

Fossil Fuels & Climate Justice/ Energy

Keywords – title

- > Niger Delta
- > Shell spills
- > Ogoniland
- > Jota v. Texaco
- > Wiwa v. Royal Dutch Petroleum

1. Factual background

The land tenure and access to resources have always been the source of numerous conflicts, often violent, in the Niger Delta.

The colonial administration did not alter the traditional communal ownership of land in southern Nigeria, but gave the government the ownership over natural resources.

“However, as far back of 1914, legislations had been in place defining who has claims to mineral resources. For instance, the Colonial Minerals Oil Ordinance of 1914, amended in 1916, 1925, 1945, and 1959, vested ownership and control of mineral resources in the British Crown. Section 3 of this Act states that “The entire property in and control of all minerals in, under or upon any land in Nigeria, and of rivers, streams, and water that coursed throughout Nigeria, is and shall be vested in the crown [state], save in so far as such rights may in any case have been limited by any express grant made before the commencement of this Act.”¹

After gaining independence in 1960, Nigeria kept this regulation in the constitutions of 1979, 1995 and 1999. In addition, however, the 1978 Land Use Act that had been adopted during the first military government of Olusegun Obasanjo, granted property over the land to the state, with the consequent loss of income and benefits derived from its exploitation for the former owners. Moreover, the colonial administration established a method for the distribution of benefits from the exploitation of natural resources, known as “The Derivation Formula”:

“The original intention was to share revenue in proportion to the contribution each region made to the central government. Between 1946 and 1960, the derivation formula was set at 50 percent – that is 50 percent of revenues from cash crops, such as cocoa, rubber,



<http://www.unep.org/nigeria/> – Location of Ogoniland in the Niger Delta

palm oil, cotton, hides and skin, etc., accrued to the producing region, and 50 percent went into Federation Account. Also, as provided for by the constitution, 50 percent of proceeds from mineral and crude oil accrued to the region or state where they were extracted; 30 percent went into a pool for distribution to all regions and 20% went to the federal government.”²

Since the independence of Nigeria in 1960, however, the aforementioned proportion in the share was modified in several occasions to the benefit of the central government, reaching a 0 percent for the regions in the period between 1979 and 1981. Since 1999, 13 percent is allocated to the regions. Therefore this aspect has always been a source of conflict in a region rich in natural resources, such as the Niger Delta.

The Niger Delta is one of the world’s largest wetlands and marine ecosystems, representing an area of approximately 70,000 square kilometres. The impact of petroleum activities on the region’s ecosystems has been extremely high as a consequence of the uninterrupted practice of burning the gasses produced by petroleum extraction operations as well as continual petroleum spills.

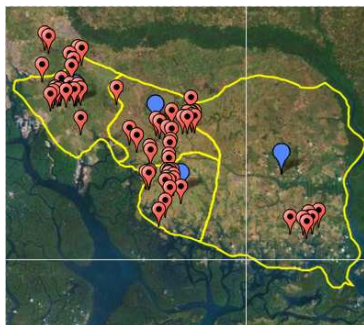
According to a recent report from the United Nations Environmental

¹ ADEOLA, Francis O., “From colonialism to internal colonialism and crude socioenvironmental injustice : anatomy of violent conflicts in the Niger Delta of Nigeria” in Environmental Justice in Filomina Chioma STEADY (Ed.), *The New Millennium: Global Perspectives on Race, Ethnicity, and Human Rights*, Palgrave Macmillan, New York, 2009 /, pp. 149-150.

² *Ibid.*

³ UNEP, *Environmental Assessment of Ogoniland report*, Nairobi, 2011; available at <http://www.unep.org/nigeria/>. This report was produced by the government of Nigeria and received funding from Shell. For this reason, it is based upon the company’s own data and does not cover the issue of responsibilities.

⁴ *Ibid.*, pp. 226-227.



UNEP 2011 – Location of spills in the area of Ogoniland



Kadir van Louhuize February 25th, 2008©, Amnesty International– a Shell worker and a victim of a spill in Iwhrekan.

³ UNEP, *Environmental Assessment of Ogoniland report*, Nairobi, 2011; available at <http://www.unep.org/nigeria/>. This report was produced by the government of Nigeria and received funding from Shell. For this reason, it is based upon the company's own data and does not cover the issue of responsibilities.

⁴ *Ibid.*, pp. 226-227.

⁵ *Ibid.*, p. 204.

⁶ UN General Assembly, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: resolution/adopted by the General Assembly*, 10 December 1984, A/RES/39/46, available at: <http://www.unhcr.org/refworld/docid/3b00f224.html> [accessed 2 January 2012].

⁷ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <http://www.unhcr.org/refworld/docid/3ae6b3aa0.html> [accessed 2 January 2012].

¹ Organisation of African Unity, *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), available at: <http://www.unhcr.org/refworld/docid/3ae6b3630.html> [accessed 2 January 2012].

Programme (UNEP) presented in London in August, 2011,³ this region in the most contaminated area in the world. More than 2.1 billion litres of crude oil have been spilled in the five decades during which petroleum extraction has been under way. This represents a rate of 42 million litres per year, an amount similar to the 41 million litres of crude spilled in 1989 in Alaska in the *Exxon Valdez* tanker disaster. The full restoration of Ogoniland would require between 25 and 30 years of work, with an estimated cost reaching into the billions of dollars for the first five years alone.⁴

The impact on human lives has been brutal: "The Ogoni people live with this pollution every minute of every day, 365 days a year. Since average life expectancy in Nigeria is less than 50 years, it is a fair assumption that most members of the current Ogoniland community have lived with chronic oil pollution throughout their lives."⁵

The company Royal Dutch Shell began its operations in Nigeria in 1957. Shell Petroleum Development Company of Nigeria (SPDC) is the operator of a Joint Venture Agreement involving the Nigerian National Petroleum Corporation (NNPC), which holds 55 per cent, Shell 30 per cent, EPNL 10 per cent and Agip 5 per cent and its operations currently occupy more than 30,000 square kilometres. During these years, the company has maintained close relations with the governments ruling Nigeria and has collaborated with them in repressing popular opposition to the continuation of its operations in the region, providing use of its infrastructure and logistical support as well as funding for government troops.

