



CORPORATE COMPLICITY, BAD GOVERNANCE AND SABOTAGE IN THE NIGER DELTA: A CASE STUDY OF CRUDE OIL PRODUCTION IN OGO NI LANDS

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ABSTRACT

Since the inception of the oil industry, Nigeria has relied on multinational oil companies from Europe and the United States for the exploration or production of crude oil. These multinational oil companies entered into contracts with the Federal Government of Nigeria. Usually the parties to this contracts are defined as the multinational oil companies and the government of Nigeria. Communities are not included as parties to these contracts. Communities have for decade argued that they have suffered the violation of their fundamental human rights by the government with the complicity of the multinational oil companies. Communities have responded to these alleged violation of their rights by resorting to violence and by instituting legal actions in the domestic courts of the home states of the multinational oil companies operating in the Niger Delta. Multinational Oil Companies on the other hand have argued that their attempts at reconciling with these communities through corporate social responsibility has met with limited success as a result of poor legal and regulatory framework. Using the Ogoni as case study, this article traces the evolution of the conflict in the Niger Delta from the era of community allegation of multinational oil companies' complicity in the violation of their rights in the 1990s to the current situation of sabotage of oil facilities by militants from the Niger Delta region.

Keywords: Sabotage, Petroleum, Social Justice, Nigeria.

1. INTRODUCTION

Nigeria like most developing oil producing countries relies on multinational oil companies for the exploration or production of crude oil. These multinational oil companies were brought into Nigeria by one of the oil exploitation regimes (such as Licenses, Production Sharing Agreements etc.). These regimes are generally considered to be contracts or to contain the essential elements of contracts and therefore define the parties of the oil exploitation agreements. Usually the parties to these oil regimes are defined as the multinational oil companies and the government of Nigeria. Multinational Oil Companies therefore perceived

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themselves as owing obligation only to the government of Nigeria and not the communities from whose territories resources are obtained.

Communities in the Niger Delta have alleged that Multinational oil companies were actively complicit with the Nigerian military government of the 1990s in the violation of their fundamental human rights and that in spite of Nigeria's return to democratic rule in 1999 they have not been adequately compensated for the violation of their fundamental human rights.² Multinational oil companies have argued that their attempts at reconciliation with Niger Delta communities through corporate social responsibility³ have been limited by the inability of the government to provide a legal framework for multinational oil companies' relationship with communities and by acts of sabotage and other criminal activities by people from the Niger Delta.⁴

Using the Ogoni as case study, this article traces the evolution of the conflict in the Niger Delta from the era of community allegation of multinational oil companies' complicity in the violation of their rights in the 1990s to the current situation of sabotage of oil facilities by militants from the Niger Delta region. This article will argue that the failure of the government to provide adequate legal and regulatory framework for multinational oil companies operation in the Niger Delta region has adversely affected the relationship between multinational oil companies and the Niger Delta communities in 2 ways. First it has resulted in the fact that the Niger Delta communities have resorted to either violence or litigation in foreign courts to seek redress for the violation of their rights. Secondly, it has resulted in the fact that multinational oil companies' attempt at reconciling with the Niger Delta communities through Corporate Social Responsibility have not produced the desired results.

2. MULTINATIONAL OIL COMPANIES AND CONFLICTS

Several developing countries rely on Multinational Oil Companies (MNOCs) for the exploitation of crude oil in their territories. Globally, there have been frequent allegations by local communities that MNOCs - either through deliberate acts or recklessness - violated their human rights and/or devastated their environment. Such allegations abound as exemplified by the complaints against Exxon Mobil Corporation in Indonesia, Chevron Texaco in Ecuador, Unicoal in Myanmar, Occidental Petroleum Corporation in Columbia, etc.⁵ These allegations have often claimed that MNOCs are guilty of human rights and environmental practices that fall short of international standards.

With very limited domestic protection and recognition in their states dependent on MNOCs for capital and technology, the affected peoples turned to the international community for assistance. The problem with international law is that the obligation to protect human rights lies with the state and not with the MNOC. MNOCs are not subjects of international law and cannot be sanctioned in international law. The primary subjects and principal actors in

² F Coomans, 'The Ogoni before the African Commission on Human and People's Rights' (2003) 52 *International & Comparative Law Quarterly* 749 at 760.

³ The European Commission defines CSR as a 'concept whereby companies integrate social and environmental concerns in their business operations and in their interactions with their stakeholders on a voluntary basis.' European Commission 'Communication from the Commission Concerning Corporate Social Responsibility: A Business Contribution to Sustainable Development' (2002) COM 3.

⁴ U Idemudia 'Corporate Social Responsibility and the Rentier Nigerian State: Rethinking the Role of Government and the Possibility of Corporate Social Development in the Niger Delta' (2010) 30 (1-2) *Canadian Journal of Development Studies*, 131 at 143.

⁵ A F M Maniruzzaman: 'Global Business and Human Rights' (2006) 67 *Amicus Curiae Journal* 11

international law are states.⁶ The principle excluding MNOCs from responsibility is so deeply rooted that most human rights instruments hold governments responsible for securing indigenous rights from violations by MNOCs and other third parties. Henkin aptly notes that:

Governments are recognised as having the sole power, authority and capacity to deal with issues of governance, human and environmental rights, despite arguments that the Universal Declaration of Human Rights' requirement, that every organ of society should promote respect for human rights and fundamental freedoms is applicable to businesses.⁷

This position reflects Milton Friedman's assertion that the 'social responsibility of business is to increase its profits.'⁸ These assertions overlook the fact that developing countries (particularly in Africa) which have only emerged from colonialism a few decades ago do not often have the skill, experience and resources to counter the influence, resources and drive of MNOCs representing interests of investors from several of the most developed and powerful states which usually includes the former colonizers of these developing countries.

