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**Oil-Exploitation in Nigeria  
- Procedures Addressing Human  
Rights Abuses**

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# Abbreviations

ACHPR	African Charter on Human and Peoples' Rights
ATCA	Alien Tort Claims Act
CA	Court of Appeals
CAT	Convention Against Torture
CLO	Civil Liberties Organisation
CRC	Convention on the Rights of the Child
CRP	Constitutional Rights Project
ERA	Environmental Rights Action
EU	European Union
FHC	Federal High Court
FSIA	Foreign Sovereign Immunities Act
GTZ	German Gesellschaft fur Technische Zusammenarbeit
HURI-LAWS	Human Rights Law Service
ICCPR	International Covenant on Civil and Political Rights
ICESCR Rights	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ING	Interim National Government
MORETO	Movement for Reparation To Ogbia
MOSOP	Movement for the Survival of the Ogoni People
NDDC	Niger Delta Development Commission
NGO	Non-Governmental Organisation
NNPC	Nigerian National Petroleum Corporation
NYCOP	National Youth Council of Ogoni People
OAU	Organisation of African Unity
OBR	Ogoni Bill of Rights
OCDT	Ogoni Civil Disturbances Tribunal
P-H	Port Harcourt
PRC	Provisional Ruling Council
RICO	Racketeering Influenced and Corrupt Organizations Act
SERAC	Social and Economic Rights Action Center
SPDC	Shell Petroleum and Development Company
TVPA	Torture Victim Protection Act
UDHR	Universal Declaration on Human Rights
UN	United Nations
US	United States of America

# Introduction

## Purpose and questions to be answered

Globalisation of the market has a major impact on human rights and environmental protection. Transnational corporations are often accused of human rights abuses and environmental pollution, but they are rarely able to exploit natural resources and the local population without the co-operation or at least approval of the Government of the state that is being exploited. Oil-exploitation in Nigeria is a clear example of violations of human rights and environmental protection by transnational corporations with the co-operation of the Government.

In this thesis the emphasis is on the decisions of the different procedures that have been used for by victims of these human rights abuses and their efficiency. Oil-exploitation in Nigeria is very interesting to look at from that perspective. In order to bring the human rights abuses to the attention of the public and remedies to the victims many different procedures have been used. Procedures have not only been invoked within Nigeria, but also internationally. Through looking at the result of the procedures used in this case the experience gained can be used in the future when deciding how to address violations of human rights.

Questions to be answered are:

1. *What was the effect of oil-exploitation on the oil-producing states surrounding the Niger-Delta?*
2. *Which Nigerian procedures have been used for addressing human rights abuses in these states?*
3. *Which international procedures have been used for addressing human rights abuses in these states?*

The thesis is divided into two separate, but closely connected, issues.

Chapter two will provide the answers to the three questions concerning the actual oil-exploitation and chapter three will provide the answers to the three questions concerning the murder of four Ogoni leaders and the consequent trial by the Ogoni Civil Disturbances Tribunal. In my conclusion the effect of these procedures will be compared and recommendations as to which procedures an international lawyer should use when addressing human rights abuses will be given.

## Summary

Nigeria is a federal state with 36 states and 1 territory, the Abuja Federal Capital Territory. Nigeria is Africa's most populous country; the population is estimated to be around 130 million. More than 250 ethnic groups live in the country. The most populous and politically influential are Hausa and Fulani (29%), Yoruba (21%) and Igbo (often called Ibo, 18%). About 50% of the population is Muslim, 40% Christian and indigenous beliefs stands for 10% of the population. The legal system is based on English common law, Islamic Shariah law (only in some northern states), and traditional law.

Chapter 2 concerning oil-exploitation starts with describing the effect of oil-exploitation in the oil-producing states surrounding the Niger-Delta during the 1990s. The environment was seriously affected through oil-spills and construction of canals, roads and pipe-lines. Flaring of gas had a serious impact on the lives of peoples, plants and animals. In recent years flaring of gas has decreased rapidly due to an increased commercial value of natural gas. Ordinary people did not benefit from oil-exploitation. Much of the profit was distributed to the Government from the oil-corporations, but corrupted politicians have put the money in their own pockets instead of using it for the good of the people. Frustrated over the situation resistance movement emerged within the communities. The most famous is the Movement for the Survival of the Ogoni People, MOSOP. Clashes between locals and the military, police and security staff emerged. Competition for benefits from the oil-corporations also created conflicts between and within communities. Oil-corporations allegedly supported the military and police. At least they tolerated their use of force and benefited from the human rights violations.

To emphasise that not much have changed on the ground since the 1990s I have written a separate section called “Developments during the 21<sup>st</sup> century” in which I look at the current situation. After looking at the actual effect of oil-exploitation I will give an overview on the human rights violations connected to oil-exploitation in the region. Chapters 2.2 and 2.3 deal with different procedures that have been used to bring recognition to the human rights violations, remedies to the victims and also to prevent future human rights violations.

Due to the influence of the Military Government over the police and the judiciary there were no prosecution of individuals using force. Nigerian Courts have however been able to adjudicate on compensation for environmental pollution from oil-corporations. I will look through some of these cases. Nigerian courts have come to fair decisions, but the procedure is too long and expensive for the courts to offer an effective remedy for victims. There is also one very interesting case concerning compensation from the Federal Government to the states for oil and natural gas derived from their areas. The case took an unexpected turn when the Court concluded that the locals did not have any right whatsoever to claim compensation, in spite of the effort by the legislator to protect such a right in the constitution. On the national level there have also been a number of non-judicial procedures. The Nigerian Government has a habit of instigating different inquiries and commission into situations involving human rights abuses. These have often come to fair conclusions, but their recommendations have not been implemented.

The case has gained international attention. A civil suit has been brought in the US by Nigerian nationals against Abubakar, the former head of state in Nigeria under the Alien Tort Claims Act. The Court found that it had jurisdiction concerning most of the allegations. One set-back was however that Abubakar was given immunity for alleged international crimes during his time as Head of State. A communication was also sent to the African Commission on Human and Peoples’ Rights. The decision by the Commission is an important step towards recognising social rights as true

enforceable human rights and the relationship between a clean environment and respect for human rights. The major problem is however the delay by the Commission before it came with a final decision.

Chapter three starts with a description of the murder of the four Ogoni leaders after an international conflict within the local movement. Other Ogoni leaders, including the MOSOP President Ken Saro-Wiwa, were accused of the murders. After a long detention under inhuman conditions a military tribunal, The Ogoni Civil Disturbances Tribunal, was established to try the accused. The trial was marked by a number of human rights violations. The defence tried to object to violations of fundamental rights both in the Tribunal and in regular courts without success. Most of the accused were sentenced to death and executed.

Relatives of the executed have brought a suit under the Alien Tort Claims Act, the Torture Victim Protection Act and the Racketeering Influenced and Corrupt Organizations Act against Royal Dutch Petroleum Company and Shell in the US. The suits have so far been successful in establishing personal and subject matter jurisdiction. There is not yet a decision on the merits. Communications were also sent by human rights organisation to the African Commission on Human and Peoples' Rights, both previous to the establishment of the Tribunal and during the trial. Due to a long delay the African Commission did not give its final decision until long after the executions. The UN-system also became involved at an early stage. One important step taken was the sending of a fact-finding mission to Nigeria. International attention made several governments impose sanctions against Nigeria. Oil-sanctions were however not imposed.

It is not the direct effect of these procedures that is important. What makes a difference is that they together make the public aware and the human rights violators feel watched. It is when these procedures are combined with the efforts of NGOs and media that human rights violations can be prevented and victims supported.

## **Method and material**

### **General sources of information**

Beginning of June I flew to Nigeria. In Lagos and Port-Harcourt I went to different NGOs and lawyers that I knew had been working within the area in the early 1990s and/or where active within the area at the moment.

It is difficult to find objective material on the issue. Companies within the region are all connected to the oil-industry and the Government is allegedly directly involved. Media has played an important role in bringing the violence and injustices in the region to public scrutiny. Media are however interested in creating a “selling scandal” and the accuracy of their articles cannot be taken for granted. In a reply to an article published in the Sunday Times Brian Anderson, managing director claims to have been misrepresented: “*The story carried out by your insight team was inaccurate and misleading.*”<sup>1</sup>

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<sup>1</sup> Letter to Mr. J Witherow, Editor of the Sunday Times, from Brian Anderson, Managing Director of Shell Petroleum Development Company, dated 20 December 1995.

NGOs are the most important source of information. However they are also likely to look for and interpret information in a way that supports their cause. Shell representatives have pointed this out. In its reply to the report “Ogoni- the struggle continues” written by the World Council of Churches Shell admits that: “*We do not claim that Shell’s record in Nigeria has been faultless. We have recognised shortcomings in important areas of our operations, and, where these existed, we have worked, and are working, hard to bring about improvements.*” They believe the report to be ill-researched and contain inaccurate allegations against SPDC. They are mostly disturbed by the fact that the authors did not speak to Shell while putting their report together.<sup>2</sup> Nor did information come from independent third party sources. Shell instead chose to refer to the 1995 World Bank Report (Defining and Environmental Development Strategy for the Niger Delta).<sup>3</sup> The World Bank has in its turn been accused of siding with the oil corporations because it is dependent on oil-money for its survival.

NGOs in Nigeria are in many ways different from most NGOs in the industrialised countries. The core of the organisations is not contributing members doing volunteer work, but well-educated full-time employed professionals paid by international funding. The high education speaks in favour of the information being reliable, but the dependence on international funding creates an incentive for writing reports alleging poverty and human rights abuses. NGOs within Nigeria are often directly affected by the case they are writing about and one can question whether they are truly objective. It is however inevitable that information coming directly from the source also comes from someone that has been affected and that has taken a stand. Neutrality does not exist. International NGOs are however more likely to give report without their judgement being clouded by personal feelings. Reports by Human Rights Watch play an important role in this thesis.

When it comes to finding information about the environment, economic development and violent clashes Nigerian NGOs were often very helpful, but I was surprised to see that in general there was lack of administrative order. Documents were either not saved or were saved, but misplaced. It was easy to get interviews, but difficult to get written reports. Such reports have mostly been made by international NGOs. Companies on the other hand were keener on giving out prepared fact sheets than to actually give interviews.

## Law

It was not difficult to find cases concerning compensation for environmental damage. Most of these cases are published in the official Law Reports and with some guidance from Nigerian lawyers I was able to find precedents relevant for my study.

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<sup>2</sup> Shell International, London, Final Draft for discussion with the World Council of Churches, Comments by Shell to the WCC Report ”Ogoni – the struggle continues”, p. 1.

<sup>3</sup> Shell International, London, Final Draft for discussion with the World Council of Churches, Comments by Shell to the WCC Report ”Ogoni – the struggle continues”, p. 2.

It was however difficult to find rulings concerning the Civil Disturbances Tribunal. 16 July 2003 I was looking through all of the cases registered in the federal High Court, Port Harcourt in 1994 and 1995. The files I looked through were written by hand and in bad shape. The only cases that I could find were rulings given previous to the commencement of the Ogoni Civil Disturbances Tribunal. During the trial by the Tribunal those who were involved or supervising the trial had taken down notes of different applications to the Federal High Court, Port-Harcourt. There was however no trace of these. A lawyer from Ledum Mitee's Chambers was helping me going through the files, but he had no better luck. I also paid a librarian at the Court to look for cases, but she was not successful. Saro from MOSOP told me on the same day that when he had been searching for documents relating to the OCDT in government authorities they were often missing. In the Court of Appeal, Port-Harcourt it was not possible to get assistance unless I offered some money and they were still unable to find all the documentation I requested.

I have therefore not always been able to read the actual court rulings, but have been forced to rely on secondary sources. Even this appeared to be not as easy as could have been expected. Documentation is not organised but scattered between different lawyers and organisations. Another aspect is that documents are not numbered or given specific titles and it is therefore difficult to give references to a specific piece of documentation. Most of the information concerning the trial was found at HURI-LAWS, at the time of the Tribunal the bureau of the defence counsel. Further at the chambers of Ledum Mitee and through interviews with Sam Amadi.

At HURI-LAWS I found two compilations that have been valuable. Statements of witnesses and accused given at the Nigeria Police were found in the compilation "The Trial of Ken Saro-Wiwa, Ledum Mitee and other Ogoni leaders [Statements of Witnesses] 1995". It was compiled by the Chambers of Gani Fawehinmi, leading counsel defending the accused. The compilation was made after some of the accused by the Tribunal prayed at the Court for an order directing the prosecution to make available to each of them copies of all statements made by prosecution witnesses to the police. The ruling of the Tribunal was that such an order was made. The second compilation is "The Trial of Ken Saro-Wiva, Ledum Mitee and other Ogoni leaders [Charges] 1995" also compiled by Gani Fawehinmi Chambers. The compilation includes statements of prosecution witnesses and also copies of the charge against the accused.

These compilations made it possible for me to determine what had happened, or at least what had allegedly happened, when the four Ogoni leaders were murdered in 1994. Much of what happened is not disputed and in these cases I will not refer to a specific witness. When I do quote a witness, I am still unable to refer to a specific page where the quote was found because pages were not numbered.

Despite much effort I was not able to find the original decision by the Civil Disturbances Tribunal. Instead I have been forced to rely on a copy of the decision in the book the Ogoni Trials and Travails edited by the Civil Liberties Organisation. This book has been an important source of

information on the part concerning the Civil Disturbances Tribunal. The book was the outcome of various research trips to Ogoni land by CLO researchers and volunteers. Foremost of these are Oronto Nantie Douglas, Uche Onyeagocha and Nick Ashton Jones. Oronto Douglas and Uche Onyeagocha are lawyers, environmental activists and CLO members. Uche Onyeagocha and Nick Ashton Jones had both been victims of severe whippings and arrests. Sam Amadi, a staff Attorney at Olisa Agbakoba and Associates and a member of the Ogoni 9 Defence team contributed to the book with an analysis. Other contributors are journalists covering the case and involved NGOs. The final text was edited by Ayo Obe.<sup>4</sup>

During my studies and investigations I became aware of the suits in the United States. Search in the database Westlaw International gave me guidance to relevant US cases and legislation. The database is a very useful tool to use due to its system of direct links to other cases and legislation that is being referred to.

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<sup>4</sup> Civil Liberties Organisation, *Ogoni Trials and Travails*, Lagos, Nigeria, ISBN 978-23188-5-9, 1996, p. ix.

# **Human Rights Violations Connected to Oil-exploitation**

## **Oil-exploitation in Nigeria**

### **Oil companies and their importance for the economy**

When talking about oil-production in Nigeria it is often said that it takes place in the Niger-Delta. Those living in the area would however react to such an assertion. They consider it wrong to classify any state that is oil-producing under the Niger-Delta. The Niger-Delta is a specific geographical location with a peculiar terrain and therefore the denomination “oil-producing states surrounding the Niger-Delta” is more appropriate. Nine states belong situated around the Niger-Delta are oil-producing: Abia State, Akwa-Ibom State, Bayelsa State, Cross River State, Delta State, Edo State, Imo State, Ondo State, and Rivers State.

Nigerian National Petroleum Corporation (NNPC) is the national oil corporation operating within the area. NNPC and its subsidiaries depend on the Government for funding. Corporations within the NNPC group are facing serious problems when trying to achieve efficiency. The total revenue realised from both export and domestic sales in 2002 for Eleme Petrochemical Company Ltd, a subsidiary of NNPC, was N5,565.29 million as against the planned revenue of N11,718.54 million. Total operating expenses during the period was N7,839.96 million, meaning that the business was not even profitable.<sup>5</sup>

The major transnational corporations within the area are Shell, ExxonMobil, Chevron, Texaco, Agip, TotalFinaElf, Esso and Conoco. Shell is the largest and oldest exploiter of the nation’s oil reserves. The company started striking oil in Ogoniland in 1958. It is mandatory for these corporations to operate in joint ventures with the Government. The Government holds a majority share of between 55 - 60 % through the NNPC. Shell Petroleum Development Company of Nigeria, Ltd (SPDC) is the operator of one of these joint ventures. It is mostly SPDC that has been criticised. SPDC is wholly owned by the Shell Petroleum Company Ltd. Shell Petroleum Company Ltd is owned by the holding companies Royal Dutch Petroleum Company (the Netherlands) and Shell Transport and Trading Company (the United Kingdom). The two European companies jointly control and operate the Royal Dutch/Shell Group, a vast, international network of affiliated but formally independent oil and gas companies.

The importance of the oil-corporations to Nigeria cannot be underestimated. Nigeria has suffered severe and persistent regression since the mid-1980s. Between 1975 and 2000 it has consistently achieved negative real per capita GDP growth rate of 1,39 %. Nigerian capacity utilisation averaged more than 70 % in the 1960s. In the 1990s it had

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<sup>5</sup> Petrochem News, an in-house magazine of Eleme Petrochemical Company Ltd, first edition April 2003, p. 17.

dropped to 30,8 %. In 1980 Nigeria was ranked 20<sup>th</sup> in the world in terms of the size of its GDP. 2000/2001 it ranked 57<sup>th</sup>.<sup>6</sup>

Nigeria has plenty of natural resources and has all the potentials to take the fullest advantage of globalisation. Still it has not been able to fully use its natural resources and stand up to international competition.

Globalisation has however not promoted development. The inability to prepare local industries for competition with foreign manufacturers in the local market led to the closure of existing industries.<sup>7</sup> Imports of consumer products has aggravated marginalisation and drawn financial resources away from long-term investments. At the same time as transnational corporations are interested in promoting consumption few of them have invested in other sectors than mining and oil production.

Excessive dependence on oil export has made Nigeria's economy extremely vulnerable. In 1970 oil production accounted for 58 % of Nigerian foreign exchange rate earnings.<sup>8</sup> 1994 oil production in the Niger Delta accounted for over 95 % of foreign exchange rate earnings and 80 % of Government revenue.<sup>9</sup> 2001 more than 90 % of the nation's revenue was derived from the oil-exploitation.<sup>10</sup> These figures clearly show how dependent the Military Government was on Shell's operations.

## **The effect of oil-exploitation**

I will start with looking at the effects of oil-exploitation in the area until late 1990s. The following chapter 2.1.2.2 deals with the current situation. I have done this divide to emphasise that even after all international attention and in spite of the present silence about the situation in the Niger-Delta region, not much has changed.

### **Environmental pollution, poverty and violence during the 20<sup>th</sup> century**

#### **Environmental damage**

Oil-exploitation has had a direct negative impact on the environment. The Niger Delta and Nigerian coastal wetlands are particularly sensitive as they include mangrove habitats and rainforest. Mangroves are some of the most biologically rich and diverse ecosystems on the planet. Environmental NGOs often use the term "*environmental wasteland*" when describing the area after four decades of Shell operations in the region. Shell never told the locals about the environmental impact that its operations would have or made an environmental impact assessment before their operations were

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<sup>6</sup> See statistics in Human Development Report, Nigeria 2000/2001 Millennium Edition, United Nations Development Programme, Lagos, Nigeria, pp. iii, vi, 10, 12, 17.

<sup>7</sup> Human Development Report, Nigeria 2000/2001 Millennium Edition, United Nations Development Programme, Lagos, Nigeria, p. 27.

<sup>8</sup> Human Development Report, Nigeria 2000/2001 Millennium Edition, United Nations Development Programme, Lagos, Nigeria, p. iii.

<sup>9</sup> Amnesty International, Nigeria Military government clampdown on opposition, London, 11.11.1994, p. 6.

<sup>10</sup> Nwankwo, Collins V.; Nigeria Human Rights Report 2000, Constitutional Rights Project, ISBN-978-2944-18-1, 2001, p. 6.

commenced. The impact of the environment had however been known for a long time. As early as 1983 the Inspectors Division of the Nigerian Petroleum Corporation drew attention to the impact of oil on the Nigerian environment. By 1992 NGOs were also telling the corporations and the international community about the effects on the environment. A report submitted by the Rivers Chiefs to the World Conference of Indigenous Peoples on Environment and Development at the Rio's Earth Summit in June 1992 stated: “[W]e have widespread water pollution and soil/land pollution that respectively result in the death of most aquatic eggs and juvenile stages of life of fin-fish and shell-fish and sensible animals...”<sup>11</sup> The flaring of gas and spillage of oil caused the most dramatic impact. Other sources of environmental problems were the construction of canals, roads and pipelines.

Construction of canals to transport for material brought salt-water by the canals killing plants and destroying drinking water. Another problem caused by canalisation was severe flooding of villages and farmlands. The construction of new roads meant that areas previously untouched by humans became accessible and consequently illegal taking of trees along the roads took place. The construction of oil-pipelines disturbed the environment. When in place pipelines rendered agricultural land economically useless.<sup>12</sup> In 1996 Shell had 96 wells connected by pipelines and hooked up to six flow stations.<sup>13</sup>

Natural gas was regarded as a waste product. Flaring of gas 24 hours a day was used for burning the gas coming to the surface when oil was exploited. Many of Shell's gas flares were situated very close to villages. The noise was so load that the vibration created cracks on walls of buildings. There is no doubt about the physical destruction to plants around the flaring areas. Communities have also claimed that thick soot was deposited on the roofs of neighbouring villages. When it rained, the soot was washed off and black-ink like water ran down the roofs.<sup>14</sup> The rain was believed to contain chemicals which destroyed the fertility of the soil, cars, roofs and clothes.<sup>15</sup>

Oil spillage caused by vandalism or eroding equipment took place regularly. According to the Nigerian Ministry of Petroleum Resources there were 2 676 cases of spillage between 1976 and 1990. An independent record of Shell's oil spillage from 1982 to 1992 reveal that 1 626 000 gallons of oil was spilt from the company's Nigeria operations in 27

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<sup>11</sup> Greenpeace International, *Shell-Shocked - The environmental and social costs of living with Shell in Nigeria*, Greenpeace Report, ISBN 1 871532 80 9, Amsterdam, July 1994, pp. 11-13.

<sup>12</sup> Greenpeace International, *Shell-Shocked - The environmental and social costs of living with Shell in Nigeria*, Greenpeace Report, ISBN 1 871532 80 9, Amsterdam, July 1994, p. 10.

<sup>13</sup> Civil Liberties Organisation, *Ogoni Trials and Travails*, Lagos, Nigeria, ISBN 978-23188-5-9, 1996, p. 6.

<sup>14</sup> Greenpeace International, *Shell-Shocked - The environmental and social costs of living with Shell in Nigeria*, Greenpeace Report, ISBN 1 871532 80 9, Amsterdam, July 1994, pp. 9-10.

<sup>15</sup> Olufemi Yaya, Environmental Quality Control Officer.

separate incidents.<sup>16</sup> It is however difficult to estimate the exact figure for spillage because many go unreported. Some of the major oil-spillages that have taken place are the Ebubu spill (1969 or 1970<sup>17</sup>), the oil blow-out in Well 11 at the Bori oilfield affecting the inhabitants of K-Dere (1970), leakage from a Shell Pipeline at Korokoro flow station in Ogoniland (June-August 1993) and lastly the oil spillage at Yorla (August 1995).

Mangrove habitats are particularly sensitive to oil-spillage as they became like a giant oil soaked sponge. Oil pollution is further persistent, meaning that it stays in an eco-system for decades if not cleaned. Staff working with detecting and cleaning up oil spillage reported that they only contained and cleaned up what they could see. This meant that oil carried away by the water in the swamps was ignored. It was impossible for those responsible to clean up such a wide area, they were simply too few. There were also delays due to the obligation to first call in staff that would do a survey to document the actual area that was affected so that communities outside this area would not be able to claim compensation.<sup>18</sup> Tests in the Delta during mid 1990s showed that total petroleum hydrocarbons in a stream was 18 parts per million (PPM), which was 360 times higher than levels allowed in the European Community.<sup>19</sup>

### **Distribution of benefits**

Between 1958 and 1997 Shell extracted an estimated US\$30 billion worth of oil from Ogoni. Still this area only produces 3 % of Nigerian Oil.<sup>20</sup> It is evident that the region has generated significant financial resources. But who benefited from this profitable business?

Much has gone to the Federal Government of Nigeria. First of all the Government has been the official owner of all oil and gas since 1969.<sup>21</sup> Secondly NNPC was holding an equity interest in joint ventures with all the transnational corporations exploiting oil. In the Shell joint ventures NNPC has held an equity interest since 1973. It was initially set to 35 %. The share was raised and from August 1979 to June 1989 it was 80 %. By July 1993 it was down to 55 %. Shell estimated that since it first started its operations in 1958 and until mid-1990s about 79 % of the value of the oil produced had gone to the Nigerian Government in taxes, royalties and equity stake. Investment and operating costs had accounted for 15 % and 6 % had gone to

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<sup>16</sup> Civil Liberties Organisation, Ogoni Trials and Travails, Lagos, Nigeria, ISBN 978-23188-5-9, 1996, p. 4.

<sup>17</sup> Shell International, London, Final Draft for discussion with the World Council of Churches, Comments by Shell to the WCC Report "Ogoni – the struggle continues", p. 11.

<sup>18</sup> Olufemi Yaya, Environmental Quality Control Officer.

<sup>19</sup> Human Rights and Environmental Operations Information on the Royal Dutch/Shell Group of Companies, Independent Annual Report, 1996-1997, pp.6-7.

<sup>20</sup> Human Rights and Environmental Operations Information on the Royal Dutch/Shell Group of Companies, Independent Annual Report, 1996-1997, p.5.

<sup>21</sup> The Petroleum Act 1969. The Constitution of the Federal Republic of Nigeria 1979 section 40(3).

foreign partners.<sup>22</sup> According to Shell this did not leave more than a fair share to the company's shareholders.

There are different ways of channelling money to the communities. Communities can be given a fixed share in the oil revenue, compensation for land acquired by oil companies, compensation for environmental pollution, employment or contracts to local businesses, and development projects.

During colonialisation and until the first military regime in 1966 the oil-producing states were given fifty per cent of the oil proceeds.<sup>23</sup> After 1966 the constitutional provisions on revenue allocation in respect to minerals moved forward and backward through some Decrees until the 1979 Constitution. The 1979 Constitution simply gave the National Assembly the right to freely decide on the distribution from the federation account. For many years the National Assembly made no provision for a derivation principle in respect of revenue allocation when revenue accrued from mineral operations. In 1992 however it was decided that “[a]n amount equivalent to 1 per cent of the Federation Account derived from mineral revenue shall be shared among the mineral producing States based on the amount of mineral produced from each State....” whether onshore or offshore. Three percent was to be paid into a fund for the development of the mineral producing areas.<sup>24</sup> This was the formula in use for revenue allocation until the coming into force of the 1999 Constitution in May 1999.

Even if the Nigerian Government was supposed to direct some of the oil revenue back to the communities where the oil is produced little, if any, of that money reached those in need of it. Shell was unwilling to ensure that the money was made effective use of. In reply to criticism from indigenous and NGOs concerning poverty in the oil-producing states Shell replied: “*The distribution of royalties and taxes is clearly a matter for the Nigerian Government and the Nigerian people. Nevertheless, SPDC has taken a strong public position that not enough of the Government's revenues from oil has gone back to the six million inhabitants of the oil producing areas in the form of development.*”<sup>25</sup>

The people complained that they were only paid for the crops growing on the fields and not for the land itself when Shell acquired land in the Delta. Shell argued that all compensation for land was to be paid to the Government, the owner of all land since 1978.<sup>26</sup> Shell claimed that additional compensation was still being paid to original owners and stated that: “*SPDC still pays rents to the original owners for all land acquired*

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<sup>22</sup> Shell International, London, Final Draft for discussion with the World Council of Churches, Comments by Shell to the WCC Report ”Ogoni – the struggle continues”, pp. 3, 7.

<sup>23</sup> 1960 Constitution section 134.

<sup>24</sup> The National Assembly, pursuant to section 149(2) of the 1979 Constitution, enacted the Allocation of Revenue (Federation Account, Etc.) Act, Cap 16 Laws of the Federation of Nigeria. This Act was amended by the Military Government by the Allocation of Revenue (Federation Account, etc.) (Amendment) Decree No. 106 of 1992. Quoting section 6.

<sup>25</sup> Shell International, London, Final Draft for discussion with the World Council of Churches, Comments by Shell to the WCC Report ”Ogoni – the struggle continues”, p. 3.

<sup>26</sup> Land Use Decree of 1978.

*prior to 1978. Since 1978, surface rights at current market rates are paid to those who formerly occupied the land. These payments are in addition to the compensation paid for economic crops.”*<sup>27</sup> I would like to point out that even if compensation was given, Shell was negotiating compensation with illiterate villagers who were not in a position to specify proper terms and conditions. Only 55 % of the Nigerian population is literate.<sup>28</sup>

Some compensation for environmental pollution was paid. For example N1,8 million was paid to the community of Nembe in April 1992 for a spillage that occurred earlier that year. Communities were still complaining that the compensation was not sufficient. Shell has often refused to pay compensation at all when spillage has been caused by sabotage, at least according to them. In 1998 a pipeline started leaking in Bayelsa and 800 000 barrels of oil were spilled out. Shell blamed the spillage on sabotage and refused to pay compensation. In other instances compensation has been paid by Shell although oil spill has been caused by sabotage. The 1994 Yorla spill was a result of sabotage and nevertheless SPDC decided to make an ex-gratia payment to the inhabitants of the community.<sup>29</sup>

Locals demanded that they were to be employed within the oil-companies and their firms offered contracts. Employment and contracts were instead often offered to foreigners or Nigerians from other parts of the country. At times however employment and contracts were given to community leaders, but then allegedly as a way of buying leaders and creating conflicts between groups. Many of the elders were given contracts with Shell. Although these contracts were often badly executed Shell did not bother about their implementation. Uzere is a good example. When the community protested against Shell’s operation in 1994, part of the grudges centred on the non-availability of potable water. It turned out, that one of the elders was awarded a contract to provide a 15 KVA generator to power the water project. Rather than do what was stipulated in the contract he supplied a 10 KVA generator.<sup>30</sup>

Shell claimed that in 1995 it had paid US \$25 million for development projects in Ogoni communities alone. Communities on the other hand claimed that on the ground there were no projects embarked upon by Shell in 1995 that could be estimated at US \$25 million. A top Shell Official spoke to the Financial Times of London in December saying: “*I would go so far as to say that (Shell) spent more money on bribes and corruption than on community development projects.*”<sup>31</sup>

## **Local movements resisting oil-exploitation**

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<sup>27</sup> Shell International, London, Final Draft for discussion with the World Council of Churches, Comments by Shell to the WCC Report ”Ogoni – the struggle continues”, p. 11.

<sup>28</sup> Human Development Report, Nigeria 2000/2001 Millennium Edition, United Nations Development Programme, Lagos, Nigeria, p. vii.

<sup>29</sup> Shell International, London, Final Draft for discussion with the World Council of Churches, Comments by Shell to the WCC Report ”Ogoni – the struggle continues”, p. 11.

<sup>30</sup> Olukova Sam, June 1996.

<sup>31</sup> Civil Liberties Organisation, Ogoni Trials and Travails, Lagos, Nigeria, ISBN 978-23188-5-9, 1996, p. 14.

Loss of sources of income, environmental degradation and knowledge of the unjust distribution of the revenue derived from oil-exploitation gave birth to local movements fighting against oil-corporations and the Government. The first and the most well-known movement arose in the Ogoni area. The Ogoni people live east of Port-Harcourt in Rivers State. The Ogoni are a distinct people numbering around 500 000 who have lived in the Niger Delta for more than 500 years. The Ogoni people lived for a long time in relative isolation prohibiting marriage with neighbours, with certain exceptions. Despite the introduction of Christianity, many aspects of the indigenous Ogoni culture and religion are still evident. For example the land on which they live is believed to be a god and worshiped.<sup>32</sup> The Ogoni people has been recognised as an indigenous people.<sup>33</sup>

The Movement for the Survival of the Ogoni People (MOSOP) was founded in 1990. The intention was to unite all the Ogoni people. First president of MOSOP was the Nigerian writer and poet Ken Saro-Wiwa. Demands by the Ogoni people were outlined in the Ogoni Bill of Rights (OBR). The three key demands were autonomy, the right to use a fair proportion of the economic resources derived from their land and the right to control their environment.

What the OBR underlined with its demand for autonomy was that they would not allow themselves to be administered in only the third-tier of government, the local government, which has little power. MOSOP wished to have the same privilege as a number of other ethnic groups and be a state, the second tier of government. Their call was therefore for a re-structuring of the federation.<sup>34</sup> Other demands were: compensation for the taking of land; just and retrospective compensation for all victims of environmental and human rights abuses; employment of indigenous in the oil companies; the release of Ogoni detainees and demilitarisation; and funding and completion of an independent environmental assessment and audit which was to be used as the basis for an environmental restoration. Finally they demanded release of all internal files pertaining to the relationship between Shell and the military, and all documents relating to payments, gifts, or contracts to different individuals within Ogoni.

The massive campaign by the Ogonis resulted in agitation against Shell, a feeling of exploitation and awareness of the ecological devastation caused by Shell operations. This in turn led to the birth of other local movements. In 1992 The Movement For Reparation To Ogbia (MORETO) was created. The Ogbia people had a document similar to the Ogoni Bill of Rights called the Charter of Demands of the Ogbia People. They asked for compensation for environmental damage and economic and social infrastructure. A number of other communities also either made demands for reparation or took to violence to disturb Shell's operations.

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<sup>32</sup> <http://www.unpo.org/member/ogoni/ogoni.html> UNPO stands for the unrepresented Nations and Peoples Organisation Accessed on 17.06.2003.

<sup>33</sup> Legbersi Saro Pyagbara, MOSOP.

<sup>34</sup> Unedited text of Ken Saro-Wiwa's statement to the Ogoni Civil Disturbances Tribunal, Civil Liberties Organisation, Ogoni Trials and Travails, Lagos, Nigeria, ISBN 978-23188-5-9, 1996, pp. 76-77.

## **Use of force**

### *Within communities, between communities and from the army and security staff*

Violent clashes took place between the communities on one side and army, police and security staff on the other. Violent conflicts also occurred between communities and even between groups within the communities. The violence eventually forced Shell to withdraw from Ogoniland in 1993. The role of the governments and oil corporations in these conflicts is much disputed. I will give some infamous examples of violence that erupted during the 1990s in chronological order.

In October 1990 what has been called the Umuechem Disaster took place 10 miles from Ogoni. 80 villagers were massacred and 495 homes were destroyed by the Mobile Police Force during a protest against Shell.<sup>35</sup> In spring 1993 soldiers opened fire on a crowd demonstrating against the laying pipes on behalf of Shell that was destroying Ogoni crops. Shell contractors had been escorted by soldiers and several hundreds were wounded and some were killed.<sup>36</sup> From July 1993 to the end of that year an estimated 1000 Ogonis allegedly died in clashes with neighbouring Adonis.<sup>37</sup> Automatic weapons, grenades, mortars and dynamite were used against the Ogonis.<sup>38</sup> The Adoni was only a smaller fishing community and it is not likely that they were able to get hold of such weaponry and plan the attack without assistance from Governmental authorities. It is also unlikely that it was a regular ethnic clash since none of the normal causes of communal clashes existed.<sup>39</sup> On 25 October 1993 SPDC called in the military to protect its facilities. Military police, in vehicles hired by the oil company, stormed Korokoro and injured and killed hundreds.<sup>40</sup>

12-14 December 1993 there were disturbances in the areas around the Ndoki Waterfront, one of the ghettos in Port-Harcourt. Thousands were rendered homeless and over 100 were killed. Government authorities claimed that it was an ethnic clash between the Ogonis and the Okrikans. The use of sophisticated weapons and the professional execution of the attack supports however that governmental authorities were involved. The fact that all Ogoni police were removed from the area prior to the attacks

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<sup>35</sup> Amnesty International, Nigeria Military government clampdown on opposition, London, 11.11.1994, pp. 7-8.

