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# *SHELL* IN NIGERIA: FROM HUMAN RIGHTS ABUSE TO CORPORATE SOCIAL RESPONSIBILITY

TINEKE LAMBOOY* and MARIE-ÈVE RANCOURT**

*I repeat that we all stand before history. I and my colleagues are not the only ones on trial. Shell is here on trial, and it is as well that it is represented by counsel said to be holding a watching brief. The Company has, indeed, ducked this particular trial, but its day will surely come and the lessons learned here may prove useful to it, for there is no doubt in my mind that the ecological war that the Company has waged in the Delta will be called to question sooner than later and the crimes of that war be duly punished. The crime of the Company's dirty wars against the Ogoni people will also be punished.*

*Ken Saro-Wiwa, Spokesman of the Ogoni people*

## A. SHELL IN NIGERIA: BACKGROUND AND CONTEXT

### 1. A SHORT HISTORY OF THE POLITICAL EVOLVEMENTS OF POST-COLONIAL NIGERIA[1]

Following successive constitutional conferences, Nigeria achieved independence from the United Kingdom (UK) on 1 October 1960 under a coalition government led by the Nigerian People's Congress (NPC). The establishment of its new federal constitution was undertaken with the aim to "promote efficiency in, and harmonious relations and

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1 The political history of Nigeria being an intricate matter – especially in regard to ethnic relations – the authors deem it useful to offer a brief description of some political events of post-colonial Nigeria which are of particular interest from a legal perspective.

unity among, the constituent parts of the Federation".[2] Yet, the challenge of unifying a nation composed of over 250 ethnic groups into a federal republic turned out to be overwhelming; ethnic rivalry and the desire for greater autonomy of certain regions rapidly led to the formation of multiple political groupings and alliances with different visions.[3] The emerging political parties were soon found to represent the three dominant ethnic groups: the northern Muslim Hausa/Fulani, the Yoruba in the southwest, and the Igbo, mainly Christian in the southeast.

The alleged corruption of the NPC government, mainly Hausa/Fulani, and a post-election crisis led Nigeria to its first military *coup d'état* in January 1966. Although the coup failed, several key politicians, including the Prime Minister Abubakar Tafawa Balewa, were murdered in the attempt.[4] The civil Prime Minister was replaced by a military Head of State, General Johnson Aguiyi-Ironsi, to bring law and order along with more honest and effective government. However, his plan to create a new unitary constitution generated strong reactions from the North. They felt threatened by the southern dominance that would result from a centralised government, and another successful *coup d'état* was orchestrated by military officers.[5] This event was followed by ethnic tension and violence all across Nigeria.[6] Especially, the violence against the Igbos increased their desire for autonomy in the eastern region, where thousands of Igbos had taken refuge, with the end-result of the unilateral declaration of independence of the Republic of Biafra on 30 May 1967. This announcement sparked a civil war with the rest of the country that lasted until Biafra surrendered to the Federal Government, 31 months later.

The control of oil-related resources in this region was not indifferent to this conflict, which was described by Okonta and Douglas as "not so much a war to maintain the unity and integrity of the country [...] as a desperate gambit by the Federal Government to win back the oil fields of the Niger Delta from Biafra". This civil war was also perceived as a "watershed in the political and economic development

2 I. Okonta and O. Douglas, Where Vultures Feast: Shell, Human Rights and Oil 17 (London: Verso, 2003), referring to: O. Awolowo, Thoughts on Nigerian Constitution 26 (Ibadan: Ibadan University Press, 1966). Okonta is a writer and journalist. He worked closely with the late Ogoni leader Ken Saro-Wiwa and other MOSOP activists in Nigeria. Douglas was a member of the defence team that represented Saro-Wiwa in 1995. Both authors are on the management committee of the NGO Environmental Rights Action/Friends of the Earth, Nigeria.

3 The exact number of ethnic groups in Nigeria is unknown. For further information on these groups, see: A. R. Mustapha, Ethnic Minority Groups in Nigeria: Current Situation and Major Problems, presented to the UN Commission on Human Rights, Sub-Commission on Promotion and Protection of Human Rights, Working Group on Minorities (E/CN.4/Sub.2/AC.5/2003/WP.10) (2003).

4 Okonta and Douglas, *supra* note 2, p. 17.

5 Human Rights Watch, The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities, January 1999, http://www.hrw.org/reports/1999/nigeria/nigeria0199.pdf (last visited on 28 June 2008).

6 See Human Rights Watch, Violence, "Godfathers" and Corruption in Nigeria, Vol. 19, No. 16(A), October 2007, http://hrw.org/reports/2007/nigeria1007/ (last visited on 28 June 2008).

of the peoples of the Niger Delta. It created conditions for the accelerated exploitation of their resources and the devastation of their environment".[7]

Following a succession of military dictators who ruled Nigeria from 1966–1979 and from 1983–1999,[8] the country had witnessed a return to civilian rule since 1999. Nevertheless, the overall situation has not substantially improved since this return to democracy: "Ethnic and religious killings are recurrent; the over-centralisation of control over power and revenue; politicisation of ethnicity; decline of state-administered security and proliferation of non-state armed groups, notably in the oil-rich Niger Delta".[9] The resulting situation in the Niger Delta is best introduced by describing the effects of oil exploitation in the region.

## 2. A BRIEF ACCOUNT OF THE ECONOMIC, GEOGRAPHIC AND SOCIAL FEATURES OF OIL EXPLOITATION IN THE NIGER DELTA (SITUATION AS OF 1995)

The first discovery of oil in Nigeria traces back to 1956 at Oloibiri in the Niger Delta, four years prior to the country's independence.[10] In 1958, Nigeria joined the ranks of oil producers and exporters.[11] During the worldwide oil boom of the 1970s, output from oil exploitation rose rapidly and significantly increased the revenue of the Federal Government. Billions of dollars worth of oil exploitation later, Nigeria became the largest oil producer in Africa and ranked as the eighth-largest world oil exporter.[12] The country is also the fifth largest oil producer in the Organisation of Petroleum Exporting Countries, of which Nigeria is a State Party since 1971.[13]

Indeed, Nigeria's economy is largely dependent on the petroleum sector, which provides around 95 percent of the country's export earnings and over three quarters of government budgetary revenues.[14] Akin to other parts of the world which are characterised by a weak regulatory environment, the very resource dependence has

7 Okonta and Douglas, *supra* note 2, p. 21.

8 Human Rights Watch (2007), *supra* note 6. As the report indicated, a civilian Interim National Government was established during a three-month period in 1993.

9 International Crisis Group, Report by Region, Nigeria, http://www.crisisgroup.org/home/index.cfm?id=4272&l=1&gclid=CPiooNuj4ZACFQJhMAodsR5-OQ (last visited on 28 June 2008).

10 Human Rights Watch (1999), *supra* note 5.

11 Nigerian National Petroleum Company, History of the Nigerian Petroleum Industry, http://www.nnpcgroup.com/history.htm (last visited on 28 June 2008).

12 Energy Information Administration, Official Energy Statistics from the US Government, Top World Oil Producers and Consumers, 2006, http://www.eia.doe.gov/emeu/cabs/topworldtables1_2.htm (last visited on 28 June 2008). Nigeria ranked as the twelfth-largest producer of oil in the world.

13 Human Rights Watch (1999), *supra* note 5.

14 WTO, Trade Policy Reviews: First Press Release, Secretariat and Government Summaries, Nigeria, June 1998, http://www.wto.org/english/tratop_e/tpr_e/tp75_e.htm (last visited on 28 June 2008).

'cursed' Nigeria with an increased vulnerability to price shocks and lopsided investment.[15]

The main oil-related activities undertaken by foreign companies in Nigeria are performed in joint ventures with the Nigerian National Petroleum Corporation (NNPC), a public organisation founded in 1977 to manage all governmental interests in the Nigerian oil industry.[16] The NNPC enjoys a privileged position in the oil sector; it owns 55 to 60 percent share in all joint ventures in the country. Of these joint venture companies, Shell Petroleum Development Company of Nigeria (SPDC) is the largest.[17] It accounts for more than 40 percent of all oil production in the country, involving the following joint venture partners: NNPC as the majority share-holder (55 percent); Shell (30 percent); Elf Petroleum Nigeria Ltd (10 percent), a subsidiary of the French oil company Total; and the Nigeria Agip Oil Company (10 percent), a subsidiary of Agip of Italy.[18] SPDC's ultimate parent company is thus Royal Dutch Shell plc (Shell), which is incorporated in the UK.[19] SPDC operates under a Joint Operating Agreement (JOA), which governs the administrative relations between the partners, including the budget approval and supervision, the crude lifting and sale by the partners in proportion to equity, and funding by partners. A Memorandum of Understanding (MoU) with the Federal Government sets the legal and fiscal framework, such as the allocation of oil income between the partners, namely the payments of taxes, royalties and industry margin.[20] According to Shell, the Federal Government received around 95 percent of the profit derived of oil production.[21] The activities are financed proportionally to the shareholdings of the partners. As the operator of the joint-

15 K. Ballentine, Promoting Conflict-sensitive Business in Fragile States: Redressing Skewed Incentives, in: O. Brown, M. Halle, S. Peña Moreno and S. Winkler (eds.), Trade, Aids and Security: An Agenda for Peace and Development 130 (London: Earthscan, 2007).

16 NNPC, About NNPC, http://www.nnpcgroup.com/aboutus.htm (last visited on 28 June 2008). NNPC was established by statutory instrument-decree No.33 of 1977.

17 SPDC is one of the four companies operated in Nigeria and owned by Royal Dutch Shell plc (together referred to as "Shell Nigeria").

18 Shell, The Shell Petroleum Development Company of Nigeria (SPDC), http://www.shell.com/home/content/nigeria/about_shell/who_we_are/companies/companies.html (last visited on 28 June 2008).

19 Shell is incorporated in the UK and headquartered and resident in The Netherlands for Dutch and UK tax purposes. Its shares are traded on London Stock Exchange, Euronext Amsterdam and New York Stock Exchange. Shell, Share Price Summary, http://www.shell.com/home/content/investor/share_price/share_price_summary.html (last visited on 28 June 2008).

20 Both agreements were signed on 11 July 1991 and last revised in 2000. Shell, Shell Nigeria Annual Report 2006, p. 4, http://www.shell.com/static/nigeria/downloads/pdfs/2006_shell_nigeria_report.pdf (last visited on 28 June 2008).

21 Ibid. p. 11. This percentage includes royalties, tax, other levies and NNPC equity share. It should be noted that the data are related to the production of Ogoniland in the Niger Delta.

venture, SPDC is responsible for the day-to-day operations on the basis of the JOA.[22] SPDC's framework of activities is described as follows:

> The company's operations are concentrated in the Niger Delta and adjoining shallow offshore areas where it operates in oil mining lease area of around 31,000 square kilometres. SPDC has more than 6,000 kilometres of pipelines and flow lines, 87 flow stations, 8 gas plants and more than 1,000 producing wells. The company employs more than 4,500 people directly of whom 95 per cent are Nigerians. Some 66 per cent of the Nigerian staff members are from the Niger Delta. Another 20,000 people are employed indirectly through the network of companies that provide supplies and services.[23]

Most of the oil fields are located in the Niger Delta, a region that counts around 190 operational oil fields.[24] Despite its oil-rich soil, the Niger Delta is ironically described as one of the poorest and most underdeveloped parts of Nigeria. Its dense population suffers the consequences of high unemployment, which amounts to at least 30 percent in the capital of the region, Port Harcourt. Additionally, education levels rank below the (already low) national average.[25] In rural areas, basic commodities such as electricity, piped water or health facilities are still lacking.[26] Vital public services are underfunded by the government, despite the wealth generated by the petroleum industry.[27] High levels of corruption and poor governance are pointed out as some of the factors 'explaining' that oil royalties have not been adequately distributed to the population.

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22 NNPC, Joint venture operations, http://www.nnpcgroup.com/jvoperation.htm (last visited on 28 June 2008).

23 Shell (SPDC), *supra* note 18.

24 NNPC, Development of Nigeria's Oil Industry, http://www.nnpcgroup.com/development.htm (last visited on 28 June 2008). There are exactly 606 oil fields in the Niger Delta, including 193 currently operational.

25 Human Rights Watch (1999), *supra* note 5.

26 Okonta and Douglas, *supra* note 2, p. 19. See: B. Naanen, Progress of the Ogoni People in Nigeria towards the attainment of the International Development Targets (IDTs) for poverty, education and health, Draft Report for the Indigenous Peoples and Socioeconomic Rights, Commonwealth Policy Studies Unit, March 2003, http://www.cpsu.org.uk/downloads/Ogoni%20People%20-%20Ben%20Naanen.pdf (last visited on 28 June 2008). This report asserts the socio-economic disadvantages of ethnic minorities in Nigeria.

27 Joint UNDP/World Bank Energy Sector Management Assistance Programme, Taxation and State Participation in Nigeria's Oil and Gas Sector, August 2004, http://www.esmap.org/filez/pubs/05704NigeriaTaxationMcPherson.pdf (last visited on 28 June 2008).

**Figure 1. Map of Nigeria**

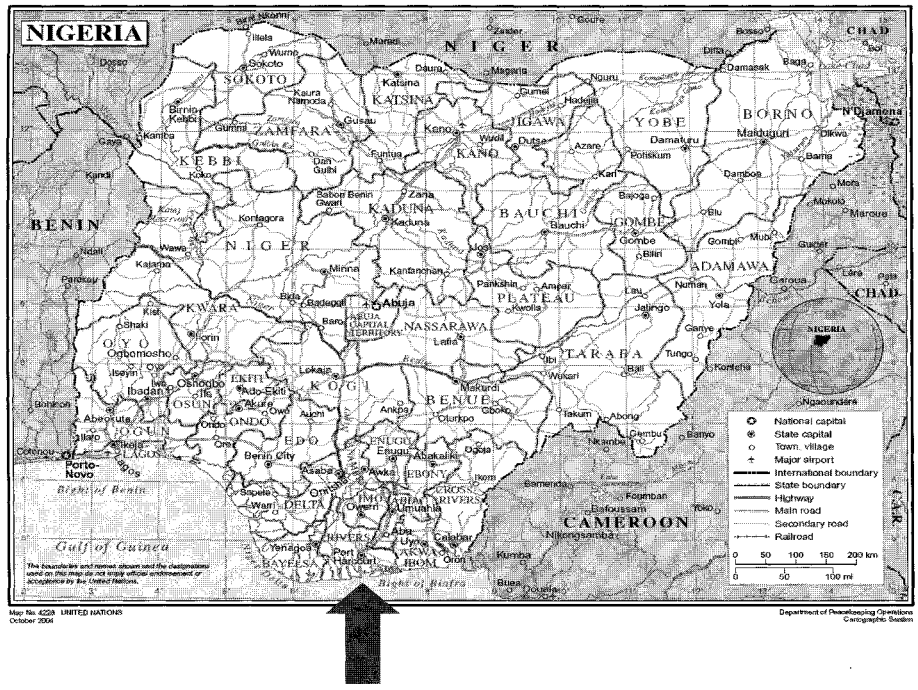
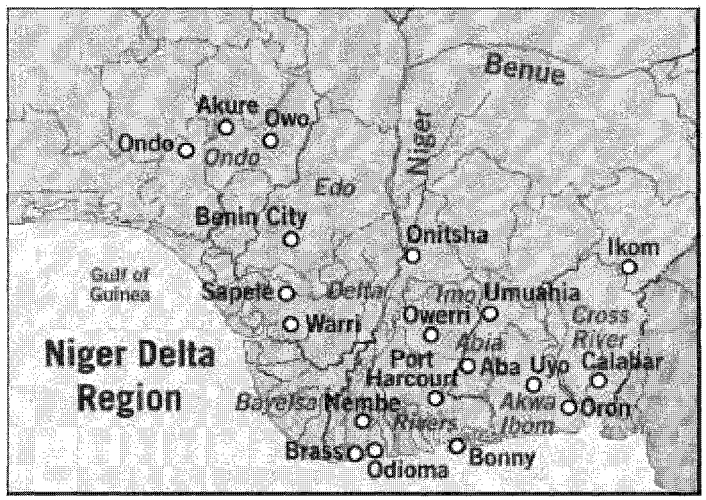



**Figure 2. Map of the Niger Delta Region**



The same corruption and weak governance are said to affect the ability of the government to deliver its obligations to protect the environment against the negative impacts of the oil industry. There, the network of pipelines crossing the villages has caused hundreds of oil spills that often spoil agriculture and fishing.[28] Moreover, oil companies have continued the environmentally harmful practice of gas flaring despite repeated promises to phase it out. As a result, the region suffers from acid rain. The unfair redistribution of oil revenues is also linked to the environmental degradation of the region; for instance, the use of wood as daily fuel by the population and intensive agriculture have both accelerated the deforestation of the area.[29]

One of the richest oil-producing areas, Ogoniland – a district in Rivers State in the central part of the Niger Delta – is particularly threatened by the side effects of the oil industry. Thereafter, from within this predicament, some of its people, the Ogonis, decided to raise their voice and take action for a better future.

