Non-adherence of MNOCs to corporate obligations: a review of litigation from the Niger Delta.

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NON-ADHERENCE OF MNOCs TO CORPORATE OBLIGATIONS: A REVIEW OF LITIGATION FROM THE NIGER DELTA

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NON-ADHERENCE OF MNOCs TO CORPORATE OBLIGATIONS: A REVIEW OF LITIGATION FROM THE NIGER DELTA

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Abstract

Multinational oil companies (MNOCs) claim that they have several corporate obligations to protect human rights and the environment where they operate and to resolve any disputes with local communities arising from their operations in the shortest possible time. However, the combative approach by MNOCs in recent transnational human rights and environmental litigations from the Niger Delta undermines these obligations because they continually deny, delay and derail justice for the local communities. The central question is whether there is a conflict between the portrayal of these companies' positions before the courts and the portrayal of their position in their corporate obligations (e.g., sustainability reports, securities filings, court filings, etc.) toward the local communities in which they operate. This Thesis investigates how MNOCs derail human rights and environmental litigations from the Niger Delta. Previous work pays little or no attention to how the non-adherence of MNOC's to their corporate obligations regarding human rights and the environment affects litigations. Legal frameworks to address derailments in litigations are merely suggested at the international levels but lack adequate legal instruments (e.g., constitutional, legislative, and regulatory) at the national levels. This Thesis adopts a combination of doctrinal research and comparative analysis methodology to address the derailments in litigations arising from the Niger Delta. Firstly, we review seven (7) transnational human rights and environmental litigations from the Niger Delta to evaluate how the non-adherence of MNOCs to their corporate obligations affects litigations. Secondly, we investigate the mechanisms used by MNOC to derail human rights and environmental litigations. Thirdly, we develop a legal framework and recommendations for addressing derailments in litigations in the Niger Delta. This research suggests that an appropriate level of engagement with stakeholders during litigations will improve human rights and environmental protection in partnerships with local governments, NGOs and local communities.

Dedication

This Thesis is dedicated to the memory of my father and mentor, the late Dr. Okoh Ebenezer, and to my husband, Dr. Laud Charles Ochei, who laid a foundation for me throughout their doctorate journeys, as well as to my mother, Dr. Mrs. Okoh Carolyn, and mother-in-law, Mrs. Patricia Udom, for their overwhelming love, and to my lovely children, David, Daniel, and Anita Ochei, for the quiet and peaceful environment they created

Declaration

I, Nkem Violet Ochei, hereby declare that the work on which this Thesis is based is my original work (except where acknowledgements indicate otherwise) and that neither the whole work nor any part of it has been, is being or is submitted for another degree in this or any other university. I authorise the university to reproduce for research either the whole or any portion of the contents in any manner whatsoever.

University Student Number……

Signature……

Preface

The research presented in this thesis was conducted in the School of Law, Robert Gordon University, Aberdeen, UK, under the supervision of Dr. Elimma C. Ezeani and Dr. Craig Anderson. I thankfully acknowledge the encouragement and assistance of these supervisors.

This work is original to the best of my knowledge, except where acknowledgements and references are made to previous work.

The following sections of the thesis have been published as "Ochei N, Ezeani E, and Anderson C, 'MNOC's Level of Engagement with Human Rights Obligations in Transnational Litigations from the Niger Delta' (2021) 7 PEOPLE: International Journal of Social Sciences." I was the primary author, along with my supervisory team.

(i) Chapter One, Section 1.4.2 (ii) Chapter Six, Section 6.5

The following sections of the thesis have been published as "Ochei, N. V., Ezeani, E. & Anderson, C. 'Mechanisms Used by Multinational Oil Companies to Derail Human Rights and Environmental litigations Arising from the Niger Delta' (2023) The African Journal of Legal Studies 1-30". I was the primary author, along with my supervisory team.

(i) Chapter Six, Section 6.6 (ii) Chapter Six, and Section 6.7

Some sections of this thesis have been adapted from unpublished work (e.g., PhD research proposal, PG Cert Module I & II) submitted to the Robert Gordon University repository/database as part of the continuous assessment during my PhD research. These sections include:

(i) Chapter One, Section 1.2; (ii) Chapter One, Section 1.4

(iii) Chapter Eight, Section 8.4

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Table of Statutes and Conventions

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The African Charter on Human and Peoples' Rights (1981) (Business Ethics).

The Alien Tort Statute (ATS) 1979

The American Convention on Human Rights (1969)

The Brussels I Regulation (recast))

The Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN)

The European Convention on Human Rights (ECHR) (1953)

The European Convention On Human Rights (European Court of Human Rights 2021

The Flare Gas (Prevention of Waste and Pollution) Regulation 2018

The Oil Pipelines Act (1956)

The petroleum (drilling and production) Regulations (1969)

The Petroleum Act (1969)

The Petroleum Act (1921)

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Aguinda v Texaco Inc (2001)

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Bowoto v. Chevron Corp., No. C99-02506SI, 2006 WL 2455752 (N.D. Cal. Aug. 22, 2006)

Cable and Wireless Plc v IBM United Kingdom Ltd [2002] EWHC 2059

Caparo Industries plc v. Dickman[1990] 2 AC 605

Centre for Oil Pollution Watch v. Nigerian National Petroleum Corporation [2019] 5 NWLR

Chandler v. Cape Plc and [2012] EWCA Civ 525

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Ejama-Ebubu community v. SPDC(2010), [2010] SUIT No: FHC/ASB/CS/231/2001

Elder Baribor N. Saakpa and Saturday Giadom v. SPDC

Emere Godwin Bebe Okpabi and Others v. Royal Dutch Shell Plc and Shell Petroleum Development Company of Nigeria Ltd, paras. 107–117. 2017 EWHC 89 (TCC)

Gbemre v Shell Petroleum Development Company Nigeria Limited and Others (2005) AHRLR 151 (NgHC 2005)

Ikpede v Shell BP Petroleum Development Company of Nigeria Ltd

Kiobel V. Royal Dutch Shell 569 U.S. 108 [2013]

Kiobel V. Royal Dutch Shell Netherlands [2021]

Lungowe v Vedanta Resources plc

Mon v Shell-BP

Oguru V Shell (15 September 2011) 5 December 2019 [2019] EWHC 3340 (QB)

PGF II SA v OMFS Company 1 Limited [2014] WLR 1386

Shell Petroleum Development Company Nigeria Limited V. Elder Baribor N. Saakpa & Anor (2012)LCN/5326(CA)

Shell Petroleum Development Company Nigeria Limited V. Elder Baribor N. Saakpa & Anor (2012)LCN/5326(CA)

Sosa v. Alvarez-Machain, 542 U.S. 692 (2004)

Thompson v The Renwick Group Plc. [2014] EWCA Civ 635

Umudje v Shell-BP Petroluem (1975) 9-11 S. C. 155.

Wiwa v Royal Dutch Shell Co. No 96 Civ 8386 (KMW) (HBP) 1998 US

List of Abbreviations and Acronyms

CSR - Corporate Social Responsibility

EGASPIN - Environmental Guidelines and standards for petroleum industries in Nigeria

MNOC - Multinational oil company

NESRA - National Environmental Standard and Regulation Enforcement Agency

NNPC - Nigerian National Petroleum Corporation

NOSDRA - National oil spill detection and response agency

NPDC - Nigerian petroleum development company

NPRA - The Nigeria Midstream and downstream petroleum regulatory Authority

NUPRC - Nigerian Upstream Petroleum Regulatory Commission

NURC - The Nigeria upstream regulatory commission

OECD - Organisation for Economic corporation and development

SPDC - Shell Petroleum development company Nigeria

UDHR - Universal declaration of human rights

UN - United Nations

UNEP - United Nations Environmental Programme

UNGP - United Nations Guiding Principles

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List of Conference Presentations and Publications

Conference Presentations and Workshops

1. International Conference on Business, Economics, Law, Language & Psychology (ICBELLP) held from April 14-15, 2021, in Rome.

Paper Title: The Impact of MNOC's Level of Engagement with Human Rights Obligations in Transnational Human Rights Litigations Arising from The Niger Delta

2. Human Rights and Foreign Policy 7th Joint Human Rights (Virtual) Conference (ISA) held from June 14-16, 2021.

Paper Title: Mechanisms used by Multinational Oil Companies (MNOCs) to derail Human rights and Environmental litigations arising from the Niger Delta

3. The Society of Legal Scholars (SLS) Annual Conference was held from August 31-September 3, 2021.

Paper Title: Comparing the response of MNOCs to Clean-up and Remediation of oil pollution in the Niger Delta and Developed Countries: Bodo v Shell and US government v Shell

4. W.G. HART LEGAL WORKSHOP 2021: New Perspectives on Jurisdiction and the Criminal Law held on April 26-28, 2021.

Journal Papers

Ochei, N. V., Ezeani, E. & Anderson, C, 'MNOC's Level of Engagement with Human Rights Obligations in Transnational Litigations from the Niger Delta.' (2021) PEOPLE: International Journal of Social Sciences, 7(3), 18-41.

Ochei, N. V., Ezeani, E. & Anderson, C. 'Mechanisms Used by Multinational Oil Companies to Derail Human Rights and Environmental litigations Arising from the Niger Delta' (2023) The African Journal of Legal Studies 1-30

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CHAPTER ONE - GENERAL INTRODUCTION

1.1 Introduction

The oil and gas industry has played and continues to play an important part in the Nigerian economy. The history of the oil industry in Nigeria can be traced back to the 1950s when large-scale oil exploration and production in Nigeria's Niger Delta began. [1]The oil operations are managed based on a Joint Venture Agreement between the NNPC (the state-owned national oil company representing the Federal Government of Nigeria) and subsidiaries of multinational oil companies (MNOCs) such as Shell, Chevron, ExxonMobil, and Agip. For example, Shell Petroleum Development Company of Nigeria (SPDC), a Royal Dutch Shell (RDS) subsidiary, is one of Nigeria's largest and oldest oil companies.

The Nigerian government has faced considerable issues in managing the sector and appropriately administering the country's natural resources. Numerous oil spills have occurred in the Niger Delta (where most oil and gas exploration and production occur), partly due to sabotage and inadequate pipeline maintenance.[2] Throughout the late 1980s and early 1990s, strong opposition has been to the environmental violations associated with oil exploration and production in the Niger Delta. Residents of the Niger Delta and NGOs have attacked the oil policies of the Nigerian government and that of the oil companies involved in oil operations and have also protested against the lack of participation in the industry and the sharing of oil revenues. These protests usually spark violent battles in the region, which drew international attention and resulted in the halting of oil exploration and production activities in the Ogoniland region in 1993.[3]

The United Nations Environment Programme (UNEP) published an extensive environmental assessment of Ogoniland in 2011, in which it harshly criticised the oil and gas industry's main stakeholders (that is, the Nigerian government, regulatory agencies, and oil companies) for the

[1] Frynas, Jedrzej George. 'Oil in Nigeria: conflict and litigation between oil companies and village communities' (2000) 1 Münster/Hamburg/Lon¬don:: Lit-Verlag 263; see more details in: Nigerian National Petroleum Corporation (NNPC), 'History of The Nigerian Petroleum Industry' (NNPC 2021) <https://nnpcgroup.com/NNPC-Business/Business-Information/Pages/Industry-History.aspx> accessed 15 November 2021.

[2] Amnesty International, 'Negligence in the Niger Delta Decoding Shell And ENI's Poor Record On Oil Spills'(Amnesty International, 2018) <https://www.amnesty.org/en/wp-content/uploads/2021/05/AFR4479702018ENGLISH.pdf> accessed February 17, 2023. 15-18

[3] United Nations Environment Programme, 'Environmental assessment of Ogoniland' (2011) <https://postconflict. unep.ch/publications/OEA/UNEP_OEA.pdf> accessed 1 October 2021.

environmental impact of their operations on the region and for failing to adequately regulate those operations. Many oil spill locations highlighted in the UNEP study remain contaminated to this day, and the report's implementation has been significantly delayed. Oil spills and numerous oil leaks continue to occur daily in the Niger Delta. According to Shell, sabotage-related spills jumped to 62 in 2017 from 48 in 2016. Shell claims that theft and sabotage were responsible for about 90% of the leaks of more than 100 kg from SPDC JV pipes, with the remainder being operational mishaps.[4]

Nigeria's oil and gas industry is governed by several laws and regulations. The regulatory agencies, on the other hand, lack the capacity, resources, and/or political will to enforce them. As a result, it is up to local oil pollution victims to seek compensation from the oil firms involved through negotiated settlements or local court cases. This is difficult for several reasons, including their low resources, considerable delays in the judicial process, poor legal representation, and the stringent evidentiary requirements connected with the available legal bases for civil responsibility claims under Nigerian law. Furthermore, claimants, who often have less technical knowledge and access to relevant information than oil firms, have to prove that the oil leak was caused by something other than sabotage or vandalism to be compensated.

The 2011 UNEP assessment and the 2011 United Nations Guiding Principles on Business and Human Rights (UNGPs) contributed to the rising pressure on MNOCs and their subsidiaries to prevent and mitigate the harm caused by their activities to people and the environment. The UNGPs establish an international policy framework relating to the obligations and responsibilities of states and corporate actors in preventing and resolving corporate human rights violations. Recent focus has shifted to the human rights obligations of MNOCs operating in the Niger Delta due to multiple claims of human rights and environmental violations.[5] According to Amnesty International and Platform, such violations have also resulted in several Human Rights and environmental conflicts in the Niger Delta.[6] For instance, in 2008 and 2009, the health, livelihoods, and property of the Bodo community were threatened by two oil spills

[4] Shell, 'Spill Response And Prevention' (Shell Sustainability Report 2017 2017) <https://reports.shell.com/sustainability-report/2017/managing-operations/our-activities-in-nigeria/spill-response-and-prevention.html> accessed 23 June 2022.
[5] David B. Spence, 'Human Rights in The Oil And Gas Industry: The Importance Of Reputational Risk' (2019) 86 Chicago-Kent Law Review.
[6] Platform, 'Counting the Cost Corporations and Human Rights Abuses in The Niger Delta' (Platform 2011) <http://platformlondon.org/nigeria/Counting_the_Cost.pdf> accessed July 30, 2021.

from Bomu-Bonny Pipeline in the Niger Delta.[7] The villagers claimed that the spills were the result of the poor maintenance of 50-year-old pipelines. Subsequently, Shell admitted that its Nigerian subsidiary, Shell Petroleum Development Company (SPDC), was responsible for spills.[8]

Multinational companies are increasingly facing liability claims brought before courts in developed countries for the effects of their actions on human rights and the environment. Transnational human rights and environmental litigations are particularly very common with MNOCs in the extractive industries due to the significant impact on the people and environment where such extraction activities are taking place. Also, the governance structures and legal standards that are put in place to protect the local population from the harmful effects of the extraction activities are either not strict or not enforced. As a result, victims are motivated to initiate litigations against the MNOCs usually with the assistance of NGOs and foreign legal experts.

Transnational human rights and environmental litigations have been initiated against MNOCs and their subsidiaries in local courts in the US, UK, and countries in Europe (e.g. Netherlands, France, Italy). For example, in the US over 150 claims have been brought before US federal courts against multinational companies (both US and non-US companies) for human rights and environmental violations committed abroad.[9] In the US, most of the litigations have been based on the Alien Tort Statute[10], while litigations outside of the US (e.g., UK and Netherlands) have been based on the principle of duty of care that MNOCs owe towards victims of human rights and environmental violations.

[7] 'Shell Lawsuit (Re Oil Spills & Bodo Community in Nigeria) | Business & Human Rights Resource Centre' (*Business-humanrights.org*, 2019) <https://www.business-humanrights.org/en/shell-lawsuit-re-oil-spills-bodo-community-in-nigeria> accessed 28 November 2019.

[8] Leigh Day, 'The Bodo Community V Shell Claim' (Leigh Day 2022) <https://www.leighday.co.uk/International/Further-insights/Detailed-case-studies/The-Bodo-community-shell-claim> accessed 25 August 2022

[9] Christensen D, Hausman DK (2016) Measuring the economic effect of Alien Tort Statute liability. J Law Econ Organ 32(4):794–815; Over 150 human rights and environmental litigations have been posted on the website of the Business & Human Rights Resource Centre. More than one-third of these litigations are aimed against companies in the oil, gas & coal industry and in the mining industry, https://business-humanrights.org/en/corporate-legal-accountability/case-profiles/industry/natural-resources (last accessed November 1, 2021).

[10] The Alien Tort Statute (ATS) is a part of the United States Code that allows federal courts to hear claims brought by foreign nationals for torts committed in violation of international law. The plaintiffs sought damages under the ATS in the Kiobel v. Royal Dutch Shell litigations, but the court held that there is a presumption that the ATS does not apply outside the United States.

The concern of any company, when faced with any dispute or litigation, should be to resolve such disputes at stake as quickly as possible. This responsibility is in line with the Human Rights obligations of most multinational oil companies (MNOCs) and their subsidiaries. However, the mechanisms used by MNOCs (e.g., Shell) to derail human rights and environmental litigations as shown in recent litigations arising from the Niger Delta are at odds with this goal.[11] It is also at odds with their Human Rights obligation relating to effective remedies for individuals whose Human Rights have allegedly been violated by corporate behaviour. One of the most common mechanisms used by MNOCs that conflicts with their human rights obligation is to deny all allegations and prevent the case from being heard in court. This should not be a concern for the MNOC if there are no issues with Human Rights and environmental violations. It should not also be an issue if MNOCs are committed to resolving the dispute by providing a suitable remedy, including apologies, rather than being defensive and calculative on how to get away with the allegations. Even after the litigations were cleared to be heard, they took steps to delay further and lengthen the proceedings.

Let me give an example to illustrate this point. In the Oguru v. Shell[12] case, Shell had unsuccessfully challenged the standing of Milieudefensie, a well-known Dutch environmental NGO which was one of the initiators and backers of these proceedings and a member of Friends of the Earth. The Dutch court ruled in favour of Milieudefensie based on Article 3:305a of the Dutch Civil Code, which allows an association or a foundation to file a claim if this association or foundation aims to protect similar interests of others and provided it represents these interests according to its constitution.[13] Shell continued its battle in the court by arguing that the standing of the individual claimants (that is, Fidelis Ayoro Oguru, Alali Efanga, and Friday Alfred Akpan), needed them to be the exclusive owners of the affected grounds and fishing ponds. Shell further argued that claimants had not provided evidence to this effect.

This was not all; Shell wanted the right to appeal the court's preliminary ruling to the Dutch Supreme Court (Hoge Raad) instead of waiting for the Court of Appeal's judgement on the merits. The court denied this motion as it was evident that Shell sought to prolong the hearing of this lawsuit. Such mechanisms used to derail the litigations demonstrate that it is not

[11] Cees van Dam, 'Enhancing Human Rights Protection: A Company Lawyer's Business' (Rotterdam School of Management Erasmus University, 2015).
[12] A.F. Akpan v. Royal Dutch Shell, plc, E. Dooh v. Royal Dutch Shell, plc, F.A. Oguru v. Royal Dutch Shell plc
[13] Lee James McConnell, 'Establishing Liability for Multinational Corporations: Lessons from Akpan' (2014) 56 International Journal of Law and Management. 90-91

interested in finding a practical resolution to the dispute as quickly as possible. Shell's intention was instead to use all available mechanisms available at its disposal to give the plaintiffs a hard time and to deplete their financial resources as much as possible. For example, as Cees van Dams pointed out, the dispute over the standing of the individual claimants and the arguments Shell chose to use in this regard seemed to contribute little to the long-term resolution of the case (over seven years).[14]

This Thesis follows a threefold approach. Firstly, to review transnational human rights and environmental litigations arising from the Niger Delta regarding the non-adherence of MNOCs to corporate policies related to human rights and environmental obligations. Secondly, to investigate the mechanisms used by MNOC to derail human rights litigations. Thirdly, to develop a legal framework and recommendations for addressing derailments in human rights and environmental litigations in the Niger Delta. The methodology adopted for this Thesis combines doctrinal research and comparative analysis to address the derailments in human rights and environmental litigations arising from the Niger Delta. Shell and Chevron will be considered as case studies because they have subsidiaries in Nigeria and have been involved in highly publicised litigations in different jurisdictions abroad- England, the Netherlands, and the US.

The Thesis provides useful insights into how the mechanisms used by MNOCs to derail human rights and environmental litigations are at odds with their human rights obligations. Recommendations for addressing these derailments and the resulting conflicts in human rights obligations will also be provided to improve human rights and environmental violations.

The rest of the chapter is organised as follows: Section 1.2 discusses the research problem. Section 1.3 presents the research questions, aim and objectives of the Thesis. Section 1.4. presents an overview of human rights and environmental litigations, including key aspects of the Thesis, such as human rights and the environment, human rights obligations, and mechanisms used by MNOCs to derail litigations. Section 1.5 discusses the research methodology. Section 1.6 discusses the scope and limitations of the study, and Section 1.7 discusses the impact and significance of the Thesis. Section 1.8 presents the contributions of the thesis to knowledge. Section 1.9 presents the organisation of the Thesis.

[14] Cees Dam, 'Preliminary Judgments Dutch Court of Appeal in the Shell Nigeria Case' (Rotterdam School of Management, Erasmus University 2016).

1.2 Research Problem

The Niger delta is a petroleum-rich area in southern Nigeria. It has been at the centre of the worldwide debate over oil and gas pollution, corruption, and human rights violations, which are frequently attributed to multinational oil companies engaged in oil exploration and production since the late 1950s.[15] According to data from the Nigerian government, there were nearly 7,000 oil spills between 1970 and 2000.[16] Table 1 shows the number of oil spills reported by Shell in the Niger Delta. The Nigerian National Petroleum Corporation (NNPC) puts the annual quantity of oil spilt into the environment at 2.300 cubic metres, with an annual average of 300 individual spills. However, as this amount does not take into account "minor" spills, the World Bank argues that the true amount of oil spilt into the environment could be up to tenfold the officially claimed amount.[17] Shell's spills in Nigeria surged to 2,000 tonnes in 2019, up from 157 sabotage incidents in 2018, according to the company's annual report. This was up from 1,600 tonnes in 2018 when there were 111 incidents.[18]

Multinational Oil Companies (e.g., Shell and Chevron) are typically hesitant to accept responsibility for oil spills. There have been instances in which they have flatly refused to pay compensation or clean the affected region due to allegations that saboteurs and thieves caused the oil spill. Recent research, however, has contradicted this stance by indicating that equipment breakdown and pipeline corrosion are the leading causes of oil spills.[19] However, several reports in recent times have countered this position by revealing that the largest cause of oil spills is equipment malfunction and corrosion of pipelines.[20]

[15] Scott R Pearson, 'Petroleum and The Nigerian Economy' (Stanford University Press 1970).

[16] John Vidal, 'Nigeria's Agony Dwarfs the Gulf Oil Spill. The US and Europe Ignore It' The Guardian (2010) <https://www.theguardian.com> accessed 14 September 2016.

[17] United Nations Development Programme, 'Human Development Reports' (UNDP Human Development Reports 2006) <http://hdr.undp.org/en/reports/nationalreports/africa/nigeria/name,3368,en.html> accessed 26 September 2020.

[18] Energy Voice, 'Sabotage, Flaring Rise for Shell in Nigeria' (DC Thomson Media 2021) <https://www.energyvoice.com/oilandgas/africa/228304/shell-spills-more-oil-flares-more-gas-in-nigeria/> accessed 2 August 2021.

[19] Frynas J, 'Corporate and State Responses to Anti-Oil Protests in The Niger Delta' (2001), African Affairs, 100, 398, p. 27

[20] Cyril I Obi, 'Globalization and Environmental Conflict in Africa' (1999) 4 African Journal of Political Science. 40-46

Table 1.1 Oil Spills reported by Shell in the Niger Delta

Source of information	Number of oil spills from Shell facilities per year, from different sources					
	2007	2008	2009	2010	2011	2012
Royal Dutch Shell Sustainability reports	249	157	132	182	182	173
Statistics on Shell's Nigeria web pages	320	210	190	170	207	192

Source: Amnesty International (2013)

In the 1970s and 1980s, government-promised advantages to the Niger Delta failed to materialise, as the Ogoni's environmental, social, and economic infrastructure deteriorated rapidly.[21] In the 1990s, the level of severity and intensity of the dispute between the Ogoni and the oil firms intensified, with each side accusing the other of committing acts of violence. The people of Ogoni issued a request to the oil companies (including Shell, Chevron) for royalties, damages and compensation, and immediate cessation of environmental degradation.[22] The Ogoni crisis brought Shell's commitment to Human Rights and environmental violations in the Niger Delta to worldwide attention.[23]

Recently, it is common to see how practically every major business organisation communicates on its website, in daily newspapers and annual reports on its obligations to corporate social responsibility. These obligation representations that the multinational oil companies are in control at the highest level of the formulation and implementation of Human Rights obligations

[21] The Ogonis are people in the Rivers South East senatorial district of Rivers State, in the Niger Delta region of southern Nigeria. It is an oil rich region that has been on international spotlight due to human rights and environmental violations by operations of oil companies.
[22] United States Institute of Peace, 'Truth Commission: Human Rights Violations Investigation Commission' (United States Institute of Peace 2022) <https://www.usip.org/publications/1999/06/truth-commission-nigeria> accessed 2 August 2022.
[23] Steven Cayford, 'The Ogoni Uprising: Oil, Human Rights, And A Democratic Alternative In Nigeria' (2021) 43 Africa Today <https://www.jstor.org/stable/4187095> accessed 1 November 2021.

throughout the enterprise. However, recent legal disputes arising from the Niger Delta shows that the mechanisms used by MNOCs to derail human rights and environmental litigations conflict with their human rights obligations. These derailments of human rights and environmental litigations and the resultant conflicts during legal disputes have contributed to human rights and environmental violations in the Niger Delta.[24]

The main research problem addressed in this Thesis is that the mechanisms used by MNOCs to derail human rights and environmental litigations (e.g., non-transparent provision of information, non-disclosure of evidence) arising from the Niger Delta are incompatible with their human rights obligations and, as a result, contribute to the worsening of human rights and environmental violations in the Niger Delta.

The discussion that follows further breaks down this problem into five sub-problems.

The first significant problem is that multinational oil companies (MNOCs) operating in Nigeria and many developing countries still consider human rights as a social development issue related to philanthropy and social investments in local communities). However, there is increasing support for MNOCs to approach human rights generally from a human rights and environmental perspective due to certain mandatory aspects of human rights, for example, respect for legal obligations.[25] Furthermore, globalisation, well-publicised incidences of human rights and environmental violations by corporations, and the need to link human rights to international law, which imposes obligations on state and non-state actors for guaranteeing respect for human rights are other reasons which have also helped in the support for human rights approach to human rights and the environment.[26] MNOCs are exposed to several international standards on Human Rights and environmental rights, which can be easily exploited to hold them accountable regarding issues of Human Rights and the environment. As a result, MNOCs are more comfortable allowing the subsidiaries to approach Human Rights as social development obligations rather than the often difficult and contentious Human rights and environmental approach.

[24] Liesbeth Enneking, 'The Future of Foreign Direct Liability? Exploring the International Relevance of the Dutch Shell Nigeria Case', Utrecht Law Review 10 (2014) 44-54; Dams (n 11) 36-39

[25] Blowfield, Michael, Frynas, Jedrzej G., 2005, "Setting New Agendas: Critical Perspectives on Human Rightsin the Developing World," *International Affairs*, 81(3):499-513.

[26] Detomasi, David A., 2008, 'The Political Roots of Corporate Social Responsibility,' *Journal of Business Ethics*, 82: 807-819; Scherer, Andreas G., Palazzo, Guido, 2011, 'The New Role of Business in a Globalized World: A Review of a New Perspective on Human Rights and its Implication for the Firm, Governance and Democracy,' *Journal of Management Studies*, 48(4): 899-931

As long as MNOCs continue to consider Human rights and social development initiatives, we will continue to see an increasing number of transnational litigations against them. Let me give an example. Plaintiffs, in most cases, will not initiate litigations against MNOCs and their subsidiaries for human rights and environmental violations in the first instance. Plaintiffs will usually report or raise concerns about an issue and after that may decide to make an official complaint and grievance through appropriate channels. A complaint that is not handled properly through active engagement with stakeholders will result in litigation against the subsidiaries of the MNOCs operating in the Niger Delta and later against the MNOCs themselves abroad. Most of the litigations that have taken place appear to follow this pattern. In the last decade, these litigations are taking place abroad (e.g., in the UK, Netherlands and the US) where the MNOC is headquartered.

The second problem is an extension of the first problem. When complaints are not treated seriously by actively engaging with the victims, it creates an environment for conflict escalation and initiating litigations against MNOCs and their subsidiaries. There are different MNOC's levels of engagement with their human rights obligations, and the level of engagement taken by the company impacts human rights and environmental violations in the Niger Delta. For example, the level of engagement could be inactive, reactive, active or proactive levels of engagement. An MNOCs level of engagement can demonstrate how the company have evolved its human rights obligations and how they intend to develop these obligations in the future toward a proactive level of engagement.[27] According to Cees Van Dams, the attitude of MNOCs with an inactive level of engagement towards oil spills is to avoid liability as much as possible by ignoring, denying or minimising the claims to keep the complainant at a distance. Also, they use both overt and covert 'complaint' procedures geared at exhausting the complainant and convincing them to quit the complaint or litigation. It is important to note that MNOCs take this approach because they are aware that the majority of complainants do not have the financial means to initiate legal action, and so they deem the risk of escalation to be acceptable. Therefore, an inactive level of engagement would be regarded as a poor level of engagement with MNOC's human rights obligations because there is no stakeholder engagement with local communities when taking actions (e.g., repairs of pipelines) unless it is inevitable. In contrast, a proactive level of engagement is regarded as the desired

[27] Dam (n 11) 18-25

level of engagement with MNOCs human rights obligations because there is active engagement in dialogues and sharing concerns with stakeholders to address the concerns of victims.

The third problem that this Thesis aims to highlight is that human rights obligations are not aligned among the various entities in the MNOCs (e.g., departments, divisions, subsidiaries, suppliers, etc.). When human rights obligations (e.g., health and safety policies) are formulated, it has to be complied with by all the entities in the enterprise.[28] It is common for companies to formulate policies regarding the management of their core facilities to ensure the health and safety of the employees and the environment. Such policies become obligations that have to be complied with by all the entities in the enterprise. A typical example of such a policy in the oil and gas industry is the management of oil pipelines to control the risk of oil spills. In doing so, the MNOCs ensure that they monitor and enforce compliance with such policies. Entities that do not comply with those policies are usually sanctioned. This performance of the entities is typically captured in the annual sustainability reports of oil companies.[29] Therefore, it can be said that oil companies are involved in the management of the operations of their subsidiaries and, specifically, the safety and security of their pipelines and facilities. This amounts to control that goes beyond merely setting groupwide policy standards.[30] It is usually the case that MNOCs capture such interventions in their annual Sustainability and Human Rights reports. Despite this level of control and oversight that MNOCs have over their subsidiaries, whenever there is a legal dispute, MNOCs claim that they are not in control of the subsidiaries.

The fourth problem is that the mechanisms used by MNOCs to derail human rights and environmental litigations conflict with their human rights obligations. One of the mechanisms used by MNOCs to derail human rights and environmental litigations is the failure to disclose evidence that is contained in the documents that are in the sole possession of the MNOC. For example, in the *Oguru v. Shell* litigation, the key issue is the distinction between spillage caused by corrosion or lack of maintenance (for which SPDC is strictly liable) and spillage caused by sabotage (for which SPDC is in principle not liable under the Nigerian law). The burden of proof for corrosion or lack of maintenance is on the claimants, but they have only limited information available. Although the Court of Appeal dismissed the claimants' request to disclose documents for proving the cause of leakages, it showed less reluctance concerning

[28] Ibid 37
[29] Shell, 'Responsible Business - Shell Sustainability Report 2018' (*Reports.shell.com*, 2019) <https://reports.shell.com/sustainability-report/2018/responsible-business.html> accessed 21 November 2019
[30] Ulrich Magnus, 'Why Is US Tort Law So Different?' (2010) 1 Journal of European Tort Law.

documents regarding Royal Dutch Shell's (that is, the parent company of SPDC) involvement in the oil spills. Specifically, the court noted that Shell sets for itself goals and ambitions, among other things relating to the environment and has formulated groupwide policies to achieve these goals and ambitions in a coordinated and uniform manner and that RDS exercises control over the compliance with the group standards and the group policy.[31] Against this background, questions arise like which (maintenance) standards were applied to an old pipeline, were these (maintenance) standards complied with; if so, what is the evidence for this, and if not, should this not be observed in the framework of the supervision exercised by the Shell/RDS. As a result of these considerations, the Court of Appeal ordered RDS to disclose specific audit reports, assurance letters, incident reports, and documents concerning the relevant oil pipelines. The court ruled that these documents would not be handed to the claimants but would be available at the office of a notary for inspection by the claimants' legal representatives and the court members. This (modest) disclosure order was very significant for the claimants. It is hard to see what other interest Shell had in refusing to disclose documents regarding its involvement in the oil spills than to cause further delay to the litigation, increasing the time, efforts and costs for the claimants.[32]

The fifth problem highlighted in this Thesis is that there is an inadequate legal framework to ensure that the human rights obligations of MNOCs are complied with by all entities in the enterprise. The purpose of this legal framework is to guide victims of Human Rights abuses, MNOCs and subsidiaries, governments, investors and the public (including NGOs) on how to exploit the Human Rights obligations of all stakeholders in the oil and gas operations to improve Human Rights and the environment in the Niger Delta. There are several legal frameworks, albeit at the international level, such as UNGP, OECD Guidelines on Multinational Enterprises and Global Compact, which impose certain obligations on the MNOCs to respect Human Rights.[33] The UN Guiding principles, for example, implement the United Nations 'Protect, Respect and Remedy' Framework. The UN Guiding principle imposes on an MNOC a duty to monitor the activities of the subsidiary because of the belief that MNOCs have a due diligence obligation to ensure that Human Rights are complied with within

[31] Dam (n 14) 6-7
[32] ibid
[33] Organisation for Economic Co-operation and Development OECD, Guidelines on Multinational Enterprises chp. II 9 (2011) available at http://www.oecd.org/daf/inv/mne/48004323.pdf; *United Nations Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, adopted by the United Nations Human Rights Council, U.N. Doc. A/HRC/17/L.17/31 (June 2011) (UNGP)

their sphere of influence. One major drawback of the international frameworks is that it may take a long time to have legislation on specific Human Rights and environmental issues due to years and decades of drafting, public consultation and debates on such legislation.[34] It would be unreasonable to expect victims of human rights and environmental violations to wait a long time to have such legislation in place for them to use it while Human rights and environmental violations are still going on. Another challenge with existing international Human Rights frameworks is that it does not address legal issues at the other levels, such as the constitutional, legislation, regulatory and common law. Furthermore, legislation and tort law, when applied alone at the domestic level, sometimes do not resolve issues between companies and their victims due to the complex and wide-ranging problems involved in these issues.[35] Therefore, there is a need for a mix of constitutional, legislative, regulatory, and tort law (i.e., the tort of negligence, nuisance, trespass) components in such a legal framework for addressing the mechanisms used by MNOCs to derail human rights and environmental litigations arising from the Niger Delta.

1.3 Research Question, Aim and Objectives of the Thesis

The research question that this Thesis considers is stated as follows:

> How can we address the mechanisms used by MNOCs to derail human rights litigations in the Niger Delta to protect human rights and the environment?

The aim of this Thesis is to address the mechanisms used by MNOCs to derail human rights litigations in the Niger Delta to improve human rights and the environment in the Niger Delta. The specific objectives of this Thesis are:

[34] David Bilchitz, 'The Necessity for a Business and Human Rights Treaty', *Business and Human Rights Journal* 1 (2016) 2, p. 203-227; Oliver de Schutter, 'Towards a New Treaty on Business and Human Rights', *Business and Human Rights Journal* 1 (2016) 1, p. 41-67

[35] Elodie Aba, 'Shell & the Bodo community - settlement vs. litigation', *Business and Human Rights Resource Centre*, 12 January 2015: https://business-humanrights.org/en/shell-the-bodo-community-%E2%80%93-settlement-vs-litigation.

1. To review a selection of human rights and environmental litigations from the Niger Delta regarding the non-adherence of MNOCs to corporate policies.

2. To identify the main legal issues for determination, how MNOCs and claimants exploit key legal issues during litigations, and the aspects of the litigations that are similar or vary.

3. To investigate how MNOCs engage with their human rights obligation during the litigations.

4. To identify mechanisms used by the MNOCs to derail human rights and environmental litigations from the Niger Delta, and how these mechanisms have affected the outcome of the litigations.

5. To develop a legal framework for addressing the mechanisms used by MNOCs to derail litigations and the resultant conflicts with their human rights obligations.

6. To provide recommendations for addressing the mechanisms used by MNOCs for derailing litigations to promote human rights and the environment in the Niger Delta.

1.4 Background to the study

This section reviews different aspects of the Thesis, such as the human rights obligations of MNOCs (e.g., Shell and Chevron), human rights and environmental violations, litigations arising from the Niger Delta, the mechanisms used by MNOCs to derail litigations and the legal framework for addressing these mechanisms to improve human rights and the environment in the Niger Delta.

1.4.1 Human Rights and Environmental Rights in the Niger Delta

The United Nations and other sources of Human Rights concepts[36]define Human Rights as: "the sum of individual and collective rights laid down in State constitutions and international law".[37] Environmental rights are: "the protection of natural resources; the access to and use of natural resources; and how the access to and use of these resources affects surrounding

[36] The main sources of the current concept of Human Rights are the Universal Declaration of Human Rights (1948), The European Convention on Human Rights (ECHR) (1953), The American Convention on Human Rights (1969), and The African Charter on Human and Peoples' Rights (1981) (Business Ethics).
[37] Manfred Nowak, Rogier Huizenga and Roberto Rodriguez, 'Human Rights- Handbook for Parliamentarians No. 26' (Office of the United Nations High Commissioner for Human Rights (OHCHR) and the Inter-Parliamentary Union (IPU) 2016)
<https://www.ohchr.org/Documents/Publications/HandbookParliamentarians.pdf> accessed 28 August 2022.

populations, as well as the resources themselves".[38] The link between human rights and the environment has been recognised for a long time. Human rights cannot be enjoyed without a safe, clean, and healthy environment; sustainable environmental governance cannot exist without creating and upholding human rights.[39]

MNOCs usually consider human rights a purely voluntary practice, doing more than required by law and maintaining the company's reputation first. In 2011, the UN Human Rights Council approved UNGPs and implemented the United Nations "Protect, Respect and Remedy" Framework. This principle means that States are obligated to protect Human Rights and that businesses have a responsibility to uphold human rights, which would ensure effective enforcement of Human Rights.[40] The duty of the company to respect Human Rights guarantees that it carries out due diligence on Human Rights. The guidelines in the UNGPs describe the steps a company needs to take to become aware of adverse Human Rights impacts, prevent them and address them.[41] Several international organisations and United Nations bodies[42] have affirmed that the State has a duty to protect Human Rights, including regulating private persons and entities whose subsidiaries abroad have committed wrongful acts outside the territory in which it has jurisdiction.[43]

Multinational oil companies approach human rights concerns reactively and as a crisis management tool rather than proactively. This approach mainly depends on what the company can publicise, such as social investments (e.g., provision of water and health care) in local communities, which create a greater return to their benefit in terms of corporate reputation and legitimacy. For most MNOCs, this is seemingly more of a crucial business priority than human

[38] 'Environmental Rights | Pachamama Alliance' (*Pachamama Alliance*, 2022) <https://www.pachamama.org/environmental-rights> accessed 1 December 2019.
[39] Patrick Mwangi, 'Human Rights and the Environment' (*UNEP*, 2019) <http://web.unep.org/divisions/delc/human-rights-and-environment> accessed 28 November 2019.
[40] Radu Mares, 'Respect" Human Rights: Concept and convergence', in: Robert C. Bird, Daniel R. Cahoy and Jamie Darin Prenkert (eds.), Law, Business and Human Rights. Bridging the Gap (Cheltenham: Edward Elgar, 2014), p. 3-47.
[41] Justine Nolan, 'The Corporate Responsibility to Respect Human Rights: Soft Law Or Not Law?', Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect? (Cambridge University Press 2013).
[42] These international organisations and UN bodies include the UN Human Rights Communion and Council, the International Covenant on Civil and Political Rights (ICCPR), the Committee on Economic, Social and Cultural Rights under the International Covenant on Economic, the Social and Cultural Rights (ICESCR) and Amnesty international. See Human Rights Committee, General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 8, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004). See Committee on Economic, Social and Cultural Rights, Statement on the Obligations of States Parties Regarding the Corporate Sector and Economic, Social and Cultural Rights, 5, U.N. Doc. E/C.12/2011/1 (May 20, 2011)
[43] Nicola Jägersions: In Search of Accountability 7 (2002). 171

rights and environmental rights, which are considered very contentious and problematic to multinational companies. This approach is more visible in countries with limited press freedom, widespread poverty, and heavy dependence on the host government for the earnings from these multinational companies. This was the case in the 1990s during the Ogoni crisis in the Niger Delta. Around the same time, Shell suffered a high reputation and financial damage[44] due to protests by international NGOs such as Greenpeace[45] concerning Shell's decision to sink the Brent Spar storage platform, a boycott of Shell's products, and pressure from global media.

Shell responded by overhauling its image and investing in 'corporate repositioning'. It updated its Statement of General Business Principles. Shell embarked upon a strategic human rights overhaul of its public communication (including the introduction of the "Tell Shell" initiative and standardising the practice of publicising its annual sustainability reports), reviewing its stakeholder engagement, tightening their self-regulation, and taking on "community development" projects (such as infrastructural development, provision of microfinance initiatives, setting up training schemes and farmers' cooperatives, etc.).[46] In the years following the initiative, Shell's global brand began to gain worldwide attention and was sold increasingly as a corporate, social and environmental responsibility model.[47]

Within the Nigerian environment, however, there did not seem to be much change from the operating norm of that global organisation, and instead of focusing on the primary issues of environmental and Human Rights violations, Shell chose to concentrate its Human Rights policy on community development in the Niger Delta.[48] It continued with the approach of providing community development such as health care, hospitals, schools, award of scholarships, empowerment of women, agricultural tools, farming products, etc. Instituting this new type of assistance involved more engagement with community members to discuss and

[44] Van Der Zwart, Alex, Van Tulder, Rob, 2006, Case Study: Quiet Diplomacy, Amnesty International and Pax Christi versus Shell (Nigeria). Available at: http://www.ib-sm.org/caseShellNigeria.pdf. Accessed June 31, 2020.
[45] Greenpeace International, 2011, 1995 – Shell reverses Decision to Dump the Brent Spar, September 13. Human Rights Watch, 1995, Nigeria: The Ogoni Crisis, A Case-Study of Military Repression in South eastern Nigeria, 7(5), July.
[46] Richard Boele, Heike Fabig and David Wheeler, 'Shell, Nigeria and the Ogoni. A Study in Unsustainable Development: I. The Story of Shell, Nigeria And The Ogoni People - Environment, Economy, Relationships: Conflict And Prospects For Resolution' (2001) 9 Sustainable Development.
[47] ibid
[48] David Wheeler, Heike Fabig and Richard Boele, 'Paradoxes And Dilemmas For Stakeholder Responsive Firms In The Extractive Sector: Lessons From The Case Of Shell And Ogoni' (2002) 39 Journal of Business Ethics.

provide answers to their needs.[49] It is, therefore, not hard to see why these multinational companies would want to publicise issues related to social investments. At the same, these multinational oil companies avoid core human rights and environmental issues such as oil spills, clean-up of oil spills and payment of compensation to victims affected by oil spills in the Niger Delta.

1.4.2 Human Rights and Environment Obligations of MNOCs in the Niger Delta

Human rights and environmental obligations are policies a company develops or signs on that indicate what it intends to do to address its impacts on human rights and environmental rights.[50] These human rights obligations are contained in the company's websites, reports (e.g., Shell Sustainability Report, Tax Contribution Report), policies and procedure manuals and code of conduct, and Securities filling (e.g., the US SEC Form 20-F filling). The Human rights obligations of any multinational oil company start with ensuring full respect and compliance with both domestic and international laws that regulate all aspects of their business operations. Human rights obligations can be formulated in different ways; each company is different and will approach human rights formulation in different ways depending on its corporate strategy.

Let us be very clear about the importance of the human rights obligations of MNOCs, which are usually taken lightly. Multinational oil companies (e.g., Shell, BP, Chevron, ExxonMobil) state in several sources, including their official websites, manuals, reports, etc., that their human rights obligations are in line with domestic and international laws and standards (e.g., 2014 European Union Directive on the Disclosure of Non-Financial and Diversity Information and the stakeholder disclosure provision of the U.K. Companies Act). MNOCs, as public companies, are required by US law to file reports and registration statements with the US Securities and Exchange Commission (SEC). For example, Shell included at least three cross-references to its 2011 Sustainability Report in its US SEC 20-F filings, indicating to

[49] Michael Watts, 'Resource Curse? Governmentality, Oil and Power In The Niger Delta, Nigeria' (2004) 9 Geopolitics.
[50] International Institute for Sustainable Development, 'Human Rights: An Implementation Guide For Business' (2007) <https://www.iisd.org/publications/corporate-social-responsibility-implementation-guide-business> accessed 30 April 2022. This section is taken from section 2 of Ochei et al., (2021).

shareholders that they can rely on the information in the report (Royal Dutch Shell Plc, 2011)[51]. Furthermore, these sources are themselves legally binding documents, for example, policy and procedural manuals produced as a result of membership of legally regulated agencies (e.g., standards for health and safety, supervision and maintenance of oil infrastructure/pipelines). It is even more serious if such sources are filled in the court or other legally binding environments (e.g., Security Exchange Commission (SEC), US). A multinational oil company can be sued for providing incorrect and misleading information (e.g. statements about the group-wide nature of its health, safety and environmental policies) to shareholders, investors, and the government[52].

In 2004 SEC settled securities fraud case with Shell (and other groups of companies) concerning a 4.47-billion-barrel overstatement of proved reserves which was done in violation of the Securities Exchange Act of 1934. Shell agreed to pay a $120 million penalty and an additional $5 million to create and implement a comprehensive internal compliance program in a related civil action filed by the Commission in U.S. District Court in Houston. This means that any materially misleading information contained in the 20-F of the sustainability Report violates the Exchange Act and Rule 10b-5 and SEC Rule 10b-5, and sanctions can be imposed on Shell for non-adherence to the rules. The serious implication of Shell's breach of its human rights obligation regarding providing incorrect and misleading information is captured as follows in the statement released by SEC:

> "The Commission also found and alleges that Shell's overstatement of proved reserves, and its delay in correcting the overstatement, resulted from (i) its desire to create and maintain the appearance of a strong RRR, (ii) the failure of its internal reserves estimation and reporting guidelines to conform to SEC requirements, and (iii) the lack of effective internal controls over the reserves estimation and reporting process. These failures led Shell to record and maintain proved reserves it knew (or was reckless in not knowing) did not satisfy SEC requirements, and to report for certain years a stronger

[51] Shell, 'Royal Dutch Shell Plc Sustainability Report 2011 – Nigeria' <https://reports.shell.com/sustainability-report/2011/ouractivities/deliveringenergyresponsibly/nigeria.html> accessed August 31, 2022; see Shell, 'Human Rights'(2011) <https://www.shell.com/sustainability/transparency/human-rights.html accessed 30 April 2022.

[52] Van Ho, T., Yilmaz Vastardis, A., Leader, S., Michalowski, S., Netto, U., Danesi, R., Ong, David & Wlodarczak, B., 'Corporate liability in a new setting: shell and the changing legal landscape for the multinational oil industry in the Niger Delta' (2011).

> RRR than it actually had achieved. Indeed, Shell was warned on several occasions prior to the fall of 2003 that reported proved reserves potentially were overstated and, in such critical operating areas as Nigeria and Oman, depended upon unrealistic production forecasts"[53].

It is also possible for SEC to initiate proceedings against an MNOC. In January 2021, the Securities and Exchange Commission launched an investigation into ExxonMobil Corporation following a complaint it overvalued a key asset in the top US shale. It was claimed that in 2019, Exxon employees estimated the Delaware Basin in the Permian to be worth $40 billion. This value was less than the $60 billion it was initially estimated to be in 2018, and as a result, employees were under pressure to recoup some lost value by using different assumptions, including a more optimistic "learning curve" that estimated the rate at which drilling times would improve.[54]

One of the world's largest multinational oil companies, Royal Dutch Shell, which has been operating in Nigeria since the 1950s, states that it

> "is committed to respecting human rights as set out in the UN Universal Declaration of Human Rights and the International Labour Organization Declaration on Fundamental Principles and Rights at Work".[55]

Shell's commitment to human rights is written into the company's existing frameworks and processes, and it applies to all employees and contractors.[56] It is important to note any breach

[53] Securities and Exchange Commission v. Shell (2004). Royal Dutch Petroleum Company and The "Shell" Transport and Trading Company, p.l.c., Civil Action No. H-04-3359, U.S.D.C./Southern District of Texas (Houston Division): Lit. Rel. No. 18844 / August 24, 2004. Sec.gov. (2021). <https://www.sec.gov/litigation/litreleases/lr18844.htm> accessed 30 April 2022.

[54] Jennifer Hiller and Rithika Krishna, 'SEC Launches Probe Of Exxon On U.S. Shale Asset Valuation: WSJ' (Reuters 2021) <https://www.reuters.com/article/us-exxon-sec-permian-idUSKBN29K1OO> accessed 30 April 2022.

[55] Shell, 'Human Rights'(2020) < https://www.shell.com/sustainability/transparency/human-rights.html> accessed on April 30, 2022.

[56] Some of the frameworks used by Shell to support compliance with its human rights obligations include Shell General Business Principles; Code of Conduct; Ethics and Compliance Manual; Health, Safety, Security, Environment and Social Performance (HSSE&SP) Control Framework; Shell Supplier Principles; Corporate and Social Responsibility Committee (CSRC) and several initiatives such as the Transparency Initiative and the Sustainability approach.

of the MNOCs human rights obligations constitutes serious human rights and environmental violations such as lack of transparency, non-disclosure of evidence, safety and security, oil spill, inadequate clean-up of the oil spill and non-payment of compensation.

Respect for human rights and the environment is guaranteed under international law, such as the UNGPs, the OECD Guidelines for Multinational Enterprises, and the African Charter. For instance, access to remedy is supported by the UNGPs, which recognise access to a remedy as one of the three foundations of the Universal Human Rights and business system. An essential element of these Guidelines is the obligation of a State to provide access to a judicial remedy for victims of Human Rights abuses by businesses.[57]

The Niger Delta has witnessed massive environmental degradation from frequent oil spills and gas flaring. According to researchers such as Frynas[58] and Van Ho et al.,[59] the Niger Delta has witnessed massive environmental degradation from frequent oil spills and gas flaring. Oil companies are usually reluctant to accept responsibility for oil spills but instead claim that oil spills are caused by sabotage and oil theft.[60] Cyril Obi[61], Gwynne Skinner[62] and several reports by international Human Rights organisations have countered this argument by maintaining that the largest cause of oil spills is equipment malfunction and corrosion of pipelines despite Shell's claims that pipelines were damaged due to oil theft and sabotage.[63]

One of the most important human rights and environmental obligations of MNOCs is to be transparent in reporting and disclosing information related to their operations in the Niger

[57] UNGP, 'Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework'. New York: United Nations Human Rights (Office of the High Commissioner). <https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf> accessed on August 31, 20220; Organisation for Economic Co-operation and Development (OECD), '2011 Update of The OECD Guidelines for Multinational Enterprises - OECD' (OECD 2022) <https://www.oecd.org/daf/inv/mne/48004323.pdf> accessed August 12, 2022; African Union, 'Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights' (2021) <https://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights> accessed on August 31, 2022

[58] Frynas (n 19) 28

[59] Van Ho and others (n 52) 53-57

[60] Frynas (n 19) 29-30

[61] Cyril (n 20) 45-50.

[62] Gwynne Skinner, 'Rethinking Limited Liability of Parent Corporations for Foreign Subsidiaries' Violations of International Human Rights Law', Washington & Lee Law Review 72 (2015). 1772-1790.

[63] Amnesty International, 'Nigeria: A Criminal Enterprise? Shell's Involvement in Human Rights Violations in Nigeria in the 1990S.' (Amnesty.org, 2022) <https://www.amnesty.org/en/documents/AFR44/7393/2017/en/> accessed 19 February 2022.

Delta. This has been a significant problem for many years in the Niger Delta because MNOCs have been implicated severally for not being transparent in reporting incidences of oil spills accurately. For example, several reports from Amnesty International and the United Nations show that Shell's account often differs significantly in terms of what has happened, where oil spills occurred, how they happened, why they happened, and when they happened.[64] Even when international bodies have urged Shell to clean up and remedy the environment, their actions have not been satisfactory. In the final report of the Netherlands National Contact Point for the OECD Guidelines for Multinational Enterprises on the Specific Instance notified by Amnesty International and Friends of the Earth International regarding an alleged violation of the OECD Guidelines for Multinational Enterprises by Royal Dutch Shell, these concerns were reflected.[65]

1.4.3 Human Rights and Environmental Violations in the Niger Delta

Human Rights and environmental violations in the Niger Delta by MNOCs have attracted worldwide attention since the 1990s. The growing attention on human rights in Nigeria is due to the actions of MNOCs engaging in Nigeria's extractive sectors, particularly the oil industry.[66] MNOCs operating in developing countries have been accused of environmental degradation and pollution by host communities and countries, especially those with significant oil operations. These problems have led to many conflicts, such as in the Niger Delta region, where host communities have been in near-constant conflict with the MNCs. For example, the Ijaws and the Ogonis (Niger Delta communities) are in constant conflict with the MNOCs operating in their area.[67]

The nature of Human Rights and environmental abuses in the Niger Delta include environmental destruction (e.g., oil spill and gas flaring), health issues (e.g., breathing

[64] Amnesty International, 'Bad Information Oil Spill Investigations in The Niger Delta' (Amnesty International 2013) <https://www.amnesty.org/en/documents/afr44/028/2013/en/> accessed 2 August 2022.
[65] National Contact Point OECD Guidelines for Multinational Enterprises, Ministry of Foreign Affairs, 'Final Statement Shell in The Niger Delta II' (National Contact Point OECD Guidelines for Multinational Enterprises 2013) <http://www.government.nl> accessed 12 November 2019.
[66] Louis Osemeke and others, Human Rights initiatives in Nigeria.' (2011) 24 Springer, Cham, 2016. 357-375; Kenneth M. Amaeshi and others, 'Human Rights in Nigeria: Western Mimicry or Indigenous Influences?' (2006) 24 Journal of Corporate Citizenship. 83-91; See Emmanuel Adegbite and Chizu Nakajima, 'Corporate Governance and Responsibility in Nigeria' (2011) 8 International Journal of Disclosure and Governance.
[67] Olayinka Ajala, 'Human Security in the Niger Delta: Exploring the Interplay Of Resource Governance, Community Structure And Conflicts' (2016) 7 Journal of Sustainable Development Law and Policy.

problems and skin diseases), torture, detentions, killings and payments to armed groups, and lack of access to relevant information. There has long been discrimination between casual/contract workers and permanent employees in terms of compensation, benefits, the right to freedom of organisation, and collective bargaining. This is referred to as casualisation, another human rights violation related to labour rights. Casualization is seen as one of the greatest risks to industrial peace in the Niger Delta's oil and gas sector.[68]

The United Nations and several international Human Rights organisations (e.g., the 2017 Amnesty International report[69]) have reported widespread Human Rights abuses in the Niger Delta. A 2011 United Nations report commissioned by the Nigerian government in the Niger Delta region revealed record levels of oil pollution and several cases of Human Rights abuse, the extent of such violations, and the impact it has had on the people and communities Niger Delta[70]. Also, a 2011 report by Platform uncovered how Shell's huge routine payments to armed militants exacerbated conflicts, in one case leading to the destruction of Rumuekpe town where it is estimated that at least 60 people were killed.[71]

It has been argued that the response of MNOCs to violations of human rights and environmental damages in the Niger Delta is inconsistent with its response in other developed countries. Multinational oil companies operating in the Niger Delta do not take enough proactive steps to prevent human rights and environmental violations such as oil spills but instead rely so much on compensation (if required) once the damage has happened.

1.4.4 Human Rights and Environmental litigations in the Niger Delta

Multinational oil companies (MNOCs) and their subsidiaries are increasingly facing litigations from victims due to reoccurring incidences of Human Rights and environmental violations (e.g., oil spills, clean-up and remediation) in the Niger Delta. The chances of victims obtaining

[68] Tula Connell, 'Degradation of Work: Oil and Casualization of Labour in the Niger Delta (2010) - Solidarity Center' (*Solidarity Center*, 2019) <https://www.solidaritycenter.org/publication/degradation-of-work-oil-and-casualization-of-labor-in-the-niger-delta-2010/> accessed 1 December 2019.
[69] Amnesty (n 63). This report accuses Shell of running a criminal enterprise in the 1990s where they caused numerous spills, fuelling communal violence and assisting the military government in torture, killing and suppressing peaceful protest and demonstrations.
[70] United Nations Environment Programme (UNEP), 'Environmental assessment of Ogoniland Report', (2011) <https://postconflict. unep.ch/publications/OEA/UNEP_OEA.pdf> accessed August 31, 2022.
[71] Platform (n 6)

remedies before local courts in developing countries may be limited due to corruption and/or favouritism, particularly in developing countries like Nigeria, where the Federal government is involved in or stands to benefit greatly from the activities in the oil and gas industry.[72] There are several difficulties in holding MNOCs and their subsidiaries to account in Nigeria.[73] Peter Nygh[74] and Skinner Gwynne[75] have discussed some of these difficulties, including weak and ineffective judicial systems in the host countries, difficulty in knowing the entity to sue due to the company's complex corporate structure, subsidiaries pursuing a policy of delay, denial and derailment of justice and subsidiaries being underfunded and thus not being not able to pay any damages (including compensation and remediation).

As a result of the difficulty in holding the oil companies liable in Nigeria, the oil spill victims have decided to sue the MNOCs of these oil companies abroad. Recently, there has been an increase in transnational litigations arising from the Niger Delta, which individuals and communities have brought against MNOCs in England, the Netherlands, and the US, where most of the MNOCs of multinational oil companies operating in Nigeria are based.[76] These litigations include - *Wiwa v Shell*, *Kiobel v Shell*, and *Bowoto v Chevron Corp in the United States*; *Bodo v Shell/SPDC* and *Okpabi v Shell* in the United Kingdom *Oguru v Shell*; and *Kiobel v Shell*[77] in the Netherlands. Esther Hennchen concludes that the modest success recorded in some aspects of these litigations shows that legal borders become permeable, especially when liability is at stake.[78] Enneking has discussed several transnational Human Rights and environmental litigations related to Shell's operations in Nigeria. Enneking also discussed the factors that determine the outcome of the foreign direct liability cases, such as jurisdiction, applicable law, the legal basis for corporate liability, and liabilities.

[72] Natural Resource Governance Institute, State participation and state-owned enterprises – Roles, benefits and challenges. NRGI Reader March 2015, https://resourcegovernance.org/sites/default/ files/nrgi_State-Participation-and-SOEs.pdf (last accessed November 1, 2021). Extractive Industries Transparency Initiative, Role of state-owned enterprises, https://eiti.org/role-of-stateowned-enterprises (last accessed November 1, 2018)
[73] Bryant D, and Romano Z, 'Corporate Parent Liability: Litigation Risks For Resource Companies' (Fasken Martineau DuMoulin 2015) <https://www.fasken.com/en/knowledge/2015/12/miningbulletin-20151203> accessed 31 August 2022
[74] Peter Nygh, 'The Liability of Multi-National Corporations for The Torts Of Their Subsidiaries' (2002) 3 European Business Organization Law Review.
[75] Gwynne Skinner and others, 'The Third Pillar Access to Judicial Remedies for Human Rights Violations by Transnational Business' (The International Corporate Accountability Roundtable (ICAR), CORE, The European Coalition for Corporate Justice (ECCJ) 2013).
[76] Enneking (n 24) 44-50.
[77] *Oguru v Shell* District Court of The Hague (15 September 2011).
[78]Esther Hennchen, 'Royal Dutch Shell in Nigeria: Where Do Responsibilities End?' (2014) 129 J Bus Ethics.

The trend toward transnational human rights and environmental litigations began in the mid-1990s in the United States, where most of these litigations have been brought. It was motivated, among other reasons, by the increased use of the Alien Tort Statute (ATS)[79] as a foundation for subject matter jurisdiction of US federal courts over civil liability claims relating to international human rights breaches committed anywhere in the world[80]. The decision by the US Supreme Court in the *Kiobel v Shell* litigation that corporate actors cannot be held liable for complicity in international Human Rights violations under the ATS severely limits the possibilities of bringing foreign direct liability cases before US federal courts.[81] The focus is shifting to the possibilities of bringing transnational litigations before US state courts and before courts in the EU Member States.

Outside the US, where there is no equivalent of an ATS, the majority of these litigations have relied on conventional tort law principles (that is, violations of written and unwritten norms about due care concerning stakeholders' human rights, health and safety, labour circumstances, and/or natural environment).[82] In the UK and Netherlands, the plaintiffs relied on establishing direct liability for failure to exercise due diligence, which creates an incentive for the MNOC to ensure that its subsidiaries respect Human Rights and environmental standards in the Niger Delta. The OECD Guidelines on Multinational Enterprises appear to follow the approach of establishing the direct liability of the MNOC. Specifically, the OECD states that its guidelines:

> *"extend to enterprise groups, although boards of subsidiary enterprises might have obligations under the law of their jurisdiction of incorporation. Compliance and control systems should extend where possible to these subsidiaries*."[83]

[79] 28 United States Code, Paragraph 1350. The Alien Tort Statute (ATS) is a US federal statute that had been enacted in 1789 but lain dormant ever since.
[80] Christensen (n 9) 794–815; Young EA (2015) Universal jurisdiction, the Alien Tort Statute, and transnational public law litigation after Kiobel. Duke Law J 64(6):1023–1128; Enneking Liesbeth, 'Foreign direct liability and beyond? – Exploring the role of tort law in promoting international corporate social responsibility'. Eleven International Publishing, The Hague. 77–85
[81] Enneking (n 75) 110.
[82] Enneking LFH (2017a) Judicial remedies: the issue of applicable law. In: Álvarez-Rubio JJ, Yiannibas K (eds) Human rights in business – removal of barriers to access to justice in the European Union. Routledge, London, pp 38-77
[83] United Nations Conference on Trade and Development (UNCTAD), 'United Nations Conference on Trade and Development (UNCTAD), World Investment Report 2018 Annex Table 19. The World's Top 100 Non-Financial Mnes, Ranked by Foreign Assets, 2018' (2022) <https://unctad.org/en/Pages/DIAE/World%20Investment%20Report/Annex-Tables.aspx> accessed August 5, 2022.

This formulation of OECD Guidelines amounts to imposing an obligation on the MNOC to control the actions of the subsidiary, in line with the growing notion that the MNOCs have a duty of due diligence to ensure that Human Rights are respected within their sphere of influence.[84]

One of the significant features in the human rights and environmental litigations arising from the Niger Delta is the fact that MNOCs are exploiting the structure of their corporate group to shield themselves from its Human Rights obligations and hence from liability from wrongful acts of their subsidiaries in the Niger delta. This exploitation is directly linked to the MNOC's frequent and reckless application of the separate legal entity doctrine, which prevents MNOCs from aligning their Human Rights obligations throughout the different subsidiaries. Human rights and environmental obligations of MNOCs are meant to be implemented throughout the enterprise, including subsidiaries. For instance, in its Sustainability Report (2018), Shell's Business Principles, Code of Conduct, official Website, etc., Shell represents that it stands in total and complete control of well-disciplined human rights and environmental policy throughout the Shell group. Several documents from Shell (e.g., official website, policy and procedure manuals, reports, etc.) prove that Shell sets Human Rights obligations and standards binding on all subsidiaries. Chevron also has a similar message. However, when there is a legal dispute, MNOCs quickly distance themselves from their subsidiaries.

1.4.5 Mechanisms used by MNOCs to derail litigations in the Niger Delta

The mechanisms used by MNOCs to derail litigations conflict with their human rights obligations and therefore lead to human rights and environmental violations in the Niger Delta. Several works of literature have highlighted that the mechanisms used by MNOCs to derail human Rights and environmental litigations, especially in developing countries, conflict with their Human Rights obligations. Cees Van Dams, in his commentary on the preliminary judgments on the Dutch Court of Appeal in the Oguru v Shell litigation, concluded that Shell's request to be allowed to challenge the preliminary judgement of the Court of Challenge before the Dutch Supreme Court (Hoge Raad), rather than waiting for the Court of Appeal's decision

[84] Organisation for Economic Co-operation and Development (OECD), 'The OECD Guidelines for Multinational Enterprises: Reference Instruments and Initiatives Relevant to The Updated Guidelines' (2012) <http://www.oecd.org/daf/inv/mne/ResourceDocumentWeb.pdf> accessed 5 December 2019.

on the merits was intentional to cause further delay to the litigation, increasing the time, efforts and costs for the claimants."[85] Van Ho et al argues that is a disconnect between what Shell documents regarding its Human Rights obligations on websites, newspapers, annual reports, code of conduct, etc., and the way it handles legal disputes with victims of Human Rights and environmental violations.[86] Cees van Dams proposes the application of a mix of self-regulation, soft law and hard law to align MNOCs level of engagement with their human rights obligations.[87] Sheldon also discussed this issue by stating that there is a clash between Shell's portrayal of its position before the courts and its position in its securities filing and sustainability reports.[88] MNOCs use several other mechanisms to derail litigations arising from the Niger Delta. These include - a lack of transparency and non-disclosure of evidence. The mechanisms used by MNOCs to derail human rights and environmental litigations are inconsistent with their human rights obligations, pointing to the fact that there is a need to address these mechanisms to improve human rights and the environment in the Niger Delta. This thesis proposes a legal framework that is composed of five layers starting from the constitution, legislation, regulation (domestic and international) and tort law (that is, the tort of negligence, nuisance and trespass), Alternative Dispute Resolution (that is, arbitration and adjudication). This legal framework will be complemented with recommendations that will take into consideration the peculiarities of the Nigerian legal system to guide the implementation of the framework.

1.5 Methodology

This thesis is qualitative research that aims to investigate how MNOCs derail human rights and environmental litigations arising from the Niger Delta. This thesis adopts a combination of doctrinal research and comparative analysis methodology to address the derailments in litigations arising from the Niger Delta to achieve this objective. The doctrinal approach is, in many ways, the prerequisite for undertaking any other type of analysis of law because it analyses and identifies the current law.

[85] Dam (n 14)
[86] Van Ho and others (n 52) 53-57
[87] Cee(n 11) 36-40
[88] Van Ho and others(n 52)

Doctrinal research, also known as theory-testing or knowledge-building research in legal academia, deals with studying existing laws (e.g., laws related to MNOC liability for Human Rights violations), related cases and authoritative materials analytically on some specific matter.[89] It provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, and explains areas of difficulty for future development.

This research will rely on existing information to collect and obtain data through library research (or desk research). This data will be accessed through the library, the internet, and online legal databases such as Lexis and Westlaw. Examples include books, historical documents, journals, newspapers, juristic work, commission reports, court judgments, case commentary, laws and acts, treaties, and so on.

Also, this thesis gathered information related to transnational human rights and environmental litigations arising from the Niger Delta. Specific characteristics of these litigations, such as the number of relevant cases cited, the locations, the year the case started and finished, and whether or not compensation and remediation were paid, etc., will be extracted. This will entail reading and analysing the text to locate the law in statutes, judicial pronouncements, case commentaries, textbooks, journals, etc. These materials will be read holistically and analysed, and the findings will be used to conclude human rights and environmental litigations involving MNOCVS in the Niger Delta.

This thesis also used comparative research methodology to supplement doctrinal methodology due to its weakness in lacking any support for social facts, which is a serious concern given that law can be used as a tool for social transformation. Doctrinal research methodology tends to ignore factors that are outside the strict confines of law but may have an impact on the legal principle, theory, or doctrine.[90] Consider the recent development in international law involving human rights and environmental violations committed by MNOCs and their subsidiaries in developing countries, where a massive public outcry acted as an extra-legal factor in shaping the law. Furthermore, in doctrinal research methodology, the actual practise and attitudes of functionaries and those who implement the law are not taken into account. For example, the disposition of the government, government officials, and supporting agencies during human

[89] Cranston R. 'The rational study of law: social research and access to justice' In Zuckermann A. A. S and Cranston R. (eds) *Reform of civil procedures: essays on access to justice* (Oxford University Press, England, 1996) 31-32; Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 Deakin Law Review.

[90] Verma, S.K. and Wani A, 'Legal Research and Methodology (Indian Law Institute' (2001) 656-657

rights and environmental litigations arising from MNOC and their subsidiaries' operations in the Niger Delta is an important factor that must be considered in the study.

Comparative methodology in law involves the study of legal systems, including their constitutive elements and how they differ, and how their elements combine into a system. Comparative law studies the differences and similarities between the legal systems of different countries. Nils Jansen writes, 'Comparison is the construction of relations of similarity or dissimilarity between different matters of fact. [91]

There are several procedures for carrying out comparative methodology with no definitive standard. For example, Eberle proposes four rules for carrying out comparative methodology: comparative skill, evaluation of external law, evaluation of internal law, and comparative observations.[92] Reitz offers nine principles for applying comparative law. The first principle considers the relationship between comparative law and foreign law study. The following four principles (Nos. 2–5) address the fundamental technique of comparing law in different legal systems as well as the unique value of such research. There are three principles (Nos. 6-8) that provide specific guidelines for conducting a comparison involving legal subjects.[93] Ishwara proposes the following steps for carrying out comparative law: statement of the problem; selection of comparative elements (jurisdictions, laws, institutions, legal families); identification of tertium comparationis; formulation of paradigm functionalist study; macro-comparison; cultural immersion; micro-comparison; comparison through the application of methods of agreement, disagreement, residue, and aggregation; description and analysis; and estimation of relative merits and demerits. He, however, points out that these steps are not suggested to be implemented in a rigid sequential order because the spontaneity of circumstances calls for flexibility.

This thesis follows the procedure proposed by Ishwara[94]. The first step is to formulate the statement of the problem which is stated as follows: the non-adherence of MNOCs to their corporate obligations regarding human rights and the environment during litigations initiated against them leads to serious human rights and environmental violations in the Niger Delta.

[91] Jansen, N., 2004. Duties and Rights in Negligence: A Comparative and Historical Perspective on the European Law of Extracontractual Liability. Oxford Journal of Legal Studies, 24(3), pp.443-469.
[92] Eberle, E.J., 'The methodology of comparative law'. (2011) Roger Williams UL Review 16. 51.
[93] John C. Reitz, 'How to Do Comparative Law' (1998) 46 Am J Comp L 617
[94] Bhat, P. Ishwara. "Comparative Method of Legal Research: Nature, Process and Potentiality." Journal of the Indian Law Institute (2015): 147-173.

Another important part of this step is highlighting the subject of comparison, that is, whether the comparison is focusing on similarities or differences. The comparatist seeks to learn from different jurisdictions' approaches to the same or similar problem. Gutteridge is motivated by the presumption that practical results are similar concerning similar social facts. Ancel and Legrand challenge this presumption by giving prominence to differences or oppositions for contrasting in the course of comparison. This thesis is interested in both similarities and differences, for example, to understand the legal issues of the litigations that are similar and vary during litigations involving MNOCs for violations of human rights and the environment in the Niger Delta.

The second step is the identification of tertium comparationis, that is, the specific legal issues for comparison. Tertium comparationis refers to the quality that two things which are being compared have in common. In short, it is the point of comparison which prompted the researcher of the comparison in question to liken a particular issue to some other issue in the first place. This thesis compares legal issues in human rights and environmental litigations involving MNOCs that are similar or vary in three different jurisdictions. Another focus of the comparative methodology is to compare and contrast the different mechanisms used by MNOCs in different jurisdictions to derail human rights and environmental litigations arising in the Niger Delta.

The third step entails the selection of comparative elements such as laws, jurisdictions, laws, institutions, and legal systems for comparison. This thesis selected four jurisdictions, namely Nigeria, UK, Netherlands, and US. Nigeria represents the jurisdiction where the subsidiaries of multinational oil companies reside, while the rest (that is, England, Netherlands and the US) represents the jurisdictions where the multinational oil companies have their headquarters. These jurisdictions have been selected for two main reasons. The first is that the multinational oil companies and their subsidiaries that operate in the Niger Delta reside in these jurisdictions. For example, Shell Petroleum Development Company (SPDC) which is in Nigeria, is a subsidiary of Royal Dutch Shell that has its headquarters in the Netherlands and England. The second is that these jurisdictions have witnessed several notable human rights and environmental litigations arising from the Niger Delta. Again this thesis selected several notable human rights and environmental litigations (e.g., Wiwa v Shell) initiated against both MNOCs and their subsidiaries operating in the Niger Delta. Three cases were selected from Nigeria, two each from England and Netherlands, and three from the US.

The fourth step is the formulation of a paradigm functionalist study which entails linking the comparison with the function of the legal system to enlarge the dimensions of comparative study to bring sociological discourse into action. It provides a tool for effectively understanding the law; it provides comparability clues; it justifies the presumption of similarity in the context of the universality of social problems; and it systematises the building process. This thesis identified the mechanisms used by MNOCs to derail human rights and environmental litigations arising from the Niger Delta due to their oil operations and then linked them to human rights and environmental obligations to establish the non-adherence of MNOCs to their corporate obligations.

The fifth step is cultural immersion. Law is ingrained in the culture, so understanding it effectively requires a certain level of "immersion" on the part of the scholar. To a large extent, legal cultures share fields of similarity, but they also differ in power processes in initiating and persuading change. The thesis takes into consideration the culture of the communities in the Niger Delta and problems of human rights and environmental violations in the Niger Delta. Communities in the Niger Delta region depend on their farmland and water bodies for survival, and as a result of oil and gas pollution, they are unable to have a source of livelihood. This has led to protests and insecurity in the region due to the oil and gas operations of MNOCs and their subsidiaries. There is also a conflict of interest between MNOCs and the Nigerian government. This conflict arises because the Nigerian government has obligations to sanction MNOCs for human rights and environmental violations in the Niger Delta, but is concerned about the potential loss of oil revenues if the action taken against MNOCs is too harsh.

The sixth step is conducting a micro and macro comparison. This involves the study of legal families (e.g., civil law, common law, religion-based laws and regional laws) or engagement in grand systems debate. Differences prevail amidst legal families, whereas similarities prevail amidst member legal systems of each legal family. The legal family that this thesis focuses on is human rights and environmental law, which is itself an aspect of international law. The thesis focuses on both differences and similarities in the relation to human rights and environmental law due to the violations of human rights and the environment by the operations of MNOCs and their subsidiaries in the Niger Delta.

Micro-comparison emphasises the comparison of specific rules to resolve a particular problem. The focus is on smaller units for manageable comparison. The focus may be on positive laws; specific legal doctrine or precedent; legal institutions; or the description. Its task is analysis and

explanation rather than evaluation. In this thesis, we applied micro-comparison in different ways. The first is that each litigation was analyzed based on the six(6) criteria – facts of the case, plaintiff claim, defendant claim, issue for determination, court decision, and significance of the litigations. The second is that this thesis identified several mechanisms used by MNOCs to derail human rights and environmental litigations arising from the Niger Delta, and then tied them to the different imp[ediments to human rights and environmental obligations of MNOCs in the Niger Delta.

The next step in the comparative methodology is analytical comparison. Analysis of the legal policy, provisions, their different components and relationships between or among themselves provides a good understanding of the law. As Rabel points out, we can only discern the inner relationships between different legal systems if we consider the similarities and differences in our comparative portrayal of the institutions. This thesis has adopted the agreement-disagreement analysis approach to identify legal issues in the litigations that are similar and legal issues in the litigations that vary. For example, the thesis identified the legal arguments that both plaintiffs and defendants use to prevent litigation from being heard in a particular jurisdiction. Also, the thesis established the legal issues that vary-, for example, the choice of applicable law, which varies depending on the jurisdiction where the litigation was initiated.

The final step is the description and analysis part of the comparative methodology. This entails describing, for example, the legal rules and doctrines, and their working in practice. In this thesis, the description covered the similarities and differences in the litigations in the different jurisdictions regarding how to hold MNOCs liable for human rights and environmental violations and the mechanisms used by MNOCs to derail human rights and environmental litigations arising from the Niger Delta. For example, the thesis considered the law/rule used by the defendants to prove that the courts have no jurisdiction to hear the case. The thesis discovered, for example, that the approach used by the MNOCs is to invoke the principle of forum non conveniens. The principle of forum non conveniens prevents courts from proceeding with a case in the jurisdiction in which it is filed if another jurisdiction is more appropriate for litigation.

Furthermore, this thesis conducted a comparative analysis of a selected number of cases arising from the Niger Delta. This involved a critical analysis of court decisions of existing and ongoing litigations to determine the legal basis for proving whether or not an MNOC is liable for human rights and environmental violations. The analysis provided explanations within the

law on why the outcomes of some litigations are similar or dissimilar, the exceptions that could arise, and possible implications of the approaches or mechanisms used by both plaintiffs and defendants in these litigations.

1.6 Scope and Limitations of the Study

The thesis focuses on two Multinational Oil Companies (MNOCs) operating in the Niger Delta region of Nigeria – Shell and Chevron. This is because these two oil companies have been involved in some of the most widely referenced Human Rights and environmental litigations both in Nigeria and abroad. Another consideration for choosing these two multinational oil companies is that their headquarters are on different continents of the world. Therefore, the litigations selected for discussion are spread across different jurisdictions of the world. Therefore, the findings and proposed solutions are mostly applicable to companies within the extractive industries, especially to multinational companies, whose operations in developing countries are handled by their subsidiaries.

In this thesis, the litigations selected for the study cover Human Rights and environmental litigations initiated in four main jurisdictions - Nigeria (the home states of the subsidiaries of the multinational oil companies), England, the Netherlands and the US (host states of the MNOCs of the multinational oil companies). These jurisdictions have witnessed several notable human rights and environmental litigations from the Niger Delta.

The transnational human rights and environmental litigations arising from the Niger Delta fall under three jurisdictions: England, the Netherlands and the United States. These jurisdictions were selected for two main reasons: (i) The headquarters of the two selected MNOCs are based in England, the Netherlands and the US; (ii) Most of the notable cases initiated against MNOCs have taken place in England (e.g., *Bodo v Shell*), the Netherlands (e.g., *Oguru v Shell*) and the US (e.g., *Wiwa v Shell*).

The thesis is anchored on the following key areas: (i) Human Rights and Environmental obligations; (ii) Human rights and environmental litigations arising from the Niger Delta; and (iii) Mechanisms used by MNOCs to derail human rights and environmental litigations. These areas will support the development of a legal framework and recommendations for addressing the derailments in human rights and environmental litigations arising from the Niger Delta.

It has to be pointed out that an important part of the thesis is concerned with civil procedure in relation to the fact that several obligations imposed on MNOCs, particularly those relating to

tort, can be frustrated or derailed. In this thesis, the term 'derailment' means ‘to prevent a litigation process from succeeding’. In other words, it means the obstruction of a litigation process by diverting it from its intended course, which is to obtain remediation and compensation for victims of human rights and environmental violations. It is important to note that ‘derailment’ covers both lawful (e.g., interlocutory appeals) and unlawful action (e.g., intimidating or interfering with a case witness) by a defendant company. The concept of ‘derailment’ also covers actions of the defendant leading up to or in an action against it (i.e., before court hearings, during court hearings, and after court hearings). In any case, such as act amounts to perverting or frustrating the litigation process.

The human rights and environmental obligations will focus on two aspects: human rights (e.g., labour rights) and environmental rights (e.g., preventing oil spills). These human rights obligations can be formulated either by the MNOCs (e.g., Shell), the host state (where the subsidies are based) or international organisations (UNGPs, and UNEP). This thesis does not consider charitable initiatives, donations, or philanthropic activities, which may also be regarded as human rights obligations.

In line with the focus of the study on Human Rights, we used the term “Human Rights obligations” to refer to the obligations related to human rights and the environmental rights that multinational oil companies have committed to the local communities in the Niger Delta. This eliminates misunderstandings about social developments and other voluntary initiatives of multinational oil companies to local communities in the Niger Delta which are usually regarded as part of human rights.

This thesis differentiates environmental rights from human rights. Environmental rights as used in this thesis includes but are not limited to environmental pollution (e.g., oil pollution and gas flaring), remediation (clean-up and restoration of oil-polluted areas) and compensation to victims of environmental damages. It is important to note that environmental rights are still part of human rights. In the last decade or so, environmental rights have emerged as a distinct and important aspect of human rights because of the increased focus and attention to the destruction of the environment due to oil exploration and production without adequate steps to remediate and compensate local communicates.

This thesis uses the terms “corporate obligations” and “human rights obligations” interchangeably. The corporate obligations of an organisation are very broad and cover various

issues such as recruitment training, health and safety, etc. The thesis focuses on corporate obligations related to human rights and environmental obligations of MNOCs towards the Niger Delta.

1.7 Impact and Significance of the Study

In the last decade, there has been a renewed focus on the human rights obligations of multinational oil companies in developing countries due to widespread allegations of Human Rights and environmental violations. Multinational oil companies have human rights obligations that cover the entire enterprise, including their subsidiaries, but whenever there is a dispute, they immediately forget their commitment to human rights obligations.

This research will have a significant impact on the following:

(i) Victims of Human Rights and environmental violations

The thesis will provide information to support victims seeking remediation and compensation from MNOCs and their subsidiaries for failing to respect their Human Rights obligations. One of the areas that will benefit victims is understanding the different types of human rights and environmental violations by MNOCs against victims of oil spills in Nigeria. Victims usually think of human rights violations as issues relating to oil spills. However, there are also types of human rights that are important if they are to make any successful legal claims against MNOCs and their subsidiaries. These types of human rights violations include transparency of oil operation, disclosure of evidence, labour rights, safety and security, oil pollution, remediation and compensation. For example, MNOCs will improve their procedure for preventing oil spills and maintaining oil pipelines knowing that they will be forced to disclose such information to victims in court by plaintiffs during litigation.

(ii) MNOC and their subsidiaries:

The proposed legal framework and recommendations will assist the MNOCs and their subsidiaries in improving human rights and the environment in the Niger Delta. One of the areas that MNOCs need to pay attention to is how they control and supervise the implementation of their groupwide policy, especially health and safety policies. For example, MNOCs need to pay attention to policies that relate to the repairs and maintenance of oil pipelines. A careful review of the litigations analysed in the thesis shows that the lack of adequate maintenance of oil pipelines has featured prominently in the litigations and is one of the strongest arguments put forward by the plaintiffs. This understanding will help MNOCs to

pay more attention to the maintenance of their pipeline, thereby reducing incidences of oil spills in the Niger Delta.

(iii) Governments of MNOCs home countries and subsidiaries' host countries

The recommendations of the thesis will influence the governments of both MNOCs home country (e.g., Netherlands) and the subsidiary's host country (e.g., Nigeria) to enact laws to allow for MNOCs to be held liable and to also allow for their subsidiaries to be sanctioned. One of the areas that governments of MNOCs host countries need to pay attention to is how to determine the cause of oil spills. Under existing legislation in Nigeria, oil companies are not responsible for remediation and compensation for oil spills caused by sabotage or oil theft. By reforming this regulation, MNOCs and their subsidiaries will no longer be able to exploit this loophole to avoid remediation and compensation to victims of oil spills in the Niger Delta.

(iv) Investors and Business community:

The proposed legal framework will help potential business investors re-shape their business intentions knowing that they will be held accountable if their subsidiaries fail to protect human rights and the environment. Examples include information regarding the transparency of oil operations (e.g., oil spill data, pipeline repairs and maintenance procedures) entered into the company’s Sustainability Report and reports filed in the Security Exchange Commission. This information has to be accurate because the company could be sued for misleading investors, shareholders and the public. Financial and reputational loss can be avoided, which will also help improve human rights and the environment in the Niger Delta.

1.8 Contributions to Knowledge

This thesis has made four main contributions to knowledge, as explained below:

1.8.1 Review of transnational human rights and environmental litigations from the Niger Delta regarding the non-adherence of MNOCs to corporate policies

In the last two decades, several transnational human rights and environmental litigations have been initiated against multinational companies and their subsidiaries involved in extracting mineral resources in developing countries. Several reviews of these litigations abound in the literature. Cee Van Dams and Lee McConnell have reviewed several litigations in the UK and Dutch courts.[95] Skinner has reviewed some human rights and environmental cases to highlight the legal barriers to victims from seeking remedy for harm caused by subsidiaries of parent companies resident in developed countries such as the US, UK and Europe[96]. Enneking reviewed a selection of transnational human rights and environmental litigations relating to Shell operations in Nigeria.[97]

This thesis has critically reviewed a selected number of transnational human rights and environmental litigations arising from the Niger Delta regarding the non-adherence of MNOCs to corporate policies. These human rights and environmental obligations include non-transparency, non-disclosure, pollution, remediation and compensation. The litigations initiated arise in three jurisdictions - England, the Netherlands, and the US. The review of the litigations covered the facts of the case, the plaintiff's claims, the defendant's claims, the issue for determination, the court decision, and the litigation's significance. The reviews looked at legal issues that point to breaches of human rights and environmental obligations of MNOCs.

[95] Cees Dam, 'Preliminary Judgments Dutch Court of Appeal in the Shell Nigeria Case' (Rotterdam School of Management, Erasmus University 2016); Cees van Dam, 'European Tort Law' (Oxford: Oxford University Press, 2013) 804-809; Lee McConnell, 'Establishing Liability for Multinational Oil Companies in Parent/Subsidiary Relationships' (2014) 16 The Environmental Law review (School of Law, Northumbria University).

[96] Skinner G and others, 'The Third Pillar: Access To Judicial Remedies For Human Rights Violations By Transnational Business' (The International Corporate Accountability Roundtable (ICAR), CORE, The European Coalition for Corporate Justice (ECCJ) 2013)

[97] Liesbeth Enneking, 'Transnational Human Rights and Environmental Litigation: A Study of Case Law Relating to Shell in Nigeria' (2019) Human Rights in the Extractive Industries, Interdisciplinary Studies in Human Rights 3. Springer Nature, Switzerland. https://doi.org/10.1007/978-3-030-11382-7_17

1.8.2 Analysis of the main legal issues in the litigations, how MNOCs and claimants exploit these key legal issues during litigations, and the aspects of the litigations that are similar or vary.

The core issue in all of the human rights and environmental litigations is the issue of liability of Shell companies for harm caused to local populations and the environment in connection with Shell's oil exploration and production operations in Nigeria. Reviews of these litigations have focused on different aspects of the litigations. For example, Enneking derived from the study some general observations relating to the opportunities and thresholds faced by victims seeking to initiate litigation against MNOCs in the countries where their parent countries are headquartered. [98]The thesis has analysed the main legal issues in the litigations and how they are either exploited by MNOCs to derail litigations or utilised by claimants to seek redress for harm suffered due to the operations of MNOCs and their subsidiaries. In addition, this thesis has identified the aspects in which the litigations are alike, aspects in which the litigations are not alike, and exceptions that could arise when applied in different jurisdictions.

1.8.3 MNOC's engagement with their human rights obligation during the litigations arising from the Niger Delta

Another contribution to knowledge is evaluating MNOC's level of engagement with their human rights and environmental obligations in the Niger Delta. The approach that MNOCs use to comply with their human rights obligations translates to different levels of engagement with stakeholders. For example, concerns regarding alleged human rights and environmental violations of MNOCs usually start with a notification, and then a formal complaint, which will result in litigation if handled improperly. The ways MNOCs handles the litigations reflects whether the company pursues an inactive, reactive, active or proactive level of engagement with its human right obligations.

Rob van Tulder initially proposed the different levels of engagement to explain his transition model, which identifies four stages in the process of sustainable development[99], and then

[98] Liesbeth Enneking, 'The Future of Foreign Direct Liability? Exploring the International Relevance of the Dutch Shell Nigeria Case', Utrecht Law Review 10 (2014) 44-54; see Enneking (n 97)
[99] Rob van Tulder and others, 'Managing the Transition To A Sustainable Enterprise: Lessons From Frontrunner Companies' (New York: Routledge, 2014). (Routledge 2014).

applied by Cee Van Dams to represent the transition phases that describe the grievance mechanisms and litigation of multinational companies during legal disputes.[100] This thesis adopted the different levels of engagement to show how companies can develop and evolve their human rights obligations in the future towards a proactive level of engagement. This thesis goes further to evaluate each level of engagement against a selected set of transnational human rights and environmental litigations from the Niger Delta. Apart from highlighting the actions of MNOCs during litigations which fall into each level of engagement, the thesis also discusses proactive steps that MNOCs can take to address derailments in human rights and environmental litigations and thereby promote human rights and the environment in the Niger Delta.

1.8.4 Mechanisms used by the MNOCs to derail human rights and environmental litigations arising from the Niger Delta

The MNOCs used several approaches to prevent victims from seeking justice for human rights and environmental violations. Skinner et al. discussed various legal and practical barriers to effective judicial remedies for victims of human rights and environmental violations and solutions to address these barriers.[101] This thesis has identified the mechanisms used by MNOCs to derail human rights and environmental litigations arising from the Niger Delta. The mechanisms identified include non-transparent provision of information, non-disclosure of evidence, bribery of witnesses to testify in litigations, victimization and restriction of employee's rights, threats and intimidation of witnesses, delay of litigation through avoiding service of process, motion to dismiss claims, and interlocutory appeals, disputing information that influences the cause of oil pollution, remediation for oil pollution, and compensation.

1.8.5 Legal framework for addressing the mechanisms used by MNOCs to derail litigations and the resultant conflicts with their human rights obligations

An important contribution of this thesis is developing a legal framework for addressing derailments in human rights and environmental litigations in the Niger delta. Several proposals

[100] Cees van Dam, 'Enhancing Human Rights Protection: A Company Lawyer's Business' (Rotterdam School of Management, Erasmus University, 2015) 36-39

[101] Skinner G and others, 'The Third Pillar: Access To Judicial Remedies For Human Rights Violations By Transnational Business' (The International Corporate Accountability Roundtable (ICAR), CORE, The European Coalition for Corporate Justice (ECCJ) 2013)

have been put forward to address victims' legal barriers to human rights and environmental violations. These proposals are in the form of recommendations for overcoming legal barriers faced by victims in bringing claims against MNOCs and their subsidiaries in different countries where their headquarters reside. The suggested proposals target specific legal barriers such as limited liability of parent corporations, lack of subject-matter jurisdiction and adoption of forum necessity. For example, Skinner et al. discuss the legal barriers related to the choice of law doctrine in different jurisdictions in the US, Europe, and Canada and how to overcome these barriers.

