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Shell Oil Company in Nigeria: Impediment or Catalyst of Socio-Economic Development?

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Shell Oil Company in Nigeria: Impediment or Catalyst of Socio-Economic Development?

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ABSTRACT

The aim of this paper is to investigate whether the Shell oil company, through investment and crude oil exploration, benefits socio-economic growth in Nigeria in general and in the Niger Delta of Nigeria in particular. In 1998, the United Nations Special Rapporteur's report on Nigeria accused Nigeria and Shell of violating human rights and failing to protect the environment, and called for an investigation into Shell activities in Nigeria. The report condemned Shell for arming the security forces which it regularly deploys to use lethal force against civilians that protest against the oil firm." The paper explores the matrix within which the socio-economic rights (human rights, development rights and environment rights) have been significantly marginalised and the implications of the lack of corporate social responsibility and the lack of accountability of Shell to the inhabitants of the Niger Delta of Nigeria. With respect to environmental obligations, the paper discusses how environmental degradation in the Niger Delta has infringed on human rights thereby impeding growth and economic development. The paper suggests possible future directions and initiatives for civil society in making corporations more accountable to states, citizens and the planet.

Keywords: Shell, Crude oil, Nigeria, Development, Economy

INTRODUCTION

Transnational corporations possess particular influence over global economic and social development through their role in foreign direct investment ("FDI"). However, as noted by Shaw (2003) that "the responsibilities of TNCs under International Law remain a grey area. Its contours are undefined and its course is partially uncharted"¹. It is the obligation of each country to preserve the best interests of her citizens, however, in many developing countries only very few economically authoritative groups including the foreign investors and their cohorts that

exert the strongest influence and manipulate policies and the enforcement of laws.

One major problem of dealing with transnational corporations is that international laws are too soft and sometimes difficult to enforce especially, against the transnational corporations. There is thus, obvious lack of binding international human rights laws and absence of mandatory international environmental obligations on transnational corporations.

The Royal Dutch/Shell Group ("Shell") is a merger of over 1,700 companies all over the world.² Sixty

¹ Shaw, M., *International Law*, 5th Edition, Cambridge: University press (2003) p.225

² Bravo, Elizabeth, *Crude oil That Flows, Seas that Bleed*, in *The Crude oil Flows The Earth Bleeds*, Bravo, E. (ed.) *Crude oil watch*, Quito, 1999 cited in Nnimmo Bassey, "Crude oil And Gas In Africa: Ecological Debt Huge As The Sky", Earth Rights Action, full text at:

per cent of the Group is owned by Royal Dutch of the Netherlands, and forty percent is owned by the Shell Transport and Trading Group of Britain.³ These two companies have been joint business since 1903. Shell is comprised of; Shell Petroleum of the United State (which wholly owns Shell Crude oil Company of the USA and many subsidiaries), Shell Nigeria, Shell Argentina, Shell South Africa, and many others.⁴ Shell is arguably, one of the World's prominent transnational corporations.⁵

According to the official records of the federal government of Nigeria, Shell discovered crude oil in Nigeria in 1956 at Oloibiri in the Niger Delta. Shell sources confirmed that, the firm has the largest network of land-based assets in Nigeria, employing nearly 6,000 people directly, owning some 90 flow stations, and running a network of pipelines through the Niger Delta. Few other Oil companies also operate in Nigeria namely; Chevron-Texaco, Total-ENI (Agip) which also carry on, onshore crude oil exploration in the Niger Delta, while Exxon-Mobil's operations are primarily offshore.⁶

It is undeniable that crude oil account for nearly 98.5% of Nigeria's annual total exports, and crude oil revenues account for an average of 90% of the country's annual foreign exchange and 80% of the federal

government's total revenue.⁷ Nigeria is the sixth largest producer of crude oil among the members of the Organisation of Petroleum Exporting Countries "OPEC".⁸ Shell Nigeria is one of the largest crude oil producers in the Royal Dutch/Shell Group and, is the largest transnational corporation in Nigeria also, the largest foreign oil company in Nigeria holding about half of the country's crude oil production. Approximately 80% of the crude oil extraction in Nigeria is from the Niger Delta (the Southeast and South-South) region. The Delta is home to many small minority ethnic groups, including the *Andoni, Ogoni, Ijaw (Izon), Ibibio, Kalabari, Ibani, Nembe, Bonny, Opobo and Okrika*.

