



**Course**  
**Global Environmental Litigation**  
**2020**

*The Shell/Ogoni case*

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### Highly recommended:

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### See also:

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O. K. EDU (2011), “Corporate Social Responsibility: The Case of Multinational Oil Companies in the Niger Delta of Nigeria”, 23 Sri Lanka J. Int'l L. 101

D. CAMBOU (2015), “The Dutch Shell case: Foreign Direct Liability Claims as an Avenue for Holding Multinational Corporations Accountable for Human Rights Violations”, in *Human Rights and Business: Direct Corporate Accountability for Human Rights*, Oisterwijk, Wolf Legal Publishers (WLP)

L. ENNEKING (2014), “The future of Foreign Direct Liability? Exploring the International Relevance of the Dutch Shell Nigeria Case”, *Utrecht Law Review*, vol. 10, issue 1, p. 44-54

## Webography

### Business and Human Rights resource center:

- British proceedings : [Shell lawsuit \(re oil spills & Ogale & Bille communities in Nigeria - Okpabi v Shell\) - Business & Human Rights Resource Centre \(business-humanrights.org\)](#)
- Dutch proceedings: [Shell lawsuit \(re oil pollution in Nigeria\) - Business & Human Rights Resource Centre \(business-humanrights.org\)](#)

## I- Factsheet

### A- Where it started

*Background: the rise of oil industry in Ogoniland.* The Niger Delta, located in the southern part of Nigeria and covering an area of some 70,000 km<sup>2</sup>, is the largest river delta in Africa and the third largest in the world. Prior to the discovery of oil in the 1950s, agriculture was the mainstay of its economy, with agricultural produce exported to the more industrialized regions of the world. By 1971 there had been a shift from agriculture to petroleum production. Currently, oil provides 80 per cent of budget revenues and 95 per cent of foreign exchange earnings.

Ogoniland is a region covering some 1,000 km<sup>2</sup> in the south-east of the Niger Delta basin. It has a population of close to 832,000, according to the 2006 National Census, consisting mainly of the Ogoni people. Oil exploration in Ogoniland commenced in the 1950s and extensive production facilities were established during the following three decades. These operations were handled by Shell Petroleum Development Company (Nigeria) Ltd (SPDC), a joint venture between the Nigerian National Petroleum Company (NNPC), Shell International, Elf and Agip. Shell Petroleum Development Company is itself a subsidiary of Royal Shell Petroleum, a multinational corporation incorporated in the United Kingdom with a headquarter in the Netherlands.

*Environmental incidents and social unrest.* The development of the oil industry in Ogoniland has caused significant damage to the environment and to the inhabitant's way of life and health. Environmental incidents, such as spills and uncontrolled flares, have steadily occurred in the area and responses have been perceived as slow and inadequate.

Partly in response to the environmental consequences of oil production, the Movement for the Survival of the Ogoni People (MOSOP) was founded at the beginning of the 1990s under the leadership of the Nigerian author Ken SaroWiwa. This movement asked for a better protection of the environment and a share of the oil revenues. Its protests and the backlash of the then military-led Nigerian government resulted in a climate of violence. On the one hand, this social climate caused the end of oil production in Ogoniland in 1993. On the other hand, the social unrest went severely repressed by the government and, in November 1995, following a trial by a military tribunal, Saro-Wiwa and eight other Ogoni leaders were hanged in Port Harcourt.

*Continuing environmental damage.* While no official oil production has taken place in Ogoniland since 1993, the facilities themselves have never been decommissioned. Some oil pipelines carrying oil produced in other parts of Nigeria still pass through Ogoniland but these are not being maintained adequately. Consequently, the infrastructure has gradually deteriorated, through exposure to natural processes, but also as a result of criminal damage, illegal refinement activity, causing further pollution and exacerbating the environmental footprint.

The study led by UNEP and concluded in 2011 found that "oil contamination in Ogoniland is widespread and severely impacting many components of the environment [contamination of soil and groundwater, impact on health, vegetation and aquatic life]. Even though the oil industry is no longer active in Ogoniland, oil spills continue to occur with alarming regularity. The Ogoni people live with this pollution every day" (UNEP, 2011, p. 9) and concluded "that the environmental restoration of Ogoniland is possible but may take 25 to 30 years" (*id.*, p.12).

These events have given rise to various proceedings, through which affected peoples have tried to engage the responsibility of either the corporations involved (parent and subsidiary) or the Nigerian

State, either in direct relation with the environmental damage caused by oil exploitation or in relation with the repression of the Ogoni protests and, especially, the killing of the “Ogoni nine”.

## B- How the dispute evolved

The massive oil pollution in the Niger delta, and more precisely in Ogoniland, has led to the introduction of various claims before various fora, including Nigerian, Dutch, British and US courts, but also the African Commission on Human Rights or the Dutch National Contact Point. This case-study thus permits, from a substantive standpoint, to feel the relevance of the topic for affected peoples but also for States and multinational corporations, to understand that it lays at the interplay between various fields of law, and to perceive the ongoing legal evolutions. It also permits, from a procedural standpoint, to emphasize the various venues that can be mobilized to claim rights but also the many barriers that can obstruct the way towards an effective access to justice.