Skinner, Enneking, and Radu Mares have proposed various instruments for addressing the barriers faced by victims of human rights and environmental abuses during litigations. These are primarily legalistic in nature.[102] Some authors have suggested international frameworks, such as incorporating important international policy frameworks relating to the duties and responsibilities of states, such as the United Nations Guiding Principles in Human rights and the Organisation for Economic Co-operation and Development(OECD), be incorporated into domestic laws and legislation. However, these have often proved very difficult constitutional restrictions, and the governing structure in some countries requires a high threshold for approval and domestication of such international policy frameworks.

Another important distinction between our legal and other frameworks is the holistic nature of our framework, which also includes non-court resolution instruments. In short, it is a mix of constitutional, legislative, regulatory, and tort law (i.e., the tort of negligence, nuisance, trespass) components in such a legal framework for addressing the mechanisms used by MNOCs to derail human rights and environmental litigations arising from the Niger Delta. The legal framework comprises five instruments - constitutional, legislative, regulatory bodies, tort law and Alternative Dispute Resolution. These instruments can be used to address several areas of litigation to improve human rights and the environment. The legal framework proposed in this thesis contains various legal instruments that can be implemented in the host countries of the subsidiaries where the harm occurred.

[102] Skinner G, 'Expanding General Personal Jurisdiction Over Transnational Corporations For Federal Causes Of Action' [2017] SSRN Electronic Journal and Skinner G, 'Parent Company Accountability; Ensuring Justice for Human Right Violation' (2015).619-630; Cee Van, 'Enhancing Human Rights Protection: A Company Lawyer's Business' (Rotterdam School of Management Erasmus University 2017); Radu Mares, Responsibility to Respect: Why the Core Company Should Act When Affiliates Infringe Rights, in Radu Mares (ed.), The UN Guiding Principles on Business and Human Rights – Foundations and Implementation, (Martinus Nijhoff Publishers, Leiden, Boston 2012)

1.8.6 Recommendations for addressing the mechanisms used by MNOCs to derail litigations and the resultant conflicts with their human rights obligations

The thesis provides recommendations for addressing the mechanisms used by MNOCs to derail human rights and environmental litigations from the Niger Delta. The recommendations take into account the particular issues of the Niger Delta (e.g., environment and security) to overcome the mechanisms used by MNOCs to derail litigations and the resultant impacts on human rights and the environment.

Skinner et al. have made several recommendations to overcome the legal barriers that victims face in seeking a remedy for business-related human rights and environmental violations and offer solutions to those barriers.[103] The recommendations are general and target different jurisdictions such as the US, Europe and Canada, with examples of litigations drawn from various sectors of the economy, including IT, manufacturing, financial, military, etc.

This thesis focuses on human rights and environmental violations in the oil and gas industry, which have arisen in the Niger Delta, Nigeria. This scope is important for two reasons: Nigeria, particularly the Niger Delta, represents a developing country where there have been various allegations of human rights and environmental violations caused by subsidiaries of MNOCS that are based in developing countries. The second is that the litigations we have chosen represent typical examples of transnational litigations initiated against parent companies or its subsidiary in the country where the parent is located.

1.9 Organisation of the Thesis

The thesis will be organised into ten chapters, as summarised below. Chapter One - General Introduction introduces the thesis by setting out the background of the study, the research questions, research aim and objectives. Chapter two focuses on human rights and the environment. This chapter discusses the relationship between human rights and the

[103] Skinner and others (n 274). 65-158

environment, human rights and environmental rights at the national level and international levels, and the role of the government and international organisations in protecting human rights. Chapter three focuses on human rights and environmental violations by MNOCs in the Niger Delta. Chapter four discusses human rights and environmental litigations in Nigeria. Chapter five discusses human rights and environmental litigations in the US, UK (England) and the Netherlands. Chapter six is an analysis of human rights and environmental litigations arising from the Niger Delta. Chapter seven presents a legal framework for addressing derailment in human rights and environmental litigations in the Niger Delta. Chapter Eight concludes the thesis with recommendations.

Figure 1.4 shows how the thesis chapters are organised into three parts: Introduction, Problem and Solution. Part One – Introductory, covers the introductory aspects of the thesis, including the issues of human rights obligations of MNOCs operating in the Niger Delta. Part Two – Problem, discusses human rights and environmental litigations in Nigeria and abroad (England, Netherlands and US). Part Three – Solution, covers the recommendations (e.g., the proposed legal framework to address derailments in litigations) and conclusion.

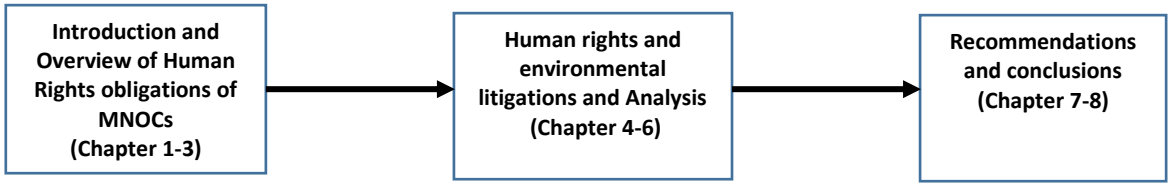

Figure 1.1 The flow of the thesis from introduction to problem and solution.

Chapter Two

HUMAN RIGHTS AND THE ENVIRONMENT

2.1 Introduction

There is a general acknowledgement that business organisations should include human rights, environment, and ethical standards as part of their broader social objectives, rather than strictly financial ones.[104] Human Rights are rights meant for human beings and for safeguarding their values. When the international Human Rights regime was set up, states were designated as the sole duty-bearers and the only subject that could violate international human rights law.[105] This has changed over time, and in recent times the subject of international human rights is deemed anyone who is the bearer of rights and duties in international law and is subject to the international legal order.[106] In short, it is no longer states that are responsible for respecting human rights but also non-state actors and business entities.[107]

There is a connection between human rights and the environment. This connection is anchored on the premise that businesses should have respect for human rights as an integral part of their obligations, especially to the local communities in which they operate. Although human rights have been gaining global importance, human rights and environmental issues have been neglected by businesses. Business entities have acknowledged their social responsibility and adopted Human Rights obligations without being aware of what they include. The adoption of several international Human Rights mechanisms (e.g., UN Guiding Principles of Business and Human Rights, UNGPs) and the increased focus on corporate respect for Human Rights have perfect timing to acknowledge the connection between them.

[104] Branko Korže, 'Obligations of the social market state and business entities according to the un guiding principles.' (2014) 11 International Journal of Business & Public Administration.1-22
[105] Florian Wettstein, 'Beyond Voluntariness, Beyond Human Rights: Making A Case for Human Rights and Justice' (2009) 114 Business and Society Review.
[106] Karin Buhmann, 'Corporate Social Responsibility: What Role For Law? Some Aspects Of Law And Human Rights' (2006) 6 Corporate Governance: The international journal of business in society.
[107] Karin Buhmann, 'Integrating Human Rights In Emerging Regulation Of Corporate Social Responsibility: The EU Case' (2011) 7 International Journal of Law in Context.

The involvement of multinational corporations in Human Rights and environmental violations obtains an international echo as they often reveal dramatic workers' conditions.[108] These cases are a testimony of how large multinational corporations are responsible for gross Human Rights and environmental violations occurring within countries characterised by weak legal systems.

Human rights and environmental violations by multinational corporations in the extractives industries are prevalent.[109] Extractive Industries have particularly come under increasing scrutiny in recent years due to the involvement of the government and the awareness created by the public and the NGOs.[110] A notable example is the case of the widely publicised Human Rights and environmental violations by Shell in Ogoni land and other parts of the Niger Delta of Nigeria.

The reason for the focus on Human Rights and environmental obligations of multinational oil companies in Nigeria derives from the activities of multinational companies (MNCs) operating in the extractive industries of the Nigerian economy, in particular in the oil and gas sector. It is a known fact that multinational oil companies have committed themselves as part of their Human Rights obligations to comply with domestic laws and obligations of the host countries where they are operating. However, MNOCs operating in Nigeria have been accused of environmental degradation and pollution by host communities. This has led to incessant conflicts between the MNOCs and the host communities (e.g., the Ijaws and the Ogonis), vandalization of infrastructure and kidnapping of oil workers and government officials.

This chapter aims to define Human Rights and environmental rights and highlight the connection between them concerning the activities of multinational oil companies in the Niger Delta. This chapter argues that MNOCs operating in Nigeria by their actions do not still see

[108] Several high-profile violations of human rights, especially labour rights have been reported to involve Nike in Asia, Zara in Brazil, Shell in Nigeria, Union Carbide in India and Yahoo in China.

[109] Jonathan Drimmer, 'Human Rights and The Extractive Industries: Litigation And Compliance Trends' (2010) 3 The Journal of World Energy Law & Business; See also Anna Grear, 'Penelope Simons And Audrey Macklin, The Governance Gap: Extractive Industries, Human Rights, And The Home State Advantage' (2015) 15 Human Rights Law Review; Isabel Feichtner, Markus Krajewski and Ricarda Roesch, 'Introduction', Human Rights In The Extractive Industries (Springer International Publishing 2019) <https://link-springer-com.ezproxy.rgu.ac.uk/content/pdf/10.1007/978-3-030-11382-7_1.pdf> accessed 10 September 2022; See John Gerard Ruggie, 'Business and Human Rights: The Evolving International Agenda' (2007) 101 American Journal of International Law.

[110] Ma Kalthum Ishak & Rohaida Nordin,'Responsibility of Oil and Gas (O&G) Companies to Protect Human Rights: The Case of Shell,' (2019) 9(2) International Journal of Asian Social Science, Asian Economic and Social Society. 240-247.

respect for human rights and the environment as an integral part of their human rights obligations. Instead, MNOCs see human rights obligations as social developments and philanthropy to local communities. This perspective is based on the notion that when MNOCs engage in public activities (e.g., provision of water, health care, and schools to communities), it improves their corporate reputation and legitimacy, as opposed to human and environmental rights, which are highly disputed and difficult to manage. In my view, if this perspective does not change, it will be very difficult, if not impossible, for Human Rights and environmental rights to improve in the Niger Delta.

The rest of the chapter is organised as follows: Section 2.2 and Section 2.3 discusses human rights and environmental rights, respectively. Section 2.4 discusses human rights regulation, including voluntary and mandatory approaches. Section 2.5 and Section 2.6 discusses the role of government and international agencies in protecting human rights and the environment. Section 2.7 discusses the implications of international human rights conventions on MNOCs. Section 2.8 summarises the chapter.

2.2 Human Rights

This section discusses human rights in general and the fundamental human rights under the United Nations and the Nigerian constitution.

2.2.1 Fundamental human rights under the United Nations

Human Rights are moral norms or values that define certain standards of human behaviour, which are routinely protected under international law as natural and legal rights.[111] The United Nations defines those norms as "the sum of individual and collective rights laid down in State constitutions and international law".[112] The United Nations also defines Human Rights as:

> Rights inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status. We are all

[111] James Nickel, 'Human Rights (Stanford Encyclopaedia of Philosophy)' (Plato.stanford.edu, 2014) <https://plato.stanford.edu/entries/rights-human/> accessed 5 October 2018.
[112] Nowak et al. (n 37)

equally entitled to our Human Rights without discrimination. These rights are all interrelated, interdependent and indivisible.[113]

Therefore, Human Rights are standards that help protect all citizens from serious political, legal, and social violations everywhere. They include rights that encompass religious freedoms, access to justice and a fair trial if faced with a criminal charge. Given that the right to life cannot be realised without basic rights to safe water, air and land, it makes perfect sense to link Human Rights to the environment.

The primary function of Human Rights norms, initially, was to protect individuals against abuse on their own or sometimes by other state entities. However, the emergent threats to individual rights are no longer limited to those arising from state actors, and we are now seeing those rights being infringed by international corporations, which are not subject to the established rules governing states. There is an obvious regulatory gap in international law to oversee non-state actors, including multinational corporations. Despite arguments that support the direct liability of corporations in areas such as international criminal law, the absence of available international regulations to govern the abuse of Human Rights by corporations results in wrongful activities being largely subject to national law. This implies relegating these breaches to the national courts for determination.[114]

International law includes regulating private persons and entities whose subsidiaries abroad have committed wrongful acts within the duties that states owe to the individuals (even though those were committed out within the jurisdictional territory of such a state).[115] Several Human Rights organisations, including the International Covenant on Civil and Political Rights (ICCPR)[116], the Committee on Economic, Social and Cultural Rights under the International Covenant on Economic, Social and Cultural Rights (ICESCR) and NGOs (e.g., Amnesty International) have stated that States have a duty to protect Human Rights and also regulate the

[113] United Nations, 'What Are Human Rights?' (Office of the United Nations High Commissioner for Human Rights (OHCHR) 2010) <https://www.ohchr.org/en/issues/pages/whatarehumanrights.aspx> accessed 1 July 2020.
[114] Olivier Salas-Fouksmann Corporate liability of energy/natural resource companies at national law for breach of international Human Rights norms 2013, 2(1), 201-229UCL Journal of Law and Jurisprudence
[115] Jägers (n 43); ICESCR (n 88)
[116] Human Rights Committee, General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 8, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004).

activities of non-state actors like powerful multinational companies. The (ICESCR), for example, has stated that States should take appropriate measures to prevent violations of Human Rights abroad by subsidiaries of parent companies headquartered in their jurisdiction.[117]

International law also recognises the need for victims of human rights abuses and environmental damages to have the right to access an effective remedy- including compensation and clean-up of the environment after an oil spill. This right has been reaffirmed by several United Nations bodies (e.g. UN Human Rights Communion and council and United Nations Guiding Principles on Business and Human Rights (UNGPs)) and regional organisations such as the African Commission on Human and Peoples' Rights[118] and the European Court of Human Rights. Therefore, the role of the State is two folds:

(i) the state has a duty to protect against violations of human rights and environmental damages

(ii) the state has a duty to ensure that victims of human rights and environmental damages have access to an effective remedy.

The United Nations General Assembly adopted an international document referred to as the Universal Declaration of Human Rights (UDHR), which enshrines the right and freedom of all human beings. The Declaration consists of 30 articles detailing an individual's "basic rights and fundamental freedoms" and affirming their universal character as inherent, inalienable, and applicable to all human beings. The General Assembly accepted it as Resolution 217 during its third session on 10 December 1948 at the Palais de Chaillot in Paris, France.

The right to life and its derivatives is the most important of these articles directly related to human rights and the environment. The right to life is stated in several declarations, including the Universal Declaration of Human Rights[119], the Rio Declaration[120], the International

[117] Committee on Economic, Social and Cultural Rights, Statement on the Obligations of States Parties Regarding the Corporate Sector and Economic, Social and Cultural Rights, 5, U.N. Doc. E/C.12/2011/1 (May 20, 2011).
[118]African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle C(a), available at https://www.achpr.org/public/Document/file/English/achpr33_guide_fair_trial_legal_assistance_2003_eng.pdf
[119] Universal Declaration of Human Rights, art. 25
[120] Rio Declaration, supra note 11.

Covenant on Civil and Political Rights[121], and regional human rights treaties (e.g., African Union, European Union)[122], including a right to "life." The right to life is taking on an environmental dimension in international laws and agreements.

The right to life is stated as follows in the following declarations:

Article 3 (UNHCR)

Everyone has the right to life, liberty and security of person

Article 6 (The International Covenant on Civil and Political Rights)

Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

Article 24 (African Charter on Human and Peoples' Rights)

All peoples shall have the right to a satisfactory general environment favourable to their development.

Article 6 protects against arbitrary deprivation of life, and imposes certain limits on capital punishment; "I and Article 7 prohibits torture, inhuman and degrading treatment or punishment, and medical or scientific experimentation without free consent. Article 7 stipulates for "safe and healthy working conditions" and for "rest, leisure and reasonable limitation of working hours and periodic holidays with pay."

[121] International Covenant on Civil and Political Rights, art. 6, supra note 5.
[122] African [Banjul] Charter on Human and Peoples' Rights, art. 4, supra note 12; American Convention on Human Rights, art. 4, supra note 8; Convention for the Protection of Human Rights and Fundamental Freedoms, art. 2, supra note 7.

Apart from the Universal Declaration of Human Rights[123], many other declarations, such as the Rio Declaration[124], the International Covenant on Civil and Political Rights[125], and regional human rights treaties[126], include a right to "life."

It is important to establish the connection between human rights and the issues of violations of human rights and the environment in the Niger Delta. The operations of MNOCS during oil exploration and production in the Niger Delta have caused harm (e.g., oil spills and gas flaring) to the environment. Also, in an attempt to stabilise the local population, MNOCs and their subsidiaries often resort to threats and intimidation of the local communities using government security forces and local militias. This approach creates a general atmosphere of insecurity, making it hard for local communities to enjoy human rights. As a result, it is difficult for people to enjoy and fully exercise their human rights, including the rights to life, health, food, water, and sanitation.

2.2.2 Fundamental human rights under the Nigerian constitution

The protection of human rights in any national constitution is a recognition and part fulfilment of the state's international obligation to take joint and separate action in cooperation with the UN for the achievement of universal respect for and observance of human rights and fundamental freedoms.

Chapter IV of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), devotes fourteen sections to these natural rights, which are in tandem with the provisions of international laws. The particular provisions of the constitutional right to the dignity of the human person, the right to freedom from discrimination and the right to acquisition and ownership of property anywhere in Nigeria.

The Constitution provides in section 34 for the guaranteed right of the dignity of the human person. Its subsection (a) specifically states, ‘No person shall be subjected to torture or inhuman and degrading treatment’. Its section 42 guarantees the right to freedom from discrimination,

[123] Universal Declaration of Human Rights, art. 25
[124] Rio Declaration, supra note 11.
[125] International Covenant on Civil and Political Rights, art. 6, supra note 5.
[126] African [Banjul] Charter on Human and Peoples' Rights, art. 4, supra note 12; American Convention on Human Rights, art. 4, supra note 8; Convention for the Protection of Human Rights and Fundamental Freedoms, art. 2, supra note 7.

and particularly states in subsection (1), 'A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion.

It is important to understand how these human rights and environmental rights fit into the argument that the operations of MNOCs have caused widespread violations of human rights and the environment in the oil spills in the Niger Delta. The term "human rights" implies entitlement in this context. [127]

Human rights and the environment are inextricably linked: a safe, clean, healthy, and sustainable environment is required to enjoy our human rights, whereas polluted, hazardous, or otherwise unhealthy environments will infringe on our human rights. These rights include but are not limited to the right to life, a healthy environment, food, and the right to work and earn a living. [128]

Environmental pollution (e.g., oil spills and gas flaring) has far-reaching socioeconomic and environmental consequences. They include biodiversity loss, aquatic ecosystem damage, air and water pollution, groundwater contamination, wildlife extinction, and cropland degradation, a vital source of economic and social existence for oil-producing communities in the Niger Delta of Nigeria.

The right to food is recognised under the International Covenant on Economic Social and Cultural Rights (ICESCR)[129], meaning that food must be available and accessible to citizens from productive land and natural resources.[130] Within the right to food, governments are required 'to protect and improve existing food sources, and should not allow food sources to be destroyed or contaminated by private persons or MNOCs, thereby preventing peoples' effort to feed themselves.

[127] Azubuike, S. I., & Songi, O. (2020). A Rights-based Approach to Oil Spill Investigations: A Case Study of the Bodo Community Oil Spill in Nigeria. Global Energy Law and Sustainability, 1(1), 28-54. https://doi.org/10.3366/gels.2020.0005

[128] Jack Donnelly, Universal Human Rights in Theory and Practice (3rd edn, Cornell University Press 2013) 7–8; see Nnamdi George Ikpeze, 'The Environment, Oil and Human Rights in Nigeria' (2011) 2 Nnamdi Azikiwe University Journal of International Law and Jurisprudence 88.

[129] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976)999 UNTS 3 (ICESCR) art 11.

[130] Commission on Economic, Social and Cultural Rights (CESCR), General Comment No 12 (1999) on the right to adequate food (Article 11 of the International Covenant on Economic, Social and Cultural Rights, E/C 12/1999/5), para 12.

The ICESCR provides for the right to gain a living through work.[131] The right to an adequate standard of living is also captured under Article 11 of the ICESCR and under Article 25 of the Universal Declaration of Human Rights (UDHR), where human right is associated with the right to food, housing, and health, and gaining a living by working.[132] Oil spill in the Niger Delta has resulted in increased degradation of the environment, occasioned food insecurity following the death of crops and fish, and impacted farmlands and rivers for fishing activities, thus resulting in the loss of livelihood.

Also recognised under the ICESCR is the right to health which includes the conditions of the right to a healthy environment. Article 16 of the ACHPR guarantees the right to health while also providing for the right to a clean and healthy environment under Article 24.[133] It has been observed that the pollution and environmental degradation of local communities in the Niger Delta, and indeed Ogoniland, made the living conditions of the people a nightmare.

Communities rely on polluted water from rivers, creeks, and streams for cooking, drinking, and bathing, exposing them to serious health risks. Pollution of the environment via gas flaring received judicial disapproval when a Federal High Court in Nigeria during the *Gbemre v. Shell* litigation held that gas flaring violated the constitutional right of local communities in the Niger Delta. The court further added that these communities have a right to life and dignity of the human person, which includes the right to a clean environment.

2.3 Environmental rights

Environmental rights are challenging to define because it has several components. These components include substantive rights (that is, the right to a healthy and clean environment), procedural rights (that is, the right to freedom of information and the right to participate in the decision-making process amongst others) and ecological rights (that is, rights of non-human species to survive).

[131] ICESCR Art 6.
[132] M Craven, 'The International Covenant on Economic, Social and Cultural Rights' (Oxford University Press, 1995) 293
[133] CESCR, General Comment No. 14 (2000) on the right to the highest attainable standard of health (Article 12 of the International Covenant on Economic, Social and Rights, E/C.12/2000/4), para 4.

The United Nations Environmental Programme (UNEP) refers to environmental rights as "any proclamation of a human right to environmental conditions of a specified quality". This means they are not abstract, distant, or irrelevant concepts, but rather measurable, visible, and functional aspects of society and its ecology. Several countries have included environmental rights in their constitutions. When environmental rights are violated, people's and the planet's health and well-being suffer.[134]

Environmental rights are an extension of the fundamental human rights that all people require and deserve. In addition to the right to food, clean water, adequate shelter, and education, the right to a safe and sustainable environment is critical because all other rights are dependent on it. The primary concern of environmental rights is to ensure that all of the inhabitants of the earth have access to this basic standard of living.[135]

2.3.1 Evolution of Environmental rights and its relationship with Human rights

Human Rights and the environment are intertwined; Human Rights cannot be enjoyed without a safe, clean and healthy environment; and sustainable environmental governance cannot exist without the establishment of and respect for Human Rights. Human Rights are also a relevant part of how corporate activities are conducted. For example, the environmental aspects of corporate activity may play out with such consequences as the pollution of waterways which then infringes on a community's right to enjoy clean and safe water.[136]

The evolution of environmental rights can be traced to the debate that has long existed regarding the relationship between human rights and environmental rights. Specifically, the debate centres on whether environmental rights should be treated separately or as a part of the wider field of human rights. Several scholars have studied the relationship between the

[134] United Nations Environment Program (UNEP), 'What are environmental rights' <https://www.unep.org/explore-topics/environmental-rights-and-governance/what-we-do/advancing-environmental-rights/what> access on February 21, 2023.
[135] Pachamama Alliance, 'Environmental Rights' <https://pachamama.org/environmental-rights> accessed in January 29, 2023.
[136] Australian Human Rights Commission Follow us on social media Twitter Follow Facebook Follow Youtube Follow, 'Human Rights& Human Rights (2008)' (Australian Human Rights Commission Follow us on social media Twitter Follow Facebook Follow Youtube Follow 2008) <https://humanrights.gov.au/our-work/corporate-social-responsibility-human-rights> accessed 28 June 2020.

environment and human rights, and this relationship has been a continuous debate. The core issue is that human rights tend to focus more on the protection and promotion of hum rights of persons or groups of persons and as a result, this may lead to a situation where the protection of the environment might either be ignored or hindered.[137] Also, it is a fact that human rights treaties do not explicitly protect the environment unless it is necessary for the fulfilment of human rights.

As a result of this, some scholars believe that environmental issues should be a part of human rights since the purpose the environmental protection is to enhance the quality of human rights. Environmental lawyers and scholars have argued that a human-centred, or anthropocentric, approach to the environmental risks reducing all environmental values to a purely instrumental use for humanity to improve the quality of human life. As a result of this somewhat utilitarian view of the environment, environmental concerns would be sacrificed on the altar of human rights.[138]

Some of the criticism regarding including environmental rights within human rights are as follows: Alston argues that including environmental protection in the human rights architecture will dilute the human rights regime.[139] Boyels opines that establishing links between human rights and the environment leads to a dangerous decoupling.[140]

Despite these criticisms, the right to a healthy environment has been recognised as the foundation for implementing or enforcing other fundamental human rights. In the international sphere, several notable developments have taken place to demonstrate that access to a clean and healthy environment is a universal human right. A good example is the decision of the International Court of Justice in Gabcikovo-Nagymaros is stated as follows:

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[137] A. Boyle, 'Human Rights or Environmental Rights? A reassessment' (2007) 18 Fordham Environmental Law Review 471; A. Boyle, 'Human Rights and the Environment: Where next?' (2012) 23 The European Journal of International Law 613; B. Lewis, 'Environmental Rights or a Right to the Environment: Exploring the Nexus between Human Rights and Environmental Protection' (2012) 8 Macquarie Journal of International and Comparative Environmental Law 36; T. Bulto, 'The Environment and Human Rights' in A. Mihr and M. Gibney (eds.) SAGE Handbook of Human Rights (SAGE: London, 2014) 1015.

[138] T. Bulto, 'The Environment and Human Rights' in A. Mihr and M. Gibney (eds.) SAGE Handbook of Human Rights (SAGE: London, 2014) 1015

[139] P. Alston 'Conjuring up New Human Rights: A Proposal for Quality Control' (1984) 78 American Journal of International Law 607.

[140] A. Boyle, 'Human Rights and the Environment: Where next?' (2012) 23 The European Journal of International Law 613

> *The protection of the environment is ... a vital part of contemporary human rights doctrine, for it is a sine qua non for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights that are spoken of in the Universal Declaration [of Human Rights] and other human rights instruments.*[141]

Also, the Ksentini report has provided a wide-ranging definition of environmental rights which incorporates various components as follows[142]:

> *freedom from pollution, environmental degradation and activities that adversely affect the environment, or threaten life, health, livelihood, well-being or sustainable development; protection and preservation of the air, soil, water, sea-ice, flora and fauna, and the essential processes and areas necessary to maintain biological diversity and ecosystems; the highest attainable standards of health; safe and healthy food, water and working environment; adequate housing, land tenure and living conditions in a secure, healthy and ecologically sound environment; ecologically sound access to nature and the conservation and the use of nature and natural resources; preservation of unique sites; and enjoyment of traditional life and subsistence for indigenous peoples.*

The evolution of environmental rights is similar to how the idea of environmental justice has evolved from its origins as an intra-national struggle sparked by the civil rights and environmental movements of the 1960s and 1970s, and it now refers to the relationship between governments and their citizens as well as corporate entities and stakeholders. Due to its compatibility with the current sustainable development paradigm, which is focused on environmental sustainability and public involvement in the development process, it has gained more appeal on a global scale.

Although the right to a healthy environment is mentioned in several international, regional, soft law, and national constitutions, in general, the right to a healthy environment or the protection

[141] A litigation regarding the Gabcikovo-Nagymaros Project, 1997, 91–92, cited in T. Bulto, 'The Environment and Human Rights' in A. Mihr and M. Gibney (eds.) SAGE Handbook of Human Rights (SAGE: London, 2014) 1018.
[142] Human Rights and the Environment: Final Report of Special Rapporteur Appointed by the Sub-commission on Prevention of Discrimination and Protection of Minorities (UN Doc E/CN.4/Sub.2/1994/9, 1994).

of the environment is not explicitly guaranteed by any international or multilateral treaties. International law, for instance, acknowledges the need to safeguard the planet's environment, including its natural resources - air, water, land, flora, and fauna - for both the present and the generations to come.

As a result, several regional and international treaties have been established to help achieve this goal as summarised below:

(i) The UNGA adopted a resolution in 1968 outlining the connection between the state of the human environment and the exercise of fundamental environmental rights.

(ii) The 1972 Stockholm Declaration, widely regarded as the first international articulation of an environmental right established a link between human rights and environmental protection. The Declaration states that 'both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of his basic rights - even the right to life itself'.

(iii) The African Charter on Human and People's Rights, drafted under the auspices of the Unity of the African Union (AU), includes substantive provisions for environmental rights. Article 24 provides that 'all peoples have the right to a general satisfactory environment favourable to their development'.

(iv) The United Nations Human Rights Commission proposes a more substantive formulation of environmental rights as captured below:

> all persons have the right to a secure, healthy and ecologically sound environment including that which is adequate to equitably meet the need of the present generations and at the same time does not impair the rights of future generations to equitably meet their needs[143]

(v) The Rio Declaration on the Environment and Development, issued by the Earth Summit in 1992, affirmed that states have the authority to exploit their resources. It also made states accountable for ensuring that activities within their jurisdiction do not harm the environment of other states.[144]

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[143] UN ESCOR Sub-Commission on Prevention of Discrimination and Protection of Minorities, ESC Res 1990/43, UN Doc E/CN 4/ 1990/94, 104

[144] Rio Declaration on Environment and Development [1992] UN Doc A/CONF.151/26. Available at: http://www.unep.org/ Documents.Multilingual/Default.asp? documentid¼478&articleid¼1163.

(vi) The Aarhus Convention, widely regarded as having global significance in its recognition of environmental rights, is the first multilateral environmental agreement, although it has been argued that it seems to only protects procedural rights and not substantive environmental rights.[145]

Regional and international treaties have tried to lay the foundation for substantive rights to a healthy environment at the global level. The legislative bodies in some countries have drafted constitutional and legislative provisions that are consistent with the internationally guaranteed rights to a healthy environment, impose the duty to prevent environmental harm, and protect the environment and natural resources. The legislative bodies of some countries have drafted constitutional and legislative provisions to align with the internationally guaranteed rights to a healthy environment, which imposes the duty to prevent environmental harm and protect the environment and natural resources.[146]

Anaebo and Ekhator have examined the provision of substantive rights to a healthy environment using South Africa and Nigeria as case studies. The authors conclude that while some countries like South Africa have expressly recognised the right to a healthy environment in their constitutions and subsidiary laws, others like Nigeria have relied on regional instruments and treaties to guarantee such rights, especially where domestic legislation is either lacking, inadequate or ineffective. The authors conclude that constitutionalising (rather than regionalising before a human rights commission or treaty) environmental rights domestically would improve environmental outcomes in Nigeria.[147]

Although the primary responsibility for upholding international Human Rights standards rests with national governments, there is an increasing recognition that companies must occupy a significant place among stakeholders.[148] Corporations have come to impact human life even more significantly in recent decades as they gain not just economic power but also political influence due to their growth and increased involvement in delivering services that were once upon a time provided by the state. Corporations have a significant impact on Human Rights.

[145] Aarhus Convention, Status of Ratifications in UN Treaties Database, Chapter 27: Environment.
[146] Dinah Shelton, Human Rights and the Environment: Substantive Rights, in research handbook on international environmental law (Malgosia Fitzmaurice, David M. Ong & Panos Merkouris eds., 2011).
[147] Anaebo OK and Ekhator EO, "Realising Substantive Rights to Healthy Environment in Nigeria" (2015) 17 Environmental Law Review 82
[148] Australian Human Rights Commission, 'Human Rights& Human Rights' (Australian Human Rights Commission 2018) <https://humanrights.gov.au/our-work/corporate-social-responsibility-human-rights> accessed 30 May 2020.

These impacts have increased in recent decades as corporations' economic power, and political influence has grown and as corporations have become more involved in providing services previously provided by governments.

Corporations also acknowledge their part in being socially responsible citizens and respecting the Human Rights of those who somehow come into contact with their business activity. This may be direct contact (e.g. staff or customers), or indirect contact (e.g. supplier's workers or people living in places impacted by the actions of a corporation). Companies often respond to the fact that many customers and investors expect companies to behave socially responsibly. The degree to which an organisation implements a robust Human Rights programme will affect customer and investor decisions.

The international community has made a considerable effort over the past decade in investigating and clarifying the links between corporations, Human Rights and environmental rights. Businesses, business associations, NGOs, intergovernmental associations and multi-stakeholder organisations have established a wide range of voluntary initiatives. Some examples of these initiatives include self-driven guidelines, codes of conduct, and measures for monitoring and reporting.

Hundreds of companies worldwide have publicly committed to upholding basic Human Rights principles through these initiatives. This is a mirror reflection of their increased awareness that the rights of their shareholders, staff, consumers and the society they work within must be simultaneously protected. By implementing these initiatives, hundreds of corporations have made a public commitment to the standards of Human Rights they undertake to uphold.

Some ready examples of these international standards and initiatives include:

- The ILO Tripartite Declaration on Fundamental Principles and Rights at Work
- The ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy
- The OECD Guidelines for Multinational Enterprises
- The United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises
- The Equator Principles
- The Voluntary Principles on Security and Human Rights
- The United Nations Global Compact

- The Business Leaders Initiative on Human Rights
- The Global Reporting Initiative

The United Nations is looking to fill this gap even more by expanding the available knowledge base on corporations and Human Rights. The United Nations named a Special Representative to the UN Secretary-General on business and Human Rights to "identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises concerning Human Rights."

2.3.2 Environmental rights under the United Nations

Environmental rights refer to any declaration of a human right to a certain level of environmental quality. Human rights and environmental protection are inextricably linked; human rights cannot be realised without a safe, clean, and healthy environment, and sustainable environmental governance cannot be achieved without establishing and respecting human rights. [149] Human rights and environmental protection are inextricably linked; human rights cannot be realised without a safe, clean, and healthy environment, and sustainable environmental governance cannot be achieved without establishing and respecting human rights.

Most people conceive of environmental rights in terms of the right to a healthy environment. The courts or authorities that recognise environmental rights do not always describe what we find as "environmental rights." Rather, environmental rights have frequently been created through imaginative interpretations of other widely recognised rights.

There are several recognised environmental human rights. Environmental rights are made up of substantive (or fundamental) rights and procedural rights (tools used to achieve substantial rights). Substantive rights include the right to a healthy environment and the right to water. Procedural rights include the right to information, the right to participate in environmental decision-making, and the right to access justice. Procedural rights assist in achieving

[149] UNEP, 'What Are Environmental Rights?' (UNEP 2021) <https://www.unep.org/explore-topics/environmental-rights-and-governance/what-we-do/advancing-environmental-rights/what> accessed 14 July 2021.

substantive rights. For example, it is difficult to defend the right to a healthy environment without access to information or participation in decision-making (which is a procedural right).

Environmental rights are determined by the constitution, court decisions, environmental laws(both in the home state and host state of MNOCs), as well as ratified human rights and environmental treaties entered into both at the international and national levels.

Environmental rights emerged later after the conventional human rights – civil, social, economic, and cultural rights held by human rights. The 1948 Universal Declaration of Human Rights[150], the 1966 International Covenant on Civil and Political Rights[151], and the International Covenant on Economic, Social, and Cultural Rights[152] do not include explicit environmental rights. Neither the 1950 European Convention on Human Rights[153] nor the 1969 American Convention on Human Rights[154] recognised explicit environmental rights. The main reason for this situation is that environmental issues were not on the international human rights agenda, or even particularly high on most national agendas, at the time those treaties were adopted.[155]

According to UNEP, environmental rights are composed of substantive rights (fundamental rights) and procedural rights (tools used to achieve substantial rights). We adopted the categorisation advanced by Kravchenko which divides environmental rights into three categories: explicit substantive environmental rights, environmental rights through creative judicial interpretation, and procedural rights.[156]

[150] Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (Dec. 10, 1948), available at http://www.un.org/en/documents/udhr/.
[151] International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, available at http://www2.ohchr.org/english/law/ccpr.htm.
[152] International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, 6 I.L.M. 360, available at http://www2.ohchr.orglenglish/law/cescr.htm.
[153] Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222, available at http://www.hri.org/docs/ECHR50.html.
[154] American Convention on Human Rights, Nov. 22, 1969, OAS Treaty Ser. No. 36, 1144 U.N.T.S. 123 (1978), available at http://www.hrcr.org/docs/American Convention/ oashr.html.
[155] Svitlana Kravchenko, 'Environmental Rights in International Law: Explicitly Recognized or Creatively Interpreted?' (2012) 7 Florida A & M University Law Review.
[156] ibid.

2.3.2.1 Explicit environmental rights

Explicit environmental rights have been included in several contemporary legal instruments. This section discusses explicit environmental rights related to a healthy environment and the right to water.

A. Right to Healthy Environment

Over the years, the right to a satisfactory, safe, or healthy environment has appeared in over one hundred national constitutions, international declarations, regional treaties or conventions, and international declarations.

The Stockholm Declaration, adopted at the United Nations Conference on the Human Environment in 1972, was the first attempt to codify a right to a safe environment in international law.[157] Again in 1992, the United Nations Conference on Environment and Development adopted the Rio Declaration, which defined the right as an "entitlement." "Human beings are at the centre of concerns for sustainable development," says Principle 1 of the Rio Declaration. Principle 1 of the Rio Declaration states, "Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature."[158]

The ratification of the African Charter on Human and Peoples' Rights marked the first explicit declaration of an environmental human right in a binding international treaty in 1981. Article 24 of the African Chaters states: "All peoples have the right to a generally suitable environment favourable to their development". The Social and Economic Rights Action Center v. Nigeria[159] litigation is a specific example of the application of the right to a healthy environment, even though it is stated as a collective right rather than an individual one. The Commission ruled that:

[157] Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration), U.N. Doc. A/Conf.48/14 2, 3 (1972), available at http://www.unep. org/Documents.Multilingual/Default.asp?documentid=97&articleid=1503.
[158] Rio Declaration on Environment and Development, U.N. Doc. A/Conf.151/26, 31 I.L.M. 874 (1992), available at http:/www.unep.org/Documents.Multilingual/Default.asp? documentid=78&articleid=1163.
[159] The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria, African Commission on Human and Peoples' Rights, Comm. No. 155/96 (2001), available at http://wwwl.umn.edu/humanrts/africa/comcases/155-96.html.

> The right to a general satisfactory environment, as guaranteed under Article 24 of the African Charter or the right to a healthy environment, as it is widely known, therefore imposes clear obligations upon a government. It requires the State to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and secure an ecologically sustainable development and use of natural resources.

The human rights and environmental violations in Ogoni and other communities in the Niger Delta due to oil operations of the MNOCs has gained international attention. Article 24 of the African Charter on Human and Peoples' Rights was determined to be violated by the Federal Republic of Nigeria, according to the African Commission.

The Aarhus Convention on Access to Information, Public Participation, and Access to Justice in Environmental Matters is another regional international convention that has come into force ("Aarhus Convention"). Both the Preamble and Article 1 of the convention states that "Every person" has the "right" to live in a "environment sufficient to his or her health and well-being".

B. Right to Water

The right to water has an explicit basis, although it has not been acknowledged in international human rights treaty bodies. Further steps in developing and promoting the existence of a human right to water began in 2006 when the United Nations Human Rights Council requested the Office of the United Nations High Commissioner for Human Rights ("OHCHR") to conduct a study on obligations related to equitable access to safe drinking water and sanitation under international human rights instruments. The OHCHR submitted its report in 2007 [160]. In 2008, the Human Rights Council asserted that various legal instruments "entail obligations in relation to access to safe drinking water and sanitation," and appointed an independent expert "to

[160] United Nations High Commissioner for Human Rights, Annual Report, U.N. Doc. A/HRC/6/3 (Aug. 16, 2007), available at http://www2.ohchr.orglenglish/issues/water/iexpert/ docs/A-CHR-6-3_August07.pdf

identify, promote and exchange views on best practices related to access to safe drinking water and sanitation."[161]

"This means that for the United Nations, the right to water and sanitation is enshrined in existing human rights treaties and is therefore legally binding," says Dr. Catarina de Albuquerque, the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation. Article 12 of the International Covenant on Economic, Social, and Cultural Rights states that everyone has the right to a decent standard of living.[162]

2.3.2.2 Environmental Rights through Creative Judicial Interpretation

In recent years, there have been innovative interpretations of existing fundamental rights to achieve environmental goals and explicit environmental rights in international law. The two most prominent institutions involved in the interpretation of existing fundamental rights are the European Court of Human Rights (ECHR)and the Inter-American Court of Human Rights. For example, the ECHR is an international court of the Council of Europe that interprets the European Convention on Human Rights.[163] The court hears claims that a contracting state has violated one or more of the human rights set out in the Convention or its optional protocols, to which a member state is a party.

The European Court of Human Rights began deriving environmental rights from other, more traditional fundamental rights in the 1990s, such as the right to privacy and family life, the right to knowledge, and the right to life. In particular, infringement of Articles 2 and 8 of the European Convention on Human Rights - the right to life and the right to respect for private and family life, respectively - have been recognised by the Court's jurisprudence.[164] Also, the

[161] United Nations Human Rights Council Res. 7/22, Human rights and access to safe drinking water and sanitation (Mar. 28, 2008), available at http://ap.ohchr.org/documents/ E/HRC/resolutions/AHRCRES_7_22.pdf.
[162] Inga T Winkler, 'The Human Right To Sanitation' (2015) 37 University of Pennsylvania Journal of International Law.
[163] The ECHR hears applications alleging that a contracting state has breached one or more of the human rights enumerated in the Convention or its optional protocols to which a member state is a party.
[164] European Court of Human Rights, 'Guide On Article 8 Of The European Convention On Human Rights' (Council of Europe/European Court of Human Rights, 2021 2021) <https://www.echr.coe.int/documents/guide_art_8_eng.pdf> accessed 26 June 2022.

Inter-American Court of Human Rights has given a new meaning to the term "property" in order to help indigenous people.

The European Court of Human Rights has been asked to expand its environmental case law because the exercise of certain rights in the European Convention on Human Rights may be harmed by environmental harm or exposure to environmental risks.[165] There is evidence that the absence of express substantive environmental rights in a treaty is no obstacle to justice in environmental matters by a range of inventive judicial interpretations in recent years.

The ECHR has ruled on several litigations related to rights to life, the right to private and family life, and the right to property. One notable example is the *Oneryildiz v. Turkey* [166] litigation, where the European Court of Human Rights interpreted Article 2 of the European Convention on Human Rights in an environmental dispute, including an obvious loss of life. In this case, the applicant claimed that the relevant authorities were negligent when a methane gas explosion occurred at a poorly planned and maintained solid waste landfill, killing nine members of his family. The explosion buried eight homes, including the applicant's and his family's home. According to a report prepared by an expert committee, the waste-collection location in question violated Turkey's Environment Act and Solid-Waste Control Regulation, posing a health risk to humans and animals. According to a report prepared by an expert committee, the waste-collection location in question violated Turkey's Environment Act and Solid-Waste Control Regulation, and no precautions were taken to prevent a possible methane gas explosion from the landfill, and as a result, an explosion happened. The European Court of Human Rights ruled that this was in breach of the right to life as contained in Article 2.[167]

In the Lopez Ostra v. Spain[168] litigation, the Court held that there had, indeed, been a breach of Article 8 of the Convention and ordered the respondent government of Spain to pay compensation to the applicant for damages due to the release of gas fumes, pestilential smells,

[165] European Court of Human Rights, 'Environment And The European Convention On Human Rights' (European Court of Human Rights 2021) <https://www.echr.coe.int/documents/fs_environment_eng.pdf> accessed 16 July 2021. ; European Court of Human Rights, 'Guide to the Case-Law of the European Court of Human Rights – Environment', European Court of Human Rights, 2021; See European Court of Human Rights, 'Manual on human rights and the environment', Strasbourg, Council of Europe Publishing, 2nd edition, 2012.
[166] Oneryildiz v. Turkey, 2004-XII Eur. Ct. H.R. 79.
[167] European Court of Human Rights, 'Environment And The European Convention On Human Rights' (European Court of Human Rights 2022) <https://www.echr.coe.int/documents/fs_environment_eng.pdf> accessed 26 June 2022.
[168] L6pez Ostra v. Spain, 303 Eur. Ct. H.R. 41, $1 6, 7 (1994).

and contamination into the atmosphere by the company's malfunctioned infrastructure.[169] In another case related to the right to property, the Inter-American Court of Human Rights ruled in the Awas Tingni litigation that Nicaragua violated an indigenous community's rights to "property" under Article 21 of the American Convention on Human Rights, even though the community did not have a formal title.[170]

2.3.2.3 Procedural Rights

Procedural rights are instruments used to achieve substantial rights. Environmental procedural rights related to access to information, participation, and justice are becoming more widely recognised in international soft law as well as treaties and conventions. Environmental procedural rights were enshrined in the Rio Declaration's Principle 10 in 1992 as follows[171]:

> Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

Many Multilateral Environmental Agreements ("MEAs") signed after 1992 provide procedural environmental rights. These include the Convention on the Transboundary Effects of Industrial Accidents (1992), the United Nations Framework Convention on Climate Change (1992), the Rotterdam Convention on the Prior informed Consent Procedure for Certain Hazardous

[169] L6pez Ostra v. Spain, 303 Eur. Ct. H.R. 41, $1 6, 7 (1994).
[170] Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Judgment of Inter-Am. Ct. H.R. (Aug. 31, 2001), available at http://www.law.arizona.eduldepts/iplp/international/ awastingni/documents/IACtHR-ATJudgmentAug3101.pdf.
[171] United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, Rio Declaration on Environment and Development, Principle 5, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), Annex I (Aug. 12, 1992).

Chemicals and Pesticides in International Trade (1998), and the Stockholm Convention on Persistent Organic Pollutants (2001), among others.

The Aarhus Convention, signed in 1998, is the most extensive of these treaties as it ensures access to information, public participation in decision-making, and access to justice in most of the countries in Europe, the Caucasus, and Central Asia.[172] The Aarhus Convention establishes a Compliance Committee, whose decisions (together with those of the periodical Meetings of the Parties ("MOPs") contribute to the development of international law. Environmental procedural rights are enforced by the Committee, which provides direction through authoritative interpretations of the Convention in its jurisprudence. It also supports the improvement of national laws and practices.

A. Right of Freedom of Information

The idea of the right to freedom of information began at the national level. Such a right was enacted in Sweden over 200 years ago. Over 100 years ago, similar laws were adopted in U.S. states. In recent years, many other countries have also adopted national legislation guaranteeing "access to information" or "freedom of information." Over 200 years ago, Sweden enacted such a right. Similar regulations were enacted in the United States over a century ago. Many additional countries have passed national legislation ensuring "access to information" or "information freedom" in recent years.

The concept of a right to information freedom emerged at the national level. More than a hundred countries have enacted some type of freedom of information law.[173] The Freedom of the Press Act of 1766 in Sweden is the world's oldest.[174]

The Aarhus Convention compels nations that have ratified it to modify their national legislation and policies in a variety of ways, including establishing a right to acquire environmental information without requiring the requester to have a specific interest or purpose for doing so,

[172] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention), June 25, 1998, 2161 U.N.T.S. 447, available at http://www.unece.org/environmental-policy/treaties/publicparticipation/aarhus-convention.html; See Marc Pallemaerts, The Human Right to a Healthy Environment as a Substantive Right, in Human Rights and The Environment 18 (Maguelonne D6jeant-Pons & Marc Pallemaerts (2002)).
[173] Right2INFO.org, 'access To Information Laws: Overview And Statutory Goals' (Right2INFOorg 2021) <https://www.right2info.org/access-to-information-laws/access-to-information-laws> accessed 15 July 2021.
[174] Juha Mustonen, The World's First Freedom Of Information Act (Anders Chydenius Foundation 2006).

and environmental information must also be actively collected and disseminated by public entities.[175]

B. Right to Participate

Another related procedural right is the right to participate. This is guaranteed in the Aarhus Convention because it provides the public with the ability to participate in a wide range of choices that could have an impact on the environment. For example, members of the public (local residents, NGOs, educational institutions) who are likely to be affected or have an "interest" must be informed "either by public notice or individually... early in an environmental decision-making procedure, and in an adequate, timely, and effective manner," according to the law. Furthermore, non-governmental environmental organisations must be notified without the requirement to demonstrate a special interest or negative consequences.[176]

C. Right of Access to Justice

By establishing the ability to seek review proceedings in a court or other independent and impartial authority, the Aarhus Convention ensures the enforcement of the rights to knowledge and participation. "Anyone who believes that his or her request for information has been disregarded, improperly denied, or insufficiently replied". When all choices are open and effective public participation may take place, and public authorities shall offer for early public participation." The convention allows the public to participate not just in projects but also in plans, programmes, policies, and executive orders.[177]

2.3.3 Environmental rights under the Nigerian constitution

Constitutional provisions provide citizens with broad and effective instruments for preserving their rights. A variety of clauses in the constitution can be used to create and enforce legal rights. With increased environmental awareness in recent decades, the environment has risen in international importance, and many constitutions now expressly provide a right to a healthy

[175] Aarhus Convention, supra note 99, art. 5.
[176] Aarhus Convention, supra note 99, art. 6.
[177] Aarhus Convention, supra note 99, art. 7, 8.

environment, as well as procedural rights to execute and enforce the substantive rights granted. The section that follows discusses the provision of environmental rights in the Nigerian constitution and the justiciability and enforcement of environmental rights in Nigeria.

2.3.3.1 Provision of Environmental rights in the Nigerian constitution

Until the 1999 Constitution, Nigerian constitutions did not include provisions for environmental preservation. While the 1999 Constitution addressed the environment, it did not specifically address environmental protection. Environmental rights are recognised as fundamental human rights in the Nigerian constitution, and its provisions can be found in several sections of the constitution. Section 20 of the Nigerian constitution, for example, states that it is the state's responsibility to protect and improve the environment, as well as to safeguard the water, air, land, forest, and wildlife.[178] Similarly, Section 33 of the constitution recognises the right to life, which includes the right to a healthy environment, and Section 34 protects citizens from pollution and degradation of the environment[179] (Babalola, 2020).

Section 20 of the Constitution provides that:

> The state shall protect and improve the environment and safeguard the water, air and land, forest and wildlife of Nigeria.

Section 20 of the Constitution is one of the "Fundamental Objectives and Directive Principles of State Policy" listed in Chapter II of the Constitution. This adds a new dimension to state duty by requiring the government to maintain and develop the environment for the greater good of society. In Nigeria, it lays the groundwork for environmental regulation and government accountability.[180]

Section 13 of chapter II states as follows:

[178] Atsegbua, Lawrence Asekome, 'Environmental law in Nigeria: theory and practic' (2004) Ababa Press, 20.
[179] Babalola, A. 'The Right to a Clean Environment in Nigeria: A Fundamental Right' (2020) 26 Hastings Environmental Law Journal 3-14.
[180] Emejuru, C, 'Human Rights And Environment: Whither Nigeria?' (2015) 35 Journal of Law, Policy and Globalization

> It shall be the duty and responsibility of all organs of government, and of all authorities and persons, exercising legislative, executive or judicial powers, to conform to, observe and apply the provisions of this chapter of this Constitution.

Section 17(1)(d) of the Constitution seems to further support Section 20. It states as follows:

> In furtherance of the social order – exploitation of human or natural resources in any form whatsoever for reasons, other than the good of the community, shall be prevented.

Section 6(6)(c) on the other hand, nullifies or impairs the legal validity of sections 20 and 24(d) and (e), respectively. As a result, the legal value of core state policy objectives and directive principles is nullified. It makes it extremely difficult to implement the government's fundamental obligations, as set forth in Section 13 of the Constitution.[181] According to Abdulkardir, the provision of section 6(6)(c) acts as an exclusion clause, removing the court's jurisdiction over the justiciability of section 20 and negating the National Policy on Environment's purpose of protecting and conserving water, air, land, and natural resources.[182]

Section 6(6)(c) provides that:

> The judicial powers vested in accordance with the foregoing provision of this Section shall not, except as otherwise provided by this constitution, extend to any issue or question as to whether any Act or omission by any authority or Person or as to whether any Law or any Judicial Decision is in Conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution

Even with the exclusion clause of Section 6(6)(c), there are alternative ways for citizens to secure the protection of the environment, seek environmental justice and protect their right to

[181] Emejuru (n 180) 3-5.
[182] Abdulkadir Bolaji Abdulkadir Bolaji Abdulkadir, 'The Right to A Healthful Environment In Nigeria: A Review Of Alternative Pathways To Environmental Justice In Nigeria' (2014) 3 Afe Babalola University: Journal Of Sustainable Development Law And Policy 2-6

a healthful environment. These include the African Charter on Human and Peoples' Rights and the provisions of chapter four of the Nigerian Constitution.

The African Union (formerly, the Organization for African Unity (OAU)) adopted the Africa Charter on Human and Peoples' Rights on January 19, 1981.[183] Following its acceptance and domestication as the Africa Charter on Human and Peoples' Rights (Application and Enforcement) Act Cap 10, Laws of Federation of Nigeria 1990, the Charter became part of Nigerian law.[184] With the adoption and integration of the Charter into Nigerian law, it became an integral element of the Nigerian legal system, with the full force of law and a mechanism for execution.

It is important to note that section 6(6)(c) of the Constitution only expressly limits the court's competence to issues enumerated in the Chapter for Fundamental Objectives and Directive Principles of State Policy, and so there is no issue of incompatibility or inconsistency of the African Charter with the Constitution. The provision of section 6(6)(c) has no reference to any other legislation, and so cannot invalidate the Charter's justiciable provisions. As a result of the Charter's provisions being enacted into law by an Act of the National Assembly, anyone can file a complaint with the Nigerian courts alleging a breach of the Charter.

2.3.3.2 Justiciability and Enforceability of Environmental rights in Nigeria

Despite the provisions of environmental rights in the Nigerian constitution, enforcing environmental rights in Nigeria has proven to be difficult. One of the most difficult issues has been the issue of locus standi, or the legal capacity to bring a case to court. Previously, only individuals who could demonstrate direct harm or injury as a result of environmental pollution could bring a case to court. As a result, there has been a debate as to whether the right to the environment is enforceable and justiciable in Nigeria. Some scholars including Atsegbua et

[183] African [Banjul] Charter on Human and Peoples' Rights, June 27, 1981, O.A.U. Doc. CABILEG/67/3 rev. 5, 21 I.L.M. 58, available at http://www.africa-union.org/official documents/treaties_%20conventions_%20protocols/banjul%20charter.pdf.

[184] Edwin Egede, 'Bringing Human Rights Home: An Examination Of The Domestication Of Human Rights Treaties In Nigeria' (2007) 51 Journal of African Law; see O. V. C Okene and B. C Eddie-Amadi, 'Bringing Rights Home: The Status Of International Legal Instruments In Nigerian Domestic Law' (2010) 3 Journal of African and international law.

al[185] and Ogbodo[186] have argued that the right to the environment is neither justiciable nor enforceable under the Nigerian constitution.

Ogbodo believes that the Nigerian Constitution lacks the necessary constitutional efficacy in environmental protection. He argues that the relevant provision falls under chapter II of the Constitution (that is, the Fundamental Objectives and Directive Principles), which is non-justiciable; consequently, the provision lacks judicial enforcement.

As a result, he recommends that the Chapter II provision of the Constitution on environmental protection be interpreted as justiciable by the courts for individuals and environmental Non-Governmental Organizations (NGOs) to participate in environmental enforcement.[187] Atsegbua et al argue that the African Charter is an ineffective tool for promoting environmental rights in Nigeria and that constitutionalizing environmental rights is a better option.[188]

Some scholars including Ekhator[189], Anaebo and Ekhator[190], Etemire[191] Amechi[192], Amechi and Ako et al[193] have argued persuasively that the right to the environment is enforceable and justiciable in Nigeria based on the domestication of the African Charter on Human and Peoples Rights and enforceable human rights in the constitution; the right to the environment can be enforced in Nigeria. Ekhator argues for the constitutionalisation of environmental rights in Nigeria. According to Ekhator, environmental rights can be constitutionalized in Nigeria by amending the constitution to include a justiciable right to a healthy environment or by

[185] Atsegbua, L. Asekome and others, 'Environmental Law in Nigeria: Theory and Practice' (2004) *Environmental law in Nigeria: theory and practice*. Ababa Press 131
[186] Ogbodo S. Gozie, 'Environmental Protection in Nigeria: Two Decades after the Koko Incident' (2009) 15(1) Annual Survey of International and Comparative Law 1.
[187] Ogbodo (n 186) 8.
[188] Atsegbua et al (n 177) 143.
[189] Ekhator, E.O., 'Regulating the activities of oil multinationals in Nigeria: a case for self-regulation?' (2016) 60(1) Journal of African Law 1-28.
[190] Anaebo, O.K. and Ekhator, E.O., 'Realising substantive rights to healthy environment in Nigeria: A case for constitutionalisation' (2015) 17(2) Environmental Law Review 82-99
[191] Etemire, U., 2021. The Future of Climate Change Litigation in Nigeria: COPW v NNPC in the Spotlight. CCLR, p.158-170
[192] Amechi, Emeka P., Uzuazo Etemire, and Agent Ihua-Maduenyi. 2021. "Access to Justice through Environmental Public Interest Litigation: Exploring Contemporary Trends in Nigeria." VRÜ Verfassung und Recht in Übersee 54 (3): 398-414
[193] Ako, R., Stewart, N. and Ekhator, E.O., 2016. Overcoming the (non) justiciable Conundrum: The Doctrine of Harmonious Construction and the Interpretation of the Right to a Healthy Environment in Nigeria. In Justiciability of Human Rights Law in Domestic Jurisdictions (pp. 123-141). Springer, Cham.

broadening the scope of the existing justiciable rights embedded in the constitution to include the right to a healthy environment.

In 2005, a Nigerian national court in the *Gbemre v. Shell* litigation upheld the African right to a healthy environment. The use of "gas flaring" by SPDC (Shell's subsidiary in Nigeria) in its production activities was found to be in breach of the fundamental right to life, including a healthy environment, by the Federal High Court of Nigeria in Benin. The court did so in part by relying on Article 24 of the African Charter on Human and Peoples' Rights, as well as other sections. The court ordered the respondents to take immediate action to prevent any more gas flaring in the applicant's neighbourhood.[194]

The *Gbemre v. Shell* litigation is widely seen as a precedent-setting case in Nigeria, as the first judicial authority to declare that environmental pollution (that is, gas flaring) is illegal, unconstitutional, and a breach of the fundamental human right to life. This litigation demonstrates that environmental issues can be brought under the umbrella of human rights and that the right to life can be broadened in a broader context to encompass the right to a healthy environment.

Recently, the Supreme Court unanimously granted the appeal in favour of the appellant in the *Centre for Oil Pollution Watch v. Nigerian National Petroleum Corporation* litigation.[195] The Supreme Court made significant progress in confirming the existence and enforceability of environmental human rights under the Nigerian Constitution, by allowing public interest litigation. The ruling is summarised below:

(i) The Supreme Court ruled that Section 20 of the Nigerian Constitution, which requires the state to protect the environment, is justiciable when read in conjunction with, and in the context of, a provision like Section 4(2) of the Constitution, which grants the power to make laws to carry out Section 20.

(ii) The Supreme Court explicitly recognised that Section 33 of the Constitution, which guarantees the Right to Life, implicitly includes and constitutes a fundamental right to a clean and healthy environment for all.

[194] Kravchenko (n 155); See Kaniye S.A. Ebeku, 'Constitutional Right to A Healthy Environment And Human Rights Approaches To Environmental Protection In Nigeria: Gbemre V. Shell Revisited' (2008) 16 Review of European Community & International Environmental Law.

[195] See Section 4.6, Chapter 4 of the Thesis for analysis of the *Centre for Oil Pollution Watch v. Nigerian National Petroleum Corporation [2019] 5 NWLR 518*.

(iii) The Supreme Court explicitly affirmed the enforceability of Article 24 of the African Charter on Human and Peoples' Rights, as domesticated in Nigeria by the African Charter Act, Cap. A9 LFN 2004.

Based on an analysis of the implications of the judgement in the *Centre for Oil Pollution Watch v. NNPC* litigation, several authors, including including Ekhator[196], Oamen and Erhagbe[197](2021), Olatunbosun and Onu[198], Babalola[199], and Etemire[200], concluded that environmental rights are now justiciable and enforceable in Nigeria. The Nigerian Supreme Court's decision in *Centre for Oil Pollution Watch v. Nigerian National Petroleum Corporation (NNPC)* liberalised the rules on locus standi, allowing individuals and groups with a sufficient interest in environmental issues to bring environmental cases to court[201].

2.4 Regulation of Human Rights

According to the Merriam-Webster Dictionary, 'regulation' refers to 'an official rule or law that says how something should be done' or 'the act of regulating something'.[202] The dictionary and legal sense in which the word is used are not different. Osuji states that regulation is a method of stipulating responsibility by indicating the existence and sanctions for breach of

[196] Eghosa Ekhator, 'Sustainable Development and the African Union Legal Order' in Femi Amao, Michele Olivier, and Konstantinos Magliveras (eds.) The Emergent African Union Law: Conceptualization, Delimitation, and Application (Oxford University Press 2021)
[197] Oamen, P.E. and Erhagbe, E.O., 'The impact of climate change on economic and social rights realisation in Nigeria: International cooperation and assistance to the rescue?' 21(2) African Human Rights Law Journal 1080-1111.
[198] Olatunbosun, A. and Onu, K.O.N. 'The liberalisation of Locus Standi in Environmental cases in Nigeria: An appraisal of the Supreme Court's decision in centre for oil pollution watch v NNPC' (2020) 11(2) The Gravitas Review of Business & Property Law 1–11
[199] Babalola, A, 'The Right to a Clean Environment in Nigeria: A Fundamental Right' (2020) 26 Hastings Environmental Law Journal 3–14
[200] Etemire, U, 'The Future of Climate Change Litigation in Nigeria: COPW v NNPC in the Spotlight' (2021) CCLR 158
[201] Olatunbosun, A. and Onu, K.O.N. 'The liberalisation of Locus Standi in Environmental cases in Nigeria: An appraisal of the Supreme Court's decision in centre for oil pollution watch v NNPC' (2020) 11(2) The Gravitas Review of Business & Property Law 1–11; Miriam C. Anozie, and Emmanuel O. Wingate. "NGO standing in petroleum pollution litigation in Nigeria—Centre for Oil Pollution Watch v Nigerian National Petroleum Corporation." The Journal of World Energy Law & Business 13, no. 5-6 (2020): 490-497
[202] See the Merriam-Webster Online Dictionary meaning of 'regulation': <http://www.merriamwebster.com/dictionary/regulation> accessed 27 June 2016

rules.[203] The Organisation for Economic Cooperation and Development (OECD) defines "regulation" as the "imposition of rules by the government, backed using penalties that are intended specifically to modify the economic behaviour of individuals and firms in the private sector".[204] The latter definitions presume the presence of sanctions for not complying with regulations, which is the direction that this study will focus on because it identifies the presence of the rules simplicities. The two types of approaches to Human Rights regulation- voluntary approach and mandatory approach, are summarised below:

2.4.1 Voluntary Approach to Human Rights Regulation

The idea of a voluntary approach to Human Rights refers to the prerogative of companies to fashion a set of rules themselves or adopting one already developed voluntarily. Self-regulation is considered a solution in the context of weak legal and regulatory frameworks.[205] It occurs when companies adopt corporate codes of conduct (CoC) which include principles, norms and values that guide the policies and practices of an enterprise, its employees and, in some cases, other stakeholders (e.g. suppliers, employees and contractors). CoCs also cover several issues, including Human Rights, the environment and ethical conduct. CoCs also serve as a means of communication of company policy to stakeholders and the public.[206] The two types of CoCs are - internal CoC, which the companies themselves develop, and external CoC, which is developed by external parties.

(i) Internal codes of conduct

These are CoC developed by companies and are the most common form of self-regulation. They usually express the company's vision and mission in concern. Enterprises that have CoCs

[203] Onyeka Osuji, 'Fluidity of Regulation-Human Rights Nexus: The Multinational Corporate Corruption Example' (2011) 103 Journal of Business Ethics 31, 46.
[204] This is the definition of 'regulation' in the Glossary of Statistical Terms on the OECD website: <https://stats.oecd.org/glossary/detail.asp?ID=3295> accessed 8 December 2015.
[205] Cragg, Wesley, 'Human Rights and Business Ethics: Fashioning a New Social Contract' (2000) 27 (2) Journal *of Business Ethics* 205-214
[206] Eweje, Gabriel, 'Environmental Costs and Responsibilities Resulting from Oil Exploitation in Developing Countries: The Case of the Niger Delta' (2006) 69 *Journal of Business Ethics,* 27-56

say they are committed to specific moral and ethical values. CoCs, at the same time, describe the nature and limits of those obligations. CoCs can be produced from domestic or host country laws and regulations and international standards and best practices.[207] They may be present in one document, multiple documents, or even on companies' websites.

(ii) External codes of conduct

These are specific to professional associations or industries, intergovernmental codes (e.g., such as OECD Guidelines for Multinational Enterprises, EU Codes of Conduct), NGO codes (e.g., Global Reporting Initiative (GRI)) and multi-stakeholder initiatives (e.g., Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (MNE Declaration)). Like internal Human Rights obligations, they do not cover all areas of business operations, but they complement and guide internal Human Rights obligations.[208]

2.4.2 Mandatory Approach to Human Rights Regulation

The mandatory approach to Human Rights involves respecting the legal and regulatory framework concerning their activities. The frequent occurrence of corporate imprudence - especially when it has global consequences - has made the legal maxim ubi jus, ibiremedium[209] appealing to advocates demanding a mandatory approach to Human Rights regulation of business. Two types of legal regulation apply to Human Rights- soft law and hard law. The term soft law is used to denote agreements, principles and declarations that are not legally binding. Soft law instruments are predominantly found in the international sphere. UN General Assembly resolutions are an example of soft law. Hard law generally refers to legal obligations that are binding on the parties involved and which can be legally enforced before a court.[210]

[207]Peter T. Muchlinski, 'Human Rights and Multinationals: Is There a Problem?' (2001) 77 International Affairs 31-47

[208]Peter Utting, 'Corporate Responsibility and the Movement of Business' (2005) 15 Development in Practice 375-388.

[209] ubi jus, ibiremedium The principle that where one's right is invaded or destroyed, the law gives a remedy to protect it or damages for its loss. Further, where one's right is denied the law affords the remedy of an action for its enforcement.

[210]'Hard Law / Soft Law' (Ecchr.eu, 2020) <https://www.ecchr.eu/en/glossary/hard-law-soft-law/> accessed 9 March 2020.

The development of hard law regarding Human Rights regulation is much recent, and national laws seem to have taken the lead in this respect (e.g., Section 172 of the UK Companies Act 2006 in the UK and the Oil Pipelines Act, 1990 in Nigeria).

2.5 The Role of Government in protecting Human Rights and the environment

Government interest in Human Rights issues takes many forms. Some governments including their parliaments have issued Human Rights guidance and play a wide range of partnering, facilitating, and profiling roles. On March 13, 2007, the European Parliament adopted a resolution on Human Rights in which it expressed the view that "increasing social and environmental responsibility by business, linked to the principle of corporate accountability, represents an essential element of the European social model…"[211]

In the US, Human Rights related regulations include the U.S. Federal Acquisition Regulation anti-human trafficking provisions which prohibit specified human trafficking conduct in connection with U.S. federal contracts and, under certain circumstances, require a compliance plan to be adopted and certifications to be provided[212] and the U.S. Trade Facilitation and Trade Enforcement Act has repealed the "consumptive demand exception" to the Tariff Act to address the exception that allowed the importation into the United States of goods made using forced labour.[213]

In the UK, Human Rights related regulations include the U.K. Modern Slavery Act which requires subject companies to annually prepare a slavery and human trafficking statement that indicates the steps taken to ensure that modern slavery is not occurring in the supply chain or business.[214] Specifically, The Modern Slavery Act 2015 (Transparency in Supply Chains)

[211] International Institute for Sustainable Development, 'Corporate Social Responsibility An Implementation Guide For Business' (International Institute for Sustainable Development 2007) <https://www.iisd.org/library/corporate-social-responsibility-implementation-guide-business> accessed 6 March 2020.

[212] 'Federal Acquisition Regulation: Combating Trafficking In Persons-Definition Of "Recruitment Fees"' (*Federal Register*, 2020) <https://www.federalregister.gov/documents/2018/12/20/2018-27541/federal-acquisition-regulation-combating-trafficking-in-persons-definition-of-recruitment-fees> accessed 31 March 2020.

[213] 'Text - H.R.644 - 114Th Congress (2015-2016): Trade Facilitation And Trade Enforcement Act Of 2015' (*Congress.gov*, 2020) <https://www.congress.gov/bill/114th-congress/house-bill/644/text> accessed 31 March 2020.

[214] 'Modern Slavery Act 2015' (*Legislation.gov.uk*, 2020) <http://www.legislation.gov.uk/ukpga/2015/30/contents/enacted> accessed 31 March 2020.

Regulations 2015 is not regarded as hard law because there are no legally binding provisions for performing due diligence on supply chains and no criminal or financial penalties for failure to comply.[215] Australia, Hong Kong and several other countries are considering legislation that is modelled on the U.K Modern Slavery Act.

In Nigeria, the Nigerian civil society is leading efforts to develop a national action plan for Nigeria that guarantees Human Rights obligations of contracting parties and sanctions for violations.[216] Nigeria has established the Human Rights Commission, and the House of Representatives has amended the Financial Reporting Council Act 2011 in a bill seeking, amongst other things, to compel companies to adopt Corporate Social Responsibilities in their corporate policies.[217]

Eghosa and Ekhator (2021) have argued for the development of a legalised framework for the use of Corporate Social Responsibility in the Oil and Gas Industry in Nigeria to mitigate the negative externalities arising from the activities of oil MNOCs in the Niger Delta region of the country. The authors suggest that Civil Society Organisations (CSO) should play a major role in the development and implementation of any CSR law that will be developed for the oil and gas sector in Nigeria.[218]

2.5.1 Constitution of a country

The environment has become a higher political priority, and many constitutions now expressly guarantee a right to a healthy environment and procedural rights necessary to implement and enforce the substantive rights granted.[219] The courts around are increasingly interpreting the

[215] Giles Dixon, 'A Guide to the Modern Slavery Act for Your Business' (*ContractStore*, 2020) <https://www.contractstore.com/blog/uk-law/a-guide-to-the-modern-slavery-act-your-business-could-be-affected/> accessed 6 September 2020.
[216]Oti Ovrawah, 'National Action on Business and Human Rights in Nigeria To Support the Implementation of The United Nations Guiding Principles On Business And Human Rights' (Federal Republic Of Nigeria 2017).
[217]Nojeem Amodu, 'Regulation and Enforcement of Human Rightsin Corporate Nigeria' (2017) 61 Journal of African Law.105-130
[218] Eghosa O. Ekhator and Ibukun Iyiola-Omisore, 'Corporate Social Responsibility in the Oil and Gas Industry in Nigeria: The Case for a Legalised Framework, (2021) in Pereira et al. (eds.), Sovereign Wealth Funds, Local Content Policies and CSR, CSR, Sustainability, Ethics & Governance. Springer 439-458
[219] Jona Razzaque, 'Human Rights and the Environment: The National Experience in South Asia and Africa' (2013) <http://www2.ohchr.org/english/issues/environment/environ/ bp.4htm> accessed 22 September 2011.

provision of these fundamental rights such as the right to life to include the right to a healthy environment in which to live that life.[220]

The constitution of the Federal Republic of Nigeria, 1999 is the main instrument that has been used to promote Human Rights obligations (especially those related to Human Rights and environmental violations) of parent companies and their subsidiaries the Niger Delta. The Constitution makes environmental protection a state objective and indeed provides for it in chapter two on Fundamental Objectives and Directive Principle of State Policy.[221] Section 20 expressly contains a provision on environmental protection and states as follows:[222]

> The state shall protect and improve the environment and safeguard the water, air, land, forest and wildlife in Nigeria.

The main aim of section 20 is to ensure a healthy environment for Nigerian citizens.[223] The protection of the environment is essential for the realization of Human Rights because Human Rights can only be enjoyed in an environment that is free of pollution.[224]

2.5.2 Human Rights Commission

Several countries now have a Human Rights Commission. In the UK, there is the Equality and Human Rights Commission, established by the Equality Act 2006. In Nigeria, there is the National Human Rights Commission, established by the National Human Rights Commission Act, 1995, as amended by the NHRC Act, 2010 in line with Resolution 48/134 of the 1992 United Nations Assembly which enjoined all member states to establish independent national institutions for the promotion and protection and enforcement of Human Rights. The commission serves as an extra-judicial mechanism that safeguards the Human Rights of the

[220] See R.S. Pathak, 'The Human Rights System as a Conceptual Framework for Environmental Law' in Brown Weiss (eds), *Environmental Change and International Law: New Challenges and Dimensions,* (UN University Press, Tokyo 1992); W.A. Shutkin, 'International Human Rights Law and the Earth: The Protection of Indigenous Peoples and the Environment' (1991) 31(3) Virginia j. of Int'l L. 479, 511, 504.
[221] See the provisions of the Chapter II of the Constitution of the Federal Republic of Nigeria 1999 (as amended in 2011).
[222] Constitution of the Federal Republic of Nigeria 1999 (as amended in 2011)
[223] Gozie Ogbodo 'Environmental Protection in Nigeria: Two Decades After Koko Incidence' (2010) 15(1) Annual Survey of International and Comparative Law 1, 18.
[224] See A.B. Abdulkadir, and A.O. Sambo, 'Human Rights and Environmental Protection: The Nigerian Constitution Examined' (2009) Journal of Food, Drug and Health Law 61, 73.

population. The Nigerian Human Rights Commission also serve as a platform for investigating Human Rights and environmental violations. In a recent example, eight multi-national oil companies operating in Nigeria were referred to the National Human Rights Commission Special Investigation Panel for the payment of N34 trillion as compensation for oil spill victims in the state in 2016.[225]

2.5.3 Environmental Legislation

Environmental legislation is well-developed in many countries of the world. In England and Wales, a significant proportion of environmental legislation originates from EU law, which is directly applicable or implemented through national legislation. The two main environmental regimes are - Environmental Permitting Regime (EPR), combining the pollution prevention and control (PPC) regime and waste management licensing and industrial emissions; and Environmental impact assessments (EIAs). For example, regarding clean-up and compensation, the relevant regulator can exercise the relevant powers and apply the available penalties, under the EPR or request action under the Environmental Damage (Prevention and Remediation) (England) Regulations 2015, or Environmental Damage (Prevention and Remediation) (Wales) Regulations 2009, as appropriate.[226] In the United States (U.S.), EPA has taken a leading role in government efforts to address environmental justice issues.

In Nigeria, the two most important environmental regulatory agencies are NOSDRA and NUPRC. The National Oil Spills Detection and Response Agency (NOSDRA) is the most active agency of the Federal Ministry of Environment that is involved in regulating the oil and gas industry in Nigeria, while the Nigerian Upstream Petroleum Regulatory Commission (NUPRC) is responsible for supervising all petroleum industry operations[227].

[225] Okon Bassey, 'Nigeria: Oil Spills Victims Take 8 Multinational Companies to The National Human Rights Commission Claim US$ 120 Billion In Compensation' *ThisDay (Nigeria)* (2016).
[226] Michael Coxall and Elizabeth Hardacre, 'Environmental Law And Practice In The UK (England And Wales): Overview' (*Uk.practicallaw.thomsonreuters.com*, 2020) <https://uk.practicallaw.thomsonreuters.com/6-503-1654?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1#co_anchor_a119184> accessed 31 March 2020.
[227] George Etomi and others, 'Nigeria Gas Regulation – Getting the Deal Through – GTDT' (*Getting The Deal Through*, 2019) <https://gettingthedealthrough.com/area/15/jurisdiction/18/gas-regulation-nigeria/> accessed 2 February 2020.

2.6 The Role of International Instruments in protecting Human Rights and the Environment

The key international instruments that influence national laws, and can help to prevent Human Rights and environmental violations in different countries are discussed below.

2.6.1 United Nations Guiding Principles (UNGPs) and their impact on Business and Human Rights

The United Nations Guiding Principles on Business and Human Rights (UNGPs) are a global standard for preventing and addressing the risk of adverse impacts on Human Rights linked to business activity, which were adopted by the United Nations Human Rights Council in 2011.[228] The UNGPs encompass three pillars outlining how states and businesses should implement the framework: the state duty to protect human rights, the corporate responsibility to respect human rights and access to remedy for victims of business-related abuses.[229]

The state's duty to protect against human rights violations through regulation, policymaking, investigation, and enforcement is the first pillar of the Guiding Principles. This pillar reaffirms states' existing obligations under international human rights law, as stated in the Universal Declaration of Human Rights in 1948. The corporate responsibility to respect human rights is the second pillar. This pillar suggests that businesses exercise caution to avoid infringing on the rights of others and to mitigate any negative consequences. The UNGP encourages companies to conduct a Human Rights Impact Assessment to assess their actual and potential human rights impacts when conducting due diligence. The third pillar addresses both the state's responsibility to provide access to remedy through judicial, administrative and legislative means, as well as the corporate responsibility to prevent and correct any violations of rights to which they contribute.

[228] United Nations Human Rights (Office of the High Commissioner), 'UN Guiding Principles on Business and Human Rights: Implementing The United Nations "Protect, Respect And Remedy" Framework' (United Nations 2011) <https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf> accessed 5 December 2019.
[229] Deva, Surya. 'Guiding principles on business and human rights: implications for companies.'(2012) 9 European. Company L. 9 (2012): 101.

The UNGPs are generally seen as a set of quasi-legal instruments, and so do not have any legally binding force.[230] As a result, there are ongoing treaty negotiations aimed towards a binding treaty giving effect to the UN Guiding Principles on Business and Human Rights.

In 2013, Ecuador proposed a binding legal instrument for the operations of transnational corporations to " provide appropriate protection, justice, and remedy to the victims of human rights abuses directly resulting from or related to the activities of some transnational corporations and other business enterprises."[231] The call was supported by over 530 civil society organisations (CSOs), and in June 2014, a majority of the UN Human Rights Council agreed to establish an open-ended intergovernmental working group tasked with developing a binding instrument.

As of 2020, 25 states had published NAPs, with another 17 in the process of doing so. In 2020, the Working Group on Business and Human Rights assessed the Guiding Principles' implementation to date and in 2021 it released a roadmap for the next decade to outline the next steps in promoting the implementation of the Guiding Principles. In a nutshell, it realised eight action areas, priority goals and targets for the next decade.[232] For example, Action Area 2 relates to the duty of the state to protect human rights. It contains two goals, the first is to improve policy coherence to reinforce more effective government action and the second is to seize the mandatory wave and develop a full “smart mix” of measures to foster a responsible business that respects human rights.

It should be noted that, as of now, the UNPGs and several human and environmental rights are not justiciable under international law. An approach that has been suggested for legally complying and enforcing with UNGPs is for member states to combine the nationality principle (i.e., recognizing that a state can adopt laws that govern the conduct of its nationals

[230] Larry Catt Backer, 'The Guiding Principles of Business and Human Rights at A Crossroads: The State, The Enterprise, And the Spectre Of A Treaty To Bind Them All' (2014) 38 Fordham International Law Journal.
[231] Business & Human Rights Resource Centre, ‘Statement on behalf of a Group of Countries at the 24rd Session of the Human Rights Council’ (media.business-humanrights.org) <https://media.business-humanrights.org/media/documents/files/media/documents/statement-unhrc-legally-binding.pdf> accessed January 21, 2023
[232] UNGPs, ‘UNGPS 10+ a roadmap for the next decade of business and human rights’ <https://www.ohchr.org/sites/default/files/2021-12/ungps10plusroadmap.pdf> access January 21, 2023.

abroad) with the Human Rights obligations to pressure countries to police corporations incorporated or operating inside their borders[233].

Several scholars including Chirwa and Amodu[234], Abe[235] and Olawuyi have discussed the implications of the UNGPs on business and human rights in developing countries. For example, Abe has discussed the feasibility of implementing the United Nations' Guiding principles on business and human rights in the extractive industry in Nigeria. He welcomes the attempt to regulate MNOCs through UNGPs but argues that the focus should be on states to domesticate the UNGPs by crafting them into national legislation.[236]

Chirwa and Amodu discussed the various objections to corporations being held accountable for human rights in general and ESC rights in particular. One of these criticisms is that the UNGPs conflate the duty to respect and the duty to protect in the context of corporations by presenting both as the responsibility to respect. According to the authors, the UNGPs and several HRC resolutions have introduced distinctions that rely on these objections and give the impression that only states have human rights obligations, not corporations.[237] The authors conclude that these objections are untenable and are an attempt to divert attention away from businesses' responsibilities to respect both the environment and environmental rights and to ensure that they are not violated in the course of business operations and beyond.

Damilola Olawuyi and Oyeniyi Abe (2022), argue that implementing BHR norms in Africa necessitates context-specific interventions that account for the continent's distinct social,

[233] Flash Michelle and Naimark Anna, 'Panel Explores the Future of Human Rights Lawyering following the Supreme Court Hearing *in Kiobel v. Royal Dutch Petroleum* ' (The American University Washington College of Law, 2012).
[234] Chirwa, D. and Amodu, N, 'Economic, Social and Cultural Rights, Sustainable Development Goals, and Duties of Corporations: Rejecting the False Dichotomies' (2021) 6(1) Business and Human Rights Journal 21-41.
[235] Oyeniyi Abe, 'The Feasibility of Implementing the United Nations Guiding Principles on Business and Human Rights in the Extractive Industry in Nigeria' (2016) 7 Journal of Sustainable Development Law and Policy 137; Oyeniyi Abe, 'Implementing Business and Human Rights Norms in Africa: Law and Policy Interventions' (2022) Routledge.
[236] Oyeniyi Abe (n 235) 140
[237] Chirwa, D. and Amodu, N., 'Economic, Social and Cultural Rights, Sustainable Development Goals, and Duties of Corporations: Rejecting the False Dichotomies' (2021) 6(1) Business and Human Rights Journal 21-41.

economic, and political realities.[238] Similarly, Oyeniyi Abe proposes several law and policy interventions for promoting business and human rights in Africa, including the need for strong regulatory frameworks and effective remedies for human rights abuses.[239]

2.6.2 United Nations Environmental Program (UNEP)

The United Nations Environment Program (UNEP) is a United Nations (UN) programme that coordinates the environmental efforts of the organisation and helps developing countries adopt environmentally sound policies and practices. One of the most notable involvements of UNEP in Human Rights in developing countries was investigating and producing a report on activities of multinational oil-producing companies in the Ogoni, Niger Delta region of Nigeria.

The 2011 UNEP report on oil pollution in Ogoniland, Nigeria, found that there were regular delays in carrying out the containment and clean-up process which exacerbate damage both to the environment and to Human Rights. The UNEP report further stated that parent companies and their subsidiaries often close down remediation processes well before the contamination has been eliminated and soil quality has been restored to fully achieve full functionality for human, animal and plant life. [240]

2.6.3 OECD Guidelines for Multinational Enterprises

The OECD Guidelines for Multinational Enterprises (recently revised in 2011) are an annexe to the OECD Declaration on International Investment and Multinational Enterprises.[241] The Guidelines which are implemented, in part, through the operations of National Contact Points (NCPs), allow individuals and organizations to bring "specific instances," or allegations of corporate violations of the Guidelines, to the NCPs for assessment and mediation, and in some instances, a determination as to whether the Guidelines have been breached.

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[238] Damilola Olawuyi and Oyeniyi Abe, 'Business and Human Rights Law in Africa' (2022) Edward Elgar
[239] Oyeniyi Abe, 'Implementing Business and Human Rights Norms in Africa: Law and Policy Interventions' (2022) Routledge.
[240] United Nations Environment Programme (UNEP), 'Environmental assessment of Ogoniland Report', (2011) <https://postconflict. unep.ch/publications/OEA/UNEP_OEA.pdf> accessed August 31, 2022.
[241]'2011 Update of The OECD Guidelines for Multinational Enterprises - OECD' (*Oecd.org*, 2019) <http://www.oecd.org/investment/mne/2011update.htm> accessed 12 November 2019.

The OECD has been used severally as a reference document in highlighting Human Rights and environmental violations by oil companies operating in Nigeria. For example, in 2011 Amnesty International and Friends of the Earth International filed an official complaint against oil giant Shell with the UK and Netherlands government contact points for breaches of basic standards for responsible business set out by the OECD. The organisations claim that Shell's use of discredited and misleading information to blame the majority of oil pollution on saboteurs in its Niger Delta operations has breached the OECD Guidelines for Multinational Enterprises.[242]

2.6.4 United Nations Global Compact

The United Nations Global Compact is a non-binding United Nations treaty designed to encourage businesses and firms around the world to adopt sustainable and socially responsible policies and to report on their implementation.[243] The UN Global Compact was announced on 31 January 1999 by then-UN Secretary-General Kofi Annan in a speech to the World Economic Forum, and it was officially launched on 26 July 2000 at UN Headquarters in New York City.

The UN Global Compact, is a multi-stakeholder initiative committing corporations to respect international principles about human rights, labour rights, environmental issues, and anti-corruption practices.[244] The United Nations Global Compact is a framework for businesses that states ten principles in the areas of human rights, labour, the environment, and anti-corruption.[245] Companies are brought together with UN agencies, labour groups, and civil society under the Global Compact.[246]

Since its inception in 2000, the Global Compact has been primarily focused on assisting in the support and achievement of the Millennium Development Goals; however, after those expired

[242] Friends of the Earth International, 'Complaint to The UK And Dutch National Contact Points Under The Specific Instance Procedure of the OECD Guidelines For Multinational Enterprises' (Friends of the Earth International 2011) <https://www.foei.org/wp-content/uploads/2020/12/OECD-Submission-FoE-and-AI-FINAL-TEXT.pdf> accessed 2 August 2022.
[243] United Nations Global Compact, 'The world's largest sustainability initiative' <https://www.unglobalcompact.org/what-is-gc> accessed on January 29, 2023
[244] Owusu, E.S., 'Environmental Degradation and Human Rights Violation: A Cursory Overview of the Potential of the Existing Frameworks to Hold Multinational Corporations Accountable'(2021) Groningen Journal of International Law, 9(1), pp.143-173.
[245] 'The Ten Principles of the UN Global Compact' (United Nations Global Compact) accessed 10 June 2020; See also Wouters and Chané (n 10).
[246] United Nations Global Compact, 'The world's largest sustainability initiative' <https://www.unglobalcompact.org/what-is-gc> accessed on January 29, 2023

in 2015, their top priority has been updated to the pursuit and progress toward the Sustainable Development Goals, as well as the SDG's accompanying 2030 deadlines.

The Global Compact provides a list of its 20,000+ participant organizations, composed of roughly 16,000 businesses and 4,000 non-business entities on its website. Notable companies (e.g., Starbucks, L'Oreal, Coca-Cola, Deloitte) have signed on to the Global Compact. The main criticism levelled at the Global Compact is that it lacks effective monitoring and enforcement provisions, and thus fails to hold corporations accountable. Moreover, these critics argue that companies could potentially misuse the Global Compact as a public relations instrument for "bluewash".

2.6.5 African Charter (African Commission on Human and People's Rights)

The African Charter on Human and People's Rights ("Charter") is one of the first international Human Rights Charter to guarantee civil, political, economic, social, and cultural rights simultaneously.[247] Nigeria is a party to the African Charter on Human and People's Rights. It has expressly incorporated the Charter into Nigerian domestic law and thus has laws in force to address Human Rights abuses.[248] The Nigeria government has implemented "remedial measures" to address the Niger Delta Human Rights crisis. These measures include the Federal Ministry of Environment, Niger Delta Development Commission, and Judicial Commission of Inquiry investigating human rights violations.[249] One notable intervention of the African Commission was in the case of *SERAP v Federal Republic of Nigeria*,[250] where it held that the Nigerian government and Shell were in breach of Human Rights and environmental damages by polluting the Ogoni area through oil spillage and gas flaring. The damage to the health of

[247] African Charter of Human and People's Rights art. 24, June 26, 1981, 21 I.L.M. 59

[248]Celestine Ezennia, 'Access to Justice Mechanisms for Individuals and Groups Under The African Regional Human Rights System: An Appraisal' (2019) 8 African Journal of Legal Studies.

[249] The Federal Ministry of Environment oversees industry operations affecting the natural environment in Nigeria, the Niger Delta Development Commission supervises and approve development projects posing a potential impact on the environment, and the Judicial Commission of Inquiry investigates Human Rights violations.

[250] SERAP v Federal Republic of Nigeria ECW/CCJ/APP/08/09. The plaintiff in this case was a Nigerian NGO, the Socio-Economic Rights and Accountability Project (SERAP). It sued the Federal Republic of Nigeria, Nigerian National Petroleum Corporation (NNPC), Shell Petroleum Development Company (SPDC) and other international oil companies for violations of rights to adequate standard of living, including the right to food, to work, to health, to water, to life and human dignity, to a clean and healthy environment; and to economic and social development.

the inhabitants as a result of drinking polluted water and inhaling fumes amounted to a denial of the right to the best attainable state of physical and mental health.