Shell was first granted exploration licence in Nigeria in 1937. Currently Shell's main interest in Nigeria is through its 100% owned subsidiary, the Shell Petroleum Development Company ("SPDC"). SPDC in turn owns 30% of oil production joint venture, the Nigerian National Petroleum Company ("NNPC") in which NNPC holds 55% shares, Agip 5% shares and Elf 10% shares, with the SPDC as the operator of this joint venture.⁹

The SPDC joint venture produces well over one million barrels a day from ninety-four oil fields in the

[www.debtwatch.org/cast/docs/observatoris/dec/Crude oil andgas.doc](http://www.debtwatch.org/cast/docs/observatoris/dec/Crude%20oil%20and%20gas.doc) accessed 11/12/2010

³ Greenpeace International, "Shell-Shocked: The Environmental and Social Costs of Living with Shell in Nigeria" (July, 1994)

⁴ Shell in Nigeria: What are the issues? <http://www.essentialaction.org/shell/issues.htm>

⁵ Human Rights Watch/Africa, "Nigeria: The Ogoni Crisis - A Case Study of Military Repression in Southeastern Nigeria" (July 1995)

⁶ Amnesty International, "Human Rights & Crude oil In Nigeria", AI Index: Afr 44/023/2004, 1 August 2004

⁷ Central Bank of Nigeria, "2005 Fiscal Review Papers", Abuja, Nigeria.

⁸ Kretzman, Steve "Nigeria's 'Drilling Fields'" *Multinational Monitor* (January/February 1995); Nigerian Tide Newspaper, Statement made by the SPDC Managing Director, Brian Anderson, Port Harcourt, *Nigerian Tide*, 17 November 1995; PIRC, "Controversies Affecting Shell in Nigeria", A Report by PIRC to Minority Group in Niger Delta, March 1996; Olorode, 'Imperialism, Neocolonialism and the Extractive Industries in Nigeria' in Ken Saro-Wiwa and the Crisis of the Nigerian State, Olorode, O. et al (eds) CDHR, Lagos (1998).

⁹ "Operations in Nigeria", Shell Briefing Note, May 1994

Niger Delta. Shell sources admit that, the “Nigerian operation is Shell's largest and most lucrative oil exploration and production venture outside North America”¹⁰. Approximately 20% of Shell's operated oil production comes from Nigeria and about 12% of its equity in Crude oil production.¹¹ The SPDC employs an estimated 5000 staff in Nigeria and more than 20,000 people are employed on contract basis.¹² The SPDC's profits are taxed at 85% by the Nigerian government.¹³ As the operator of the joint venture, Shell operates more than half of Nigeria's crude oil production.¹⁴

In response to the argument put forward by some campaigners that Shell should leave Nigeria, the company argues that its operations have benefited the country threefold in terms of generating revenues which have assisted development, by contributing to the local economy in the Delta region and in terms of technology transfer through its foreign direct investment (“FDI”).¹⁵ The issues therefore are: (1) what role is Shell playing in the socio-economic development of Nigeria? And, (2) to what extent is Shell investment in Nigeria assisting development?

¹⁰ “Shell In Nigeria, Shell International Petroleum Co”, An Official Paper of the Shell Management In Nigeria, 1995.

¹¹ “Controversies Affecting Shell in Nigeria”, A Report by PIRC to Minority Group in Niger Delta, March 1996

¹² Ibid

¹³ Iyayi, Festus., ‘Oil companies and the Politics of Community Relations in Nigeria’ in Bcrude oil ing Point. Raji et al (eds.). Lagos: CDHR, (2000), pp.151-178

¹⁴ Statement made by the SPDC Managing Director, Brian Anderson, Port Harcourt, Nigerian Tide, 17 November 1995.

¹⁵ Statement by SPDC Managing Director Brian Anderson, Press Release, 14.11.95, Shell International Petroleum Company Press Release 15.12.95

SHELL AND SOCIO-ECONOMIC DEVELOPMENT IN NIGERIA

The term “development” is widely used, but rarely specifically defined in international agreements or other instruments. Two representative definitions of “development” are provided by the *World Conservation Strategy* (“WCS”) and the United Nations General Assembly Declaration on the Right to Development. The definition provided by the WCS is directed at the relationship between conservation and development. According to the WCS, development is:

“... modification of the biosphere and the application of human financial, living and non-living resources to satisfy human needs and improve the quality of human life.”¹⁶

The United Nations Declaration on the Right to Development characterises development as:

“...a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair

¹⁶ WCS, “World Conservation Strategy for the 1990’s,” Perspectives on the second draft of “Caring for the World: A Strategy for sustainability” presented to the General Assembly of the World Conservation Union (IUCN), 28 November 1990.

distribution of benefits resulting there from.”¹⁷

In essence, development is about change for the better, and such change should involve adequate and acceptable improvement in the general wellbeing of the society culturally, economically, technologically. For the impacts of the change to be progressive and positive, it must involve the full participation of beneficiaries. In which case, there must be equity and justice; the change must also be sustainable. According to Hugo (1995) true development cannot be measured in solely economic terms, but must also include changes in the quality of lives, which are less tangible.

A great number of third world scholars’ perspective of the concept of development has been clearly expressed for example Rodney (1982) suggests that:

“Development in human society is a many-sided process. At the level of the individual, it implies increased skill and capacity, greater freedom, creativity, self-discipline, responsibility and material well-being. Some of these are virtually moral categories and are difficult to evaluate – depending as they do on the epoch in which one lives, one’s class origins, and one’s personal code of what is right and what is wrong ... At the level of social groups, therefore, development implies an increasing capacity to regulate both internal and external relationships.”

