Question of Access to Justice" in C. Obi and S.A. Rustad, (Eds.), *Oil and Insurgency in the Niger Delta: Managing the Complex Politics of Petro-violence* (Zed Books; London, 2011), 55-70, 57.

will be demonstrated that as part of the colonial legacy, English common law tort principles in trespass,¹⁰ nuisance, negligence and strict liability, were received into the jurisdiction and formed part of Nigerian law. To establish any of these causes of action, a claimant must overcome the formidable burden of proving causation, foreseeability and damage. The technicalities and costs of litigating any of these actions are not only difficult for local people, but also unaffordable, leaving the majority of those who suffer damage unable to sue and therefore, without a remedy. Besides, only those who can afford to sue and are successful benefit from awards of compensation, even though the damage may be suffered by a wider population. Apart from that, most victims of oil pollution are not necessarily motivated by financial gains, so that the common law's preoccupation with monetary awards does not go far enough. These and other issues such as the ownership of petroleum resources or of the surface rights in land are not matters within the purview of common law tort actions, yet may be addressed in human rights actions. Also, the second section will demonstrate that although victims have the option of instituting litigation in the home countries of the IOCs operating in the area, the cost, complexity and inconvenience of suing in a foreign land is not only daunting for local people (and for whom these jurisdictions are alien), but also the procedural hurdles to be endured are enormous.

These discussions will show that while the remedies provided by common tort actions as well as foreign litigation are options open to victims, and have been utilized over the years for redressing injuries suffered, the limitations inherent in them have not provided an adequate remedy or cannot be utilized by all those who suffer damage, justifying the need to consider an alternative cause of action in human rights.

¹⁰ Although trespass is rarely used in redressing oil pollution injuries in the Niger Delta, the reason for discussing it is that it appears less tedious than the other causes of action to establish.

3.2 The Common Law

The received English common law rules which are a source of Nigerian law remain part of her legal system till date.¹¹ These common law rules include the torts¹² of trespass to land, negligence, nuisance and the rule in *Rylands v. Fletcher*.¹³ Their relevance in modern environmental litigation as relates to the liability of a polluter whose activities cannot be reasonably foreseeable, remains uncertain.¹⁴ Although Bowman suggests that in such instances, these remedies may be unreliable and unhelpful,¹⁵ they are the most utilized recourse available to victims,¹⁶ in the absence of alternative causes of action. In deed as Amokaye noted, the common law plays a vital role in environmental protection where pollution exceeds the minimum statutory threshold and caused personal or proprietary damage.¹⁷ They are useful not only for claims for monetary compensation but sometimes for injunctive relief, to avert future pollution.¹⁸ The discussions that follow will show that in almost all cases relating to damage caused to property during seismic activities,¹⁹ pollution of farmlands, streams, fishponds, oil blowouts and

¹¹ The common law of England and the doctrines of equity as a source of law in Nigeria date back to Ordinance No. 3 of 1863, which introduced English law into the Colony of Lagos by the British colonial administration. Current legislation, which received English laws into Nigeria include the Interpretation Act Cap. 192 Laws of the Federation of Nigeria, 1990, section 45 thereof. See also J. Asein, *Introduction to Nigerian Legal System*. (Sam Bookman Publishers; Ibadan, 1998), 92-108; A. Obilade, *The Nigerian Legal System*. (Sweet and Maxwell: London 1979), 55.

¹² Described as “The breach of a legal duty which affects the interests of an individual to a degree which the law regards as sufficient to allow that individual to complain on his or her own account rather than as a representative of society as a whole”. Quoted by J. Murphy, *Street on Torts*, 12th Edition (Oxford University Press; Oxford, 2007), 3; See also R.P. Balkin and J.L.R. Davis, *Law of Torts*, 4th Ed. (LexisNexis Butterworths, Australia, 2009), 4. For a historical and philosophical foundation of Tort, see D.G. Owen, (ed.), *Philosophical Foundations of Tort Law*, (Clarendon Press; Oxford, 1995); and A. Calnan, *A Revisionist History of Tort Law: From Holmesian Realism to Neoclassical Rationalism*, (Carolina Academic Press; North Carolina, 2005).

¹³ (1866) L.R. [Ex 265; (1868) L.R.] H.L. 330 [hereinafter, ‘*Rylands v Fletcher*’].

¹⁴ O. Amokaye, *Environmental Law and Practice in Nigeria*, (University of Lagos Press; Lagos, 2004), 33.

¹⁵ M. Bowman, ‘Nuisance, strict liability and Environmental Hazards’, *Environmental Law*, (1995) *Environmental Liability*, 105.

¹⁶ Even in England, the common law remains a source of environmental litigation although now of limited utility in view of more recourse to statute law. See the dictum of Lord Goff in *Cambridge Water Co. Ltd v. Eastern Counties Leather plc* (1994) 2 AC 264, 305.

¹⁷ Amokaye, *ibid*, 37.

¹⁸ *Ibid*, 33.

¹⁹ See *Shell-BP v. Usoro* (1960) SCNLR 121; *Seismograph Service v. Omokposa* (1972) 1 All N.L.R. (Pt. 1) 347.

leakages,²⁰ as well as pollution caused by continuous gas flaring,²¹ are based on common law tort actions. The applicability of each of these common law principles will now be examined, to highlight their strengths, weaknesses and limitations for combating the menace of oil pollution in the Niger Delta.

3.2.1 Trespass to Land

Trespass to land is the unjustifiable interference or intrusion by one person on the land of another.²² Such interference may be physical, or by causing or allowing an object to intrude on another person's land.²³ The interference may be in the form of wrongfully entering the land, remaining there after the right of entry has ended or by placing a material object on the land.²⁴ Based on this principle, an action may lie in trespass for the intentional entry and/or dumping of refuse or toxic waste on a person's land by another without lawful justification.²⁵ The defendant remains liable even where he was under the mistaken belief that the land in question was his.²⁶ However, for an action to lie, the defendant's conduct must be intentional rather than careless or unreasonable, and the resultant damage must be direct and not merely an indirect consequence of the defendant's actions or activities.²⁷ In essence, the act complained of must be a direct part of the act rather than a consequence of it.²⁸ In oil related pollution cases, this includes for instance, placing waste or noxious substances on the boundary so that they fall onto or come into contact

²⁰ *Ogiale v. Shell* (1997) 1 N.W.L.R. (Pt. 480) 148; *Shell v. Farah* (1995) 3 N.W.L.R. (Pt. 382) 148.

²¹ *Chinda v. Shell-BP* (1974) 2 R.S.L.R. 1.

²² G. Kodilinye, *Nigerian Law of Tort* (Spectrum Law Publishing Co.; Ibadan, 1992), 93.

²³ Per Uwais Ag. C.J. (as he then was) in *Alhaja Salamota v. Adamu Yola* (1976) 1 NMLR, 115, 117.

²⁴ G. Kodilinye and O. Aluko, *The Nigerian Law of Torts 2nd ed.*, (Spectrum Law Publishing; Ibadan, 1999), 182.

²⁵ A A Owolabi, "An Examination of the Legal Framework for the control and Management of Pollution in Nigeria", (2003) 45(1), *Journal of Indian Law Institute*, 61.

²⁶ *Conway v. George Wimpey & Co Ltd* (1951) 2 KB 266, 273.

²⁷ Amokaye, *supra* note 14, 43.

²⁸ See the *Prior of Southwark's Case* (1498) YB 13.

with the plaintiff's land,²⁹ or spills from pipelines, storage facilities or sludge and other wastes generated by or during oil exploration and production activities.

In spite of the regular incidents of oil pollution which directly and indirectly affect and interfere with the land of victims of oil pollution in the Niger Delta, there is a dearth of cases in which claimants have based their action on trespass. Indeed, Fekumo argues that trespass to land has not been directly pleaded in any oil pollution litigation in Nigeria,³⁰ which is unfortunate as it may well be easier to prove than the other tort actions. However, this situation may not be unrelated to the perceived difficulty of proving that the defendant's act was intentional or deliberate. Usually, to prove intention, the plaintiff will have to adduce evidence showing that the act was carried out by the defendant with full knowledge of the consequences of his action and the desire to produce them. Although proving intention may be difficult, yet in practice, the courts would presume the defendant's intention from what he said or did and other surrounding circumstances.³¹ In cases of oil spills for instance (especially where pipelines are old and not adequately monitored or maintained), the burden of proving 'intent' may be easier to discharge than is generally perceived, as a party may in certain circumstances be considered to intend that which is the necessary consequence of his act.³² Yet, even though trespass to land would have offered respite in oil-related environmental pollution, it has not been explored in oil pollution cases in Nigeria.

²⁹ *Simpson v. Weber* (1925) 41 TLR 302. See also, *Westripp v. Baldock* (1939) 1 All ER 279.

³⁰ J. Fekumo, 'Civil Liability for Damages Caused by Oil Pollution' in J. Omotola (ed.), *Environmental Law in Nigeria Including Compensation* (University of Lagos; Lagos, 1990) 256.

³¹ *R v Harvey* (1823) 107 ER 379; G. Kodilinye, *Commonwealth Caribbean Tort Law, 3rd Edition*, (Cavendish Publishing Limited; Ibadan, 2003), 6.

³² *R v Harvey* (1823) 107 E.R. 379, 383.

3.2.2 Negligence

Negligence in law is the breach of a legal duty to take care, which results in damage to the plaintiff.³³ It connotes the concept of duty owed by a person (the defendant), breach of which occasions damage to the person (the plaintiff) to whom the duty is owed.³⁴ In other words, a party who asserts that another was negligent must prove the cause of the harm; that the harm or injury should have been reasonably foreseen and, that he was in close proximity of the harm from which he suffered damage.³⁵ The House of Lords in *Caparo Industries v. Dickman*³⁶ laid down three criteria for imposing a duty of care on a defendant. They include: (a) the damage must be foreseeable (bearing in mind the kind of harm involved); (b) there must be a relationship of proximity between the claimant and the defendant; and (c) it must be fair, just and reasonable in the circumstances for a duty of care to be imposed on the defendant.³⁷ This duty is owed only to the individual within the scope of the risk created and not to the whole world, as a cause of action subsists only if it involves the invasion of a legally protected interest or the violation of a right. In practice, what amounts to negligence will depend more on the facts of each case and in the context of “existing authority” than on the general application of the above principles of law.³⁸

Consequently, what will amount to negligence in the oil industry will depend on the facts of each case, but the first ingredient to establish is that the defendant was careless or negligent in the

³³ G. Kodilinye and O. Aluko, *The Nigerian Law of Torts 2nd ed.* (Spectrum Law Publishing, Ibadan, 1999), 182.

³⁴ Lord Atkin in *Donoghue v Stevenson* (1932) AC 562, HL, at 580. See also, *Anthony Atubin v. Shell-BP* Suit No UHC/48/73.

³⁵ See *Chief Patrick A. Abusomwan v. Mercantile Bank of Nigeria Limited* (1987) 3 NWLR (Pt. 60) 196 at 208-209; (1987) 6 SC, 303, 334-335.

³⁶ (1990) 2 WLR 358.

³⁷ Murphy, *supra* note 12, 33.