Egosa Ekhiator has highlighted the potential of regional institutions in regulating the activities of MNOCs in Africa by extrapolating many AU mechanisms such as the African Commission on Human and People's Rights, NEPAD, APRM and AU conventions. The author proposes the development of a binding treaty by the AU based on the erstwhile UN norms to regulate the activities of MNCs in Africa. For example, the author proposes the amendment of Article 46C of the Malabo Protocol entitled 'Corporate Criminal Liability' so that regional courts can have jurisdiction over legal persons, except for states.[251]

2.7 Implications of International Human Rights Conventions on MNOCs

There are implications of the various international human rights conventions on the activities of MNOCs and other private actors either directly or indirectly. For example, Chirwa and Amodu (2021) argue the various international human rights treaties have implications for the activities of MNOCs.[252] This is because without these treaties being justiciable, it is not possible to hold MNOCs and their subsidiaries liable for human rights and environmental violations due to oil operations.[253]

Owusu has provided an overview of existing frameworks to hold MNOCs accountable for violations of human rights and environmental violations. The author establishes that existing regulatory mechanisms, however minor, have helped to raise awareness and instil environmental and human rights issues in corporate culture. It demonstrates, however, that these frameworks are grossly inadequate due to the complexity of MNCs, the overtly broad and obscure nature of existing international instruments, and the reeking corruption in domestic

[251] Eghosa Osa Ekhator, 'Regulating The Activities Of Multinational Corporations In Nigeria: A Case For The African Union?' (2018) 20 International Community Law Review.
[252] Chirwa, D. and Amodu, N., 'Economic, Social and Cultural Rights, Sustainable Development Goals, and Duties of Corporations: Rejecting the False Dichotomies' (2021) 6(1) Business and Human Rights Journal 21-41
[253] Oluduro, o. 'Oil Exploitation and Human Rights Violations in Nigeria's Oil Producing Communities' (2014) Intersentia Publishing: Cambridge.

political and judicial institutions. It advocates for the codification of binding documents, as well as the establishment of an International Court with special jurisdiction over all MONCs.[254]

Currently, as international law stands, several human rights and environmental rights are not justiciable, especially in developing countries like Nigeria where several MNOCs operate. One of the ways of achieving this is to incorporate these treaties into the constitution. The most relevant international human rights and environmental convention that is related to environmental rights is the African Charter which has been incorporated into domestic law and is thus considered part of its national law. The Supreme Court ruled in *General Sani Abacha v Chief Gani Fawehinmi* that, while the African Charter is part of Nigerian law, whenever there is a conflict between the Charter and the constitution, the constitution will take precedence. To address this challenge, the National Assembly can amend or repeal the African Charter (Ratification and Enforcement) Act. Some scholars have argued that the African Charter is an ineffective tool for promoting environmental rights in Nigeria and that constitutionalizing environmental rights is a better option.[255]

2.8 Chapter Summary

This chapter presented an overview of Human Rights and the environment. This chapter first discusses human and environmental rights at two levels: the international level based on the United Nations and the national level based on the host country's constitution where the MNOCs operate. At the international level, human rights and environmental rights are defined mainly by international regulations agencies set up by the United Nations (e.g., UNEP) and regional bodies such as the African Union and the European Union (European Court of Justice). At the national level, human rights and the environment are defined by the constitution (e.g., the 1999 Constitution of the Federal Republic of Nigeria) together with support regulatory agencies in the country.

The chapter also discusses the regulation of human rights and environmental rights. There are two approaches to regulating human rights and environmental rights: voluntary and mandatory.

[254] Owusu, E.S., 'Environmental Degradation and Human Rights Violation: A Cursory Overview of the Potential of the Existing Frameworks to Hold Multinational Corporations Accountable' (2021) 9(1) Groningen Journal of International Law 143-173.
[255] Oluduro, O. 'Oil Exploitation and Human Rights Violations in Nigeria's Oil Producing Communities' (2014) Intersentia Publishing: Cambridge 111

Most MNOCs adopt self-regulation as a solution to a voluntary approach to human rights through various instruments, including an internal and external code of conduct. The mandatory approach to human rights is achieved through a combination of soft law (e.g., the United Nations resolutions) and hard law (e.g., environmental regulations(e.g., the NOSDRA Act in Nigeria) in the home countries where the MNOCs operate.

The role of governments (home and host countries of MNOCs) and international regulatory agencies in protecting human and environmental rights have been discussed. Both the government of the countries where the MNOCs is headquartered (e.g., the government of the UK and the Netherlands, where Shell is headquartered) and the government where they operate in developing countries (e.g., the government of Nigeria) have a role to play. For example, the Nigerian government has set up several regulatory agencies such as NOSDRA and NESREA to protect human rights and environmental violations arising from the oil operations in the Niger Delta. The UK government has also set up enabling environment (e.g., providing access to legal aid) for victims that may want to bring claims against the MNOCS for violations of human rights by their subsidiaries abroad. International agencies (e.g., UNEP) have also been at the forefront by providing guidelines for MNOCs and governments on best practices to protect human rights and the environment where they operate.

The next chapter will discuss multinational oil companies' human rights and environmental violations. The discussion will cover the human rights obligations of MNOCs (i.e., Shell and Chevron), instruments used by MNOCs to comply with human rights obligations, improving human rights obligations through an appropriate level of engagement, the Nigerian legal system’s response to human rights and environmental violations, and types of human rights and environmental violations.

Chapter Three

Human Rights and Environmental Violations of Multinational Oil Companies in the Niger Delta

3.1 Introduction

When the international human rights regime was set up, states were designated as the sole duty-bearers and the only subject that could violate international human rights law.[256] This has changed over time, and the issue of international human rights is deemed anyone who is the bearer of rights and duties in international law and is subject to the international legal order.[257] It is no longer States that have obligations in the area of human rights protection but also non-

[256] Florian Wettstein, 'Beyond Voluntariness, Beyond CSR: Making A Case for Human Rights and Justice' (2009) 114 Business and Society Review.
[257] Karin Buhmann, 'Corporate Social Responsibility: What Role for Law? Some Aspects of Law And CSR' (2006) 6 Corporate Governance: The international journal of business in society.

state actors and business entities.[258] Business entities have a responsibility to respect human rights. It is widely accepted that businesses should include broader social objectives (e.g., human rights, environmental and ethical standards) rather than strictly financial ones.[259]

Human rights and environmental violations by multinational corporations have attracted international attention.[260] Due to widespread allegations of human rights and environmental violations, respect for human rights is an integral part of the obligations of MNOCs. Although multinational oil companies have been promoting corporate social responsibility initiatives and gaining global importance, business and human rights issues have been neglected.

Extractive industries, especially the oil and gas industry, have particularly come under increasing scrutiny in recent years due to the awareness created by the public and NGOs.[261] A notable example is the case of the widely publicised human rights and environmental violations by Shell in Ogoni land and other parts of the Niger Delta of Nigeria.

This chapter examines human rights and environmental violations arising from the Niger Delta. Most major oil companies (e.g., SPDC and Chevron Nigeria Ltd) operating in the Niger delta are subsidiaries of MNOCs resident abroad. This chapter argues that the response of MNOCs (and their subsidiaries) regarding clean-up, remediation, and compensation after an oil spill has occurred in developing countries like Nigeria is inconsistent with its response in other developed countries.

The rest of the chapter is organised as follows: Section 3.2 describes the Niger Delta region of Nigeria and the oil operations. Section 3.3 discusses the human rights obligations of MNOCs in the Niger Delta. Section 3.4 discusses how the Nigerian legal system has responded to human rights and the environmental violations in the Niger Delta in terms of constitutional, legislative, regulatory and tort law response. Section 3.5 discusses the different types of human rights and environmental violations by MNOCs in the Niger Delta. Section 3.6 compares the response of MNOCs to human rights and environmental violations in the Niger Delta and other developed countries using clean-up and compensation as a case study. Section 3.7 summarises the chapter.

[258] Karin Buhmann (n 107)
[259] Branko Korže (n 104) 1-22
[260] Jonathan Drimmer (n 109); Anna Grear (n 109); John Gerard Ruggie (n 109).
[261] Ishak and Nordin (n 110) 240-247.

3.2 The Niger Delta Region and Oil Industry in Nigeria

This section describes the Niger Delta, which is a region in Nigeria that is at the centre of international human rights and environmental violations by MNOCs, and the oil operations that take place in the region.

3.1.1 Oil and Gas Industry in Nigeria

Oil was discovered in Nigeria in 1956, and production began in the late 1950s. Oil exploration became open to foreign corporations in the following decade, and the oil industry grew steadily to become a global powerhouse, with some exceptions due to economic constraints. The Nigerian National Petroleum Company (NNPC) was established in 1977. The state-owned corporation's mission is to regulate and engage in the country's oil industry. Nigeria is now Africa's largest oil producer. Nigeria is the world's eleventh largest oil producer, with 18 operational pipelines and an average daily production of 1.8 million barrels in 2020.

The petroleum industry accounts for around 9% of Nigeria's GDP and over 90% of the country's export value. Nigeria's oil industry structure can be divided into three sectors: upstream, downstream, and services.[262] The structure of the Oil and Gas Industry in Nigeria is shown in Figure 3.1.

[262] Gail M. Gerhart and Jedrzej Georg Frynas, 'Oil In Nigeria: Conflict And Litigation Between Oil Companies And Village Communities' (2001) 80 Foreign Affairs.

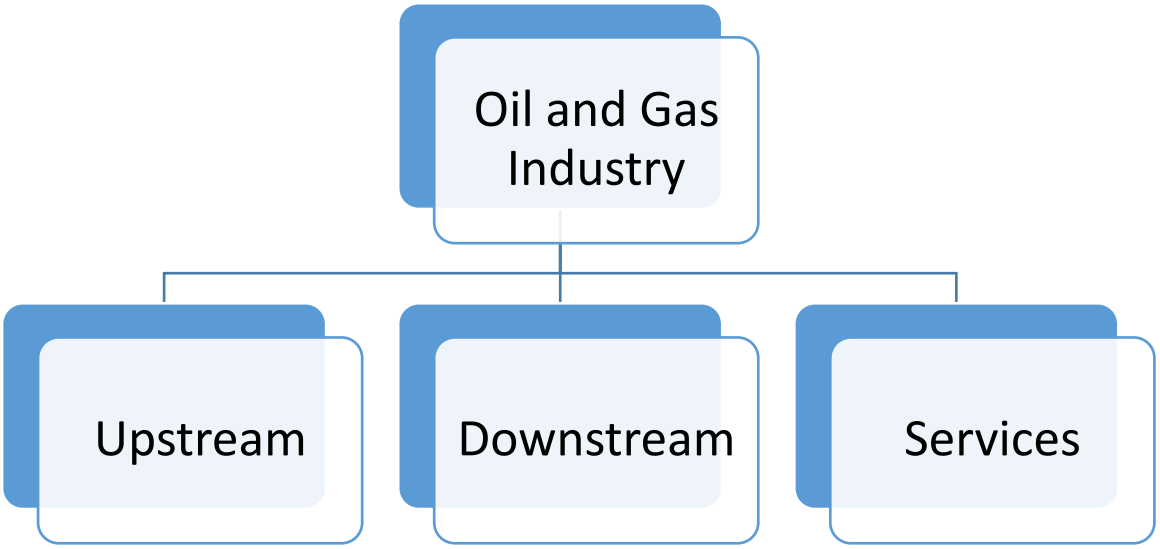


Figure 3.1. Structure of the Oil and Gas Industry in Nigeria

1.4.1.1 Upstream Sector

The upstream oil sector is the most important in the economy, accounting for more than 90% of the country's exports and around 80% of the Federal Government's revenue.[263] This sector is characterised by crude oil and gas exploration and production. The income of oil companies engaged in exploration and production is subject to tax under the Petroleum Profits Tax Act, 2004 (PPTA), as amended. The three main basins where crude oil is now produced are the Niger Delta (shallow and deep offshore basins), the onshore Anambra, and the offshore Benin/Dahomey (deepwater and ultra-deepwater).

The country's proven oil reserves are estimated at about 37.2bn bbl as of the end of 2010, according to a report by the US Energy Information Administration (EIA).[264] A recent BP

[263] Okoye, A., 'Legal approaches and corporate social responsibility: towards a Llewellyn's law-jobs approach'. Routledge; See Mordor Intelligence, 'Nigeria Oil and Gas Market - Growth, Trends, Covid-19 Impact, And Forecasts (2022 - 2027)' (Mordor intelligence 2022) <https://www.mordorintelligence.com/industry-reports/nigeria-oil-and-gas-market> accessed 26 June 2022.
[264] KPMG, 'Nigeria's Oil and Gas Industry Brief', (KPMG 2022) < https://s3.amazonaws.com/rgi-documents/807cb4d6f40af92c55d9a0cd4aed6c942cb08537.pdf > accessed 26 June 2022; See Ezeadichie C, 'Overview Of The Nigerian Oil And Gas Industry' (Financial Quest 2022) <https://financialquest.com.ng/overview-of-the-nigerian-oil-and-gas-industry/> accessed 26 June 2022

Statistical Energy Survey assessed proven natural gas reserves at 5.29 trillion cubic metres, or 2.82 per cent of the world's estimated reserves. Due to the lack of gas infrastructure, 75% of associated gas is flared and only about 12% is re-injected. The major forms of oil and gas arrangements in Nigeria's upstream sector are as follows: Joint Venture (JV), Production Sharing Contracts (PSCs), Service Contract (SC), Marginal Field Concession (MFC).

Joint Venture

This is the usual agreement between the Nigerian National Petroleum Corporation (NNPC), the country's national oil firm, and the MNOCs. Both the NNPC and the MNOC contribute to the funding of oil operations in proportion to their JV equity ownership, and they normally get crude oil produced in the same proportion. Major operators in the JVs with the NNPC are Shell, ExxonMobil, ChevronTexaco, TotalFinaElf and Agip. It is however important to note that the JV model is currently being phased out in the oil and gas industry, due mainly to the inability of the NNPC to fund its share of JV costs.

Production Sharing Contract

Under this arrangement, the concession is held by NNPC. NNPC engages the MNOC or the indigenous company as contractor to conduct petroleum operations on behalf of itself and NNPC. The Contractor takes on the financing risk. If the exploration is successful, the Contractor is entitled to recover its costs on commencement of commercial production. If the operation is not successful, the Contractor bears the loss.

Service Contract

Under this model, the Contractor undertakes exploration, development and production activities for, and on behalf of, NNPC or the concession holder, at its own risk. The concession ownership remains entirely with the NNPC/ holder, and the Contractor has no title to the oil produced. The Contractor is reimbursed cost incurred only from proceeds of oil sold and is paid periodical remuneration following the formulae stipulated in the contract.

Marginal Field Concession

Under this arrangement, the Federal Government (FG) encourages MOCs to submit their marginal fields for assignment to indigenous concession holders as part of its Nigerian Content programme. The FG passed the Petroleum (Amendment) Act No. 23 and the Marginal Field Operations (Fiscal Regime) Regulations 2005 on the development of marginal fields to provide particular incentives to marginal field operators.

1.4.1.2 Downstream sector

Downstream operations are oil and gas functions that occur after the production phase to the point of sale. The midstream operations are usually included in the downstream sector. However, a distinction is now being made between the two sectors. The Midstream covers the processing, storage, marketing and transportation of crude oil, gas, gas-to Liquids and liquefied natural gas.

The key segments in the downstream sector in Nigeria include - Transmission and Conveyance, refining, Distribution and Marketing Distribution and Marketing of refined petroleum products are complementary activities, and the Liquefied Natural Gas (LNG) Nigeria holds the largest natural gas reserves in Africa but has limited infrastructure in place to develop the sector.

1.4.1.3 Services Sector

The classification of services under this sector include Exploration support services (e.g., seismic data acquisition, processing and interpretation, and logging, and cementing Drilling services (that is, welding services, well drilling), Production support services (e.g., wireline services, workover services, production testing services, and construction of oil & gas facilities), and Downstream services (wireline services, refinery maintenance, pipeline/depots construction, petroleum products haulage, petroleum product marketing).

3.2.2 Oil Operations in the Niger Delta

The Niger Delta is the Niger River Delta that sits directly on the Atlantic Ocean in Nigeria, on the Gulf of Guinea. As now officially defined by the Nigerian government, the Niger Delta covers more than 70,000 km2 (27,000 sq mi) and accounts for 7.5 per cent of the landmass of Nigeria. As shown in Figure 3.1 it is traditionally considered to be located within nine coastal southern Nigerian states.[265]

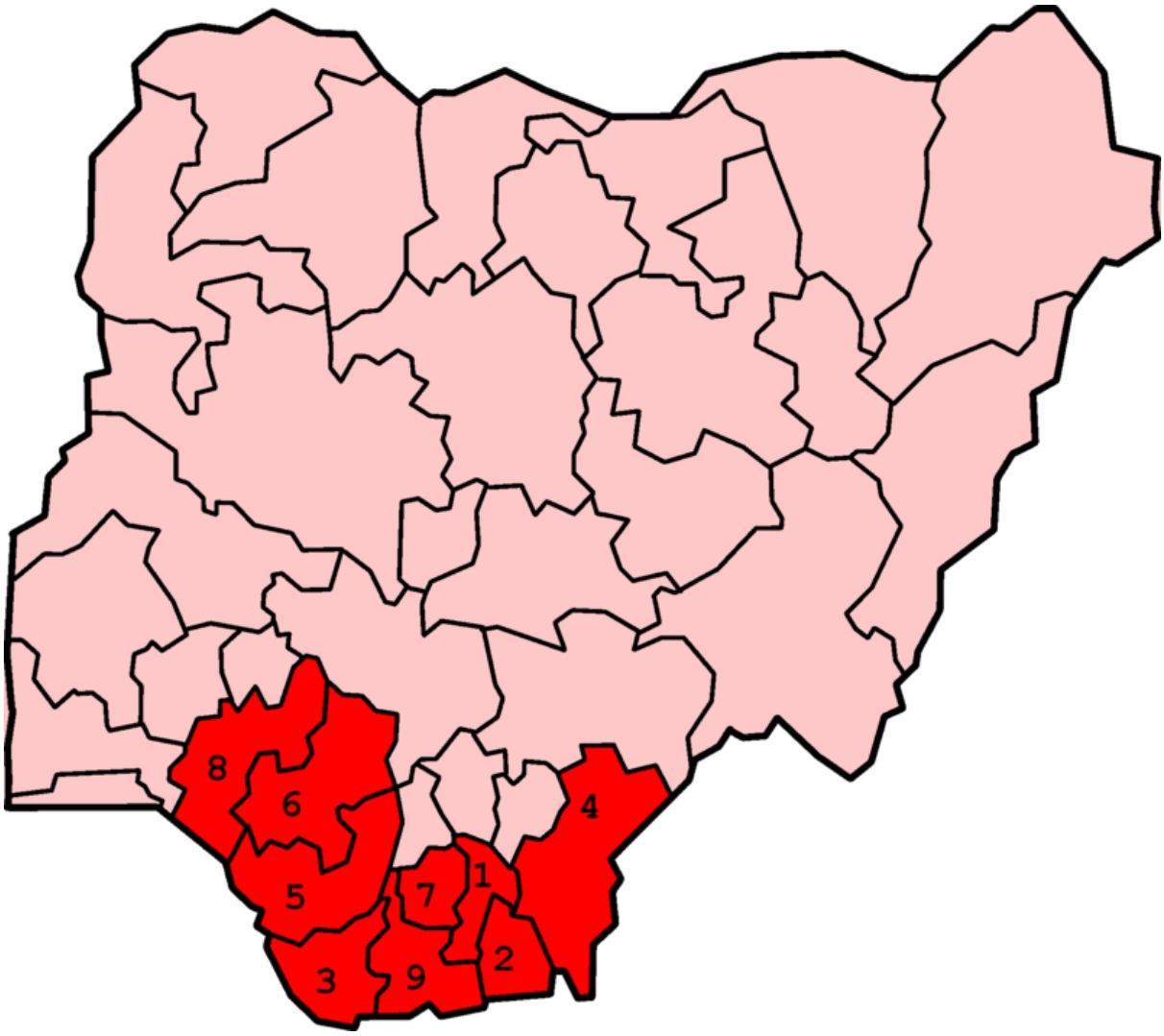


Figure 3.1 – The Niger Delta region consists of the following states: 1. Abia, 2. Akwa Ibom, 3. Bayelsa, 4. Cross River, 5. Delta, 6. Edo, 7.Imo, 8. Ondo, 9. Rivers

[265] Hogan (n **Error! Bookmark not defined.**)

The Niger Delta is densely populated is some areas. It was once a major palm oil producer area in Nigeria. The area was the Protectorate of British Oil Rivers from 1885 until 1893 when it was expanded and became the Protectorate of the Niger Coast. The delta is an area rich in petroleum and has been the focus of international pollution controversy.

Nigeria has become the biggest petroleum producer in Western Africa. It extracts about 2 million barrels (320,000 m3) a day in the Niger Delta. It is estimated that as of the beginning of 2012, 38 billion barrels of crude oil existed under the delta. [266]The region's first oil operations began in the 1950s and were undertaken by multinational corporations, providing Nigeria with the technological and financial resources needed to extract oil[267]. The Niger Delta region has accounted for more than 75% of Nigeria's export earnings since 1975. Together, oil and natural gas production constitute "95% of Nigeria's foreign exchange revenues."[268]

The history of the Niger Delta has been characterized by various struggles due to the minority status of many of these ethnic groups. The environmental devastation associated with the industry and the lack of oil wealth distribution has been the source and key aggravating factors of the region's numerous environmental movements and interethnic conflicts. In the early 1990s, local communities demanded environmental and social justice from the federal government, with the Ogoni tribe leading figures in the political and economic empowerment struggle.

The Niger Delta region of Nigeria accounts for almost all of Nigeria's oil and gas operations. Oil spills are frequent in the Niger Delta; it has been estimated that between 9 and 13 million barrels (1,400,000 and 2,100,000 m3) have spilt out since oil exploration began in 1958. This has resulted in several incidents of human rights and environmental pollution often blamed on the oil companies. According to estimates from the Nigerian federal government, between 1970 and 2000, there were more than 7,000 oil spills.[269] Table 3.1 indicates the number of oil spills in barrels and the estimated total volume.

[266] Baird, J. 'Oil's shame in Africa'. (2010). Newsweek (Atlantic Edition). 156 (4), 16.
[267] Pearson (n 15)
[268] *Nigeria: Petroleum Pollution and Poverty in the Niger Delta*. United Kingdom: Amnesty International Publications International Secretariat, 2009, p. 10; See US Energy Information Administration (EIA), 'Country Analysis Brief: Nigeria' (US Energy Information Administration (EIA) 2021) <https://www.eia.gov/international/content/analysis/countries_long/Nigeria/nigeria.pdf> accessed 31 July 2021.
[269]John Vidal, 'Nigeria's Agony Dwarfs the Gulf Oil Spill. The US and Europe Ignore It' The Guardian (2010) <https://www.theguardian.com> accessed 14 September 2016.

Table 3.1: Details of Oil Spills as Reported by Shell

Year	**2007**	**2008**	**2009**	**2010**	**2011**	**2012**	**2013**	**2014**	**Total**
Number of spills	320	210	190	170	207	192	200	204	1693
Volume in barrels	26,000	100,000	120,000	23,000	18,000	22,000	20,000	22,000	351,000

Source: Amnesty International (2015)

Multinational oil companies (e.g., Shell and Chevron) are typically reluctant to take liability for oil spills, and there are situations in which they have openly declined to pay compensation or clean up the region, alleging saboteurs and theft caused the oil spill. Recently, however, multiple studies have reported that the biggest cause of oil spills is equipment failure and pipeline corrosion.[270]

Multinational companies have committed several Human Rights and environmental violations in the Niger Delta, which constitutes a breach of their Human Rights obligations. Some of these violations include lack of transparency, reluctance to disclose information, reluctance to disclose explain the complex relationship between the parent and their subsidiaries, lack of

[270] Cyril (n 20)

support to access remediation and compensation, prevention of oil spills, and lack of clean-up.[271]

3.3 Corporate Policies of MNOCs regarding Human Rights and the Environment in the Niger Delta

Within the context of this study, the term 'Corporate policies' refers to obligations a company develops or signs on to that indicate what the company intends to do to address its human rights and environmental rights impacts.[272]

The human rights strategy of any business will start with ensuring full compliance with the laws already in place. Most countries have a broad variety of laws (at the regional, state, or local government levels), relating to health and safety, Human Rights and environmental protection, bribery and corruption, corporate governance, and taxation.

Respecting domestic and international laws is an important part of Human Rights obligations. In some countries like the UK, there are provisions within an Act or statute of Parliament (e.g., The Modern Slavery Act 2015 (Transparency in Supply Chains) Regulations 2015) that contain provisions that impose legally binding requirements on the company. In other cases, there may be a situation in which the law or Act is open to different conflicting interpretations (i.e., flexibility regarding the content of the statement). No matter how good a Human Rights obligation may be, failure to observe the law will undermine other good efforts. Even with a good Human Rights strategy, a corporation's reputation can be easily destroyed if it violates basic laws. Therefore, one cannot but agree that the first and major Human Rights obligation of any company is respecting both domestic law in which they operate and international law that regulates all aspects of their business operations.

Although most corporations have made significant contributions to social development, this does not absolve them of obligations for Human Rights and environmental abuses. The focus of this study is on Human Rights obligations. Human Rights obligations can be classified into

[271] Gwynne Skinner, ' Parent Company Accountability; Ensuring Justice for Human Right Violation' (International Corporate Accountability Roundtable, ICAR, 2015). 9-11.
[272] International Institute for Sustainable Development, 'Human Rights: An Implementation Guide For Business' (International Institute for Sustainable Development 2007) <https://www.iisd.org/library/corporate-social-responsibility-implementation-guide-business> accessed 6 March 2020.

two categories: Human Rights and Environmental obligations. Figure 3.2 shows the two main categories of Corporate policies/obligations regarding Human Rights.

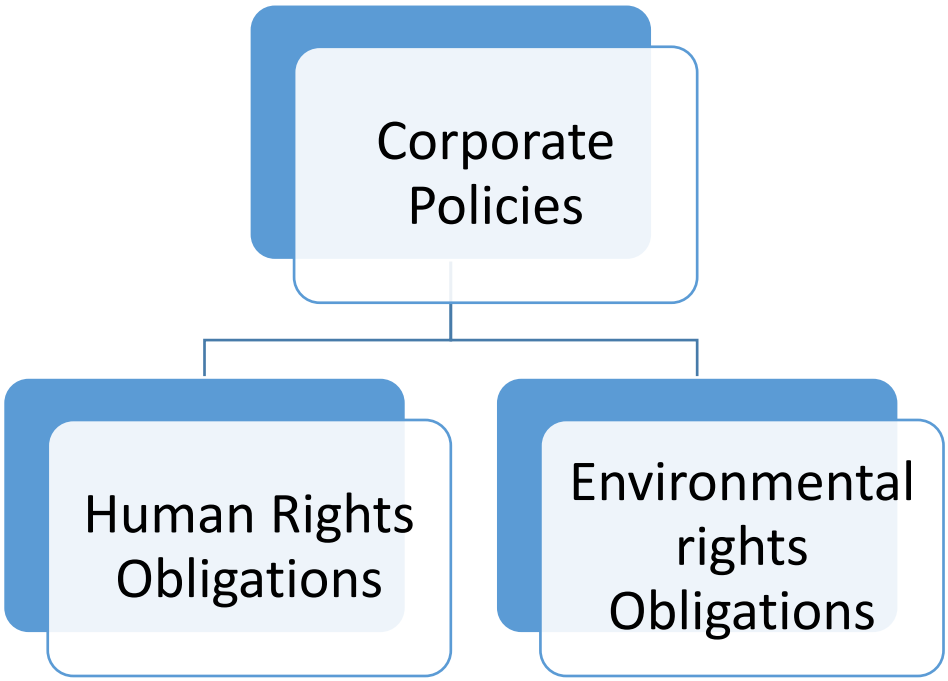


Figure 3.2. Types of Corporate Obligations on human rights (compiled by the Author)

Human Rights obligations are increasingly associated with Human Rights and environmental rights. Human Rights refer to "the sum of individual and collective rights laid down in State constitutions and international law".[273] The relationship between Human Rights and Environmental Rights has long been established. Human Rights are relevant to the economic, social, and environmental aspects of corporate activity. Although the primary responsibility for the enforcement of international Human Rights standards lies with national governments, corporations have come to recognise that part of being a good corporate citizen includes respecting the Human Rights of those who come into contact with the corporation in some way and act in a socially responsible manner. Examples of Human Rights obligations related to

[273] Manfred Nowak, Rogier Huizenga and Roberto Rodriguez, 'Human Rights- Handbook for Parliamentarians No. 26' (Office of the United Nations High Commissioner for Human Rights (OHCHR) and the Inter-Parliamentary Union (IPU) 2016) <https://www.ohchr.org/Documents/Publications/HandbookParliamentarians.pdf> accessed 5 October 2018.

human rights are – transparency, disclosure, labour rights, security and safety, and access to compensation.

3.3.1 Multinational Oil Companies Operating in the Niger Delta

MNOCs in recent years have grown in numbers and size and have expanded abroad. Several challenges have emerged due to the growth, including the complex multi-tiered corporate structures that are constantly changing due to mergers and determining ownership of the MNOCs and their affiliates, which multiple parent corporations can own.[274] The headquarters of the MNOCs operating in Nigeria are primarily located in the USA, the UK, and Europe (e.g., Italy, and the Netherlands). Table 3.2 shows a list of major Multinational oil companies in Nigeria and their subsidiary companies. The vast economic power of MNOCs and the complex legal and corporate structures they embody are the major reasons why efforts at redressing human rights and environmental violations have been frustrated. This section presents two multinational oil companies operating in the Niger Delta – Royal Dutch Shell and Chevron.

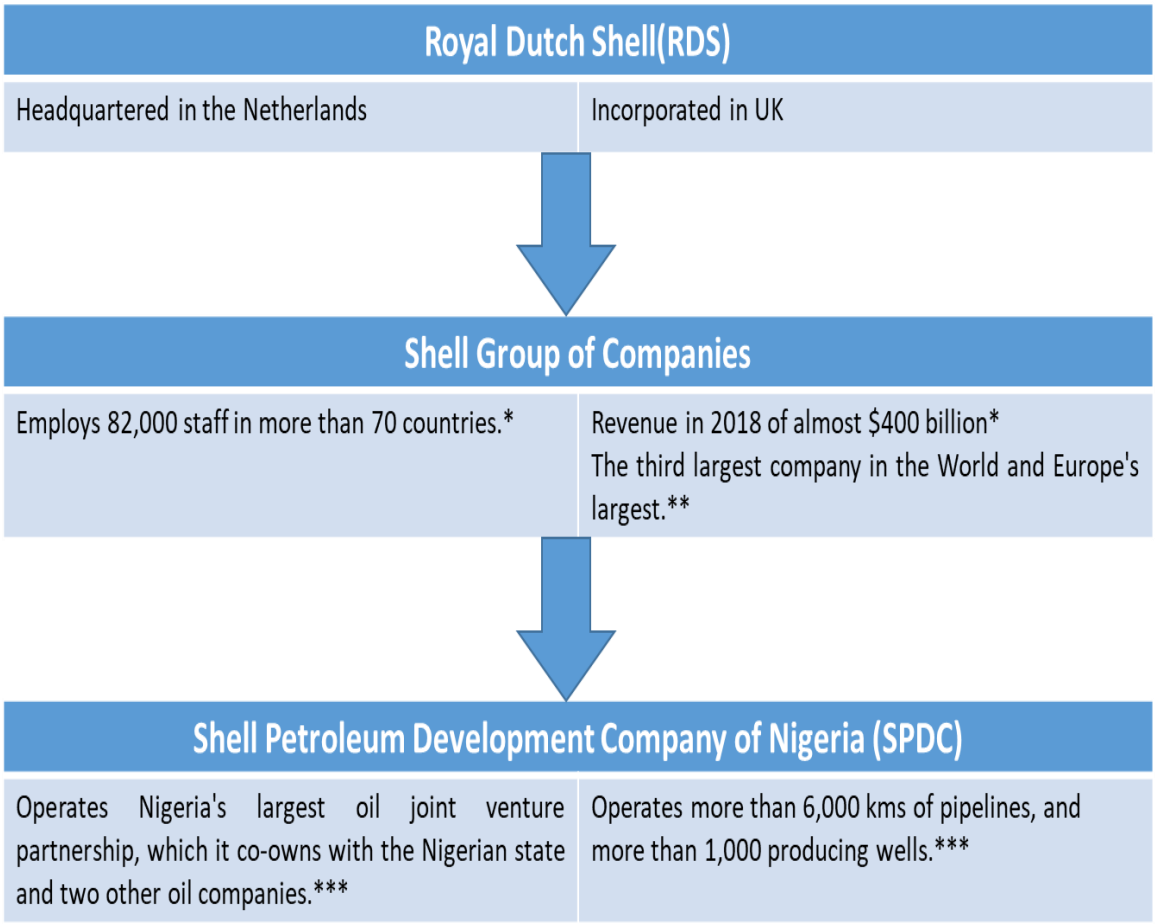
Table 3.2. Subsidiary Company and Parent Company and homes states

SN	Subsidiary Company (Nigeria)	Parent Company	Domiciled Country
1	Shell Development Company of Nigeria (SPDC)	Royal Dutch Shell (RDS)	Netherlands
2	Mobil	ExxonMobil	USA
3	Chevron Nig. Ltd	Chevron	USA
4	Eni (Saipem) formerly AGIP	Eni (Saipem)	Italy
5	Total	Total	France
6	Adax petroleum	Sinopec	China

[274] Skinner G, Chambers R, and McGrath S, Transnational Corporations and Human Rights: Overcoming Barriers to Judicial Remedy (Cambridge University Press 2022) 9-10

3.3.1.1 Royal Dutch Shell and SPDC (Nigeria)

Royal Dutch Shell (RDS) is a legal entity organised under the laws of the United Kingdom with a registered address in the UK and its head office in the Netherlands.[275] SPDC is part of the Joint Venture Agreement (JVA) in the Nigerian petroleum industry which also involves the Nigerian National Petroleum Corporation (NNPC), Total E&P Nigeria Ltd, and Nigerian Agip Oil Company Ltd. NNPC controls 55 per cent of the joint venture, SPDC controls 30 per cent, Total controls 10 per cent and Agip controls 5 per cent[276]. Shell's corporate structure is shown in Figure 3.3.



[275] 'Who We Are' (*Shell.com*, 2020) <https://www.shell.com/about-us/who-we-are.html> accessed 26 June 2020.
[276] Shell, 'SPDC Sets Out Its Future Intent for Nigeria' (Shell 2013) <https://www.shell.com/media/news-and-media-releases/2013/spdc-sets-out-its-future-intent-for-nigeria.html> accessed 3 September 2022.

Figure 3.3: Shell Corporate Structure (Amnesty International, 2019)[277]

Shell's Human Rights obligation is based on what it calls the "Sustainability approach"[278] which is anchored on Shell General Business Principles, Code of Conduct, and Ethics and Compliance Manual. Sustainability at Shell means providing more and cleaner energy solutions responsibly – in a way that balances short- and long-term interests, and that integrates economic, environmental and social considerations into decision-making. Sustainability is integrated across Shells' business on three levels:

(i) Shell company operations – by running a safe, efficient, responsible and profitable business

(ii) customers – by helping to shape a more sustainable energy future;

(iii) communities and wider society – by sharing benefits where we operate and making a positive contribution.

The aspects of the Human Rights obligation that is of interest in this study is captured in a section of the sustainability report referred to as "**Responsible business**". It states that:

> that Shell works to reduce our environmental impact and manage our operations safely and responsibly. Safety and respect for people – our employees, contractors and neighbours – are fundamental to how we do business.[279]

There are three main aspects that Shell focuses on in the "Responsible business" aspect of its sustainability approach to Human Rights. These include- Human Rights, safety and the environment as summarised below:

(i) Human Rights: recognises the responsibility to respect Human Rights in all aspects of doing business. It focuses on four areas where Human Rights are critical: communities, security,

[277] Amnesty (n 63); Shell, 'Who We Are' (Shell 2022) <https://www.shell.com/about-us/contact-us.html> accessed 2 August 2022.
[278] Shell, 'Shell Sustainability Report - Our Approach' (Shell 2022) <https://shell.online-report.eu/sustainability-report/2019/responsible-business/environment/our-approach.html> accessed 2 August 2022.
[279] 'Responsible Business - Shell Sustainability Report 2018' (*Reports.shell.com*, 2019) <https://reports.shell.com/sustainability-report/2018/responsible-business.html> accessed 21 November 2019.

labour rights and supply chains. This approach applies to all employees and contractors and is informed by the Universal Declaration of Human Rights, the core conventions of the International Labour Organization, and the United Nations Guiding Principles on Business and Human Rights. This approach is set out in Shell's General Business Principles, Code of Conduct, and Shell Supplier Principles.

(ii) Safety: works to deliver energy responsibly and safely. It aims to do no harm to people and to have no leaks across its operations. Shell refers to this approach as "Goal Zero ambition".

(iii) Environment: Shell states that it is carefully considered the potential environmental impact of its activities and how local communities might be affected during the lifetime of a project. Shell aims to comply with all applicable environmental regulations, continually improve its performance and prepare for future challenges and opportunities.

Another important aspect of Shell's sustainability approach is the transparency initiative.[280] Shell states that it is committed to "doing business in a clear, open way is a commitment we work hard to keep, and we promote transparency where possible throughout our industry."

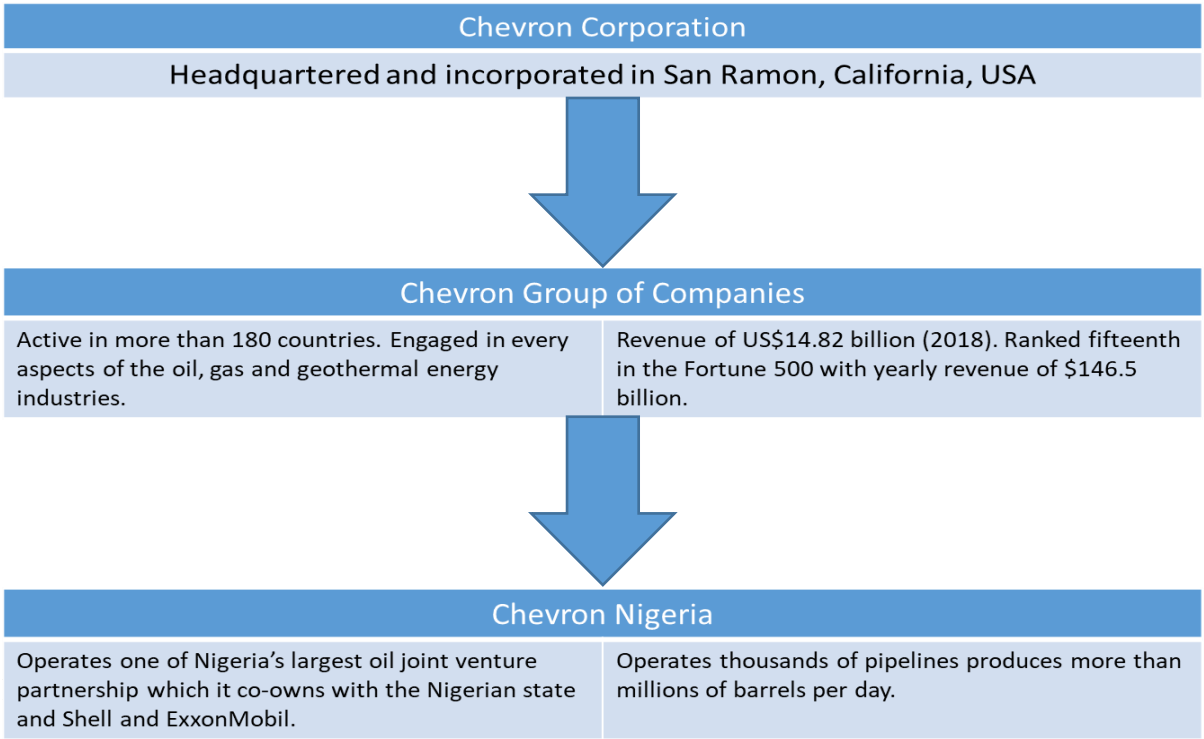
3.3.1.2 Chevron Corporation and Chevron Nigeria Ltd

Chevron is an American multinational energy company headquartered in San Ramon, California, and operating in over 180 countries.[281] Chevron is engaged in all facets of the oil, gas and geothermal energy industries, including hydrocarbon exploration and production; refining, marketing and transport; manufacturing and sales of chemicals; and power generation. As of March 2020, Chevron ranked fifteenth in the Fortune 500 with an annual sale of $146.5 billion and a market cap of $136 billion.[282]

[280] 'Transparency' (*Shell.com*, 2019) <https://www.shell.com/sustainability/transparency.html> accessed 21 November 2019.
[281]Chevron, 'Chevron: Government and Public Affairs Chevron Policy' (*chevron.com*, 2020) <http://www.chevron.com/about/leadership/> accessed 25 August 2020.
[282] 'Fortune 500' (*Fortune*, 2020) <https://fortune.com/fortune500/2020/> accessed 25 August 2020.

As of December 31, 2018, Chevron had approximately 48,600 employees (including about 3,600 service station employees). Chevron's oil and gas exploration and production operations are primarily in the US, Australia, Nigeria, Angola, Kazakhstan, and the Gulf of Mexico. As of December 31, 2018, the company's upstream business reported worldwide net production of 2.930 million oil-equivalent barrels per day.[283]

Chevron Nigeria Limited is a subsidiary of Chevron Corporation, one of Nigeria's largest oil producers. The company operates a joint venture with Nigerian National Petroleum Corporation. Chevron's inland and shallow waters operations were profoundly impacted by local communities fighting back against deforestation, military interference, and unfair distribution of oil resources to the Delta peoples. The company, however, has been involved in producing commercially viable gas in its Western Niger Delta operations and Deepwater operations. Chevron Corporate Structure is shown in Figure 3.4.



[283] Chevron Corporation, 'Chevron Corporation 2018 Annual Report (Form 10-K)' (US Securities and Exchange Commission 2020) <https://www.sec.gov/Archives/edgar/data/93410/000009341019000008/cvx12312018-10kdoc.htm> accessed 25 August 2020

Figure 3.4: Chevron Corporate Structure

The Human Rights obligation of Chevron is clearly stated in the corporate responsibility section of the Chevron website. Chevron's approach to Human Rights is stated as follows[284]:

> We conduct our business in a socially responsible and ethical manner, protect people and the environment, support universal Human Rights, and benefit the communities where we work.

Chevron states that its corporate responsibility reporting focuses on environmental, social, and governance (ESG) which it claims are issues that matter to their business and stakeholders – investors, customers, host governments, local communities, and employees. Apart from companywide reporting, Chevron also provides specific industry reporting.[285] The different aspects of the ESG are summarised below[286]:

(i) Environment: this aspect covers protecting the environment, addressing climate change, and managing water resources.

(ii) Social: this aspect covers valuing diversity and inclusion, creating prosperity, and respecting Human Rights.

(iii) Governance: this aspect covers getting results the right way, prioritizing our culture of operational excellence, and operating safely and reliably.

Chevron claims that its Human Rights policy is consistent with international standards and is informed by the United Nations Guiding Principles on Business and Human Rights. Although

[284] Government and Public Affairs Chevron Policy, 'Corporate Responsibility — Chevron.Com' (*chevron.com*, 2019) <https://www.chevron.com/corporate-responsibility> accessed 21 November 2019; See also Government and Public Affairs Chevron Policy, 'Chevron's Approach To Corporate Responsibility' (*chevron.com*, 2019) <https://www.chevron.com/corporate-responsibility/our-approach> accessed 21 November 2019.
[285] Chevron, 'Corporate Responsibility Reporting' (Chevron 2021) <https://www.chevron.com/-/media/chevron/PDF-Reports/Corporate-Responsibility/corporate-responsibility-reporting.pdf> accessed 13 August 2022.
[286] Chevron, 'Corporate Responsibility Reporting' (Chevron 2021) <https://www.chevron.com/-/media/chevron/PDF-Reports/Corporate-Responsibility/corporate-responsibility-reporting.pdf> accessed 13 August 2022; see Chevron, '2018 Corporate Responsibility Report Highlights' (2019) <https://www.chevron.com/-/media/shared-media/documents/2018-corporate-responsibility-report.pdf> accessed 21 November 2019.

governments have the primary duty to protect and ensure the fulfilment of Human Rights, Chevron believes that we have a responsibility to respect Human Rights and that we can play a positive role in the communities where we operate.[287]

3.3.2 Reasons for MNOCs to comply with Human Rights and Environmental Obligations

An MNOC that pursues an active Human Rights policy is doing the right thing and treating people with dignity.[288] Not only is this a moral issue, but it is also a legal issue to a large extent that is actionable in court. MNOCs have several solid legal reasons for pursuing an active and proactive Human Rights obligation. This section discusses the reasons for MNOCs to comply with and take their Human Rights obligations seriously rather than simply as an ethical, reputational or strategic thing to do.

3.3.2.1 Difficulty in distinguishing between voluntary and mandatory aspects of human rights obligations

The most important reason MNOCs should take human rights obligations seriously is that it is difficult to interpret and differentiate between aspects of human rights obligations that are voluntary (that is, soft law) from mandatory aspects (that is, hard law). The line between hard law and soft law obligation is blurred.[289] According to some definitions, the UN Guiding Principles are not soft law obligations; they are considered hard regulations. Justine Nolan also said this in her definition of the role of soft law in corporate responsibility for upholding Human Rights. Although it may not be possible for a victim of a company's human rights abuses to explicitly invoke UN guidelines in a court of law (since they are a collection of obligations for businesses to uphold Human Rights) for their damages, it is incorrect to claim that corporate duty under the UN guidelines and other OECD guidelines is legally irrelevant.[290]

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[287] Chevron, 'Chevron's Human Rights Policy' (*chevron.com*, 2022) <https://www.chevron.com/corporate-responsibility/people/human-rights> accessed 13 August 2022.
[288]Arun Marsh, 'John Ruggie on UN Human Rights Principles - video, *The Guardian*, 11 October 2013: https://www.theguardian.com/sustainable-business/video/jo-confino-talks-to-john-ruggie-un-human-rights-video.
[289] Dina Shelton, 'Soft Law', Routledge Handbook of International Law (Routledge 2010).
[290] Justine (n 41)

So why are Human Rights obligations legally relevant and relevant for a company? First, human rights obligations can function as a forerunner to hard law. It could serve as a working laboratory for developing legally binding hard laws, especially in area of tort law where a claim can be successful if an MNOCs breaches a duty of care it owes to the claimants. [291]

Second, in a court of law, Human Rights obligations are enforceable in various ways. Governments, banks and investors are gradually enforcing compliance with human rights obligations on companies to offer certain benefits or make them eligible for certain benefits (e.g., loans, certifications, membership in certain organisations, etc.). Third, hard law comes up in several "hardness" levels. This means that businesses are not always needed to promise precise outcomes, but rather to 'make an effort' or 'take sufficient care.' This principle of "taking sufficient care" is the basis of many litigations brought against MNOCs for Human Rights and environmental violations. Fourth, hard law norms, such as the EU Directive on large companies' non-financial reporting, are established by reference to Human Rights obligations: businesses may make use of reporting requirements developed by private organisations: a form of private soft law.

Therefore, it is important to note that it may not be possible to differentiate between hard law and soft law (human rights obligations) because they are interwoven and blend into each other. Enforcement of soft law obligations could even be more effective in some areas than enforcing hard law obligations. This applies particularly to NGOs, governments, investors, banks, media and social media with a relatively high level of scrutiny.[292] The UN Guiding Principles are also a form of multi-level governance, where international norms (e.g., UN Guiding Principles, OECD Guidelines, African Charter) are operationalized at the local (EU Regulations and Directives) and national level (Nigerian Human Rights Commission, National Action Plan-Nigeria), with a mix of binding obligations and non-binding norms and a mix of governance institutions and lawmakers.[293] Therefore, if MNOCs decide to ignore Human Rights

[291] Doug Cassel, 'Outlining the Case for a Common Law Duty of Care of Business to Exercise Human Rights Due Diligence', Business and Human Rights Journal 1 (2016) 79-202; see Cees van Dam, European Tort Law (Oxford: Oxford University Press, 2013) 804-809, for details on the judicial technique of 'finding' the standard of care.

[292] Jan Eijsbouts, 'Corporate Responsibility, Beyond Voluntarism. Regulatory Options To Reinforce The Licence To Operate,' (Maastricht University 2011); see Jan Eijsbouts, 'Corporate Social Responsibility, A Matter Of Principle(S), Law Or Both?', *Tussen Themis en Mercurius, Bedrijfsjuridische bijdragen aan een Europese beleidsconcurrentie, NGB 1930-2005* (Kluwer 2005).

[293] Jan M. Smits, 'Enforcing Human RightsCodes Under Private Law, Or: On The Disciplining Power Of Legal Doctrine' [2015] SSRN Electronic Journal.

obligations, it means that they are orientated in the past rather than in the future and reject the incoming tide rather than anticipate it.

3.3.2.2 Improving assessment and management of legal risk

Complying with Human Rights obligations improves the company's discovery, assessment and management of legal risks. This is possible when a company uses an active approach for legal control and compliance with Human Rights obligations to engage in Human Rights due diligence and conduct a proper stakeholder policy. Companies' inability to forecast risk correctly may be due to people's natural inclination. Research studies have demonstrated this to overestimate their ability to predict company legal risk accurately.[294] This premise is based on research studies that have confirmed that companies tend to overestimate their ability to assess the level of legal risk for the company correctly.[295]

A good example of how multinational companies underestimate legal risk is to consider the reputational damage that Royal Dutch Shell suffered in the Wiwa v Shell litigation. Shell spent twelve (12) years petitioning the court not to hear the cases with no success.[296] This case was finally heard on May 26, 2009. As papers emerged during the trial which shed light on Shell's attempts to deal with the PR nightmare, Shell agreed to a $15.5 million out-of-court settlement in June 2009. Ben Amunwa, director of the Remember Saro-Wiwa Organization, said, "No company that is innocent of any involvement with the Nigeria military and Human Rights abuses would settle out of court for 15.5 million dollars. It clearly shows that they have something to hide".[297] Before the commencement of the trial and during the trial, Shell suffered serious reputational damages both in Nigeria and abroad because of this case. For example, Shell was forced to pull out of all operations in the Ogoniland in the Niger Delta, Nigeria. Following the hanging of Saro-Wiwa and eight other Ogoni under a trumped-up military charge

[294] Douglas Hubbard, The Failure of Risk Management: Why It's Broken and How to Fix It, (John Wiley & Sons, Inc., 2009) ("Hubbard"), Kindle ed., pp. 457-459
[295] Fagone, Masters of Disaster: At Wharton's Risk Management and Decision Processes Center, researchers are investigating why humans to such a poor job planning for, and learning from, catastrophes, Wharton Magazine (Summer 2010), available at http://www.whartonmagazine.com/issues/815.php.)
[296] Christine Kearney, 'New York Trial Delayed For Nigerians Suing Shell' (U.K., 2020) <http://uk.reuters.com/article/rbssEnergyNews/idUKN0641522820090406?sp=true> accessed 17 May 2020.
[297] Bryce R, 'T. Boone'S Windy Misadventure' (*The Real News Network*, 2020) <http://therealnews.com/t/index.php?option=com_content&task=view&id=31&Itemid=74&jumival=3845&updaterx=2009-06-10+01:43:12> accessed 17 May 2020

of murder in a military court, the indignation spread all over the world.[298] Vigils were held, protests were carried out, Nigeria was suspended from the Commonwealth, and the country financially suffered from an international boycott of its oil and gas exports.[299] European activists were targeting Shell stations, questions were raised in parliament worldwide, and Shell's credibility was destroyed. If Royal Dutch Shell had an active Human Rights obligation and conducted a proper policy of engagement with stakeholders, it would have achieved a more accurate estimation of the legal risk involved in this case.

3.3.2.3 Preventing disputes and operational delays

Taking Human Rights obligations seriously by performing due diligence on Human Rights helps the company foresee, avoid or minimise the effects of disputes with workers, trade unions, and local communities. The costs of due diligence and meetings with stakeholders can be much lower and, therefore, a fraction of the operating expenses incurred by conflicts. [300] This is a common occurrence in the Niger Delta, where oil operations are frequently shut down and, in some cases, for several months, thus, affecting local economic activities and revenue both for the company, government officials, and local communities. For example, during the height of the Ogoni crisis in the 1990s, Shell's operations were severely affected for a long time in the region. They were eventually stopped from operating in the Ogoni land of the Niger Delta.

3.3.2.4 Staying ahead of the legislation

A proactive Human Rights obligation helps MNOCs anticipate the chaotic regulatory changes at the national, regional and international levels over the next decade. Business and Human

[298] Amnesty International, 'Investigate Shell for complicity in murder, rape and torture' (Amnesty International 2017) < https://www.amnesty.org/en/latest/news/2017/11/investigate-shell-for-complicity-in-murder-rape-and-torture/> accessed June 26 2022

[299] Plaut, Martin, BBC, 'UK and US considered Nigeria naval blockade over Saro-Wiwa execution' (BBC 2017) < https://www.bbc.co.uk/news/world-africa-50892306> accessed June 26, 2022

[300] Rachel Davis and Daniel M. Franks, *Costs of Company-Community Conflict in the Extractive Sector*, Human RightsInitiative Report Nr. 66 (Cambridge MA: Harvard Kennedy Law School 2014: https://www.hks.harvard.edu/m-rcbg/Human RightsI/research/ Costs%20of%20Conflict_Davis%20%20Franks.pdf.

Rights are one of the areas in which "law" is transnational and, by nature multiform.[301] In reality, a vast set of legislative and non-legislative measures and guidelines are faced by corporations. These are issued at different levels (UN, OECD, EU and national legislators) and in different forms (hard law, soft law, private regulation through industry codes, including Global Compact, through the conditions set by investors and lenders, as well as by certification organisations). [302] Therefore, an MNOCs that tries to decide which Human Rights obligations are binding and non-binding raises serious legal risks because the distinction is blurred and cannot be maintained as a mechanism of decision-making. Failing to do this means that such a company must be prepared to respond to a constant stream of different piecemeal changes in different parts of the world where the company is operating? Without any doubt, it will be more costly to adjust to each regulatory change than to invest in an active and proactive Human Rights obligation strategy and remain ahead of the legislative game.[303]

3.3.2.5 Avoiding penalties and restrictions on business privileges

Governments, banks, and investors are increasingly imposing compliance with soft law on companies to access certain business-related privileges. For example, companies that do not comply with human rights obligations usually discover that export credit guarantees are unavailable, trade missions are not permitted, procurement procedures are missed, and banks and investors become reluctant to invest or engage in any business activities with these companies. In short, there will be significant isolation and reduced engagement with banks, investors, business customers, and the public. Some NGOs, including Amnesty International,

[301] Peer Zumbansen, 'Transnational Law, evolving' (2011) 27 Comparative Research in Law & Political Economy; See also Fabrizio Cafaggi, 'Transnational Private Regulation: Regulating Private Regulators', *Research Handbooks on Globalisation and the Law series (Edited by Sabino CASSESE)* (Edward Elgar 2016) <http://hdl.handle.net/1814/39369> accessed 16 November 2019.
[302] Anna Beckers, *Enforcing Human RightsCodes. On Global Self-Regulation and National Private Law* (Hart Publishing 2015). See also Jan M. Smits, 'Enforcing Human RightsCodes Under Private Law: On the Disciplining Power of Legal Doctrine' (2017) 24 Indiana Journal of Global Legal Studies. 99.
[303] John F Sherman, 'Six Reasons Why Lawyers Should Practice Law With Respect For Human Rights' (*Shiftproject.org*, 2014) <https://www.shiftproject.org/resources/viewpoints/six-reasons-why-lawyers-should-practice-law-with-respect-for-human-rights/> accessed 16 November 2019; See John F Sherman III, 'The UN Guiding Principles: Practical Implications For Business Lawyers' (*Shiftproject.org*, 2013) <https://www.shiftproject.org/resources/publications/un-guiding-principles-practical-implications-business-lawyers/> accessed 16 November 2019; See Shift, Oxfam and Global Compact Network Netherlands, 'Business And Human Rights Initiative, How To Do Business With Respect For Human Rights? A Guidance Tool For Companies' (Global Compact Network Netherlands 2016) <http://www.businessrespecthumanrights.org> accessed 16 November 2019.

regularly monitor multinational companies and investors becoming more critical of Human Rights risks in their portfolios.[304]

3.3.3 Instruments used by MNOCs for Compliance with Human rights and environmental Obligations

The section discusses the various instruments used by MNOCs to comply with Human Rights obligations.

3.3.3.1 Legal department

In most multinational companies, the legal control and compliance with Human Rights obligations fall within a company's legal department. Multinational companies operate as a corporate group structure. As a result, the functions of the legal department may, from time to time, interface with that of the PR department, and the HR department, which a traditionally responsible for Human Rights formulation and compliance. Some multinational companies also have a compliance department (and associated compliance manager). The role of the Legal Department within the organisation, particularly its degree of independence, is the subject of much debate. One school of thought argues that if a lawyer at a company is also a member of the bar, then he is considered independent in many jurisdictions to a large extent. This thesis adopts the position that an employment relationship between the company lawyer and the company is an obstacle to an independent exercise of his profession.[305]

The question is: What is the role of a company lawyer that is a member of a bar or some other professional body. Is his role only to promote the company's profit generation without asking difficult questions or a corporate morality figure who sees his remit as going well beyond compliance with the law, moving the company to an active Human Rights obligation? The

[304] Fair Finance Guide International, 'Undermining Our Future A Study Of Banks' Investments In Selected Companies Attributable To Fossil Fuels And Renewable Energy' (2015) <https://fairfinanceguide.org/media/60908/ffg-report-151102-undermining-our-future-final.pdf> accessed 16 November 2019.

[305] The European Court of Justice (ECJ) adopted this postion in 2010 in its decision in the AkZo Nobel case. The decision of the ECJ suggest that the employment relationship between a company lawyer and the company may be obstackle to being fair and impartial.

challenge is that these companies claim that the legal department is independent. However, there have been clear cases where the legal department is pursuing a different goal, as stated by the company. It is important to note that the legal department's role is, to a large extent, what defines the legal control and compliance with Human Rights regulations of that company.

3.3.3.2 Corporate codes of conduct

Corporate governance mechanisms of "self-regulation" include corporate codes of conduct, Human Rights board committees, business ethics units, and supply chain assurance.[306] Corporate codes of conduct vary widely in addressing corporate ethics and articulating the norms and standards that a corporation voluntarily adopts on a range of key issues such as Human Rights, labour, and the environment. Such codes gained prominence in the 1990s particularly with multinational corporations operating in developing countries, but have come under criticism as ineffective window dressing that may not improve corporate behaviour unless accompanied with more significant organizational change.[307] This criticism is reflected in the variety of reasons that motivate corporations to adopt codes of conduct, including: "to prevent government intervention in the form of mandatory regulation…; to limit political opposition to the growing globalization of markets; as a response to pressures from consumer groups; and as a means to protect their reputation".[308]

Although corporate codes of conduct are among the "softest" form of voluntary self-regulation and are typically expressed in abstract and non-binding language, in some instances, they succeed in diffusing global standards[309], and NGOs and advocacy groups have attempted to

[306] Gill, Amiram. 2008. "Corporate Governance as Social Responsibility: A Research Agenda." *Berkeley Journal of International Law* 26: 452–478.
[307] Muel Kaptein and Johan Wempe, ' Twelve Gordian Knots When Developing an Organizational Code of Ethics ' (1998) 17 Business Ethics: A European Review. 853-869
[308] Rosen-Zvi, Issachar, 'You Are Too Soft!: What Can Human RightsDo For Climate Change?' (2011) 12 *Minnesota Journal of Law, Science & Technology*. 527–566.
[309] Toffel, Michael W., Jodi L. Short, and Melissa Ouellet, 'Codes in Context: How States, Markets, and Civil Society Shape Adherence to Global Labour Standards.' (2015) *Regulation & Governance* 9(3): 205-223.

hold corporations to their stated commitments. Code-of-conduct audits and inspections in production and service settings can also improve operations.[310]

3.3.3.3 Human Rights Board Committee

Another mechanism used by parent companies for legal control and compliance with Human Rights obligations is a combination of Human Rights board committees and business ethics units. This is an internal governance mechanism used as a means of carrying out and monitoring the principles adopted in the corporate code of conduct throughout the organizational hierarchy. These complement compliance departments within corporations, which also function to bring broader social interests into the firm.[311]

Royal Dutch Shell, for instance, established the Human Rights committee in 2005. It is one of the four Board Committees. Its role was to review and advise Shell on policies and performance against Shell's general Business principles, Shell's code of conduct and mandatory Health, Safety, Security, Environment and Social Performance (HSSE & SP) standards.[312] As of the time of this writing (May 2020), Shell's Human Rights committee was chaired by Sir Nigel Sheinwald. It regularly announces changes to the membership of the Human Rights committees.

3.3.3.4 Annual Human Rights and Sustainability Reports

Another way that companies exercise legal control and compliance with Human Rights obligations is to produce an annual report that highlights Human Rights and environmental rights issues. Shell, for example, calls it the Sustainability Report.[313] Chevron calls it "Human

[310] Saed Alizamir, Sang-Hyun Kim and Suresh Muthulingam, 'Compliance As Operations Management', *Cambridge Handbook of Compliance* (Cambridge University Press) 2020) <https://www.ssrn.com/author%3D362604> accessed 24 May 2020.
[311] Sean J Griffith, 'Corporate Governance In An Era Of Compliance' (2016) 57 William & Mary Law Review. 2075 – 2140. <https://pdfs.semanticscholar.org/2ddf/a095503023af825a33390ec6f9b56a8157f1.pdf>.
[312] 'Sustainability Governance - Shell Sustainability Report 2018' (*Reports.shell.com*, 2020) <https://reports.shell.com/sustainability-report/2018/introduction/our-approach-to-sustainability/sustainability-governance.html> accessed 26 June 2020.
[313] 'Sustainability Reports' (*Shell.com*, 2020) <https://www.shell.com/sustainability/sustainability-reporting-and-performance-data/sustainability-reports.html> accessed 24 May 2020.

Rights report".[314] Any discrepancies and misinformation in these reports can be the subject of legal disputes. As a result, companies are increasingly taking the publications and the content of these annual reports very seriously.

Multinational companies outside the oil and gas industry also publish annual reports. Unilever, a British-Dutch multinational consumer goods company, regularly produces Human Rights reports that include all of its supply chains in the tea industry. In 2010, the company was heavily criticised for not including several Human Rights violations in the supply chain of tea production.[315]

Emeseh and Songi has researched on CSR, human rights and sustainability report in Africa.[316] The authors states corporations care about the information in sustainability reports because it affects their corporate image and reputation. As a result, using corporate accountability for false and misleading statements made by companies under the appropriate framework has the potential to improve the effectiveness of CSR. One of the mechanisms identified by the authors that can be utilised to hold corporations accountability for false and misleading statements in sustainability reports is termed "transnational - Organisation for Economic Cooperation and Development's (OECD) and national contact points (NCPs)". According to the authors, an example of this mechanism is a complaint filed by Amnesty International, Friends of the Earth (FoE) International, and FoE The Netherlands against Shell Nigeria before the UK and Dutch NCPs (Organisation for Economic Cooperation and Development Watch, 2011). The complainants claimed that Shell violated relevant provisions of the guidelines by making false, misleading, and incomplete statements about incidents of sabotage to its operations and pollution sources in the Niger Delta, as well as their clean-up operations, preventing victims from claiming appropriate compensation under Nigerian law. Contrary to Shell's communications and statements (Shell Dialogues Webchat, 2011), the report discovered, among other things, that Shell's own internal procedures were not followed, and that ten of the

[314] Chevron, 'Human Rights Report' (*Chevron.com*, 2020) <https://www.chevron.com/-/media/shared-media/documents/2018-corporate-responsibility-report.pdf> accessed 24 May 2020.
[315] Justin Rowlatt and Jane Deith, 'The bitter story behind the UK's national drink', BBC 8 December 2015: http://www.bbc.co.uk/news/world-asia-india-34173532.
[316] Emeseh, E. and Songi, O., 'CSR, human rights abuse and sustainability report accountability (2014) 56(2) International Journal of Law and Management' 136-151.

investigated sites, which Shell records show as having completed remediation, had pollution levels that exceeded Shell (and government) remediation closure values.

Songi and Dias have also researched on sustainability reporting in Africa countries including Egypt, Equatorial Guinea, Kenya, Nigeria, Botswana and South Africa. According to the authors, the conflicting nature of sustainability reporting standards necessitates a broader reform strategy or policy harmonisation, and they argue that African regimes should abandon self-regulatory sustainability reporting models in favour of sanctions-based models or hybrid models combining mandatory and voluntary approaches.[317]

3.7.4 Supply Chain Assurance

Supply chain assurance refers to the confidence that the supply chain will produce and deliver elements, processes, and information that function as expected.[318] Supply Chain assurance is another instrument that is increasingly being used in the legal control and compliance with Human Rights obligations of multinational companies. Organisations often rely on third-party suppliers and vendors to deliver their core mission and meet consumer demand. This is usually beneficial to multinational companies because these suppliers can deliver specific services at a lower price point through economies of scale. However, multinational companies can face legal risk if the suppliers are found to engage in Human Rights and environmental violations. An example of such legal risk is when suppliers engage in illegal labour practices (e.g., using child labour in their operations). Supply chain assurance extends the corporation's voluntarily adopted principles into its external contracts through private ordering, requiring suppliers to use international business norms and standards of Human Rights, labour rights, and social responsibility, or otherwise providing incentives to do so.[319]

[317] Songi, Ondotimi, and Ayesha Dias. 'Sustainability Reporting in Africa: A Comparative Study of Egypt, Equatorial Guinea, Kenya, Nigeria, Botswana and South Africa' (2019) Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability (Cambridge University Press, 2019)
[318] NIST, 'supply chain assurance' (NIST, US Department of Commerce) < https://csrc.nist.gov/glossary/term/supply_chain_assurance> accessed June 26, 2022
[319] Margaret M. Blair, Cynthia A. Williams and Li-Wen Lin, 'Assurance Services As A Substitute For Law In Global Commerce', (2007) 33 SSRN Electronic Journal. 325–360.; Stephen Kim Park and Gerlinde Berger-Walliser, 'A Firm-Driven Approach To Global Governance And Sustainability' (2015) 52 American Business Law Journal; Saed Alizamir, Sang-Hyun Kim and Suresh Muthulingam, 'Compliance As Operations Management', *Cambridge Handbook of Compliance* (Cambridge University Press) 2020) <https://www.ssrn.com/author%3D362604> accessed 24 May 2020

3.3.3.5 Investigation by consultants

When there are serious allegations of Human Rights and environmental violations, sometimes parent companies can appoint an independent firm (or consultants) to investigate these allegations. For example, in 2011 Shell hired Bureau Veritas (another multinational company that specialises in specialized in testing, inspection and certification), to verify the oil spill investigation system following criticism of the oil spill investigation process in the Niger Delta.[320]

The value of the Bureau Veritas procedure, and the degree to which it fixes some of the long-standing issues with the oil spill investigation, will depend on the criteria of its verification approach. In the absence of a clear procedure, the Bureau Veritas initiative is merely a public relations response to increasing criticism of the influence of Shell in Nigeria. Despite numerous demands from Amnesty International and others for clarification about what Bureau Veritas has confirmed or would verify, and if Bureau Veritas would be permitted to accept evidence from communities and NGOs, Shell has declined to react.[321]

This general reluctance by Shell to release the report of such independent investigations is consistent with the attitude of most parent companies and their subsidiaries in addressing issues of Human Rights and environmental violations. This is also a typical case of a multinational failing in its Human Rights obligations regarding disclosure and transparency.

3.3.3.6 Joint Inspection

Another way that multinational companies use to ensure legal control and compliance with Human Rights obligations is to conduct joint investigations between the companies and the representatives of the local communities. This is a widespread method in the extractive industries such as the oil and gas industry. For example, when an oil spill occurs in the Niger Delta, a joint investigation team is mobilized to visit the site. The joint investigation team

[320] Amnesty International, 'Bad Information: Oil Spill Investigations in The Niger Delta' (2012) (Amnesty International 2012) 44-45

[321] 'Royal Dutch Shell Plc Sustainability Report 2011 - Nigeria' (*Reports.shell.com*, 2020) <https://reports.shell.com/sustainability-report/2011/ouractivities/deliveringenergyresponsibly/nigeria.html> accessed 24 May 2020.

includes representatives of regulatory agencies (e.g., National Oil Spill Detection and Response Agency (NOSDRA), Nigerian Upstream Petroleum Regulatory Commission (NUPRC)), the oil company, the affected community – almost always men – and the security forces.

The information recorded on the form of an oil spill investigation, known as a Joint Investigation Visit (JIV) report, is extremely important because it is the basis for deciding whether communities receive compensation for damage to their homes, fields and fisheries. If a leak is determined to be caused by negligence or intervention from third parties, the community does not receive any compensation from the oil company, irrespective of the harm done. The data recorded on JIV forms about the volume of oil spilt and the affected area can also affect how much compensation people receive and can affect the extent and quality of clean-up.

These reports have been criticised in the past for lacking in detail and transparency. There are systemic flaws in the system for investigating oil spills in the Niger Delta. Individual cases investigated by Amnesty International and the Centre for Environment, Human Rights and Development (CEHRD) show significant inconsistencies between the facts and arguments made by the oil companies.[322] As a result, the outcome of these investigations lacks credibility, and therefore there is little confidence in the results of those inquiries.

3.4 The Nigerian Legal System's Response to Human Rights and Environmental Violations

In this section, we will discuss the response of the Nigerian legal system to Human Rights and environmental violations. This will cover the constitutional, legislative, and regulatory framework and common tort law.

3.4.1 Constitutional Response

[322] Amnesty (n 64)

There are so many laws and regulations in Nigeria that have been set up to protect Human Rights and the environment. The foundation of environmental law and policy in Nigeria can be traced back to its involvement in the 1972 Stockholm Conference on the Human Environment.[323] Later, environmental policies were incorporated into the 1999 constitution of the Federal Republic of Nigeria as environmental awareness continued to grow to make provisions for protecting and improving the environment- air, land, and water bodies. [324]

Unlike previous constitutions in Nigeria, the 1999 Constitution attempted to address the issue of human rights and the environment. Although the environment was given constitutional significance, it seems that its inclusion simply serves to expose Nigeria as a government that is unconcerned about environmental issues.

Section 20 of the constitution states as follows:

> The state shall protect and improve the environment and safeguard the water, air and land, forest and wild life of Nigeria.[325]

Section 20 of the Constitution is one of the "Fundamental Objectives and Directive Principles of State Policy" listed in Chapter 11 of the Constitution.[326]

Nigeria has been active in signing and ratifying international human rights treaties, but it has faced difficulties in putting these treaties into practice at home. Nigeria operates under a dualist system, which means that international treaties cannot be implemented until they are accepted by Nigeria's legislative bodies. In addition, while the Nigerian constitution protects civil and political rights, international treaties such as the African Charter extend protection to cultural, economical, and collective rights.

[323] Makinde , O and Ayanbule, B., 'Chapter 36: Nigeria' in International and Comparative Guide to Environmental Law, 2006, written for the Legal Group. Retrieved at https://alukooyebode.wpengine.com/wp-content/uploads/2018/10/chapter_36-nigeria.pdf at July 7, 2021
[324] Federal Constitution of Nigeria, 1999, at Section 20.
[325] Section 20, 1999 Constitution of the Federal Republic of Nigeria.
[326] Chapter 11 of the 1999 Constitution of the Federal Republic of Nigeria as amended 2011

3.4.2 Legislative Response

Nigeria has put in place several laws and regulations to regulate the petroleum industry and its impacts including human rights and environmental violations since oil was discovered in the 1950s. The most important ones are the Oil Pipelines Act (OPA), the Petroleum Act, the National Oil Spills Detection and Response Act, and the National Oil Spill Contingency Plan (NOSCP).

Ambrose discussed the laws and standards (for example, National Environmental Standards and Regulation Enforcement Agency Act, 2007 (NESRA Act), which repealed the FEPAA Act[327] and Section 40 of the 1999 Constitution of the Federal Republic of Nigeria) used in Nigeria for addressing remediation and compensation. A critical examination of the legal and institutional framework in Nigeria would give a verdict on the absence of a comprehensive statutory provision to prevent human rights and environmental violations in Nigeria[328]. For example, the available laws do not explicitly include natural resources damage within the range of liability headings for compensation.[329] The legal provision is too restrictive in scope and the terms used can also be interpreted vaguely to the extent that it seems to exclude compensation for more sophisticated valuation methods based on the so-called 'existence' and 'option' values. In the following discourse, we review some of the laws and legal authorities for addressing human rights and environmental violations in Nigeria.

3.4.2.1 Oil Pipeline Act (OPA)

The Oil Pipeline Act (1956) (OPA) is "an act to make provision for licences to be granted for the establishment and maintenance of pipelines incidental and supplementary to oilfields and oil mining and purposes ancillary to such pipelines".[330] In summary, the OPA requires the oil pipeline licensees to pay compensation in two oil spill-related scenarios[331]:

[327] Ambrose Ekpu, 'Environmental Impact of Oil on Water: A Comparative Overview of the Law and Policy In The United States And Nigeria' (1995) 24 Denver Journal of International Law and Policy
[328] Van Ho and others (n 52)
[329] Danielle Schopp and John Pendergrass, 'Natural Resource Valuation and Damage Assessment In Nigeria A Comparative Analysis' (The Environmental Law Institute 2003).
[330] The Oil Pipeline Act (1956) (OPA)
[331] Anna Maitland and Megan Chapman, 'Oil Spills in the Niger Delta: Proposals for an Effective Non-Judicial Grievance Mechanism' (Stakeholder Democracy Network (SDN) Under the Compensation Rates and Processes Project 2014).

(1) for damages resulting from leakages or breakages in pipelines, or saboteurs; and

(2) for damages resulting from any failure to protect, maintain or repair any work, structure or thing executed under the licence.[332]

The provisions of the OPA see the possibility of licensee liability to neglect to protect pipelines from malicious third-party interference[333]. Apart from these laws, the government and other regulating bodies on oil spills have put together a standard rate of compensation for oil spills (e.g., the 2008 National Technical Development Forum (NTDF) Rates, and the 1998 Nigerian Upstream Petroleum Regulatory Commission (NUPRC) Rates).[334]

3.4.2.2 National Oil Spill Detection and Response Agency (Establishment) Act, 2006

This act created the National Oil Spill Detection and Response Agency (NOSDRA). NOSDRA's is responsible for preparedness, detection and response to all oil spillages in Nigeria.[335] This act also created a monitoring and evaluating arm of NOSDRA called the National Control and Response Centre (NCRC).

In addition, this Act also mandates NOSDRA to coordinate and implement the National Oil Spill Contingency plan (NOSCP), a blueprint for checking oil spills through containment, recovery and restoration in accordance with international standards[336]. NOSDRA also receives oil spill reports from Zonal offices and units of the Agencies in different states of the country.[337]

[332] Oil Pipelines Act (see Chapter 338)
[333] *Bodo Community & Ors. v. SPDC* [2014] EWHC 1973 (TCC) (ruling on preliminary objections).
[334] Kingsley Ezeibe, 'The Legislative and Institutional Framework of Environmental Protection in The Oil and Gas Sector in Nigeria – A Review' (2011) 2 Nnamdi Azikiwe University Journal of International Law and Jurisprudence.
[335] Section 1, NOSDRA (Establishment) Act, CAP N157, 2006
[336] Allan Ingelson and Chilenye Nwapi, 'Environmental Impact Assessment Process for Oil, Gas and Mining Projects in Nigeria: A Critical Analysis' (2014) 10 Law Environment and Development Journal <http://www.lead-journal.org/content/14035.pdf> accessed 6 October 2016.
[337] Section 18(1) (a-c)

Even though this act provides that NOSDRA should act as the lead agency in coordinating oil spill response management, it is still not clearly defined in the act and all the functions of NOSDRA that it is directly involved with clean-up of the oil spill site.[338]

3.4.2.3 Nigerian National Petroleum Corporation (NNPC) Act, CAP N123, LFN 2004

The Act was created to "dissolve the Nigerian National Oil Corporation and to establish the Nigerian National Petroleum Corporation empowered to engage in all commercial activities relating to the Petroleum industry and to enforce all regulatory measures relating to the general control of the Petroleum sector through its Petroleum Inspectorate department."[339] This means that although the Nigerian National Petroleum Corporation (NNPC) is the oil company through which the government of Nigeria participates and regulates the country's petroleum industry, it is also involved in environmental protection in the oil and gas sector.[340]

The NNPC Act makes the NPPC (which is also an oil-producing company like many other multinational oil companies such as Shell and Chevron) responsible for its operations and also liable for violations of human rights and serious environmental damages. Therefore, the NNPC also has to take due diligence to avoid such liability, and hence their involvement in the protection of the environment and also in remediating and compensating victims for oil spills.

3.4.2.4 The Petroleum Act (1969) and Petroleum Drilling and Production Regulation (1969)

These are laws that ensure the protection of the environment caused by petroleum extraction which causes pollution in the air, crops, land and wildlife. Regulation 25 of the petroleum drilling and production regulation of 1969 requires operating companies to take extra care to prevent pollution on water and land. Regulation 37 of the petroleum drilling and production

[338] Ken Ezeibe, 'The Legislative and Institutional Framework of Environmental Protection in The Oil and Gas Sector in Nigeria – A Review' (African Journals Online (AJOL) 2013).
[339] Section 5(1) (a-e) NNPC Act
[340] Ezeibe K, 'The Legislative and Institutional Framework of Environmental Protection in The Oil And Gas Sector In Nigeria – A Review' (African Journals Online (AJOL) 2013)

regulation ensures that installations be in good condition to avoid leakage, and wastage of oil so as not to cause damage to crops, aquatic life, land and properties.

The Petroleum Industry Act (PIA) 2021 was revised and signed into law in 2021 to overhaul Nigeria's Petroleum sector.[341] This Act provides a legal, governance, regulatory, and fiscal framework for the Nigerian petroleum industry and the development of host communities. The Act contains five (5) chapters structured into several parts, 319 sections and schedules. The Act provides for two regulatory agencies - the Nigerian Upstream Petroleum Regulatory Commission (NUPRC) and the Nigerian Midstream and Downstream Petroleum Regulatory Authority, (NMDPRA) - that will be responsible for the technical and commercial regulation of petroleum operations in their respective sectors, and have the power to acquire, hold, and dispose of property, as well as sue and be sued in their name.

The most important implication of the revised Petroleum Act 2021 to human rights and the environment relates to the general administration of the upstream petroleum operations and environment, and the license and leases under the Act. [342]The Act requires the Commission to manage the environment under the Act to ensure environmental sustainability. For example, Section 102 of the Act, requires a licensee or lessee engaged in upstream or midstream petroleum operations to submit to the Commission or Authority, as the case may be, an environmental management plan in respect of projects requiring environmental impact assessment within one year or six months of the effective date or after the grant of the applicable licence or lease. The plan will be approved if it complies with applicable Environmental Acts and the applicant can rehabilitate and manage negative environmental impacts.[343]

According to Kpea-ue, a combined reading of the provisions in the Petroleum Act 2021 reveals a restriction on Nigerians' fundamental right to own property, including property in lands and natural resources, as well as the right to compensation where private lands are compulsorily acquired. It is concluded that, while the PIA provides certain mechanisms for the prevention

[341] Petroleum Industry Act 2021, s. 70(1)(a)
[342] Kasirim Nwuke, 'Nigeria's Petroleum Industry Act: Addressing old problems, creating new ones' (The Brookings Institution) <https://www.brookings.edu/blog/africa-in-focus/2021/11/24/nigerias-petroleum-industry-act-addressing-old-problems-creating-new-ones/> accessed February 2, 2023
[343] Ibid., s. 102(1), 102(1)(a), 102(a)(b), 102(3)(b), 102(4).

of pollution, gas flaring, and remediation measures, the effective implementation of existing legal regimes and measures requires a viable and visionary institution and agency.[344]

3.4.2.5 Nigerian Upstream Petroleum Regulatory Commission(NUPRC), and Environmental Guideline and Standard for the Petroleum Industry (EGASPIN) in Nigeria

The environmental regulations of the petroleum industry are the province of the NUPRC, which sets guidelines and enforces standards. Its function includes monitoring the operations of the oil companies, setting and enforcing environmental standards, collecting royalties and rents, as well as supervising and ensuring compliance with oil industry regulations and issuing licenses and permits, and protecting all oil and gas investments.[345]

The EGASPIN guidelines provide that the operators clean up the spill no matter the cause. Section 4.1 states that an operator shall be responsible for the containment and recovery of any spill discovered within the location of the company. The operator shall then take the normal procedure to remove or dispose of the spill. Pursuant to sections 2.6,3 of the guidelines the clean-up must commence within 24 hours after the occurrence of the spill.

Apart from this, within 24 hours of the spill, the operator has to submit an oil spill report to the director of the NUPRC of Nigeria. In line with Section 2.11.1 of the guidelines, the operator has a duty to restore the environment to its original state. Furthermore, for inland waters, the only option for cleaning spills shall be complete containment and mechanical/manual removal.[346]

3.4.3 Regulatory Framework

[344] Kpea-ue B. S., 'Oil and gas regulation and human rights' protection in nigeria: a critical appraisal of the petroleum industry act 2021' (2021) 2(1) The Journal of Environmental and Human Right Law 66
[345] Awogbade, S., Sipasi, S and Iroegbunam, G., "Getting the Deal Through - Oil Regulation 2008: Nigeria', 114-119, at 115, www.gettingthedealthrough.com/
[346] Department of Petroleum Resources, 'Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN) - Revised Edition 2002' (The Department of Petroleum Resources 2022) <https://ngfcp.dpr.gov.ng/media/1066/dprs-egaspin-2002-revised-edition.pdf> accessed 28 August 2022. See Section 4.1 of the EGASPIN

The main regulatory and enforcement authorities in Nigeria are the Nigerian Upstream Petroleum Regulatory Commission (NUPRC), which is the regulatory agency of the Federal Ministry of Petroleum, the National Oil Spill Detection and Responses Agency (NOSDRA), the National Environmental Standards and Regulations Enforcement Agency (NESREA), which is a regulatory agency of the Federal Ministry of Environment and the Ministry of Water Resources, and which regulates the pollution of watercourses and underground waters. The two most important of these regulatory agencies are NUPRC and NOSDRA.

3.4.3.1 National Oil Spill Detection and Response Agency (NOSDRA)

The National Oil Spills Detection and Response Agency (NOSDRA) is the most active agency of the Federal Ministry of Environment that is involved in regulating the oil and gas industry in Nigeria. NOSDRA was established by the National Oil Spill Detection and Response Agency (Establishment) Act, 2006. NOSDRA monitors and receives reports of the oil spil, coordinates response, and imposes punishment for oil companies that fail to report oil spills within 24 hours or clean-up and remediate spill sites[347].

NOSDRA has to coordinate and enforce the National Oil Spill Contingency Plan and to create a monitoring and asset system or, where appropriate, to protect the response. NOSDRA cannot detect oil spills, yet it is expected to report them within 24 hours of their occurrence. Prompt and accurate reporting of oil spills by NOSDRA is not always possible because it relies on oil companies. In turn, the oil companies have often been accused of not promptly and accurately reporting the spill's occurrence and magnitude.[348]

The link between NOSDRA and the Human Rights obligations of parent companies and their subsidiaries operating in the Niger Delta is an important one. Under the NOSDRA Act 2006, when there is an oil spill, NOSDRA, the oil companies, accompanied by government officials and community representatives are supposed to visit the oil spill site to access key information.

[347] National Oil Spill Detection and Response Agency (Establishment) Act, No 15 of 2006 [NOSDRA Act].
[348] Tell: Nigeria's independent weekly magazine, Special Edition on '50 years of the oil I Nigeria', (February, 2008), cited in Okpanachi E, 'Confronting the governance Challenges of Developing Extractive Industry'. Policy and Performance in the Oil and Gas Sector', Review of Policy Research, volume 28, no.1 (2011) 25-47, at43-44.

This information is put into a report called the joint investigation visit (JIV) report. Several reports have shown that the content (e.g., cause of the spill, amount of oil and how long the spill lasted) of this report is inconsistent and misleading,[349] and therefore amounts to a breach of Human Rights obligations of parent companies regarding Human Rights and environmental violations.

3.4.3.2 Nigerian Upstream Petroleum Regulatory Commission (NUPRC)

Nigerian Upstream Petroleum Regulatory Commission, formerly the Nigerian Upstream Petroleum Regulatory Commission (NUPRC), is a department under the Nigerian Federal Ministry of Petroleum Resources (FMPR). It monitors the oil and gas industry to ensure compliance with relevant regulations and laws.

The Nigerian Upstream Petroleum Regulatory Commission (NUPRC) supervises all petroleum industry operations. In other words, the role of NUPRC is to monitor the activities of the oil companies, set and enforce environmental standards, collect royalties and leases, monitor and maintain compliance with the oil industry regulations, issue licences and permits, and protect and invest in oil gas. At the same time, the Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN), issued by NUPRC, provides an important set of regulations to prevent, minimise, and control pollution from the various aspects of petroleum operations.

The link between NUPRC, EGASPIN and the operations of multinational oil companies to prevent oil spills, clean-up and remediation of the oil spill is an important one. For example, the Guidelines require the operator, inter alia, to clean up the oil irrespective of its cause. [350] Section 4.1 states:

> "The operators shall be responsible for the containment and recovery of any oil spill discovered within its operational area, whether or not its source is known. The operator shall take adequate steps to contain, remove and dispose of the spill"

[349] Amnesty (n 64)

[350] DPR, The Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN) was first issued in 1991 by the Department for Petroleum Resources (DPR) at the Ministry of Petroleum Resources. EGASPIN was subsequently revised and updated in 2002, 2016, and 2018.

It is still a common practice for parent companies to accept responsibility only in cases where the oil spill was caused by faulty operation (and not by sabotage) even though this policy contradicts with NUPRC and EGASPIN which clearly states that oil companies are responsible for cleaning up the spill and paying compensation spill irrespective of its cause.[351]

The Nigerian regulatory system consists of a collection of rules and procedures that provides an essential benchmark for preventing and managing oil spills:

1. The basic conditions under which a licence is issued include provisions to protect underground pipelines against corrosion if soil conditions make such safety appropriate in the opinion of the Director of Petroleum Resources.[352]

2. They include the use of up-to-date equipment to avoid pollution and prescribe prompt measures to monitor and, if possible, end pollution. The regulations require that equipment be kept in good repair.[353]

3. The operator's obligations to act to contain and recover oil spill within 2 hours from the occurrence of the spill, whether or not the operator identified the source. The operator should contain the spill instead of waiting for the source of the spill to be determined. This is valid regardless of whether the consumer believes that the involvement of third parties caused the harm.[354]

4. In terms of international standards, they describe the right oil field practises, referring to the codes issued by the Institute of Petroleum Safety, the American Petroleum Institute and the American Society of Mechanical Engineers.[355]

The measures to be taken to prevent sabotage are legally appropriate. Steiner points out that where third-party intervention is highly likely, an operator should take such steps as enhanced leak detection systems, sabotage-resistant pipe specification, burial and concrete casements around a pipe, and alternative routing away from high-risk areas. Also, the operator should

[351] The Environmental Guidelines and Standards for the petroleum industry in Nigeria (EGASPIN).
[352] Standard forms contained in the Petroleum Act, 1969, Form G.
[353] The Petroleum (Drilling and production) Regulations of 1969 Art 25 contained in Petroleum Act, 969.
[354] NOSDRA Act.
[355] The Petroleum (Drilling and production) Regulations of 1969 Art 25 contained in Petroleum Act, 969.

implement enhanced pipeline surveillance that can detect any damage to pipeline integrity. These indicators reflect some of the American Petroleum Institute's standards.[356]

Although State Environmental Protection Agencies are also involved in controlling and monitoring the environment at the state level, these agencies have not succeeded at reducing oil spill incidences in frequency or magnitude because power lies with federal officials. The process and policy of compensation among different actors in the petroleum sector have contributed to exacerbating conflicts in the region because compensation estimates do not accept or consider all factors necessary to calculate the values.[357] These include cultural heritage, the importance of resource areas and, more specifically, the need for long-term community sustainability. Moreover, guidelines for government compensation are far from sufficient and detailed. Okonmah notes that the statutory regulatory control of the oil sector in Nigeria offers little to no protection for oil pollution victims.[358] As a result, the alternative is the common tort law-based regime based on the tort of trespass to land, nuisance, negligence and related regulations.

Olawuyi and Tubodenyefa, have extensively reviewed and evaluated the revised EGASPIN 2018 to determine its alignment with international best practices for environmental protection, particularly during the approval, operations, and decommissioning phases of the oil and gas sector value chain. It also makes suggestions for enhancements that would improve its effectiveness. [359] The report arrived at the following key findings[360]:

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[356] Steiner, R, 'Double standards, Shell practices in Nigeria compared with international standards to prevent and control pipeline oil spills and the Deepwater Horizon oil spill' Report on behalf of Friends of the Earth/Milleudefensie Netherlands, University of Alaska, Anchorage, Alaska, USA (November, 2010) 28 Available at: http://www. Milleudefensie.nl/publicaties/rapporten/double-standard (accessed August, 2020); See API, Standards are available at http://www.api.org/Publications-Standards-and-Statitical/Anual-Standards-Plan.aspx(accessed August 2020)

[357] Onosode, G. 'Environment and Community Consideration in Nigeria's Oil and gas industry: Towards a Re-assessment', paper presented at the International Seminar on the Petroleum Industry and the Nigerian Environment , Abuja, Nigeria (1998)

[358] Okonmah, P,D. 'Right to a clean Environment: The case for the People of Oil producing communities in the Niger Delta' Journal; of African law 41, no 1, (1997) 43-67, at 43.

[359] Olawuyi, D. S. and Tubodenyefa, Z., 'Review of the environmental guidelines and standards for the petroleum industry in nigeria (egaspin) <https://www.iucn.org/news/world-commissionenvironmental-law/201908/new-report-finds-regulatory-oversight-nigerian-oil-industry-remainsextremely-weak> accessed February 2, 2023.

[360] IUCN, 'New Report Finds Regulatory Oversight Nigerian Oil Industry Remains Extremely Weak' < https://www.iucn.org/news/world-commission-environmental-law/201908/new-report-finds-regulatory-oversight-nigerian-oil-industry-remains-extremely-weak> accessed February 2, 2023

- Regulatory oversight of the Nigerian oil industry remains extremely weak and does not currently align with international best practices on oil sector transparency and accountability.
- Although the 2018 EGASPIN, in principle, seeks to adopt best practice, using methods and guidelines that are consistent with international standards, transparency and accountability in interpretation and implementation remain key concerns.
- There is an urgent need to reform EGASPIN to make its prescribed environmental standards more rigorous and comprehensive, in line with international best practices.
- A reform of supervision arrangements to place the environmental enforcement functions in an independent body that is at arm's length from the DPR is also long overdue.