In Rodney’s view, the term ‘development’ is used exclusively to

describe economic progress in that the nature of a country’s economy is indicative of other social variables.

There is no doubt that Shell contribute towards the production of crude oil and gas that in turn, contribute towards the socio-economic development of Nigeria. For instance, the central bank of Nigeria reported that the rise in the price of crude oil in the international market in significantly improved Nigeria’s external accounts and national reserves in 2000. Oil export contributed to rapid economic growth rising from 58% in 1999 to 64% in 2000 and, provides foreign exchange of 181% for imports. It was also reported that:

“Tax revenue from the crude oil sector helped to support a sharp rise in public investment spending in 2000. In addition, inspection of imports rose to 100%, significantly increasing revenue from import duties and offsetting what could have been a significant budget deficit for 2000. The government budget for 2001 had envisaged even greater capital outlays (around 50% more than in 2000 and 250% more than in 1999). But the introduction of procurement rules and value-for-money audits of capital projects helped to slow capital spending and prevented waste”.¹⁸

¹⁷ UN General Assembly Resolution 41/128, 1986, also in United Nations General Assembly Resolution 2200A (XXI) of 16 December 1966

¹⁸“Nigeria—Untapped Potential” UN Economic Report on Africa 2002: Tracking Performance and Progress. Also cited in Central Bank of Nigeria, Annual Report and Statement of Accounts, 2000, and EIU 2001a, except for data for 2001 and 2002, which are Economic Commission for Africa estimates based on official sources, including Nigeria, Ministry of Finance 2000a.

The oil firms in Nigeria especially Shell, consistently uses the foregoing contribution of oil to Nigeria economy to buttress its argument that its operations and investment is catalyst to Nigeria's development but fails to confirm the sustainability of such economic input of oil. However, I argue that there is the diminishing role of the government in regulating the behaviour and practices of Shell and, the increasing repressive power of the government against local communities where the exploration activities are being conducted causing huge environmental destruction. As direct consequence of environmental destruction, poverty rates are high in the rural communities of the Niger Delta as the inhabitants lose farmlands, plants, fishing grounds and native ways of sustaining livelihoods. In essence, what the federal government and Shell construe as development is not sustainable development as it fails to meet the basic requirement of sustainable development as stated by the *Brundtland Commission Report*¹⁹ inter alia:

“...Sustainable development requires the promotion of values that encourage consumption standards that are within the bounds of the ecological possible and to which all can reasonably aspire ... At a minimum, sustainable development must not endanger the natural systems that support life on Earth: the atmosphere, the waters, the crude oil, and the living beings ...”

HUMAN RIGHTS REPERCUSSION OF SHELL ACTIVITIES

¹⁹ UN General Assembly, *The Brundtland Commission Report on Development and International Economic Corporation – Environment*, 4 August 1987.

Increasingly, international attention is focusing on the effects of oil exploration to human rights. In Nigeria, several international human rights groups including Human Rights Watch and Amnesty International have been critical of the oil firms on human rights abuses in the Niger Delta. However, not many critics seem to be concerned about the implications of oil exploration to the right to development. The right to development is internationally recognised as a human right. The *United Nations Declaration on the Right to Development 1986* provides in Article 1, Paragraph 1 that:

“The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised.”²⁰

The provision of the foregoing was clarified by the *United Nations Independent Expert on the Right to Development*.²¹ The right to development therefore implies:

“The right to a particular process of development that allows the realization of

²⁰ Declaration on the Right to Development, Adopted by General Assembly resolution 41/128 of 4 December 1986

²¹UNCHR “*Preliminary study of the independent expert on the right to development*, Mr. Arjun Sengupta, on the impact of international economic and financial issues on the enjoyment of human rights”, submitted in accordance with Commission resolutions 2001/9 and 2002/69, E/CN.4/2003/WG.18/2, 18 February 2006.

economic, social and cultural rights, as well as civil and political rights, and all fundamental freedoms, by expanding the capabilities and choices of the individual”.

The UNCHR independent expert further remarked that it is only human development initiatives that involve the participation of all citizens in well accountable and transparent manner with justice and equity that can preserve the right to development. By the same vein, the development initiatives must include policies aimed at poverty eradication, education, and providing adequate shelter as well as preserving cultural rights, political and civil rights.

The extent to Shell and its cohorts has become an impediment to Nigeria’s development and actively violating human rights of the indigenous people is lucidly stated by *Nimmo Bassey*²² as follows:

“The story of crude oil and gas in Africa is the story of rogue exploitation, despoliation and bizarre brigandage. It is a story of pollution, displacement and pillage. It is a montage of burnt rivers, burnt forests and maimed lives. A crude oil well is a death sentence if it is located in your backyard... Every destructive action attracts a debt. It is an ethical issue; it is a moral issue; it has cultural connotations; it is economic, political and even criminal...”