³⁸ *Ibid*, 31; Amokaye, *supra* note 14, 45-46.

exercise of a specific duty to take care.³⁹ In *Seismograph Services (Nigeria) Ltd v. Mark*⁴⁰ the plaintiff claimed compensation for damage suffered due to the destruction of his fishing nets by a seismic boat. The court held that the tearing of the nets by the boat did not sufficiently prove negligence on the part of the defendant, or that they breached a duty of care towards him.⁴¹ While the plaintiff is required to prove that pollution was caused by the defendant's failure to observe 'good oil field practice' as required by law, this burden is especially difficult to discharge where the plaintiff does not possess the special knowledge necessary to do so. Amokaye noted that to establish fault, it will be necessary to prove the date the scientific information became available and known to the defendant company, or when they should have known that the process would cause the harm, or alleged harmful emission.⁴² Indeed, knowledge and availability of information are essential to establish foreseeability without which no duty of care can arise.⁴³ In *Seismograph Services (Nigeria) Limited v. R.K. Ogbeni*,⁴⁴ the plaintiff claimed that the shooting operations carried out by the defendant appellant while prospecting for oil caused extensive damage to his buildings. Although an employee of the company gave evidence that the house did not have cracks before the shooting operations, the plaintiff's case failed on grounds that he could not prove the negligence of the defendants as it was not 'within his knowledge'. Similarly, in *Chinda v. Shell-BP*⁴⁵ the plaintiffs sued for the heat, noise and vibration resulting from the negligent management and control of the flare set used during gas flaring operations, which resulted in damage to their property. The court held that they could not

³⁹ Lord Atkin in *Donoghue v Stevenson*, supra note 34, ibid.

⁴⁰ (1993) 7 NWLR (Pt. 304) 203.

⁴¹ Per Uwaifo, JCA, 214.

⁴² Amokaye, supra note 14, 41.

⁴³ Ibid.

⁴⁴ (1976) 4 SC, 85.

⁴⁵ (1974) 2 *Rivers State Law Report*, 1. See also, *Seismograph Services (Nigeria) Limited v. Bennedict E. Onakpasa* (1972) 4 SC 123.

prove any negligence on the part of the defendants in the management and control of the flare set, and therefore their action must fail.⁴⁶

The above cases confirm, as Osipitan noted, that in oil operation cases, the plaintiffs, not being knowledgeable in the technical details of oil exploration, are required to prove breach of technical standards, which may be difficult,⁴⁷ This difficulty may be compounded by their inability either to afford the additional cost, or of providing expert's witness of quality, compared to the oil companies, and/or conducting tests in order to prove their cases.⁴⁸ Where such expert opinion is not adduced in these cases, the court is bound to act on the unchallenged or uncontroverted evidence of the defendant's 'expert' witness,⁴⁹ who in most cases are engaged by the oil companies either as staff or consultants and who often adduce evidence to show that the oil companies engage in good oil field practice, even where there is physical evidence to the contrary.

In these circumstances, the plaintiff may rely on the principle of *res ipsa loquitur*,⁵⁰ and all the plaintiff is required to prove is that the thing which caused the damage was under the management and control of the defendant, and that in the ordinary course of events, the injury

⁴⁶ See also *Anthony Atubin v. Shell-BP* Suit No UHC/48/73. But see, *Chief Simon Onajoke v. Seismograph Services (Nigeria) Limited* Suit No. SHC/28/67 delivered on January 29, 1971 by a Sapele High Court.

⁴⁷ T. Osipitan, 'Problems of Proof in Environmental Litigations' in J.A. Omotola (ed.), *Environmental Laws in Nigeria, Including Compensation* (University of Lagos; Lagos, 1990), 112-115. Also, F. Erhonselé, 'The Onus of Proof in Cases of Environmental Degradation in Oil Related Litigations: A Case for Change in Attitude of Nigerian Courts', in Atsegbua (ed.), *Selected Essays on Petroleum and Environmental Law* (University of Benin; Benin City, 2000). See also, O. Akanle, 'A Legal Perspective on Water Resources and Environmental Development Policy in Nigeria', *Nigerian Law Journal*, (1981) 12(1), 14.

⁴⁸ See generally, A. Adedeji, and R. Ako, 'Hindrances to Effective Legal Response to the Problem of Oil Pollution in the Niger Delta', *UNIZIK Law Journal*, (2005) 5(1), 415-439.

⁴⁹ Per Sowemimo, JSC in *Seismograph Services Ltd v Ogbeni* (1976) 4 SC 85.

⁵⁰ The maxim literally means 'the thing speaks for itself'.

should not have happened unless there was want of care.⁵¹ Three conditions are required to be met in order to rely on this principle successfully. Firstly, the plaintiff must prove that the accident occurred. Secondly, he must prove that the accident would not have occurred ‘in the ordinary cause of things without negligence on the part of somebody other than the plaintiff’. Thirdly, the facts should suggest that the defendant, not the plaintiff was negligent.⁵² In *Mon v. Shell-BP*,⁵³ the plaintiffs claimed compensation for damage from an oil spill. The court deciding in their favour, held that: ‘[N]egligence on the part of defendants has been pleaded, and there is no evidence of it. None in fact is needed, for they must naturally be held responsible for the results arising from an escape of oil which they should have kept under their control’.⁵⁴ Fekumo opines that this principle is also applicable if a well blow-out causes widespread oil spill that results in damage to life and property.⁵⁵ Although, the principle is easier to apply in oil spill incidents where damage caused by oil operations is manifest, nonetheless, it is not conclusive in itself as the defendant may rebut it by adducing expert evidence to show that he took all reasonable care and acted in accordance with standard industry practice.⁵⁶ Where the defendant is able to establish that the incident occurred without negligence, the burden shifts back to the plaintiff.⁵⁷ Therefore, this shifting of the burden of proof may cause injustice in situations where the plaintiff establishes damage but the defendant is able to prove lack of negligence and therefore, no compensation is awarded, yet the plaintiff has suffered damage, sometimes substantial damage.

⁵¹ Per Karibi-Whyte JSC, in *Aliu Bello and Others v A.G. of Oyo State* (1986) 12 SC 1, 93-94, Kazeem JCA., in *Lagos University Teaching Hospital v Yemi Lawal* (1982) 3 FNR 184, 193.

⁵² J. Frynas, *Oil in Nigeria: Conflict and Litigation between Oil Companies and Village Communities* (Transaction Publishers, 2000), 191.

⁵³ (1970-1972) 1 RSLR 71.

⁵⁴ Per Holden CJ, 73.

⁵⁵ Fekumo, *supra* note 30, 271.

⁵⁶ *NEPA v Role* (2000) 7 NWLR (Pt 663) 69.

⁵⁷ Morris, LJ in *Roe v Ministry of Health* (1954) 2 All ER 131 at 139. See also, *Shell v. Enoch* (1992) 8 NWLR (Pt. 259) 335.

3.2.3 Nuisance

Nuisance refers generally to an act, omission or interference which causes disturbance or annoyance to a person in the exercise or enjoyment of:

- (a) a right belonging to him as a member of the public (when it is public nuisance) or,
- (b) his ownership or occupation of land or of some easement or other right, used or enjoyed in connection with land (when it is private nuisance).⁵⁸

In essence, there are two categories of nuisance; private and public nuisance, and a defendant may be held liable whether or not the act is intentional. The rule governing nuisance was an absolute one, which allowed no exception to the disturbance of a landowner's right to enjoy his property and rejected any form of justification for the harmful act, including the utilitarian concept of public good. In *Bamford v. Turney*,⁵⁹ Bramwell, J rejected public policy considerations and noted that to gauge the proper cost of an activity, the injury caused to outsiders must be taken into account. According to him, a law is bad which, for the public benefit, inflicts loss on an individual without compensation. The increase in industrial use of land for activities other than agriculture however compromised this position of the law. Subsequently, there arose conflicts between the uses of land (by industrialists for example) for purposes beneficial to themselves against the rights of their neighbours to enjoy their property without 'offensive disturbances'. The courts thus had to reconsider the issue of property rights in order to resolve the conflicting claims on the right to use and enjoy property. The major issue for the courts at this stage was to determine whether to adopt a plaintiff-centred approach that emphasized private property rights or a defendant-centred view that placed emphasis on the

⁵⁸ Per Eso JSC, in *Ipadeola and Anor. v. Oshowole and Anor.* (1987) 5 SC, 376, 389.

⁵⁹ (1862) 3 B&S 66.

reasonableness of use of land. In essence, the courts had to choose whether to focus on the reasonableness of the harm to the plaintiff or the reasonableness of defendant's conduct.⁶⁰

Clearly, the previous absoluteness of rights was compromised, albeit not on the utilitarian argument that where the defendant's act is for public benefit, it should not amount to nuisance. The compromise was that the defendant is liable in nuisance only when his conduct amounts to an unreasonable use or enjoyment of land which causes an unreasonable interference with the plaintiff's use of his land. As Lord Denning observed in *Miller v. Jackson*,⁶¹ the very essence of a private nuisance is the unreasonable user by a man of his land to the detriment of his neighbour. In essence, the courts have to balance the gravity of the harm caused by the act complained of and its utility. With regard to what will amount to reasonableness, it appears that the test is to determine what would be 'reasonable' given the ordinary usages of mankind living in society. In *Sedleigh-Denfield v. O'Collaghan*,⁶² the court held that interference would be considered unreasonable if (1) the conduct involved a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience; or (2) the conduct was of a continuing nature or produced permanent or long-lasting effect upon the public right. The above appears to be conditions for claims based on public nuisance. Where a private nuisance is alleged, the plaintiff will also have to establish that he suffered some degree of damage.⁶³ What amounts to reasonableness thus depends on the act itself and other surrounding circumstances such as the nature and extent of the damage, the locality of the

⁶⁰ Amokaye, supra note 14, 38-39.

⁶¹ (1977) QB, 966.

⁶² See *Sedleigh-Denfield v. O'Collaghan* (1940) AC 880.

⁶³ *Seismograph Services Ltd v. Akporuovo* (1974) 6 SC 119.

alleged nuisance,⁶⁴ its duration,⁶⁵ purpose for which the claimant uses the land and that of the defendants. It is noteworthy that many of the early nuisance actions were based on claims of noxious odors, noise and vibration, flooding or depositing of toxic substances.⁶⁶

Indeed, such acts are associated with the oil industry and have been the cause of oil-related litigation in the Niger Delta. But many of these actions have not been successful as the courts often conclude that nuisance is of a public nature, to be redressed only by the Attorney-General,⁶⁷ as public nuisance was regarded as a crime and therefore actionable by the state.⁶⁸ Generally, failure to bring an action in relation to an act of public nuisance by the Attorney-General will render it procedurally defective and incompetent.⁶⁹ Thus, an action brought by a whole community will not succeed in the absence of proof of loss by each individual member over and above those of other members of the community.⁷⁰ In the same vein, an individual may bring an action for public nuisance only if he could establish that as a result of the nuisance he suffered damage over and above the other members of the general public.⁷¹ This difficulty is apparent in cases of oil-related pollution where the damage is not usually limited to private

⁶⁴ *St. Helen Smelting Co v. Tipping* (1865) 11 HL C 642.

⁶⁵ *Abiola v. Ijeoma* (1970) All NLR 569.

⁶⁶ See for instance, *Tebite v. Nigerian Marine Co Ltd* (1971) 1 UILR 432; *AG v. Cole* (1901) 1 Ch. 205; and *Adams v. Ursell* (1913) 1 Ch. 296.

