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## **MNOC'S LEVEL OF ENGAGEMENT WITH HUMAN RIGHTS OBLIGATIONS IN TRANSNATIONAL LITIGATIONS FROM THE NIGER DELTA**

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### **Abstract**

*The approach that Multinational Oil companies (MNOCs) use to comply with their human rights obligations translates to the different levels of engagement with stakeholders. For example, concerns regarding alleged human rights and environmental violations of MNOCs usually start with a notification, and then a formal complaint and if this is handled improperly will result in litigation. The ways MNOCs handle the disputes reflects whether the company pursues an inactive,*

*reactive, active or proactive level of engagement with its human right obligations. This paper evaluates each level of engagement against a selected set of transnational human rights and environmental litigations arising from the Niger Delta. This evaluation reveals that MNOCs with a proactive approach considers the engagement and implementation of their human right obligations as a shared societal responsibility and are more inclined to look at the background of the complaint to solve the underlying problems in collaboration with all stakeholders. This paper, therefore, concludes that a proactive approach will lead to an improvement in human rights and environmental protection, in partnerships with local governments, local communities, and NGOs.*

### **Keywords**

Human Rights, Environmental Rights, Obligations, Transnational, Litigations, Levels of Engagement, Multinational Oil Companies, Niger Delta

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## **1. Introduction**

Multinational oil companies (MNOCs) have a variety of approaches to dealing with issues and complaints, and they can be inactive, reactive, active, or proactive in engaging their human rights and environmental obligations (e.g., timely and adequate clean-up of oil spill and compensation) (Dam, 2015). The lack of appropriate level of engagement of MNOCs (e.g., Shell, Chevron, ExxonMobil) with their human rights obligations is the reason for reoccurring conflicts and incidences of human rights and environmental violations in the Niger Delta which in turn has led to numerous transnational human rights litigations (Onwuazombe, 2017). This has led to calls for regulating the activities of MNOCs operating in the Niger Delta (Ekhaton, 2018a). The Niger Delta is an oil-rich region in the southern region of Nigeria. It has been in the international spotlight for numerous allegations of human rights and environmental violations due to oil operations by MNOCs.

Let me give an example to illustrate this point. In the Bodo v Shell litigation, Shell fought so hard for many years to prevent the litigation from being heard in the first place on several grounds including lack of jurisdiction (Enneking, 2019). Shell only admitted liability for the two oil spills in July 2011, after plaintiffs' lawyers stated that they intended to file a lawsuit in this matter. Again, Shell only agreed to pay compensation only when the courts were presented with evidence that the oil spill was due to poorly maintained oil pipelines and not by sabotage as they had claimed. It can be concluded that MNOCs level of engagement with their human rights

obligations as evidenced in recent litigations is an indication that Shell is not interested in finding a realistic solution to the conflict in the shortest possible time.

This paper aims to evaluate how MNOC level of engagement with their human rights obligation affects the human right and environmental litigation in the Niger Delta. The main contributions of this paper are -

(i) Analyzing the different levels of engagement of the multinational oil companies with their human rights obligations;

(ii) Evaluating three (3) transnational human rights and environmental litigations against MNOC's level of engagement with their human rights obligations.

This paper adopts a comparative analysis methodology to address the impact of MNOC's level of engagement with their Human Rights obligations in litigations arising from the Niger Delta. Firstly, we review three (3) transnational litigations (that is, *Wiwa v Shell*, *Bodo v Shell*, and *Oguru v Shell*) arising from the Niger Delta. The three litigations cut across three jurisdictions – the US, UK (England), and the Netherlands and are arising from the Niger Delta. Secondly, we describe four (4) levels of MNOCs level of engagement with their human rights obligations. Thirdly, we evaluate how Shell's level of engagement with their human right obligations affect human rights and environmental litigations in the Niger Delta.

This paper argues that MNOC's with a proactive approach that regards their human rights obligation as a shared responsibility with their stakeholders leads to an improvement in human rights and environmental protection. It is recommended that the attitude of MNOCs during litigations should line up with their human rights obligations to provide effective remedies for persons whose human rights have allegedly been violated by corporate behavior.

The rest of the paper is organized as follows. Section two discusses the background- human rights and environmental obligations of MNOCs, and violations of human rights and the environment due to oil operations in the Niger Delta. Section three discusses three (3) transnational human rights litigation arising from Niger Delta. Section four describes different levels of MNOCs engagement with their Human Rights obligations. Section five is the discussion and Section six concludes the paper with future work.

## **2. Background**

Human rights obligations are policies a company develops or signs on to that indicate what the company intends to do to address its human rights and environmental rights impacts (International Institute for Sustainable Development, 2007). These human rights obligations are contained in the company's Websites, reports (e.g., Shell Sustainability Report, Tax Contribution Report), policies and procedure manuals and code of conducts, and Securities filing (e.g., the US SEC Form 20-F filing). The Human rights obligations of any multinational oil company start with ensuring full respect and compliance with both domestic and international laws that regulate all aspects of their business operations. Human rights obligations can be formulated in different ways; each company is different and will approach human rights formulation in different ways depending on its corporate strategy.

