

# Inadequate Monitoring and Enforcement in the Nigerian Oil Industry: The Case of Shell and Ogoniland

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## Introduction

The Niger Delta, situated in the southern part of Nigeria, is one of the most densely populated regions in Africa.<sup>1</sup> The Delta is considered one of

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1. RICHARD STEINER, FRIENDS OF THE EARTH NETH., DOUBLE STANDARD: SHELL PRACTICES IN NIGERIA COMPARED WITH INTERNATIONAL STANDARDS TO PREVENT AND CONTROL PIPELINE OIL SPILLS AND THE DEEPWATER HORIZON OIL SPILL 11 (2010), available at <http://www.milieudefensie.nl/publicaties/rapporten/double-standard>.

the ten most important wetlands and marine ecosystems in the world, serving as a habitat for many rare species, including several primates, ungulates, and birds.<sup>2</sup> The Delta is also home to a vast mangrove ecosystem and serves as an important habitat for the vast fish population found along the West African coastline.<sup>3</sup> The majority of Nigeria's oil production takes place in the Niger Delta.<sup>4</sup> Nigeria began producing oil in 1958, after the discovery of crude oil by Shell British Petroleum (now Royal Dutch Shell).<sup>5</sup> Since then, Nigeria has become Africa's largest oil producer, with an estimated 37.2 billion barrels of oil reserves as of January 2013.<sup>6</sup>

As a developing market, the Nigerian economy is heavily dependent on its oil industry.<sup>7</sup> Oil production accounts for 95% of export earnings and about 80% of the government's revenue.<sup>8</sup> Shell is the largest oil company in Nigeria.<sup>9</sup> Its operations span over an estimated 31,000 square kilometers and include thousands of kilometers of pipelines, many of which are close to homes, farms, and water resources.<sup>10</sup>

The Niger Delta is also home to many indigenous groups, including the people of Ogoniland.<sup>11</sup> The Ogoni people rely heavily on natural resources for survival.<sup>12</sup> Despite the revenue generated from areas like Ogoniland, which reached an estimated total of \$30 billion, relatively little has trickled down to the indigenous communities.<sup>13</sup> Instead, the oil industry has subjected people like the Ogonis to oil spills, gas flares, and significant environmental pollution that has destroyed farms, streams, and fishing—key resources on which the indigenous people depend.<sup>14</sup> The Nigerian government has failed to monitor the extent of the oil spills and enforce existing environmental laws that require quick oil spill response

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2. *Id.*; AMNESTY INT'L, NIGERIA: PETROLEUM, POLLUTION AND POVERTY IN THE NIGER DELTA 9 (2009) [hereinafter AMNESTY REPORT], available at <http://www.amnesty.org/en/library/asset/AFR44/017/2009/en/e2415061-da5c-44f8-a73c-a7a4766ee21d/af440172009en.pdf>.

3. STEINER, *supra* note 1, at 11.

4. *Id.*

5. See AMNESTY REPORT, *supra* note 2, at 11.

6. U.S. ENERGY INFO. ADMIN., ANALYSIS BRIEFS: NIGERIA 1, 6 (2013), available at <http://www.eia.gov/countries/analysisbriefs/Nigeria/nigeria.pdf>.

7. See *id.* at 1.

8. See *The World Factbook: Nigeria*, CENT. INTELLIGENCE AGENCY (2013), <https://www.cia.gov/library/publications/the-world-factbook/geos/ni.html> (last updated Dec. 4, 2013).

9. See AMNESTY REPORT, *supra* note 2, at 12.

10. See *id.* at 11.

11. See Richard Boele et al., *Shell, Nigeria and the Ogoni. A Case Study in Unsustainable Development: I. The Story of Shell, Nigeria and the Ogoni People - Environment, Economy, Relationships: Conflict and Prospects for Resolution*, 9 SUST. DEV. 74, 76 (2001), available at [http://www.econ.upf.edu/~lemenestrel/IMG/pdf/boele\\_al\\_2001\\_sd\\_shell\\_nigeria\\_.pdf](http://www.econ.upf.edu/~lemenestrel/IMG/pdf/boele_al_2001_sd_shell_nigeria_.pdf).

12. See *id.*; STEINER, *supra* note 1, at 11.

13. See Boele et al., *supra* note 11, at 74-77 (acknowledging the uneven distribution of oil wealth in the Niger Delta and explaining that, like other indigenous communities in the Niger Delta, the Ogoni people have never directly controlled any part of the petroleum earnings).