²² Nnimmo Bassey, “Crude oil And Gas In Africa: Ecological Debt Huge As The Sky”, Earth Rights Action, full text at: www.debtwatch.org/cast/docs/observatoris/dec o/Crude oil andgas.doc

I affirm the above opinion of Nimmo Bassey in that, whilst it is undeniable that the revenue accruing from crude oil and gas exploration is certainly huge. The problem is that it does not translate to positive change within the communities and territories where the oil production activities are being conducted. The huge revenues are neither adequately nor transparently accounted for by Shell and the federal government. Thus, the deprived Nigerian people are made to bear the heavy load of debts owed to foreign creditors including the International Monetary Fund and the World Bank.²³

The exploration of crude oil and gas by Shell in Nigeria is often marked by seismic activities that involve the use of dynamites and numerous other explosives. The explosives are often detonated in the bowels of the earth through water bodies or dry land. They have direct impact on the aquatic stocks in the area as well as the fauna. Independent Scientists claim that aftershocks of the explosions cover as much as a radius of twelve kilometres. It is also claimed that, the blasts have negative impact on the auditory systems of sea birds and mammals affecting their ability to procreate. Other side effects are noted in diminishing food supplies, increased cases of hypertension and endocrine imbalance.²⁴ The ultimate impact is on the fish and food supply and, health of the indigenous community of the Niger Delta.

²³ *ibid*

²⁴ Bravo, Elizabeth, *Crude oil That Flows, Seas that Bleed*, in *The Crude oil Flows The Earth Bleeds*, Bravo, E. (ed.) Crude oil watch, Quito, 1999 cited in Nnimmo Bassey, “Crude oil And Gas In Africa: Ecological Debt Huge As The Sky”, Earth Rights Action, full text at: www.debtwatch.org/cast/docs/observatoris/dec o/Crude oil andgas.doc

The transportation stage of the explored crude oil and natural gas often results in oil spillages and gas leakages due to broken pipes and sometimes, pipeline explosions. The reason being that pipelines are routinely left to rust and rupture before replacement. In certain parts of the Niger Delta, pipelines have not been replaced but constantly in use since 1957. The oil spills are never adequately cleaned-up. For example, Amnesty investigation of Ogoni in 2004 reveals that farmlands become disused, flares from the gas flow stations are never controlled and often located too close to residential area of neighbouring villages and towns resulting in numerous diseases to the inhabitants of the communities. Huge automobile that transports equipment to the oil exploration sites damage the roads and streams, thereby polluting the sources of drinking water and creating transportation difficulties for local people. Pipelines are routinely laid on the earth surface across thousands of acres of land depriving the indigenous people the right to farming on their lands. Farm owners caught conducting farming activities near the pipelines are routinely arrested and tortured sometimes shot by well armed Shell Police.

Several observers including Amnesty International have lamented that civil and political as well as economic, social and cultural rights are being violated and abused in the process of the oil exploration and production in the Niger Delta. Amnesty avers that the violation of human rights has consequentially resulted to escalating violence in the Niger Delta, between the state and armed groups as well as between different armed groups. These are manifesting in hostage taking of crude oil Company Staff by aggrieved local militias. Oil companies' employees and assets, such as pipelines, are also

frequently targeted for attack and sabotage. Amnesty further found that, economic and social rights, such as the right to health and the right to adequate standard of living remain unfulfilled for many Nigerians especially in the Niger Delta which is the main oil producing and hence main revenue generating region in the country.²⁵

Portmann and Seidler (2003) suggest that it is becoming more glaring that no one seems to figure out how to hold corporation accountable. They remarked that the problem is exacerbating in that drawing the boundaries of corporate responsibilities is particularly exigent when the sphere of concern is that of human rights. While in a few cases corporate responsibilities are clearly defined when, for instance, TNCs have direct control over issues such as workers' rights in many other cases the boundaries of their responsibility are unclear and often contested.

Studies conducted in the Niger Delta found evidence of dangerous effects of oil exploration in the Niger Delta, for example Ime, et.al., (2008) found that hydrocarbon contaminants in Iko community which is plagued by gas flaring and oil spillages in Eastern Obolo; Hart, et. al., (2005) found exceptionally high level of lead, iron, copper and zinc in cassava and various other food crops at areas of high industrial activities in Port Harcourt; and, Kretzmann and Wright (1997) found that the soil and water samples from Luawaii (Ogoni) and Ukpeleide (Ikwerre) have between 18 ppm²⁶ - 34 ppm hydrocarbons which are 360 to 680 times more than the safety levels permitted in the European Union. It is difficult to sustain the argument that oil exploration by Shell and others is

²⁵ Nigeria: Are human rights in the pipeline? Amnesty International, 9 November 2004.

²⁶ The abbreviation PPM stands for "Parts per million" which is the measurement of the tiniest volume of pollutants in the environment.

catalyst for development rather it is catalyst for human rights violations; and, food and water contamination.