Let us be very clear about the importance of human rights obligations of MNOCs which is usually taken lightly. Multinational oil companies (e.g., Shell, BP, and Chevron, ExxonMobil) state in several sources including their official websites, manuals, reports, etc., that their human rights obligations are in line with domestic and international laws and standards (e.g., 2014 European Union Directive on the Disclosure of Non-Financial and Diversity Information and the stakeholder disclosure provision of the U.K. Companies Act). MNOCs, as public companies, are required by US law to file reports and registration statements with the US Securities and Exchange Commission (SEC). For example, Shell included at least three cross-references to its 2011 Sustainability Report in its US SEC 20-F filings, indicating to shareholders that they can rely on the information in the report (Shell, 2011). Furthermore, these sources are themselves legally binding documents, for example, policy and procedural manuals produced as a result of membership of legally regulated agencies (e.g., standards for health and safety, supervision and maintenance of oil infrastructure/pipelines). It is even more serious if such sources are filled in the court or other legally binding environments (e.g., Security Exchange Commission (SEC), US). A multinational oil company can be sued for providing incorrect and misleading information (e.g., statement about the group-wide nature of its health, safety, and environmental policies) to shareholders, investors, the government (Van et al, 2011).

This means that any materially misleading information contained in the 20-F of the sustainability Report violates the Exchange Act and Rule 10b-5, as well as SEC Rule 10b-5, and sanctions can be imposed on the Shell for non-adherence to the rules. In 2004 SEC settled

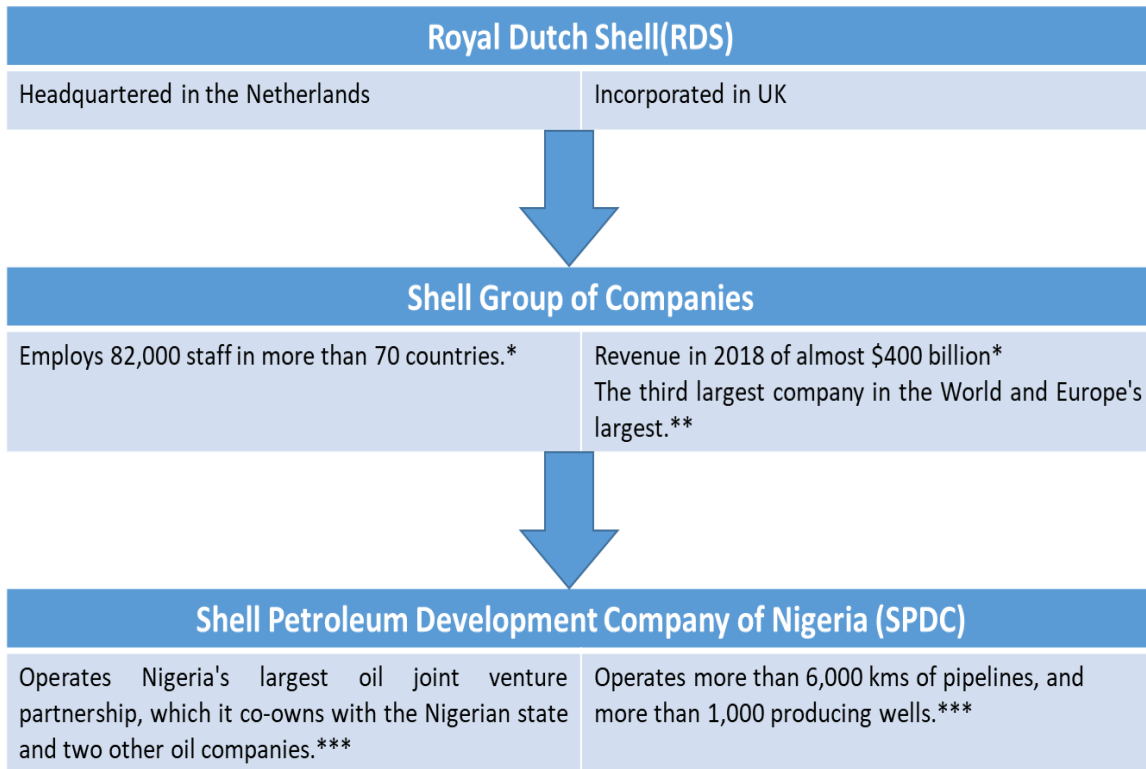
securities fraud case with Shell (and other groups of companies) concerning a 4.47-billion-barrel overstatement of proved reserves which was done in violation of the Securities Exchange Act of 1934. Shell agreed to pay a \$120 million penalty and an additional \$5 million to create and implement a comprehensive internal compliance program in a related civil action filed by the Commission in U.S. District Court in Houston. The serious implication of Shell's breach of its human rights obligation regarding providing incorrect and misleading information is captured as follows in the statement released by SEC (US Securities and Exchange Commission, 2004):