3.4.3.3 NESREA

The National Environmental Standards and Regulations Enforcement Agency (NESREA), is a regulatory agency of the Federal Ministry of Environment, Nigeria, which was founded in 2007 by law to "guarantee a cleaner and healthier environment for Nigerians."[361]

The 2007 NESREA Act established the Agency as the body responsible for enforcing compliance with environmental standards, regulations laws, policies and guidelines.[362] The NESREA ensures the protection and development of the environment, biodiversity conservation, sustainable development and the development of environmental technology. The Act prohibits the discharge in harmful quantities of any hazardous substances upon any land and into the waters of Nigeria or at the adjoining shoreline, except where permitted or

[361] National Environmental Standards and Regulations Enforcement Agency (Establishment), 2007. Act No. 25, 30 July 2007

[362] Suleiman Romoke Monsurat Monsurat, Raimi Morufu Olalekan Olalekan and Sawyerr Olawale, 'A Deep Dive Into The Review Of National Environmental Standards And Regulations Enforcement Agency (NESREA) Act.' [2019] International Research Journal of Applied Sciences. <https://ssrn.com/abstract=3498797> accessed 2 August 2021; Muhammed Tawfiq Ladan, 'Review Of NSREA Act 2007 And Regulations 2009-2011: A New Dawn In Environmental Compliance And Enforcement In Nigeria' [2013] SSRN Electronic Journal; S. Gozie Ogbodo, 'National Environmental Standards and Regulations Enforcement Agency (NESREA) Act - A Review' (nigerianlawgurucom) <http://www.nigerianlawguru.com/articles/environmentallaw/national environmental standards and regulations enforcement agency (nesrea) act, a review.pdf> accessed 2 August 2021.

authorised by law in Nigeria. NESREA is also responsible for enforcing environmental laws, guidelines, policies, standards and regulations, except concerning the petroleum industry.

It has been argued that the powers of the NESREA do not extend to environmental issues arising from the oil and gas sectors. In other words, the Agency lacks jurisdiction over environmental matters emanating from the oil and gas sector. As for the environmental regulations of the petroleum industry, this falls under the jurisdiction of the Nigerian Upstream Petroleum Regulatory Commission (NUPRC) noted above. The Petroleum Act of 1969 and its correlate, the Petroleum (drilling and Production) Regulation of 1969, are fairly comprehensive laws with provisions for protecting the environment from damage caused by the activities of petroleum extraction, but oil companies do not comply with many of its regulations (e.g., rampant gas flaring).

3.4.4 Tort Law

The Nigerian tort law complements the regulatory framework. Tort law is a civil wrong arising from a breach of duty, fixed by law, generally giving rise to compensation by way of an action for unliquidated damages. The tort law in Nigeria often tracks developments in the UK, allowing for the possibility of oil spill claims in tort law. Although tort law provides the possibility of compensation payments to victims higher than those offered by the law, the enforcement of these decisions raises well-known issues. There is a possibility that some of these judgements can be enforced abroad.

Under the Nigerian court system, the possibility of oil spill claims is based on tort law (the law of negligence, nuisance, and the rule in Rylands v Fletcher[363]). Aggrieved parties rely on common law remedies, and those issues revolve around the rights, duties, and obligations developed by the local courts about established tort law-based liabilities of negligence. For example, the court relied on the law of negligence in the case of Umudje v Shell[364] in establishing that Shell was negligent in the construction of roads and overflows of waste from the pit and so was liable for damages to the ponds and lakes.[365]

[363]Ryland v Fletcher [1868] UKHL 1 LR 3, 330.
[364]Umudje V Shell BP Nigeria [2014] 20 June EWHC 1973 (TCC)
[365] Adewale, O 'Rylands, Fletcher and the Nigerian Petroleum Industry', Journal of private and Property Law, vols. 8 & 9 (1987/88) 37.

In the case of Ejama-Ebutu community v. SPDC (2010)[366], the court delivered judgement in favour of the local community and ordered Shell to pay $100 million. Shell appealed the court ruling but refused to clean up despite being the operator of the facility that caused the spill. There are so many other cases (e.g., Ijaw community v. SPDC[367], SPDC v. Chief G. B. A. Tiebo VII and Others[368], SPDC v. Amao[369]) where the courts have ordered Shell to pay compensation. Still, it has consistently refused to clean up and pay compensation, claiming acts of sabotage and theft. These cases demonstrates Shell's approach to delaying and derailing justice for claimants of oil spills in the Niger Delta.

Another option that claimants can explore s to show 'substantial occupation' of a property.[370] The limitation of this option, according to Obagbinoko, is that this can only be actional as a private nuisance if the claimant can prove that the event caused severe inconvenience to private property rights. The court would require the plaintiff to prove that the damage to their personal property is far beyond the damage to the general public.[371] Furthermore, the high standard required for claimants to provide evidence has severely reduced the number of negligence litigations. The *Chindra and Ors v Shell-BP Petroleum company of Nigeria*[372] litigation involving surplus gas flaring is a good example that illustrates this point. The plaintiff sued the defendant for heat, noise and vibration due to negligence in the management and control of the gas flaring operation that resulted in substantial damage to the claimant's property. The Court held that the plaintiff could not show that the defendant was negligent. Also, an appeal for an injunction against such gas flaring operations failed due to Nigeria's inability to influence ongoing petroleum industry operations, despite the effect of oil operations on the local communities.[373]

[366]Ejama Ebutu Community V SPDC [2010]
[367]Ijaw community V SPDC [1993] 4 NWLR (part 289) 512
[368]SPDC V Chief G.B.A Tiebo(vii) and others 2005 9 NWLR (PART 931) 439
[369]SPDC V Amao [May 11, 2011]
[370] Ebeku, K.S.A, 'Locus standi in Environmental nuisance actions: a perspective from the commonwealth' Environmental law Rep (DLR) 62, at 76-78, per Clement J A
[371] Okukpon, A. O., 'Tort law and the protection of the individual against industrial pollution', (2001) 6(2) University of Benin Law Journal. Obagbiniko, C, 'The crisis environmental degradation in the Niger Delta Region; how effective is the law and its enforcement?' in Ojakurunto V., (ed.), Fresh Dimension on the Niger Delta Crisis of Nigeria. Journal of Alternative Perspective in the Social Science (JAPSS) Press. Miami, USA (2009) 170-193; Idowu A.A Environmental Degradation and Human Rights Violation Modern Practice'. (1999) 3(1) Journal of Finance and Investment Law
[372] The Chindra and Ors v Shell-BP Petroleum company of Nigeria.
[373] Frynas, 'Social and environmental litigation against transnational firms in Africa', Journal of Modern African Studies, vol 42, no.3 (2004) 363-88, and 374-376

As rightly pointed out by Obagbinoko, this issue is compounded by the vast gaps between the individual claimant and the industrial defendants concerned, both in the knowledge base and available tools to initiate and defend these allegations.[374] However, Frynas has a different view on the likelihood of appropriate common law response to environmental harm from Nigeria's oil spills. He claims that the Nigerian judicial response to common law claims against oil industry operations in negligence and nuisance has shown a willingness to accommodate. Also, the Nigerian judicial has relaxed traditional standing issues, evidence of injury, proof of causation, etc., which historically stood in the way of significant common law claims in tort. Frynas summarises the reasons for this shift in judicial approach to the Nigerian court's claims to include the improved technical capacity of legal counsel assisting claimants and the shifting attitudes of the judiciary in Nigeria and elsewhere, such as the UK, as a result of evolving social attitudes towards the victims of corporate actions.[375]

This slight change in attitude does not mean that problematic legal issues arising from common law-based litigation in Niger have been addressed. There are continuing deficiencies in the application of tort law-based claims for environmental damage in the Niger Delta. Some examples of these deficiencies include outdated penalties, incapacitation of the enforcement officials, the attitude of the prosecution lawyers, attitude of the courts concerning environmental cases.[376]

Scholars argue that Nigeria needs to establish a statutory liability scheme similar to the 2004 EU Environmental Liability Directive[377] , which is also applicable in the UK. However, due to the aggressive and combative attitude of SPDC, as evidenced in many of the legal claims against it, it is still doubtful whether this approach would make much difference.

Holding parent companies liable in Nigeria has been very challenging due to a combination of several factors, including weak and ineffective judicial system in the host countries, difficulty

[374] Obagbinoko, opt, cit., at 187 and 190, citing Okukpon, A. O., 'Tort law and the protection of the individual against industrial pollution', University of Benin Law Journal, vol 6, No. 2(2000/2001)
[375] Frynas (n 373) 363-88, and 374-376
[376]P Tamuno, 'Negligence Versus Strict Liability in The Fight Against Environmental Degradation In The Niger Delta of Nigeria,' International Energy Law', International Law and Energy Research papers series. Working Research paper series No. 2011/2012. Centre for Energy, Petroleum and Mineral Law and Policy. University of Dundee. (2011).
[377] The Environmental Liability Directive 2004/35/EC is an EU law Directive on enforcement of claims to improve the environment.

in knowing which entity to sue due to the company's complex corporate structure, pursuance of a policy of delay, denial and derailment of justice, and underfunding of subsidiaries which makes it unable to pay any damages (including compensation and remediation)[378]. As a result of the difficulty in holding the oil companies to account in Nigeria, the oil spill victims decided to sue the parent companies of these oil companies abroad.

Recently, there have been cases brought by individuals and communities against parent companies in England, the Netherlands, France, Italy and the US, where most of the parent companies of multinational oil companies operating in Nigeria are based. For example, in several rulings in the *Oguru v Shell* litigations, the court has established that it is competent to hear the cases against Royal Dutch Shell and its Nigerian subsidiary.[379]

The impact of Human Rights standards emerging from regional Human Rights treaties (e.g., African Charter on Human Rights and People's Rights[380] and European Convention on Human Rights[381]) has shown the potential to encourage greater security for individuals and communities. This standard is particularly significant concerning enhanced prospects of legal protection against interference with the rights of private or common property.

3.5 Impediments to Human Rights and Environmental Obligations of MNOCs in the Niger Delta

This section discusses some of the impediments to human rights and environmental obligations of MNOCs in the Niger Delta. These impediments contribute to human rights and environmental violations in the Niger Delta.

[378] Skinner (n 271)
[379] Dam (n 14); Previous rulings in the Oguru v Shell in 2009, 2013 and 2015 at the District Court and Court of Appeals in Netherlands have ruled that it has jurisdiction to hear the cases. The recent court ruling in 2021 found Shell liable for oil spills and ordered it to clean-up and install leak detection system on the pipelines.
[380] Eaton, J., 'The Nigerian Tragedy, Environmental Regulation of Transnational Corporations, and the Human Rights to a Healthy Environmental', Boston University International Law Journal, vol 15, (1997) at 261;
[381] Wilde, M., 'Locus Standi in Environmental Torts and the Potential Influence of Human Rights Jurisprudence', Review of European Community and International Environmental Law, Vol. 12, No. 3 (2003) at 284 94.

3.5.1 Transparency Reporting

Transparency is a characteristic of governments, companies, organisations, and individuals that are candid and sincere regarding the disclosure of information, processes, and actions. Simply making information available is not sufficient to achieve transparency; the information should be managed and published so that it is relevant and accessible and timely and accurate.[382]

Lack of transparency is a breach of Human Rights obligations, and it constitutes a serious form of Human Rights and environmental violations. Information related to environmental violations has to be transparently recorded so that victims can have access to remediation and compensation. For example, in Nigeria, when an oil spill occurs, the responsible party must record the required data regarding the incident in an investigation form known as a Joint Investigation Visit (JIV) report.[383] The JIV report is extremely significant as it is the basis for determining if communities benefit from oil spill clean-up and compensation. If an oil spill is found to be caused by sabotage or interference from third parties, then the community does not receive compensation from the oil company, irrespective of the damage.

The implementation of the JIV reporting process is based on the legislative backing of Nigeria's 1990 Oil Pipelines Act, and the recommendations set down in the Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN). Therefore, if victims of the oil spill cannot claim remediation and compensation due to incorrect and misleading information on the JIV forms, or simply put, lack of transparency, then this is a violation of Human Rights.

Transparency reporting is an essential aspect of Human Rights obligation for parent companies and their subsidiaries. There are several laws that support transparency reporting both at the international level (e.g., 2013 EU Accounting and Transparency Directives and Extractive

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[382] 'Transparency' (*Eltis.org*, 2020) <https://www.eltis.org/glossary/transparency> accessed 31 March 2020; See 'How Do We Define Key Terms? Transparency And Accountability Glossary - Transparency and Accountability Initiative' (*Transparency and Accountability Initiative*, 2020) <https://www.transparency-initiative.org/blog/1179/tai-definitions/> accessed 31 March 2020; See Recital 39 of the GDPR is informative as to the meaning and effect of the principle of transparency in the context of data processing. See 'Article 29 Working Party Guidelines on Transparency under Regulation 2016/679' (Directorate C (Fundamental Rights and Union Citizenship) of the European Commission 2018) 2 <http://ec.europa.eu/newsroom/article29/news.cfm?item> accessed 31 March 2020.

[383]Eben, Rachael. 'A Systematic Appraisal of Nigeria's Vessel-Source Compensation Regimes for Spill Victims.' (2016) (24) African Journal of International and Comparative Law. 406. See Amnesty (n 64)

Industries Transparency Initiative (EITI)[384] and UK's revised 2013 Accounting Directive) and national levels (e.g., National Human Rights Commission Act, 1995, as amended by the NHRC Act, 2010, and the Freedom of Information Act[385]).

Many corporations have reviewed their Human Rights obligations to align with transparency reporting. One of Shell's Human Rights obligations on transparency is stated as follows:

> "Doing business in a clear, open way is a commitment we work hard to keep, and we promote transparency where possible throughout our industry."

Shell's transparency initiatives cover areas such as tax contribution reports, Human Rights, shell's approach to tax, advocacy and political activity and support of several external voluntary codes.

One area where transparency is frequently not witnessed is the way information about the oil spill is recorded and published by multinational oil companies and their subsidiaries. The historical practice demonstrated a lack of adequately published information about the process of investigating oil spills, and this is despite the requirement for the joint investigation process. Communities were not entitled to receive or even request a copy of the JIT form, even after the same communities had signed it. At the current date, Amnesty International has still not been able to gain access to the larger number of the pre-2011 oil spill investigation forms, despite their repeated requests for information. The same lack of transparency is seen throughout the oil spill investigation process. There is no transparency in the field investigation to demonstrate how key data is established, such as the volume of the spill. There are instances when the key data has not been recorded during field investigation and therefore left out of the JIT form, or the further requirements to gather additional evidence is abandoned and therefore omitting the key inclusion of regulators and community representatives.

Another area where there is a lack of transparency relates to Shell's failure to be transparent about the condition of its infrastructure and which has inflamed communal tension around any

[384] 'Press Corner' (European Commission - European Commission, 2019) <https://ec.europa.eu/commission/presscorner/detail/en/MEMO_13_541> accessed 27 December 2019.
[385] 'UK Implementing Regulations and Rules for Reports on Payments To Governments (EU Accounting And Transparency Directives)' (*Pwyp.org*, 2016) <https://www.pwyp.org/wp-content/uploads/2019/04/PWYP-UK-fact-sheet-UK-regulations-rules-for-reports-on-payments-to-governments-EU-Directives-updated-October-2016.pdf> accessed 27 December 2019.

investigations regarding oil spills and pollution. With no verifiable information provided by the company about the state of its existing infrastructure in certain parts of the Niger Delta, there is the plausible concern that certain pipes have been poorly maintained and in a weakened condition – hence the high number of oil spills. Most multinational companies have consistently used sabotage to deflect shareholders and media criticism. It is in the interest of oil companies like Shell to have oil spills attributed to sabotage and theft because it will absolve them from paying compensation and deflect attention away from the condition of their pipes and infrastructure. Given how Shell has referenced sabotage in response to criticism of its environmental impact in Nigeria, there should be far greater scrutiny of the basis on which Shell makes these claims and the implication of inaccurate reporting.[386]

There is also poor access to information for affected communities. If international NGOs like Amnesty International had difficulty accessing information, communities would have even greater problems. For example, several communities reported that they did not receive copies of joint investigation reports into oil spills (where communities are supposed to be one of the stakeholders present during the investigation). Communities frequently do not have access to essential information on oil projects – even when they are the "host" community. According to an internal SPDC report in 2003, SPDC does not:

> "*provide substantial information about the scope, impact and duration of major projects" and "there is a widespread corporate assumption that communities can use any information against the company… As there is no mechanism available to communities to obtain accurate information, the company leaves itself vulnerable to misinformation and rumours that feed grievances*."[387]
>
> NGOs have strongly criticized the failure to monitor and publish relevant data on the human impacts of the oil industry. The lack of available information on health impacts has fed community fears and anxieties, which are factors that significantly undermine people's quality of life.

[386] G. J. Frynas, "Legal Change in Africa, "Evidence from oil-related litigation in Nigeria", Journal of African Law, Vol 43, No. 2 (1999), p128.
[387] Wac Global Services, 'Peace and Security in the Niger Delta Conflict Expert Group Baseline Report Working Paper For SPDC' (Wac Global Services 2013) <https://www.academia.edu/4852921/Shell_wac_report_2004> accessed 2 August 2022.

The informal compensation system lacks transparency. The amounts paid are not made public, and it is not clear to whom compensation is paid. This contributes to community conflicts and distrust of companies. An internal SPDC report in 2003 noted: "There is no transparency about (a) to whom the company pays compensation; (b) the basis on which the amount is calculated, and (c) how individual or communal compensation is divided."

Lack of access to information can increase the risk of - or exacerbate - conflicts within and between communities, companies, and the state. Lack of information and transparency can breed distrust and suspicion and can be a catalyst for wider Human Rights problems, particularly when community tensions are met with forcible responses by public and private security forces. In the Niger Delta lack of information and failure to ensure meaningful participation in decision-making are factors that contribute to conflict. Moreover, lack of information has a significant impact on the ability of communities to seek redress for harm caused by extractive projects.

3.5.2 Disclosure of Information

Disclosure is simply the act of making something known or the fact that is made available.[388] The purpose of "disclosure" is to make sure that both or all parties know of all information that has a bearing on an issue or a case. A key aspect of ensuring that corporate action respects Human Rights is assessing Human Rights risks and disclosing information on how corporate operations affect people. While some information may legitimately be considered confidential, companies often take the approach of not disclosing data except as required by law. Disclosure of information in the extractive sector (e.g., oil and gas industry) is critical in fostering trust and enhanced communal interactions.[389]

[388] 'Disclosure and Transparency Rules' (*Iasplus.com*, 2019) <https://www.iasplus.com/en-gb/resources/other-regulatory/market-rules/disclosure-and-transparency-rules> accessed 27 December 2019.

[389] Olufemi O Amao, 'Corporate Social Responsibility, Multinational Corporations And The Law In Nigeria: Controlling Multinationals In Host States' (2008) 52 Journal of African Law. See Lee J McConnell, 'Establishing Liability For Multinational Oil Companies In Parent/Subsidiary Relationships' (2014) 16 Environmental Law Review.

The type of information to disclose depends on the industry. For multinational oil companies, disclosure of information entails, but not limited to, the publication of details of the condition of pipelines and other assets annually and the disclosure of the age of infrastructure and all repairs and replacements, the publication of all the steps taken or planned to prevent sabotage and the theft of oil from facilities.

The failure of companies to provide – or to disclose – the most basic evidence regarding their operations constitutes a serious form of Human Rights and environmental violation. One of the consequences of the failure of multinational oil companies to provide – or to disclose information about oil spills is that it hinders the estimation of the volume of oil spills and hence, remediation and clean-up efforts. After the 2008 Bodo oil spill, Amnesty International looked for evidence to support Shell's claim it stopped the flow of oil at Bodo but found none. To match Shell's claim that oil flowed at Bodo for only three or seven days between 5 October and 7 November (first spill) and 7 December and 21 February 2009 (second spill), this would mean some part of one of the two Trans-Niger Pipelines (there are two: a 24" and a 28") would have been shut off or isolated for approximately three months in five months. However, as far as Amnesty International could discover, Shell did not make any public disclosure about this at the time.[390]

Another consequence of the failure of multinational oil companies to disclose the most basic evidence of the cause of an oil spill completely is that this attitude undermines the process of gaining lessons from an oil spill event. The process of these investigations is known within the industry as the Joint Investigation Visit or JIV process. Notwithstanding the seeming gesture of transparency by Shell in publishing the annual reports of its subsidiary in Nigeria (SPDC), Amnesty International has still discovered a general reluctance among the major multinational oil and gas companies operating in Nigeria when it comes to disclosing historical data on the environmental and social impacts of their operations. For example, although companies claim to have undertaken studies on a range of such important issues as health and fisheries, these studies are rarely made available. Some examples of these studies include:

[390] Amnesty (n 64)

- ExxonMobil claimed to have undertaken studies on marine resources and to have commissioned a study called "Air Quality, Precipitation and Corrosion Studies of Qua Iboe Terminal (QIT) Flares and Environs".
- In 2006, SPDC reportedly carried out a study that looked at the impact on marine life of wastewater disposed of at sea. Amnesty International could not find this study and received no response from SPDC to a request for a copy
- In 2008, SPDC claimed to have studies that looked at a range of impacts of oil operations, which the company said it would supply.

As reported by Amnesty International, none of the above studies has been disclosed. The control which companies have over data - from what is reported to regulators to the knowledge of the impacts of oil operations, is a fundamental problem in the oil and gas. While some information may be released to the public and NGOs, communities in the location of where these companies do business still have little access to even basic information about the oil industry's impacts on their lives. Multinational oil companies (and their subsidiaries) do not provide communities with access to information about the health and livelihood impacts of oil operations. Evaluations are either not made or are not disclosed, and neither is the key data that gives metrics for how the spills may have been caused and what other secondary impacts might be expected.[391]

Non-disclosure of evidence also makes it difficult for victims of Human Rights violations to pursue remediation and compensation, and it has increased tensions within the communities. The courts have commented severally on the failure of multinational oil companies to disclose information in Nigeria. In Shell v Isaiah, an appeal by Shell was dismissed by the Appeal Court, and it was noted by Judge Onalaja, in concurrence with the lead judgement that:

> "A vital consideration in the oil spillage cases is the extent of the oil spillage. The pattern of defence of the appellant has been to withhold from the court the report of the

[391] Amnesty International, 'Oil Spill Investigations in The Niger Delta Amnesty International Memorandum September 2012' (Amnesty International 2012) <https://www.amnesty.org/download/Documents/16000/afr440422012en.pdf> accessed 14 January 2020

> oil spillage carried out by their employees. In Tiebo's case supra [another oil case] the appellant's report of the oil spillage was similarly withheld from the court…" [392]

In a recent case in the Netherlands (that is, Oguru V Shell), Shell refuses to disclose a vital document oil spill related data which would have helped the defendants in their case. The court insisted that the relevant documents should be brought to the court for examination by the defendants.

Scholars have called for mandatory disclosure and reform.[393] Several jurisdictions around the world have imposed or are considering mandatory "nonfinancial" or "sustainability" disclosures such as the 2014 European Union Directive on the Disclosure of Non-Financial and Diversity Information and the stakeholder disclosure provision of the U.K. Companies Act.[394] In Nigeria, the main regulation that supports disclosure of the information is the Freedom of Information Act which requires public institutions to record, keep, maintain and publish detailed information on all their activities, operations and businesses.

Many multinational oil companies have Human Rights obligations related to disclosure, for example, data related to oil spills, gas flaring and clean up and remediation. Shell has an elaborate disclosure policy termed: "Shell Responsible Disclosure Policy" which it claims is based on guidance issued in 2013 by the National Cyber Centre of the Dutch Ministry of Security and Justice.[395] Shell also states that it complies with Section 13 (R) of the US

[392] Shell v. Isaiah (1997) 6 NWLR (Pt. 508) 236. This case was cited in Amnesty International Report, 2011.
[393] Fisch, Jill E, 'Making Sustainability Disclosure Sustainable' (2019) 107 *Georgetown Law Journal* 923–966; Lipton, Ann, 'Not Everything is About Investors: The Case for Mandatory Stakeholder Disclosure.' (2019) *Yale Journal on Regulation*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3435578; Williams, Cynthia A, 'The Securities Exchange Commission and Corporate Social Transparency' (1999) 112 Harvard Law Review 1197-1311.
[394] Grewal, Jody, Edward J. Riedl, and George Serafeim, 'Market Reaction to Mandatory Nonfinancial Disclosure' (2019) 65(7) *Management Science* 3061-3084; Harper Ho, Virginia, 'Risk-Related Activism: The Business Case for Monitoring Nonfinancial Risk' (2016) 41 *Journal of Corporation Law* 647-704; Fisch, Jill E, 'Making Sustainability Disclosure Sustainable' (2019) 107 *Georgetown Law Journal* 923–966
[395] 'Shell Responsible Disclosure Policy' (*Shell.com*, 2020) <https://www.shell.com/about-us/our-values/shell-global-helpline/responsible-disclosure-policy> accessed 29 June 2020.

Securities Exchange Act of 1934 disclosure. An extract of the Royal Dutch Shell Plc 2013 Foreign Issuer Report 6-K – SEC states as follows[396]:

> "In accordance with our General Business Principles and Code of Conduct, Shell seeks to comply with all applicable international trade laws including applicable sanctions and embargoes. The activities listed below have been conducted outside the USA by non-US subsidiaries of Royal Dutch Shell plc. None of the payments disclosed below were made in US dollars, nor are any of the balances disclosed below held in US dollars: however for disclosure purposes, all have been converted into US dollars at the appropriate exchange rate."

There are only a few multinational oil companies (for example, in Nigeria) that publish a Joint Investigation Visit (JIV) report and other information relating to oil spills.[397]In fact, there is general reluctance by most multinational companies in Nigeria (e.g., Shell) to disclose information regarding oil spills. Although Shell has admitted that frequent spills are due to degradation of the oil infrastructure, she has declined to make public the state of her oil pipeline.

From the above discussion, it is clear that it is common for multinational companies to claim that it has an acceptable disclosure policy when, in reality, it maintains very tight control over every piece of information – deciding what to disclose and what to withhold. Therefore, it is imperative that multinational corporations annually publish data regarding their asset integrity data and the age of infrastructure, including details of any repair and replacement.

[396] Royal Dutch Shell, 'Form 6-K Royal Dutch Shell Plc Report of Foreign Issuer [Rules 13A-16 And 15D-16]' (Royal Dutch Shell 2013) <https://sec.report/Document/0001193125-13-314564/> accessed 29 June 2020.
[397]Amnesty International, 'Negligence in The Niger Delta: Decoding Shell and Eni's Poor Record on Oil Spills' (Amnesty International 2018) <https://www.amnesty.org/download/Documents/AFR4479702018ENGLISH.PDF> accessed 14 January 2020.

3.5.3 Bribery and Corruption

Transparency International defines corruption as "the abuse of entrusted power for private gain".[398] Bribery is a specific subset of corruption that refers to the offering, giving, soliciting, or receiving of any item of value as a means of influencing the actions of an individual holding a public or legal duty.[399] The relationship between corruption and Human Rights has begun to be seriously examined as conjoined issues due to the ensuing impacts that corruption has on ultimately devastating the availability, quality and accessibility of related goods and services in the given society. Even more crucially, it disables a state from meeting its obligations to respect, fulfil, and protect the Human Rights of its citizens.[400]

States are now enacting legislation that addresses potentially corrupt practices engaged in by resident corporations while doing business abroad, and tighter regulations regarding securities are being applied to ensure more accurate bookkeeping for earnings and expenditure both home and away. These laws could be international laws (e.g., 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions[401] and the 2003 UN Convention against Corruption) and national laws (e.g., the Nigerian Economic and Financial Crimes Commission (Establishment) Act, and the Nigerian Extractive Industries Transparency Initiative Act) which deal with bribery and corruption.

In the US, there is the Foreign Corrupt Practices Act (FCPA), which makes it legislates against the bribing of a foreign official by any securities issuer, or 'any officer, director, employee, or agent of such issuer, or any stockholder thereof acting on behalf of such issuer", for the purpose of either gaining a business advantage or inducing such a foreign official to commit an act or omit to undertake a duty in contravention of their legally required duties.[402] In the Netherlands,

[398] Transparency International, 'What Is Corruption?' (*Transparency.org*, 2020) <https://www.transparency.org/what-is-corruption> accessed 26 March 2020.
[399] Legal Information Institute, 'Bribery' (*Legal Information Institute*, 2020) <https://www.law.cornell.edu/wex/bribery> accessed 26 March 2020.
[400] 'Corruption and Human Rights' (Ohchr.org, 2020) <https://www.ohchr.org/EN/Issues/CorruptionAndHR/Pages/CorruptionAndHRIndex.aspx> accessed 26 March 2020.
[401] The 2004 OECD Principles of Corporate Governance provide an authoritative source of reference, http://www.oecd.org/document/49/0,2340,en_2649_34813_31530865_1_1_1_1,00.html.
[402] Jeremy Zucker, 'United States Anti-Corruption Enforcement: Highlights And Trends At The End Of The Obama Administration And Potential Changes Under The Trump Administration' (2017) 23 International Trade Law & Regulation. 41-46

there is Article 177a and 178a of the Dutch Criminal Code (amended in 2001).[403] The UK introduced the Bribery Act in 2010, which aligned with the direction of US law on the subject and increased the UK's ability to prosecute parent companies for overseas bribery and corrupt practices.[404]

Even before the Bribery Act 2010 came into being the UK has relied on the common law of torts to prosecute such historic offenders such as Mabey & Johnson for engaging in corrupt practice in countries such as Ghana and Jamaica, and for violating UN sanctions in Iraq[405]. Mabey & Johnson ended up being fined with a sum which amounted to over 10% of its annual turnover after it voluntarily reported its bribery acts. In doing this, the UK judicial system had established that it could prosecute the business activities of corporations which were involved in acts of bribery occurring even before the enactment of the 2010 Bribery Act.[406]

Many multinational oil companies have Human Rights obligations to prevent bribery and corruption. For example, the Human Rights obligation of Shell regarding bribery and corruption is stated below:

> "The Shell General Business Principles state our insistence on honesty, integrity and fairness in all aspects of our business. The direct or indirect offer, payment, solicitation or acceptance of bribes is unacceptable."

Despite the existence of anti-bribery and corruption obligations, recent events have shown several breaches by parent companies and their subsidiaries in Nigeria. In a specific instance, Shell and two subsidiaries were held liable under US law for bribery in Nigeria.[407] Shell, on behalf of its subsidiaries, paid out civil and criminal fines to the US government amounting to

[403] Cedric Ryngaert, 'Amendment Of The Provisions Of The Dutch Penal Code Pertaining To The Exercise Of Extraterritorial Jurisdiction' (2014) 61 Netherlands International Law Review; Peter Burbidge, '"How Can You Be Sure of Shell?" Is Corporate Governance Better Served By Unitary Or Two-Tier Boards?' (2005) 9 International Energy Law & Taxation Review.
[404] John Zadkovich, 'International Commercial Arbitration and the Bribery Act 2010 (United Kingdom): A Matter of Common Sense' (2011) 14 International Arbitration Law Review.
[405] Jacinta Anyango Oduor and others, 'Left out Of the Bargain Settlements in Foreign Bribery Cases and Implications for Asset Recovery' (4 International Bank for Reconstruction and Development / The World Bank 2014) <https://star.worldbank.org/sites/star/files/9781464800863.pdf> accessed 29 June 2020. 121-123
[406] N Burkill and J Knoll, 'Bribery and Corruption In The Construction Industry: Challenges For International Construction And Engineering Projects.' [2013] Construction Law Journal <https://www.dorsey.com/newsresources/publications/2013/02/bribery-and-corruption-in-the-construction-indu2__> accessed 27 August 2022.
[407] Van Ho and others (n 52) 29-30

$48 million and including the regulator's right to recover any profits obtained through bribery. Again, a widely publicised report by Transparency International in 2017 detailed how Shell and Eni paid 1.1 billion USD for an oil block "OPL 245", one of the largest oil fields in West Africa. The payment (amounting to 80% of Nigeria's proposed 2015 health budget) went to Malabu Oil and Gas, a front company set up by former Nigerian oil minister and dictator Sani Abacha.[408] According to Global Witness, despite denying the corruption allegations for six years, Shell executives knew where the money was actually going to and that they were engaging in a massive bribery scheme.

There are three dimensions of Human Rights obligations related to bribery and corruption, which can lead to Human Rights violations if breached. These three dimensions are the underlying obligations for companies to respect, protect and fulfil Human Rights. Bribery and corruption can cause violations of any of these dimensions of Human Rights violations. The duty to respect rights means that corporations cannot engage in acts of bribery and corruption that directly impact on rights. An example of this occurs when corporations pay bribes to government officials in order to lucrative licences to prospect for solid minerals and oil and gas, or even to reduce fines and sanctions for wrongful acts. The duty to protect means that any corrupt acts by officials or third parties must be prevented, investigated and punished. An example of this occurs when corporations shield their officials and contractors in the supply chain for alleged bribery offences. That is, a corporation may refuse to provide relevant information for the prosecution of these officials. The duty to fulfil rights prohibits the diversion of resources (or embezzlement), including through corruption, that was initially dedicated to social purposes. This occurs when corporations fail to make statutory payments directly to the government, a form of diversion of resources, for the public. In most cases, such monies do not end up in government treasuries but in the bank accounts of government officials.[409]

[408]Transparency EU, 'Transparency International EU' (Transparency International EU, 2019) <https://transparency.eu/shell-knew/> accessed 27 December 2019.

[409] UN Committee on Economic, Social and Cultural Rights (CESCR), 'General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)', 14 December 1990, E/1991/23, available at: https://www.refworld.org/docid/4538838e10.html [accessed 29 June 2020]

The legal risk of multinational companies for bribery and corruption has expanded in recent years since the establishment of the Bribery Act in different countries (e.g., US, UK, Netherlands). Parent companies (e.g., RDS) have directly been put under significant pressure. The first consequence is that bribery by a subsidiary in one location can potentially implicate the parent company in another location. For example, if a subsidiary pays a bribe in one country (say Nigeria) to sell goods and services of another entity within an enterprise (say, Shell, UK) located in a different country, then the later could violate the Bribery Act and hence Human Rights. Although RDS, as a parent company may not likely be in this position, however, the liability of other members of its group may have an immense concern to the parent company.

The second consequence is the danger of facing multiple prosecutions in different jurisdictions. That is, the prosecution in the US of a parent company does not stop the judicial system in the UK from taking action on similar or even the same charges.[410] Although the prohibition on the so called 'double jeopardy' may apply in some countries (e.g., in the US due to its federal structure), if it were shown that a parent company or a subsidiary engaged in the same acts, the parent company could face further liability in several other countries where it does business.

The third consequence is that the parent company may also be liable in different countries under other legal provisions. As one example, if the offending subsidiaries have accounts that are consolidated the parent company's accounts, then the parent company is at risk of having those accounts being investigated and possibly restricted for offences of false accounting committed by the subsidiary. This is related to violations of securities law which addresses inaccurate bookkeeping. Countries can seek criminal and civil liability if evidence emerges of bribery and the potential financial liability arises under securities laws. The parent company is responsible for ensuring that its own books are separate and accurate enough to reflect all payments made. Failure to do so constitutes violations of US securities law, and hence the Human Rights. Similar laws exist in the UK and Netherlands. Such a finding is more severe than a normal criminal fine, as such a violation of US securities laws leads to disgorgement of

[410] BBA and Clifford Chance, 'Double Jeopardy in the EU: Focusing in the Possibilities of Schengen as a solution for Prosecutions and regulators Alike, at 1-2' (noting that EU Law requires the UK to recognise foreign judgement for the purpose of double jeopardy or ne is un idem), available at www.bba.org.uk/download/1802 <accessed on July 29, 2020>

profits. Any accusations of bribery and corruption successfully levied against RDS or its Nigerian subsidiaries results in the larger corporation being subject to similar complaints and charges brought by the SEC and therefore could incur very similar financial liabilities for both the parent company as well as its subsidiary.

Corporations must note that even if the bribery and corruption take place exclusively in a foreign country (e.g., Nigeria), the parent company can be sued in other jurisdictions such as the US. As shown in the US SEC bribery case, the finding of the courts was that RDS had not instituted the required procedures to detect and prevent financial malpractice within its group of companies. This means that the failure of the parent company to adjust its procedures in the light of the UK Bribery Act, 2010 is likely to lead to larger legal risk in the future.

In the light of the above discussion, it is clear that parent companies and their subsidiaries do not take human rights violations seriously due to bribery and corruption. Therefore, it is essential for parent companies and their subsidiaries to ensure that group-wide changes to anti-bribery and corruption practices are implemented and that training is provided for those further down the subsidiary chains to be cognizant of how potential liability can be passed on to the entire group of companies.

3.5.4 Victimization of employees and contractors

Employees and contractors working for MNOCs have certain legal rights that form the basis of their relationship with employers. These legal rights, usually called labour rights, are codified in national and international labour and employment law.[411] The International Labour Organization (ILO) and the UN have established international labour standards to create legal rights for workers worldwide.[412] To ensure that employees hired by multinational corporations enjoy the right to freedom of association and collective bargaining to improve working

[411] IndustriALL, 'Labour Rights Are Human Rights: UN Report' (IndustriALL, 2018) <http://www.industriall-union.org/labour-rights-are-human-rights-un-report> accessed 17 March 2020.

[412] The UN itself have backed labour rights by incorporating several laws into two articles of the United Nations Declaration of Human Rights- that is, Article 6-8 of the International Covenant on Economic, Social and Cultural Rights.

conditions, the ILO has created a Tripartite Declaration of Principles on MNEs and Social Policy.[413]

It is fair to say that all companies (parent companies and their subsidiaries) have an obligation to protect the labour rights of their employees. Shell and Chevron have stated that they are committed to observing labour rights as part of their Human Rights obligation. Shell's Human Rights obligation regarding labour rights is worded as follows:

> "We respect the rights of our staff and suppliers by working in alignment with international conventions and guidelines." [414]

In addition, Shell also states the following:

> "We respect our employees and contractors' rights by working in line with ILO conventions and the UN Global Compact. Labour rights include freedom of association, the right to collective bargaining, non-discrimination and equal opportunity, conditions of work, adequate remuneration, forced labour and child labour."[415]

Many multinational oil companies operating in the Niger Delta have failed to comply with and respect labour rights. There are forms of violation of labour rights by parent companies and their subsidiaries. These include working in unsafe or deplorable conditions, child or forced labour use, non-provision of entitlement, and casualization of workers. One of the ways that labour rights have been violated by multinational oil companies operating in Nigeria is the use of casual/contract employees temporarily instead of permanent (that is, casualization, a term used to connote how companies hire employees on a temporary, and casual/contract basis).[416] The historic discrimination between the services of casual/contract workers and that of

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[413] International Labour Organization (ILO), 'Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy' (International Labour Organization 2020) <https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf> accessed 17 March 2020. . See 'What Is The ILO MNE Declaration?' (*Ilo.org*, 2020) <https://www.ilo.org/empent/areas/mne-declaration/WCMS_570332/lang--en/index.htm> accessed 17 March 2020.

[414] Royal Dutch Shell, 'Respecting Human Rights - Shell Sustainability Report 2018' (Shell 2020) <https://reports.shell.com/sustainability-report/2018/responsible-business/human-rights/respecting-human-rights.html> accessed 29 June 2020.

[415] Royal Dutch Shell, 'Shell Human Rights' (Shell 2020) < https://www.fourleafdigital.shell.com/webapps/human_rights/> accessed 29 June 2020.

[416] As of 1991, there were estimated 14559 casual workers and contract workers as opposed to 23065 junior works in permanent jobs or positions in the Nigerian oil and gas industry. Oil companies are still adopting casualization as the dominant form of employment out of the need to avoid obligations imposed by labour laws and international labour standards.

permanent employees and how that is reflected in terms of pay and working benefits is well situated alongside Human Rights to freedom of association and collective bargaining.[417] The increased use of casual workers has worsened in recent times, creating certain tensions between local communities and the oil companies. It is a commonplace for MNCs such as Shell, Chevron, ExxonMobil and Eni/Agip to exploit casual and contract workers through local manpower agencies (basically body shops that popularly supply labour and service contractors to the industry). As of 1991, there were an estimated 14559 casual workers and contract workers as opposed to 23065 junior workers in permanent and career-tracked roles or positions in the Nigerian oil and gas industry.[418] It is clear from these figures that these companies have decided to adopt casualization as the dominant form of employment out of the need to avoid obligations imposed by labour laws and international labour standards. In fact, it is one of the greatest threats to industrial peace and affects the operations of the oil and gas industry in the Niger Delta region of Nigeria.[419]

3.5.5 Security and Safety

The security and safety as a Human Rights obligation cover unsafe operating environment for the employees, and torture, detentions, killings and payments to armed groups. The way in which some multinational oil companies engage with communities is a central part of the worsening security situation in many regions where there are exploration and extraction of minerals. There is no transparency regarding how compensation is awarded and what selection process is followed to select contractors for the clean-up activities following a pollution incident. The inter-communal conflict makes a bad situation even more volatile, and it is the communities that are considered to require the most "pacification" that are addressed rather than a more critical process of stakeholders assessment regarding the impact of oil operations. As one clear example, this haphazard approach to communal relations in the Niger Delta has resulted in very damaging strategies in the Niger Delta region of Nigeria. It cannot be denied

[417]Tula Connell, 'Degradation of Work: Oil and Casualization of Labour in the Niger Delta (2010) - Solidarity Center' (*Solidarity Center*, 2019) <https://www.solidaritycenter.org/publication/degradation-of-work-oil-and-casualization-of-labor-in-the-niger-delta-2010/> accessed 1 December 2019.

[418] Figures from National Union of Petroleum and Natural Gas Union in Nigeria (NUPENG); See Solidarity Centre, 'Degradation Of Work: Oil And Casualization Of Labor In The Niger Delta (2010)' (Solidarity Centre 2020) <https://www.solidaritycenter.org/publication/degradation-of-work-oil-and-casualization-of-labor-in-the-niger-delta-2010/> accessed 29 June 2020.

[419] IndustrialALL Global Union, 'Nigeria: Police Use Violence to Break up Unionising Subcontractors, 1 Worker Blinded' (IndustriALL 2011) <http://www.industriall-union.org/archive/icem/nigeria-police-use-violence-to-break-up-unionising-subcontractors-1-worker-blinded> accessed 29 June 2020.

that companies have effectively realised that paying communities youths off in the hope of preventing protests has now led to a new menace of threats of even more violence and protests as a means to gain more access to financial compensation.

Another strategy has been the engagement and deployment of heavily armed government security forces by multinational oil companies. Protests by local communities about the oil industry (including peaceful protests) and attacks on oil installations by armed groups are frequently met with reprisals characterized by excessive use of force and serious Human Rights violations. Action has rarely been taken to bring to justice members of the security forces who are suspected of being responsible for grave Human Rights violations in the region.[420]

The right to security and safety under the international system of Human Rights law can be inferred from the obligation of the State to guarantee the security of the individual, as set forth in:

(i) Article 3 of the Universal Declaration of Human Rights - "Everyone has the right to life, liberty and security of person".

(ii) Article 9 of the International Covenant on Civil and Political Rights - "Everyone has the right to liberty and security of person".

Shell and many other parent oil companies and subsidiaries have a specific Human Rights obligation regarding security and safety. The following Human Rights obligation of the Shell is shown below:

> "We work to maintain the safety, security and Human Rights of our employees, contract staff and local communities."

This is probably one of the most breached Human Rights obligations by companies, especially in the extractive industries. For example, Shell was well aware that there is a high risk that the security forces would respond to community protests with excessive and possibly lethal force,

[420] Amnesty International, 'A criminal Enterprise: Shell's Involvement In Human Rights Violations in Nigeria in The 1990s' (Amnesty International Publications AFR 44/7393/2017 2020) <http://www.amnesty.org> accessed June 29 2020

if they requested the army to hold off protestors when trying to work, for example, as in the case of laying of new pipeline through Ogoniland in 1993.

Furthermore, a 2011 report by Platform uncovered how extremely generous payments being made by Shell to armed community militants actually worsened the inter-communal conflicts, which have led to further tragedies such as the devastation of the Rumuekpe town in Rivers State where an estimated 60 people were killed.[421]

3.5.6 Pollution (Oil Spill and Gas Flaring)

Oil Spill is the release of liquid petroleum hydrocarbons into the atmosphere, in particular the marine ecosystem, due to human activity. Gas Flaring is the burning of gaseous waste and non-waste gases into the atmosphere through an elevated vertical chimney.[422] The commitment to prevent oil spills and gas flaring is one of the major Human Rights obligations of any multinational oil company.[423] In Nigeria, for example, the oil industry is subject to several specific federal laws regarding the prevention of oil spills (e.g., Oil Pipelines Act (1956) and the Petroleum Act (1969)) and gas flaring (e.g., and the Flare Gas (Prevention of Waste and Pollution) Regulation 2018).

General exposure to oil spills may also lead to health problems, as noted above. Individuals in communities that have experienced oil spills report that the spill causes skin rashes and breathing difficulties. Residents of the Niger Delta have complained that gas flares seriously damages their quality of life and pose a risk to their health. Flares cause severe problems and discomfort for people living near the sites where flaring occurs. Flaring creates noise pollution and produces considerable heat in the immediate area. [424] Residents continually complain of black oil dust collecting in homes, clothes and food, and accelerated rusting of roofs of houses because of acid rain associated with the flares.

[421] Platform (n 6)
[422] Solomon O. Giwa and others, 'Gas Flaring Attendant Impacts of Criteria and Particulate Pollutants: A Case of Niger Delta Region of Nigeria' (2019) 31 Journal of King Saud University - Engineering Sciences.
[423] Europe-Third World Centre (CETIM), 'Cases of Environmental Human Rights Violations by Shell in Nigeria's Niger Delta' (2014) United Nations General Assembly.
[424] Uchechukwu Nwoke, 'Two Complimentary Duties Under Corporate Social Responsibility' (2016) 58 International Journal of Law and Management.

Multinational oil companies have failed to respect the Human Rights of the people. It has directly harmed Human Rights through failure to prevent and mitigate the pollution. For example, in case of *Ebubu v Shell* provides one example of how longstanding the effects of oil spill pollution can be in the Niger Delta. The spill took place sometime between 1967 and 1970. A scientific study of the site published in 1992 found a crust of burnt oil on the surface of the soil, and the vegetation has still not fully recovered some 20 years later.

The commitment to prevent oil spills and gas flaring is one of the major Human Rights obligations of multinational oil companies. In a joint written statement submitted by the Europe-Third World Centre (CETIM) to the Human Rights Council of the United Nations, the main causes of environmental Human Rights violations were oil spill and gas flaring.[425]

The oil industry is subject to several specific federal laws in Nigeria.[426] Under Nigerian law, even if the cause was sabotage, the parent company remains liable "for the containment and recovery of any spill discovered within its operational area, whether or not its source is known". The Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN) stipulates that the operator must "take prompt and adequate steps to contain, remove [,] and dispose of the spill".[427]

The Human Rights obligations of most multinational oil companies (e.g., Shell and Chevron) is very detailed and comprehensive on prevention of oil spill, clean-up and remediation when an oil spill occurs. The Human Rights obligation of Shell regarding pollution is stated as follows:

> "To avoid spills and leaks of hazardous substances, we work hard to make sure our facilities are well designed, safely operated and appropriately inspected and maintained. We invest in the equipment and human expertise we need to deal with any spills that happen. Employees are guided on how to avoid and respond to spills in our Health, Safety, Security, Environment and Social Performance (HSSE & SP) Control Framework."

[425] Europe-Third World Centre (n 423).
[426] Oil and gas related laws in Nigeria include the oil pipelines Act (1956), the petroleum (drilling and production) Regulations (1969), the petroleum Act (1969), and the Flare Gas (Prevention of Waste and Pollution) Regulation 2018 and EGASPIN (revised 2002), issued by the DPR, and NOSDRA.
[427] EGASPIN (n 346) see Section 2.6.3

According to the United Nations and several International Human Rights organisations, oil pollution and gas flaring continue to occur in many developing countries involved in oil and gas operations despite these Human Rights obligations. For example, community complaints continue to be raised over the process of oil spill investigations in the Niger Delta, and the allegations subsist over the lack of transparency in that process as it consistently fails to comply with national law and standards. More concerning is the inaccuracy of the data recorded in the oil spill investigation forms.[428] The United Nations and several international Human Rights organisations (e.g., the 2017 Amnesty International report)[429] have reported on widespread Human Rights abuses in the Niger Delta. A 2011 United Nations report commissioned by the Nigerian government in the Niger Delta region revealed record levels of oil pollution, several cases of Human Rights abuses, and the extent of such violations and the impact it has had on the people and communities in the Niger Delta[430].

Amnesty International and The Centre for Environment, Human Rights and Development (CEHRD) collaborated to produce a report on the Bodo spills in 2011 which pointed out the devastation to the local environment of the Bodo community and the painful after effect on the lives of the local people. The Amnesty report stated:

> "The disaster at Bodo should not have happened. If Shell had immediately stopped the spills and cleaned up the oil, the impact on people's lives and the environment would not have escalated to the level of complete devastation that prevails today… Three years on, the oil continues to permeate every aspect of people's lives in Bodo. It has destroyed their land and their livelihoods. The lack of a prompt clean-up has caused infinitely more damage than a case of equipment failure should have done, had it been dealt with as required by law."

Friends of the Earth (Netherlands) investigated Shell's operations in Nigeria in 2010 and observed that Shell operates a double standard when it comes to the Niger Delta. The report found that Shell conducts its operations in Nigeria far below commonly accepted international standards and far below standards it uses anywhere else in the world. The report concluded that

[428] Amnesty (n 391)
[429] A recent report by Amnesty International in 2017 has accused Shell of running a criminal enterprise in the 1990s where they caused numerous spills, fuelling communal violence and assisting the military government in torture, killing and suppressing peaceful protest and demonstrations.
[430] United Nations Environment Programme (UNEP), 'Environmental assessment of Ogoniland Report', (2011) <https://postconflict. unep.ch/publications/OEA/UNEP_OEA.pdf> accessed August 31, 2022.

the standards used to prevent, control and respond to oil spills did not reflect good practice and fell below international standards and standards required by Nigerian law.

3.5.7 Clean-up and Remediation

The commitment to clean up the environment after an oil spill has occurred even if the companies did not directly because it is one of the critical Human Rights obligations. Clean-up and remediation refer to the act of cleaning up the environment and restoring it to the state it was in before the environmental pollution (e.g., oil spill, gas flaring, waste leakage, etc.) occurred. In cases of oil spills–this will include any spills attributed to vandalism or sabotage and the company operating the asset is obliged to contain and limit the spread of the pollution in the affected area. The consequences of failing to clean up and remediate the area following the pollution incidences are legislated by Nigerian law, and failure to do so is considered a violation of Human Rights and environmental damages of the people of the Niger Delta.

Under Nigerian regulations, the remediation and clean-up process is expected to be swiftly carried out following oil spill, in accordance with industry practice and standards. The EGASPIN in Nigeria requires clean-up to commence within 24 hours after the spill occurs. These guidelines also require that where the pollution has occurred over or in water bodies "there shall be no visible sheen after the first 30 days of the occurrence of the spill no matter the extent of the spill."[431]

Specifically, Shell states that it has an obligation for oil spill clean-up and restoration even when this results from illegal activity such as sabotage or theft.[432] In an open letter published on Shell's official website as part of its Human Rightsobligations, Mutiu Sunmonu, the Managing Director of Shell Nigeria, stated:

> "Shell is committed to cleaning up spilt oil and restoring the surrounding land" when spills occur as a result of "illegal activity such as sabotage or theft."

The response of parent companies and their subsidiaries in Nigeria is at odds with this very important obligation.

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[431] EGASPIN, Section 2.6.3

[432] Mutiu Sunmonu, 'An Open Letter on Oil Spills from The Managing Director of The Shell Petroleum Development Company of Nigeria Ltd' (*Shell.com.ng*, 2011) <https://www.shell.com.ng/media/2011-media-releases/open-letter-04082011.html> accessed 10 January 2022.

The operations of the multinational oil companies in the Niger Delta, and their role in several oil spills (e.g., the damage caused to the Bodo community from pipeline pollution incident of 2008), have been subject to severe criticism from international organisations and experts. The conclusion reached by most of those international experts and commentators is that Shell apparently operates with one set of laws for the disadvantaged regions it operates in within Nigeria and another law for other more regulated areas of the world. There is widespread international condemnation of parent companies and their subsidiaries (especially Shell) for how it carries out clean-up and remediation of an oil spill in the Niger Delta. For example, despite the admission of responsibility for the Bodo oil spill in 2008, it is regrettable that Shell and its subsidiary in Nigeria have not made any concerted or appropriate efforts to complete the cleanup efforts in that community.

Shell has claimed it cleaned up at Bodo. An investigation by Amnesty International and CEHRD, published in 2011, found Shell had not cleaned up. This investigation was based on a review of existing and new evidence, including satellite images, video and photographic evidence and community testimony. Shell's statements about clean up at Bodo and access to Bodo are inconsistent and raise serious questions.

Even though regulatory certification of clean up in the Niger Delta is a completely discredited process, with regulators certifying polluted sites as clean, Shell's failure to secure the relevant facilities also raises questions.[433] The limited amount of work carried out in Bodo has been grossly inadequate and not at all up to acceptable industry standards. Delays in cleaning up worsen the problem worse as oil continues to be trapped in the soil and the local ecosystem continues to deteriorate and poses the risk that the environment will be irreparably damaged for generations to come. [434]

3.5.8 Access to Compensation

Compensation for harm due to Human Rights and environmental violations is a key Human Rights obligation. Under international law, there should be effective remedies available to

[433] Oil spill investigations in the Niger Delta Amnesty International November 2013 Index: AFR 44/028/2013 50
[434] Leigh Day (n 8)

victims of Human Rights abuses. These recourses should include administrative remedies and other forms of remediation as well.[435] The right to effective reparation includes restitution, measures to restore the victim to the original situation, compensation for economically assessable damage, rehabilitation, and satisfaction. This last remedy should consist of effective measures to verify facts and disclose the truth so that judicial and administrative sanctions can be effectively applied against the liable persons who have committed the violations.

Various UN bodies have explicitly recognized the right to effective remedies (e.g., United Nations General Assembly, United Nations Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Rights Law and Serious Violations of International Humanitarian Law), and also in various regional contexts (e.g., African Commission on Human and Peoples' Rights, European Court of Human Rights).[436] Courts are also empowered to issue injunctions to put an effective stop to certain parent companies and their subsidiaries' behaviours and award compensatory monetary damages to compensate for the injury.

Several multinational oil companies operating in the Niger Delta have Human Rights obligations regarding access to compensation. For example, Shell has the following Human Rights obligation regarding compensation:

"Regardless of the cause, SPDC cleans up and remediates areas impacted by spills that come from its facilities. In the case of operational spills, SPDC also pays compensation to people and communities impacted by a spill."[437]

There have been several breaches of this Human Rights obligation by multinational oil companies including Shell and Chevron. In fact, the commitment of these companies and their subsidiaries to compensation for victims of oil spills and gas flaring in Nigeria have not been

[435] United Nations General Assembly, United Nations Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, art. 3, U.N. Doc. A/RES/60/147 (Mar. 21, 2006) [hereinafter Principles and Guidelines on Reparation]. See also Economic and Social Council, United Nations Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity, U.N. Committee H.R. Res. 2005/81, Principle 31, U.N. Doc. E/CN.4/2005/102/Add.1(Apr. 21, 2005)

[436] African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle C(a), available at http://www.achpr.org/instruments/fair-trial/ (last visited Nov. 13, 2013). See also The European Court of Human Rights and the European Convention on Human Rights.

[437] 'Spill Response and Prevention in Nigeria - Shell Sustainability Report 2018' (Reports.shell.com, 2019) <https://reports.shell.com/sustainability-report/2018/special-reports/spill-response-and-prevention-in-nigeria.html> accessed 7 December 2019.

satisfactory. Many scholars argue that the lack of access to compensation stems from the fact that companies under-report the extent of an oil spill which will, in turn, affect the amount of compensation to be paid out to the communities that would have suffered environmental damage.[438]

A recent Amnesty international report uncovered serious disparities with how volumes of recorded oil spills were documented and found that "it is likely that the volume of oil recorded as spilt in many cases is incorrect". What this means, in reality, is that it becomes impossible to properly assess the impact of such spills and consequent evaluation of the community compensation. Remember that under relevant legislation affecting the region, where the spill has been recorded as having resulted from sabotage or theft, the affected community will receive no compensation from the company operating the asset, regardless of how the consequence of pollution has damaged their livelihood. This is based on a provision in the 1990 Oil Pipelines Act. Section 11(5) of the Oil Pipeline Act, which states:

> "The holder of a licence shall pay compensation … to any person suffering damage (other than on account of his own default or on account of the malicious act of a third person) as a consequence of any breakage of or leakage from the pipeline or an ancillary installation, for any such damage not otherwise made good."[439]

3.6 Comparing the response of MNOCs to Oil Spill in the Niger Delta and other Developed Countries

There is widespread international criticism of how Shell performs its operations in the Niger Delta and, in particular, its shortcomings concerning the oil spills. The response of multinational companies to Human Rights and environmental violations in developing countries like Nigeria is very different from the way it responds to the same concerns in developing countries. The response of MNOCs regarding compliance with Human Rights

[438] 'Spill Response and Prevention in Nigeria - Shell Sustainability Report 2018' (*Reports.shell.com*, 2019) <https://reports.shell.com/sustainability-report/2018/special-reports/spill-response-and-prevention-in-nigeria.html> accessed 7 December 2019. Shell states that regardless of the cause, SPDC cleans up and remediates areas impacted by spills that come from its facilities. In the case of operational spills, SPDC also pays compensation to people and communities impacted by a spill.

[439] Oil Pipelines Act, 1990, Clause 11 (5). Also, the Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN) state: "A spiller shall be liable for damages from a spill for which he is responsible" (Part 8 (B) 8.20).

obligations in terms of pollution, clean-up and remediation, and compensation is inconsistent and misleading. [440] Several international experts and analysts have argued that Shell seems to operate with one law and another for the rest of the country for this impoverished region of Nigeria.

Let us compare and contrast the response of an MNOCs to two oil spills that involve Royal Dutch Shell within a space of 10 years – between 2008 and 2018: the Gulf of Mexico oil spill near Louisiana, the US and the Bodo oil spill Niger Delta, Nigeria.

Bodo oil spills occurred in 2008 and 2009 in the Bodo Community of Niger Delta, which affected the day-to-day life of the people in the community, their property and the land. The people in the Bodo community filed a legal suit against Royal Dutch Shell (RDS) and Shell Petroleum Development Company (SPDC) for the oil spillage. The villagers claimed that the spill was a result of poorly maintained 50-year-old pipelines and that Shell had been initially warned about the damaged pipelines[441]. Shell attempted to agree with the plaintiff to accept liability and jurisdiction on the grounds that no further claims would be brought against it; however, this failed, and the case went to court.[442]

The Shell Gulf of Mexico oil spill occurred happened on or about May 11, 2016, when Shell discharged crude oil into the waters of the Gulf of Mexico from its Green Canyon Block 248 offshore facility located on the Glider field, leading to a 2-mile by 13 mile sheen on the sea surface some 97 miles south of Port Fourchon, LA. The oil is spilt from a 6-inch-diameter pipeline that is used to transfer oil from a production well on the seabed to a collection point. The incident resulted in an estimated discharge of 1,926 barrels of oil (80,892 gallons) into the waters of the Gulf of Mexico.[443] Shell's response to the Gulf of Mexico oil spill and Bodo oil spill is based on different aspects of oil spills are discussed below (see Table 3.3 for a summary)

[440] Leigh (n 8).
[441] Business & Human Rights Resource Centre. (2021). Shell lawsuit (re oil spills & Bodo community in Nigeria). London: Business & Human Rights Resource Centre. Retrieved from http://business-humanrights.org/en/shell-lawsuit-oil-spills-bodo-community-in-nigeria in June 21, 2021
[442] Leigh Day (n 8).
[443] National Oceanic and Atmospheric Administration, 'Shell Green Canyon 248' (Damage Assessment, Remediation, and Restoration Program (DARRP) 2021) <https://darrp.noaa.gov/oil-spills/shell-green-canyon-248> accessed 19 August 2021.

3.6.1 **Denial of responsibility**

The most noticeable way that multinational oil companies respond to remediation and compensation is to deny (or at least diminish) their responsibility for the oil spill. This can be done in several ways, including disputing the cause of the oil spill, the area affected by the spill and the volume of oil spilt. Disputing allegations related to oil spill data directly impact remediation and compensation (if it inevitably takes place) to victims.

In the Bodo oil spill, Shell denied responsibility for the oil spill, and instead blamed it on sabotage. Under Nigerian law, there is an incentive for blaming oil spills on sabotage because the oil company is not obligated to pay compensation to victims for oil spills caused by sabotage or theft.[444]

Shell worked collaboratively with the U.S. Fish and Wildlife Service, National Oceanic & Atmospheric Administration, and the Government of Louisiana (Trustees) claims that natural resources may have been impacted by an oil leak in the Glider field on May 12, 2016. This resulted in a consent decree between the two parties. There is no evidence that Shell denied responsibility for the Gulf of Mexico oil spill.[445]

When MNOCs claim that oil spills were due to sabotage undermines their obligations, it also undermines government regulation which expects MNOCs like Shell and Chevron to swiftly carry out clean-up and remediation after an oil spill, following industry practice and standards.

3.6.2 **Prevention and Containment of Oil Spill**

The approach also evidences the shell's response to remediation and compensation to prevent the oil spill in the first instance and the approach used to contain and recover from the oil spill (if an oil spill occurs).

In the Bodo oil spill, the core allegations against Shell is that it had not exercised due diligence in preventing oil spills, failed to take adequate measures to prevent spills and/or mitigate their consequences, and failed to clean up the contaminated sites properly after the oil spill occurred.

[444] Leigh Day. (2021). Shell - Bodo. London: Leigh Day. Retrieved 21 July 2021, from https://www.leighday.co.uk/latest-updates/cases-and-testimonials/cases/shell-bodo/
[445] United States District Court Eastern District of Louisiana [2019]. Consent Decree. United States Of America (Plaintiff) V. Shell Offshore Inc. para 7

When evidence was presented based on an investigation by Amnesty International to show that the polluted site was worse than stated, Shell subsequently accepted liability. Shell argued that they have adequately cleaned up oil spills in some polluted sites.[446]

In the Gulf of Mexico oil spill, Shell stated that it took steps to clean up, as captured below:

> "…Since the event, Shell has taken steps to improve the safety of our operations following multiple reviews. This is in line with continually improving our asset integrity management and leak detection capabilities and maintaining our readiness to respond quickly, safely, and effectively in the unlikely event of a release in the future….."[447]

Shell's response regarding prevention, containment and recovery of the oil spill in the Niger Delta is different from its response in the US. Following the 2016 oil spill in the U.S. Gulf of Mexico, Shell immediately identified and isolated the leak's source and coordinated a successful response effort with the US Coast Guard utilising proven oil spill response equipment and technology to contain the leak. Shell also indicated that it was working to improve its asset integrity management and leak detection skills so that it could respond promptly, safely, and effectively in the event of an oil spill.[448]

It was reported that oil was pumping out of one of the pipelines at a very high rate several weeks after it was first reported. Compare this response to the oil spill incident in Bodo. Shell said it was contacted about the oil spill in October 2008. However, the villagers claim that crude oil has been leaking in the good area for six weeks before this time. Even after Shell was contacted, the spill was not contained until after one month.[449]

[446] Leigh Day (n 8).
[447] Energy Offshore, 'Shell to Pay Millions To Settle Lawsuit Over Gulf Of Mexico Oil Spill' (Energy Offshore 2021) <https://www.offshore-energy.biz/report-shell-to-pay-millions-to-settle-lawsuit-over-gulf-of-mexico-oil-spill/> accessed 7 August 2021.
[448] Energy Offshore, 'Shell To Pay Millions To Settle Lawsuit Over Gulf Of Mexico Oil Spill' (Energy Offshore 2021) <https://www.offshore-energy.biz/report-shell-to-pay-millions-to-settle-lawsuit-over-gulf-of-mexico-oil-spill/> accessed 7 August 2021.
[449] Van Ho and others (n 52)

3.6.3 **Clean-up of oil spill**

Shell's response to remediation is first demonstrated by disputing the volume of the oil spill and the area affected by the spill, and later by unfounded claims that it has cleaned up areas affected by the oil spill when it has failed to do so.

In the Bodo v Shell litigation, despite Shell's admission of liability in line with court judgement for failing in its duty of care to ensure that adequate steps were taken to avoid the harm, it had made no concerted or adequate efforts to begin cleaning up the harm caused by the 2008 oil spills.[450] Shell had not cleaned up, according to an investigation published in 2011 by Amnesty International and CEHRD, and its claims on the clean-up and access to Bodo were contradictory, raising serious concerns. [451]

In the Shell v US government litigation, Shell stated that it was committed to cleaning up the areas affected by the oil spill. According to press sources, the spill was detected after a helicopter saw a 13-mile (21-kilometre) sheen around 90 miles (145 kilometres) south of Timbalier Island. After heavy winds dispersed much of the oil into the water column, a five-day cleanup finished with the oil getting as close to shore as 75 miles (121 kilometres).[452]

Shell and many other MNOCs do not take enough proactive steps to prevent oil spills and other environmental violations but instead rely so much on compensation (if required) once the damage has happened. In the case of the Bodo oil spill, it was expected that Shell should have commenced efforts to clean up the oil spill without waiting for the victims to initiate a legal claim. Shell initially refused to commence clean-up efforts in the area affected by the spill in order not to be seen as accepting liability and responsibility for the oil spill. It was their preference to see the litigation to the end and possibly with the hope that they would not be found guilty or still directed by the courts to pay a small amount of compensation. On the contrary, such cleanup efforts would have even strengthened their position not only in the litigation but to improve their reputation within and outside Nigeria.

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[450] Richard Meeran, 'Tort Litigation against Multinational Corporations for Violation of Human Rights', City University of Hong Kong Law Review 3 (2011) 1-41.

[451] Amnesty International, 'Shell's Growing Liabilities In The Niger Delta: Lessons From The Bodo Court Case' (Amnesty International 2015) <https://www.amnesty.org.uk/files/amnesty_international_briefing_on_shell_for_investors.pdf> accessed 2 August 2022.

[452] Insurance Journal, 'Shell Subsidiary To Pay $3.8M For 2016 Gulf Spill Off Louisiana Coast' (Wells Media Group, Inc 2021) <https://www.insurancejournal.com/news/southcentral/2018/07/11/494607.htm> accessed 25 August 2021.

3.6.4 Methodology for collecting oil spill data

The methodology used to collect oil spill data constitutes another form of response to remediation and compensation for oil spills. In the Bodo oil spill, Shell refused to admit that its figures were wrong and that it had underestimated the amount of oil spilt in both of the Bodo spills even when evidence from reputable organisations(e.g., Amnesty International) was presented to them. Shell also tried to divert attention by stating that the volume of oil discharged and the degree of the effect as a result of the 2008 Oil Spills would be the topic of expert testimony in court, which would include hydrological data, satellite imaging, and additional data samples collected from the affected areas.

Shell's JIVs contained the figures that were later discovered to be inaccurate. Shell's admission that the figures for two JIVs – and two different factors (volume and affected area) – are incorrect is extremely noteworthy. If these figures were incorrect and the methodology utilised is suspect – it casts severe questions on the results of the hundreds of other JIVs conducted over time. This could lead to calls for reopening spill investigations in other areas and legal action.[453]

In the Gulf of Mexico oil spill, there was a robust methodology for collecting the oil spill data. For example, after the oil spill, Shell said it used a remotely operated vehicle (ROV) to determine the leak's source, which was a flow pipe. Shell stated that they were working hard to discover the exact source of the discharge by evaluating subsea equipment and flowlines; thereafter, the incident was communicated to the Bureau of Safety and Environmental Enforcement (BSEE).[454]

3.6.5 **Payment of Compensation and Establishment of a compensation fund**

Payment of compensation by the MNOCs can be used to illustrate how MNOCs respond to an oil spill. Compensation could be paid to the community affected by the spill or paid directly to the victims of the oil spill. Also, there may be an effort by MNOCs to establish compensation funds or other initiatives to support the local communities.

[453] Amnesty (n 451)
[454] Steven Mufson, 'Shell'S Brutus Production Platform Spills Oil Into Gulf Of Mexico' (The Washington Post 2016) <https://www.washingtonpost.com/news/energy-environment/wp/2016/05/13/shells-brutus-production-platform-spills-oil-into-gulf-of-mexico/> accessed 17 August 2021.

In the Gulf of Mexico Oil spill, Shell stated in advance that it would pay the full sum of the settlement as stipulated in the consent decree, with the majority of the funds going toward natural resource restoration programs. The conclusion to be drawn from Shell's response to the oil spill in the Gulf of Mexico regarding compensation is that they had accepted the oil spill data and the process that led to the collection of the oil spill data (e.g., and the payment of the compensation, and the times that elapses for payment of compensation after the oil spill occurred) used to calculate the compensation amount.[455]

In the Bodo oil Spill, there is no evidence that Shell accepted to pay compensation rather, it was interested in disputing oil spill data. Shell only agreed to settle the case and pay compensation to the local communities when evidence emerged in court that the cause of the oil spill was poor maintenance of its oil pipeline rather than sabotage. Many scholars do not see Shell's response to the oil spill as a genuine attempt to address issues of remediation and payment of compensation. The establishment of a compensation fund resulted from a court decision or pressure from shareholders. Also, it may be an effort to boost its reputation, which has been badly damaged as a result of allegations of human rights and environmental violations.

Table 3.3. Comparing Shell's Response to remediation and compensation by Shell

Aspects of Shell's responses	**Gulf of Mexico oil spill**	**Bodo Oil spill**
Admission of liability	Shell admitted guilt and regretted the incidence	Shell does not swiftly admit responsibility; they pursue a policy of denial, delay and derailment of justice
Compensation fund	Compensation fund established	Compensation is paid directly to victims. No compensation fund was established.

[455] Insurance Journal, 'Shell Subsidiary To Pay $3.8M For 2016 Gulf Spill Off Louisiana Coast' (Wells Media Group, Inc 2021) <https://www.insurancejournal.com/news/southcentral/2018/07/11/494607.htm> accessed 25 August 2021.

Framework for managing compensation	A consent decree was set up to resolve the dispute without accepting liability	Contest the amount of oil spilt; reluctant to pay compensation, let alone having a legal framework for managing compensation
Length of time	May 2016 - July 2018 (2 years)	2008-2015(8 years)
Duration of oil spill	Few days	3 months
Remediation done	Oil spill remediation completed before litigation	Remediation of affected areas is ongoing even after litigation
Compensation paid	Compensation paid	Compensation paid.

The discussion above shows that Shell's response to oil spills in developing countries stands in stark contrast to Nigeria's decades-long struggle to pin Shell (and other multinational firms) down on how they intend ultimately to fully discharge their obligation and liabilities for oil spills in the Niger Delta. Many scholars and NGOs like Amnesty International and Friends of the Earth, have drawn attention to the disparity existing between the clean-up efforts in developed countries. Also, there is a clear reluctance to apply the same amount of effort to pollution damage of similar or even greater magnitude in developing countries (e.g., the Niger Delta region) even though it has taken place over a greater length of time.[456] With Royal Dutch Shell, the parent company of SPDC (Nigeria) being an equally EU-based corporate entity, there is a viable argument that the strict application of EU and US environmental law definitions for waste and the liability applied to Shell in the US should have been similarly applied by Shell in the operations of its Nigerian subsidiary in the Niger Delta.

Shell's response to oil spills in developed countries is not an isolated case. The Deepwater Horizon/Macondo (BP/US) oil spill in the US[457] is also a contemporary example of international best practices of corporate response to oil spill clean-up, remediation and

[456] Vidal, J., 'Nigeria's Agony dwarfs the Gulf oil spill. The US and Europe ignore it. The Deepwater Horizon disaster caused headache around the world, yet the people who live in the Niger Delta have had to live with environmental catastrophes for decades' The observer (UK) newspaper, Sunday 30, may 2010.
[457] Smithsonian Ocean, 'Gulf Oil Spill' (Smithsonian Ocean, 2022) <https://ocean.si.edu/conservation/pollution/gulf-oil-spill> accessed August 31, 2022; See also Environmental Protection Agency (EPA), 'Deepwater Horizon – BP Gulf of Mexico Oil Spill' (US EPA, 2022) <https://www.epa.gov/enforcement/deepwater-horizon-bp-gulf-mexico-oil-spill> accessed August 31, 2022.

compensation in the oil and gas industry.[458] BP has been widely commended for its swift admission of overall corporate responsibility for the Deepwater Horizon spill, as well as the acceptance of financial liability to the tune of multi-billion US dollars. This was swiftly followed up by the establishment of a framework by the company to manage incoming claims for compensation. This is sharply contrasted against the sluggish and slow-grinding effort even to engage multinational oil companies in the Niger delta to deal with their responsibility and liability for oil spills in the Niger Delta.[459]

Some academics have examined and compared MNOCs' (e.g., BP and Shell) responses to oil spills in developed countries, including Nigeria. For example, Jumbo and Ole conduct a critical examination of Nigeria's offshore oil risk governance regime following the Macondo incident. The authors argue that the offshore risk governance regime is insufficient to prevent offshore accidents in Nigeria. According to the authors, the key challenges include the regulations' prescriptive nature which undermines their effectiveness in preventing offshore risk-related accidents, the fact that the provisions in some of the regulations (e.g., Petroleum Regulations 1969) allow for the reduction of risk governance costs at the expense of actual environmental accident prevention, general lack of regulatory capacity, which makes it difficult for the Department of Petroleum Resources (DPR) to effectively regulate risk governance, and conflict of interest due to DPR's dual role as regulator and regulated which undermines the effectiveness of the risk governance regime.[460]

The issue of conflict of interest between regulatory agencies is a major cause of oil spills. According to reports, a rudimentary cause of the Macondo accident was a potential conflict of interest resulting from the MMS's dual function as an offshore oil revenue maximisation and risk governance body.[461] As a result, MMS ignored several warnings about the potential failure of offshore operators' risk governance measures.[462] Commenting on a similar oil spill incident,

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[458] Leveque Leveque, 'Total Found Guilty In 1999 French Oil Spill Case' (*Reuters.com*, 2019) <https://www.reuters.com/article/environment-france-tanker-trial-dc/total-found-guilty-in-1999-french-oil-spill-case-idUSPAB00375220080116> accessed 1 December 2019.

[459] Steiner, R 'Double standard, Shell practices in Nigeria compared with international standards to prevent and control pipeline oil spills and the Deepwater Horizon oil spill', Report on behalf of Friends of the Earth/Mileudefensie Netherlands, University of Alaska, Anchorage, Alaska, USA(Nov, 2010) p.28 Available at:

[460] Jumbo, I and Ole, N. C., 'A Critical Analysis of the Nigerian Offshore Oil Risk Governance Regime (Post Macondo)' (2019) 3(3) African Journal of International Energy and Environmental Law 5-6

[461] C. Carrigan, 'Captured by Distaste: Reinterpreting Regulatory Behaviour' in David Carpenter and D. Moss (ed), Preventing Regulatory Capture (Cambridge University Press 2014) 247.

[462] Baran and Lidoe, 'Modes of Risk Regulation for Prevention of Major Industrial Accidents' in Preben Lidoe and others(ed) in Risk Governance of Offshore Oil and Gas Operations (Cambridge University Press

that is, the Gulf Oil Spill to Hydraulic Fracturing, Heidi commented that it was necessary to eliminate or reduce internal conflicts of interest where a single organisation handled tasks that presented competing interests, such as concurrent responsibility for the leasing programme, royalties collection, and the creation and enforcement of drilling and operations regulations in the case of the former Mineral Management Service (MMS).[463]

The Centre for Environment, Human Rights and Development (CEHRD) (2015) in their report titled 'After Bodo: Effective Remedy & Recourse Options for Victims of Environmental Degradation Related to Oil Extraction in Nigeria' has also compared the Bodo case with the Deepwater Horizon case. The report illustrates how the various elements of an effective remedy can be achieved in an enabling environment.[464] The report commends BP's attitude in establishing the BP Gulf Cost Compensation Fund (GCCF), waiving statutory liability limits, and ultimately agreeing to such class settlements, which likely reflect a variety of factors, including the strict liability imposed by statute (regardless of the possibility of other wrongdoers); the government's tough stance through regulatory and public enforcement action (during much of the settlement action with plaintiffs, BP's was also engaged in settlement negotiations). On the other hand, by settling with certified classes of plaintiffs, BP obtained what its shareholders desired: certainty in the resolution of all future claims. The report concludes that victims of human rights and environmental violations in Bodo and Nigeria deserve the same response from BP and other MNOCs as they do elsewhere.[465]

3.7 Summary

This chapter presented an overview of Human Rights and environmental rights concerning Human Rights obligations. This chapter introduced the definition of Human Rights and environmental rights and their relationship to corporate social responsibility. This chapter also

2014) 52.

[463] Heidi Gorovitz Robertson, 'Applying Some Lessons from the Gulf Oil Spill to Hydraulic Fracturing' (2013) 63(4) Case Western Reserve Law Review 1281

[464] The Centre for Environment, Human Rights and Development (CEHRD), 'After Bodo: Effective Remedy & Recourse Options for Victims of Environmental Degradation Related to Oil Extraction in Nigeria' (2015) <https://cehrd.org.ng/download/after-bodo/> accessed February 5, 2023

[465] Ibid 6-7

presented the different forms of MNOCs obligations related to Human Rights and environmental rights breached by MNOCs and their subsidiaries in the Niger Delta.

The chapter has observed that the clean-up and remediation of oil pollution in the Nger Delta region is vastly inconsistent with international best standards. Specifically, this chapter has highlighted a significant difference between the approaches used by Shell for clean-up, remediation and compensation in the Niger Delta and the more recent oil pollution cases such as the Gulf of Mexico oil spill.

As a result, this chapter recommends that multinational companies respond to issues of Human Rights and environmental violations in developing countries in the same way they respond to similar issues in developing countries. Businesses should not consider Human Rights and Environmental rights separately but comprehensively integrate them as the only way to implement an effective Human Rights strategy. This will ensure that its actions are consistent with its Human Rights obligations to respect, protect and fulfil its Human Rights obligations.

Chapter Four

Human Rights and Environmental Litigations in Nigeria

4.1 Introduction

The widespread and reoccurring incidences of human rights and environmental violations in the Niger Delta have resulted in several litigations being initiated against oil companies operating in the Niger Delta. These litigations are either individual or collective litigations against oil companies operating in the Niger Delta.

The analysis of these litigations is necessary to highlight the challenges that victims face in bringing claims against oil companies and the response of these oil companies to these claims. These challenges are the reasons why victims of Human Rights and environmental violations have initiated litigations abroad, for example, in the UK, Netherlands, and the US. Also, this analysis will help to highlight how these difficulties are related to shortcomings in the Human Rights obligations of parent companies and subsidiaries in Nigeria.

This chapter reviews three human rights and environmental litigations arising from the Niger Delta to illustrate how all stakeholders, including plaintiffs and defendants, have approached these litigations and the government to highlight the challenges of suing oil companies in Nigeria and which have led to litigations being initiated aborad have handled the oil companies. For example, it is important to know how oil companies responded to court judgements and how the approaches have had an impact on the victims. The findings by the Nigerian courts that Shell has committed common law (i.e., tort law negligence and nuisance) are significant as a body of precedents that have been gradually built since the 1970s. For example, in the case of Umudeje v. Shell-BP Petroleum (1975) where the Nigerian Supreme Court held the corporations liable for damage to the ponds and lakes of the plaintiffs.[466]

The rest of the chapter is organized as follows: Section 4.2 discusses the characteristics of the human rights and environmental litigations that will be reviewed in Nigeria. Section 4.3 reviews the Ejama-Ebubu community v. SPDC (2010) litigation. Section 4.4 reviews the Elder Baribor N. Saakpa and Saturday Giadom v. SPDC litigation. Section 4.5 reviews Iwherekan community (Gbemre) v SPDC and others (2005). Section 4.6 reviews Centre for Oil Pollution Watch v NNPC(2019). Section 4.7 discusses challenges of suing MNOCs in Nigeria and

[466] Umudje v. Shell-BP Petroleum (1975) 9-11 S.C. 155

Section 4.8 discusses the reasons for suing MNOCs abroad for human rights and environmental violations. Section 4.9 summarises the chapter.

4.2 Human Rights and Environmental Litigations in Nigeria

Several human rights and environmental litigations have been initiated against subsidiaries of multinational oil companies to compensate and remediate for oil spills in the Niger Delta[467]. Most of the litigations have not been successful due to the challenges of holding oil companies liable for human rights and environmental violations. These challenges include delays on litigations, cost of the litigations, threats and victimization of claimants, etc.

Some precedent-setting court cases initiated against oil companies are worth reviewing. We carefully selected three litigations involving parent companies that were initiated in Nigeria. The litigations were carefully selected to satisfy the following criteria:

(i) the litigation relates to human rights and environmental violations in the Niger Delta of Nigeria;

(ii) the litigation involves a subsidiary of an MNOC based abroad either as the sole or joint defendant;

(iii) issues of compensation and remediation of either damage done to individuals or the environment feature prominently in the plaintiff's claim.

Table 4.1 shows a summary of the litigations in Nigeria that will be reviewed in terms of the type of case, location, entity being sued, duration and completion status.

Table 4.1. Characteristics of Litigations in Nigeria against Oil Companies operating in the Niger Delta.

SN	Cases	Location	Entity being sued	Estimated Duration	Decision

[467] Waldemar Braul and Paul Wilson, 'Parent Corporation Liability for Foreign Subsidiaries' (Fasken Martineau Dumoulin LLP 2016).

1	Ejama-Ebubu community v. SPDC (2010)	Nigeria	SPDC (a subsidiary of Shell)	32 years	The court awarded 15.4 billion Naira ($100 million) as special and punitive damages.
2	Elder Baribor N. Saakpa and Saturday Giadom v. SPDC	Nigeria	SPDC (a subsidiary of Shell)	5 years	The court awarded the plaintiffs N5.5. Billion in compensation.
3	Iwherekan community (Gbemre) v SPDC and others (2005)[468]	Benin City, Nigeria	SPDC (a subsidiary of Shell)	10 years	The court ruled that SPDC should stop gas flaring
4	Ijaw community v SPDC	Port Harcourt, Nigeria	SPDC (a subsidiary of Shell)	8 years	The court award N210 billion to the Ijaw community in compensation for pollution and environmental degradation

Source: Compiled by the author[469]

The litigations initiated in Nigeria will be reviewed to understand the role of oil companies in oil spills and the challenges of holding oil companies liable for oil spills and thus laying the foundation for compensation and remediation for human rights and environmental violations.

[468] *Gbemre v. Shell* (2005) Judgment of the Federal High Court of Nigeria in the Benin Judicial Division on 14 November 2005, AHRLR 151 (NgHC 2005), FHC/B/CS/53/05. <https://www.globalhealthrights.org/wp-content/uploads/2013/02/HC-2005-Gbemre-v.-Shell-Petroleum-Development-Company-and-Ors..pdf> accessed 12 September 2020. See Friends of the Earth International, 'Shell Fails to Stop Nigeria Flaring, Again' (Friends of the Earth International 2007) <https://www.foei.org/press_releases/archive-by-subject/resisting-mining-oil-gas-press/shell-fails-to-stop-nigeria-flaring-again> accessed 12 September 2020.

[469] The three cases have been arranged according to location, entity sued and court decision.

Each litigation is reviewed under the following sub-headings: the fact of the case, the plaintiff's claim and defendant's claim, issues for determination, court decision and significance of the litigation.

They are numerous other cases where subsidiaries of multinational oil companies have been sued for oil and gas pollution in the Niger Delta. Notable examples include Iwherekan community - Gbemere V. SPDC and other (2006)[470], SPDC v. Chief G.B.A Tiebo VII and others[471], SPCD v. Farah[472], SPDC v. Amao and SPDC v. Chief T Kille. In its usual reactions to past and current allegations, SPDC insists that the spill resulted from sabotage and is thus not responsible. They still do not want to pay money in any of these situations.

4.3 Ejama-Ebubu community v. SPDC (2010)

The facts of the case

In 1970 there was an oil spill at Shell's oil facility in the Ejama-Ebubu community. The exact cause of the spill is controversial. Some believe that an explosion caused the spill during the Nigeria-Biafra civil war, while others believe that the spill is the fault of the Shell equipment. While the reason for the spill is contested, it is thought that approximately 2 million barrels (631 acres, or 255 hectares) of raw oil were spilt in the surrounding region. Also, the leaked oil caught fire and burned for several weeks. In 2011, 40 years after the spill, it was claimed that

[470] *Gbemre v. Shell* (2005) Judgment of the Federal High Court of Nigeria in the Benin Judicial Division on 14 November 2005, AHRLR 151 (NgHC 2005), FHC/B/CS/53/05. <https://www.globalhealthrights.org/wp-content/uploads/2013/02/HC-2005-Gbemre-v.-Shell-Petroleum-Development-Company-and-Ors..pdf> accessed 12 September 2020. See Friends of the Earth International, 'Shell Fails to Stop Nigeria Flaring, Again' (Friends of the Earth International 2007) <https://www.foei.org/press_releases/archive-by-subject/resisting-mining-oil-gas-press/shell-fails-to-stop-nigeria-flaring-again> accessed 12 September 2020.
[471] The Supreme Court of Nigeria, [2005] SC.9/1999. S.P.D.C. (Nig.) Ltd. v Tiegbo VII (2005) 9 NWLR (Pt.931) 439 (2005) 3-4 S.C 137
[472] The Court of Appeal of Nigeria, [1995] SPDC v F.B. Farah and others. 3 N.W.L.R

they can still see oil from deep cracks and that 8 centimetres of refined oil floated in groundwater in the area.[473]

The Plaintiff's claim

In 2001 the Ejama-Ebubu community filed a lawsuit against the SPDC due to the long-term environmental effects, the health impact of the oil spill and the failure to keep its commitments to act.[474] The plaintiffs also stated that the SPDC vowed to clean up the affected area, but oil pollution persists.[475] A summary of the plaintiffs claim is presented below[476]:

(i) Recovery of damages of N1.772 billion, allowing for interest for delayed payment for the five years from 1996 at a modest mean Central Bank of Nigeria deregulated rate for that volume at 25 per cent per anum, totalling N5.4 billion, for an oil spill that occurred in 1970.

(ii) Recovery of punitive general damages of 10bn for general inconveniences, acid rain, pollution of underground water and hardship to the pollution, who have been deprived of the right to self substance, education and good life. Interest for delayed payment for five years from 1996 at a modest mean Central Bank of Nigeria deregulated rate for that volume at 25 per cent per anum, totalling N5.4 billion, for an oil spill that occurred in 1970.

(iii) The plaintiffs, also requested an order directing the defendant to de-populate and rehabilitate the drylands swamps to their pre-impact status.

The Defendant's claim

Following the change of the system of government in Nigeria from Military rule to civilian rule in 2001, Shell has tried to file no less than 27 interculotory (interim) appeals, delaying the case from being considered on its merit until a judgement in July 2010. Shell attempted to postpone proceedings to appeal to a superior court each time the court ruled in favour of the

[473] Ejama Ebubu V SPDC SUIT NO: FHC/ASB/CS/231/2001
[474] The Federal High Court of Nigeria, [2010] SUIT No: FHC/ASB/CS/231/2001, Ejama-Ebubu community v. SPDC(2010), para. 9.
[475] Eddy Wifa, 'The Role of Environmental Impact Assessment (EIA) In The Nigeria Oil And Gas Industry Using The United Nation's Environmental Programme EIA On Ogoni As A Case –Study- Lessons From Some International Good Practices' (2014) 3 International Energy Law Review. 111-117
[476] Van Ho and others (n 52) 53-57

plaintiff's preliminary case. In some instances, the final judgement, but not the interim orders, can be appealed. Shell managed to outlast two judges over nine years of trials. The judge who eventually ruled on the matter was the third to be named. An initial objection was raised by Shell on the grounds of the statute of limitation arguing that the case was based on a nuisance that had occurred since 1970 but had been discontinued for a long time. However, Justice Ibrahim Baba rejected this challenge, considering that the matter was based on the continuing nuisance of Shell.[477]

The Issue for determination

The main issue for determination in the case was to determine whether Shell was liable for the damages caused by the oil spill that occurred at one of Shell's oil extraction facilities located in the Ejama-Ebubu community.[478]

The Court decision

The high court in Asaba awarded 15.4 billion Naira ($100 million) as special and punitive damages and ordered the defendant to de-pollute and rehabilitate the drylands swamps to their pre-impact status. The court also ordered Shell to remediate the affected land to its pre-spill condition. Shell had filed an appeal against the judgement by contending that the spill was caused by the Nigerian troops during the Nigerian civil war in the 1960s.

In November 2020, the Nigerian Supreme Court dismissed a plea by Shell Petroleum Development Company seeking a rehearing of a January 11, 2019 verdict ordering it to pay

[477] Chief Isaac Osaro Agbara, Chief Victor Obari, Chief Humphery Ogiti, Chief F. N. Ogusu, Chief John N. Oguru, Hon. Joseph Ogosu, Chief G. O. Nnah, Chief George O. Osaro, Chief Adanta Obelle, Mrs Laleoka Ejii (For themselves and on behalf of the Ancient "Onne Eh Ejama" Stool-in-Council, Chiefs, Elders, Men, Women and Children of Ejama-Ebubu in Tai Eleme Local Government Area of Rivers State) v. The Shell Petroleum Development Company of Nigeria Limited, Shell International Petroleum Company Limited, Shell International Exploration and Production BV Case No: FJ 31/19 IHQ19/0293 High Court of Justice Queen's Bench Division 5 December 2019 [2019] EWHC 3340 (QB)

[478] African Journal of International and Comparative Law 2020 Assessing the role of the courts in enhancing access to environmental justice in oil pollution matters in Nigeria Eloamaka Carol Okonkwo

N17 billion to several Ogoni communities in Rivers State who were harmed by the company's 1970 oil leak.[479]

The Significance of the Litigation

This litigation is significant for several reasons. First, it is significant in the sense that no evidence was provided by Shell against the plaintiff's claims regarding its wrongdoing. Instead, Shell responded to the allegations by denying responsibility and instead pointed to local rebel activities. This is a typical pattern - Shell and Chevron have for years reported that much of their oil pollution in Nigeria was caused by sabotage rather than a poor maintenance record. According to Kaufman, it is certainly true that local criminal and insurgent groups have associated some of the incidences of the oil spill. However, it stated that it was ridiculous to think that the lion's share of environmental pollution in the Delta is self-inflicted by the acts of local communities who have to live with the consequences is ludicrous.[480]

Following a court ruling against it, Shell submitted a request for a stay of the execution and an appeal against the decision claiming the spills occurred during the Nigerian Civil War when troops had caused the leak. Shell also stated that it was not working in the region at the time because of the fighting. As a consequence of the appeal, Shell's irresponsible actions have long been unable to alleviate people, whose lands and livelihood have been lost.[481]

This litigation again illustrates the difficulty faced by plaintiffs not only in obtaining court judgments but also in compelling the oil companies to obey court ruling. In this litigation, the Supreme Court had issued the N17bn order in favour of Ejama-Ebubu in Tai Eleme Local Government Area of Rivers State, represented by Chief Isaac Agbara and nine others, in the matter that had lasted about 31 years from when it began at the High Court.