⁶⁷ Murphy suggests that nuisance law whether private or public now plays only a limited role (although not redundant) in the protection of the environment as a result of the steady growth in popular concern for the protection of the environment and the implementation of statutes and planning regulations imposing a system of regulation and enforcement, which render common law a secondary means of protection. See Murphy, *supra* note 12, 421-422. Lord Goff stated in *Cambridge Water Co. Ltd v. Eastern Counties Leather plc* (1994) 2 AC 264, that “so much well-informed and carefully structured legislation is now being put in place to effect environmental protection that there is less need for the courts to develop a common law principle to achieve the same end, and in deed it may be undesirable that they should do so.” *Ibid*, 305.

⁶⁸ S.234(f) of the Criminal Code Act, Cap. 42, Laws of the Federation of Nigeria, 1958; *Internland Transport Ltd. v. Adediran & Ors.*, (1986) 2 NWLR (Pt 20) 78, 87; Also, per Omosun J. in *Udegbe v. Attorney-General Bendel State and Others* (unreported) Suit No. HAU/9/76 of 25/5/77 High Court Auchi.

⁶⁹ *Lawani and Ors. v. The West African Portland Cement Company Limited* (1973) 3 UILR (Pt.4) 489.

⁷⁰ Per Olatawura JSC, in *Adediran v. Interland Transport*, *supra* note 62, 162.

⁷¹ B.A. Susu, *Law of Torts* (C.J.C. Press Nigeria Ltd; 1996), 67. See also, *Ipadeola and Anor. v. Oshowole and Anor.* (1987) 1 SC 376 at 393.

property but also communal property such as streams, creeks or ponds. For instance, in *Chief A.S. Amos and others (for themselves as individuals and on behalf of the Ogbia Community Brass Division) v. SPDC and Another*⁷² the plaintiffs in their representative capacity claimed special and general damages for injuries suffered as a result of the defendants' deliberate blocking of Kolo Creek in the course of their petroleum operations, which paralyzed agricultural and economic activities in the area. The court held that the Kolo Creek is a public waterway and that its obstruction constituted a public nuisance, and as the plaintiffs failed to prove any damage suffered over and above that suffered by the general public, their action must fail. Their appeal to the Supreme Court was dismissed on grounds that the learned Chief Judge expressed the correct statement of the law.⁷³ It is submitted that this and similar decisions ignored the dictum in *Ballard v. Tomlison*⁷⁴ that 'where the nuisance is an interference with a natural right incidental to ownership then the liability is a strict one', especially as the 'defendant knows or reasonably ought to have foreseen' that the plaintiffs will be damaged if oil escapes into their close.⁷⁵

The distinction between private and public nuisance has now been abolished in Nigeria with the Supreme Court's decision in *Adediran & Ano. v. Interland Transport*⁷⁶ where the court considered the nature of *locus standi* in public nuisance generally. In that case, Karibi-Whyte, JSC held that: '[T]he restriction imposed at common law on the right of action in public nuisance is inconsistent with the provisions of section 6(6)(b) of the Constitution, 1979 and to that extent is void.'⁷⁷ The provisions of this section which is repeated in the 1999 Constitution,⁷⁸ give the

⁷² (1974) 4 ECLR, 486.

⁷³ *Lawani and Ors. v. The West African Portland Cement Company Limited* (1973) 3 UILR (Pt. IV) 489.

⁷⁴ (1885) 29 ChD 115.

⁷⁵ Lord Goff in *Cambridge Water v. Eastern Counties Leather* (1994) 1 All ER 53, 69.

⁷⁶ (1991) 9 NWLR (Pt. 214) 155.

⁷⁷ *Adesanya v. President of the Federal Republic of Nigeria & Another* (1991) 9 NWLR (Pt. 214) 155, 180.

⁷⁸ S. 6(6)(b) of the 1999 Constitution.

courts judicial powers to adjudicate on ‘all matters between persons or between government or authority and to any persons in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person’. In essence, any individual who believes that his rights have been infringed upon may institute action against the perpetrator whether or not it affects his private rights or his rights as a member of a community. Since the abolition of the distinction between private and public nuisance, there has been a rise in the number of cases where an individual has successfully sued an oil company on behalf of a family or the larger community.⁷⁹ The previous distinction no doubt deprived several communities of their right to bring suit for public nuisance, and may have contributed to the frustration and consequent violence in the area. The Attorney General was the only person who could bring an action in public nuisance, but never did, as this would amount to the Attorney General suing the Government of which he is a part and chief legal officer and adviser, and which Government is a joint venture partner in all the IOCs operating in Nigeria.

3.2.4 Strict Liability - The rule in *Rylands v. Fletcher*⁸⁰

The common law strict liability rule, otherwise known as the rule in *Rylands v. Fletcher* was formulated by Blackburn, J. to the effect that where ‘a person who for his own purposes, brings on his land, collects and keeps there, anything likely to do mischief if it escapes, must keep it at his peril, and if he does not do so is prima-facie answerable for all the damages which are the natural consequences of its escape’.⁸¹ But for this rule to apply, the defendant must bring, collect and keep something on his land for his own purpose; the thing must not be naturally there; the

⁷⁹ *Shell Petroleum Development Company Ltd. v. Tiebo* (1996) 4 NWLR (Pt. 445) 657; *Farah v. Shell* (1995) 3 NWLR (Pt 382) 148.

⁸⁰ (1868) LR 3 HL 330.

⁸¹ *Ibid*, 338-340.

thing must be known to be likely to harm if it escapes; the thing must escape; in order for the defendant to be liable for the natural and anticipated consequences.⁸²

The rule imposes strict liability even where the act was accidental and independent of any wrongful intent or negligence on the part of the defendant. This tort appears more readily applicable to oil spill cases than the others. For instance, in *Umudje and Ano. v. Shell-BP*,⁸³ the plaintiffs sued the oil company for damages resulting from an oil waste pit dug during a road construction, and the defendants failed to build adequate culverts around it, leading to diversion of fish that previously entered the plaintiff's artificial ponds and lakes during the rainy season. The court accepted the facts but found that while the defendant company was not liable under the rule in *Rylands v. Fletcher* for the blockage, it was liable for the oil spill.⁸⁴ According to the court: Liability on the part of an owner or the person in control of an oil-waste pit, such as the one located at Location 'E' in the case in hand, exists under the rule in *Rylands v. Fletcher* although the 'escape' has not occurred as a result of negligence on his part.⁸⁵ In respect of the spill from the oil pit, the strict liability rule applied, whereas the rule of negligence did not. On the other hand, in respect of the road construction, strict liability was held inapplicable while the rule of negligence applied. As Frynas noted, 'the rule in *Rylands v. Fletcher* can increase a plaintiff's chances of success in an oil-related case because it requires only the proof of the escape of oil waste rather than the proof of negligence by the tortfeasor.'⁸⁶

⁸² Amokaye, supra note 14, 51.

⁸³ (1975) 5 UILR (Pt 1) 115.

⁸⁴ Per Idigbe JSC, 170-171 and 172.

⁸⁵ Ibid, 172.

⁸⁶ J. Frynas, 'Legal Change in Africa: Evidence from Oil-related Litigation in Nigeria', (1999) 43(2), *Journal of African Law*, 127.

The efficacy of the rule is however limited by the exceptions to the general rule and other defences, which led Scrutton J. to observe in *Smith and Ors v. Schilling*⁸⁷ that ‘there are so many exceptions to it that it is doubtful whether there is much to the rule left.’⁸⁸ The first of these exceptions – the non-natural user – was introduced by Lord Cairns in the *Rylands v Fletcher* case, while the second is the ‘reasonability’ test introduced by Lord Goff in *Cambridge Water v Eastern Countries Leather*.⁸⁹ The ‘non-natural user’ exception stipulates that for the rule in *Rylands v. Fletcher* to apply, the escape must be as a result of a ‘non-natural user’ of the land. The true interpretation of this phrase however is a recurring subject of controversy as there is no objective universal test of what amounts to a non-natural user.⁹⁰ Lord Moulton proffered a definition of the term in *Richards v. Lothian*⁹¹ thus: ‘It must be some special use bringing with it increased damages to others and must not merely be the ordinary use of the land or such a use as is proper for the general benefit of the community.’⁹² The latter limb of this exception could be used to justify the damage or inconvenience suffered by victims of oil pollution in the Niger Delta as the price they must pay for ‘national development’.⁹³ Granted that individuals and groups may suffer inconveniences in certain respects for the public good, this presupposes that they too are beneficiaries of national development. However, there is abundant literature, suggesting that this region remains one of the poorest and under-developed areas of Nigeria.⁹⁴ The courts have wide discretionary powers to determine what will amount to non-natural user of

⁸⁷ (1928) LTR 475, 478.

⁸⁸ Ibid.

⁸⁹ (1994) All ER 53, 69.

⁹⁰ O. Adewale, O., ‘*Rylands v. Fletcher* and the Nigerian Petroleum Industry’, (1988) 8 *Journal of Private & Property Law*, 38.

⁹¹ (1913) AC 263

⁹² Ibid, 280.

⁹³ P. Okonmah, ‘Right to a Clean Environment: The case for the People of Oil Producing Communities in the Nigerian Delta’, (1997) 41(1), *Journal of African Law*, 50.

⁹⁴ N. Bassey, ‘The Oil Industry and Human Rights in the Niger Delta’ Testimony of the author before the US Senate Judiciary Subcommittee on Human Rights and the Law, 24 September, 2008

land, taking into account the defendant's conduct, the utility or general benefit to the community of the activity called into question and the care with which it is carried out.⁹⁵ Courts in Nigeria have confirmed that oil operations including the laying of crude oil-carrying pipelines through the swamp forests is a non-natural user of land.⁹⁶

The second exception is the 'reasonableness' test, which was introduced by Lord Goff in *Cambridge Water v. Eastern Countries Leather*,⁹⁷ to the effect that if the user is reasonable, the defendant will not be liable for the consequent harm to his neighbour's enjoyment of his land; but if the user is not reasonable the defendant will be liable, even though he may have exercised reasonable care and skill to avoid it. Indeed, the 'reasonableness' principle will make it difficult to apply the rule in *Rylands v. Fletcher* in the oil producing communities in Nigeria as oil exploration and production activities can hardly be regarded as unreasonable. Oil is the Nigerian Government's main revenue source, and accounts for over 80% of Nigeria's foreign exchange earnings. Therefore, its uninterrupted exploration and production remains the government's priority. The decision of a Warri High Court in the case of *Allan Irou v. Shell-BP*⁹⁸ reflects this position. The court refused to grant injunction to restrain the defendant from further polluting claimant's land, creek and fish pond, on grounds that restraining the defendant's trade would cause unemployment and affect the nation's revenue.

In addition to these two exceptions, there are several statutory defences available to a defendant, including: act of God; or act or default of the plaintiff; or damage caused with the consent of the

⁹⁵ W.V.H. Rogers, *Winfield and Jolowicz on Tort*, 18th Edition, (Sweet & Maxwell; London, 2010), 775-778.

⁹⁶ *Sam Ikpede v. Shell-BP* (1973) MWSJ, 61.

⁹⁷ (1994) All ER 53, 69.