*“The Commission also found and alleges that Shell's overstatement of proved reserves, and its delay in correcting the overstatement, resulted from (i) its desire to create and maintain the appearance of a strong RRR, (ii) the failure of its internal reserves estimation and reporting guidelines to conform to SEC requirements, and (iii) the lack of effective internal controls over the reserves estimation and reporting process. These failures led Shell to record and maintain proved reserves it knew (or was reckless in not knowing) did not satisfy SEC requirements, and to report for certain years a stronger RRR than it had achieved. Indeed, Shell was warned on several occasions before the fall of 2003 that reported proved reserves potentially were overstated and, in such critical operating areas as Nigeria and Oman, depended upon unrealistic production forecasts”.*

It is also possible for SEC to initiate proceedings against an MNOC. In January 2021, the Securities and Exchange Commission launched an investigation into ExxonMobil Corporation following a complaint it overvalued a key asset in the top US shale field. It was claimed that in 2019, Exxon employees estimated the Delaware Basin in the Permian to be worth \$40 billion. This value was less than the \$60 billion it was initially estimated to be in 2018, and as a result, employees were under pressure to recoup some lost value by using different assumptions, including a more optimistic “learning curve” that estimated the rate at which drilling times would improve (Hiller & Krishna, 2021).

This paper considers Royal Dutch Shell as a case study for two main reasons: the first is that RDS is the largest and oldest MNOC in operating in the Niger Delta; and secondly, most of the high profile transnational human rights and environmental litigations arising from the Niger Delta have been initiated against Shell. RDS is a company incorporated under the laws of the United Kingdom, with a registered address in the UK and its head office in the Netherlands (Shell,

2020a). RDS (represented by Shell Petroleum Development Company-SPDC) is part of a Joint Venture Agreement (JVA) between the Federal Government of Nigeria (represented by Nigerian National Petroleum Company-NNPC) and several multinational oil companies in Nigeria to operate in its petroleum industry. Figure 1 shows the corporate structure of Shell.



**Figure 1:** *Shell Corporate Structure (Amnesty International, 2019a)*

Shell states that it “is committed to respecting human rights as set out in the UN Universal Declaration of Human Rights and the International Labor Organization Declaration on Fundamental Principles and Rights at Work” (Shell, 2020b).

Shell's commitment to human rights is written into the company's existing frameworks and processes, and it applies to all employees and contractors. The following are some of the frameworks used by Shell to support compliance with its human rights obligations including relevant laws and regulations:

- (i) Shell General Business Principles; (ii) Code of Conduct; (iii) Ethics and Compliance Manual; (iv) Health, Safety, Security, Environment and Social Performance (HSSE&SP) Control Framework; and (v) Shell Supplier Principles - this includes specific labor and human rights expectations for contractors and suppliers.

In addition to the above existing frameworks, Shell also has committees (e.g., Corporate and Social Responsibility Committee - CSRC) and several initiatives (e.g., Transparency initiative and the Sustainability approach) that support human rights and environmental protection. The “Responsible business” section of the latest Sustainability Report (2019) specifically focuses on human rights and the environment with the following key areas - human rights, safety, and environment.

It is important to note any breach of the MNOCs human rights obligations constitutes serious human rights and environmental violations such as lack of transparency, non-disclosure of evidence, safety and security, oil spill, inadequate clean-up of an oil spill, and non-payment of compensation. The prevention of oil spills and clean-up even if the spill was not directly caused by the company is one of the critical human rights obligations of MNOCs. The right to an effective remedy for human rights and environmental violations is well established in international law. For example, the United Nations Guiding Principles for Business and Human Rights (UNGPs) and the expanded jurisdiction provided by the Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (also known as Malabo Protocol) underlines that victims must have access to an effective remedy and that state actors (e.g., host government and their relevant agencies) and non-state actors (e.g., MNOCs and their affiliates) have a responsibility to guarantee that such a remedy is available. (United Nations Human Rights Council, 2014a; Abe, O., & Order, A, 2018).

MNOCs operating in the Niger Delta are usually reluctant to accept responsibility for oil spills, and there are cases where they have bluntly refused to pay compensation because they blame saboteurs and thieves as the cause of the oil spill (Frynas, 2001). However, several reports in recent times have countered this position by revealing that the largest cause of oil spills is equipment malfunction and corrosion of pipelines (Obi, 1999; Amnesty International, 2017). According to Nigerian federal government figures, there were more than 7,000 oil spills between 1970 and 2000. Table 1 shows the number of oil spills reported by Shell in the Niger Delta.