During the 1990s, especially cruel repression was imposed on the Ogoni people, who inhabit the region of the same name in the state of Rivers, as well as against the organization that leads the opposition, the Movement for the Survival of the Ogoni People

(MOSOP). Shell suspended its activities in the area in 1993. In 1994, in addition to the destruction of dozens of towns and villages, mass detentions, the displacement of more than 100,000 local residents, and an estimated 2,000 civilian deaths, nine members of the MOSOP were arrested and held incommunicado in military custody. They were then summarily judged, found guilty of murder, and executed by hanging in 1995.

According to the U.S. organizations that support the cause, the Centre for Constitutional Rights and EarthRights International, about 1% of Nigeria's population benefits from almost 85% of the country's revenues from petroleum, while according to data from the International Development Bank, more than 70% of Nigerians live on less than one dollar a day.

The Ogoni region possesses a diversity of very valuable natural resources, such as the world's third-largest mangrove forest and one of the largest rainforests remaining in Nigeria. The extraction of petroleum by several different companies has had a devastating impact on the region, caused by petroleum spills, the burning of natural gas, and deforestation that has resulted in the destruction of the soil, natural resources, and the Ogoni economy, which is based upon subsistence agriculture and fishing. This history of petroleum exploitation in Nigeria has been plagued by incidents of contamination, with the most recent episode taking place on 21 December 2011, when 30,000 barrels of petroleum were spilled at the Bonga offshore platform, near the shoreline of the state of Bayelsa.

2. International legal framework

The impacts of Shell's activities in Nigeria have been more than just environmental. Detailed allegations have also been raised that, in various ways, implicate the company in the repressive activities of the dictatorship that governed Nigeria during the 1990s. These activities were focused on shutting down the popular protests organized in opposition to Shell's operations in the country.



UNEP – The coast of Ogoniland, Nigeria

Fundamental standards of international human rights law have therefore come into play, such as prohibitions against torture, arbitrary detentions, and crimes against humanity. These standards are a part of international customary law or are recognized in various international treaties, such as the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,⁶ the 1966 International Covenant on Civil and Political Rights,⁷ and the African Charter on Human and Peoples' Rights of 27 June 1981.⁸

Also included among the avenues that have been taken to hold Shell accountable are a framework of voluntary commitments such as the OECD Guidelines for Multinational Enterprises produced by the Organisation for Economic Co-operation and Development, a set of recommendations for multinational companies intended to promote responsible behaviour.⁹

3. Action taken in the context of international institutions

3.1 The African Commission on Human and Peoples' Rights

Shell's activities in Nigeria have also been considered within the African system of human rights protection. The African Commission on Human and Peoples' Rights adopted a decision in October 2001,¹⁰ which claimed that, in relation to the Ogoni people, Nigeria had violated articles 2, 4, 14, 16, 18(1), 21, and 24 of the African Charter on Human and Peoples' Rights.¹¹ These violations were also claimed to have involved the company Nigerian National Petroleum Company (NNPC) and its consortium with the Shell Petroleum Development Corporation (SPDC).

With regard to the right to a satisfactory and health environment, recognised in

Article 24 of the Charter,¹² the Commission states that:

"It requires the State to take reasonable and other measures to prevent pollution conservation, and to secure an ecologically sustainable development and use of natural resources. [...] The right to enjoy the best attainable state of physical and mental health enunciated in Article 16(1) of the African Charter and the right to a general satisfactory environment favourable to development (Article 16(3)) already noted obligate governments to desist from directly threatening the health and environment of their citizens. The State is under an obligation to respect the just noted rights and this entails largely non-interventionist conduct from the State for example, not from carrying out, sponsoring or tolerating any practice, policy or legal measures violating the integrity of the individual. [...] We now examine the conduct of the government of Nigeria in relation to Articles 16 and 24 of the African Charter. Undoubtedly and admittedly, the government of Nigeria, through NNPC has the right to produce oil, the income from which will be used to fulfil the economic and social rights of Nigerians. But the care that should have been taken as outlined in the preceding paragraph and which would have protected the rights of the victims of the violations complained of was not taken."¹³

With regard to Article 21 of the Charter on the sovereignty over natural resources,¹⁴ the Commission states:

"Governments have a duty to protect their citizens, not only through appropriate legislation and effective enforcement but also by protecting them from damaging acts that may be perpetrated by private parties [...] The Commission notes that in the present case, despite its obligation to protect persons against interferences in the enjoyment of their rights, the Government of Nigeria facilitated the destruction of the Ogoniland. Contrary to its Charter obligations and despite such

⁹ These were adopted in 1976 and have been revised on various occasions, most recently at the meeting of the OCDE Council at the ministerial level in May 2011. OECD (2011), *OECD Guidelines for Multinational Enterprises*, OECD Publishing. Available at http://www.oecd.org/document/28/0,3746,e_n_2649_34889_2397532_1_1_1_1,00.html

¹⁰ African Commission on Human & Peoples' Rights; 155/96, *The Social and Economic Rights Action Center for Economic and Social Rights/Nigeria*. On this subject: Shelton, Dinah, *International Decisions: Decision Regarding Communication 155/96 (Social and Economic Rights Action Centre/ Centre for Economic and Social Rights v. Nigeria)*. Case No. ACHPR/COMM/A044/1, 96 *American Journal of International Law*, October, 2002, pp. 937-942.

¹¹ African [Banjul] Charter on Human and Peoples' Rights, June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5; 21 I.L.M. 58 (1982).

¹² "All peoples shall have the right to a general satisfactory environment favourable to their development." Article 16 also states that: "(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."

¹³ Pars. 52-54.

¹⁴ "1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it. ..."