In recent times, there have been wide spread concerns about alleged complicity of MNOCs in the acts of violation of indigenous peoples' rights and the destruction of their environment.⁹ Concern about MNOCs and state complicity arise because 'the brunt of this complicity is unfortunately, borne by the hapless communities living in the corridors of resources, whose livelihood and rights are mortgaged in the name of oil and mineral extraction.'¹⁰

3. THE Ogoni CRISIS AND THE ISSUE OF CORPORATE COMPLICITY

The *Ogoni* crisis represents the most notorious example of alleged complicity of MNOCs in the violation of the rights of indigenous communities. Shell¹¹ has been the sole operator in *Ogoni* since 1959 when oil was discovered in the area. It appears Shell's operations had a negative impact of the ecology of the area from the beginning, for as far back as 1970, *Ogoni* leaders sent a memorandum to Shell and the military government of Rivers State complaining about the adverse effect of oil spills on their farmlands.¹² This and numerous other complaints were neither addressed by Shell or the military government and judicial actions by the *Ogoni* in Nigerian Courts were mostly unsuccessful.¹³ Under the leadership of the environmentalist Ken Saro Wiwa, the *Ogoni* founded the political organization: the Movement for the Survival of *Ogoni* People (MOSOP) in 1990 to protest the devastation and neglect of the

⁶ A Cassese, *International Law* (Oxford University Press, Oxford 2001)3; C Warbrick 'States and Recognition in International Law' in M. D. Evans *International Law* (Oxford University Press 2006) 217

⁷ L Henkin, 'The Universal Declaration at 50 and the Challenges of Global Markets,' (1999) 25 (1) Brooklyn Journal of International Law, 17 at 23 – 25.

⁸ M Friedman, 'The Social Responsibility of Business is to Increase its Profit' New York Times Magazine, 13 September 1970.

⁹ Maniruzzaman (note 4).

¹⁰ C Ochieze, 'Corporate Complicity in the Extractive Industry: Where does Legal Liability Stand?' (2007) 5(2) Oil Gas Energy Law Intelligence 1 at 8.

¹¹ Shell is used in this paper to describe the Shell Petroleum Development Company of Nigeria. This is a subsidiary of Shell International registered in Nigeria.

¹² K S Wiwa, *Genocide in Nigeria: the Ogoni Tragedy* (Saros International Publishers, Port Harcourt, 1988) 85; L S Pyagbara, 'The Ogoni of Nigeria: Oil and the Peoples' Struggle' in A Whitmore (ed) *Pitfalls and Pipelines: Indigenous Peoples and Extractive Industries* (IWGIA/TEBTEBBA Foundation Publication, Copenhagen, 2012) 124.

¹³ For an examination of these cases see P S Tamuno, 'The Tort of Negligence and Environmental Justice in the Niger Delta' (2017) 1 OGEL 1; J F Fekumo, 'Civil Liability for Damage Caused by Pollution in J A Omotola (ed) *Environmental Laws in Nigeria including Compensation* (University of Lagos Press 1990) 268.

Ogoni area.¹⁴ In August 1990, MOSOP adopted the 'Ogoni Bill of Rights' which spelt out the demands of Ogoni, including *inter alia*: the right to self-determination of the Ogoni and the right to the control and use of the economic resources found on their land.¹⁵ MOSOP presented the Bill of Rights to the federal government in October 1990, and also sent a set of demands to Shell, which included *inter alia* an ultimatum to 'pay the Ogoni royalties and compensation within thirty days or quit the area.'¹⁶

MOSOP proceeded to internationalize the conflict by embracing the indigenous right concept and making representations to the U.N. Working Group on Indigenous Peoples.¹⁷ This was in the era when the International Work Group on Indigenous Affairs (IWGIA) was holding a series of conference aimed at expanding the indigenous concept to address human rights in Africa. MOSOP also joined the Unrepresented Nations and Peoples' Organization.¹⁸ The Ogoni Bill of Right was also presented to the U.N. Sub- Committee of Human Rights on the Prevention of Discrimination and Protection of Minorities and the African Commission on Human and Peoples' Rights.¹⁹ In 1993, MOSOP coordinated an Ogoni boycott of the Nigerian presidential elections.²⁰ In the same year, MOSOP organized a rally on the 4th of January to commemorate the commencement of U.N. International Year of the Indigenous Peoples which culminated into a series of protest against Shell.²¹ The Nigerian government sent several units of the Nigerian army into Ogoni, as a result of the fact that the protest against Shell had caused Shell to cease operations in Ogoni.²² Gross acts of human rights abuse were perpetrated by the army in the weeks they occupied Ogoni.

On May 21, 1994, the murder of four Ogoni leaders by Ogoni youths for alleged complicity with Shell inspired the military government to arrest sixteen leaders of MOSOP, including Saro-Wiwa.²³ A military tribunal was set up to try them.²⁴ In a controversial decision, nine of the accused persons, including Ken Saro-Wiwa were convicted and sentenced to death and executed on November 10, 1995.²⁵ Shell came under international criticism for alleged complicity with the Nigerian military government.²⁶

The two categories of complicity alleged against Shell represent the two global classes of alleged MNOCs' complicity in human right violations. These are:

¹⁴ R Ako, 'Resource Exploitation and Environmental Justice: the Nigerian Experience' in Francis N. Botchway (ed) *Natural Resource Investment and Africa's Development* (Edward Elgar Publication, United Kingdom 2011) 72 at 94; R Boele, 'Report of the UNPO Mission to Investigate the Situation of the Ogoni in Nigeria,' February 17 – 26, 1995, The Hague, UNPO, 1995, page 7 <http://www.unpo.org/images/reports/ogoni1995report.pdf> Accessed 2 December 2017.