14. See AMNESTY REPORT, *supra* note 2, at 14.

for oil operators.<sup>15</sup> Furthermore, Nigeria provides little protection for the rights of indigenous groups.<sup>16</sup>

Nigeria is, however, a party to the International Convention on Economic, Social, and Cultural Rights (ICESCR) and the African Charter on Human and People's Rights (African Charter).<sup>17</sup> Both agreements require the Nigerian government to fulfill, respect, and protect the right to health and the right to a healthy environment.<sup>18</sup> This Note explores how the Nigerian government has breached its obligation to protect by (1) failing to monitor the oil production activities of Shell and other multinationals; and (2) failing to enforce domestic and international environmental standards, which require safety measures and prompt oil spill response to prevent further environmental pollution and ecological devastation. Part I of this Note presents an independent environmental impact assessment of Ogoniland. Part II discusses the international legal framework imposing the obligations to protect, respect and fulfill. Part III examines how Nigeria has breached its obligations through inadequate monitoring and enforcement. Part IV explores the international framework for protecting indigenous rights. Part V proposes a solution: the creation of an indigenous oil company for the purpose of the environmental restoration and compensation of the Ogoni people.

## I. The Extent of Environmental Damage: United Nations Environmental Impact Assessment of Ogoniland

Until 2011, there was no published independent environmental impact assessment on the extent of the environmental damage in Ogoniland.<sup>19</sup> Then, at the request of the Federal Government of Nigeria, the

15. See, e.g., *id.* at 8.

16. Most importantly, Nigeria is not a signatory to the Indigenous and Tribal Peoples Convention. See *Ratifications of C169 - Indigenous and Tribal People's Convention, 1989 (No. 169)*, INT'L LABOUR ORG., [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0:NO:11300:P11300\\_INSTRUMENT\\_ID:312314:NO](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0:NO:11300:P11300_INSTRUMENT_ID:312314:NO) (last visited Nov. 21, 2013) [hereinafter *Ratifications of C169*] (showing that Nigeria is not one of the twenty-two countries that have ratified Convention 169).

17. See *Status of the International Covenant on Economic, Social and Cultural Rights*, U.N. TREATY COLLECTION, [https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&lang=en&mtdsg\\_no=IV-3&src=TREATY](https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&lang=en&mtdsg_no=IV-3&src=TREATY) (last visited Jan. 3, 2014); *Ratification Table: African Charter on Human and Peoples' Rights*, AFRICAN COMM'N ON HUMAN AND PEOPLE'S RIGHTS, <http://www.achpr.org/instruments/achpr/ratification/> (last visited Jan. 3, 2014).

18. See U.N. Econ. & Soc. Council, Comm. on Econ., Soc., and Cultural Rights, *General Comment No. 14: The Right to the Highest Attainable Standard of Health*, ¶ 33, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000), available at [http://www.unhcr.ch/tbs/doc.nsf/\(symbol\)/E.C.12.2000.4.En?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(symbol)/E.C.12.2000.4.En?OpenDocument) [hereinafter *General Comment No. 14*]; see generally International Covenant on Economic, Social, and Cultural Rights, art. 12, Dec. 16, 1966, 993 U.N.T.S. 3, available at <http://www.ohchr.org/Documents/ProfessionalInterest/cescr.pdf> [hereinafter ICESCR]. See Soc. & Econ. Rights Action Ctr. (SERAC) v. Nigeria, Case No. ACHPR/COMM/A044/1, Afr. Comm'n Human & Peoples' Rights ¶ 44 (May 27, 2002); see generally African Charter on Human and People's Rights, arts. 16, 24, June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5 [hereinafter African Charter], available at [http://www.achpr.org/files/instruments/achpr/banjul\\_charter.pdf](http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf).

19. See AMNESTY REPORT, *supra* note 2, at 15.

United Nations Environment Programme (UNEP) conducted an independent environmental impact assessment with a team of international experts, local experts, and academics.<sup>20</sup> The team surveyed 122 kilometers of pipelines and visited all oil spill sights, oil wells, and other oil facilities in Ogoniland, including decommissioned and abandoned facilities.<sup>21</sup> The assessment covered the extent of contamination on land and in the groundwater, surface water, sediment, vegetation, and air.<sup>22</sup> It also covered industry practices, institutional issues, and the effects of contamination on public health.<sup>23</sup> The resulting report claims to provide the best available assessment on the extent of environmental damage in Ogoniland and its implications for the local population.<sup>24</sup> It also provides guidance on how Shell and the Nigerian government can remedy the effects of the damage.<sup>25</sup>

The findings of the report show that oil pollution in Ogoniland is widespread and severely affects many parts of the environment.<sup>26</sup> With respect to soil and ground water, the report concluded that the pollution from petroleum hydrocarbons in Ogoniland is extensive in many land areas, sediments, and swamps.<sup>27</sup> The report also found that the groundwater in Ogoniland is exposed to hydrocarbons spilled on the surface, noting that “[i]n 49 cases, [the] UNEP observed hydrocarbons in soil at depths of at least 5m.”<sup>28</sup> As a result, the hydrocarbon pollution in the ground water in many places exceeded Nigerian national standards as set out by the Environmental Guidelines and Standards for the Petroleum Industries in Nigeria (EGASPIN).<sup>29</sup>

Oil spills have also devastated the vegetation in Ogoniland.<sup>30</sup> Oil pollution in many creeks has destroyed mangrove forests, which provide spawning areas and serve as nurseries for juvenile fish.<sup>31</sup> Extensive pollution and destruction of mangroves has a negative impact on the fish cycle.<sup>32</sup> The oil pollution has also damaged crops, leading to lower yields and making remediation of the vegetation difficult.<sup>33</sup>

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20. See U.N. ENV'T PROGRAMME, ENVIRONMENTAL ASSESSMENT OF OGO NILAND 8 (2011) [hereinafter UNEP REPORT], available at [http://postconflict.unep.ch/publications/OEA/UNEP\\_OEA.pdf](http://postconflict.unep.ch/publications/OEA/UNEP_OEA.pdf).