## 3. WORLDWIDE HUMAN RIGHTS MOVEMENT FOR THE RIGHTS OF INDIGENOUS PEOPLE AND THEIR RIGHT TO SELF-DETERMINATION WITH RESPECT TO THE SUSTAINABLE DEVELOPMENT OF NATURAL RESOURCES (UNTIL 1995)

### *a) Introduction: the Ogonis*

This section outlines the deeds which were inflicted on Ken Saro-Wiwa, foreman of the Ogonis, in the struggle for self-determination, especially in relation to natural resources. As here revealed, the ideals of Saro-Wiwa concurred with the worldwide human rights movement for the right to self-determination of Indigenous Peoples. For hundreds of years, their rural community of fishermen and subsistence farmers has lived in the Niger Delta in a harmonious relationship with its environment, as for them: "The land was considered sacred, and to commit acts that polluted or desecrated, it was viewed as an abomination and promptly visited with appropriate sanctions." Saro-Wiwa reported how he perceived this change of situation in the early nineties:

> Thirty-five years of reckless oil exploration by multinational oil companies has left the Ogoni environment completely devastated. Four gas flares burning for twenty-four hours a day over thirty-five years in very close proximity to human habitation; over one hundred oil wells in villages backyards; and a petrochemical complex, two oil refineries, a fertiliser plan, and oil pipelines crisscrossing the landscape aboveground have spelled death for human beings, flora, and fauna. It is unacceptable.[30]

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28 Human Rights Watch (1999), *supra* note 5.

29 Naanen, *supra* note 26, p. 4.

30 Okonta and Douglas, *supra* note 2, pp. 75 and 94 referring to Saro-Wiwa's speech delivered on the occasion of a ministerial visit to Ogoniland in January 1993.

With over 600,000 inhabitants in an area of about 100,000 square kilometres, Ogoniland is densely populated.[31] Nonetheless, the Ogonis represent one of the smallest of the ethnic groups living in Nigeria. Similar to several minority groups, they suffered from ethnic discrimination. Few Ogonis held key positions in government or management in the industry active in the area.[32] Their exclusion as a minority group has translated into economic and social disadvantages as well as into underdevelopment of a corresponding enormity of scale.[33]

### *b) The MOSOP*

Against this background, Ken Saro-Wiwa, a Nigerian poet, writer, television-producer and environmentalist, launched the Movement for the Survival of the Ogoni People (MOSOP) in August 1990. This organisation was established as a vehicle to "mobilise the Ogoni People and empower them to protest against the devastation of their environment by Shell, and their denigration and dehumanisation by Nigeria's military dictators".[34] This non-violent organisation aimed to protect their endangered ecosystem and resources, and strive for greater social justice.

Saro-Wiwa was also known to be a fervent activist on the political plane; arguing for democratic accountability and direct representation of the Ogonis in all national institutions. Indeed, since the coming of the independence of Nigeria, the situation had not changed: the national politics were still dominated by the three larger ethnic groups. Consequently, the minorities, including the Ogonis, were – in their view – systematically excluded from power.[35]

In October 1990, the MOSOP presented the Ogoni Bill of Rights to the Government. This bill requested, among others, the political right of the Ogonis to self-determination in the Nigerian Federation; adequate representation and direct representation in national institutions; the right to control and use of a fair proportion of the economic resources in Ogoniland for its development; language and culture rights; and the right to protect their environment from further degradation.[36] The wording of the Ogoni Bill of Rights closely follows the fundamental principles contained in the United Nations Declaration on the Rights of Indigenous People (UNDRIP), which reaffirms

31 At the national census of 2001 the population was estimated at 635,825. Naanen, *supra* note 26, p. 8.

32 K. Wiwa, In the Shadow of a Saint: A Son's Journey to Understand his Father's Legacy 83 (London: Black Swan, 2000).

33 Naanen, *supra* note 26, p. 13.

34 Wiwa, *supra* note 32, p. 16.

35 Since political control is not a 'clear cut game', it could also be argued that the Niger Delta representatives should have created alliances with other progressive political platforms.

36 See Wiwa, *supra* note 32, pp. 124–125.

the right to self-determination of Indigenous Peoples.[37] The right to self-determination generally refers to the right of Indigenous Peoples to freely determine their political status and pursue their economic, social and cultural development. By virtue of that right, Indigenous Peoples "have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means of financing their autonomous functions."[38]

The Ogoni Bill of Rights was followed by further instruments created by other groups (e.g. the Izon Peoples Charter, the Ogbia Charter) addressing similar issues related to access and control of land and resources in the Niger Delta.[39]

Another significant milestone for the MOSOP was the announcement in November 1992 of a thirty-day ultimatum to all the oil companies operating on their land, including SPDC, to pay back rents and royalties as well as compensation for lands devastated by the oil industry or otherwise, to leave. The companies ignored their request and pursued the usual course of business.[40]

The same year, Saro-Wiwa was imprisoned for several months without trial by the military government then headed by the dictator General Sani Abacha.

In January 1993, the MOSOP organised a peaceful protest march to draw attention to their cause during which approximately 300,000 Ogonis (i.e. three out of every five Ogonis!) took to the streets. That day "the Ogoni declared Shell *persona non grata* until it paid back rents and cleaned up the environment."[41]

### c) *The Arrest and Trial of Saro-Wiwa*

As a result of these protests, SPDC decided to suspend its operations in Ogoniland in mid-1993, without resuming them to this day.[42] These events led some companies, including SPDC, to request assistance from the Government. A special military unit, the Rivers State Internal Security Task Force (RSISTF), was sent to Ogoniland to stop and prevent further unrest. The RSISTF is reported to have massacred hundreds of civilians and destroyed villages in 1994.[43] An investigation undertaken by Human Rights Watch on the means used for the suppression of protest at oil company activities in Nigeria found:

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37 Article 3 of the UNDRIP (A/RES/61/295) (2007). The UNDRIP was adopted by the General Assembly on 13 September 2007 after over 20 years of debate. The recorded vote was of 143 in favour to 4 against, with 11 abstentions, including Nigeria. See also: Article 1(2) of the UN Charter (1945).

38 Article 4 of the UNDRIP.

39 Okonta and Douglas, *supra* note 2, p. 182.

40 Ibid. p. 117. Especially, MOSOP requested Shell, Chevron and NNPC to pay damages of US$4 billion for destroying the environment and US$6 billion in unpaid rent (back-rent) and royalties.

41 Wiwa, *supra* note 32, p. 17.

42 The company pursues its activities in other parts of the Niger Delta region and still try to conclude an agreement to resume its activities in Ogoniland.

43 Wiwa, *supra* note 32, p. 141.

> [...] repeated incidents in which people were brutalised for attempting to raise grievances with the companies; in some cases security forces threatened, beat, and jailed members of community delegations even before they presented their cases. Such abuses often occurred on or adjacent to company property, or in the immediate aftermath of meetings between company officials and individual claimants or community representatives. Many local people seemed to be the object of repression simply for putting forth an interpretation of a compensation agreement, or for seeking effective compensation for land ruined or livelihood lost.[44]

According to the same report, allegations were made of Shell collaboration with the military unit related to the suppression of local resistance to oil extraction policies.

On 22 May 1994, Saro-Wiwa and eight other MOSOP leaders were arrested for allegedly inciting the murder of four pro-government Ogoni chiefs during a riot at a meeting of the Gokana Council of Chiefs held in Giokoo, Ogoniland. Saro-Wiwa was nowhere near Goikoo at the time of the murders. Ironically, one of the murder men was Saro-Wiwa's brother-in-law and another, an old friend of his.[45]

At their trial before the Civil Disturbances Special Tribunal, widely seen as flawed and unfair,[46] Saro-Wiwa and his compatriots were found guilty of murder and sentenced to death on 31 October 1995. Their execution occurred ten days later. In the week prior to the execution, Ken Saro-Wiwa's elder son, Ken Wiwa, flew to the Commonwealth Summit held in New Zealand to convince the world leaders to appeal for clemency.[47] Although his tentative attempt failed, the event drew worldwide condemnation of the then dictatorship of General Sani Abacha. The military government was known for violating rights related to free political activity including the freedom of expression and human rights abuses by its security forces. Reactions from the international community were translated into some actions including the suspension of Nigeria from the Commonwealth, the imposition of a ban on arms sales by certain countries, and calls for a multilateral oil embargo.[48] Nevertheless, as Human Rights Watch pointed out, international attention gradually lessened "as

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44 Human Rights Watch (1999), *supra* note 5.

45 Wiwa, *supra* note 32, pp. 144–145 and 153–154; Okonta and Douglas, *supra* note 2, p. 130.

46 See: M. Birnbaum, Nigeria-Fundamental Rights Denied, Report of the Trial of Ken Saro-Wiwa and Others, ARTICLE 19, June 1995, http://www.article19.org/pdfs/publications/nigeria-fundamental-rights-denied.pdf (last visited on 28 June 2008). Birnbaum was asked to attend and report on the Saro-Wiwa's trial proceedings from 21–29 March 1995 as the representative of the Law Society of England and Wales with the support of ARTICLE 19, the International Centre against Censorship. See section 1.4 on the UN fact-finding mission.

47 See Wiwa, *supra* note 32, pp.181–194.

48 TED Case Studies, Ogoni and Oil, 1 November 1997, http://www.american.edu/TED/OGONI.HTM (last visited on 28 June 2008).

Nigeria's major trading partners have returned to protecting their short-term economic interests".[49]

## 4. FACT-FINDING MISSION OF THE UNITED NATIONS (UN) IN NIGERIA

In March 1996, at the request of the Government of Nigeria, the UN Secretary-General decided to launch a fact-finding mission to Nigeria.[50] The mission was twofold, addressing: (1) the trial of Saro-Wiwa and the other co-accused including the examination of the judicial procedures based on Nigerian law and on the various international human rights instruments, to which Nigeria is party; and (2) the plans of Nigeria to implement its commitment to restore democratic rule.[51] The mission indeed took place at the end of March until mid-April 1996 and a report was subsequently delivered in April 1996.[52]

Concerning the first matter, the mission reported that the Civil Disturbance Committee had not been constituted as required by Part I, Section 1, of the *Civil Disturbances (Special Tribunal) Decree, No. 2 of 1987.* Hence, it concluded that the order composing the tribunal was void *ab initio* and therefore *non est.*[53] Furthermore, the report found that several procedures during the trial were unfair including *inter alia,* the denial of the defendants' access to Counsel for an extended period before the opening of the trial, harassment of the members of the defence counsel by military personnel, and refusal of the tribunal to consider a statement prepared by Saro-Wiwa. Moreover, the accused were deprived of their right to have the death sentence reviewed pursuant to Section 7(1) of *Decree No. 2 of 1987.* In addition, the delay to submit a petition for clemency to the President was not respected. The mission also noted that the right of appeal was not respected as recognised under Nigerian law and Article 14(5)

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49 Human Rights Watch, Nigeria: Transition or Travesty? Vol. 9, No. 6(A), October 1997, http://www.hrw.org/reports/1997/nigeria/ (last visited on 28 June 2008).Helpful Clarification: Check webpage: relevant quote appears on sub linked page: http://www.hrw.org/reports/1997/nigeria/Nigeria-10.htm#P608_159172.

50 UN, General Assembly, Human Rights Questions: Human Rights Situations and Report of Special *Rapporteurs* and Representative (A/51/538) (1996). The mission was in accordance with: UN, General Assembly, Situation of Human Rights in Nigeria (A/RES/50/199) (1996).

51 United Nations, Secretary-General to Send Fact-Finding Mission to Nigeria, Press Release SG/SM/5929, 20 March 1996, http://www.un.org/News/Press/docs/1996/19960320.sgsm5929.html (last visited on 28 June 2008). The composition of the mission was: A. K. Amega, former Minister for Foreign Affairs and former President of the Supreme Court of Togo, and member of the African Commission for Human and People's Rights; Justice V.S. Malimath, member of the National Human Rights Commission of India; and J. P. Pace, Chief of Legislation and Prevention of Discrimination Branch, Centre for Human Rights.

52 Under the Terms of Reference, the Government of Nigeria undertook to fully cooperate with the mission team and to ensure access to all relevant individuals, premises and information.

53 A/51/538, para. 77.

of the *International Covenant on Civil and Political Rights* (ICCPR).[54] Finally, the report stressed that the presence of a military officer at the tribunal was contrary to the standard of impartiality and independence as set out in Articles 7(1)(d) and 26 of the *African Charter on Human and Peoples' Rights* (ACHPR)[55] and 14(1) of the ICCPR.[56] Among the final recommendations on the trial, the report stressed that a legal panel should be established by the Government to determine the modalities of the financial assistance to be accorded to the dependents of the deceased.[57]

Regarding the second matter of the report – on the implementation of a transitional programme – it was found that sanctions against Nigeria at this stage may prove unhelpful and retard the progress towards positive improvement. Among other measures, the mission advised the UN Secretary-General to continue the dialogue with the Head of State with the aim of creating conditions for the restoration of democratic rule.

Although the implementation of the recommendations of the UN fact-finding mission by the Government is not said to have yet produced the desired effects, the trial and execution of Saro-Wiwa itself has transformed the political national landscape.

## 5. AFTERMATH OF THE EXECUTION

Since the day of Saro-Wiwa's execution, the political equation is said to have changed in the Niger Delta; the ethnic minorities have raised their voices, insisting to be included in the economic development of their region and to be heard in their struggle for social and ecological justice.[58] Saro-Wiwa's execution also drew international attention to the human rights of Indigenous Peoples to self-determination and to the accountability of corporations for complicity in environmental and human rights abuses. In particular, it has set the stage for a collaborative campaign between the well-known NGOs Sierra Club and Amnesty International to protect the human rights of environmentalists and communities at risk.[59] For the first time up to this level, this case demonstrates the close connection between underdevelopment, environmental concerns and human rights violations when linked to corporate activities in an area where they could afford the support of a dictatorial regime.