⁹⁸ Unreported Suit No. W/89/71 (Warri High Court), November 26, 1973.

plaintiff; or independent act of third parties; or statutory authority.⁹⁹ These defences, especially ‘acts of a third party’ or, as widely used in Nigeria, ‘sabotage’, have been successfully applied to avoid liability. In *Shell v. Otoko*¹⁰⁰ for instance, some communities in Rivers State sued for damages from an oil spill which polluted surrounding rivers and creeks. Shell claimed that the damage was caused by sabotage. The High Court dismissed the defence, but was overturned on appeal, as the judge felt the evidence supported the company’s defence. One of the plaintiff’s witnesses had testified that ‘there was nothing else done again by the defendant company (Shell) to control the spillage apart from corking the manifold’.¹⁰¹ The judge concluded on the basis of this and other evidence that a screw or bolt was removed by a third party which caused the oil spill.

The oil companies appear to abuse the defence of sabotage.¹⁰² In *Shell v. Enoch*¹⁰³ for instance, Shell relied on this defence in a suit for damages caused by oil spill. The trial judge held that it was clear that the plaintiffs had shown that there was an explosion at the defendant’s manifold and that there was crude oil spillage which was extensive as a result of that damage. There was evidence that no third party caused the explosion and no one in the community could have done it.¹⁰⁴ It is unfair for an entire community to suffer the adverse effects of oil pollution and the oil company pleads sabotage without evidence implicating the community. This is particularly so as it is no secret that most of the oil pipelines in the Niger Delta are old and poorly maintained and, therefore, susceptible to blowouts. The Shell-initiated Niger Delta Environmental Survey

⁹⁹ G. Kodinliye, *Nigerian Law of Torts* (London, Sweet & Maxwell, 1982), 117-121.

¹⁰⁰ (1990) 6 NWLR (Pt. 159) 693.

¹⁰¹ Per Omosun JCA, 715.

¹⁰² J. Frynas, *supra* note 52, 196.

¹⁰³ (1992) 8 NWLR (Pt. 259) 335.

¹⁰⁴ Per Jacks, JCA, 341.

(NDES) concluded in its report that many operators have hidden under the cloak of sabotage to avoid remediation in cases of environmental spills, accidents and discharges.¹⁰⁵ In *Anare v. Shell*¹⁰⁶ for instance, four communities sued over oil spills which the defendant company claimed was caused by sabotage. The court disbelieved Shell's witnesses and awarded the plaintiff's the equivalent of \$200,000 in compensation. While Frynas noted that oil companies' allegation of sabotage often lacks merit or is exaggerated,¹⁰⁷ the Court of Appeal in *Shell v. Isaiah*, labeled Shell's defence of sabotage 'an afterthought'.¹⁰⁸

The defence of statutory authority also exempts companies from liability under the rule in *Rylands v. Fletcher*. An example is the court's decision in *Ikpede v. Shell*¹⁰⁹ where a leakage of crude oil from the defendant's pipeline caused damage to the plaintiff's fish swamp. Although the requirements of the rule in *Rylands v. Fletcher* were satisfied, the company escaped liability, on grounds that the laying of pipelines was pursuant to a licence issued under the Oil Pipelines Act. Also, in *Irou v. Shell-BP*,¹¹⁰ the court was of the opinion that since the defendants had been granted an oil exploration licence, an order of injunction may render such licence nugatory. However, it is argued that while a statutory authority may permit certain acts, such as the laying of pipes for instance, the statute should not be read to permit consequent adverse effects save where the defendant proves that he acted with utmost care. In Nigeria where pipe networks are old and poorly maintained, it may seem unfair to assume that destruction to private property

¹⁰⁵ A. Ogbuigwe, 'Legal Sector, NDES Phase 1' (Anpez environmental Law Centre; Port Harcourt, 1996) cited in Frynas, supra note 52, 197. Also Human Rights Watch *The Price of Oil*, 1999, online at <http://www.hrw.org/reports/1999/nigeria/Nigew001-05.htm>, (last accessed on 21/10/ 2008).

¹⁰⁶ Unreported suit no. HCB/35/89.

¹⁰⁷ Frynas, *ibid*, 196.

¹⁰⁸ (1997) 6 NWLR 236. It is noted that while Nigerian law provides very serious punishment for offenders, this is rarely invoked. See O. Adewale, *Sabotage in the Nigerian Petroleum Industry: Some Socio-Legal Perspectives*, (NIALS Legal Studies Monograph Series; Lagos, 1990).

¹⁰⁹ (1973) All NLR, 61.

¹¹⁰ Unreported Suit No. W/89/71 (Warri High Court), 26 November, 1973.

would be permitted by legislation. These companies have access to modern technology which would enable them prevent or at least, minimize the effects of spills and other environmental polluting consequences of their operations. For instance, there exist many oil pipeline surveillance technologies in the market, in particular, a host of fibre optic sensors that can detect stress in pipelines and drilling equipment through subtle shifts in the optic wavelength.¹¹¹ These, and other technologies, are however not used in the Niger Delta.

3.2.5 Observations on common law Tort Actions

The foregoing discussions show that common law tort actions are utilized with varying degrees of success in environmental litigation in Nigeria's oil industry. In the few cases where the claimants were successful, they provided mainly compensatory remedies, which in most cases may not fully assuage all the damages suffered. Despite the limitations, one of the reasons why they appear to be the preferred cause of action is that there is no maximum limit of the compensation awards for successful plaintiffs as is the case under statute.¹¹² This position was stated in *Farah v. Shell*¹¹³ where the Court of Appeal objected to the use of official compensation rates and statute law in determining compensation payable to the plaintiffs. In that case, several families sued Shell for compensation for a well blow-out in 1970. The court found for the plaintiffs and awarded the equivalent of \$30,667. The Court of Appeal upheld the lower court's decision and affirmed the award, but objected to the use of official and statutory compensation. The court held that: 'Where a tortious act is committed, the injured party is entitled to damages

¹¹¹ P. Zachary, 'Oil Pipelines with Low Tech—or No Tech—Surveillance Technologies Are another Example of Digital Divide', *MIT Technology Review*, January 24, 2003.

¹¹² For instance, the repealed Federal Environmental Protection Agency (FEPA) Act, 1988, provided for a maximum fine of N500,000 (equivalent of \$3,333) for activities that pollute the environment. This is inadequate for the most serious damage to the environment, let alone to compensate individuals whose private property may also be damaged.

¹¹³ (1995) 3 NWLR (Pt. 382) 148, 195.

in accordance with the measure of damages applicable to his injury.¹¹⁴ Compensation according to the court should ‘restore the person suffering the *damnum* (damage) as far as money can do that to the position he was before the *damnum* or would have been but for the *damnum*’.¹¹⁵ The basis for calculating damages was broadened in this case to include ‘subsequent consequential and prospective future losses’¹¹⁶ in addition to loss of destroyed property. The court also took cognizance of the market value of the property for the purposes for which it was designed.

Notably, since the decision in *Farah’s case*, subsequent decisions suggest that the courts have adopted a more liberal approach to the award of compensation.¹¹⁷ For instance, in *SPDC v. Tiebo*,¹¹⁸ crude oil from Shell’s installation spilled to the Plaintiff’s/Respondent’s lands, streams and ponds polluting the source of drinking water, killing fishes in swamps and thereby paralyzing their way of life and occupation. The plaintiffs/respondents relied on the common law principle of strict liability successfully and the Court of Appeal awarded the equivalent of \$2,666.66 as special damages for the loss and injury to the young raffia palm, and the cumulative sum of the equivalent of \$37,333.33 as general damages. Interestingly, the court in this case did not cite the earlier decision of the Court of Appeal in *Farah’s case*, even though Onalaja JCA who delivered the judgment in *Tiebo’s case* sat on *Farah’s case*. Also, while in *SPDC v. Adamkue*,¹¹⁹ the Court of Appeal affirmed the trial judge’s award of \$1,660,710.67 as special damage, while in *Shell v. Isaiah*¹²⁰ the equivalent of \$146,666.667 was awarded as compensation to the plaintiff.

¹¹⁴ Ibid.

¹¹⁵ Per Edozien JCA, 192.

¹¹⁶ Frynas, supra note 52, 212.

¹¹⁷ Frynas, supra note 52, 122.

¹¹⁸ (1996) 4 NWLR (Pt. 445) 657.

¹¹⁹ (2003) 11 NWLR (Pt. 832) 533.

¹²⁰ (1997) 6 NWLR 236.

Although in the last few years, compensatory awards have improved in oil pollution claims, yet the plaintiff's ability to establish liability remains onerous as each of the common law principles impose specific limitations on their ability to do so or even contemplate suit.¹²¹ This is more so as the courts are not disposed to grant injunctive reliefs or order remediation even where it is evident that continuation of the offensive act will cause further damage and pollute the environment. Frynas notes in this regard that 'in respect of oil operations in Nigeria, injunctions have sometimes been sought by the plaintiffs, but were virtually never granted.'¹²² In *Irou v. Shell BP*¹²³ for instance, the plaintiff's land, fish pond and creek had been polluted by defendants. The plaintiffs sought an injunction to stop further damage to their land, but the court held that to grant the order would amount to asking the defendant to stop operating in the area, or render nugatory the operating licence given to the defendants. Similarly, in *Chinda v. Shell-BP*,¹²⁴ where the plaintiffs sought an order restraining the defendants from operating a flare stack within 5 miles of their village, the court held that the request was an 'absurdly and needlessly wide demand'.¹²⁵

In both these cases, the plaintiffs were not seeking an injunction to stop the defendants from carrying out their exploration and production activities, rather they sought to limit the adverse effects of defendant's operations. An injunction for instance, may force the oil companies to redirect the gas flares or repair derelict pipelines. Ebeku noted with regard to *Chinda's case* that 'while the refusal to grant injunctive relief may be justified, the observation that the relief was

¹²¹ Frynas, supra note 52, 193.

¹²² Frynas, supra note 52, 122.

¹²³ Unreported Suit No. W/89/71 (Warri High Court), 26 November, 1973.

¹²⁴ (1974) 2 RSLR, 1.

¹²⁵ Ibid., 14.

“absurd and needlessly wide” indicates the judge’s unwillingness to exercise his discretion, even had the plaintiffs proved a stronger case.¹²⁶ He noted further that the tone of the judgment suggests that the judge gave ‘tremendous weight’ to the likelihood that granting an injunction would affect the economy of the country that relies heavily on oil revenues.¹²⁷ Frynas quoted Odeleye, Shell’s legal manager as saying in 1988 that: ‘the law is on our side because in the case of a dispute, we don’t have to stop operations’.¹²⁸

This reveals a major limitation on the application of common law principles. It is argued that decisions such as these have contributed to the laxity in operating standards in Nigeria’s oil industry. Since the companies do not have to stop operations or clean up the damaged areas, and are allowed to pay miserly compensation, they are not obliged to adopt modern technology to ensure their operations have minimum adverse impact on their host communities. Indeed, if the IOCs are ordered to clean-up polluted areas or halt operations while a dispute is being resolved, perhaps the full rigour of the common law would be brought to bear by the judiciary in the interest of justice. In *Shell v. Tiebo*¹²⁹ for instance, the plaintiffs alleged that oil spills from the defendant’s facilities polluted the communities’ source of water and caused environmental, social, economic and health problems. The company admitted that there was a spill, but the extent was not as averred by the plaintiffs, suggesting that the plaintiffs had rejected compensation thought to be fair and adequate based on the calculated damages. Both the trial and appeal courts found in favour of the plaintiffs and awarded substantial monetary compensation. However, no order was made for the remediation of the damaged area or to the environment.

¹²⁶ K. Ebeku, ‘Judicial Attitudes to Redress for Oil-Related Environmental Damage in Nigeria’, (2003) 12(2), *RECIEL*, 202.