**Table 1: Oil Spills reported by Shell in the Niger Delta**

Source of information	Number of oil spills from Shell facilities per year, from different sources					
	2007	2008	2009	2010	2011	2012
Royal Dutch Shell	249	157	132	182	182	173

Sustainability reports						
Statistics on Shell's Nigeria web pages	320	210	190	170	207	192

*(Source: Amnesty International 2013)*

Respect for human rights and the environment is guaranteed under international law such as the UNGPs and the OECD Guidelines for Multinational Enterprises, and the African Charter. For instance, access to remedy is supported by the UNGPs, which recognizes access to a remedy as one of the three foundations of the universal Human Rights and business system. An essential element of these Guidelines is the obligation of a State to provide access to a judicial remedy for victims of Human Rights abuses by businesses (UNGP, 2011; OECD, 2011; African Union, 2021).

### **3. Transnational Human Rights Litigation Arising from Niger Delta**

This section summarises three transnational human rights litigations arising from the Niger Delta.

#### **3.1. Wiwa V Royal Dutch Shell**

The Wiwa family filed three separate lawsuits against Royal Dutch Shell in the United States District Court. The lawsuits alleged violations of the Alien Tort Statute, the Torture Victim Protection Act of 1992, and the RICO Act against RDS, its subsidiary Shell Nigeria (SPDC), and the subsidiary's CEO Brian Anderson (Center for constitutional rights, 2010).

The plaintiffs sought to hold two Shell holding companies, RDS and SPDC, liable for their roles in the Nigerian military junta's human rights abuses against two environmental activists who were executed in November 1995. The defendant requested that the case be dismissed on several grounds, including whether the US court that had jurisdiction over the case could exercise personal jurisdiction over the defendant holding companies (Wiwa v Shell, 2009a).

There were two main issues for determination: (i) whether the court could exercise personal jurisdiction over the defendants- Shell and SPDC, which were based in England and the Netherlands, and (ii) whether the human rights abuses in the litigation fall within the scope of the authority of the federal court based on the Alien Tort Statute (ATS). The Court of Appeal upheld the decision of the lower court concerning personal jurisdiction but disagreed with its dismissal of



the case based on forum non-convenient, stating that the case can be heard in the United States because two of the plaintiffs were legally resident in the US. Also, the court rules that conducting the litigations in England and Netherlands would be expensive and inconvenient to the plaintiffs. On June 8, 2009, Shell settled the case by awarding \$15.5million to the people of Ogoni land, with \$4.5 million of the pay-out going to a trust to benefit the Ogoni people (Wiwa v Shell, 2009b). The high-profile nature of the Wiwa v. Shell litigations drew attention to Shell and its subsidiaries operating in the Niger Delta, pushed the human rights and environmental violations in the Niger Delta situation into the international spotlight, and resulted in financial settlements that the company would not have agreed to pay otherwise (Ako and Ekhatior, 2016).

### **3.2. Bodo v Shell**

In 2008 and 2009 two oil spills took place in the Bodo Community of Niger Delta which affected the day-to-day life of the people in the community, their property, and the land. The people in the Bodo community filed a legal suit against Royal Dutch Shell (RDS) and Shell Petroleum Development Company (SPDC) for the oil spillage. The villagers claimed that the spill was a result of poorly maintained 50-year-old pipelines and that Shell had been initially warned about the damaged pipelines (Business & Human Rights Resource Centre, 2021). Shell attempted to reach an agreement with the plaintiffs to accept liability and jurisdiction because no further claims would be brought against it; however, this failed, and the case went to court (Leigh Day, 2020a).

The main issues for determination were (i) whether the Nigerian law applied to the claims to the exclusion of other possible legal bases (e.g., common law torts of negligence); (ii) whether SPDC could be held liable for oil spills caused by sabotage instead of faulty oil pipelines (Bodo v Shell, 2014a). Shell had been warned about the pipeline's "risk and hazard" before the oil spill that impacted the Bodo community, according to documents filed in the UK High Court in November 2014. The Court ruled on June 20, 2014, that Shell could be held responsible for spills from pipelines if the company failed to take reasonable measures to protect them from malfunction or oil theft (Bodo v Shell, 2014a). Shell agreed to a £55 million out-of-court settlement while the case was expected to go to trial in mid-2015 (LeighDay, 2021b).

The Bodo decision is significant for many reasons. It is the first time that an English court has had jurisdiction in a human rights and environmental litigation involving oil MNOCs operating in the Niger Delta (Ekhatior, 2018a; Ekhatior, 2018b). Also, this is the first time that an MNOCs

has agreed to clean up an oil spill and pay compensation directly to local communities in the Niger Delta following transnational human rights and environmental litigations in the English court.