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54 A/51/538, para. 76–78. The Report also outlined Article 6(4) of the ICCPR.

55 African [Banjul] Charter on Human and Peoples' Rights (OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58) (1982).

56 A/51/538, para. 76.

57 A/51/538, para. 42.

58 Okonta and Douglas, *supra* note 2, p. 3.

59 *S. Mills*, Sierra Club, Human Rights and the Environment, Writer's Death Gives Life to a Movement, http://www.sierraclub.org/human-rights/nigeria/ken_saro.asp (last visited on 28 June 2008).

Furthermore, the period from December 1994 to 2004 was proclaimed by the UN General Assembly the International Decade of the World's Indigenous People,[60] with the goal to strengthen international cooperation for solving problems faced by Indigenous People in such areas as human rights, the environment, development, education and health.

In this wave, legal proceedings were filed against SPDC, its ultimate parent-company Shell and the Government of Nigeria in connection with human rights violations and environmental damages caused by the oil exploitation in the Niger Delta. The most important of these claims will be discussed in the next section.

## B. LEGAL PROCEEDINGS – HUMAN RIGHTS AND THE ENVIRONMENT

### 1. CIVIL LAW LITIGATION

After the execution of Saro-Wiwa and the others, human rights groups worldwide blamed General Abacha and Shell. The reasons for blaming Shell were multiple. The allegations were, in general, that Shell had severely polluted the environment of the Niger Delta and had depleted – without permission of the Ogonis representatives – their mineral resources without redistributing the proceeds to the Ogonis. The protestations of Saro-Wiwa have led to his death. Shell was also said to co-operate with the regime of General Abacha, not only by concluding oil concessions and participating in the joint venture SPDC, but also by requiring the Government to protect its oil installations, knowing that the available special security forces were 'licensed to kill'. Shell allegedly contributed financially and by furnishing equipments and arms.

Following the events, family members of Saro-Wiwa and the other executed Ogonis were afraid of being targeted as the next victim of General Abacha, and left the country for a safe harbour abroad. With support from NGOs, they filed several legal claims against Shell and the Government.

For various reasons, it appears generally difficult for victims to obtain justice in civil court proceedings against multinational companies. In the particular case of the families of Saro-Wiwa and the others, the issue of security was the primary obstacle to the initiation of legal action in Nigeria. Since SPDC is a Nigerian joint venture company, Nigeria would be the logical place to commence proceedings. In principal, victims cannot file a claim against the local company before a court in another

60 UN, International Decade of the World's Indigenous People (A/RES/48/163) (1994). A Second International Decade commenced on 1 January 2005 (A/RES/59/174) (2004).

country.[61] Secondly, successfully asserting a claim against Shell, the ultimate parent company of SPDC – which consisted of a dual-company structure, registered both in The Netherlands and in the UK – is not an easy undertaking.[62] The parent company would basically assert that it is only the (indirect) shareholder of SPDC and has no influence upon the wrong-doings of the local SPDC management. Parent-companies establish local legal entities for protection against commercial risks and other liabilities incurred by their subsidiary ventures. This is especially true for operations abroad in risky regions of the world, such as Nigeria. To hold a shareholder liable for the behaviour of a subsidiary, it means that the claimant has to 'pierce the corporate veil'.[63] To be successful, several facts need to be established, principally concerning the involvement and interference of the parent company in the policies and activities of its subsidiary company.[64]

Despite the corporate veil, there are interesting examples of multinationals being held accountable for injuries in developing countries. In the UK, plaintiffs from South Africa and Namibia employed by local companies have been allowed to submit their claims for negligence against the ultimate UK parent companies. They held the defendant companies liable for breaches of a duty of care in tort, instead of alleging violations of human rights. In particular, these cases concerned miners in South Africa who claimed damages for personal injuries allegedly sustained as the result of exposure to asbestos (*The Cape Plc cases*[65]); a cancer victim who worked in a uranium mine in Namibia (*Connelly v. R.T.Z. Corporation Plc*[66]); and workers who suffered from lethal mercury poisoning in South African mines (*Thor cases*[67]). Meeran, who represented some of the defendants in these cases, emphasised that the plaintiffs had

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61 See: A. Clapham, Human Rights Obligations of Non-State Actors 237–239 (Oxford: Oxford University Press, 2006).

62 In 2005, the two parent companies, Royal Dutch and Shell Transport, merged into one company, Royal Dutch Shell plc, registered in the UK.

63 Under the Dutch legal doctrine, this is known as the '*directe of indirecte doorbraak van aansprakelijkheid*' or '*vereenzelviging*' that is, respectively, piercing the corporate veil, directly or indirectly, and identification. See, the leading jurisprudence: HR 19 February 1988, NJ 1988, 487 *(Alberda Jelgersma)*, HR 12 June 1998, JOR 1998, 107 *(Coral/Stalt Holding)*, HR 21 December 2001, commented by Lennarts in Ondernemingsrecht 2002, pp. 109–113 *(Hurks)* and HR 13 October 2000, JOR 2000, 238 (*Rainbow Ltd*).

64 See: P. Muchlinski, Multinational Enterprises & the Law 308–335 (Oxford: Oxford University Press, 2007).

65 *Rachel Lubbe v. Cape Plc.* (1998) CLC 1559 and *Lubbe et al v. Cape Plc.* (2000) 2 Lloyd's Rep 383; (2000) 1 WLR 1545. A class action was later settled out of court. See Clapham (2006), *supra* note 61, pp.199–201; N. Jägers, Corporate Human Rights Obligations: in Search of Accountability 204–209 (Antwerpen: Intersentia, 2002).

66 *Connelly v. RTZ Corporation Plc*, (1996) 2 WLR 251 and 1997, 3 WLR 373–388. Jurisdiction and standing accepted in 1994, claims denied in 1998.

67 *Ngcobo et al v. Thor Chemicals Holdings Ltd. and Others* (TLR 10/11/95); *Sithole et al v. Thor Chemical Holdings Ltd. and Another* (TLR15/2/99); *Sithole et al v. Thor Chemical Holdings Ltd. and Others* (LTL 3/2/99). Thor agreed to settle the damage claims.

namely no access to justice in their home country.[68] In the UK, they could apply for legal aid. He advocated that multinational companies should not be able anymore – in this globalising world – to get away with a practice whereby their subsidiary companies located in developing countries apply lower health and safety standards than their factories elsewhere ("double standards"). In his view, the corporate veil should not limit the legal responsibility of the parent company. Since most of the multinational companies today work with operational divisions, which usually do not coincide with the legal 'corporate chart barriers', it would result as an unfair situation to hide legal responsibility for negligent behaviour towards their employees by 'legal group charts'. As the House of Lords stated with respect to the 12 to 35 times higher asbestos levels in the mines in South Africa in comparison to the UK level (*Lubbe v. Cape Plc.*): "[...] the corporation ought to have taken into account the scientific knowledge that was available to it, as it was situated in England".

These judgments are interesting considering that most of them were favourable to the plaintiffs. Some of the cases were settled out of court, paying compensation to the victims. It could not be a coincidence that a group action by over 20,000 African victims of the Ivory Coast scandal in 2006, regarding the illegal dumping of 400 tonnes of toxic waste, has been filed before the UK High Court against Trafigura, a UK-based multinational company.[69]

Another interesting development is the announcement of a possible lawsuit in May 2008 against Shell by Nigerian farmers and fishermen in the Niger Delta, supported by the NGOs Friends of the Earth Netherlands/Nigeria. Based on their rights to food and to a clean and healthy environment, they intend to claim damages caused by oil spills in their villages as a result of the exploitation of Shell's subsidiaries in the Niger Delta.[70]

In addition to the corporate veil obstacles in parent companies jurisdictions, civil litigation in the UK and the United States (US) face the additional hurdle of the *forum non conveniens* doctrine. This doctrine intends to protect the defendant who can challenge the forum chosen by the plaintiff if there is another appropriate forum and

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68 R. Meeran, Corporations, Human Rights and Transnational Litigation, lecture delivered at the Monash University Law Chambers, 29 January 2003, pp. 9,14 and 18.

69 According to the law firm representing the local injured people, the claims are based on the fact that Trafigura were negligent and the nuisance resulting from their actions caused the injuries. In February 2007, the Ivory Coast Government signed an agreement with Trafigura, accepting an out-of-court settlement sum of around £100 million "for damages sustained and the repayment of pollution cleaning costs". Nevertheless, the group action against Trafigura continues as at June 2008.
Leigh Day & Co, Ivory Coast toxic waste disaster claim issued in High Court, 10 November 2006, http://www.leighday.co.uk/doc.asp?doc=964 (last visited on 28 June 2008).

70 *Milieu defensie*, The People of Nigeria versus Shell, 14 May 2008, http://www.milieudefensie.nl/english/oil-mining-gas/the-people-of-nigeria-versus-shell#nigerians (last visited on 28 June 2008).

certain other criteria are met.[71] A parent company will typically bring up this defence stating that the complaint or the facts on which the case is based have a closer link with another jurisdiction and that it would be more appropriate to litigate the case there. In other European Union (EU) countries, Article 2 of the *Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*[72] precludes the application of this doctrine where the defendant is based in the EU.[73]

Human rights violations have also been brought up in civil law cases in the US. Plaintiffs submitted claims against parent companies that were registered in other countries, making use of a special form of legal extra-territoriality: the over 200 years old *Alien Tort Claim Act* 28 U.S.C. §1350 (ATCA). This statute enables US courts to exercise extra-territorial jurisdiction over specified claims, including particular categories of human rights violations. The ATCA was originally enacted in 1789 to provide a remedy for foreigners (aliens) who were mistreated on American soil. The current text states that US district courts shall have jurisdiction over any civil action by an alien (an individual, his or her legal representative or a person who may be a claimant in an action for wrongful death) for a tort only, committed in violation of the law of nations or a treaty of the US. The alien does not need to be physically present in the US nor does the tort need to occur in the US. However, the defendant must be properly served notice in order for personal jurisdiction to arise. In the past 30 years, the ATCA has increasingly been used by non-US-nationals to bring up severe human rights violations, which took place outside the US, as a tort claim before a US court, even against non-US defendant companies.[74]

## 2. CLAIMS VERSUS SHELL UNDER THE ATCA

In November 1996, a claim was filed against Shell by family members of some of the executed Ogoni leaders before the New York District Court, based on the ATCA, the *Tort Victim Protection Act* (TVPA), the *Racketeer Influenced and Corrupt Organisations Act* (RICO), international law and treaties, Nigerian law, and various state law torts.[75]

Plaintiffs were: Ken Wiwa, the son of Saro-Wiwa; Owens Wiwa, the brother of Saro-Wiwa; Blessing Kpuinen, the wife of the executed John Kpuinen; and another

71 S. Kirchner, Legal Culture, Conference Report of the 6th Joint Conference held by the American and Dutch Societies of International Law, 4(8) German Law Journal 5 (2003). See also Muchlinski, *supra* note 64, pp. 153–160; Jägers, *supra* note 65, pp. 196–198.

72 Convention of 27 September 1968.

73 Meeran, *supra* note 58, pp. 9, 14 and 18.

74 Clapham (2006), *supra* note 61, pp. 261–263; Jägers, *supra* note 65, pp. 179–203, Meeran, *supra* note 58, p. 19.

75 2002 U.S. Dist. LEXIS 3293. *Wiwa v. Royal Dutch Petroleum* (Shell), Docket Nos. 99-7223[L] United Stated Court of Appeals for the Second Circuit 2000 U.S. App. LEXIS 23274. Cert. Denied Mar 26 2001.

woman identified as Jane Doe. The first three plaintiffs were, at the time of filing the complaint, respectively, citizen and resident of the UK, Nigerian citizen and residing in Canada, Nigerian citizen and US citizen, and Nigerian citizen.

Defendants were the Royal Dutch Petroleum Company and Shell Transport and Trading Co. plc (collectively: Royal Dutch/Shell) headquartered and incorporated in The Netherlands and the UK respectively, at that time the two parent companies of the Shell group.[76] Royal Dutch/Shell wholly owned the Shell Petroleum Company, which in turn wholly owned Shell Nigeria, including SPDC. Defendant Brian Anderson was the Country Chairman of Nigeria for Royal Dutch/Shell and Managing Director of SPDC at that time.

More specifically, the plaintiffs alleged that Royal Dutch/Shell is liable for summary executions, crimes against humanity, torture, cruel, inhuman and degrading treatment, arbitrary arrest and detention, violations of the right to life, liberty and security of person and the right to freedom of peaceful assembly and association, wrongful death, assault and battery, intentional and negligent infliction of emotional distress; and conspiracy. The allegations essentially concerned joint responsibility of Royal Dutch/Shell for the execution of the Ogoni leaders. In other words, they alleged complicity related to the human rights violations by the Nigerian military regime, because Royal Dutch/Shell was said to tacitly have endorsed and facilitated the actions taken by the military regime against the Ogoni leaders and activists and failed to exercise its influence to halt the executions.[77]

The first question to be answered was whether the US court was an appropriate forum. Royal Dutch/Shell filed a motion to dismiss the case on the grounds of *forum non conveniens*.[78] In this case, the defendants argued that the claims ought to be brought before an English or Dutch court, where the Shell's headquarters were located. The District Court granted the motion. The Court of Appeals however, reversed the decision by ruling that Royal Dutch/Shell was "doing business in the State of New York", considering that Shell had had an investment office in New York for a long time. When assessing whether *forum non conveniens* dismissal is appropriate, the Court of Appeal stated that a two-step process is employed: (1) the first step is to determine if an adequate alternative forum exists (e.g., *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22 (1981); *Gulf Oil Corp. v. Gilbert*, 330 U.S. at 506-07). If so, a series of factors must then be balanced involving "the private interests of the parties in maintaining the litigation in the competing *fora* and any public interests at stake." In

76 They subsequently merged into one parent company registered in the UK. The unification of Royal Dutch and Shell Transport to one parent company, Royal Dutch Shell plc, was completed on 20 July 2005.

77 2002 U.S. Dist. LEXIS 3293, pp. 4–5. Meeran, *supra* note 58, p. 19.