¹²⁷ *Ibid.*

¹²⁸ Frynas, *supra* note 52, 123.

¹²⁹ (1996) 4 NWLR (Pt. 445), 657.

This is notwithstanding the fact that the damage done to the physical environment will continue to deprive the plaintiffs of their economic sustenance and among other problems, put their health at risk. Indeed, while the case is precedent for the award of significant monetary compensation, a major drawback is that it failed to order remediation.

In *Shell v. Isaiah*,¹³⁰ Shell was sued *inter alia* for compensation for damage and loss occasioned by reason of extensive oil spillage and pollution. In defence, the company alleged that there was no spillage but a minor splash of oil. Both the court of first instance and court of appeal found that there was ‘massive oil spillage’ causing extensive damage to ‘economic crops, economic trees, water resources and hunting amenities’. Compensation was awarded, but no order for remediation was made. However in *Farah v. Shell*,¹³¹ the Court of Appeal reached a different conclusion regarding remediation. The court observed that the damage the respondents suffered went beyond a mere damage to crops and economic trees, as experts called on both sides confirmed that the respondents’ arable land was heavily polluted and rendered unproductive for many years. Consequently, it awarded compensation and rehabilitation of the damaged land, which is unusual, apparently as a result of the scale of damage occasioned. This decision came in the wake of international opprobrium which followed the killing of Ken Saro-wiwa by the Federal Government, and the courts were apparently trying to distance themselves from the Government on issues regarding oil pollution in the Niger Delta, which were championed by Ken Saro-wiwa.¹³²

¹³⁰ (1997) 6 NWLR, 236.

¹³¹ (1995) 3 NWLR (Pt. 382) 148, 195.

¹³² See P. Okonmah, “The Judicial Murder of Nine Environmental and Human Rights Activists in Nigeria and the Implications for the Enjoyment of Human Rights in Nigeria”, *Tilburg Foreign Law Journal*, (1999) 7(4), 393-428.

From the above cases, it is obvious that the common law tort remedies are variable, uncertain and unpredictable, and in most cases inadequate to ameliorate the adverse effects of oil industry pollution and their impact on the inhabitants of the Niger Delta, and by extension contributed to the present state of anarchy and lawlessness in the area.¹³³ While the public benefit argument of oil exploration and production activities has some merit, Nwogugu suggests that the mere award of damages to compensate for injuries suffered from pollution arising from hazardous operation stretches the principle of ‘public benefit’ too far.¹³⁴ More so, proof of causation, foreseeability and damage are tedious and expensive to undertake. Ordinarily, the costs associated with litigation are beyond the purse of most individuals or communities in the Niger Delta region. The Nigerian government does not have functioning laboratories where the extent of oil pollution to water, land, wildlife, and trees or other effects of the oil industry on the environment can be studied. Such tests have to be carried out either in private laboratories within the country or abroad. The more advanced tests can only be carried out in facilities owned or run by the oil companies themselves. In cases where such technical or scientific issues are in contention, the plaintiff’s failure to adduce requisite evidence to support his claim will doom his case. Also, where the defendant gives technical evidence in his defence and the plaintiff does not have any expert evidence to controvert the defendant’s evidence, his case will fail. This is usually the case as the oil companies are in control of the logistics for determining the effects of their operations on the environment. For instance in *Seismograph Service Ltd v. Onokpasa*,¹³⁵ the plaintiff sued for cracks to his wall caused by defendant’s seismic operations. The defendant argued that the seismic operations did not have any connection with damage or cracks to the plaintiff’s building.

¹³³ E. Emeseh, ‘Limitations of Law in Promoting Synergy between Environment and Development Policies in Developing Countries: A Case Study of the Petroleum Industry in Nigeria’, (2006) 24, *Journal of Energy & Natural Resources Law*, 574.

¹³⁴ E.I. Nwogugu, ‘Law and Environment in the Nigerian Oil Industry’, (1975) 1, *Earth Law Journal*, 91.

¹³⁵ (1972) 1 All NLR 343.

The trial judge found for the plaintiff. However, this ruling was overturned on appeal by the Supreme Court as the contention of both parties was of a ‘technical nature that must be proven by experts ‘specifically qualified in the particular field or science which in this case comprised of the knowledge and practice of seismology and civil engineering.’¹³⁶ The court held that since the plaintiff failed to call any expert evidence, the trial court should have followed the evidence called by the defendant’s expert witness. Similarly, in *Seismograph Services v. Akporuovo*,¹³⁷ the trial judge found for the plaintiff, but the Supreme Court again, overturned the decision on grounds that there was conflicting evidence before the trial judge which should have been resolved by a visit to the *locus in quo* in accordance with section 77 (d) (ii) of the Nigerian Evidence Act. The Supreme Court in this case, rather than consider the serious issue of environmental damage prioritized evidentiary rules. This has led to suggestions that the court was biased in favour of national economic interests intrinsically linked to unhindered exploitation of oil resources.¹³⁸ Also, in *Seismograph v. Ogbeni*¹³⁹ the plaintiff claimed compensation for the environmental damage resulting from defendant’s exploratory exercise of exploding oil testing chemicals around the plaintiff’s building. The court of first instance found for the plaintiff, but on appeal, the Supreme Court relied on its earlier decision in *Onokpasa’s case* and overturned the decision of the lower court, stressing that:

*We are unable to agree with the learned trial judge that the evidence of an expert is not absolutely necessary to prove damage alleged to be caused by vibrations radiating from seismic operations taking place within a reasonable distance from the property damaged. These are phenomena beyond the knowledge of the unscientific and untrained in seismology and civil engineering.*¹⁴⁰

¹³⁶ Ibid, 348.

¹³⁷ (1974) 1 All NLR, 104.

¹³⁸ Ebeku, supra note 126, 203.

¹³⁹ (1976) 4 SC, 85.

¹⁴⁰ Ibid.

The challenges discussed above, indicate that common law tort actions and the remedies they provide address only narrow issues of monetary compensation, and the capricious nature of litigation seems to the environmentally sensitive no longer a viable response¹⁴¹ to the wider issues which touch on the rights and livelihood of victims, issues which could not simply be remedied by monetary compensation. While the recent awards appear to reflect a change in attitude by the courts when compared to earlier decisions, in terms of the time it takes to litigate (in some cases decades as in *Farah's*),¹⁴² these awards pale into insignificance. Besides, the amount of compensation merely reflects what the court quantifies the claimant's losses to be; it does not for instance, take account of the damage to the natural environment, or threat to the health (and therefore to life), not only of the claimants, but the community as a whole, or their economic wellbeing. The UNDP had looked at other damages which the people may suffer as a result of oil pollution, to include uncontrolled urbanization with attendant social ills, loss of fishing grounds, loss of land and depletion of forest resources (which provides not only food, but also herbal remedies for treatment), occupational disorientation as well as cultural rights.¹⁴³

Also when compared to compensation paid in similar pollution cases in other jurisdictions,¹⁴⁴ this level of award is miniscule. For instance, the cleanup costs for the *Exxon Valdez* (Alaska, 1989) oil spill was put in the region of US\$2.5 billion, and other costs fines, penalties and claims settlements at times estimated as much as US\$7 billion. The court cases continue, making the full costs yet unknown. *Amoco Cadiz* (France, 1978) reportedly cost about US\$282 million, out of which about half was for legal fees and accrued interest. In *Braer* (UK, 1993) costs are put in

¹⁴¹ J. Maclaren, 'The Common Law Nuisance Actions and the Environmental Battle-Well-Tempered Swords or Broken Reeds?' (1972) *Osgoode Hall Law Journal*, 505, 507.

¹⁴² *Farah's case* for instance took about 25 years.

¹⁴³ See UNDP report, supra note 9, 83-85

¹⁴⁴ The *Exxon Valdez* (Alaska, 1989)

the region of US\$83 million, out of which US\$61 million was paid out for fishery-related damages. The cost for cleaning up after the *Sea Empress* (UK, 1996) was US\$37 million, with total costs for the incident more than US\$60 million once all damage settlements were made. For the *Nakhodka* (Japan, 1977), compensation was settled at approximately US\$219 million, while claims are still being processed for the *Erika* (France, 1999) as at October 2010.¹⁴⁵ Therefore, the level of compensation paid in the Niger Delta, even though it has improved in the last few years, cannot be compared to the above payments even though the incidents, volume and regularity of spills are higher than in these jurisdictions.

As a result of the situations highlighted above and the fact that common law actions appear to have failed over the years to mitigate the incidents of pollution, perhaps in appropriate cases an alternative cause of action in human rights may be better placed to address some of these issues, considering the speed of human rights litigation, which also avoid the technicalities and the high threshold of proving causation, forceability and damage; the cost of litigation (in the absence of adequate legal aid scheme for such cases) and the fact that only those who are parties directly benefit from common law tort actions, whereas human rights actions may be instituted both by those affected as well as third parties, and which outcome may benefit not only the parties, but the community at large. Human rights actions may be more likely to decree injunctive reliefs and orders for remediation than in common law actions, as well as being able to have a head of claim for damage to the natural environment and damage to social, economic and cultural life. It remains to be asked whether the advantages of human rights actions far outweigh the

¹⁴⁵ See The International Tanker Owners Pollution Federation Limited, “Cost of Spills”, online at <http://www.itopf.com/spill-compensation/cost-of-spills/>, (last accessed on 20/12/2011).

predominantly financial awards, which claimants get under common law tort actions hence the human rights?

3.3 Foreign Litigation

Litigation in the home countries of IOCs operating in the Niger Delta region is another method by which the people have attempted to claim for injuries caused by oil pollution. Thus far, this form of seeking redress has been brought in the United States under the Alien Torts Claims Act (ATCA), and recently in the Netherlands.¹⁴⁶ It is however, important to point out that the English common law also permits foreigners to sue in British courts,¹⁴⁷ but the defendant must show that no other forum is more convenient ‘for the interest of the parties and the ends of justice’.¹⁴⁸ In fact, ‘traditional English courts did little to discourage litigants from choosing to litigate in England, provided the case was brought in compliance with English jurisdictional rules.’¹⁴⁹ The dictum of Lord Denning in *The Atlantic Star*¹⁵⁰ further illustrates the attitude of English courts when he stated that: ‘No one comes to these courts asking for justice should come in vain. The right to come here is not confined to Englishmen. It extends to any friendly foreigner’.¹⁵¹ In other words, other than the challenges which may be faced in applying the doctrine of *forum non conveniens*, English courts are open to foreign litigation.¹⁵² But foreign

¹⁴⁶ Case brought by four Nigerians with Friends of the Earth against Shell, with regard to their operations in the village of Oruma, where pipelines contaminated their farmland and fishing ponds. See J. Donovan, “Dutch Court Adjourns Shell Nigeria Lawsuit until summer”, Dow Jones Newswires, 10 February, 2010, online at royaldutchshellplc.com/2010/02/10/dutch-court-adjourns-shell-nigeria-case-until-summer, (last accessed on 20/12/2011).

¹⁴⁷ In a recent case in England, Shell admitted liability for two massive oil spills in Bodo, Ogoni and could be forced to pay up to \$410 million in damages. See Adam Ma’anit, “Oil Spill Exposes Shell’s ticking timebomb”, The Guardian Newspaper, Wednesday 17 August, 2011, available online at <http://www.guardian.co.uk/commentariesfree/2011/aug/17/oil-spill-shell-timebomb>, (last visited on 6/09/2011).