[479] Jennifer O Nikoro, 'Supreme Court Dismisses Shell'S Application To Review Ogoni N17bn Judgment' (DNL Legal and Style 2020) <https://dnllegalandstyle.com/2020/supreme-court-dismisses-shells-application-to-review-ogoni-n17bn-judgment/> accessed 2 August 2021.

[480] African Journal of International and Comparative Law 2020 Assessing the role of the courts in enhancing access to environmental justice in oil pollution matters in Nigeria Eloamaka Carol Okonkwo

[481]Nwachukwu C, 'Shell Appeals N15.4Bn Oil Spill Penalty - Vanguard News' (*Vanguard News*, 2020) <https://www.vanguardngr.com/2010/07/shell-appeals-n15-4bn-oil-spill-penalty/> accessed 16 August 2020

The plaintiff's lawyer, Nwosu, had urged the Supreme Court not only to dismiss the application but also to make an order against all senior lawyers in Shell's legal team as a "deterrent" for filing the application to review the judgement, which he claimed was aimed at ridiculing the integrity and finality of the apex court's decisions.

Another significance of this litigation is that it has increased the possibility of oil spill claims based on common law (based on tort). Specifically, this raised the prospects of victims obtaining more compensation than that allowed under an existing statute in Nigeria, there remains the challenge of enforcing such court judgements. The Nigerian courts have severally held Shell liable for committing common law wrongs. Notable examples include the Umudeje v. Shell-BP Petroloeum (1975)[482] litigation where the Nigerian Supreme court held Shell liable for polluting the ponds and lakes belonging to plaintiffs, the Agabara et al v. Shell Petroleum et al.[483]

Another significant issue that this case raised was that the Nigerian court can indeed award damages to MNOCs headquartered abroad. Specifically, the court awarded damages against SPDC and two other companies within the Shell group, that is, Shell International Petroleum Company Ltd (UK), and Shell International Exploration and Production BV (Netherlands). To be successful in enforcing such judgments, the foreign court must agree with the Nigerian Supreme Court that the MNOC was present at the time the damage was done, and if it does, the road to enforcement is clear.

4.4 Elder Baribor N. Saakpa and Saturday Giadom v. SPDC

The fact of the case

The land and farm crops were damaged by crude oil spillage in 2011 from Shell's Alesa, Eleme, Bonny Trunk Line, which is the main SPDC oil pipeline from the upstream production areas to the Bonny (Island) export terminal. Residents in Gokana Rivers State Local Government

[482] Umudje v. Shell-BP Petroluem (1975) 9-11 S. C. 155.
[483] Agbara v. Shell Petroleum, Suit No. FHC/ASB/CS/231/2001

reported that the activities of the SPDC had led to an oil spill which, in turn, harmed their landed property of approximately 37 hectares in size.[484]

The plaintiff claim

The plaintiffs claimed N10 billion as general and special damages caused to the land and farm crops. The claim was made for the plaintiffs themselves and on behalf of the members of the Saakpa family of Baranyowa-Dere, in Gokana Local Government Area of Rivers State.

In response to the variation of conditional stay of execution on 20/01/2011 granted to the defendants whereby an order of unconditional stay of execution was granted, the Respondents/Applicants filled two applications on 10/5/2011 at the court of Appeal. [485]

In the first, the applicant was praying for an order of Mareva Injunction or alternatively a stay of execution of the judgment of the lower court. A Mareva Injunction (also known as a freezing injunction) is a pre-trial court order preventing the disposal by a party of assets forming part of the subject matter of a case pending trial.[486] This application failed and was accordingly dismissed. In the second, the applicant was praying to amend the Notice of Appeal and Brief of Argument. This application succeeded in part in the ruling. For example, the court ordered that the word "Cross" be added before the word "Appeal" in the Notice of Appeal wherever the Appellant appears therein and the Notice of Appeal of the cross-appellant shall be so amended.

The counsel for the applicants formulated 3 issues for determination to wit:

[484] Shell Petroleum Development Company Nigeria Limited V. Elder Baribor N. Saakpa & Anor (2012)LCN/5326(CA) In The Court of Appeal of Nigeria On Thursday, the 26th day of April, 2012 CA/PH/481/2009 (R)

[485] Corporate liability in new setting; Shell and the changing landscape for multinational oil industry in the Niger Delta`

[486] Mahasweta Muthusubbarayan and others, 'The Mareva Injunction And Its Story Of Expanding Horizons - Kluwer Arbitration Blog' (*Kluwer Arbitration Blog*, 2021) <http://arbitrationblog.kluwerarbitration.com/2019/05/20/the-mareva-injunction-and-its-story-of-expanding-horizons/> accessed 1 October 2021.

"(i) whether in the peculiar circumstances of this matter this Honourable court ought to grant the prayer for mareva injunction sought for in order to prevent the dissipation of the assets of the appellant/respondent before the conclusion of this appeal?

(ii) whether this Honourable court ought to order the appellant/respondent to deposit the judgment debt and interests thereon in an interest yielding Account as sought for by the respondents/applicants pending the determination of the appeal?

(iii) whether this Honourable court ought to order the appellant/respondent to furnish a bank guarantee as sought for by the applicant?"[487]

The Defendant claim

At the Federal court stage, SPDC denied any spill, claiming that there was no record on 27 May 2000, as claimed by the claimants, of the spill of its manifold along the SPDC trunk line. In response to the application by plaintiffs filed on 10/05/2011 in the Court of Appeal, the defendants filed a 42-paragraph reply affidavit to oppose the application. The averments of the counter affidavit that are most relevant are paragraphs 9-28, some of which are summarised below:

> "9. The defendant/respondent (SPDC) is a Nigerian indigenous company that is registered under the Federal Republic of Nigeria's regulations. The defendant/respondent (SPDC) is a long-standing Nigerian oil company with a good financial track record and an international reputation.
>
> 12. The defendant/respondent (SPDC) is a major joint venture partner with the Federal Government of Nigeria through the Nigeria National Petroleum Corporation (NNPC), Total and Agip Oil Company Joint Venture partnership. The defendant/respondent is the operator of the NNPC/SPDC/TOTAL/NAOL Joint Venture.
>
> 14. The grant of this application will adversely affect the operation of the NNPC/SPDC/TOTAL/NAOL Joint Venture and the Nigerian economy.

[487] Tombari Bodo, 'Deep Issues Behind The Crisis In The Niger Delta Region: The Case Of Oil Exploration In Ogoniland, Rivers State, Nigeria' [2019] Asian Journal of Geographical Research.

15. The defendant/respondent's' (SPDC) interest in each of the various Oil Mining Leases (OML) listed in paragraph 15 of the applicant's affidavit for exceeding the judgment debt in this matter.

22. In 2006, the Federal High Court adjudged the defendant/respondent (SPDC) liable to pay over 200 Billion Naira (1.5 Billion United States Dollars) in Suit No: FHC/YNG/CS/3/05. Notwithstanding the said huge judgment sum, the defendant/respondent (SPDC) has strongly remained in operation with no intention of exiting Nigeria or dissipating its assets to avoid paying the huge judgment sum. The matter is now on appeal at the Court of Appeal and the Supreme Court as CA/A/209/2006 and SC 290/2007 respectively. There are other court cases in Nigeria where a very huge judgment sum were awarded against the defendant/respondent (SPDC) as in Suit FHC/YNG/CS/3/05.

23. The judgment sum in the present case is a little above 5 Billion Naira. The 5 Billion Naira judgment sum in the present case is considerably little compared to the very huge judgment sums in other cases such as in suit No: FHC/YNG/CS/3/05 to warrant his application.

24. The present action was filed at the lower court in year 2005, a period of over 6 years from date. The judgment of the lower court was made in August 5, 2009 a period of almost two years form date. The parties concluded filing of Briefs in the defendant/respondent's present appeal since January 22, 2010, over a year from date. The defendant/respondent has continued to operate in Nigeria despite the judgment sum in this matter and will continue to do so with no intention of dissipating its assets within jurisdiction.[488]

Issues for determination

[488] Shell Petroleum Development Company Nigeria Limited V. Elder Baribor N. Saakpa & Anor (2012)LCN/5326(CA) In The Court of Appeal of Nigeria On Thursday, the 26th day of April, 2012 CA/PH/481/2009 (R)

Justice Chukwu of the Federal High Court at Uyo identified two issues for determination: if there was an oil leak from the defendant's manifold on the trunk line at the appropriate date, and whether the plaintiffs are entitled to seek general and special damages from SPDC.[489]

The appellant/respondent was dissatisfied with the judgment filed on appeal against it on 7/9/2009 and subsequently applied for and obtained an order of unconditional stay of execution on 20/01/2011 of the said judgment.

At the Court of Appeal, the main issue presented for determination by the claimants revolved around granting a maveran injunction. The claimants presented the following issues for determination:

"(i) whether in the peculiar circumstances of this matter this Honourable court ought to grant theprayer for mareva injunction sought for in order to prevent the dissipation of the assets of theappellant/respondent before the conclusion of this appeal?

(ii) whether this Honourable court ought to order the appellant/respondent to deposit the judgmentdebt and interests thereon in an interest yielding Account as sought for by the respondents/applicantspending the determination the of the appeal?

(iii) whether this Honourable court ought to order the appellant/respondent to furnish a bankguarantee as sought for by the applicant?"

Chief Richard Akinjide SAN, counsel for the respondent, also filed a written address opposing the applicants' move on notice, and formulated the following five(5) issues for determination on page 9 of his written address:-

> "a. Whether the plaintiffs/applicants relief for mareva injunction is a post judgment remedy and maintainable after the plaintiffs, claim had already been heard and determined and judgment delivered?

[489] Shell Petroleum Development Company Nigeria Limited V. Elder Baribor N. Saakpa & Anor (2012)LCN/5326(CA) The Court of Appeal of Nigeria. CA/PH/481/2009 (R) paragraph 4 - 7

b. In case this Honourable court holds that the application for Mareva Injunction can be made to the Court of Appeal post judgment by virtue section 15 of the Court of Appeal Rules, is the present application competent having regard to Order 7 Rule 4 of the Court of Appeal Rules?

c. Is an Order of Mareva Injunction available to the plaintiff/applicants after this Honourable court of appeal has granted unconditional stay of execution of the judgment sum in this matter pending the determination of the appeal.

d. Whether this Honourable Court of Appeal has jurisdiction to either consider and/or grant the alternative reliefs sought by the plaintiff/applicants after this Honourable court has become Functus officio as regards all applications stay of execution in this matter?

e. Assuming but without conceding that Mareva Injunction a post-judgment remedy, is it judicial and judicious, in the circumstances of his case, for this Honourable Court to grant the plaintiff/applicant application?"[490]

The court decision

In August 2008, the court ruled in favour of the plaintiff's issues for determination. He awarded the plaintiffs N5.5. Billion in compensation. Shell had initially requested that the judgements be unconditionally stayed by the Federal high court in Uyo, Akwa Ibom state, but was only able to get the execution order stayed awaiting the result of the appeal.

On 5/9/2009, the respondent/cross-appellants/applicants won a judgement against the appellant/cross-respondent/respondent in a Federal High Court in Uyo judgement issued by E.S. Chukwu J. The appellant/respondent was unsatisfied with the ruling and filed an appeal against it on September 7, 2009, requesting a stay of execution.[491]

The Federal High Court issued a conditional stay of execution, requiring the appellant to produce a corporate guarantee backed by a resolution of the Appellants' Board of Directors that

[490] Shell Petroleum Development Company Nigeria Limited V. Elder Baribor N. Saakpa & Anor (2012)LCN/5326(CA) The Court of Appeal of Nigeria. CA/PH/481/2009 (R) paragraph pp9

[491] Lawcarenigeria.com, 'Shell Petroleum Development Company Nigeria Limited V. Elder Baribor N. Saakpa & Anor (2012)' (lawcarenigeriacom 2021) <https://lawcarenigeria.com/shell-petroleum-development-company-nigeria-limited-v-elder-baribor-n-saakpa-anor-2012/> accessed 1 October 2021.

the S.P.D.C. would pay the judgement debt immediately if they lost on appeal. On January 20, 2011, the appellant applied for and was granted a revision of the conditional stay of execution order, which resulted in an order of unconditional stay of execution.

The respondents/applicants filed this application on May 10, 2011, requesting among others prayers that an Order Of Mareva Injunction restraining the appellant/respondent from disposing of, selling, or otherwise transferring its interests in its assets in Nigeria to any person, company, corporate body, or organisation, pending the determination of this appeal. The respondents/applicants further added that if the assets of the Appellant/Respondent's (SPDC) are sold, disposed of, or transferred in Nigeria, the Respondents/Applicants will be unable to enforce the Federal High Court's judgement in their favour for the sum of N5,502,500,000.00 (Five Billion, Five Hundred and Two Million, Five Hundred Thousand Naira) only granted in Suit No. FHC/UY/CS/16/2009 (Suit No. FHC/PH/CS/438/2005).

Both parties filed several applications and counter-affidavit in the Court of Appeal. For example, in response to the respondent's counter-affidavit, the petitioners filed a 15-paragraph reply affidavit. Wodu, on behalf of the respondents, filed a reply address on grounds of law in response to the respondent's objection.[492]

After giving due consideration to both sides' arguments. The court concurred with the respondent's counsel that the applicant's claim was without merit for several reasons. One of the most important reasons is that the contention of the applicant as per paragraphs 16 and 17 of their supporting affidavit was denied by the respondent in paragraphs 9 - 21 of its counter-affidavit. Paragraph 16 and 17 are stated as follow:

> "16. That the appellant/respondent (SPDC) is gradually selling off its assets in Nigeria.
>
> 17. That on the 29th day of January 2010 after the delivery of the judgment of the lower Court in issuein this appeal, the Appellant/respondent (SPDC) sold its interests in three of its oil miningconcessions or leases i.e. OML4, OML38 & OML 41, for over N30 Billion. The said sale of the saidOML4, 38 & 41 is also captured at page 20 of the Appellant/respondent's (SPDC) Corporate AccountsYear 2009 was fi led by the

[492] Lawcarenigeria.com, 'Shell Petroleum Development Company Nigeria Limited V. Elder Baribor N. Saakpa & Anor (2012)' (lawcarenigeriacom 2021) <https://lawcarenigeria.com/shell-petroleum-development-company-nigeria-limited-v-elder-baribor-n-saakpa-anor-2012/> accessed 1 October 2021.

Appellant/Respondent (SPDC) as an Exhibit to its Counter Affi davit in theseproceedings fi led on the 29th day of April, 2011."

Paragraph 12 and 13 of the counter affidavit presented by the respondents is stated as follows:

"12. The defendant/respondent (SPDC) is a major joint venture partner with the Federal Government of Nigeria through the Nigeria National Petroleum Corporation (NNPC), Total and Agip Oil Company Joint Venture partnership. The defendant/respondent is the operator of the NNPC/SPDC/TOTAL/NAOL Joint Venture.

13. The various oil Mining Licenses 9OMLs) listed in paragraph 15 of the applicant's affidavit are held by the defendant/respondent (SPDC) in a joint venture with the Federal Government of Nigeria and other joint venture partners. Under the joint venture the federal government of Nigeria, through the Nigerian National Petroleum Corporation (NNPC), hold 55% interest in those assets, SPDC holds 30% interest, Total holds 10% while Agip owns 5% stake in those assets. None of the OMLs can be sold without the prior approval of the National Assembly of Nigeria."

The court stated the application requires that there be a genuine and imminent risk of the respondent removing assets from the jurisdiction, rendering any judgement obtained by the plaintiff null and void. The court stated that there is no doubt that paragraphs 16 and 17 of the supporting affidavit, as well as the aforementioned paragraphs of the respondent's counter-affidavit, contradict each other on this core issue. Furthermore, the court stated that it is not for the applicant to show that the respondent is disposing of a fraction of its assets, but rather that such a proportion is large and threatening enough to the recovery of the judgement debt from the respondent. The applicant must demonstrate that there is a real and impending danger. The court decision, therefore, was that it was the applicant's responsibility to demonstrate the imminence of the risk; and so the application failed on that point because the key point had not been proven.[493]

[493] Shell Petroleum Development Company Nigeria Limited V. Elder Baribor N. Saakpa & Anor (2012)LCN/5326(CA) In The Court of Appeal of Nigeria On Thursday, the 26th day of April, 2012 CA/PH/481/2009 (R) paragraph 1 - 28

The Significance of the Litigation

The main significance of this litigation is that both parties used several interlocutory appeals and injunctions. Such appeals and injunctions are meant to delay the court process for the defendant. SPDC refused to accept these determinations, filed an appeal, and requested a stay of execution.[494] Initially, they asked for an unconditionally stayed on the judgments from the Judge Oloto of the Federal high court in Uyo, Akwa Ibom state. They were, however, only able to secure a stay of the execution order pending the outcome of the appeal.[495]

It would have been expected that the defendant would have allowed the case to be heard on its merit. During the court proceedings, the defendant filed several counter Affidavits to dismiss the application. For example, in response to the application, the appellant/respondent filed a 42-paragraph counter-affidavit and a written address in one instance.

The plaintiff, whose source of livelihood had been destroyed by oil spills, initiated the litigation in the first place due to Shell's failure to address human rights and environmental violations after years of oil spillage in the community. The plaintiffs stated as follows in paragraph 31of the appeal:

> "31. That we the respondents/applicants are farmers whose source of livelihood has since the year 2000 been destroyed and devastated by the crude oil spillage from the appellant/respondent's (SPDC) facilities for about 11 years now and have lived without any income from the said very vast farmland nor any form of compensation from the appellant/respondent (SPDC). The Appellant/respondent (SPDC) has till date refused to clean up and remediate the aforesaid impacted land."

This litigation and many others point to the fact that victims would only decide to sue the oil companies when they have exhausted all avenues to address the human rights and environmental violations. This would usually be in the form of cleaning up the polluted areas and paying compensation to the victims.

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[494] Badejo, E., 'Shell rejects N5.5b verdict over Bayelsa environment pollution' at overseas Agency Nigeria (OAN) Ltd., website at: http://www.oan-agency.com/site/newsdetail.php?recordID=Shell (accessed August, 2020)

[495] Suit No. FHC/PH/CS/438/2005, FHC/UY/CS/16/2009. See Agina, C., 'Shell gets stay of execution on payment order'. February 18, 2010. Available at NBF news website: http://www.nigerianbestforum.com/blog/?p=37526(accessed August, 2020)

4.5 Gbemre v. Shell Petroleum Development Company of Nigeria Ltd. and Others

The facts of the case

In 2005, Jonah Gbemre, a representative of the Iwherekan community in the Niger Delta, filed a lawsuit in the Benin Judicial Division of the Federal Court of Nigeria against the Nigerian Government and oil companies - Nigerian National Petroleum Company (NNPC), Total, and local subsidiaries of Shell, Chevron, and Agip to stop continuing gas flaring operations. Gas flaring (the practice of burning off natural gas associated with oil production) has been illegal in Nigeria since 1984. Companies may only flare if they have ministerial consent. The Nigerian Government has imposed several deadlines for phasing out the practice, none of which have been met.[496]

According to a World Bank statement from 2002, Nigeria has been the world's largest gas flarer, contributing more greenhouse gas emissions than all other sources in Sub-Saharan Africa combined. [497]Flaring harms the environment as well as the inhabitants of the Niger Delta. It can cause leukaemia or asthma, as well as mortality. It creates acid rain, which degrades the environment by acidifying lakes and streams and destroying plants.

The Plaintiff's Claim

The plaintiff's alleged that that the companies' continued practice of gas flaring (burning off natural gas in oil production) caused environmental damages and violated their right to life and human dignity guaranteed by the Nigerian constitution and the African Charter. The plaintiffs

[496] Gbemre v Shell Petroleum Development Company Nigeria Limited and Others (2005) AHRLR 151 (NgHC 2005)

[497] 'Gas Flaring In Nigeria: A Human Rights, Environmental And Economic Monstrosity | Eldis' (*Eldis.org*, 2021) <https://www.eldis.org/document/A20035> accessed 2 October 2021.

alleged that Shell's oil exploration and production activities, which resulted in constant gas flaring, had breached their rights to life and dignity as human beings under sections 33(1) and 34(1) of the constitution, as well as articles 4, 16, and 24 of the African Charter.[498]

The plaintiff further claims that gas flaring negatively impacts human health, the environment, food, water and housing.

The plaintiffs sought relief on several grounds including the following:

> A declaration that the constitutionally guaranteed fundamental rights to life and dignity of the human person provided in sections 33(1) and 34(1) of the Constitution of Federal Republic of Nigeria, 1999 and reinforced by articles 4, 16 and 24 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, cap A9, vol1, Laws of the Federation of Nigeria, 2004 inevitably includes the right to clean poison-free, pollution-free and healthy environment.

The plaintiff's also sought the following relief on Shell Petroleum Development Company Nigeria Ltd and the Nigerian National Petroleum Corporation.

> A declaration that the actions of the 1st and 2nd respondents in continuing to flare gas in the course of their exploration and production activities in the applicant's community is a violation of their fundamental rights to life (including healthy environment) and dignity of human person guaranteed by sections 33(1) and 34(1) of the Constitution of Federal Republic of Nigeria, 1999 and reinforced by articles 4, 16 and 24 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, cap A9, vol1, Laws of the Federation of Nigeria 2004.

The plaintiffs claimed that the company's constant gas flaring poisoned and polluted the environment, putting the community at danger of premature mortality, respiratory ailments, asthma, and cancer. They also claimed that pollution had harmed their crop productivity,

[498] Gbemre v Shell Petroleum Development Company Nigeria Limited and Others, the Federal High Court of Nigeria in the Benin Judicial Division, suit FHC/B/CS/53/05, 14 November 2005

putting their food security at risk. They said that many of the indigenous people had perished and that many more were sick. As a result, the neighbourhood was left in a state of severe underdevelopment.[499]

The Defendant's Claim

The defendants argued that such articles of the African Charter do not generate enforceable rights under Nigeria's fundamental rights enforcement procedure, among other things. However, due to procedural problems, they were unable to follow up on their points during the hearings.

On 14 November 2005, the court issued a judgment confirming that gas flaring violates the right to life and dignity of a person. The defendants filed an appeal against the decision.

Contempt of court charge was filed against SPDC and NNPC on December 16, 2006. Shell said it was not in contempt of court since it has many appeals pending in the case.[500]

The Issue for Determination

The main issue for determination in this litigation was whether the continued gas flaring activities of Shell and which have been supported by the Nigerian government, constitute a violation of the plaintiff's fundamental human rights as guaranteed by the constitution of the Federal Republic of Nigeria.[501]

The Court Decision

[499] Amao (n 389) 108-110

[500] Gbemre v Shell Petroleum Development Company Nigeria Limited and Others, the Federal High Court of Nigeria in the Benin Judicial Division, suit FHC/B/CS/53/05, 14 November 2005 page 13- 19 paragraph 1 - 14 Gbemre v Shell Petroleum Development Company Nigeria Limited and Others, the Federal High Court of Nigeria in the Benin Judicial Division, suit FHC/B/CS/53/05, 14 November 2005

[501] Gbemre v Shell Petroleum Development Company Nigeria Limited and Others, the Federal High Court of Nigeria in the Benin Judicial Division, suit FHC/B/CS/53/05, 14 November 2005 paragraph 1 - 5

The court ruled on November 14, 2005, that gas flaring violates a person's right to life and dignity. The court made the following rulings, among others:

(a) By virtue of the provisions of sections 33(1) and 34(1) of the Constitution of the Federal Republic of Nigeria, 1999 they have a fundamental right to life and dignity of the human person.
(b) Also by virtue of articles 4, 16 and 24 of the African Charter on Human and Peoples' [Rights] (Ratification and Enforcement) Act Cap A9, vol 1 Laws of Federation of Nigeria, 2004, they have the right to respect for their lives and dignity of their persons and to enjoy the best attainable state of physical and mental health as well as the right to a general satisfactory environment favourable to their development.

The defendants were ordered by the court to take immediate action to stop gas flaring in the community. [502]

The Court ordered SPDC and NNPC to halt flaring by April 2007, as well as the managing directors of SPDC and NNPC, as well as government officials, to appear in court on May 31, 2006, to submit a plan to stop gas flaring in the neighbourhood.

The Significance of the Litigation

The main significance of the case is that it was the first time a national court had found an oil company liable based on the constitutional provisions that guarantee the plaintiff's right to live in a clean and healthy environment. [503] Although the Nigerian constitution does not appear to contain a justiciable right to a ‘‘clean poison-free, pollution-free, and healthy environment," the court used a combination of constitutional provisions and African Charter provisions (especially article 24) to recognise and apply a fundamental right to a ‘‘clean poison-free, pollution-free, and healthy environment."[504]

[502] Gbemre v Shell Petroleum Development Company Nigeria Limited and Others, the Federal High Court of Nigeria in the Benin Judicial Division, suit FHC/B/CS/53/05, 14 November 2005 page 22 - 34
[503] Kravchenko (n 155)
[504] Amao (n 389) 108-110.

It's also worth noting that the clauses used were not just those included in the Constitution, but also those found in the African Charter, which has a broader scope. This means that the Nigerian court took a step toward catching up with the new global jurisprudence on environmental rights, holding that the constitutionally guaranteed fundamental rights to life and dignity of human persons were provided by Sections 33(1) and 34(1) of the Constitution of the Federal Republic of Nigeria, 1999 and reinforced by Article 4, 16 and 24 of the African Charter on Human Procurement rules (Procedure and Enforcement) Act.[505]

Gbemre v. Shell, therefore, became a precedent-setting case in Nigeria, as the first judicial authority to declare that gas flaring is illegal, unconstitutional and a breach of the fundamental human right to life. This case is a manifestation of how gas flaring and other related environmental problems can affect the enjoyment of the fundamental right to life. This litigation is significant because it shows how fundamental rights protected in the Constitution can be violated by environmental pollution such as gas flaring. It also shows that issues concerning the environment could be brought under the purview of human rights. Therefore, if the contention that environmental pollution affects the enjoyment of basic human rights is tenable, there is arguably nothing inconsistent with bringing environmental matters under the umbrella of human rights.[506]

This case also highlights the delays and inefficiencies in the legal system that plaintiffs face in Nigeria to hold oil companies liable for human rights and environmental violations. The defendants filed several applications delaying the proceedings. For example, after the court ordered the defendants to present a plan on how to stop gas flaring, the plaintiffs' legal counsel alleged that the judge in the case was removed from the court in Benin on May 31, 2006, and that the case file could not be found.

As of July 2021, SPDC and Shell have not stopped gas flaring in Nigeria, even though it was reported in its 2010 Sustainability Report that it had begun addressing the gas flaring in its

[505] Emejuru (n 180)
[506] Abdulkadir Bolaji Abdulkadir, 'The Right To A Healthful Environment In Nigeria: A Review Of Alternative Pathways To Environmental Justice In Nigeria' (2014) 3 Afe Babalola University: Journal Of Sustainable Development Law And Policy.

SPDC installations.[507] The failure to comply with this court ruling has been condemned in Nigeria and abroad and is widely regarded as disrespectful to the Nigerian legal system.

The complainant in the Nigerian court action against Shell, Mr Jonah Gbemre, stated: "Shell is disobeying court orders and keeps on flaring gas in my community despite an April 30 deadline. For us, time is running out. Shell must be forced to shut down this gas flaring. It is our only hope for survival."[508]

4.6 Centre for Oil Pollution Watch v. Nigerian National Petroleum Corporation

The facts of the case

The Centre for Oil Pollution Watch (COPW) filed a lawsuit against the Nigerian National Petroleum Corporation on May 13, 2005. (NNPC). The NNPC was established by an Act of Parliament and is engaged in the prospecting, mining, production, exploration, and storage of persistent hydrocarbon mineral oil such as crude oil. It has offices, oil installations, oil pipelines, oil rigs, and other facilities throughout Nigeria. The case was filed in the Federal High Court, Lagos Division, in response to an oil spill in ACHA Community, Abia State, Nigeria. The oil spill was allegedly caused by the defendant's negligence as a result of its pipeline, which had corroded due to lack of maintenance and had ruptured, fractured, and spewed its entire Contents of persistent hydrocarbon mineral oil into surrounding streams and river of lneh/Aku, contaminating two community streams that were the community's major sources of water supply.[509]

The Plaintiff's Claim

The plaintiff claimed that, while the defendant contained spillage on the surface, it failed to clean up or restore the Ineh/Aku streams/river. Furthermore, the plaintiff claimed that the

[507] Van Ho and others (n 52) 53-57
[508] Friends of the Earth International, 'Shell Fails to Stop Nigeria Flaring, Again - Friends Of The Earth International' (Friends of the Earth International, 2021) <https://www.foei.org/press_releases/archive-by-subject/resisting-mining-oil-gas-press/shell-fails-to-stop-nigeria-flaring-again> accessed 2 October 2021.
[509] Center for Climate Change Law, 'Centre for Oil Pollution Watch (COPW) Vs NNPC (2018) Supreme Court of Nigeria < http://climatecasechart.com/non-us-case/centre-for-oil-pollution-watch-copw-vs-nnpc-2018-supreme-court-of-nigeria/> accessed February 2, 2023.

respondent was negligent in both the cause and containment of the oil spill and that the spill harmed living resources, marine life, human health, and other uses of the streams.

The Defendant's Claim

The respondent challenged the plaintiff's standing to sue and requested that the suit be dismissed. On February 9, 2006, the trial court dismissed the suit for lack of locus having suffered no injury at all, let alone any injury that was greater than that of every other member of the Acha community as a result of the alleged oil spillage.

The Issue for Determination

The main issue for determination in this litigation was whether the Court of Appeal was right in dismissing the appellant's appeal for want of locus standi to maintain the suit.[510]

The Court Decision

The Court of Appeal dismissed the appeal on January 28, 20013, reaffirming the trial court's decision. On March 9, 2013, the plaintiffs filed an appeal with the Supreme Court. On July 20, 2018, the Supreme Court unanimously granted the appellant's appeal.

The Supreme Court of Nigeria (SCN) ruled that the appellant non-governmental organisation (NGO) had standing to sue the respondent, thus liberalising or broadening the rule of standing. The Supreme Court specifically stated, "that public-spirited individuals and organisations can bring a court action against relevant public authorities and private entities to demand compliance with relevant laws and to ensure the remediation, restoration, and protection of the environment."

Justice Kumai Bayang Aka'ahs of the Supreme Court of Nigeria states that[511]: "there is no gain saying in the fact that there is increasing concern about climate change, depletion of the ozone

[510] The Supreme Court of Nigeria, [2018] Centre for Oil Pollution Watch(COPW) v. Nigerian National Petroleum Corporation [2019] 5 NWLR 518, pp 7

[511] Centre for Oil Pollution Watch v. Nigerian National Petroleum Corporation [2019] 5 NWLR <http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2018/20180720_17534_decision.pdf>

layer, waste management, flooding and global warming etc… Both nationally and internationally, countries and organizations are adopting stronger measures to protect and safeguard the environment for the benefits of the present and future … it is on account of this, inter alia, that I am of the firm view that this court, being a court of policy should expand the locus standi of the Plaintiff/Appellant to sue". [512]

Another Justice of the Supreme Court, Ejembi Eko, further stated that the national resources of the earth "must be protected and conserved for the benefit of present and future generations through careful planning and management as appropriate".[513]

This position aligned with the view of Oamen and Erhagbe[514] and Babalola[515]. For example, Babalola welcomes this position by stating two of the Supreme Justices in the Centre for Oil Pollution Watch(COPW) v. NNPC litigation expressed remarkable views that the Nigerian constitution, legislature, and the African Charter on Human and Peoples Rights, to which Nigeria is a signatory, recognise the citizenry's fundamental right to a clean and healthy environment to sustain life through the provisions of Section 33 of the Nigerian Constitution, Article 24 of the African Charter on Human and Peoples' Rights (African Charter), and Section 17(4) of the Oil and Gas Act.[516]

The Significance of the Litigation

This litigation is significant in several ways. The first is that the Supreme Court clarified the legal standing of persons, including non-governmental organisations (NGOs), who can hold governments and their agencies accountable for failing to protect human rights and the environment. The Supreme Court ruled that "Accordingly, every person, including NGOs, who bona fide seek the due performance of statutory functions or enforcement of statutory provisions or public laws, particularly laws designed to protect human lives, public health, and

[512] The Supreme Court of Nigeria, [2018] Centre for Oil Pollution Watch(COPW) v. Nigerian National Petroleum Corporation [2019] 5 NWLR 518, para. 32.
[513] The Supreme Court of Nigeria, [2018] Centre for Oil Pollution Watch(COPW) v. Nigerian National Petroleum Corporation [2019] 5 NWLR 518, para. 33.
[514] Oamen, P.E. and Erhagbe, E.O., 'The impact of climate change on economic and social rights realisation in Nigeria: International cooperation and assistance to the rescue?' (2021) 21(2) African Human Rights Law Journal, 1080-1111
[515] Babalola, A. 'The Right to a Clean Environment in Nigeria: A Fundamental Right' (2020) 26 Hastings Environmental Law Journal 3-14.
[516] Ibid 9

the environment, should be regarded as proper persons clothed with standing in law to request adjudication on such issues of public nuisance," the Supreme Court ruled.

The Supreme Court also acknowledged that recognising public interest litigation will help address some other barriers to access to justice, as poor communities lacking "the financial muscle to sue," which typically and disproportionately bear the brunt of environmental and climate change problems, will benefit from the efforts of public-spirited individuals and organisations fighting their cause.

4.7 Challenges of suing Oil Companies operating in Nigeria

Before we consider the reasons for initiating litigations against MNOCs in the countries where they are headquartered (that is, the home countries), it is important to understand why victims cannot, and thus do not initiate litigations against subsidiaries of their own countries where they harm occurred (that is, the host countries). It would have been expected that all countries would put in place adequate mechanisms – constitutional, legislative, and judicial mechanisms to address allegations of human rights and environmental violations committed by MNOCs.

A lot of people have expressed concern about why litigations are not initiated against subsidiaries of MNOCs in their host countries, and some have even questioned whether it is even appropriate or worthwhile. In fact, the US Government, following the *Kiobel v Shell* litigation, seems to suggest that victims should explore ways of bringing claims and obtaining remedies in their home countries.[517] It is not, however, as straightforward as that. Indeed, given the complexity of claiming an MNOC abroad, it would be considerably easier for the victims to make a claim in their home nations and seek relief. However, in many of the host countries where MNOCs operate, this is not always practicable.[518]

Oil companies operating in Nigeria (e.g. SPDC and Chevron Nigeria Ltd) are usually subsidiaries of multinational oil companies (e.g., Royal Dutch Shell and Chevron corporation)

[517] Kiobel v Royal Dutch Petroleum. Co., 569 U.S. 108, 129 (2013) (citing Sosa v. Alvarez – Machain, 542 U.S. 692, 733 (2004)

[518] Gwynne Skinner, 'Beyond Kiobel: Providing Access t Judicial Remedies for Corporate Accountability for Violations of International Human Rights Norms by Transnational Corporations in a New (Post-Kiobel) World', 46, Columbia Human Rights Law Review 158, 172(2014)

that are headquartered abroad. The litigations that have been reviewed in this chapter are very typical of the nature of human rights litigations against oil companies in Nigeria. The court decisions in the litigations show that there is an adequate legal system to deal with Human Rights and environmental violations in the oil and gas industry in Nigeria. David Ong points out that it is not the case that Nigeria's environmental regulation against oil spills is ineffective or insufficient, nor is it simply the poor functioning of Nigeria's environmental protection system that prevents oil pollution from being cleaned up, remediated and compensated.[519] The main shortcoming remains the recurrent combative approach adopted by Shell and its subsidiaries and other IOCs towards the Nigerian legal system. It is noticeable that when allegations are brought before the court regarding environmental damage caused by oil pipelines and other pollution-related incidents in the oil industry and ongoing failure to clean up and remediation, there is still no success due to the readiness of SPDC to deny, derail and derail the proceedings. Some of the challenges of suing oil companies in Nigeria are discussed below:

4.7.1 Ineffective court system and Corruption

One of the main challenges that limit the ability of victims that have suffered human rights and environmental violations to seek remedy in the host state is the weak rule of law, the ineffective court system, political instability and corruption. The oil companies in Nigeria have exploited this weakness to frustrate the litigation process further. The ineffective court system and corrupt practices make it difficult for plaintiffs to recover damages in their home country when human rights and environmental violations occur.[520] This point is very important in the Nigerian context because of the contribution of oil and gas to Nigeria's economy. As of 2000, Oil and gas exports contributed to more than 98 per cent of export earnings, 83 per cent of federal government revenue, and more than 14 per cent of the country's GDP in 2000.[521] Therefore, it is very difficult for the government to support any litigation against MNOCS,

[519] David Ong, 'Remedying Oil Spill in the Niger Delta: Elements for Assessing Responsibility' in 'Corporate Liability in A New Setting: Shell and The Changing Legal Landscape for The Multinational Oil Industry in The Niger Delta' (School of Law, University of Essex 2015). 90-100; See David Ong, 'Regulating Environmental Responsibility for the Multinational Oil Industry: Continuing Challenges For International Law'' (CORE 2012) <https://core.ac.uk/download/pdf/46164433.pdf> accessed 12 July 2022.
[520] Gwynne (n 62) 1800
[521] World Bank, 'Taxation And State Participation In Nigeria's Oil And Gas Sector' (World Bank 2004) <https://openknowledge.worldbank.org/handle/10986/18078> accessed 3 October 2021.

which they consider to bring investment to boost the country's economy. Corruption in the judiciary can take many forms. Judges and lawyers, for example, may be bribed directly by private parties in the form of cash, land, goods and services. According to the International Commission of Jurist, several factors contribute to corruption in the judiciary system. These include- low salaries, heavy caseloads, insecurity of tenure, and no or ineffective accountability systems.[522]

In Nigeria, the most direct form of bribery is the award of contract to supply items needed by the MNOCs subsidiaries for their operations, or contract to build infrastructure (e.g., roads, schools, hospitals) as part of community development. Another method is to lobby and persuade persons in government and the legislature to influence rules that would have solved many of the problems in the oil and gas industry. It is widely believed within and outside Nigeria that Shell has a lot of influence on the government of Nigeria. For example, according to a leaked US diplomatic cable release by WikiLeaks in 2010, the oil firm Shell said it had placed workers in all of Nigeria's top ministries, giving it access to politicians' every move in the oil-rich Niger Delta.[523] The WikiLeaks disclosure is proof of Shell's vice-like grasp on the country's oil resources. According to Celestine AkpoBari of the Social Action, "Shell and the government of Nigeria are two sides of the same coin". "Shell is everywhere. They have an eye and an ear in every ministry of Nigeria. They have people on the payroll in every community, which is why they get away with everything. They are more powerful than the Nigerian government."[524]

The ineffective judicial system has been confirmed by the Bureau of Democracy, Human Rights, and Labor at the U.S. Department of State.[525] The report for Nigeria notes that

[522] International Commission of Jurists, 'Judicial Accountability: A Practitioners Guide' (June 2016) < https://www.icj.org/wp-content/uploads/2016/06/Universal-PG-13-Judicial-Accountability-Publications-Reports-Practitioners-Guide-2016-ENG.pdf> accessed August 31, 2022. 108.
[523] Guardian, 'Wikileaks Cables: Shell's Grip On Nigerian State Revealed' (Guardian 2010) <https://www.theguardian.com/business/2010/dec/08/wikileaks-cables-shell-nigeria-spying> accessed 3 October 2021.
[524] Guardian, 'Wikileaks Cables: Shell's Grip On Nigerian State Revealed' (Guardian 2010) <https://www.theguardian.com/business/2010/dec/08/wikileaks-cables-shell-nigeria-spying> accessed 3 October 2021.
[525] Bureau Of Democracy, Human Rights, And Labor, U.S. Dep't Of State, Country Reports on Human Rights Practices for 2013, http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm#wrapper; See Catherine

"[i]mpunity remained widespread at all levels of government," and notes that political leaders influence the judiciary, particularly at the state and local levels; that is, understaffing, underfunding, inefficiency, and corruption continued to prevent the judiciary from functioning adequately; that judges frequently fail to appear for trials, often because they were pursuing other sources of income and sometimes because of threats against them; and that there was a widespread perception judge were easily bribed and litigants could not rely on the courts to render impartial judgments.

Also, due to globalisation, many host countries do not have sufficient regulations to prevent harm. Many countries, including Nigeria, have done away with or weakened the regulations to attract transnational business. Experts, NGOs, and international Amnesty International have expressed concern that several of Nigeria's oil and gas regulations and agencies are not robust enough to hold oil companies liable for human rights and environmental violations. For example, agencies such as NUPRC and NOSDRA and some regulations do not have strict penalties for causing oil spills. The Oil Pipelines Act states that oil companies are not liable to compensation for oil spills caused by sabotage and oil theft. As a result, many oil companies have exploited this loophole to blame the majority of the oil spills in the Niger Delta on sabotage and oil theft.

4.7.2 Delays in the legal process

The delay in delivering justice in Nigeria is a serious impediment to human rights and environmental litigations. Environmental litigation in Nigeria is notorious for dragging on for over a decade, making it both more expensive and tedious. Due to the excessively long time, it takes to resolve cases, personnel of environmental authorities and victims of environmental rights breaches are discouraged from pursuing a legal remedy. Delaying court hearings to frustrate petitioners is one of the methods used by corporate polluters to avoid accountability.[526] The *Shell v. Anaro* litigation, a case involving four Ijaw communities in the Niger Delta, also exemplifies the inexcusable delay in delivering justice in Nigeria and how MNOCs abuse the

Boggs, Project Management: A Smorgasbord of International Operating Risks, 4 Rocky Mtn. L. Inst. Paper No. 13 (2008).

[526] Schopp, D and Pendergrass, J., 'Natural Resources and Damage Assessment in Nigeria: A Comparative Analysis', A Report for the Environmental Law Institute, Washington D.C, USA (August 2003) 28

appeals system to further frustrate victims. The litigation was filed in 1983 in the High Court, and the Supreme Court's final verdict was issued in 2015, 32 years later.[527]

Another cause of delay in the legal process involves filing several interlocutory appeals to delay the litigation. A typical example of this point played out in the Ejama-Ebutu vs SPDC.[528] The case was filled in 2001; by 2010, Shell had attempted to fill over 27 interlocutory appeals to delay the case. Every time the court decides a preliminary issue in favour of the plaintiff, Shell would file an interlocutory appeal to suspend proceedings until an appeal to a higher court is heard. Shell was allowed to file only three out of the 27 interlocutory appeals. The third judge assigned to the case was finally able to deliver judgement on the case after outlasting two judges. This pattern cuts across all litigations involving the MNOCs and their subsidiaries. It is common for MNOCs and subsidiaries to use other procedural practices to delay the litigations, such as requesting the court to postpone proceedings because of pending litigation in another jurisdiction (an approach known as "lis pendens") and challenging the standing of claimants.

4.7.3 High Threshold of Evidentiary Proof set by the local court

Another challenge of suing MNOCs and their subsidiaries in Nigeria is the high threshold of evidentiary proof set for the plaintiffs by the local courts in Nigeria. Examples of evidence required by the court include proof of negligence, proof of control and ownership of property, and witness statements. Let me give an example to illustrate my point using litigation involving gas flaring in the Niger Delta.[529] The plaintiff sued the defendant's company for heat, noise, and vibration caused by the defendant's firm's negligent management and control of the flare set used during gas flaring operations, which caused extensive property damage to the plaintiff.

[527] After fourteen years of legal proceedings, the first verdict was handed down on May 27, 1997. The defendant, Shell, filed an appeal with the Court of Appeal, which was dismissed on May 22, 2000. Shell then appealed to the Supreme Court, which upheld the trial court's decision in a June 5, 2015 decision. The impacted towns received around thirty million naira (approximately $1.37 million) in damages from the oil spill, according to the High Court.

[528] Kaufman, J., 'Stop Oil Companies from Denying, Derailing and derailing local Justice', citing the outcome of Ejama-Ebubu litigation. Available in http:www.earthrights.org. Accessed last on January 17, 2022

[529] the Chinda and Ors vs. BP-Petroleum Company of Nigeria litigation

According to the court, the plaintiff could not show that the defendant was negligent in the management and control of the gas flaring operations.

Furthermore, despite the impact of the oil operations on the surrounding environment and residents, an injunction request against such gas flaring operations failed due to the Nigerian court's reluctance to interfere with ongoing oil sector activities. According to Obagbinoko, the problem is worsened by the significant knowledge gaps between individual plaintiffs and industry defendants and the limited resources available to make and defend these claims.

4.7.4 Security and Safety of Plaintiffs

Victims of environmental pollution in the Niger Delta also have legitimate fears of retaliation by the business or the members of the community if they bring a claim for which the government cannot protect them. The plaintiff and their witnesses face challenges of safety and security for the plaintiffs and their witnesses. Victims of human rights and environmental violations by MNOCs and their subsidiaries are usually intimidated to either testify against or in favour of the oil companies during human rights and environmental litigations. For example, in the *Oguru v Shell* litigation, the testimony of witness and experts were important to strengthen the plaintiffs' claims that Shell and its subsidiary's actions violated their "rights" and caused "considerable environmental damage," and that this "damage could have and should have been avoided through prudent pipeline maintenance and management and an adequate response after the oil spill occurred."[530]According to Skinner and others, technical experts were required to refute Shell's claims that the spills were the result of sabotage; however, many experts from the Ogoni area worked professionally with Shell and were thus unable or unwilling to testify.[531]

[530] Statement of Defense in the Motion Contesting Jurisdiction, Oguru et al./Shell Petroleum Development Company of Nigeria, Rechtbank ‘s-Gravenhage [District Court of The Hague], 8 juli 2009 (Neth.) cited in Skinner G and others, 'The Third Pillar: Access To Judicial Remedies For Human Rights Violations By Transnational Business' (The International Corporate Accountability Roundtable (ICAR), CORE, The European Coalition for Corporate Justice (ECCJ) 2013) 93

[531] Skinner G and others, 'The Third Pillar: Access To Judicial Remedies For Human Rights Violations By Transnational Business' (The International Corporate Accountability Roundtable (ICAR), CORE, The European Coalition for Corporate Justice (ECCJ) 2013) 93

There have been allegations that witnesses have been provided with gifts, bribes, and promises of jobs or contracts to testify against plaintiffs or testing in favour of the MNOCs in court. When these efforts are unsuccessful, then local militia are used to pressure and intimidate witnesses. For example, in the Kiobel v Shell litigation in the Netherlands in 2019, the court heard evidence that Shell paid bribes to individuals in exchange for them falsely testifying against the men. Four Nigerian women sued Shell for their alleged complicity in the unlawful arrest, detention, and execution of their husbands in 1995. Shell is being sued by the four widows for compensation and a public apology. [532]

In addition, there is insecurity and threat to lawyers and their families during human rights and environmental litigations. Some lawyers may even refuse to take up such litigations for fear of retaliation from businesses or members of the community. Amnesty International and several NGOs reported how Shell collaborated with security forces to intimidate victims during the trial and execution of Ken-Saro Wiwa in 1995. [533]

4.7.5 Poverty and High Cost of Litigation

One of the challenges faced by plaintiffs during litigations in the Niger Delta is the lack of funds to bring claims against MNOC. The lack of funds can manifest in several areas including lawyers' fees, transport to and from the court, and gathering of evidence required. In some of the cases, the plaintiffs may need to analyze evidence scientifically (e.g., analysis of oil spill data to deduce the type of oil spill, when and where it occurred), and travel to different places to interview witnesses and document statements.

Justice is out of reach for the majority of the population in Nigeria. The high expense of litigation has a severe impact on victims' ability to retain lawyers, employ experts, and use legal institutions, limiting their access to the courts and legal representation. In Nigeria, legal aid exists for very few legal scenarios unlike what is obtainable in other developed countries like

[532] Amnesty International, "On Trial: Shell In Nigeria .Legal Actions Against The Oil Multinational' <https://www.amnesty.org/en/latest/news/2023/02/nigeria-shell-oil-spill-trial/> access February 4, 2023
[533] Amnesty (n 63); see Amnesty International, 'Nigeria: 2020 could be Shell's year of reckoning' (Amnesty International Publications) <https://www.amnesty.org/en/latest/news/2020/02/nigeria-2020-could-be-shell-year-of-reckoning/> accessed 3 October 2021

the UK and Europe. For example, legal aid has been available in Nigeria for people facing the death penalty almost since the country's independence; this right has been expanded since 1978, following the establishment of the Nigerian Legal Aid Council in 1976 under the Federal Ministry of Justice, with the mission of providing legal aid to those who cannot afford it.[534] While certain charitable and non-profit organisations exist to give free legal assistance in these types of situations, they are restrictive in terms of the selection process and limited in resources. Victims of human rights and environmental violations are often the most vulnerable community members and have few resources available to hire lawyers and pay legal fees. It is hard to see how there is a level playing field when there is no legal aid for environmental litigants against wealthy businesses.[535]

4.8 Reasons for suing MNOCs abroad for Human rights and Environmental litigations

The previous section discussed several challenges of suing subsidiaries of MNOCs in Nigeria. It is, therefore, not difficult to see why victims have now decided to initiate legal action against parent companies abroad. A combination of the challenges of suing oil companies operating in Nigeria and a favourable legal environment abroad makes suing MNOCs in their own jurisdiction very attractive. This section will discuss some of the reasons for suing MNOCs abroad.

4.8.1 Non-Existence of Company and Limited Assets

One of the main reasons for suing MNOCs abroad is that the subsidiaries or subsidiaries of the MNOCs may no longer be available. Even if it does exist, there are limited assets that can be used to support the remediation and compensation process. In the words, the subsidiary often has limited assets and offers little scope for recovery. It may even have disappeared altogether, meaning the subsidiary may cease to exist. This was the case in the Lubbe vs Cape plc

[534] Nigeria, Legal Aid Act, 2011. National Legal Aid Council in each of Nigeria's 36 states carry out this mandate, regulated by the Legal Aid Act of 2011; United Nations Development programme), 'Global Study On Legal Aid Global Report' (United Nations Office on Drugs and Crime, 2021) <https://www.unodc.org/documents/justice-and-prison-reform/LegalAid/Global-Study-on-Legal-Aid_Report01.pdf> accessed 15 November 2021.
[535] Skinner and others (n 75) 90-94

litigation.[536] In *Lubbe v Cape Plc* litigation, Lord Hope of Craighead said in the House of Lords: "In the present case, the asbestos mines and mills in South Africa which the defendant's subsidiaries operated are all closed, and its subsidiaries are no longer present or available to be sued in that country."[537]

In that case, as his Lordship concluded, there is little hope of recovery for the plaintiffs unless the parent company can be made liable. Even if the subsidiary is still available and has assets, the parent corporation can be made accountable before local courts for its operations in a developing country because of its direct involvement in the mining, processing, or manufacturing operation; there are often good reasons to proceed against the parent corporation in its jurisdiction.

4.8.2 Access to Legal Aid and Legal Expertise

The cost of pursuing litigations against MNOCs and their subsidiaries in Nigeria can be very high for plaintiffs who, in most cases, are poor and barely have enough to survive. Although there is some form of legal aid in Nigeria, getting it to fund litigations against big oil companies can be very long and exhausting. Litigation costs are also high in developed countries (e.g., Netherlands, UK), but plaintiffs can apply for legal aid in various cases such as human rights and environmental issues. In the Netherlands, the cost is notably high where legal representation is required in civil liability litigations; however, this is partially offset by the Netherlands' comparatively short proceedings.[538]

As a result of these difficulties, several countries have introduced legal aid (or similar schemes) so that plaintiffs can access funds to cover the cost of the litigations. In the Netherlands, for example, legal aid is typically only awarded for situations having legal interests inside the

[536] Lubbe and Others and Cape Plc. and Related Appeals (2000) UKHL 41 (20th July, 2000), accessed 5 December 2020. This case demenostrated that in principle it is possible to show that a parent company owes a direct duty of care in tort to anybody injured by a subsidiary company in a group.
[537] P. Muchlinski, "Corporations in International Litigation: Problems of Jurisdiction and the United Kingdom Asbestos Case", 50 International and Comparative Law Quarterly, ICLQ (2001) 1, at pp. 8 and 9.
[538] Enneking (n 80) 257 - quoting a report of the WODC written by Faure and Moerland in 2006 on the issue of the costs of litigating in the Netherlands.

Dutch legal system. However, international litigants can obtain legal aid, as evidenced by the fact that the Nigerian farmers in the Dutch Shell case were successful in their application.[539]

In the UK, there are several cases where you can apply for legal aid. This includes criminal, human rights, and environmental litigations. For example, you can claim legal aid for damages or nuisance caused by environmental pollution such as oil spills. Legal aid sponsored the first cases against companies based in the United Kingdom for human rights breaches perpetrated abroad. The legal expenses were paid at a predetermined rate, but this provision seems to have been constrained due to deliberate government policy to cut legal aid funding in the UK. This meant that claimants with a strong case but insufficient funds were eligible for government support.[540]

Access to legal expertise is one of the challenges plaintiffs face in Nigeria during human rights and environmental violations. Legal expertise is required in the area of human rights and environmental law. Legal expertise is required to advise the plaintiff on key aspects of the litigation, such as data collection, data analysis, and interpretation. Legal expertise also includes access to scientific resources that will add value to the plaintiff's claims, such as scientific laboratories (e.g., chemical and forensic labs). For instance, the nature of the Oguru v Shell litigation necessitated the plaintiffs' lawyers to learn and understand the Nigerian law and hire Nigerian legal experts to assist the case. Legal experts were also required to dispute Shell's claims that the spills were caused by sabotage; however, many professionals in the Ogoni area worked for Shell and were not willing or able to testify.[541] However, because the *Oguru v Shell* litigation was initiated in the Netherlands, the plaintiffs were able to rely on their legal representative and the international NGOs (e.g., Friends of the Earth) that were were joint plaintiffs in the litigation to provide them with legal experts, legal analysis and legal support.

4.8.3 Impartial Local Institutions

Local institutions are usually biased and partial towards the plaintiff due to the close link between them and public relations in Nigeria. Local law may even seek to shield the local

[539] Skinner and others(n 75) 48, 91-92 .
[540] Ministry Of Justice, Transforming Legal Aid: Delivering A More Credible And Efficient System (2013), https://www.basw.co.uk/system/files/resources/basw_112451-9_0.pdf (last visited October 20, 2021) (on the latest policy decisions made in September 2013); Gwynne (n 75).
[541] Skinner and others (n 75)

operation from liability. It is not difficult to see why the government and the local law will seek to protect oil companies from liability. Nigeria depends on oil and gas for over 80% of its national revenues and 95% of its foreign exchange earnings. MNOCs are seen by the Nigerian government as a lifeline in the business of running the country.[542]

Therefore, suing a multinational oil company like Shell, ExxonMobil and Chevron is like suing the Nigerian government. It is also most like an obligation for local institutions to cooperate with the government to derail the litigation, even if it means that such a collaboration will condone human rights and environmental violations.

4.8.4 Access to Information

One of the main reasons for initiating litigations against MNOCs in the home countries is access to information. It is one thing to allege that an MNOC has committed human rights and environmental violations against you, it is another thing to be able to find evidence to support your allegations. Access to information about MNOCs is important for several reasons. First, access to information will help to understand the inside decision-making and what the MNOCs knew about that might have taken place when there were human rights and environmental violations. MNOCs are generally not reluctant to disclose information about their operations or are not also willing to provide information that will lead to litigation against them. Second, access to information about the MNOCs will help to determine the entity that is being sued. Due to the complexity of the corporate structures, victims and their lawyers are sometimes unavailable to identify the correct subsidiary of the MNOCs that is operating in their area to bring claims.[543] What is not in doubt is the identity of the parent company of the subsidiary, thus the reason for initiating litigation against the parent company. It is a lot easier to access information in developed countries where most MNOCs are registered rather than in the countries where their subsidiaries are operating. This is because the local law and practice are

[542] World Bank. 2004. Taxation and State Participation in Nigeria's Oil and Gas Sector. Energy Sector Management Assistance Programme (ESMAP) Technical paper;no. ESM 057. Washington, DC. © World Bank. https://openknowledge.worldbank.org/handle/10986/18078 License: CC BY 3.0 IGO

[543] Gwynne (n 62) 1808.

more favourable to plaintiffs. Second, the population is high literacy levels, high economic power, legal expertise, which further makes it possible to access the necessary information.[544]

4.9 Chapter Summary

This chapter discusses Human rights and environmental litigations in Nigeria. Three human rights and environmental litigations in Nigeria were discussed – Ejama-Ebutu v SPDC, Elder Baribor Saakpa, Saturday Giadom v SPDC, and Iwerekan community v SPDC and others (2005) and Centre for Oil Pollution Watch v NNPC. It was highlighted in these litigations that Shell's combative approach in fighting every single allegation and exploiting every procedural option to frustrate the victim is an indication that MNOCs are not interested in resolving legal disputes and thus improving human rights and environmental protection.

This chapter also discussed the challenges of suing MNOCs in Nigeria and the reasons for suing MNOCs abroad for human rights and environmental litigations. The challenges of suing MNOCs include a weak legal system, inability to access evidence, lack of funds to bring a lawsuit, lack of access to legal experts, and intimidation of witnesses. These challenges converge to create a difficult environment for victims to have recourse in their countries and no path to potential remedy but that of suing the MNOCs in their home jurisdiction. Some of the reasons why victims sue MNOCs in their home country include access to legal aid and legal experts, less delay, and derailments of the litigations.

[544] Environmental Injustice and Human Rights Abuse: The States, MNCs, and Repression of Minority Groups in the World System Francis O. Adeola Human Ecology Review Vol. 8, No. 1 (Summer 2001), pp. 39-59

Chapter Five

Transnational Human Rights and Environmental Litigations in the UK, US and Netherlands

5.1 Introduction

Multinational companies and their subsidiaries consistently maintain both in the host states and in their home state where they have the headquarters that they are committed to Human Rights obligations to respect, protect and fulfil Human Rights and environmental rights. Ligations brought against parent companies for Human Rights and environmental violations by their subsidiaries abroad have increased in recent times. These litigations, especially the ones initiated abroad, are usually the last resort for the victims who would have tried all to no avail to sue the subsidiaries in their host state.

MNOCs should comply with Human Rights obligations regarding engagement with stakeholders (particularly with local populations) before legal disputes and during, and after any legal disputes. However, as recent cases have shown, as soon as litigation is initiated against parents abroad, they do not comply with their human rights obligations but instead, pursue an aggressive approach to defending themselves even when such an approach has been shown to worsen the Human Rights and environmental violations which victims have complained. When their reputation and profit margin seem to be affected, they turn to mediation and human rights initiatives mostly targeted at social development (e.g., the building of schools, health centres, provision of housing, roads, etc.) while still ignoring human rights and environmental violations. This lack of compliance with Human Rights obligations during litigations covers several aspects of Human Rights violations, including lack of transparency, reluctance to disclose relevant documentation to victims, and lack of support to victims for remediation and compensation.

Litigations due to Human Rights and environmental violations by subsidiaries of parent companies cover a wide variety of industries, including extractive industries (e.g., mining, oil, gas), banking and financial, garment and fashion, construction, medical and pharmaceutical, etc. However, the litigations that focus on the extractives industries, especially the oil and gas industries, remain one of the most transnational litigations in recent times. This is because multinational companies have been shown to perform poorly and, in many cases, have been accused of a double standard in how they respond to Human Rights and environmental violations in developing countries compared to how they respond to similar or even worse incidences in developed countries.

This chapter examines litigations related to Human Rights and environmental violations arising from the Niger Delta (both within and outside Nigeria). The Niger Delta is a particularly unique area in Nigeria as far as oil and gas operations are concerned. Most of the major oil companies (e.g., Shell and Chevron) operating in the Niger delta are subsidiaries of parent companies resident abroad. When there are Human Rights and environmental violations, victims may decide to sue the parent companies and their subsidiaries abroad in the home state of the parent companies due to the difficulties of obtaining justice in Nigeria. Nigeria represents a typical example of a developing country with a weak and ineffective legal system where victims have found it difficult to successfully pursue a legal case against multinational oil companies. Thirdly, because oil and gas are the main stay of the Nigerian economy, this makes it even more difficult for the government to intervene due to concerns that it may affect its revenue expectations. Therefore the government may not be seen as being on the side of victims in preventing or improving Human Rights violations in the Niger Delta.

One of the ways international law has responded to the lack of a direct enforceable mechanism to hold parent companies liable for violations abroad is by creating an enabling environment for litigation in the home states of multinational oil companies.[545] The International jurisprudence and domestic case law show that there is ambivalence towards holding parent companies in their home states for Human Rights and environmental violations committed abroad by their subsidiaries. More recently, developing countries (France, USA) that have

[545] David M. Ong, 'Regulating environmental responsibility for the multinational oil industry; continuing challenges for international law'. (2015) 11(2), international journal of law in context 153-173

experienced Human Rights and environmental abuses due to multinational corporations' activities have responded by reaffirming their domestic regulatory powers to demand urgent remediation and compensation before domestic litigation. This is because of the realisation that developing countries cannot achieve the same level of effective enforcement to hold parent companies liable for Human Rights and environmental violations by subsidiaries. This is partly due to efforts by foreign states and international institutions and also multinational companies to weaken the political and economic bargaining positions of developing countries.

In litigating against parent companies and their subsidiaries for wrongful actions, several approaches can be used. These approaches include – enterprise liability, agency theory, piercing the corporate veil, due diligence, etc.[546] Although some of these approaches have been useful in some areas, they have either not been useful or irrelevant in certain jurisdictions to prevent human rights violations. The most successful of these approaches seems to be the due diligence approach, which has been used in cases such as *Bodo v Shell* and *Oguru v Shell* in the Netherlands. Even this approach relies heavily on the plaintiff's ability to link the actions of subsidiaries to the parent which is sometimes difficult. The challenge of proving the link, between parent companies and the subsidiaries makes it possibly difficult to achieve success in the litigation let alone improve Human Rights and environmental rights. Therefore, the approach should go beyond winning the court case, to pursuing an approach that can also help to improve Human Rights and environmental rights. The approach of establishing direct liability from failure to exercise due diligence (instead of the traditional approach of piercing the corporate veil by linking the behaviour of the subsidiary to the parent[547]) creates an incentive for parent companies to ensure that its subsidiaries respect Human Rights and environmental violations in the Niger Delta.

The rest of the chapter is organized as follows: Section 5.2 discusses transnational litigations in the US. Section 5.3 discusses transnational litigations in the UK, and Section 5.4 discusses transnational litigations in the Netherlands. Section 5.5 discusses the influence of foreign courts' judgements on Nigerian courts regarding human rights and environmental litigations

[546] Skinner and others (n 274) 65-74
[547] Thomas K. Cheng, '*The Corporate Veil Doctrine Revisited: A Comparative Study of the English and the U.S. Corporate Veil Doctrines'*, (2011) 34 Boston College International and Comparative Law Review. 329-334, https://lawdigitalcommons.bc.edu/iclr/vol34/iss2/2.

against subsidiaries of MNOCs. Section 5.6 summarises the chapter. Each litigation is reviewed based on the facts of the case, the plaintiff's claims, the defendants' claims, issues for determination, court decisions, and the significance of the litigations. We also point out the key legal issues in the litigations.

5.2 Human rights and Environmental Litigations in the US

This chapter reviews some notable human rights and environmental litigations arising from the Niger Delta initiated in the United States of America (US). As the largest economy in the world, the US is one of the largest consumers and producers of energy in the world. It has some of the world's biggest oil companies, including ExxonMobil and Chevron, both major players in the Nigerian oil and gas industry.

ExxonMobil Nigeria (formerly Mobil Producing Nigeria) began operations in 1955 and is the second-largest producer of crude oil in Nigeria after Shell. Chevron Nigeria Limited, a subsidiary of Chevron Corporation, is one of the largest oil producers in Nigeria. These companies partner with the Nigerian National Petroleum Corporation in most of its operations.

The operations of Shell and other multinational oil companies like ExxonMobil and Chevron have led to allegations of several human rights and environmental violations in the Niger Delta. Many of these allegations have led to litigations in the US regarding harm caused by their subsidiaries (e.g., SPDC) operating in Nigeria.

In the following section will discuss three litigations in the US - Wiwa v Shell, Kiobel v Shell, and Bowoto v Chevron. Each litigation is reviewed based on the facts of the case, the plaintiffs' claims, the defendants' claims, issues for determination, court decisions, and the significance of the litigations. We summarise in a tabular form, for each case, the legal basis for court decisions in a selected set of human rights and environmental litigations in the Niger Delta .

5.2.1 Wiwa v Royal Dutch Shell

Facts of the Case

Royal Dutch Shell started oil exploration and production in the Ogoni area of Nigeria in the late 1950s. Pollution ensuing from the oil production has contaminated the local water supply and agricultural land upon which the region's economy is based. For decades, Shell and its

Nigerian subsidiaries had worked with the Nigerian military regime to suppress any demonstrations carried out in opposition to the oil company's activities.[548] In 1995, the company and its subsidiary colluded with the Nigerian government to bring about the arrest and execution of the Ogoni 9 (including Ken Saro-Wiwa, an internationally renowned writer and activist). They were later hanged on November 10, 1995 after a "trial" before a special military tribunal based on fabricated charges.[549]

The claims in the Wiwa-case were initiated before the US District Court for the Southern District of New York in November 1996 on the basis of the Alien Tort Statute. The plaintiffs sought to hold two Shell holding companies (the Netherlands-based Royal Dutch Petroleum Company and the UK-based Shell Transport and Trading Company) liable for complicity in the human rights abuses perpetrated by the Nigerian military junta against two of the environmental activists who had been executed in November 1995. They claimed that the executions were part of a pattern of collaboration and/or conspiracy between the two Shell companies and the Nigerian military junta, aimed at suppressing opposition to the exploitation by Shell of oil and gas resources in the Ogoniland region and the Niger Delta more generally. As a result, the plaintiffs argued, the companies had become responsible for the violations of international human rights norms—including, inter alia, extrajudicial killing, torture, arbitrary detention, and crimes against humanity—by the military regime.[550]

Plaintiff Claim

The plaintiff brought an action against the defendant for injustice, civil wrong done against the Ogoni community. The plaintiff filed three lawsuits (Wiwa v. Royal Dutch Petroleum, Wiwa v. Anderson, and Wiwa v. Shell Petroleum Development Company) against the Royal Dutch Petroleum Company and Shell Transport and Trading Company (Royal Dutch/Shell); the head of its Nigerian operation, Brian Anderson; and the Nigerian subsidiary itself, Shell Petroleum

[548] Shell has admitted the existence of extensive environmental damage in the area, including acid rain. Shell Sued by Family of Nigerian Eco-Activist Ken Saro-Wiwa, ENV. N. SERv., May 26, 1999, at http://ens.lycos.com/ens/may99/1999L-05-26-04.html (last visited September 12, 2020).
[549] Center for constitutional rights, Wiwa et al. Royal Dutch Petroleum et al., https://ccrjustice.org/home/what-we-do/our-cases/wiwa-et-al-v-royal-dutch-petroleum-et-al (last accessed 1 October 2018). See Earthrights international, Wiwa v. Royal Dutch Shell, https://earthrights.org/wp-content/uploads/legal/Wiwa-Original-Complaint_0.pdf (last accessed 1 October 2018).
[550] Earthrights international, Wiwa v. Royal Dutch Shell, https://earthrights.org/wp-content/uploads/legal/Wiwa-Original-Complaint_0.pdf (last accessed 1 October 2018).

Development Company (SPDC). The initial lawsuit was filed in 1996 by the Center for Constitutional Rights (CCR) and co-counsel from EarthRights International. Later an additional lawsuit against Brian Anderson, managing director of Shell's Nigerian subsidiary SPDC was filed in 2001. The plaintiff brought a claim under the Alien Tort Claims Act (ATCA) of 1789, and also under the 1991 Torture Victim Protection Act (TVPA). The laws allow foreign nationals to bring lawsuits in a U.S. Federal Court for wrongs committed in violation of international law or U.S. treaties.[551]

Defendant Claims

The defendants presented several reasons for the dismissal of the case in response to these allegations. The defendant claimed that Royal Dutch Shell lacked jurisdiction to entertain the case, on the grounds of forum non conveniens,[552] a doctrine whereby the court will decide if it is appropriate for the plaintiff to sue in the foreign courts. The court considered several factors to determine the issue of forum non conveniens. These include the convenience to the parties to the litigation and the convenience of the courts, governments of affected states to hear the case, the ability of the plaintiff to compel witnesses and testimonies, the cost of gathering evidence and other problems that could make the court process easy.[553]

Issues for determination

There were two main issues for determination: (i) Firstly, whether the court could exercise personal jurisdiction over the defendants- Shell and SPDC, which were based in England and the Netherlands. This was an issue for determination both for the District Court and the Court of Appeals for the Second Circuit. (ii) Secondly, whether the Human Rights abuses in the litigation fall within the scope of the authority of the federal court based on the ATS. This latter issue followed the ruling of the Supreme Court of the United States in 2004 on the reach and interpretation of the ATS case in a separate ATS-based case, the Sosa case. In that litigation, the Court held that the federal courts could only assume subject-matter jurisdiction under the

[551] Aaron Fellmeth, 'Wiwa V. Royal Dutch Petroleum Co.: A New Standard for The Enforcement of International Law In U.S. Courts?' (2014) 5 Yale Human Rights and Development Journal
[552] Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88,101 (2000)
[553] Wiwa V Royal Dutch Shell Co. No 96 Civ 8386 (KMW) (HBP) 1998 US

ATS in respect of claims relating to violations of modern norms of customary international law, which were generally recognised, reasonably relevant and of a compulsory nature.

Court Decision

At first, the District Court in 1998 ruled that it will exercise its personal jurisdiction over the defendants because the holding companies were doing business in New York, listed on the New York Stock Exchange and had an investor relations office there. However, it granted the defendants' motion to dismiss the litigation on the grounds of forum non conveniens. The court found England to be the preferred and suitable alternative forum for the litigation since it had no relation to the US legal order or the New York Court.[554]

The ruling of the District Court was overturned in 2000 by the Court of Appeals for the Second Circuit, which agreed with the lower court's finding of personal jurisdiction but disagreed with its dismissal on the grounds of the forum non conveniens. The Court of Appeal considered the following in arriving at this decision: (i) that the District did not give sufficient weight to plaintiffs for choosing the New York forum of which two of them were lawful US residents; (ii) that dismissing the case to be held in England or the Netherlands would be legally costly and inconvenient for the plaintiffs compared to that of the defendants[555]; (iii) that the District Court did not consider the fact that the United States had a policy interest in establishing a forum for the adjudication of claims relating to violations of the international prohibition of torture, which was one of the allegations.[556]

The Court of Appeals in June 2009 overturned and remanded an early decision of the District Court which had ruled that SPDC did not have business relations in the US for it to assume personal jurisdiction.[557] The District Court held in April 2009 that most of the norms of customary international law claims against Shell and Brian Anderson are sufficiently general,

[554] United States District Court for the Southern District of New York, 25 Sept 1998, *Wiwa et al. v. Royal Dutch Petroleum and Shell Transport and Trading Company*, 96 Civ. 8386.
[555] United States Court of Appeals for the second circuit, Docket Nos. 99-7223[L], 99-7245[XAP], *Wiwa et al. v. Royal Dutch Petroleum and Shell Transport and Trading*, CA 2nd Cir. 14 September 2000, 226 F.3d 88.
[556] United States Court of Appeals for the second circuit, Docket Nos. 99-7223[L], 99-7245[XAP], *Wiwa et al. v. Royal Dutch Petroleum and Shell Transport and Trading Company*, CA 2nd Cir. 14 September 2000, 226 F.3d 88, paras. 56–66.
[557] United States Court of Appeals for the second circuit, Case 1:01-cv-01909-KMW-HBP, Document 112, *Wiwa et al. v. Shell Petroleum Development Company of Nigeria*, CA 2nd Cir. 29 June 2009, 08-1803 Cv.

precise and binding to conform with the Sosa case and thus to confer on its subject-matter jurisdiction under the ATS. The proceedings were therefore permitted to continue on the merits of the appeal.[558]

On June 8, 2009, Shell settled the case by awarding $15.5million to the people of Ogoni land, with $4.5 million of the pay-out going to a trust to benefit the Ogoni people. The settlement did not require the defendants to admit wrong-doing.[559]

Significance of the Litigation

There were at least three main Human Rights obligations that Shell had violated in this case, namely, lack of access to remedies, bribery and corruption, and safety and security. The lawsuits were filed by the Center for Constitutional Rights (CCR) and co-counsel from EarthRights International in 1996. Shell had prevented this case from being heard in the first place for several years. This case was heard on 26 May 2009 after 12 years of Shell petitioning the court not to hear the claims. This is a violation of international law and the parent companies Human Rights obligation regarding access to remedy for victims of Human Rights violations which Shell has signed up to.

Shell was also alleged to have violated its Human Rights obligation regarding bribery and corruption. One of the laws/acts under which the litigation was based was the Racketeer Influenced and Corrupt Organizations Act (RICO). In this litigation, Shell was charged with racketeering which allows Shell and its officials to be tried for crimes related to giving orders to others to do harm (i.e., the Nigerian security forces) or assist in doing harm[560]. Amnesty

[558] United States District Court Southern District of New York, *Wiwa et al. v. Royal Dutch Petroleum, Wiwa et al. v Brian Anderson*, 23 April 2009, https://ccrjustice.org/sites/default/files/assets/04.23.09%20Judge%20Wood%20Order%20regarding%20SMJ.pdf (last accessed 1 October 2018).
[559] United States District Court Southern District of New York, *Wiwa et al. v. Royal Dutch Petroleum, Wiwa et al. v Brian Anderson*, Settlement Agreement and Mutual Release, https://ccrjustice.org/sites/default/files/assets/Wiwa_v_Shell_settlement_agreement.Signed-1.pdf (last accessed September 12, 2020). See Aaron Fellmeth, 'Wiwa V. Royal Dutch Petroleum Co.: A New Standard For The Enforcement Of International Law In U.S. Courts?' (2014) 5 Yale Human Rights and Development Journal.
[560] 18 U.S. Code § 1962(c); see also Criminal RICO Prosecutors Manual, elaborating that "A Defendant May Be Liable for a RICO Conspiracy Offense Even if the Defendant Did Not Participate In the Operation or Management of the Enterprise"

International has documented several instances where Shell bribed and provided financial and logistic support to the security forces to commit abuses in the Niger Delta.[561]

Concerning safety and security, Shell has confirmed that one of its primary Human Rights obligations is to maintain the safety and security of the employees, contract staff and local communities. However, as this case demonstrated, Shell was accused of several security incidents, including - the 1995 judicial hangings (e.g., members of the Movement for the Survival of the Ogoni People (MOSOP) and the torture and detention of Ogoni leaders. The plaintiffs sued Shell under the Alien Tort Statute, the Torture Victim Protection Act of 1992. During this litigation, images from the book "Curse of the Black Gold: 50 Years of Oil in the Niger Delta" were deposed as evidence of the Human Rights abuses that the oil industry, particularly Shell, has inflicted on the Ogoni people. Table 5.1 and 5.2 summarise the issues for determination and legal basis for court decision in the *Wiwa v Shell* litigation.

Table 5.1 Summary of issues for determination and legal basis for court decision in the *Wiwa v Shell* litigation (initial lawsuit against RDS)

Court	**Issue for determination**	**Court decision**
District court	Whether the US court seized of the matter could exercise personal jurisdiction over the defendant holding companies (RDS)	(i) Court decided it could exercise personal jurisdiction over the defendants. (ii) Court dismissed the case on the basis of forum non conveniens, holding that England was an adequate alternative.
Court of Appeal	(i) Whether or not to uphold decision of District court on personal jurisdiction	(i) Agreed with the lower court's finding of personal jurisdiction
	(ii) Whether or not to uphold the decision to dismiss case on forum non conveniens	(ii) Disagreed with its dismissal of the case on the basis of forum non conveniens. Court acknowledged that two of the plaintiffs were lawful US

[561] Amnesty (n 63)

		residents, and that holding the case in England or Netherlands would be expensive and inconvenient for the plaintiffs.

Table 5.2 Summary of issues for determination and legal basis for the court decision in the *Wiwa v Shell* litigation (additional lawsuits against SPDC and its managing director-Brain Anderson)

	Issue for determination	Court decision
District court	(i) whether the court could exercise personal jurisdiction over SPDC (ii) whether the human rights violations at issue fell within the scope of the federal court's subject matter jurisdiction on the basis of the ATS	(i) District Court determined in 2008 that SPDC did not have the necessary 'continuous and systematic business contacts with the United States' for the court to assume personal jurisdiction over SPDC. (ii) The court had held that federal courts could only assume subject matter jurisdiction under the ATS over claims relating to violations of norms of customary international law that were universally accepted, sufficiently specific, and of an obligatory nature.
Court of Appeal	Whether or not to uphold decision of District court not to assume personal jurisdiction over SPDC – (i) and (ii) above	(i) On the first issue, the decision was vacated and remanded, however, by summary order of the Court of Appeals in early June 2009, as the court considered that the plaintiffs had not had sufficient opportunities for discovery of evidence relevant to the issue (ii) Court decided that all but one of the customary international law norms at

		stake in the cases against the holding companies and Brian Anderson were sufficiently universal, specific and obligatory to confer subject matter jurisdiction upon it under the ATS.

5.2.2 Kiobel v Royal Dutch Shell (UK)

Facts of the Case

The operations of Shell in the Niger Delta were first put under the spotlight in the 1990's by the struggles of MOSOP (Movement for the Survival of the Ogoni People) led by Ken Saro-wiwa, an acclaimed Nigerian writer. MOSOP stated that its operations "led to the complete degradation of the Ogoni environment turning our homeland into an ecological disaster."[562] Shell accused MOSOP and Ken Saro-wiwa of exaggerating the scale of the alleged pollution from the oil spills and gas flaring from the Niger Delta and encourage and solicited the intervention of the Nigerian military to deal with the protesters. These actions resulted in several incidents of Human Rights abuses. The most notable of these incidences happened in 1995 were Ken Saro-wiwa and eight other men (Ogoni Nine) were hanged, accused of involvement in the murder. This followed a blatantly unfair trial in Port Harcourt, Nigeria in 1995.

One of the hanged men, alongside Ken Saro-wiwa was Dr. Barinem Kiobel, a government official from the Ogoniland. He was not a member of MOSOP, but personal correspondence seen by Amnesty International shows that he had courageously tried to use his influence to prevent Human Rights abuses being committed even after he was jailed.[563]

Plaintiff Claim

[562] MOSOP, The Ogoni Bill of Rights, article 16, 1090.
[563] 'Kiobel V. Royal Dutch Petroleum Co. (Amicus)' (*Center for Constitutional Rights*, 2020) <https://ccrjustice.org/home/what-we-do/our-cases/kiobel-v-royal-dutch-petroleum-co-amicus> accessed 25 August 2020.

In 2002, a collection of charges was brought against Shell before the New York District Court by Esther Kiobel, the wife of one of the other activists who had been killed, and a number of other Nigerians from the Ogoni region. The plaintiff sued two Shell holding companies (the Netherlands-based Royal Dutch Petroleum Company and the UK-based Shell Shipping and Trading Company) responsible for involvement in Human Rights violations committed by the Nigerian military junta against two environmental activists who had been executed in November 1995. As a result, the plaintiff argued that the firms had been liable for abuses of international Human Rights standards - including extrajudicial executions, torture, arbitrary imprisonment and crimes against humanity - by the military regime.

Defendant Claim

In this litigation, the defendant holding corporations centred their defence on the question of whether the claims came within the ATS's subject matter jurisdiction.

Issues for determination

The primary question before the District Court was whether the claims came within the federal court's subject matter jurisdiction under the ATS. In March 2012, following oral arguments on the subject, the Supreme Court requested briefings from the parties on a distinct, larger issue. The question posed by the Court was whether the ATS actually permitted US federal courts to consider cases involving alleged international human rights abuses that happened outside the United States. This question of the extraterritorial reach of the ATS as a matter of personal jurisdiction or forum non conveniens has not been expressly addressed in any ATS cases. It was especially significant in the Kiobel case, which featured foreign defendants, and behaviour that occurred outside the United States.

The District Court granted and declined a petition to dismiss all of the defendants' claims in September 2006. Only accusations connected to Shell's alleged complicity in torture, arbitrary arrest and imprisonment, and crimes against humanity committed by the Nigerian military were found to be actionable under the ATS. It did so in reference to the aforementioned Sosa-case, in which the Supreme Court stated that ATS-based claims could only be based on violations of contemporary norms of customary international law with the same definite content and

acceptance among civilised nations as "the historical paradigms familiar when [the ATS] was enacted." One unanswered issue was whether lawsuits against corporations rather than individuals might be brought under the Alien Tort Statute.

Court Decision

The defendants filed a request to dismiss all claims with the District Court in September 2006, and the court partially granted and partially refused the move. It ruled that the only claims that could be brought under the ATS were allegations that Shell was complicit in torture, arbitrary arrest and imprisonment, and crimes against humanity committed by the Nigerian military.[564] This was done by citing the aforementioned Sosa case, in which the Supreme Court had established that only violations of modern norms of customary international law with the same clear content and acceptance among civilised nations as "the historical paradigms familiar when [the ATS] was enacted" could be the subject of ATS-claims.[565] Whether or not the Alien Tort Statute allows suits against corporations instead of individuals remained an open subject.

According to the court's majority decision, the ATS does not provide subject-matter jurisdiction for civil claims against corporate actors, indicating that corporations cannot be held accountable under this legislation for their role in international Human Rights abuses.[566] In October 2011, the plaintiffs petitioned the US Supreme Court to consider their appeal on the question of corporate responsibility under the ATS. On the issue of corporate responsibility under the ATS, which the Court of Appeals for the Second Circuit had considered in its rejection of the Kiobel case, the Supreme Court of the United States issued a ruling in April 2013 upholding the Second Circuit's dismissal of the case.[567] The court ruled that:

[564] United States District Court Southern District of New York, 02 Civ. 7618, *Kiobel et al. v. Royal Dutch Petroleum Company and Shell Transport and Trading Company*, 29 September 2006, https://ccrjustice.org/sites/default/files/assets/2006.09.29_Order_re_interloctory_appeal.pdf (last accessed 1 October 2018).
[565] United States Supreme Court, No. 03–339, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).
[566] United States Court of Appeals for the second circuit, 621 F3d 111, *Kiobel et al. v. Royal Dutch Petroleum Company and Shell Transport and Trading Company*, 17 September 2010, pp. 148–149.
[567] United States Supreme Court, No. 10–1491, *Kiobel v. Royal Dutch Petroleum*, 133 S.Ct. 1659 (2013).

"[…] there is no indication that the ATS was passed to make the United States a uniquely hospitable forum for the enforcement of international norms".[568]

Significance of the Litigation

The Supreme Court neither affirmed nor reversed the judgement of the Court of Appeals because, on appeal, it chose to address the issue of extraterritoriality (i.e., whether international Human Rights violations that have occurred outside the US can lead to liability under the ATS) rather than the issue of corporate liability. Some commentators wondered if the Appeals Court's decision meant the end of ATS-claims against corporate defendants because it dealt a severe blow to those who advocated for ATS-based civil litigation as a means to hold corporate actors accountable before US federal courts for their involvement in international Human Rights violations perpetrated abroad.[569] The conclusion was driven by worries about the impact on US foreign policy if claims with tenuous ties to US law were to be heard in US courts on the basis of an ATS. Table 5.3 summarises the issues for determination and legal basis for the court decisions in the Kiobel *v Shell* litigation.

Table 5.3 Summary of issues for determination and legal basis for the court decision in the Kiobel *v Shell* litigation

Court	Issue for determination	Court decision
District court	Whether the plaintiffs' claims fell within the subject matter jurisdiction of the federal court under the ATS.	District Court partially allowed and partially refused defendants' petition to dismiss all claims, stating that only allegations related to Shell's alleged complicity in torture, arbitrary arrest and imprisonment, and crimes against

[568] United States Supreme Court, No. 10–1491, Kiobel v. Royal Dutch Petroleum, 133 S.Ct. 1659 (2013), p. 1668.

[569] Childress T, Is it the end of the Alien Tort Statute? Conflict of Laws weblog 17 September 12, 2010, http://conflictoflaws.net/2010/is-it-the-end-of-thealien-tort-statute (last accessed 1 October 2018); Keitner CI, Keitner on Kiobel and the future of the Alien Tort Statute. Conflict of Laws weblog21 September 2010, http://conflictoflaws.net/2010/keitner-on-kiobel-and-the-future-of-the-alientort-statute (last accessed September 12, 2020)

		humanity by the Nigerian military were actionable under the ATS.
Court of Appeal	whether claims against corporate rather than individual defendants were actionable under the Alien Tort Statute (that is, issue of corporate liability under the ATS)	court held that civil claims against corporate actors do not fall within the scope of the subject-matter jurisdiction granted by the ATS. This was a summary judgment rendered by the Court of Appeals for the Second Circuit in 2010.
Supreme court	whether the ATS did allow US federal courts to hear lawsuits in relation to alleged international human rights violations that had occurred outside of the territory of the United States (that is, the issue of the extraterritorial scope of the ATS)	The supreme court ruled that ATS only applies to norm violations perpetrated within the US (or on the high seas). The was concerned about the potential foreign policy consequences of allowing ATS-based claims with limited connections to the US legal order to be dealt with by US court.

5.2.3 Bowoto v. Chevron (US)

Facts of the Case

Plaintiffs filed this lawsuit in 1999, claiming damages for a series of brutal attacks that occurred in Nigeria between mid-1998 and early 1999. On May 28, 1998, a Chevron Nigeria Ltd. (CNL) offshore drilling facility known as the "Parabe platform," which consisted of an oil drilling platform and an attached construction barge, was allegedly attacked. On May 25, 1998, over 100 native Nigerians took over the Parabe platform to protest CNL's destruction of the environment and refusal to provide jobs to the local population. Plaintiffs allege that some people were killed, injured, detained, tortured and killed. These people stayed on the platform

and barge until May 28, 1998. Defendants claim that after three days of occupation, CNL decided to seek the assistance of Nigerian government security forces ("GSF").

On January 4, 1999, the second and third alleged attacks took place. Plaintiffs claim that the GSF attacked the villages of Opia and Ikenyan on that day, shooting civilians and setting fire to the villages. Plaintiffs claim that Timi Okoro, Kekedu Lawuru, Shadrack Oloku, and Bright Pabulogba were killed in these attacks. In 1999, injured protestors and the family of a deceased protestor filed a lawsuit in the Northern District of California against three Chevron companies based in the United States ("Chevron"), alleging a variety of claims relating to the GSF raid on the Parabe platform.

Plaintiffs Claim

The plaintiffs brought claims under the Alien Tort Statute ("ATS"), Nigerian law, and California law seeking to hold Chevron accountable for serious human rights violations committed abroad.

The plaintiff brought a claim under the Alien Tort Statute seeking to hold Chevron accountable for serious human rights violations committed abroad. The plaintiffs sought compensation for the murders and the injuries suffered by the victims of Ilaje Community in the Niger Delta by Chevron during the peaceful protest of the people.[570]

Defendant Claim

The defendant countered these allegations by portraying the protestors as violent and unpredictable and argued that CNL sought the assistance of the GSF as a last resort. The defendant further argued that the GSF fired on protestors in self-defence. Defendants, therefore, brought a motion for summary judgment on the plaintiffs' claim for violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c) and (d). The defendants claimed no genuine issue with any material fact in the plaintiff's case.

[570] Braden Reddall, 'Burden of Proof At Issue At Chevron-Nigeria Appeal' (Reuters 2010) <https://www.reuters.com/article/idUSN1424424620100614> accessed 1 August 2022.

Issues for determination

The main issues for determination in this litigation are summarised below:

(i) whether the federal Death on the High Seas Act ("DOHSA") preempts ATS wrongful death and survival claims.

(ii) whether corporations can be held accountable under the Torture Victim Protection Act ("TVPA").

Both issues for determination are related to the statutes enacted by Congress to incorporate principles of international law.

Court Decision

The US federal court took a series of decisions: (i) granted the defendants' motion to dismiss the claims under the Torture Victim Protection Act and the Alien Tort Claims Act in 2006[571]; (ii) dismissed the claim of crimes against humanity. The court also granted Chevron's motion for summary judgment on the plaintiffs' RICO claim in 2007 for not providing enough evidence that the two incidents underlying this litigation or that Chevron's treatment of the local communities had any impact on the U.S. economy.[572]

The *Bowoto v. Chevron Corp.* litigation was decided on December 1, 2008, when nine jurors unanimously agreed that Chevron was not liable for any of the numerous allegations. In March 2009, the federal judge refused the plaintiffs' petition for a new trial and found that the panel's verdict supported it. On September 10, 2010, the Ninth Circuit Court of Appeals upheld a jury verdict in favour of the Chevron Corporation. The Court of Appeal issued a ruling in September 2010 upholding the trial court's judgment. On 20 June 2011, the plaintiff requested the Supreme Court to hear the appeal. The Supreme Court refused to hear the appeal at the end of April 2012.

[571] *Bowoto v. Chevron Corp.*, No. C99-02506SI, 2006 WL 2455752 (N.D. Cal. Aug. 22, 2006)
[572] *Bowoto v. Chevron Corp.*, No. C99-02506SI, 2007 WL 800940 (N.D. Cal. Mar. 14, 2007).

Significance of the Litigation

This litigation is significant since it was one of the few Alien Tort Statute (ATS) claims brought against corporations that actually went to trial. During a process of the trial, the court dismissed several claims brought by the plaintiff. These claims were related to act of state doctrine, forum non-conveniens, secondary liability for transgressions of international law, corporate responsibility under the ATS, and the actionability of several norms of international human rights law (e.g., extrajudicial killing, torture, and cruel, inhuman, and degrading treatment).