### Proceedings before the African Commission on Human and Peoples Rights

A first move took the form of the introduction in 1996 of a claim to the African Commission on Human and Peoples’ Rights. This claim was introduced by two NGOs (the Social and Economic Rights Action Center and the Center for Economic and Social Rights) against Nigeria for various breaches of the African Charter on Human and Peoples’ Rights, adopted in 1981 and ratified by Nigeria in 1990.

- African Commission on Human and Peoples’ Rights, Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria, 155/96, 27<sup>th</sup> October 2001, [link](#) : Nigeria sentenced

In this case, after having stated that no available remedies existed at that time in Nigeria, the Commission stated that Nigeria had breached the right of the Ogoni population to life (article 2) and to family (article 18, right to housing), to health (article 16), to a satisfactory environment (article 24), to free disposal of wealth and natural resources (article 21).

More precisely, the Commission considered:

- That Nigeria damaged the environment and impaired the livelihood of the population by exploiting itself oil through the national oil company without any caution, by failing to control oil production by private companies, such as Shell, and by aiding these companies through its military forces (54, 57, 66);
- That Nigeria breached the right to life and to family, that includes the right to a shelter through its military forces that repressed ruthlessly the population, and expelled villagers.

Thus, the Commission held that Nigeria:

- Shall stop all attacks against civilians;
- Shall prosecute those responsible for the human rights violations identified and compensate the victims;
- Shall ensure that appropriate environmental and social impact assessments are prepared for any future oil development; that information are provided to the population and that those affected are associated to the decision-making process.

### Nigerian proceedings

Nigerian courts appear as the most “natural” judges to hear claims related to the pollution of Ogoniland, since the damages have occurred in Nigeria, the victims are of Nigerian nationality,

and the company mainly involved is itself incorporated in Nigeria. Nevertheless, the various proceedings brought to the Nigerian courts have not permitted, for now, to settle the case.

- In 2001, the African Commission was of the view that “no adequate domestic remedies [were] existent” (at. 41);
- Since then, some claims have been successful, especially the one brought by the Ejama-Ebubu community for a pollution that occurred in 1970: a judgment issued in 2010 sentenced Shell to pay \$516 million in compensation for the damages caused. This judgment was eventually upheld by the Nigerian Supreme Court in 2020. But it is still to be enforced (see [ThisDayLive](#)).

Although the jurisdiction of the Nigerian courts is undisputed, their capacity to actually settle such claims is debatable. During a first period, when Nigeria remained submitted to a military government, their independence was highly questionable (see AfCoHPR). Since then, the Nigerian judiciary system has improved. But some issues regarding the length and the quality of the Nigerian procedures are still raised. Moreover, the enforcement of the judgments issued by the Nigerian courts can be difficult.

- See UK, High Court, *Chief Osaro Agbara and others vs. SPDC and others*, 5 december 2019, denying the enforcement of the judgment issued in the Ejama-Ebubu community case in the UK due to procedural failure (Shell having been denied the right to present its case).

### Dutch proceedings

The shortcomings of the Nigerian judicial system have led the victims, sometimes backed by NGOs, to turn to foreign courts in order to hold the oil producers/operators responsible for their damage. They have thus turned to the home States of Shell. Since the Shell group is a Dutch-British group, there existed a jurisdictional hook both in the UK and the Netherlands. Nevertheless, formally speaking, the oil production activities in Ogoniland had been run by a Nigerian company, Shell Nigeria. Most of these cases are still pending but victims have known some procedural successes, despite Shell’s corporate structure.

- *Milieudefensie* case:
  - o District Court of The Hague, *Akpan v. Royal Dutch Shell Plc et al.*, C/09/337050 / HA ZA 09-1580, judgment, 30 January 2013, only available in Dutch [link to a summary in English](#)
  - o Court of Appeal of The Hague, *Eric Barizaa Dooh of Goi and others v. Royal Dutch Shell Plc and Others*, 200.126.843 (case c) + 200.126.848 (case d), 18th December 2015, [link](#): jurisdiction affirmed, case ongoing

The Dutch proceeding had been initiated by four fishermen and farmers, together with a Dutch NGO named *Milieudefensie*, claiming for reparation by Shell SPDC (Nigeria) and its parent company, Royal Dutch Shell (headquartered in the Netherlands) for an environmental damage caused in 2003-2004 by oil spillages due to a hole in a pipeline.

The District Court first affirmed its jurisdiction on the claims brought both against the parent company and its subsidiary, considering that these claims were closely intertwined. On the merits, it held that the parent company was not liable since, pursuant to the applicable Nigerian law, such a company is not obliged to prevent harm caused to third parties abroad by its subsidiaries. It also rejected most of the claims brought against SPDC, considering that the oil

spills had been caused by sabotage. But it considered that SPDC liable for two oil spills for a tort of negligence, since some of its facilities were not adequately protected against sabotage.