¹⁴⁸ *Spiliada Maritime Corp. v. Cansulex Ltd.* (1987) AC 460, 476.

¹⁴⁹ C. Morse, ‘Not in the Public interest? Lubbe v. Cape Plc’, (2002)37, *Texas International law Journal*, 542.

¹⁵⁰ (1973) 1 QB 364.

¹⁵¹ *Ibid.* 381.

¹⁵² See generally, Morse, *supra* note 149, 541-547.

litigation has not been as popular under English law as in American courts in oil-related litigation hence the discussions under this heading would explore some of the cases brought in US courts under the ATCA rather than under English law.¹⁵³

3.3.1 The Alien Torts Claims Act (ATCA) 1789

The Alien Tort Claims Act, 1789 (hereinafter “ATCA”), adopted as part of the original Judiciary Act, 1789 in its original form created no legal rights, but simply asserted that “the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the laws of nations or a treaty of the United States.” For over 200 years, the statute lay dormant, but as a result of the increasing international concern about human rights issues, litigants have begun to seek redress more frequently under this Act.¹⁵⁴

The Act provides that ‘The district courts shall also have cognizance, concurrent with the courts of several States, or the circuit courts as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States’.¹⁵⁵ In essence, the ATCA allows non-citizens to sue in U.S. Federal Courts for violations of the law of nations or a US treaty.¹⁵⁶ Initially used to allow victims of offshore piracy to sue onshore, Frynas notes that it was not until 1996 that litigation against US corporations grew quickly as a result of successes

¹⁵³ English litigation is expensive and tedious, and the court will not assume jurisdiction if a more appropriate forum is available than in England. See Belgore, *Problems with Oil Pollution Injury Litigation in the Nigerian Legal System: Can Nigerian Litigants Gain Access to Courts in England and the USA?*, PhD thesis (University of Dundee; Scotland, 2003)

¹⁵⁴ The development of this jurisdiction was recounted in the case of *Wiwa v. Royal Dutch Petroleum Co.*, F.3rd (2d Cir. 2000)

¹⁵⁵ C. Shaw, ‘Uncertain Justice: Liability of Multinationals Under the Alien Tort Claims Act’, (2002) 54, *Stanford Law Review*, 1364.

¹⁵⁶ M. Osofsky, ‘Environmental Rights Enforcement in U.S. Courts’, (2004) 2(11), *Human Rights Dialogue*, 30.

in its application.¹⁵⁷ To successfully bring an action under the ATCA, the following conditions must be met: Firstly, the issue must fall within the jurisdiction of the district courts. Thus, in *International Labour Rights Education & Research Fund v. Bush*,¹⁵⁸ the plaintiffs sought an injunction against President Bush to enforce the labour provisions of the Generalized System of Preferences (GSP). The court denied jurisdiction, on ground that the Court of International Trade was the proper forum to address the issues raised.¹⁵⁹

Secondly, the plaintiff must be an alien.¹⁶⁰ Although the defendant must be subject to service in the US, he need not be a resident of the United States.¹⁶¹ Where the defendant is foreign, the courts exercise their discretion to assume jurisdiction on a case-by-case basis. However, there are general guidelines that the courts refer to, including whether the defendant does business in the forum State or otherwise consented to jurisdiction, or visited the State.¹⁶² In *Aguinda v. Texaco, Inc.*,¹⁶³ the court assumed jurisdiction as the plaintiffs were aliens suing a New York based corporation for alleged harm to the dwelling forests of indigenous peoples, destruction of their property and the stability of the Amazon habitats. Also, the courts will assume jurisdiction

¹⁵⁷ J. Frynas, 'Social and Environmental Litigation against Transnational Firms in Africa', (2004) 42(3), *Journal of Modern African Studies*, 370; B. Kieserman, 'Comment, Profits and Principles: Promoting Multinational Corporate Responsibility by Amending the Alien Tort Claims Act', (1999) 48, *Catholic University Law Review*, 881; N. L. Bridgeman, 'Seeking Accountability in U.S. Courts: Human Rights Litigation Under The ACTA As a Proxy for Environmental Claims', *Roscoe Hogan Environmental Law Essay Contest*, sponsored by The Roscoe Pound Foundation, 2002.

¹⁵⁸ 954 F.2d 745 (D.C. Cir. 1992).

¹⁵⁹ *Ibid*, 747-748.

¹⁶⁰ *Kadic v. Karadzic* 70 F. 3d 232, 236-237 (2d Cir. 1995).

¹⁶¹ *Filartiga v. Pena-Irala* 630 F.2d 876 (2d Cir. 1980).

¹⁶² See R. Herz, 'Litigating Environmental Abuses under the Alien Tort Claims Act: A Practical Assessment', (2000) 40, *Virginia Journal of International Law*, 545, 566; Also, L. Lambert, 'At the Crossroads of Environmental and Human Rights Standards: *Aguinda v. Texaco, Inc.* Using the Alien Tort Claims Act to Hold Multinational Corporate Violators of International Laws Accountable in US Courts', (2000) 10, *Journal of Transnational Law & Policy*, 118.

¹⁶³ 1994 U.S. Dist. LEXIS 4718 (S.D.N.Y. 1994)

where both parties are aliens but the ‘law of nations’ is violated. In *Filartiga v. Pena-Irala*,¹⁶⁴ though both parties were aliens, the alleged acts of torture which led to the death of the plaintiff’s child was held to be ‘deliberate torture perpetrated under colour of official authority,’ which ‘violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties.’¹⁶⁵

Thirdly, the suit must be a ‘tort only’ action. According to the Oxford Dictionary of Law, a tort refers to a wrongful act or omission for which damages can be obtained in a civil action by a person wronged, other than a wrong that is only a breach of contract.¹⁶⁶ As Romero noted, although the definition is clear, the text of the ATCA generates confusion when it states ‘for a tort only’.¹⁶⁷ Romero avers that an explanation may be that at the time the ATCA was enacted, there were certain wrongs that were usual at the time, but are no longer so, such as piracy, which were the wrongs the phrase appears to refer to.¹⁶⁸ However, there is a consensus that the ATCA imposes no such limits, and current case law reveals that the Act is used for several wrongs beyond piracy and other wrongs that were usual years ago.¹⁶⁹ For instance, in *Adra v. Clift*¹⁷⁰ the court held that the wrongful withholding of custody of a child constituted an actionable tort while in *Nguyen Da Yen v. Kissinger*¹⁷¹ the court noted that injuries for illegal evacuation of children from Vietnam by the US Immigration and Naturalization Service could be addressed

¹⁶⁴ 630 F.2d 876 (2d Cir. 1980).

¹⁶⁵ *Ibid*, 878.

¹⁶⁶ E. Martin (ed.), Oxford Dictionary of Law (3rd Ed.) (New York: Oxford University Press, 2002), 401.

¹⁶⁷ R. Romero, ‘Using the US Alien Tort Claims Act for Environmental Torts: The Problem of Definability of the Right to a Healthy Environment’, online at http://www.dundee.ac.uk/cepmlp/journal/html/Vol16/Vol16_7.pdf
See also, A. Bernstein, ‘Conjoining International Human Rights Law with Enterprise Liability for Accidents’, (2001) 40, *Washburn Law Journal*, 397.

¹⁶⁸ Romero, *ibid*

¹⁶⁹ Bernstein, *ibid*.

¹⁷⁰ 195 F. Supp. 857 (D. Md 1961).

¹⁷¹ 528 F.2d 1194 (9th Cir. 1975).

pursuant to the ATCA. It appears that the ambit of the ATCA also covers international human rights abuses that occur abroad. The US Court of Appeals for the Second Circuit in *Wiwa v. Royal Dutch Petroleum Co.* stated that ‘whatever the intent of the original legislators of the (ATCA) it seems to reach claims for international human rights abuses occurring abroad.’¹⁷²

The fourth condition to be met is that the tort must be committed in ‘violation of the laws of nations or a treaty of the United States’. The laws of nations or international law refer to ‘the system of law regulating the interrelationship of sovereign states and their rights and duties with regard to one another. In addition, certain international organizations (such as the United Nations), companies, and sometimes individuals (e.g. in the sphere of human rights) may have rights or duties under international law.’¹⁷³ The law of nations as defined by the Act include international law (both treaty-based and customary law) which deal with issues such as the law of the sea and of space, human rights, international crimes, among others, and ascertained by the work of jurists or by the general usage and practice of nations or by judicial decisions recognizing and enforcing that law.¹⁷⁴ The incorporation of the laws of nations into US law is long established.¹⁷⁵ For instance, the US Supreme Court in *The Paquete Habana*¹⁷⁶ expressly incorporates principles determinable from the laws of nations into the domestic legal system. A similar opinion was held in *Kadic v. Karadzic*¹⁷⁷ and *re Estate of Ferdinand E. Marcos Human Rights Litigation*¹⁷⁸ where the courts held that it is well settled that the laws of nations is part of the federal common law. The incorporation of international law principles into domestic law

¹⁷² 226 F. 3d 88, 104 n. 10 (2d Cir 2000).

¹⁷³ E. Martin (ed.), Oxford Dictionary of Law, 3rd Ed., (Oxford University Press; New York, 2002), 207-208.

¹⁷⁴ See also, *Filartiga*, 630 F.2d, 880 (citing *United States v. Smith*, 18 U.S. 153, 160–61, 5 L. Ed. 57 (1820)).

¹⁷⁵ L. Dhooge, ‘The Alien Torts Claims Act and the Modern Transnational Enterprise: Deconstructing the Mythology of Judicial Activism’, (2003), *Georgetown Journal of International Law*, 35-48, 67.

¹⁷⁶ 175 US 1, 677, 700 (1900).

¹⁷⁷ 70 F.3d 232, 246 (2d Cir. 1995).

¹⁷⁸ 978 F.2d 493, 502 (9th Cir. 1992).

without the need for legislative action has been reiterated by the Supreme Court.¹⁷⁹ Thus as Dhooge noted, in interpreting the ATCA, federal courts are merely entertaining litigation implicating tortious violations of principles set forth in treaties or the laws of nations, which are clearly incorporated within US laws.¹⁸⁰

Courts have held that ATCA provides a cause of action for allegations against international norms that are ‘specific, universal, and obligatory’.¹⁸¹ While specific norms are defined as those readily discernable from treaties or the laws of nations, universal norms have been interpreted variously as obligatory norms ascertainable from treaties and laws of nations.¹⁸² Acts of extrajudicial killing, denial of labour rights and racial discrimination have been held to constitute ‘specific, universal, and obligatory’ acts against the laws of nations.¹⁸³ But more traditional tort claims are liable to be dismissed.¹⁸⁴ In *Abdullahi v. Pfizer, Inc.*,¹⁸⁵ the district court held that gross negligence bordering on recklessness in the administration of a drug testing protocol did not rise to the level of specific, universal and obligatory norm.¹⁸⁶ Likewise, claims based on defamation and negligence lack an adequate basis for ATCA jurisdiction.¹⁸⁷ Other principles considered, include the doctrine of international comity and *forum non conveniens*. On the one hand, the doctrine of international comity is defined as ‘the practice of deference to the acts, laws

¹⁷⁹ See for instance, *The Paquete Habana* 175 US 1, 677, 700 (1900) and *Hilton v. Guyot* 159 US 113, 163 (1895).