Despite environmental pollution, there are several other problems associated with oil exploration in the Niger Delta of Nigeria. Deforestation by way of bush burning occurs regularly from oil spillages caused by ruptured oil pipes and intentional burning by the oil firm as was the case in Etiema forest in 1999 where Shell set the forest on fire when it found that its pipelines constructed in 1972 had broken and caused spillage of crude oil to the surrounding environment. The same evidence was found in Aleibiri forest in 2000, 2003, 2004, 2005 where Shell set fire on the forest and the as a way of drying up the pools of spilled crude oil.

The oil firms routinely cut down large acres of bushes to make ways for the conveying of heavy machinery to sites of oil exploration; and, firms clear hundreds of kilometre of bushes for laying of pipelines and for seismic activities. The clearing of bushes and fire often destroy farmlands and sometimes force the inhabitants to migrate away from their ancestral villages and communities without any reason compensation by the oil firms.

In 2004 the UNDP and World Bank report estimated that the Shell oil company's revenue in Nigeria was fifty million US Dollars (\$50 million) per day. It was also reported that, approximately 66% of the Nigerian population lives on less than one US Dollar per day; and, Oil companies in Nigeria were flaring over 70 million cubic metres of gas daily, amounting to about 70 million tonnes of carbon dioxide into the environment per day and has contributed more greenhouse gas emissions than all other sources in

sub-Saharan Africa combined.²⁷ Similarly, the gas industry statistics publisher, *Cedigaz*,²⁸ indicates that Nigeria accounted for 19.79% of global gas flaring in 2001, more than Iran and Indonesia combined, making Nigeria the highest gas flaring country in the World. It noted that gas flaring by Shell and other oil companies costs Nigeria about US\$2.5 billion in lost revenue yearly.

Gas flaring is supposedly prohibited in Nigeria under Environmental Regulation Laws. However, the legislations are deficient in that it contains clauses that ministerial consent could be granted to allow flaring of same. Under section 3 of the Associated Gas Re-Injection Act 1979, consent can only be issued if the Minister is satisfied that utilization or re-injection is not appropriate or feasible in a particular oil field. Where the oil Minister consent is issued, the Minister may require the recipient oil Company to pay a sum of 10 Naira (about One US cent) per million cubic feet of gas flare.²⁹

The need to control the activities of Shell and its cronies are growing, the question is how?

SOCIAL ACCOUNTABILITY AND RESPONSIBILITY OF SHELL

²⁷ Strategic Gas Plan for Nigeria, Joint UNDP/World Bank Energy Sector Management Assistance Programme (ESMAP) (February 2004), paragraph 2.5 also in the Memorandum of the President of the International Development Association and the International Finance Corporation to the Executive Directors on an Interim Strategy Update for the Federal Republic of Nigeria, February 13, 2002, Report No. 23633- UNI, paragraph 15).

²⁸ www.cedigaz.org

²⁹ Fact Sheet produced by the Climate Justice Programme and Environmental Rights Action/Friends of the Earth Nigeria, June 2005

There is delicate balance between the ability of the States to sustain and support the inflow of capital of transnational corporations and the control of the negative effects of foreign investment. At stake is the zest of the transnational corporations to control and perpetually operate business in the developing countries without the control of the recipient governments. The inability of Nigeria to control the oil firms was illustrated in *Jonah Gbemre v. (1) Shell Petroleum Development Company of Nigeria Limited, (2) Nigerian National Petroleum Corporation, (3) Attorney-General of the Federation*³⁰ in which the Applicant(s) sought the following remedies:-

- a) "A declaration that the constitutionally guaranteed fundamental rights to life and dignity of human person provided in sections 33(1) and 34(1) of the Constitution of the Federal Republic of Nigeria, 1999 and reinforced by Articles 4, 16 and 24 of the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act, Cap. A9, Vol. 1, Laws of the Federation of Nigeria, 2004 inevitably includes the right to clean, poison-free, pollution-free and healthy environment;
- b) A declaration that the actions of the first and second defendants in continuing to flare gas in the course of their Crude oil exploration and production activities in the applicant's community is a violation the aforementioned rights;
- c) A declaration that the failure of the first and second defendants to carry out environmental impact assessment in the applicants' community concerning the effects of their gas flaring activities is a violation of section 2(2) of the Environmental Impact Assessment Act, Cap. E12, Vol. 6, Laws of the Federation of Nigeria, 2004 and contributed to the violation of the applicant's said fundamental rights to life and dignity of human person;
- d) A declaration that the provisions of section 3(2) (a) (b) of the Associated Gas Re-Injection Act, Cap. A25, Vol. 1, Laws of the Federation of Nigeria, 2004 and section 1 of the Associated Gas Re-Injection (Continued Flaring of Gas) Regulations S.1. 43 of 1984 under which continued flaring of gas in Nigeria may be allowed are inconsistent with the applicant's rights to life and/or dignity of human person enshrined in sections 33(1) and 34(1) of the Constitution of the Federal Republic of Nigeria, 1999 and Articles 4, 16 and 24 of the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act, Cap. A9, Vol. 1, Laws of the Federation of Nigeria, 2004 and are therefore unconstitutional, null and void by virtue of section 1(3) of the same Constitution; and,
- e) An Order of perpetual injunction restraining the first and second defendants by themselves or by their agents, servants, contractors or workers or otherwise howsoever from