<sup>36</sup> Greenpeace International, Shell-Shocked - The environmental and social costs of living with Shell in Nigeria, Greenpeace Report, ISBN 1 871532 80 9, Amsterdam, July 1994, p. 19. Quoting Ken-Saro Wiwa.

<sup>37</sup> Amnesty International, Annual Report 1994, London 1994a, p. 230.

<sup>38</sup> Civil Liberties Organisation, Ogoni Trials and Travails, Lagos, Nigeria, ISBN 978-23188-5-9, 1996, p. 19.

<sup>39</sup> Greenpeace International, Shell-Shocked - The environmental and social costs of living with Shell in Nigeria, Greenpeace Report, ISBN 1 871532 80 9, Amsterdam, July 1994, pp. 7-8. Quoting Professor Claude Ake of the UN World Commission on Development and Culture who investigated the clash.

<sup>40</sup> Civil Liberties Organisation, Ogoni Trials and Travails, Lagos, Nigeria, ISBN 978-23188-5-9, 1996, p. 8.

also implies that the attacks were instrumented by the military.<sup>41</sup> A Commission of Inquiry was set up by Lt-Colonel Komo.<sup>42</sup> The Commission reported in part: “...[E]vidence before the Commission suggests a situation in which one well prepared party caught the other unsuspecting party sleeping in a series of attacks co-ordinated with military expertise and precision....The disturbances should not be described as a communal clash as it was nothing of the sort.”<sup>43</sup> Concerning weapons used it stated: “The evidence before the Commission leaves none of the members in doubt that dangerous weapons were freely and expertly put into use... explosive guns and petrol bombs were used in an manner suggestive of long practice...”<sup>44</sup> The attackers had “...planned and executed with brutal thoroughness the actions...”<sup>45</sup>

In the end however the Commission came to the conclusion that the clash was rather a result of the Government not acting than a result of Government acts. The Commission observed the obvious apathy of the Government towards the problem and stated: “In failing however to take the decisions which are in the short term ”inconvenient”, Governments have unintentionally laid the foundation for and supplied the impetus for confusion, social disequilibrium and perhaps even disaster.”<sup>46</sup> It should be pointed out that the history of the two neighbours had been marked by regular wars. There was also a dispute concerning land ownership. There had further been discrimination and marginalisation of Okrikans.

The Internal Security Task Force was sent into Rivers State in April 1994 following clashes between the Ogoni and Ndoki ethnic groups in which about 20 people were reportedly killed. Again there were allegations implicating government forces behind these unprecedented inter-ethnic clashes.<sup>47</sup> The head of the Internal Security Task Force Major Paul Okuntimo wrote a secret memo to the Rivers State Military administrator on May 12 1994: “Shell operations still impossible unless ruthless military operations are undertaken for smooth economic activity to commence...” Events that follow the memo show that it was adopted. In a few weeks the task force had raided almost all of the 126 Ogoni villages. The soldiers massacred, raped and looted.<sup>48</sup> Amnesty International has come to the

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<sup>41</sup> Greenpeace International, Shell-Shocked - The environmental and social costs of living with Shell in Nigeria, Greenpeace Report, ISBN 1 871532 80 9, Amsterdam, July 1994, p. 20.

<sup>42</sup> Lt-Colonel Komo set up a Commission of Inquiry headed by a serving military officer, Major Paul Taiwo. The Commission was inaugurated 22nd December 1993. Citations are taken from the Main Report.

<sup>43</sup> Main-report p. 9.

<sup>44</sup> Main-report p. 8.

<sup>45</sup> Main-report p. 67.

<sup>46</sup> Main-report p. 103.

<sup>47</sup> Amnesty International, Nigeria Military government clampdown on opposition, London, 11.11.1994, p. 5.

<sup>48</sup> Civil Liberties Organisation, Ogoni Trials and Travails, The memo was made available to Richard Boele of the UNDP. Lagos, Nigeria, ISBN 978-23188-5-9, 1996, p. 18.

conclusion that the inter-ethnic clashes were instigated by the security forces.<sup>49</sup>

It should be noted that also within the communities living in the Niger Delta there have been conflicts. In 1993 MOSOP became divided between the youths (who declared their support for Ken Saro-Wiwa), on the one hand, and the traditional rulers, on the other. On 21 May 1994, four conservative Ogoni leaders were murdered in Gokana Kingdom. Ken Saro-Wiwa, Lendum Mitee and a number of other Ogoni leaders were arrested and accused of involvement in the murders. I will go more into detail in these killings in chapter 3. The human rights situation deteriorated considerably after the murder of the Ogoni leaders. The task force was reinforced arresting several hundred people.<sup>50</sup> In late May and June the task force is reported to have attacked at least 30 towns and villages in Gokana, Khana and Tai-Eleme local government areas. At least 50 people, possibly as many as 100, were believed to have been killed and many wounded in attacks by the security forces in May and June 1994. An estimated 600 people were detained between May and November 1994.<sup>51</sup>

In February 1995, after being detained eight months without official charges, Ken Saro-Wiwa and the other Ogoni leaders accused of killing the four conservative Ogoni leaders, were brought before a special military tribunal. Late October 1995 they were sentenced to death and shortly thereafter they were executed. Following the execution of Ken Saro-Wiwa 3000 policemen and over 1000 security operatives were deployed to boost the men of the Internal Security Force of Rivers State. More than ever before human rights of the Ogonis were violated.<sup>52</sup> The struggle of the Ogonis did not stop with the death of their leaders, but continued.

#### *Shell involvement*

It is alleged that SPDC has used their financial power to create conflicts in the region, armed a private military force, supplied weapons and financial support to the Nigerian military and police force and in other ways co-operated with Governmental authorities. Violence served Shell in two ways. First violence was used to protect its facilities. Secondly conflicts between and within communities made it more difficult for the locals to demand compliance with international norms protecting the environment and fair distribution of benefits.

Shell has denied that it has armed, paid or in any way supported the Nigerian military or police.<sup>53</sup> It cannot however be disputed that oil-

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<sup>49</sup> Amnesty International, Nigeria Military government clampdown on opposition, London, 11.11.1994, p. 1.

<sup>50</sup> Amnesty International, Nigeria Military government clampdown on opposition, London, 11.11.1994, p. 5.

<sup>51</sup> Amnesty International, Nigeria Military government clampdown on opposition, London, 11.11.1994, pp. 5, 7.

<sup>52</sup> Civil Liberties Organisation, Ogoni Trials and Travails, Lagos, Nigeria, ISBN 978-23188-5-9, 1996, p. 21.

<sup>53</sup> Shell International, London, Final Draft for discussion with the World Council of Churches, Comments by Shell to the WCC Report "Ogoni – the struggle continues", pp. 17-18.

corporations just through operating in Nigeria and transferring money to the Nigerian Government supported the military regime and sponsored corruption. National and international observers have also long claimed that Shell's practice of payments through the awarding of contracts to traditional chiefs in communities, their payments of compensation for environmental pollution and distribution of development projects are deliberately divisive. It was alleged that the aim of Shell was to corrupt chiefs and divide communities. Even if the actual aim of Shell is disputed it is clear that violent conflicts did occur between groups who benefited from Shell's operations and those who did not.<sup>54</sup>

In response to community resistance Shell armed a standing security army of over 1 000 men during 1993-1995.<sup>55</sup> Shell admits that 107 Beretta pistols were purchased for the police assigned to SPDC for guarding its people and property. The use of such police and the payment for their weapons was common practice in Nigeria. Shell stated that due to violent crimes involving the use of arms in Nigeria unarmed men would not have been adequate to protect SPDC people and property. Shell claimed that the use by those police of the pistols was subject to strict supervision. The guns had not been used by anyone other than the SPDC police.<sup>56</sup> Men interviewed by NGOs maintained that not only Beretta pistols had been used, but also "*pump action shotguns, automatic rifles, and revolvers*". An interviewed police constable maintained that there was no account of bullets. Other constables maintained that bullets were recorded, but that Shell had more bullets than registered.<sup>57</sup>

There are several instances when SPDC has been accused of using the Nigerian police force and army for protecting its operations. Operation Order 4/94 for the Nigerian Police confirms that oil-corporations enjoyed protection by armed men from the Nigerian Government. It lays out a co-ordinated strategy between the Nigerian army, air force, navy and police to in part ensure that the corporations are "*not molested*".<sup>58</sup> It is alleged that it was SPDC who, previous to the Umuechem Disaster, contacted the Commissioner of the Police when they heard of a proposed demonstration against its operations and made a request for security protection.<sup>59</sup> During the attacks in September 1993 against Ogoni villages on the Adoni border it was claimed that the troops used boats belonging to Shell and Chevron. Witnesses, including Ken's brother Owens Wiwa, also stated that on the

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<sup>54</sup> Human Rights and Environmental Operations Information on the Royal Dutch/Shell Group of Companies, Independent Annual Report, 1996-1997, p.8.

<sup>55</sup> Civil Liberties Organisation, Ogoni Trials and Travails, Lagos, Nigeria, ISBN 978-23188-5-9, 1996, p. 7.

<sup>56</sup> Shell International, London, Final Draft for discussion with the World Council of Churches, Comments by Shell to the WCC Report "Ogoni – the struggle continues", pp. 17-18, 25.

<sup>57</sup> Human Rights and Environmental Operations Information on the Royal Dutch/Shell Group of Companies, Independent Annual Report, 1996-1997, p.9.

<sup>58</sup> Human Rights and Environmental Operations Information on the Royal Dutch/Shell Group of Companies, Independent Annual Report, 1996-1997, p.9.

<sup>59</sup> Greenpeace International, Shell-Shocked - The environmental and social costs of living with Shell in Nigeria, Greenpeace Report, ISBN 1 871532 80 9, Amsterdam, July 1994, p. 15.

days of the attacks helicopters which Shell often chartered were seen flying over the area.<sup>60</sup> Shell claims that such witnesses are lying. All helicopters used by Shell were provided by the same contractor, Bristows. Shell claims that the identification of the helicopters as Shell helicopters was impossible. The only thing that distinguished such helicopters was a small pectin on the fuselage that was not possible to detect from the ground.<sup>61</sup>

Shell has been able to refute some of the accusations. For example MOSOP accused SPDC of re-entering Ogoni land 29 and 31 of January 1997 under armed guard to carry out work on two flow-stations to put them back into operation and that flaring of gas had occurred. Shell denied such an operation. If flaring had taken place at the Bomu flow station plants would have been burned. Pictures taken from flying over the station showed that it was overgrown by vegetation.<sup>62</sup>

It is alleged that Shell either promoted or at least tolerated that the Rivers State Internal Security Task Force coerced locals into withdrawing court cases against SPDC concerning the Yorla spill and K-Dere flow station spills. Shell denies any such involvement and points out that if there was such pressure they failed because out of 33 court cases in the Yorla and K-Deere area only four were withdrawn.<sup>63</sup> At Shell's annual meeting in 1996, it was announced that Shell would not return to Ogoni unless there was a "*full agreement with all Ogoni communities and opinion leaders*" behind an invitation to the corporation. Numerous reports have emerged indicating that members of the Rivers State Internal Security Task Force were forcing citizens, chiefs and prisoners to sign statements inviting Shell to return. SPDC denied the use of coercive measures but confirmed that the company had received a number of letters from Ogoni chiefs indicating their willingness for the company to resume its operations in Ogoni land.<sup>64</sup>

Shell continuously denied involvement in violent clashes. Instead the company agreed with the Nigerian Government that the outbreaks of violence were ethnic clashes. In the publication "Operations in Nigeria" Shell argues that the conflicts were "*disputes between neighbouring communities over territory*".<sup>65</sup> Shell however later admitted two instances of payments to the military but disputed the claim that these soldiers were paid or directed to suppress dissent.<sup>66</sup> Shell also later admitted that

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<sup>60</sup> Unedited text of Ken Saro-Wiwa's statement to the Ogoni Civil Disturbances Tribunal, Civil Liberties Organisation, Ogoni Trials and Travails, Lagos, Nigeria, ISBN 978-23188-5-9, 1996, p. 56.

<sup>61</sup> Shell International, London, Final Draft for discussion with the World Council of Churches, Comments by Shell to the WCC Report "Ogoni – the struggle continues", pp. 17-18.

<sup>62</sup> Shell News Release of 6 February 1997 – "Shell Refutes Allegations of Flaring in Ogoni". Contact Eric Nickson and Julian Barnes.

<sup>63</sup> Shell International, London, Final Draft for discussion with the World Council of Churches, Comments by Shell to the WCC Report "Ogoni – the struggle continues", p. 15.

<sup>64</sup> Human Rights and Environmental Operations Information on the Royal Dutch/Shell Group of Companies, Independent Annual Report, 1996-1997, pp. 11, 16.

<sup>65</sup> Shell International Petroleum Company, Briefing Note, "Operations in Nigeria", May 1994.

<sup>66</sup> This statement was made in a letter from Eric Nickson (Head of Media Relations Shell International, 6/11/96 to Paul Brown and Andy Rowell). Human Rights and Environmental

*“members of the security forces have been accompanied Shell personnel in SPDC helicopters and boats at various times.”*<sup>67</sup> I believe that at least this practice of admitting after multiple denials shows that Shell officials sometimes did lie to the public and shareholders about the company’s relationship with the Nigerian military.

Shell also denied that SPDC was involved in Nigerian policies promoting the use of violence.<sup>68</sup> It claimed that multinational corporations should not interfere with national politics, but rather adapt to the legal and political framework that is offered: *“While it is not the place of multinational company to interfere in the legal or political processes of any country we will continue to promote humanitarian values and may on occasion feel it helpful to intercede, as in this case, either privately, or publicly.”*<sup>69</sup> Shell later continued *“it is not for a multinational group of companies such as Shell to interfere in the legal processes of any sovereign nation.”*<sup>70</sup>

## **Developments during the 21<sup>st</sup> century**

### **Influence of the Government and Shell Petroleum Development Company**

The local movements fought for several years against oil-exploitation in the area. They called for help among consumers and share-holders, international interstate organisations, Nigerian and US Courts, international NGOs and Nigerian authorities. Much attention was given to their fight, but lately not much has been heard about the oil-exploitation by transnational corporations and the Nigerian Government. It is therefore interesting to go back to the region to look at how those accused has responded to the accusations and see what the situation is like at present.

SPDC has resumed their activities exploiting oil both deepwater and on-shore. In 2002 SPDC had 6 000 kilometres of pipelines and flow lines, 87 flow stations, 8 gas plants and more than 1 000 producing wells. The average crude oil production of Shell then amounted to 719 000 barrels per day. The joint venture accounted for over 40 % of Nigeria’s oil production in 2002. Shell Nigeria Gas Ltd was established in March 1998 and in 2002 it sold 812 million standard cubic feet of gas per day, which

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Operations Information on the Royal Dutch/Shell Group of Companies, Independent Annual Report, 1996-1997, p.9.

<sup>67</sup> Complaint to the Broadcasting Complaints Commission from Shell International Ltd, Reply of 10 June 1996 of Shell International Ltd to the Undated Response of Channel Four Television sent to the BCC on 12 April 1996. Human Rights and Environmental Operations Information on the Royal Dutch/Shell Group of Companies, Independent Annual Report, 1996-1997, p.10.

<sup>68</sup> Shell International, London, Final Draft for discussion with the World Council of Churches, Comments by Shell to the WCC Report “Ogoni – the struggle continues”, pp. 20-21.

<sup>69</sup> Comment by Mr. Herstroter, Shell International Ltd, News Release, “Shell Reaffirms Support for Human Rights and Fair Trial”, dated 30 January 1996.

<sup>70</sup> Comment by Mr. Herstroter, Shell International Ltd, Media Relations, News Release, “Call for Reconciliation at Shell AGM”, dated 15 May 1996.

was up 11 % on 2001.<sup>71</sup> Business is expanding. In June 2003 SPDC announced that crude oil production capacity of the Kokori Flow station had been increased from 60 000 to 90 000 barrels per day.<sup>72</sup> In June 2003 SPDC announced that the share of the natural gas exported by the Nigerian Liquefied Natural Gas plant in Bonny, Rivers State, supplied by Shell had increased from 53,3 % to 60%.<sup>73</sup>

To improve its relationship with the locals SPDC has initiated a series of stakeholders' workshops. The aim of these workshops is to improve the stakeholders understanding of SPDC operations and obtaining their input into the programmes of SPDC. During the workshops different ways of consultation and co-operation is explored. Over 750 participants attended the 2002 Stakeholders' workshop. Among the participants were NGOs, community representatives, government officials, development institutions, regulatory authorities, industry specialists, SPDC staff and journalists. Not everyone is as enthusiastic about these workshops as SPDC itself. Mr Mitee claims that the workshops are just a show-off. According to him Shell has not changed and notes that the relationship between Shell and MOSOP could not have been worse.

In the OBR the Ogoni people demanded autonomy in the form of a state of their own. The National Constitutional Conference was very much confronted by the demand for a restructuring of the federation and rejected such demands.<sup>74</sup> Later development has moved towards making the local governments even less powerful. In July 2003 Obasanjo suggested restructuring the local governments through replacing the system of public vote for electing the local governments with a system of civil servants appointed by the state governments.

Publicly the Government claims that the people of oil-producing states are involved in the decision-making. Before the Niger Delta Development Commission (NDDC) was formed MOSOP suggested a fund, to which each Niger Delta People could turn for financing of projects, instead of creating a whole new institution with high administrative costs. The Federal Government refused to accept the proposal. Now that the NDDC has been created it has launched a master plan for public participation. Saro at MOSOP maintains that such participation does not take place.

### **The reply to criticism of environmental damage**

One way of oil companies to respond to demands for increased environmental protection has been to deny that the degree of environmental deterioration is as bad as claimed. Shell has declared that "*the Delta is not*

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<sup>71</sup> 2002 People and Environmental Annual Report SPDC, p. 52.

<sup>72</sup> Iba Louis, "Kokori's flowstation capacity increases to 90 000 barrels", The Punch, 12.6.2003, p. 35.

<sup>73</sup> Iba Louis, "Shell feeds NLNG with 60 % gas", The Punch, 12.6.2003, p. 36.

<sup>74</sup> Unedited text of Ken Saro-Wiva's statement to the Ogoni Civil Disturbances Tribunal, Civil Liberties Organisation, Ogoni Trials and Travails, Lagos, Nigeria, ISBN 978-23188-5-9, 1996, pp. 76-77.

*and never will be an area devastated by the Industry.”*<sup>75</sup> To prove that this is the case SPDC frequently flies journalists and others over the area.<sup>76</sup> This method for proving that there is no environmental destruction is criticised. It is not visual pollution that is the major threat posed by oil activity, but rather toxicity. That cannot be detected from the air. The company claims that the effect on the landscape is restricted because SPDC facilities only cover a small share of the total area of Ogoni land. Shell has also implied that even if the environment was devastated this may not be due to oil-operations but due to other causes such as population increases and the construction of dams. For example Shell has claimed that there is no evidence supporting that gas flaring causes acid rain.<sup>77</sup>

It is however not possible to claim that oil-exploitation does not have any impact on the environment and Shell has made a large number of public statements that it will improve environmental protection. Shell promised that if it was allowed to resume its activities within Ogoniland its environmental practices would improve and oil spills would be cleaned up, whether or not due to sabotage.<sup>78</sup> The promise was not only directed to the locals but also to shareholders and consumers. As an initial step SPDC initiated The Niger Delta Environmental Study to investigate the impact of its operations on the environment. Locals did however not put any trust in the study.<sup>79</sup>

There is a gap between public relations statements and the acts of the oil companies. There is still constant pollution caused by oil spillage, gas flaring, leakage and other discharges into the environment. It is mostly the level of propaganda that has changed.<sup>80</sup> Companies may even have become more careless.<sup>81</sup> At the 2002 Stakeholders’ workshop participants demanded more resources dedicated to displaying and reviewing of environmental impact assessments, a stop to gas flaring, surveillance and maintenance of oil pipelines and improved waste management.<sup>82</sup>

Another way of avoiding responsibility for environmental damage is to place responsibility of the spills on the communities themselves. Shell maintained that spills occurring after the withdrawal of the company in 1993 were due to threat of violence from the communities. Shell staff was not able to safely shut down and secure the 96 wells in the area before leaving. Therefore flow lines were under pressure and thus oil would flow from any rupture, through sabotage or other cause. SPDC also agreed that

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<sup>75</sup> Human Rights and Environmental Operations Information on the Royal Dutch/Shell Group of Companies, Independent Annual Report, 1996-1997, p.2.

<sup>76</sup> Funmi Elesha, Public Affairs the SPDC.

<sup>77</sup> Shell International, London, Final Draft for discussion with the World Council of Churches, Comments by Shell to the WCC Report “Ogoni – the struggle continues”, pp. 2, 4-5, 14.

<sup>78</sup> Shell International Ltd, Media Relations, News Release, “Shell Nigeria offers plan for Ogoni”, dated 8 May 1996.

<sup>79</sup> Civil Liberties Organisation, Ogoni Trials and Travails, Lagos, Nigeria, ISBN 978-23188-5-9, 1996, p. 16.

<sup>80</sup> Mr Saro, MOSOP.

<sup>81</sup> Mr Lucius Nwosu, a legal practitioner specialised in cases for compensation for environmental pollution.

<sup>82</sup> 2002 Stakeholders Workshop Report, published by SPDC, p. 10.

the clean-up work had been unsatisfactory, but that this was also due to SPDC staff being unable to enter the area. SPDC still tried to respond to all reported oil spills via local Ogoni contractors. Shell staff could not however supervise the contractors used.<sup>83</sup>

Another common excuse is vandalism by the communities. According to Shell the locals are more interested in the short-term benefit of oil spills, such as clean-up jobs and compensation, than in a clean environment.<sup>84</sup> Shell for example claimed that the Ebubu and Yorla spills were caused by vandalism and not by SPDC.<sup>85</sup> The Government and the NNPC recently blamed the Jesse fire incidence in Delta state, in which over 1000 persons where charred to death, on sabotage.<sup>86</sup>

There is no doubt that vandalism is taking place. In June 2003 15 suspected of vandalism of SPDC oil pipelines in Iwurite Rivers State were arrested by naval personnel and were to be handed over to the police for prosecution.<sup>87</sup> Military tribunals established under the Petroleum Production and Disturbances (Anti-Sabotage) Act can try suspects of sabotage. Such a military tribunal has never been established and only a few cases have gone to regular courts. The normal procedure is that the people are arrested as a way of demonstrating that something is being done, but without being prosecuted.<sup>88</sup>

Without doubt much of the spills are however due to ageing facilities, corrosion and bad maintenance. Shell admits that about 50% of the oil spilled is due to corrosion of ageing facilities.<sup>89</sup> Shell has however found a way of defending also damage evidently caused by its operations. According to Shell much of the criticism relate to old practices. Most of the production infrastructure was installed in the 1960s and 1970s when requirements were not so high. The Nigerian regulations on environmental standards, based on then current US standards, were not introduced until 1992. Not satisfied with that explanation critics have accused Shell of racism due to their differing standards between production in developed and developing countries.<sup>90</sup> Shell has replied that different standards depend on where the operations take place: "*Countries may aim for similar environmental standards, but at any time they will be at different stages of*

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<sup>83</sup> Shell International, London, Final Draft for discussion with the World Council of Churches, Comments by Shell to the WCC Report "Ogoni – the struggle continues", pp. 9-10.

<sup>84</sup> Shell International, London, Final Draft for discussion with the World Council of Churches, Comments by Shell to the WCC Report "Ogoni – the struggle continues", p. 12.

<sup>85</sup> Shell International, London, Final Draft for discussion with the World Council of Churches, Comments by Shell to the WCC Report "Ogoni – the struggle continues", p. 4.

<sup>86</sup> ND-HERO, Niger Delta Human Resource Organisation,

[http://www.essentialaction.org/shell/HERO\\_HRRap.html](http://www.essentialaction.org/shell/HERO_HRRap.html), Accessed on 7.7.2003.

<sup>87</sup> Ebiri, Kevin; "Navy arrests 15 suspected oil pipeline vandals in Rivers", The Guardian, 26.6.2003, p. 7.

<sup>88</sup> Ledum Mitee.

<sup>89</sup> Shell International, London, Final Draft for discussion with the World Council of Churches, Comments by Shell to the WCC Report "Ogoni – the struggle continues", p. 7.

<sup>90</sup> Unedited text of Ken Saro-Wiva's statement to the Ogoni Civil Disturbances Tribunal, Civil Liberties Organisation, Ogoni Trials and Travails, Lagos, Nigeria, ISBN 978-23188-5-9, 1996, p. 79.

*development. Companies operating in such a setting will be similarly affected.”*<sup>91</sup> Consequently people should not expect a company to operate above standard.

Shell admits that there is no use to “*pretend all is perfect in Nigeria*”, but points out that important improvements have been made and that SPDC is more protective of the environment than other companies in the region.<sup>92</sup> I believe that there can be some truth in this. In 2002 SPDC achieved 19 new ISO 14001 certificates covering 85 facilities and three major operations and services.<sup>93</sup> In July, 2003, SPDC constituted a team to monitor and ensure compliance to international standards and announced that the company would soon start ISO 9001 auditor training for field staff.<sup>94</sup> Eleme Petrochemical Company Ltd on the other hand report that audits during 2002 had shown major deficiencies and shortfalls in the ISO9000QMS installation and eventual certification.<sup>95</sup>

SPDC points out that both oil spills and gas flaring have been reduced. In 2002 there was a 13 % reduction in number of spills and a 74 % reduction in volume compared to 2001.<sup>96</sup> Measures taken for reducing the number oil spills included improving the equipment, educating staff and improving response capability.<sup>97</sup> In July 2003 SPDC announced that it had invested about \$5 million on replacing the old pipelines.<sup>98</sup> Gas flaring has decreased rapidly. 14 % of the decrease between 2001 and 2002 were however due to lower oil production. There is a drive to end all routine gas flaring by 2008.<sup>99</sup>

What is then being done by Governmental authorities? As mentioned Nigerian regulations on environmental standards were introduced in 1992. Lack of implementation of environmental regulations is mostly due to confusion on the administrative level. There is no clear attribution of responsibility between different governmental agencies.<sup>100</sup> NDDC does not have a comprehensive programme for environmental protection, but engages in piecemeal projects. Hopefully there will be improvements when the GTZ-plan arrives. The GTZ-plan is a comprehensive plan for development of the region being drawn by the German Gesellschaft fur Technische Zusammenarbeit.

## **Current distribution of benefits**

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<sup>91</sup> Shell International, London, Final Draft for discussion with the World Council of Churches, Comments by Shell to the WCC Report ”Ogoni – the struggle continues”, p. 23.

<sup>92</sup> Shell International, London, Final Draft for discussion with the World Council of Churches, Comments by Shell to the WCC Report ”Ogoni – the struggle continues”, pp. 22-23.

<sup>93</sup> 2002 People and Environmental Annual Report SPDC.

<sup>94</sup> Iba Louis, ”Shell raises health, safety team” The Punch, Nigeria, 24.7.2003, p. 38.

<sup>95</sup> Petrochem News, an in-house magazine of Eleme Petrochemical Company Ltd, first edition April 2003, p. 16.

<sup>96</sup> 2002 People and Environmental Annual Report SPDC, pp. 42-43.

<sup>97</sup> 2002 Stakeholders Workshop Report, published by SPDC, pp. 24-25.

<sup>98</sup> Iba Louis, ”Shell spends \$5m on crude oil pipelines” The Punch, Nigeria, 24.7.2003, p. 36.

<sup>99</sup> 2002 People and Environmental Annual Report SPDC, pp. 24-25, 39.

<sup>100</sup> Mr Saro, MOSOP.

### *From the Federal Government*

Significant financial resources are flowing from the oil-corporations to the Federal Government. In 2002 the private companies received a fixed margin within an oil price range of \$15 to \$19 a barrel. At \$19 per barrel the Government took in taxes, royalties and equity share \$13,78 per barrel.<sup>101</sup> More money now flows from the Federal Government to the Delta region. Two measures to increase the share of the oil-revenue to the people of oil-producing states have been taken. Firstly the Niger Delta bill was adopted reserving a share of the profit for the region of origin; secondly the NDDC has been created.

Section 162(1) of the Constitution of the Federal Republic of Nigeria 1999 provides that revenues collected by the Federal Government shall be paid into the Federation Account. From the account money is distributed to the states. Sub-section (2) of section 162 of the 1999 Constitution empowers the National Assembly to determine the formula used for distribution of the Federation Account. The formula must however comply with one condition: "*Provided that the principle of derivation shall be constantly reflected in any approved formula as being not less than thirteen per cent of the revenue accruing to the Federation Account directly from any natural resources.*" This principle means that when parts of the revenue to the Federation Account come directly from oil-production, at least 13 of this revenue is to be directed back to the oil-producing State. The National Assembly has enacted a formula through the Niger Delta bill which provides that the principle of 13 % derivation allocation to the mineral producing states, as provided for in the constitution, shall be enforced in relation to the oil-producing states.

Of these 13% of the oil-revenue that goes back to the region, 15% is reserved for the NDDC.<sup>102</sup> In addition to the contribution from the Government any oil producing or gas processing company operating in the Niger-Delta Area must contribute with 3% of their total annual budget to the NDDC.<sup>103</sup> The nine oil-producing states in the Delta-region are members of the NDDC. The Commission was created to formulate policies and guidelines for the development of the Niger-Delta area, conceive and implement projects and programmes in the field of environmental protection and economic and social development. It is also to implement measures approved for the development of the Niger- Delta area by the Federal Government and assist the member States in the formulation and implementation of policies. The Commission is subject to the direction, control and supervision by the President.<sup>104</sup>

NGOs are however very critical against NDDC claiming that they do not achieve any meaningful results. Too much administration has made it highly inefficient. It is even questioned if the Commission was ever even

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<sup>101</sup> Memorandum of Understanding 2000, 2002 People and Environmental Annual Report SPDC, pp. 6-7.

<sup>102</sup> O.J. Goehwa, NDDC.

<sup>103</sup> Niger-Delta Development Commission Act, No. 2 1999, section 14.

<sup>104</sup> Niger-Delta Development Commission Act, No. 2 1999, section 7.

intended to perform.<sup>105</sup> NDDC replies that many are disappointed because they expected rapid change. The NDDC has however only been operative for the last two years. During this limited period of time many projects have been completed. NDDC admits that there are some administrative problems, for example co-ordination between NDDC and the state and local governments. It is believed that with the planned arrival of the GTZ- plan co-operation will improve. NDDC and the state and local governments will then decide who will be responsible for implementing which part of the plan and overlapping will be avoided. There is however not yet any agreement on the allocation of projects or how the actual implementation of the plan will be executed.<sup>106</sup>

#### *From oil companies*

There are still complaints that oil companies do not: pay compensation for land, crops and environmental pollution; initiate enough development projects; or offer contracts and employment to locals.

The rates for compensation for land and crops are specified by the Department of Petroleum Resources. SPDC has however adopted its own minimum land take policy. In 2001 it paid over N537 million as compensation for land acquisition, tenement rates, ground rental and different fees.<sup>107</sup> Many are still disappointed. In July 2003 the Ijaw group in the Burutu Local Government area of Delta State claimed that Shell is yet to pay for the property and accrued arrears totalling N200 million. Instead of paying this money Shell is alleged to have paid N5,8 million to the former Burutu Council Chairman.<sup>108</sup> Complaints also concern compensation for environmental pollution. During the 2002 Stakeholders' workshop participants demanded increased compensation for environmental pollution.<sup>109</sup>

When SPDC left the Niger Delta it presented a plan of action with development projects that would be implemented if it was allowed to resume its activities.<sup>110</sup> At its return SPDC started several initiatives promoting community health, education, micro credit and business development.<sup>111</sup> In 2002 SPDC spent \$67 million on community development programmes.<sup>112</sup> In 2003 SPDC announced a contribution of \$50 million in the provision of social infrastructure in the Niger Delta.<sup>113</sup> Even if international oil companies have increased the amount of money spent on projects, they are accused of being bad at monitoring the actual

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<sup>105</sup> Mr. Mitee, MOSOP.

<sup>106</sup> O.J. Goehwa, Manager Corporate Affairs at NDDC.

<sup>107</sup> 2002 Stakeholders Workshop Report, published by SPDC, p. 32.

<sup>108</sup> Okafor, Chido; "Ijaw group ends feud with Shell", The Guardian, Nigeria, 21.7.2003, p. 6.

<sup>109</sup> 2002 Stakeholders Workshop Report, published by SPDC, p. 10.

<sup>110</sup> Shell International Ltd, Media Relations, News Release, "Shell Nigeria offers plan for Ogoni", dated 8 May 1996.

<sup>111</sup> 2002 Stakeholders Workshop Report, published by SPDC, pp. 11, 13-19, 37.

<sup>112</sup> 2002 People and Environmental Annual Report SPDC.

<sup>113</sup> Soni Daniel, "Shell invests \$50m in Niger Delta", The Punch, 30.6.2003, Lagos, p.11.

implementation of the projects. SPDC did not want to comment this criticism.<sup>114</sup> Staff at NNPC rejected that projects were not implemented.<sup>115</sup>

Most of the contracts are still awarded to businesses coming from outside the region, but the situation is improving.<sup>116</sup> When SPDC in June 2003 announced that crude oil production capacity of the Kokori Flow station had been increased a local contractor performed this work.<sup>117</sup> The awarding of contract to locals is however creating conflicts between and within communities. Some claim that this is the intention of oil companies. Oil companies admit the existence of conflicts, but deny that this is their aim.<sup>118</sup>

The most critical point seems to be the issue of employment. Employment is not given to the locals but to friends coming from other parts of Nigeria. Promises by the company to employ locals are persistently made and broken.<sup>119</sup> A representative of the peoples of Abonchia stated:

*“However we appeal that qualified members of the Host Communities be considered for recruitment into vacancies in middle level and management positions as against the present practice whereby recruitment into such positions is secretly done to the disadvantage of members of the Host Communities...”<sup>120</sup>*

Though some improvements have been made and the communities now benefit some more of the revenue derived from oil, poverty and underdevelopment is still widespread in the region. It is obvious for any traveller in the region that the people do not receive a fair proportion of the revenues generated from their lands. Evidence of the poverty is to be found in the fact that people risk their lives to scoop petroleum products from burst pipes. In Jesse village, Delta State, more than 100 people were burnt alive. A recent pipeline explosion in Okpe Local Government Area of Delta State killed at least 300 people.<sup>121</sup>

### **Current use of force**

People living in the Niger Delta region hoped that the transition to democratic rule in 1999 would end their suffering. This was however not the case. People have become aware of their rights but they still lack other means that the use of force the means for enforcing them.<sup>122</sup> Community incidents have increased lately, from 245 in 2001 to 282 in 2002. There had also been an increase in rig blockades and shutdown of flow stations. There had however been a reduction in the number of hostage-taking incidents

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<sup>114</sup> Funmi Elesha, SPDC Department of Public Affairs.