There have been similar litigations in England in recent times, that is, *Vedanta v. Lungowe*, *Okpabi v. Shell* where the court confirmed that MNOCs can owe a duty of care to foreign claimants harmed by its subsidiaries' operations in other countries (Varvastian & Kalunga, 2020). For example, in the *Okpabi v Shell* litigation, the UK Supreme court ruled that Shell owed the claimants a common law duty of care because it 'executed significant control over material aspects of SPDC's operations through the promulgation and imposition of mandatory health, safety, and environmental policies, standards, and manuals' that were insufficient to protect the claimants from 'harm arising from SPDC's operations (Hackett et al., 2021). The decision in *Okpabi v Shell* litigation is an important precedent for providing access to justice for foreign claimants in transnational corporate liability litigation.

### **3.3. Oguru v Shell**

In this litigation, the plaintiffs filed three different lawsuits against SPDC to address the impact of the spill in the Oruma community. Pipelines that were restored after the civil war were not properly fixed, and as a result of that oil flowed through plaintiff farmland, lakes, fishpond, and their immediate environment where they live to make it unfit to earn a livelihood. The plaintiff also stated that SPDC were negligent in their duties by allowing the oil spill to have occurred and also did not make any attempt to prevent it nor limit the spill and did not do a proper clean-up of the spill in the community (Milieudefensie, 2014).

Specifically, in May 2009, the defendant filed a motion stating that the Dutch court lacked jurisdiction over the plaintiff claim (*Oguru v Shell*, 2010a). They also claimed that they were not liable for the spill in the community. The defendants also claimed that the oil spills were due to sabotage and theft.

The main issues for determination were (i) whether the Dutch court had jurisdiction over the claims brought against the Nigerian subsidiary; (ii) whether the oil spills were caused by faulty maintenance or sabotage and whether, under Nigerian law, the parent company (RDS) owed a duty of care to the claimant. The Hague Court of Appeal confirmed in December 2015 that the District Court had jurisdiction not only over the claims against Shell but also over those against the subsidiary (SPDC) and that the claims against Shell were not clearly without merit (*Oguru v Shell*, 2010b).

The Dutch Court of Appeal ruled on January 29, 2021, that Shell Nigeria was liable to pay compensation for two oil spills in the Niger Delta. The court ruled that Royal Dutch Shell owes a duty of care to the villagers who were harmed by the oil spill and that the company is responsible (along with Shell Nigeria) for any failure to prevent future oil spills. In addition, the company was ordered to install leak detection equipment in its pipelines (Bartman, S. M., & De Groot, C., 2021; Reuters, 2022).

#### **4. MNOC’s Levels Of Engagement with their Human Right And Environmental Obligation**

Multinational oil corporations have complete control over the formulation and implementation of human rights obligations (e.g., health and safety standards) for all of their subsidiaries. The extent of this control maps to the different levels of engagement of MNOC with their human rights obligations - inactive, reactive, active, and proactive. The different levels of engagement are inspired by the work of Rob van Tulder's transition model which identifies four stages in the process of sustainable development (Tulder et al., 2014). This paper adopts the different levels of engagement to show how companies can develop and evolve their human rights obligations in the future towards a proactive level of engagement. A summary of MNOCs level of engagement with their human obligations in transnational litigations arising from the Niger Delta is shown in Table 2.

**Table 2.** *MNOCs Levels of Engagement with Human Rights Obligations*

<b>Levels of engagement</b>	<b>Role of company</b>	<b>An attitude of the company during litigations</b>	<b>Example engagement during litigation</b>
Inactive	No engagement. Avoid liability	Always defensive and calculating how to get away with the allegations.	Refusing to disclose evidence. Blame the cause of the oil spill on sabotage instead of faulty pipeline. (Bodo v Shell)
Reactive	No engagement unless it is unavoidable. Avoid liability	Always defensive and calculating how to reduce the risks due to the fallout from the allegations.	Blame the cause of the oil spill on sabotage. Disclose evidence only if it is unavoidable due to legal obligations or pressure from the government and investors. (Bodo v Shell)

Active	Actively engages with stakeholders. Take responsibility for causing harm.	Engages with victims to resolve the dispute by providing damages.	Disclose evidence without conditions. Accepts liability for oil spills even if it was caused by sabotage. (Bodo v Shell; UNEP, 2021)
Proactive	Engages with stakeholders in a proactive way to control the situation. Take responsibility for causing harm	Engages with the plaintiff to resolve the dispute by providing a proper remedy which may include apologies and explanations	Disclose evidence without conditions. Contributes to improving the plaintiff's ability to obtain evidence. Proactively puts in place appropriate mechanisms to resolve the dispute (e.g., installing leak detection equipment in its pipelines) (Oguru v Shell, 2010b)

*(Source: Self)*

#### **4.1. Inactive Levels Of Engagement**

In the inactive level of engagement, the role of the company is to avoid liability; always be defensive, and calculate how to get away with the allegations. This means that the company continues with its actions as long as the company can get away with them. In the inactive level of engagement, there is no consultation with societal organization, unless there is a strong commercial interest, which is uncommon. The role of the company towards business operations is to ignore the rights and interests of the individuals and local communities simply because it has the legal license to operate. An example is when an MNOC approaches the litigation to defend and calculate how to kill the case by refusing to disclose evidence, and reference the content or existence of the evidence required by the plaintiffs. Another example is when an MNOC fails to prevent oil spills and when oil spills occur, they blame the cause on sabotage instead of faulty pipeline. This is the approach used by many MNOCs in litigations arising from the Niger Delta to avoid liability for remediation and compensation to local communities after the oil spill (Amnesty, 2009).