¹⁵ 'Ogoni Bill of Right,' Para 20 http://www.mosop.org/Ogoni_Bill_of_Rights_1990.pdf Accessed 20 September 2013.

¹⁶ Boele (n 13); 'The Ogoni Crisis: A Case Study of Military Repression in South Eastern Nigeria' (1995)7(5) Human Rights Watch Report 8.

¹⁷ I D Ikerionwu, 'The Movement for the Survival of the Ogoni People: A case of Non Violent Campaign against Environmental Degradation' (2014) 3(1) Journal of Education Research and Behavioural Science 13 at 17; Boele (n 13).

¹⁸ Boele (n 13).

¹⁹ E. Osaghae, 'The Ogoni Uprising: Oil Politics, Minority Agitations and the Future of the Nigerian State,' (1995) 94 African Affairs, 325 at 335

²⁰ The results of this election were annulled by the military.

²¹ Boele (n 13).

²² Ibid.

²³ Ibid; For details on the execution of Wiwa see A Rowell, J. Marriot and L. Stockman, *The Next Gulf: London Washington and the Oil Conflict in Nigeria* (Constables and Robinsons Publishers, London, 2005) 1-15

²⁴ Ibid.

²⁵ O Sanya, *K S Wiwa's Shadow: Politics, Nationalism and the Ogoni Protest Movement* (Addonis and Abbey Publishers Ltd London 2007) 78; Boele (n 13); C. Bob, *The Marketing of Rebellion: Insurgents Media and International Activism* (Cambridge University Press 2005)54.

²⁶ Rowell (n 22) 6.

(a) Direct Complicity:

This complicity entails a direct involvement of MNOCs in acts of violation of indigenous people's rights usually with the connivance of the government of a developing country. The *Ogoni* alleged before the Nigerian Human Rights Violation Investigation Commission of 2001,²⁷ that Shell gave arms to the Nigerian army to throw them out of their lands as a retaliatory measure to the internationalization of the environmental degradation of the *Ogoni* territory by Wiwa and that Shell paid witnesses to testify against Ken Saro Wiwa in the trial that resulted in his execution.²⁸

Shell has persistently denied these allegations.²⁹ In spite of Shell's denial, there are claims that the Nigerian army was funded by Shell and received ammunition from Shell during its occupation of *Ogoni* territory.³⁰ There is a potential argument that an MNOC in a hostile environment as the Niger Delta ought to protect its investments.³¹ However, prior to the execution of Wiwa in the late 1990s, most Niger Delta Community protests were peaceful.³² It was the MNOCs' dependence on the Nigerian army which resulted in human rights abuses and culminated in the execution of Wiwa that ushered in the current wave of violence in the region.³³

(b) Indirect Complicity:

This takes two forms. The first form is when the MNOC looks the other way when a host government's intervention on its behalf results in the violation of human rights. This study argues that Shell is at least culpable for this kind of complicity in the *Ogoni* crisis.³⁴ The second form is when due to environmental degradation as a result of practices of MNOCs that fall short of international standards of oil exploration and exploitation practices indigenous people living within the oil exploration region lose their health, source of living, Agricultural Investment and source of drinking water. The communities in the Niger Delta have for decades complained that MNOCs 'encroach upon their lands, displace them from their communities with little or no compensation, distort their cultural life style and pollute their farmlands.'³⁵ The global criticism of Shell following the *Ogoni* crisis resulted in the fact that Shell and other MNOCs changed their approach to community relationship.

²⁷ Under the Chairmanship of Justice Chukwudifu Oputa.

²⁸ Rowell (n 22) 4.

²⁹ See for instance 'Shell Settles Nigeria Deaths Cases' BBC News 9 June 2009 <http://news.bbc.co.uk/1/hi/world/africa/8090493.stm> Accessed 12 November 2017; Shell paid 15.5 million U.S. Dollars to the families of Wiwa and 8 others executed by the Nigerian military. Shell said this payment was not an acknowledgement of wrongdoing but merely a step towards reconciliation.; see also Rowell (n 22) 4.

³⁰ J G Frynas, 'The Oil Industry in Nigeria: Conflict between Oil Companies and Local People' in J G Frynas, S Pegg (eds) *Transnational Corporations and Human Rights* (Palgrave Macmillan June 2003) 99 at 104; Rowell (n 22) 88 -90.

³¹ Frynas (n 29)106.

³² Ibid.

³³ Ibid.

³⁴ The phrase 'at least' is used because researchers on the subject matter always insists that Shell was directly complicit. See for instance B Manby, *The Price of Oil: Corporate Responsibility and Human Rights Violation in Nigeria's Oil Producing Communities* (Human Right Watch Publications, 1999) 12 -17.

³⁵ J Ejegi, 'Indigenous People's Right over Natural Resources –How it has been accommodated by Sovereign State' OGEL 5 (2004)4.