<sup>115</sup> Amechi Nwafw working for Eleme Petrochemical Company Ltd, a subsidiary of NNPC.

<sup>116</sup> Oronto Douglas, Environmental Rights Action.

<sup>117</sup> Iba Louis, "Kokori's flowstation capacity increases to 90 000 barrels", The Punch, 12.6.2003, p. 35.

<sup>118</sup> Amechi Nwafw working for Eleme Petrochemical Company Ltd, a subsidiary of NNPC.

<sup>119</sup> Amechi Nwafw working for Eleme Petrochemical Company Ltd, a subsidiary of NNPC. George Ohindo, security staff working at the same company.

<sup>120</sup> Petrochem News, an in-house magazine of Eleme Petrochemical Company Ltd, first edition April 2003, p. 8.

<sup>121</sup> Nwankwo, Collins V.; Nigeria Human Rights Report 2000, Constitutional Rights Project, ISBN-978-2944-18-1, 2001, p. 88.

<sup>122</sup> Mr. Ufuoma J Efemua, who grew up in the area and now lives in Port-Harcourt.

from 45 in 2001 to 24 in 2002. In 2002 there were 74 violent incidents against SPDC staff. This was a decline compared to 2001, which experienced 97 incidents.<sup>123</sup> A recent incident took place in July 2003 when an Ijaw group in the Burutu Local Government area of Delta State threatened to disrupt the operations of Shell unless the SPDC pays tenement rates due their community.<sup>124</sup>

In spite of the removal of the Rivers State Internal Security Task Force from Ogoniland in 1998 protests are still at times met with arbitrary arrests, beatings and sometimes killings by the state governments.<sup>125</sup> Excessive use of force, arbitrary detention by police and life threatening conditions while in arrest and detention remains some of Nigeria's major problems. Several persons have however been released and no arrests or detention under Decree 2/1984 have been reported since 9 June 1998.<sup>126</sup> One step in the right direction was the release in September 1999 of the 20 Ogoni prisoners who had been detained without trial, most of them since 1994.<sup>127</sup>

One example of police and military violence against locals is the incident at K-Dere, Ogoni, 11 April 2000, in response to peaceful protests against SPDC for its failure to hire local labour for a road construction project. Forces entered the community unannounced burning houses and killing people. It appears that some individuals were specifically targeted. Among the homes razed was that of Ledum Mitee and other community leaders, including two traditional rulers. Ledum Mitee was arrested as a suspect, and detained at police headquarters. The police stated that they went to K-Dere to quell inter-community violence.<sup>128</sup>

The oil companies themselves are not yet free from allegations of use of force. According to the Human Rights Watch the oil companies remain complicit in many violent abuses because of their failure to monitor security force activity at or near their facilities.<sup>129</sup> One of several examples of violence against locals by staff protecting oil facilities took place on 23 June 2000. A petroleum pipeline surveillance team in Ogala allegedly shot

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<sup>123</sup> 2002 People and Environmental Annual Report SPDC, pp. 4, 12.

<sup>124</sup> Aborisade, Sunday; "SPDC threatened over tenement rate", The Punch, Nigeria, 21.7.2003, p. 12.

<sup>125</sup> Nwankwo, Collins V.; Nigeria Human Rights Report 2000, Constitutional Rights Project, ISBN-978-2944-18-1, 2001, p. 6.

<sup>126</sup> Report submitted by the Special Rapporteur of the Commission on Human Rights, Mr. Soli Jehangir Sorabjee, pursuant to Commission resolution 1997/53, "Situation of human rights in Nigeria", Commission on Human Rights, Fifty-fifth session, E/CN.4/1999/36, 14 January 1999, paragraphs 20-25, 78.

<sup>127</sup> Amnesty International Report 1999,  
[Ihttp://www.amnesty.org/ailib/aireport/ar99/afr44.htm](http://www.amnesty.org/ailib/aireport/ar99/afr44.htm) Accessed on 4.7.2003

<sup>128</sup> Ledum Mitee.

<sup>129</sup> <http://www.hrw.org/press/2002/10/nigeria1022.htm> . Accessed on 17.6.2003.

at 4 children who were looking at people scooping kerosene from a burst pipeline.<sup>130</sup>

Oil companies are also complicit in violence since clashes that are ethnic or religious on the surface are often caused by competition for political and economic influence.<sup>131</sup> The existence of clashes is still certain, but the intention of the oil-companies is not.<sup>132</sup> The recently mentioned Ijaws claims that Shell had paid money due to them to the former Burutu Council Chairman with the aim of instigating internal fights.<sup>133</sup> On 21 January 2000, in Ughelli, Community leader Chief O Fashe was killed by the police. Prior to this incident the youths from Ughelli had requested N4,2 million from Shell as compensation for pollution. Shell claimed that the money had been paid to the chief. When the chief refused to release the money a violent clash erupted and the traditional ruler was killed. The Divisional Police Officer in charge decided to revenge his death and shot Chief Fashe.<sup>134</sup> Clashes between two ethnic groups have frequently erupted around Warri, Delta State since 1997. Tension in the area was said to have been intensified by the competition for benefits from the oil companies. During August 2003 clashes in Warri were very violent and received international attention.

Mr. Efemuai claims that the Government has been ignorant towards the violence. He continues with saying that the Government not only chooses to not prevent or stop conflicts between groups, but even supports these conflicts. This because if unity was created this would decrease the share of oil revenue flowing to the pockets of members in the Government. The Nembe local government area has been ruled by youth groups with little intervention from the Government. Fights between groups took place in May and July 2000 leaving several dead or injured and much property destroyed. Witnesses reported that mobile police had been sent to the clashes. There are disagreements whether the mobile police actually participated in the violence or merely watched. Witnesses however agreed that they did not contain it. At first Governor Alamieyeseigha and the Commission of Police Mayels State denied that any violence had occurred. It was only after pressure from international NGOs that they recognised that there had been a crisis. 30 members of youth groups were arrested. All were later released and by February 2003 none had been prosecuted.<sup>135</sup>

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<sup>130</sup> Nwankwo, Collins V.; Nigeria Human Rights Report 2000, Constitutional Rights Project, ISBN-978-2944-18-1, 2001, pp. 19-20. There are more examples of violence and abuse enumerated on pages 23 to 26 in the 2000 Report from CRP.

<sup>131</sup> Human Rights Watch, Testing Democracy: Political Violence in Nigeria, Vol. 15, No. 9 (A) – April 2003, pp. 11, 22-23.

<sup>132</sup> Mrs Agnes Tunde-Olowu, Head Legal Services at Constitutional Rights Project.

<sup>133</sup> Okafor, Chido; "Ijaw group ends feud with Shell", The Guardian, Nigeria, 21.7.2003, p. 6.

<sup>134</sup> Nwankwo, Collins V.; Nigeria Human Rights Report 2000, Constitutional Rights Project, ISBN-978-2944-18-1, 2001, p. 14.

<sup>135</sup> Human Rights Watch, Testing Democracy: Political Violence in Nigeria, Vol. 15, No. 9 (A) – April 2003, pp.5-6, 8-9.

## **Human rights violations connected to oil-exploitation**

The Nigerian Government was and still is obliged to respect a number of fundamental rights under both domestic law and international law. In this part I would like to briefly present the human rights abuses committed by the Nigerian Government through its involvement in oil-exploitation. In chapters 2.2 and 2.3 I will investigate which national and international mechanisms that have been used to bring compensation to the victims, attention to and recognition of their suffering and finally to prevent future human rights abuses. Instead of concentrating on each of the human rights at issue the emphasis of this paper is on the procedures and to show which human rights that have proved to be justiciable in practice. It is not intended to be a detailed analysis of the different rights abused, but a presentation of the many human rights abuses that are involved.

The 1979 Constitution protected and the 1999 Constitution today protects fundamental rights. The rights protected in the 1979 and 1999 Constitutions are very similar. The major difference is the numbering of the articles. In my references to the Constitutions I have therefore made the primary reference to the 1979 Constitution and written the equivalent article in the 1999 Constitution within brackets.

Early 1990s a number of important human rights instruments also became binding on the Nigerian Government. Since April 1991 it has been bound by the Convention on the Rights of the Child (CRC). In October 1993 Nigeria became bound by the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR). The Convention Against Torture (CAT) did not become binding on the Nigerian Government until July 2001.

Specific legislation must be passed for an international treaty to be directly applicable under Nigerian domestic law. The African Charter on Human and Peoples' Rights (ACHPR) has been incorporated into domestic law through the Enforcement and Ratification of the African Charter of Human and People's Rights Act Cap 10 Law of the Federation of Nigeria, 1990. The Supreme Court has also stated that the provisions of the African Charter are binding on the Nigerian Government.<sup>136</sup> Concerning the other international instruments such legislation has not been enacted. The Nigerian Government has not ratified the optional protocols of the ICCPR or the CAT. This means that the Nigerian Government does not allow any individual petitions alleging human rights violations at the international level.

Pollution of the environment violates the right to a clean environment in the ACHPR Art. 24. Living in a degraded environment also deprives the individual of the right to a life in dignity. Another violation of the right to a dignified life is extreme poverty caused by the Government though inadequate compensation for pollution and oil. The right to life is protected in the ICCPR Art. 6, the ACHPR Art. 4 and the 1979 Constitution Art. 30 (33). Severe poverty that is not serious enough to violate the right to life may still violate the right to an adequate standard of living, which entails adequate food, clothing and housing. This right is guaranteed in the

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<sup>136</sup> Ogugu v. State [1994] NWLR pt. 366.

ICESCR Art. 11 and the CRC Art. 27. Poverty and environmental pollution deprives individuals of their health. The right to health is to be found in the ICESCR Art. 12, the ACHPR Art. 16 and the CRC Art. 24. The CRC Art. 24 (2) (c) provides that a child is to be given “*adequate nutritious foods and clean drinking water, taking into consideration the dangers and risks of environmental pollution*”.

The much disputed right to development in the ACHPR Art. 22 is also affected as forced poverty and environmental degradation makes it impossible for a people to progress. In this case the internal aspect of the right to development is affected through Government involvement. The external aspect is also affected since transnational corporations and their home states are involved. According to CRC Art 6 the child has a right to survival and development.

Pollution rendering land economically useless means in practice that the individual is deprived of property and their means of subsistence. Taking oil from a people and destruction of their homes and crops are a direct form of deprivation of property. The right to property is protected in the ACHPR Art. 14. The 1979 Constitution provided the right to property in Article 40 (44), but vested the control of all mineral oils and natural gas in the Federal Government in subsection (3). The ACHPR also protects the right to wealth and natural resources in Art. 21. Art. 1(2) of the ICCPR and the ICESCR also provide the right of all peoples to “*freely dispose of their natural wealth and resources...*” They specifically state that “[i]n no case may a people be deprived of its own means of subsistence.”

Several cases of torture and injuries have been reported. The Convention Against Torture has not become binding on the Nigerian Government until recently. This does not however mean that the Government did not violate the prohibition against torture in customary international law. Inhuman and degrading treatment is prohibited in the ICCPR Art. 7, the ACHPR Art. 5 and the 1979 Constitution Art. 31 (34). The ICCPR Art. 10 specifically provides that those who are detained shall be treated with humanity. Use of force within the region has also led to several deaths and thus there have been a number of direct violations of the right to life.

### **Nigerian procedures addressing human rights violations connected to oil-exploitation**

After this presentation of oil-exploitation in Nigeria, its effects and human rights violations of the Nigerian Government connected to oil-exploitation I will now start looking at Nigerian procedures that have been used for addressing these human rights violations within the area.

First I will look at cases in Nigerian courts. There are no cases against the Nigerian police and army or security staff of oil-corporations for excessive use of force within the region. The reason for this will be clarified through looking at the independence of the judiciary and the police during the military regimes and during the present democratic rule. There have however been a large number of cases concerning compensation for environmental pollution and some of these will be analysed. So will also an important case concerning compensation for oil taken from the region.

Secondly in this chapter I will look into the use of national inquires and commissions initiated by the Nigerian authorities.

## Nigerian Court Cases

### No cases concerning use of force

#### **Independence of the judiciary and police under the military regimes**

The judiciary has been under military influence for most of Nigeria's modern history. With the judiciary and the police under the control of the alleged perpetrators there can be no prosecutions of those responsible for the use of force and destruction of property.

With the exception of a brief period of civilian regime in 1979 to 1983 different military regimes were in power from 1966 until 1999 when democracy was formally installed. When Babangida came into power in 1983 he abolished legislative assemblies and placed legislative powers on the Federal Military Government.<sup>137</sup> In the states legislative authority was placed on the military governors, who exercised it through edicts. Between 1983 and 1999 the highest governmental authority was the Provisional Ruling Council (PRC), at times also known as the Supreme Military Council and the Armed Forces Ruling Council. It was composed of military officials and some civilians. Chairman was the current the military leader. The PRC exercised both legislative and executive authority as well as judicial oversight.

Babaginda claimed that his aim was to transfer power to an elected government. The 1989 Constitution established two parties and a transition programme preparing for democratic rule was initiated. The elections were postponed, but finally held in 1993. General Babangida later annulled the 1993 elections without any reasonable explanation. According to the CLO more than 100 persons were killed and 200 wounded during demonstrations to force the military to release the results and install Abiola, the believed winner, as president.<sup>138</sup>

The support for General Babangida eroded and pressure from pro-democracy groups, the international community, and his military colleagues and forced him to resign as a Head of State on 26 August 1993. An Interim National Government (ING) was established under the leadership of Ernest Shonekan. The High Court of Lagos declared that the ING was unconstitutional since it was created by General Babangida at a time when he had no legal power to do so. The ruling was ignored.

Mr Shonekan was forced to resign by General Sani Abacha. Formally General Abacha took power on the basis of National Guard Decree No 61 1993. The same decree that had created the ING and which had been nullified by the Lagos High Court. Abacha signed a decree, the Constitution (Suspension and Modification) Decree No 107 1993, which has been called the military constitution. Decree No 107 restored the 1979

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<sup>137</sup> The Constitution (Suspension and Modification) Decree No 1 of 1984.

<sup>138</sup> Civil Liberties Organisation, Annual Report, 1993, Lagos October, 1994a, p. 178.

Constitution, but suspended and modified the constitution to further ensure control of the General over the legislative and executive power. Decree 107 provided for absolute immunity from judicial review to itself and any other decree issued since 1983. The Federal Military Government (Supremacy and Enforcement of Powers) Decree No 12 1994 stipulated that no civil proceedings should be instituted in any Court with respect to any step taken by the Federal Military Government. Further that no Court could decide on whether any human right guaranteed under the 1979 Constitution had been contravened. All these decrees were issued by General Abacha himself, giving evidence of the one-man rule in Nigeria at the time. There are some features that reoccur when looking at the military laws of that time: Retroactivity, clauses ousting jurisdiction of courts, prohibition of judicial appeal, and the use of laws aimed at specific targets or individuals (ad hominen laws).

Upon Abacha's sudden death in June 1998, General Abdul-Salami Abubakar became Head of State. He committed himself and his government to a transition programme that would lead the country to civilian rule in May 1999. Under the transition regime, human rights violations decreased. General Abubakar released political prisoners and lifted the ban on party-politics. Many of the decrees violating human rights ceased to be used and were repealed before the handing over to civilian control. However, human rights violations continued. Security forces and regular police continued to utilise excessive force and torture.

### **Installation of democracy**

In 1999 democratic rule was formally installed and the Federal Government launched a programme for transiting from a militarised system of governance to a democratic system of administration. With Obasanjo in power the human rights situation continued to improve.

A necessary step in democratisation was to abolish the Constitution (Suspension and Modification) Decree No 107 1993, signed by Abacha and a new Constitution was adopted in May 1999. Many decrees containing ouster clauses were repealed in 1999. Ouster clauses meant that no Court was allowed to make any rulings with respect to steps taken by the federal military government or any allegation of violations of human rights guaranteed under the Constitution. Some of these decrees were: the State Security (Detention of Persons) Decree No. 2 of 1984, the Treason and Other Offences (Special Military Tribunal) Decree No. 1 of 1986, the Civil Disturbances (Special Tribunal) Decree No. 2 of 1987, and the Federal Military Government (Supremacy and Enforcement of Powers) Decree No. 12 of 1994.<sup>139</sup>

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<sup>139</sup> The Constitution of the Federal Republic of Nigeria ( Certain Consequential Repeals ) Decree № 63 of 1999,  
<http://www.nigerialaw.org/Constitution%20of%20the%20Federal%20Republ...>  
Accessed on 4.7.2003 .

Section 6 of the Constitution of the Federal Republic of Nigeria 1999 vests the judicial power in the courts created by the Constitution. Even if the judiciary is formally independent reality can be a different matter. So called dictatorial democracy still prevails in Nigeria. In practice the executive and the judiciary are still very connected and those working within the Government do not always respect decisions by courts.<sup>140</sup> Evidence of the dependence of the judiciary to the Government is that the length of the trials seems to depend on the interests involved.<sup>141</sup> Even if problems remain independence of the judiciary has improved lately.<sup>142</sup> There is a struggle between the judiciary and the Government building up as courts demand more independence.

Factors still threatening the judiciary are corruption among judges and lack of resources. The judiciary is infected by corruption. Not only on the part of justices but also on the part of lawyers and judicial staff.<sup>143</sup> The Chief Judge of Lagos State, Hon Justice Ibitola Sotuminu criticised the high level of corruption in the judiciary. She said corruption was especially widespread in the magistrate's courts.<sup>144</sup> According to Frances Ogwo The existence of bribes make it particularly difficult for people to bring cases to court when transnational corporations are involved. Companies have enough resources to buy witnesses, experts, and even whole communities. Also NGOs are often bribed with free dinners, tours and human rights declaration so it is difficult to make them write shadow reports or submit other forms of information. Transnationals are further able to pay qualified legal advisors during long periods of time. An insufficient number of judges, tedious and cumbersome procedures, and inadequate facilities are other reasons for undue delays.<sup>145</sup>

Members of the police, security forces or SPDC staff have still not been prosecuted for excessive use of violence. Prosecution of locals having used force are also rare. Impunity is a recurring theme in cases of political violence in Nigeria. When arrests are made police target low-level thugs more often than the politicians who sponsor them. Policemen have reported that they had at several times received instructions from local politicians to release suspects.<sup>146</sup> Mr. Efumai stated that through connections and bribes it

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<sup>140</sup> Oronto Douglas, Legal Practitioner and Deputy Director of Environmental Rights Action.

<sup>141</sup> Frances Ogwo, the Human Rights Law Service.

<sup>142</sup> Ledum Mitee, President of MOSOP, legal practitioner, accused in the Ogoni Civil Disturbances Tribunal.

<sup>143</sup> Human Rights Watch, Testing Democracy: Political Violence in Nigeria, Vol. 15, No. 9 (A) – April 2003, pp. 30-31. Nwankwo, Collins V.; Nigeria Human Rights Report 2000, Constitutional Rights Project, ISBN-978-2944-18-1, 2001, pp. 55-56.

<sup>144</sup> At the Public Forum for Court Users with the theme; "Strengthening Judicial Integrity and the Capacity in Lagos State". The meeting was held at the High Court Foyer in Lagos Island in collaboration with the UN Office for Drug Control and Crime Prevention. Article by Aina Yemisi, "Judge decries corruption in judiciary", The Punch, 30.6.2003, Lagos, p.7.

<sup>145</sup> Nwankwo, Collins V.; Nigeria Human Rights Report 2000, Constitutional Rights Project, ISBN-978-2944-18-1, 2001, p. 55.

<sup>146</sup> Human Rights Watch, Testing Democracy: Political Violence in Nigeria, Vol. 15, No. 9 (A) – April 2003, pp. 1, 30-31.

is possible to escape the law.<sup>147</sup> Just as the judiciary the police force suffers from inadequate or wasted resources. This has led to lack of training and an inability to carry out effective investigations. The trend seems to be arbitrary arrests to appease the demand for action, but once the dust has settled the suspects are released.<sup>148</sup>

## **Compensation**

### **Compensation for pollution**

In the Federal High Court, Port-Harcourt almost all the cases filed 1994-1995 were against oil corporations for compensation. Most of them were against Shell, some of them against Chevron. Although the cases are large in number there are difficulties with turning to courts for compensation for environmental pollution. According to Lucius Nwosu judges at the lower levels are mostly not biased. At the Supreme Court level however judges are reluctant to rule against the corporations because of fear of losing profitable connections. According to Oronto Douglas compensation in national courts are not satisfactory.

One major problem is that ordinary people with little resources can not afford to litigate. The procedure has been made even more expensive through transferring jurisdiction over all claims for compensation for environmental damage from oil companies from the State High Courts to the Federal High Courts.<sup>149</sup> Instead they may settle their claims through negotiations. It can not however be a matter of true negotiations since the parties are too unequal when it comes to financial power and education.

The major problem is however that the procedure is too long. Corporations have the financial resources to litigate for longer periods and often use delay tactics. Often the corporations delay payment through not implementing the negotiated agreements.<sup>150</sup> We will look at how the courts have ruled in such cases.

I will give two examples of cases when SPDC has been using delay tactics. In the first case villagers claimed N100 000 as compensation for a blockade from 1966 of the plaintiffs' Utu Iyi Efi creeks and ponds at Oguta farmlands. After negotiations SPDC agreed in January 1985 to pay compensation. The applicant claimed that payment was not made and issued the summons in May 1985. SPDC did not file a statement of defence but instead a motion for an order to dismiss the action on the ground that the action was statute barred. According to Nigerian law there cannot be a suit if more than 6 years have been allowed to pass after the cause of action arose. The trial judge at the Imo State High Court ruled in favour of SPDC. The Court of Appeal however reversed this ruling. It concluded that when there has been an admission of liability the time will stop running.

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<sup>147</sup> Ufuoma J Efemuai. Project Engineer in the Niger Delta.

<sup>148</sup> Human Rights Watch, Testing Democracy: Political Violence in Nigeria, Vol. 15, No. 9 (A) – April 2003, pp. 15, 30-31.

<sup>149</sup> Lucius Nwosu, lawyer.

<sup>150</sup> Lucius Nwosu, lawyer.

Negotiations after SPDC had admitted liability did not prevent a future suit because the company had broken the agreement.<sup>151</sup>

The Court of Appeal ruled on a similar matter in 1994. The claim was for N100 000 as compensation for a blockade of the plaintiffs' creek. The Creek was blocked in 1972 and was still blocked in 1994. SPDC again filed an application that the claim was barred by the statute because it had commenced more than 6 years after the cause of action arose. The plaintiff saw the matter as another move of Shell's delay tactics.<sup>152</sup> The Court ruled that where there has been admission of liability during negotiation and that all that remains is fulfilment of the agreement, the statutory period of limitation will not bar the action if the defendant violated the agreement.<sup>153</sup>

According to Nigerian national legislation land-owners that are victims of pollution are entitled to compensation for their damage from the oil-corporations.<sup>154</sup> The problem with attributing responsibility for the damage is mostly connected to sabotage. As described above oil companies are likely to blame environmental damage on the locals themselves. We will now look at one case dealing with the issue of sabotage. Plaintiffs claimed compensation from SPDC for the spillage of crude oil in October 1981 affecting the Andoni River and Creeks at the Bori High Court in Rivers State. The Court of Appeal (Port Harcourt Division) came to the conclusion that the spill was likely to have been caused by a third party and ruled in favour of SPDC.

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The Court provided that a company is only liable for damage caused by third parties if it ought to have foreseen and taken measures against it: "*To sustain an action for negligence it must be shown that the negligence found by the court is the proximate cause of the damage and where the proximate cause is the malicious act of a third person against*

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<sup>151</sup> Nwadario v. Shell Petroleum Dev. Co. Ltd (1990) 5 NWLR (Pt 150) 322, pp. 338-339, paras. H-B.

<sup>152</sup> Shell Petroleum Development Company v. Uzaoru (1994) 9 NWLR (Pt366) 56, p. 61, paras. B-C.

<sup>153</sup> Shell Petroleum Development Company v. Uzaoru (1994) 9 NWLR (Pt366) 56, p. 75, paras A-F.

<sup>154</sup> The Oil Pipelines Act (1956) Chapter 338 Laws of the Federation of Nigeria 1990 part IV. The Petroleum Act (1969) Chapter 350 Laws of the Federation of Nigeria 1990 paragraph 36 Schedule 1. In 1990 the laws of the Federation of Nigeria were revised and consolidated pursuant to The Revised Edition (Laws of the Federation of Nigeria) Decree 1990. The laws in force as of the 31st day of January 1990 subsequently became different chapters of the Laws of the Federation of Nigeria 1990. The acts dealing with oil pollution were not subject to any major changes when it comes to the subject matter.

*which precautions should have been operative, the defendant is not liable in the absence of a finding either that he instigated it or that he ought to have foreseen and provided against it.*<sup>155</sup> There are circumstances under which a company can be liable also for damage caused by a third party: *"If things within the defendants control are "dangerous things" and likely to escape and do damages, any resulting damage constitutes liability in negligence on the part of the owner."*<sup>156</sup> It first seemed as if the Court was about to put oil-exploiters under strict liability for their facilities. The court however made a U-turn and made liability again dependent on negligence through the following comments: *"In law, the owner of a dangerous thing is not liable if the thing has escaped through the independent act of a third party and there has been no negligence on his part."*<sup>157</sup> *"If the mischievous, deliberate and conscious act of a stranger causes the damages the occupier can escape liability he is absolved."*<sup>158</sup>

The final conclusion was thus that oil companies are not liable for damage caused by sabotage. Sabotage has now become a useful excuse for companies wanting to escape liability.

Once liability has been established the next step is to set the actual sum to be awarded as compensation. Shell v. Farah is a famous case in which a significant sum was awarded as compensation and guidelines for how to estimate compensation was set out.<sup>159</sup> In 1995 the plaintiffs instituted the action in their personal as well as representative capacity of families all coming from K-Dere at the Bori High Court in Rivers State. The plaintiff wanted compensation for damage caused by an oil spill and an order compelling the defendant to rehabilitate the land or money to cover a rehabilitation exercise.

The spill took place in 1970 when there was an oil blow out from the Bomu oil well II which lasted several weeks before it was brought under control. SPDC accepted liability and paid compensation for the crops and economic trees destroyed. No compensation was however paid for the damage to the plaintiffs' land. The respondent also promised to rehabilitate the land. The respondent claims that in 1988 the land had been rehabilitated, plaintiffs however claimed that it had not. The trial judge found in favour of the respondents and awarded them a total of N4 621 307 and as costs a sum of N10 000 was awarded. The trial in the lower court lasted for 3 years.

SPDC appealed to the Court of Appeal, Port Harcourt. The appellant claimed that the trial judge erred in law when awarding the damages and that the sum was "*based on a wholly erroneous estimate of*

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<sup>155</sup> Shell Petroleum Dev. Co. Ltd v. Chief Graham Otoko and 5 others (1990) 6 NWLR (Pt. 159) 693. p. 725 paragraphs. A-B.

<sup>156</sup> Shell Petroleum Dev. Co. Ltd v. Chief Graham Otoko and 5 others (1990) 6 NWLR (Pt. 159) 693. p. 724 paragraphs. D-E.

<sup>157</sup> Shell Petroleum Dev. Co. Ltd v. Chief Graham Otoko and 5 others (1990) 6 NWLR (Pt. 159) 693. p. 724 paragraph F.

<sup>158</sup> Shell Petroleum Dev. Co. Ltd v. Chief Graham Otoko and 5 others (1990) 6 NWLR (Pt. 159) 693. p. 725 paragraph D.

<sup>159</sup> Shell Pet. Dev. Co. Ltd v. Farah (1995) 3NWLR (Pt. 382) 148.

*damages*”<sup>160</sup> The appellate court concluded that the land had not been rehabilitated. The appeal was dismissed and the plaintiffs awarded costs.

The Court ruled that compensation must be paid for the loss of the actual land: “[T]he respondents were paid fully only for the crops and economic trees damaged at the time of the incident, that certainly could not amount to a fair and adequate compensation as the damage the respondents suffered went beyond a mere damage to crops and economic trees, for according to the experts called on both sides the respondents’ arable land was heavily polluted and rendered unproductive for many years.”<sup>161</sup>

When estimating the sum the justice must take into account the underlying principle that a person who has suffered damages from the tortious act of another is to be restored “as far as money can do to the position he was before the damnum or would have been put for the damnum.”<sup>162</sup> Thus the plaintiff occupier must be compensated for the diminution of the value of the land. The loss of value can be decided from looking at the cost of replacement or repair or in the case of nuisance the cost of abatement. Not only physical damage to the land is to be compensated but also “annoyance, inconvenience, discomfort, or even illness to the plaintiff occupier”<sup>163</sup> Secondly consequential losses or losses of user profits are to be compensated. Thirdly the plaintiff should be compensated “also for the future or prospective damages reasonably anticipated as the result of the defendant’s wrong, whether such future damage is certain or contingent.”<sup>164</sup> When property has been taken “[a]dequate compensation means just value of property taken under power of eminent domain payable in money. Market value of property when taken.”<sup>165</sup>

The reasoning of the Court is reasonable and fair. The estimated amount shows that when courts estimate the sum to be awarded as compensation they try to cover all damage suffered by the plaintiff.

### **Compensation for oil and natural gas**

The General-Attorney of the Federation, the plaintiff, took out a writ of summons praying for “*a determination of the seaward boundary of a littoral State within the Federal Republic of Nigeria for the purpose of calculating the amount of revenue accruing to the Federation Account directly from any natural resources derived from that State pursuant to section 162(2) of the Constitution of the Federal Republic of Nigeria 1999.*” Meaning that he wanted to know the southern (or seaward) boundary of each of the eight littoral defendant states of Akwa- Ibom, Bayelsa, Cross-River, Delta, Lagos, Ogun, Ondo and Rivers. It was necessary to know this border when distributing resources from the Federation Account.

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<sup>160</sup> Shell Pet. Dev. Co. Ltd v. Farah (1995) 3NWLR (Pt. 382) 148, p. 171 paragraph B.

<sup>161</sup> Shell Pet. Dev. Co. Ltd v. Farah (1995) 3NWLR (Pt. 382) 148, p. 176 paragraphs B-C.

<sup>162</sup> Shell Pet. Dev. Co. Ltd v. Farah (1995) 3NWLR (Pt. 382) 148, p. 192 paragraphs E-F.

<sup>163</sup> Shell Pet. Dev. Co. Ltd v. Farah (1995) 3NWLR (Pt. 382) 148, p. 194 paragraph D.

<sup>164</sup> Shell Pet. Dev. Co. Ltd v. Farah (1995) 3NWLR (Pt. 382) 148, pp. 192-193 paragraphs F-C.

<sup>165</sup> Shell Pet. Dev. Co. Ltd v. Farah (1995) 3NWLR (Pt. 382) 148, p. 199 paragraph A.

Other States in the Federation joined as defendants in the action. Some of the defendants raised counter-claims against the plaintiff. In different ways the defendants claimed that the Federal Government had distributed too little to them from the Federation Account and hence owed them money. Not only oil-producing states are defendants because the case concerns a range of different issues concerning the Federation Account. I will only deal with the conclusions of the Court that is of particular relevance for oil-producing states.

First the Court ruled that oil and gas exploited offshore was under the jurisdiction of the Federal Government and could therefore not be regarded as extracted within the coastal states. Secondly the Court ruled that since the Federal Government had not enacted a formula for the derivation of the revenue accruing to the Federation Account directly from any natural resources, no state could claim any particular advantage when funds from the Federation Account was distributed. Not even if the state possessed profitable natural resources. This in spite of the Section 162(2) of the 1999 Constitution: "*...the National Assembly shall take into account, the allocation principles especially those of population, equality of States, internal revenue generation, land mass, terrain as well as population density: Provided that the principle of derivation shall be constantly reflected in any approved formula as being not less than thirteen per cent of the revenue accruing to the Federation Account directly from any natural resources.*"

First I will look into the courts ruling concerning off-shore exploitation. The eight littoral states claimed that their boundaries extended to the exclusive economic zone and the continental shelf of Nigeria. According to the littoral states natural resources exploited within these zones were to be regarded as extracted from their territory. By the Colony of Nigeria (Boundaries) Order in Council, 1913 the southern boundary of Nigeria was the sea, that is, the Atlantic Ocean. The Court found that subsequent constitutional changes had not altered the boundary. The southern boundaries of all these littoral Defendant States were thus still the sea. The judge then made references to doctrine and cases from common law jurisdictions and came to the conclusion that the boundary between the sea and their land territory, at common law, is the low-water mark or the seaward limit of their internal waters. Territory beyond the low-water mark does not belong to the states. The circumstances were a bit different for the Cross River State which has a number of islands dotted on its internal waters and the sea. For this State the southern boundary will be the seaward limit of her internal waters, her territory thus includes these islands.

The Littoral Defendant States then made the objection that by sections 2(2), 3(1) & (2) and First Schedule to the Constitution, Nigeria consists of the aggregate of the territories of all the 36 States of the Federation and the Federal Capital Territory. They argued that if the Federal Government was given sovereignty over territories not belonging to any of the 36 States Nigeria's territory would exceed the constitutional limit. The Court explained that the Geneva Convention on the Territorial Sea and the Contiguous Zone, 1958 and the United Nations Convention on the Law of the Sea grants only limited sovereignty to coastal States over their territorial

seas. This sovereignty is different from that over their land territory. Therefore, the claim by the Federation of sovereignty over the territorial sea of Nigeria and the Exclusive Economic Zone does not extend the land territory of Nigeria.

The littoral states came with a new objection. Even if the offshore, in accordance with common law and international law, is under the jurisdiction of the Federal Government, they claimed that the Government had conceded this right. The Court agreed that the 1960 Constitution section 134 provided that the continental shelf contiguous to a region was a part of that region when money was distributed from the Federation: "*I* There shall be paid by the Federation to each Region a sum equal to fifty per cent of- (a) the proceeds of any royalty received by the Federation in respect of any minerals extracted in that Region... (6) For the purposes of this section the continental shelf of a Region shall be deemed to be part of that Region." Section 140 of the 1963 Constitution also contained sub-section (6). The Court however concluded that sub-section (6) did not make the continental shelf part of the Region, but deemed it to be part of the Region solely for the purpose of the section. Section 134(6) of the 1960 Constitution did therefore not mean that the Federal Government at any time had admitted that the area of the sea beyond the low-water mark belonged to the coastal Regions or States contiguous to it. Since no equivalent provision is inserted in the 1999 Constitution revenue derived from mining operations in the continental shelf is no longer payable to the Region contiguous to the shelf.