¹⁵ Pars. 57-58.



internationally established principles, the Nigerian Government has given the green light to private actors, and the oil Companies in particular, to devastatingly affect the well-being of the Ogonis. By any measure of standards, its practice falls short of the minimum conduct expected of governments, and therefore, is in violation of Article 21 of the African Charter.”¹⁵

Also, in terms of the right to food, implicit in the right to health:

“65. The right to food is inseparably linked to the dignity of human beings and is therefore essential for the enjoyment and fulfillment of such other rights as health, education, work and political participation. The African Charter and international law require and bind Nigeria to protect and improve existing food sources and to ensure access to adequate food for all citizens. Without touching on the duty to improve food production and to guarantee access, the minimum core of the right to food requires that the Nigerian Government should not destroy or contaminate food sources. It should not allow private parties to destroy or contaminate food sources, and prevent peoples’ efforts to feed themselves.

66. The government’s treatment of the Ogonis has violated all three minimum duties of the right to food. The government has destroyed food sources through its security forces and State Oil Company; has allowed private oil companies to destroy food sources; and, through terror, has created significant obstacles to Ogoni communities trying to feed themselves. The Nigerian government has again fallen short of what is expected of it as under the provisions of the African Charter and international human rights standards, and hence, is in violation of the right to food of the Ogonis.”¹⁶

Finally, in relation to the right to life, described in Article 4 of the Charter¹⁷:

“Given the wide spread violations perpetrated by the Government of Nigeria and by private actors (be it

following its clear blessing or not), the most fundamental of all human rights, the right to life has been violated. The Security forces were given the green light to decisively deal with the Ogonis, which was illustrated by the wide spread terrorizations and killings. The pollution and environmental degradation to a level humanly unacceptable has made it living in the Ogoni land a nightmare. The survival of the Ogonis depended on their land and farms that were destroyed by the direct involvement of the Government. These and similar brutalities not only persecuted individuals in Ogoniland but also the whole of the Ogoni Community as a whole. They affected the life of the Ogoni Society as a whole.”¹⁸

In its recommendations, the Commission urges the government of Nigeria to prosecute those responsible for the Nigerian National Petroleum Company’s security forces, as well as those of other relevant institutions implicated in human rights violations.

4. Development of the Shell case in Nigeria before national courts

4.1 United States

Several civil complaints have been filed in U.S. federal courts under the scope of the Alien Tort Claims Act (ATCA)¹⁹, in relation to the violation of international law on the part of the company Shell in Nigeria. The most significant amongst these are those associated with the Wiwa and Kiobel cases.

4.1.1. *Wiwa v. Shell*

On 8 November 1996, the companies Royal Dutch Petroleum Company and Shell Transport and Trading Company were sued in the U.S. federal courts by Ken Wiwa and nine other members of the MOSOP. The claimants alleged that Nigeria’s military government and security forces committed multiple human rights violations against those who implemented a non-violent

¹⁵ Pars. 57-58.

¹⁶ Pars. 65-66.

¹⁷ “Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.”

¹⁸ Par. 67.

¹⁹ Its short text includes the following: “1350. Alien’s action for tort. The 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.” Act of 24 September 1789, ch. 20, § 9 (b), 1 Stat. 79; 25 June 1948, ch 646, § 1, 62 Stat. 934; 28 U.S.C. § 1350 (2004).

²⁰ He was nominated for the Nobel Prize and was awarded the *Right Livelihood Award* in 1994 and the Goldman Prize in 1995, for his defence of human rights and the environment.



campaign to protest the environmental impact caused by petroleum extraction in Nigeria's Ogoni region. Included among the allegations was the execution, on 10 November 1995, of several of the group's directors, one of whom was Ken Saro Wiwa, the father of the first claimant and president of the MOSOP.²⁰

The suit also alleges that the company Royal Dutch Shell (the company's previous name) was complicit in the commission of these abuses and, in particular, that the executions "were carried out with the knowledge, consent and/or support of defendants [...] and its agents and officers as part of a pattern of collaboration and/or conspiracy between Royal Dutch Shell and the military junta of Nigeria to violently and ruthlessly suppress any opposition to Royal Dutch Shell's conduct in its exploitation of oil and natural gas resources in Ogoni and in the Niger Delta" (par. 2).

In addition to the ATCA, this case also invoked the applicability of the Torture Victim Protection Act (TVPA), a law passed by the United States Congress in 1991.²¹ It specifically allows unlimited filing of civil suits by foreign citizens, against foreign or domestic actors who, acting on behalf of foreign nations, commit crimes involving torture and extrajudicial execution.

Unlike the ATCA, the TVPA includes two provisions that, respectively, require the exhaustion of internal recourses and establish a prescription period of ten years, counted from the commission of the acts upon which the claim is based.

The claim was rejected by Judge Wood of the U.S. district court, Southern District of New York on 25 September 1998, based upon the doctrine of forum non conveniens. The judge claimed that the proceedings should take place in the United Kingdom. However, he did not follow the recommendations of the earlier report produced by another judge, which considered that there was an absence of personal jurisdiction over the defendant companies on the grounds

that their commercial links to the United States were not sufficiently significant. The claimants appealed the decision.

However, the claimants also requested the Court to reconsider its decision in accordance with the demands introduced by the Second Circuit Court of Appeals in the Texaco case.²² In a new decision issued on 20 January 1999, Judge Wood accepted this motion and conditioned maintenance of his earlier decision on the defendants' commitment to accept the jurisdiction of the United Kingdom on their compliance with all orders to deliver company documents, on their compliance with any judgment issued in England, and on renunciation of the period of prescription if the claim was initiated in the United Kingdom within a period of one year from the conclusion of the proceedings in the United States.