4. MULTINATIONAL COMPANIES ATTEMPTS AT CORPORATE SOCIAL RESPONSIBILITY

From the late 1990s Shell introduced community partnership as a corporate social responsibility strategy. This partnership took several forms. The first approach involved signing Memorandum of Understanding (MOU) with communities.³⁶ Shell also adopted direct partnership in which projects were determined by the communities and implemented by project management committees from the community that had been taken on board by Shell.³⁷ This approach has also not attained success in the Niger Delta. Shell identified two problems it encountered in its community development partnership. These are: 'growing community expectations' and 'sustainability of existing intervention.'³⁸

The problem of 'growing expectation' arises because communities tend to substitute Shell for the government and expect Shell to take full responsibility for providing their infrastructural needs.³⁹ The problem of 'sustainability of existing intervention' arises because the facilities built by Shell, were not supported by government departments.⁴⁰ The communities often expected Shell to fund the staffing and maintenance of these projects where as Shell in its 'business case logic' 'considered itself to have finished its assignment on the building of these projects.'⁴¹

The failure of this approach is attributable to the failure of the Nigerian government to provide an enabling environment for corporate social Responsibility (CSR). Although CSR is widely acknowledged to be an initiative of private companies, host-state governance is indispensable to the capacity for CSR to enhance sustainable development.⁴² According to Ward: 'businesses face substantial difficulties in finding and maintaining appropriate boundaries

³⁶ For instance, in 1998 Shell, Mobil and Nigerian Liquefied Natural Gas Company signed a MOU with the traditional heads of Bonny kingdom; Frynas (n 8)52. The MOU provided *inter alia* that in exchange for the communities making land and labour available for oil exploitation and Liquefied Natural Gas Project Shell, Mobil and Liquefied Natural Gas Company would contribute to the development of the Bonny Community in three key areas: roads development, electricity and water supply and funding of education and training of community members. The MOU has two clauses that are worth noting. The first is that, every project shall on completion be taken over and maintained by the communities. This was aimed at preventing the abandoning of completed projects as was the case in other parts of the Niger Delta. Secondly, the MOU provides that disputes shall be resolved by arbitrators agreed by the respective parties. This made the MOU legally binding on the parties. See generally: The Memorandum of Understanding Between Bonny Kingdom, and Shell Petroleum Development Company, Mobil Ltd and Liquefied Natural Gas Company Ltd of 5th November 1998. The success of this MOU lies in the fact that over 50 community electricity, water, and road projects have been undertaken in the community between the year 2000 to 2014; also over 1,000 youths have benefited from the community scholarship scheme. For a detailed analysis of this MOU and its impact, see generally: E. T. Bristol Alagbariya, *Participation in Petroleum Development: Towards Sustainable Community Development in the Niger Delta* (Dundee University Press, Dundee 2009).

³⁷U Idemudia, 'Corporate Partnership and Community Development in the Nigerian Oil Industry: Strength and Limitations' (United Nations Research Institute for Social Development Publications 2007) 8 – 9.

³⁸ Shell Petroleum Development Company (SPDC). 2004. *People and the Environment: 2003 Annual Report*. SPDC: Lagos cited in Idemudia Ibid.

³⁹ Idemudia (n 36) 9.

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² J Sagebie, 'The Corporate Social Responsibilities of Canadian Mining Companies in Latin America: A systems Perspective.' (2008) 14(3) Canadian Foreign Policy 103, 112; B Horrigan, *Corporate Social Responsibility in the 21st Century: Debates, Models and Practices across Governments Law and Business* (Edward Elgar Publishing Ltd, United Kingdom 2010) 153.

for their CSR interventions' if there are no government regulations on 'minimum environmental and social standards.'⁴³

The Nigerian government did not provide the parameters for the partnership between communities and MNOCs. No code of practice for this partnership has been designed to regulate the MNOCs practice, no regulations providing incentives for MNOc oil communities' partnerships and no penalties have been recommended for the failure to engage in these partnerships. MNOCs have had to rely on intuition and apply discretion. This has resulted in the fact that some communities have received more than is ordinarily expected from CSR and others have received far less than is to be reasonably anticipated from their circumstances. It has been aptly observed that 'CSR practices of private enterprises cannot provide an effective substitute for good governance.'⁴⁴ Therefore, for CSR to advance the recognition of the rights of the Niger Delta Communities the Nigerian government must fulfil its host-state governance roles. Fox and Ward identify four roles a government ought to play to create an enabling environment for CSR:⁴⁵

(a) A Mandating Role

This involves laying down the minimum standards for business operations within the legal framework usually through laws, regulations and penalties for MNOCs operations.⁴⁶ The importance of this role in Nigeria lies in the fact that it provides objective criteria for assessing MNOCs' CSR practices. These objective criteria would thus be a yardstick for measuring the extent to which CSR has advanced the position of the Niger Delta communities. The risk is that the presence of regulations on CSR in Nigeria may result in legislation that is counter-productive. First, the regulations may be futile as they may amount to an uncritical importation of CSR practices from other jurisdictions that are simply not applicable to the peculiar socio-cultural reality of the Niger Delta. This is illustrated by the Petroleum legislation in Nigeria. The Nigerian Petroleum Statutes mirror the practices of other jurisdictions and have been ineffective in the Niger Delta.⁴⁷

Secondly, legislation on CSR may inhibit the capacity of CSR to adjust to changing local circumstances because it may result in a 'compliance mentality' by which MNOCs can tick the 'Regulation check list' and legally argue that they have fulfilled their obligations as provided in the regulations even though the concerns of the Niger Delta region is not addressed and the environmental degradation in the region remains unaddressed. This is also illustrated by the approach of agencies like the Niger Delta Development Commission which seek to address the Niger Delta crisis by uncritically undertaking projects without consulting the people.

⁴³ H Ward, *Public Sector Roles in Strengthening Corporate Social Responsibility: Taking Stock* (World Bank and International Finance Corporation, 2004)7

<http://pubs.iied.org/pdfs/16014IIED.pdf> Accessed 13 November 2013.

⁴⁴ Ibid 7.