With this conclusion it was determined that the seaward boundary of a littoral State is the low-water mark of the land surface. It is on the basis of this boundary that the amount of revenue accruing to the Federation Account directly from any natural resources derived from that State pursuant to section 162(2) of the Constitution of the Federal Republic of Nigeria 1999 will be calculated. If the State, as in the Cross River State, has an archipelago of islands the boundary is determined by the seaward limits of inland waters within the State. Once this had been determined the Court started looking at the counter-claims. I will look at some legal issues raised by the plaintiff that were common to all counter-claims.

First the plaintiff asked about the procedure for determining a formula for distribution of the amount standing at the Federation Account. The Court answered that section 162(2) of the Constitution was not enough in itself. A formula had to be enacted by the National Assembly in that behalf. At the time of the judgement the National Assembly had not enacted any law relating to revenue allocation. To avoid a vacuum, the Constitution in section 313 provides: "*Pending any Act..., the system of revenue allocation in existence for the financial year beginning from 1st January 1998 and ending on 31st December 1998 shall, subject to the provisions of this Constitution and as from the date when this section comes into force, continue to apply:*" Hence 4A of Cap 16 (as amended by Decree No. 106 of 1992) was to be used pending a new formula: "*An amount equivalent to 1 per cent of the Federation Account derived from mineral revenue shall be shared among the mineral producing States based on the amount of mineral produced from each State and in the application of this provision, the*

*dichotomy of on-shore and offshore oil producing and mineral oil and non mineral oil revenue is hereby abolished.”*

Cap 16 was however only applicable in so far as it is not inconsistent with the provisions of the 1999 Constitution. The proviso to subsection (2) of section 162 reads: "*Provided that the principle of derivation shall be constantly reflected in any approved formula as being not less than thirteen per cent of the revenue accruing to the Federation Account directly from any natural resources.*" The Constitution thus provides for "*not less than 13 per cent*" to be distributed on the principle of derivation. Cap. 16 says "*1 per cent*". These are undoubtedly inconsistent provisions. And by the provisions of sections 1(3), 313 and 315(1), of the Constitution the provisions of section 1 of Cap 16 that are inconsistent with the Constitution must give way to the Constitution. This meant that the one per cent formula prescribed in Cap 16 could not be used. Consequently the one per cent formula in Cap 16 could not be used at the same time as there was no enactment of the National Assembly pursuant to section 162(2) of the Constitution specifying that figure. The surprising conclusion was that the figure 13 per cent that had been used in working out the principle of derivation in respect of crude oil derived from the littoral States had no legal basis. According to the Court that figure was merely "*a rule of the thumb or a gentleman's agreement among the parties.*" Hence no formula existed and all counterclaims based upon the assumption that such a formula existed were untenable.

This last conclusion by the Court has serious consequences for the locals of oil-producing states. I believe that the Court failed to take the purpose of the Constitution into account. Ruling that an enactment by the National Assembly was needed before the 13 % principle became applicable was the same thing as deriving the weak from their constitutional protection. After the ruling the Federal Government enacted the Niger Delta Bill. According to the bill the 13 per cent formula was to be implemented in relation to the mineral producing states in the Niger-Delta. Constitutional protection of the locals in oil-producing states is however forever gone. If the Niger-Delta Bill is repealed they again have no right to claim that revenue derived from oil should be returned to their region.

## **National non-judicial procedures**

### **National commissions and inquiries**

The Nigerian Government has frequently answered to environmental pollution and conflicts between groups in the oil-producing states surrounding the Niger-Delta with initiating commissions and other fact-finding missions to investigate the facts and perhaps make recommendations and/or reconcile those involved.

Sometimes the national inquiries have proved to be a better option for the people than the courts. In 1970, there was an oil blow-out in Well 11 at the Bori oilfield. The Rivers State Government set up a Committee to inquire into the blow-out and make recommendations as to the payment of compensation and other measures. Shell allegedly talked the inhabitants of K-Dere into going to the courts which awarded them a compensation that

amounted to less than one per cent of what the Committee set up by the Rivers State Government had considered adequate.<sup>166</sup> The problem is thus not a matter of the commissions not coming to fair conclusions, but mostly a matter of lack power to implement the decisions.

There was a judicial inquiry into the attack on the ethnic group in Umuechem, Rivers State, in October 1990.<sup>167</sup> First the inquiry named officers in the Mobile Police Force responsible and recommended prosecution. Secondly it stated that SPDC had played an important role in the attack: “*Their streams get polluted with the disposal of waste products from oil operations rendering the river void of fishes...their farms planted on the remaining areas of farmland get damaged by oil pollution; their economic trees are hewed down; their economic situation bites and there is no help for them. These deprivations without any compensatory benefits, cause frustration...*” “*These drilling operations have had serious adverse effects on the Umuechem people who are predominantly farmers, in that their lands had been acquired and their crops damaged with little or no compensation, and are thus left without farmlands or means of livelihood.*” The Justice provided that the SPDC was obliged: “*to pay adequate compensation for lands acquired for oil operations and for crops and economic trees on such lands; to pay adequate compensation for pollution of water, rivers and streams by oil spillage and such other liabilities as may be stipulated by law...*”<sup>168</sup>

On 12 December 1993 the Okrika attacked Ogoni settlements. Lt-Colonel Komo had just arrived to the region and set up a Commission of Inquiry headed by a serving military officer, Major Paul Taiwo. Apart from the major the Commission consisted of two other military men and four civilians. The Commission was inaugurated 22 December 1993. In the preface of the report the terms of reference are stated: “*Inquire into the disturbances at Captain Amengala Ndoki, Ibadan, Enugu and Creek Road Waterfront areas and the fire incident at the Creek Road Market. In particular: a) Investigate and ascertain the remote and immediate causes leading to the disturbances; b) Identify the principle actors in the disturbances and make appropriate recommendations; c) Identify the number of casualties, if any; d) Identify and evaluate the property damages of destroyed, their owners and recommend remedies if necessary; e) Recommend ways of checking future occurrences of such disturbances; f) Make such recommendations as the Commission may deem necessary.*”<sup>169</sup>

Besides visiting the site the Commission was to organise public sittings. A total of 75 memoranda and 2029 claims were received. Public

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<sup>166</sup> Unedited text of Ken Saro-Wiva’s statement to the Ogoni Civil Disturbances Tribunal, Civil Liberties Organisation, Ogoni Trials and Travails, Lagos, Nigeria, ISBN 978-23188-5-9, 1996, p. 72.

<sup>167</sup> Amnesty International, Nigeria Military government clampdown on opposition, London, 11.11.1994, pp. 7-8.

<sup>168</sup> Hon Justice Inko-Tarish O, Chief Ahalakwo J A, Alamina BA, Chief Godwin Amadi, 1990, Commission of Inquiry to the Causes and Circumstances of the Disturbances that Occurred at Umuechem in the Etche Local Government Area of Rivers State in the Federal Republic of Nigeria.

<sup>169</sup> Main-report pp. 1-2.

sittings commenced 11 January 1994 and took evidence daily except Sundays. 2013 witnesses testified with 49 exhibits tendered and received. The Commission also engaged quantity surveyors from the Ministry of Works and Transport to carry out a valuation of the cost of buildings destroyed.<sup>170</sup>

Many witnesses made strong allegations against MOSOP to the effect that MOSOP not only planned the disturbances, but also directed Ogoni Military operation during the disturbances. In the report the issue was commented in the following way: “*The Commission wishes to point out that it has painstakingly investigated these allegations to try to establish a link between the disturbances and MOSOP but was unable to establish MOSOP’s involvement with the disturbance in the remotest possible way.*”<sup>171</sup>

This comment shows that the Commission was at least independent enough not to side with the military in criticising MOSOP. There were also allegations of police involvement in the attack. The Commission was not independent enough to support such a view, but at least it had the courage to criticise the police to some extent. The Commission stated that it would not comment on “*the attitude of the Nigeria Police before, during and after the crisis.*” But it did disclose that when it asked the police for a “*comprehensive report of the disturbances*”, it was given a report “*which appears to have been deliberately framed to give away as little information as possible.*”<sup>172</sup>

In its report the Commission went into detail in describing how the attack was performed. It provided the history of the land ownership issue that may have been one of the reasons behind the conflict. There is a list of those injured, and perhaps more surprisingly a list of names of the peoples that were involved in the killings and in the destruction. The Okrika principal actors in the attack are named, for example Chief L.O.P. Aninadoki is alleged to be one of the masterminds behind the plot. There is a description in the report on how he and others planned the attack.<sup>173</sup>

The investigations into the facts were followed by recommendations by the Commission. Primarily the apathy of the Government against the problem had to come to an end.<sup>174</sup> It recommended a government initiative to mediate between the groups and investigate disputes followed by a programme for a gradual change in attitude.<sup>175</sup> Secondly it emphasised the importance of prosecution of those involved: “*That the principal actors be prosecuted in accordance with the existing relevant laws through a tribunal...*” “*That the federal investigation and intelligence bureau should investigate this matter for the purpose of prosecution...*” “*That the laws governing the use of explosives through the explosive act of 1990 be fully enforced with immediate effect.*”<sup>176</sup>

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<sup>170</sup> Main-report pp. 3-4.

<sup>171</sup> Main-report pp. 62-63.

<sup>172</sup> Main-report pp. 65-66.

<sup>173</sup> Main-report pp. 72-73.

<sup>174</sup> Main-report p. 41.

<sup>175</sup> Main-report p. 14.

<sup>176</sup> Main-report pp. 79-81.

The third group of recommendations regarded compensation. There was a list of dead and injured individuals combined with the recommendation that those injured and families who had suffered deaths should be given compensation. Material damage suffered was estimated in the report and the Commission recommended immediate payment of compensation in conformity with those estimations.<sup>177</sup> The fourth group were recommendations for checking future occurrences. For instance the Commission recommended: resettlement and rehabilitation compensation, monitoring of land allocation, establishment of police station, prosecution without delay, organisation of a peace forum, and surprisingly the splitting of Rivers State into two different states or that the Federal Government created a new local government.<sup>178</sup>

Both the report concerning the Okrika Attack and the report concerning the Umucheum disaster included independent conclusions and good recommendations. None of the investigations were however implemented. None was prosecuted and no compensation paid.<sup>179</sup> The reports were not even published. The authorities tried to keep the inquiry into the Umucheum attack secret, but it was leaked in 1992.<sup>180</sup>

To investigate the clashes between the Ogonis and the Adonis that started in July 1993 a reconciliation committee called the Rivers State Peace Conference Committee was set up. Prof. Claude Ake was appointed to mediate. Ken Saro-Wiva and other Ogoni participated with the Peace Committee only “*out of courtesy to Claude Ake*”.<sup>181</sup> Prof. Claude Ake however pulled out of the signing of the peace accord meeting stating: “*Reports on the conflict have noted the scale and systematic nature of destruction as well as the sophistication of the operations. These features raise questions about whether the conflict is merely communal and also the possibility that the two communities might have been victims of some other forces exploiting a local situation.*”<sup>182</sup> Prof. Claude Ake was replaced by Professor Elaigwu of the National Council on Inter-Governmental Relations. On 4 October 1993 the peace conference between the groups were held. Shell was represented at the Peace Conference. Ken Saro-Wiva refused to sign the agreement because of two paragraphs that asked for a resumption of all economic activity. In spite of the refusal it was decided that there was an agreement and Shell returned to the oil fields under the

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<sup>177</sup> Main-report pp. 85-86.

<sup>178</sup> Main-report pp. 91 and forward.

<sup>179</sup> Legbersi Saro Pyagbara, MOSOP. Unedited text of Ken Saro-Wiva’s statement to the Ogoni Civil Disturbances Tribunal, Civil Liberties Organisation, Ogoni Trials and Travails, Lagos, Nigeria, ISBN 978-23188-5-9, 1996, pp. 52, 85.

<sup>180</sup> Amnesty International, Nigeria Military government clampdown on opposition, London, 11.11.1994, pp. 7-8.

<sup>181</sup> Unedited text of Ken Saro-Wiva’s statement to the Ogoni Civil Disturbances Tribunal, Civil Liberties Organisation, Ogoni Trials and Travails, Lagos, Nigeria, ISBN 978-23188-5-9, 1996, p. 55.

<sup>182</sup> Civil Liberties Organisation, Ogoni Trials and Travails, Lagos, Nigeria, ISBN 978-23188-5-9, 1996, p. 19.

protection of Nigerian troops.<sup>183</sup> When Shell returned it was unable to resume its operations due to local resistance.

All representatives and NGOs that I interviewed agreed that in large the national inquiries have not served any purpose. As Saro from MOSOP said: “*They are not implemented, because they were never intended to be implemented.*” This practice by the Government to initiate inquiries has continued also today.

The clash between Zeekpon and Yeghe Communities in Ogoni land 5-10 May 2002, killing 38 persons and destroying property estimated at N1,9 billion, was followed by the initiation of a judicial commission of inquiry. In June 2003 Chairman Justice Ben Ugbari presented a report to the governor Dr. Phil Odili. The Judge said that during the course of investigations the commission had received a total of 84 memoranda, 163 exhibits and interviewed 28 persons. The Inquiry recommended compensation. Still it is not clear whether the state government will pay compensation to others than the paramount ruler of the Bori whose palace was razed and cousin killed. The reason for this? There are so many reports of enquiry commissions already accepted by the Rivers State Government which are yet to be implemented.<sup>184</sup>

On 15 November 2002, an explosion took place at the office of the National Pilot injuring five people and destroying the building. Police arrested several people, but Human rights Watch had not been able to determine whether they were going to be tried in court. On the other hand the state government had initiated a judicial commission of inquiry.<sup>185</sup>

### **The Justice Oputa Panel**

Two weeks into his administration, on 14 June 1999, President Olesgun Obasanjo set up the Human Rights Violation Investigation Commission, later known as the Justice Oputa Panel. Initially the Panel was supposed to exist for three months. Its lifespan was extended and the Panel handed in its final report by the end of 2000 to the Federal Government. The aim of the commission was not to prosecute anybody, but to find the truth and achieve reconciliation through public hearings. It was envisaged that the Panel would travel to a large number of cities in Nigeria. The public hearings were however later cut down to five Nigerian cities: Abuja, Lagos, Port Harcourt, Kano and Enugu.<sup>186</sup>

The Panel was given a mandate to investigate the causes, nature and extent of human rights violations committed in Nigeria between 1 January 1984 and 28 May 1999 and identify those which could be held accountable for the violations. The Panel would then recommend whether

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<sup>183</sup> Unedited text of Ken Saro-Wiva’s statement to the Ogoni Civil Disturbances Tribunal, Civil Liberties Organisation, Ogoni Trials and Travails, Lagos, Nigeria, ISBN 978-23188-5-9, 1996, p. 58.

<sup>184</sup> Soni Daniel, ”Ogoni crisis claims 38 lives, Ni,9 billion property”, The Punch, 30.6.2003, Lagos, p.11.

<sup>185</sup> Human Rights Watch, Testing Democracy: Political Violence in Nigeria, Vol. 15, No. 9 (A) – April 2003, pp. 16-18.

<sup>186</sup> Ndubihe Clifford, “Oputa Panel: Can it Really Right Past Wrongs?”; Liberty, a publication of Civil Liberties Organisation; Vol. 12, No. 6, December 2000, p 23.

judicial, administrative, legislative or institutional measures were to be taken to redress past injustices and to prevent future violations or abuses of human rights. The final report consisted of eight volumes of testimony and a further volume of recommendations for action.<sup>187</sup>

Eight people were chosen to sit in the panel. As chairman Justice Chukwudifu A. Oputa was chosen. Other members chosen were: Mr T. D. Oyelade (Secretary), Abubakar Alr Kura Michika, Rev. Father Matthew Kukah, Mrs Elizabeth Pam, Mallam Mamman Daura, Dr. Tunji Abayomi and Mrs Modupe Areola. Before hearings commenced Dr. Abayomi, the only experienced human rights activist, was dropped along with Mamman Daura by the President himself. Dr. Abayomi was dropped because he was a victim of human rights violations and could therefore be biased. They were replaced with Aljahi Lawal Bamali, Mr N. B. Danbatta and Barrister Bala Ngilari.<sup>188</sup>

The response to the Panel was massive and about 10 000 petitions were sent in.<sup>189</sup> The 10 000 petitions were categorised into murder/assassinations, abduction, torture, inhuman and degrading treatment, harassment and intimidation, prolonged detention, unemployment related issues, and attempted assassinations. The Panel declared that only those petitions that alleged infringement or denial of the right to personal liberty and the right to dignity of the person were to be tried in a public hearing. It further stated that cases which were subject of judicial proceeding were not considered suitable for public hearing by the Panel. This meant that out of 10 000 only 200 went to public sittings by the Panel.<sup>190</sup>

For over 16 months there were no public sittings and nothing was heard about the Panel. It blamed logistical problems such as lack of accommodation, funds, vehicles etc. Public sittings were finally commenced in Abuja on 23 October 2000.<sup>191</sup> Over 2 000 witnesses attended the hearings. Most of them coming voluntarily to speak of the alleged crimes committed against themselves or their people. Others were called to answer allegations made against them. President Obasanjo himself appeared before the panel twice to answer questions about his period as a military leader in the late 1970s.<sup>192</sup>

Petitions concerning oil-exploitation in Ogoniland were heard at the sitting by the Panel in Port Harcourt. At the hearing the Federal Government apologised to all families in Ogoniland who had lost one or several of their family members in “*the sordid and sad events that took place in Ogoniland over the last few years*”. It was however Justice Oputa

<sup>187</sup> BBC News, <http://news.bbc.co.uk/1/hi/world/africa/2000691.stm>, Accessed on 7.7.2003.

<sup>188</sup> Ndubihe Clifford, “Oputa Panel: Can it Really Right Past Wrongs?”; Liberty, a publication of Civil Liberties Organisation; Vol. 12, No. 6, December 2000, pp. 19, 22.

<sup>189</sup> Ndubihe Clifford, “Oputa Panel: Can it Really Right Past Wrongs?”; Liberty, a publication of Civil Liberties Organisation; Vol. 12, No. 6, December 2000; p 22.

<sup>190</sup> Ndubihe Clifford, “Oputa Panel: Can it Really Right Past Wrongs?”; Liberty, a publication of Civil Liberties Organisation; Vol. 12, No. 6, December 2000; p 23.

<sup>191</sup> Ndubihe Clifford, “Oputa Panel: Can it Really Right Past Wrongs?”; Liberty, a publication of Civil Liberties Organisation; Vol. 12, No. 6, December 2000; pp. 22, 23.

<sup>192</sup> BBC News, <http://news.bbc.co.uk/1/hi/world/africa/2000691.stm>, Accessed on 7.7.2003.

himself who delivered the message on behalf of the Government. Representing the Panel Oputa said: “*Although the past is bitter and the memories are sad, yet I will implore you to forgive the past, embrace peace and shun anything that could divide you because division is a wind that blows no one any good.*”<sup>193</sup>

SPDC appeared at the Panel agreeing to enter into negotiations with both the Federal Government and MOSOP on ways to resolve their conflicting interests. Steps towards reconciliation between fractions of the Ogoni movement were also taken. For the first time in their seven years of mutual suspicions, representatives of MOSOP, the families of the Ogoni leaders that had been murdered during the riot in 1994 and the families of those convicted of their deaths signed an agreement to live together in peace. Consequently the Commission had the remains of Chiefs Edward Kobani, Albert Badey, Samuel Orage and Theophilus Orage released to it. Similar directives were given to the authorities where the bodies of the convicted and executed were buried to allow the Ogonis to give them a proper burial.<sup>194</sup>

Many observers have expressed their doubts about the procedure. First of all the Panel did not address economic or social rights or environmental pollution, but mostly dealt with violations of civil rights.<sup>195</sup> It was also believed that the Panel was used instead of judicial proceedings and hence created an escape route for human rights violators. It is at least questionable if a reconciliation procedure is suitable in cases where both the violator and the victim are identified.

The atmosphere under which the panel performed was not free. Journalists were consistently under threat from government officials and security agents for reporting news considered as negative publicity. CRP reports that it appears that many of the witnesses had been lying.<sup>196</sup> The Commission was still regarded as successful in gathering information and bringing clarity to some issues. Much was revealed at the testimonies of military intelligence offices.<sup>197</sup> Although Sam Amadi believed that the Panel was mostly a show it did disclose some human rights violations and also fulfilled a purpose in letting people talk about what had happened to them, thus “steaming off” some of their anger.

One might however question the value of finding out these facts, as the report has not yet been published. Saro from MOSOP claimed that the will to make the truth known was not there. Many politicians were involved and they did not want to risk their political careers. The delay before the Panel could start working was due to lack of funding from the Government. In the end it was the Ford Foundation that paid the costs. The Government now uses the Babaginda suit (see below) as an excuse for not publishing the

<sup>193</sup> Ndubihe Clifford, “Oputa Panel: Can it Really Right Past Wrongs?”; Liberty, a publication of Civil Liberties Organisation; Vol. 12, No. 6, December 2000; p 27.

<sup>194</sup> Ndubihe Clifford, “Oputa Panel: Can it Really Right Past Wrongs?”; Liberty, a publication of Civil Liberties Organisation; Vol. 12, No. 6, December 2000; p 27.

<sup>195</sup> Oronto Douglas, Environmental Rights Action.

<sup>196</sup> Nwankwo, Collins V.; Nigeria Human Rights Report 2000, Constitutional Rights Project, ISBN-978-2944-18-1, 2001, pp. 5, 80.

<sup>197</sup> Agnes Tunde-olowu, Constitutional Rights Project. Legbersi Saro Pyagbara, MOSOP.

report.<sup>198</sup> The creation of the Panel should also have been approved by the national assembly through a bill. This was not done and hence the Panel could not be given any powers. In 1999 it was given powers to subpoena witnesses. The Panel was also given the powers to order for the arrest of those summoned but have refused to appear before them. Still it had no means for enforcing decisions, but only to make recommendations. The Commission recommended prosecution, but this did not happen.<sup>199</sup>

The weakness of the Panel became evident when one looks at the treatment of the former dictator, General Babangida. He and others did not appear at the Panel although they were called. Babangida has said that his non-appearance before the Panel was not out of disrespect for the panel or out of fear, but simply because his lawyers already had done so on his behalf. When put under pressure Babangida filed a suit challenging the constitutionality of the Panel. The Panel was ordered by Justice Babatunde Belgore not to compel Babangida and two other military officers, Colonel T. Togun and Brigadier-General Halili Akilu to appear before it pending a decision by the Court of Appeal Lagos. The suit is still pending for interpretation.

### **International attention**

#### **US Court Cases - Abiola v. Abubakar**

##### **Suit under the Alien Tort Claims Act**

Nigerian nationals have sued former Head of State Abubakar.<sup>200</sup> The suit, which was still pending in August 2003, was not specifically directed at the acts taking place in the oil-producing states surrounding the Niger Delta, but it is relevant to this region because it shows the possibility of holding the Nigerian officials behind the violations within that area accountable for their acts. Abubakar became a member of the Provisional ruling Council (PRC) that ruled Nigeria in November 1993 and was Nigeria's Head of State from June 1998 until the transition to a democratic regime in 1999. This means that he was an influential official during the period when the human rights violations in the oil-producing region were most frequent. Plaintiffs contended that Abubakar caused others to torture and kill Nigerians opposed to the military regime.

Plaintiff Hafsat Abiola is the daughter of Abiola, the assumed winner of the 1993 elections. In June 1994 Abiola declared himself the President of Nigeria and he was arrested in August 1994 charged with treason. Plaintiff alleged that while in prison Abiola was kept under inhuman conditions, tortured, and denied access to lawyers, doctors, and family. He remained in prison until he died on 9 July 1998, allegedly in Abubakar's office. Plaintiff Abiola's mother, Alhaja Kudirat Abiola, was also a pro-democracy activist. In June 1996 Kudirat was gunned down in her car. According to the complaint the killers have confessed that they carried out the killing on orders of the PRC. Plaintiff Anthony Enahoro is a

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<sup>198</sup> Legbersi Saro Pyagbara, MOSOP.

<sup>199</sup> Mrs Ndidi Bowei, Social and Economic Rights Action Center.

<sup>200</sup> Abiola v. Abubakar 267 F. Supp.2d 907 N.D. Illinois, Easter Division, No. 02 C 6093 June 17, 2003.

former member of Nigeria's parliament. He founded pro-democracy organisations and actively took part in civil resistance against the military dictatorship. In August 1994 the then seventy-year old man was arrested and imprisoned. He was released in December 1994. He was not given medical treatment in spite of his diabetics. Plaintiff Arthur Nwankwo is a political activist who was arrested on 3 June 1998 and detained until 24 August 1998. He claimed that during his arrest he was kept naked and tortured.

The suit was brought under the Alien Tort Claims Act (ATCA, 18 USC. § 1330 (1993)). The ATCA provides that "*[t]he district courts shall have original jurisdiction of 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.*" In the 1980 decision *Filártiga*, the Second Circuit recognised that ATCA "validly creates federal court jurisdiction for suits alleging torts committed anywhere in the world against aliens in violation of the law of nations."<sup>201</sup> ATCA subject matter jurisdiction is established when (1) an alien sues (2) for a tort (3) committed in violation of the law of nations or a treaty of the United States. Additionally, except in a few narrowly defined situations, a state action requirement must be satisfied. No equivalent of the ATCA is available in Europe.

Abubakar motioned for summary judgment. He asserted (1) lack of subject matter jurisdiction, (2) lack of personal jurisdiction, and (3) forum non conveniens.

### **Jurisdiction**

Concerning personal jurisdiction the Court ruled Abubakar was personally served with summons while visiting Chicago. Abubakar claimed that this did not fulfil the required minimum contacts with the forum to render the Court jurisdiction. In case law mere physical presence has been enough to create personal jurisdiction over a defendant, but there was no need for this Court to go into this issue. It simply concluded that Abubakar waived any defect in personal jurisdiction by answering the complaint without challenging personal jurisdiction.

Most of the ruling concerned subject matter jurisdiction. Abubakar asserted that the Court lacked subject matter jurisdiction because plaintiffs had failed to comply with the exhaustion-of-remedies requirement of the Torture Victim Protection Act (TVPA, 28 USC § 1330). Plaintiffs had however not even asserted a claim under the TVPA. Abubakar argued that the TVPA barred jurisdiction because it governed subject matter jurisdiction over foreign human rights violators. This argumentation was wrong because the TVPA does not mean that it is not possible to bring a claim merely under the ATCA when the claim concerns torture and extra judicial killings. The TVPA is only a cause of action supplementing the ATCA. This claim was brought only under the ATCA and therefore the TVPA exhaustion of remedies requirement did not apply.

Abubakar also referred to the Foreign Sovereign Immunities Act of 1976 (FSIA, 28 USC § 1602 et seq) in support of a dismissal due to lack of subject matter jurisdiction. He claimed that he, as Nigeria's former Head

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<sup>201</sup> *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980).

of State, was entitled to immunity from suit and thus the Court would lack subject matter jurisdiction. The FSIA gives a “*foreign state*” immunity from the jurisdiction of courts in the United States, with certain exceptions. The FSIA defines a “*foreign state*” in § 1603(b) as an “*agency or instrumentality of a foreign state*”. Meaning “*any entity (1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof.*” Thus entities like state owned-companies, governmental departments and government organisations are included under “*foreign state*”.

The Act does not explicitly give immunity to individuals. In case law it is still uncertain whether the FSIA extends to individuals and thereby provides immunity for heads of state and foreign officials.<sup>202</sup> In early common law a foreign Head of State was undoubtedly immune on the notions of comity and the equal dignity of nations. A foreign state and its head-of-state were regarded as one and the same.<sup>203</sup> Courts regarded the judgement over conduct of foreign states to be a part of US foreign affairs and consequently under the executive arm.<sup>204</sup> It was thus the State Department that determined the availability of sovereign immunity and the courts deferred to its decisions.

In the 1950s the US adopted a theory in which immunity would be restricted to a sovereign’s public acts. Commercial or private acts could hence be judged by US Courts. Courts still relied on the State Department’s determinations. Diplomatic pressure on the State Department led to inconsistency in its determinations. The FSIA was passed to clarify the standards and to transfer determinations from the State Department to the courts. According to the judge in this case, Judge Kennelly, the FSIA has an emphasis on making it possible to sue in relation to commercial activities of foreign states. The FSIA provides that immunity is unavailable for acts connected to a commercial activity carried out in the United States or elsewhere. Judge Kennelly found no indication that the FSIA meant to include heads of state in the FSIA definition of “*foreign state*” and hence “*alter traditional immunity for heads of state*”. The practice of following the State Department’s immunity determinations would therefore be followed in this suit

The State Department had made no recommendation concerning Abubakar. Judge Kennelly provided that when there are no recommendations from the State Department concerning immunity for the defendant it is up to the Court to decide whether the requisites of immunity exist. Judge Kennelly did not agree with plaintiffs that the nature of the alleged acts in this case would eliminate immunity. According to the Judge common law provides heads of state with immunity from suit, regardless of the nature of the allegations. The Supreme Court has previously held that immunity protected foreign states from suits for unlawful detention and

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<sup>202</sup> Tachiona v. Mugabe, 169 F. Supp. 2. D 259, 293-94 (S.D.N.Y2001).

<sup>203</sup> The Schooner Exchange v. McFaddon, 11 US (7 Cranch) 116, 3 L.Ed.287 (1812).

<sup>204</sup> Republic of Mexico v. Hoffman, 324 US 30, 35, 65 S.Ct. 530, 89 L.Ed 729 (1945).

torture because “*a foreign state's exercise of the power of its police has long been understood for purposes of the restrictive theory as peculiarly sovereign in nature.*”<sup>205</sup> Kennelly concluded that “*the same is true for a Head of State.*”

The matter is however not settled here. Abubakar is no longer a Head of State and immunity for private acts committed during a period as a Head of State may disappear when a defendant has stepped down from her or his office.<sup>206</sup> Immunity will also disappear if a state waives immunity for its former leader.<sup>207</sup> There had been no waiver in this case and Judge Kennelly did not find that the alleged conduct could be regarded as private acts. The Court therefore determined that Abubakar was entitled to immunity for his acts during the period that he was Nigeria’s Head of State. Consequently the Court lacked subject matter jurisdiction for the treatment of M.K.O. Abiola between 8 June 1998 and until his death 9 July 9 1998 and plaintiff Nwankwo’s claims arising from acts between 8 June 1998 and 24 August 1998. Concerning the other allegations it did have both personal and subject matter jurisdiction.

I would like to compare this case concerning immunity for the former Head of State Abubakar under US legislation with the Arrest Warrant Case concerning the scope of immunity from criminal jurisdiction in national courts for incumbent high-ranking State officers under international law.<sup>208</sup> The case concerned the Minister of Foreign Affairs of the Democratic Republic of Congo accused of war crimes and crimes against humanity. Two differences between the cases can be seen immediately; first the US case concerned a civil suit while the ICJ case concerned criminal jurisdiction, secondly the Abubakar was a former Head of State while the Minister of Foreign Affairs was still in his office. The ICJ however stated that immunity related to “*any act of authority*” that would hinder them in the performance of their duties. It seems like the ICJ had not only criminal jurisdiction in mind but also civil subpoenas.

In its judgement the ICJ ruled that high-state officials do not enjoy impunity for crimes committed during their time in office (section 60). Thus accepting that universal jurisdiction over international crimes of high-state officials committed while they were in the office exists. Both as a matter of domestic law of some countries and as a matter of international law. In the following section the ICJ turned to look at the question of immunity.

The ICJ ruled that in customary international law there is a presumption that high-ranking State officials like the Head of State and the Minister of Foreign Affairs have immunity from jurisdiction by foreign courts. According to ICJ sitting foreign ministers enjoy full immunity independent of whether the acts were private or official. Immunity is not exempted simply because allegations concern crimes under international law like war crimes or crimes against humanity. The ICJ therefore ruled that

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<sup>205</sup> Saudi Arabia v. Nelson, 507 US 349, 361, 113 S.Ct. 1471, 123 L.Ed.2d 47 (1993).

<sup>206</sup> Republic of Philippines v. Marcos, 806 F.2d 344, 360 (2d Cir.1986).

<sup>207</sup> In re Grand Jury Proceedings, 817 F.2d 1108, 111 (4<sup>th</sup> Cir. 1987).

<sup>208</sup> Arrest Warrant of April 11th 2000 (Democratic Republic of the Congo v. Belgium), Judgment, Merits, para. 78.D.2, 41 ILM 536 (2002).

Belgium had failed to respect the immunity from criminal jurisdiction and the inviolability of the incumbent Minister under international law. On the other hand the ICJ added that international law does not prevent that an official's State itself prosecutes him or her or may waive immunity to prosecution by another State. So far the reasoning by the two courts are consistent. In addition the ICJ provided that immunity can not be claimed before an international tribunal.

The ICJ then turned to look at immunity when the individual is no longer sitting in his or her office. The ICJ stated that when the official ceases to hold public office any State can try him or her for any acts committed prior or subsequent to the minister's period of office, as well as for private acts committed during his or her tenure. Just like Judge Kennelly ruled when applying US law.

The question is how private acts should be interpreted. Judge Kennelly ruled that war crimes and crimes against humanity could not be regarded as private acts because operating the military and police were within the functions of a head of state. The House of Lords in the United Kingdom on the other hand has ruled, in November 1998 in the Pinochet Case, that international crimes, including torture and hostage-taking, could not be considered as within the normal functions of a head of state. Thus Pinochet was not granted immunity for these acts.

One must be careful when drawing conclusions from this ruling by the ICJ. It did not have any reason to go deep into the issue of immunity when the official ceases to hold public office, but merely declared its general standing. The ICJ did not at all comment on whether international crimes could be regarded as private acts or not. ICJ Judge Van den Wyngaert regrets in his dissenting opinion that the ICJ never drew the line between public and private acts in their ruling. He points out that even if many international crimes are committed as a part of State policy and therefore are within the category of official acts, immunity should never apply to such crimes.

### **Forum non conveniens**

The Court also considered the objection of forum non conveniens. The doctrine of forum non conveniens implies that a federal court is permitted to decline to entertain a case even when it has jurisdiction over it, if dismissing the action would serve justice or the convenience of the parties. Defendant has the burden of showing that the factors are in favour of dismissal.<sup>209</sup> The strong presumption is that "*the plaintiff's choice of forum should rarely be disturbed.*"<sup>210</sup>

First the Court is to decide if there is an alternative forum. Even if there is an alternative forum there must be compelling reasons in favour of dismissing the case. The court will consider the private and public convenience factors set forth in *Gulf Oil Corp. v. Gilbert*.<sup>211</sup> Public interest factors relate to the interest of the state in the case. Different circumstances

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<sup>209</sup> R. Maganlal & Co. V. M.G. Chem. Co., 942 F.2d 164, 167 (2d Cir.1991).

<sup>210</sup> *Gulf Oil Corp. v. Gilbert* 330 US 501, 67 S. Ct. 839, 91 L. Ed 1055 (1947), at 508.

