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Niger Delta People *v* Nigeria:
a Missed Occasion before the
ECOWAS Court of Justice



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Nota a [judgement of 10th October 2017, no. ECW/CCJ/JUD/03/17](#)
[*Osaghae et al. v. Republic of Nigeria*](#)

1. Introduction

The aim of this paper is to analyse the main contents of the decision *Osaghae et al. v Nigeria* who applied to the Economic Community of West African States (ECOWAS) Court of justice. The case is relevant because it aims at seeking justice for the serious violations of human rights in Nigeria related to the environmental degradation caused by the unethical exploitation of resources by oil companies. The Plaintiffs alleged the violations of several of their human rights enshrined in international legal instrument which regarded, amongst others, equality, right to self-determination, right to economic, social and cultural development and the right to a general and satisfactory environment. Even though the case was dismissed by the Court because of the lack of locus standi of the Plaintiffs, since they aimed at representing the whole population of Niger Delta People, and the insufficient proofs attached, we consider this application relevant because it brings back to our attention how the situation in Niger Delta is still characterized by numerous violations of human rights committed by national and multinational oil companies. Also, we consider it important since it seeks justice and respect for the human right to a healthy environment.

The paper will start with a contextualization of the case *Osaghae et al. v Nigeria*, reporting the main issues in the African state for what regards oil exploitation, environmental degradation and the related questions of human rights violations, highlighting the link between a healthy environment and the enjoyment of fundamental human rights. Then it will briefly summarize the contents of two landmark international human rights courts decisions regarding issues very similar to the ones denounced by *Osaghae et al*, *SERAC v Nigeria* and *SERAP v Nigeria*, the first one presented before the African Commission on

* Nota valutata dalla direzione del Focus.

Human and Peoples Rights, while the second one presented before the ECOWAS Court of Justice. In both decisions the Courts sentenced Nigeria to have violated several human rights connected to environmental degradation and oil pollution perpetrated by oil companies and ordering the State to re-establish a situation of decent living conditions for its peoples.

The case *Osaghae et al.* is part of this international jurisprudence concerning Nigeria, oil exploitation, environmental disaster and serious violations of human rights. Although the State has been object of recommendations by international authorities and NGOs, Nigeria keeps in avoiding enacting a policy of protection of its peoples, defending instead the petroleum companies through militarisation of strategic oil areas, while weak and unenforced legislation¹ makes possible massive oil pollution, territorial despoliation and environmental degradation². We will finally argue for the necessity for the Nigerian government to respect and apply recommendations made by the international courts, harmonizing its national law with the provision contained in international human rights agreements.

2. Nigeria, environmental degradation and related violations of human rights

The Federal Republic of Nigeria is well-known for the existence of considerable oil deposits which have been exploited by both Nigerian and multinational companies since many decades. The oil and gas industry is for Nigeria the main source of income, representing the 97% of foreign exchange revenues, which has generated 600\$ billion since the 1960s.³ Nonetheless, the redistributive effect for Nigerian people of this income has been practically inconsistent. Nigerian peoples from the Delta Region still live in extreme poverty, which makes them one of the most sadly known examples of the ‘resource curse’. Not only are they living in conditions of extreme deprivation of adequate living conditions, high unemployment, neglect by institutions and endemic conflict, but the enjoyment of their fundamental human rights is continuously at stake. The side effects of the oil industry are causing an unprecedented and uncontrolled pollution of lands, water and air which are essential to the survival of Niger Delta People which livelihood rely on the preservation of these natural resources.

¹ National Environmental Standards Enforcement act 2007/2001; Petroleum Act 1967 and Petroleum Regulations 1969.

² Onwuzombe Ifeanyi, *Human Rights Abuse and Violation in Nigeria: a Case Study of the Oil-Producing Communities in the Niger Delta Region*, Annual Survey of Int'l & Comp. Law, Vol. XXII, 2017, pp. 115-160.

³ Amnesty international, *Nigeria: Petroleum, Pollution and Poverty in the Niger Delta*, Amnesty International Publications, 2009.