21. *Id.*

22. *Id.*

23. See *id.* at 10-11.

24. *Id.* at 6.

25. See *id.* at 12-17.

26. *Id.* at 9 (noting that “[e]ven though the oil industry is no longer active in Ogoniland, oil spills continue to occur with alarming regularity”).

27. *Id.*

28. *Id.*

29. See *id.* at 10.

30. *Id.* at 10 (“Oil pollution in many intertidal creeks has left mangroves denuded of leaves and stems, leaving roots coated in a bitumen-like substance sometimes 1cm or more thick.”).

31. *Id.*

32. *Id.*

33. *Id.* (“Channels that have been widened and the resulting dredged material are clearly evident in satellite images, decades after the dredging operation. Without proper rehabilitation, former mangrove areas which have been converted to bare ground are being colonized by invasive species such as nipa palm . . .”).

The UNEP investigation concluded that surface water in the region's creeks contained varying level of hydrocarbons, with some creeks having layers of thick black oil.<sup>34</sup> This pollution has negatively affected the fishing sector, due to the destruction of fish habitats in the mangroves and the creeks.<sup>35</sup> Because fish tend to leave polluted areas for cleaner waters, the pollution has forced fishermen to relocate to stay in business.<sup>36</sup>

Finally, with respect to public health, the report found that oil spills have exposed the Ogoni people to high concentrations of hydrocarbons in the air and drinking water.<sup>37</sup> According to the UNEP, one community was drinking from a well contaminated with benzene, a known carcinogen, "at levels over 900 times above the World Health Organization (WHO) guideline."<sup>38</sup> Experts also found hydrocarbon contamination in twenty-eight other wells in ten different communities.<sup>39</sup> In several samples, the hydrocarbon levels were "at least 1,000 times higher than the Nigerian drinking water standard of 3  $\mu\text{g}/\text{l}$ ."<sup>40</sup> In air samples, the UNEP team detected benzene in concentrations 900 times higher than recommended levels.<sup>41</sup> Given the timeline of oil operations in the area and Nigeria's average life expectancy, the report concluded, "it is a fair assumption that most members of the current Ogoniland community have lived with chronic oil pollution throughout their lives."<sup>42</sup>

## II. The International Legal Framework: The Right to Health and the Right to a Healthy Environment

The majority of human rights instruments to date do not recognize the relationship between the right to health and the right to a healthy environment.<sup>43</sup> While there are a number of non-binding universal declarations and regional agreements that recognize some form of the right to a healthy environment,<sup>44</sup> the only binding global treaty that addresses the right is

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34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at 11.

39. *Id.*

40. *Id.*

41. *See id.* at 13.

42. *Id.* at 10, 204.

43. Melissa Fung, *The Right to a Healthy Environment: Core Obligations Under the International Covenant of Economic, Social and Cultural Rights*, 14 WILLAMETTE J. INT'L L. & DISP. RESOL. 97, 104 (2006).

44. *Id.* at 103. *See, e.g.*, Declaration of the United Nations Conference on the Human Environment, princ. 1, June 16, 1972, U.N. Doc. A/CONF.48/14, available at <http://www.unep.org/Documents.Multilingual/Default.asp?documentid=97&articleid=1503> ("Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations."); Rio Declaration on Environment and Development, princ. 23, June 13, 1992, U.N. Doc. A/CONF/.151/5 ("The environment and natural resources of people under oppression, domination and occupation shall be protected.").

the ICESCR.<sup>45</sup> Article 12 of the ICESCR guarantees that every man and woman has an inherent right to the “highest attainable standard of physical and mental health.”<sup>46</sup> The ICESCR recognizes the right to health, but like the majority of human rights treaties, it does not explicitly recognize the right to a healthy environment.<sup>47</sup>

Instead, the existence of the right to a healthy environment is implicit in certain articles of the convention: Articles 1 (the right to self-determination and the right to control natural wealth and resources);<sup>48</sup> Article 7 (the right to safe and healthy working conditions and the right to a decent living);<sup>49</sup> Article 11 (the right to an adequate standard of living and the right to the continuous improvement of living conditions);<sup>50</sup> Article 12 (the right to health, including all aspects of environmental and industrial hygiene);<sup>51</sup> and Article 15 (the right to the benefits of scientific progress).<sup>52</sup>

The Committee on Economic, Social, and Cultural Rights (CESCR) has also addressed the right to a healthy environment. The CESCR, which is the implementing body of the ICESCR, has used its General Comments to recognize that the right to health is “an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as . . . healthy occupational and environmental conditions . . . .”<sup>53</sup> In doing so, the CESCR has recognized that a healthy environment is a necessary condition for the enjoyment of the right to health.<sup>54</sup>

Unlike the ICESCR, the African Charter explicitly recognizes the right to a healthy environment.<sup>55</sup> The African Charter is one of the first regional conventions to explicitly recognize the right to a healthy environment, providing that “[a]ll peoples shall have the right to a general satisfactory environment favorable to their development.”<sup>56</sup> The CESCR and the African Commission, the body responsible for implementing the Charter, both interpret the ICESCR and the African Charter as imposing certain core or minimum obligations on states, including the obligations to protect, respect, and fulfill.<sup>57</sup> The ICESCR requires state parties to use the maxi-

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45. See ICESCR, *supra* note 18, art. 12.