This case highlights the importance of defining the relationship between the parent company and the subsidiary in a corporate group structure. The difficult and complex nature of relationships between the subsidiary and the parent company could result in the plaintiff suing the wrong defendant. For example, the case was filed in 1999, but it was not until June 2005 that the plaintiffs and the court learned that ChevronTexaco failed to disclose that Chevron USA, Inc. rather than Chevron Overseas Petroleum Inc. controlled the subsidiary in Nigeria. This is significant because the plaintiffs were suing the wrong defendant. The court chastised Chevron's attorneys for keeping silent and intimated that they might have done so on purpose to delay or otherwise obstruct the plaintiffs' claims.[573]

This litigation is significant because Chevron appears to have violated its obligations on safety and security. The U.S. District Court allowed a complaint brought against Chevron by victims and victims' relatives, alleging that there could be evidence that Chevron had recruited, supervised, and shipped the Nigerian military forces notorious for their widespread violence and abuse. Chevron had argued that military action was appropriate to protect the lives of his staff. Although, a federal jury in 2008 acquitted Chevron of all charges brought against them.[574] Many international NGOs and Human Rights organisations and NGOs disagreed with this ruling because of the opinion that Chevron knew or ought to have known that involving the Nigerian military would cause harm to the protesters.[575] Table 5.4 summarises the issues for determination and legal basis for the court decision in the Bowoto *v Chevron* litigation.

[573] Pamela MacLean, 'Lawyers Rebuked In Human Rights Case' [2006] The National Law Journal.
[574] Bob Egelko, 'S.F. Jury Clears Chevron Of Protest Shootings' (2008) <https://www.sfgate.com/business/article/S-F-jury-clears-Chevron-of-protest-shootings-3183175.php> accessed 25 August 2020.
[575] *Bowoto v. Chevron Corp.*, No. C99-02506SI, 2007 WL 800940 (N.D. Cal. Mar. 14, 2007).

Table 5.4 Summary of issues for determination and legal basis for court decision in the Bowoto *v Chevron* litigation

Court	**Issue for determination**	**Court decision**
Federal court in San Francisco County (before trial)	(1) Whether corporations could not be sued under that ATS, Torture Victim Protection Act, and crimes against humanity. (2) Whether or not a violation of California's unfair business practices law could be litigated in federal court, due to federal standing rules.	(1) Court denied Chevron's motion for summary judgment to dismiss all claims. The court held that the plaintiffs had supplied sufficient evidence that ChevronTexaco could be found responsible for the actions of its subsidiary, and so proceeded to trial. (2) The court ruled that a violation of California's unfair business practices law could not be litigated in federal court, due to federal standing rules.
District court (U.S. District Court for the Northern District of California	(1) Whether or not it is lawful for the plaintiffs to repay the cost of the litigation	(1) The court dismissed the case adding the plaintiff had no money. The plaintiffs re-filed this claim in California state court, seeking a court order that Chevron would need to change its business practices.
Federal court in San Francisco County	Whether corporations could be sued under the Alien Tort Statue (ATS), Torture Victim Protection Act, Racketeer Influenced and	Court dismissed all claims. On December 1, 2008, the jury delivered a complete defense verdict for Chevron.

	Corrupt Organizations Act (RICO), and crimes against humanity.	
Court of Appeal	Whether or not to uphold the jury verdict of the District court to dismiss all claims against Chevron	(1) On September 10, 2010, the Ninth Circuit Court of Appeals upheld a jury verdict in favour of Chevron Corporation. (2) The Plaintiff did not provide enough evidence that Chevron treatment of the local communities had any impact on the US economy.
Supreme court	Review the question of whether corporations can be sued under the TVPA.	The U.S. Supreme Court decided denied the petition.

5.3 Human rights and Environmental Litigations in the UK

This section reviews some notable human rights and environmental litigations arising from the Niger Delta initiated in the United Kingdom (England). The United Kingdom is one of the largest consumers and producers of energy and is home to several large energy companies, including BP and Shell.

Shell plc (formerly called Royal Dutch Shell), a well-known multinational oil company, has been headquartered in London since January 2022, following the merger of the two types of shares in the company – the A and B shares.

Shell is one of the largest oil and gas producing companies in Nigeria. Shell began production in Nigeria in 1958, and its operations have led to allegations of several human rights and environmental violations in the Niger Delta. Many of these allegations have led to litigations in the Netherlands regarding harm caused by their subsidiaries (e.g., SPDC) operating in Nigeria.

In the following section will discuss two litigations in the UK - Bodo v Shell and Okpabi v Shell. Each litigation is reviewed based on the facts of the case, the plaintiffs' claims, defendants' claims, issues for determination, court decision, and significance of the litigations.

5.3.1 Bodo v Shell Petroleum Development Company Nigeria (SPDC)

Facts of the Case

A group of Nigerian farmers and fishermen sued RDS and SPDC in London High Court for two oil spill incidents in 2008 and 2009 near the Bodo village in the Niger Delta.[576] The farmers requested compensation for the harm they had endured from the oil spills and a court order compelling Shell to clean up the affected areas adequately. The farmers claimed the oil spills harmed their health, lands, and livelihoods.

Issues for determination

The main issue raised was that of negligence on the part of SPDC and whether the parent company owes a duty of care to the subsidiary company in Nigeria. Specifically, the issues for determination were as follows:

(i) if common law torts (such as negligence and/or public nuisance) could form the basis of the claims, or whether only Nigerian statute law applied.

(ii) whether SPDC may be held liable for harm caused by oil leaks from its pipelines under Nigerian statute law if such spills stemmed from sabotage rather than inadequate maintenance.[577]

Plaintiff's Claim

[576] Business & Human Rights Resource Centre, 'Shell lawsuit (re oil spills & Bodo community in Nigeria)' < https://www.business-humanrights.org/en/latest-news/shell-lawsuit-re-oil-spills-bodo-community-in-nigeria/> accessed on August 31, 2022

[577] The United Kingdom High Court of Justice, [2014] EWHC 1973 (TCC), The Bodo Community and others v The Shell Petroleum Development Company of Nigeria Ltd, para. 9.

The locals alleged that Shell had been told about the faulty pipes before the spills occurred because of the company's failure to properly repair pipelines that were 50 years old. Senior employees also warned the company about the damaged pipeline, which could result in a serious spill in the community but was ignored by the company. They also claimed that Shell lied and made an inaccurate assessment of the spill. Shell claimed that they initially cleaned up the spill, but when Amnesty International did some investigation of the spill, they found that the spill was worse than stated; Shell had made an inaccurate assessment regarding the spill.[578]

Defendant Claim

The defendants claim that they were not aware of the damaged pipeline and that it was due to theft and bunkering.[579] Shell subsequently admitted that its Nigerian subsidiary, Shell Petroleum Development Company (SPDC), was liable for the spill. However, it denied the plaintiffs' allegations and argued that the cause of the oil spills was oil theft and sabotage.[580] Shell also disputed the alleged volume of oil spilt and the size of the area affected.

Court Decision

Based on an assessment of the relevant Nigerian statutory provisions and case law, the court decided that only based on the statutory provisions, in this case, could the plaintiffs claim compensation. This means that the plaintiffs cannot claim compensation for damage caused by

[578] The United Kingdom High Court of Justice, [2014] EWHC 1973 (TCC), The Bodo Community and others v The Shell Petroleum Development Company of Nigeria Ltd, para. 9.
[579] LeighDay, 'Shell agrees £55m compensation deal for Niger Delta community', <https://www.leighday.co.uk/News/2015/January-2015/Shell-agrees-55m-compensation-deal-for-Nigeria-Del> accessed August 31, 2022; Guardian, 'Nigerian community fights Shell in UK court over oil spills.' < https://www.theguardian.com/environment/2014/apr/29/nigerian-community-shell-uk-court-oil-spills> accessed on August 31, 2022
[580] LeighDay, 'Shell agrees £55m compensation deal for Niger Delta community', <https://www.leighday.co.uk/News/2015/January-2015/Shell-agrees-55m-compensation-deal-for-Nigeria-Del> accessed August 31, 2022.

third-party sabotage.[581] The Court, however, ruled on June 20, 2014, that Shell could be held responsible for spills from pipelines if the company failed to take reasonable measures to protect them from malfunction or oil theft (known as "bunkering").[582] Even though Shell had initially dismissed suggestions that it had knowingly continued to use pipelines that were not safe to operate,[583] documents produced in the UK High Court in November 2014 revealed that Shell had been warned about the "risk and hazard" of the pipeline before the oil spill that affected the Bodo community.[584] While the case was expected to go to trial in mid-2015, Shell agreed to a £55 million out-of-court settlement in January 2015. £35 million was split between those impacted by the spill, which would each receive £2,200, and £20 million will go to the community.[585]

Shell attempted to prevent the community from going back to court in 2017 by requesting that a clause be included in the settlement that any disruptive act by any resident of the Bodo community would result in the lawsuit being terminated. The court ruled in May 2018 that the Bodo community should have the right to reopen the claim for another year with no conditions if the clean-up is not completed to an adequate standard.

Significance of the Litigation

Shell attempted but failed to stop the claims from being heard under jurisdictional grounds. Shell's action amounted to denying access to remedy, guaranteed under international law such

[581] The United Kingdom High Court of Justice, [2014] EWHC 1973 (TCC), The Bodo Community and others v The Shell Petroleum Development Company of Nigeria Ltd, paras. 21–69.
[582] The United Kingdom High Court of Justice, [2014] EWHC 1973 (TCC), The Bodo Community and others v The Shell Petroleum Development Company of Nigeria Ltd, paras. 70-93
[583] Business & Human Rights Resource Centre, 'Shell lawsuit (re oil spills & Bodo community in Nigeria)' < https://www.business-humanrights.org/en/latest-news/shell-lawsuit-re-oil-spills-bodo-community-in-nigeria/> accessed on August 31, 2022
[584] Business & Human Rights Resource Centre, 'Shell lawsuit (re oil spills & Bodo community in Nigeria)' < https://www.business-humanrights.org/en/latest-news/shell-lawsuit-re-oil-spills-bodo-community-in-nigeria/> accessed on August 31, 2022
[585] Ibid; John Vidal, 'Shell announces £55m pay out for Nigeria oil spills', Guardian (UK), 7 Jan 2015 < https://www.theguardian.com/environment/2015/jan/07/shell-announces-55m-payout-for-nigeria-oil-spills> accessed August 31, 2022; LeighDay, 'Shell agrees £55m compensation deal for Niger Delta community', <https://www.leighday.co.uk/News/2015/January-2015/Shell-agrees-55m-compensation-deal-for-Nigeria-Del> accessed August 31, 2022.

as the UNGPs[586] and the OECD Guidelines for Multinational Enterprises.[587] For instance, access to remedy is supported by the UNGPs, which recognise access to a remedy as one of the three foundations of the Universal Human Rights and business system. An essential element of these Guidelines is the obligation of a State to provide access to a judicial remedy for victims of Human Rights abuses by businesses.

Shell violated its human rights and environmental obligation related to pollution, clean-up and remediation, and compensation. Despite Shell admitting liability and claims concerned about Bodo's devastation, Shell had made no immediate, concerted, or adequate efforts to begin cleaning up the harm caused by the 2008 oil spills. For instance, since the Deepwater Horizon spill in the Gulf of Mexico, BP created a US$ 20 billion fund – a far smaller region than the Niger Delta. On the other hand, Shell has not committed any concrete sum towards proper compensation and clean-up of the Bodo area.[588] The UK court agreed with the plaintiff that the parent company owed a duty of care to the victims and that it had the power to ensure that adequate steps were taken to avoid harm, but it had breached that duty by failing to ensure that the appropriate safeguards were taken[589]. Table 5.5 summarises the issues for determination and the legal basis for the court decision in the Bodo *v Shell* litigation.

Table 5.5 Summary of issues for determination and legal basis for the court decision in the Bodo *v Shell* litigation

Court	**Issue for determination**	**Court decision**
London High Court (preliminary hearing)	(1) Whether Nigerian statutory law governing the claims to the exclusion of other potential legal bases (like the common law torts of negligence and/or public nuisance) (2) Whether under Nigerian statutory law SPDC could be held liable for an	(1) plaintiffs could only claim compensation based on statutory provisions in this case (2) The defendant cannot be held liable for a spill from its pipeline if it was caused by sabotage or theft.

[586] United Nations Guiding Principles on Business and Human Rights adopted by the United Nations Human Rights Council, U.N. Doc. A/HRC/17/L.17/31 (June 2011)
[587] Organisation for Economic Co-Operation and Development (OECD) Guidelines For Multinational Enterprises (2011) *available at* http://www.oecd.org/daf/inv/mne/48004323.pdf
[588] Leigh Day (n 8).
[589] Meeran (n 450)

	oil spill from its pipeline due to sabotage rather than faulty maintenance	(3) The court ruled that there remained a theoretical possibility that Shell could be held liable for negligence in the protection of the pipeline (4) The parties reached an out-of-court settlement before trial on the merits of the case.

The report from the Centre for Environment, Human Rights, and Development (CEHRD) compares the Bodo case to the Deepwater Horizon case and shows how the various components of an effective remedy can be realised in a supportive environment.[590] Although the Bodo litigation took place in another country, the report looked at how the lessons learned can be applied in Nigeria for recourse and access to effective remedies such as restitution, compensation, rehabilitation, satisfaction (e.g., penalties), and guarantees of non-repetition.
The report suggests several recourse options, including proper documentation of oil spill data, reporting oil spills as soon as they occur, and avoiding oversimplification of responsibility by assessing the responsibility of each party (e.g., company facility, pipeline operator, third parties who may be involved, various government agencies responsible for responding to environmental degradation or investigating and prosecuting unlawful activity), and choosing an appropriate forum for litigation when dealing with an oil company's parent or subsidiary.I[591]

5.3.2 Okpabi v Royal Dutch Shell

Facts of the Case

[590] The Centre for Environment, Human Rights and Development (CEHRD), 'After Bodo: Effective Remedy & Recourse Options for Victims of Environmental Degradation Related to Oil Extraction in Nigeria' (2015) <https://cehrd.org.ng/download/after-bodo/> accessed February 5, 2023
[591] Ibid 4-7

Two sets of proceedings were brought by several named individuals against RDS and SPDC as a result of pollution and environmental damage affecting large areas of land and the health and livelihood of many people in and around the Niger Delta in Nigeria, caused by oil spills from SPDC's oil pipelines and associated infrastructure.[592]

The first proceedings were brought by 20 named claimants both for themselves and on behalf of the people of the Ogale community in Nigeria, which has a population of around 40,000. The first of the named claimants, HRH Okpabi, is the King of the Ogale community in Nigeria. The second set of proceedings was brought by 2,335 different claimants. In both sets of proceedings, the claimants were all residents and citizens of Nigeria. The claims were brought under Nigerian statute and common law.

The claimants, relying on earlier litigation relating to oil spills in Nigeria against SPDC (Bodo litigation), argued that the claims had a much better prospect of progress and success if undertaken in the English courts rather than in Nigeria, where legal proceedings were subject to delays and sought redress in this jurisdiction in the form of both injunctive relief and damages.

Plaintiff Claim

The claimants, citizens of the Niger Delta, seek damages arising as a result of alleged ongoing pollution and environmental damage caused by oil leaks from pipelines and associated infrastructure. They allege that Royal Dutch Shell (RDS) and its local subsidiary, Shell Petroleum Development Company of Nigeria Limited (SPDC), are liable for negligence. The claim against RDS was brought on the basis that RDS owed the claimants a duty of care because it controlled the operation of the pipelines and infrastructure from which the leaks occurred or because it had assumed a direct responsibility to protect the claimants from the environmental damage caused by the leaks.[593] The claimants appealed to the Supreme Court following the Supreme court's *Lungowe v Vedanta* decision in 2019. In that case, the Supreme court ruled that there was no "limiting principle" that a parent could never incur a duty of care

[592] Leigh Day, 'Two New Legal Actions Launched against Shell over Nigerian Oil Pollution' (*Leigh Day (https://www.leighday.co.uk)*, 2016) <https://www.leighday.co.uk/News/News-2016/March-2016/Two-new-international-legal-actions-launched-again> accessed August 31, 2022.
[593] Royal Courts of Justice Strand, London, WC2A 2LL Date: 14 February 2018 in The Court of Appeal (Civil Division) on Appeal from The High Court of Justice Technology and Construction Court (The Hon. Mr Justice Fraser)

in respect of the activities of a subsidiary merely by laying down group-wide policies. Following the court's decision in Vedanta, the claimants argued in Okpabi that the Court of Appeal had taken an overly restrictive approach.

The claims against the first respondent are summarised below:

> "The appellants' case is that the oil spills were caused by the negligence of the pipeline operator, the second respondent, The Shell Petroleum Development Company of Nigeria Ltd ("SPDC"), a Nigerian registered company. It operated the oil pipelines and ancillary infrastructure on behalf of the unincorporated joint venture between the state-owned Nigerian National Petroleum Corporation …"[594]

The claims against the second respondent are summarised below:

> "The appellants' case against RDS is that it owed them a common law duty of care because, as pleaded, it exercised significant control over material aspects of SPDC's operations and/or assume responsibility for SPDC's operations, including by the promulgation and imposition of mandatory health, safety and environmental policies, standards and manuals which allegedly failed to protect the appellants against the risk of foreseeable harm arising from SPDC's operations. It is agreed that the issue of governing law should be approached on the basis that the laws of England and Wales and the law of Nigeria are materially the same"[595]

Defendant Claims

Shell claims that Ogale is in Ogoniland, and there has been no oil or gas production by SPDC since 1993. It also claims that access to the area has been limited following a rise in violence, threats to staff, and attacks on facilities. RDS alleged that SPDC was responsible for all operational decisions in Nigeria and that RDS simply acted as a holding company. The defendants argued that the English courts did not have jurisdiction to hear the case and that the approach of bringing a claim against the parent company, RDS, was a device being used

[594] Okpabi and others (Appellants v Royal Dutch Shell Plc and another (Respondents). Hilary Term [2021] UKSC 3 on appeal from: [2018] EWCA Civ 191, paras 5
[595] Okpabi and others (Appellants v Royal Dutch Shell Plc and another (Respondents). Hilary Term [2021] UKSC 3 on appeal from: [2018] EWCA Civ 191, paras 7

cynically by the claimants to bring claims, that would otherwise have no connection whatsoever with England, to trial in the English courts.[596] Shell claim that the Netherland and the UK based parent company RDS is a separate legal entity from the SPDC in Nigeria.

Contrary to what the claimants argued, Shell stated that, while RDS owns 100 per cent of SPDC and receives profits earned by SPDC, it has no responsibility for SPDC actions and does not intervene in operational matters concerning its subsidiary. For these reasons, Shell argued that RDS did not have a duty of care for the people affected by the operations of its Nigerian subsidiaries. As a result, the defendant claimed that the English court had no jurisdiction to hear the claims.

Issues of Determination

The court addressed several preliminary issues in its decision, and the main issue for determination at the High Court and the Court of Appeal was whether there was a real issue to be tried between the plaintiffs and the parent company or, in other words, whether those claims had any merit.[597] The issues for determination at the Supreme Court were:

"(1) Whether the majority of the Court of Appeal materially erred in law;

(2) If so, whether the majority was wrong to decide that there was no real issue to be tried."[598]

Court Decision

In 2016, the High Court agreed that the legal case against Shell could proceed to the next stage through the London High Court, where the parent company, Royal Dutch Shell plc, is based. At the hearing held at the Technology and Construction Court, it was ruled that formal legal proceedings against Shell could now be served on Shell Nigeria (the Shell Petroleum

[596] High Court Judgement, Okpabi and other V Royal Dutch Shel and another, January 26, 2017
[597] The United Kingdom High Court of Justice, 2017 EWHC 89 (TCC), His Royal Highness Emere Godwin Bebe Okpabi and Others v. Royal Dutch Shell Plc and Shell Petroleum Development Company of Nigeria Ltd, paras. 62, 69.
[598] Okpabi and others (Appellants v Royal Dutch Shell Plc and another (Respondents). Hilary Term [2021] UKSC 3 on appeal from: [2018] EWCA Civ 191, paras 74

Development Company of Nigeria Ltd), who would be joined to the English proceedings alongside Royal Dutch Shell plc.[599]

On 14 February 2018, the Court of Appeal upheld the High Court's ruling, with a majority of judges holding that the parent company did not hold a duty of care toward affected communities. Following the dismissal, the claimants announced their intention to bring the case to the UK Supreme Court. In May 2019, civil society organizations asked the UK Supreme Court to allow the fishing communities to appeal against the 2017 ruling saying that Shell did not hold a duty of care toward affected communities. In July 2019, the UK Supreme Court granted permission to appeal.

On 12 May 2020, the claimants filed an appeal with the UK Supreme Court.[600] The Supreme Court unanimously reversed the Court of Appeal. The court concluded that it was at least arguable, based on the degree of control and de facto management, that the parent company owed a duty of care to the claimant Nigerian citizens regarding alleged environmental damage and human rights violations by Shell's Nigerian subsidiary.

On the first issue for determination, the Supreme Court determined that the Court of Appeal had made a material error of law by engaging in a mini-trial and taking an incorrect approach to the factual issues. It had preferred and accepted the evidence of various RDS witnesses, even though there had been no opportunity for cross-examination and RDS had provided minimal disclosure. In light of Vedanta[601], the Supreme Court accepted the claimants' formulation of four possible "routes", suggesting the existence of a parent company's duty of care (although finding these to be non-exhaustive). The Supreme Court identified the following errors in law as summarised below[602]:

(i) Mini-Trial: The majority of the Court of Appeal became engrossed in a mini-trial on substantive issues, leading it to take an approach unsuitable for an interlocutory application.

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[599] Leigh Day, 'Judge Agrees Two Nigerian Legal Cases against Shell Can Proceed in London High Court' (Leigh Day 2022) <https://www.leighday.co.uk/News/News-2016/March-2016/Judge-agrees-two-Nigerian-legal-cases-against-Shel> accessed 3 September 2022.
[600] Okpabi and others v Royal Dutch Shell Plc and another
[601] Lungowe v Vedanta Resources plc [2019] UKSC 20. This is a UK company law and English tort law case, where the Supreme Court ruled unanimously that Vedanta Resources plc, as the parent company, had assumed responsibility or owed a duty of care to claimants who had been harmed by Vedanta's subsidiaries.
[602] Dentons, 'Okpabi V. Shell: UK Supreme Court Reaffirms Broad Potential For Environmental Damage Claims Against Parent Companies' (dentons 2021) <https://www.dentons.com/en/insights/articles/2021/february/25/okpabi-v-shell> accessed 30 April 2022.

(ii) Importance of disclosure: The mini-trial approach also led the majority of the Court of Appeal to make inappropriate determinations about the documentary evidence. This was captured as follows in the judgment:

> "Conducting a mini-trial also led to the court making inappropriate determinations in relation to the documentary evidence. Since the court was making a decision on the evidence, it effectively had to conclude that the prospect of there being further relevant evidence on disclosure could and should be discounted".[603]

(iii) Summary judgment test: The Court of Appeal should have applied the summary judgement test of whether the claim had a "real prospect of success" when considering the possibility of more relevant evidence being produced on disclosure.

(iv**)** No distinct category of liability: The Court of Appeal erred by applying the Caparo test to this case, because the parent/subsidiary relationship is not a separate category of liability in negligence, as Vedanta stated.

(v) No limiting principle: The Court of Appeal erred in stating that a parent company's adoption of group-wide policies could never give rise to a duty of care, as Vedanta made it clear that no such "limiting principle" existed.

(vi) No special test or presumption for parent company liability: the majority of the Court of Appeal erred in making broad generalisations based on the parent/subsidiary relationship.

On the second issue for determination, the Supreme Court concluded that there was nothing to suggest that the facts asserted in the particulars were demonstrably false or unsupportable.

The claimants' case was bolstered by arguments based on two RDS internal documents made public: an "RDS Control Framework" and an "RDS HSSE Control Framework," both of which are policies that apply to all Shell companies. The Supreme Court determined that there was a genuine issue to be tried, relying in particular on the Shell group's "vertical" structure, which meant that it was organised along with business and functional lines, facilitating delegation rather than corporate status. The judgement is captured as follows:

> 153. I have set out a detailed summary of the appellants' case at paras 24-69 above. Having full regard to the respondents' written and oral submissions and evidence, I do

[603] Okpabi and others (Appellants v Royal Dutch Shell Plc and another (Respondents). Hilary Term [2021] UKSC 3 on appeal from: [2018] EWCA Civ 191, paras 126

not consider that it has been shown that the averments of fact made in the particulars of claim should be rejected as being demonstrably untrue or unsupportable. On that basis, it is my view that the case set out in the pleadings, fortified by the points made in reliance upon the RDS Control Framework and the RDS HSSE Control Framework, as summarised above, establish that there is a real issue to be tried under Vedanta routes (1) and (3). In those circumstances it is not necessary to make any ruling in relation to Vedanta routes (2) and (4), and I would prefer not to do so given that the pleading has not been structured around such a case. I would, however, observe that there is currently no pleaded identification of systemic errors in the RDS policies and standards[604]

Significance of the Litigation

The significance of the case is that the public and the international Human Rights organisation are all in agreement that denying claimants the opportunity to have these claims tried on their merits would cause grave injustice to the communities harmed by Shell's operations. For example, in April 2018, over forty international Human Rights in the United Kingdom and abroad development and environmental NGOs submitted a letter to the Supreme Court supporting the claimants' application to appeal. The International Commission of Jurists, The Corporate Responsibility Coalition Limited, and Corner House Research submitted written requests to the Supreme Court to intervene in the case.[605]

The Supreme court's decision agreed with the position of the public and international human rights and environmental organisations. The Supreme Court emphasised (as it had in Vedanta) that it is inappropriate for the court to conduct a detailed examination of the evidence and issues in dispute during the jurisdictional phase. Except where the alleged facts are "demonstrably false or unsupportable," it is not appropriate for the defendant to dispute the facts through its evidence at this stage; doing so may simply demonstrate that there is a triable issue. The correct approach focuses on whether the cause of action has a real prospect of success based on the facts set out in the particulars of the claim and any witness statements.

[604] Okpabi and others (Appellants v Royal Dutch Shell Plc and another (Respondents). Hilary Term [2021] UKSC 3 on appeal from: [2018] EWCA Civ 191, paras 153.
[605] Leigh Day (n 599).

This litigation shows that Shell has violated its human rights obligations, namely, disclosure of relevant evidence and access to remedies which are crucial commitments from Shell. Shell's continued attempt to prevent the case from being heard or appealed constitutes a severe breach of Human Rights, particularly access to remedy, which is a crucial Human Rights obligation from Shell. The Human Rights obligation related to environmental pollution, clean-up and compensation has also been violated. Since the case started, there is no indication that Shell has completed the clean-up or commenced the clean-up of the areas affected by the oil spills.

Another fundamental breach of Shell's human rights obligation relates to disclosing relevant evidence. The most likely source of evidence demonstrating the degree to which one company entity relates to another is the company itself. Therefore, such internal information can only come from within Shell itself in this instance. It is the kind of information that a rural community like Bille and Ogale would be able to access. It is somewhat surprising and unhelpful that the Court of Appeal struck out the case in the first place and did not give any chance for disclosure of critical information on the actual structure of Shell and the role its headquarters play in decision making. Table 5.6 summarises the issues for determination and legal basis for court decision in the Okapbi *v Shell* litigation.

Table 5.6 Summary of issues for determination and legal basis for the court decision in the Okapbi *v Shell* litigation

Court	**Issue for determination**	**Court Decision**
London High Court (preliminary case)	Whether there was a real issue to be tried between the plaintiffs and parent company RDS	(1) There was no duty of care on the part of RDS to the plaintiffs (2) There existed no jurisdictional basis for the claims against subsidiary SPDC before the English courts (3) The court ruled that the plaintiffs would be able to pursue their claims before the courts in Nigeria.
Court of Appeal	Whether there was a real issue to be tried between the plaintiffs and parent company RDS	The court ruled that the plaintiffs were not able to prove that they had a properly arguable case that parent

		company RDS (the anchor defendant) owed them a duty of care.
Supreme court	(1) Whether the Court of Appeal materially erred in law (2) Whether there is a real issue to be tried in the substantive proceedings.	(1) The Supreme court ruled that the Court of Appeal materially erred in law. The Court of Appeal made the following errors, among others – (i) Court of Appeal to be drawn into a mini-trial of substantive factual issues, which was not appropriate in an interlocutory application (ii) the Court of Appeal had focussed inappropriately on the issue of control (iii) Court of Appeal had been wrong to assert that the promulgation of group-wide policies could never in itself give rise to a duty of care (2) The Supreme Court held that there was a real issue to be tried. The found evidence that the Shell group is organised along business and functional lines, rather than according to corporate form (i.e., separate corporate entity).

5.4 Human rights and Environmental Litigations in Netherlands

This section reviews some notable human rights and environmental litigations arising from the Niger Delta initiated in the Netherlands. Netherlands (Dutch) is located in North-western Europe with overseas territories in the Caribbean. Royal Dutch Shell, now known as Shell plc, is a well-known international Dutch company. Until its unification as Royal Dutch Shell plc in 2005, the company was dual listed. The British and Dutch companies maintained their legal existence and separate listings but operated as a single-unit partnership. From 2005 to 2022,

the company's headquarters were in The Hague, its registered office was in London, and it issued two types of shares (A and B). The company merged the A and B shares in January 2022, relocated its headquarters to London and changed its name to Shell plc.

Shell is one of the largest oil and gas producing companies in Nigeria. Shell began production in Nigeria in 1958, and its operations have led to allegations of several human rights and environmental violations in the Niger Delta. Many of these allegations have led to litigations in the Netherlands regarding harm caused by their subsidiaries (e.g., SPDC) operating in Nigeria

In the following section will discuss two litigations in the Netherlands - *Oguru, Effanga and Others v Royal Dutch Shell Plc* and *Kiobel v Royal Dutch Shell*. Each litigation is reviewed based on the facts of the case, the plaintiffs' claims, the defendants' claims, issues for determination, court decisions, and the significance of the litigations.

5.4.1 Oguru, Effanga v Royal Dutch Shell Plc and SPDC [Netherland]

Fact of the Case

In this litigation, the plaintiffs filed three lawsuits against SPDC to address the impact of the spill on the Oruma community. Pipelines restored after the civil war were not properly fixed. As a result, oil flowed through the plaintiff's farmland, lakes, fishpond, and the immediate environment where they live, making it unfit to earn a livelihood.[606]

Four Nigerian farmers and the Dutch environmental organisation Milieudefensie brought multiple civil responsibility cases against RDS and SPDC in the Hague District Court in 2008 and 2009, alleging that the companies were responsible for oil spills caused by SPDC-operated pipelines in the Niger Delta. Farmers said their land and fish ponds had been ruined by oil leaks, making it impossible for them to make a living. According to Nigerian law, the corporations at fault for this loss committed the tort of negligence and are thus accountable for any resulting damages.

[606] Ckika Amanze Nwachuku, 'Dutch court to hear Nigeria suit against shell' Thisday Nigeria, 2 October 2012

The plaintiff claimed they started the clean-up in November 2005 and that Shell Nigeria has adequately cleaned neither their environments close to Oruma nor their polluted property.[607] The plaintiff also stated that SPDC were negligent in its duties by allowing the oil spill to have occurred, did not attempt to prevent it or limit the spill, and did not properly clean up the spill in the community.[608]

Plaintiff Claim

The plaintiff sought to establish that both defendants were jointly and severally liable to the plaintiff for current and future damage resulting from negligence. They were also liable for trespass to the plaintiff's farmland and contamination of the community.[609] Furthermore, the plaintiff requested that Shell use equipment and pipelines of modern standards, commence a proper clean-up in the community, implement an adequate oil spill incidence, and pay appropriate compensation to the affected victims.[610]

Defendant Claim

The defendant companies contested the arguments of the plaintiffs on a variety of grounds:

(i) whether the Dutch court could assert jurisdiction over the arguments against the Nigerian subsidiary,

(ii) whether the oil spills were caused by defective maintenance (as claimed by the plaintiffs) or sabotage (as claimed by the defendants),

(iii) whether, under Nigerian law, the parent company owed a duty of care to the claimant.

[607] Amnesty International, 'Injustice Incorporated: Corporate Abuses and the Human Right to Remedy' (Amnesty International 2014).
[608] Shell made false claim about Niger Delta oil pollution says Amnesty by John Vidal, Guardian 7 November Reuters, 18 December 2015.
[609] Shell sued in the Netherland for oil spills in Nigeria: African oil Journal.com 11 September 2008
[610] Lee McConnell, 'Establishing Liability for Multinational Oil Companies in Parent/Subsidiary Relationships' (2014) 16 The Environmental Law review (School of Law, Northumbria University).

Specifically, in May 2009, the defendant filed a motion stating that the Dutch court lacked jurisdiction over the plaintiff's claim.[611] They also claimed that they were not liable for the spill in the community. They said it was due to sabotage and theft.

As such, the defendant companies disputed the plaintiffs' claims on multiple fronts, including:

(i) whether the Dutch court had jurisdiction over the claims against the Nigerian subsidiary, (ii) whether the oil spills were caused by defective maintenance (as claimed by the plaintiffs) or sabotage (as claimed by the defendants), and

(iii) whether, under Nigerian law, the parent company owed a duty of care to the claimant.

In particular, the defendant asserted that the Dutch court lacked jurisdiction over the plaintiff's claim in a petition submitted in May 2009.[612] They blamed theft and sabotage for the loss. They denied responsibility for the local spill as well.

Issues for determination

For the most part, the case centred on whether or not the Dutch court could take over jurisdiction of the claims against the Nigerian subsidiary. The question of whether the parent corporation owed a duty of care to the claimant under Nigerian law and whether the oil leaks were the result of defective maintenance or sabotage was also at issue.[613]

Court decision

Claims were filed against RDS and its Nigerian subsidiary in December 2009 and February 2010, and the District Court ruled that it had jurisdiction to hear the cases in both instances

[611] Corporate liability in a new setting: shell and the changing legal landscape for the multinational oil industry in Niger delta by the Essex business and Human Right project
[612] Corporate liability in a new setting: shell and the changing legal landscape for the multinational oil industry in Niger delta by the Essex business and Human Right project
[613] Meeran (n 450)

(SPDC). The Brussels I Regulation[614] of the EU, which empowers courts in EU member states to acquire jurisdiction over claims against corporations that are domiciled in their country, awarded the court authority over claims against the parent company.[615] Dutch domestic law of international jurisdiction provides for the exercise of jurisdiction over claims against the foreign subsidiary by Dutch courts.[616]

In a subsequent interlocutory ruling issued in September 2011, the court concluded, among other things, that Nigerian tort law was to be used to decide the claims and rejected a request from the plaintiffs that Shell submits proof of some crucial pieces of evidence. Based on the evidence shown to it, the court ruled in January 2013 that the oil leaks were the consequence of vandalism, not improper maintenance, as the plaintiffs had claimed. The District Court found that SPDC acted negligently, caused a nuisance, or unlawfully took the plaintiffs' property in violation of Nigerian law.[617]

All claims against RDS's parent company were also dismissed, with the court citing Nigerian tort law, which states that a parent business has no obligation to prevent its subsidiaries from causing harm to third parties unless there are extraordinary circumstances, which the court concluded did not apply. Claims against SPDC from a decommissioned wellhead in the area of Ikot Ada Udo were upheld in a lawsuit involving oil leaks in 2006 and 2007. The court found that vandalism was the direct cause of the leak, but that SPDC's failure to secure the wellhead so that criminals couldn't screw their valves was negligent. Due to SPDC's failure to take reasonable precautions against the risk of sabotage, the court ruled that the company had breached its duty of care to the surrounding farmers.

Companies named as defendants had their request for an interlocutory appeal denied by the Hague Court of Appeal. Before filing an appeal with the Dutch Supreme Court, they would have to wait until the court issued a ruling on the merits of the case. The Hague Court of Appeal agreed with the District Court in December 2015 that it had jurisdiction over claims against

[614] Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)

[615] Articles 2 and 60 Brussels I Regulation (now Articles 4 and 63 Brussels I Regulation (recast)).

[616] Article 7(1) Dutch Code of Civil Procedure.

[617] Donald Robertson, Leon Chung and Anne Hoffmann, 'Emerging Trend: Multinationals Being Sued in Their Home Countries for Harmful Practices Of Their Foreign Operations-Lexology' (*Lexology.com*, 2013) <http://www.lexology.com> accessed 30 September 2016.

both the parent and the subsidiary and that the allegations against the parent were not plainly without merit.

On January 29, 2021, the Dutch Court of Appeal ruled that Shell Nigeria was accountable for two oil spills in the Niger Delta and must pay compensation. Shell has been obliged to install pipeline leak-detecting equipment.[618]

Significance of the Litigation

The significance of this litigation regarding the Human Rights obligations of parent companies covers several areas, including - safety and security, transparency and disclosure and delays in accessing justice. Regarding transparency, the claimants needed to prove that the information provided by Shell was incorrect and not transparent. The claimants also needed to disprove Shell's statements that sabotage was the cause of the oil spill. This became necessary when the Dutch court decided to apply Nigerian Law. The plaintiffs needed to fly to Nigeria to interview various specialists, claimants, and particular persons in Ogoni to refute Shell's claims. This was extremely difficult since many specialists from the Ogoni area worked professionally with Shell and were thus unable or unable to testify, most likely because of pressure and intimidation from Shell.[619] Amnesty International has documented cases of intimidation and coercion to testify against plaintiffs while refusing to testify against Shell.

There was also a violation of Human Rights obligations related to disclosure. The claimants found it very difficult to access internal information - from both Shell and Shell Nigeria- regarding the operations of the business. In the first instance, the District Court's justification for the rejection of the SPDC charges was that the plaintiffs could not establish that the oil spill was the result of poor pipeline maintenance. For this evidence, applicants just had to rely on public information while Shell was sitting on the relevant corporate details they could not access. The intervention of the Court of Appeal was required to force RDS to produce particular audit reports, assurance letters, incident reports, and documentation pertaining to the relevant

[618] Wifa E, and Adebola T, 'Triumph For Farmers And Fisherfolks: The Hague Court Of Appeal Finds Shell Liable For Oil Spills In Nigeria' (School of Law, University of Aberdeen 2022) <https://www.abdn.ac.uk/law/blog/triumph-for-farmers-and-fisherfolks-the-hague-court-of-appeal-finds-shell-liable-for-oil-spills-in-nigeria/> accessed 19 September 2022; David Vetter, 'Niger Delta Oil Spills: Shell Ruled Responsible In Landmark Verdict' (Forbes 2021) <https://www.forbes.com/sites/davidrvetter/2021/01/29/niger-delta-oil-spills-shell-ruled-responsible-in-landmark-verdict/?sh=aa41f09465e6> accessed 19 September 2022.
[619] Skinner and others (n, 75)

oil pipelines. The court determined that some records would not be given to the applicants but would be available for review by the applicant's legal representatives and the court judges at the notary's office. The defendants also employed a variety of tactics to prolong the trial, including asking the court to postpone proceedings due to ongoing litigation in another jurisdiction (a strategy known as "lis pendens") and disputing the status of Dutch environmental NGOs and individual plaintiffs. Table 5.7 summarises the issues for determination and legal basis for the court decision in the Oguru *v Shell* litigation

Table 5.7 Summary of issues for determination and legal basis for the court decision in the Oguru *v Shell* litigation

Court	**Issue for determination**	**Court decision**
The Hague District Court (2009 and 2010)	(1) Whether the Dutch court could assume jurisdiction over the claims against the Nigerian subsidiary (2) Whether the oil spills had been caused by faulty maintenance (as claimed by the plaintiffs) or by sabotage (as claimed by the defendants) (3) Whether under Nigerian law a parent company owes a duty of care towards third parties that may suffer harm because of activities carried out by its (sub-)subsidiary	(1) In December 2009 and February 2010, the District Court determined that it had jurisdiction to hear not only the claims against the parent company, but also those against the Nigeria-based subsidiary. (1) Jurisdiction over the claims against the parent company was a given under the EU's Brussels I Regulation, while jurisdiction over subsidiary is based on Dutch domestic rule which allows courts to exercise jurisdiction over claims against co-defendants in proceedings in which they have jurisdiction with respect to one of the defendants.
District Court (interlocutory ruling, 2011)		(1) The court ruled that the applicable law on the basis of which the claims were to be adjudicated was Nigerian tort law

		(2) The court dismissed a request made by the plaintiffs for Shell to provide exhibits of certain key evidentiary documents
District Court (2013)	(1) Whether the spills were caused sabotage or faulty maintenance (2) Whether SPDC had violated the duty of care it owed to the neighbouring farmers for failing to take sufficient precautions against the risk of sabotage	(1) The court ruled that the oil spills were the result of sabotage, and not the result of faulty maintenance as had been argued by the plaintiffs (2) The court dismissed all of the claims against the parent company RDS (3) The court ruled that SPDC had violated the duty of care it owed to the neighbouring farmers for failing to take sufficient precautions against the risk of sabotage.
The Hague Court of Appeal (Interlocutory judgment on preliminary issues, before trial) (2015)	Whether the court had jurisdiction to hear claims against the parent company and the subsidiary.	The Court of Appeal re-confirmed the District Court's findings that it had jurisdiction to hear claims against the parent company and the subsidiary. The court added that claims against the parent company were not evidently without merit.
Court of Appeal (2021)		(1) On 29 January 2021, the Dutch Court of Appeal held that Shell Nigeria was responsible for two oil spills in Niger Delta, and liable to pay compensation. (2) Shell was ordered to install leak detection equipment in its pipelines.

5.4.2 Kiobel v Royal Dutch Shell (Netherlands)

Facts of the case

This case was first initiated in the US by Esther Kiobel, where was granted asylum in 2002. The facts of the case are very similar to the *Kiobel v Shell* case in the US. One of the hanged men executed in 1995 by the Nigerian Military junta in the Ogoni crisis, alongside Ken Saro-wiwa was Dr. Barinem Kiobel, a government official from the Ogoniland. He was not a member of MOSOP, but personal correspondence seen by Amnesty International shows that he had courageously tried to use his influence to prevent Human Rights abuses from being committed even after he was jailed.[620]

Plaintiff claim

In 2016, Dr. Kiobel's window Esther brought a claim against Shell in the Netherlands and the three other windows of the "Ogoni Nine": Victoria Bera, Blessing Eawo and Charity Levula. The women sought compensation for injury caused by Shell's acts, as well as a public apology, compensatory damages (for both material and intangible harm), and exemplary damages (that is, a form of damages aimed not at compensating the harm suffered by the victims but rather at punishing the perpetrator for its misconduct and deterring similar misconduct in the future).[621]

The claimants accused Shell of colluding with the Nigerian military authorities on Human Rights abuses during the government's campaign to silence the protest movements, including the unlawful arrest, detention and execution of their husband Dr. Kiobel. The claimants also allege that Shell offered jobs and money to several witnesses to induce them to provide false testimony incriminating the "Ogoni Nine".

Defendant claim

[620] Center for Constitutional Rights, 'Kiobel V. Royal Dutch Petroleum Co. (Amicus)' (Center for Constitutional Rights, 2022) <https://ccrjustice.org/home/what-we-do/our-cases/kiobel-v-royal-dutch-petroleum-co-amicus> accessed 25 August 2022.
[621] Statement of claim(Esther Kiobel) pp 43-46, 113-115, cited in Amnesty International, 'Shell on Trial' 2019.

Shell, in its statement of defence, has rejected all allegations. Shell argued that the court should dismiss the claim on jurisdictional grounds because the events took place so long ago.[622]

Issue for determination

The main issue for determination, in this case, was whether the court had jurisdiction to hear the case, mainly because the event happened a long time and outside the European Union.

Court decision

In May 2020, the Hague District Court released an interim ruling in the case brought by Esther Kiobel and three other women about Shell's participation in the Nigerian military's unlawful arrest, detention, and execution of their husbands. It ruled that the court had jurisdiction over the case favouring the plaintiffs and that this would not be time-barred.[623] The court also ruled that Shell should hand over some confidential internal documents to the plaintiffs' lawyers and that they would have the opportunity to examine witnesses.

On March 23, 2022, a court in The Hague dismissed Esther Kiobel's civil case due to a lack of evidence linking Shell to bribing witnesses to give false testimony at the trial of the "Ogoni Nine," which led to their execution.

According to Judge Larissa Alwin:

> *"The witnesses' testimony relies heavily on assumptions and interpretations and cannot be relied on to conclude that the money they received at the time was actually from SPDC, and that actual SPDC employees were present,"* [624]

Shell has consistently denied the allegations. Esther Kiobel has stated that she will appeal the decision.

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[622] Shell, Statement of Defence in the case SPDC et all V Kiobel and Others, on file with Amnesty International

[623] 'Amnesty International, 'A Vital Step towards Justice for Esther Kiobel in Her Battle against Shell' (*Amnesty.org*, 2020) <https://www.amnesty.org/en/latest/news/2019/05/nigerianetherlandsshell-ruling-a-vital-step-towards-justice...> accessed 21 June 2020.

[624] Business & Human Rights Resource Centre, 'Shell Lawsuit (Re Executions In Nigeria, Kiobel V Shell, Filed In The Netherlands)' (Business & Human Rights Resource Centre 2022) <https://www.business-humanrights.org/en/latest-news/shell-lawsuit-re-executions-in-nigeria-kiobel-v-shell-filed-in-the-netherlands> accessed 29 April 2022.

Significance of the Litigation

Importantly, this case demonstrates that Esther Kiobel and Shell's legal struggle continued even after the US Supreme Court dismissed their case in 2013. The District Court in The Hague resumed the Kiobel v. Shell litigation without bringing up any concerns pertaining to the recognition of foreign judgements because the case had been dismissed in the U.S. on jurisdictional grounds (i.e., Alien Tort Statute) and not on merits (i.e., liability issue). As opposed to environmental damage, the primary concern in *Kiobel v. Shell* (Netherlands) is violations of human rights. The plaintiff filed a suit asking for records from the legal firm that represented Shell in most of the human rights and environmental litigations, which is an intriguing aspect of this litigation.

The US Court of Appeals for the Second Circuit reversed the District Court's order to produce the requested records in Kiobel's lawsuit in July 2018.[625] It Kiobel's petition fell within the District Court's purview, but the court ultimately decided against hearing it because it abused its discretion. Since Shell, the party from whom the discovery was sought, was also a party to the litigation in the Netherlands, the court determined that US courts did not have to intervene. The court also saw the plea as an effort to circumvent the Netherlands' strictest discovery procedures. The Court of Appeal gave other reasons for its reversal, including the fact that the records had been disclosed in earlier procedures before US courts pursuant to a secrecy order that specifically forbade the plaintiffs from utilising the information in other litigations. As a result, allowing the petition might damage attorney-client relationships in future cases.

One of the key human rights obligations that Shell was alleged to have violated in this litigation is bribery and corruption. Shell has consistently maintained that it does not support or engage and bribery and corruption. Although not proven yet in this case, Shell has been accused severally in the past of bribing individuals to testify against those they felt were engaging in actions that would hurt the company's operations. This is not an isolated case; Amnesty International has also documented how Shell bribed government officials to endorse incorrect and misleading data about oil spills. In some cases, it has also encouraged its employees to provide false and misleading information, such as the date of the reported oil spill and the oil spill volume. The litigation also highlights another Human Rights obligation - safety and

[625] United States Court of Appeals for the Second circuit, No. 17-424-cv, *Esther Kiobel v. Cravath, Swaine & Moore LLP*, 10 July 2018 <https://cases.justia.com/federal/appellate-courts/ca2/17-424/17-424-2018-07-10.pdf> (last accessed September 25, 2020).

security, which Shell has stated that it is committed to respecting. In this litigation, Shell has been accused of soliciting the direct involvement of Nigerian security forces despite knowing the likelihood that it would be lead to grieve human rights abuses because a military regime ruled Nigeria.[626] Table 5.8 summaries the issues for determination and legal basis for the court decision in the Kiobel v Shell litigation in the Netherlands.

Table 5.8 Summary of issues for determination and legal basis for the court decision in the Kiobel v Shell litigation in the Netherlands.

Court	**Issue for determination**	**Court decision**
District Court in The Hague	Whether or not Shell has jurisdiction to hear the case.	(1) On 1 May 2019, a Dutch court said it has jurisdiction to hear the case and ruled that Shell should hand over confidential internal documents to the claimants. (2) A US court of appeals reversed the decision, earlier granted by New York District Court for Shell's lawyers, Cravath Swaine & Moore LLP to turn over the documents in their possession to be used for the case in Netherlands. On 7 January 2019, the US Supreme Court denied Kiobel's petition
Court of Appeal	Whether Shell had bribed witnesses to give false testimony at the "Ogoni Nine"'s trial that led to their execution.	On 23 March 2022, a court in The Hague dismissed the case due to insufficient evidence to link Shell to bribing witnesses to give false testimony at the "Ogoni Nine"'s trial that led to their execution. Esther Kiobel said she will appeal the decision.

[626] Amnesty International, 'In the Dock' (Amnesty International 2020) <https://www.amnesty.org/download/Documents/AFR4466042017ENGLISH.pdf> accessed 25 August 2020.

5.5 Influence of foreign courts' judgements on Nigerian courts against subsidiaries of MNOCs

An important development in human rights and environmental litigations is that the outcome of transnational litigations initiated abroad is beginning to influence the judgement of litigations initiated in Nigeria, which is a significant development in human rights and environmental litigations. A notable example is the recent case in Nigeria - *Obong Effiong Archiang & Ors v Nigerian National Petroleum Corporation, Mobil Producing Nigeria Unlimited, & Exxon Mobil Corporation (5959) Las Conilas Boulevard Irving Texas, United States of America (USA) Unreported Suit No FHC/ABJ/CS/54/12*. In 2021, the Nigerian High court, Federal Capital Territory Division, found the second defendant liable, a subsidiary of the third defendant operating under a joint agreement with the NNPC in tort in the litigation. The plaintiffs claimed against the defendants for their negligence in oil spillage from a pipeline causing environmental harm in the Niger Delta Region of Nigeria. The court found this in favour of the plaintiffs, and the case is significant because it analyzed parent-subsidiary relationships.

The court was influenced by the UK Supreme Court decision in *Lungowe v Vedanta Resources plc*[627] because there was no Nigerian precedent that touches directly on how to establish liability arising from a parent-subsidiary company relationship.[628] The decision of the Nigerian High Court in Obong Effiong Archiang & Ors cited above, alludes to the relationship between NNPC and MNCs. The trial judge concluded that

> It is a fundamental right of all persons and communities to clean and healthy environment. Legislations and agencies in place to address issues of environmental degradation, including the 1st Defendant [NNPC] must be seen to make sure that the legislations are complied with by oil companies. [NNPC] should not only be interested in the profit it shares with the 2nd Defendant [Mobil].[629]

[627] Lungowe v. Vedanta Resources plc [2019] UKSC 20. Lungowe v. Vedanta Resources plc UKSC 20 is a UK company law and English tort law case involving business liability for human rights violations, environmental damage, and a parent company's duty of care.
[628] Ibid. The court also referenced Oguru v Shell, supra note 87
[629] Obong Effiong Archiang & Ors, supra note 108 at 147.

While the plaintiffs claimed that Vedanta Resources plc violated its duty of care by failing to ensure that its Zambian subsidiary (Konkola Copper Mines Plc) did not harm the environment or local communities, the defendants claimed that the English court lacked jurisdiction to hear the claim and should stay proceedings on forum non conveniens grounds because it was an abuse of EU law. The Supreme Court unanimously decided on 10 April 2019 that Vedanta Resources plc could be sued in England under Zambian law, which was agreed to share similar principles to English tort law. The court ruled that Vedanta Resources plc, as the parent company, had assumed responsibility or owed a duty of care to the claimants who had been harmed by Vedanta's subsidiaries.

Similarly to Vedanta, the court held that a parent company based outside of Nigeria may be subject to the jurisdiction of Nigerian courts if the plaintiffs adequately plead facts demonstrating that the parent company has control and supervision over the subsidiary company in Nigeria. However, the facts necessary to demonstrate that the US parent company exercises such control and supervision over the Nigerian subsidiary company were not pleaded in this case. As the court correctly pointed out, holding a parent company liable in Nigeria may assist the plaintiffs in enforcing the judgement against parent companies that are frequently financially capable of satisfying the judgement sum. In effect, Nigerian courts may be following in the footsteps of their counterparts in the United Kingdom and the Netherlands.[630]

The fact that the court referred to the decision of the *Lungowe v Vedanta Resources plc* litigation in the UK and the decision of the *Oguru v Shell* litigation in the Netherlands in its judgement, demonstrates the indirect or persuasive influence that foreign courts can have on Nigerian courts when it comes to MNOCs.[631]

[630] Akinwumi Olawuyi Ogunranti, 'Voices fr oices from Below—Africa om Below—Africa's Contribution t s Contribution to the De o the Development of elopment of the Norm of Corporate Responsibility to Respect Human Rights'(2022) Schulich School of Law, Dalhousie University. 255-257 <https://digitalcommons.schulichlaw.dal.ca/cgi/viewcontent.cgi?article=1016&context=phd_disserations> accessed February, 2023

[631] Obong Effiong Archiang & Ors v Nigerian National Petroleum Corporation, Mobil Producing Nigeria Unlimited, & Exxon Mobil Corporation (5959) Las Conilas Boulevard Irving Texas, United States of America (USA) Unreported Suit No FHC/ABJ/CS/54/12.

5.6 Chapter Summary

The chapter has reviewed transnational litigations arising from the Niger Delta and initiated in the US, UK and Netherlands. The litigations were reviewed based on the facts of the case, plaintiffs' claims, defendant claims, issues for determination, and court decisions and the significance of the litigations. These litigations were initiated against two main multinational oil-producing companies and their subsidiaries operating in Nigeria - the first is Royal Dutch Shell and their subsidiary Shell Producing Development Corporation (SPDC) and the second is Chevron Plc and their subsidiary Chevron Niger Ltd.

In the United States, three cases have been examined: Wiwa v Shell, Kiobel v Shell, and Bowoto v Shell. The court held in the Wiwa v Shell lawsuit that it may exercise personal jurisdiction over SPDC and that the human rights breaches at issue came within the purview of the federal court's subject matter jurisdiction under the ATS. On the eve of trial in the proceedings against the holding corporations and Brian Anderson, and less than a week after the Court of Appeals' decision to remand the case against SPDC, the parties agreed on an out-of-court settlement for $15.5 million on June 8, 2009.

In the Kiobel v Shell litigation, the United States Supreme Court ruled that the Alien Tort Claims Act presumptively does not apply extraterritorially. This ruling was primarily motivated by concerns about the potential foreign policy consequences of allowing ATS-based claims with limited ties to the US legal order to be heard in US courts. On September 10, 2010, the Ninth Circuit Court of Appeals upheld a jury verdict in favour of Chevron Corporation. The court granted the defendant's motion to dismiss the claims under the Torture Victim Protection Act and the Alien Tort Claims Act, thereafter, dismissing the claim of crimes against humanity. In the Bowoto v Chevron litigation, the court delivered a complete defence verdict for Chevron.

This chapter examined two Niger Delta-related litigations filed in the United Kingdom (England) - Bodo v Shell and Okpabi v Shell. The court concluded in the Bodo v Shell lawsuit that, under the applicable clauses, harm caused by pipeline rupture or leaking as a consequence of third-party hostile conduct was, in theory, excluded and hence not recoverable; however, responsibility for pipeline negligence was theoretically possible. In 2014, the parties settled out of court for £55 million after the court was set to further examine the merits of the claims based on the evidence provided. This is quite significant because this is the first time compensation

has been paid to a large group of individuals impacted in this way in Nigeria by an oil spill. In the *Okpabi v Shell* litigation, the Supreme court ruled that it was at least arguable, based on the degree of control and de facto management, that Shell owed a duty of care to the claimant Nigerian citizens in respect of alleged environmental damage and human rights violations by Shell's Nigerian subsidiary (SPDC). The supreme court decision in this litigation was a determination of the threshold for jurisdiction and not a decision on the merits of the claim.

The chapter discussed two human rights and environmental litigations from the Niger Delta initiated in the Netherlands. The first litigation reviewed was *Oguru v Shell*, where the court ruled in its most recent 2021 that Royal Dutch Shell was responsible for two oil spills in the Niger Delta and liable to pay compensation. The court ruled that Royal Dutch Shell owes a duty of care to the villages impacted by the oil spill and is accountable (together with Shell Nigeria) for any failure to prevent future oil spills. Royal Dutch Shell was also ordered to install leak detection equipment in its pipes.

The second litigation is the *Kiobel v Shell*. In the most recent court decision on March 23, 2022, the court in The Hague dismissed Esther Kiobel's civil case due to a lack of evidence linking Shell to bribing witnesses to give false testimony at the trial of the "Ogoni Nine," which led to their execution. Shell has consistently denied the allegations. Esther Kiobel has stated that she will appeal the decision. The focus of this litigation should not only be to hold the defendant guilty of human rights abuses. There are other ways to engage with the plaintiff to address the harm caused. For example, Shell could settle out of court, tender an apology, and compensate the plaintiff for the years of pain to the Kiobel family. This action does not necessarily mean that Shell accepts responsibility, but it will no doubt be the first step to improving relations for alleged violations of human rights and the environment in the litigation. There is precedence in the *Wiwa v Shell* litigation in the US, where Shell settled out of court without accepting responsibility.[632]

[632] Shell, 'Shell Settles Wiwa Case with Humanitarian Gesture' (Shell 2009) <http://s3.amazonaws.com/fcmd/documents/documents/000/001/604/original/royal-dutch-shell-nigeria_wiwa_rdspr.pdf?1423020612#:~:text=Shell%20today%20agreed%20to%20settle,to%20benefit%20the%20Ogoni%20people> accessed 28 June 2022.

Chapter Six

Findings and Discussion of Transnational Human Rights and Environmental Litigations arising from the Niger Delta

6.1 Introduction

This chapter focuses on the general aspects of the litigations rather than the specifics of each litigation. In all the litigations discussed in Chapters 4 to 7, the core issue is that MNOCs use several mechanisms to derail the litigations, leading to a worsening of human rights and environmental litigations in the Niger Delta. This chapter draws some more general conclusions from the study of these litigations about the barriers and opportunities that plaintiffs face when initiating litigations against MNOCs in the home or host states due to the harm caused by the conduct of their subsidiaries.

It should be noted that, unless otherwise stated, the inferences drawn in this discussion are based on transnational human rights and environmental litigations abroad (the US, UK and Netherlands) rather than on the litigations in Nigeria. The litigations in Nigeria were discussed to demonstrate the challenges that victims go through in initiating litigations against MNOCs and their subsidiaries in Nigeria, which necessitated the decision to sue the MNOCs abroad. Furthermore, when discussing the relevant legal framework, the primary focus will be on the rules that apply in cases brought before the US, UK (England) and the Netherlands (an EU Member State court). This is because the MNOCs operating in Nigeria have their headquarters in these jurisdictions – the US, UK and Netherlands.

The rest of the chapter is organised as follows: Section 6.2 is the characteristics of the litigations. Sections 6.3 and 6.4 discussed the similarities and differences between the litigations, respectively. Section 6.5 discusses how MNOCs level of engagement with their human rights obligations affects litigations. Section 6.6 discusses the derailments in MNOCs litigations arising from the Niger Delta. Section 6.7 discusses the mechanisms used by MNOCs to derail human rights and environmental litigations arising from the Niger Delta. Section 6.8 critically analyses foreign human rights and environmental litigations involving Nigerian litigants using relevant literature. Section 6.9 summarises the chapter.

6.2 Characteristics of the Litigations Arising from the Niger Delta

Before we present an analysis of the litigations discussed in Chapters five (5) to seven (7), it is important to highlight the important characteristics of these litigations in a tabular form. Table 6.1 shows the characteristics of the litigations arising from Nigeria against MNOCs and their subsidiaries for violations of Human Rights and environmental violations in the Niger Delta.

The litigations discussed in chapters five (5) to seven (7) and analysed in this chapter are based on the latest decision or judgement (usually in the highest court that handled the case). The main source of data/information was the case judgment, as documented in reputable online databases such as Westlaw and Hein online. This analysis was complemented with case commentaries, journal articles and law reports from reputable law firms. We also analyse the case digest for the litigations in legal databases (e.g., Westlaw). These cases represent a mixture of civil (*Bodo v Shell*) and criminal claims (i.e., a series of bribery and corruption litigation in the Netherlands, Italy and Nigeria against the involvement of Shell and Eni in huge bribery and corruption scandal) Shel and Eni.

These litigations are very important for several reasons:

(i) It is important for the individuals and the local communities because this is the only way they can claim compensation and remediation for harm caused to them by Shell and its subsidiary in Nigeria. Tens of millions of dollars in fines, oil spill clean-up and legal expenses are at stake in each of these.

(ii) These cases set a significant precedent for the liability of businesses for their overseas activities, which would pave the way for more lawsuits, not just against Shell but also against other multinational corporations.

(iii) These litigations also shine the spotlight on the business model of many multinational companies (like Shell) in developing countries. Revenues that continue to flow from Nigeria to its parent company in the Netherlands and the UK is undoubtedly significant. Reuters estimated that Shell earned 4 billion from oil and gas operation from Nigeria in 2017, which was around 7 percent of its total global output. [633]Revelations from these case as well as research finding from United nations and Amnesty international shows that while Shell has

[633] Reuters, 'In Nigeria, Shell'S Onshore Roots Still Run Deep' (Reuters 2022) <https://www.reuters.com/article/ozabs-uk-nigeria-shell-idAFKCN1M50PO-OZABS> accessed 14 August 2022.

continued to generate profits, it has operated in a way that has harm to the environment and has not effectively remediated the damage it has caused.

(iv) It is not a coincidence that these cases are all focusing on the same country, Nigeria. The Nigerian legal system has been unable to offer victims of Human Rights abuse a meaningful avenue to seek justice.

(iv) The fact that these cases are not taking place in Nigeria underscores the difficulties of holding the parent companies and their subsidiaries liable for Human Rights and environmental violations. One of the main reasons for these difficulties is that Nigeria's Regulatory framework is undoubtedly weak and lacks independence.

(v) Finally, these litigations put back the very question that has been debated over many years regarding how to proactively address Human Rights and environmental violations. In other words, why should Shell have to wait for legal action before taking such actions and why would individuals and affected communities have to resort to legal action in order to obtain remedy. This is obviously that most of the damages would have been averted if Shell has taken a different approach.

Table 6.1. Characteristics of transnational human rights and environmental litigations against parent companies arsing from the Niger Delta, Nigeria.

SN	Cases	Location	Entity Sued	Duration	Status	Outcome
1	*Wiwa v Shell*	US	Parent	1999-2011	Completed	Resulted in compensation
2	*Bowoto v Chevron Corp*	US	Parent/ Subsidiary	1999-2010	Completed	Case decided in favour of Chevron
3	*Kiobel v Shell - I*	US	Parent/ Subsidiary	2008-2013	Completed	Case decided in favour of Shell
4	*Bodo v Shell/SPDC*	UK	Parent	2008-2015	Completed	Resulted in compensation
5	*Okpabi v RDS*	UK	Parent	2015-2020	Completed	No liability for the parent company. Awaiting appeal to the supreme court
6	*Oguru v Shell*[634]	Netherlands	Parent/ Subsidiary	2008-2020	Completed	The court ruled that Shell was liable for oil spills and should pay compensation to victims

[634]Oguru v Shell District Court of The Hague (15 September 2011). [56] See *Okpabi* (n 30).

7	*Kiobel v. Shell* - II	Netherlands	Parent	2017- 2020	Ongoing	The court (i.e., the Hague) dismissed the litigation due to a lack of evidence linking Shell to bribing witnesses to give false testimony during the "Ogoni Nine's" trial, which led to their execution.

Source: Compiled by the author[635]

[635]The seven cases have been arranged according to completion status. The last two cases were filed in March 2016.

6.3 Legal issues in the Litigation that are similar

This section presents key legal issues in the litigations that are similar across the litigations. By knowing the legal issues in the litigations that are similar, it will then be possible to identify the trends and patterns and possibly explain the response of MNOCs to their human rights obligations in litigations.

6.3.1 Existence and Non-Existence of Jurisdiction

Based on the litigations reviewed, there seems to be a pattern in terms of the arguments put forward by parent companies in their defence. The parent company's arguments seem to be a lack of jurisdiction. The issue of jurisdiction could either be related to personal jurisdiction or subject matter jurisdiction.

Personal jurisdiction refers to the power of the court to adjudicate the rights and obligations of a person, corporation, or other legal entity within its jurisdictional reach. A court with personal jurisdiction has the authority to rule on the law and facts of the case, as well as the authority to order the parties to the case to comply with its ruling. Personal jurisdiction arises in a situation where the plaintiffs, due to the challenges in the host country of the subsidiary company, initiate litigation against an MNOC in the home country of the parent company.[636] One of the major issues raised in the *Wiwa v Shell* litigations was whether the US court handling the case could exercise personal jurisdiction over the defendant holding companies, which had offices in England and the Netherlands. The court ruled that it had personal jurisdiction to hear the claim against Shell.

Subject-matter jurisdiction refers to the authority of a court to hear cases of a particular type or cases relating to a specific subject matter (e.g., an election court set up to attend to election disputes and a bankruptcy court set up to attend to bankruptcy cases). The legal argument in the *Kiobel v Shell* litigation (US) centred on the issue of subject-matter jurisdiction because it primarily dealt with matters relating to the division of regulatory powers between the US state court and the US federal court concerning the subject matter in dispute.[637] Again, in the *Wiwa v Shell* litigation, one of the core issues for determination was whether the human rights

[636] Skinner and others (n 274) 52-59
[637] Enneking (n 97) 519-522

violations at issue fell within the scope of the US federal court's subject matter jurisdiction on the basis of the ATS. The District Court ruled that it could exercise subject matter jurisdiction under ATS. In *Oguru v Shell*, the court's jurisdiction over the claims against Royal Dutch Shell was given under the EU's Brussels I Regulation[638], while the court's jurisdiction over against SPDC was given on the basis of Article 7(1) Dutch Code of Civil Procedure[639], a Dutch domestic rule on international jurisdiction that allows Dutch courts to exercise jurisdiction over claims against co-defendants in proceedings in which they have jurisdiction with respect to one of the defendant.[640]

One approach used by MNOCs in human rights litigations to justify the lack of jurisdiction is to invoke forum non conveniens. The principle of forum non conveniens keeps courts from pushing ahead with a case in the jurisdiction in which it is filed because another jurisdiction is the more suitable area for litigation. This is because of the parties involved, witnesses, and evidence, and given that the court is more acclimated to the local law, which is usually the law associated with the circumstance.[641] In the *Wiwa v Shell* litigation, the Court of Appeals for the Second Circuit reversed the decision of the District Court on the grounds of forum non-conveniens. The courts ruled that two of the plaintiffs were lawful residents of the US and that it would be inconvenient and expensive for the plaintiffs to initiate the litigation in England and Netherlands.

MNOCs often claim to do this in the interest of the victims to make it less expensive, less stressful, and easier for victims to exploit their vast knowledge of domestic laws. However, this often implies that the case is rejected under the principle that it can be initiated in the host State. In any case, that is regularly not the situation. Statistics show that most litigations rejected on the grounds of forum non conveniens grounds in developed countries (e.g., the US) are never refiled in other places, leaving the victims with no remedy. Even if it is initiated in another jurisdiction, the focus of the claims may be different. The recent *Kiobel v Shell* case, cleared to proceed in the Netherlands, further illustrates this point. After exhausting all avenues

[638] Articles 2 and 60 Brussels I Regulation (now Articles 4 and 63 Brussels I Regulation (recast)). Note that Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 2001 L 12/1 (16 January 2001) (Brussels I Regulation) has been replaced by Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ 2012 L 351/1 (Brussels I Regulation (recast)).
[639] Article 7(1) Dutch Code of Civil Procedure
[640] Enneking (n 97) 528.
[641] Peter Muchlinski, 'Corporations in International Litigation: Problems of Jurisdiction and the United Kingdom Asbestos Cases' (2001) 50 International and Comparative Law Quarterly 1.

to seek justice in the US following the Kiobel court judgment, which favoured the parent company, Mrs Esther did not file the case in Nigeria. Instead, the plaintiffs approached the Dutch court to hear the case again.[642]

6.3.2 Examination of the Corporate Group Structure and the relationship between MNOCs and subsidiaries

In many human rights litigations, the central issue for determination has been examining the corporate group structure and its pertinence to the presence of the duty of care of the parent company. This issue arises because corporate groups are organized as a network of distinct legal entities, with varying degrees of influence exercised by the parent company on its subsidiaries or other parts of a business enterprise.

Additionally, in many countries, there is an absence of liability concerning the parent company over which the home state has jurisdiction in connection to its subsidiaries' activities because of limited liability statutes. Therefore, claimants would have to either establish direct participation of the parent companies, close relationships between the parent and subsidiary (e.g., similar boards of directors, common policies, common policymakers etc.), pierce the corporate veil, or provide sufficient facts to hold the parent company liable, otherwise the victims will be without a remedy for Human Rights abuses.

It is difficult for victims to hold parent companies liable if they cannot establish a link between the behaviour of the subsidiary to the parent. The *Okpabi v Shell*[643] case is a good example that illustrates this point. The claimants contended that RDS breached the duty of care owed to them to guarantee that SPDC's activities in the Niger Delta did not damage the environment. The cases were unsuccessful mostly because the claimants could not prove that there was any duty of care upon RDS as a parent company of SPDC (Nigeria). The court ruled that RDS was a parent company without any activities at all. In particular, the court ruled that the two officers of RDS were individuals from the Executive Committee of the Shell Group and RDS just managed the budgetary issues of the business that influence it as a parent company. Likewise,

[642] Center for Constitutional Rights, 'Kiobel V. Royal Dutch Petroleum Co. (Amicus)' (Center for Constitutional Rights, 2022) <https://ccrjustice.org/home/what-we-do/our-cases/kiobel-v-royal-dutch-petroleum-co-amicus> accessed 25 August 2022.
[643] *Okpabi and others v Royal Dutch Shell Plc and another* [2018] EWCA Civ 191.

it additionally expressed that RDS did not hold any significant permit to lead activities in Nigeria, and it did not have detailed information on oil exploration. The judgment in *Okpabi v Shell* affects the progress of the tort prosecution against TNCs in the English courts. Amnesty International has concluded that the judgment "gives green light for corporations to profit from overseas abuses"[644].

6.3.3 Establishing Direct Liability on MNOCs

An important similarity relates to the fact that the plaintiff will always try to establish liability on the parent company by linking the behaviour of the subsidiary to the parent. The approach used to establish the link is a different question altogether, as there are several approaches that this may be done. The litigations in the UK (England) and the Netherlands show that the claimants tend to prove that the parent companies failed to exercise due diligence in controlling the acts of its subsidiaries over which they may exercise control. For example, in the *Bodo v. Shell*[146] case, the parent company (i.e., Shell) was held liable on the grounds that it owed a duty of care to members of the Bodo community for oil spills in the Niger Delta. The court ruled that Shell was liable for spills from their pipelines because it failed to take reasonable measures to protect them from malfunction or oil theft. In 2015, Shell accepted liability for the spills, agreeing to pay 55 million pounds to Bodo villagers and to clean up their lands and creeks. The claimants also used the due diligence approach in a similar case, the *Oguru v Shell* case in the Netherlands. In its most current ruling, the court found RDS and Shell Nigeria liable for the oil spills because they failed to take sufficient steps to prevent sabotage. Therefore, the court ordered Shell to clean up and install leak detection systems on its pipelines.

6.3.4 Burden of Proof

The cases examined demonstrate victims' considerable burden to establish their claims. In most European legal systems, the absence of a disclosure rule requiring the defendant to disclose

[644] Amnesty, 'UK: Shell Ruling Gives Green Light for Corporations to Profit from Abuses Overseas' (*Amnesty*, 2018) <https://www.amnesty.org/en/latest/news/2017/01/uk-shell-ruling-gives-green-light-for-corporations-toprofit-from-abuses-overseas/> accessed 5 May 2018.

material in its possession presents a substantial barrier for plaintiffs. This is made worse by the challenges in gathering evidence and the requirements for information disclosure or discovery.

The plaintiffs in the *Oguru v. Shell* case asked Shell to turn over important records that would have supported their case.[645] The records covered issues like the state of the oil pipelines, internal Shell Group policies, and operating procedures. However, the court determined in September 2011 that Shell was not compelled by Dutch law to disclose this information, which significantly hindered the claimants' access to the data they needed to support their claims. This issue was eventually resolved when the court ordered Shell to bring the document to the court for analysis.

The plaintiffs also face similar difficulty in the litigations against parent companies in the US. In the *Kiobel v Shell*, the claimant accused Shell of bribing and intimidating witnesses not to give evidence against the companies. Some of these witnesses live and work for Shell, and so they are intimidated not to provide evidence or testify against Shell in the litigations.[646]

6.3.5 Length of time in bringing claims and completing litigation

Many of the litigations that have been brought against multinational companies take a very long time before the cases are even heard. For example, in the *Wiwa v Shell* case in the US, it took twelve (12) years for the case to be heard. In *Bowoto v Chevron,* it took over seven (7) years for the case to be heard. Even if the litigations are cleared to be heard in the home state, the case itself can run for another five to ten years. This similarity is seen in many of the cases arising from the Niger Delta, and it is a classic policy of most multinational companies to deny, delay and derail justice.

Most of the legal challenges to claims by victims of Human Rights and environmental violations significantly increased the delay and cost for the plaintiffs. These include

[645] *Oruma Subpoena*, Milieudefensie, https://www.milieudefensie.nl/publicaties/bezwarenuitspraken/ subpoena-oruma/view.
[646] Prakken d'Oliveira, ' Shell summoned to court over unlawful executions in Nigeria', June 28, 2017, htpps://www.prakkendoliveira.nl/en/news/2017/shell-summoned-to-court-for-involvement-in-unlawful-executions-in-nigeria

challenging the allegations on the grounds of lack of jurisdiction, challenging the legal standing of third parties in the case, and challenging the grounds of lis pendens.

In the *Oguru v Shell* litigation, for example, Shell maintained that it was not accountable for the wrongdoings of its Nigerian subsidiary and that the Dutch courts were not the right forum to hear the claim against Shell Nigeria.[647] It took the court until December 2009 to rule that "reasons of efficiency supported a joint hearing of the claims against Shell and Shell Nigeria"; this alone took almost ten months."[648]

Another procedural rule that MNOCs exploit is to increase the length of time of the litigation by requesting a postponement of the case on the grounds of lis pendens, a doctrine that allows the court to stay proceedings due to ongoing litigation in another jurisdiction. For example, Shell argued in *Oguru v Shell* litigation that the claims of Friday Alfred Akpan - the plaintiff in the Ikot Ada Udo case, be postponed on the ground of lis pendens. This argument was rejected by the court.[649] Finally, Shell claimed that Friends of the Earth Netherlands lacked sufficient standing to pursue the action, but the court rejected this claim as well.

6.4 Legal issues in the Litigations that vary

In this section, we discuss some of the differences in the litigations concerning the Human Rights obligations of MNOCs. Knowing the legal issues that are dissimilar will help us explain the variation in the response of parent companies (and their subsidiaries) regarding their Human Rights obligations owed to the Niger Delta communities.

6.4.1 Declining Jurisdiction

One of the main differences in litigations relates to the approach used by both the parent companies and the victims of Human Rights violations to prevent the court from declining jurisdiction. Depending on the jurisdiction where the case is being initiated, the claimants may benefit from laws that prevent the court from declining jurisdiction to hear the claims in

[647] Skinner and others (n 75) 94
[648] ibid
[649] Enneking, Liesbeth, 'Foreign Direct Liability and Beyond - Exploring the Role of Tort Law in Promoting International Corporate Social Responsibility and Accountability' (2012). Eleven International Publishing. 116-117. Available at SSRN: https://ssrn.com/abstract=2206836

Europe. Liability cases brought against defendants with residence in the forum State must be filed in a court in that state in accordance with the Brussels I Regulation.[650] Therefore, in European countries such as the United Kingdom and the Netherlands, the concept of extraterritorial jurisdiction is not as difficult as it is for enterprises that are not based in the European Union.

Brussels I has been increasingly important for victims of European Union-based enterprises in recent years.[651] The European Court of Justice has rejected the use of the doctrine of forum non-conveniens in the European Union. The European Parliament has taken note of the Brussels I Regulation, which requires national courts within the European Union to recognise their jurisdiction in cases involving Human Rights violations committed abroad, particularly in developing States where European multinationals operate as a result of the actions of the companies.[652] The law of the Member States addresses the question of whether or not a court has jurisdiction over a non-EU business, such as a foreign subsidiary of a European company. It should be mentioned that even with the introduction of the Brussels I Regulation, there are still significant impediments for victims to submit their claims to courts in the European Union due to complicated corporate structures and the principle of limited liability.[653]

6.4.2 Choice of Applicable Law

Courts conduct a choice of law/applicable law analysis to identify the appropriate law when hearing cases involving damage occurring in another jurisdiction. The application of the law of the state where the violation occurred may create substantial obstacles to litigation, such as when the chosen law (often the host State's law) affects statutes of limitations and does not recognise or limit vicarious or secondary liability. Other barriers also include when the chosen

[650] Gerlinde Berger-Walliser, 'Reforming International Human Rights Litigation Against Corporate Defendants After Jesner V. Arab Bank' [2019] SSRN Electronic Journal; Maja Stanivukovic, 'Recasting of the Brussels I Regulation and Its Impact upon Third Countries, In Particular Serbia' (2011) 45 Zbornik radova Pravnog fakulteta, Novi Sad

[651] Brussels I (n 32). The Brussels I Regulation consolidated the European Community Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 27 September 1968 into European Community law: its principles were extended to EFTA States by the Lugano Convention of 1988.

[652] European Parliament resolution on the Commission Green Paper on Promoting a European framework for Human Rights (COM (2001) 366 – C5-0161/2002 – 2002/2069(COS)) (2002).

[653] AAH. van Hoek, Transnational Corporate Social Responsibility: Some Issues with Regard to The Liability of European Corporations for Labour Law Infringements in The Countries of Establishment of Their Suppliers (Kluwer Law International 2008).

law has elements for its torts that are more difficult to prove than under the forum State's common law or provide stricter immunity than under the forum State's common law.[654]

In most European countries, including the UK and Netherlands, the Rome II Regulation applies to tort obligation claims exhibited to the national courts of the EU Member States. This Regulation, on a fundamental level, assigns the law of the State in which the harm happened as the applicable law. Civil liability claims are decided based on the rules in force in the State where the damage occurred.[655] For example, in *Oguru v Shell* case in the Netherlands, the court allowed Nigerian law to be applied to certain aspects of the case. Specifically, based on Nigerian law, the Dutch court ordered a Nigerian legal entity (SPDC) to pay damages to a Nigerian claimant for damage suffered in Nigeria.[656]

6.4.3 Class Action Mechanism and Legal Standing of Third Parties

A class action is a collective redress mechanism where a group of interested parties brings a claim to the courts collectively. Class action litigating can be an efficient way to ensure remedy for a large number of victims. Class action litigation in Human Rights cases in the United States has occurred in several litigations. However, the large majority of Human Rights cases have not been brought as class actions. The recent cases of Human Rights litigations arising from the Niger Delta seem to suggest that this is a barrier in the US. This is not the case in European countries. Specifically, in the United Kingdom, procedural rules enable courts to allow collective actions on an opt-in basis.

A related issue to the collective redress mechanism is the standing of third parties. In the US, most of the litigations brought against parent companies have been brought by either individual victims or by multiple victims who have "standing" to bring the case, and third-party standing is permitted only in certain limited circumstances where the third party themselves have

[654] Skinner and others (n 274) 125-130
[655] The Rome II Regulation (EC) No 864/2007 is a European Union Regulation regarding the conflict of laws on the law applicable to non-contractual obligations. From 11 January 2009, the Rome II Regulation creates a harmonised set of rules within the European Union to govern choice of law in civil and commercial matters (subject to certain exclusions) concerning non-contractual obligations, including specific rules for tort/delict and specific categories of tort/delict, unjust enrichment, *negotiorum gestio* and *culpa in contrahendo*.
[656] Enneking (n 24) 44-54

suffered an injury. Litigants interested in the outcome of a case that has not otherwise been injured by the actions of the defendant are not allowed in U.S. courts on behalf of third parties. This does not appear to be a problem in the European member states where it is increasingly being recognised. In the domestic court of member states, associations/nongovernmental organizations may file claims for damages based on the statutory interest they represent, or in other terms, on purpose for they have been established.

In the Netherlands, the District Court upheld its 2010 interlocutory ruling allowing Friends of the Earth Netherlands' claims in the *Oguru v Shell* action to proceed (Milieudefensie). The court found that the NGO could bring a complaint regarding issues that fall completely outside the scope of Dutch law. The NGO met the formal conditions of engaging in genuine actions connected to the case (campaigns focused on decreasing environmental damage caused by Nigerian oil production) and the lawsuit fits within its statutory goal of environmental protection.[657]

6.4.4 Approach to Establishing Liability on Multinational Oil Companies (MNOCs)

Another aspect in which the litigations vary is the approach of establishing liability on the parent company. In the US, litigations have mostly relied on the Alien Tort Statute (ATS) and other related statutes, such as the Torture Victim Protection Act of 1992 and the Racketeer Influenced and Corrupt Organizations Act (RICO). The three main litigations from the Niger Delta that relied on ATS include *Wiwa v Shell*, *Kiobel v Shell* and *Bowoto v Shell*. In the 2013 decision of *Kiobel vs Royal Dutch Petroleum*, the US Supreme Court held that the Alien Torts Act, which grants jurisdiction to federal district courts over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States" does not apply to claims where the plaintiff, the defendant, and the allegedly tortious conduct lack any connection to the US.

In the *Kiobel v Shell* case, the US Supreme Court held that the presumption against extraterritoriality applies to all cases filed pursuant to the ATS to sue a corporation in the United States for wrongs allegedly committed abroad. Plaintiffs can rebut the presumption when "claims touch and concern the territory of the United States" with "sufficient force."

[657] Skinner and others (n) 54

Importantly, the Supreme Court held that a plaintiff must prove that a defendant has more than a "mere corporate presence" in the United States. Curtis Bradley submits that the United States Supreme Court has considerably limited the use of ATS in the *Kiobel v Shell* case.[658] However, Anthony Colangelo argues that the court decision has not entirely erased the possibility of future claims involving foreign elements because the court has left the door open by stating that claims have to sufficiently "touch and concern" the United States.[659]

In the UK and Netherlands, litigations have mostly relied on establishing direct liability on the parent using general rules of tort law and the tort of negligence. Examples of the case are *Bodo v Shell*, *Okpabi v Shell* (in the UK) and *Oguru v Shell* (in the Netherlands). This was the approach used in the *Bodo v Shell* litigation, where the core argument put forward by the claimant was that the parent company owed a duty of care to the victims and that it had the power to ensure that adequate steps were taken to avoid the harm. As result of relying on the doctrine of due diligence and duty of care, this makes US court decisions in human rights litigations irrelevant and largely unimportant if such litigations were brought in the United Kingdom.

6.4.5 Settlement out of court

There is variation in terms of the way these litigations were settled. When the parent company is convinced that the outcome will be favourable to them, they would prefer to see out the litigation to the end. Some examples of this case are *Kiobel v Shell* and *Bowoto v Chevron*. As expected, when the parent company thinks that the outcome may either not be in their favour or result in severe reputational damage, they usually decide to settle out of court. Some of these litigations have been settled out of court, for example, *Wiwa vs Shell* and *Bodo v Shell* case. In the *Bodo v Shell* case, the parties reached an out-of-court settlement with a payment of £55 million to the victims when it became clear to Shell that they would be found guilty based on new emerging evidence. It was discovered in November 2014 that documents submitted to the

[658] Curtis Bradley, 'Supreme Court Holds That Alien Tort Statute Does Not Apply To Conduct In Foreign Countries' (2013) 17 ASIL Insight <https://www.asil.org/insights/volume/17/issue/12/supreme-court-holdsalien-tort-statute-does-not-apply-conduct-foreign> accessed 1 October 2018.

[659] Anthony Colangelo, 'The Alien Tort Statute and the Law of Nations in Kiobel and Beyond', Georgetown Journal of International Law 44 (2013) 1329-1346

UK High Court appeared to support the idea that Shell had been informed of the "risk and hazard" of the pipeline before the oil spill that impacted the Bodo community.[660]

Shell's settlement with the Bodo group means that the Nigerian plaintiffs can seek compensation without having to go through a possibly lengthy court process-something we have not seen in other such cases. This is not necessarily a good outcome in the sense that the claimants and the public have been prevented from knowing the full facts of the case and also from facing the full weight of the law. However, if the plaintiffs continued to appeal, it might have set a significant legal precedent and clarified English courts' status for prospective companies.

The way the *Bodo v Shell* litigation ended is echoed in the case of *Wiwa v. Shell*, where the plaintiff alleged Shell was complicit in the summary execution of a group of Nigerian Ogoni activists. This case resulted in a settlement following a lengthy court dispute, but the allocation of the insurance funds was complicated here.[661] For both cases, the confluence of Shell's reputational damage from a public legal dispute with the likelihood of unfavourable judgement for the plaintiffs led to an out-of-court settlement.[662]

6.5 Impact of MNOCs' Level of engagement on Human Rights Litigations

MNOCs' level of engagement with their human rights obligations affects human rights litigations. Multinational oil companies have complete control over formulating and implementing human rights obligations (e.g., health and safety standards) for all their subsidiaries. The extent of this control maps to the different levels of engagement of MNOC with their human rights obligations - inactive, reactive, active and proactive. The different levels of engagement are inspired by the work of Rob van Tulder transition model, which identifies four stages in the process of sustainable development.[663] The different levels of

[660] Business & Human Rights Resource Centre, 'Shell lawsuit (re oil spills & Bodo community in Nigeria)' < https://www.business-humanrights.org/en/latest-news/shell-lawsuit-re-oil-spills-bodo-community-in-nigeria/> accessed on August 31, 2022

[661] United States District Court Southern District of New York, Wiwa et al. v. Royal Dutch Petroleum, Wiwa et al. v Brian Anderson, Settlement Agreement and Mutual Release, <https://ccrjustice.org/ sites/default/files/assets/Wiwa_v_Shell_SETTLEMENT_AGREEMENT.Signed-1.pdf> accessed August 31, 2022.

[662] Elodie Aba, 'Shell & The Bodo Community – Settlement Vs. Litigation' (2020) <https://www.business-humanrights.org/en/blog/shell-the-bodo-community-settlement-vs-litigation/> accessed 25 August 2020.

[663] Rob van Tulder and others, *Managing The Transition To A Sustainable Enterprise: Lessons From Frontrunner Companies (New York: Routledge, 2014).* (Routledge 2014).

engagement show how MNOCs can develop and evolve their human rights obligations in the future towards a proactive level of engagement. The different MNOCs' levels of engagement are discussed below:

Inactive Level of Engagement

In the inactive level of engagement, the role of the company is to avoid liability; always defensive and calculating how to get away with the allegations. This means that the company continues with its actions as long as the company can get away with them. In the inactive level of engagement, there is no consultation with societal organizations, unless there is a strong commercial interest, which is uncommon. The role of the company towards business operations is to ignore the rights and interests of the individuals and local communities simply because it has the legal license to operate. An example is when an MNOC approaches the litigation to defend and calculate how to kill the case by refusing to disclose evidence and reference the content or existence of the evidence required by the plaintiffs. Another example is when an MNOC fails to prevent oil spills and when oil spills occur, they blame the cause on sabotage instead of faulty pipeline. This is the approach used by many MNOCs in litigations arising from the Niger Delta to avoid liability for remediation and compensation to local communities after the oil spill.[664]

Reactive Level of Engagement

In the reactive level of engagement, the role of the company is to avoid liability; always defensive and calculate how to reduce the risks due to the fallout from the allegations. This means that the company continues with its actions as long as these are not expressly prohibited. Companies respond specifically to the actions of external stakeholders (e.g., civil society organizations) that could damage their reputation.[665] In this approach, although the company still has a legal license to operate, the company's attitude towards business operations is to respect the rights and interests of the individuals and local communities if it is inevitable. An example is when an MNOC approaches the litigation to defend and calculate how to minimize risk by disclosing evidence and referencing the content or existence of evidence required by

[664] Amnesty International, 'Nigeria: Petroleum, Pollution And Poverty In The Niger Delta' (Amnesty International 2009).
[665] Rhuks Ako and Eghosa O. Ekhator, 'The Civil Society and The Regulation of The Extractive Industry In Nigeria' (2016) 7(1) Journal of Sustainable Development Law and Policy (The).183-203

the plaintiffs only if it is unavoidable due to legal obligations or pressure from the government and investors. Another example is when an MNOCs accepts liability for oil spills only when it is presented with evidence that cannot be disregarded. The Federal Government's amnesty initiative in collaboration with oil companies to reform and train militants is also regarded as a reactive level of engagement to curb conflicts in the Niger Delta. This initiative brought some relief, but due to a lack of legal support, it is unsustainable as a long-term project.[666]

Active Level Of Engagement

In the active level of engagement, the company's role is to take responsibility for resolving the dispute by providing damages. This indicates that the company will continue to act in an active, ethical manner. More dialogue, questioning, and exchange of ideas, as well as operational collaboration, are all part of the level of engagement with stakeholders. In its operational and strategic decisions, as well as when interpreting the company's legal obligations, the company explicitly and positively considers the rights and interests of third parties. An example is when an MNOC approaches litigation to resolve the dispute by disclosing evidence and referencing the content or existence of evidence required to support the plaintiff's claim without conditions. Another example is when an MNOC not only accepts liability for oil spills even if it was caused by sabotage but actively engages with stakeholders, especially, local communities to clean up the polluted areas and pay compensation. In the *Bodo v Shell* litigation, Shell accepted to be actively involved in the remediation and compensation for the local communities, although it has to be pointed out that this was only after evidence emerged that they were warned about the poorly maintained oil pipelines in the Bodo community.[667]

Proactive Level of Engagement

In the proactive level of engagement, the company's role is to take responsibility for resolving the dispute by providing a proper remedy which may include apologies and explanations. This indicates that the company will continue to act proactively to shape and implement human rights obligations in close collaboration with stakeholders. The essence of the engagement is

[666] Rhuks Ako, 'Environmental Justice in Nigeria's Oil Industry: Recognizing and Embracing Contemporary Legal Developments' [2014] Global Environmental Law at a Crossroads.
[667] Business & Human Rights Resource Centre, 'Shell Lawsuit (Re Oil Spills & Bodo Community In Nigeria)' (Business & Human Rights Resource Centre 2022) <http://business-humanrights.org/en/shell-lawsuit-oil-spills-bodo-community-in-nigeria> accessed 15 August 2022.

to not only respect human rights and prevent harm to others but also to work with stakeholders, particularly local communities, to find structural solutions to problems and issues. An example is when an MNOC approaches the litigation to resolve the dispute by disclosing evidence and referencing the content or existence of evidence, which contributes to improving the plaintiff's ability to obtain evidence. Another example is when an MNOC not only accepts liability for oil spills even if it was caused by sabotage but proactively puts in place appropriate mechanisms such as installing leak detection equipment in its pipelines. UNEP undertook an independent study of the environmental and health implications of oil contamination in Ogoniland, Niger Delta, as well as remediation strategies, at the request of the Federal Republic of Nigeria. Shell accepted to support the study and accept its report[668].