#### **4.2. Réactive Levels Of Engagement**

In the reactive level of engagement, the role of the company is to avoid liability; always be defensive, and calculate how to reduce the risks due to the fallout from the allegations. This means that the company continues with its actions as long as these are not expressly prohibited. Companies respond specifically to the actions of external stakeholders (e.g., civil society organizations) that could damage their reputation (Ako & Ekhaton, 2016). In this approach,

although the company still has a legal license to operate, the company's attitude towards business operations is to respect the rights and interests of the individuals and local communities if it is inevitable. An example is when an MNOC approaches the litigation to defend and calculate how to minimize risk by disclosing evidence and referencing the content or existence of evidence required by the plaintiffs only if it is unavoidable due to legal obligations or pressure from the government and investors. Another example is when an MNOCs accepts liability for oil spills only when it is presented with evidence that cannot be disregarded. The Federal Government's amnesty initiative in collaboration with oil companies to reform and train militants is also regarded as a reactive level of engagement to curb conflicts in the Niger Delta. This initiative brought some relief, but due to a lack of legal support, it is unsustainable as a long-term project (Ako, R., 2014).

#### **4.3. Active Levels Of Engagement**

In the active level of engagement, the company's role is to take responsibility for resolving the dispute by providing damages. This indicates that the company will continue to act in an active, ethical manner. More dialogue, questioning, and exchange of ideas, as well as operational collaboration, are all part of the level of engagement with stakeholders. In its operational and strategic decisions, as well as when interpreting the company's legal obligations, the company explicitly and positively considers the rights and interests of third parties. An example is when an MNOC approaches litigation to resolve the dispute by disclosing evidence and referencing the content or existence of evidence required to support the plaintiff's claim without conditions. Another example is when an MNOC not only accepts liability for oil spills even if it was caused by sabotage but actively engages with stakeholders, especially, local communities to clean up the polluted areas and pay compensation. In the Bodo v Shell litigation, Shell accepted to be actively involved in the remediation and compensation for the local communities, although it has to be pointed out that this was only after evidence emerged that they were warned about the poorly maintained oil pipelines in the Bodo community (Business & Human Rights Resource Centre, 2021).

#### **4.4. Proactive Levels of Engagement**

In the proactive level of engagement, the company's role is to take responsibility for resolving the dispute by providing a proper remedy which may include apologies and explanations. This indicates that the company will continue to act proactively to shape and implement human rights obligations in close collaboration with stakeholders. The essence of the engagement is to

not only respect human rights and prevent harm to others but also to work with stakeholders, particularly local communities, to find structural solutions to problems and issues. An example is when an MNOC approaches the litigation to resolve the dispute by disclosing evidence and referencing the content or existence of evidence and also, contributes to improving the plaintiff's ability to obtain evidence. Another example is when an MNOC not only accepts liability for oil spills even if it was caused by sabotage but proactively puts in place appropriate mechanisms such as installing leak detection equipment in its pipelines. UNEP undertook an independent study of the environmental and health implications of oil contamination in Ogoniland, Niger Delta, as well as remediation strategies, at the request of the Federal Republic of Nigeria. Shell accepted to support the study and accept its report (UNEP, 2021).

## **5. Discussion**

In the three litigations discussed here, the core issue is an evaluation of Shell's level of implementation and engagement with its human rights and environmental obligations they owe to stakeholders, especially the local communities in which they operate. The level of engagement indicates that Shell is not interested in resolving legal disputes in the shortest possible time or whether they are interested in derailing the litigations so that the plaintiffs can abandon the claims.

### **5.1. Evaluating The Level of Engagement of MNOCs with Human Rights Obligations During Litigations in The Niger Delta**

The desired approach for MNOCs to engage with their human rights obligations in the Niger Delta is the proactive approach. This is because a proactive approach means that the company is actively engaged in dialogues, sharing concerns with stakeholders to learn from them and looking for partners to address the concerns. In all of the three human rights litigations discussed here, there is no evidence to demonstrate that Shell proactively shapes and implements its human rights obligations. In *Wiwa v Shell* litigation, Shell was inactive in engaging with their human rights obligations by being defensive and calculating how they would get away with the legal claims regarding human rights violations. In both *Bodo v Shell* and *Oguru v Shell* litigation, Shell showed mostly a reactive level in engagement with their human rights obligations because Shell was defensive and calculating how to reduce the risk on the business operations and the reputation of the company if it cannot get away with the allegations. In the following discussion,

we show how the inactive and reactive levels of engagement by Shell have manifested in the different aspects of human rights and environmental litigations.