As for the appeal, the Second Circuit Court of Appeals²³ issued its ruling on 14 September 2000. First, it confirmed the district court's assessment in terms of the existence of personal jurisdiction over the defendant companies:

"Under New York law, a foreign corporation is subject to general personal jurisdiction in New York if it is "doing business" in the state.[...] The continuous presence and substantial activities that satisfy the requirement of doing business do not necessarily need to be conducted by the foreign corporation itself. In certain circumstances, jurisdiction has been predicated upon activities performed in New York for a foreign corporation by an agent. Under well-established New York law, a court of New York may assert jurisdiction over a foreign corporation when it affiliates itself with a New York representative entity and that New York representative renders services on behalf of the foreign corporation that go beyond mere solicitation and are sufficiently important to the foreign entity that the corporation itself would perform equivalent services if no agent were available."²⁴

²¹ Torture Victim Protection Act of 1991. Act of 12 March 1992, P.L. 102-256, 106 Stat. 73. It is appropriate to emphasise section 2 of its text:

Sec. 2. Establishment of civil action

(a) Liability. An individual who, under actual or apparent authority, or color of law, of any foreign nation,

(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or

(2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

(b) Exhaustion of remedies. A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.

(c) Statute of limitations. No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose.

²² *Jota v. Texaco, Inc.*, 157 F. 3rd 153 (2nd Cir., 1998).

²³ In the United States federal court system there are 93 judicial districts, divided into 12 regional circuits. For each circuit there is one court of appeals. The second circuit corresponds to the states of Connecticut, New York, and Vermont.

²⁴ *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 95 (2d Cir. 2000).

²⁵ *Ibid.*, 101.



However, in contrast it decided to overturn the district court's decision in relation to forum non conveniens for three reasons:

"In our view, the district court failed to give weight to three significant considerations that favor retaining jurisdiction for trial: (1) a United States resident plaintiff's choice of forum, (2) the interests of the United States in furnishing a forum to litigate claims of violations of the international standards of the law of human rights, and (3) the factors that led the district court to dismiss in favor [*35] of a British forum were not particularly compelling. For the reasons developed below, we believe that they are outweighed by the considerations favoring exercise of the court's jurisdiction."²⁵

Also, in support of the second argument, it offered the following paragraph, which perfectly describes the situation of torture victims, but which is applicable to all types of serious human rights violations:

"One of the difficulties that confront victims of torture [**50] under color of a nation's law is the enormous difficulty of bringing suits to vindicate such abuses. Most likely, the victims cannot sue in the place where the torture occurred. Indeed, in many instances, the victim would be endangered merely by returning to that place. It is not easy to bring such suits in the courts of another nation. Courts are often inhospitable. Such suits are generally time consuming, burdensome, and difficult to administer. In addition, because they assert outrageous conduct on the part of another nation, such suits may embarrass the government of the nation in whose courts they are brought. Finally, because characteristically neither the plaintiffs nor the defendants are ostensibly either protected or governed by the domestic law of the forum nation, courts often regard such suits as "not our business".²⁶

The case was therefore remanded back to the district court to continue conducting the open proceedings.

On 5 March 2001, the claimants added Brian Anderson as a defendant, Shell's head of operations in Nigeria during the time period related to the case.²⁷ On 22 February 2002, the district court rejected the applicability of the ATCA for some crimes related to one of the claimants, but accepted its applicability for the remaining allegations.²⁸

On 5 April 2004, the claimants added the Nigerian subsidiary Shell Petroleum Development Company of Nigeria (SPDC) as a defendant. In November of 2004, this company filed a motion of inadmissibility for lack of personal jurisdiction. On 4 March 2008, the district court granted the motion. On 15 April 2008, the claimants appealed this decision in relation to the Wiwa case (as will be seen, the same issue was raised in parallel in the Kiobel case after a decision on 8 March). On 3 June 2009, the Second Circuit Court of Appeals overturned the district court's decision and the matter was again remanded to the lower court.

Meanwhile, on 29 September 2006, the district court ruled in favour of the appeal filed by the same defendants in the Kiobel case in relation to crimes of extrajudicial executions, forced exile, the right to life, liberty, and security, and the destruction of property, but rejected the appeal in other areas, confirming the viability of the claims related to crimes against humanity, torture, and arbitrary detentions.²⁹

On 23 April 2009, the district court once again confirmed the viability of the ATCA's applicability for the crimes against humanity, but accepted the defendants' appeal with respect to the claim that freedom to peaceably assemble was not a right that could be protected within the framework of the ATCA.

With the trial date imminent, on 7 and 8 June 2009, the parties signed multiple agreements to put an end to the litigation.³⁰ The agreement involved the payment of a total of 15.5 million dollars

²⁶ *Ibid.*, 106.

²⁷ The complaint was amended on 16 June 2003.

²⁸ *Wiwa v. Royal Dutch Petroleum Co.*, No 96-cv-8386, 2002 WL 319887, at 4 (S.D.N.Y., Fed. 28, 2002).

²⁹ *Kiobel v. Royal Dutch Petroleum Co.*, 456 F. Supp. 2d (S.D.N.Y. 2006).

³⁰ The documents related to the agreements can be viewed at the website maintained by the Center for Constitutional Rights:

<http://ccrjustice.org/ourcases/current-cases/wiwa-v.-royal-dutch-petroleum>.



³¹ *Kiobel v. Royal Dutch Petroleum Co.*, 456 F. Supp. 2d 457, 464-65, 467 (S.D.N.Y. 2006).

³² 4 March 2008, *Kiobel v. Royal Dutch Petroleum Co.*, No. 02 Civ. 7618, 2008 WL 591869 (S.D.N.Y. 2008).

³³ *Kiobel v. Royal Dutch Petroleum Company*, No. 02 Civ. 7618, 2010 WL 2507025 (S.D.N.Y. 21 June 2010).

³⁴ *Kiobel v. Royal Dutch Petroleum Company*, 621 F.3d 111, 149 (2d Cir. 2011), 17 September 2010.