The Amnesty International (AI) 2009 Report, *Nigeria: Petroleum, Pollution and Poverty in the Niger Delta*, has been fundamental in shedding light on the main issues that interlink oil exploitation, environmental degradation and human rights violations in Nigeria, highlighting a situation of severe problems for Niger Delta Peoples which, evidently, the State has so far failed to properly address. From this document it emerged clearly how the pollution caused by the oil industry in Nigeria is threatening several fundamental rights strictly intertwined to the preservation of the environment: “Oil spills, waste dumping and gas flaring (gas is separated from oil and, in Nigeria, most of it is burnt as waste) are endemic in the Niger Delta. This pollution, which has affected the area for decades, has damaged the soil, water and air quality. Hundreds of thousands of people are affected, particularly the poorest and those who rely on traditional livelihoods such as fishing and agriculture. The human rights implications are serious, under-reported and have received little attention from the government of Nigeria or the oil companies⁴”. The main critical issues deriving from oil exploitation found by AI can be summarized in 7 macro areas:

- i) Oil spills: they can occur both on land and offshore, destroying crops and damaging the productivity of soils, polluting freshwater and saltwater, contaminating drinkable water and destroying fish stocks. It is estimated, from the data available, that 9/13 million barrels have been spilt over the past 50 years;
- ii) Disposal of waste products: the improper disposal of hazardous wastes (discharge into rivers and sea) deriving from the oil exploitation has contaminated land and water. It has been estimated that about 17.000 cube metres of information water where discharged inadequately in 2006;
- iii) Gas flaring: the gas deriving from the oil production is normally burnt up in massive flares, resulting in an extreme wasteful activity with considerable environmental impact;
- iv) Construction of infrastructures: all activities associated with building infrastructures such as oil pipelines and make areas accessible by road and water are likely to affect the environment and the inhabiting people, with deforestation or access to lands and watercourses that would have been normally dedicated to farm or fisheries;

⁴ *Supra* note, p. 9.

- v) Dredging: oil companies normally dredge rivers in order to obtain sand for construction and to facilitate navigation. This process leads to severe repercussions on fisheries and water quality, also because the dredging waste material can be dumped into the river banks;
- vi) Inadequate clean-up: rapid and adequate clean-up processes are fundamental when one of the above-mentioned problems occurs. The fact that clean-up is often slow, inadequate or non-existing causes long-term environmental harms, resulting in a tightening damage to livelihoods and health;
- vii) Cumulative impact of multiple sources of oil pollution: the fact that since decades oil exploitation is damaging the environment and no effective action has been taken to remedy the situation, has caused an extensive accumulation of damages which become every year more difficult to address, obliging people to live in environmental degradation.

In Nigeria the human rights impacts of oil pollution are evident and tangible. In the AI Report Amnesty International clearly put into evidence how several fundamental human rights were at stake due to the adverse consequences of oil pollution. These rights are protected in international agreements ratified by Nigeria, namely the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Social, Economic and Cultural Rights (ICESCR) and the African Charter on Human and Peoples' Rights (ACHPR). Although the ACHPR has been domesticated in Nigerian national law in 1990 with the Ratification and Enforcement Act⁵, its contents have not been successfully translated into effective means of human rights protection. Indeed, in relation to oil pollution in Niger Delta, many substantive human rights violations linked to environmental issues have been reported: violation of the right to an adequate standard of living, including the right to food, as a consequence of the impacts of oil pollution on crops and fisheries; violations of the right to gain a living through work as a consequence to the widespread damage to crops and fisheries; violations of the right to water due to oil spills and waste disposal; violations to the right to health and the right to a healthy environment because of the gas flares and the oil pollution; failure to provide the affected communities with adequate information or consultation procedure; failure to access remedies and compensation for those who have been victims of violations.

⁵ African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Chapter A9, Chapter 10 LFN 1990, Laws of Federation of Nigeria 1990.



The human rights violations associated to the exploitation of oil in Nigeria have already been at the centre of two landmark judgements, one from the African Commission on Human and Peoples' Rights (ACoMHPR) and the other from ECOWAS Court of Justice.