Ochei et al., evaluate each level of engagement against a selected set of transnational human rights and environmental litigations arising from the Niger Delta. This evaluation shows that MNOCs who adopt a proactive stance see upholding their human rights obligations as a shared social duty and are more likely to investigate the circumstances behind a complaint to address the root causes in cooperation with all stakeholders.[669] A summary of MNOCs level of engagement with their human obligations in transnational litigations arising from the Niger Delta is shown in Table 6.2.

Table 6.2. MNOCs Levels of engagement with Human rights and environmental obligations

Levels of engagement	**Role of company**	**The attitude of the company during litigations**	**Example engagement during litigation**
Inactive	No engagement. Avoid liability	Always defensive and calculating how to get away with the allegations.	Refusing to disclose evidence. Blame the cause of the oil spill on sabotage instead of a faulty pipeline. (*Bodo v Shell*)
Reactive	No engagement unless it is	Always defensive and calculating how to reduce	Blame the cause of the oil spill on sabotage. Disclose

[668] United Nations Environment Programme (UNEP), 'Environmental assessment of Ogoniland Report', (2011) <https://postconflict. unep.ch/publications/OEA/UNEP_OEA.pdf> accessed August 31, 2022.
[669] Nkem Violet Ochei, Elimma Ezeani and Craig Anderson, 'MNOC's Level of Engagement with Human Rights Obligations in Transnational Litigations from The Niger Delta' (2021) 7 PEOPLE: International Journal of Social Sciences.

	unavoidable. Avoid liability	the risks due to the fallout from the allegations.	evidence only if it is unavoidable due to legal obligations or pressure from the government and investors. (*Bodo v Shell*)
Active	Actively engages with stakeholders. Take responsibility for causing harm.	Engages with victims to resolve the dispute by providing damages.	Disclose evidence without conditions. Accepts liability for oil spills even if it was caused by sabotage. (*Bodo v Shell*; UNEP, 2021)
Proactive	Engages with stakeholders in a proactive way to control the situation. Take responsibility for causing harm	Engages with the plaintiff to resolve the dispute by providing a proper remedy which may include apologies and explanations	Disclose evidence without conditions. Contributes to improving the plaintiff's ability to obtain evidence. Proactively puts in place appropriate mechanisms to resolve the dispute (e.g., installing leak detection equipment in its oil pipelines) (*Oguru v Shell*, 2010b)

There are several areas where the MNOC's (poor) level of engagement with their human rights obligations affects human rights litigations. These include the doctrine of a separate legal entity, transparency and disclosure of evidence, lack of understanding of the complex nature of MNOC's relationship with their subsidiaries, joint action mechanism, and delay of the litigation. On the issue of disclosure, MNOC's reluctance to disclose evidence during litigations stems from a poor level of engagement. Disclosure of evidence is an important Human Rights obligation of MNOCs, and it directly affects the ability of plaintiffs to prove their case in litigations. In the ligations that we have reviewed, it is easy to see why MNOCs are generally reluctant to disclose relevant plaintiffs to prove their case. MNOCs are only

willing to do so when it is inevitable, for example, when courts force them to disclose evidence.[670]

The discovery and obtaining of documentation required for litigation are significant for plaintiffs to access remedies. The discovery process and access to public records have, for the most part, provided ample details on the relationships between parents and subsidiaries operating in many countries. For example, MNOCs with jurisdiction over which the courts can deny any involvement in subsidiaries' actions yet often will not produce information about the subsidiaries, including details about their relationships with the subsidiaries. A court may usually deny any discovery order unless a claimant can prove there is information that the parent only knows and precisely knows the type of information known by the parent company**.**

The *Oguru v Shell* litigation is a good example that shows how a poor level of engagement of MNOCs affected the plaintiff's ability to prove their case. The plaintiff faced an enormous challenge in putting forward their allegations due to difficulty obtaining internal information - both from Shell and Shell Nigeria - concerning the business operations. The court initially dismissed the claimants' request to order Shell to disclose documents that could prove their case. On appeal, the Court of Appeal ordered RDS to disclose specific audit reports, letters of assurance, incident reports, and documents regarding the oil pipelines. The court also ruled that these documents will not be handed over to the claimants but will be available for inspection at a notary's office by legal representatives of the claimants and court members.[671]

6.6 Derailments in MNOCs Litigations arising from the Niger Delta

This section discusses derailments in litigations, phases of mechanisms for derailments in litigations, and the types of human rights with associated mechanisms for derailing litigations.

6.6.1 What Is Derailment in Litigations

The term 'Derailment' within the context of this thesis means "to prevent a litigation process from succeeding"[672]. In other words, it means the obstruction of a litigation process by diverting it from its intended course, which is to obtain remediation and compensation for

[670] Dam (n 14)
[671] Gwynne (n 62) 1808. See Dam (n 13).
[672] "Derail". Merriam-Webster Dictionary. Retrieved at https://www.merriam-webster.com/ on March 3, 2021

victims of human rights and environmental violations. Litigation is a highly structured process of dispute resolution that invokes the power of the state, or a contractually agreed-upon private decision-maker, to provide a means to adjudicate a dispute between two or more parties authoritatively. Litigation is typically conducted through agents (lawyers) who have their own set of incentives. The methods, rules and laws governing the litigation process (e.g., filing complaints, motions, petitions, interrogatories) could be exploited by MNOCs to derail the litigations. This thesis refers to such acts as "mechanisms for derailment" in litigations.[673] Human rights and environmental litigations initiated against multinational oil companies are frequently criticized as costly and slow, resulting in violations of human rights and the environment.

A related legal issue to the concept of "derailment" of litigations is "abuse of process". An abuse of process is the unjustified or unreasonable use of legal processes or process by an applicant or plaintiff in an action to further a cause of action.[674] It is a claim made by the respondent or defendant that the other party is abusing or perverting the regular court process (civil or criminal) in a way that is not supported by the underlying legal action.[675] There are several actions where the court might consider a case as an abuse of process. These include - delay, double jeopardy, breach of promise, loss of evidence/failure to disclose unused material, investigative impropriety and pre-trial publicity. Several of the mechanisms used by MNOCs during human rights and environmental litigations, such as requesting several interlocutory appeals amount to an abuse of process. In the *Oguru v Shell* litigation, for example, Cees Van Dams concluded that Shell's request to be allowed to challenge the preliminary judgement of the Court of Challenge before the Dutch Supreme Court (Hoge Raad) rather than waiting for the Court of Appeal decision on the merits was intended to cause further delay, increasing the time, effort, and costs for the claimants.

[673] Mechanisms for derailment include - filing complaints, answers and demurrers, serving documents on the opposition, setting hearings, depositions, motions, petitions, interrogatories, preparing orders, giving notice to the other parties, the conduct of trials, and all the rules and laws governing that process.
[674] Health and Safety Executive(HSE), 'What is abuse of process?' (Health and Safety Executive 2022) <https://www.hse.gov.uk/enforce/enforcementguide/court/abuse-abuseprocess.htm> accessed 22 December 2022.
[675] Bretz C, "Abuse of Process, a Misunderstood Concept" (1971) 20 Cleveland State Law Review 401- 408

6.6.2 Phases of Derailment in Litigations

The phases of derailment in the Human rights and Environmental Litigations process are divided into three: before the court hearing, during the court hearing and after the court hearing. Figure 6.1 shows the different phases in the human rights and environmental litigation process. Table 6.3 summarises the features of the three phases in the litigation process.

6.6.2.1 Before the Court hearing

This phase involves all mechanisms before the plaintiffs' claims are finally heard in court. This is a very important stage in the overall litigation process because it is common for the defendant to engage in various practices to prevent the court from hearing the merits of the plaintiff's claims. A very good example of mechanisms that undermines the human rights and environmental obligations of MNOCs is that of multiple petitions to prevent the court from hearing the plaintiff's claim. The Center for Constitutional Rights (CCR) and co-counsel for EarthRights International filed the *Wiwa v. Shell* litigation in 1996. The litigations were heard in May 2009 after 12 years of Shell petitioning the court not to hear the plaintiff's claim.

6.6.2.2 During the court hearing

This phase involves all mechanisms during the court hearing, that is, from the time the court starts hearing the plaintiffs' claims up to the time when the final court decision is made, for example, by the court (e.g., supreme court) or if the settlement has been agreed by the parties outside of the court. One such mechanism includes interlocutory appeals and injunctions to delay the litigation from moving forward. Apart from wasting time for the plaintiffs to seek remedy, it also depletes their resources. For example, the UK supreme in January 2021, ruled that the claimants in the *Okpabi v Shell* litigations can continue with a claim that the UK-domiciled parent of a multinational group (that is, Shell) owed a duty of care to those allegedly harmed by the acts of a foreign subsidiary (that is SPDC in Nigeria). Every mechanism used by the defendant to derail the litigation process when the court starts hearing the plaintiff's claim would fall under this phase.

6.6.2.3 After the court hearing

This phase involves all mechanisms used to derail the litigation after the court's final court decision has taken place. The final court decision could happen in various ways, such as the case being decided in the highest court, which means that there can be no more appeal. In a situation where the defendant accepts the lower court's decision and does not appeal the decision, then the final court decision becomes the decision of that lower court. The defendant may decide to withdraw the case to settle out of court in other cases. An example could be when the defendant approaches the court to modify the final court judgement. This happened in Bodo v Shell where the defendant approached the court to set aside the judgement if the local residents disrupted the cleanup operation. The court rejected this request.

Figure 6.1 shows the different phases in the human rights and environmental litigation process.

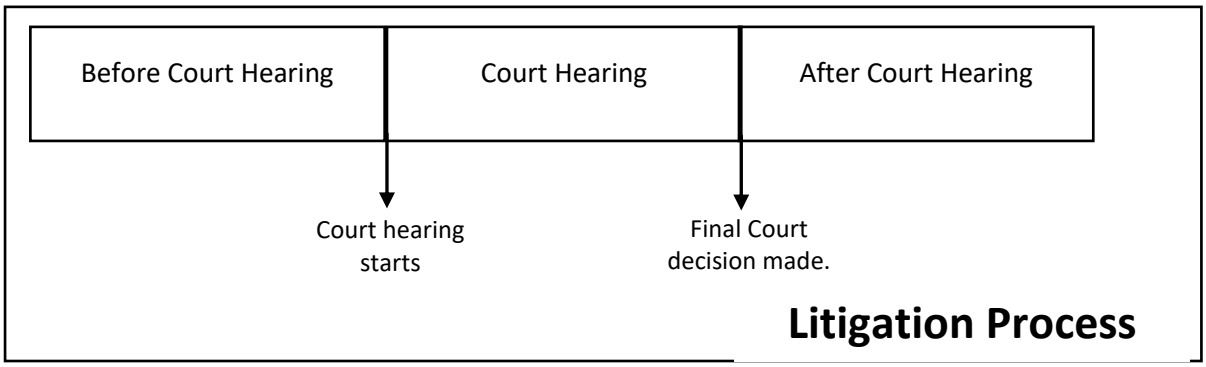

Table 6.3. Features of the three phases in the ligation process

SN	**Before the court hearing**	**During the court hearing**	**After the court hearing**
Timeline	Practices taking place before the court hearing	Practices taking place during the court hearing and up to the final court decision on the matter	Practices after the court decision
Reasons for practice	○ prevent the case from being heard on its merit	○ delay the case ○ withhold evidence	○ prevent the plaintiffs from going back to court to resume the claim
Examples	○ Defendants petitioning the court not to hear the cases	○ Defendants filling several interlocutory appeals	○ Defendants filing a case to deny plaintiffs the right to resume the claim should the clean-up be inadequately conducted

6.7 Mechanisms used by MNOCs to Derail Litigations

This section discusses mechanisms used by MNOCs to derail human rights and environmental litigations arising from the Niger Delta. Table 6.4 summaries the impact of mechanisms used by MNOCs to derail a selected set of litigations from the Niger Delta in terms of remediation, compensation, and acceptance of liability.

6.7.1 Non-Transparent provision of information on oil operations

Several aspects of the oil operations in the Niger Delta lack transparency. These include severe faults in Shell's post-2011 oil spill investigation procedure, errors in the underlying evidence used to assign spills to sabotage, and the fact that JIV reports are completed by Shell after the joint investigation process, rather than as part of it. As a result, there is a lack of openness and supervision about what is documented in the new JIV reports. The implementation of the JIV reporting process is based on the legislative backing of Nigeria's 1990 Oil Pipelines Act, and the recommendations set down in the Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN). Therefore, if victims of the oil spill cannot claim remediation and compensation due to incorrect and misleading information on the JIV forms, or simply put, lack of transparency, then this is a violation of human rights.

There are several other related to transparency in which the practices of MNOCs related to transparency undermine their human rights obligations. These include providing misleading information related to the cause of the oil spill (that is, whether the oil spill was due to sabotage of an oil pipeline or due to a poorly maintained oil pipeline), providing incorrect data on the volume of oil spilt and the area affected to avoid liability or avoid paying huge compensation.

For example, in the *Bodo v Shell* litigation, the villagers claimed that the spill was a result of poorly maintained 50-year-old pipelines and that Shell had been initially warned about the damaged pipelines. Senior employees also warned the company about the damaged pipeline, which could result in a serious spill in the community but was ignored by the company. They also claimed that Shell made an inaccurate assessment of the spill. Shell claimed that they initially cleaned up the spill, but when Amnesty International did some investigation of the

spill, they found that the spill was worse than stated; Shell had made an inaccurate judgement regarding the spill.[676]

6.7.2 Non-Disclosure of Evidence

The disclosure of evidence required for litigations is significant for plaintiffs to access remedies. In the ligations that we have reviewed, it is easy to see that MNOCs are generally reluctant to disclose relevant evidence to plaintiffs to prove their cases. MNOCs are only willing to do so when it is inevitable, for example, when courts force parent companies to disclose evidence.[677]

For example, in the *Oguru v Shell* case, the plaintiff faced an enormous challenge in putting forward their allegations due to difficulty obtaining internal information - both from Shell and Shell Nigeria - concerning the business' operations. The court initially dismissed the claimants' request to order Shell to disclose documents that could prove their case. On appeal, the Court of Appeal ordered RDS to disclose specific audit reports, letters of assurance, incident reports, and documents regarding the oil pipelines. The court also ruled that these documents will not be handed over to the claimants but will be available for inspection at a notary's office by legal representatives of the claimants and court members.[678]

During the *Bodo v Shell* litigation, Shell repeatedly refused to release evidence required by the plaintiff to prove that the oil spill was due to poor maintenance of the oil pipeline. Specifically, Shell refused to disclose communication (via several emails) between Shell employees in Nigeria and their colleagues in the headquarters (Netherlands) regarding the poor condition of oil pipelines which needed adequate maintenance. After many years of delay and denial in the court, Shell eventually decided to settle the litigation out of court when they learnt that the plaintiff was to present the emails in the court showing that the parent company were warned about the poor condition of the pipelines in Bodo which could lead to an oil spill in the community.[679]

[676] Amnesty (n 64)
[677] Dam (n 13)
[678] Gwynne (n 62) 1808; See Dam (n 14)
[679] Amnesty (n 64)

6.7.3 Bribery of Witnesses to testify in litigations

Allegations of bribery and corruption have been featured in several human rights and environmental litigations arising from the Niger Delta. In *Wiwa v Shell*, the plaintiff alleged that the defendant was complicit in the human rights violations committed by the Nigerian military junta against two environmental activists who were killed in November 1995. They alleged that the killings were part of a pattern of bribery, collusion, and conspiracy between the two Shell corporations and the Nigerian military junta aimed at crushing resistance to Shell's exploitation of oil and gas resources in the Ogoniland region and the Niger Delta in general. Shell was also accused of bribing and arming militants and government troops to stop any form of protest against the defendant company forcefully. The plaintiffs allege that Shell was actively involved in the tribunal, bribing and preparing witnesses.[680]

In their defence in the Wiwa litigations, Shell the multinational oil companies engaged in several practices during the litigation that conflicts with their human rights obligations. Amnesty International in their report alleged that witnesses bribed to testify against claimants - witnesses were promised employment and contracts with the company, those in employment are promised promotions and awards.[681] Amnesty International in their report concluded that bribing some witnesses to testify against the plaintiff during the court process proved Shell's intentional corruption of the Ogoni 9 trial, via bribery and witness coach. These prove Shell was hell-bent on ensuring a guilty verdict. In the *Kiobel v. Royal Dutch Shell* litigation, it was alleged that Shell, through its Nigerian subsidiary Shell Petroleum Development Company of Nigeria (SPDC), provided transport to Nigerian troops, allowed company property to be used as staging areas for attacks against the Ogoni and provided food to the soldiers and paid them.[682]

6.7.4 Victimization and restriction of employee's rights

Victimization and restriction of employees' rights are very common during human rights litigations. Employee rights are a group of legal and human rights related to labour relations

[680] Legal Information Institute, 'Bribery' (*Legal Information Institute*, 2020) <https://www.law.cornell.edu/wex/bribery> accessed 26 March 2020.
[681] John Zadkovich (n 404)
[681] Jacinta Anyango Oduor and others, 'Left out Of the Bargain Settlements
[682] 'Corruption and Human Rights' (Ohchr.org, 2020) <https://www.ohchr.org/EN/Issues/CorruptionAndHR/Pages/CorruptionAndHRIndex.aspx> accessed 26 March 2020.

between employers and employees, codified in national and international labour and employment law.[683] The International Labour Organization (ILO) and the UN have established international labour standards to create legal rights for workers worldwide.[684] This ensures that employees hired by multinational companies are not victimised but enjoy the right to freedom of association and the right to collective bargaining to improve working conditions.

There have been several instances of victimization and restriction of employees' rights during the litigation process to prevent employees from giving out important information to the courts or NGOs in order not to be used against MNOCs in court. This could be in the form of restricting employees and contractors from belonging to human rights organisations, and even granting interviews to the media. For example, during the *Oguru v Shell* case, the lawyers (and NGOs) had to make several trips to Nigeria to interview witnesses, and many often were Shell workers. Shell has in some cases through middle players and or senior managers engaged in wrongful labour rights activities to subvert justices. There were allegations that Shell told witnesses not to grant interviews to Amnesty International or cooperate in the investigations.[685]

6.7.5 Threats and Intimidation of witnesses

There are cases where MNOCs threatened witnesses not to testify against Shell or are threatened to testify against the plaintiff. The issue of security and safety was mentioned during the litigation of *Bowoto V Shell* in this litigation it was also related to the issue of security and safety, which is also an essential aspect of human rights and environmental violation. The U.S. District Court, allowed a complaint brought against Chevron by victims and victims' relatives, alleging that there could be evidence that Chevron had recruited, supervised, and/or shipped the Nigerian military forces notorious for their widespread violence and abuse. Also, in the case of *Kiobel V Royal Dutch Shell* and *Wiwa v Shell*, there were allegations of bribery and corruption by Shell. The suit alleges that Shell, through its Nigerian subsidiary Shell Petroleum Development Company of Nigeria (SPDC), provided transport to Nigerian troops, allowed company property to be used as staging areas for attacks against the Ogoni and provided food to the soldiers and paid them.

[683] IndustriALL (n 411)
[684] The UN itself have backed labour rights by incorporating several laws into two articles of the United Nations Declaration of Human Rights- that is, Article 6-8 of the International Covenant on Economic, Social and Cultural Rights.
[685] IndustriALL (n 411)

For example, in the case of *Bowoto v Shell*, the plaintiffs claimed the defendant companies were complicit in the commission of torture, extrajudicial killing and other violations according to the Alien Tort Claims Act (ATCA). The plaintiff brought a claim under the Alien Tort Statute and the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c). the suit seeks to hold Chevron accountable for serious human rights violations committed abroad. The plaintiffs sought compensation for the murders and the injuries suffered by the victims of Ilaje Community in the Niger Delta by Chevron during the peaceful protest of the people.[686] The defendants claimed that there was no genuine issue as to any material fact in the plaintiff's case, but as a matter of law, they were entitled to judgment law.

6.7.6 Delay of litigation

There are several mechanisms that the MNOCs used in delaying litigations. These include avoiding service of process, change of forum, interlocutory appeals, injunctions, and postponements, motion to Challenge the legal standing of joint/collective claimants, motion to strike out the litigation or modify court judgement and allowing plaintiffs to sue the wrong entity.

Avoiding Service of Process

Service of process is the procedure by which a party to a lawsuit gives an appropriate notice of initial legal action to another party (e.g., defendant), court or administrative body to exercise jurisdiction over that person to enable that person to respond to the proceeding before the court, body or another tribunal. Notice is furnished by delivering a set of court documents to the person to be served.

The mechanism related to 'service of process' means that Multinational Oil Companies are avoiding places where they may be served notification of the lawsuit. This type of mechanism played out in the *Wiwa v Shell* case in New York, USA. The plaintiffs sought to make two

[686] Braden (n 570)

Shell holding companies accountable for their role in the Nigerian military junta's human rights violations against two environmental activists who were killed in November 1995.[687]

In response to these claims, the defendant companies attempted to avoid service of process by moving to dismiss the case on the grounds that it would violate the fairness requirement of the Due Process Class for a New York court to exercise personal jurisdiction over them. The District Court ruled that because the holding companies were listed on the New York Stock Exchange and maintained an investor relations office, they could be deemed "doing business in New York."

The multinational oil companies were attempting to avoid New York and the USA and instead preferred to be served notification of the lawsuit in other jurisdiction that would have been a disadvantage to the plaintiffs in terms of financial resources and convenience. In short, Shell believed that the trial going on in the US would not be to their advantage because of reasons of proximity as some of the plaintiffs were living in the United States and not in England or the Netherlands.

Change of Forum

This mechanism involves a situation where the defendant seeks a change in the forum or venue thereby delaying or derailing the litigation. In the case of *Wiwa v. Shell*, the District Court initially granted the defendant's petition to dismiss the lawsuit on the grounds of forum non conveniens, reasoning that the case lacked insufficient ties to the US legal order or the New York forum to justify continuing the action there. Though the Second Circuit Court of Appeals agreed with the District Court's determination of personal jurisdiction, it disagreed with the lower court's dismissal of the complaint based on forum non conveniens. It so reversed the District Court's judgement in 2000.

The appellate court ruled that the district court erred in its analysis of the competing interests by giving inadequate weight to the plaintiffs' (two of whom were legal permanent residents of the United States) decision of New York as the venue for the case. The court also considered that dismissing the lawsuit in favour of a British (or Dutch) venue would be costly and inconvenient for the financially strapped plaintiffs. At the same time, it would cause the

[687] Center for constitutional rights, Wiwa et al. Royal Dutch Petroleum et al., https://ccrjustice.org/home/what-we-do/our-cases/wiwa-et-al-v-royal-dutch-petroleum-et-al (last accessed January 18, 2021).

defendants, with their immense financial resources, little more than the negligible inconvenience of keeping the case in New York.

Interlocutory appeals, injunctions, and postponements

This is one of the most damaging mechanisms used by MNOCs to intentionally delay litigations. When a verdict has been made, the defendant may file an appeal in which the judgment may be 'stayed' until a decision of the appeal has been made. There are different types of appeals - stay of execution, interlocutory appeals, and interim injunction. A stay of execution is a court order to temporarily suspend the execution of a court judgment or other court order. It is similar to an injunction.

A stay can be granted automatically by operation of law or conventionally when the parties in a civil or criminal case agree that no execution shall occur for a certain period. If a party appeals a decision, any judgment issued by the original court may have stayed until the appeal is resolved. For example, in the *Oguru v Shell* litigation, Shell initiated several interlocutory appeals. Interlocutory orders from September 2011 included the court's determination that Nigerian tort law will be used to decide the claims and the denial of a request by the plaintiffs that Shell produce exhibits of some critical evidence papers.

Another mechanism used by MNOCs to delay litigations is to postpone litigation on the grounds of "lis pendens," which is a doctrine that allows the court to stay proceedings due to ongoing litigation in another jurisdiction. For example, in the *Oguru v Shell* litigation, Shell requested to allow it to appeal the Court of Appeal's preliminary judgement before the Dutch Supreme Court (Hoge Raad), rather than waiting for the decision of the Court of Appeal on the merits. This request was rejected by the court.

Motion to Challenge the legal standing of joint/collective claimants

Class settlement proceedings allow the parties to a collective settlement agreement jointly and can ask the Court to declare the settlement to be binding on all class members. In doing this, the court assesses, among other things, that the reasonableness of the agreed compensation is likely to be successful. This is a threat to the defendant, which is why they have always challenged it. The collective action is more efficient and effective than bringing an individual

claim, that is, that: the questions of law and fact are sufficiently similar; the class of claimants is sufficiently large; and in a damages action, the class members individually and jointly have a sufficiently large financial interest. For example, in the Oguru v. Shell litigation, Shell argued that Friends of the Earth Netherlands did not have sufficient standing to bring the case, but again the court found otherwise.[688] The representative entity meets the standing requirements of Article 3:305a, Civil Code .

Motion to strike out the litigation or modify court judgement

Motion to strike out litigation for lack of cooperation or obstruction to the enforcement of court judgement. In the *Bodo v Shell* litigation, Shell tried to strike out the lawsuit in 2017, alleging that some members of the community obstructed clean-up. The court dismissed the claim. The parent company may try to change the terms of the settlement or change certain aspects of the court judgement. In the *Bodo v Shell* case, for instance, Shell attempted to prevent the community from re-filing by proposing an arbitration clause in the settlement that would have ended the litigation upon the commission of any disruptive conduct by any person of the Bodo community. A court determined in May 2018 that the Bodo community should have the right to reopen the claim for another year without any limitations if the cleanup was inadequate.

Allowing plaintiffs to sue the wrong entity

Another mechanism used by MNOCs is to be silent about the identities of the entity involved in the litigations. This seems unusual but it was actually the case in *Bowoto v Chevron* litigation where the defendant know in advance that the plaintiff was suing the wrong entity but decided not to disclose it but instead allowed the litigation to continue for several years. The litigation started in 1999, but it was not until 2005 that the plaintiff knew that they were suing the wrong entity (i.e., Chevron Overseas Petroleum Inc. instead of Chevron USA). Presiding Judge Susan Illston of the United States District Court for the District of Columbia chastised Chevron's attorneys for remaining silent, implying that they may have done so on purpose to delay or obstruct the plaintiffs' claim.[689] Oil companies that are subsidiaries of multinationals are usually part of a large and complex structure that can sometimes be very difficult to understand.

[688] Skinner and others (n 75) 54
[689] MacLean (n 573)

This mechanism implies that if the case is decided against the MNOCs, then the court decision would not be binding on it. This would be a double blow to victims who would have to endure a whole lot in terms of time, effort and financial resources to mount a legal challenge against a multinational company only for it to discover that the decision is not binding on the defendant.

6.7.7 Disputing information that influences the cause of oil pollution

Disputing information that influences the cause of the oil spill is one of the mechanisms used by MNOCs to derail litigations that are directly related to oil pollution. For example, in the Ejama-Ebutu litigation, Shell raised an initial objection based on the limitation's status, arguing that the incidence was caused by nuisance dating back to 1970 but has long since been discontinued. Shell did not put forward any evidence against the allegations raised by the plaintiffs regarding its misconduct during the oil spill. The only response by Shell to the allegations was a denial of responsibility, pointing instead to local rebel activities. Shell would point to sabotage and oil theft from local communities in other litigation.

Another mechanism of MNOCs related to pollution is accepting responsibility but presenting incorrect information in court regarding oil pollution based on an internal methodology for inspection and assessment of oil spills. Several experts and international human rights and environmental agencies, including Amnesty International, have long raised concerns about the robustness and validity of the methodology underlying this process. For example, in the *Bodo v Shell* litigation, Shell claimed that its information was based on a process called Joint Inspection Visit (JIV). Shell uses this process to determine 'the spread, the volume and the cause of hundreds of other spills in Nigeria. Despite Amnesty International providing Shell with considerable evidence that these statistics were inaccurate, the MNC had previously and publicly defended its figures.[690]

Amnesty International 2012 conducted an impartial review of the video footage of the first oil spill and estimated that the overall volume of oil spills alone surpassed 100,000 barrels. In addition, the expert evidence obtained from the Bodo Community estimated that the volume of oil spilt was 500,000 barrels, suggesting that the methodology of Shell is completely flawed and unreliable. In documents submitted to the court, Shell eventually acknowledged that its

[690] Van Ho and others (n 52)

estimates were incorrect and that it had underestimated the amount of oil spilt in both of the Bodo cases.

6.7.8 Disputing information that influences remediation

There are several kinds of information that MNOCs can dispute in court to influence remediation for oil spills. This information includes the time the oil spill occurred and when it was first reported, how long it happened, the volume of oil spilt, and the area affected by it. In the Bodo v Shell litigations, Shell initially denied responsibility for the 2008 and 2009 Niger Delta oil spills of 560,000 barrels. It claimed that these were caused by illegal pipeline tapping and sabotage. However, an investigation conducted by Amnesty International revealed that the oil spills were caused by neglect and poor maintenance.

It was revealed in November 2014 that documents produced in the UK High Court suggested that Shell had been warned about the pipeline's "risk and hazard" before the oil spill that affected the Bodo community. If Shell could prove this, they would not be liable for remediation and clean-up of oil spills in the Bodo community. Shell accepted responsibility in January 2015 and agreed to a £55 million out-of-court settlement to cover the cost of cleaning up the spill. The Dutch government also established an internationally recognized cleanup operation, the Bodo Mediation Initiative.[691]

6.7.9 Disputing information that influences Compensation for oil pollution

In the *Bodo v Shell* litigation, one of the main issues for determination was whether Shell has an obligation to take appropriate measures to protect its facilities to avoid leaks from its pipelines, whether due to operational failure or oil theft (bunkering). Shell has consistently maintained that it was only liable to pay compensation if the spills were caused by the failure of its pipelines to work and that, in the event of spills caused by bunkering, it had no such responsibility. The court disagreed with Shell's position by claiming that, if it failed to take appropriate measures to secure, maintain or fix its facilities, it might be legally liable to pay compensation for spills resulting from bunkering and illegal bunkering of its pipelines.[692]

[691] Sunmonu (n 432).
[692] Leigh Day (n 8).

The court's position was captured as follows in paragraph 92(g)[693]:

> *Short of a policing or military or paramilitary defence of the pipelines, it is my judgment that the protection requirement within Section 11(5)(b) involves a general shielding and caring obligation. An example falling within this would be the receipt by the licencee of information that malicious third parties are planning to break into the pipeline at an approximately definable time and place; protection could well usually involve informing the police of this and possibly facilitating access for the police if requested. Other examples may also fall within the maintenance requirement such as renewing protective coatings on the pipeline or, with the advent of new and reliable technology, the provision of updated anti-tamper equipment which might give early and actionable warning of tampering with the pipeline.*

The court judgement represents a strong rebuke of the practices of Shell and many other MNOCs operating in the Niger Delta and guarantees that possibilities the victims will get larger compensation pay-outs than what would have been if the oil spill data was provided by MNOCs was relied on.

Another mechanism used by the MNOCs related to compensation is to file a motion to challenge the volume of oil spilt and the area covered by the spill and the duration of the oil spill. The volume of oil spilt, the area affected, and the duration of the spill are all important parameters in calculating compensation that the MNOCs will pay to the plaintiffs, that is, the victims of the oil spill. It would be unexpected that multinational oil companies with a vast number of financial resources would be interested in disputing these parameters if they are actually committed to respecting their obligations regarding access to remedy and payment of compensation to victims of human rights and environmental violations.[694]

Table 6.4 Summary of the Impact of mechanisms used by MNOCs to derail litigations regarding remediation, compensation, and acceptance of liability

SN	Cases	Mechanisms used by MNOCs to derail litigations	Impact on the Litigations regarding remediation,

[693] http://www.hendersonchambers.co.uk/wp-content/uploads/2014/06/Bodo-jment-prelim-issues.pdf
[694] Oil spill investigations in the Niger Delta Amnesty International November 2013 Index: AFR 44/028/2013 50

			compensation, and acceptance of liability
1	*Wiwa v Shell*	Delay of litigation – lack of personal and subject-matter jurisdiction and forum non-conveniens.	The court ruled litigation can proceed to trial. The parties agreed to settle out of court. Shell accepted no liability but agreed to pay compensation.
2	*Bowoto v Chevron Corp*	Delay of the litigations. Not knowing the correct entity to sue in the litigation.	Litigation dismissed. No compensation paid
3	*Kiobel v Shell - I*	Dismiss the case and delay the case on grounds of lack of subject-matter jurisdiction.	Litigation dismissed. No compensation paid
4	*Bodo v Shell/SPDC*	Non-transparency and non-disclosure of evidence regarding maintenance of oil pipelines. Disputing information regarding the cause of the oil spill, remediation, and compensation. Disputing information regarding the amount of oil spilt and the extent of the damage caused by the oil spills.	The parties agreed to settle out of court. Shell accepted no liability but agreed to clean up and pay compensation.
5	*Okpabi v RDS*	Dismissal of litigation at High court and Appeal court. Delay of litigation on the grounds of lack of subject-matter jurisdiction.	Supreme Court ruled litigation can proceed to trial
6	*Oguru v Shell*	Disputes regarding the cause of the oil spill, the volume of oil spilt, and are affected of the spill. Dismissal and delay of litigation on grounds of lack of jurisdiction over RDS and SPDC. Non-	Court ruled Shell was liable. Court ordered Shell to clean up and pay compensation.

		transparent provision of information, and non-disclosure of evidence required by plaintiffs.	
7	*Kiobel v. Shell* - II	Dismissal and delay the litigation on the grounds of lack of jurisdiction to hear the case. Non-transparent provision of information and non-disclosure of evidence. Bribery and corruption of witnesses, safety, and security of witnesses.	No compensation paid to the plaintiffs

6.8 Analysis of Foreign Human Rights and Environmental Litigations involving Nigerian Litigants

In addition to the findings and discussion of transnational human rights and environmental litigations arising from the Niger Delta, this section critically analyses foreign human rights and environmental litigations involving Nigerian litigants using relevant literature.

Foreign human rights and environmental litigations involving Nigerian litigants have become increasingly common in recent years. Transnational corporate liability for environmental damage and climate change has been a subject of interest in recent years. A review of the literature on foreign human rights and environmental litigations shows that while transnational litigation can provide a means for victims of environmental harm to seek justice, it can also result in the dilution of their claims due to a variety of factors such as jurisdictional challenges, high litigation costs, and power imbalances between the parties involved.

The review also shows that Nigerian litigants have been at the forefront of transnational tort litigation, particularly in the area of multinational corporations' environmental harm. Despite progress in holding corporations accountable for their actions, researchers contend that the current legal framework may be insufficient to address the complex issues raised by corporate human rights and environmental violations.

Bertram used the *Chevron Corp. v. Yaiguaje*, *Vedanta Resources PLC and another v. Lungowe and others* litigations to highlight the difficulties in pursuing transnational tort litigation, particularly concerning jurisdictional issues and holding multinational corporations accountable for their actions in developing countries.

For example, in the *Vedanta Resources PLC and another v. Lungowe and others* litigation, the defendants, Vedanta Resources PLC, a UK-based company, faced allegations that the mining operations of its Zambian subsidiary had harmed the local ecosystem. The plaintiffs argued that the parent company had a duty of care to the impacted areas and should be held responsible for the subsidiary's actions.

The UK Supreme Court ruled that the case could be heard in the UK, but its decision raised questions about whether multinational corporations can be held liable for their subsidiaries' actions. According to Bertram, the ruling was significant because it recognised that parent companies can owe a duty of care to affected communities, but it did not address the broader question of whether parent companies can be held liable for their subsidiaries' actions.

The case also highlighted the difficulties in ensuring that affected communities have access to justice in their home countries. Bertram notes that the plaintiffs in the case attempted to pursue their case in Zambia at first but were unable to do so due to a variety of legal and procedural obstacles. As a result, they were forced to seek redress through the UK courts for the harm caused by the mining operations.[695]

Varvastian and Kalunga note that transnational corporations operating in Nigeria have been accused of environmental damage and climate change due to their activities in the extractive industries. The authors argue that access to justice for communities affected by the activities of transnational corporations is a fundamental human right and that the Lungowe v. Vedanta litigation has provided some reassurance that such access to justice is possible.[696]

Obani and Ekhator provide a critical analysis of transnational litigation and climate change in Nigeria, highlighting the challenges faced by Nigerian litigants in seeking redress for

[695] Bertram, D., 'Environmental Justice "Light"? Transnational Tort Litigation in the Corporate Anthropocene'(2022) 23(5). German Law Journal 738-755.
[696] Varvastian, S. and Kalunga, F., "Transnational corporate liability for environmental damage and climate change: Reassessing access to justice after Vedanta v. Lungowe"(2020) 9(2) Transnational Environmental Law 323-345.

environmental damage and climate change caused by multinational corporations. The authors argue that the lack of adequate legal frameworks, resources, and political will in Nigeria undermines the effectiveness of transnational litigation. They also highlight the need for greater collaboration between Nigerian and international civil society organizations to promote transnational corporate accountability for environmental damage and climate change.[697]

Bertram discusses the Nigerian oil spill cases that have been brought before the Dutch courts, highlighting the challenges faced by Nigerian litigants in seeking redress for environmental damage caused by multinational corporations. The author argues that the cases highlight the need for a more comprehensive approach to transnational corporate accountability for environmental damage in Nigeria and other jurisdictions. The Dutch court cases demonstrate that the Netherlands is emerging as a forum for transnational litigation, providing a legal basis for seeking redress for environmental degradation and human rights abuses.[698]

The oil exploration in the Niger Delta has had severe intergenerational impacts, affecting the rights of future generations to a clean environment and sustainable development. Faga and Uchechukwu discuss the impact of oil exploration on environmental degradation in the Niger Delta. Faga and Uchechukwu argue that enforcing intergenerational rights and sustainable development requires legal and judicial activism, as well as a commitment to holding the extractive industry accountable for its actions. This highlights the need for a more comprehensive approach to environmental governance in Nigeria.[699]

Bertram notes that the increasing number of litigations against transnational corporations has led to the judicialization of environmental governance. The author argues that such litigations may be a useful tool in holding corporations accountable for environmental damage and other environmental offences. However, the author also notes that the use of litigation to hold corporations accountable may be limited by legal and practical challenges.[700]

[697] Obani, P. and Ekhator, E. 'Transnational Litigation and Climate Change in Nigeria' (2021) Afronomicslaw
[698] Bertram D. 'Transnational Experts Wanted: Nigerian Oil Spills before the Dutch Courts (2021) 33(2) Journal of Environmental Law 423-435
[699] Faga, H. P., & Uchechukwu, U. 'Oil Exploration, Environmental Degradation, and Future Generations in the Niger Delta: Options for Enforcement of Intergenerational Rights and Sustainable Development Through Legal and Judicial Activism' (2019) 34 Journal of Environmental Law & Litigation 185
[700] Bertram, D., 'Judicializing Environmental Governance? The Case of Transnational Corporate Accountability'. (2022) 22(2) Global Environmental Politics 117-135.

The *Okpabi v. Shell* case in the UK Supreme Court has significant implications for parent company liability in Nigeria. Aristova and Lopez argue that the ruling reaffirmed the duty of care owed by parent companies towards communities impacted by their subsidiaries in third countries.[701] Roorda and Leader discuss the *Okpabi v Shell* and *Oguru v Shell* cases, which have brought parent company liability back to court in Nigeria. These cases have challenged the notion of corporate impunity and highlighted the need for greater accountability for multinational companies operating in Nigeria.[702]

In a recent article on corporate liability for toxic torts abroad, Bradshaw highlights the significance of the Okpabi case in providing a potential avenue for foreign litigants to hold parent companies accountable for the actions of their subsidiaries in third countries.[703]

Leader discusses the developing legal landscape on parent company liability and concludes that the trend towards holding parent companies accountable for the actions of their subsidiaries is gaining momentum and that corporate impunity may be drawing to a close.[704]

Abe discusses the implementation of business and human rights norms in Africa. According to the authors, legal and policy interventions are necessary to promote accountability for environmental damage and other environmental offences by transnational corporations.[705]

Meeran and Meeran provide a practical guide to human rights litigation against multinationals. The authors believe that such litigations are a critical tool in promoting accountability for environmental damage and other environmental offences by transnational corporations.[706]

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[701] Aristova, Ekaterina, and Carlos Lopez. 'UK Okpabi et al v Shell: UK Supreme Court Reaffirms Parent Companies May Owe a Duty of Care Towards Communities Impacted by Their Subsidiaries in Third Countries' (2021) Opinio Juris <https://opiniojuris.org/2021/02/16/uk-okpabi-et-al-v-shell-uk-supreme-court-reaffirms-parent-companies-may-owe-a-duty-of-care-towards-communities-impactedby-their-subsidiaries-in-third-countries/> accessed on February 17, 2023

[702] Roorda, L. and Leader, D., 'Okpabi v Shell and Four Nigerian Farmers v Shell: parent company liability back in court' (2021) 6(2) Business and Human Rights Journal 368-376.

[703] Bradshaw, C., 'Corporate Liability for Toxic Torts Abroad: Vedanta v Lungowe in the Supreme Court' (2020) 32(1) Journal of Environmental Law 139-150.

[704] Daniel Leader, 'The developing legal landscape on parent company liability - corporate impunity drawing to a close?' (2022) Centre for Law and Environment, University College London(UCL). < https://www.ucl.ac.uk/law-environment/blog-climate-change-and-rule-law/developing-legal-landscape-parent-company-liability-corporate> accessed February 17, 2023

[705] Abe, O., 'Implementing Business and Human Rights Norms in Africa: Law and Policy Interventions' (2022) Routledge.

[706] Meeran, R. and Meeran, J. 'Human rights litigation against multinationals in practice' (2021) Oxford University Press.

The extractive industry has had a significant impact on the Niger Delta region, where oil spills, gas flaring, and environmental pollution have affected the health and livelihoods of local communities. Ako and Ekhator argue that civil society organizations (CSOs) have played a crucial role in holding multinational corporations accountable for environmental degradation and human rights abuses. Through activism, advocacy, and litigation, CSOs have pressured the government and the extractive industry to adopt better practices and respect the rights of affected communities.[707]

The issue of environmental justice in Nigeria is closely linked to gender, as women are disproportionately affected by environmental degradation and human rights abuses. Ekhator and Obani discuss the challenges faced by women in accessing justice for environmental issues in Nigeria. They argue that the intersectionality of gender and environmental justice requires a more nuanced approach to legal and policy interventions. The authors also note that access to justice for women in such litigations may be limited due to cultural and legal barriers. This highlights the need for gender-sensitive strategies in addressing environmental degradation and human rights abuses.[708]

International and comparative law has played a critical role in regulating transnational corporate accountability in Nigeria. Riley and Akanmidu discuss the difficulty of establishing jurisdiction in transnational tort cases. The authors note that multinational corporations frequently have a complex network of subsidiaries and affiliates, which can make determining the appropriate venue for litigation challenging. They contend that this complexity highlights the need to develop clear and consistent legal standards for transnational tort litigation.[709]

In addition, the authors discuss the potential for transnational tort litigation to promote greater corporate responsibility and accountability in Nigeria's extractive industry. They note that litigation is a potent instrument for holding multinational corporations accountable for their role in causing environmental damage and human rights violations. They contend that litigation

[707] Ako, R., & Ekhator, E. O. 'The civil society and the regulation of the extractive industry in Nigeria' (2016) 7(1) Journal of Sustainable Development Law and Policy (The) 183-203.
[708] Ekhator, E., & Obani, P. 'Women and Environmental Justice Issues in Nigeria' (2021) Intersectionality and Women's Access to Justice in Africa 259.
[709] Riley, Christopher, and Oludara Akanmidu. 'Explaining and Evaluating Transnational Tortious Actions against Parent Companies: Lessons from Shell and Nigeria.' (2022) 30(2) African Journal of International and Comparative Law 229-251.

can also promote greater transparency and accountability in the extractive industry and prevent further harm to affected communities.

Ahmed (2022) discusses private international law and its implications. The article addresses the jurisdiction and substantive liability in transnational tort cases. The UK Supreme Court has recently issued several decisions on these issues, including the *Okpabi v Shell* case mentioned earlier. The author examines these decisions and their potential effects on multinational corporation regulation and their obligations to developing country communities.[710]

Additionally, the author discussed the potential implications of Brexit for transnational tort litigation in English courts. They point out that Brexit has changed the rules regarding jurisdiction and foreign judgements, which has led to uncertainty as well as challenges for litigants. The article places a strong emphasis on the significance of clear and consistent legal standards for transnational tort litigation, as well as the role that legal frameworks and judicial activism play in the process of promoting accountability and transparency within the extractive industry.

According to Okoye, one of the most pressing problems in Africa is the lack of access to justice for corporate violations of human rights. The author of this piece argues that the role that African regional and sub-regional courts could play in facilitating access to justice for cases involving such violations ought to be given some thought. The author also discusses several legal and practical issues that, depending on the circumstances, may limit the effectiveness of such courts in terms of increasing access to justice.[711]

A comparative analysis of the future of international corporate human rights litigation on both sides of the Atlantic is provided by Chambers and BergerWalliser (2021). The authors argue that environmental damage and other environmental violations committed by transnational corporations need to be held accountable, and that litigation is an important tool for doing so.[712]

[710] Ahmed, M. 'Private international law and substantive liability issues in tort litigation against multinational companies in the English courts: recent UK Supreme Court decisions and post-Brexit implications' (2022) 18(1) Journal of Private International Law 56-82.
[711] Okoye, A., 'Promoting access to justice for corporate human rights violations in Africa: The role of African regional and sub-regional courts' In Business and Human Rights Law and Practice in Africa (Edward Elgar Publishing 2022) 231-250
[712] Chambers, R. and Berger-Walliser, G., 'The Future of International Corporate Human Rights Litigation: A Transatlantic Comparison' (2021) 58(3) American Business Law Journal 579-642

6.9 Chapter Summary

This chapter presents the findings and discussion of the review of human rights and environmental litigations arising from the Niger Delta. The chapter first presented a characteristic of the litigations selected from the three different jurisdictions – England, the Netherlands and the US. After that, the chapter discusses the different aspects of the litigations that are similar across the litigations reviewed to discover the trends ad patterns in the litigations that can be generalised.

The chapter discussed the aspects that are not similar in the litigation to understand how these aspects can help explain some of the variations in the outcome of the litigations. Some of the aspects discussed covers areas such as lack of jurisdiction, examination of the corporate group structure and the relationship between MNOCs and subsidiaries, establishing direct liability on MNOCs, the burden of proof, length of time in bringing claims and completing litigation, and direct liability of the MNOCs arising from the failure to exercise due diligence.

This chapter discusses the various mechanisms used by MNOCs to derail litigations arising from the Niger Delta. The mechanisms discussed covers issues such as lack of transparency in oil operations, non-disclosure of evidence, bribery of witnesses to testify in litigations, victimization and restriction of employee's rights, threats and intimidation of witnesses, delay of litigation through avoiding service of process, motion to dismiss claims, and interlocutory appeals, disputing information that influences the cause of oil pollution, remediation for oil pollution, and payment of compensation. The chapter concludes with an analysis of foreign human rights and environmental litigations involving Nigerian litigants using relevant literature.

Chapter Seven

Legal framework for addressing derailment in human rights and environmental litigations in the Niger delta

7.1 Introduction

The discussion of the human rights and environmental litigations, both initiated in Nigeria and abroad, shows that there is an inadequate legal framework to address the mechanisms used by Multinational oil companies to derail these litigations, which contribute to the worsening of human rights and the environment in the Niger Delta.

Several of the human rights and environmental obligations of MNOCs due to their oil operations in Nigeria have been breached, resulting in litigations against MNOCs abroad. A striking example is the obligation to prevent oil spills and clean up the environment irrespective of the cause or source of the oil spill. During the litigations, MNOCs exploited the Oil Pipelines Act 1990 to argue that the oil spills were caused by sabotage. The Oil Pipeline Act 1990 states that the oil company cannot be held liable for oil spills caused by sabotage.

Despite this claim, several independent reports and documents that have emerged in the court (e.g., *Bodo v Shell litigation*) have countered this position by showing that the majority of the oil spills are due to poor oil pipelines. Such an approach taken by MNOCs derails victims' efforts to seek remediation and compensation for oil spills. Furthermore, it will impact the environment and the local communities in the sense that the environment is not allowed to disintegrate, and the victims would have access to compensation while the litigation is going on in the courts.

There is a need to address the fact that MNOCs use sabotage to avoid liability for oil spills by enacting a regulation that will make it difficult for MNOCs to derail litigations initiated by victims of human rights and environmental violations. Such regulation will allow victims to obtain remediation and compensation from the litigations in the shortest possible time.

Several legal frameworks, albeit at the international level, such as UNGP, OECD Guidelines on Multinational Enterprises and Global Compact, impose certain obligations on the MNOCs to respect Human Rights.[713] The UN Guiding principles, for example, implement the United Nations 'Protect, Respect and Remedy' Framework. The UN Guiding principle imposes on an MNOC a duty to monitor the subsidiary's activities because of the belief that MNOCs have a due diligence obligation to ensure that Human Rights are complied with within their sphere of influence.

One major drawback of the international frameworks is that it may take a long time to have legislation on specific Human Rights and environmental issues due to years and decades of drafting, public consultation and debates on such legislations.[714] It would be unreasonable to expect victims of Human Rights violations to wait a long time to have such legislation in place for them to use it while Human rights and environmental violations are still going on. Another challenge with existing international Human Rights frameworks is that it does not address legal issues at the other levels, such as the constitutional, legislation, regulatory and common law.

Furthermore, when applied alone at the domestic level, legislation and tort law sometimes do not resolve issues between companies and their victims due to the complex and wide-ranging problems involved.[715] Therefore, there is a need for a mix of constitutional, legislative, regulatory, and tort law (i.e., tort of negligence, nuisance, trespass) components in such a legal framework for addressing the mechanisms used by MNOCs to derail human rights and environmental litigations arising from the Niger Delta.

The focus of this chapter is to propose a legal framework to address mechanisms used by MNOCs to derail litigations to improve human rights and the environment in the Niger Delta. The rest of the chapter is structured as follows: Section 7.2 describes the legal framework. Section 7.3 discussed the instruments in the legal framework for addressing derailments of human rights and environmental litigations. Section 7.4 summarises the chapter.

[713] Organisation for Economic Co-operation and Development OECD, Guidelines on Multinational Enterprises chp. II 9 (2011) available at http://www.oecd.org/daf/inv/mne/48004323.pdf; UNGP (n) United Nations, '*United Nations Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework'*, adopted by the United Nations Human Rights Council, U.N. Doc. A/HRC/17/L.17/31 (June 2011)
[714] David (n 34) 203-227
[715] Elodie (n 35)

7.2 Legal Framework for addressing derailment in litigations

The legal framework is composed of five components/categories - constitutional, legislative, regulatory bodies, tort law and Alternative Dispute Resolution. The legal framework is shown in Figure 7.1 as a pyramid structure with an interconnected and hierarchical relationship with the first level on the bottom and narrowing up to the last level at the top. Level 1 (that is, constitutional) text appears in the pyramid segments, and Level 2 (legislative) text appears in shapes alongside each segment.

It is assumed that these recommendations are to be implemented in the home state of the victims of Human Rights and environmental damages (or the country where the subsidiaries reside). This assumption is based on the fact that in the absence of legislation clearly stating that a multinational company can be found civilly liable for Human Rights violations committed by its subsidiary abroad, where it has not acted with due diligence to prevent such violations from occurring, victims typically remain out of reach of the jurisdiction of the home state.

Therefore, the focus of this thesis is to recommend reforms within our proposed legal framework that can be applied mainly in the host state to allow victims to access the jurisdiction of both the host state and home state to address the mechanisms used by MNOCs to derail human rights litigations in the Niger Delta to improve human rights and the environment in the Niger Delta. Previous research focused on broad recommendations mostly to be applied in home states where the headquarters of the multinational companies reside.

The framework starts at the bottom layer with the Constitution up to Non-court resolution at the top. This is because the constitution is the foundation of evaluating any legal issue, while Alternative dispute resolution is a mechanism that can be used once every other approach fails to yield a reasonable outcome.

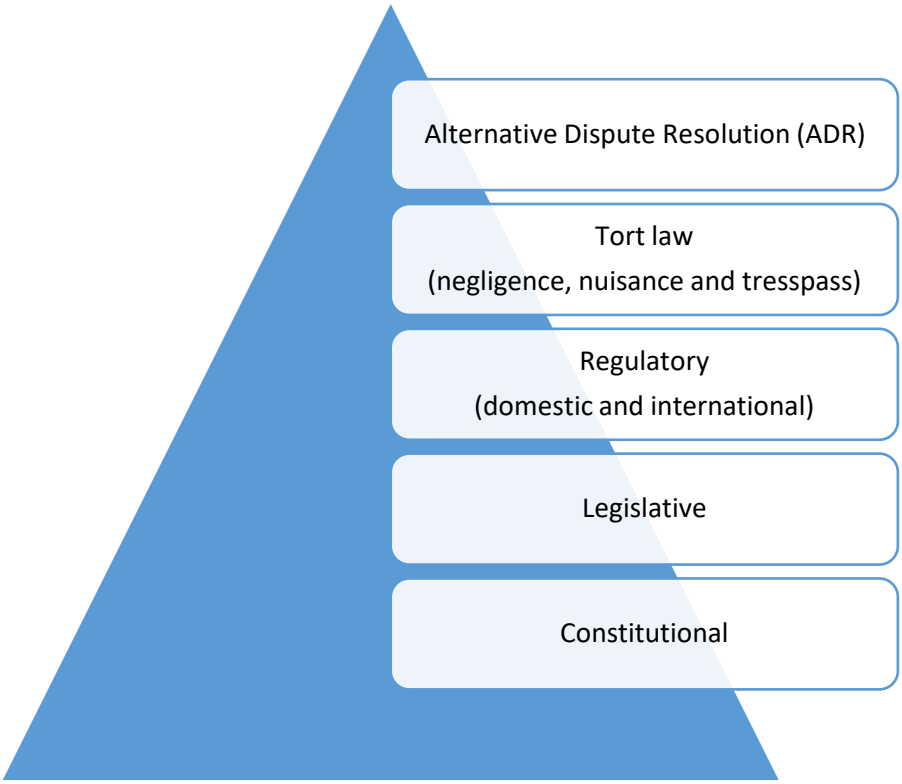

Figure 7.1. Legal Framework for addressing derailments in litigations[716]

In the next section discusses the various legal instruments for addressing derailments in human rights and environmental litigations in the Niger delta. The discussion in this section will proceed as follows: for each legal instrument, the relevant law or legal issues will be discussed, followed by how the relevant laws and legal issues play a role in derailing human rights and environmental litigations, and thus why it should be addressed.

7.3 Constitutional Instruments

A constitution is a set of fundamental principles or established precedent that governs a state.[717] A constitution amendment is a formal change to the text of a nation's or state's written

[716] The Pyramid structure shows the instruments of the legal framework in an ascending order of importance from constitutional to ADR.

[717] The Law Dictionary, 'What Is Constitution?' (The Law Dictionary 2022) <https://thelawdictionary.org/constitution/> accessed 31 March 2022.

constitution. In some jurisdictions, the text of the Constitution is changed; in others, the text is not changed, but the amendment changes the effect of the Constitution.

Unwritten constitutions (e.g., the UK constitution) have a more flexible process that allows the legislature to amend laws in their Constitution through an ordinary or straightforward law-making process. Written constitution (e.g., the US and Nigerian constitutions) has a strict amendment process and special procedure for enacting, repealing, or amending any given law.

Most constitutions have a more stringent amendment procedure than ordinary legislation. Passage by supermajorities in the legislature, direct approval by the electorate in a referendum, and even a combination of two or more special procedures are examples of such special procedures. Popular initiatives in some jurisdictions may trigger a referendum to amend the Constitution.[718]

Section 9(2) of the 1999 Nigerian Constitution grants the authority to amend the Constitution, which states that an amendment must be proposed with a two-thirds majority vote in both the Senate and the House of Representatives and then approved by a resolution of the Houses of Assembly of not less than two-thirds of all the States.

The Federal Republic of Nigeria's 1999 Constitution appears to have been influenced by the American model. The procedure for amending the US Constitution and its ratification is clearly stated in Article V of the US Constitution. To amend the Constitution in Nigeria, Section 9(2) requires the votes of two-thirds of members of both houses of the National Assembly and approval by a resolution of two-thirds of the State Houses of Assembly. Where the amendments deal with the creation of new states, boundary adjustments, new local government areas, fundamental rights or the mode for altering the constitution, Section 9(3) imposes a higher requirement of a four-fifth majority by both chambers of the National Assembly and approval by a resolution of two-thirds of the States Houses of Assembly. The constitutional amendment involves the process outlined in Section 9(3) of the Nigerian constitution.

In some jurisdictions like Nigeria (and in many other countries like the Republic of Ireland, Estonia, and Australia), constitutional amendments originate as bills and become laws in Acts of Parliament. In Nigeria, the Law Reform Commission is responsible for the codification of

[718] Policy and Legal Advocacy Centre (PLAC), 'A STEP-BY-STEP PROCESS OF AMENDING THE NIGERIAN CONSTITUTION' (Policy and Legal Advocacy Centre (PLAC) 2022) <https://placng.org/i/wp-content/uploads/2021/05/Step-by-Step-Guide-to-the-Process-of-Amending-the-Nigerian-Constitution.pdf> accessed 31 March 2022.

all laws, including Constitution amendments. In Nigeria, the Executive may propose a bill seeking to amend the constitution and send it to the Legislature for consideration.

The main action required at the constitutional level of the legal framework for addressing the derailment of human rights and environmental litigations amounts to amending the constitution. Constitutional amendments are essential because critical areas in the polity cannot be changed by a straightforward passage of legislation in Nigeria. In Nigeria, for example, some of these critical areas have been specified in Section 9 (3) of the 1999 Consitution (as amended). These include creating new states, boundary adjustments, new local government areas, fundamental rights, or the mode for altering the constitution.

The following sections of the 1999 Consitution of the Federal Republic of Nigeria (as amended) provide opportunities for amendments of the constitution to accommodate the legal framework proposed for addressing the derailment of human rights and environmental litigations:

(i) Section 9 of the 1999 Consitution (as amended) - establishes the procedure and the areas of the polity that can be amended. Section 9(2) provides that:

> An Act of the National Assembly for the alteration of this Constitution, not being an Act to which section 8 of this Constitution applies, shall not be passed in either House of the National Assembly unless the proposal is supported by the votes of not less than two-thirds majority of all the members of that House and approved by resolution of the Houses of Assembly of not less than two-thirds of all the States.

Section 9(3) provides that:

> An Act of the National Assembly for the purpose of altering the provisions of this section, section 8 or Chapter IV of this Constitution shall not be passed by either House of the National Assembly unless the proposal is approved by the votes of not less than four-fifths majority of all the members of each House, and also approved by resolution of the House of Assembly of not less than two-third of all States.

(ii) Section 12 of the 1999 Consitution (as amended) - establishes that treaties ratified by Nigeria must be enacted as domestic legislation to be enforceable. Section 12(1) provides that:

''No treaty between the federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.''

(iii) Section 6 (5) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), - establishes all courts of superior record. Section 6(5) provides as follows:

"The courts to which this section relates, established by this Constitution for the Federation and for the States, specified in subsection (5) (a) to (1) of this section, shall be the only superior courts of record in Nigeria; and save as otherwise prescribed by the National Assembly or by the House of Assembly of a State, each court shall have all the powers of a superior court of record."

Subsection (4) paragraph (a) of section 6 provides as follows:

"the National Assembly or any House of Assembly from establishing courts, other than those to which this section relates, with subordinate jurisdiction to that of a High Court;"

It is important to note that although the constitutional amendment process is tedious in Nigeria, there have been several amendments to the Nigerian constitution. The constitutional amendment has helped to clarify the Constitution, adapt it to changing times, and repair the occasional damage done by the courts. For example, in Nigeria, based on the Constitution of the Federal Republic of Nigeria (Third Alteration) Act 2010, an amendment of the Nigerian Constitution now makes the International Labour Conventions (ILO) Conventions directly applicable in the National Industrial Court of Nigeria. Section 254 (c) (2) of the Nigerian Constitution now provides that:

'Notwithstanding anything to the contrary in this Constitution, the National Industrial Court shall have the jurisdiction and power to deal with any matter connected with or pertaining to the application of any international convention, treaty or protocol of which Nigeria has ratified relating to labour, employment, workplace, industrial relations or matters connected therewith.' [719]

[719] Section 254 of the 1999 Constitution of the Federal Republic of Nigeria as amended.

Onomrerhinor, states that one of the ways of acquiring obligations in international law is by agreeing to the text of the treaty stipulating such obligations. According to Onomrerhinor, in addition to being a signatory to a treaty, such a treaty may need to be domestically incorporated by the state assuming such obligation before its provisions can be fully benefited by her citizens. Section 12 of the Federal Republic of Nigeria Constitution of 1999 (as amended) states that a treaty must be domesticated by the Nigerian legislature before it can be heard in a Nigerian court.[720] The author welcomes the Third Alteration Act 2010 to the Constitution and recommends that it be extended to human rights treaties, particularly those addressing socio-economic rights.[721]

The following section discusses three instruments at the constitutional level that is required to address the derailment of human rights and environmental litigation in Nigeria.

7.3.2.1 Invoking Jurisdiction of the International courts

The first legal instrument at the constitutional level is invoking the jurisdiction of regional and international courts within the constitution. An international court is an international organisation, or a body of an international organisation, that hears litigations in which one of the parties is a state or an international organisation. International courts are made up of independent judges who follow predetermined rules of procedure to issue binding decisions based on international law.[722] Examples of such regional and international courts that can be invoked during human rights and environmental litigations include the African Court on Human and Peoples' Rights, the European Court of Justice (ECJ), the International Court of Justice (ICJ), and the International Criminal Court.

The ICC has recently indicated that it will also begin to focus on environmental crimes and Human Rights violations, and victims have already begun to submit requests. The UN-backed court, which sits in The Hague, has ruled mostly on genocide and war crimes cases since it was set up in 2002. It has been criticized for its reluctance to investigate major environmental and cultural crimes, which often happen in peacetime. The ICC can take action if the crime happens

[720] Onomrerhinor, F. A. 'A re-examination of the requirement of domestication of treaties in Nigeria', (2016) 7 Nnamdi Azikiwe University Journal of International Law and Jurisprudence 17-25.
[721] Ibid 23-24
[722] Cesare P.R. Romano, Karen J. Alter and Yuval Shany, *The Oxford Handbook Of International Adjudication* (Oxford University Press 2013) 4-9

in any of the 124 countries that have ratified the Rome statute, if the perpetrator originates from one of these countries, or if the UN Security Council refers a case to it. Crimes must have taken place after the Rome Statute came into force on 1 July 2002.[723]

Claimants (or groups of claimants) can lodge a case directly with the ICC. Recently, Richard Rogers, a partner in the international criminal law firm Global Diligence, lodged a case with the ICC on behalf of 10 Cambodians alleging that the country's ruling elite, including its government and military, has perpetuated mass rights violations since 2002 in pursuit of wealth and power by grabbing land and forcibly evicting up to 350,000 people. As recently as March 2016, one such case was considered by the International Criminal Court (ICC), although it was rejected on jurisdictional grounds, the victims' request to investigate a case of environmental destruction by Chevron in Ecuador. There is interest in how the ICC can prosecute environmental destruction as a crime against humanity under Article 7 of the Rome Statute.

Establishing the basis for invoking the jurisdiction of international courts is recommended for addressing the derailment of human rights and environmental litigations in Nigeria. This recommendation addresses the lack of jurisdiction, a significant barrier to holding MNOCs and their subsidiaries for human rights and environmental violations. Most human rights and environmental litigations reviewed in this thesis have taken place in the court systems of the MNOC's host countries.

Although claimants (or groups of claimants) can lodge a request directly with the ICC,[724] amending the constitution to include a section/clause that recognises the jurisdiction of the international courts (e.g., ICC) would strengthen victim claims. Under the Nigerian constitution, the main Section that can be amended is Section 12 of the 1999 Constitution (as amended). Although this section states that treaties ratified by Nigeria must be enacted as domestic legislation in order to be enforceable, it can be amended to allow claimants to invoke the jurisdiction of international courts. Section 12(1) provides that:

[723] John Vidal and Owen Bowcott, 'ICC Widens Remit to Include Environmental Destruction Cases' *The Guardian* (2016) <https://www.theguardian.com/global/2016/sep/15/hague-court-widens-remit-to-include-environmental-destruction-cases#:~:text=The%20ICC%20can%20take%20action,force%20on%201%20July%202002.> accessed 29 April 2022.

[724] Leiden Journal of International Law 2008 Amended most serious crimes": a new category of core crimes within the jurisdiction but out of the reach of the International Criminal Court

''No treaty between the federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.''

This constitutional amendment will allow victims of human rights and environmental violations in the Niger Delta can sue MNOCs in international courts (e.g., ECJ and ICC) to avoid issues of lack of jurisdiction, especially in the home state of the parent companies.

7.3.2.2 Environmental Courts and Special Courts

The establishment of environmental courts and special courts for human rights and environmental litigations is another instrument that can be implemented at the constitutional level of the legal framework. A special court is a court with limited jurisdiction that deals with a particular field of law rather than a particular territorial jurisdiction. A special tribunal is a criminal court set up on an ad-hoc basis by the United Nations. It is generally set up to investigate core international crimes – war crimes, crimes against humanity, and genocide – in a specific conflict. To date, special tribunals have been set up to prosecute crimes in the former Yugoslavia (1993), Rwanda (1994), Cambodia (2003), and Lebanon (2005).[725]

There are several examples of Special Courts and Tribunals that have been set up in different countries of the world. Common forms of special courts in the United States include drug, family, and Traffic courts, where these special courts can handle both civil and criminal disputes. An example of a special court in the United States is the Court of Appeals for the Armed Forces, founded in 1951, which functions as an appeal court for military and economic offences. The Veterans' Court, which was created in 2008, is another example of a special court in the US. In the UK, the judiciary of England and Wales includes special courts tasked with hearing cases related to minor traffic offences.

Special courts and Tribunals are considered a quick remedy for questions of delays in litigations.[726] Special courts are mainly set up to speed up the solving and closure of some special cases that require special judicature. Transnational human rights and environmental

[725] European Center for Constitutional and Human Rights, 'Special Tribunal' (Berlin 2022) <https://www.ecchr.eu/en/glossary/special-tribunal/#:~:text=A%20special%20tribunal%20is%20a,genocide%20%E2%80%93%20in%20a%20specific%20conflict.> accessed 1 April 2022.
[726] Legal Dictionary, 'Special Courts' (2022) <https://legal-dictionary.thefreedictionary.com/Special+Courts> accessed 1 April 2022.

litigations arising from the actions of MNOCs in developing countries (e.g. Nigeria) would benefit immensely from such special courts and tribunals, which usually take several years from initiation and completion. In Nigeria, subsection (5) of Section 6 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) establishes all courts of superior record. The National Assembly and State Houses of Assembly may establish courts other than those established by subsection (5) of section 6, provided that such courts have subordinate jurisdictions to those established by section 6 (5) for amending the Constitution.

In Nigeria, the constitution mainly establishes the election tribunals and allocates those tribunals and courts jurisdictions to adjudicate election disputes. The Electoral Act (i.e., the Electoral Act 2010) outlines the detailed rules governing the implementation of election tribunals.

Under the Nigerian constitution, the critical section for amendment is Section 6 of the 1999 Constitution (as amended). Section 6 (5) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) establishes all courts of superior record. Section 6(5) provides as follows:

> "The courts to which this section relates, established by this Constitution for the Federation and for the States, specified in subsection (5) (a) to (1) of this section, shall be the only superior courts of record in Nigeria; and save as otherwise prescribed by the National Assembly or by the House of Assembly of a State, each court shall have all the powers of a superior court of record."

Subsection (4) paragraph (a) of section 6 provides as follows:

> "the National Assembly or any House of Assembly from establishing courts, other than those to which this section relates, with subordinate jurisdiction to that of a High Court;"

Okumagba provides a critical examination of Nigeria's legal and policy frameworks for preventing petroleum pipeline vandalism. The author contends that a comprehensive approach is required to prevent environmental harm and ensure accountability for Niger Delta companies. Okumagba's analysis emphasises the significance of legal mechanisms, such as the

establishment of environmental courts and other legal mechanisms, in addressing human rights violations and environmental degradation in the region.[727]

According to Anaebo and Ekhator, the establishment of environmental courts and special courts can provide a means of addressing stumbling blocks in Niger Delta human rights and environmental litigation. These courts can act as a forum for resolving disputes involving environmental damage caused by oil companies, as well as ensuring that the rights of communities affected by such damage are adequately protected. The authors states that such courts can be used to hold corporations accountable for any environmental harm they cause while also acting as a deterrent to further environmental damage. Furthermore, these courts can help communities seek redress for human rights violations, such as the right to a healthy environment, which is a fundamental right enshrined in the Nigerian Constitution. Anaebo and Ekhator emphasise the importance of establishing environmental courts and special courts in Nigeria to address environmental and human rights issues arising from Niger Delta oil production. These courts have the potential to play a critical role in protecting the rights of communities impacted by environmental damage and holding oil companies accountable for any harm they cause.[728]

7.3.2.3 Ratification of International treaties and Agreements

The third instrument at the constitutional level of the legal framework that can be explored to address the derailment of human rights litigations is to establish the basis for the ratification and incorporation of international treaties to become justiciable in the national courts. A treaty (also known as a convention, protocol, pact, or accord) is any legally binding agreement between states under international law (countries).[729] Treaties are primary sources of international law.[730] In several jurisdictions such as Nigeria and the US, a treaty is specifically

[727] Okumagba, E.O. 'Critical analysis of laws and policies for the prevention of petroleum pipeline vandalization in Nigeria' (2021) 23(4) Environmental Law Review 305-320.
[728] Anaebo, O.K., and Ekhator, E.O. 'Realising substantive rights to healthy environment in Nigeria: A case for constitutionalisation' (2015) 17(2) Environmental Law Review 82-99.
[729] Anders Henriksen, 'The Actors In The International Legal System', *International Law* (3rd edn, Oxford University Press 2017); Shaw, M.N., 2017. *International law*. Cambridge university press.
[730] University of California Hastings Law Library, 'International Law Research Guide: International Treaties' (University of California Hastings Law Library 2022) <https://www.phe.gov/s3/law/Pages/International.aspx> accessed 7 April 2022.

a legally binding agreement between governments that requires ratification and the "advice and consent" of the legislature.

Some international treaties that can be invoked to help progress human rights and environmental litigations include the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic Social and Cultural Rights (ICESCR), the European Convention on Human Rights (ECHR), the American Convention on Human Rights (AmCHR), the Inter-American Commission on Human Rights (IACHR) and the African Convention on Human and Peoples' Rights (AfCHPR).[731]

Nigeria is a signatory to various bilateral and multilateral treaties on human rights, international trade, taxation, intellectual property, women and children's rights, immigration etc., but only a few of them have been domesticated. [732] For example, Nigeria is a signatory to the United Nations Framework Convention on Climate Change (UNFCCC) and Kyoto Protocol, and it has obligations as a party to the protocol. However, these treaties have not been domesticated.[733]

In many countries, international treaties do not become justiciable if there are not domesticated within the country's legal system, usually through a constitutional amendment. Nigeria has domesticated two key international treaties – the African Charter[734] and the Rights of the Child Act.[735] The African Charter was domesticated into Nigerian law via the instrumentality of the African Charter on Human and Peoples' Rights (Enforcement and Ratification) Act 1983.

Under the Nigerian constitution, the main Section that can be amended is Section 12 of the 1999 Constitution (as amended). This section established that treaties ratified by Nigeria must be enacted as domestic legislation to be enforceable. Section 12(1) provides that:

[731] Alan Boyle, 'Human Rights And The Environment: Where Next?' (2012) 23 European Journal of International Law. 614

[732] See the list of treaties signed by Nigeria and their status here: Law Nigeria, 'Center For Treaties Of Nigeria' (Law Nigeria 2018) <https://laws.lawnigeria.com/2018/02/23/center-for-treaties-of-nigeria-3/> accessed 30 April 2022.

[733] The UNFCCC) was opened for signature at the Rio Summit. The Kyoto protocol came into force in 2005. See Article 10 o the Kyoto Protocol, available at http://unfccc.int/resource/docs/convkp/kpeng.pdf#page=12

[734] Cap.10, Laws of the Federation of Nigeria 1990 with a commencement date of 17 March 1983.

[735] Act No. 26 of 2003 is a law that was enacted in 2003. It has 278 sections and 11 schedules that cover a variety of topics, including a child's rights and responsibilities, crimes against children, child care, protection, and supervision, child custody and possession, guardianship, wardship, fostering, and adoption, as well as the institutional framework for enacting the act.

> ‘‘No treaty between the federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.’’

The citizens of a country are essentially beneficiaries of human rights treaties. Victims can count on these treaties to hold any agency, including the MNOCs, responsible for human rights violations in defence of human rights. It is, therefore, not appropriate that Nigeria does not take measures to integrate them into its laws after ratifying such treaties.

Several researchers have presented the case for the constitutionalization of human rights and environmental rights. Onyeka and Eghosa argue that domestically constitutionalizing environmental rights (rather than regionalizing them before a human rights commission or treaty) would improve environmental outcomes in Nigeria.[736] The authors make a case for Nigeria to amend the constitution to expressly recognise a legally binding and enforceable substantive provision for rights to a healthy environment. The authors draw inspiration from South Africa, which has constitutionalized the right to the environment, to bolster the constitutionalization argument. This means that the constitution can also be amended to include international environmental treaties. Eke has even taken a more aggressive stand on the issue by arguing that the non-domestication of treaties in Nigeria is a breach of international obligations. [737]

Furthermore, the liberalisation of the locus standi doctrine by the FREP rules 2009 has provided another pathway for the future incorporation of a right to the environment in Nigeria. The locus standi rule is abolished in Nigeria by Preamble 3(e) of the new fundamental rights enforcement rules (FREP) 2009. The preamble 3(b) of the FREP rules posits that the courts should respect municipal, regional and international treaties or bills of rights that the court is aware of. It has been argued that:

> “the [FREP] Rules laid to rest any lingering doubt regarding the justiciability of the socio-economic provisions of the Act, including the right to a healthy environment, by

[736] Onyeka K. Anaebo and Eghosa O. Ekhator, 'Realising Substantive Rights To Healthy Environment In Nigeria' (2015) 17(2) Environmental Law Review. 82-99

[737] Sandra Sandra, 'Non-Domestication Of Treaties In Nigeria As A Breach Of International Obligations' (S P A Ajibade & Co 2020) <https://spaajibade.com/non-domestication-of-treaties-in-nigeria-as-a-breach-of-international-obligations-sandra-eke/?utm_source=Mondaq&utm_medium=syndication&utm_campaign=LinkedIn-integration> accessed 30 April 2022.

> expressly defining fundamental rights as including 'any of the rights stipulated in the African Charter on Human and People's Rights (Ratification and Enforcement) Act."

Another approach to establishing the basis for ratified international treaties to become justiciable in the courts is to expand the remit of international treaties in the Nigeria Constitution. This can be handled by including more international environmental treaties to complement existing treaties (e.g., the African Charter) in the Constitution. This approach is attractive considering the difficulty in the constitutional amendment process in Nigeria.

The abundance of case law in Nigeria on the African Charter suggests that the domestication of the charter has broadened domestic enforcement rights. There have been several litigations in Nigeria that have tested the domestic application of international human rights treaties. One of the most notable litigations is the *Abacha v Fahewimi* litigation, where the Supreme Court of Nigeria examined section 12(1) in relation to the African Charter on Human and Peoples' Rights (the African Charter). One of the critical issues in this litigation was the status of a domesticated treaty under Section 12 in relation to other municipal laws. The inequity of section 12(1) is highlighted by the statement made by one of the Supreme Court justices in the *Abacha v Fahewimi* litigation when he said:

> *''It is therefore manifest that no matter how beneficial to the country or the citizenry an international treaty to which Nigeria has become a signatory may be it remains unenforceable, if it is not enacted into law of the country by the National Assembly*.''[738]

This means that human rights treaties to which Nigeria is a party intended for the citizenry's ultimate benefit have no effect unless invoked by the legislature.[739] This appears to defeat the purpose of Nigeria's numerous human rights treaties, which are intended to benefit Nigerians living within the country's borders.[740] The domestication of international treaties would strengthen the plaintiffs' claims in human rights and environmental litigations.[741]

7.4 Legislative

Victims of human rights and environmental violations can explore several instruments at the legislative level to address the derailments of litigations arising from the Niger Delta. The

[738] [2000] 6 NWLR (Part 660) 228. See note 12 above per Ejiwunmi JSC at 356–57
[739] Abacha case at note 12 above per Ejiwunmi JSC at 356–57.
[740] Edwin (n 184)
[741] Ibid

term “legislative” is associated with the body or department that exercises power and function of legislating (that is, the process of making laws). In Nigeria, the powers of the government are separated under the Nigerian Constitution. Chapter I, Part II of the Nigerian Constitution divides these powers among the three branches of government: the legislature, the executive, and the judiciary. Legislative powers refer to the law-making powers of the legislature, including the power to make new laws, alter existing ones and guard and repeal laws.[742]

Legislative power is held by the two chambers of the legislature: the house of representatives and the senate. Together, the two chambers make up the law-making body in Nigeria, called the national assembly, which serves as a check on the executive arm of government. The National Assembly of the Federal Republic of Nigeria is established under section 4 of the Nigerian Constitution. It consists of a Senate with 109 members and a 360-member House of Representatives.[743]

The legislative level of the legal framework provides a platform for enacting new laws and modifying (or repealing) existing laws to address derailment in human rights and environmental litigations. There are several important laws and regulations that are important in human rights and environmental litigations.

(i) The NESREA Act

(ii) The National Oil Spill Detection and Response Agency (Establishment) Act establishes the National Oil Spill Detection and Response Agency (NOSDRA), which coordinates and implements the National Oil spill Contingency Plan (NOSCP) for Nigeria.

(iii) The Environmental Guidelines and Standards for the Petroleum Industry (hereafter known as the ‘Guidelines,’ EGASPIN)

(iv) The Oil Pipeline Act Nigeria

(v) The Petroleum Act (1969): this act provides the exploration of petroleum from territorial waters and the continental shelf of Nigeria and vests the ownership of all on-shore and off-shore revenue from petroleum resources in the Federal Government. It is organized into five

[742] Efobi, N. and Ekop, N., 2022. *Legal systems in Nigeria: overview*. [online] Practical Law. Available at: <https://uk.practicallaw.thomsonreuters.com/w-018-0292?transitionType=Default&contextData=(sc.Default)&firstPage=true> [Accessed 16 April 2022].

[743] The Nigerian legislature body, modelled after the federal Congress of the United States, is supposed to guarantee equal representation with 3 Senators to every 36 states irrespective of size in the Senate plus one senator representing the FCT and single-member district, plurality voting in the House of Representatives.

sections: Oil Exploration Licences, Oil Prospection Licenses and Oil Mining Licenses; Rights of Pre-Emption; Repeals; and Transitional And Savings Provisions.

(vi) The Environmental Impact Assessment (EIA) Act provides the framework for assessing the impact of oil and gas projects on the environment

(vii) The Nigerian Extractive Industries Transparency Initiative Act 2007 provides the framework for transparency and accountability by imposing reporting and disclosure obligations on oil and gas companies upon the Nigeria Extractive Industries Transparency Initiative (NEITI).

(viii) The Petroleum Industry Act (PIA) 2021: this act is the most recent legislation aimed at creating an environment more conducive for the growth of the sector and addressing legitimate grievances of communities most impacted by extractive industries. This regulation brings to a close a 20-year effort to reform Nigeria's oil and gas sector.

The following section discusses three instruments at the legislative level that is required to address the derailment of human rights and environmental litigation in Nigeria.

7.4.2.1 Defining the Choice of Law to apply in litigations

The first legal instrument at the legislative level of the legal framework that can be explored to address the derailment of human rights litigations in the Niger Delta is enacting legislation to define the choice of law application in human rights and environmental Litigations. One of the key issues in deciding on human rights and environmental litigations determining the choice of law to apply in the litigations, that is, whether to apply the law of the host state where the subsidiary/subsidiary of the MNOC is operating or the law of the home state where the MNOC is headquartered.

Choice of law is a stage in the litigation of a case involving a conflict of laws in which it is necessary to reconcile differences between the laws of different legal jurisdictions. As a result of this process, courts in one jurisdiction may be required to apply the law of another jurisdiction in lawsuits arising from, say, family law, tort, or contract.

There are several areas where the issue of choice of applicable law can arise in human rights and environmental litigations. The first is the jurisdiction of the court, where the court chosen by the plaintiff must decide whether it has jurisdiction to hear the case and, if so, whether

another forum is more appropriate for the disposition of the litigation. A plaintiff with the necessary legal expertise and funds would usually always initiate proceedings in the court, most likely to result in a favourable outcome, but ultimately whether or not a court accepts such cases is always determined by local law.

In several human rights and environmental litigations such as *Wiwa v Shell*, *Kiobel v Shell*, *Bodo v Shell*, and *Oguru v Shell*, the court has always had to decide whether it has personal jurisdiction and subject matter jurisdiction to hear the case. For example, in *Wiwa v Shell* one of the key issues for determination was to determine whether the court had jurisdiction to hear the litigation. The defendant in this litigation, SPDC, submitted a variety of grounds for dismissal of the case. One of the main points of contention was whether the US court seized the matter and could exercise personal jurisdiction over the defendant holding companies based in England and the Netherlands. The court of Appeal ruled that it had personal jurisdiction to hear the litigation.[744]

The second issue is the recognition of foreign judgement, where the court is allowed to recognise the validity of a foreign judgement. Recognition of foreign judgements varies differently in different jurisdictions, although under international law, this authority is usually part of the doctrine of comity after looking at whether the foreign court had jurisdiction to hear the litigations and the whether fair procedures were followed in adjudicating the litigation. In England, this authority is governed by the doctrine of obligation. The Brussels Recast Regulation governs jurisdiction and recognition within the European Union.

Again, there are several litigations where the choice of law has been used to recognise foreign judgement. For example, the Dutch Court of Appeal in the *Oguru v Shell* litigation ordered a Nigerian legal entity (SPDC) to pay damages to a Nigerian claimant for damage sustained in Nigeria based on Nigerian law. This litigation was significant because it shows that a foreign court could hold a multinational oil company liable for environmental damage in a country where its subsidiary/subsidiary was operating.[745]

Another related legal concept that can help plaintiffs apply the law and initiate court proceedings that are most likely to result in a favourable outcome is the collection redress and class action. A class action is a collective claim in which the court awards permission to an

[744] United States Court of Appeals for the second circuit, Case 1:01-cv-01909-KMW-HBP, Document 112, Wiwa et al. v. Shell Petroleum Development Company of Nigeria, CA 2nd Cir. 29 June 2009, 08-1803 Cv.
[745] Dam (n 13)

individual or individuals to bring Class action lawsuit claims against others similarly situated (the class members) in a single case. There are two different collective redress mechanisms in the Dutch legal system: representative collective actions and a class/collective settlement mechanism based on an opt-out system.

Under Dutch law, a collective action allows an association or foundation to file an action to protect the similar interests of a group of other people. This mechanism of collective action has been in place since 1994. A notable example is the *Oguru v Shell* where the Friends of the Earth Netherlands and the claimants initiated a legal case against Shell in the Netherlands for oil spills caused by their subsidiary/subsidiary (SPDC) in Nigeria.

There are two aspects in which the choice of applicable law can impact human rights and environmental litigations. The first aspect relates to the ability of the plaintiffs to bring claims against MNOCs in their home state for harm caused by their subsidiaries abroad, and the second is the ability of the plaintiffs to bring claims against the MNOCs in the host state of the subsidiaries where the harm occurred. In both aspects, the core legal issue is that the responsibility of MNOCs to respect human rights entails monitoring the activities of its subsidiaries, which is consistent with the UNGPs' requirement that businesses have a due diligence process in place to ensure that human rights are respected.[746]

On the first aspect, bringing claims against MNOCs in the home state for harm caused by their subsidiary can be very complex and challenging in human rights and environmental litigations. The critical issues for determination in these litigations would usually require a decision on the choice of applicable law before the court can make its final judgement. A good example is the *Oguru v Shell* litigations. The court applied Nigerian law in deciding key legal issues related to the cause of oil spill sabotage and the maintenance of oil pipelines. On this specific issue, the court applied Nigerian law and agreed with the defendant that the oil company is not liable for remediation and compensation for oil spills due to sabotage and oil theft under Nigerian law. However, on the issue of lack of jurisdiction, the court applied the EU's Brussels I Regulation to determine that it had jurisdiction to hear the claims against the Royal Dutch shell (parent company) and those against the Nigeria-based subsidiary (SPDC).

The second aspect relates to the ability of the plaintiff to bring claims against the MNOCs for harm caused by their subsidiaries in their host state. This second aspect will allow the local

[746] Skinner (n 75) 65

courts in the host state of the subsidiaries to apply the laws in the home state, such as the EU's Brussels I Regulation and the collective redress mechanisms. As a result, it will be easier for plaintiffs to hold MNOCs liable for remediation and compensation for oil spills.

7.4.2.2 Responsibility for oil spill due to sabotage

Sabotage in the oil and gas industry is a term used to describe illegal activities by third parties to break oil pipelines or steal oil from oil pipelines. Two main laws govern the issues of sabotage in Nigeria. The first is the Oil Pipelines Act 1990 and the Oil and Gas Pipelines Regulations, which provide the legal and regulatory framework for establishing, operating, and maintaining incidental and supplementary pipelines to oil and gas operations in Nigeria. Section 11(5) of the Oil Pipeline Act states as follows:

> "The holder of a licence shall pay compensation … to any person suffering damage (other than on account of his own default or on account of the malicious act of a third person) as a consequence of any breakage of or leakage from the pipeline or an ancillary installation, for any such damage not otherwise made good."[747]

The above legislation excludes the MNOC from remediation and compensation when the oil spill is caused by sabotage. The Nigerian law also provides clear international standards that indicate special material to be used, special surveillance to be exercised and care in selecting the location of the route to be followed by the pipeline. Nigerian legislation also lays forth specific international requirements for using special materials, the implementation of special monitoring, and carefully selecting the pipeline's path. For example, section 15 (f), Part II of the Oil Pipelines Act states as follows:

> *all new pipework shall be tested in accordance with A.S.M.E. working standards to 1.25 times the maximum intended working pressure before being put into service; and pipework shall also be similarly tested when alterations or repairs have been carried out.*[748]

[747] Oil Pipelines Act, 1990, Clause 11 (5). Also, the Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN) state: "A spiller shall be liable for damages from a spill for which he is responsible" (Part 8 (B) 8.20).
[748] 1990 Oil Pipelines Act

This means that even if the sabotage claims by Shell and other MNOCs are valid, it does not still absolve Shell of the responsibility of monitoring and supervising the use of oil infrastructure.

Another law that governs the issue of sabotage is the Environmental Guidelines and Standards for the Petroleum Industry (section 4.1). The DRP, Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN) was issued in 1992 and revised in 2002. EGASPIN is a collection of standards and practices and is the primary environmental document used in the oil industry. Section 4.1 states:

> "An operator shall be responsible for the containment and recovery of any spill discovered within his operational area, whether or not its source is known. The operator shall take prompt and adequate steps to contain, remove and dispose of the spill."[749]

It is important to understand why the sabotage issue is important in human rights and environmental litigations. The law simply states that an oil company is not responsible for an oil spill caused by sabotage or theft. Therefore, if it is proven that the cause of the oil spill is sabotage, then the oil company that owns the oil infrastructure is not liable for remediation and compensation. Simply put, the party who proves or disproves sabotage as the cause of the oil spill can affect whether or not remediation and compensation are paid.

The plaintiffs and the defendants can exploit the issue of sabotage in human rights and environmental litigation differently. While the plaintiffs aim to prove that the oil spill results from poor maintenance, the defendant proves that the oil spill is caused by sabotage to avoid remediation and compensation. The defendants have blamed the majority of the oil spill on sabotage in several litigations by exploiting the Nigeria law (oil pipeline act), which states that if an oil spill is caused by sabotage, then the oil company does not remediate and pay compensation.

Several litigations like *Bodo v Shell* and *Oguru v Shell* have seen the sabotage issue play a prominent role in the court decisions. In the *Oguru v Shell* litigation, the defendant contested the plaintiffs' claims on several grounds. These include:

(i) whether the oil spills had been caused by faulty maintenance (as claimed by the plaintiffs) or by sabotage (as claimed by the defendants)

[749] DPR, Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN)

(ii) whether, under Nigerian law, a parent company owes a duty of care towards third parties that may suffer harm as a result of activities carried out by its (sub)subsidiary.

In its final ruling in 2013, the court concluded that the oil spills resulted from sabotage and not from faulty maintenance as claimed by the plaintiffs. The court also ruled that the oil pipeline operator is not liable for remediation and compensation for an oil spill caused by sabotage under Nigerian law.[750]

7.4.2.3 Defining the relationship between MNOCs and their Subsidiaries

Defining the relationship between the MNOCs and their parent entity and its subsidiaries is very important in initiating a litigation action against the parent company for the harmful actions of its subsidiaries. The main legal issue is the circumstance under which the parent company can assume a duty of care over the subsidiaries regarding how it controls and supervises them. One of the ways a parent company can assume a duty of care is when it administers and implements group-wide policies. In several human rights and environmental litigations, the court has ruled on whether a parent company can be liable for a subsidiary's operations. The relationship between the entities within the MNOCs has featured in most human rights and environmental litigations arising from the Niger Delta.

The recent Supreme Court decision in *Okpabi v Royal Dutch Shell Plc* [2021] UKSC3, completed a triumvirate of cases in which the Court has been asked to rule on whether a parent company can be liable for a subsidiary's operations. The importance of this legal issue is that during litigation, for you to hold the parent company liable, there needs to be a connection and a link between the parent and the subsidiary company in terms of control. The link and the control must be established during litigation.