³⁰ Suit No. FHC/CS/B/153/2005 brought by Jonah Gbemre on behalf of himself and the Iwherakan Community of Niger Delta.

further flaring of gas in the applicants' said community which remedies are in terms of the remedies sought ..."³¹

The Court ruled that:

- a) "The actions of the first and second Respondents in continuing to flare gas in the course of their Crude oil exploration and production activities in the Applicants' Community is gross violation of their fundamental right to life (including healthy environment) and dignity of human person as enshrined in the Constitution;
- b) Failure of the first and second Respondents to carry out Environmental Impact Assessment in the Applicants' community concerning the effects of their gas flaring activities is clear violation of Section 2(2) of the Environmental Impact Assessment Act, Cap. E12 Vol. 6, Laws of the Federal Republic of Nigeria 2004 and has contributed to a further violation of the said fundamental rights; and,
- c) That Section 3(2)(a) and (b) of the Associated Gas Re-Injection Act and Sections 1 and Section 1.43 of Associated Gas Re-Injection (continuing Flaring of Gas) Regulation 1984 under which continued flaring of gas in Nigeria may be allowed are inconsistent with the Applicant's rights to life and/or dignity of human person enshrined in Sections 33(1) and 34(1) of the Constitution of the

Federal Republic of Nigeria, 1999 and Article 4, 16, and 24 of the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act, Cap. A9, Vol. 1, Laws of the Federation of Nigeria, 2004 and are therefore unconstitutional, null and void by virtue of Section 1(3) of the same Constitution."

Irrespective of the above ruling, the Shell and its cohort continue all the activities which were the subject of the litigation. The Niger Delta people legitimately expected that it is 'just and equitable' for Shell to be socially and morally accountable for its actions. They also expected that Shell would follow the spirit of *Chorzów, Germany v. Poland*³² where it was stated inter alia:

"The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which restitution in kind would bear..."

The refusal of Shell to respect the rulings of the Nigerian High court is indicative of the extent to which

³¹ *ibid*

³² Court of International Justice, No. 17, Norton, September 13, 1928.

transnational corporations can demonstrate their ability to disregard the national institutions and the laws of host third world countries without repercussion. Furthermore, Shell's ability to secure swift counter-ruling on the matter which effectively grant "stay of execution" of the initial judgement is indicative of the ability of corporations to manipulate corrupt national institutions of host countries. The despicable activities of Shell in Nigeria are part of a broader trend across the world where TNCs invest and subsist; therefore, an assessment of the international control mechanism of TNCs would offer better explanation to the problems.

THE INTERNATIONAL CONTROL MECHANISM

For decades, there has been growing concern for international collective action for the control of the activities of TNCs. The overall picture depicts a rather dismal outcome. In 1962, the UN General Assembly passed Resolution 1803 (XVII) to protect the right of all people within sovereign jurisdictions. The Resolution states *inter alia*:

- a) "The right of peoples and nations to permanent sovereignty over

Subsequently, in 1974, the UN General Assembly adopted Resolution 3281 (Charter of Economic Rights and Duties of States) which provided among others that States have the right to supervise TNCs. The Resolution also requires TNCs to comply with national Laws in the jurisdiction of its operation. In the same direction, in furtherance of the UNCTAD various understandings and declarations regarding trade, investment and TNCs, the Declaration on the establishment of

their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned" (Article 1).

- b) "... The exploration, development and disposition of such resources, as well as the import of the foreign capital required for these purposes, should be in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable with regard to the authorization, restriction or prohibition of such activities "(Article 2).
- c) "... Violation of the rights of peoples and nations to sovereignty over their natural wealth and resources is contrary to the spirit and principles of the Charter of the United Nations and hinders the development of International co-operation and the maintenance of peace" (Article 6).
- d) "... States and international organizations shall strictly and conscientiously respect the sovereignty of peoples and nations over their natural wealth and resources in accordance with the Charter and the principles set forth in the present resolution" (Article 8).

a New International Economic Order was adopted by the UN General Assembly (Resolution 3201) in 1974. The utility of the declaration on the control of TNCs has been very negligible. On the preservation of human rights law, where progress has been made around the world, frankly, transnational corporations are exempted. Remarkably, the UN Commission on Human Rights noted that:

“It is not possible for private actors whose actions have a strong impact on the enjoyment of human rights by the larger society ... to absolve them from the duty to uphold international human rights standards...”³³

In conjunction with the UN General Assembly, Resolution 3201, there has been a multitude of transnational codes and principles in the area of corporations and human rights but the four major players are the Organisation for Economic Cooperation and Development’s Guidelines for Multinational Enterprises (OECD, 1984), the International Labour Organisation’s Tripartite Declaration of Principles concerning Multinational Enterprises (ILO, 1977), the United Nations Global Compact (UNGC) and the Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights.