The first case, Social and Economic Rights Action Centre (SERAC) et al. v. Nigeria⁶, is known also as the Ogoniland case. The Ogoni people accused the State to have committed very serious breach of international human rights law, connected to the exploitation of oil resources “with no regard for the health or environment of the local communities, disposing toxic wastes into the environment and local waterways in violation of applicable international environmental standards⁷”. It also sued that Shell and the Nigerian National Petroleum Corporation had not addressed appropriately the problem of spills causing serious damages to the villages and contamination of water, soils and air. The issues regarded not only environmental degradation, but also acts of intimidation and eviction of Ogoni people from their lands without any consultation, since the Nigerian security forces, put at the disposal of oil companies, attacked and burned several villages under the pretext of dislodging official and supporters of the Movement for the Survival of Ogoni People. Ken Saro Wiwa, the leader of the Ogoni movement, had been executed in 1995 by the Nigerian State along with other eight activists, following an unfair trial motivated by political reasons⁸. The ACoMHPR found that the State had violated articles 2, 4, 14, 16, 18(1), 21 and 24 of the African Charter on Human and Peoples' Rights, recognizing the link between environmental degradation and human rights violations and a *responsibility to protect* the most vulnerable people from the damages caused by non-State actors. The Government also asked Nigeria to pay compensation, take all the necessary measures to re-establish adequate living conditions for Ogoni people and to provide them with information on health and environmental risks. But according to AI, “The African Commission’s decision has never been implemented in Nigeria. Ogoniland remains polluted and the human rights violations detailed by the African Commission persist. Many of the problems outlined in the Ogoni complaint to the

⁶ Africa Commission on Human and Peoples' Rights, Communication 155/96, *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria*, Decided at the 30th ordinary session, Oct 2001, 15th Annual Activity Report.

⁷ *Supra* note, par. 2.

⁸ African Commission on Human and Peoples' Rights, Decision on Communications 137/94-139/94-154/96-161/97, *International PEN, Constitutional Rights Project, Civil Liberties Organisation and Interights (on behalf of Ken Saro-Wiwa Jnr.) v. Nigeria*, 31st October 1998.

African Commission are found right across oil producing areas of the Niger Delta today, affecting hundreds of communities”⁹.

The other relevant international human rights law case, *SERAP v Nigeria*¹⁰, was filed to the ECOWAS Court in order to denounce a similar situation compared to the one analysed above. Here, the NGO claimed the State to have violated several fundamental rights of Niger Delta People connected to environmental degradation following “oil spills, which destroy crops and damage the quality and productivity of soil that communities use for farming, and contaminates water that people use for fishing, drinking and other domestic and economic purposes”¹¹. The Court acknowledged that Nigeria had violated its international obligations enshrined in articles 1 and 24 of the ACHPR and adjudged the State to take all effective measures, within the shortest possible time, to ensure restoration of the environment of the Niger Delta, to prevent the occurrence of damage to the environment; and to hold the perpetrators of the environmental damage accountable.

The case that we are going to discuss in the next paragraph presents many similarities to the two above, arguing how the situation in Nigeria is still the same for what regards oil spills and governmental policies that favour petroleum companies instead of protecting the rights of the population. In all the three cases, Niger Delta People were claiming for their right to a healthy environment which is strictly interlinked with the enjoyment of their fundamental human rights, given the close relation that they have with their lands and territories. But, differently from the Ogoni and the Niger Delta People case, it has been dismissed because of lack of locus standi and inconsistency of the proofs submitted by the Plaintiffs.

3. Osaghae et al. (on behalf of Niger Delta People) v. Federal Republic of Nigeria

The Application no. ECW/CJJ/APP/20/15 was completed by a total of four Plaintiffs (Nosa Ehanire Osaghae, Jonah Gbemire, Peter Aiko Obabiafo, Daniel Ikponmwosa) on behalf of the indigenous peoples of Niger Delta, inhabiting the areas of Edo, Delta, Bayelsa, Rivers, Akwa, Ibom and Cross River States. They accused the Nigerian State to have committed violations of their human rights with regards to, respectively: marginalization operated by the State and its representatives in the Delta Region; injustice perpetrated by oil exploitation firms because of problems such as crude oil spills, gas flaring and

⁹ Amnesty International, *supra* note, p. 24.

¹⁰ *The Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) v. Federal Republic of Nigeria*, ECOWAS Court of Justice, Judgement no. ECW/CCJ/JUD/18/12.