³⁵ *Ibid.*, p. 7. In terms of claims against companies within the framework of the ATCA, the legal position that has been expressed is summarised in the following ideas: in international law, it is not possible to demonstrate the existence of prohibitions directed towards companies; on the few occasions where international law imposes obligations upon non-state actors, it does not impose obligations on, or liabilities for, juridical persons, as demonstrated for example by their exclusion from the jurisdiction of the International Criminal Court; the concepts of national law such as conspiracy or complicity cannot be used to expand the category of conducts prohibited by customary international law or the modality of participating in such conducts, for example in allegations of the defendant companies in *In re "Agent Orange" product liability litigation*, 373 F. Supp. 2d 7 (E.D.N.Y. 2005), or in the Brief for the Chamber of Commerce of the United States of America *As Amicus Curiae in Support of Defendant-Appellee Talisman Energy, Inc.*, and in *Support of Affirmance*, 8 May 2007, in the case *Presbyterian Church of Sudan v. Talisman Energy, Inc.* However, the condition of possible multinational corporate defendants in accordance with the ATCA, and therefore their exposure to being held responsible for violations of international law, although with certain conditions, has been broadly recognised, from *Carmichael v. United Technologies Corp.*, 835 F.2d 109 (5th Cir. 1988), although the first claim effectively established against a company was that filed against UNOCAL in 1996 for its involvement in human rights violations in Myanmar, related to construction of the Yadana pipeline. Of particular interest is the U.S. district court, *Eastern District of New York's decision in In re "Agent Orange" product liability litigation*, 373 F. Supp. 2d 7, 56-57 (E.D.N.Y. 2005). In general, see Stephens, Beth, "Corporate Accountability: International Human Rights Litigation Against Corporations in US Courts", in Kamminga, Menno T. – Zia-Zarifi, Suman (Eds.), *Liability of Multinational Corporations Under International Law*, Kluwer Law International, The Hague, 2000; pp. 209-229; Pigrau, Antoni, "La responsabilidad de las empresas transnacionales por daños graves al medio ambiente: explorando la vía de la Alien Tort Claims Act", in Badia Martí, Anna – Pigrau Solé, Antoni – Olesti Rayo, Andreu (Coords.), *El Derecho internacional ante los retos de nuestro tiempo. Homenaje a la Profesora Victoria Abellán Honrubia*, Marcial Pons, Madrid-Barcelona-Buenos Aires, 2009; pp. 517-569. On the UNOCAL case, see Martín Ortega, Olga, *Empresas Multinacionales y Derechos Humanos en Derecho Internacional*, Bosch Editor, Barcelona, 2008, 282-291; Martínez Barrabás, Mireia, "La responsabilidad civil de las corporaciones por violación de los derechos humanos:

(7.5 million assigned to Shell Petroleum N.V. and Shell Transport and Trading Company LTD; 3.5 assigned to SPCD of Nigeria; and 4.5 assigned to Energy Equity Resources Limited), which covered compensation for the ten claimants and a portion of the legal costs. The agreement also included the establishment of a trust to benefit the Ogoni people, which was assigned to independent administrators. The trust is meant to fund initiatives in the Ogoni territory such as education, women's programmes, adult literacy, and support for small businesses.

4.1.2 *Kiobel v. Shell*

Esther Kiobel, the wife of Dr. Barinem Kiobel, another of the Ogoni activists killed in 1995, submitted a claim against the same companies in September 2002. It alleged that Shell, through its Nigerian subsidiary the Shell Petroleum Development Company of Nigeria (SPDC), facilitated the transport of Nigerian troops, allowed company properties to be used as bases of operation for attacks against the Ogoni, provided food for soldiers and paid them. The claimants therefore contended that the companies named as defendants were guilty as accomplices in the commission of torture, extrajudicial executions, and other violations, in accordance with the Alien Torts Claims Act.

On 29 September 2006, after several earlier motions filed by the defendants were rejected, the U.S. District Court, Southern District of New York accepted the allegations of torture, illegal detention, and crimes against humanity as the material bases for the applicability of ATCA in the case, while rejecting others such as extrajudicial execution, the rights to life, liberty, and security, forced exile, and the destruction of property.³¹ This decision was appealed by the defendants.

Furthermore, in 2004 the defendants claimed a lack of jurisdiction over the companies as a cause for inadmissibility. On 8 March 2008, the district court

accepted the defendants' motion to dismiss for lack of personal jurisdiction over the companies.³² However, after an appeal from the defendants based upon the 3 June 2009 decision mentioned above, in which the Second Circuit Court of Appeals overturned the district court's decision in the *Wiwa* case, the court took up the matter again. A new decision was issued on 16 November 2009, this time rejecting the alleged claim of inadmissibility, and setting new deadlines for issuing a decision on the matter.

On 21 June 2010, the district court established that SPDC was a Nigerian company with its headquarters in Nigeria, that it did not have offices or a commercial location in the United States, and that the claimants had not demonstrated that there was a commercial relationship between the United States and SPDC. This meant that it was not possible to establish the jurisdiction of the federal courts over the company, and the claim against SPDC was dismissed.³³

Based on their appeal against the district court's decision in 2006, which partially affirmed the viability of the alleged claims regarding violation of the ATCA, the claimants appealed this new decision, and on 17 September 2010, the Second Circuit Court of Appeals in New York issued a surprising opinion in terms of the possibility of bringing suit against companies under the framework of the ATCA. The court's majority opinion not only confirmed the district court's decision, but also declared that the ATCA could not be used to bring suit against companies for violations of international law:

No corporation has ever been subject to any form of liability (whether civil, criminal, or otherwise) under the customary international law of human rights. Rather, sources of customary international law have, on several occasions, explicitly rejected the idea of corporate liability. Thus, corporate liability has not attained a discernable, much less universal, acceptance among



un análisis del caso UNOCAL”, in Victoria Abellán Honrubia – Jordi Bonet Pérez (dirs.), *La incidencia de la mundialización en la formación y aplicación del Derecho Internacional Público*, Bosch Editor, Barcelona, 2008, pp. 219-267. On the application of the concept of complicity to multinational corporations: Clapham, A. – Jerbi, S., “Categories of Corporate Complicity in Human Rights Abuses”, 24 *Hastings International and Comparative Law Journal* (2001) 339-349; Ramasastry, Anita, “Corporate Complicity: from Nuremberg to Rangoon: An Examination of Forced Labor Cases and their Impact on the Liability of Multinational Corporations”, 20 *Berkeley Journal of International Law* 2002, 91-159.