⁴⁵ T Fox, H Ward, B Howard, 'Public Sector Roles in Strengthening Corporate Social Responsibility: A Baseline Study' (the World Bank, 2002) 3 <http://pubs.iied.org/pdfs/16017IIED.pdf> Accessed 18 December 2013.

⁴⁶ Ibid; Ward (n 42)5.

⁴⁷ For instance, the Petroleum Act of 1969 was modelled after the Mineral Oil Ordinance of 1916 enacted by the British colonizers; See generally, R Ako, 'Resource Exploitation and Environmental Justice: the Nigerian Experience' in Francis N. Botchway (ed) *Natural Resource Investment and Africa's Development* (Edward Elgar Publication, United Kingdom 2011) 72; The Environmental Impact Assessment Act was modelled after the American EIA Systems; O Ogunba, 'EIA Systems in Nigeria: Evolution, Current Practice and Shortcomings' (2004) 24(6)Environmental Impact Assessment Review 643.

(b) A Facilitating Role:

This involves incentivizing companies to engage in CSR through the government playing a catalytic or secondary role.⁴⁸ This is accomplished by setting overall policy framework to guide business investment in CSR, developing non-binding CSR guidance etc.⁴⁹ This role is necessary to inspire MNOCs involvement in the recognition of the rights of the Niger Delta Communities. This role is lacking in Nigeria as no incentives have been provided by the Nigerian government for CSR practices by MNOCs.

This is not peculiar to Nigeria. The reality is that there is scarcely any regional standard for CSR in the African continent. Although Africa has a high rate of mining communities and mining companies' conflict, CSR is unrecognized in African financial treaties. African leaders enacted the New Partnership for Africa's Development (NEPAD) as a common vision to *inter alia* 'eradicate poverty and to place their countries, both individually and collectively, on a path of sustainable growth and development.'⁵⁰ This vision is African states' collective stance against poverty and underdevelopment in Africa. NEPAD emphasized *inter alia* the promotion of democracy, human rights, accountability and transparent governance, macro-economic stability.⁵¹ NEPAD states that its aim is to encourage states to provide conducive environment for private sector led development.⁵² NEPAD laments the fact that many states lack the necessary policy and regulatory framework for private sector led growth.⁵³ However by making no mention of CSR, NEPAD missed an important opportunity for filling the gap of the absence of regulations on CSR in African states.

(c) An Endorsement Role:

This involves showing public validation and political support for particular kinds of CSR practices etc.⁵⁴ While such endorsements are aimed at encouraging positive CSR practices; there is however an inherent risk in this role. The risk is that acts of public endorsement may become tools in the hands of MNOCs.⁵⁵ The reality is that MNOCs often adopt CSR not because of domestic pressures in the developing countries in which they operate, but as a result of the fear of the impact of such local conflicts on their international reputation. MNOCs may therefore publicize endorsements from their host state in a manner that silence other voices in these states that raise genuine grievances against them.

Furthermore developing African states in their reliance on MNOCs are prone to give quick endorsement to MNOCs. CSR practices have therefore been criticized as representing 'a success for corporations in resurrecting their public image and colonising the issue space around the social and environmental impacts of business.'⁵⁶ It has been pointed out that MNOCs in international forums have 'exploited feel-good stories about "voluntary action," "corporate

⁴⁸ Fox (n 44) 3-5.

⁴⁹ Ward (n 42) 5.

⁵⁰ The New Partnership for Africa's Development 2001

http://www.nepad.org/system/files/framework_0.pdf Accessed 10 December 2017 para 1.

⁵¹ Ibid para 49.

⁵² Ibid para 163.

⁵³ Ibid para 86.

⁵⁴ Fox (n 44)6; Ward (n 117) 5.

⁵⁵ For analysis on how MNOCs use CSR in their favour in developing countries see 'Behind the Shine: the Other Shell's Report.' (Friends of the Earth Publication 2003); Christian Aid, 'Behind the Mask: the Real Face of Corporate Social Responsibility' (2004)

http://www.humanrights.ch/upload/pdf/050816_csr_behindtheface_2004.pdf Accessed 11 December 2017.

⁵⁶ Corporate Watch Evolution (n 76).

philanthropy” and “partnerships” with “stakeholders” in the last few years.⁵⁷ The issue is that the endorsement role may be reduced to a public relations campaign ‘to boost the image of transnational corporations through highlighting isolated examples of social environmental or human rights initiatives as ‘proof’ of corporate commitment to sustainable development.’⁵⁸ Frynas provides an illustration of the adverse impact of CSR in the Niger Delta.

In the late 1990s Shell announced that it had invested over U.S. \$7 million dollars on roads in the Niger Delta in its forty years of operation in the region but failed to disclose that the roads were required for oil operations and therefore the bulk of these roads bypassed the Niger Delta communities and linked oil installations.⁵⁹

CSR if properly conducted has a great potential to advance the rights of people in developing countries experiencing poor governance. However, the oil industry notorious for its sense of urgency may adopt CSR as a public relations exercise to mask deep rooted issues of social, economic, political and environmental injustice occasioned by their operations without addressing the root cause of such issues. This is particularly likely in the Niger Delta. Idemudia asserts that the problem with the endorsement role in the Niger Delta is rooted in the fact that the Nigerian government’s tendency to resort to force in dispute between communities and MNOCs has caused the government to lose its legitimacy in the eyes of the Niger Delta communities and the fact that the Nigerian government and the MNOCs have both traditionally used each other’s failure ‘as a means of absolving itself of any wrong doing in the region.’⁶⁰ Therefore, any acts of endorsement by the Nigerian government would in this circumstance be viewed with suspicion.