<sup>211</sup> *Gulf Oil Corp. v. Gilbert* 330 US 501, 506-507 (1947).

support that a state has an interest in the matter. Citizenship, residency and the place of conduct and effect are important factors. The court must also consider whether retaining the case would be inconvenient for the court. An alternative forum might be more appropriate if retaining the case will require the Court to use foreign law in its judgement. However, “*it is well-established that the need to apply foreign law is not alone sufficient to dismiss under the doctrine of forum non conveniens.*”<sup>212</sup> Private interest factors relate to the costs and inconveniences of the defendants and the plaintiffs.

In this case the Court did not dismiss the action because Abubakar had not demonstrated that an adequate alternative forum existed. There is not yet a decision on the merits.

### **The African Commission on Human and Peoples’ Rights Communication on violations of social rights**

The NGOs, Social and Economic Rights Action Center (SERAC), Nigeria, and the Center for Economic and Social Rights, USA, sent a communication to the African Commission on Human and Peoples’ Rights alleging that the Government of Nigeria had been involved in a number of human rights violations in relation to oil-exploitation in Ogoni. The communication mostly concerned activities that had taken place through the Nigerian National Petroleum Company (NNPC) in co-operation with Shell Petroleum Development Corporation.<sup>213</sup>

SERAC pointed out a number of faults of the Nigerian Government leading to environmental pollution. It had failed to enact sufficient regulation to protect the environment and to monitor operations by the corporations. The Government had not requested environmental impact assessments and even refused to allow others from making environmental studies. Further it had failed to require that Ogoni communities should be informed about the effect of oil-exploitation and be consulted in decisions concerning exploitation of their natural resources. The Government was also alleged to have been involved in the use of force against the population. SERAC claimed that the Nigerian Government had placed its legal and military powers at the disposal of the oil companies. In cases when the Government had not been directly involved it had failed to investigate the attacks and to punish perpetrators. In the communication it was claimed that the Nigerian Government had even admitted its role in the violent operations in several memos exchanged between officials of the SPDC and the Rivers State Internal Security Task Force.

SERAC claimed that the conduct of the Government had destroyed and threatened Ogoni food sources. The soil and water that was needed for farming had been poisoned. Crops had been destroyed and animals killed during raids. Fear for security forces had kept Ogoni villagers from returning to their fields and animals. Complainants hence made the conclusion that the Nigerian Government had acted in violation of

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<sup>212</sup> R. Maganal & Co. V. M.G. Chem. Co., 942 F.2d 164, 167 (2d Cir.1991), at 169.

<sup>213</sup> The Social and Economic Rights Action Center for Economic and Social Rights .v Nigeria, Communication No. 155/95 African Commission on Human and Peoples’ Rights.

international environmental standards and the African Charter of Human and Peoples' Rights.

When determining admissibility the Commission looked closer at whether all available local remedies had been exhausted. It noted that no domestic court actions had been undertaken to address the issue. This was not a bar if no effective remedy was actually possible through domestic courts. According to the Commission no such remedy was available because: (1) several rights infringed were not protected under domestic law; (2) the law governing class action was not well developed and consequently it was difficult to bring an action as a people; (3) it was evident that the Nigerian Government in spite of international attention to Ogoniland had not used the opportunity to provide domestic remedies; and (4) when there is a large number of victims it could not be required that each should have gone individually to Court, even when there might be such a possibility.

The next question dealt with by the Commission was the issue of collectivity. The Commission stated that "*community and collective identity in African culture is recognised throughout the African Charter.*"

<sup>214</sup> Article 24 of the African Charter provides rights for peoples as collectives. Another feature of collectivity being recognised in the African Charter is that the authors of the communications do not have to be victims themselves. In cases like this one when there are a large number of victims; victims did not even need to be named. It is also possible for someone to bring a complaint on behalf of a large group of people. Thus the communication was declared admissible.

Before looking at each right allegedly violated the Commission provided that the human rights protected by the Charter included both negative and positive obligations and stated that there were "*at least four levels of duties for a state that undertakes to adhere to a rights regime, namely the duty to respect, protect, promote, and fulfil these rights.*"<sup>215</sup> Throughout the decision the Commission looked at all these levels and frequently found violations of the Nigerian Government at all of them. There was considerable emphasis on the obligation to protect against damaging acts by private entities through legislation and monitoring. The Nigerian Government did not submit any written response to the allegations and thus the facts were uncontested. This meant that when the Commission looked at each violated right the facts were accepted as they were stated in the communication.

The right to health and the right to a clean environment are protected by Art. 16 and 24 of the African Charter. Art. 16: "(1) Every individual shall have the right to enjoy the best attainable state of physical and mental health.(2) States Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick." Art. 24: "All peoples shall have the right to a general satisfactory environment favourable to

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<sup>214</sup> Communication No. 155/95 African Commission on Human and Peoples' Rights, section 40.

<sup>215</sup> Communication No. 155/95 African Commission on Human and Peoples' Rights, section 45.

*their development.*" There is a close link between health and a clean environment. The Commission combined them both into a "*right to a healthy environment*"<sup>216</sup>

Under this right the state is obliged not to undertake or sponsor activities that deteriorate the environment and thus peoples' health. Further to take positive action to protect the environment. To comply with Art. 16 and 24 a state must permit scientific monitoring of the environment, require that studies about the impact on the environment are undertaken and communicated to the public prior to industrial projects and ensure that individuals are able to give their views on decisions affecting their communities. The Commissions concluded that the Nigerian Government had failed to fulfil its obligations.

The Complainants further alleged a violation of Art. 21, protecting the right of peoples to their wealth and natural resources. The Article provides that when resources are exploited it is to be done in the interest of the people and the peoples are to be compensated. States are also obliged to eliminate all forms of foreign economic exploitation. The Complainants alleged that the Government of Nigeria failed to monitor and regulate the operations of the oil companies and even itself exploited oil in an abusive manner. Thus creating a situation where the exploitation of oil reserves in Ogoniland did not benefit the population. Secondly the Ogoni Communities were not involved in the decisions that affected oil reserves in, and the development of, Ogoniland. The Commission found that there had been a violation of Art. 21.

Under Art. 14 the right to property is protected. Property can only be expropriated in the "*interest of public need or in the general interest of the community*" and in accordance with "*appropriate laws*". Art. 18(1) provides that the family is to be protected by the State. Through combining Art. 14, 18 and 16 (the right to health) the Commission found that the right to housing or shelter is protected under the African Charter. Due to destruction of houses and forced evictions by the Nigerian Government and the Government tolerating such conduct by others this right had been violated. The Commission further found a violation of the right to shelter as it also guarantees "*the individual's right to be let alone and to live in peace.*" Through the deployment of forces against villages this right had been violated.

Through combining the right to life (Article 4), the right to health (Article 16) and the right to economic, social and cultural development (Article 22) the Commission found that the right to food is implicitly protected in the African Charter. The African Charter consequently obliged "*Nigeria to protect and improve existing food sources and to ensure access to adequate food for all citizens.*" The Government had at least been obliged not to destroy food sources and to protect such sources from being destroyed by private parties. According to the Commission, the Nigerian Government had violated this right in both respects.

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<sup>216</sup> Communication No. 155/95 African Commission on Human and Peoples' Rights, section 54.

Allegations also concerned violations of Art. 4 that guarantees the right to life. The Security forces had killed individuals and terrorised communities. Environmental degradation had made living in some of the areas very difficult. The Commission had itself seen that the situation had come to a state when a life in dignity within the area was no longer possible at its mission to Nigeria between the 7 and 14 March 1997. Article 4 had consequently been violated.

Not only did the Commission state that there had been a violation of several rights guaranteed by the African Charter and other international human rights instruments, it also made a number of recommendations to the then sitting Government of Nigeria. It recommended the Government to stop all attacks on Ogoni communities and leaders, investigate human rights violations and prosecute those involved, compensate victims, ensure that the environment is cleaned up and restored as far as possible, require impact assessments prior to oil development, and guarantee that those affected are informed about the risks. The Commission urged the Government to keep it informed about its actions taken to address the situation in the Niger Delta region.

### **The inefficiency of the African Commission**

Many organisations complained about the extensive period of time that is needed by the African Commission before a decision is taken. The communication alleging violations of economic and social rights by SERAC was received by the Commission in 1995 but the case was not finally settled until October 2001. Reasons given by involved NGOs for this incapacity to answer rapidly varied between overwhelming bureaucracy, the period of time in between the sessions being too long and the Commission holding back waiting for a more favourable government in Nigeria.<sup>217</sup>

The first session treating the SERAC Communication 155/95 was the 20<sup>th</sup> Ordinary Session in October 1996. At the session the Commission declared the Communication admissible. It was decided that it would be taken up with the relevant authorities by a planned mission to Nigeria. In April 1997, the Commission postponed taking decision on the merits to the next session. The Commission was waiting for some written submissions from the Complainants and a further analysis of the mission it conducted to Nigeria between 7 and 14 March 1997. At the 22<sup>nd</sup> Ordinary Session, the decision was again postponed pending a discussion of the mission report. At the 23<sup>rd</sup> Ordinary Session the case was not considered due to lack of time. On the 24<sup>th</sup>, 25<sup>th</sup> and 26<sup>th</sup> Ordinary Session, the Commission postponed consideration of the communication to the next session without giving any reasons. 16 February 2000 the Nigerian Government requested to be informed of the status of pending communications. The Secretariat informed the Government that the SERAC communication was set down for a decision on the merits at the next session. At the 27<sup>th</sup> Ordinary Session of the Commission held in Algeria from 27 April to 11 May 2000, the Commission took the case into consideration, but deferred further

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<sup>217</sup> Ledum Mitee, MOSOP. Agnes Tunde-Olowu, Constitutional Rights Project. Mr Felix Morka, SERAC.

consideration of the case to the 28<sup>th</sup> Ordinary Session. At the 28<sup>th</sup> and 29<sup>th</sup> Ordinary Session it was again decided that the case was to be taken under further consideration the next session. Final consideration of the case was done in Banjul, the Gambia at the 30<sup>th</sup> Ordinary Session in October 2001.

The second major concern by NGOs was the important fact that governments do not take any practical measures based on the decisions by the African Commission.<sup>218</sup> First of all it should be noted that the Commission is not a Court and even if the African Charter is binding upon the parties the actual decisions by the Commission as such are not. The Commission thus cannot have any sanctions at its disposal for forcing states to comply with its decisions. No action was taken by the Government in immediate response to the decisions by the Commission. Many changes have taken place since the new democratic Government in Nigeria came to power, those involved does not however believe that the decisions by the Commission played an important role when the Government formulated these new policies. Mrs Ndidi Bowei (SERAC) saw these policies rather as an excuse to cover that violations are still taking place and not as a true response to the decision. Mr Morka (SERAC) believes that in the future the African Commission should include a plan of implementation in their decisions. Recommendations describing measures to be taken and a timeframe would facilitate monitoring of implementation.

Admissibility of the above communication was mostly dependent on the exhaustion of remedies requirement. Ledum Mitee claimed that since the installation of a democratic government in Nigeria it had become almost impossible to claim that domestic remedies were not available and efficient. During the military regime it was never a problem making such a claim. In his view the need to be able have an additional procedure on top of the domestic was still needed. Even if this requirement can be met it is not certain that violations of human rights in Nigeria reach the Commission. The public is still unaware of its existence.

The importance of the African Commission in gaining international attention and putting pressure on the Government was still recognised.<sup>219</sup> The decision in response to the Communication by SERAC was of particular importance. The obligation of Governments to respect, promote, fulfil and protect economic and social rights was confirmed and it was shown that these rights can be violated. Through finding that the right to housing and shelter and the right to food were protected although they were not explicitly stated in the African Charter the Commission clearly created a precedent that will be used in the future.

The decision by the African Commission was also an important step towards recognising environmental pollution as a human rights violation.<sup>220</sup> It is obvious that SERAC has used recognised principles in customary international environmental law as guidance when formulating their communication. Some general principles in international environmental law

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<sup>218</sup> Ledum Mitee, MOSOP. Sam Amadi, defence counsel. Agnes Tunde-olowu, Constitutional Rights Project.

<sup>219</sup> Agnes Tunde-olowu, Constitutional Rights Project. Frances Ogwo, Huri-Laws.

<sup>220</sup> Oronto Douglas, Environmental Rights Action. Mr Felix Morka, SERAC.

that had been used are the obligation to protect the environment, the obligation to require environmental impact assessment and the principle of public participation. The interdependence between protection of the environment and respect human rights is thus recognised.

Several NGOs stated that they had used or were about to use the decisions from the African Commission as a starting point for advocacy and campaigns.<sup>221</sup> MOSOP had sent copies of the decisions to the Government demanding compliance with the recommendations. The organisation now plans to launch a national advocacy based on the decisions.<sup>222</sup> SERAC is trying to supervise the implementation of the decision. When the decision first came SERAC duplicated it and sent the copies with a follow-up letter to different government agencies, the Attorney General of the Federation, NDDC officials, oil-corporations, and different groups of the people in the Niger Delta. In their letters they requested a meeting on which they could explain their position. About 17 letters were sent, only one reply was received. They are now planning a fact-finding mission that will report to the African Commission on the measures that have been taken to implement the decision. SERAC believes that the decision by the Commission makes their advocacy much stronger now when they have a clear decision to refer to.<sup>223</sup>

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<sup>221</sup> Ledum Mitee, MOSOP.

<sup>222</sup> Legbersi Saro Pyagbara, MOSOP.

<sup>223</sup> Mrs Ndidi Bowei, SERAC.

# **Human Rights Violations Connected to the Ogoni Civil Disturbances Tribunal**

## **The murder of the Ogoni Four**

The Rivers State authorities set up a special court, the Ogoni Civil Disturbances Tribunal (OCDT), to try those alleged to have murdered four Ogoni leaders on 21 May 1994. It was created through the Special Tribunal (Offences Relating to Civil Disturbances) Edict 1994, on the basis of the Civil Disturbances (Special Tribunal) Decree No 2 1987. Often I will refer to the latter decree simply as the No 2 1987 Decree. First I will give a short description of the sequence of events and then a more detailed description of what the charges actually were. In section 3.1.3 I will briefly discuss human rights violations committed by the Nigerian Government in connection to the OCDT.

## **Sequence of events**

A conflict between fractions of MOSOP had started with a decision to boycott the presidential election of 12 June 1993. Saro-Wiva, President of MOSOP and a famous poet, and Ledum Mitee, Vice President of MOSOP and member of its Steering Committee and legal advisor, supported the decision. Other members, including Dr. Leton and Kobani opposed it. The National Youth Council of Ogoni People (NYCOP), the youth wing of MOSOP, was to enforce the boycott. Three of those murdered had reportedly been among seven people sentenced to death by NYCOP members at a public meeting in November 1993. It was also alleged that Saro-Wiva instigated and encouraged his followers to kill the “*vultures*” at a rally on 20 May 1994. Senior Ogonis who protested against the use of violence to enforce the boycott were called vultures. Mitee was present at that meeting.

On 21 May Saro-Wiva was making public statements. At one venue in Bori a crowd gathered. The Commander of the Security task Force at Bori/Ogoni Stephan Hasso directed that the rally should cease. Saro-Wiva complied and he and Mitee left in separate cars followed by the security team. The cars of Saro-Wiva and Mitee were stopped at the Kpopie junction by security forces. When Saro -Wiva was stopped Mitee returned to Port-Harcourt. Before leaving he gave money to Kpuinen, Vice President of NYCOP, to enable him to contact the venues of scheduled meetings and notify them of their cancellation.

It was alleged that Saro-Wiva addressed some youths at the junction. In a statement by Mr. Danwi, later admitted by Mr. Danwi to have been made under duress, he said that: *“I came to know that the man inside the white car who was arguing with the uniformed men was Ken Saro-Wiva. I also saw Mr Ledum Mitee inside his own car near Ken Saro-Wiva’s car. After much argument, when they were about to go back, I heard Ken Saro-Wiva said in Ogoni language ...meaning in English language that it is those*

*vultures who are at Giokoo sharing money that send the uniformed men to arrest them. He told the crowd who gathered around there that they should go back and deal with the vultures.”*

The killings on 21 May took place at the palace of Gbenemene of Gokana in Giokoo. A crowd invaded the hall. It was alleged that most of those in the crowd were members of NYCOP. Bera, one time Chairman of Gokana Central Vigilante, was claimed to have been leading the crowd shouting E-sho-be, which means that blood must be spilt. The crowd attacked Meabe. Bera attacked A.M. Kobani. The attackers directed the chiefs to march out in a single file. Outside they were attacked. They then came back into the hall where they were attacked again.

After having ceased the rally Hasso came back to Bori Police Station. A man called Giodom entered the station asking that men be sent to the palace. Kiobel, who was the chairman of both Kilso Gokana and of MOSOP Publicity Committee (He did however deny membership before the Civil Disturbances Tribunal), also came to the police station. Giodom claims that Kiobel were there, but did not support his request. Instead Hasso urged Kiobel to go to Giokoo and deal with the situation himself. When Kiobel arrived to the palace A.M. Kobani and Chief Kpai had managed to escape from the crowd and were hiding in the Shrine. Attackers hesitated to use violence in there and were standing outside when Kiobel arrived. Witnesses said that Kiobel talked to the attackers in “soft tones” and then left. Kiobel claimed that the youths told him that he would be killed if he did not leave. When he refused he had been slapped and forced to run for his life.

Saro-Wiwa, Mitee, Kpuinen, Bera and Kiobel were arrested and held in detention without any charges brought until 28 January 1995. The trial against the defendants was supposed to commence on 5 February 1995. Due to the absence of key persons in the prosecution and the Tribunal it was postponed and recommenced the following day. The Tribunal held two separate trials concerning the killings. The first trial (Charge No OCDT/PH/1/95) dealt with Group A including Saro-Wiwa, Mitee, Kpuinen, Bera and Kiobel. On 2 May 1995 the second trial (Charge No OCDT/PH/2/95) concerning groups B and C started.

30 and 31 October 1995 the Tribunal convicted Felix Nuate, Nordu Eawo, Saturday Dobee, Paul Levura, Daniel Gbokoo to death in charge No OCDT/PH/2/95 and Ken Saro-Wiva, Barinem Kiobel, John Kpuinen and Baribor Bera in charge No OCDT/PH/1/95 to death. They were hanged in Port-Harcourt prison. After the death sentences the Royal Dutch/Shell Group issued a statement reaffirming its support for the Universal Declaration of Human Rights. Mr. Brian Anderson claimed that Shell had consistently and publicly affirmed the Group’s belief in the importance of a fair trial.<sup>224</sup> Shell claims that the death of Ken Saro-Wiva and the others were received by Shell with shock and sadness: “*Shell asked that they be given an early and fair hearing with prompt release for the innocent and clemency for the guilty. Shell has also stressed that the prisoners should be*

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<sup>224</sup> Shell International Ltd, News Release, ”Shell Reaffirms Support for Human Rights and Fair Trial”, dated 30 January 1996.

*held under proper conditions and treated in a way which accords with human dignity.”*<sup>225</sup>

### **The crime committed**

The accused were divided into groups A, B and C. The accused in groups B and C were persons identified as taking part of the attacking crowd. In the application for commencement of trial by the prosecution they instigated charges for the offence of: “*Murder under item 13 Schedule 1 Cap 53 supra contrary to Section 316 of the Criminal Code*” The accused were allegedly “counselled and procured by Kenule Beeson Saro-Wiva to storm and kill Ogoni “Vultures” The prosecutor continues: “[A]t a meeting of chiefs at Giokoo, you, in concert with others now at large armed with associated dangerous weapons while shouting “E-sho-be” attacked and killed..., contrary to Section 316 of the Criminal Code.”<sup>226</sup> Even though most of the identifications were vague and that the actual trial can be criticised, the actual definition of their crime murder was not disputed.

Concerning Group A the prosecution formulated their charges in the following way: “*Pursuant to section 4 of the Civil Disturbances (Special Tribunal) Act, and paragraph 1 of schedule 2 of Cap 53 Laws of Nigeria 1990, I hereby apply for the commencement of a trial for the offence of: Murder under item 13 Schedule 1 Cap 53 Supra contrary Section 316 of the Criminal Code against the undermentioned persons, namely: Ken Saro-Wiva, Ledum Mitee, Barinem Kiobel, John Kpuinen and Baribor Bera.*” The prosecution accused “*Ken Saro-Wiva, Ledum Mitee and Barinem Kiobel for having counselled and procured 4 [John Kpuinen] and 5 [Baribor Bera] in company of others to inflict grievous harm of Badey, Kobani, Samuel Orage, Theophilus Orage. In relation to Kobani also 4<sup>th</sup> and 5<sup>th</sup> accused persons participated, supervised and omitted to act to stop the attackers and thereby committed an offence contrary to section 316 of the Criminal Code.*”

John Kpuinen and Baribor Bera were convicted for having actually participated in all four murders. Bera allegedly led the mob shouting E-sho-be and telling the others to kill. It was claimed that he himself attacked A.M. Kobani and had beaten Prage to death. Whether his conviction was justified or not is, as for the accused in groups B and C, a matter of evidence. It is more questionable if the murder definition used by the Tribunal concerning the other accused was in accordance with Nigerian law. My conclusion is that the Tribunal retroactively invented a new definition of murder.

John Kpuinen was the Vice President of NYCOP, he was alleged to have been present at the meeting on 20 May and on 21 May he got money from Mitee to go to the Palace and stop scheduled rallies. Ken Saro-Wiva, Ledum Mitee and Barinem Kiobel were charged with having counselled and procured all four murders. Ken Saro-Wiva was put on trial because he was

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<sup>225</sup> Shell International Ltd, Media Relations, News Release, ”Anniversary of the death of Ken Saro-Wiva”, dated 8 November 1996.

<sup>226</sup> “The Trial of Ken Saro-Wiva, Ledum Mitee and other Ogoni leaders [Charges] 1995”, compiled by Gani Fawehinmi Chambers.

the President of MOSOP and for his acts at the meeting held 20 May and at the road-crossing 21 May. Ledum Mitee for being Vice President of MOSOP, member of its Steering Committee and legal advisor, and for having been with Saro-Wiwa at the meeting 20 May and at the cross-road 21 May. He was however not convicted. Barinem Kiobel for being Chairman of Kilso Gokana and Chairman of MOSOP Publicity Committee (he however denied membership) and for having tried to talk to the attackers at the shrine.

The 1987 No 2 Decree section 3(1) confers jurisdiction to try any person charged with offences specified in Schedule 1 to the Decree of the Tribunal. Schedule 1 contains offences defined in the Criminal Code, Penal Code and a number of new offences like acts of gross indecency, unlawful society and mischief. The Head of the State is given powers to create new offences as long as he thinks they relate to civil disturbances. In the Decree section 3(2) it is provided that anyone who "*acted in concert with any other person*" or who "*knowingly took part to any extent whatsoever*" in an offence may be treated as if he had committed the alleged act himself. The thinking of the Tribunal appears to be that it was trying murder as defined under the 1987 No. 2 Decree. The Tribunal warned against: "*confusing the offence of murder under the decree with a similar offence under the Criminal Code, even though both attract the same punishment.*"<sup>227</sup> It continued: "*although a person may be charged under a named offence listed in Schedule 1 of the Decree such as murder and punishable under the Criminal Code or Penal Code, the acts constituting the offence arise from the actions or conduct of the person in civil disturbances as provided for in sections 1(2)(a)-(c) in the decree as reproduced above.*"<sup>228</sup>

But there is no murder definition anywhere in the Decree. The Decree merely incorporated the definition of murder in the Criminal Code. The prosecution also referred to the murder definition in the Criminal Code in its charges. The Tribunal was not given a right to extend this definition. Therefore we must turn to Nigerian legislation to determine whether the acts committed by the accused were unlawful.

Criminal Code Section 310 defines murder: "*Except as hereinafter set forth, any person who causes the death of another directly or indirectly, by any means whatever, is deemed to have killed the other person.*" Section 316 of the Criminal Code provides that even if the murderer did not intend to actually kill the victim, she or he can still be convicted for murder if the offender intended to do the person killed or some other person some grievous harm. According to section 8 of the code each person is guilty of murder if two or more persons have "*formed a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that*

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<sup>227</sup> Birnbaum, Michael, "A Tragedy of Law and Justice Analysis (ii)" Civil Liberties Organisation, Ogoni Trials and Travails, Lagos, Nigeria, ISBN 978-23188-5-9, 1996, p. 258.

<sup>228</sup> Amadi Sam, "A Legal Critique Analysis (i)", Civil Liberties Organisation, Ogoni Trials and Travails, Lagos, Nigeria, ISBN 978-23188-5-9, 1996, p. 237.

*its commission was a probable consequence of the prosecution of such purpose....”*

When the Tribunal looked at the question of common intent it held that NYCOP and MOSOP had as its policy to “*eliminate those they classify as “vultures”*”, second that all those charged were “*part of the leadership of both MOSOP and NYCOP with intimate knowledge of its policies and plans to eliminate “vultures.”*”.<sup>229</sup> Therefore, according to the Tribunal, on the principle of common intention they were all guilty of murder. Mere membership of an organisation is however not enough evidence of common intention. Common intention presupposes some involvement in the acts that constituted the offence.

Kpuinen was convicted exclusively on the principle of common intention. Even the fact that Kpuinen produced minutes of NYCOP meetings to show that he was not present at some of them could not help him. The Tribunal stated concerning Kpuinen: “*When it was discovered that the game was up, 4<sup>th</sup> accused desperately went around to try and stop other rallies. He admitted he took money from 2<sup>nd</sup> accused so as to travel and notify others of the cancellation of the rallies. This is evidence of direct involvement in the organisation of their ill-conceived rallies.*”<sup>230</sup> The Tribunal came to the conclusion that Kpuinen did not need to be “*physically present or directly personally participate in the act of civil disturbances, he is all the same credited with the consequences of the civil disturbances and answerable for them and their consequences.*”<sup>231</sup> There was no evidence that Kpuinen was present at Giokoo during the killing or that he aided the attackers. The conclusion is that the Tribunal wrongly convicted Kpuinen when it based its verdict on the assumption that membership was enough to constitute common intent to commit murder.

Section 9 of the Criminal Code deals with the issue of procurement: “*When a person counsels another to commit an offence, and an offence is actually committed after such counsel by the person to whom it is given, it is immaterial whether the offence actually committed is the same as that counselled or a different one, or whether the offence is committed in the way counselled or in a different way, provided in either case that the facts constituting the offence actually committed are a probable consequence of carrying out the counsel.*” Section 9 means that anyone who was a party to any of the killings with the intention that grievous harm should be inflicted would be guilty of murder. Consequently in the case of Saro-Wiwa it does not matter whether he told the youths to cause grievous harm or to kill the “vultures”. In either case he is deemed to have counselled the other person to commit the offence actually committed. The crucial issues are, therefore, that there must be active encouragement of the offence of the alleged counsellors and procurers and that the offence

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<sup>229</sup> Amadi Sam, ”A Legal Critique Analysis (i)”, Civil Liberties Organisation, Ogoni Trials and Travails, Lagos, Nigeria, ISBN 978-23188-5-9, 1996, pp. 243-244.

<sup>230</sup> Amadi Sam, ”A Legal Critique Analysis (i)”, Civil Liberties Organisation, Ogoni Trials and Travails, Lagos, Nigeria, ISBN 978-23188-5-9, 1996, p. 222.

<sup>231</sup> Amadi Sam, ”A Legal Critique Analysis (i)”, Civil Liberties Organisation, Ogoni Trials and Travails, Lagos, Nigeria, ISBN 978-23188-5-9, 1996, p. 235.

actually committed is a “probable consequences of carrying out the counsel.”

The following quote is from a previous procurement decision by the Federal Supreme Court that is still being cited by Nigerian Law text books writers: *“If members of a society meet and being faced with orders to kill a particular man they decided unanimously to obey those orders, each man present at the meeting encourages his fellows to kill the victim. Moreover 10 men plan and encourage each other to kill A on Saturday, and the plan fails, and five of the 10 kill A on Sunday in pursuance of the original agreement to kill, it seems to me that the five who took no active part in the killing are yet responsible for the killing. They were among those who lit the fuse. Having lit it, they let it burn with the result which they desired.”*<sup>232</sup>

There can however be no procurement if A was procured but B did the act. There was no evidence before the Tribunal that any of those who attended the meetings where Ken Saro-Wiva allegedly urged that the vultures would be dealt with or killed actually took part in the killing. Still Saro-Wiva was convicted. The Tribunal concluded:<sup>233</sup>

*”It has not been challenged that:*

- (a) *There were riots at Giokoo on May 21, 1994;*
- (b) *That as a result of those riots four eminent personalities of Gokana...were brutally murdered;*
- (c) *That the federal Constitutional Assembly Election bye Laws prohibited election campaigns on May 21, 1994;*
- (d) *That Mr Kenule Beeson Saro-Wiva, 1st accused was not a candidate for the Constitutional Assembly Election;*
- (e) *That not being a candidate for the election, he (1st accused) and other members of MOSOP and NYCOP wrongfully organised election campaigns rallies in Gokana and thereby wrongfully congregated a large crowd of their fanatical MOSOP and NYCOP youths who rioted and caused the deaths of the four eminent Gokana leaders at Giokoo.”*

It seems as for the Tribunal the key issue was not who counselled the murdered but who organised an illegal election campaign that was stopped and whose stoppage led to murders would be found guilty of murder. This is not procurement of murder according to Nigerian law and therefore the conviction of Ken Saro-Wiva had no legal ground.

When it comes to the verdict of Kiobel it is not enough to convict him of murder based on common intent due to his alleged membership in MOSOP. It is also impossible to find him guilty of having counselled and procured. Kiobel himself claimed that he was trying to stop the violence. This claim is supported by prosecution evidence. It should also be noted that Kiobel arrived to the Palace after the murders had been committed. He was

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<sup>232</sup> R v. Idika, (1959) 4 F.S.C. 106.

<sup>233</sup> Amadi Sam, “A Legal Critique Analysis (i)”, Civil Liberties Organisation, Ogoni Trials and Travails, Lagos, Nigeria, ISBN 978-23188-5-9, 1996, pp. 238-239.

consequently convicted for having procured a murder by a posterior act. It is obvious that such a conviction could not find support in the Nigerian Criminal Code.

## **Human rights violations connected to the Ogoni Civil Disturbances Tribunal**

A number of the Government's human rights obligations were violated in connection with the Ogoni Civil Disturbances Tribunal. These violations were brought to attention of both the Tribunal itself and also to regular Nigerian courts.

Individuals are protected from arbitrary arrest arbitrary detention through the ICCPR Art. 9; including the right of the accused to be informed of the charges and to be brought before a judge within reasonable time. The same right can be found in the ACHPR Art. 6. The 1979 Constitution Art. 32 (35)<sup>234</sup> provided that anyone arrested was to be informed of the reasons for detention within 24 hours. The detained was also given the right to be brought before a court of law within reasonable time. Inhuman and degrading treatment is prohibited in the ICCPR Art. 7, the ACHPR Art. 5 and the 1979 Constitution Art. 31 (34). The ICCPR Art. 10 specifically provides that those who are detained shall be treated with humanity.

The right to a fair and public hearing is guaranteed in Art. 14 of the ICCPR. The Article provides that the hearing should be undertaken by a competent, independent and impartial tribunal. The right to a fair hearing includes: trial without undue delay; the presumption of innocence; time and facilities to prepare ones defence with the help of counsel; that the accused must be able to hear examine witnesses under the same circumstances as the prosecution; and the right to judicial review. The ACHPR Art. 26 obliges all member states to guarantee the independence of the courts. The right to a fair trial is guaranteed in the ACHPR Art. 7. The 1979 Constitution Art. 33 (36) included in the right to fair hearing a right of the accused not to "*be compelled to give evidence at the trial*" in subsection 11.

The ACHPR Art. 7 prohibits retroactive legislation of criminal law. This prohibition can also be found in the ICCPR Art. 15. Execution based on a sentence by a Tribunal that lacked jurisdiction or based its verdict on retroactive criminal legislation violates the right to life. The right to life is protected in the ICCPR Art. 6, the ACHPR Art. 4 and the 1979 Constitution Art. 30 (33).

The accused in the OCDT were further sentenced because of their membership in MOSOP. There were thus violations of: the right to freedom of assembly, the right to free association, and the right to express and disseminate opinions. The right to freedom of assembly is protected in the ICCPR Art. 21 and the ACHPR Art. 1. The right to free association is to be found in the ICCPR Art. 22 and the ACHPR Art. 10. Both of these rights are protected in the 1979 Constitution Art. 37 (40). The right to express and disseminate opinions is provided for in the ICCPR Art. 19, the ACHPR Art. 9(2) and in the 1979 Constitution Art. 36 (39).

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<sup>234</sup> The equivalent article in the 1999 Constitution is put within brackets.

## Nigerian Court Cases

Below I will look at cases in Nigerian courts concerning: the arrest and detention of the detainees; lack of jurisdiction of the Tribunal; the right to a fair trial denied ; and the accused being denied the right to judicial appeal.

### The detention

#### Arbitrary detention

Ken Saro-Wiwa was arrested on 21 May 1994, and shortly after this the other accused. They were held in detention without any charge preferred against them until 6 February 1995, when they were formally arraigned. The military regime had empowered itself to detain people without trial for reasons of state security through the State Security (Detention of Persons) Decree No 2 of 1984. Detainees were not given the right to challenge or even to be informed about the reasons for their arrest and detention. Decree No 2 of 1984 was amended in September, after the arrest, by decree No 11 and 14 of 1994. The Chief General Staff and now in addition the Inspector General of Police were able to order the detention without charge or trial of any person considered to be a threat to the security of the state for an initial period of three months, doubled from 6 weeks. The combined effect of Decrees 11 and 14 of 1994 was a removal of the right to habeas corpus, indefinite detention without charges became permitted.

It is difficult to claim with certainty whether the actual arrests were arbitrary. Whether or not the police had reasons to believe that they had committed the crime and whether defendants were given prompt information as to the reason for their arrest is disputed. The case is however clear concerning arbitrary detention. It is undisputed that they charges were not brought promptly and that they were held in long detention without a hearing in court. Although the decrees made the detention by Ken Saro-Wiwa legal they remained arbitrary.

When Ken, Mitee, Kiobel, Kpuinen and Bera were arraigned for trial they applied for bail at the Tribunal. The bail application raised the question of fairness of the Tribunal and claimed that the authorities had no right to keep them in detention because there was no evidence connecting the accused to the murders. The Tribunal dismissed the bail application in its ruling on 15 March 1995 stating that: “*The circumstances that warrant the Federal Government to charge the accused persons not before the ordinary courts but before the Special Tribunal showed that the offence that they are said to have committed is not just an ordinary murder case. The allegation against the accused is very serious, taking into consideration the calibre of people who were murdered in cold blood.*”<sup>235</sup>

Simply because the Federal Government accused them of cold blooded murder under unusual circumstances and created the Tribunal, the Tribunal assumed that there was enough evidence for rejecting bail. The Tribunal further stated that it was necessary to refuse bail in order to keep

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<sup>235</sup> Amadi Sam, ”Hangman’s Court Is It Analysis (i)”, Civil Liberties Organisation, Ogoni Trials and Travails, Lagos, Nigeria, ISBN 978-23188-5-9, 1996, p. 145.

the accused person in protective custody: “*The likelihood of committing the offence again is also there as relations of the victims are also there, in that these same people that were killed have relations who may be eager to take revenge. It is therefore necessary at this stage and in the interest of the accused persons to remain in protective custody...the court may as in this case decide to keep the accused persons in the custody of Lt-Col Paul Okuntimo...*”<sup>236</sup> They were therefore kept in detention.