46. *Id.*

47. See *id.*

48. See *id.* art. 1. See also Fung, *supra* note 43, at 104.

49. See ICESCR, *supra* note 18, art. 7.

50. See *id.* art. 11.

51. See *id.* art. 12.

52. See *id.* art. 15.

53. *General Comment No. 14*, *supra* note 18, ¶ 11.

54. See *id.*

55. See African Charter, *supra* note 18, art. 24.

56. *Id.*

57. See *General Comment No. 14*, *supra* note 18, ¶ 33; SERAC v. Nigeria, Case No. ACHPR/COMM/A044/1, Afr. Comm'n Hum. & Peoples' Rights ¶ 44 (May 27, 2002), available at <http://www.escr-net.org/sites/default/files/serac.pdf> (“Internationally accepted ideas of the various obligations engendered by human rights indicate that all rights . . . generate at least four levels of duties for a State that undertakes to adhere to a rights regime, namely the duty to respect, protect, promote, and fulfil [sic] these rights.”).

imum of their available resources to work progressively towards fully realizing the rights in the Covenant.<sup>58</sup> A state's failure to protect, respect, or fulfill constitutes a breach unless the state can show that it has used all available resources to meet its obligations.<sup>59</sup>

State compliance with the three core obligations is necessary to ensure that individuals can fully realize the right to health. First, the obligation to respect requires states to "refrain from interfering directly or indirectly with the enjoyment of the right . . . ."<sup>60</sup> A state fails to meet its obligation where it repeals or suspends legislation necessary for the full realization of the right to health.<sup>61</sup> Second, the obligation to protect imposes an affirmative duty on states to prevent third parties, including corporations, from interfering with the right to a healthy environment and hence, the right to health.<sup>62</sup> States must adopt and enforce measures that require non-state actors to conduct their operations in a manner that respects the right to health.<sup>63</sup> States breach their obligation to protect when they fail to prevent or regulate the operations of individuals, groups, corporations, or other third parties whose conduct violates the right to health.<sup>64</sup>

Finally, the obligation to fulfill requires that states "take positive measures that enable and assist individuals and communities to enjoy the right to health."<sup>65</sup> This obligation is more difficult to implement since it requires states to take affirmative steps to assist communities.<sup>66</sup> For example, concerning the right to water, states must take positive steps to assist communities to enjoy the right to water by assisting in the cleanup of polluted streams or wells.<sup>67</sup> To ensure that third parties respect the right to health, states must adopt proper domestic legislation that guarantees those

58. ICESCR, *supra* note 18, art. 2.

59. *See id.*

60. *See, e.g.,* U.N. Econ. & Soc. Council, Comm. on Econ., Soc., and Cultural Rights, *General Comment No. 15: The Right to Water*, ¶ 21, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003) [hereinafter *General Comment No. 15*].

61. *See General Comment No. 14, supra* note 18, ¶ 49. States also violate the right to health when they adopt "legislation or policies which are manifestly incompatible with pre-existing domestic or international legal obligations in relation to the right to health." *Id.* ¶ 48.

62. *See General Comment No. 15, supra* note 60, ¶ 23.

63. *See SERAC v. Nigeria*, Case No. ACHPR/COMM/A044/1, Afr. Comm'n Human & Peoples' Rights ¶ 46 (May 27, 2002) (explaining that the state has an obligation to protect beneficiaries of the right to health by enacting legislation and providing effective remedies and that "[p]rotection generally entails the creation and maintenance of an atmosphere or framework by an effective interplay of law and regulations so that individuals will be able to freely realize their rights and freedoms").

64. *See id.* ¶ 51.

65. *General Comment No. 14., supra* note 18, ¶ 37.

66. *See Fung, supra* note 43, at 125.