78 Motion to dismiss the complaint and the Memorandum of law in support of their motion to dismiss were filed on 27 March 1997. Thus, the ATCA requires (1) a claim by an alien, (2) alleging a tort, and (3) a violation of international law.

this case, the fact that the plaintiffs were at that time US residents was taken into account as well as the American interest in litigating international human rights violations under both the ATCA and the TVPA. Human rights considerations were part of the balancing, thus creating an innovative element in the *forum non conveniens* test applied by the court.[79] In 2001, the US Supreme Court confirmed the Court of Appeals decision.[80] The hurdle of *forum non conveniens* had been successfully overcome by the plaintiffs.[81]

The second question concerned the subject matter: could an American court decide over the claims? In order to give rise to a claim under ACTA, the plaintiffs must allege a violation of an international norm that qualified as "specific, universal, and obligatory" (*Doe v. Unocal*, 110 F. Supp.2d 1294, 1304 (C.D. Cal. 2000)). In 2002, this question has been answered affirmatively: the District Court decided that when the factual allegations could be proved, the complicity of Royal Dutch/Shell in violations of international law norms was established. Further, the attribution of the acts of SPDC to its ultimate parent company was considered sufficiently demonstrated.[82] The case could proceed for the discovery stage: putting forward evidence to substantiate their factual allegations, legal positions and defence.[83] Presently, twelve years after this case commenced, many authors have shone their light over this case and are eagerly awaiting a final sentence. Obviously, not only the legal world is anxious to learn of the outcome, but also the Ogoni People and the industry whose interests are at stake![84]

## 3. HUMAN RIGHTS OBLIGATIONS: NIGERIA

Nigeria is a party to the most important international human rights conventions and protocols: it has signed the UN Charter thereby accepting the Universal Declaration of Human Rights (UDHR) (1948) and it has accessed the ICCPR and the International Covenant on Economical, Social and Cultural Rights 1966 (ICESCR) – all in 1993.[85]

79 Kirchner, *supra* note 71, p. 5, referring to *Gulf Oil Corp. v. Gilbert*, 330 US 501, 67 S Ct 839 (1947).

80 *Royal Dutch Petroleum Co. v. Wiwa*, 226 F.3d 88 (2d Cir. 2000), cert. denied, 532 U.S. 941 (2001).

81 Also compare Clapham (2006), supra note 61, pp. 255–265 on *Doe v. Unocal*, 2002 US App LEXIS 19263 (9th Cir 2002).

82 *Wiwa v. Royal Dutch Petroleum Co.*, 2002 U.S. Dist. LEXIS 3293.

83 As to information obtained on 6 July 2007 from one of the plaintiffs, Ken Wiwa, and on 13 December 2007 from a representative of one of the law firms involved with the case, Earth Rights International, U.S. Office, on behalf of the plaintiffs. Research closed as of 28 June 2008.

84 For an analysis of case law and the tests developed by US courts in order to determine whether jurisdiction arises and whether a corporation can be held liable under the ATCA, see: Clapham (2006), *supra* note 61, pp. 252–270 and 443–450; Jägers, *supra* note 65, pp. 179–203.

85 As of March 2008, however, Nigeria had not signed the first Optional Protocol (1966) to the ICCPR, under which individuals – who claim that their rights under the ICCPR have been violated, and who have exhausted all domestic remedies – can submit written communications to the UN Human Rights Committee.

Nigeria is also a party to the ACHPR.[86] Furthermore, since the independence of Nigeria, the most important human rights have been included in its Constitution.[87] Chapter IV, Section 33(1) of the Constitution of the Federal Republic of Nigeria (1999) guarantees the right to life of all Nigerians. According to Chapter II, Section 20, "the State shall protect and improve the environment and safeguard the water, air and land, forest and wild life of Nigeria".[88] Thus, the Nigerian Government is committed (i) to protect these human rights of the Nigerian people and (ii) to guarantee that the Nigerian people, including legal entities, comply with these human rights. The latter could be regarded as ensuring a horizontal application of human rights.

## 4. AFRICAN HUMAN RIGHTS COMMISSION RULING

The ACHPR is one of the most modern regional human rights treaties. Besides the traditional civil and political rights and economic, social and cultural rights, it also includes 'modern' human rights such as various 'peoples' rights': the right to self-determination, development and a generally satisfactory environment.[89] The ACHPR is also the first human rights charter that specifies the duties of individuals to the State, society and family.[90]

Part 2 of the ACHPR empowers the African Human Rights Commission (Commission) with a very wide and general mandate, including interpreting the ACHPR and investigation.[91] It may hear inter-state complaints and can receive communications from individuals and groups containing complaints against States.[92] Although the Commission is not empowered to render binding sentences, it can issue recommendations to States and suggest provisional measures where appropriate.[93]

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86 See: M. Shaw, International law 363–365 (Cambridge: Cambridge University Press, 2003).

87 Independence Constitution (1960), Republican Constitution (1963), Constitution of the Federal Republic of Nigeria (1979), Chap. V, and Constitution of the Federal Republic of Nigeria (1999), Chap. IV.

88 See Okonta and Douglas, *supra* note 2, p. 212.

89 Articles 19–22 and 24 of the ACHPR. Article 21 provides the right to natural resources while Article 24 guarantees the "right to a satisfactory environment favourable to their development". On the right to self-determination of Peoples under the ACHPR, see: *Katangese Peoples' Congress v. Zaire, African Commission on Human and Peoples' Rights*, Comm. No. 75/92 (1995) where the Commission recognised the right to exercise a variant of self-determination that was compatible with the sovereignty and territorial integrity of the country.

90 Articles 27–29 of the ACHPR. Shaw, *supra* note 86, p. 365. Included are duties to avoid compromising the security of the State and to preserve and strengthen social and national solidarity and independence.

91 Articles 45–59 of the ACHPR.

92 See Articles 47–56 of the ACHPR and rule 88 of the ACHPR Rules of Procedure. There are annual activity reports from the Commission on decisions on communications.

93 Rule 111(1) of the ACHPR Rules of Procedure. Shaw, *supra* note 86, p. 365. In addition, the African Court of Human and Peoples' Rights (Court) was established in 2004 having advisory, conciliatory and contentious jurisdiction. The Commission, the State Parties and the African intergovernmental

In 1996, a communication was submitted to the Commission by the Lagos-based Social and Economic Rights Action Centre (SERAC) and the New York-based Centre for Economic and Social Rights (CESR) against the government of General Abacha. The communication alleges that the oil consortium, including NNPC and SPDC, has exploited oil reserves in Ogoniland with no regards for the health or environment of the local communities in violation of international environmental standards. It added that the consortium neglected to maintain its facilities causing numerous avoidable oil spills around the villages.[94]

An important aspect in this case was NNPC's active involvement in the oil joint venture. The petitioners of the communication maintained that the State was directly responsible for the allegations against the joint venture company. This aspect is of interest considering that there is no *communis opinio* on the position of State companies under the international human rights regimes.[95] Based on Article 21 of the ACHPR, the Commission noted:

> despite its obligation to protect persons against interferences in the enjoyment of their rights, the Government of Nigeria facilitated the destruction of the Ogoniland. Contrary to its Charter obligations and despite such internationally established principles, the Nigerian Government has given the green light to private actors, and the oil Companies in particular, to devastatingly affect the well-being of the Ogonis.[96]

In discussing the merits of the case, the Commission: (i) emphasised the need to protect individuals from non-state actors with regard to the right to housing; (ii) found that the right to food was implicit in the ACHPR and stressed that the Government "should not allow private parties to destroy or contaminate food sources"; and (iii) referred to violations by private actors in the context of its finding of a violation of the right to life and integrity of the person.[97] Moreover, it commented on

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organisations have access to the Court. Under certain conditions, it also has jurisdiction over complaints of individuals or groups. See: Articles 5(3) and 34(6) of the Protocol to the ACHPR on the establishment of the Court. See also: A. Nollkaemper, *Kern van het Internationaal Publiekrecht* 421–422 (The Hague: Boom Juridische, 2005); Clapham (2006), *supra* note 61, p. 92.

94 African Human Rights Commission, *Social and Economic Rights Action Center/Center for Economic and Social Rights v. Nigeria*, ACHPR/COMM/A044/1 (27 May 2002), para. 2. The Communication and the decision of the Commission are available on: CESR, Nigeria, http://cesr.org/nigeria (last visited on 28 June 2008).

95 *SERAC/CESR v. Nigeria*, para. 54. See: Clapham (2006), *supra* note 61, pp. 434–435; Jägers, *supra* note 65, p. 157.

96 *SERAC/CESR v. Nigeria*, para. 58.

97 *SERAC/CESR v. Nigeria*, para 59–67. See: F. Coomans, The Ogoni Case Before The African Commission on Human and Peoples' Rights, 52 International and Comparative Law Quarterly 749–760 (2003). He draws attention to a *Note verbale* 127/2000 submitted in October 2000 to the Commission by the Nigerian Government. The then new President Obasanjo admitted that "there is no denying that a lot of atrocities were and are still being committed by the oil companies in Ogoniland and indeed in the Niger Delta area".

the impact of corporate-led globalisation in developing countries by stating: "The intervention of multinational corporations may be a potentially positive force for development if the State and the people are ever mindful of the common good and the sacred rights of individuals and communities".[98]

Finally, the Commission found the Nigerian Government in violation of the ACHPR for the period 1993–1996 based on the rights to non-discrimination (Art. 2), life (Art. 4), property (Art. 14), health (Art. 16), family life (Art. 18(1)), the environment (Art. 24), and the rights of peoples to "freely dispose over their wealth and natural resources" (Art. 21).[99] It appealed the Government to ensure protection of the environment, health and livelihood of the Ogonis by, amongst others: (i) stopping all attacks by the Rivers State Internal Securities Task Force; (ii) conducting an investigation into the said human rights violations; prosecuting officials of the security forces, NNPC and relevant agencies involved in the violations; (iii) ensuring compensation to the victims; (iv) ensuring appropriate environmental and social impact assessments for any future oil development and the safe operations of any further oil development; and (v) providing information on health and environmental risks and meaningful access to regulatory and decision-making bodies to communities likely to be affected by oil operations.[100]

The regional human rights system of Africa does not provide for a mechanism where private parties can be held directly accountable for human rights violations.[101] However, this decision shows that the Commission acknowledged that economic, social and cultural rights can be threatened by the behaviour of multinational corporations.[102] In addition, it should be noted that collective rights concerning natural resources were successfully claimed by the Ogonis.

## 5. NIGERIAN LAW – OIL AND THE ENVIRONMENT

The question, 'in which way and under which conditions is oil exploration allowed and can extraction from Nigerian soil take place must be answered first and foremost in accordance with Nigerian law. There are various sources: (1) English law, comprising of common law, doctrines and statutes of general or specific application and English law made before 1960 and extending to Nigeria; (2) Nigerian legislation, which consists of ordinances, acts, laws, decrees and edicts; (3) customary law in existence in all the various rural communities of Nigeria (they originated from social/moral rules, now accepted as 'jural postulates'. In Nigerian legal jurisprudence, customary law is the

98 *SERAC/CESR v. Nigeria*, para. 69.

99 30th Ordinary Session, held in Banjul, The Gambia, 13–27 October 2001.

100 *SERAC/CESR v. Nigeria, in fine.* Information confirming the implementation of the said recommendations other than on the Niger Delta Development (see section 4) has not been found.

101 Jägers, *supra* note 65, p. 219.

102 Clapham (2006), *supra* note 61, p. 434.

organic living law of the Indigenous People of Nigeria, regulating their lives and transactions); and (4) Nigerian case law.[103]

Since the sixties, Nigerian law provides for detailed environmental law regulations resulting in the requirement that anyone exploring or extracting oil needs a permit subject to environmental protection requirements. The environmental laws are not to be found in any one volume; relevant acts and regulations are, for instance:[104]

- Petroleum Act 1969;
- *Petroleum (Drilling and Production) Regulations 1969*;[105]
- *Associated Gas Re-Injection Act* (1979);[106]
- *Oil in Navigable Waters Decree No. 34* (1968);[107]
- *Federal Environmental Protection Agency Decree* (1988);[108]
- *Harmful Waste (Special Criminal Provisions, etc.) Decree* (1988);[109]
- *Environmental Impact Assessment Decree No. 86* (1995);
- *Oil Pipeline Act 1956*;
- *Oil & Gas Pipelines Registration*;
- *Agricultural Act, LFN 1990*;[110] and
- Customary rules regulating the protection of the environment as a whole, e.g. forests, wildlife and soil.[111]

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103 Okonta and Douglas, *supra* note 2, pp. 212–213, regarding customary law, referring to: *Eshugbayi Eleko v. Government of Nigeria* (1931), Ac 662 and Justice R.O. Fawehinmi, guest speaker on the occasion of the Nigeria Bar Association (Ondo) on 22 September 1988.

104 A. Adeoye Idowu, Human Rights, Environmental Degradation and Oil Multinational Companies in Nigeria: The Ogoniland Episode, 17(2) Netherlands Quarter of Human Rights 172–177 (1999).

105 Regulations 54 and 55 require oil companies to respect communal areas and customs. The authority to issue an oil exploration or drilling licence is vested in the Head of the Petroleum Inspectorate, who can revoke it in case of non-compliance. The licences are subject to work obligations relating to the prevention of oil pollution, safety standards and confinement of petroleum. See Regulations 25, Part IV and 36; Idowu, *supra* note 104, p. 173.

106 This Act regulates the use and conservation of natural gas.

107 Cap. 337, *Laws of the Federation of Nigeria*, 1990. See Sections 4(2)(a), 4(5), 4(4), 5, 7(1), 7(2), 7(5)(b) and 10. This is the most comprehensive legislation in Nigeria on oil pollution, also providing penalties.

108 This Decree is related to the pollution, piercing the corporate veil, spells out liability, and penalties for spillers of hazardous substances whether on land or on water. Spillers must bear the cost of removal; replacement of natural resources damaged or destroyed by the discharge; and report to the relevant agencies. Corporations are explicitly addressed as well as their managers.

109 No. 42, Sections 1(3), 5.

110 This Act prohibits the import of plant seed, soils and containers that could harm the land.

111 Okonta and Douglas, *supra* note 2, p. 215.

Nigerian law allows for claims regarding land use, including tort claims. Traditional rules of torts apply to trespass to land, nuisances and negligence. Damages caused by oil pollution are also addressed under criminal law.[112]

Although the Nigerian laws provide clear guidance for oil production in regard to the environment and lives of people, Nigerian authors often point out that the Government's policy to own approximately 60 percent of the equity shares in the operational oil companies leads to a practice in which the focus is often more on profit maximisation than on taking the necessary measures against environmental degradation. They state that the overall governmental policy is that the oil trade should not be jeopardised. Finally, penalties under Nigerian law are unsubstantial and, hence, do not provide a substantial deterrent effect against oil spills.[113]

## 6. CLEAN-UP CLAIM AGAINST SHELL

The Ijaws, one of the ethnic groups inhabiting the Niger Delta have been campaigning since 2000 for compensation for environmental degradation. With the support of the NGOs Friends of the Earth and Environmental Rights Action, they filed a legal claim for environmental damages against SPDC. The Federal High Court sitting in Port Harcourt rendered judgments on 24 February 2006 ordering SPDC joint venture to pay US$1.5 billion (corresponding Shell share: US$450 million) in damages as compensation to communities in Bayelsa State for degrading their creeks and spoiling crops and fishing.[114] SPDC has disputed the judgment, stating that most spills are caused by saboteurs trying to steal oil for sale by criminal syndicates on the world market. SPDC also argued that the parliamentary committee that had made the original order in 2000 did not have the power to require payment.[115]

More specifically, the dispute was presented to the Lower House of Representatives in 2003 and reviewed by an independent legal advisory panel set up by the Lower House, resulting in the decision that SPDC had to pay compensation. This was approved by the National Assembly in 2004. When the case was subsequently

112 Sections 234, 245 and 257 of the Nigerian Criminal Code.

113 Idowu, *supra* note 104, pp. 172–176. See: J.P. Eaton, The Nigerian Tragedy, Environmental Regulation of Transnational Corporations, and the Human Right to a Healthy Environment, 15 Boston University International Law Journal 284–288 (1997). He indicated that the amount of the fines is "a pittance to the foreign oil companies and their managers may opt to pay the daily fine and defer clean-up to some undetermined time, instead of defraying clean-up costs at the time of the spill".