### **Motion under the Fundamental Rights (Enforcement Procedure) Rules**

Previous to the setting up of the Tribunal defence counsel of Saro-Wiwa and Mitee, Gani Fawehinmi, tried to start a procedure within the regular court system under the Fundamental Rights (Enforcement Procedure) Rules. The first step was to submit a motion applying for leave to apply for the enforcement of the fundamental rights of Ken Saro-Wiwa and Ledum Mitee.<sup>237</sup> The motion notice was brought under order 1 Rule 2 (1) and order 6 Rule 1 (1) of the Fundamental Rights (Enforcement Procedure) Rules, 1979. Order 1 Rule 2 (1) provides that anyone who alleges a violation of fundamental rights provided for in the constitution and to which he is entitled has been or is likely to be infringed, may apply to the Court in the State for redress.

The Federal High Court of Port-Harcourt (FHC) granted leave for the applicants to apply for the enforcement of their Fundamental Rights. The actual application for enforcement sought the following relieves: 1) A declaration that the arrests without a warrant were a violation of sections 32 and 38 of the 1979 Constitution and Articles 6 and 12 of the African Charter Act Cap. 10 Laws of the Federation of Nigeria 1990; 2) a declaration that the arrests and continued detention at an unspecified destination is a violation of the above mentioned legislation; 3) a mandatory release of the applicants; and 4) an order of perpetual injunction that the applicants will not be further arrested or detained in the future in violation of their fundamental rights. Respondents were: 1) the Attorney General of the Federation, 2) the State Security Service, 3) the Inspector-General of Police, 4) the Chief of Army Staff Nigeria Army, 5) the Military Administrator in Rivers State, and 6) the Commissioner of Police in Rivers State.<sup>238</sup>

Following this ruling by the FHC respondents 5 and 6 submitted preliminary objections: 1. That the instant application contravenes Order 2 and 3 of the Fundamental Rights (Enforcement Procedures) Rules 1979 and is “*therefore incompetent and should be struck out.*” According to the wording of the rules each applicant must apply to the Court separately. Only the Court can decide to consolidate the applications. 2. “*That this Honourable Court lacks jurisdiction to entertain the instant application and it should be struck out.*” The respondents submitted that when a Court has

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<sup>236</sup> Akinnola Richard, ”The Trial and Conviction of the Ogoni Nine”, Civil Liberties Organisation, Ogoni Trials and Travails, Lagos, Nigeria, ISBN 978-23188-5-9, 1996, pp. 108-109.

<sup>237</sup> Dated 25.5.1994 to the Federal High Court, Port-Harcourt (Suit No: FHC/PH/33/94).

<sup>238</sup> The ruling dated 27 May 1994. The application is dated 1.6.1994.

no jurisdiction with respect to a matter before it, the judicial basis for the exercise of any power with respect to such matters is also absent. The FHC would therefore not have any jurisdiction from the federal structure of Nigeria because the offences envisaged are state offences and therefore cannot entertain any application in respect of such offences.<sup>239</sup>

The FHC issued a ruling that was unusually long and detailed in its motivation compared to other rulings of Nigerian courts. Concerning preliminary objection no 1 the court rules on page 12: "...*Order 2 Rule 3 thereof, there is nothing contained therein to warrant this Court to hold that each of the Respondents/Applicants should apply to the Court separately.*" Concerning preliminary objection No. 2 the Court ruled on page 17 that "*in the instant case the subject matter before this Court is not one of murder but an Application by the Applicants against the Respondents therein for the enforcement of their Fundamental Right under the Fundamental Rights (Enforcement Procedure) Rules, 1979.*" The Court therefore concluded that it had jurisdiction.<sup>240</sup>

The Attorney General of the Federation, the State Security Service, the Inspector General of Police, the Chief of Army Staff Nigeria Army, the Military Administrator in Rivers State and the Commissioner of Police in Rivers State appealed this ruling to the Court of Appeal, Port-Harcourt. The appeal concerned the whole decision of the FHC. The actual grounds are difficult to understand. My conclusion is that the only ground actually referred to is that the "*Trial Judge erred in law.*"<sup>241</sup>

Shortly after having made the appeal the appellants made an application for stay of proceedings in the Federal High Court. The Judge takes into consideration that the applicants had raised a preliminary objection both on the competence and on the vires of the Court. To warrant a stay there must be a special circumstance, raising an issue of jurisdiction is not per se such a special circumstance. At page 3 the Judge concludes: "*I therefore consider it in the interest of justice that the status quo be maintained till the Appeal is heard. In the circumstances I hereby order a stay of further proceedings in the present suit until the Appeal on the issue of jurisdiction in this Court is heard and determined by the Court of Appeal.*"<sup>242</sup>

In brief what has happened is that first the motion for leave to apply for enforcement of the fundamental rights at the FHC was granted. When this was granted the actual motion was submitted. Respondents then made a preliminary objection claiming that the FHC did not have jurisdiction to try the case. The FHC gave a ruling that it did have jurisdiction. This ruling was appealed and a motion submitted to the FHC to stay the proceedings. Proceedings in the FHC were stayed.

The notice of Appeal was served upon the plaintiffs/respondents 2.11.1994. In the Court of Appeal the suit was given No. CA/PH/177m/94. Because I could not find the ruling in any of the lawyers' offices I went to

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<sup>239</sup> Notice of preliminary objection dated 9.6.1994.

<sup>240</sup> Ruling dated 28.6.1994 by Hon. Justice E.O. Sanyaolu.

<sup>241</sup> Letter of appeal dated 6.7.1994.

<sup>242</sup> On 19 July 1994 Justice E.O. Sanyaolu gave his ruling on the matter.

the Court of Appeal, Port-Harcourt and asked what had happened to the appeal. A staff-member, who did not want to give his name, told me that the Court had taken different measures to deliberately delay the case until the Tribunal was created. After the trial had commenced it was considered that it had become too late to claim release due to arbitrary detention. The subject matter of the motion under the Fundamental Rights (Enforcement Procedure) Rules was hence never tried.

While the respondents appeal was pending Saro-Wiwa and Mitee filed a motion for an interim measure releasing the applicants from unlawful detention pending the hearing and determination of the appeal or alternatively an interim order admitting applicants to bail until they would be charged to court. Respondent 5 and 6 then filed a notice of preliminary objection on the ground that the Court of Appeal lacked jurisdiction to entertain the application for bail of the respondents. They contended that by virtue of section 219 of the 1979 Constitution the Court of Appeal couldn't exercise original jurisdiction over the release of the applicants or grant them bail except on an appeal from the High Court. In response to the preliminary objection the Court of Appeal gave its ruling on 22 November 1994. The Court unanimously dismissed the application by Wiwa and Mitee stating that it did not have original jurisdiction to grant bail.<sup>243</sup>

### **Conditions during detention**

Ken Saro-Wiwa and Mitee were held incommunicado for 9 months. Ledum Mitee swore: "*That since my arrest and detention and prior to the 6<sup>th</sup> February 1995, I have not been allowed to see and speak with any members of my family and lawyers.*"<sup>244</sup> Dr. Owens Wiwa swore: "*That since the Applicants are being detained in an unknown and unspecified destination the Applicants are being denied access to members of their families as well as to their lawyers, medical doctors and proper medication.*"<sup>245</sup> A Senior Police Officer, James Emmanuel Okoh in charge of the Homicide Section of the Special Investigation and Intelligence Bureau of the Nigeria police Force in Port-Harcourt denied that this was the case and made under oath the following statement: "*That it is not true that the Applicants families do not know where the Applicants are being kept. Applicants are being allowed visits by their families while the 1<sup>st</sup> Applicant is being given regular medical attention.*"<sup>246</sup>

The medical condition of both Wiwa and Mitee was deteriorating during their detention. Ledum Mitee swore: "*That on occasions when I lost*

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<sup>243</sup> Ken Saro-Wiwa and Ledum Mitee v. The Attorney General of the Federation, the State Security Service, the Inspector General of Police, the Chief of Army Staff Nigeria Army, the Military Administrator in Rivers State and the Commissioner of Police in Rivers State (1995)NWLR(Pt373) pages 759-767.

<sup>244</sup> Charge No OCDT/PH/1/95 2nd affidavit in support.

<sup>245</sup> Affidavit in support of motion filed on 25.6.1994 by Dr, Owens Wiwa, Medical practitioner, paragraph 8. Suit No: FHC/PH/33/94 in the Federal High Court , Port-Harcourt. In the matter of application by 1) Ken Saro-Wiwa and 2) Ledum Mitee for leave to apply for the enforcement of their fundamental rights.

<sup>246</sup> Counter Affidavit of 5th and 6th respondents suit No FHC/PH/33/94 dated 8.6.1994, paragraph 26.

*consciousness owing to my worsening health condition the military officers had to bring in doctors to attend to me in the cell.”*<sup>247</sup> Medical Dr. IV.

Nssien examined L. Mitee on the 2 and 3 June 1994 and gave the following opinion: “*He was found to be clinically suffering from chest infection and congestion. His blood pressure rising from previously known records and he has lost weight considerably and is pale.*” Wiwa claimed that he was “*denied food for weeks and medical attention for months.*”<sup>248</sup> Dr. Owns swore that Wiwa “*has a heart condition called Coronary insufficiency and if he is prevented from taking prescribed drugs at the normal time or denied access to his medical doctors it could lead to his death.*”<sup>249</sup>

Ledum Mitee swore: “*That at the Bori Camp Military base about 30 of us (detainees) were kept in a small cell of about 4 feet by 6 feet. We all could only squat and were not allowed to leave the room to visit the toilet. We had to defecate in waterproof bags...and urinate in bottles kept in the same cell where our meals were served.*”<sup>250</sup> Wiwa stated: “*My lord, since my arrest on the 21<sup>st</sup> of May, 1994 I have been subjected to physical and mental torture,...*”<sup>251</sup> Amnesty International came to the conclusion that Ken Saro-Wiva had been severely beaten following his arrest and had his legs chained for 10 days, causing one leg to swell. Treatment was however refused.<sup>252</sup> Not only the accused were assaulted. The relatives of the accused were subjected to inhuman treatment at several occasions.

Defence Counsel complained to the Tribunal of the conditions during the detention and on the assaults on the relatives of the accused. At one point the defence protested strongly that Saro-Wiva had not been admitted to hospital. The case was adjourned and the Tribunal ordered that Saro-Wiva be admitted to Port-Harcourt Military Hospital. This order was obeyed. Often however directives from the Tribunal concerning treatment of detainees and those surrounding them were ignored. Also rulings by the Federal High Court that visits by their doctors and family members should be allowed were disobeyed.

## No jurisdiction of the Tribunal

Chief Fawehinmi raised a preliminary objection to the trial on the ground lack of jurisdiction. The Tribunal dismissed the objection. The application was predicated on the premise that several preconditions for establishing the Tribunal had not been met. There had been no civil disturbance, no

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<sup>247</sup> Charge No OCDT/PH/1/95 2nd affidavit in support.

<sup>248</sup> Unedited text of Ken Saro-Wiva’s statement to the Ogoni Civil Disturbances Tribunal, Civil Liberties Organisation, Ogoni Trials and Travails, Lagos, Nigeria, ISBN 978-23188-5-9, 1996, p. 98.

<sup>249</sup> Affidavit in support of motion filed on 25.6.1994 by Dr, Owens Wiwa, Medical practitioner, paragraph 12. Suit No: FHC/PH/33/94 in the Federal High Court , Port-Harcourt. In the matter of application by 1) Ken Saro-Wiva and 2) Ledum Mitee for leave to apply for the enforcement of their fundamental rights.

<sup>250</sup> Charge No OCDT/PH/1/95 2nd affidavit in support.

<sup>251</sup> Unedited text of Ken Saro-Wiva’s statement to the Ogoni Civil Disturbances Tribunal, Civil Liberties Organisation, Ogoni Trials and Travails, Lagos, Nigeria, ISBN 978-23188-5-9, 1996, p. 98.

<sup>252</sup> Amnesty International, Nigeria Military government clampdown on opposition, London, 11.11.1994, pp. 9-10.

investigation committee had been created previous to the Tribunal, and there had not been sufficient evidence for commencing a trial. An ordinary murder case would have been tried at a High Court. The Attorney-General of the Federation justified the resort to a Special Tribunal with the special nature of the offence, the communal clashes, and the slow procedures and poor facilities of the ordinary courts.<sup>253</sup>

The lawyers of the accused in charge No/ OCDT/PH/2/95 then brought an application in the Federal High Court, Port-Harcourt under the fundamental rights enforcement procedure seeking a declaration that the Tribunal lacked jurisdiction to try the charge because of non-compliance with conditions precedent.<sup>254</sup> The Federal High Court never gave a ruling on the matter.<sup>255</sup>

Part I, Section 1 of Decree No. 2 of 1987 envisaged the constitution of a Civil Disturbance Investigation Committee, whenever the President claimed that any of the following four conditions existed: a) Civil disturbances, commotions or unrest in any part of Nigeria; b) a breach of the peace that would have the effect of destabilising the peace and tranquillity of the nation; c) the public order and public safety of Nigeria was threatened by any disturbance; or d) a riot or civil disturbances, resulting or likely to result in loss of life and property and injury to person, had occurred or was likely to occur. The defence claimed that the circumstances did not amount to a civil disturbance. I do not believe that the objection by the defence holds. There is no clear definition of "*civil disturbance*" in section 1 of the Decree 1987 No 2. Instead it was up to the Head of State to declare whether a civil disturbance had occurred or not.

The President was to appoint the investigation committee. The Ogoni Civil Disturbances Tribunal was established without a report by an investigation committee. When the preliminary objection was brought to the Tribunal the prosecution replied that there was no requirement for the President to inform anyone of a decision to set up an investigation committee and hence there had been no breach of the procedure. The Tribunal held that Chief Fawehinmi was not in a position to state whether the committee was set up or not. Referring to section 8(1) of the 1987 No 2 Decree the Tribunal concluded that the actions of the Head of State under the Decree could not be challenged in court. Further the Decree referred to acts done by the Head of State and not to what was undone.<sup>256</sup> I believe that it is not clear from the Decree that an investigation committee is an actual precondition for the appointment of a tribunal. In any case it is at least

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<sup>253</sup> Amadi Sam, "Hangman's Court Is It Analysis (i)", Civil Liberties Organisation, Ogoni Trials and Travails, Lagos, Nigeria, ISBN 978-23188-5-9, 1996, p. 124.

<sup>254</sup> Amadi Sam, "Hangman's Court Is It Analysis (i)", Civil Liberties Organisation, Ogoni Trials and Travails, Lagos, Nigeria, ISBN 978-23188-5-9, 1996, p. 156.

<sup>255</sup> I was not able to find the ruling by the Federal High Court, nor could any of the lawyers remember that a ruling was ever given. I therefore come to the conclusion that the Federal High Court never gave a ruling on the matter.

<sup>256</sup> Akinnola Richard, "The Trial and Conviction of the Ogoni Nine", Civil Liberties Organisation, Ogoni Trials and Travails, Lagos, Nigeria, ISBN 978-23188-5-9, 1996, p. 108.

surprising that the Tribunal showed no interest in finding out whether there had been one or not, but merely said that it was of no importance.

A third objection raised was that there had not been sufficient evidence. Rule 1 of Schedule 2 to Section 4(1) of Decree No 2 1987 provided that: "*The trial of offences under this Decree shall commence by way of an application, supported by a summary of evidence or affidavit made to the Tribunal by the Prosecutor.*" The Attorney General of the Federation had announced the commencement of the trial before the prosecution's summary of evidence was delivered to the Tribunal. Rule 2 provided that: "*Where after the perusal of the application and the summary of evidence..., the Tribunal is satisfied that any person appears to have committed an offence referred to in this Decree, it shall cause that person to be brought before the Tribunal...*" The Supreme Court has ruled in a previous case: "*Suspicion alone is not enough to justify preferring a charge against a person, there must be evidence linking the subject with the offence. But there must be evidence to meet all essential elements of that offence.*"<sup>257</sup> This means that there must be at least the makings of a case against the defendant. The summary later delivered concerning Group A only mentioned Mitee once by the witness Danwi: "*I also saw Mr Ledum Mitee inside his own car near Ken Saro-Wivas's car.*" It is not possible that the Tribunal could have considered that there was any proper basis for the trial of Mitee. The commencement of a trial without any *prima facie* evidence constituted an infringement of their right not to be tried arbitrarily or unnecessarily harassed by criminal proceedings.

### **The right to a fair trial denied**

Accused in charges No/OCDT/PH/1/95 turned to the Federal High Court, Port Harcourt requesting it to stop the Tribunal as the Tribunal did not offer them a fair trial. Respondents were the Tribunal members and the Attorney-General of the Federation. Sam Amadi said that the Court gave a ruling that it lacked jurisdiction to do so. Plaintiffs appealed this ruling to the Court of Appeal, Port Harcourt. The application at the Court of Appeal never took off. They referred to being on vacation and other reasons for delaying. Sam Amadi claims that the real reason is that the Governor told them not to list the case. The execution was carried out while the appeal was still pending.

### **Influence from the Military Government**

Everyone has a right to trial by an independent and impartial tribunal. Independence implies that it must be free from influence from the executive. It is clear that the members of the OCDT were under strong influence from the Military Government.

Section 2 of the 1987 No 2 Decree provided the rules of membership in a Civil Disturbances Tribunal. A later Decree (No. 4 of 1992) altered the rules. Consequently the Tribunal was to consist of a judicial chairman and not more than six other members, one of whom was to be a serving member of the armed forces. The Federal Government was to appoint the members of the Tribunal. MOSOP had accused the Federal

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<sup>257</sup> Ikomi vs. State [1986] 3 NWLR (Pt 8) 340 at 376.

Military Government of complicity. Consequently it was the accused that made the appointments. The Tribunal consisted of Hon. Justice Obrahim Ndali Auta as Chairman and Hon. Justice E.E. Arikpo and Lt Col. M. Ali as members. The Chairman was a junior judge in the Federal High Court, Lagos. He was very little experienced as a judge and had worked as a government lawyer under the dictator Ibrahim Babangida. Hon. Justice Arikpo was a judge of the Cross River State High Court. Col. Ali had served under General Abacha when the latter was Chief of Defence Staff.<sup>258</sup> The mere presence of a military officer was enough to guarantee the subservience of the Tribunal to the Government.

In a letter dated 27 November 1994, Chief Gani Fawehinmi made inquiries from the Chief Judge at the Federal High Court, Lagos. In his reply the Chief Judge said that his court had nothing to do with the case as it was purely a Presidency affair.<sup>259</sup> When the defence complained that in spite of order from the Tribunal, it had not been allowed access to the accused persons Justice Auta responded: "*I am directly answerable to the Commander-in-Chief (that is General Abacha) I am not answerable to any other person, I will report whoever interferes with this trial directly to the Commander-in-Chief, be it prosecution, defence or Police.*"<sup>260</sup> Sam Amadi, defence counsel, said that the judges sitting during the trials of the Ogoni leaders were under strong pressure from the Government. Sam talked to one of the judges several years after the trial and the judge had then claimed that the Government had used him.

Concerning impartiality the UN Human Rights Committee has held that: "*Impartiality of the court implies that judges must not harbour preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties.*"<sup>261</sup> For starters it can be mentioned that the Tribunal called the defence "*a pack of noise makers who impose themselves on clients*", "*human rights abusers*", "*irresponsible lot*" etc.<sup>262</sup>

Impartiality was further threatened through the use of two simultaneous trials. The trial concerning group A, charge No. OCDT/PH/1/95, commenced 6 February 1995. In March the prosecution made another application for the trial of Group B and C in charges No OCDT/PT/2/95 and OCDT/PH/3/95. The defence objected to this application because they did not want the same Tribunal to be sitting in three almost identical trials. The summary of evidence and the list of witnesses attached to each of these charges were similar.

Since the witnesses who would testify in charge No. 1 were the same witnesses for the other charges, the prosecution was given a double opportunity to give evidence against the accused in that one witness would

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<sup>258</sup> Amadi Sam, "Hangman's Court Is It Analysis (i)", Civil Liberties Organisation, Ogoni Trials and Travails, Lagos, Nigeria, ISBN 978-23188-5-9, 1996, p. 133.

<sup>259</sup> Dated 5 December 1994, with reference No.FHC/310/C/180.

<sup>260</sup> Amadi Sam, "Hangman's Court Is It Analysis (i)", Civil Liberties Organisation, Ogoni Trials and Travails, Lagos, Nigeria, ISBN 978-23188-5-9, 1996, p. 135.

<sup>261</sup> Karttunen v. Finland, Communication 387/1989, adopted 23 Oct. 1992.

<sup>262</sup> Amadi Sam, "Hangman's Court Is It Analysis (i)", Civil Liberties Organisation, Ogoni Trials and Travails, Lagos, Nigeria, ISBN 978-23188-5-9, 1996, p. 147.

testify on the same set of facts. The witness was given the opportunity to adjust his testimony at the second trial in order to further implicate the accused. The simultaneous trials of the three charges by the same Tribunal would also bias the minds of members of the Tribunal. After taking part of evidence in one of the trials they would not approach the next case with the requisite open mind. Further if the Tribunal accepted the truthfulness of a witness when he appeared as a witness in the first trial it would prejudge his truthfulness when he appeared as a witness in another charge. The accused would further not be able to defend himself against a statement given by a witness in one of the other trials. What a witness said in one trial would still affect the decision of the Tribunal in the other trial. The potential for confusion and inconsistency was simply enormous.

The defence made a submission urging that a second tribunal with different members would be set up to try the other charges. The submission was rejected on the ground that it was not made in good faith. After the ruling the prosecution indicated that group B and C would be tried in one trial. Their trial was adjourned until 30 March. On 30 March Groups B and C appeared. The prosecution filed an indictment consolidating both groups into one group of 10. The trial of then was postponed until 2 May.

### **Treatment of the defence council**

As mentioned above Ken Saro-Wiva and Mitee were held incommunicado for 9 months. Not only were they denied access to family and doctors, but also to their lawyers. Ledum Mitee swore: “*That since my arrest and detention and prior to the 6<sup>th</sup> February 1995, I have not been allowed to see and speak with my ...lawyers.*”<sup>263</sup> Dr. Owens Wiwa swore: “*That since the Applicants are being detained in an unknown and unspecified destination the Applicants are being denied access ...to their lawyers...*”<sup>264</sup>

When the trial had begun the counsel was to be given immediate access to the accused. The defence claimed that Lt-Col. Paul Okuntimo insisted on being given notice of all appointments to see the detainees. When counsel was allowed to see them it was always in his presence. 26 June 1994 two lawyers visiting Mitee were even assaulted and detained for four days.<sup>265</sup> Defence was able to get orders from the Tribunal that they were to be allowed visits by their lawyers. These orders were however often disobeyed. Orders from the Federal High Court that they be allowed visits by their lawyers were also ignored.<sup>266</sup>

Apart from being harassed and physically stopped from meeting the accused the defence were prevented from performing in other ways. During the trial the Tribunal inhibited the planning of the defence through

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<sup>263</sup> Charge No OCDT/PH/1/95 2nd affidavit in support.

<sup>264</sup> Affidavit in support of motion filed on 25.6.1994 by Dr, Owens Wiwa, Medical practitioner, paragraph 8. Suit No: FHC/PH/33/94 in the Federal High Court , Port-Harcourt. In the matter of application by 1) Ken Saro-Wiva and 2) Ledum Mitee for leave to apply for the enforcement of their fundamental rights.

<sup>265</sup> Birnbaum Michael, ”Analysis (ii)”, Civil Liberties Organisation, Ogoni Trials and Travails, Lagos, Nigeria, ISBN 978-23188-5-9, 1996, pp. 197-198.

<sup>266</sup> Amadi Sam, ”Hangman’s Court Is It Analysis (i)”,Civil Liberties Organisation, Ogoni Trials and Travails, Lagos, Nigeria, ISBN 978-23188-5-9, 1996, pp. 128, 135.

refusals to grant short adjournments. Defence was further given an impossible mission to present a case that was strong enough to free the accused. First of all the Tribunal allegedly reversed the burden of proof. It then interpreted witnesses and refuted evidence to the detriment of the defence.

### Treatment of evidence

The Tribunal required very little evidence from the prosecution to support an allegation. Once such evidence had been presented the defence was given the burden of presenting enough evidence to refute it. Otherwise the allegations presented by the prosecution were presumed to be true. In relation to Saro-Wiwa the Tribunal stated: "*It is important to note that not only has 1<sup>st</sup> accused failed to refute the assertion that "vultures be killed; it is also noted that no meeting in which it is said that members of NYCOP gave instructions for "vultures" to be killed has been denied.*" Because it had not been denied it was presumed true. In relation to Kpuinen: "*In any instance in which John Kpuinen is credited with a statement at such a meeting all that he says is that he was not at a meeting where he made such statement or that he was on leave of absence. The truth is that any unchallenged evidence is presumed admitted.*"<sup>267</sup> Unchallenged evidence was presumed true. The Tribunal stated in relation to the case of Kiobel: "*In the absence of any calid explanation we are left in no doubt that the purpose was to set off the events and riots which occasioned the murder of those leaders of Gokana.*"<sup>268</sup>

At the initial state of the trial two key prosecution witnesses, Charles Suanu Danwi and Nanyone Akpa, who alleged that Saro-Wiwa told his followers to "deal" with the "vultures" recanted their statements to the security agents. They swore affidavits at the Federal High Court of Lagos claiming that they were bribed to give false statements. Mr. Danwi, stated in the affidavit: "*At Eleme some plain cloth securitymen and some youth who claim to be Gokana Youth Development Association came and arrested me to Port-Harcourt, I was asked to make statement to the Security Agents but I refused. I was detained under house arrest...I was afraid so I made statement to them, but they refused my statement and ask me to copy a statement made by them. Under duress I made the writing of the their statement. Other youths that made the statement agreed that their own was made the same way I made my own. At this time I was promised that after the case I will be given a house any place in the country, a contract from Shell and OMPADEC and some amount of money...*" Copies of the affidavits were submitted to the Tribunal for investigation and judicial response. The Tribunal rejected the affidavit and held that: "*It is not new that witnesses have changed sides. It is not something that is unimaginable*

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<sup>267</sup> Birnbaum, Michael, "A Travesty of Law and Justice Analysis (ii)"Civil Liberties Organisation, Ogoni Trials and Travails, Lagos, Nigeria, ISBN 978-23188-5-9, 1996, p. 261.

<sup>268</sup> Birnbaum, Michael, "A Travesty of Law and Justice Analysis (ii)"Civil Liberties Organisation, Ogoni Trials and Travails, Lagos, Nigeria, ISBN 978-23188-5-9, 1996, p. 264.

*or something that has never happened. The observation is premature as trial will soon start.*”<sup>269</sup>

Danwi and Akpa claimed that other witnesses had also made their statements under duress. If one takes a look at the statement B of Akpa made on 28 December 1994 it is almost the same statement as statement E made on the same day by Alhaji Kobani. Statement B made under duress by Nanyone Akpa on 28/11/94: “*On the 22<sup>nd</sup> Nov. 1994, I was travelling from home to Port-Harcourt, I then called at Gems Filling Station at Baraobara to buy some fuel. At the filling station, I cited somebody I recognised to be one of those who attacked [not eligible]...that led to the deaths of our leaders and then alerted the police at the police station near the filling stations as Baraobara. And the police assisted in arresting the suspect whom I later know his name to be Felix Nuate a native of Deyon in Gokana Local Government Area. He was taken to the Divisional Police Headquarters at Eleme.*” Statement E made by Aljhaji Kobani: “*On 22 November, A.M. Kobani was en route from his home to Port-Harcourt. He stopped for fuel at Gems filling station Baraobara. At the filling station I cited someone I immediately recognised to be one of those who attacked us at Giokoo on 21<sup>st</sup> May 1994 that led to the death of my brother...and 3 others. I then alerted the police at Baraobara Police post who assisted me in arresting the suspect whom I later knew his name to be Felix Nuate. He was arrested and taken to Divisional police Headquarter at Eleme.*”

This clearly raises the suspicion that the statement made by Kobani had been dictated to him by the same person that dictated the statement made by Akpa. The Tribunal however convicted both Nordu Eawoh and Paul Levura on the evidence of Alhaji Kobani. He had testified in charge No OCDT/PH/2/95 that it was Paul Levura who took away the body of T.B. Orage. Later in his testimony the next day, he told the same tribunal that he erred when he told the Tribunal that it was Paul Levura who took away the body of T.B. Orage. He then claimed that it was Nordu Eawoh.

It was suspected that the Tribunal was acting on information gained outside the proceedings. Several incidents suggest that the Tribunal received information from a military or police source. For example on 25 June 1995 Lt Col. Okuntimo held a meeting with the Tribunal members, which lasted over an hour.<sup>270</sup> The Supreme Court has held: “*No trial court is entitled to draw conclusions of fact outside the available legal evidence before it, it has obviously abandoned its proper role, and such facts or conclusions of fact found without appropriate evidence in support thereof will be regarded as perverse by an appellate court.*”<sup>271</sup>

The Tribunal also refused to accept evidence presented by the defence. The witness statement given by Alhaji Kobani contrasted with statements made by him at a press conference held 22 May and his police statement. The defence tendered a videocassette of the press conference to

<sup>269</sup> Amadi Sam, “Hangman’s Court Is It Analysis (i)”, Civil Liberties Organisation, Ogoni Trials and Travails, Lagos, Nigeria, ISBN 978-23188-5-9, 1996, p. 146.

<sup>270</sup> Amadi Sam, “Hangman’s Court Is It Analysis (i)”, Civil Liberties Organisation, Ogoni Trials and Travails, Lagos, Nigeria, ISBN 978-23188-5-9, 1996, p. 136.

<sup>271</sup> Akpabio v. State 7 NWLR (Pt. 359) 635 at 669 paragraphs H-A.

show the inconsistency in the statements. The Tribunal rejected it on the ground that it could not be sure that it had not been electronically hampered with.<sup>272</sup> It should be noted that admission of any piece of evidence, by Nigerian law, is not guided by the authenticity of the piece of evidence. What is important is whether the evidence is relevant to the trial. It is only after it had admitted the evidence that it should assess its probative value.<sup>273</sup>

After the refusal defence counsel sought a subpoena to be issued directed at those that had been present at the conference to present the transcripts and the video. At first the Tribunal refused, but eventually a subpoena was issued. Out of the three persons subpoenaed only the Chief Press Secretary to the Military Administration Mr Fidelis Agbiki came. Mr. Agbiki on his part held that the video copy had not been saved. At this stage Mr Falana stated that the refusal to provide the tape and the transcript showed that there was no purpose in continuing defending the accused. He applied to withdraw from the Tribunal and other defence counsel followed suit. The Tribunal assigned the new defence team. Also this second team withdrew after having been harassed. The accused decided not to have new lawyers assigned and the trial continued without legal representation of the accused.

### **The right to appeal denied**

It was not possible to appeal the ruling by the Tribunal to regular national courts. Section 8 of the No. 2 1987 Decree excludes the right of appeal:

*“The validity of any decision, sentences, judgement, confirmation, direction, notice or given order or made, as the case may be, or any other thing whatsoever done under this Decree shall not be enquired into in any court of law.”* It was not possible to object to Section 8 of the No. 2 1987 Decree at a higher court. Such an objection was efficiently prevented through section 5 of Constitution (Suspension and Modification) No 1 of 1984: “*No question as to the validity of this or any other decree or edict shall be entertained in any court of law in Nigeria.*” The decree was further expanded by Abacha through Constitution (Suspension and Modification) Decree 107 of 1993: “*No question as to the validity of this Decree or any other Decree, made during the period 31<sup>st</sup> December 1983 to 26<sup>th</sup> August 1993 or made after the commencement of this Decree or of an Edict, shall be entertained by any court of law in Nigeria.*”

Defence Counsel could thus not turn to national courts concerning a violation of the right to appeal. Section 7 of decree 2 of 1987 however provided that the decision of OCDT was invalid until confirmed by the Provisional Ruling Council (PRC), a higher military authority. Even if the procedure did not really mean that there was a right to appeal, it at least required a reconsideration of the whole record of the trials. Defence Counsel attempted to make representations to the PRC. The PRC however made its

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<sup>272</sup> Amadi Sam, ”Hangman’s Court Is It Analysis (i)”, Civil Liberties Organisation, Ogoni Trials and Travails, Lagos, Nigeria, ISBN 978-23188-5-9, 1996, p. 154.

<sup>273</sup> Torti v Ukpabi [1984] 1 SC NLR 214.

decision before submissions had been made. The meeting of the PRC was reported to have lasted 2 hours.<sup>274</sup>.

The Federal High Court of Lagos was actually given one last chance to prevent the executions. The Constitutional Rights Project filed an application to the Court praying for injunction restraining the Federal Military Government from carrying out the confirmation and execution of the sentence while its communication to the African Commission was still pending. According to Agnes Tunde-Olowu, Head Legal Services Constitutional Rights Project, the application never took off. Although it was filed as an urgent application the court delayed listing the case. The reason for the delay was orders from the Government. After the executions the case was dropped.

## **International attention**

### **US Court Cases - Wiwa v. Royal Dutch Petroleum Company**

Victims and lawyers directly involved in the OCDT and engaged NGOs were not satisfied with seeking redress in national courts, but also tried to gain international attention. Suits were filed in US courts, communications sent to the African Commission on Human and Peoples' Rights, and contacts established with the international community. I will start with looking at the suit in the US.

#### **The suit**

In the case Wiwa v. Royal Dutch Petroleum Company the Ogoni people won an important victory against Royal Dutch/Shell when US Courts found that they had jurisdiction to try their case.<sup>275</sup> The suit not only concerns the OCDT, but also actions taken in relation to normal operations connected to oil-exploitation. Since three of the four plaintiffs are relatives of the Ogoni leaders convicted by the OCDT and the conviction triggered the suit I have decided to discuss the case in this chapter concerning the Tribunal.

US courts have so far issued two separate rulings on the matter. The first concerns personal jurisdiction and forum non conveniens. After the ruling on personal jurisdiction over corporate defendants a second action was raised against defendant Brian Anderson. This new action and subject matter jurisdiction over corporate defendants were considered in the second decision. There is not yet a decision on the merits.

Plaintiffs were Ken Wiwa, Blessing Kpuinen, Owens Wiwa, and Jane Doe. Ken Wiwa sued individually and as executor of the estate of his deceased father Ken Saro-Wiwa. Blessing Kpuinen sued individually and as administratrix of the estate of her husband. They first raised an action against corporate defendants Royal Dutch Petroleum Company and Shell Transport and Trading Company p.l.c. Plaintiffs alleged that corporate defendants' conduct had violated international and common law and that the violations were actionable under the Alien Torts Claim Act (ATCA).