67. *See General Comment No. 15, supra* note 60, ¶ 25 ("States parties are also obliged to fulfill (provide) the right when individuals or a group are unable, for reasons beyond their control, to realize that right themselves by the means at their disposal."). *See also* Michael J. Dennis & David P. Stewart, *Justiciability of Economic, Social, and Cultural Rights: Should There be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?*, 98 AM. J. INT'L L. 462, 493-94 (2004).

rights.<sup>68</sup> Specifically, Article 2 of the ICESCR requires that states use “all appropriate means” to adopt legislative measures and other programs necessary to fulfill the right to health.<sup>69</sup>

In 2001, the African Commission on Human and People’s Rights illustrated the close relationship between the right to health and the right to a healthy environment when it issued its decision in *SERAC v. Nigeria*.<sup>70</sup> In *SERAC*, the plaintiff, a non-governmental organization representing the interests of the Ogonis, alleged that the Nigerian government caused environmental degradation and health problems for the Ogoni people through its involvement in a joint oil venture with Shell.<sup>71</sup> The plaintiff argued that the Nigerian government’s failure to monitor the operations of oil companies operating in Ogoniland and failure to require standard industry safety measures was the direct cause of the environmental damage.<sup>72</sup> As a result, the complaint alleged that the oil consortium disposed of toxic wastes, contaminating Ogoni waterways in violation of applicable international environmental standards.<sup>73</sup> According to the plaintiff, the consortium neglected to properly maintain oil facilities, resulting in numerous oil spills close to villages.<sup>74</sup> These spills had “serious short and long-term health impacts, including skin infections, gastrointestinal and respiratory ailments, and increased risk of cancers, and neurological and reproductive problems.”<sup>75</sup> The plaintiff also alleged that the Nigerian government failed to produce basic environmental impact studies relating to the hazardous effects of oil production in Ogoniland and even refused to allow scientists from environmental organizations to conduct assessments.<sup>76</sup>

Finally, the plaintiff alleged that between the years of 1990 and 1993, Nigerian security forces attacked Ogoni villages, burning homes, killing innocent villagers and animals, and destroying crops and farms in response to the Movement of the Survival of the Ogoni People (MOSOP), a non-violent campaign in opposition to the destruction of the Ogoni environment.<sup>77</sup> With regard to these allegations, the Nigerian government admitted to its role in the attacks on Ogoni villages.<sup>78</sup> In communication recordings between officials of Shell and the Rivers State Internal Security

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68. See *id.* at 491.

69. See ICESCR, *supra* note 18, art. 2.

70. See *SERAC v. Nigeria*, Case No. ACHPR/COMM/A044/1, Afr. Comm’n Hum. & Peoples’ Rights ¶¶ 51-53 (May 27, 2002).

71. See *id.* ¶¶ 1, 9.

72. See *id.* ¶ 4. The complaint also alleged that the Nigerian government did not require oil companies to consult with local communities before commencing oil-drilling activities, even when those operations threatened the right to health and the right to a healthy environment. See *id.* ¶ 6.

73. *Id.* ¶ 2.

74. *Id.*

75. *Id.*

76. *Id.* ¶ 5.

77. *Id.* ¶ 7 (alleging that the Nigerian government failed to investigate the perpetrators of the attacks or punish them, further implicating the involvement of the Nigerian government itself).

78. *Id.* ¶ 8.



Task Force, the Nigerian government called for “ruthless military operations” and “wasting operations coupled with psychological tactics of displacement.”<sup>79</sup>

In *SERAC*, the Commission highlighted the Nigerian government’s breaches of the obligations to respect, protect, and fulfill the right to health and the right to a healthy environment under the African Charter.<sup>80</sup> First, in regard to the obligation to respect, the Commission reasoned that governments must not threaten the health and environment of their citizens and must refrain from interfering with the enjoyment of “the best attainable state of physical and mental health.”<sup>81</sup> According to the Commission, this obligation requires states to desist from tolerating or carrying out practices or policies that violate the integrity of the individual.<sup>82</sup> In other words, parties to the African Charter may not engage in conduct that undermines the right to health and the right to a healthy environment.<sup>83</sup> Here, the Nigerian government breached that duty by sending security forces to attack villages and to destroy the environment and livelihood of the Ogoni people.<sup>84</sup>

Secondly, the Commission recognized the obligation to fulfill, which, under the African Charter, requires party states to take reasonable measures to prevent pollution and ecological degradation and to “promote . . . sustainable development and use of natural resources . . . .”<sup>85</sup> Compliance with this obligation, the Commission said, requires states to conduct environmental impact assessments in order to provide communities with information regarding their exposure to hazardous substances.<sup>86</sup> Here, the Nigerian government breached this obligation by failing to provide environmental impact assessments of Ogoniland<sup>87</sup> and by preventing independent experts from conducting such assessments.<sup>88</sup>

Finally, with regard to the obligation to protect, the Commission stated that the African Charter “requires [states] to take reasonable . . . measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources.”<sup>89</sup> Moreover, failing to regulate the conduct of third parties—including corporations—that interfere with the right to health and

79. *Id.*

80. *Id.* ¶¶ 50–54.

81. *See id.* ¶¶ 44–45, 52; African Charter, *supra* note 18, art. 16.

82. *See SERAC*, Case No. ACHPR/COMM/A044/1 at ¶ 52.

83. *See id.*

84. *See id.* ¶ 54. In addition, the Commission found a violation of the right to life, noting that “[t]he Security forces were given the green light to decisively deal with the Ogonis, which was illustrated by [ ] wide spread terrorisations and killings.” *Id.* ¶ 67.

85. *Id.* ¶¶ 47, 52.