(d) A Partnership role:

This involves combining public inputs such as skills, resources etc., with the input of businesses to tackle issues within the CSR agenda.⁶¹ This role is indispensable in advancing the rights of the Niger Delta communities as it assigns roles to all the stakeholders in the oil industry: the Nigerian government, the MNOCs and the oil communities. Oil operations in Nigeria are typically through joint ventures⁶² between the national oil company of Nigeria (Nigerian National Petroleum Corporation) and MNOCs. This joint venture implies that the Nigerian government is a partner in all acts of degradation of the environment in the Niger Delta. Therefore, MNOC’s partnership with communities ought to necessarily include the Nigerian government. The weakness of the partnership role is that it may compromise the sovereignty of the state by causing the state to descend from regulator to player in the exploitation of resources in her territory.⁶³ This is not peculiar to the context of CSR, but is also applicable in oil exploitation regimes involving partnership such as joint ventures. For instance

⁵⁷ Corporate Europe Observer ‘Industry’s Rio +10 Strategy: Banking on Feel Good PR’ <http://archive.corporateeurope.org/observer10/basd.html> Accessed 5 December 2017.

⁵⁸ Ibid.

⁵⁹ J G Frynas, *Oil in Nigeria: Conflict and Litigation Between Oil Companies and Village Communities* (Lit Verlag Munster, 2000) 51-52.

⁶⁰ U Idemudia ‘Corporate Social Responsibility and the Rentier Nigerian State: Rethinking the Role of Government and the Possibility of Corporate Social Development in the Niger Delta’ (2010) 30 (1-2) *Canadian Journal of Development Studies*, 131 at 143.

⁶¹ Fox (n 44)5; Ward (n 42)5.

⁶² The Nigerian government through the Nigerian National Petroleum Corporation entered into Joint Ventures agreements with MNOCs (such as Shell, Agip, etc) for the exploration and production of crude oil. By these JVs the government obtained 55% share in the concession held by the MNOCs. Y Omorogbe *Oil and Gas Law in Nigeria* (1st edn, Malthouse Press Ltd Lagos, Nigeria, 2003) 47.

⁶³ B Campbell, ‘Corporate Social Responsibility and Development in Africa: Redefining the Roles and Responsibilities of Public and Private Actors in the Mining Sector’ (2011) *Resource Policy Journal* 2.

in 2008, Shell blamed the Nigerian government for failing to meet its own target to end gas flaring by 1st January 2008, by failing to provide its 55% share of the cost of gas utilization facilities under the terms of the Shell/Nigerian National Petroleum Corporation Joint Venture.⁶⁴ In addition, partnership carries the risk of raising situations in which government apparatus like the army are transformed into security agents for MNOCs as is the case in the Niger Delta.

In spite of these weaknesses of the partnership role, its utility to the advancement of the rights of the Niger Delta communities is seen in the fact that it has proved to be the most successful model for addressing the needs of the Niger Delta Communities. Some MNOCs have adopted this approach by partnering with the Niger Delta Communities through the development agencies set up by the government.

Shell has also adopted the approach of partnering with the NDDC to provide vocational training of thousands of youths and women in the Niger Delta.⁶⁵ The benefit of this to the region is the fact that women and children have been the worse hit by the poverty occasioned by the ecological devastation of the region. Other MNOCs have partnered directly with the host communities. An example is the Integrated Community Development Project established as a partnership between the government of Akwa Ibom state, Mobil and Esso Petroleum as an agency for providing microcredit scheme to boost small scale enterprise in Akwa Ibom state.⁶⁶ The advantage of this approach is that creates an alternative source of livelihood for local peoples.

The adoption of CSR by MNOCs did not fully address the crisis in the Niger Delta region. There is still widespread sabotage of MNOC facilities by militants of the Niger Delta. Shell and other MNOC in Nigeria have since the year 2000 alleged that the vast majority of oil spills in the Niger Delta are the outcome of sabotage. The percentage of oil spillage attributable to sabotage was in 2011 placed at 70% of all oil spills; while system failures were responsible for 30% of the spill.⁶⁷ But some other communities resorted to litigation in the domestic courts of the MNOCs operating in the Niger Delta.

5. RECOURSE TO THE DOMESTIC COURTS OF MULTINATIONAL OIL COMPANIES' HOME STATES

The recourse to the domestic courts of the home states of the MNOCs in the Niger Delta was not fortuitous. Since the 1970s Niger Delta communities have sought redress from the courts of Nigeria for the environmental devastation of the Niger Delta region. The majority of these cases have been dismissed on the basis of the technicalities of the law.⁶⁸ Loss of confidence in the Nigerian Courts inspired the Niger Delta Communities to take their case to the domestic courts of the home states of the MNOCs operating in the region.

⁶⁴ See Alexander Oil and Gas, 'Nigeria House of Representatives insist on 2008 Gas Flaring Deadline' <http://www.gasandoil.com/news/africa/d34c23e836dc281f0eb0b10300bcb521> Accessed 9 January 2018.

⁶⁵ 'NDDC/SPDC Empower 1620 Niger Delta Women' NDDC Publication 2013 http://www.nddc.gov.ng/news_id3b.html Accessed 20 August 2017.

⁶⁶ Idemudia (n 81) 8-9.

⁶⁷ T Adebayo 'Oil Spill: Shell Modifies Data to 70% from 98%' *The Nigerian Vanguard* 27 January 2011 11.

⁶⁸ For an examination of these cases see P S Tamuno, 'The Tort of Negligence and Environmental Justice in the Niger Delta' (2017) 1 OJEL 1; J F Fekumo, 'Civil Liability for Damage Caused by Pollution in J A Omotola (ed) *Environmental Laws in Nigeria including Compensation* (University of Lagos Press 1990) 268.