114 *Shell v. Ijaw Aborigines of Bayelsa State* (2006), text of the judgement not found in public sources. Sources accessed: BBC News, Shell Contests Huge Nigeria Fine, 22 May 2006, http://news.bbc.co.uk/go/pr/fr/-/2/hi/africa/5004854.stm (last visited on 28 June 2008); R. Alford, Case of the Month: *Shell v. Ijaw Aborigines of Bayelsa State, Opinio Juris*, January 2007, www.opiniojuris.org/posts/1141148695.shtml. Guardian.co.uk (last visited on 28 June 2008); The Guardian, Shell told to pay Nigerians US$1.5 billion pollution damages, 25 February 2006, www.guardian.co.uk/world/2006/feb/25/oil.business (last visited on 28 June 2008).

115 Compare: Shell Nigeria Annual Report 2006, *supra* note 20, pp. 6–7 and 14–16.

presented to the Federal High Court, Judge Okechukwu Okeke ruled that since both sides had agreed to submit their dispute to the National Assembly, the order was binding on both sides. The Court denied a request from SPDC to postpone the payment and set a deadline to pay the fine. Nonetheless, SPDC appealed the judgment and refused to pay the fine until judgment had been reached by the appellate court. SPDC issued a press statement declaring that it "believes that the appeal has strong grounds as independent expert advice demonstrates that there is no evidence to support the underlying claims. SPDC remains strongly committed to dialogue with the Ijaw People and all its other stakeholders."[116]

This news triggered a series of attacks on oil installations and kidnappings of foreign oil workers by Ijaw militants, who want the oil wealth to benefit the local community. Ijaw leader Ngo Nac-Eteli declared: "if Shell wanted to buy time by taking the case to the appellate court, the company would not be allowed to operate on Ijaw land until the case was settled."

Apart from the appeal, Shell maintains that paying would not help resolve the existing problems: money tends to 'disappear'. In view of the high scores of Nigeria in the Transparency International's Corruption Perception Index[117] and a history of disappearing oil revenues at all levels of governance, this point is somehow merited.

## 7. RULING ON GAS FLARING

Gas flaring is notoriously considered detrimental to the environment and the people living in the vicinity. According to a report of an NGO, more gas is flared in Nigeria than anywhere else in the world; it is estimated that 40 percent of all Africa's natural gas consumption in 2001 was flared off in Nigeria. The loss of potential earnings to Nigeria corresponds to around US$2.5 billion a year.[118] In fact, routine gas flaring was first outlawed in Nigeria by a law approved in 1984. However, this had no immediate effect on company practice. In particular, SPDC made a commitment in 1996 to end gas flaring of associated gas by 2008. Nigeria's President Obasanjo had agreed on this voluntary deadline with the oil companies.[119] This required SPDC to prepare a plan to collect and put to economic use the gas otherwise flared from its network of 73 flow stations. It also entailed a commitment not to develop new oil fields without a clear plan for the utilisation of the associated gas. In 2007, however, SPDC admitted that it

116 Shell, Press Statement on Nigeria Judgement, 24 February 2006, http://www.shell.com/home/content/media/news_and_library/press_releases/2006/nigeria_24022006.html (last visited on 28 June 2008).

117 Transparency International, Corruption Perceptions Index 2007, http://www.transparency.org/policy_research/surveys_indices/cpi/2007 (last visited on 28 June 2008).

118 Friends of the Earth International, Poverty, Climate Change and Energy: the Case against Oil Aid, June 2008, http://www.foei.org/en/publications/pdfs/pdf-oil-poverty-briefing (last visited on 28 June 2008).

119 See www.shell.com/home (last visited on 28 June 2008). President Obasanjo is of Yoruba origin.

could not meet the 2008 deadline. They claimed that the target was predicated on the joint venture's programme being fully funded to deliver the required Associated Gas Gathering Projects, which was not achieved due to reduced funding of the programme.[120]

The controversial issue of gas flaring was the subject of a decision by the Federal High Court of Nigeria, *Gbemre v. Shell Petroleum Development Company Nigeria*, dated 14 November 2005.[121] The case was brought up by the minority Iwherekan community, with the support from Environmental Rights Action, the Nigerian branch of the NGO Friends of the Earth. The claims were directed against SPDC and NNPC, as co-defendants, and against the Attorney-General of the Federation. Similar suits were commenced by seven other minority communities, including Ogoni ethnic groups.

In this case, Justice C.V. Nwokorie decided that the gas flaring in the course of the oil exploitation and production activities of SPDC and NNPC violates the rights to life and dignity as provided under Sections 33(1) and 34(1) of the Nigerian Constitution and reinforced by Articles 4, 16 and 24 of the ACHPR,[122] which guarantee the right to a clean poison-free, pollution-free and healthy environment.[123] He ordered the companies to stop such further practice in this community immediately and the Nigerian Government to take immediate action.

This judgment is in line with the 2001 ruling of the Commission (*vide* section 2.4), that appealed to the Government to compensate the Ogonis for abuses against their lands, housing and health caused by oil production including flaring by multinational corporations. In its Annual Report, Shell asserted that the procedures followed by the High Court did not allow witness testimonies, expert evidence or cross-examination. SPDC appealed the judgment, which was granted, and filed a stay of execution of the judgment. In a press release, SPDC explained having already spent US$2 billion to reduce and eventually phase out the practice in 2009.[124] This explanation clearly did not satisfy the NGO *Milieudefensie*, a branch of Friends of the Earth. It decided to start an 'anti-gas flaring campaign' against Shell on 30 April 2007 by creating a 15-meter high flame in front of Shell's headquarters in The Hague, The Netherlands.

120 Ibid.

121 *Jonah Gbemre (for himself and as representing Iwherekan Community in Delta State, Nigeria) v. Shell Petroleum Development Company Nigeria Ltd and Nigeria National Petroleum Corporation*, Federal High Court of Nigeria in the Benin Judicial Division, Suit No. FHC/B/CS/53/05 (14 November 2005).

122 *ACHPR (Ratification and Enforcement) Act*, Cap. A9, Vol. 1, Laws of the Federation of Nigeria, 2004.

123 *Gbemre v. Shell Petroleum Development Company Nigeria*, pp. 30–31.

124 Shell Nigeria Annual Report 2006, *supra* note 20, p. 14.

## C. MULTINATIONAL COMPANIES UNDER INTERNATIONAL LAW

### 1. BACKGROUND AND DEVELOPMENTS ON THE APPLICATION OF HUMAN RIGHTS TO CORPORATIONS

We are nowadays facing a situation where some multinational corporations – the giant Shell among others – possess and control resources more extensively than certain States and where their decisions shape the international political landscape. As an effective way of illustrating their growing part in the world's economy, it is commonly reported that corporations represent 51 of the top 100 largest economies worldwide (Institute for Policy Studies, 2000).[125] Therefore, their effective powers permit them to negotiate, agree, including on concession agreements, and litigate as equals with governments. Moreover, corporations 'freely' exploit and control economic, natural as well as human resources of several States. From this initial consideration, one may consider that States are even losing powers to these corporate entities and it then justifies the need to affect these multinational corporations with corresponding responsibility at the international plane. In fact, corporate responsibility and the accountability of multinational corporations are of growing concern among the international community considering this perception that the ability of States to act in the public interest, including securing human rights within their jurisdiction, has been weakened by the consequences of globalisation. In other words: everybody wants to see multinational corporations held responsible for their actions, and especially in the case of human rights violations. Nevertheless, States remain the sole parties to international conventions under international law, including human rights treaties.

As this section will underline, this issue has been extensively discussed by legal scholars and human rights activists with specific reference to the respect of the obligations formulated under human rights instruments, such as the UDHR. Some current academic developments on the application of human rights treaties to corporations will be further explored. It will also be evaluated whether *ius cogens* norms apply directly to corporations. As an important development in this matter, a review of the UN 'Ruggie Report' is inserted. Following a current trend, it will be followed by an analysis of the scope and legal effects of the adoption of Voluntary Codes of Conduct by corporations with respect to human rights, which is based on

125 S. Anderson and J. Cavanagh, Top 200: The Rise of Global Corporate Power, Institute for Policy Studies, 2000, http://www.ips-dc.org/downloads/Top_200.pdf (last visited on 28 June 2008). It indicated: "Two hundred giant corporations, most of them larger than many national economies, now control well over a quarter of the world's economic activity." For instance, it mentions that Shell is "bigger" than Venezuela (this is based on a comparison of corporate sales and country GDPs).

the fact that the observance of human rights is now considered to be 'Good for Business'.[126]

It has become commonly accepted that individuals possess some international rights and obligations under international law. Since World War II, the establishment of international supervisory organs allows individuals to bring claims against a State for violations of human rights. With the establishment of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, individuals can be prosecuted at the international level, and it is accepted that individuals are subject to duties under international law.[127]

Whether international rights and obligations should be extended to a legal person, such as multinational corporations, has been the subject of great debate.[128] Concerning their rights, it has been rightfully suggested that this question should be centred "not so much [on] whether, as a conceptual matter, corporations should enjoy the benefit of human rights protection, but whether, given the nature, characteristics, and functions of corporations, they should enjoy the same human rights and to the same extent as natural persons".[129] Obviously, there are some violations which can only be suffered by natural persons (e.g. torture, rape). Nevertheless, some rights may be enjoyed by both entities, including the legal person, "although the precise nature of the right may need to be modified to take account of realities of corporate activity".[130] For instance, a corporation may enjoy the right to own property, to fair trial or the right to free speech. The question remains: What is the scope of their parallel obligations based on existing human rights treaties?

## 2. LEGAL OPINIONS ON THE APPLICATION OF HUMAN RIGHTS TREATIES TO CORPORATIONS

According to **Clapham**, the network of international treaties concerned with the criminalisation of the acts of legal persons lead to conceive that legal persons, such as corporations, can commit international crimes, and that they may be put on trial, in

126 Muchlinski, *supra* note 64, p. 515.

127 A. Clapham, MNCs under International Criminal Law, in: M.T. Kamminga and S. Zia-Zarifi (ed.), Liability of Multinational Corporations under International Law 189 (The Hague: Kluwer, 2000).

128 See: K. de Feyter, Human Rights: Social Justice in the Age of the Market (London: Zed Books, 2005). This aim of this article is not to address the question of the international legal personality of private actors such as corporations. Nevertheless, the topic plays a role in this regard. See especially: I. Brownlie, Principles of Public International Law 57 (Oxford: Oxford University Press, 2003); W. Friedmann, The Changing Structure of International Law 213 (London: Stevens & Sons, 1964).

129 Muchlinski, *supra* note 64, p. 510.

130 Ibid. This author provides the following interesting example related to the right to corporate free speech: "[...] not all corporate speech will be protected. A distinction between commercial speech, aimed at improving the commercial performance of the company, and non-commercial speech has been developed, with greater protection being accorded to the latter than the former".

some circumstances, outside the jurisdiction in which the crime took place.[131] Importantly for him, the lack of the International Criminal Court's jurisdiction over legal persons for war crimes should not be misleading to consider that the human rights law does not apply to corporations; the international legal order has already been adapted to define corporate crimes in international law and to oblige States to criminalise this behaviour. It clearly appears that "lack of international jurisdiction to try a corporation does not mean that a corporation is under no international legal obligation".[132] Treaties on corruption, environmental crimes, financing of terrorism groups, and trafficking by organised criminal groups illustrate that international law treaties are in fact used to address the behaviour of corporations.[133] States are bound under international law to ensure that corporations respect the particular obligations as defined by these international instruments.[134] Therefore, these treaties require that State Parties implement the said obligations into national law, including the adoption of related sanctions. For instance, Article 26 of the *UN Convention against Corruption* on the liability of legal persons indicates that "Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in the offences established in accordance with this Convention".[135]

Moreover, Clapham held that protection should exist for all violations of human rights, thus not exclusively when the violator is an agent of the State. For instance, in the case of the European Convention on Human Rights (ECHR), this could be legally justified by a dynamic interpretation considering the general evolution of international law and in particular the international law of human rights.[136]

Nevertheless, there is an existing limitation on imposing direct obligations on corporations *via* treaties:

> There is currently little appetite among states to develop new international treaties focused on the issue of human rights abuses facilitated or committed by corporations. Nor does it appear that the human rights treaty bodies are ready to interpret the UN human rights treaties to directly impose obligations on non-state actors or individuals.[137]

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131 Clapham (2000), *supra* note 127, p. 172. For instance, the *International Convention on the Suppression and Punishment of the Crime of Apartheid* (1976) states that apartheid is an international crime and declares 'criminal those organisations, institutions and individuals committing the crime of apartheid' (Article I (2)).

132 Clapham (2000), *supra* note 127, pp. 139, 189 and 267.

133 Ibid. p. 241.

134 Ibid. p. 267. See: M. K. Aldo, Human Rights and Transnational Corporations – an Introduction, in: M. K. Aldo (ed.), Human Rights Standards and the Responsibility of Transnational Corporations 31 (The Hague: Kluwer Law International, 1999).

135 The Convention was adopted by the General Assembly by its Resolution 58/4 of 31 October 2003 and entered into force on 14 December 2005.

136 A. Clapham, Human Rights in the Private Sphere 89 (Oxford: Clarendon Press, 1993).

137 Clapham (2006), *supra* note 61, p. 240.

For **Muchlinski**, common arguments against the extension of human rights responsibilities to multinational corporations can be refuted. He explained that corporations "have been expected to observe socially responsible standards of behaviour for a long time" in national and international law (as well as in Codes of Conduct) set by inter-governmental organisations; their social responsibility is then not limited to making profits for the shareholders.[138] This implies that multinational corporations should be subject to human rights obligations because human dignity must be protected in every circumstance.[139] Despite this justification, Muchlinsky concluded that the content of legal obligations of multinational corporations in regard to human rights violations remains uncertain and the actual related claims are still to be adequately developed. States remain the ultimate responsible actors for human rights protection and, therefore, multinational corporations "should not become scapegoats for failures of governance on the part of host country governments".[140]

Interestingly, **Jägers** pointed out that human rights instruments might entail obligations for corporations via the doctrine of horizontal effect or *Drittwirkung* or 'third-party effect'.[141] Following this doctrine, certain rights do not only apply to the vertical relationship between governments and individuals but also apply to the horizontal relationship, for instance between an individual and a corporation.[142] She explained that the horizontal effect of human rights emanate from the very nature of human rights and from general provisions contained in human rights treaties, notably the UDHR, the ICCPR, ICESCR and the ECHR. This doctrine is gaining recognition based on "the increased attention to infringements on human dignity by non-State entities".[143]

Jägers concluded that general provisions do not independently provide enough strong evidence that norms of international human rights law can be applied horizontally. An examination of each right is necessary to establish whether it is indeed applicable to non-State actors, i.e. has horizontal effect.[144] Her analysis of the provisions of the above mentioned human rights instruments reveals that a significant number of norms are, in her opinion, applicable to corporations "in practice and on the grounds of principles". Equality and prohibition of discrimination, right to life, prohibition of slavery and forced labour and prohibition of torture should be

138 Muchlinski, *supra* note 64, p. 515, referring to UNCTAD, The Social Responsibility of Transnational Corporations (New York and Geneva: United Nations, 1999); UNCTAD World Investment Report 1999 chap. XIII (New York and Geneva: United Nations, 1999).