86. *See id.* ¶ 53.

87. *See id.* ¶ 54.

88. *See id.*

89. *Id.* ¶ 52.

a healthy environment is a violation of the obligation to protect.<sup>90</sup> The Nigerian government breached this obligation by failing to (1) monitor the oil production activities of Shell and other multinational corporations operating in Ogoniland; (2) enforce domestic and international environmental standards, which require safety measures and prompt oil spill response to prevent further environmental pollution and ecological devastation; and (3) consult with indigenous communities before commencing oil operations.<sup>91</sup> The Commission held that despite the Nigerian government's obligation to protect the rights of the Ogonis, the Nigerian government facilitated the destruction of Ogoniland.<sup>92</sup> Hence, the Commission ordered Nigeria to take necessary steps to comply with these core obligations.<sup>93</sup>

Since the Commission's decision, Nigeria has taken some steps to address the issues discussed in *SERAC*. For example, the Nigerian government requested the independent assessment that led to the UNEP's report.<sup>94</sup> The government also established the National Oil Spill Detection and Response Agency (NOSDRA).<sup>95</sup> Lastly, the country has enacted and revised several environmental laws and regulations intended to monitor and control the operations of the oil industry.<sup>96</sup>

However, aside from its involvement in the UNEP assessment, the Nigerian government has failed to publicize information regarding the extent of daily oil spills and their effects.<sup>97</sup> There is still a gross lack of transparency and lack of access to information available to affected communities regarding the operations of the Nigerian government and the oil industry as a whole.<sup>98</sup>

More importantly, the increasing environmental damage cited in the 2011 UNEP findings suggests that Nigeria is *still* in breach of the obligation to protect. Evidence of this breach is further substantiated by its failure to enforce a recent decision issued in 2012, in *SERAP v. Federal Republic of Nigeria*.<sup>99</sup> In *SERAP*, the plaintiff, an NGO, alleged that Nigeria

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90. *Id.* ¶ 57 ("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.")

91. *Id.* ¶¶ 54-55.

92. *Id.* ¶ 58.

93. *Id.* at 15. It is important to note, however, that the Commission's decisions are effectively unenforceable. See African Charter, *supra* note 18 (containing no provision describing how the Commission's decisions will be enforced or carried out).

94. See UNEP REPORT, *supra* note 20, at 8.

95. See *id.* at 12.

96. See STEINER, *supra* note 1, at 16 (noting that the Nigerian government revised and updated its Environmental Guidelines and Standards for the Petroleum Industry (EGASPIN) in 2002). See also AMNESTY REPORT, *supra* note 2, at 41.

97. See *id.* at 49-50 (explaining that there is a lack of access to information because there is inadequate data gathering and monitoring of the oil industry).

98. See *id.* at 62.

99. Socio-Econ. Rights & Accountability Project (*SERAP*) v. Nigeria, Judgment No. ECW/CCJ/JUD/18/12, ECOWAS (Dec. 14, 2012), available at [http://www.courtecawas.org/site2012/pdf\\_files/decisions/judgements/2012/SERAP\\_V\\_FEDERAL\\_REPUBLIC\\_OF\\_NIGERIA.pdf](http://www.courtecawas.org/site2012/pdf_files/decisions/judgements/2012/SERAP_V_FEDERAL_REPUBLIC_OF_NIGERIA.pdf).

violated the right to health, the right to an adequate standard of living, and rights to economic and social development of the people of the Niger Delta under the ICESCR and the African Charter, by failing to enforce existing environmental laws and regulations to protect the environment.<sup>100</sup>

Although the plaintiffs alleged several violations of both the ICESCR and the African Charter, the court limited its judgment to Articles 1 and 24 of the African Charter.<sup>101</sup> After dismissing Nigeria's claims that human rights violations were non-justiciable, the court reaffirmed the African Commission's essential holding in *SERAC*. The court held that Nigeria's failure to monitor and enforce environmental laws violated the rights to health and a healthy environment under Articles 1 and 24 of the African Charter.<sup>102</sup> The court also recognized that a breach of the right to health and the right to a healthy environment has led to the subsequent breach of other rights, including the rights to an adequate standard of living and economic and social development.<sup>103</sup> Accordingly, the court ordered the Federal Republic of Nigeria to (1) take all effective measures, as quickly as possible, to restore the environment of the Niger Delta; (2) take all measures necessary to prevent the occurrence of further environmental pollution; and (3) take all measures to hold the perpetrators of the environmental damage, including Shell, accountable.<sup>104</sup> Since the issuance of this decision in 2012, Nigeria has yet to take any appropriate measures to enforce the court's decision.<sup>105</sup>

While no oil production has taken place in Ogoniland since 1993, partly due to peaceful protests by the Ogoni People, many facilities remain in the area, and "pipelines carrying oil produced in other parts of Nigeria still pass through Ogoniland" which have led to continued oil spills.<sup>106</sup> The Nigerian government has enacted several environmental laws and regulations, which would force third party polluters to clean up oil spills. However, it does not enforce them.<sup>107</sup> The government's continued failure to monitor compliance with and enforce those laws against Shell and other multinational corporations has exacerbated the environmental devastation of Ogoniland.<sup>108</sup>

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100. *Id.* ¶ 19 (c), (d).