### **5.1.1. Delay of Litigation**

In the *Wiwa v Shell* litigations, Shell had prevented this case from being heard in the first place for several years. This case was finally heard in May 2009 after 12 years of Shell petitioning the court not to hear the claims. In *Bodo v Shell* litigation, attempts by Shell to delay the litigation from being heard under jurisdictional grounds. Shell attempted unsuccessfully to prevent the community from returning to court by requesting that a clause be included in the settlement that would result in the lawsuit being terminated if any resident of the Bodo community engaged in disruptive behavior. In *Oguru v Shell* litigation, Shell used a variety of techniques to postpone the trial, such as requesting the court to postpone proceedings because of pending litigation in another jurisdiction (an approach known as “*lis pendens*”) and challenging the standing of the Dutch Environmental NGOs and individuals’ claimants. Shell also demanded that it be allowed to challenge the preliminary judgment of the Court of Challenge before the Dutch Supreme Court (*Hoge Raad*), rather than waiting for the Court of Appeal’s decision on the merits. The court rejected this request (Dam, 2016b).

### **5.1.2. Lack of Transparency and Non-Disclosure of Evidence**

One of the areas in which multinational oil companies manifest a lack of transparency is providing information related to the oil spill, for example, the volume of the oil spill, the area affected by the oil spill, and the methodology used in the oil spill investigation. In the *Bodo v Shell* litigation, the court heard evidence that revealed serious flaws in the underlying evidence used to attribute spills to sabotage, as well as the fact that Shell fills out JIV reports after the joint investigation process, rather than as part of it.

Shell demonstrated a reactive level of engagement with its human rights obligation in the *Bodo v Shell* litigation, as Shell repeatedly refused to release evidence required by the plaintiff to prove that the oil spill was due to poor maintenance of the oil pipeline. Specifically, Shell refused to disclose communication (via several emails) between Shell employees in Nigeria and their colleagues in the headquarters (Netherlands) regarding the poor condition of oil pipelines which needed adequate maintenance (Amnesty International, 2013).

In *Oguru v Shell* litigation, the claimants found it extremely difficult to obtain internal information about the company's operations from both Shell and Shell Nigeria. It took the

intervention of the Court of Appeal to order RDS to disclose specific incidents reports, audit reports, assurance letters, and documents concerning the relevant oil pipelines. The court ruled that certain records will not be turned over to the applicants, but that they will be available at the notary's office for review by the legal representatives of the applicants and the judges of the court.

### **5.1.3. Poor Safety and Security**

In *Wiwa v Shell* litigation, Shell was accused of several security incidents including - the 1995 judicial hangings (e.g., members of the Movement for the Survival of the Ogoni People (MOSOP) and the torture and detention of Ogoni leaders. Amnesty International and other international human rights organizations have collaborated instances of intimidation and pressure against plaintiffs not to testify against Shell (Amnesty International, 2009; Amnesty International, 2017; Platform, 2011). This was the situation in *Bodo v Shell* and *Oguru v Shell* litigation. For example, in the *Bodo v Shell* litigation, the plaintiffs needed to disprove Shell's claims by traveling to Nigeria to interview some experts, claimants, and specific individuals in Ogoni. This was difficult because many experts in the Ogoni region worked for Shell and were thus unable or unwilling to testify due to pressure and intimidation from Shell (Skinner, 2013a, Skinner, 2020b). Amnesty International has documented several instances where Shell bribed and provided financial and logistic support to the security forces to commit abuses in the Niger Delta (Amnesty International, 2009; Amnesty International, 2017).

### **5.1.4. Prevention of Oil Spill**

Shell's poor level of engagement is evidenced by its continual denial of responsibility for the oil spill and claiming that sabotage and theft were to blame for the oil spill. Claiming that oil spills were due to sabotage undermines Shell's obligations, and government regulation expects MNOCs to swiftly carry out clean-up and remediation after an oil spill, following industry practice and standards. In the *Bodo v Shell* and *Oguru v Shell* litigation, the core allegations against Shell had not exercised due diligence in preventing oil spills, failing to take adequate measures to prevent spills and/or mitigate their consequences, and failing to clean up the contaminated sites properly after the oil spill occurred. Shell argued that they have adequately cleaned up oil spills in some of the polluted sites. When evidence was presented based on an investigation by Amnesty International to show that the polluted site was worse than stated, Shell subsequently accepted liability.