The TNCs are not bound by the Codes and Principles. For instance, the Guidelines contained in the OECD are not legally binding and apply only to multinational enterprises from member States of the Organisation for Economic Cooperation and Development and a few other State parties. This fact was echoed by the UNDP logically as follows:

“There are no mechanisms for making ethical standards and human rights binding for corporations and individuals, not just government...But multinational corporations are too important and too

dominant a part of the global economy for voluntary codes to be enough.”³⁴

The principles internationally agreed through the International Labour Organisation’s tripartite structure (employers, trade Unions and governments) only cover labour rights rather than the whole spectrum of human rights and the right to development. The process by which they are interpreted is little utilised. Only national governments may request for interpretations and only if they fail to do so will workers’ and employers’ associations having standing to fill the breach and make requests themselves.

The Global Compact on the other hand, is a forum for dialogue and exchange of experience and best practice rather than a means of holding companies to account for human rights violations.³⁵ TNCs commit to adhere to “Ten Principles” as part of their membership of the Global Compact and there is no enforcement mechanism.³⁶ It could be noted that Shell is yet to be a member of the Global Compact so also are many other TNCs.

The UN arena would have best provided the most needed control of the TNCs. Sadly, the UN Resolution 1803 (XVII) of 1962, and Resolution 3281 (1974), both created ambiguity in that, customary law notions of ‘*sovereign state competence within its borders*’ was emphasised and equally weighed with the notions of ‘*diplomatic protection*’, this creates

³³ UN Commission on Human Rights, Sub-Commission on the Protection and Promotion of Human Rights, 52nd session, 1 August 2000, E/CN.4/Sub.2/2000/1/Rev.1,p17

³⁴ UNDP Human Development Report, New York/Geneva, 1999 p. 100

³⁵ Hillemans, Carolin “UN Norms on the Responsibilities of Transnational Corporations and, other Business Enterprises with Regard to Human Rights”; German Law Review Vol. 4 No. 10 (2003).

³⁶ GC Norms document: UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003)

confusion and hard to balance one against the other. The questions over the protection of and the due compensation for the violation of human and peoples' rights and right to development within a country came to bear.

Despite attempts at global level to tackle the overwhelming powers of TNCs, at regional level efforts have not been relaxed either. In the case of *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights V. Nigeria*³⁷ (Hereinafter referred to as "SERAC"), SERAC, an NGO concerned with the promotion of economic and social rights in Nigeria, and another New York based NGO known as the *Centre for Economic and Social Rights* (CESR), petitioned the Nigerian government to the African Commission pursuant to *Articles 55, 56 and 58* of the *African Charter on Human and Peoples Rights* concerning the widespread contamination of crude oil, water and air; the destruction of homes; the burning of crops and killing of farm animals; and the climate of terror that has been visited upon the Ogoni communities in violation of their rights to health, a healthy environment, housing and food.

The petition alleged violations of *Articles 2, 4, 14, 16, 18, 21, and 24* of the *African Charter*, in addition to violations of corresponding provisions of the followings: Universal Declaration of Human Rights (UDHR) United Nations Document A/810, 71 (1948); the International Covenant on Economic, Social and Cultural Rights

(ICESCR);³⁸ the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD);³⁹ the Convention on the Elimination of All Forms of Discrimination Against Women;⁴⁰ and, the International Convention on the Rights of the Child (CRC).⁴¹

The petition highlighted the role of private actors in the Ogoni violations. In considering the entirety of the petition, the African Commission based its decision on the State's duties to respect, protect, promote and fulfil all human rights. It was decided that Nigeria violated of all the alleged human and development rights. The African Commission cited the failure by the government to protect the Ogoni population from the harm caused by the NNPC-Shell group. In addition, the Commission found a violation of these human and development rights on account of the failure by the government to provide or permit studies of potential or actual environmental health risks caused by the oil operations. In the same perspective, it observed that, Crude oil exploration by Nigeria and Shell consortium fell short of the requirements of the African Charter guaranteeing the peoples' right to free disposal of wealth. With regards to the right to life, human dignity, health and the right to economic, social and cultural development, the Commission observed that, by destroying food sources through environmental and ecological damage. It further found that, Nigeria, by its inaction towards Shell and government security forces allowing them to continue to destroy

³⁷ *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* Communication 155/96 decided at the African Commission's Ordinary Session held from 1 to 27 October 2001. SERAC petition available at <http://www.cesr.org> last visited 30 April 2006.