Plaintiffs also asserted common law claims under New York, Nigerian, and

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<sup>274</sup> Amadi Sam, "Hangman's Court Is It Analysis (i)", Civil Liberties Organisation, Ogoni Trials and Travails, Lagos, Nigeria, ISBN 978-23188-5-9, 1996, p. 158.

<sup>275</sup> Wiwa v. Royal Dutch Petroleum Company, et al., 226 D.3d88 (2d Cir.2000).

United States law. Plaintiffs Owens Wiwa and Jane Doe further asserted a claim under the Racketeering Influenced and Corrupt Organizations Act (RICO).

Claims against Anderson only differ in three ways. First plaintiffs alleged that some of Anderson's conduct violated not just the ATCA but also the Torture Victim Protection Act (TVPA). Second Jane Doe was not a plaintiff in the action against Anderson. Third there was no RICO claim against Anderson.

Jane Doe was only identified as a Nigerian citizen. The other plaintiffs were former citizens and residents of Nigeria. Ken Wiwa is now a citizen and resident of Great Britain. Owens Wiwa, the brother of Ken Saro-Wiwa, remains a Nigerian citizen but resides in Canada. Blessing Kpuinen remains a Nigerian citizen but resides in the United States. Defendants Royal Dutch Petroleum Company and Shell Transport and Trading Company (Royal Dutch / Shell) are incorporated and headquartered in the Netherlands and the United Kingdom respectively. Royal Dutch / Shell own Shell Petroleum Company Ltd., which owns Shell Petroleum Development Company of Nigeria, Ltd (Shell Nigeria). Defendant Brian Anderson was the country chairman of Nigeria for Royal Dutch / Shell and managing Director of Shell Nigeria. Anderson is a citizen of the United Kingdom and Northern Ireland. According to plaintiffs, Anderson resides in China. According to Anderson he resides in Hong Kong and France.

Plaintiffs alleged that the corporate defendants directed and aided the Nigerian Government in violating international, federal and state law in the Ogoni region of Nigeria during the 1990s. Plaintiff's allegations concerned: coercive appropriation of Ogoni land without adequate compensation; damage to the local environment and economy; defendants recruiting the Nigerian police and military; and the trial, conviction and hanging of Ken Saro-Wiwa and John Kpuinen. Allegedly Royal Dutch/Shell had acted through Anderson.

Another ATCA suit related to this case that was also still pending at that time was directed against Chevron.<sup>276</sup> Plaintiffs alleged that Chevron provided assistance to and participated in two Nigerian military raids in which alleged human rights abuses occurred. One raid had taken place on Chevron's oilrig directed at demonstrators and another against a village supporting the demonstrators. Plaintiffs filed their second amended complaint on 12 January 2000. Defendant's motion to dismiss was denied on 16 June 2000. Since that date several amended complaints have been filed, the fourth adding Chevron Texaco as a defendant. There is not yet a decision on the merits.

### **Personal Jurisdiction, forum non conveniens**

Plaintiffs filed the first action against the corporate defendants on November 6 1996 and filed an amended complaint on 29 April 1997. The defendants moved to dismiss the suit for lack of personal jurisdiction and on forum non conveniens grounds. The United States District Court for the Southern District of New York, by order dated September 25 1998, found that there

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<sup>276</sup> Bowoto, et al. v. Chevron, et al., (N.D. Cal.), No. C99-2506.

was personal jurisdiction, but dismissed action on forum non conveniens grounds, finding the United Kingdom to be an adequate alternative forum. Plaintiffs moved for reconsideration. The Court of Appeals found that there was personal jurisdiction and that the district court had erred in law in its forum non conveniens determination. The case was therefore affirmed in part, reversed in part and remanded. I will now look at the decision by the Court of Appeal on personal jurisdiction and forum non conveniens.<sup>277</sup>

### **Personal jurisdiction**

The question of personal jurisdiction becomes particularly relevant in cases against foreign corporations. Under the Federal Rules of Civil Procedure (Fed.R.Civ.P. 4(k)(1)(a)) a court may exercise jurisdiction over any defendant "*who could be subjected to the jurisdiction of a court of general jurisdiction in the state in which the district court is located*". As the case against Royal Dutch Petroleum Company and Shell were filed in New York I will look at New York state law regarding personal jurisdiction.

Under New York state law, NY CPLR § 301, a Court may exercise jurisdiction over a corporation that is doing business in New York. When it does it is subject to personal jurisdiction with respect to any cause of action, related or unrelated to the New York contacts. For a company to be regarded as doing business there it must be engaged in "*continuous, permanent, and substantial activity in New York*".<sup>278</sup>

It is also regarded as if the corporation is doing business in New York if it operates through a representative in New York. The agent relationship confers jurisdiction over the foreign corporation only if the agent is primarily employed by the defendant and not engaged in similar services for other clients.<sup>279</sup> The agent must offer services that are integrated with the foreign company and the services must be of importance for the foreign company.<sup>280</sup> Mere listing of shares on New York-based stock exchanges and activities solely related to such listings does not mean that they become subject to New York jurisdiction for unrelated occurrences.<sup>281</sup> This does not mean however that contacts related to stock exchange listings are of no relevance when establishing personal jurisdiction. All that it means is that it is not enough to establish jurisdiction on its own. Together with other services rendered on behalf of the company they may confer jurisdiction over the foreign entity.<sup>282</sup> It should also be noted that the plaintiff does not have to show that the corporation exercised direct control over its agent.<sup>283</sup>

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<sup>277</sup> Wiwa v. Royal Dutch Petroleum Co. 226 F.3d 88 (2d. Cir. 2000).

<sup>278</sup> Landoil Resources Corp. V. Alexander and Alexander Servs., Inc., 918 F.2d 1039, 1043 (2d Cir.1990).

<sup>279</sup> Miller v. Surf Properies, Inc, 4 N.Y.2d 475, 481, 176 N.Y.S.2d 318, 151 N.E.2d 874 (1958).

<sup>280</sup> Frummer v. Hilton Hotels Int'l Inc., 19 N.Y.2d 533, 281 N.Y.S.2d 41, 227 N.E.2d 851 (1967).

<sup>281</sup> Celi v. Canadian Occidental Petroleum Ltd, 804 F.Supp. 465, 468 (E.D.N.Y.1992).

<sup>282</sup> Pomeroy v. Hocking Valley Ry. Co., 218 N.Y. 530, 536, 113 N.E- 504 (1916).

<sup>283</sup> Palmieri v. Estefan, 793 F.Supp.1182, 1194 (S.D.N.Y.1992).

The Court first stated that neither Royal Dutch nor Shell had direct contacts with New York that could confer personal jurisdiction over them. Still both conduct certain activities in New York in order to have their shares, directly or indirectly, listed on the New York Stock Exchange. They had to prepare files for the Securities and Exchange Commission and employ transfer agents and depositories for their shares. Royal Dutch also maintained an Internet site, accessible in New York. Both had previously been defendants in a lawsuit in New York without challenging personal jurisdiction. They had for many years retained New York counsel and owned subsidiary companies that did business in the United States that were without doubt subject to the jurisdiction of the New York courts. The defendants also had an Investor Relations Office in New York City. The office was a part of Shell Oil, a US based subsidiary in the Royal Dutch/Shell Group. Its function was however to establish relationships between Royal Dutch and Shell Transport with investors. The manager frequently sought the approval of the defendants before scheduling meetings or making important decisions.

The district court held that the activities of the Investor Relations Office were sufficient to confer jurisdiction. The Appellate Court concluded that the conduct of the Office were attributable to the defendants for jurisdictional purposes because all the activities of the office were on the behalf of the defendants, the defendants funded the expenses of the Office and the manager sought the defendants' approval on important decisions.

Even if personal jurisdiction has been established the defendant can object that jurisdiction under the circumstances of the case does not comport with the requirements of due process.<sup>284</sup> Jurisdiction is not to be exercised when a defendant does not have "*minimum contacts*" with the forum state and/or the assertion of jurisdiction does not comport with "*traditional notions of fair play and substantial justice*" meaning that the exercise of jurisdiction must be "*reasonable under the circumstances of a particular case.*"<sup>285</sup> Once the plaintiff has showed that there are certain contacts to the forum state and justified personal jurisdiction it is the defendant that must show circumstances that would render jurisdiction unreasonable.<sup>286</sup>

The Court dismissed the objection that the exercise of jurisdiction did not comport with the requirements of due process. Circumstances in favour of the defendants were that they were foreign corporations and that the events in question did not occur in New York. Still litigation in New York City would not have been particularly inconvenient to the defendants. They were physically present in the forum state, possessed enormous resources, had no problems with litigating in English, had previously litigated in the US and had a long relationship with a law firm in the country. They were also the parent companies of one of America's largest corporations, present in New York.

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<sup>284</sup> Kernan v. Kurz-Hastings, Inc., 175 F.3d 236, 240 (2d Cir.1999).

<sup>285</sup> Chaiken v. VVPubl'g Corp., 119 F.3d 1018, 1027 (2d Cir.1997).

<sup>286</sup> Metropolitan Life Ins. Co. V. Robertson-Ceco Corp., 84 F.3d 560, 569-70 (1996).

## **Forum non conveniens**

In their appeal against the dismissal of the case on forum non conveniens grounds plaintiffs claimed that a British forum would be inadequate. The Court concluded that the British courts were fair and committed to the rule of law and therefore adequate. After a discussion on the public and private interest factors the Court concluded that the District Court had committed an error in law in three ways when dismissing the case on forum non conveniens grounds. The district court had failed to take into account that two of the plaintiffs were residents of the United States. Though none of the plaintiffs were residents of the Southern District of New York where the case was filed US residency strongly supports litigation in US courts. The district court further failed to take into account that expenses and the inconvenience imposed on plaintiffs by dismissal would exceed the inconvenience to the companies if litigation took place in the United States.

It was also an error by the Court not to take into account the interests of the United States in providing a forum to litigate alleged violations of international human rights law constituted error expressed in the ATCA, as supplemented by the Torture Victim Prevention Act (TVPA). The state has expressed a policy of having a certain interest in some matters. In case law it has been recognised that dismissing a claim pursuant to the ATCA on forum non conveniens grounds would in many cases be contrary to Congress' intent with the ATCA, to provide a federal forum for aliens suing domestic entities for violations of the law of nations.<sup>287</sup> The Court concluded that even if it is not domestic entities, but foreign companies, that is being sued there are strong reasons for not dismissing an ATCA or TVPA claim. The Court provided that the TVPA "*expresses a policy favoring our courts*" when jurisdiction is conferred by the ATCA in cases of torture.<sup>288</sup> The ATCA and the TVPA were therefore evidence supporting the fact that the US has an interest in providing a forum for the adjudication of violations of international human rights law.

In conclusion the Court of Appeals held that: (1) New York investor relations office of defendants' subsidiary was an agent of the companies for purposes of New York's personal jurisdiction statute; (2) defendants were, through the office, doing business in New York, as required to confer jurisdiction; (3) subjecting defendants to personal jurisdiction in New York did not violate due process; and (4) the district court had failed to weigh all relevant considerations in forum non conveniens determination.

## **Subject matter jurisdiction**

Before the Court in this ruling was defendants' motion to dismiss the actions on the ground of lack of subject matter jurisdiction. Objections were raised concerning all the three statutes at issue: the ATCA, the TVPA, and the RICO. The Court also considered the motion to abstain on the basis of the act of state doctrine and forum non conveniens in relation to Anderson.

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<sup>287</sup> Jota v. Texaco, Inc., 157 F.3d 163, 159 (2d Cir.1998).

<sup>288</sup> Wiwa v. Royal Dutch Petroleum Company et al., 226 F.3d88 (2d Cir.2000), at 103 and 106.

The Court granted defendants' motion to dismiss with respect to two claims only: Owens Wiwa's ATCA claim founded on an alleged violation of his right to life, liberty and security of person, and his ATCA claim for arbitrary arrest and detention.<sup>289</sup>

It should be reminded that when a Court is to decide on a motion to dismiss the Court should accept factual allegations as true and merely determine whether the complaint itself is legally sufficient. Whether factual allegations are true are determined in the ruling on the merits.

### **The Alien Tort Claims Act**

Defendants contended that plaintiffs did not sufficiently support (1) some of their claims pleading violations of international law and (2) their contention that the corporate defendants or defendant Anderson "acted under color of law". According to the defendants plaintiffs had therefore failed to fulfil the requirements for filing a suit under the ATCA: (1) an alien sue (2) for a tort (3) committed in violation of the law of nations or a treaty of the United States (4) and, with certain exceptions, that the defendant was a government actor or committed the violation while acting "*under color of law*".

#### *Violation of international norms actionable under the Alien Tort Claims Act*

First I will look at defendants' objection that plaintiffs did not sufficiently support some of their claims pleading violations of international law.

Plaintiffs alleged violations of seven international norms: (1) summary execution with respect to Ken Saro-Wiwa and John Kpuinen; (2) crimes against humanity against all plaintiffs; (3) torture of Ken Saro-Wiwa, John Kpuinen, and Jane Doe; (4) cruel, inhuman, or degrading treatment of all plaintiffs; (5) arbitrary arrest and detention with respect to Ken Saro-Wiwa, John Kpuinen, and Owens Wiwa; (6) violation of the rights to life, liberty and security of person with respect to Ken-Saro Wiwa, John Kpuinen, Owens Wiwa, and Jane Doe; and (7) violations of the right to peaceful assembly and association with respect to Ken-Saro Wiwa, John Kpuinen, Owens Wiwa, and Jane Doe.

For a suit to be actionable under the ATCA a violation of international law must be alleged. In Unocal II the Court stated that in order to give rise to a claim under ATCA, plaintiffs must allege a violation of an international norm that is "*specific, universal, and obligatory.*"<sup>290</sup> With these requirements the Court meant that the norm must be specific enough to make it possible to determine whether the conduct in question is actually in violation of that norm, the prohibition expressed by the norm must be universally recognised and the norm must be non-derogable and therefore binding at all times upon all actors. In Forti II the Court stated that the tort must be universally recognised not only to its binding status but also to its content to be actionable under the ATCA.<sup>291</sup> A Court must hence first

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<sup>289</sup> Wiwa v. Royal Dutch Petroleum Company United States District Court, S.D. New York, S.D.N.Y., Feb. 28, 2002. (Not Reported in F.Supp.2d) No. 96 CIV. 8386(KMW).

<sup>290</sup> Doe v. Unocal, 110 F.Supp.2d 1294, 1304 (C.D.Cal.2000).

<sup>291</sup> Forti v. Suarez-Mason, 694 F.Supp. 702, 712 (C.D.Cal.1988).

determine whether plaintiffs allege a violation of international law and secondly if the international norm is cognisable under the ATCA.

The Court found that it is well established that torture, summary execution, and arbitrary detention were violations of international law that are “*specific, universal and obligatory*”. Thus plaintiffs could allege violations of these norms under the ATCA. Defendants contended, however, that Doe had not alleged facts adequate to support a claim for torture, and that Owens Wiwa had not alleged facts that support a claim for arbitrary arrest. It is not for the Court to determine whether allegations are true, only if they are sufficient to support a claim. The Court concluded that Doe’s allegations with respect to torture were adequate. Owens Wiwa on the other hand had only asserted that he had previously been arrested and detained without charges at some undefined time in the past. He had therefore failed to allege facts that supported a claim for arbitrary arrest and detention and defendants’ motion to dismiss was granted with respect to this claim.

In the past it has been uncertain whether “*cruel, inhuman, or degrading treatment*” had been defined adequately under customary international law to make it actionable under the ATCA. In Forti I, the Court held that the prohibition of cruel, inhuman, or degrading treatment under international law was not clearly defined. It concluded that it was still too unclear what behaviour that actually fell within the proscription, for claims based on it to be actionable under the ATCA.<sup>292</sup> A different conclusion was reached in the Xuncax case. The Judge ruled that the prohibition of “*cruel, inhuman, and degrading treatment*” was sufficiently defined and therefore recognised under the ATCA.<sup>293</sup> The Judge however restricted his finding in that only acts of the defendants directed directly against the plaintiffs violated a defined international norm. Acts of the defendants on others affecting the plaintiffs indirectly did not violate such a norm and was therefore not cognisable under the ATCA.<sup>294</sup>

In this case the Court concluded that “*cruel, inhuman, or degrading treatment*” conduct is cognisable under the ATCA. Further that Owens Wiwa and Jane Doe had sufficiently supported their allegations with facts. The Court made references to human rights instruments like the UDHR the ICCPR and the American Convention on Human Rights. These references supported Owens Wiwa’s statement that threats from the defendants of arbitrary arrest, torture and death eventually forcing him to leave Nigeria was a violation of international law. The Court also found that Doe’s allegations that defendants had beaten her and destroyed her property were also in violation of the international proscription.

Defendants further claimed that the allegations of crimes against humanity were not actionable under the ATCA. Owens Wiwa had alleged that he had been forced in exile and Jane Doe that she had been tortured. Plaintiffs claimed that these acts were intentionally perpetrated against members of a specific civilian population, the Ogoni people, as part of a widespread attack and including persecution. Thus, according to plaintiffs,

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<sup>292</sup> Forti v. Suarez-Mason, 672 F.Supp.1531, 1540 (N.D. Cal 1987), at 1543.

<sup>293</sup> Xuncax v. Gramajo, 886 F.Supp.162 (D.Mass.1995), at 187.

<sup>294</sup> Xuncax v. Gramajo, 886 F.Supp.162 (D.Mass.1995), at 189.

defendants had committed crimes against humanity. The Court referred to the listing of crimes against humanity in Article 7 of the Statute of the International Criminal Court and to case law from international tribunals, in particular case law by the Hague tribunal, to support its conclusion that the prohibition of crimes against humanity is a norm that is customary, obligatory, and well-defined in international jurisprudence. The Court found that plaintiffs Owens Wiwa and Jane Doe had stated various facts that were violations of the established definition of crimes against humanity and that the conduct therefore was actionable under the ATCA.

It was not disputed that customary international law recognises the right to life, liberty, and personal security, and the right to peaceful assembly and expression. The Court also regarded these norms as actionable under the ATCA. Doe's allegations that she was shot and beaten while protesting were sufficient to state a claim pursuant to the right to personal security and the right to peaceful assembly. Owens Wiwa's allegation that his rights to peaceful assembly and expression were violated was also sufficiently supported by facts. He had however failed to present enough facts before the Court to support his contention that defendants violated his right to life, liberty, and personal security. Wiwa had contended that when defendants had given him the option of buying his brother's release with an end to protests against Shell Nigeria's activities by MOSOP those rights had been violated. The Court did not agree that this act had violated his right to life, liberty, and personal security. Thus Owens Wiwa's claim under the ATCA pursuant to his right to life, liberty, and personal security was dismissed with leave to re-plead this claim.

Claims of violations of international law actionable under the ATCA were thus: (1) torture with respect to Doe; (2) cruel, inhuman, or degrading treatment with respect to Doe and Owens Wiwa; (3) crimes against humanity with respect to Doe and Owens Wiwa; (4) violation of the right to peaceful assembly and association with respect to Doe and Wiwa; and (5) violation of the right to life, liberty and security of person with respect to Doe.

#### *The state action requirement*

Secondly defendants' objection that plaintiffs did not present sufficient facts showing that the state action requirement under the ATCA was satisfied. All defendants in this case are private actors. To satisfy the state action requirement plaintiffs must demonstrate that the defendant is a government actor or committed the violation while acting "*under color of law*".<sup>295</sup> To determine whether a private actor acts under colour of law a "*joint action*" test developed in case law is to be used. A private individual or entity acts under colour of law "*when he acts together with state officials or with significant state aid.*"<sup>296</sup> Another way of expressing it is that state action is present "*where there is a substantial degree of cooperative action between the state and private actors in effecting the deprivation of rights.*"<sup>297</sup>

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<sup>295</sup> Kadic v. Karadzic, 70 F.3d 232, 236 (2d Cir.1995) at 239.

<sup>296</sup> Kadic v. Karadzic, 70 F.3d 232, 236 (2d Cir.1995) at 242.

<sup>297</sup> Doe v. Unocal, 963 F.Supp.880 (C.D.Cal. 1997) at 891.

Important to note is that the Court in the Bigio v. Coca-Cola Co. Case made a difference between being a wilful participant in unlawful conduct and only being an inadvertent beneficiary.<sup>298</sup> In the latter case there is no joint action with the state and the state action requirement is not fulfilled. Plaintiffs are however not required to demonstrate that the private actor acted in concert with the government with respect to each human right violations allegedly committed. It is enough to show that there has been consistent co-operation.<sup>299</sup>

In Kadic I, the Court described three categories of international law violations: (a) genocide, (b) war crimes, and (c) other instances of inflicting death, torture, and degrading treatment.<sup>300</sup> With respect to genocide and war crimes the Kadic I Court held that individuals could be held liable for these torts without any showing of state action.<sup>301</sup> With respect to (c) the Court held that such acts were prohibited by international law “*when committed by the state officials or under color of law.*”<sup>302</sup> The Court did however not say that individuals could not be held liable for category c violations without showing state action. Under the TVPA the state action requirement is absolute, the defendant must be a government official or have been acted under the colour of law.

The crimes against humanity alleged by plaintiffs in this case fall within category c: “*other instances of inflicting death, torture, and degrading treatment*”. Even if the exceptions expressed by the Court were not absolute, the Court found that plaintiffs had not shown reasons for why violations alleged by them in this case would be exempted from the state action requirement. Again the issue is not whether the defendants actually had acted under the colour of law in the context of a claim under ATCA and the TVPA, but whether they were alleged to have done so. The Court used the “*joint action*” test. The Court was hence to determine whether it was alleged to have been a substantial degree of co-operation between the defendants and government officials. First plaintiffs had to sufficiently allege that the link between Royal Dutch/Shell and Shell Nigeria was so strong that the latter was controlled and dominated by Royal Dutch/Shell. Only if these facts were proven true, could Royal Dutch/Shell be held liable for torts committed by Shell Nigeria.

Plaintiffs claimed that meetings between Royal Dutch/Shell and Shell Nigeria had taken place in England and the Netherlands in February 1993 with the aim of finding ways of striking down MOSOP resistance. The Court found these allegations sufficient. Secondly there had to be allegations of co-operation between Royal Dutch/Shell and the Nigerian authorities. The Court concluded that plaintiffs had alleged, and supported their allegations with sufficient facts, that there was a substantial degree of co-operative action between corporate defendants and the Nigerian Government in committing the unlawful conduct. Plaintiffs had alleged that

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<sup>298</sup> Bigio v. Coca-Cola Co., 239 F.3d440 (2c Cir.2000).

<sup>299</sup> Burton v. Wilmington Parking Authority, 365 US715, 724-725 (1961).

<sup>300</sup> Kadic v. Karadzic, 70 F.3d 232, 236 (2d Cir.1995) at 241.

<sup>301</sup> Kadic v. Karadzic, 70 F.3d 232, 236 (2d Cir.1995) at 241-42, 243.

<sup>302</sup> Kadic v. Karadzic, 70 F.3d 232, 236 (2d Cir.1995) at 243.

Royal Dutch/Shell, often through Anderson, supported the Nigerian military and police with money, boats, helicopters and weapons. Further Royal/Dutch was alleged to have shared information with the Nigerian military and police and helped them with planning raids and terror campaigns and through bribing witnesses.

The Court thus found that the state action requirement applied to plaintiffs' claims and that plaintiffs succeeded in satisfying the "*joint action test*" in relation to both defendants.

### **The Torture Victim Protection Act**

The Torture Victim Protection Act (TVPA, 28 USC § 1350) recognises explicitly that the law of nations is incorporated into the law of the United States. It provides that a violation of the prohibition of torture and extrajudicial killings in international law of human rights is ipso facto a violation of US domestic law. §2(a) provides that "[*a*]n individual who, under actual or apparent authority, or color of law, of any foreign nation..." subjects an individual to torture is liable for damages to that individual in a civil action. In cases of extrajudicial killings the perpetrator is liable for damages to the victim's legal representative, or to any person who may be a claimant in an action for wrongful death. The requirement that alleged violations must have been perpetrated "*under actual or apparent authority or color of law, of any foreign nation*" is the codification of the state action requirement in the ATCA. There are no exceptions to this requirement. § 2(b) requires that plaintiffs exhaust "*adequate and available*" local remedies. There is no such requirement in the ATCA.

The TVPA is not, unlike the ATCA, a jurisdictional statute<sup>303</sup> and therefore does not in itself supply a jurisdictional basis for plaintiffs' claim.<sup>304</sup> The TVPA merely provides a cause of action for torture and extrajudicial killings. Rather, the TVPA works in conjunction with the ATCA, expanding the reach of ATCA to torts committed against United States citizens, not just aliens, who, while in a foreign country, are victims of torture or extra judicial killing. An alien can therefore choose between bringing a claim under the ATCA or the TVPA.

Defendant Anderson asserted several defences against the TVPA claims directed against him: (1) the TVPA provides a cause of action against those directly responsible for torture or extrajudicial killing, and not those who allegedly only assisted in such action; (2) plaintiffs do not belong to the class of plaintiffs who can bring claims for torture under the TVPA; and (3) plaintiffs have not exhausted available remedies as required by the TVPA. The Court dismissed these arguments.

The TVPA provides for liability for an individual who "*subjects*" another to torture or extrajudicial killing. Defendant Anderson interpreted this in the way that the TVPA provides a cause of action only against individuals who are primary violators and not those who assist, abet or conspire to commit torture or extrajudicial killing. The Court did not interpret the word subject as narrowing the reach of the statute to the

<sup>303</sup> Al Odah v. United States, 321 F.3d 1134, 1146 (D.C.Cir.2003).

<sup>304</sup> Kadic v. Karadzic, 70 F.3d 232, 236 (2d Cir.1995) at 246.

primary violators, but rather that the word expands the reach. The Court thus concluded that not only the primary violators, but also those who cause someone to undergo torture or extrajudicial killing, could be held liable under the TVPA.

Anderson also argued that the TVPA limits the class of plaintiffs who can bring claims under the statute. Claims for torture on behalf of Saro-Wiwa and John Kpuinen, brought by their legal representatives, Ken Wiwa and Blessing Kpuinen, would thus be barred. Anderson compared section 2(a)(1), which provides a cause of action for torture and section 2(a)(2), which describes the cause of action for extrajudicial killing. Section 2(a)(2) explicitly provides that claims for extrajudicial killings may be brought by the “*individual's legal representative*” and section 2(a)(1) provides that a defendant can be liable for a claim of torture “*to that individual*”.

Anderson makes the conclusion that according to section 2(a)(1) only victims of torture, and not their representatives, are allowed to sue under the TVPA. The Court ruled that such an interpretation was not correct, as it would thwart the purpose of the TVPA to redress torture. This ruling was in contrast to the conclusion by the Court in the Xuncax Case in which the Court ruled that a third party, in that case a relative, did not have the right to sue for torture under the TVPA.<sup>305</sup>

Next argument by Anderson was that plaintiffs had not exhausted all “*available and adequate remedies*” in Nigeria as required by the TVPA § 2(b). Hence the claimed should be dismissed. Anderson referred to the Justice Oputa Panel and Nigerian Courts as available and adequate remedies that plaintiffs had not exhausted. The Court disagreed. First it stated that the defendants bear the burden of demonstrating that plaintiffs have not exhausted available remedies in Nigeria. Only when Anderson has proved that plaintiffs have failed to exhaust “*available and adequate remedies*” in Nigeria are plaintiffs required to demonstrate that such remedies are inadequate or obviously futile. According to the Court Anderson did not succeed in meeting this initial burden. There may be difficulties in bringing a suit against Anderson in Nigeria because he is a non-citizen and non-resident of Nigeria. The Court also stated that Nigerian courts were corrupt and inefficient. The Justice Oputa was not an available remedy according to the Court as its purpose was reconciliation and not to provide remedies.

### **The Racketeering Influenced and Corrupt Organisations Act**

Plaintiffs contended that Royal Dutch / Shell's actions violated the Civil Racketeering Influenced and Corrupt Organizations Act (RICO, 18 USC. §§ 1961-1968) leading to Jane Doe's loss of property and Owens Wiwa's loss of business. RICO provides a civil cause of action for “[a]ny person injured in his business or property by reason of a violation of section 1962.” § 1962(c) provides that: “*It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity.*” Hence to be able to state a RICO claim a plaintiff

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<sup>305</sup> Xuncax v. Gramajo, 886 F.Supp.162 (D.Mass.1995), at 192.

must demonstrate: (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. Additionally the enterprise must be engaged in, or at least affect, interstate or foreign commerce. 18 USC. § 1964 (c) confers standing to assert a RICO claim to “*any person injured in his business or property by reason of a violation of section 1962.*” Thus, in order to have standing, a plaintiff must allege a violation of section 1962, injury to business or property and causation of the injury by the violation.

Within the meaning of a RICO claim an enterprise is “*a group of persons associated together for a common purpose of engaging in a course of conduct.*”<sup>306</sup> An enterprise “*includes any individual, partnership, corporation, association or other legal entity, and any union or group of individuals associated in fact although not a legal entity.*” (§ 1961(4)). There is a possibility that corporations and their agents or subsidiaries can be considered as such an enterprise and not as one entity.<sup>307</sup>

RICO Claims cannot be used against all unlawful acts. In §1961(1) all the predicate acts that can constitute “*racketeering activity*” are listed: (a) “[A]ny act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, ... which is chargeable under State law and punishable by imprisonment for more than one year” and (b) acts indictable under the Hobbs Act (Title 18 USC. § 1951). One problem Courts have faced is to what extent a predicate offence must be chargeable under the laws of a particular state. It has been held that “[r]eferences to state law serve a definitional purpose, to identify generally the kind of activity made illegal by the federal statute.”<sup>308</sup> This means that the act must not necessarily be chargeable under state law, but that state law is to be used for guidance. It should also be noticed that allegations are actionable under the Hobbs Act statute only if it is alleged that the acts “*obstructs, delays, or affects commerce*” within the United States (18 USC. § 1951(b)(3)). The Second Circuit has held that the level of effect can be low holding that “*whether slight, subtle or even potential is sufficient to uphold a prosecution under the Hobbs Act.*”<sup>309</sup>

It is however not enough to show that an enterprise has engaged in a racketeering act, plaintiffs must allege a pattern of racketeering activity. In Case law this has been defined as “*a series of allegedly criminal acts.*”<sup>310</sup> Plaintiffs must demonstrate at least two RICO predicate acts that are related to each other and constitute continuing racketeering activity or a threat thereof.<sup>311</sup>

Defendants objected that: (1) RICO does not apply to extraterritorial action; (2) plaintiffs fail to state a claim under the RICO statute; and (3) plaintiffs lacked standing to bring a RICO claim. The Court dismissed all the objections.

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<sup>306</sup> Procter & Gamble v. Big Apple Indus, Bldg, Inc., 879 F.2d 10, 15 (2d Cir. 1989).

<sup>307</sup> Riverwoods Chappaqua Corp. V. Marine Midland Bank N.A., 30 F.3d 339, 344 (2d Cir.1994).

<sup>308</sup> United States v. Bagaric 706 F.2d42 (2d Cir. 1983).

<sup>309</sup> United States v. Shareef, 190 F.3d71, 75 (2d Cir.1999).

<sup>310</sup> Procter & Gamble v. Big Apple Indus, Bldg, Inc., 879 F.2d 10, 15 (2d Cir. 1989), at 15-

<sup>311</sup> H.J. Inc. V. Northwestern Bell Tel. Co, 492 US 229, 240 (1989).

In this case the issue of extraterritoriality was raised. The RICO statute is silent as to its extraterritorial application. A foreign corporation can however be liable under RICO in spite of its location. The difficulty has been to determine the degree of domestic activity required to justify RICO jurisdiction over the foreign corporation. Two tests for courts have developed determining sufficient domestic activity the “*conduct test*” and the “*effects test*.<sup>312</sup> In the conduct test the Court looks at where the conduct at issue was taken and in the effects test where the effect of the conduct at issue took place. Important to keep in mind when determining RICO extraterritorial jurisdiction over foreign individuals and corporations is that the purpose of RICO is “*to protect ... domestic markets from corrupt foreign influences.*<sup>313</sup> The ultimate inquiry is whether the resources of the US really should be used for solving the case at hand.<sup>314</sup>

Plaintiffs in this case relied on the “*effects test*”. Plaintiffs pleaded that subject matter jurisdiction was appropriate because a great deal of defendant’s oil was shipped to the US. The alleged racketeering activities were thus used by the defendants for gaining an unfair competitive advantage in the United States oil market. The Court concluded that if these allegations were proven true, they would affect the economy of the US. The allegations were thus sufficient for supporting subject matter jurisdiction under the RICO statute.

Plaintiffs alleged a RICO enterprise between the two corporate defendants, Shell Nigeria, the Nigerian authorities, and Willbros West Africa, Inc. Each of these satisfies the criteria in 18 USC. § 1961(3) through being an “*individual or entity capable of holding a legal or beneficial interest in property*”. Plaintiffs further alleged that the defendants arranged meetings and co-ordinated activities unlawful under RICO. Defendants argued that what had been described by plaintiffs was no enterprise within the meaning of RICO. According to defendants an enterprise cannot consist of defendants and their agents only, as these would be one single entity. The Court concluded that the alleged enterprise included at least three separate entities: the corporate defendants (with Shell Nigeria), the Nigerian military, and Willbros. The Court dismissed defendant’s argument.

Plaintiffs have alleged numerous predicate acts like bribery, murder, arson and extortion. These acts are all included in the definition of “*racketeering activity*” as defined in section 1961(1). Defendants contended that the alleged acts were not predication acts within the meaning of RICO because they did not occur within the US and thus did not violate the laws of a state or of the United States. The Court disagreed and reminded defendants that acts did not have to be actual violations of state law, but that state law was only to be used for guidance. Defendants further argued that plaintiffs had failed to plead a Hobbs Act violation because extortion of property from plaintiff Owens Wiwa and Jane Doe did not affect commerce within the United States (18 USC. § 1951(b)(3)). The Court ruled that

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<sup>312</sup> North South Finance Corp. V. Al-Turki, 100 F.3d 1046, 1051 (2d Cir.1996), at 1051.

<sup>313</sup> Madenes v. Madenes, 981 F.Supp.241, 250 (S.D.N.Y.1997).

<sup>314</sup> Bersch v. Drexel Firestone Inc., 519 F.2d974, 985 (2d.Cir.1975).

plaintiffs' allegations that these acts were a way of selling cheap oil in the US were sufficient to support that US commerce was affected.

There was no doubt that plaintiffs had sufficiently demonstrated defendants' direct involvement in a "*pattern*" of racketeering activities. Plaintiffs had pleaded that defendants committed at least two predicate acts, that those predicate acts were related, and that there remained a continued threat of racketeering activity. Plaintiffs had also demonstrated commercial nexus. According to 18 USC. § 1962(c) plaintiffs must show that interstate or foreign commerce was affected. The same reasons used for justifying extraterritorial jurisdiction, could also show that interstate or foreign commerce was affected.