³⁶ In his opinion: “the pleadings do not assert facts which support a plausible assertion that Shell rendered assistance to the Nigerian military and police for the purpose of facilitating human rights abuses, as opposed to rendering such assistance for the purpose of obtaining protection for its petroleum operations with awareness that Nigerian forces would act abusively.”; *Kiobel v. Royal Dutch Petroleum Company*, 621 F.3d 111, 149 (2d Cir. 2011), 17 September 2010.

³⁷ *Ibid.*

³⁸ 4 February 2011. *Kiobel v. Royal Dutch Petroleum Company*, 642 F.3d 268 (2d Cir. 2011) and 642 F.3d 379 (2d Cir.2011).

³⁹ This is the case for the District of Columbia Court of Appeals – *Doe v. Exxon Mobil Corp.*, 2011 U.S. App. LEXIS 13934 (D.C. Cir. 8 July 2011) – and for the Seventh District Court of Appeals, in *Flomo v. Firestone Natural Rubber Co., LLC*, 643 F.3d 1013 (7th Cir. Ind. 2011),

⁴⁰ Until now, the Supreme Court has only ruled on one occasion in relation to the ATCA, on the *Álvarez-Machain* case on 29 June 2004. This case involved a claim filed by Humberto *Álvarez-Machain* against agents of the U.S. Drug Enforcement Agency (DEA), who abducted him in order to try him under the U.S. justice system for allegations including collaboration with drug traffickers and participation in the torture and killing of a DEA agent in Mexico. The claim went forward against only one of the agents, José Francisco Sosa. The Ninth Circuit Court of Appeals opined that the unilateral detention of *Álvarez Machain* in Mexico constituted a violation of international law in accordance with the ATCA; *Álvarez-Machain v. United States*, 331 F.3d 604 (9th Cir. 2003). The matter was brought before the *Supreme Court*, which had to rule on the material scope of the law. According to the narrowest interpretation, the ATCA only assigns jurisdiction, but does not entail the incorporation of new material allegations for its applicability, which would have been established at the time of its adoption and which would require prior regulatory activity on the part of the legislature for expansion. See, for example, the extensive concurring opinion of Judge Bork in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 823 (D.C. Cir. 1984) and, along the same lines, the position advanced by Sosa’s defence, which was added to by the Bush administration through its Department of Justice’s Brief for the United States as Respondent Supporting Petitioner (Jan. 2004), *Sosa v. Alvarez-Machain*, 12w4 S.Ct. 2739 (2004). On this subject see: Stephens, Beth, “Upsetting Checks and Balances: The Bush Administration’s Efforts to Limit Human Rights Litigation”, *Harvard Human Rights Journal*, Vol.17,

nations of the world in their relations inter se, and it cannot, as a result, form the basis of a suit under the ATS.³⁴

Judge José Cabranes’ opinion written for the majority alludes to a famous passage from the Nuremberg trials: “From the beginning, however, the principle of individual liability for violations of international law has been limited to natural persons—not “juridical” persons such as corporations—because the moral responsibility for a crime so heinous and unbounded as to rise to the level of an “international crime” has rested solely with the individual men and women who have perpetrated it.”³⁵

In spite of his support for rejection of the appeal, the third judge, Pierre N. Leval, disagreed with this criterion,³⁶ and wrote a long dissenting opinion that begins with the following paragraph:

The majority opinion deals a substantial blow to international law and its undertaking to protect fundamental human rights. According to the rule my colleagues have created, one who earns profits by commercial exploitation of abuse of fundamental human rights can successfully shield those profits from victims’ claims for compensation simply by taking the precaution of conducting the heinous operation in the corporate form. Without any support in either the precedents or the scholarship of international law, the majority take the position that corporations, and other juridical entities, are not subject to international law, and for that reason such violators of fundamental human rights are free to retain any profits so earned without liability to their victims.³⁷

On 14 October 2010, the claimants filed a petition for a new hearing before the panel of judges and also before the court in a plenary session. These motions were denied on 4 February 2011 by two votes to one in the first instance and five votes against five in the second.³⁸ On 30

September 2011, the district court therefore decided to close the case.

However, the claimants presented a motion of appeal before the U.S. Supreme Court in June of 2011. On 17 October 2011, the Supreme Court agreed to consider the appeal against the position Shell expressed in its brief filed on 12 August 2011, and it is expected that the case will be heard in early 2012. The court will issue a ruling on two issues:

“1. Whether the issue of corporate civil tort liability under the Alien Tort Statute (ATS), 28 U.S.C. § 1350, is a merits question, as it has been treated by all courts prior to the decision below, or an issue of subject matter jurisdiction, as the court of appeals held for the first time.

2. Whether corporations are immune from tort liability for violations of the law of nations such as torture, extrajudicial executions or genocide, as the court of appeals decisions provides, or if corporations may be sued in the same manner as any other private party defendant under the ATS for such egregious violations, as the Eleventh Circuit has explicitly held.”

The claimants presented their arguments on 14 December 2011.

In fact, the Second Circuit Court of Appeals is the only appellate court that has applied this criterion. Subsequent to the New York court’s decision, other U.S. appellate courts have ruled to the contrary, affirming the applicability of ATCA for companies.³⁹ The significance of the Supreme Court’s decision for the future of the applicability of the ATCA to companies is enormous,⁴⁰ and organisations that act in defence of human rights are clearly concerned about a decision that could be made by a Court consisting of a majority of conservative justices.