On appeal, the Court of The Hague upheld the judgment of the District Court concerning jurisdiction. Applying the Brussels I Regulation (44/2001), the Court affirmed its jurisdiction over the claim brought against Royal Dutch Shell. It then considered that there is a close connection between the claim against the parent, on which Dutch Courts have jurisdiction, and the claims against the subsidiary. The hearings on the merits took place in October 2020 and a decision should be issued in January 2021 (see [RFI](#)).

### British proceedings

Other cases have been introduced in Great Britain by many Nigerian citizens, since Royal Dutch Shell is incorporated in UK. The proceedings have led to some results, since the *Bodo* case terminated with an agreement on compensation amounting to 55 million pounds plus costs, while the *Okpabi* case has resumed before the Supreme Court, with some chance of procedural success despite its previous dismissal by the Court of Appeal.

- *Bodo* case:
  - o Queen's Bench Division (Technology & Construction Court), *Bodo Community v Shell Petroleum Development Co of Nigeria Ltd*, judgment (preliminary issues), 20 June 2014, [2014] EWHC 1973 (TCC): settled
- *Okpabi* case:
  - o Queen's Bench Division (Technology & Construction Court), *His Royal Highness Okpabi v Royal Dutch Shell Plc*, judgment, 26 January 2017, [2017] EWHC 89 (TCC)
  - o Court of Appeal (Civil Division), *His Royal Highness Okpabi v Royal Dutch Shell Plc*, 14 February 2018, [2018] EWCA Civ 191, [link](#) : dismissed
  - o Supreme Court of the UK: [ongoing](#).

In the *Okpabi* case, the claimants, a group of 42.500 Nigerian citizens claiming for compensation by both Royal Dutch Shell and its Nigerian subsidiary (SPDC) for the pollution of natural water sources, faced a significant defeat in 2018, when the Court of appeal dismissed their claim for lack of jurisdiction. According to the Court, on the one hand, a claim can be brought against a foreign subsidiary of a UK corporation only if there exist a serious claim against the parent company and, on the other hand, that no such claim existed against Royal Dutch Shell. According to the Court, RDS was not submitted to a duty of care towards the claimants, who remained to remote from it, since it did not exercise operational control over SPDC. That being said, this judgment could be reversed on appeal by the Supreme Court, in the wake of the *Vedanta* case, in which the Court held that a British parent company had assumed responsibility for the acts of its subsidiaries in Zambia.

- *See also Jalla* case, also not related to Ogoniland : *Jalla & Ors v Royal Dutch Shell Plc & Ors* [2020] EWHC 459 (TCC) → jurisdiction affirmed, applying the same reasoning as the one followed in *Vedanta* to the relation between RDS and its Nigerian subsidiaries.

## US proceedings

Claims related to the events that took place in Ogoniland have also been lodged before US courts, although they do not relate to oil pollution but to the violent repression of the Ogoni protest movement by the Nigerian government.

- **Wiwa case:**
  - United States District Court Southern District of New York, *Wiwa v. Royal Dutch Petroleum Co* → Settlement on the 8 of June 2009 for 15,5 million USD
- **Kiobel case :**
  - Supreme Court of the United States, *Kiobel v. Royal Dutch Petroleum Co.*, 17 April 2013, 569 U.S. 108 (2013) → Dismissed for lack of jurisdiction

These claims were directed against Shell, for its alleged complicity of human rights abuses by the Nigerian government. The focus on human rights abuses before US courts can be explained by the fact that the Alien Tort Statute gives US courts jurisdiction over torts committed in violation of the law of nations (reducing the scope of the claims that could be lodged on this basis). Meanwhile, State's immunities make it difficult to lodge a claim against a sovereign State like Nigeria itself. This explains why Shell was targeted for aiding and abetting Nigeria. Although the *Wiwa* case led to a settlement, the *Kiobel* claim was eventually dismissed by the Supreme Court, which considered that the case did not "touch and concern the territory of the United States... with sufficient force".

## II- Issues to be discussed

### JURISDICTION

- Personal jurisdiction
  - The claimants
    - Claims by individuals
    - Claims by NGOs
    - Class actions
  - The respondents
    - The host State (Nigeria, before international courts)
    - The companies
      - The subsidiary companies
      - The parent companies
- International jurisdiction of domestic courts
  - Jurisdiction of the home State courts:
    - Towards the parent company (seat, incorporation)
    - Towards the subsidiary company (anchor defendant mechanism)
  - Jurisdiction of third-States courts:



- Universal jurisdiction (ATS)

## MERITS

- Duty of care of the companies involved
  - Duty of care of the subsidiary company
  - Duty of care of the parent company (depending on the applicable law)

## RELIEF

- Nature of the relief
  - At the international level
  - At the domestic level: compensation, injunction
  - Broader impact of the proceedings (reputational...)
- Enforcement of the judgment