¹¹ *Supra* note, par. 13.

environmental degradation; destruction of communal fishing water in the Niger Delta by oil companies; unlawful takeover of communal natural resources.

According to the Plaintiffs, these violations of the Niger Delta Peoples' rights were happening in a broader context of unprecedented degradation which started 30 years before with the first concessions of oil exploitation. In particular, they claimed for the general destruction of the environment through crude oil spills and gas flaring which destroyed their social and economic life. Also, they accused the State to have made use of the Constitutional law in a way which is "undemocratic, unlawful, oppressive, repressive and discretionary"¹² when it came to the oil concessions. With the application of this kind of governance, they believed that the Niger Delta environment had become a death trap that "has led to indiscriminate killings and brutal massacres by the military of thousands of innocent indigenous". Furthermore, the Plaintiffs argued that the State had awarded illegally oil and gas concessions, some of them for up to 20 years, to indigenous and non-indigenous companies some of whom were totally unexperienced in the oil production. They claimed these allocations were also based on arbitrary criteria such as tribalism and nepotism, renewing these same oil block licenses without assessing their impacts in terms of damages inflicted to the environment and to the indigenous peoples inhabiting the Niger Delta, whose health and life is threatened by crude oil spills and gas flaring.

For these reasons the Plaintiffs were demanding to the Court six provisions¹³:

- i) To assess the violation of human rights as described in Articles 21, 22, and 24 of the African Charter on Human and Peoples' Rights (ACHPR); Article 1 (1-3) of the International Covenant on Civil and Political Rights (ICCPR); Article 1 (1-3) and 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) due to the arbitrary allocation of oil concessions to private firms in total disregard of the indigenous peoples;
- ii) To assess the violation of the provisions contained in Articles 1, 2, 4, 16 and 24 of the ACHPR; Articles 1 and 6 of the ICCPR; Article 1 and 12 of the ICESCR due to the damages deriving from the environmental degradation which constituted a serious threat to the life, health and right to self-determination of Niger Delta People;
- iii) To declare a moratorium on all oil blocs transactions in respect of Article 1 and 21.2 ACHPR;

¹² Osaghae et al. vs. Republic of Nigeria, Judgement n. ECW/CCJ/JUD/17, par. 7.

¹³ *Idem*.

- iv) To mandate the Nigerian Government to reallocate the ownership of all off-shore oil block in Niger Delta back to the Niger Delta People in compliance with Articles 21 and 22 ACHPR and Article 11 ICESCR;
- v) To direct the Nigerian Government to pay a compensation of \$30 billion in order to repair the environmental damage caused by the 9 million barrels of spilt crude oil in the Niger Delta Region pursuing Articles 1, 21 and 24 ACHPR and Article 12 ICESCR;
- vi) To call the Government for the institution of a self-determination referendum for the 30 million people of Niger Delta pursuing the respect of the rights enshrined in ICCPR and ICESCR.

The Nigerian State ('the Defendant' from this point until on) opposed to these arguments several preliminary objections¹⁴. It argued that the Plaintiffs lacked of any locus standi in representing the entire group of Niger Delta People, while some aspects of the claim were to be considered *res judicata* and so no liable to be object of the Court's jurisdiction. Also, the Defendant "denied each and every material allegation of fact contained in the Plaintiffs' application and puts the Plaintiffs' to the strictest proof of those facts¹⁵", declaring that "the award of operation license in the oil sector in Nigeria is done in compliance with global standards¹⁶".

The Court proceeded with the analysis of the case, starting from the substantiality of the application. It argued that "the Plaintiffs have led sufficient evidence to substantiate their claims against the Defendant¹⁷". As for the preliminary objections raised by the Defendant one of the crucial arguments in the application was related to the lack of locus standi: the Court was of the view that "for the plaintiffs to access the Court for and on behalf of the people of Niger Delta, they need the mandate upon which they act and when questioned must establish consent of the people or a justification for acting without such consent. This is different where the Application is brought by an NGO. While the NGO's enjoy a wide range of access to Court on behalf of individuals, the individuals on the other hand have access mainly in their personal capacity on alleged human rights violations and approaching the Court in a representative capacity requires authorization [...] The Plaintiffs in this case are natural persons claiming to appear on behalf of the People

¹⁴ *Supra* note, par. 8.