An example of the importance of this issue can be seen in the large number of *Amicus Curiae* briefs that have been submitted to the Supreme Court.⁴¹ The U.S. government’s report of 21



spring 2004, pp.169-205. With this option, the ATCA would be left practically without effect, breaking with a consistent line of rulings that had lasted for more than twenty years. The broadest interpretation considers it to be possible to judicially incorporate new suppositions in accordance with the evolution of international law, and this was the position ultimately adopted by the Supreme Court, which confirmed the prior jurisprudence, although defending a position of caution in the recognition of the admissible causes for basing an action under the framework of the ATCA: *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), 124 S.Ct. 2739 (2004); on this subject see the note "Supreme Court Interpretation of Alien Tort Claims Act", in *The American Journal of International Law*, Vol. 98, no. 4 (Oct. 2004), 845-848.

⁴¹ See:

<http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/10-1491.htm>.

⁴² Brief for the United States as Amicus Curiae Supporting Petitioner, 21 December 2011; pp. 7-8; Available at <http://www.earthrights.org/sites/default/files/documents/USG-Kiobel-amicus.pdf>.

⁴³ Available at

<http://www.supremecourt.gov/qp/10-01491qp.pdf>.

⁴⁴ See the full list of Amicus curiae briefs at <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/10-1491.htm>

⁴⁵ Supplemental Brief for the United States as Amicus Curiae in Partial Support of Affirmance, 13 June 2012;

<http://sblog.s3.amazonaws.com/wp-content/uploads/2012/06/Kiobel-US-supp-brief-6-13-12.pdf>

⁴⁶ Oil Pipelines Act, Chapter 338, Laws of the Federation of Nigeria 1990; <http://www.nigeria-law.org/Oil%20Pipelines%20Act.htm>.

⁴⁷ Petroleum Act Chapter 350 L.F.N. 1990 Act Chapter 10 L.F.N. 20041, <http://www.babalakinandco.com/resources/lawsnigeria/LAWS/90350petroleum%20act.htm>.

December 2011 in favour of the claimants is particularly noteworthy and contains arguments summarised in the following:

"A. A corporation's liability in a suit under the ATS does not depend on the existence of a generally accepted and well-defined international law norm of corporate liability for law-of-nations violations. The particular limitation this Court found dispositive in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004)—that any claim under the ATS must at least 'rest on a norm of international character accepted by the civilized world and defined with' sufficient 'specificity,' id. at 725—pertains to the international-law norm itself and not to whether (or how) that norm should be enforced in a suit under the ATS. The latter question is a matter to be determined by federal courts cautiously exercising their 'residual common law discretion.' Id. at 738. International law informs, but does not control, the exercise of that discretion.

At the present time, the United States is not aware of any international-law norm of the sort identified in *Sosa* that distinguishes between natural and juridical persons. Corporations (or agents acting on their behalf) can violate those norms just as natural persons can. Whether corporations should be held accountable for those violations in private tort suits under the ATS is a question of federal common law.

B. Courts may recognize corporate liability in actions under the ATS as a matter of federal common law. The text and history of the ATS itself provide no basis for distinguishing between natural and juridical persons. Corporations have been subject to suit for centuries, and the concept of corporate liability is a well-settled part of our 'legal culture.' Pet. App. A8. *Sosa's* cautionary admonitions provide no reason to depart from the common law on this issue.

International law does not counsel otherwise. Although no international tribunal has been created for the purpose of holding corporations civilly liable for violations of international law, the same is true for natural persons. And while international criminal tribunals have, thus far, been limited to the

prosecution of natural persons that appears to be because of matters unique to criminal punishment. Notably, several countries that have incorporated international criminal offenses into their domestic law apply those offenses to corporations."⁴²

A first hearing took place on 28 February 2012, after which the case was restored to the calendar for reargument and the parties were directed to file supplemental briefs addressing the question "whether and under what circumstances the Alien Tort Statute (...) allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States."⁴³ Also on this occasion, a large number of *Amicus curiae* briefs were submitted to the Supreme Court,⁴⁴ including a supplemental brief from the US administration, this time partially supporting the respondents.⁴⁵ The second hearing took place on 1 October 2012, and a final decision by the Supreme Court is expected next year.

4.2 Nigeria

In Nigeria, a great quantity of litigation has derived from Shell's activities in the Niger Delta. Nigerian laws hold companies responsible for spills they cause and assign liability for compensation to those who suffer damages. The Nigerian Federal Environmental Protection Agency Act of 1988 establishes that following a petroleum spill, companies must "begin immediate clean-up operations following the best available clean-up practice and removal methods."

In its section 11.5.c, the Oil Pipelines Act of 1990⁴⁶ stipulates that companies must pay compensation "to any person suffering damage (other than on account of his own default or on account of the malicious act of a third person) as a consequence of any breakage of or leakage from the pipeline or an ancillary



⁴⁸ Court of The Hague, Docket number: 2009/0579; Date: 13 May 2009; Motion for the Court to Decline Jurisdiction and Transfer the Case, also Conditional Statement of Defence in the Main Action. The claimants' response to this motion was presented on 8 July 2009.

⁴⁹ Court of The Hague, Civil law section, Case number / docket number: 330891 / HA ZA 09-579 Judgment in motion contesting jurisdiction of 30 December 2009.

installation, for any such damage not otherwise made good.”

In its section 8.1.g, the Nigerian Petroleum Act of 1969 establishes that the Minister “may direct in writing the suspension of any operations which in his opinion are not being conducted in accordance with good oil field practice.”⁴⁷

Hundreds of claims related to petroleum spills have been filed against Shell in the Nigerian courts, but decisions have frequently been delayed for years and firm judicial decisions are rare.

For example, on 20 June 2005, a representative of the Iwherekan community in the Niger delta submitted a claim against the government of Nigeria and Shell for the permanent burning into the atmosphere of natural gas coming from petroleum extraction operations. On 14 November 2005, the Federal High Court of Nigeria ruled that petroleum companies must cease the flaring of gas in the Niger Delta. Shell appealed this decision. On 16 December 2005, a new claim was presented against Shell and other companies for failure to cease flaring. The Supreme Court of Nigeria decided in April of 2006 that within a period of one year, Shell must cease burning gas in the Iwherekan community.