139 Muchlinski, *supra* note 64, p. 516, referring to Clapham (2006), *supra* note 61, chap. 6.

140 Ibid., p. 536.

141 Jägers, *supra* note 65, pp. 10, 32–37.

142 The term *Drittwirkung* originates from a doctrinal debate held in Germany.

143 Ibid. p. 40–45.

144 Following the general rules of interpretation of treaties based on the Vienna Convention on the Law of the Treaties, the said provision will be interpreted by examining its general wording, the context and, if necessary, the preparatory work and the circumstances of its conclusion.

guaranteed by corporations. Her analysis is based on the fact that these provisions "aim to protect interests of a fundamental nature"; they belong to the category of *ius cogens*. In her view, other norms are applicable to corporations "in practice". For instance, the right to property based on Article 17 of the UDHR[145] can be violated by corporations, in certain circumstances, in the light of a subsistence right to property.[146]

According to Jägers, the activities of oil companies in the Niger Delta resulting in the destruction of local livelihood, such as fishing grounds, can constitute a violation of the corporate duty to respect the right to food of the inhabitants. Articles 25 of the UDHR and 11 of the ICESCR, for example, contain the right to an adequate standard of living including the right to food. As stressed by Jägers, this right to food can be interpreted as including the duty of a corporation to not interfere with the ability of people to satisfy their food needs. In addition, it could be argued that the right to life (Articles 3 of the UDHR and 6 of the ICCPR) implies that a corporation shall take measures to ensure that its business partners do not violate this right. Jägers refers to the security arrangements of oil companies operating in Nigeria with private security forces to protect their property. Especially, a violation would occur by providing arms to such security forces that are notorious for violating the right to life. In addition, this concerns an additional type of corporate obligations: the duty not to cooperate.[147]

Hence, there is on the one hand, a common agreement among these authors that multinational corporations should be held responsible for infringements of human rights. Several arguments have been explored to support this principle, for instance, by referring to human dignity or to the horizontal effects of human rights. On the other hand, it remains uncertain to which extent human rights law applies to corporations under international public law – and even more uncertain whether it is an extent commensurate with their effective role and influence in the present global society.[148] As underlined, human rights treaties do not impose direct obligations on non-state actors such as corporations. This results in a lack of clear guidance for businesses. Furthermore, none of the international bodies dealing with human rights have jurisdiction over corporations directly. In the case of enforcing human rights

145 Article 17 of the UDHR reads: "Everyone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property.".

146 Jägers, *supra* note 65, pp. 61–62, referring to: C. Krause and G. Alfredsson, Article 17, in: G. Alfredsson and A. Eide (eds.), The Universal Declaration of Human Rights, a Common Standard of Achievement 359–378 (The Hague: Martinus Nijhoff, 1999), In other words, a corporation that deprives an individual of his means of existence by taking away property violates the interest protected by Article 17 of the UDHR.

147 Jägers, *supra* note 65, pp. 85–89. This vision has been confirmed in the decision of the Commission, see section 2.4.

148 See: T. Kamminga and S. Zia-Zarifi, Liability of Multinational Corporations under International Law: An introduction, in: M.T. Kamminga and S. Zia-Zarifi (eds.), Liability of Multinational Corporations under International Law 1 (The Hague: Kluwer, 2000).

obligations on multinational corporations operating in Nigeria, additional challenges should also be considered.

As highlighted in section 2, corporations have been accused of violating human rights in collusion with the Nigerian Government. Considering the profits received directly from the oil industries owned by foreign corporations, the host-state government may lack the political will to prevent or mitigate the negative economic, environmental and social impacts of natural resource extraction.[149] This indifference can also be motivated by fear that greater accountability can provoke corporations to withdraw their much-needed foreign investments.[150] Consequently, human rights treaties have little impact in such a situation where a government lacks the willingness – or sometimes the means – to enforce them. On the one hand, it is doubtful whether the adoption of an international treaty related to human rights abuses by corporations would improve the situation, for instance, in the Niger Delta. It is uncertain whether governments would take subsequent national measures – including penal sanctions – to implement and enforce the said treaty within their territory. On the other hand, such a treaty could contain provisions on its extraterritorial application, which would allow foreign governments to control the behaviour of their multinational companies operating abroad. Nevertheless, the efficiency of such a regime can be discussed considering, among others, the principle of State sovereignty, the related costs of conducting an investigation abroad, and the feasibility at the technical level.

The lack of certainty on the application of human rights to corporation led the UN Human Rights Council to call for further analysis in this field. The result is an important development on the application of human rights responsibility on corporations: the Ruggie Report.

## 3. THE RUGGIE REPORT: "PROTECT, RESPECT AND REMEDY" PRINCIPLES AND ITS APPLICATION TO THE OIL INDUSTRY

On 7 April 2008, the UN Human Rights Council for the Special Representative of the Secretary-General released the Ruggie Report.[151] The Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, was commissioned to elaborate a framework toward the aim of providing more effective protection against corporate-related human rights harms. The result is a principles-based framework that rests on the concept of "differentiated but complementary responsibilities" for the social actors,

149 Ballentine, *supra* note 15, p. 130.

150 S. Joseph, Corporations and Transnational Human Rights Litigation 5 (Oxford: Hart Publishing, 2004).

151 UN, General-Assembly, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie (A/HRC/8/5) (2008).

i.e.: States, corporations, and civil society. It focuses on three foundational principles: the State duty to protect against human rights abuses by third parties, including businesses; the corporate responsibility to respect human rights; and the need for more effective access to remedies. These three principles – Protect, Respect and Remedy – are said to form a complementary whole in that each actor supports the others in achieving progress.

The approach taken has the merit of formulating specific and concrete measures, including changes in national laws and regulatory policies, international mechanisms and voluntary initiatives. Although the human rights regime "rests upon the bedrock role of States", the Report clearly stresses that corporations have the responsibility to respect human rights, and so, independently of States' duties.[152] Consequently, failure in this regard can subject a corporation to domestic jurisdiction. Concerning the allegation of complicity, the Report points out that: "The number of domestic jurisdictions in which charges for international crimes can be brought against corporations is increasing, and companies may also incur non-criminal liability for complicity in human rights abuses". A recommendation at this level is to strengthen the judicial capacity to hear complaints and enforce remedies against all corporations operating in their territory. It implies that obstacles to access to justice should be addressed. Moreover, the Report draws attention to the significant role of national human rights institutions which have the capacity to handle grievances related to the human rights performance of corporations.[153]

At the level of the State's duty to protect, the report especially recommends that all actors should work towards developing better means in order to better balance investor interests and the needs of host States to discharge their human rights obligations. This is based on the fact that the expansion of legal rights of transnational corporations has created imbalances between corporations and States that may be detrimental to human rights. The Report also upholds that host States offer protection through bilateral investment treaties to attract foreign investment. Such protection generally covers a promise not to modify the law to the disadvantage of the investor. Consequently, States find it difficult to strengthen domestic and environmental standards, including those related to human rights.

In conclusion, although the Report does not intent to 'withdraw' the responsibility of States to protect human rights, it clearly points out the responsibility of corporations to respect human rights. It sketches them as complementary responsibilities. When

152 See: Corporate Responsibility under International Law and issues in Extraterritorial Regulation: Summary of Legal Workshop, A/HRC/4/35/Add.2, (2007), http://ap.ohchr.org/Document (last visited on 28 June 2008).

153 Business & Human Rights Resource Centre, Business and Human Rights: A Survey of NHRI Practices, http://www.business-humanrights.org/Gettingstarted/UNSpecialRepresentative (last visited on 28 June 2008).

applied to the exploitation of natural resources, several human rights related issues are to be addressed by both the States and the companies (extractive industry).

Firstly, companies shall respect the right of Indigenous People to self-determination when the extractive natural resources are located in areas inhabited by Indigenous People. In such cases, either the people wish to continue their traditional way of living – when they are not interested in the so-called 'modern economic development' and prefer the area to remain untouched – or they are interested to profit from the economic benefits that could be generated in the area (e.g. to use it to improve their infrastructure or welfare).[154]

Secondly, whenever it has been firmly, voluntary and democratically established that the local people agree to the exploitation of their area, companies shall respect the rights of the inhabitants during the preliminary phase of exploitation. That can mean providing a fair market value for the expropriated property; providing alternative area for living; a profit-sharing agreement with the community; implementation of a transparent investment policy; environmental assessment, involving external expertise.[155]

Thirdly, during exploitation and exploration, companies should implement the highest standards regarding environmental and social concerns. This should be the case even where local law does not itself impose high standards or does not enforce it. Another important element of best practices concerns avoiding corruption. A company shall not facilitate the governmental abuse of the 'community money' derived from natural resources.

Fourthly, after the exploitation phase, the company shall restore the area, to the extent possible to its original status, requesting assistance from the relevant experts. People should be offered financial compensation and/or the choice to move back to their traditional grounds.

Finally, from preliminary phase to post-exploitation phase, companies shall ensure transparency in their operations by publishing clear and complete sustainability

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154 Articles 3 and 4 of the UNDRIP and Article 1 of ICESCR. See: *Lubicon Lake Band v. Canada*, Communication No. 167/1984 (26 March 1990), U.N. Doc. Supp. No. 40 (A/45/40) (1990), See also: M. A. Orellana, Indigenous Peoples, Energy and Environmental Justice: The Pangue/Ralco Hydroelectric Project in Chile's Alto BíoBío, 23(4) Journal of Energy and Natural Resources Law 511 (2005); B. Harvey and S. Nish, Rio Tinto and Indigenous Community Agreement Making in Australia, 23(4) Journal of Energy and Natural Resources Law 499 (2005); S. Joseph, Taming the Leviathans: Multinational Enterprises and Human Rights, 46 Netherlands International Law Review 173 (1999).

155 Compare: Coomans, *supra* note 97, p.7. He indicated that "instances of forced eviction are *prima facie* incompatible with the requirements of the Covenant" (ICESCR). See: D. Shelton, Human Rights, Health and Environmental Protection: Linkages in Law and Practice, 1(1) Human Rights & International Legal Discourse 9 (2007); S. Giorgetta, The Right to a Healthy Environment, Human Rights and Sustainable Development, 2 International Environment Agreements: Politics, Law and Economics (2002); A. Hildering, International Law, Sustainable Development and Water Management (Delft: Eburon Publisher, 2004). See also: Right to Environment.org, Environment and Rights, http://www.righttoenvironment.org/ (last visited on 28 June 2008).

reports; for example by following the Global Reporting Initiative's criteria (GRI G3), supported by evidence and verified by independent experts. As it became clear from a 2008 survey conducted by the Global Reporting Initiative (GRI) and the Roberts Environmental Centre on Reporting on Human Rights: "more quantitative results and performance-orientated indicators are needed to measure the effectiveness of policies and actions that a company implements to ensure human rights".[156]

## 4. CORPORATE RESPONSIBILITY FROM A SUSTAINABLE DEVELOPMENT PERSPECTIVE

Several authors have argued from a sustainable development perspective that there are ethical grounds to foster the position that multinational companies shall not only comply with human rights instruments but shall also share the duty to actively promote them. Without being 'bound' by the generally accepted principles of international law, this position is based on moral responsibility.[157] When referring to economic, social and cultural rights (second-generation), for instance, corporations should constructively use their powers and resources to contribute to a better world. This perspective goes beyond the actual framework established by international law scholars, and appeals for a situation where multinational companies have the burden of implementing human rights as well as measures to protect the environment. This sustainable development perspective leads to explore another facet of corporate responsibility based on voluntary initiatives.

## 5. CORPORATE PRACTICE TO ADOPT VOLUNTARY CODES OF CONDUCT

There is a trend for western corporations to adopt Voluntary Codes of Conduct as part of their Corporate Social Responsibility (CSR) policies, which habitually embrace the protection of human rights. Generally, these Codes of Conduct set minimum standards for the company's own behaviour, as well as standards for the types of countries the company will be willing to invest in, and standards for the behaviour of business partners, including suppliers and contractors.[158] At first glance, multinational corporations appear to reject a role which would be seen as "purely non-social" through the adoption of such instruments.[159] Furthermore, their creation can have

156 GRI, Reporting on Human Rights, 2008, http://www.globalreporting.org (last visited on 28 June 2008). Shell was one of the companies reviewed.

157 E. Nieuwenhuys, Social, Sustainable Globalisation Requires a Paradigm Other Than Neo-Liberal Globalism, in: E. Nieuwenhuys (ed.), Neo-Liberal Globalism and Social Sustainable Globalisation 221 (Brill: Leiden-Boston, 2006). See: N.J. Schrijver and E. Hey, *Volkenrecht en duurzame ontwikkeling* (The Hague: T.M.C. Asser Press, 2003).

158 Joseph, *supra* note 150, pp. 7–8.

159 Muchlinski, *supra* note 64, p. 516.

some value in terms of creating 'soft law' that could gel into 'hard law' regulating the activity of corporations and the States in which they operate.[160] Some suggest that the increasing use of these Codes of Conduct could be seen as a new form of 'privatisation' of human rights, "as an allusion to the increased self-regulation instead of State regulation".[161] Corporate self-regulation may then be used to fill the regulatory gap left by national legislators.[162]

Nevertheless, the adoption and implementation of Codes of Conduct do not only receive positive commentary. A frequent initial remark is that their provisions do not generally impose legally binding obligations on corporations. Some argue that their effectiveness necessitates an independent supervisory and enforcement mechanism, which is in most cases lacking. Moreover, the limited space occupied by human rights among the CSR scheme is sometimes deplored. According to the research of Kamminga and Zia-Zarifi on the liability of multinational corporations under international law, the real impact on the problematic situation is often modest; Voluntary Codes of Conduct are seldom useful in ameliorating the problems caused by corporations.[163] These authors give the example of the adoption of Shell's Internal Code of Conduct in response to the massive public disapproval in the wake of the oil crisis in the Niger Delta where the company reduced its activities. The result of the actions taken decreased the vulnerability of the company to public pressure, but did not improve the situation of the local population.[164] In contrast, one might reply that Shell has since started a sustainable community development programme in Nigeria (see section IV) and has explicitly declared its commitment to several external codes of conduct and principles.[165]

Most of the Global Codes of Conduct adopted today were not yet developed when the discussed events in the Niger Delta took place in 1994. In that case, what are the potential impacts of these emerging Codes of Conduct with regard to regulating corporate conduct of petroleum industries in such a socio-political context? Such questions could hypothetically be answered by analysing the main voluntary initiatives and external codes of conduct supported by Shell:[166] the Organisation for Economic

160 Kamminga and Zia-Zarifi, *supra* note 148, p. 9, referring to H.W. Baade, The Legal Effects of Codes of Conduct for Multinational Enterprises, in: R.N. Horn (ed.), Legal Problems of Codes of Conduct for Multinational Enterprises 3 (Antwerp, 1980).

161 A. Reinisch, The Changing International Legal Framework, in: P. Alston (ed.), Non-State Actors and Human Rights 43 (Oxford: Oxford University Press, 2005).

162 Muchlinski, *supra* note 64, p. 113.

163 Kamminga and Zia-Zarifi, *supra* note 148, p. 9.

164 In particular, some parts of Shell's operation were simply transferred to competitors.

165 Shell, External voluntary codes, http://www.shell.com/home/content/envirosoc-en/approach_to_reporting/external_voluntary_codes/external_voluntary_codes_000407.html (last visited on 28 June 2008).