¹⁸⁰ Dhooge, supra note 175, 68.

¹⁸¹ *Alvarez-Machain v. United States*, 331 F.3d 604, 613 (9th Cir. 2003); *John Doe v. Unocal Corp*, 2002 U.S. App. LEXIS 19263 (9th Cir. 2002) (citing *Papa v. United States*, 281 F.3d 1004, 1013 (9th Cir. 2002)). See also *In re Estate of Ferdinand E. Marcos, Human Rights Litig.*, 25 F.3d 1467, 1475 (9th Cir. 1994).

¹⁸² Dhooge, *ibid*, 70-71.

¹⁸³ See, *Estate of Rodriguez v. Drummond Co.*, 256 F. Supp. 2d 1250, 1262-1264 (N.D. Ala. 2003) and *Sarei v. Rio Tinto plc* 221 F. Supp 2d 1160, 1162.

¹⁸⁴ Dhooge, *Ibid*, 73.

¹⁸⁵ No. 01 Civ 8118, 2002 US Dist. LEXIS 17436 (SDNY Sept 16, 2002).

¹⁸⁶ See also, *Eastman Kodak Co. V. Kavlin* 978 F. Supp. 1078, 1092-1093 (S.D. Fla. 1997).

¹⁸⁷ *Akbar v. N.Y. Magazine Co.*, 490 F. Supp. 60, 63 (D.D.C. 1980) and *Damaskinos v. Societa Navigacion Interamericana, S. A.*, 225 F. Supp. 919, 923 (S.D.N.Y. 1966).

and jurisdictions of foreign countries. Essentially, it is respect for another's sovereignty.'¹⁸⁸ The doctrine of *forum non conveniens* on the other hand, simply determines if there is a proper and more convenient forum to entertain the action. If the US Courts determine that there exists a more convenient forum, they would have to decline jurisdiction under this doctrine.¹⁸⁹

3.3.2 The ATCA and Environmental Litigation

This section examines the ATCA jurisdiction as used for environmental litigation, the hurdles and other challenges which claimants face in bringing an action under this Act. *Filartiga v. Pena-Irala*¹⁹⁰ opened the floodgates,¹⁹¹ in which the court opined that 'deliberate torture perpetrated under the colour of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties.'¹⁹² The court based its ruling on the fact that (1) 'there is at present no dissent from the view that the guaranties [of international law] include, at a bare minimum, the right to be free from torture,' and (2) torture — like other universally condemned forms of conduct such as piracy — was 'sufficiently determinate' and well-defined to trigger ATCA jurisdiction.¹⁹³ The case is even more significant as it marked the first in modern times in which a court upheld ATCA jurisdiction for a suit between non-U.S. citizens for violation of the 'law of nations'.¹⁹⁴ Though the court failed to rule specifically on the liability of a private party under the Act, subsequent cases have recognized its

¹⁸⁸ Lambert, *supra* note 162, 128.

¹⁸⁹ B. Stephens, 'Upsetting Checks and Balances: The Bush Administration's Efforts to Limit Human Rights Litigation', (2004) 17, *Harvard Human Rights Journal*, 175.

¹⁹⁰ 630 F.2d 876 (2d Cir. 1980).

¹⁹¹ See A. Boggio, 'The Global Enforcement of Human Rights: The Unintended Consequences of Transnational Litigation', (2006) 10(4), *The International Journal of Human Rights*, 328; P. Nickles, T. Cabbage III, and E. Honig, 'Court Properly Limits Scope of Alien Tort Claims Act', (2003) 18(2), *Legal Background*, 2; and M. Osofsky, 'Environmental Rights Enforcement in U.S. Courts', (2004) 2(11), *Human Rights Dialogue*, 30.

¹⁹² 630 F.2d 876 (2d Cir. 1980), 878.

¹⁹³ *Ibid*, 880.

¹⁹⁴ P. Nickles, T. Cabbage III, and E. Honig, 'Court Properly Limits Scope of Alien Tort Claims Act', (2003) 18(2), *Legal Background*, 2.

application to government actors, individuals - including organizations and corporations.¹⁹⁵ With regard to human rights cases, a significant decision was made in *Sosa v. Alvarez-Machain*,¹⁹⁶ where the Supreme Court rejected the argument that no human rights claims should be actionable under the statute. If the Court had affirmed the U.S. Government's argument, it would have dashed all hopes of plaintiffs in cases based on similar complaints against multinational corporations for environmental harm and gross human rights violations.

The following cases specifically deal with environmental torts. In *Beanal v. Freeport McMoran*,¹⁹⁷ the plaintiff, an Indonesian citizen and leader of the Amungme tribe sued an American mining company operating the Grasberg Mine in Irian Jaya, based on the ATCA and the Torture Victims Protection Act (TVPA) for environmental abuses, human rights violations and cultural genocide. The plaintiff alleged that the defendant deposited approximately 100,000 tons of tailings per day in the Aghwagaon, Otomona and Akjwa Rivers, which resulted in the alteration of the environment and damage to the inhabitants of the region. The District Court of Louisiana dismissed the plaintiff's claims for lack of precision in describing the violations of international law. On appeal, the US District Court of Appeals for the Fifth Circuit confirmed the lower court's decision, stating that the plaintiff failed to demonstrate that the environmental torts alleged violated universal norms of international law. In the opinion of the appellate court, the sources of international law cited by Beanal and their *Amici* merely referred to a general sense of environmental responsibility and to abstract rights and liberties devoid of articulable or discernable standards and regulations, which identify practices that constitute international

¹⁹⁵ Boggio, *supra* note 191, 328

¹⁹⁶ 504 US 655 (1992).

¹⁹⁷ 197 F.3d 161 (5th Cir. 1999).

environmental abuses or torts.¹⁹⁸ However, as Romero argued the lack of definability of the right to a healthy environment hindered it as a concrete and specific norm that provides objective criterion for establishing when environmental harms violate it.¹⁹⁹ Romero further noted that the court's decision reveals that a general sense of state responsibility is not enough to constitute international law for ATCA purposes (even when the damage to the environment is considerable).²⁰⁰ In *Aguinda v. Texaco, Inc.*,²⁰¹ the US Court of Appeal for the Second Circuit addressed issues of Texaco's liability under the ATCA for environmental damage to the Ecuadorian and Peruvian rain forests, which allegedly occurred as a result of its oil production activities. The claim was dismissed on grounds of *forum non conveniens*, as Texaco accepted services in Ecuador, which means that the case could conceivably be brought in Ecuador. It is interesting to note that Ecuadorian law prohibits the filing of claims already initiated abroad, yet the US court insisted that it would reconsider its dismissal if the case was dismissed in Ecuador and such dismissal was affirmed by the Ecuadorian Supreme Court.²⁰²

3.3.3 Nigerian Cases: *Wiwa v. Royal Dutch Petroleum Co.*²⁰³

The plaintiffs in this case alleged sixteen separate causes of action arising from the operations of Royal Dutch Petroleum Company and Shell Transport and Trading Company, of their wholly owned subsidiary, Shell Petroleum Development Company of Nigeria.²⁰⁴ The plaintiffs alleged that their late fathers had been imprisoned, tortured and executed by the Nigerian government for

¹⁹⁸ Ibid, 167 (citing *Zapata v. Quinn*, 707 F.2d 691, 692 (2d Cir. 1983)).

¹⁹⁹ R. Romero, 'Using the US Alien Tort Claims Act for Environmental Torts: The Problem of Definability of the Right to a Healthy Environment', online: http://www.dundee.ac.uk/cepmlp/journal/html/Vol16/Vol16_7.pdf

²⁰⁰ Ibid.

²⁰¹ 303 F.3d 470 (2nd Cir. 2002).

²⁰² Ibid., 477.

²⁰³ 226 F.3d 88 (2d Cir. 2000) [hereinafter *Wiwa's case*].

²⁰⁴ Ibid., 92.

their opposition to the defendants' oil exploration activities in Ogoniland.²⁰⁵ They claimed that these human rights violations were 'instigated, orchestrated, planned and facilitated by Shell Nigeria under the direction of the defendants.'²⁰⁶ The plaintiffs further alleged that the defendants provided money, weapons, ammunition, vehicles, and logistical support to the Nigerian military in the commission of human rights abuses as well as participated in fabricating evidence against the plaintiffs at their trial in Nigeria, which resulted in their death sentences.²⁰⁷ The district court dismissed the plaintiffs' claims based on the principle of *forum non conveniens*. This decision was overturned on appeal where it was held that the suit could be heard under the ATCA. The Circuit Court held that the district court failed to acknowledge that, at the time of filing the complaint, two of the four plaintiffs were U.S. residents and had erroneously based its dismissal on the fact that none of the plaintiffs were residents of the Southern District of New York.²⁰⁸ Furthermore, the court noted that the U.S. forum did not involve substantial inconvenience or cost associated with the transportation of physical evidence, documents and witnesses. In its opinion, any additional cost and inconvenience incurred by the defendants in litigating in the United States were more than offset by the cost and inconvenience to the plaintiffs of having to pursue their claims in a foreign venue.²⁰⁹ In addition, with the British citizenship of the defendant, Shell Transport, the likelihood of applicability of British law to determine its liability on the merits, and Nigeria's membership of the Commonwealth of Nations were relevant but not overriding considerations.²¹⁰ Consequently, the appellate court remanded the case back to the district court.

²⁰⁵ Ibid.

²⁰⁶ Ibid.

²⁰⁷ Ibid, 92-93.

²⁰⁸ Ibid, 103.

²⁰⁹ *Wiwa's case*, supra note 203, 107.

²¹⁰ Ibid.

The defendants, however, petitioned the Supreme Court to review the Court of Appeal's decision. The Supreme Court rejected the defendant's *writ of certiorari* on 26 March, 2001. The plaintiffs filed additional suits against Brian Anderson, former Managing Director of Royal Dutch/Shell's Nigerian subsidiary. Royal Dutch/Shell and Mr. Anderson filed motions to dismiss the case, arguing that the plaintiffs did not have a legal basis for their claims. The defendant's motion was denied on 22 February, 2002, by U.S. District Court Judge Kimba Wood. The judge found that the plaintiffs were entitled to bring their actions under the ATCA. The Court also found that plaintiffs had adequately set forth their case that Royal Dutch knew what its Nigerian subsidiary was doing. On the eve of the substantive case, the defendants settled the case for \$15 million without accepting liability, and denied the plaintiffs the opportunity of a full trial.