In other litigation, on 5 July 2010, after almost ten years since the suit was first filed, the Federal High Court of Nigeria issued a ruling against Shell Nigeria, ordering it to pay 100 million dollars to another community, the Ejama-Ebubu, for damages and losses caused by a petroleum spill that occurred forty years earlier in 1970, and which affected more than 250,000 hectares. This compensation includes damages based upon the value of the crops, the loss of income derived from agriculture and hunting, pollution of the water supply, health risks, psychological impact, and the desecration of sacred areas, among other aspects. The judge also ruled that Shell Nigeria must decontaminate and rehabilitate the area back to its condition prior to the spill.

4.3 The Netherlands

4.3.1. Oruma, Goi, and Ikot Ada Udo

On 9 May 2008, three claims against the Shell Petroleum Development Company of Nigeria were filed in the District Court of The Hague in the Netherlands, where the company's main headquarters are located. These were filed on behalf of group of residents from three villages in the Niger Delta (Oruma, Goi, and Ikot Ada Udo), along with Friends of the Earth Netherlands and Friends of the Earth Nigeria, in relation to petroleum spills that occurred there between 2004 and 2006.

The three spills were similar, and are generally attributed to the company's negligence in allowing the spills to occur, its failure to act in a timely manner to limit their effects, and its failure to properly clean up the areas affected. The claimants also allege that the Shell parent company was negligent because it did not ensure that its subsidiary carried out petroleum production in Nigeria in a careful manner, despite having the capabilities to do so. The results have been contamination of croplands and aquaculture ponds as well as damage to personal health.

In its reply to the claims related to Oruma filed on 13 May 2009, Shell argues that the Dutch courts lack jurisdiction in relation to the Shell's Nigerian subsidiary.⁴⁸ On 28 October 2009, Shell presented similar arguments in relation to the other claims, also adding in the case of Ikot Ada Udo an argument of exemption from litigation because of the existence of open judicial proceedings in Nigeria related to the same case.

On 30 December 2009, the District Court of The Hague rejected the exemption claimed by the company in the Oruma case and declared jurisdiction. The arguments will probably be identical in the other two cases.⁴⁹



⁵⁰ Royal Dutch Shell in the Niger Delta, Complaint to the UK and Dutch National Contact Points under the Specific Instance Procedure of the OECD Guidelines for Multinational Enterprises, 25 January 2011, Submitted by: Amnesty International, Friends of the Earth International, Friends of the Earth Netherlands; p. 3. Available at <http://www.foei.org/en/resources/publications/pdfs/2011/oecd-submission>.

On 24 March 2010, the old Shell Transport and Trading Company and Shell Petroleum NV (Shell's Dutch subsidiary) were added as defendants, after which Shell argued that it could not be held responsible for the actions of its predecessors.

The solicitors for the claimants requested that the respondent companies release relevant internal documents. Shell denied this request on 16 June 2010, arguing that it was neither in a position to do so, nor could it be obliged to do so.

4.3.2 OECD National Contact Point

In the case of Shell in Nigeria, a mechanism that is generally only infrequently used has also been employed – a complaint filed with the OECD's National Contact Points (NCPs) in the Netherlands and the United Kingdom. This approach was taken on 25 January 2011 by Friends of the Earth Netherlands, Friends of the Earth International, and Amnesty International. The mission of the NCPs is to promote the effectiveness of the OECD Guidelines for Multinational Enterprises. The NCP "will contribute to the resolution of issues that arise relating to implementation of the Guidelines in specific instances in a manner that is impartial, predictable, equitable and compatible with the principles and standards of the Guidelines." To accomplish this, an initial evaluation is conducted to determine whether the issues raised merit a more careful examination and if so, the parties involved should be offered the NCP's good offices to facilitate the resolution of their differences. To do this, a series of consultations should be held, and at the end of the procedures the results should be made public, regardless of whether or not an agreement is reached.

The claim against Shell is centred on repeated statements made by the company to the effect that the majority of

the petroleum spills in Nigeria have been due to sabotage:

"The implications of Shell's repeated claims that between 70 per cent and 85 percent and, most recently, 98 per cent of oil spills are due to sabotage are both serious and negative for the communities of the Niger Delta. Firstly, when spills are classified as the result of sabotage Shell has no liability or responsibility with respect to compensation for damage done to people or their livelihoods. Secondly, these figures have tended to be used by Shell to deflect attention away from legitimate criticism of its own environmental and human rights impact in the Niger Delta and as such to mislead key stakeholders – including consumers of Shell's products and investors in the company."⁵⁰

For the organisations making the claims, such statements involve violation of the OCDE guidelines in three aspects:

"The section on Disclosure (III), which states that enterprises 'should ensure that timely, regular, reliable and relevant information is disclosed regarding their activities, structure, financial situation and performance,' and that '[e]nterprises are also encouraged to apply high quality standards for non-financial information including environmental and social reporting where they exist. The standards or policies under which both financial and non-financial information are compiled and published should be reported.' [...]

The section on Environment (V), which states that enterprises should 'take due account of the need to protect the environment, public health and safety, and generally to conduct their activities in a manner contributing to the wider goal of sustainable development.' [...]

The section on Consumer Interests (VII), which states that enterprises should 'act in accordance with fair business, marketing and advertising practices.' Specifically, point 4 requires that enterprises '[n]ot make representations

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⁵¹ *Ibid.* pp. 12-13.

or omissions, nor engage in any other practices, that are deceptive, misleading, fraudulent, or unfair.”⁵¹

After its initial examination, the NCP in the Netherlands notified the claimants, on 23 February 2011, that it would act on behalf of the two NCPs, and that it believed that the alleged acts merited a more careful examination, meaning that the next phase of their procedures would be opened.

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