101. *Id.* ¶ 107.

102. *Id.* ¶ 107.

103. *Id.* ¶ 101.

104. *Id.* ¶ 121.

105. See Brittany West, *ECOWAS Community Court of Justice Holds Nigerian Government Liable for Human Rights Violations of Oil Companies*, HUMAN RIGHTS BRIEF (Mar. 7, 2013), <http://hrbrief.org/2013/03/ecowas-community-court-of-justice-holds-nigerian-government-liable-for-human-rights-violations-by-oil-companies/>.

106. See *Health Effects of Oil Spills in the Niger Delta*, AMNESTY INT'L., <http://www.amnesty.ca/get-involved/health-and-human-rights-project/health-effects-of-oil-spills-in-the-niger-delta> (last visited Nov. 24, 2013) (describing one of Shell's most recent oil spills in Bodo, Ogoniland in 2008, which amounted to a total spill of between 103,000 and 311,000 barrels of oil).

107. See STEINER, *supra* note 1, at 41; AMNESTY REPORT, *supra* note 2, at 38, 41.

108. See UNEP REPORT, *supra* note 20, at 15–18 ("Given the dynamic nature of oil pollution and the extent of contamination revealed in UNEP's study, failure to begin

This failure to monitor and enforce further contributes to the difficulty in attributing an accurate level of responsibility to Shell. Although the government no longer authorizes brutal attacks on Ogoni villages, the government still allows the Ogonis to consume contaminated water with known carcinogens in concentrations 900 times WHO recommendations.<sup>109</sup> The Ogoni people continue to live with chronic oil pollution in conditions that threaten their means of survival and undermine their right to health.<sup>110</sup> Thus, Nigeria continues to breach its obligations under the ICESCR and the African Charter.

### III. Assessment of Nigeria's Breach of the Obligation to Protect

#### A. Nigerian Domestic Law and Internationally Recognized Standards on Oil Spill Response

Nigeria's breach of the obligation to protect is not due to a lack of environmental laws and regulations. Nigeria's domestic law requires that oil operators comply with internationally recognized standards in conducting oil operations.<sup>111</sup> These standards include the American Petroleum Institute (API) and American Society of Mechanical Engineers (ASME) standards for petroleum production, which focus primarily on the reduction of the risk of oil spills.<sup>112</sup> The Nigerian Petroleum Act of 1969 requires that all operators comply with "good oil field practice," the internationally recognized benchmark for oil field practice that is embodied in the API and ASME standards.<sup>113</sup> The Act gives the Minister of Petroleum Resources the authority to revoke the license of any operator that does not comply with that standard.<sup>114</sup> Furthermore, Nigerian drilling regulations require companies to "adopt all practicable precautions including the provision of up-to-date equipment" to prevent pollution.<sup>115</sup> In the event that pollution does occur, operators must take "prompt steps to control and, if possible, end it."<sup>116</sup> According to the regulations, oil companies must maintain all installations, prevent oil spills, and cause as little damage as possible to trees, crops, and other environmental properties.<sup>117</sup>

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addressing urgent public health concerns and commencing a cleanup will only exacerbate and unnecessarily prolong the Ogoni people's suffering").

109. See *id.* at 11.

110. See *id.*

111. See STEINER, *supra* note 1, at 17 (stating that oil contamination of surface water and sediments cannot exceed internationally recognized standards).

112. See *id.*

113. See *id.*; see also *Publications, Standards, and Statistics Overview*, AMERICAN PETROLEUM INST., [www.api.org/publications-standards-and-statistics](http://www.api.org/publications-standards-and-statistics) (last visited Nov. 22, 2013).

114. See STEINER, *supra* note 1, at 16.

115. *Id.*

116. *Id.*

117. *Id.* Operators must prevent "the escapable or avoidable waste of petroleum and . . . cause as little damage as possible to the surface of the relevant area and to the trees, crops, buildings, structures, and other property thereon." See *id.* (quoting the Petroleum Drilling and Production Regulations of 1969).

The Nigerian Department of Petroleum Resources (DPR), the department primarily responsible for regulating the oil industry, expanded these requirements in 1991 by promulgating the Environmental Guidelines and Standards for the Petroleum Industry (EGASPIN).<sup>118</sup> “EGASPIN confirms that oil and gas operations are governed by the Nigerian Petroleum Act and subsequent federal legislation.”<sup>119</sup> Regarding oil spills, EGASPIN requires that oil companies commence cleanup within twenty-four hours of the occurrence of a spill.<sup>120</sup> Where a spill is on inland waters or wetlands, the only option for cleanup is complete containment and removal.<sup>121</sup> Operators must conduct their cleanup efforts in a way that does not cause additional harm to the environment.<sup>122</sup>