166 Shell is also committed to the Extractive Industries Transparency Initiative, see section 4.2.

Co-operation and Development Guidelines for Multinational Enterprises,[167] the International Labour Organisation Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy,[168] the Global Reporting Initiative,[169] the United Nations Global Compact (GC),[170] and the Voluntary Principles on Security and Human Rights (VPSHR).[171] Generally speaking, a review of these key international corporate initiatives reveals that the recommended standards encourage corporations to take an active role toward human rights fulfilment by stimulating development and improving social conditions. The adoption of such instruments by Shell certainly indicates an increased awareness of the impacts of its activities on the society and the environment, including in the Niger Delta. Although, a comprehensive analysis of each of these mentioned instruments goes beyond the scope of the present article, the two last instruments will be further discussed considering the particular relevance of their content to the present matter.

It should be noted here that the VPSHR have been created in 2000 especially to assist extractive and energy companies in maintaining the safety and security of their operations while respecting human rights. It addresses three important core areas in this case: risk assessment, interactions between companies and public security, and interactions between companies and private security. In particular, the VPSHR state that corporations should consider its risk assessment when transferring equipment (including lethal equipment) to public or private security force in order to mitigate foreseeable negative consequences, including human rights abuses. It also involves considering the available human rights records of public security forces, paramilitaries, law enforcement, as well as the reputation of private security agencies to be hired. From an internal report published after the first five years of existence of the VPSHR, it has been reported that they provide "guidance on managing security and human rights, especially for companies that operate in challenging environments where

167 OECD, Guidelines for Multinational Enterprises, www.oecd.org/daf/investment/guidelines (last visited on 28 June 2008). See: S.C. van Eyk, The OECD Declarations and Decisions concerning Multinational Enterprises: An Attempt to Tame the Shrew (Nijmegen: Ars Aequi Libri, 1995); Jägers, *supra* note 65, pp. 101–119; D. Leipziger, The Corporate Responsibility Code Book 52–56 (Sheffield: Greenleaf Publishing, 2003).

168 Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, adopted by the Governing Body of the International Labour Office at its 204th Session (Geneva, November 1977), as amended at its 279th Session (Geneva, November 2000).

169 Global Reporting, Sustainability Reporting Guidelines, http://www.globalreporting.org (last visited on 28 June 2008). See: T. Lambooy, Sustainability Reporting by Companies is Necessary for Sustainable Globalisation, in: E. Nieuwenhuys (ed.) Neo-Liberal Globalism and Social Sustainable Globalisation 215–235 (Leiden-Boston: Brill, 2006). Governments are excluded from this initiative for the GRI to keep its independence from their intervention.

170 GC, About the GC, http://www.unglobalcompact.org (last visited on 28 June 2008).

171 Voluntary Principles on Security and Human Rights, Welcome, http://www.voluntaryprinciples.org/, (last visited on 28 June 2008). Examples of other participants are: ExxonMobil, Rio Tinto and Talisman Energy.

expectations regarding human rights and security may be inconsistent".[172] Nevertheless, it has been mentioned that the VPSHR suffer from a lack of clarity and vague language, which often results in confusion among operations-level staff. Furthermore, they are difficult to monitor and audit and thus, may foster the perception that they lack transparency. Shell could give these points some attention in its reporting on sustainability.

The same comments are generally applicable to the GC which merely relies on public accountability, transparency and the self-interest of its stakeholders to promote and to implement its principles; it has not been developed as a regulatory instrument as such. Companies are simply invited to produce an annual Voluntary Communication on Progress on the implementation of the GC, which reports are subsequently posted on the website of the GC.[173] Since the Global Compact consists of ten principles rather than detailed rules, it could be described more as a network opportunity than as a practical tool for companies. However, since Shell is among the corporate founders of The Netherlands Network (GCNL),[174] and the national GC network, public pressure could be counted as an element promoting its implementation.

Such Voluntary Codes of Conduct and corporate initiatives can play a positive role with regard to the accountability of corporations for human rights violations. When code provisions coincide with mandatory local law, companies surely have to comply. When such provisions are incorporated into a contract a company is a party to (e.g. loan agreement or supply agreement), they will be enforceable before the Court. Codes of Conduct can also be used by the Court to apply higher standards. Furthermore, public referral to these instruments can lead to certain expectations; violations of these Codes may give rise to claim. In addition, Codes of Conduct can encourage the adoption of higher standards in national regulation, the so-called "bottom-up pressure" in legislation. Considering that the private sector usually moves faster than the government, adoption of corporate voluntary codes of conduct can be considered as a major step forward. The credibility and effectiveness of such codes of conduct could nevertheless be greatly improved if corporations that have adopted them were to commit themselves to the establishment of clear, common and verifiable performance obligations.[175]

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172 Voluntary Principles on Security and Human Rights, Five-Year Overview + Overview of Company Perceptions of the Principles, http://www.voluntaryprinciples.org/reports/2005/company-perceptions.php (last visited on 28 June 2008).

173 The GC's coverage is considerable, with over 5,000 participants, including over 3,700 businesses in 120 countries. GC, Participants, http://www.unglobalcompact.org/ParticipantsAndStakeholders/index.html (last visited on 28 June 2008).

174 GC, The Global Compact in the Netherlands, http://www.unglobalcompact.org/NetworksAroundTheWorld/country_contact/netherlands.html (last visited on 28 June 2008). The network focused on raising awareness of the GC in The Netherlands and providing a valuable learning and action platform for signatories of the GC.

175 Ballentine, *supra* note 15, p. 136.

The following will conclude on certain significant aspects of the operations of Shell in the Niger Delta – mainly at the political and economical level – following the trial of Saro-Wiwa.

## D. CORPORATE SOCIAL RESPONSIBILITY IN THE NIGER DELTA REGION

### 1. RECONCILIATION PROCESS BETWEEN THE OGONI PEOPLE, SHELL AND THE NIGERIAN GOVERNMENT

In 2005, a decade after the execution of Saro-Wiwa and his compatriots, President Obasanjo announced the establishment of a reconciliation process involving Shell, the Ogonis, and both the Federal and Rivers State Governments.[176] Reverend Father Matthew Hassan Kukah, a well-known figure in Nigeria, was appointed as a facilitator to handle the peace process. Among the items for negotiation, an environmental assessment of Ogoniland and its eventual clean-up of oil spills were set as priorities by the parties.[177]

As a long-term commitment to the reconciliation process, Shell stated that it will assess and proceed with cleaning-up of oil spills that occurred in the area since the company left in 1993, irrespective of how the oil spills did occur. Shell offered to initiate dialogue with the Ogoni communities.[178] Pursuant to a press release, its development programme in Ogoni has been maintained despite the fact that the company has ceased its activities there in order to maintain a good relationship with the communities. Additionally, Shell stressed that it needs the freedom to conduct normal operations in order to assess the conditions of its facilities in Ogoniland and to make them safe. Shell Nigeria Annual Report 2006 stated that the company: "remains committed to an amicable resolution of issues and will continue to do its part to support the reconciliation process".[179]

From the side of the representatives of the Ogonis, MOSOP stressed that steps should first be taken by Shell, the Federal and the State Government to ensure the integrity and confidence-building in the entire process. After this, measures should be taken regarding the environmental degradation and rehabilitation of Ogoniland,

176 Coventry Cathedral, International Centre for Reconciliation, Ogoni Reconciliation, 15 June 2005, http://www.coventrycathedral.org.uk/ogonireconciliation.pdf (last visited on 28 June 2008).

177 Shell Nigeria Annual Report 2006, *supra* note 20, p. 31.

178 Shell, Shell in Nigeria, Press Release, The Ogoni Issue, http://www.shell.com/home/Framework?siteId=nigeria&FC2=&FC3=/nigeria/html/iwgen/about_shell/issues/ogoni/ogoni.html (last visited on 28 June 2008).

179 Shell Nigeria Annual Report 2006, *supra* note 20, p. 31.

including the conduct of an independent audit, a substantive clean-up of oil spills, and prevention of further damages.[180]

They also requested an apology for "past injury and firm commitments against future repetition" and connected damages. Furthermore, MOSOP stressed the opportunity to provide solutions concerning the political marginalisation of the Ogonis, their struggle for self-determination and to promote their socio-economic development, including sharing the benefits of oil exploitation.

In the course of the reconciliation process in 2005–2006, MOSOP considered that it has not been properly consulted and informed by the facilitator of all developments. In particular, they were concerned about the public announcement of an eventual clean-up plan of the polluted area to be sponsored by Shell and executed by the United Nations Environment Programme (UNEP), under which project MOSOP had not been duly informed and consulted.[181] Some estimated that MOSOP saw this clean-up as a manoeuvre by Shell to service its facilities in preparation for its return to Ogoniland.[182]

As a measure of reconciliation in 2005, the Federal Government inaugurated an Oil Spill Compensation Committee towards finding solutions to the problem of oil spillage in the Niger Delta.[183] The work of the Committee was subsequently transferred to a national regulatory agency; the National Oil Spill Detection and Response Agency (NOSDRA). In accordance with the *National Oil Spill Detection and Response Agency Act*, NOSDRA is responsible to ensure compliance with all existing environmental legislation and detection of oil spills in the petroleum sector.[184] At the beginning of 2008, the Director General of NOSDRA announced that the guidelines on spillage management and related compensation for damaged property were being prepared by the relevant authorities.[185]

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180 MOSOP, Whiter Ogoni-Shell Reconciliation, 2006, http://www.unpo.org/downloads/Whither%20Ogoni-Shell%20Reconciliation.pdf (last visited on 28 June 2008).

181 See also: MOSOP, Press Release, The Father Kukah Cooked OGONI Mou, 27 February 2007, http://www.mosop.net/Archivesfiles/MOSOPPRFeb272007.pdf (last visited on 28 June 2008).

182 UNEP, the Environment in the News, UNEP and the Executive Director in the News, 12 June 2007, http://www.unep.org/cpi/briefs/2007June12.doc. See http://www.nuos-international.org/id27.html (last visited on 28 June 2008). SPDC reported that it would not resume oil production operations without the welcome of the people. Shell, Shell in Nigeria, Press Release, *SPDC's Submission*, 23 January 2001, http://www.shell.com/home/content/nigeria/news_and_library/press_releases/2001/2001_2301_01031504.html (last visited on 28 June 2008).

183 *National Oil Spill Detection and Response Agency (Establishment) Act*, 2006 (2006 Act No. 15, 18 October 2006). Federal Government of Nigeria, Official Website of the Office of Public Communications, *President Obasanjo's Role in Reconciling the Ogonis*, 17 July 2006, http://www.nigeriafirst.org/cgi-bin/artman/exec/view.cgi?archive=1&num=6181 (last visited on 28 June 2008).

184 Article 6(4) of the *National Oil Spill Detection and Response Agency Act*.

185 O. Bassey, Legal Oil, *Guidelines to Check Oil Spill Out Soon, 8 February 2008*, http://www.legaloil.com/NewsItem.asp?DocumentIDX=1202628848&Category=news (last visited on 28 June 2008).

For its part, the Rivers State Government announced in 2006 the creation of a special fund to enable development projects in Ogoniland.[186]

From an external perspective, it appears difficult to ascertain the outcome of this reconciliation process for the different parties involved. From the information provided by the facilitator, Shell and the governmental authorities, progress has been achieved and concrete steps taken. From the perspective of MOSOP though, no solution has clearly emerged; these negotiations have simply ceased without solving anything.[187]

Nevertheless, a significant proposal connected to the objectives of the reconciliation process is on the way to be concretised. At the request of the Nigerian Government, UNEP announced in November 2007 its plan of undertaking a comprehensive environmental assessment of oil-impacted sites in Ogoniland in association with the United Nations Development Programme (UNDP). The project started in the autumn of 2007 and was then expected to be completed by the end of 2008.[188] Following the survey, recommendations will be drafted on the basis of international standards for a subsequent clean-up programme.[189] Only the future will tell if this project can generate concrete positive impacts in the region.

As mentioned, one capital aspect of the reconciliation process for the Ogonis was to reconsider the distribution of oil proceeds. It is deemed necessary to further explore this matter.

## 2. DISTRIBUTION OF OIL PROCEEDS: "NEGOTIATIONS" BETWEEN THE NIGERIAN GOVERNMENT AND THE NIGER DELTA PEOPLE AND FURTHER CONCERNS

According to Human Rights Watch, former President Obasango rejected the idea of negotiation surrounding further reallocation of oil revenue generated in the Niger

186 UNPO, Ogoni: Rivers State Government Earmarks N2bn for Ogoniland Development, 5 January 2006, http://www.unpo.org/content/view/3461/236/ (last visited on 28 June 2008).

187 UNPO, Ogoni: MOSOP Alerts of Plot, 26 October 2006, http://www.unpo.org/article.php?id=5676 / (last visited on 28 June 2008).

188 UNEP, News Centre, UN Environment Programme to Assess 300 Oil-Polluted Sites in Nigeria's Ogoniland, http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=521&ArticlelD=5692&l=en (last visited on 28 June 2008). This assessment is financed by funds which are made available to the Government by SPDC in which it has a 55 percent share.

189 UNEP, Ogoniland Environmental Assessment, UNEP in Ogoniland, http://postconflict.unep.ch/ogoniland/, (last visited on 28 June 2008). It mentioned that the goal is to "identify the impacts of oil on environmental systems such as land, water, agriculture, fisheries and air – as well as the indirect effects on biodiversity and human health." Although the UNEP website indicated that bulletined information about the mission progress will be posted, no such information has been released as of 28 June 2008.

Delta.[190] Rather, he opted in 2000 for the establishment of the Niger Delta Development Commission. Especially, this Commission aimed to reorganise management and administrative structure for a more effective use of the sums received from the federation account for tackling environmental pollution and other related problems arising from oil operations in the area.[191] Its mandate is also to implement the Niger Delta Regional Development Master Plan in consultation with stakeholders, such as local government, State government, oil companies (including SPDC), the National Planning Commission and NGOs.[192]

Unfortunately, critics say that there is little evidence that the Commission is succeeding in fairly distributing the oil proceeds to the population.[193] They consider that corruption is likely to affect its functioning. MOSOP representatives considered that it has failed to solve the region's problems.[194] The rising tide of violence in the Niger Delta can be perceived as a direct sign that the actual redistribution of oil revenues is not satisfactory for all parties. In place of the non-violent manifestations as previously promoted by MOSOP, violence and hostage-taking are now employed by militants to draw international attention to the Delta crisis. In particular, a group of activists, the Movement for the Emancipation of the Niger Delta (MEND), has orchestrated attacks on oil installations and hostage-taking of foreign oil workers since 2006.[195] In particular, the MEND demands that the Government grants oil revenue concessions to Delta groups. Nonetheless, there is hope that the situation will improve following the election in May 2007 of President Umaru Yar'Adua, who has begun dialogue with militants groups and some ethnic organisations.[196]

The question of the distribution of oil proceeds was examined by Shell. In response, the company publishes data in its annual reports on the sharing of oil revenues between the private joint venture partners, including SPDC, together with the paid royalties, Petroleum Profit Tax and other levies.[197] This initiative is in line with its

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190 Human Rights Watch, Update on Human Rights Violations in the Niger Delta, 14 December 2000, http://www.hrw.org/backgrounder/africa/nigeriabkg1214.htm (last visited on 28 June 2008).

191 *Niger-Delta Development Commission (Establishment etc) Act* (2000 Act No 6).

192 Niger Delta Development Commission, Partners for Sustainable Development, http://www.nddcnet.com/Partnerships.html (last visited on 28 June 2008).