### **5.1.5. Inadequate Clean-Up of Oil Spill and Non-Payment of Compensation**

Shell's inactive approach regarding inadequate clean-up and non-payment of compensation is first demonstrated by disputing the volume of the oil spill and the area affected by the spill, and later by unfounded claims that it has cleaned up areas affected by oil spill when it has failed to do so. In the Bodo v Shell litigation, despite Shell's admission of liability in line with court judgment for failing in its duty of care to ensure that adequate steps were taken to avoid the harm, it had made no concerted or adequate efforts to begin cleaning up the harm caused by the 2008 oil spills (Leigh Day, 2021). Shell had not cleaned up, according to an investigation published in 2011 by Amnesty International and CEHRD, and its claims on the clean-up and access to Bodo were contradictory, raising serious concerns. Again, Shell only agreed to settle the case and pay compensation to the local communities when evidence emerged in court that the cause of the oil spill was due to poor maintenance of its oil pipeline rather than sabotage (Leigh Day, 2020b; Amnesty International, 2015).

### **5.2. Improving Human Rights and Environmental Protection through a Proactive Approach**

It has been highlighted that there are different MNOCs levels of engagement with its human rights obligations, and the level of engagement taken by the company has an impact on human rights and environmental violations in the Niger Delta. In the following discussion, it is shown that MNOCs with a proactive approach that regards their human rights obligation as a shared responsibility with their stakeholders leads to an improvement in human rights and environmental protection.

Let me give an example to illustrate this point. Shell does not take enough proactive steps to detect and prevent oil spills nor clean-up the oil spill but instead relies so much on compensation (if required) once the oil spill has occurred. In the Bodo v. Shell litigation, Shell refused to commence clean-up of the oil spill in order not to be seen as accepting liability for the oil spill but instead preferred to see out the litigation to the end with the hope that they would not be found guilty or better still directed by the courts to pay a small amount of compensation.

Passively dealing with oil spill complaints and failing to take the cleanup seriously creates the most fertile ground for the conflict to escalate. Shell does not take complaints of oil spills seriously because they are aware that the majority of complainants do not have the financial means to litigate, they consider the risk of escalation to be acceptable.

A practical approach of how Shell can engage and implement its human rights obligations proactively is involvement in an independent review or investigation of its oil operations. This involvement includes accepting in advance to participate in the investigation, disclosing the findings, and allowing findings of the report to be used in courts. A notable example was Shell's involvement in the 2011 UNEP assessment of Ogoniland. Shell through its SPDC Joint Venture (JV) funded the report and provided data as requested.

Shell has been commended for taking the right step in supporting the UNEP assessment of Ogoniland by pledging in advance to be part of the assessment. Shell in this instance was proactive in engaging with its human rights obligations. The UNEP emphasized that the study, which started at the end of 2009, is independent, and its financing is in line with the polluter pays principle of the Shell Petroleum Development Company (United Nations, 2020b). The 'polluter pays principle is a widely accepted practice that the costs of managing pollution to prevent harm to human health or the environment should apply to those who produce pollution (De Sadeleer, 2009). The report's findings and recommendations were accepted by Shell, and it decided to set up an independent scientific advisory board to examine SPDC practices in the Niger Delta for the rehabilitation and remediation of oil spill sites

The findings of the report have been referenced by the plaintiffs in several human rights and environmental litigations against Shell including the Bodo v Shell litigation which led to the payment of compensation directly to victims and cleanup of the oil spill in the communities (LeighDay, 2020b).

One of the ways of improving human rights and environmental violations in the Niger Delta through a proactive approach is to strengthen the MNOCs self-regulation (e.g., health and safety standards for employees and residents) and incorporate such regulation into legally binding contracts between MNOCs, the governments, and local communities. This will give such self-regulations a legally binding status and help deter MNOCs from violating them whenever they see fit (Ekhatator, 2016).

## **6. Conclusion**

This paper contributes to the literature on the impact of multinational oil company's levels of engagement with their human rights obligations in transnational human rights and

environmental litigations. Three (3) litigations arising from the Niger Delta has been evaluated against four different levels of engagement with Shells's human right obligations.

It was revealed that MNOCs use an inactive or reactive approach to engage with their human rights obligations (e.g., disclosure of evidence to plaintiffs, prompt clean-up, and payment of compensation) in the Niger Delta. This means that MNOCs are always defensive and would only react occasionally in a positive way to their human rights obligations during litigations when it is unavoidable.

This paper recommends that a proactive approach where MNOCs see their human rights obligations as a shared responsibility with their stakeholders (especially local communities) leads to an improvement in human rights and the environment. A proactive level of engagement with human rights obligations ensures does not only address the immediate issues of oil pollution but also put place mechanisms to address future occurrences of human rights and environmental violations.

This research study is limited to Shell's level of engagement with its human rights obligations during human rights and environmental litigations initiated against them. The findings can be generalized to other transnational human rights and environmental litigations initiated against other MNOCs operating in Nigeria and other developing countries. In the future, a comparative analysis of MNOCs responses to their human rights obligations (e.g., remediation and compensation for oil spill) in developed and developing countries will be considered.

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