¹⁵ *Idem*.

¹⁶ *Idem*.

¹⁷ *Supra* note, par. 9.2.

of Niger Delta without authorization. The proof of authorization in the case of natural persons acting on behalf of a group cannot be dispensed with. The Niger Delta is so vast that an action brought for and on behalf of the said people without authorization sounds questionable. The Plaintiffs have failed to attach a mandate if any, given to them to clear the air in this regard. Above all no proof that the Niger Delta Region is a “people” within the context of the right of self-determination. The term is merely a coinage for administrative purposes and that does not qualify them as a people to which the right of self-determination in international law can be claimed [...] The Court is of the view that the Plaintiffs lack the locus standi to act on behalf of the people of Niger Delta”¹⁸. In sentencing this argument, the Court relied on the cases SERAP vs. Federal Republic of Nigeria, where the claim was presented by an NGO with locus standi to represent the indigenous People of Niger Delta¹⁹.

In relation to the preliminary objection of the Defendant arguing that the case had to be considered res judicata and was inadmissible for that reason, the Court responded that the case SERAP v. Federal Republic of Nigeria, although was very similar, presented different parties in the suit, so the issue of res judicata was not applicable to the case. Concerning the pendency of the suit before a domestic Court, it appears that the ECOWAS Court of justice does not apply the *ne bis in idem* principle, since “this Court has repeatedly stated that the pendency of a case before a Domestic Court does not oust its jurisdiction to entertain a matter. As long as the matter is not before another International Court, this Court has the competence to entertain same²⁰”. Finally, regarding the Defendant objection that the facts presented did not disclose a reasonable cause of action, the Court claimed that the Plaintiffs’ allegation of crude oil spills, gas flaring, environmental degradation, destruction of fishing reserves and unlawful takeover of communal natural resources are issues suggestive of human rights violations disclosing a reasonable cause of action.

On the substantive matters, the Court was of the opinion that the Plaintiffs, as individuals, were claiming for the respect of their collective rights enshrined in the ACHPR Articles 1, 19, 20, 21, 22, 23 and 24 which established, respectively, acknowledgement in Member States of the rights outlined in the Charter, equality of all peoples, right to self-determination and to social and economic development, right of all peoples to freely dispose of their wealth and resources, recovery in case of spoliation and right to be fully compensated, right to social and cultural development, right to international peace and security and the

¹⁸ *Supra* note, par. 9.3.

¹⁹ The Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) v. Federal Republic of Nigeria, ECOWAS Court of Justice, Judgements no. ECW/CCJ/APP/07/10 and no. ECW/CCJ/JUD/18/12.

²⁰ Osaghae et al. vs. Republic of Nigeria, Judgement n. ECW/CCJ/JUD/17, par. 9.3.

right to a general satisfactory environment. The Court was on the view that Articles 19 to 24 of the ACHPR were to be interpreted as peoples' collective rights in opposition to individual rights. Relying on the case *Kemi Penheiro San v. Republic of Ghana*, the Court stressed that “it is opinio juris communis that the rights referred to in Articles 19-24 of the African Charter are rights of (all) “peoples” in contrast to the rights of “every individual”, “every human being”, or “every citizen” proclaimed in Article 2-17²¹”. Considering, on the one hand, a previous affirmation of the Court, which stated “On one part the Plaintiffs allege personal injuries/violations of their rights by the Defendant while on the other part they allege violation of the rights of the peoples of Niger Delta. The Plaintiffs action are first for themselves and secondly on behalf of the people of Niger Delta” and on the other hand the claim for the lack of locus standi for the individuals to represent the Niger Delta People, it may seem that the Court would consider only the alleged violations relatively to their impacts on the Plaintiffs individually.

But still, the proof of burden carried by the Plaintiffs, in the Court's opinion, was not sufficient to prove evidence of the alleged violations: “For the Court to determine whether or not a violation of the Charter has occurred, it must have access to credible evidence and information on the alleged violation .The burden of presenting this evidence is on the Plaintiff as he stands to fail if no such evidence is adduced [...]It is not sufficient simply to challenge a law or State policy or practice in the abstract (actio popularis) without demonstrating how the alleged victim is individually affected. The complaint must be sufficiently substantiated [...] The Plaintiffs failed to adduce evidence to support their allegation. They did not attach any photograph, or expert report to show the extent of the said degradation and its negative impact on them personally²²”.