(a) The United States

The basis of taking the case to the U.S. was the Alien Tort Statute (ATS). The ATS provides that: “the district courts shall have original jurisdiction of any civil action by an alien for tort committed only in violation of the law of nations or a treaty of the United States.”⁶⁹

This statute was initially perceived as giving the U.S. courts jurisdiction to hear cases of torts committed outside the U.S. by corporations registered in the U.S. The few cases brought by the Niger Delta Communities under the ATS did not examine the nature of rights of the Niger Delta Communities but were focused on the applicability of the ATS to torts committed outside the U.S.

In *Wiwa V. Royal Dutch Shell*⁷⁰ the plaintiffs (members of the Wiwa family) brought this action claiming compensation under the ATS for the defendant’s complicity in the murder of Ken Saro Wiwa and other human rights abuses in *Ogoni*. The defendant company raised preliminary application to dismiss the case on the basis of the inapplicability of the ATS on the grounds that their registered head-quarters was not in the U.S.⁷¹ The court dismissed this application on the grounds that even though the defendant company’s head-quarters was not in the U.S., the defendant was registered in the U.S.⁷² The defendant company at this stage approached the plaintiff for an out of court settlement without allowing the case go into full trial.⁷³ This raised hope that the ATS was applicable to torts outside the U.S.

In *Bowoto V. Chevron Corporation*⁷⁴ the plaintiff community brought this action against the defendant company for crimes against humanity under the ATS on the basis of the alleged complicity of the defendant company in the killing of four members of the plaintiff’s community in a 1998 protest by the plaintiff community against the defendant company.⁷⁵ The U.S. District Court in San Francisco in 2006, upheld the defendant’s argument that the plaintiff’s claim could not be admissible under the ATS because the plaintiff provided no evidence that the defendant company in association with the Nigerian security forces engaged in acts that qualify as crimes against humanity as contemplated by the ATS.⁷⁶ This decision was a *prima facie* suggestion that the ATS could be applied to address the human rights claims that originate outside the U.S. if there was evidence of crimes against humanity.

In *Kiobel V. Royal Dutch Shell*,⁷⁷ the complainants brought this action under ATS against the defendant MNOC claiming compensation on the grounds that the defendant MNOC allegedly armed Nigerian security personnel to violently quell peaceful demonstrations in *Ogoni*. The action did not proceed to trial as the Supreme Court ended the uncertainty as to the applicability of the ATS outside the U.S. by unanimously holding that: ‘the presumption against extra territoriality applied to claims under the ATS and nothing in the statute rebuts that presumption.’⁷⁸ The presumption against extra territoriality is the doctrine in the U.S. jurisprudence that U.S. statutes ‘apply only to conducts occurring within and having an effect

⁶⁹ 28 USC S. s.1350.

⁷⁰ 226 F.3d 88 (2d Cir. 2000).

⁷¹ Ibid.

⁷² Ibid.

⁷³ Center for Constitutional Rights ‘Wiwa V. Royal Dutch Shell’ <http://ccrjustice.org/Wiwa> Accessed 12 November 2017.

⁷⁴ WL 2455752 (nd Cal 2006).

⁷⁵ See *Boweto V. Chevron Corporation*, ‘Order granting Defendant’s Motion for Summary Judgment on Plaintiff’s Crime Against Humanity Claim’ Order No. C9902506SI (2007) 2.

⁷⁶ Ibid 15

⁷⁷ 133 S.Ct. 1659 (2013).

⁷⁸ Ibid.

within the territory of the United States.’⁷⁹ This decision closed the door to actions based on the ATS.

(b) The Netherlands

The actions in this jurisdiction proceeded to full trial. Four plaintiffs from different parts of the Niger Delta brought actions against Shell⁸⁰ in the domestic court of The Hague. The first plaintiff was a farmer who depended on his land and fish pond for livelihood. The second to fourth plaintiffs were farmers and fishermen. They brought this action against both the Royal Dutch Shell and the Shell Petroleum Development Company of Nigeria. The plaintiff alleged that several oil spills from different facilities of Shell Nigeria in different parts of the Niger Delta between 2004 and 2007 resulted in the devastation of their farmlands and fishing ground. For Akpan, the first plaintiff, the source of the pollution was a well drilled by Shell in 1959 and then abandoned.

The well was capped by a ‘Christmas tree cap,’⁸¹ that could be opened with a wrench.⁸² The source of the spill for the other farmers varied from pipelines to other facilities. The first defendant argued for the dismissal of the case on the grounds that the plaintiff’s complaints were against Shell Nigeria (the second defendant) and not the Royal Dutch Shell. The court ruled that the action was admissible as Royal Dutch Shell was the parent company of Shell Nigeria and in recent times ‘there has been an international trend to hold parent companies of multinationals liable in their own country for the harmful practices of foreign (sub-) subsidiaries.’⁸³ The matter proceeded to full trial and the plaintiffs tendered evidence of the devastation of their farmlands and rivers. The defendant in its defence argued that the oil spills was caused by sabotage and tendered evidence to that effect. The rulings of the court were as follows:

- The claims against Royal Dutch Shell were all dismissed because Nigerian law provided no obligation to a parent company to prevent its subsidiaries from harming third parties abroad.⁸⁴
- The claims of the second to fourth farmers were dismissed on the grounds that under the tort of negligence applied in Nigeria, a company was not liable for damages caused by the acts of sabotage of third parties.⁸⁵
- The court however ruled that the first farmer was entitled to compensation because Shell Nigeria contributed to the sabotage by failing to install a concrete plug over the Christmas tree cap.⁸⁶

The merit of this decision is that the MNOC’s contribution to negligence was examined resulting in the conclusion that the defence of sabotage did not guarantee automatic acquittal of a defendant. The problem with the decision is that it did not take into account the historical and political factors behind the sabotage.