Another case from Nigeria heard under the ATCA is *Bowoto v Chevron*,²¹¹ a class action suit charging Chevron/Texaco Corporation with gross violations of human rights, including extrajudicial killing, crimes against humanity and cruel, inhuman and degrading treatment in the Nigerian Delta. Plaintiffs claimed as victims of machine gun attacks by the military against protesters on the Parabe oil platform in the Niger Delta, and later against the villages of Opia and Ikenyan from May 1998 to January 1999 by a detachment of the Joint Task Force, at the request and facilitated by Chevron, who transported the soldiers in company-owned helicopters and boats, including payment of salaries and provision of ammunition and other tools. In 1998, a Chevron spokesman admitted that Chevron management authorized its helicopters to fly the mobile police and soldiers from the Nigerian navy to the platform, that Chevron pilots flew the aircraft and that he personally accompanied the military and observed the operations. The

²¹¹ *Bowoto v. Chevron*, 621 F. 3rd 116, Court of Appeals, 9th Circuit, 2010.

company later denied involvement with the activities of the military. On its website, the corporation stated that the helicopters and boats used by the military were leased by its joint venture with the NNPC, and that the Nigerian government which owns a 60 per cent interest in the venture had the right to use the equipment freely. The defendant's filed a motion to dismiss the plaintiff's complaints on the grounds of *forum non conveniens*. The district court dismissed the motion on 7 April, 2004. The court held that even though Chevron's Nigerian subsidiary was amenable to Nigerian courts, it was Chevron Corporation that was being sued, and since there was no jurisdiction over Chevron Corporation in Nigeria, the motion must be denied. On 4 November, 2004, the Superior Court of California denied the defendant's motion to dismiss the case on grounds that Chevron was exercising its right to free speech by lying about and covering up the violence at Parabe. In late 2006, Chevron filed five motions for summary judgment in the federal court challenging the plaintiffs' claims for crimes against humanity and for violation of the Racketeer Influenced and Corrupt Organizations Act, 1970. At the end, this case was dismissed by the court for the Plaintiff's inability to prove liability under ACTA after several years of litigation and investment of time, money and expectation.²¹²

A new case pending in the US court is *Kiobel v. Shell*,²¹³ in which one of the men killed along with Ken Saro-Wiwa in 1995 has brought an action, which facts are similar to *Wiwa case*. On 17 October, 2011, the US Supreme Court agreed to use the case as a test case to consider whether corporations can be sued under federal laws that protect people in other countries for human rights abuses. Another case is also pending in the Dutch court, filed by Friends of the Earth, Netherlands against Shell on behalf of two Nigerian farmers in the Niger Delta for oil pollution

²¹² Pleadings and decisions on this matter are available online at <http://www.business-humanrights.org/search>, (last accessed 21/11/2011).

²¹³ See <http://www.businesshumanrights.org/search>, (last accessed on 21/11/2011).

in their villages.²¹⁴ While some hope is placed on these cases, given the history of previous cases, it is with much anticipation that the litigants await the verdicts.

3.3.4 Observations on Foreign Litigation

The first observation on foreign litigation using the ATCA is that the action must take place in the US in accordance with American legal principles, which means that lawyers qualified and with experience in the American judicial system must be hired. There is also the requirement to find such lawyers, prepared to combine the arduous task of litigating against powerful multinationals as well as appreciate the problems that the people in the Niger Delta face. There is also need to hire Nigerian lawyers to bring ‘local’ perspectives on oil operations there, the effects on the people, the environment and human rights in Nigeria. These challenges could put off intending plaintiffs, with heavy financial burden in terms of legal fees, flight tickets and accommodation for lawyers, the litigants themselves and their witnesses. This is almost impossible for individuals and communities that are barely able to eke out a living from their devastated environment, and the reason that this form of litigation cannot be undertaken, except with assistance from foreign NGOs or other such spirited individuals or organizations.

Several NGOs assisted in these matters and some of the US lawyers acted on a *pro bono* or contingency fee basis. For instance, the plaintiffs in *Wiwa’s case* were represented by New York-based Centre for Constitutional Rights (CCR), Washington based EarthRights International, Seattle University law professor Julie Shapiro, and Paul Hoffman. These organizations have limited funding and have to prioritize the cases they get involved in. Also despite a variety of

²¹⁴ See <http://www.business-humanrights.org/search>, (last visited 20/11/2011).

legal strategies employed by counsel, most if not every Alien Tort Claims Act case on environmental damage and violation of human rights has failed on substantive or procedural grounds. The first difficulty appears to be that environmental rights do not fit neatly into conventional categories of international law ('laws of nations'). Advocates have tried unsuccessfully to weave issues of environmental rights under such existing and recognized international norms and customs as international human rights law. The claims of the Plaintiffs under the ATCA are categorized generally as violations of the right to life and health and sometimes as cultural genocide as in the *Freeport McMoran case*. Although the link could be drawn, the weight of evidence required by the Act is difficult to meet. While the ATCA provides an avenue for litigants to venture into the American judicial system and perhaps, raise the profile of their cases, the time these cases take and the enormous financial and emotional commitments they entail make them an inappropriate remedy for the environmental crisis facing the people of the Niger Delta. As turned out, none of the Nigerian cases succeeded and the fact that *Wiwa's case*, which held so much promise was settled out of court after over ten years in the US judicial system, denied the Claimants of their day in court.²¹⁵

Therefore, the efficacy of foreign litigation to ameliorate or curb the menace of oil pollution in the Niger Delta is very doubtful, especially as it does not offer any incentive to the IOCs to adopt best practice, even if the litigant is successful.²¹⁶ While *Wiwa's case* may be said to have succeeded in part, following settlement by Shell at the last minute, the *Bowoto* case has since

²¹⁵ An author stated that although human rights victims are increasingly seeking recompense against TNCs in the court of their home states, this has not translated to merits decisions, as a result of interminable interlocutory applications concerning jurisdictional and procedural issues, and if the Plaintiffs succeed on these points, cases have tended to settle. S. Joseph, *Corporations and Transnational Human Rights Litigation*, (Hart Publishing, Oxford, 2004), 145. Baxi believes the reason they settle is to avert any 'precedent-creating effects'. U. Baxi, 'Geographies of Injustice: Human Rights at the Altar of Convenience', in C. Scott (Ed.), *Torture as Tort* (Hart Publishing; Oxford, 2001), 197, 209

²¹⁶ Joseph, *Ibid*, 153.

failed, which suggests that human rights concerns are best adjudicated within municipal courts or occasionally at regional human rights courts, rather than in other jurisdictions. While extra-jurisdictional actions may also be available in extreme circumstances and will increase with globalization,²¹⁷ it is within the domestic arena that future battles for redressing human rights abuses would be fought. The advantages are three-fold. Firstly, a declaration by a foreign court that the IOC has violated the ‘laws of nations’ will take the matter no further than award of compensation. The court may not, for instance, decree injunctive relieves to restrain IOC from future abuse or for remediation. Secondly, most victims would only litigate in foreign land as a last resort as such jurisdictions are alien and unfamiliar with different legal cultures and social environment, especially considering the length of time these actions take, the inconveniences attendant and costs are enormous. Thirdly, what is required is not the liberalization of foreign or universal jurisdiction, but equipping, strengthening and empowering local judicial systems to handle such complex environmental and human rights cases, and whose remedies would be felt swiftly by both parties.

3.4 Conclusion

This chapter discussed the various methods by which victims of oil pollution in the Niger Delta have sought over the years to redress the injuries suffered as a result of oil pollution. The chapter commenced with discussions on common law remedies provided by actions in trespass to land, negligence, nuisance and the rule in *Rylands v. Fletcher*. It was shown that these causes of action are not only difficult to prove, but when proved, the damages awarded are limited mainly to monetary awards and compensation, for which only those who can afford to bring

²¹⁷ See J.C. Drimmer and S.R. Lamoree, “Think Globally, Sue Locally: Trends and Out of Court Tactics in Transnational Tort Actions”, (2011) 29(2), *Berkeley Journal of International Law*, 456-527.

these actions benefit directly, and have over the years, failed to minimize pollution. Although these torts remain largely the only viable remedies available to victims, it was only recently that the courts began to award damages which may be interpreted as sufficient, but inadequate to assuage the damages suffered by victims. In spite of this shift, many victims remain marginalized from the judicial process as litigation in Nigeria is particularly tedious and expensive and take a long time to resolve. Besides, the victims are among the poorest members of the community who cannot afford the cost of litigation, let alone the time it takes for these matters to come to court.²¹⁸ This means that a good number of cases which should come to court do not and these injuries are not redressed or remedied. The common law is reluctant to decree injunctive reliefs and rarely order remediation. This means that while the victims are embroiled in court actions, the perpetrators could continue to pollute, and at the end monetary awards are made, measured against pre-determined rates, which at the end of the day provides little recompense for many years of suffering. Award of compensation does not guard against future damage or pollution nor offer relief against land that remains contaminated or fish pond in which no fish can be cultivated or an environment that is permanently damaged.

An attempt was also made to discuss the other remedies available to victims who may wish to bring an action in the home court of the IOCs operating in Nigeria. It was shown that this type of action is difficult, not only in terms of the expense and inconvenience of bringing a civil action in a foreign land, but also the length of time it takes before a plaintiff has his day in court, and the procedural hurdles to overcome. The U.S. remains the most viable jurisdiction for such suits as a result of the ACTA jurisdiction, which enables aliens to bring civil actions against US

²¹⁸ See E. Emeseh, "The Niger Delta Crisis and the Question of Access to Justice", in C.Obi and S.A. Rustad , (Eds.) (Zed Books; London, 2011) 55-70.

companies or individuals operating in foreign countries for torts committed there. Such suits are extremely difficult to prove, beside the fact that the defendants in these actions are usually large and very powerful corporations with limitless finance to fight such legal battles. Other than the publicity, which arguably may be considered a remedy in itself, which may affect the corporate image and reputation of the company concerned, these cases often fail and cannot be relied on to ameliorate or curb the oil pollution crisis which the people of the Niger Delta face daily. As shown from the two Nigerian cases recently fought in US courts (one of which was dismissed and the other settled before trial), without the assistance of NGOs no victim of oil pollution in the Niger Delta could afford to litigate in the US,²¹⁹ and this invariably limits this method of seeking redress as a viable option.

The contribution of international and local NGOs is important, not only for providing the funding and expertise in the few cases fought in US courts as well as at the African regional human rights system, but they are less forthcoming in funding litigation in municipal common law courts. The reason is partly financial as NGOs have limited funds in any event, which compels them to select the most egregious cases, but also the fear of Government reprisals as well as the potential of being condemned to high litigation costs over many years. Funding common law actions for compensation behind the scenes is not an attractive proposition for NGOs as this could be easily misunderstood. This is the reason NGOs select only those cases

²¹⁹ G.S. Akpan, 'Litigating Problems that Arise From Natural Resources Exploitation in Foreign Courts: Impediments to Justice', (2002) 20, *Journal of Energy and Natural Resources Law*,55; A K Sacharoff, 'Multinationals in Host Countries: Can they be held Liable Under the Alien Tort Claims Act for Human Rights Violations?', (1998) 23, *Brooklyn Journal of International Law*, 927; B. Belgore, *Problems with Oil Pollution Injury Litigation in the Nigerian Legal System: Can Nigerian Litigants Gain Access to Courts in England and the USA?* PhD Thesis (University of Dundee; Scotland, 2003); B. Adaralegbe, 'Nigerian's Oil Pollution Claims: Are US courts really that Viable?' online at <http://www.gasandoil.com/goc/news/nta62790.htm>, (last accessed on 21/10/2008).

involving human rights abuses, which opportunities were constricted under the old Fundamental Rights Enforcement Procedure Rules, 1979.

It is therefore evident from the discussions that there are challenges in common law methods of redressing environmental injuries. Common law tort actions have been used since commercial exploitation of oil began in Nigeria in 1956 with limited success. Only very few victims are able to invoke these remedies for the reasons given, yet oil pollution has continued, which makes an alternative approach necessary. Could human rights based approaches mitigate some of these challenges in terms of the cost, time and technicalities, as well as provide far-reaching remedies, including injunctive reliefs, declarations, orders for remediation and other consequential orders, which would inure not only to claimants but also the community at large? The human rights based approach and the methods by which this may be brought under Nigerian law will be discussed in the next two chapters.