Another related issue is the fact the plaintiff may not even know the correct entity to sue in litigation. The relationship between parent companies and their subsidiaries is often complicated and complex to understand. The plaintiff may not even know the entity to sue in some cases. The *Bowoto v Chevron* case is a very good example.[751] The case started in 1999,

[750] The Hague District Court, 30 January 2013, Dooh et al. v Royal Dutch Shell and Shell Petroleum Development Company of Nigeria, ECLI:NL:RBDHA:2013:BY9845, paras. 4.43–4.58; The Hague District Court, 30 January 2013, Oguru et al. v Royal Dutch Shell and Shell Petroleum Development Company of Nigeria, ECLI:NL:RBDHA:2013:BY9850, paras. 4.45–4.60.
[751] Bowoto v. Chevron Texaco Corp., 312 F. Supp. 2d 1229 (N.D. Cal. 2004).

but it was not until 2005 that the plaintiff knew that they were suing the wrong entity (Chevron Overseas Petroleum Inc. instead of Chevron USA). This is significant because the plaintiffs had filed a lawsuit against the incorrect defendant. Presiding U.S. District Court Judge Susan Illston chastised Chevron's attorneys for remaining silent, implying that they may have done so to delay or obstruct the plaintiffs' claims.[752]

With such legislation in place, plaintiffs can know the entity to sue in litigation and the relationship between the MNOCs and their subsidiaries operating in Nigeria in human rights and environmental litigations. The plaintiffs will also understand the extent of the supervision and control that the MNOCs have over their subsidiaries in critical operations such as health and safety and maintenance of oil pipelines and other infrastructure.

7.5 Regulatory

The third legal instrument in our proposed legal framework relates to the regulatory agencies and associated regulations. The key areas that will impact human rights and environmental litigations are discussed below.

7.5.1 Conflicting Mandates of different Regulatory Agencies

The existence of regulatory agencies and associated regulations that are robust and independent is essential in human rights and environmental litigations. The mandates/objectives of the different regulatory agencies and related regulations must not be the same and conflict with each other.

Nigeria has a fairly robust set of regulations and regulatory agencies that are responsible for supervising Human Rights and environmental violations in the oil and gas industry. The key agencies are - NESDREA, NOSDRA, NUPRC, and EGASPIN. As Nigeria operates a federal system of government, the federal ministry of environment and the state ministry of the environment are also involved in supervising environmental matters. According to Ekhator, alhough there are various laws and regulations that apply to the oil and gas industry in Nigeria, the regulatory bodies still lack the power, resources, and political will to implement them.[753]

[752] MacLean (n 573)
[753] Ekhator EO, 'Public regulation of the oil and gas industry in Nigeria: an evaluation' (2016). Annu Surv Int Comp Law 21(1):43. Article 6; see Emeseh E., 'The Niger Delta crisis and the question of access to justice' (2011). In: Obi C, Rustad SA (eds) Oil and insurgency in the Niger Delta – managing the complex politics of petro-violence. Zed Books, London. 55–70

Although the oil and gas sector in Nigeria is subject to different laws and regulations, Nigerian regulatory agencies lack the capacity, resources and/or political will to enforce them

The key legal issue relates to how the various agencies implement/enforce these laws and standards and their relationship with the international oil companies in the Niger Delta. Also, the overlap and conflict of authorities and responsibilities of the federal regulatory agencies and the state agencies have negatively impacted the management of Human Rights and the environment in the Niger Delta. This is added to the fact that there are separate government agencies with conflicting mandates. Therefore, when there are environmental violations, these agencies cannot monitor and enforce compliance with environmental laws.

The conflicting mandates of regulatory agencies are significant in litigations because MNOCs can decide to comply with those aspects of the mandate that is easy while ignoring other demanding parts. On the one hand, the plaintiffs would claim that the MNOCs violated their human rights and the environment by referring to specific legal mandates of the Act that establishes an agency of the government responsible for protecting human rights and the environment due to oil operations. On the other hand, the defendants would claim that they had complied with an aspect of a similar regulation even though it may not sufficiently address the concerns of the claimants regarding human rights and the environment.

The two main agencies responsible for monitoring and supervising oil operations in Nigeria are NOSDRA and NUPRC. However, NOSDRA and NUPRC differ in their understanding of EGASPIN, which directly affects the clean-up of oil spills in the Niger Delta. This means that both bodies struggle to deal with the incidence when there is an oil spill. This is evident in the lack of coordination of the operations, misinterpretation of the rules, and even confusion and struggles to gain access to the affected sites simultaneously.

It has been suggested that NORSDRA should be responsible for mobilizing resources to clean up once the oil spill has been reported since it has already focused on that. However, the challenge for NOSDRA, as pointed out by the agency's Director, is that it does not have the ability and technical expertise to detect oil spills. The responsibility to monitor and report should be on DRP because of their relationship with oil companies and their expertise and resources. This delineation of responsibility will improve the response to an oil spill. Therefore

whenever there is a litigation, MNOCs can choose the agencies they would want to cooperate with and the extent to which they plan to cooperate with such an agency.

Another area of concern is that some of the most important regulatory agencies are locked in a conflict of interest, which hampers effective supervision and monitoring of Human Rights and environmental pollution. The environmental agency and the ministry under which it is placed for supervisory purposes have a conflict of interest. The Ministry of Environment, for example, did not exist when the EGASPIN was established under the Ministry of Petroleum's NUPRC. It is understandable and logical to see why the DRP was under the Ministry of Petroleum because of its strategic importance of the oil and gas industry as the mainstay of the Nigerian government, availability of technical expertise, and knowledge to regulate the oil and gas industry. Now that there is a ministry of environment, there is a conflict of interest in a ministry that has to maximize revenue by maintaining production at acceptable levels and, on the other, ensure compliance with Human Rights and environmental standards. This point was captured as follows in the UNEP Ogoniland Report:

> "resource limitations, both physical and human, are a feature of oil Nigeria ministries. … For example: Both NUPRC and NOSDRA suffer from a shortage of senior and experienced staff who understand the oil industry and can exercise effective technical oversight. The main reason for this is that individuals with technical knowledge in the field of petroleum engineering or science find substantially more rewarding opportunities in the oil industry" [754]

It is important to note that in most countries of the world, including the Middle East where oil is the mainstay of the economy, the key environmental regulatory agencies are placed within the environment ministry. After the Deepwater Horizon incident, the US government realised that there was a conflict of interest between the different agencies regulating environmental issues. Therefore, there was a need to separate the agencies responsible for developing the offshore oilfields from the agency responsible for environmental approvals. This realisation led the US government to create a new Bureau of Safety and Environmental Enforcement under the US Department of the Interior to make it independent from the Department of energy resources. Previously the US Offshore Energy and Minerals Management Office (under the

[754] United nations Environment programme (UNEP): Environment Assessment of Ogoniland (2011) at 147, available at http://www.unep.org (last access in March 28, 2022)

Bureau of Ocean Energy Management, Regulation, and enforcement) was responsible for handling both developments of offshore oilfields as well as environmental approvals.

7.5.2 Internationally accepted standards in oil operations

Reference to internationally accepted standards in the extractive industries, and especially in the oil and gas operations, is a key legal issue in several human rights and environmental litigations. These internationally accepted standards are usually referenced in litigations during the presentation of evidence by the plaintiffs and defendants to establish the cause and impact of the oil spill.

One area that would benefit from applying internationally accepted standards in oil and gas operations is the maintenance of oil pipelines. In the United States, for example, a system known as Pipeline Integrity Management in High Consequence Areas (49 CFR 195.425) is mandated by law and is recognised as the International best practise standard. Some internationally recognised standards for oil pipeline management include[755]:

(a) American Petroleum Institute Codes (API 1160), which guides the implementation of the Integrity Management (IM) program for High Consequence Areas (defined as areas with a high human population, navigable waterways or environmental areas which are sensitive to oil spills, e.g., drinking water areas, or productive ecosystem); and

(b) American Society of Mechanical Engineers (ASME B31.4) standard for design and construction of pipelines API 1130 standard for pipeline Leak Detection System.

Relevant oil and gas regulations in Nigeria incorporate several international standards. Some key examples are summaries below:

(i) The Petroleum Act of 1969 states that the phrase "good oil field practise" must be interpreted in light of international industry standards and explicitly refers to the Institute of Petroleum Safety Codes, the American Petroleum Institute Codes, or the American Society of Mechanical Engineers Codes (ASME). The definition of 'good oil practice' is captured as follows in the Petroleum Act, 1969:

[755] Van Ho and others (n 52) 75

"*good oil field practice shall be considered to be adequately covered by appropriate current Institute of Petroleum Safety Codes, the American Petroleum Institute Codes, or the American Society of Mechanical Engineers Codes*."

(ii) The Environmental Guidelines and Standards for the Petroleum Industry (hereafter known as the 'Guidelines', or EGASPIN) stipulates that oil contamination of soil, sediment and surface water may not exceed specified levels consistent with internationally recognised standards for maximum levels of oil pollution.

The issue of international standards is significant in litigations because it might be the only way to compare the operations of the MNOCs(e,g., cleanup of oil spills) themselves between the developing and developed countries and the between MNOCs and operations of other MNOCs that have been adjudged to be of international best practice or standard.

The plaintiffs and defendant can exploit this issue in several ways. Plaintiffs have referred to the lack of installation of a leak detection system in several litigations as the cause of oil spills in the Niger Delta. For example, plaintiffs will attempt to prove that the operations of MNOCs in their countries(usually developed countries) are either not the same as the what same MNOCs have done in other developed or that the response is not up to international standards. The defendant usually will argue that their response is in line with the country's laws, which in most cases might not be up to international standards.

There are several litigations where this issue has arisen in the litigation. For example, in the *Oguru v Shell* litigations, the court agreed with the plaintiff's claim that Shell failed to apply internationally accepted standards in maintaining their pipelines. As a result, the court ruled that Shell should not only maintain the oil pipelines using the best international standards but should specifically install a 'leak detection system' on its pipelines to safeguard against future oil spills.

7.5.3 Involvement of International Human rights and Environmental Organisations

The involvement of international human rights and environmental has shaped the outcome of several human rights and environmental litigations. An environmental organisation is a group that focuses on protecting, analysing, or monitoring the environment against misuse or degradation caused by human forces. The organization may be a charity, a trust, a non-governmental organization, a governmental organization, or an intergovernmental

organization. Pollution, waste, resource depletion, human overpopulation, and climate change are some of the environmental issues environmental organisations focus on.

International human rights and environmental organisations have played a prominent role in human rights and environmental litigations. The key legal issues at stake in these litigations are the concept of Class Action and Collective Redress.

The concept of collective redress "encompasses any mechanism that may accomplish the cessation or prevention of unlawful business practices that affect many claimants or the compensation for the harm caused by such practices."[756] Collective redress will be mainly for plaintiffs in Nigeria to use MNOCs in two ways. The first relates to joint action where the plaintiffs can be joined in a lawsuit by international human rights and environmental agencies such as Friends of the earth and Amnesty international.

This legal instrument is essential because international human rights and environmental agencies can be involved in joint action and joint hearings in these litigations, which can significantly impact the outcome of the litigations. There is precedence in international agencies being involved in joint actions against MNOCs (e.g., Shell).

The involvement of international agencies can be exploited by plaintiffs in several areas, including leveraging their structure to apply for funding, access to legal expertise, and access to knowledge in collecting and analysing evidence for use in litigations. For example, an international environmental agency can team up with plaintiffs to initiate litigation against MNOCs due to the actions of their subsidiaries in developing countries like Nigeria.

The *Oguru v Shell* litigation is a notable example where the involvement of Friends of the Earth, an international human rights and environmental organisation, affected the outcome of the litigations. On realizing the impact they would have on the case, Shell argued that Friends of the Earth Netherlands did not have sufficient standing to bring the case, but the court found otherwise again. After almost four and a half years, the case was finally heard before the Dutch court.

[756] Marguerite Sullivan and Rüdiger Lahme, 'Class/Collective Actions In Europe: Overview Of Applicable EU Law Principles' (Thomson Reuters Practical Law 2022) <https://uk.practicallaw.thomsonreuters.com/2-618-0602?transitionType=Default&contextData=(sc.Default)&firstPage=true> accessed 8 April 2022.

7.6 Tort Law

The constitutional, legislative, and regulatory instruments of environmental regulation in the oil industry are insufficient to address the derailment of human rights and environment litigations arising from the Niger Delta. Most of the environmental laws and regulations in Nigeria do not confer any right of private action on the victims of oil pollution. Furthermore, the process and politics of various instruments of remedy for victims are unsatisfactory in the Niger Delta. For example, determining how to pay compensation and how much compensation can be paid have failed to embrace or weigh all the factors fairly are relevant to estimating value. Examples of such factors include - cultural heritage, the significance of resource areas, long-term community sustainability and incomprehensive government guidelines.

These challenges have led experts to conclude that the statutory regulations and oil and gas activities in Nigeria provided little or no protection for victims of oil pollution; hence the need for a fall-back is the tort law.

Tort is a civil wrong that causes a claimant to suffer loss or harm, resulting in legal liability for the person who commits the tortious act[757]. The tort law is a complement to the constitutional, legislative and regulatory framework. The key and mutually supporting functions of the tort law are to compensate people when their rights are infringed and provide a mechanism for redress, thereby defining and upholding those rights. The legal system in Nigeria allows for the possibility of oil spill claims to be based on tort law based on negligence, nuisance and the rule of Rylands v Fletcher.

7.6.1 Tort of Negligence

The tort of negligence is a legal wrong suffered by someone at the hands of another who fails to take proper care to avoid what a reasonable person would regard as a foreseeable risk (e.g., not taking reasonable steps to maintain oil pipelines).[758] Negligence is one of the most common tort law remedies available to victims of oil pollution in Nigeria.[759] For the plaintiff to succeed in an action of Negligent, he must show that the oil company was negligent. Negligence must

[757] A.V Chouhan, 'Tort Is A Civil Wrong But All Civil Wrongs Are Not Tort-A Comparative Study. Jus Corpus LJ, 1, P.587.' (2020) 1 Jus Corpus Law Journal. 587
[758] John Oberdiek, 'The Wrong In Negligence' (2021) 41 Oxford Journal of Legal Studies.
[759] Omobolaji Adewale, Oil Spill Compensation Claims in Nigeria: Principles Guidelines and Criteria, (1989) Journal of African Law 3

be established on the basis that the defendant owes the plaintiff a duty of care that he has violated and that it was the infringement that caused the injury suffered by the victim.[760] Evidence of negligence is usually a daunting task for the plaintiff.[761]

7.6.2 Tort of Nuisance

Tort of nuisance (private or public nuisance) is a legal wrong to redress harm arising from using one's property. A private nuisance is a civil wrong; it is an unreasonable, unwarranted, or unlawful use of one's property to substantially interfere with the enjoyment of use of another individual's property without the actual trespass or physical invasion of the land. A public nuisance is a criminal wrong; it is an act or omission that obstructs, damages or inconveniences the community's rights [762]

The tort of nuisance is less common in Nigeria's human rights and environmental litigations. According to Jedrzej, the success of litigations brought under public or private nuisance claims against multinational oil companies remains unclear in Nigeria due to the reluctance of the courts in Nigeria to assign damages to a group of individuals or whole communities.[763] This reluctance is because the infringement of private nuisance protects property interests and is, therefore, unlikely to be available to complainants who bring personal injury claims arising from oil pollution. Most environmental pollution that affects water bodies is regarded as part of public nuisance. Therefore, it is likely that oil pollution that affects water bodies in the Niger Delta will also be considered to be a public nuisance.

The difficulty here is that since such pollution affects the public, no single individual would be able to sue the oil companies under the tort of nuisance unless such an individual can establish that he suffered special damages that are peculiar to the individual. A notable example is the case of Amos v Shell Petroleum Development Company of Nigeria Ltd[764] litigation. The plaintiffs brought claims for and on behalf of 42 villages alleging that the oil company, in the course of oil operations, built a large earth dam across their creek which caused serious flooding

[760] R A Percy, *Charksworth & Percy on Negligence* (13th ed, Sweet & Maxwell 2014) 15; See Chinda & ors v Shell B. P (1974) 2 R.S.L.R.I and Seismograph Service v. Mark (1993) 7 NWLR 203.
[761] Adewale Ombolaji, 'Oil Spill Compensation Claims in Nigeria: Principles, Guidelines and Criteria' (1989) 33(1) J. Afr. L. 91-104.
[762] Sam Porter, 'Do the Rules of Private Nuisance Breach the Principles Of Environmental Justice?' (2019) 21 Environmental Law Review.
[763] Jedrzej George Frynas, 'Legal Change in Africa: Evidence from oil-related litigation in Nigeria' (1999) 43 Journal of African Law 125.
[764] 4 E.C.S.L.R. 86 (1974), aff'd 6 S C 109 (1977).

upstream and the drying up of the creek downstream. They claimed, as a result, their farms were flooded and damaged, the movement of canoes, the main means of transportation, was hampered, and their agricultural and commercial life was paralyzed. The court dismissed the action holding that the creek was a public waterway and its blocking was a public nuisance for which the plaintiffs could not sue in the absence of any proof that they suffered any damage over and above that of the general public. The court also held that the plaintiffs could not maintain a representative action for special damages because the losses were suffered individually, and each person must prove and plead their special individual loss.

It would seem that private claims would be more likely to succeed as long as the claimant can prove that the operations of the oil companies directly caused the damages to their property. However, litigations that have attempted to use this argument have not succeeded for several reasons. First, the private nuisance is limited by the burden of proof imposed on the plaintiff to prove that the defendant's actions caused damage to him. Second, the plaintiff must also prove that the defendant was unreasonable in the use of the defendant's premises. The court's interpretation of the use of the property as reasonable in environmental litigations involving oil pollution is dependent on various factors: the suitability of the activities of the defendant, the inaccessibility to prevent interference, the extent of the claimant's harm to the property and the legal, social value of the claimant. A public nuisance action does not cover the requirement for reasonable use of land. If an obstacle to property ownership is obstructed, the action shall be taken regardless of whether or not the defendant's use of the land is objectively reasonable.

7.6.3 Rule of Rylands v Fletcher

The rule of Rylands v Fletcher states that:

> *"the person who brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it at his perils, and if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape*."[765]

[765] (1866) LR1 Exch 265. 'Oil naturally occurs in the ground, and therefore in its natural state would not come under the rule in Rylands v Fletcher. However, once it has been channelled through pipes or gathered into tanks, its presence is no longer 'natural' and the rule applies. However, the case law on the issue is not entirely

The rule in Rylands v. Fletcher made a significant impact in tort, especially in the sphere of environmental litigation in Nigeria. The rule provides for strict liability, not requiring any showing of negligent conduct on the part of the defendant.[766] The plaintiff only needs to prove: (i) that there was an 'escape' of materials or objects from the defendant's land which is likely to do mischief,

(ii) that there was a 'non-natural' use of the land, and 3) that the plaintiff suffered damage as a result of the 'escape'.

Victims of oil spills have benefitted from applying the rule of Rylands v Fletcher in several litigations in Nigeria.[767] For example, in *Umudje v Shell BP Petroleum Development Company of Nigeria Ltd*,[768] the plaintiffs claimed damages for the 'escape' of oil waste from a pit in the defendants' control, which damaged the plaintiffs' ponds and lakes farmlands. The Supreme Court held that the defendant company was liable for the damage to the plaintiffs' property under the rule in Rylands v Fletcher even though there was no negligence on his part.[769]

There are two main challenges to applying this rule in litigations arising from Nigeria. The first is the challenge of proving a non-natural use is usually a stumbling block to the plaintiffs' reliance on this rule.[770] However, the concept is associated with some particular use that poses an increased risk to others and must not be merely the ordinary use of land or appropriate for the community's benefit. The non-natural use of land changes from time to time depending on the circumstances.

The second is that the courts have accepted statutory authority as a complete defence to a claim brought under the rule. For example, in *Ikpede v Shell BP Petroleum Development Company of Nigeria Ltd*,[771] where leakage of crude oil from the defendant's pipelines caused damage to

consistent'. See Edu, Kingsley. "A review of the existing legal regime on exploitation of oil and the protection of the environment in Nigeria." *Commonwealth Law Bulletin* 37, no. 2 (2011): 307-327.

[766] Rylands v Fletcher (1866) L.R. 1 Exch. 265, 277-280.

[767] Some examples of litigations where the rule was accepted by the courts as the basis for their decisions include Edhemowe v Shell BP Petroleum Development Company of Nigeria Ltd, Otuku v Shell BP Petroleum Development Company of Nigeria Ltd. Suit No. BHC/2/83, Judgment of the Bori High Court delivered on January 15, 1985 (unreported); Okoro v Shell BP Petroleum Development Company of Nigeria Ltd. Suit No. W/21/72, Judgment of the Warri High Court delivered on November 27, 1972 (unreported).

[768] (1975) 9-11 S C 155.

[769] See Silas Osigwe v. Unipetrol & Anor (2005) 6 W.R.N 97; Koya v. U.B.A Ltd (1997) 1 NWLR (Pt. 481) 251 and Umar v. Ahungwa (1997) 1 NWLR (Pt. 483) 601.

[770] Taiwo Osipitan 'A conspectus of Environmental Law in Nigeria' (1997) 1 The Nigerian Journal of Public Law 91.

[771] Rylands, L.R. 1 Exch. 273. In Umudje's case, the Supreme Court indicated that it would have been prepared to accept the defence of statutory authority had any existed in that case.

the plaintiffs' fish swamp, the court held that even though the plaintiffs met all the requirements of the rule in Rylands' case, the defendant could not be held liable under the rule since its act of laying pipelines was done pursuant to a license issued under the Oil Pipelines Act.[772]

7.7 Alternative Dispute Resolution

Alternative Dispute Resolution (ADR) (also known as non-court dispute resolution) refers to any method of resolving disputes other than in court.[773] ADR mechanisms include non-legally binding mechanisms like mediation and conciliation and legally binding mechanisms like arbitration and adjudication. As long there is as a rising number of court cases and litigation costs, and time delays continue to plague litigants, more countries will continue to experiment with ADR programs.

Negotiation is the preeminent mode of dispute resolution and allows the parties to meet to settle a dispute.[774] Conciliation is a process whereby the parties to a dispute use a conciliator, who meets with the parties both separately and together to resolve their differences. Mediation is an informal alternative to litigation. Mediators are individuals trained in negotiations that bring opposing parties together and attempt to negotiate a settlement or agreement that both parties accept or reject. [775] An adjudication is a legal ruling or judgement that is usually final, but it can also refer to the process of settling a legal case or claim through the court or justice system. Arbitration is a procedure in which a dispute is submitted to one or more arbitrators who make a binding decision on the dispute by agreement of the parties. There are different types of arbitration - national arbitration, international commercial arbitration and investor-state arbitration. National arbitration is governed by different rules enacted by the institutions of each country. International commercial arbitration is used to settle disputes that arise from commercial contractual relations between parties in different jurisdictions. Investor-state arbitration is a unilateral referral by private individual investors to an arbitral tribunal against a host State of their investment.

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[772] The court, however, awarded damages to the plaintiffs on the basis of the strict liability provisions of the Oil Pipelines Act.
[773] Alternative Dispute Resolution Guidelines, Investment Climate Advisory Services of the World Bank Group, June 2011, Washington D.C., p.2
[774] Legal Information Institute, 'Alternative Dispute Resolution' (Legal Information Institute 2022) <https://www.law.cornell.edu/wex/alternative_dispute_resolution> accessed 28 March 2022.
[775] Legal Information Institute, 'Alternative Dispute Resolution' (Legal Information Institute 2022) <https://www.law.cornell.edu/wex/alternative_dispute_resolution> accessed 28 March 2022.

Alternative Dispute resolution (ADR) should be encouraged to address derailments in human rights and environmental litigations in the Niger Delta. Arbitration is the most widely accepted and used dispute resolution method in the international energy sector.[776] There is advancement in establishing an international system of law administering international arbitration has been through international agreements. The most significant agreement in the international commercial arbitration community is the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("The New York Convention"). [777]Other international arbitration convention includes the European Convention on International Commercial Arbitration (Geneva, 1961), the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1966 ("The Washington Convention")[778], the Energy Charter Treaty validated in 1998 and the more recent UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006. The United Nations Commission on International Trade Law (UNCITRAL) Model Law has been designed to assist States in reforming and modernizing their laws on the arbitral proceedings to consider international commercial arbitration's particular features and needs.

International arbitration does not stop at state borders; it extends beyond them. If ADR is included in the agreement, the courts usually expect the parties to demonstrate reasonable engagement with it. As an example, BP Exploration (Caspian Sea) Ltd registered in the UK, contracted with McDermott International and incorporated in the US, for the development and production sharing for the Azeri and Chirag fields and the Deep-Water Portion of the Gunashli field in the Azerbaijan sector of the Caspian Sea, with any disputes being resolved by United Nations Commission on International Trade Law (UNICITRAL[779]) in Stockholm. In *PGF II SA v OMFS Company*, the court stated that a failure to respond to a suggestion that ADR has

[776] Alternative Dispute Resolution Guidelines, Investment Climate Advisory Services of the World Bank Group, June 2011, Washington D.C., p.2

[777] Other international arbitration convention includes the European Convention on International Commercial Arbitration (Geneva, 1961), the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1966 ("The Washington Convention")[777], the Energy Charter Treaty validated in 1998 and the more recent UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006.

[778] This Convention is managed by The International Centre for the Settlement of Investment Disputes ("ICSID"), which is a branch of the World Bank

[779] UNICITRAL, United Nations Commission on International Trade Law, Status, Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), <www.uncitral.org>, accessed on March 28, 2022

opted for could be rejected using ADR.[780] In Cable & Wireless plc v IBM United Kingdom Ltd, the parties were required to engage in the ADR process by the court.[781]

Arbitration is widely used in virtually all sectors of the Nigerian dispute landscape and it appears to be the most popular option in the energy, construction, and maritime sectors. Arbitration has been used in the past for high-profile energy disputes involving Nigeria. In 2017, an arbitration tribunal seated in London decided that Nigeria (represented in the case by the Ministry of Petroleum Resources) was liable for damages to Process and Development Limited (P&ID). In 2017 the tribunal awarded USD6.6 billion in damages to P&ID. The damages resulted from failing to arrange the agreed supply of Wet gas, including building the necessary pipelines in respect of a 20-year Gas Supply and Processing Agreement (GSPA).[782] In October 2020, Eni filed a request for arbitration against Nigeria at the World Bank dispute settlement body to argue that the country's failure to allow it to exploit an offshore oilfield (that is, OPL 245) it acquired with Royal Dutch Shell (RDS) in 2011 breaches their investment agreement. Eni submitted a request for arbitration against Nigeria with the World Bank International Centre for the Settlement of Investor Disputes (ICSID), of which Nigeria is a member state.[783] The oilfield in question is itself a subject of multiple court cases worldwide, including a criminal case in Milan, Italy, in which the Nigerian government alleges that roughly $1.1 billion of payments from the companies were paid as a bribe to a fake company owned by politicians and intermediaries.

ADR enables the parties to conclusively resolve their disputes in a confidential proceeding by a panel of arbitrators experienced in industry issues. Significant human rights and environmental litigation components can benefit from ADR mechanisms even if such litigations have already ended in court. One such area that will benefit from ADR is remediation and compensation for victims of oil pollution after litigation. An independent arbitrator can be appointed to handle the arbitration. Such an independent arbitrator can represent an

[780] PGF II SA v OMFS Company 1 Limited [2014] WLR 1386
[781] Cable & Wireless Plc v IBM United Kingdom Ltd [2002] EWHC 2059 (Comm).
[782] JUS MUND, 'P&ID V. Nigeria' (Process and Industrial Developments Ltd. v. The Ministry of Petroleum Resources of the Federal Republic of Nigeria) <https://jusmundi.com/en/document/decision/en-process-and-industrial-developments-ltd-v-the-ministry-of-petroleum-resources-of-the-federal-republic-of-nigeria-final-award-tuesday-31st-january-2017> accessed 28 March 2022.
[783] Reuters, 'Eni Seeks World Bank Arbitration In Nigeria Oilfield Dispute' (Reuters 2020) <https://www.reuters.com/article/us-eni-nigeria-idINKBN26Y1U1> accessed 30 April 2022.

international regulatory agency (at either the plaintiff or the defendant) or even an international court (e.g., ICC).

The Arbitration and Conciliation Act (ACA), which is the primary arbitration law in Nigeria, serves as the foundation for the country's legal framework for arbitration. [784]The ACA is largely consistent with the UNCITRAL Model Law. Although the UNCITRAL Model Law was revised in 2006, Nigeria has yet to amend the ACA to incorporate the revised UNCITRAL Model Law provisions. The Arbitration and Mediation Bill 2022 was passed by Nigeria's Senate in May 2022. The Arbitration and Mediation Bill 2022, which is expected to replace the ACA once signed by the President, incorporates the revised provisions in the UNCITRAL Model Law to a large extent. The 2022 Bill, if signed by the President, will replace the current Arbitration and Conciliation Act of 1988. The 2022 Bill includes new provisions such as an award review tribunal, third-party consolidation and joinder, third-party funding (TPF), emergency arbitrators, the recognition and enforcement of interim measures, and so on.

Several scholars including Nwazim, Onyebor, Abila and Damfebo have discussed the importance of alternative dispute resolution mechanisms in settling environmental disputes in Nigeria. Nwazi has presented a detailed and critical review of Alternative Dispute Resolution as a non-judicial mechanism for the settlement of environmental disputes in the Niger Delta region of Nigeria. According to Nwazim, the devastation wreaking havoc in Nigeria's Niger Delta and the inability of the traditional courts to address such as a justification for the ADR as a necessary option, particularly because in most of the countries where it has been introduced, it has succeeded where the courts failed.[785] Onyeabor discusses the role of alternative dispute resolution mechanisms to resolve environmental disputes in Nigeria.[786] The author concludes that the most reliable way to achieve environmental justice is to use an ADR mechanism to settle environmental disputes. The ADR mechanisms are advocated for recognition in the legal and institutional framework as a means of resolving environmental disputes. The author promotes the need for a review of the NESREA Act to recognise ADR

[784] Abimbola Akeredolu, A and Umeche C. 'Arbitration Procedures and Practice in Nigeria: Overview' <https://uk.practicallaw.thomsonreuters.com> accessed on February 7, 2023
[785] Nwazi, J. 'Assessing the efficacy of alternative dispute resolution (ADR) in the settlement of environmental disputes in the Niger Delta Region of Nigeria' (2017) 9(3) *Journal of Law and Conflict Resolution* 26-41
[786] Onyeabor, E. U and Nwafor, I. e., 2022. 'Resolution of environmental disputes in nigeria: the role of alternative dispute resolution mechanism' (2022) 4(2) International review of law and jurisprudence; see Abila S.E and Damfebo 'Towards Alternative Dispute Resolution (ADR) for compensation claims for oil and gas operations in Nigeria', Emiri, F., and Deinduomom, G., (ed), Law and Petroleum Industry in Nigeria Current Challenges Essay in Honour of Justice Kate Abiri (Malthouse Law Books, Lagos, 2009 Law and Petroleum Industry in Nigeria: Current Challenges : Essays in Honour

mechanisms in resolving environmental disputes, the creation of a unique Environmental ADR Tribunal, and capacity development for environmental lawyers and scholars through continued Legal Education programmes.[787]

7.8 Chapter Summary

This chapter discussed a legal framework that can be used to address the derailment of human rights and environmental litigations arising from the Niger Delta. The legal framework is divided into five instruments: the constitutional, legislative, regulatory, tort of negligence, nuisance and trespass, and alternative dispute resolution. The fundamental laws and legal issues behind each legal instrument were presented. After that, this chapter discussed the importance of the legal instrument and how plaintiffs and defendants exploit the issues related to legal instruments in human rights and environmental litigations. |Also, notable examples of litigations that raised such legal issues.

At the constitutional level, three issues were discussed: invoking the jurisdiction, environmental courts and special courts, and ratification of international treaties. At the legislative level, the legal issues discussed were legislation defining the choice of law application, responsibility for oil spills due to sabotage, and the relation between MNOCs and their subsidiaries.

At the regulatory level, the issues discussed were the mandate of different regulatory agencies, internationally accepted standards in the oil industry and the involvement of international regulatory agencies and human rights and environmental organisations. The issues discussed at the tort law level were the tort of negligence and nuisance and the Rule of Rylands v Fletcher. The last legal instrument is the application of alternative dispute resolution, especially arbitration, which can be applied when other legal instruments fail to yield any significant result.

[787] Onyeabor, E.U. and Nwafor, I. E., 'Resolution of environmental disputes in nigeria: the role of alternative dispute resolution mechanism'(2022) 4(2) International review of law and jurisprudence (IRLJ).

Chapter Eight

Conclusion and Recommendations

8.1 Introduction

This thesis focused on human rights and environmental litigations arising from the Niger Delta and how to address the mechanisms used by MNOCs to derail these litigations to improve human rights and the environment. The thesis is structured into eight chapters as follows: Chapters One to Three introduce and contextualise human rights and the environment in the Niger Delta. Chapters Four to Six discuss human rights and environmental litigations arising from the Niger Delta. Chapters Seven and Eight present a legal framework and recommendations for addressing the derailment of human rights and environmental litigations in the Niger Delta.

Chapter one introduced the thesis and discussed the research problem addressed in the thesis. Chapter Two discussed the concept of Human Rights and the environment with particular reference to Nigeria's oil and gas industry. Chapter Three discussed human rights and environmental violations of multinational oil companies in the Niger Delta. This chapter discussed the human rights obligations of MNOCs in the Niger Delta, focusing on Royal Dutch Shell and SPDC (Nigeria), and the Chevron Corporation and Chevron Nigeria Ltd, two of the major multinational oil producing companies in the Niger Delta. Chapter Four of the thesis focused on reviewing ligations in Nigeria, while Chapters Five, Six and Seven reviewed litigations in the US, UK, and Netherlands.

After reviewing the litigations, an analysis of the litigations followed in Chapter Eight. The analysis covered several areas, including the aspects that are similar and dissimilar in the litigations, to explain the variations and patterns in the response of the MNOCs to human rights and environmental violations in the Niger Delta. Chapter Seven presents a legal framework for addressing derailment in human rights and environmental litigations arising from in the Niger delta. The legal framework comprises different legal instruments, including the constitution, legislation, regulatory bodies and common law. Chapter Eight is the conclusion, recommendations and future work. The rest of this chapter is structured as follows: Section 8.2 presents the recommendations of the thesis. Section 8.3 summarizes the thesis contributions to knowledge. Section 8.4 concludes the thesis, while Section 8.5 discusses future work.

8.2 Recommendations

This section discusses the recommendations for addressing the mechanisms used by MNOCs to derail human rights and environmental litigations. The recommendations are drawn from the legal instruments in the legal framework (i.e., constitutional, legislative, regulatory, tort, and alternative dispute resolution) discussed in the previous chapter.

8.2.1 Recommendations regarding Non-Transparent provision of information

Provision of information transparently is one of the critical recommendations for addressing derailments in human rights and environmental litigations. There are several recommendations for addressing derailment and non-transparent provision of information related to oil and gas operations. The first recommendation is the involvement of international regulatory agencies in oil and gas operations to complement Nigeria's national/domestic regulatory agencies. One of the areas of involvement of the international regulatory agencies is in the oil spill investigation process. Nigeria's oil spill investigation process has been widely criticised by several international agencies such as Amnesty Internation for lacking transparency and accuracy and, therefore, cannot be used to provide evidence in court during human rights and environmental litigation.

For example, there have been serious flaws in Shell's post-2011 oil spill investigation process and a lack of transparency and oversight regarding what is recorded on the new JIV reports. [788]As reported by Amnesty International, the main challenge is that Shell fills out the JIV reports after the joint investigation process, not as part of the joint investigation process. If an international agency is involved in the investigation process, then international standards will be strictly applied. Therefore, whatever information is produced at the end of the investigation process can use used as reliable evidence in human rights and environmental litigations. Another related area that will benefit from the involvement of international regulatory agencies is the inspection and maintenance of oil pipelines. International regulatory agencies collaborate with several international partners with the knowledge and expertise in certifying and validating all oil operations.

[788] Amnesty (n 64)

8.2.2 Recommendations regarding Non-Disclosure of Evidence

The non-disclosure of evidence is another mechanism for MNOCs to derail Nigeria's human rights and environmental litigations. Several recommendations can be drawn from our legal instruments to address this challenge. One of the instruments that can be explored by the plaintiffs when applying the home state law is the collective redress mechanisms available in Europe and most developed countries. The collective redress "encompasses any mechanism that may accomplish the cessation or prevention of unlawful business practices that affect many claimants or the compensation for the harm caused by such practices."[789] Collective redress will be helpful to plaintiffs in Nigeria since human rights violations frequently involve many victims, such as an entire village impacted by oil spills or all workers on a certain industrial site. Individual complaints are unlikely to address such group violations appropriately.

Collective redress can be useful to plaintiffs in two ways. The first relates to joint action where plaintiffs are joined in a lawsuit by international human rights and environmental agencies such as Friends of the earth and Amnesty International. These agencies have more financial resources, legal experts and technical knowledge to gather and process and also compel MNOCs to disclose evidence that may be useful in litigations. There is precedence in the *Oguru v Shell* litigation, where Shell argued that Friends of the Earth Netherlands did not have sufficient standing to bring the case, but the court found otherwise.[790] The second relates to the settlement reached during the litigation. In the Netherlands, a settlement reached out of court can be presented to the court to be declared binding on all covered by it after the parties have agreed to the settlement. If the settlement is declared binding, all parties that have obtained damages by the harmful event and have been made aware of the settlement agreement are bound by it unless they have opted out. The settlement reached may be put before the court by a representative organization.[791]

There is a need to bring Nigeria in line with international practice to remove the barrier against suing MNOCs for harm caused by their subsidiaries, irrespective of the jurisdiction where the harm occurred. To achieve this, Nigeria needs legislation to clarify through amending existing statutes or enacting a new law to clarify that when lawsuits allege that subsidiaries of MNOCs

[789] Sullivan & Lahme (n 756).
[790] Skinner and others (n 75) 92-94
[791] Albert Knigge and Isabella Wijnberg Houthoff, 'Class/Collective Actions in the Netherlands: Overview' (Practical Law 2022) <https://uk.practicallaw.thomsonreuters.com/6-618-0285?transitionType=Default&contextData=(sc.Default)&firstPage=true> accessed 8 April 2022.

over which the court has personal jurisdiction have engaged in illegal conduct in local communities, the courts should apply the law of the home state in which the MNOC is headquartered. Applying the law of the home state where the MNOCs are headquartered is particularly important if the plaintiffs would not receive an adequate remedy under the law of the state where the harm occurred.

The second recommendation is enacting legislation that will mandate MNOCs to disclose evidence in the event of any human rights and environmental litigations regardless of the jurisdiction in which the litigation is initiated. In a situation where there are privacy and confidential concerns, the defendant will be obligated to disclose the information in court. There is a precedence in the *Oguru v Shell* litigation where the court instructed the defendants to bring the documents to the court to help plaintiffs extract the information required for the litigations.

8.2.3 Recommendations regarding Bribery, Threats of Witnesses from Testifying and Victimization of employee

MNOCs have been accused of using bribery and the inducement of witnesses to derail human rights and environmental litigations. MNOCs do this so that witnesses can either testify against the plaintiffs or in favour of the defendants. These witnesses include employees working for Shell, either as employees or contractors, and staff of regulatory agencies involved in the oil spill investigation process or who have access to valuable information about the operations of MNOCs. The key recommendation to address this mechanism is to enact legislation that removes reliance on the resources that belong to regulatory agencies in carrying out any activity related to oil spill operations. This reliance compromises oil spill investigations and undermines the ability of the regulatory agencies to enforce any form of sanction or even support plaintiffs in the litigations. Also, there should be a regulation restricting regulatory agencies in Nigeria from relying on MNOCS resources (e.g., surveillance equipment to spot oil spills and equipment to ascertain the cause or extent of oil spills).

One of the mechanisms MNOCs use to derail litigations is threats and intimidation of witnesses. A notable example occurred in the *Oguru v Shell* litigation, where the Milieudefensie (Friends of the Earth Netherlands) travelled to Nigeria to gather evidence and interview some witnesses in the affected communities. The MNOCs could not access the witness because they feared that they would be victimized by the local communities or even the local vigilante groups that the MNOCS sometimes sponsors. To address this challenge, it would be recommended that international human rights organisations should be involved in initiating joint action and joint hearings in human rights and environmental litigations. There is a precedence in the *Oguru v Shell* litigations, where Milieudefensie (Friends of the Earth Netherlands) were involved in a joint action with the plaintiffs to sue Shell and Shell Nigeria in the Netherlands. If this approach was not taken, the plaintiffs would have been afraid to initiate this litigation because of fear of victimization and intimidation. The plaintiffs would have been afraid to initiate this litigation without the support of the international agencies because of fear of threats and intimidation from Shell employees/contractors, government officials, and local communities.

Another recommendation is to incorporate whistle-blowing legalisation into existing oil regulations in Nigeria so that witnesses can be free to report the wrongdoing of MNOCs independently to avoid victimization and intimidation by the public and the local communities. Although there is no specific legislation in Nigeria regarding whistleblowing, several whistleblowing guidelines have been successfully implemented in the public and private sectors. [792]Some examples of whistleblowing guidelines in Nigeria include: Whistleblowing Guidelines for Pensions 2008 ('the PENCOM Guidelines'), Code of Corporate Governance for Banks and Discount Houses in Nigeria ('the Corporate Governance Code'), Guidelines for Whistleblowing in the Nigerian Banking Industry ('the CBN Guidelines'), and Rulebook of the Nigerian Stock Exchange 2015 ('the NSE Rulebook'). Whistleblowing guidelines can be incorporated into the existing regulations in the oil industry, such as NOSDRA Act and NESREA Act, to support the disclosure of human rights and environmental violations (e.g., employee victimization, oil spills, fraud, bribery, and corruption) in the operations of MNOCs and their subsidiaries in Nigeria. There is a precedence in Western countries in the appropriate

[792] Beverley Agbakoba-Onyejianya and Ebunoluwa Bayode-Ojo Olisa, 'Nigeria: Whistleblowing: An Approach Towards Good Corporate Governance in Nigeria' (Olisa Agbakoba Legal (OAL) 2021) <https://www.mondaq.com/nigeria/whistleblowing/1084026/whistleblowing-an-approach-towards-good-corporate-governance-in-nigeria> accessed 23 July 2022.

use of whistleblowing legislation to encourage witnesses to report incidences in the workplace and elsewhere and protect the witness.

MNOCs have been accused severally of victimising and restricting the rights of employees and contractors during human rights and environmental litigations. The MNOCs prevent these employees from providing any information or assisting third parties that would harm their business operations or reputation. These employees would be concerned about losing their jobs or contracts with the MNOCs. The recommendation to address this victimization and restriction of employee rights is to involve international regulatory agencies in initiating joint action and hearings in human rights and environmental litigations.

There is also precedence in the *Oguru v Shell* litigations, where Milieudefensie and Friends of the Earth were involved in a joint hearing with the plaintiffs to sue Shell in the Netherlands. Claimants of oil spills in the communities of Goi, Oruma, and Ikot Ada Udo, along with Milieudefensie (Friends of the Earth Netherlands), filed a legal claim in the Netherlands against Shell and Shell Nigeria in 2008. Their involvement in the litigation helped the plaintiffs secure vital information required for the litigation, secure resources such as expertise in analysing the submitted evidence and apply for legal aid.

8.2.4 Recommendations regarding Delay of litigation

The delay of litigations has been one of the most serious challenges contributing to Nigeria's human rights and environmental violations. This is because while the litigations are being delayed, the environment cannot be clean-up or remediated, and the victims cannot receive any compensation.

Several recommendations from our proposed legal framework can be used to address the delay in litigation, a primary mechanism that MNOCs use to derail human rights and environmental litigations. The first recommendation is to amend the constitution[793] to include a section/clause to recognise the jurisdiction of the international courts (e.g., ICC) to strengthen victim claims within local courts in Nigeria. This recommendation will address the issue of lack of jurisdiction, which is one of the defendant's main lines of attack used for delaying and derailing litigations. This means that plaintiffs can sue MNOCs even if the defendant claims that the local court in Nigeria or the court in the home state where the MNOC is headquartered lacks

[793] Under the Nigerian constitution, the main Section to be amended is Section 12 of the 1999 Constitution (as amended).

jurisdiction to hear the case. MNOCs have raised the issue of lack of jurisdiction in most of the transnational human rights and environmental litigations reviewed. Resolving this issue alone usually takes several months, as seen in the *Wiwa v Shell*, *Oguru v Shell*, and *Bodo v Shell* litigation.

The next recommendation is to establish special environmental courts or tribunals to handle Nigeria's human rights and environmental litigations. This will avoid delay of litigations while promoting the development and exchange of legal knowledge and expertise in human rights and environmental litigations. There is a precedence for the establishment of environmental courts. For example, in Australia, the Land and Environment Court and the Environment, Resources and Development Court operate effectively as specialist courts for trying environmental offenders.[794]

Malaysia has also recently taken this route by establishing an environmental court to enhance its enforcement capabilities and opened its doors to greater industry involvement and private participation in the enforcement process. Malaysia commissioned its environmental court in September 2012 to expedite hearings in environmental cases and possibly act as a greater deterrent for environmental offenders[795]. Environmental cases are required to be concluded in this court within six months and three months in Sabah and Sarawak. This court provides speedy access to environmental justice, a relevant aspect of the enforcement process. The fruits of Malaysia's regulatory efforts show in the 2020 ranking of its environmental performance index, which is 50th in the world,[796] compared to Nigeria, which is 100th in the world.[797]

In Nigeria, the election tribunals are examples of special courts or tribunals. The process of how these court functions can be adopted to set up a special tribunal for Human Rights and environmental violations in the oil and gas industry due to the prevalence of oil spills and other related violations in the oil gas industry. Environmental courts are required in Nigeria to ensure that trained judicial personnel are available to handle the technicalities of petroleum issues and to guarantee expeditious justice for environmental offences. The existence of this court will

[794] Samantha Bricknell, 'Environmental Crime in Australia' (2010) AIC Reports Research and Public Policy series, xii < http://192.190.66.70/documents/2/1/1/%7B211B5EB9-E888-4D26-AED4-1D4E76646E4B%7Drpp109.pdf > accessed November 28, 2020

[795] Asian Environmental Compliance and Enforcement Network, 'Malaysia: Environmental Court Opens' < http://www.aecen.org/stories/malaysia-environment-court-opens > accessed Novemeber 29, 2020

[796]Lavanya Lingan, 'Malaysia Jumps to 25 in Environmental Index' (New Strait Times, 22 October 2012) < http://www.nst.com.my/nation/general/malaysia-jumps-to-25-in-environmental-index-1.160374> accessed November 29, 2020)

[797] 'Environmental Performance Index-Nigeria' (*Epi.yale.edu*, 2020) <https://epi.yale.edu/epi-country-report/NGA> accessed 29 November 2020.

serve as a deterrent mechanism for potential offenders. The establishment of environmental courts will also support the enforcement of environmental law.

Another recommendation to address delay in litigation is to enact legislation to compel MNOCs to define the type of relationship they have with their subsidiaries so that the victims will know the correct entity to sue in a legal dispute. The complex relationship between MNOCs and their subsidiaries can be difficult to understand, putting a significant burden on plaintiffs during litigation in determining which entity to sue and the link between the MNOCs and their entity. Knowing the nature of this relationship is critical in determining the nature, and extent of control the MNOCs have over their subsidiaries.

As a result, their relationship with parent businesses should be carefully reviewed before signing contracts with oil companies. Recent litigation in England, such as *Chandler v Cape Plc* (Court of Appeal 2012 EWCA CIV 525), demonstrated that such a review should include liability for any foreign incorporated subsidiaries within the group structure. In this litigation, the court looked at the group structure more widely by looking for evidence showing that the parent has a practice of intervening in the subsidiary's operations (e.g., responsibility for health and safety and production and funding issues).[798] Therefore, if a company has a practice of intervening in the operations of its subsidiaries, then it is important to clearly define its relationship with its subsidiaries in all contractual agreements.

Another recommendation for addressing delay in litigation is to use alternative dispute resolution (ADR), especially arbitration. ADR has become a preferred way to resolve disputes in Nigeria's energy, oil and gas industry either early before initiating any litigation (e.g., cause of oil spills) or after litigation (e.g., clean-up). Entities involved in disputes benefit from a lower cost, an expeditious, and more efficient process than other legal avenues to achieve a resolution and benefit from a neutral venue to resolve their dispute and confidentiality. The plaintiffs would benefit from the arbitrator's technical knowledge and legal support. Privacy issues and avoidance of multiple legal jurisdictions would help the plaintiff.[799]

Nigeria's human rights and environmental litigations will benefit from applying ADR mechanisms if the government enacts legislation requiring all oil and gas contracts and

[798] The Court of Appeal decision in Chandler v Cape plc [2012] EWCA Civ 525 is available at http://www.bailii.org/ew/cases/EWCA/Civ/2012/525.html.
[799] Harry T Edwards, 'Advantages of Arbitration Over Litigation-Reflections of A Judge'. See Temitayo Bello, 'Why Arbitration Triumphs Litigation' [2019] SSRN Electronic Journal; Adesina Temitayo Bello, 'Why Arbitration Triumphs Litigation: Pros of Arbitration' (2014) 3 Singaporean Journal of Business, Economics and Management Studies.

agreements between Nigeria and MNOCs (including subsidiaries located elsewhere) to contain arbitration clauses. It means that if any dispute related to human rights and environmental violations occurs, then arbitration can be considered an option for settling the dispute before resorting to the court system of one of the parties. An arbitration clause will often set out the parties' agreement on the rules (e.g., arbitration institution to administer the proceeding, number of arbitrators involved, place of arbitration) that will govern the arbitration. Usually, the place of the arbitration is typically a neutral location whose arbitration law will govern disputes over procedural issues. The law of the seat of arbitration can also be important when it comes to challenging or enforcing any award made.

Also, legislation can be enacted to state that the parties in dispute can enter into an "arbitration agreement" after a dispute arises. In a situation where the oil and gas contract underlying the dispute does not include an arbitration clause, such legislation will ensure that the parties can still have the option of resolving the dispute through arbitration. Another area that can be explored in implementing ADR is the appointment of an arbitrator to settle the dispute. An international regulatory agency (or a representative of a reputable Human Rights and environmental agency like Amnesty International) can be appointed arbitrators. Such an appointment can help address the power imbalance between the plaintiffs and the MNOCs.

Cee Van dam encourages resolving disputes using trained diplomats and counsellors instead of lawyers because lawyers are not particularly good at creating something good out of a crisis.[800] In the Bodo v. Shell case, for example, many months after Shell had admitted liability for the pollution in Bodo, no progress was made by Shell and the residents in reaching an agreement over how the area should be cleaned. The Dutch ambassador to Nigeria, Bert Ronhaar, who took up the role of a mediator, observed that the parties were outright hostile to each other. He decided to ask the parties to negotiate without their lawyers.[801] That was the breakthrough as negotiations got on their way, trust between the parties was established, and they came to a solid agreement about the cleaning up of the area.

[800] Dam (n 11)
[801] 'Dutch Mediation in Niger Delta Proves Successful' (Government.nl, 2018) <https://www.government.nl/latest/news/2015/05/02/dutch-mediation-in-niger-delta-proves-successful> accessed 28 December 2018.

8.2.5 Recommendations regarding Dispute of information that influences the cause of oil pollution

In the Niger Delta, serious problems, including oil theft, are used, primarily by multinational oil companies (e.g., Shell, Chevron), to divert attention away from the pollution caused by the aged pipes and poor maintenance. Many MNOCs have blamed sabotage and oil theft on several oil spills in the Niger Delta.[802] Several reports by International Human rights and Environmental agencies (e.g., Amnesty International) have raised serious concerns about the scale of oil spills in the Niger Delta caused by Multinational Oil Companies. These reports acknowledge that although oil theft and sabotage of oil infrastructure occur and contribute to pollution; however it cautions that theft and sabotage, as causes of pollution, are over-stated by oil companies in a bid to deflect criticism about their environmental impact.[803]

In addition, MNOCs have also ignored long-standing international best practices and legal standards that remediation and compensation should be provided to victims regardless of the cause of the oil as long as the company owns or operates the oil infrastructure that is linked to the oil spill. For example, in the Erika oil tanker spill off the French coast of Brittany[804], the court ruled that the Directive (75/442/EC) provides that, under the 'polluter pays principle', the responsibility to remediate and pay compensation is to be borne by the 'previous holders' or by the 'producer of the product from which the waste came'.

Therefore, Nigeria must amend its legislation to address the fact that oil companies face no sanctions for oil spills as long as they are attributed to sabotage or theft. This situation has permitted a range of highly damaging practices. One of the possible options is to enact legislation that establishes the polluter pays principle. The plaintiffs can invoke the polluter pays principle to hold the party responsible for pollution liable for the damage done to the natural environment. The polluter pays principle is regarded as a regional custom due to the strong support from most Organisation for Economic Co-operation and Development (OECD) and European Union member countries. It is a fundamental principle of environmental law in

[802] Jedrzej (n 763) 121-150
[803] Amnesty (n 64)
[804] International Oil Pollution Compensation Fund (IOPC), 'Erika Oil Tanker Breakup & Oil Spill' (2022) <https://iopcfunds.org/wp-content/uploads/2018/05/incidents2012_e.pdf> accessed 9 April 2022.

the United States. In the UK, Part IIA of the Environmental Protection Act 1990 established the operation of the polluter pays principle. [805]

Another option is to include the 'polluter pays principle in the objectives of the critical environmental regulatory agencies like NOSDRA, NEASRA. This is the approach used in Australia, where the polluter pays principle, along with the other principles of ecologically sustainable development, has been included in the objectives of the Environment Protection Authority in the Australian state of New South Wales.[806] De Sadeleer points out that a legal instrument referencing the polluter pays principle can be invoked as a non-binding or binding rule.[807] He notes in the landmark ligation in the Erik oil tanker spill that the ECJ judgement imposes not just on the owner of the oil tanker that spilt the oil but also on the companies who created the product and involuntarily discarded it as waste.[808] This suggests that Shell/SPDC can equally be held liable for oil pipeline spills in the Niger Delta because the MNOCs involved in the oil spill are based in the EU. The polluter pays principle is a fundamental environmental law in the EU.

Another recommendation for addressing the disputes of information that influences the cause of oil spills is for plaintiffs to involvement of international regulatory agencies. The Nigerian approach to enforcing environmental regulations in its oil and gas industry shows that efficient enforcement of environmental obligations in Nigeria is not currently feasible if left as the sole preserve of the unreliable environmental regulatory bodies, tainted by lack of coordination and conflict of interest. What is required is a collaborative approach to enforcement involving a wide range of stakeholders. Environmental issues are general concerns, and the aftermath of environmental incidents affects several parties. For example, the BP Macondo incident

[805] The Department for Enviroment, Food and Rural Affairs, 'The Environmental Damage Regulations Preventing and Remedying Environmental Damage', < https://webarchive.nationalarchives.gov.uk/ukgwa/20130402182915/http://archive.defra.gov.uk/environment/policy/liability/pdf/quick-guide-regs09.pdf> accessed 9 April, 2022.

[806] 'Protection of the Environment Administration Act 1991 - Sect 6 Objectives of The Authority' (*Www6.austlii.edu.au*, 2022) <http://www6.austlii.edu.au/cgi-bin/viewdoc/au/legis/nsw/consol_act/poteaa1991485/s6.html> accessed 9 April 2022.

[807] De Sadeleer, N., 'Environmental principles: From political slogans to legal rules'(2020). Oxford University Press.

[808] De Sadeleer, N, 'Liability For Oil Pollution Damage Versus Liability For Waste Management: The Polluter Pays Principle At The Rescue Of The Victims: Case C-188/07, Commune De Mesquer V Total France SA [2008] 3 CMLR 16, [2009] Env LR 9' (2009) 21(2) Journal of Environmental Law 299-307

affected: the state revenue[809]; industry activity through suspension of deep-sea drilling[810]; loss of livelihood for individuals[811] and BP was imposed with a $4.5billion fine amongst other penalties [812]

One of the ways of achieving this involvement is to expand the current scope and mandate of the domestic regulatory agencies to support collaboration with international regulatory agencies. Another way of achieving this involvement is establishing an independent agency that will serve as a bridge between the activities of the domestic regulatory agencies in Nigeria and international regulatory agencies. Existing agencies would not be able to bridge this gap and foster this collaboration since they are so varied and often have conflicting objectives. Some of the areas that will benefit from the involvement of international regulatory agencies, and international human rights and environmental agencies during litigations include:

(i) mandatory disclosure of human rights and environmental impact of oil operations by oil companies in the Niger Delta. International human rights and environmental agencies such as Amnesty International, Transparency International, Friends of the Earth have been the main driving force in the publication and dissemination of various human rights violations in the Niger Delta.

(ii) monitoring and supervision (e.g., oil spill-related information) of oil operations of MONCs in the Niger Delta. Monitoring and supervision would help ensure that internationally accepted standards such as standards for oil drilling, maintenance and monitoring of pipelines, clean-up and compensations are adhered to by MNOCs and their subsidiaries in the Niger Delta.

(iii) involment in joint actions and joint hearings in litigations to provide logical reasoning, evidence, and legal experts to victims of oil spills during the litigations. In addition to joint hearings and actions, international regulatory agencies, and international human rights and environmental agencies can support victims by requesting a review of some previous international human rights and environmental litigations arising from the Niger Delta. This can

[809] Eric Skalac, 'News BP Well to stay sealed after Gulf Spill, Experts Predict' (National Geographic, April 20 2011) <http://news.nationalgeographic.com/news/energy/2011/04/110418-oil-spill-anniversary-is-bp-well-sealed/> accessed 27 April 2014

[810] Jason K Levy and Chennat Gopalakrishnan, 'Promoting ecological sustainability and community resilience in the US Gulf Coast after the 2010 Deepwater Horizon oil spill' (2010) 2(3) Journal of Natural Resources Policy Research, 300

[811] ibid at 300

[812] 'BP gets record criminal fine over Deep Water Disaster' (BBC, November 15 2012<http://www.bbc.co.uk/news/business-20336898 > accessed 27 April 2014

be likened to judicial review, which is available in many countries.[813] Under Nigeria law, any person who can show that they have sufficient interest in their application's matter can initiate a request for judicial review. The remedies available under judicial review include quashing orders, prohibitions, injunctions and declarations, and damages.

A request for judicial review would be beneficial when litigations are dismissed on grounds other than the case's merits. In the *Kiobel v Shell* litigation, the US court did not rule on the merits of the case but rather on jurisdictional grounds. [814] This litigation was initiated in Netherlands in 2018 on the case's merits. Furthermore, this litigation can be re-initiated on the merits of the case in the US. Other litigations like *Bowoto v Shell* can also be revisited in the US on separate legal issues (e.g., to claim compensation for delay in not knowing the correct entity to sue in the initial stages of the litigation).

8.2.6 Recommendations regarding Dispute of information that influences the remediation and compensation for oil spill

One of the core issues in all reviewed human rights and environmental litigations from Nigeria is that plaintiffs and defendants must present evidence to establish the impact of the oil spill and how much compensation to pay. Such evidence includes, for example, the cause of the oil spill, the location of the oil spill, areas affected by the oil spill and when the oil spill occurred, and for how long the oil spill occurred.

MNOCs do not operate with the same standards in developed countries as in developed countries. There is a general belief that multinational oil companies demonstrate a double standard for oil and gas operations in developing and developed countries. The response of multinational oil companies to recent environmental pollution, such as BP’s response to the

[813]Judicial Review is the power of the court (usually the Supreme Court in the US) to decide whether a law or decision by the legislative or executive branches of federal government, or any court or agency of the state governments is constitutional.
[814] United States Supreme Court, No. 10–1491, Kiobel v. Royal Dutch Petroleum, 133 S.Ct. 1659 (2013), p. 1669.

Deepwater Horizon and the Elf/Total oil tanker disaster[815] compared to the widely criticized Shell's response to oil spills in the Niger Delta, have further strengthened this assertion. [816]

Shell's response to remediation was characterized by disputing the oil spill volume and the area affected by the spill, and later by unfounded claims that it has cleaned up areas affected by the oil spill when it has failed to do so. In the *Bodo v Shell* litigation, Shell admitted liability in line with the court judgement for failing in its duty of care to ensure that adequate steps were taken to avoid the oil spill. However, it had made no concerted or sufficient efforts to clean up the damage caused by the 2008 oil spills.[817] Shell had not cleaned up, according to an investigation published in 2011 by Amnesty International and CEHRD, and its claims on the clean-up and access to Bodo were contradictory, raising serious concerns. [818]

As a result, enforcement of internationally accepted standards in oil and gas operations is key to addressing the derailments of human rights and environmental litigations by MNOCs. The government can enforce standards by incorporating a clause into regulations associated with existing regulatory agencies (e.g., NOSDRA, NEASDRA, NUPRC). The clause should state explicitly that the impact of oil operations and the accompanying evidence should be evaluated using internationally accepted human rights and environmental standards.

Specifically, it would be helpful to include text such as "international accepted standards" in the Act or legislation that establishes the agencies. Claimants and international human rights agencies refer to these legislations whenever there is a legal dispute regarding the cause of oil spills and the maintenance of oil pipelines/infrastructure due to the conduct of MNOCs.

Some areas that would benefit from applying internationally accepted standards are maintaining oil pipelines and clean-up operations to ensure that oil companies use the same standards in all countries where they do business. Applying internationally accepted environmental standards will also increase collaboration between domestic (e.g., NOSDRA) and international regulatory agencies (e.g., United Nations Environmental Program (UNEP)).

The technical capacity of regulatory bodies is also a matter of concern. Several international human rights and environmental agencies such as Amnesty and CEHRD have conducted

[815] Erika Oil Tanker Braek-up & Spill Incident', France, 12 December 1999, Report of the International Oil Pollution Compensation Funds (IOPC) Organisation, updated May 9, 2011. Avaulable at: https://Iopcfunds.Org/Wp-Content/Uploads/2018/12/2009_English_Incident_Report.pdf
[816] Van Ho and others (n 52) 105-110
[817] Meeran (n 450) 1-41
[818] Amnesty (n 451)

independent research, which has raised serious questions about the technical capacity of the regulators in Nigeria.[819] In a 2011 environmental assessment of Ogoniland, the United Nations Environment Programme (UNEP) found:

> "Both [the Nigerian Upstream Petroleum Regulatory Commission] and NOSDRA suffer from a shortage of senior and experienced staff who understand the oil industry and can exercise effective technical oversight. The main reason for this is that individuals with technical knowledge in the field of petroleum engineering or science find substantially more rewarding opportunities in the oil industry."[820]

Therefore, there should be legislation to set and comply with internationally accepted standards for the technical capacity of regulators such as NUPRC, NOSDRA and NEASRA in the oil spill investigation process. For example, there should be a legal requirement to use certain types of equipment to detect oil spills and the involvement of skilled personnel in the oil spill investigation process.

Another recommendation to address the dispute of information that influences remediation and compensation of oil spills is to enact legislation to amend conflicting mandates of the different regulatory agencies and resolve conflicts of interest between different regulatory agencies in the Nigerian oil industry. Coordination between key regulatory agencies is poor, and they take different approaches to solve the same problem, such as cleaning up contaminated oil spill sites. For example, no clear directive delineates the operational boundaries between NOSDRA and NUPRC concerning cleaning up contaminated sites and applying procedures. As a result, the two agencies have different interpretations of EGASPIN guidelines, which continues to undermine clean-up operations. Let me give an example to illustrate this point. NOSDRA Act legislates a provision for an emergency response system. However, NOSDRA cannot detect oil spills and relies on the resources and reports from oil companies to know, for example, when the oil spill started, how much oil was spilt, the area affected, and so on. NOSDRA relies on the resources of oil companies such as helicopters and other forms of transportation to access the contaminated sites. The NUPRC may also be expected also to gather information on the oil spill process. Under this situation, several conflicting information about the oil spill would emerge, thus, giving rise to the dispute of the information during litigations.

[819] Amnesty (n 64)
[820] Ibid 16

One of the solutions would be to amend the NUPRC and EGASPIN Acts to place them under the Ministry of Environment, as in the United States and several Middle Eastern countries. This will help avoid a conflict of interest between the Ministry of Petroleum and the Ministry of environment. Most experts who could have worked in the Ministry of Environment are working in the Ministry of Petroleum due to higher remuneration. Another related option would be to enact legislation that merges these two agencies or clearly define the boundaries of operations of each agency. One area that would benefit from this modification is which agencies are responsible for monitoring and reporting and which agency is responsible for the clean-up of contaminated sites. This will bring Nigeria in line what international best practices of placing agencies responsible for monitoring environmental pollution under the Ministry of Environment rather than under the ministry of petroleum. For example, in Norway, the Norwegian Environment Agency, a department under the Ministry of Climate and Environment, is responsible for the environmental monitoring of its petroleum industry. Similarly, the Department of Environment discharges this responsibility in Malaysia[821].

8.2.7 Recommendations regarding Tort of Negligence, Nuisance and Trespass

The recommendations under the tort-based claims - the tort of negligence, nuisance, and trespass- are discussed below.

(i) Reforming the law of tort of negligence, nuisance, and trespass

The tort of negligence, nuisance and trespass needs continuous reforms to cope with Nigeria's challenges to human rights and environmental litigations. In the preceding chapter, we discussed how the tort of negligence, nuisance and trespass had shaped the outcome of human rights and environmental litigations, especially those that have to do with claims of remediation and compensation for oil spills.

On the tort of negligence, one recommendation that can significantly improve the chances of success for litigants who sue oil companies is to enact legislation that shifts the plaintiff's

[821] See the responsibilities and functions of the Ministry of Natural Resources and Environment (Kementerian Sumber Asli dan Alam Sekitar) Malaysia, on its official website in < https://www.ketsa.gov.my/en-my/Pages/default.aspx > accessed August 31, 2022.

burden to the defendant's proof. The landmark case of *Mon v Shell-BP*[822] demonstrates that shifting the burden of proof from the plaintiff to the defendant can significantly improve the chances of success for litigants who sue oil companies.[823] The plaintiffs claimed compensation for damage from an oil spill. They won the case with the court justifying its decision as follows:

> "Negligence on the part of defendants has been pleaded, and there is no evidence of it. None is needed, for they must naturally be held responsible for the results of an escape of oil that they should have kept under control."[824]

Although the courts may sometimes invoke the doctrine of res ipsa loquitur to relieve the plaintiff of the burden of proving the defendant's negligence, the inference is rebuttable by expert evidence showing that the defendant took the utmost care and acted under standard industry practices. The doctrine of res ipsa loquitur is a principle that states that the mere occurrence of some type of accident is sufficient to imply negligence.[825]

On the tort of nuisance, the plaintiff's main challenge is establishing that he suffered special damages that are peculiar to the individual even though such pollution is regarded as affecting the public. One of the ways of addressing environmental damage from the perspective of the tort of nuisance is to broaden the class of potential claimants to include those who can show "substantial occupation" of a property so that it can be actionable as a private nuisance. This will prevent the court from classifying only events that cause serious inconvenience to private property rights as actionable as a private nuisance.

In most cases, such problems are classified as a public nuisance. The court usually requires the individual plaintiff to prove that they have suffered a serious interference to their properties over and above the disturbance caused to the public. This would help to reduce the high threshold of evidentiary proof set for negligence-based litigations in local courts. For example, the court ruled in the *Chinda and Ors v Shell-BP Petroleum Company of Nigeria*[826] that the

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[822] R. Mon & Anor v. Shell BP. (1970–1972) 1R.S.L.R. 71. Cited in: Jedrzej (n 763) 121-150.; Also cited in: Charity Emelie, 'Exploring Alternative Compensation Strategy for Victims of Oil Spillage' [2012] SSRN Electronic Journal.

[823] Jedrzej George (n 763) 121-150

[824] Jedrzej George Frynas, Oil in Nigeria: Conflict and Litigation Between Oil Companies and Village Communities (Münster: Lit Verlag, cop 2000); See Frynas, J.G. (2003). The Oil Industry in Nigeria: Conflict between Oil Companies and Local People. In: Frynas, J.G., Pegg, S. (eds) Transnational Corporations and Human Rights. Palgrave Macmillan, London. https://doi.org/10.1057/9781403937520_5

[825] A.W. Stewart, 'Are We Allowing the Thing to Speak For Itself-Linnear V. Centerpoint Energy And Res Ipsa Loquitur In Louisiana' (2010) 71 Louisiana Law Review; Benjamin Neil, 'Res Ipsa Loquitur It Really Does Speak For Itself' (2016) 5 Review of Contemporary Business Research.

[826] Chinda & Ors v. Shell B.P., (1974) 2 R.S.L.R. 1. Cited in Jedrzej (n 763) 121-150; Cited in Olubayo Oluduro, Oil Exploitation and Human Rights Violations In Nigeria's Oil Producing Communities.

plaintiffs could not prove any negligence on the defendant's part in the management and control of the gas flaring operation. The court ruled against the plaintiffs even though the plaintiff had alleged heat, noise, and vibration resulting from the negligence of management and control of the flare set used during gas flaring, resulting in severe damage to the plaintiff's property.

The challenge of applying the rule of Rylands rule relates to the plaintiff's difficulty in proving a non-natural use of the land. Also, the court seems to accept the plaintiffs' argument that laying pipelines whose leakage causes damage to the land is an activity based on statutory authority pursuant to a license issued under the Oil Pipelines Act.

It would be recommended that new legislation be enacted to clarify the meaning of "non-natural use of land". The court needs to be willing to modify this rule to meet the needs of a changing society as the rule itself, being a common law, is not immutable.[827] Also, new legislation should be enacted to state the type of legislation and the type of activity that a defendant can reference in support of its action on the land that causes damage to persons and properties on the land. This will ensure that the multinational oil companies cannot claim that its action, such as laying pipeline or using certain chemicals for clean-up, is in line with specific environmental legislation.

(ii) Reform the Sanction regime

There is a need for a review of environmental legislation in Nigeria to strengthen the current sanction regime in Nigeria. Some of the legislation that needs significant review include the Oil in Navigable Waters Act 1968, the Environmental Impact Assessment Act 1992 and the Harmful Waste (Special Criminal Provisions, Etc.) Act 1988 because they provide for paltry and vague sanctions. Criminal sanctions should remain the predominant tool because the prevalence and severity of environmental offences in the Nigerian petroleum industry require an illegal stamp on such actions to pass a strong message of disapproval.

Specifically, the statute should attach strict liability to prevent severe offences such as oil spills. This approach will make it easier for regulators to hold polluters liable for environmental harm and difficult for polluters to escape liability by raising the defence of accidental discharge.

[827] McCaskill Lauren, 'When Oil Attacks: Litigation Options for Nigerian Plaintiffs in U.S. Federal Courts' (2013) 22 (2) Health Matrix: Journal of Law-Medicine 535.

Strict liability is reflected in most environmental offences in Australia and has achieved higher rates of successful prosecutions for environmental offences[828].

An important aspect of the review of sanction regimes for environmental laws is to ensure that oil companies are actively involved in the clean-up of oil spills while litigation is going on, instead of waiting for the court of the litigation. The difference between the reforms and recommendations proposed for legislation and regulation is that the sanctions should target specific areas related to human rights and the environment. We recommend the following aspects:

(i) Before litigations – this would cover penalties related to steps taken to prevent oil pollution. A good example would be information showing the condition of oil infrastructure (e.g., oil pipeline) and steps taken to maintain oil infrastructure, especially the oil pipeline in the areas affected by the oil spills referenced in the litigations.

(ii) During litigations – penalties should cover areas such as failure to disclose information and failure to be transparent in the information related to oil pollution.

(iii) After litigations - this will cover post litigations issues such as clean-up, remediation and compensation.

After litigation, an important aspect that needs strengthening is to include some form of guarantee or warranty on every clean-up of oil spills. This would ensure that areas claimed to have been cleaned up remain in good condition for a long time after the clean-up. Additionally, these laws should allow key corporate officers to be personally liable for environmental offences committed by the company. Holding the officials responsible would be an effective deterrent. IOCs in Nigeria have been accused of maintaining higher environmental standards in other countries, which points to a management failure.

In one of the oil industry's biggest alleged scandals, Italian prosecutors allege Eni and Shell acquired a Nigerian oilfield in 2011, knowing most of the $1.3 billion purchase price would go to politicians and middlemen in bribes. Some of their present and former executives, including Eni CEO Claudio Descalzi, were jailed in a long-running trial over alleged corruption in Nigeria. In July 2020, Italian prosecutors asked for oil majors Eni and Shell to be fined. Although this concept is entrenched in Nigerian law, this type of sanction would be very

[828]Samantha Bricknell, 'Environmental Crime in Australia' (2010) AIC Reports Research and Public Policy series, xii < http://192.190.66.70/documents/2/1/1/%7B211B5EB9-E888-4D26-AED4-1D4E76646E4B%7Drpp109.pdf > accessed November 2020

difficult to achieve because of weak enforcement of Human Rights and environmental violations.

Another important approach to strengthening the sanction regime is to encourage private individuals to play a more prominent role in environmental law enforcement. This can be achieved by creating incentives and providing protection to whistleblowers. The 2012 amendment of the Malaysian Environmental Quality Act (EQA) 1974 grants protection and incentives to whistleblowers[829]. Statutory rights should be given to private individuals to proceed against petroleum companies for environmental law breaches, as this would bridge the administrative deficiencies of the environmental regulators.

(iii) Establishment of an Environmental Liability scheme

There are deficiencies in utilising tort-based claims (i.e., negligence, nuisance and trespass) for environmental damage in the Niger Delta. There is a need to establish a statutory environmental liability scheme supporting legislation in Nigeria. Such a scheme would be similar to existing schemes like the 2004 Environmental Liability Directive (ELD), which is now applicable in the UK. The Environmental Liability Directive 2004/35/EC is an EU law Directive on the enforcement of claims to improve the environment.[830] Another approach would be to incorporate the liability scheme into an existing regulatory agency (e.g., NOSDRA, NEASRA, NUPRC) and the laws supporting the agencies.

The Directive 2004/35/EC of the European Parliament and the Council of 21 April 2004 on environmental liability established a framework based on the polluter pay principle to prevent and remedy environmental damage. As the Environmental Liability Directive deals with "pure ecological damage", it is based on the public authorities' powers and obligations ("administrative approach") as distinct from the "traditional damage" scheme of civil liability (damage to property, economic loss, personal injury).[831]

[829] Environmental Quality (Amendment) Act 2012, S.19 &S.20
[830] 'Environmental Liability' (*Ec.europa.eu*, 2021) <https://ec.europa.eu/environment/legal/liability/index.htm#:~:text=Environmental%20Liability-,Introduction,prevent%20and%20remedy%20environmental%20damage.> accessed 26 January 2021.
[831] 'Environmental Liability' (*Ec.europa.eu*, 2021) <https://ec.europa.eu/environment/legal/liability/index.htm#:~:text=Environmental%20Liability-,Introduction,prevent%20and%20remedy%20environmental%20damage.> accessed 26 January 2021.

In a report to the European Commission detailing incidents where the Environmental Liability Directive was applied between 2009 and 2012, the UK government stated that 19 cases were reported - eight in England, eight in Wales, two in Scotland and one in Northern Ireland. Out of the 19 cases, 12 were confirmed cases of environmental damage comprising nine cases of damage to land, two cases of damage to biodiversity, and one case of damage to water.

The main strength of ELD, which has been applied in the United Kingdom, is that it has introduced a requirement for compensatory remediation where environmental damage to water, protected species or natural habitats has been caused. For example, one recorded incident resulted in more environmental changes to the waterway paid for by the operator that may not have been expected under current legislation.[832]

It was also reported that the application of the ELD provided a mechanism for remedying harmful land contamination, which was quicker and simpler to use. It gave enforcing authorities wider powers to recover costs from responsible operators. This can be very useful in Nigeria, where costs are only recoverable where 'environmental damage' is established, and the operator is liable after court litigations.

8.3 Conclusion

This thesis focused on human rights and environmental litigations in the Niger Delta and how to address the mechanisms employed by MNOCs to derail these litigations to enhance human rights and the environment. This thesis has investigated how to address the mechanisms used by MNOCs to derail human rights litigations in the Niger Delta to promote human rights and the environment. The main research problem addressed in this thesis is that the mechanisms used by MNOCs in the Niger Delta to derail human rights litigations (e.g., exploiting procedural rules to delay litigations) are incompatible with their human rights obligations and thus contribute to the worsening of human rights and environmental violations in the region.

The thesis has achieved its stated aims and objectives, including proposing a legal framework and recommendations for addressing derailment in human rights and environmental litigations

[832] European Commission, 'Environmental Liability Directive 2004/35/EC- UK Report to The European Commission On The Experience Gained In The Application Of The Directive' (2021) <https://ec.europa.eu/environment/legal/liability/pdf/eld_ms_reports/UK.pdf> accessed 26 January 2021.

in the Niger Delta. The legal framework is composed of different legal instruments that can be implemented at the constitutional, legislative, regulatory and non-court dispute resolution levels. For example, at the regulatory level, the legal framework recommends that the Nigerian government must amend the key regulations, including the Oil Pipeline Act that allows MNOCs to avoid liability and thus remediation and compensation for an oil spill caused by sabotage and theft.

Several lessons and conclusions have been presented in different chapters of the thesis. In Chapter One, we highlighted the various problems that this thesis aims to address. The first problem is that MNOCs operating in Nigeria and many developing countries still consider human rights from a social development perspective (i.e., philanthropy and social investments in local communities) rather than from the human rights and environmental perspective. The second problem is that MNOCs failure to treat complaints seriously by actively engaging with the victims creates an environment for conflict escalation and the initiation of litigations against MNOCs and their subsidiaries. The third problem highlighted is that human rights obligations are not aligned among the various entities in the MNOCs (e.g., departments, divisions, subsidiaries, suppliers, etc.). The fourth problem is that the mechanisms used by MNOCs to derail human rights and environmental litigations conflict with their human rights obligations and contribute to the worsening of human rights and environmental violations in the Niger Delta. The fifth problem highlighted in this thesis is an inadequate legal framework to ensure that the human rights obligations of MNOCs are complied with by all entities in the enterprise. MNOCs are involved in managing the operations of the subsidiaries (e.g., the safety and security of their pipelines and facilities). However, despite this level of control and oversight that MNOCs have over their subsidiaries, they claim that they are not in control of the subsidiaries whenever there is a legal dispute.

In chapter two, the thesis describes human rights and the environment as it applies to the oil and gas operations of MNOCs, especially in developing countries. The chapter also discussed human rights and environmental rights under the United Nations and the Nigerian constitution, the regulation of human rights, and the role of the government in protecting human rights and the environment.

Chapter three discussed human rights and environmental violations of multinational oil companies in the Niger Delta. This Chapter established that the human rights obligations of MNOCs are a commitment of the whole enterprise, including the MNOCs and their

subsidiaries because the very structure of the parent and subsidiary relationship is a legal structure. As a result, if there is a legal dispute, multinational oil companies cannot argue that they do not have legal control over their subsidiaries. Therefore, it follows those human rights obligations that emerge from this legal structure should be legally binding. In Chapter Three, it was learnt that the response of MNOCs and their subsidiaries to human rights and environmental violations in developing countries like Nigeria is inconsistent with its response in other developed countries.

Chapter Four examined three human rights and environmental litigations in the Niger Delta region of Nigeria. Chapter Five reviewed a selected set of human rights and environmental litigations initiated in the US, UK, and the Netherlands. The litigations relate to human rights and environmental violations arising from the Niger Delta. It was learnt that in litigating against MNOCs and their subsidiaries for wrongful actions, it is important to link the actions of subsidiaries to the parent companies. Although establishing this link, which is sometimes difficult, this chapter concludes that the approach of establishing direct liability from failure to exercise due diligence creates an incentive for MNOCs to ensure that their subsidiaries respect human rights and environmental violations in the Niger Delta.

Chapter Six analysed the human rights and environmental litigations arising from the Niger Delta. This analysis covered the similarities and differences between the litigations to explain why certain aspects of the litigations are similar or vary and under what circumstances. It was learnt that the mechanisms used by MNOCs to derail human rights litigations conflict with their human rights obligations. Therefore, there is a need to address the mechanisms used by MNOCs to derail litigations to improve human rights and the environment in the Niger Delta

Chapter Seven presents a legal framework for addressing derailment in human rights and environmental litigations in the Niger delta to promote human rights and the environment. The legal framework is composed of different legal instruments, including the constitution, legislation, regulatory bodies, and non-court dispute resolution. Chapter Eight concludes the thesis with recommendations and plans for future work.

The thesis concludes that Nigeria has fairly robust laws protecting human rights and the environment from harm from oil and gas operations. The real problem is the combative approach MNOCs against claimants when there is a legal dispute due to the actions of their subsidiaries due to oil operations in the Niger Delta. An appropriate level of engagement with stakeholders will improve human rights and environmental protection in partnerships with

local governments, local communities, and NGOs. In addition, applying the recommendations we have proposed will help address the mechanisms used by MNOCs to derail litigations, thereby promoting human rights,

8.4 Future Work

The future direction of our research is discussed below:

8.4.1 Analysis of approaches and conditions that lead to varying outcomes in human rights and environmental litigations against MNOCs.

As a result of the difficulty in holding the MNOCs liable for Human Rights and environmental violations in Nigeria, the victims of environmental pollution have decided to sue the parent companies of these oil companies abroad. Recently, there has been significant success in some cases (e.g., *Wiwa v. Shell, Oguru, Efanga and Others v. Royal Dutch Shell* and *Bodo v. Shell/SPDC*) initiated by individuals and communities in the US, England, Netherlands, France, and Italy, where most of the multinational oil companies operating in Nigeria are based[833].

Although some of these cases (e.g., *Wiwa v. Shell, Oguru, Efanga and Others v. Royal Dutch Shell and Bodo V Shell/SPDC*[834]) have been successful in certain aspects[835], a careful review of the cases has revealed that there are varying and often conflicting outcomes both for the victims and the parent companies. This is possibly due to the type of legislative and judicial provisions and the extent to which they are applied in different domains.[836]

Recent cases in the United States in which the Alien Tort Act (ATS) has been applied (e.g., *Kiobel vs Royal Dutch Petroleum* and *Aguinda v Texaco Inc* (2001) 142 F Supp 2d 534) show the ATS has generally been a barrier to holding parent companies liable. On the other hand, legal cases brought against parent companies in England and the Netherlands have largely relied on the doctrine of due diligence and parental duty of care, and so this makes the US court

[833] Enneking (n 24) 44-50.

[834] Howard Mustoe, 'Shell Being Sued in Two Claims Over Oil Spills In Nigeria - BBC News' (BBC News, 2016) <http://www.bbc.co.uk/news/business-35701607> accessed 14 September 2016.

[835] Enneking (n 24) 44-50.

[836] Gwynne Skinner, 'Rethinking Limited Liability of Parent Corporation from Foreign Subsidiaries' (2015) 72 Washington and Lee Law Review.1772-1790.

decisions irrelevant and largely unimportant if such a case were brought in the United Kingdom.

One possible area of extension would be an analysis of approaches and conditions that lead to varying outcomes in human rights and environmental litigations arising from the Niger Delta against MNOCs. Specifically, a critical study of human rights and environmental litigations would help in understanding how to select the best possible approaches (or combination of approaches) and laws that would lead to successful outcomes when suing MNOCs abroad (that is, in Europe and the US) for violations of Human Rights and environmental damages.

8.4.2 Exploring other approaches for holding Multinational Oil Companies liable for environmental harms, for example, based on a combination of legal and sociological approaches (e.g., 'Green Criminology').

The question of how to hold parent companies liable for environmental harm has mostly been considered from the legalistic approach. This subject has struggled for several years because the reoccurring problem is that the law tends to be ill-equipped to deal with such transgressions. It will be very interesting to consider the concept of 'green criminology' where criminologists have tried to address this problem in a more sociological context. Green criminology covers not only the study of harms and crimes against the environment, the study of environmental law and policy, corporate crimes against the environment and environmental justice from a criminological perspective[837].

8.4.3 Exploring the use of International Courts in Human Rights and Environmental litigations in the Niger Delta

Most of these litigations are taking place at the national level, that is, by relying on the court system of the parent company's host countries. For example, in England, the case may start from the magistrate court or crown through the Court of Appeal up to the highest court of the land, the Supreme Court. The *Okpabi v Shell* litigation initiated in England was unsuccessful at the High Court and the Court of Appeal. Leigh Day, the law firm representing the two

[837] Nigel South, 'Green Criminology, Environmental Crime Prevention and the Gaps between Law, Legitimacy and Justice' (2014) 65 Crime Justice Journal4. 373-381; see Nigel South, 'Green Criminology and Environmental Crime s and Harm' (2019) 13 Sociology Compass 1.

Nigerian communities, appealed to the UK Supreme Court, where they were successful.[838] It has long been suggested that corporations should logically be considered criminally accountable under international law for any violations of international criminal law. This is based on the interpretation of criminal law that is generally recognised by States as having been incorporated under international criminal law such as The Hague Convention of 1907. For example, Article 10 ensures that individual members and corporations can be held liable for criminal acts.[839]

It would be interesting to explore whether, and in what circumstances, these litigations can be heard at the regional or international level, which has a wider jurisdiction, for example, the European Court of Justice (ECJ), the International Court of Justice (ICJ) and the International Criminal Court. The United Nations have encouraged the governments of different countries, and local and international NGOs to explore how to access justice in these courts concerning violations of Human Rights and environmental damages and present appropriate recommendations to the United Nations and the European Commission to develop relevant policies in the future[840]. As recently as March 2016, one of such cases was considered by the International Criminal Court (ICC), although it was rejected on jurisdictional grounds a victims' request to investigate a case of environmental destruction by Chevron in Ecuador. The ICC has recently indicated that it will also begin to focus on environmental crimes in addition to Human Rights violations[841] , and victims have already begun to submit requests. Also, there is interest in how the ICC can prosecute environmental destruction as a crime against humanity under Article 7 of the Rome Statute.[842]

8.4.4 Impact of UNGP and other International regulatory agencies on Transnational Litigations involving Human Rights and Environmental damages in the Niger Delta

International regulatory agencies have been actively influencing human rights and environmental issues in the last decade. Many countries have amended their constitution to

[838] Libby George and Tife Tife, 'Appeal Court Rules Nigerians Cannot Pursue Shell Spill Claim in England' (2018) <https://uk.reuters.com/article/us-shell-nigeria-court/appeal-court-rules-nigerians-cannot-pursue-shellspill-claim-in-england-idUKKCN1FY1V0> accessed 15 February 2018.
[839] Sudipto Sircar; Kshitiz Karjee, Public Liability of Transnational Corporations: An Argument for Expanding the Scope of Liability under International Law, 9 US-China L. Rev. 359 (2012)
[840] Nicolas Sadeleer, Gerhard Roller and Miriam Miriam, 'Access to Justice in Environmental Matters' (2017).
[841] John Vidal (n 723)
[842] Caitlin Lambert, 'Environmental Destruction in Ecuador: Crimes Against Humanity Under the Rome Statute?' (2017) 30 Leiden Journal of International Law.

give room for its adoption and implementation, while others have enacted legislation to pave the way for its application to allow victims to access remedies for violations of international human rights and the environment. The provisions and guidelines of some of the international regulatory agencies (e.g., UNGP and OECD) have been referenced in transnational litigations and have even provided the basis of legal arguments for the plaintiffs in these cases.

To address the lack of access to justice, the United Nations approved the United Nations Guiding Principles on Business and Human Rights (UNGPs), which state that states are obligated to provide effective remedies for victims of Human Rights breaches.[843] The UNGPs is a framework based on international law and legal instruments, with three pillars: the state's obligation to defend human rights, business responsibility to respect, and access to redress if these rights are violated. In light of this development, it would be interesting to investigate the influence of compliance with international regulatory authorities (e.g., UNGP and OECD) on transnational lawsuits involving human rights abuses and environmental harm in the Niger Delta.[844]

The main challenge of the effective implementation of UNGPs is whether it should be binding or voluntary on member states.[845] Stakeholders have raised several issues with the UNGPs. Firstly, the UNGPS has been criticised for not setting a sufficiently high standard for business because it is sometimes viewed as non-binding or voluntary on member states.[846]. For example, it has been argued that the private sector should have an “obligation” to realise the rights and not merely a “responsibility". Secondly, there is concern from stakeholders is that the UNGPs do not have an overarching accountability mechanism that would make the framework legally enforceable.

Despite these challenges, the UNGPs have received widespread uptake and support from civil society organisations, public sectors, and private sectors, and several companies have publicly stated their support for them.[847] This has led some countries such as France and Switzerland,

[843] Radu Mares, ‘Responsibility to Respect: Why the Core Company Should Act When Subsidiaries Infringe Human Rights’ in Radu Mares (ed), The UN Guiding Principles on Business and Human Rights - Foundations and Implementation (Martinus Nijhoff 2012) 169

[844] Michelle Flash and Anna Naimark, 'Panel Explores the Future of Human Rights Lawyering following the Supreme Court Hearing in Kiobel v. Royal Dutch Petroleum' (The American University Washington College of Law, 2012).

[845] Oyeniyi Abe (n 235) 137-157

[846] Oyeniyi Abe (n 235) 137-157

[847] Daria Davitti, 'Refining the Protect, Respect and Remedy Framework for Business and Human Rights And Its Guiding Principles' (2016) 16 Human Rights Law Review.

to quickly introduce legislation that creates a presumption of liability on the part of parent corporations for their subsidiaries' torts abroad.[848]

Currently, little research has investigated and documented the key legislative and judicial developments in Europe and America (where most parent companies are based) and thereafter evaluated their impacts on compliance with UNGP to provide for parental liability due to serious human rights violations and environmental damages. Therefore, there is a need to investigate recent legislative and judicial developments in Europe and US on compliance with UNGP to provide for parental liability. There is also a need to investigate the actual and possible impact of the UNGP on judicial decisions arising from a selected set of cases initiated against parent companies for serious violations of Human Rights and environmental damages.

Based on a carefully selected set of litigations initiated against parent companies of multinational oil companies operating in the Niger Delta of Nigeria, it is possible to contribute to knowledge by providing an implementation framework including the methodological concepts, legal and judicial tools, and measurement tools for guiding the implementation of the UNGP. The implementation framework will help to address the issue of access to justice by victims of corporate abuse by providing a tool that pools together all existing information on the international community's policy commitments in complying with UNGPs. This will compel oil companies through their parent companies abroad to compensate and remediate for oil spills. It will not only strengthen accountability but also help many countries target their future strategies to allow victims to receive compensation and remediation for gross Human Rights violations and environmental damages.

[848] Marco Marco, 'The Enforcement of Corporate Human Rights Due Diligence: From the UN Guiding Principles on Business and Human Rights to The Legal Systems Of EU Countries' (2016) 10 Human Rights & International Legal Discourse.

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