⁷⁹ ‘Restatement of the Law, (Second) Foreign Relations Laws of the United States’ (American Law Institute Publication 1965) para 38.

⁸⁰ The actions were Akpan v. Royal Dutch Shell C/09/337050 /HA ZA 09 -1580; Oguru, Efanga and Another V. Royal Dutch Shell C/09/330891/HA ZA 09-0579.

⁸¹ A wellhead shutting equipment comprising of a collection of valves, a pressure gauge and a choke; H. Devold, *Oil and gas production handbook An introduction to oil and gas production, transport refining and petrochemical industry* (ABB Oil and Gas Publication Oslo 2006) 32.

⁸² Akpan v. Royal Dutch Shell C/09/337050 /HA ZA 09 -1580 para 2.4.

⁸³ Ibid para 4.5.

⁸⁴ Ibid para 4.35.

⁸⁵ *Oguru, Efanga and Another v. Royal Dutch Shell C/09/330891/HA ZA 09-0579*, para 4.47.

⁸⁶ Akpan v. Royal Dutch Shell C/09/337050 /HA ZA 09 -1580 para 5.1.

(c) The United Kingdom

In 2014, Bodo community of the *Ogoni* filed a law suit against Shell Nigeria in a U.K. High Court concerning two massive oil spills in 2008 and 2009 which allegedly spilled 500,000 and 600, 000 barrels of crude oil into the surrounding rivers and seas.⁸⁷ At the trial of the case, Shell raised the defence that the oil spill was as a result of sabotage ('the malicious act of third parties seeking to steal crude oil from the pipeline').⁸⁸

The plaintiffs argued that under section 11 (5) (b)⁸⁹ of the Oil Pipelines Act of Nigeria 1990, the defendant company would still be liable if the sabotage was made possible by its failure to protect the Oil Pipeline and that the word 'protect' 'must be construed as requiring provision of para – military security over the pipelines and/or keeping the pipeline in good state of repair through not abandoning the pipeline.'⁹⁰ The plaintiff insisted that the defendant's failure to provide para military security and the non-maintenance of the pipeline facilitated the sabotage of the Pipeline.⁹¹ The court rejected the argument that 'protect' in the Act should be construed as providing para military security over the pipeline but upheld the argument that the defendant's abandonment of the pipeline facilitated the sabotage.⁹² Shell opted for an out of court settlement with the Bodo community.⁹³ This laudable decision has also not provided long term solution to the crisis in the Niger Delta region.

6. CONCLUSION

Communities in the Niger Delta have alleged that Multinational oil companies were actively complicit with the Nigerian military government of the 1990s in the violation of their fundamental human rights and that in spite of Nigeria's return to democratic rule in 1999 they have not been adequately compensated for the violation of their fundamental human rights. Multinational oil companies have argued that their attempts at reconciliation with Niger Delta communities through corporate social responsibility have been limited by the inability of the government to provide a legal framework for multinational oil companies' relationship with communities and by acts of sabotage and other criminal activities by people from the Niger Delta communities themselves.

This article traced the evolution of the conflict in the Niger Delta from the era of community allegation of multinational oil companies' complicity in the violation of their rights in the 1990s to the current situation of sabotage of oil facilities by militants from the Niger Delta region. This article argued that the failure of the government to provide adequate legal and regulatory framework for multinational oil companies operation in the Niger Delta region has adversely affected the relationship between multinational oil companies and the Niger Delta communities. It has resulted in the fact that the Niger Delta communities have resorted to violence by sabotaging facilities of MNOC in the region.

⁸⁷ *Bodo Community and Others v. Shell Petroleum Development Company of Nigeria Ltd* [2014] All ER (D) 181.

⁸⁸ *Ibid* para 5.

⁸⁹ Section 11(5)(b) of the Oil Pipeline Act provides that 'the holder of a licence shall pay compensation to any person suffering damage by reason of any neglect on the part of the holder or his agents or servants to protect, maintain or repair any work structure executed under the licence, for any such damage not otherwise made good.'

⁹⁰ *Bodo Community* (n 162) para 5.

⁹¹ *Ibid*.

⁹² *Ibid*.

⁹³ Shell Global 'Shell Nigerian Subsidy agrees £55 million settlement with Bodo Community' <https://www.shell.com/global/aboutshell/media/news-and-media-releases/2015/shells-nigerian-subsidiary-settlement-with-bodo-community.html> Accessed 2nd November 2017

The absence of effective legal and regulatory framework for oil and gas in the region has also resulted in the fact that Niger Delta communities have resorted to the domestic courts of the home states of MNOCs operating in the Niger Delta region to seek redress for the violation of their rights. Attempts were made in the U.S., the Netherlands and the U. K. The attempts in the U.S. were focussed on the preliminary issue of jurisdiction on the basis of the applicability of the ATS to torts committed outside the U.S. and culminated in the conclusion that the ATS was inapplicable to torts committed outside the U.S. The attempts in the Netherlands (in contrast to the U.S.) went beyond the issue of jurisdiction and addressed the nature of rights of the Niger Delta Communities. The attempts in the U.K. like the Netherlands also produced some measure of success. Nevertheless the crisis in the Niger Delta region has not been resolved. This article also noted the fact that MNOCs' attempt at reconciling with the Niger Delta communities through Corporate Social Responsibility have not produced the desired results owing to the fact that adequate legal and regulatory framework have not been put in place by the government.

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