The Court decided to dismiss the case, although it was admissible, because of the lack of locus standi and the lack of sufficient proof demonstrated by the Plaintiffs.

4. Conclusions

The case *Osaghae et al v. Nigeria* has reported, once again, how the situation in Nigeria concerning human rights violations connected to oil spills and environmental degradation has not changed nonetheless the numerous accusations by NGOs and judgments by international human rights courts. It seems that Nigeria is still not acting properly to enforce its responsibility to protect Niger Delta People from the negative

²¹ *Osaghae et al. vs. Republic of Nigeria*, par. 9.3.

²² *Idem*.

externalities of the oil industry, but on the contrary is protecting the interests of companies regardless of the Nigerian populations.

We consider the case *Osaghae et al* as a missed occasion for the enforcement of Niger Delta People' rights because of the procedural flaws highlighted by the Court. The first issues regarded the lack of locus standi: a group of individuals cannot act on behalf of an entire community without any written justification of victim's consent. If the Plaintiffs had filed the application through an accredited NGO, perhaps the decision of the Court on the merits would had been different like in the case *SERAP v Nigeria*, where the organization had the capacity to invoke the Court's jurisdiction. The second issue concerned the lack of attachment of sufficient proofs by the Plaintiffs. Even though they had led adequate evidence to substantiate their claims against Nigeria, the burden of proof was not enough to let the Court ascertain the human rights violations, both at individual or collective level. Differently, in the case *SERAP*, not only the AI Report was admitted as a proof, but the Court also recognized that "it is public knowledge that oil spills pollute water, destroy aquatic life and soil fertility with resultant adverse effect on the health and means of livelihood of people in its vicinity. Thus in so far as there is consensus by both parties on the occurrence of oil spills in the region, we have to presume that in the normal cause of events in such a situation, to wit, consequential environmental pollution exist there²³".

The issue of the lack of *locus standi* raises very relevant questions that is not possible to analyse in the present paper, so we will concern ourselves solely with the consideration of this matter in the case *Osaghae et al. v. Nigeria*. What the case has put into evidence is that the lack of locus standi of the four Plaintiffs in representing the community of Niger Delta People seems also interlinked with the burden of proof matter: indeed, in the case of an accredited NGO acting on the behalf of a community, the human rights reports have been considered as an adequate proof (see the case *SERAP v. Nigeria*). In the case of private citizens like *Osaghae et al.*, on the contrary, they had to demonstrate to the Court the evidence of the alleged human rights violations which impacted on them personally.

The alleged human rights violations denounced by the four Nigerian plaintiffs have brought to our attention how the situation in their country regarding environmental degradation due to oil industry is still critical. According to the last AI annual report, "Environmental pollution linked to the oil industry continued to undermine the economic, social and cultural rights of the Niger Delta communities. The

²³ *SERAP v. Nigeria*, par. 96.



government took limited steps to address pollution in the Ogoni region of the Niger Delta, as recommended by the UN Environment Programme (UNEP) in 2011”²⁴.

It is evident that the State is failing in addressing the problem of the human rights protection in those areas where people are affected by the negative externalities of oil production since decades. Western states and multinational oil companies²⁵ have also a great responsibility in what is going on in Niger Delta, contributing significantly in endangering the lives of the 30 million people living in oil producing areas. The unethical exploitation, the absence of remedies and compensation mechanisms for the destruction of the environment and the lack of enforcement of the recommendations made by international organisms deserve to be effectively addressed by the Nigerian government and the international community to end the catastrophe in Niger Delta region.

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²⁴ Amnesty International, *Report 2017/2018*.

²⁵ Shell, Eni and Chevron are only but a few of the oil companies operating in Nigeria; see also: Amnesty International, *A Criminal Enterprise? Shell's involvement in Human Rights Violations in Nigeria in the 1990s*, 2017; The New York Times, *Shell and Eni to be tried over \$1.3 billion Nigerian oil deal*, 20 December 2017; Friend of the Earth Europe, *ENI and the Nigerian Ikebiri case*, 4th May 2017.