193 See H. Ekwuruke, Panorama, The Niger Delta Youth in Nigeria's Development, http://www.takingitglobal.org (last visited on 28 June 2008).

194 UNPO, Ogoni: A Deprived Community, 10 January 2007, http://www.unpo.org/article.php?id=6121 (last visited on 28 June 2008).

195 See: P. Collin, The Bottom Billion: Why the Poorest Countries Are Failing and What Can Be Done About It 30–31 (Oxford: Oxford University Press, 2007).

196 International Crisis Group, Nigeria: Ending Unrest in the Niger Delta, Africa Report, No. 135, 5 December 2007, http://www.crisisgroup.org/home/index.cfm?id=5186&CFID=33852747&CFTOKEN=45311858 (last visited on 28 June 2008). MEND also requests the Government to withdraw troops and releases imprisoned ethnic leaders. President Yar'Adua (Fulani origin) is the second elected President after the end of the military regime in 1999.

197 Shell Nigeria Annual Report 2006, *supra* note 20.

commitment to the Extractive Industries Transparency Initiative (EITI), which represents a multi-stakeholders initiative to improve transparency and accountability in the extractives sector. Among the main principles stated for revenue transparency, the EITI encourages an independent verification and publishing of payments by extractive companies and receipts by governments.[198]

At this point, the real issue seems to define the extent of responsibility of oil companies. This appears to raise difficult legal and ethical questions. For instance; to which extent a multinational company should ascertain that its contractual partner legitimately deals with the interests of the inhabitants it represents and whether it has indeed been given the authority by the representatives of the Indigenous People. The field of CSR and its connection to sustainable development definitely contain complex research questions worthy of further exploration.

## 3. SHELL & THE MILLENNIUM DEVELOPMENT GOALS IN THE NIGER DELTA REGION

Regarding the linkage between CSR and sustainable development, it is noted that Shell has expressed its commitment to the MDGs – the well-known eight targets universally agreed upon in a common effort to reduce extreme poverty by 2015.[199] This part briefly presents some of Shell's initiatives taken under the MDGs in relation to the problems facing the population of the Niger Delta; the intention is not to offer an analysis of the MDGs themselves.

Shell supports the view that achieving the MDGs streams mainly from the role of governments as "reducing poverty depends on effective public institutions that allow business to create jobs and wealth."[200] Its greatest contribution to the MDGs is through providing energy needed for economic and social development.

Nevertheless, Shell has undertaken development projects dedicated to the MDG, such as participating together with the International Finance Corporation and Diamond Bank in a risk-sharing credit programme to finance indigenous contractors operating in the Niger Delta.[201] The programme aims to develop the capacities and competitiveness of Nigerian contractors. Moreover, Shell maintains a sustainable

198 EITI, EITI Summary, http://eitransparency.org/eiti/summary (last visited on 28 June 2008). See: A. Al Faruque, Transparency in Extractive Revenues in Developing Countries and Economies in Transition: A Review of Emerging Best Practices, 24 Journal of Energy & Natural Resources Law 66 (2006).

199 UN, UN Millennium Development Goals, What are the Millennium Development Goals? http://www.un.org/millenniumgoals/ (last visited on 28 June 2008).

200 Shell, Millennium Development Goals, http://www.shell.com/home/content/envirosoc-en/society/millennium_development_goals/millenium_dev_goals_26042007.html (last visited on 28 June 2008).

201 The project is a US$30 million revolving credit facility in which Shell, the International Finance Corporation and Diamond Bank participate equally in the funding and risk sharing of the facility.

community development programme in Nigeria since 2003, which is said to be integrated into the oil and gas project planning. This programme is established through the conclusion of global memoranda of understanding between Shell and the involved communities, which set long-term agreements allowing for sustainable development activities. Especially, they are aimed to improve the management of projects on the levels of accountability and transparency.[202] The company indicated having increased its assistance to reach US$53 million in 2006 on community development projects in Nigeria. Concretely for the Niger Delta, this assistance is translated into, for instance; the construction of roads, the renovation of a health centre, aid to start up community cassava enterprises (a SPDC/USAID partnership), university scholarships and malaria drugs for children. In addition, Shell has provided financial support for the publication of the UN Development Programme "Niger Delta Human Development Report", a study analysing why abundant human and natural resources in this region have had little impact on poverty.[203] One of the conclusions of this Report is the necessity to undertake a multi-stakeholders approach while involving all levels of government, the Niger Delta Development Commission, the oil companies, the organised private sector, civil society organisations, the representatives of local groups and development agencies in partnership for ensuring a sustainable development and the achievement of the MDGs.

Another last event with large impact on the region needs to be signalled: the emergent presence of China.

## 4. THE NIGERIAN GOVERNMENT TALKS WITH CHINESE OIL COMPANIES AND PRIVATISATION OF THE OIL INDUSTRY: WHAT FUTURE FOR THE OGONIS?

In the context of the booming economy of China and its increasing drive for energy resources, the Nigerian Government started to concretise talks with Chinese oil companies vividly interested in its rich natural reserves.

In 2005, China National Offshore Oil Corporation (CNOOC), the largest Chinese gas and oil producer, agreed to disburse close to US$2.3 billion for a 45 percent stake in an oil block in the Niger Delta.[204] In 2006, the Government offered the state-owned company China National Petroleum Corporation (CNPC) four oil exploration licences out of 17 licences in an auction.[205] Two of the oil explorations are located in the Niger

202 Shell Nigeria Annual Report 2006, *supra* note 20, p. 24.

203 UNDP Nigeria, Niger Delta Human Development Report on the Niger Delta, 2006, http://web.ng.undp.org/reports/nigeria_hdr_report.pdf (last visited on 28 June 2008).

204 See: Embassy of China to the USA, CNOOC Takes 45 percent Stake in Nigerian Oil, 1 October 2006, http://www.china-embassy.org/eng/xw/t230362.htm (last visited on 28 June 2008).

205 I. Taylor, Sino-Nigerian Relations: FTZs, Textiles, and Oil, Association for Asian Research, The Jamestown Foundation, China Brief, 25 July 2007, http://www.jamestown.org/china_brief/article.php?articleid=2373438 (last visited on 28 June 2008).

Delta.[206] In exchange for the drilling rights, China agreed to invest in Nigeria's infrastructure.[207]

Additionally, the media have reported that Shell may sell stakes in some of its oil and gas fields in Nigeria to CNOOC.[208] The willingness of China to acquire its share of the oil industry is also facilitated by the intent of the Government to privatise the oil industry.[209] The Federal Government has already approved licences to several independently-owned refineries.

Some may perceive that the arrival of China in the Niger Delta would improve the region's resources to fund a better future for the Delta population. However so far, the opinion of the Niger Delta militants is squarely different; it has been reported that militants of the MEND have detonated a car bomb as a warning against China's further expansion in the region. Kidnapping of Chinese workers by militants has also been reported.[210]

Indeed, the general security situation surrounding the oil industry in the Niger Delta is still problematic. In its attempts to control the situation, "Nigeria has criticised Washington for failing to help protect the country's oil assets from rebel attack, forcing it to turn to other military suppliers, including China, for support".[211] It might be said that concerns over the level of corruption within the Nigerian security forces and human rights violations have made the Americans reluctant to supply additional equipment. In consequence, Nigeria has turned to China as a military ally to protect its oil fields, especially, by providing supply. Considering further critique of China's commercial engagements with controversial regimes – such as its involvement in Darfur related to the oil industry[212] or its investment and military supplies in Zimbabwe and its loans to Angola – one may doubt if this development forecasts a better future for the Ogonis. It would probably depend firstly on the concretisation of

206 E. Goujon, News24, China Gets Nigerian Oil Rights, 19 May 2006, http://www.news24.com/News24/Africa/News/0,,2-11-1447_1936128,00.html (last visited on 28 June 2008). They were sold to CNPC for around US$5 million and US$10million, respectively. Two Nigerian oil firms from the Niger Delta were also allocated operating production licences.

207 Global Insight, Indian and Chinese Oil Companies Dominate Mini Licensing Round in Nigeria, http://www.globalinsight.com/SDA/SDADetail5934.htm (last visited on 28 June 2008).

208 BBC News, Shell 'Mulls' Nigerian Oil Sale, 22 November 2007, http://news.bbc.co.uk/1/hi/business/7107717.stm (last visited on 28 June 2008).

209 Energy Information Administration, Official Energy Statistics from the US Government, Nigeria, http://www.eia.doe.gov/emeu/cabs/Nigeria/Oil.html (last visited on 28 June 2008).

210 BBC News, Car Blast near Nigeria Oil Port, 30 April 2006, http://news.bbc.co.uk/2/hi/africa/4959210.stm (last visited on 28 June 2008); D. Naku, Legal Oil, *Militants Kidnap 10 Chinese Oil Workers, 26 January 2007, http://www.legaloil.com/NewsItem.asp?DocumentIDX=1169971443&Category=news* (last visited on 28 June 2008).

211 D. Mahtani, Nigeria Turns to China for Defence Aid, FT.com, Financial Times, http://www.ft.com/cms/s/0/ef8dbc30-a7c6-11da-85bc-0000779e2340.html (last visited on 28 June 2008).

212 Human Rights Watch, World Report 2007, China, http://www.hrw.org/wr2k7/essays/introduction/3.htm (last visited on 28 June 2008).

promises related to the development of selected infrastructure by Chinese companies. A *status quo* is more likely.

## CONCLUSION

The severe problems encountered by the Ogoni People as a result of the oil wealth of the Delta region were outlined in this contribution. For the Ogonis, oil exploration and exploitation have had devastating effect on their environment and on the local economy. The existing balance of the inhabitant's livelihood, which was based on fishery and agriculture, was severely disturbed.

On the political plane, the military dictatorship of General Abacha in the nineties was accused of numerous human rights violations. Shell, the leading oil company in the region, was blamed, among others, for complicity with the Abacha regime, environmental pollution, threatening food security and health. In particular, Shell was said to have requested the national security forces for protection of their operations in the Niger Delta and contributed by furnishing equipments, including arms, and other aids.

In addition, the political situation at that time did not allow for the Ogonis' participation as stakeholders in the decision-making process affecting their homeland. Neither did they profit from the financial benefits of oil exploitation, which went directly to the Federal Government. As corruption indices point out, Nigeria is said to have had a long history of corruption. Therefore, it is likely that even the thin percentage of profits actually allocated to the region has generally 'disappeared'.

The execution of Saro-Wiwa and the eight other Ogonis in 1995 was the beginning of a new era, which, unfortunately, did not bring much relief for the Ogoni People. In 1996, a UN fact-finding mission reported that the trial and execution of Saro-Wiwa and the others violated a number of fundamental rights of the defendants as guaranteed both by Nigerian law and by international human rights instruments to which Nigeria is a party. In the meantime, family members of the sentenced activists fled Nigeria in fear of their lives. Expatriated abroad, they commenced legal proceedings in 1996 – still pending today – against Shell based on the *Alien Tort Claim Act* alleging complicity in human rights violations perpetuated by the then Nigerian military regime (*Wiwa v. Shell*).

The same year, complaints were filed against the Government of Nigeria under the African Charter to the Commission. The allegations stated that the Government did not prevent that the oil exploitation in the Niger Delta led to human rights violations. The complaints were awarded. The Commission thereby recognised collective rights of the Ogoni People regarding natural resources and the environment. Moreover, the Commission applied 'modern academic thinking' on how to protect economic, social and cultural rights by emphasising the duties of a State Party: (1) not to allow private

actors to destroy or contaminate food sources; (2) to protect individuals from non-state actors with right to the right of housing; and (3) to prevent violations by private actors with regard to the right to life. Furthermore, the Commission recommended the Government to investigate the allegations of human rights abuses, prosecute those responsible, award compensations to the victims, and, finally, ensure environmental clean-up.

Concerning the environment, a favourable decision to the Niger Delta People was also reached in *Shell v. Ijaw Aborigines of Bayelsa State*, where the Federal High Court of Nigeria ordered SPDC, the entity which runs Shell's operations in Nigeria, in 2006, to pay US$1.5 billion in damages to the Ijaw community as compensation for degrading the environment. However, SPDC has since appealed the judgment and refused to pay. Similarly, farmers and fishermen from the Delta region have publicly announced in May 2008 the preparation of a court case against Shell in The Netherlands, alleging damages to their food sources caused by oil spills.

Another controversial issue in the region is gas flaring. Whereas the Government and Shell are committed to phase out gas flaring, the practice has not yet been stopped. As mentioned, the decision of the Federal High Court in November 2005, which found that gas flaring violates certain rights guaranteed by the Nigerian Constitution and the ACHPR, was appealed by SPDC and a stay of execution granted.

Still today, the Ogonis seem not to gain from the oil exploitation of their homeland and suffer the effects of the same oil industry. As the overview of the legal proceedings in section 2 has shown, these cases and claims did not bring any concrete results for the Delta people.

As discussed in section 3, human rights and the role of corporations in that respect represents a complex matter. Although most Governments, international organisations, NGOs and academia, in one way or the other, express the insight that private actors, including multinational companies, should respect human rights, the legal reality shows a different picture. On the one hand, international human rights treaties do not allow human rights tribunals to assess claims against companies directly. Nevertheless, it is possible to request human rights tribunals and commissions to issue an order against a Government for it to undertake measures against private actors, in order to ensure respect for human rights. This was demonstrated in section 2 by reporting on the ruling of the African Human Rights Commission ordering the Nigerian Government to actively protect its people from human rights violations. On the other hand, international private law is mostly territorially organised. As shown in section 2, various legal obstacles, such as *forum non conveniens*, together with financial obstacles make it complicated for local people to commence a legal claim against a parent company located in another country. In addition, legal proceedings before a foreign court are often lengthy; the multinational companies do not hesitate to extend the proceeding to appellate courts. Consequently, it might well be concluded that both the national legal systems and the international public legal systems do not

provide practical solutions in the short term for the environmental and human rights problems as a result of the on-going globalisation process. Companies have recognised this and expressed their willingness to cooperate with Governments and other stakeholders to achieve solutions and results. As section 4 outlined, Shell actively seeks ways to cooperate with the Ogoni People and the Nigerian Government, for instance, by the adoption of Codes of Conduct, its participation in the reconciliation process and the training of local contractors. Its sustainable community development programme in Nigeria and annual reports provide an insight in its corporate activities and the distribution of oil revenues. These actions show commitment to CSR. Certainly, the complex reality of the Niger Delta, including ethnic tension and violence, the high level of corruption, the weak governance structure and the Chinese competitors knocking at the door will not make CSR an easy win. Natural resources and easy money can in fact amount to a 'curse' on sustainable development. However, as it has been observed in this case, a multi-stakeholder dialogue and transparency on business operation and income flows appear to be the best option for the people concerned rather than having to await the outcome of a lengthy court case.

Since CSR is at an early stage, however, there is still room for improvement. An important aspect is the quality and quantity of sustainability reporting. Although the GRI continuously improves its reporting standards and formulates industry criteria, companies can make a more concrete contribution. They can improve instructions and control mechanisms, provide additional information in their reports and decide to proceed with full external verification of the information. Only information based on true facts can assist people in formulating their "wish-list on corporate behaviour". At the same time, companies can defend themselves against political rent-seekers, sabotage and false allegations. Transparency based on correct facts will support the transition from human rights conflicts to corporate social responsibility.