³⁸ U.N. Doc. A/6316 (1966) (ratified by Nigeria Oct. 1993)

³⁹ U.N.T.S. 195 (1966) (ratified by Nigeria, Oct. 1967)

⁴⁰ U.N. Doc. A/RES/34/180 (1980) (ratified by Nigeria, June 1985)

⁴¹ U.N. Doc. A/RES/44/25, 1989 (ratified by Nigeria, Apr. 1991)

food sources and creating obstacles to the members of the community trying to feed themselves, the Commission held that the state was violation of its minimum duties regarding the right to food.

The overall decision and *obiter* of the African Commission in the SERAC case affirms the duty of the State to protect people's rights from violation by private actors. It said:

“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.”⁴²

The case re-ignited the need to enforce the obligations of the private actors through the avenue of state responsibility, and the direct responsibility of the corporations. The failure of the Nigerian government to support the people of Niger Delta against the activities of She Oil Company is proof, of the so called “*race to the bottom concept*” where African states, in a bid to attract the badly needed foreign direct investment (FDI) would go to the extreme compromises of social standards and human rights.

⁴² SERAC decision, paragraph 57, the Commission draws from the jurisprudence of both the Inter-American Court in *Velasquez* (n 119 above) and the European Court on Human Rights in *X and Y v Netherlands* 91 ECHR (1985).

THE WAY FORWARD

In view of the foregoing discourse, it is therefore an uphill task for aggrieved group of persons to tackle the might of corporations in the face of weak national institutions and in the absence of enforceable international corporate regulatory framework. The springboards for in-road towards achieving effective corporate social accountability are as follows:

- a) Trade agreements like the WTO that sets out the legal framework for the operation of TNCs must be subordinated to the international human rights frameworks reflected in national constitutions and international agreements. The current trend is to supersede all other international agreements and give pre-eminence to trade and investment at any cost which is unfair.⁴³
- b) Shell should take appropriate route in its activities to reducing the hazard of accidents and damage to the environment by adopting the

⁴³ Finn, Ed “The Revolt Against Corporate Rule,” Briarpatch July-August 1999.

best management practices and technology.⁴⁴

- c) Shell should ensure that its private police, officials and security forces representing its interest does not in any way use bully tactics while communicating with communities, and to comply with the specific provisions in the Voluntary Principles for Security and Human rights and the UN Codes of Conduct for Law Enforcement Officials, regarding the appropriate use of force.⁴⁵
- d) Shell should setup an inquiry into the conduct of its officials in the Niger Delta communities. The results of the inquiry must be made public and to provide the Niger Delta communities with prompt, effective and adequate reparation for any damage done or property affected where appropriate.⁴⁶
- e) Shell should routinely carry out Environmental Impact Assessment in the Niger Delta communities regarding the effects of its gas flaring activities pursuant to Section 2(2) of the Environmental Impact Assessment Act, Cap. E12 Vol. 6, Laws of the Federal Republic of Nigeria 2004.
- f) Shell should devise means of exploring natural gases without flaring same in proximity to villages, fishing ports and

farming areas. In addition, Shell should avoid the construction of high pressure Crude oil and gas pipelines on the surface of community land and should endeavour to maintain same to avoiding exposure and Crude oil spillages which constitute gross violation of right to life (including healthy environment) and dignity of human person as enshrined in the Nigerian Constitution and, in International Human Right Laws and Covenants.

- g) The Nigerian government should restructure the present Niger Delta Development Commission (“NDDC”) to include representative from the “neglected” rural communities in the policy and decision making.

CONCLUSION

In spite of several initiatives to regulate and control TNCs, these rules remain very weak at the international level compared to the rules that exist within the framework of the national state. Today, in the era of increasing globalization of capital and cross-border operation of all major corporations, concerned persons and NGOs are raising the issue of international norms and rules. The rules that have promoted a more orderly society within national borders no longer suffice in the open borders and open markets of a global economic system. A series of economic crises in the late 1990s proved this all too clearly, as have other emerging problems at the global level like climate change, toxic waste disposal,

⁴⁴ Nigeria: Are human rights in the pipeline? Amnesty International, 9 November 2004.

⁴⁵ *ibid*

⁴⁶ *ibid*

money laundering and large scale tax evasion.⁴⁷

The oil company can play a very positive role in the development of Nigeria and improve the lives of Nigerians (including the indigenous communities) through technology and knowledge transfer, job creation, the introduction of higher wages and labour standards, improvement of infrastructures such as schools, roads, drinking water, adequate clean-up of Crude oil spillages and, the introduction of newer and cleaner technologies that protect the environment. However, more often than not the evidence that filters out of the Niger Delta of Nigeria portrays people whose lives and livelihoods have been damaged by Shell activities.

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⁴⁷ James A. Paul and Jason Garred, "Making Corporations Accountable" A Background Paper for the United Nations Financing for Development Process, *Global Policy Forum*, December 2000, full text available at: www.globalpolicy.igc.org/socecon/ffd/2000.pr.htm

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