For RICO standing plaintiffs must not only show a violation of section 1962, but also injury to business or property and causation of the injury by the violation. Owens Wiwa and Jane Doe alleged that defendants' racketeering activities caused injury to their businesses and property. Owens Wiwa was forced to leave Nigeria and leave his medical practice because of fear. Jane Doe alleged that she lost her crops because of her physical injuries caused by the Nigerian military, acting with Shell Nigeria. Now she is no longer able to operate her farm. Injury had thus been pleaded. Further the alleged violation of the RICO statute must have been the legal and proximate cause of the injury. The Court found that also this had been sufficiently proven. Hence plaintiffs met all the RICO's standing requirements.

### **Act of state doctrine and forum non conveniens**

Defendants urged the Court to abstain from exercising jurisdiction over this case under the act of state doctrine. They claimed that a ruling by the Court would judge the acts of the Nigerian Government within its own territory and interfere with the independence of Nigeria. The act of state doctrine should however only be applied in rare cases and the defendants were to justify the application of the doctrine.<sup>315</sup> When determining if a court is to apply the act of state doctrine the Court should weigh the impact of the ruling on US foreign relations. The Court answered that the military regime alleged to be responsible for the torts had been replaced by a democracy. The new democracy was trying to investigate the alleged abuses and findings by the Court would thus rather be consonant with the policy of the present Nigerian Government. The Court decided not to apply the act of state doctrine.

The Second Circuit had already ruled in the previous decision on this case that a dismissal on forum non conveniens ground was not proper and the current Court relied on that ruling also in this case. Defendant Anderson however claimed that the action against him should be dismissed on the grounds of forum non conveniens. Anderson demonstrated differences between himself and the corporate defendants; the Court however concluded that these distinctions did not warrant a different result.

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<sup>315</sup> Kadic v. Karadzic, 70 F.3d 232, 236 (2d Cir.1995) at 250.

## **The African Commission on Human and Peoples' Rights**

Several communications were filed to the African Commission concerning the detention and trial of Ken Saro-Wiwa and his co-defendants. The Commission took a final decision on the merits on 31 October 1998.<sup>316</sup>

International Pen and Constitutional Rights Project (CRP) separately submitted the first two communications before the Tribunal was created. The communications complained about arbitrary detention and that detainees were held under inhuman conditions and incommunicado. In June 1995, after the trial had begun, CRP submitted a supplement alleging harassment of defence counsel, military presence at meetings between defendants and their counsel, biased tribunal members, lack of evidence, and bribery of witnesses.

Shortly after the death sentences were issued CRP asked for provisional measures to prevent the executions. The Secretariat of the Commission invoked revised Rule 111 of the Commission's Rules of Procedure concerning interim measures for sending a note verbal to the Ministry of Foreign Affairs of Nigeria, the Secretary General of the OAU, the Special Advisor (Legal) to the Head of State, the Ministry of Justice of Nigeria, and the Nigerian High Commission in the Gambia. The Secretariat pointed out that there was a communication pending at the Commission, that the Government of Nigeria had invited the Commission to undertake a mission to Nigeria to discuss the communications and asked that the executions be delayed until those discussions were ended. The Commission did not receive a response to the appeal and the executions were carried out.

Interights submitted a communication in 1996 alleging that those condemned had been kept in arbitrary detention under inhuman conditions and incommunicado. There were also claims that the tribunal members had not been independent, that there had been no presumption of innocence, no time for defence counsel to prepare their defence of the accused, and no right of appeal. CLO submitted a communication in December 1996 alleging that the Civil Disturbances (Special Tribunal) Decree was invalid because it had been made without the participation of the people, a tribunal that included military officers and members of the PRC could not be impartial, and that the decree violated the right to appeal and fair trial. The communication further alleged that the trial, conviction and execution of Ken Saro-Wiwa and others violated the African Charter.

The Nigerian Government made no written submission and did not refute the allegations in its oral presentation. The Commission thus made its decision on the presumption that the facts presented in the communications were correct.

Art. 6 of the African Charter prohibits arbitrary arrest and detention. The Commission provided that the State Security (Detention of

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<sup>316</sup> Final decision taken 31<sup>st</sup> October 1998 in Banjul concerning communications 137/94, 139/94, 154/96 and 161/97 by International Pen, Constitutional Rights Project (CRP) and Civil Liberties Organisation (CLO), Nigeria on behalf of Ken Saro-Wiwa and co-defendants.

[http://www1.umn.edu/humanrts/africa/comcases/137-94\\_139-94\\_154-96\\_161-97.html](http://www1.umn.edu/humanrts/africa/comcases/137-94_139-94_154-96_161-97.html) accessed on 20.7.2003.

Persons) Act of 1984 and State Security (Detention of Persons) Amended Decree No. 14 (1994) *prima facie* violated Art. 6 as they allowed the Government to detain people for three months without the detainees having access to court or even information. There was therefore no need to look at the detention of the Saro-Wiwa and the others specifically.<sup>317</sup>

International PEN had alleged that Ken Saro-Wiwa were kept in leg irons and handcuffs, had been beaten, kept in unsanitary conditions and denied medical attention. It was alleged that other co-defendants had been beaten and chained to the walls in their cells. The Commission concluded that there had been a violation of Art. 5 providing the right to human dignity and prohibiting "*torture, cruel, inhuman or degrading punishment and treatment*".<sup>318</sup> Art. 16 protects the right to health. The Commission pointed out that the obligations on the state by this right are heightened in relation to someone in custody. Denials of requests for medical attention by Saro-Wiwa were thus in violation of Art. 16.<sup>319</sup>

The Commission referred to its previous decision ACHPR/87/93 where it had stated that special tribunals established under the Civil Disturbances Act violated the right to a fair trial in Art. 7.1 (d). That decision based its conclusion on the fact that their composition is at the discretion of the executive branch and thus in principle not impartial. The Commission thus found that it did not need to go into the conduct of this particular tribunal, but could rely on the earlier decision that all Civil Disturbances Tribunals violated the right to a fair trial.<sup>320</sup>

The right to appeal is provided in Art. 7(1) (a) and the independence of courts is guaranteed by Art. 26. The Commission concluded that because the PRC was the ruling council of the Federal Military government it was not impartial or independent. Both Articles 7(1) (a) and 26 had been violated.<sup>321</sup> In communication 154/96 it had been alleged that the Tribunal had admitted at the conviction that there was no direct evidence linking the accused to the murders. This had not been contradicted by the Government. The Commission thus found a violation of Art. 7(1) (b), the right to be presumed innocent.<sup>322</sup> According to Communication 154/96 and Communication 139/94 defence lawyers had been harassed and after the withdrawal of all defence counsel the trial continued without legal representation of the accused. It was also alleged that the defence was denied access to evidence used by the prosecution. The

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<sup>317</sup> Final decision concerning communications 137/94, 139/94, 154/96 and 161/97, section 83.

<sup>318</sup> Final decision concerning communications 137/94, 139/94, 154/96 and 161/97, section 81.

<sup>319</sup> Final decision concerning communications 137/94, 139/94, 154/96 and 161/97, sections 112.

<sup>320</sup> Final decision concerning communications 137/94, 139/94, 154/96 and 161/97, sections 86, 90.

<sup>321</sup> Final decision concerning communications 137/94, 139/94, 154/96 and 161/97, sections 93, 95.

<sup>322</sup> Final decision concerning communications 137/94, 139/94, 154/96 and 161/97, section 96.

Commission therefore found that a violation of the right to a defence, Art. 7(1) (c), had occurred.<sup>323</sup> Since the trial was in violation of Art. 7 the executions were in violation of the right to life, Art. 4.<sup>324</sup>

It had been alleged that the condemned had been tried and convicted for their opinions, membership in MOSOP and spreading of information. The Commission thus found that there had been a violation of: the right to freedom of assembly, Art. 1; the right to free association, Art. 10; and the right to express and disseminate opinions, Art. 9(2).<sup>325</sup>

The Commission further condemned the Nigerian Government for ignoring its obligations to institute provisional measures. The Commission had appealed to the Government that it should forestall the executions pending discussions with the Commission at its mission to Nigeria. The Government had thus not respected its obligations under the Charter Rule 111 of the Commission's Rules of Procedure (revised) which aims at preventing irreparable damage being caused to a complainant before the Commission. This conduct was in violation of Art. 1 of the African Charter.

Just like in the decision by the African Commission concerning oil-exploitation the actual decision by the Commission is fair, but too late. The first communication was filed in 1994 before the trial had even started, but the decision did not come until 1998 long after the executions. No particular action has been taken on the basis of the decision by the Nigerian Government or NGOs.

## **UN involvement**

### **The UN fact-finding mission**

On 22 December 1995 the General Assembly asked the Secretary-General to contact the Government of Nigeria. The Secretary-General was to discuss the human rights situation in Nigeria and to report back of the possibilities for the UN to assist Nigeria in achieving democratic rule.<sup>326</sup> Previous to the resolution the Government of Nigeria had sent a letter to the secretary-general dated 19 December 1995 in which it invited the Secretary-General to send a fact-finding mission to investigate the trial and execution of Ken Saro-Wiwa and others and the planned transition to civilian democratic rule in Nigeria. The mission arrived in Lagos on 29 March 1996. The mission resumed its work in New York on 15 April 1996 and finalised its report on 22 April 1996.<sup>327</sup>

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<sup>323</sup> Final decision concerning communications 137/94, 139/94, 154/96 and 161/97, sections 97-99, 101.

<sup>324</sup> Final decision concerning communications 137/94, 139/94, 154/96 and 161/97, section 103.

<sup>325</sup> Final decision concerning communications 137/94, 139/94, 154/96 and 161/97, sections 108, 110.

<sup>326</sup> General Assembly resolution 50/199 paragraph 7.

<sup>327</sup> Report of the fact-finding mission of the Secretary-General to Nigeria – Summary of information and views received. NDM Information Release

The terms of reference of the fact-finding mission was set by the Secretary-General, after consultation with the Government of Nigeria. It was composed of: Justice Atsu Koffi-Amega, former Minister for Foreign Affairs and former President of the Supreme court of Togo and a member of the African Commission for Human and People's Rights; Justice V.S. Malimath, member of the National Human Rights Commission of India; and John P. Pace, Chief of Legislation and Prevention of Discrimination Branch, Office of the High Commissioner for Human Rights/Center for Human Rights. The mission was to investigate whether the trial and execution of Ken Saro-Wiwa and others had violated any international human rights instruments to which Nigeria is a party or Nigerian domestic law.

In order to perform this investigation the mission was mandated to consult with persons, officials and organisations involved in the case.<sup>328</sup> The mission reported that they had been able to perform consultations. The mission had however been informed by some persons and organisations, which had attempted to get in touch with the mission or who had been interviewed by the mission, that they had been arrested and/or detained. When investigating the trial of Saro-Wiwa and others the mission had gathered information from the families of the four murdered chiefs, the families of the executed, Ledum Mitee, and a delegation from MOSOP. It interviewed two of the members of the special tribunal, three members of the prosecution team, and some members of the defence counsel. The trials were also discussed at meetings with the Minister for Foreign Affairs, the Minister of Justice/Attorney-General and his top aides, the Chief Justice, and representatives of the Bar Association. Further meetings were held with political leaders, NGOs and political associations in Abuja, Lagos, Port-Harcourt and other states visited by the mission.<sup>329</sup>

In its conclusion the mission started with reporting objections connected to the Tribunal raised by several organisations including MOSOP, the Nigerian Bar Association, the Civil Liberties Organisation, Amnesty International Nigeria section and the Lawyers for the defence. Examples of objections were the refusal to accept evidence, having simultaneous trials and the lack of the right to appeal. The mission also reported the defence to the objections by the lawyers for the prosecution, the judges of the Ogoni Tribunal, the defence lawyers appointed by the Tribunal and government officials.<sup>330</sup>

In its own analysis the mission looked at possible violations of relevant international human rights instruments and Nigerian law. It started with looking at whether the procedures for establishing a tribunal as envisaged in the Civil Disturbances (Special Tribunal) Act No of 1987 had been followed. The mission was of the opinion that there were no signs that

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May 29, 1996. <http://www2.h-net.msu.edu/~africa/sources/unreport.html>  
accessed on 17.6.2003.

<sup>328</sup> Chapter "Introduction", section 5.

<sup>329</sup> Chapter "Summary on information and views on the trials of Mr. Ken Saro-Wiwa and Others", section 15.

<sup>330</sup> Chapter "Summary on information and views on the trials of Mr. Ken Saro-Wiwa and Others", sections 19- 20.

that the President had constituted an investigation committee previous to the Tribunal as envisaged by the Act. The Tribunal had therefore been constituted in violation of the Act and hence had no jurisdiction to try Saro-Wiwa and others.<sup>331</sup>

The mission stated that the trials had not been fair on a number of issues: During the detention pending trial accused had been held under "*inhuman conditions*" and denied access to counsel, there had been limited access to counsel during the trial and harassment of defence lawyers, military involvement in the trials "*affecting the credibility of witnesses*" and intimidating the accused and others connected to the trial, unfair treatment of evidence, and finally refusals by the Tribunal to stay proceedings while counsel prepared their defence while cases were pending at national courts. The mission concluded that the Tribunal violated "*the standard of impartiality and independence set out in applicable human rights law as found in the African Charter on Human and People's Rights (article 7(1-d) and article 26) and the International covenant on Civil and Political Rights, (article 14(1))*."<sup>332</sup> In particular through the presence of the military.

According to the mission Part III, Section 7 of the No. 2 1987 Act providing for "*confirmation*" of the sentence by the PRC could not be regarded as a right to judicial review. The mission had been informed that the records of the proceedings had not been completed before the confirmation and that the PRC could not have treated the matter adequately during such a limited period of time. According to the above-mentioned provision a sentence is not legally valid without confirmation. Further the convicted had not been given a copy of the judgement or sufficient time that would have enabled them to prepare and submit a petition to the President praying for clemency. The mission hence first found a violation of the right of appeal recognised in Nigerian domestic law and Article 14(5) of the ICCPR and secondly a violation of Article 6(4) of the ICCPR providing the right to seek pardon.<sup>333</sup>

The mission recommended that the Civil Disturbances (Special Tribunal) Act No 2 of 1987 should be repealed and offences connected to civil disturbances be tried in ordinary criminal courts. An alternative was to amend the Act in several ways as to make it conform with human rights standards. All trials that were pending under the 1987 Act were to be suspended until recommended amendments had been carried out. The mission also recommended that a panel of jurists was to be established to determine financial relief to the families of the executed. In regard of the Ogoni people the constitution of a committee comprised of representatives of the Ogoni community and other minority groups in the region was recommended. The Committee was to promote socio-economic development, receive complaints directed at the authorities and make recommendations to the Government.<sup>334</sup>

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<sup>331</sup> Chapter "Analysis, observations and recommendations", sections 4-7.

<sup>332</sup> Chapter "Analysis, observations and recommendations", sections 8, 16.

<sup>333</sup> Chapter "Analysis, observations and recommendations", sections 10-15.

<sup>334</sup> Chapter "Analysis, observations and recommendations", sections 14-15.

### **Other steps by the UN and the effect of UN-involvement**

The fact-finding mission was not the only step taken by the UN-system in relation to the trial of Saro-Wiwa and others. The UN Human Rights Committee requested a report from the Government of Nigeria on 29 November 1995.<sup>335</sup> The Committee expressed that it was “[d]eeply concerned by recent executions after trials that were not in conformity with provisions of the Covenant”. The report was submitted in time for the 56<sup>th</sup> session of the Committee.<sup>336</sup>

When the Committee examined the report it found a number of violations of the ICCPR. It concluded that the detention incommunicado for an indefinite period and the suppression of habeas corpus violated Art. 9. Further the establishment of special tribunals, which excluded “*the free choice of a lawyer, and the absence of any provisions for appeals*” violated Art. 14. A sentence of death by a tribunal which violated human rights ”*led to the arbitrary deprivation of life of Mr. Ken Saro Wiwa and the other accused*”, hence violating also Art. 6 (1) (2). The neglect to investigate ”*allegations of torture, ill-treatment or conditions of detention*” meant that issues were also raised under Art. 7. The Committee recommended that decrees establishing special tribunals or including ouster clauses should be revoked and all trials before special tribunals suspended. Further the Committee recommended that the right to a fair trial provided in Art. 14 (1), (2) and (3) and the right to appeal provided in (5) was to be guaranteed. The Government was to inform the Committee of the steps taken to implement the above recommendations.

The UN Special Rapporteur on Torture also responded to the Ogoni Civil Disturbances Tribunal. It transmitted urgent appeals on the behalf of Ken Saro-Wiwa.<sup>337</sup>

The appeal by the Special Rapporteur did not prevent the trial or execution. The direct response to the report and recommendations by the fact-finding mission was also weak. The Government did not take any action to compensate the families of deceased and no committee with representatives of the Ogoni communities was created. NGOs still claim that the efforts of the UN had an impact. According to CLO the Government did make some changes in the 1987 Act as recommended in the report. The serving armed forces personnel were actually removed from the special tribunals and it was provided for a judicial appeal process.<sup>338</sup> In 1999 the new democratic Government repealed a number of the decrees that were listed by the Human Rights Committee. It is however difficult to determine the role that the Committee report had behind this decision.

Mrs. Bowei from SERAC commented that she believes that the UN involvement at the time was valuable for putting extra pressure on the Government. Ledum Mitee commented that the UN involvement had an important impact. Apart from putting pressure on the Government it

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<sup>335</sup> Concluding Observations of the Human Rights Committee, Nigeria: 03/04/96.

<sup>336</sup> CCPR/C/92/Add.1.

<sup>337</sup> UN Doc E/CN.4/1994/31, paragraph 419.

<sup>338</sup> Civil Liberties Organisation, Ogoni Trials and Travails, Lagos, Nigeria, ISBN 978-23188-5-9, 1996, p. vii.

provided support to the victims. MOSOP is now actively represented at the UN working group on minorities and Saro believes that this work is of value (he himself is the representative of the Ogoni people). SERAC on the other hand has no collaboration with the UN. Mrs. Bowei emphasised that she believes that regional procedures should be exhausted before the UN becomes involved.

## **Sanctions**

After the executions of Saro-Wiwa and others governments were under rising pressure to impose sanctions against Nigeria. The US and the EU banned arms sales to Nigeria, imposed visa restrictions on Nigerian officials and cut off aid to the Nigerian regime. Some measures had been taken previous to the executions but these were strengthened to some extent and several foreign ambassadors were withdrawn from Nigeria in protest. Nelson Mandela, then President of South Africa, led a successful move to suspend Nigeria from the Commonwealth. Bills were introduced in the US Senate that were not suggesting very comprehensive sanctions, but at least they included measures like a ban on all new investments in Nigeria and a freeze on the personal assets of top officials of the Nigerian regime. The reaction from European countries was however rather negative.<sup>339</sup>

Governments were not committed to the sanctions. The arms embargo, which was imposed after the jailing of Abiola, probable winner of the 1993 general election, was ineffective. Just prior to its imposition the Nigerian Government had signed considerable contracts with Britain buying heavy arms. The restrictions did not cover existing contracts and hence Britain's Vickers delivered 80 battle tanks in 1995.<sup>340</sup> Further there was a quite return of ambassadors to Nigeria fairly soon. The UN fact-finding mission said that the representatives of Nigerian society that they had met had opposed the imposition of sanctions against Nigeria. It had been claimed that they were hurting the ordinary people and negatively affecting the whole West African region. The mission therefore concluded that strengthened sanctions against Nigeria would only slow down development.<sup>341</sup> Mr. Nwosu said that the sanctions did not have any direct impact on the actions of the Government.

National and international NGOs agreed that the only sanction that would have had an impact on the Government was restrictions on trade and investments within the oil-sector. As previously explained most of the revenue flowing to the Government came and still comes from oil exports. Oil sanctions were endorsed by a wide range of famous individuals and

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<sup>339</sup> CNN, <http://www.cnn.com/WORLD/9703/21/briefs.pm/nigeria.soyinka/>, accessed on 20.7.2003. Nigeria: Sanctions Need New Push Date Distributed (ymd): 960324, [http://www.sas.upenn.edu/African\\_Studies/Urgent\\_Action/dc\\_32496.html](http://www.sas.upenn.edu/African_Studies/Urgent_Action/dc_32496.html), accessed on 20.7.2003.

<sup>340</sup> Dixon Norm, "Nigeria: US, Britain, EU refuse sanctions", <http://www.greenleft.org.au/back/1995/214/214p19b.htm>, accessed on 20.7.2003.

<sup>341</sup> Report of the fact-finding mission of the Secretary-General to Nigeria – Summary of information and views received, chapter 2.2 "Analysis, observations and recommendations", sections 26, 37.

organisations like Nelson Mandela, Nobel Prize winner Wole Soyinka, Archbishop Desmond Tutu, Human Rights Watch, Greenpeace, and the Sierra Club.<sup>342</sup> Governments however chose to put their own economic interests in the premier position. Britain, the Netherlands and the US were Nigeria's main investors. The US was the biggest importer of Nigerian oil, followed by Germany, France and Spain. The British and Dutch Governments, home-countries of involved oil-corporations, worked hard against the imposition of oil sanctions. Sweden, Belgium, Luxembourg, Finland and Denmark were the only EU-countries supporting oil-sanctions.<sup>343</sup>

Mr. Nwosu said that in one way the restrictions that were imposed were a way of making a statement to the Government that the international community opposed its conduct, but at the same time the reluctance to impose oil-sanctions clearly told the Government that the threat was not a serious one but "*only lip service*".

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<sup>342</sup> Nigeria: Sanctions Need New Push Date Distributed (ymd): 960324, [http://www.sas.upenn.edu/African\\_Studies/Urgent\\_Action/dc\\_32496.html](http://www.sas.upenn.edu/African_Studies/Urgent_Action/dc_32496.html), accessed on 20.7.2003.

<sup>343</sup> Dixon Norm, "Nigeria: US, Britain, EU refuse sanctions", <http://www.greenleft.org.au/back/1995/214/214p19b.htm>, , accessed on 20.7.2003.

# **Conclusion – Procedures for addressing violations of international law**

The situation in the oil-producing states surrounding the Niger-Delta has improved since the 1990s, but there are still frequent human rights abuses within the area. Environmental pollution is present, the local population is living in poverty and violence is common. Oil-corporations and Nigerian authorities have made many public commitments in different forms, but implementation is lacking. Most of the human rights affected have been addressed by different procedures, directly or indirectly. The right to property for example was not explicitly mentioned, but there have been national cases concerning both compensation to victims for environmental pollution and compensation for oil to the state of origin. Due to the efforts of the African Commission even the social rights were given attention. It should however be pointed out that no social or economic rights were directly referred to by either Nigerian or US Courts.

It is the concerted acts of the Government and the transnational corporations that have resulted in the human rights abuses. Which of these two can be held responsible for these violations? Traditionally it is only states, and not private entities, that are bound by international law. States can now also be held accountable for acts by private entities that result in human rights abuses through their obligation to take measures to protect against such acts. One example is the decision by the African Commission that the Nigerian Government was obliged under the ACHPR to protect the locals against environmental pollution. It was the acts of a private entity that was behind the human rights violation, still it was not the private entity that violated international law, but the state.

There is a move towards binding transnational corporations directly by international law. Parts of this move are voluntary codes of conduct, partnerships between corporations and Governments and involvement of corporations in international negotiations. States have still not been able to agree on an international convention that would be directly binding on all transnational corporations. There are agreements obliging Governments to oblige corporations to act in a certain way, but this is not the same thing as the corporations being bound by international law. Indirectly corporations are however bound. Through making international law part of national law corporations can be held accountable for violations.

It is not remarkable that violations of international law transformed into Nigerian national law by private entities within Nigeria can be tried in Nigerian national courts as in cases concerning compensation for environmental pollution. More remarkable is that violations of international law incorporated into US national legislation can be claimed within US courts although acts were taken within Nigeria. A private entity is thus found accountable for violations of obligations set in international law, independent of where in the world the acts were committed. The US legislator has thus taken an important step towards holding transnational

corporations directly responsible for violations of international law. One should however not forget the state action requirement for litigating under the ATCA and the TVPA. It is only if acts have been taken in conjunction with the Government that violations of international law by private entities can be claimed.

Many of the human rights have been addressed and the procedures used have pointed out both the Government and the Royal/Dutch Shell. Still there are violations also today. What was the actual effect of the procedures?

It is not possible to get a fair judgement from a Court that is under strong influence of the Government when it is the Government itself that is being accused. Ledum Mitee said that they did not ever really expect to get a fair judgement when turning to the Federal High Court or Court of Appeal to seek help against the Ogoni Civil Disturbances Tribunal, but at least it was worth a try. Turning to national courts that are not independent can be a way of getting public attention to the human rights abuses. A wrong judgement may however be dangerous as it justifies human rights violations. Sam Amadi said that if he could do the trial all over again he would have stayed it. Through continuing and defending the accused a judgement that justified the killing of the leaders could be issued.

Transnational corporations may have some power over national courts through bribes, but in Nigeria it has been possible to find judges that would rule against the corporations. The inequality between the corporations of environmental pollution and the corporations when it comes to financial resources is still an obstacle. It is expensive to litigate for several years and the corporations are able to delay the case until the victim is prepared to negotiate and settle for less compensation. With external financial backing Nigerian national courts have proved efficient for litigating against transnational corporations.

National investigations are often a way of doing something to satisfy public pressure for action. National investigations are not an efficient way of putting international pressure on an abusing Government. They may be useful for gaining international attention if combined with competent local NGOs that can use the conclusions and recommendations as support in their campaigning. By themselves however they are likely to be simply forgotten. Their main advantage is that a Commission that accepts submissions and witness statements from the victims gives the victims the opportunity to tell their story and listen to others that have been in a similar situation. In some cases a national inquiry can be suitable but one must be careful and take all circumstances into account before initiating such a procedure. The danger is that such a public hearing can create conflicts if recommendations are not followed and identified human rights violators left unpunished.

US Courts have become an available procedure for human rights victims. The advantage with making a civil suit in the US is that the damages paid in case of victory are higher than in Nigeria. Such a suit also offers an important possibility for victims of human rights to make the international community aware of their sufferings. The most important obstacle is however the distance. If Nigerian courts are too far away and

expensive for people living out in the villages, US courts are even more remote and costly. A suit in the US also takes many years and few are likely to be able to litigate for such long time. I would further like to question if the judges are truly impartial in a case between transnational corporations with a major economic influence for the US and victims of human rights abuses in Nigerian villages.

The African Commission was and still is too slow. Not until long after the executions did it make its decision concerning the OCDT. Even if there are delays it is useful to send a communication to the Commission. Sending a communication does not have to be expensive and at least the Commission and the international community will become aware of the situation. This awareness may be enough for the abusing Government to improve its conduct. The decision on oil-exploitation has proved to be more useful because the human rights violations are still continuing even after all these years. The decision is now used for supporting NGOs in their campaigning. It is not only used to protect human rights in the oil-producing states surrounding the Niger Delta region, but also to strengthen campaigns for respect for social rights in other parts of the world.

When turning to UN-involvement it is one observation that I would like to point out. Procedures at national courts and at the African Commission were instigated by the human rights victims or involved non-governmental organisations. The UN, on the other hand, takes the initiative to act independent of such communications. The only possible option would be the UN Human Rights Commission and its Working Group on Individual Petitions, but this is a slow mechanism and measures taken depend on the will of governments. It is interesting to note that the UN started responding to the situation after trial by the Ogoni Civil Disturbances Tribunal. The UN had not acted during all the years of violations of social rights and use of force connected to the actual oil-exploitation. It is obvious that an on-off event that gains the attention of the international community is more likely to be addressed within the UN-system than frequent violations extended during a longer period of time involving transnational corporations. It is a shame that the UN did not act on an earlier stage. Pressure from international organisations has more effect on oil corporations than the threat of litigation in national courts.<sup>344</sup> Even if the UN was not able to prevent or stop the human rights abuse it did put some pressure on the Nigerian Government and made it cooperate to some extent. UN-involvement also supported the victims in their struggle and recognized their rights.

All of the different ways of addressing human rights violations that were used have their deficiencies. The true key to stopping human rights abuses is knowledge. Victims being aware of their rights and the international community being aware of the victims. A government or private entity that knows that its conduct is subject to public scrutiny is not likely to continue unhindered. Through using many different ways for addressing human rights violations attention can be gained and knowledge increased. It should also be noted that even if the situation is still bad in the region today we do not know how bad it would have been if these

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<sup>344</sup> Lucius Nwosu, lawyer.

procedures had not been used. Even if the more formal procedures discussed in this thesis are ways of gaining attention to a situation there are cheaper and quicker ways of doing this.

Both local and international NGOs and media played a very important part in Nigeria in bringing out information. Pressure is put on the Government through frequent monitoring and reporting. Indirectly media and NGOs also put pressure on oil corporations. The public is an important weapon in their hands when they call for consumer boycotts against corporations. Public pressure also made several Governments impose sanctions against Nigeria. These sanctions were a way of making a statement that they did not agree on the methods used by the Nigerian Government. At the same time it was a statement saying that states were not prepared to take measures to help the victims if they would lose financially. National and international NGOs agreed that the only sanction that would have had an impact on the Government was restrictions on trade and investments within the oil-sector. As Mr. Nwosu rightly said, the reluctance to impose oil-sanctions clearly told the Government that the threat was not a serious one but "*only lip service*".

The problem with relying on public attention for putting pressure on human rights abusers is that interest in a situation quickly fades away. Oil-production in Nigeria is an excellent example of this. For a while the international community was screaming for change. The situation there is still bad, but it is no longer new and exciting and therefore reports from the area are no longer as interesting. Attention disappears. Oil-production in Nigeria also clearly shows that a military Government is fairly immune to criticism. The executions of Ken Saro-Wiwa and the others were carried out in spite of the fact that the whole world was watching.

I believe that the only threat that can affect the decisions of severe human rights violators is the threat of individual punishment such as prosecution and civil suits for compensation. The Pinochet Case, the Arrest Warrent Case and the Abubakar Case all show that high-state official do not enjoy impunity for international crimes committed during their time in office. An obstacle to human rights protection is however the granting of immunity in foreign national courts to Heads of States and Ministers of Foreign Affairs for public acts. When the possibility arises the ICJ must clarify that crimes under international law are not to be regarded as performed in an official capacity. It is also important to note that immunity cannot be claimed before international tribunals. With the establishment of the International Criminal Court there is an important complementary jurisdiction to that of national courts.

Before ending I would like to thank Ebaye Ntan and Funmi for all their support and help given to me during my time in Nigeria. Without their help I would not have been able to write my thesis.

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Interviews and other forms of assistance by NGOs and lawyers have been of great importance to this thesis. I will give some details around the interviews in this section in alphabetic order. In the actual text I will only refer to the name and at most times also briefly mention the background of the individual.

Sam Amadi is a Doctoral Student in Law/Mason Fellow in Public Administration at Harvard University. Sam Amadi was one of the defence attorneys at the trial against Ken Saro-Wiwa and the other Ogoni leaders. Sam Amadi was also one of the writers behind a general report submitted to the African Commission on Human Rights when they were working on the communication concerning the Ogoni leaders. The first interview took place at the Office of the Human Rights Law Service (HURI-LAWS), 2<sup>nd</sup> Floor, Maritime Complex 34, Creek Road, Apapa, Lagos, Nigeria on 17.6.2003. A second meeting was held at Social and Economic Rights Action Center, 16 Awori Crescent off Obokun Street/Coker Rd., Illupeju, Lagos, Nigeria on 9.7.2003. We also had much contact via telephone calls. His e-mail address in case of questions is [samadi@law.harvard.edu](mailto:samadi@law.harvard.edu).

Mrs. Ndidi Bowei is the Senior Legal Officer at Social and Economic Rights Action Center. The meeting took place at the SERAC office 16 Awori Crescent off Obokun street/Coker Rd., Illupeju, Lagos, Nigeria on 9.7.2003.

Mr. Oronto Douglas is a legal practitioner and Deputy Director of Environmental Rights Action (Friends of the Earth Nigeria). We met on 14.7.2003 in his office. He can easily be reached through his e-mail address [orontolaw@yahoo.com](mailto:orontolaw@yahoo.com).

Mr. Ufuoma J Efemuai is a project engineer working for oil corporations in the Niger Delta where he also grew up. The interview took place in Port-Harcourt on 14.6.2003.

Funmi Elesha works at the department of Public Affairs at the Shell Petroleum Development Company of Nigeria Ltd. I made my interview at the Eastern Division, Port-Harcourt on 16.7.2003.

O.J. Goehwa is the Manager of Corporate Affairs at the Niger Delta Development Commission. I interviewed him at the NDDC office in Port-Harcourt on 14.7.2003.

Ledum Mitee is the current President of Movement of the Survival of the Ogoni People and also a legal practitioner and former accused by the Ogoni Civil Disturbances Tribunal. I had the formal interview at 20 Station Road, Port Harcourt on 15.7.2003. After this interview we had many more informal talks and he provided me with much assistance when I was looking for Nigerian cases and legislation.

Mr. Felix Morka is the Executive Director of Social and Economic Rights Action Center. The meeting was held in the office of SERAC on 9.7.2003.

Amechi Nwafw works at Public Affairs at Eleme Petrochemical Company Ltd. My interview took place during a tour at the Eleme refinery, Port-Harcourt on 16.7.2003. He refused to answer any questions as a representative of his company. He was only prepared to answer questions as a private person living in the area, in spite of the fact that he was working at the department of public affairs. He did not even want to answer any questions in his office; instead we went to the parking area.

Lucius Nwosu is a legal practitioner who has specialised in cases for compensation for environmental pollution caused by oil corporations. Interview took place at 27 Ohaeto Street, D-line, Port-Harcourt on 17.7.2003. Mr. Nwosu also helped me with finding Nigerian cases on compensation for environmental pollution.

Frances Ogwo is the Programme Officer at the Human Rights Law Service (HURI-LAWS, [www.hurilaws.org](http://www.hurilaws.org), e-mail [hurilaws@hurilaws.org](mailto:hurilaws@hurilaws.org)). The interview took place at HURI-LAWS on 17.06.2003.

George Ohindo, security staff at Eleme Petrochemical Company Ltd, was also interviewed during my tour at the Eleme refinery, Port-Harcourt on 16.7.2003.

Legbersi Saro Pyagbara is the Programme Officer Movement for the Survival of the Ogoni People, Interview at 27 Odu Street, Ogbunabali, Port Harcourt on 14.6.2003. E-mail address [mosop@phca.linkservice.com](mailto:mosop@phca.linkservice.com).

Agnes Tunde-Olowu is the Head of Legal Services at Constitutional Rights Project. Our meeting took place at Constitutional Rights Project, 5 Abiona Road, off Falolu Road, Surelere, Lagos on 11.7.2003.

Olufemi Yaya was an Environmental Quality Control Officer 1992. He was at the time doing his National Youth Service. This service is mandatory for all graduates in Nigeria. Even if the service is within the Government his stay was paid by oil corporations. He was formally interviewed on 11.7.2003 at 8B Reeve Road, Ikoyi, Lagos. We also lived in the same room for several weeks.

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*ICJ*

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