The API, ASME, U.S. Integrity Management (IM) for High Consequence Areas (HCAs), and the Alaska Best Available Technology (BAT)<sup>123</sup> industry standards collectively form the internationally recognized standards for pipeline management and constitute “good oil field practice.”<sup>124</sup> Hence, to comply with domestic law—and accordingly satisfy its duty to protect under international law—the Nigerian government must ensure that oil operators comply with these standards.<sup>125</sup>

The IM regulations primarily protect HCAs, which include highly populated areas, navigable waterways, and environments that are unusually sensitive to oil spills.<sup>126</sup> IM regulations require companies to assess the adequacy of all pipelines in HCAs in case of failure, ensure a continued process for monitoring and evaluating pipeline integrity, and adopt preventative measures to reduce damage to HCA environments.<sup>127</sup>

With regard to oil spill response, international good oil field practice requires that companies be prepared to “respond promptly and effectively to a maximum probable discharge.”<sup>128</sup> Companies must make every effort to detect and stop a spill as quickly as possible.<sup>129</sup> Additionally, companies must make serious efforts to restore the damaged environment to its pre-spill condition.<sup>130</sup>

Because Shell operates in the United States, it ought to be quite famil-

118. *Id.*

119. *Id.*

120. *Id.* at 17.

121. *Id.* (“It shall be required that these cleanup methods be adopted until there shall be no more visible sheen of oil on the water.”).

122. *Id.*

123. See *Best Available Technology*, ALASKA DEPT. ENVTL. CONSERVATION, <http://dec.alaska.gov/spar/ipp/batpage.htm> (last visited Nov. 22, 2013) (requiring oil operators to use the best available technology that was available when they submitted their contingency plans).

124. See STEINER, *supra* note 1, at 18 (noting that there are many overlapping sets of criteria that can be used to compare oil practices around the world).

125. Lack of compliance with good oil field practice leads to environmental pollution, which interferes with the right to health and the right to a healthy environment.

126. *Id.* at 21.

127. *Id.*

128. See *id.* at 19.

129. *Id.*

130. *Id.*

iar with good oil field practice.<sup>131</sup> However, the company's operations in Nigeria have fallen short of international standards. Ogoniland and other areas of the Niger Delta are highly populated wetlands and are sensitive to environmental damage.<sup>132</sup> Thus, these areas qualify as HCAs.<sup>133</sup> Yet, Shell has failed to treat Ogoniland as an HCA and has failed to comply with good oil field practice in Nigeria.<sup>134</sup> During the period of 1989-1994, Shell reported an average of 221 oil spills per year in the Niger Delta.<sup>135</sup> The company reports that half of these spills were due to corrosion of aging facilities,<sup>136</sup> while another 28% were due to sabotage by third parties.<sup>137</sup> Due to the high spill rate, in 1995 Shell took certain preventative measures to reduce and manage oil spills.<sup>138</sup> Shell claims that it replaced and upgraded aging facilities and pipelines, improved the ways it responded to oil spills, and increased the company's communications with local communities.<sup>139</sup>

Today, Shell claims that over 70% of all oil spilled from its facilities in the Niger Delta is due to sabotage, theft, and illegal refining (as opposed to corrosion).<sup>140</sup> Indeed, oil theft and sabotage are real problems in the Niger Delta.<sup>141</sup> However, due to poor monitoring by the Nigerian government, the designation of the cause of a particular oil spill is largely dependent on the oil company's own assessment of the incident.<sup>142</sup> This means Shell has been in a position to inflate the prevalence of third-party pollution.

Moreover, even if the 70% figure is accurate, good oil field practice requires oil companies to protect against the risks of third-party damage.<sup>143</sup> API standards recommend that oil operators internalize third-party risks by taking measures to protect against vandalism and theft, and their resulting environmental damage.<sup>144</sup> Such measures include using robust design factors, such as thicker-walled pipes, sabotage-resistant pipe specifications, deeper-buried pipeline segments, and enhanced leak detection systems.<sup>145</sup> The extent to which Shell has adopted these measures in

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131. See *Shell in Alaska*, SHELL, <http://www.shell.us/aboutshell/projects-locations/alaska/about.html> (last visited Jan. 5, 2014) (describing Shell's oil operations in Alaska dating back to 1918).

132. See STEINER, *supra* note 1, at 22.

133. See *id.*

134. See *id.* at 21, 30.

135. *Id.* at 29.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 30.

140. *Rising Crude Theft Activities Threaten Daily Export of 140,000 Barrels of Oil*, SHELL (June 2, 2012), <http://www.shell.com.ng/aboutshell/media-centre/news-and-media-releases/archive/2012/rising-crude-theft.html> (explaining that the level of crude theft results not only in loss of profits for the Nigerian government but also significantly contributes to the consistent pollution of farmlands and rivers).

141. See *id.*

142. AMNESTY REPORT, *supra* note 2, at 54 (discussing personal interviews conducted in Nigeria with Shell employees and managers).

143. See STEINER, *supra* note 1, at 27.

144. See *id.* at 27-28.

145. *Id.*

maintaining its pipeline integrity in Nigeria is questionable.<sup>146</sup>

## B. Conflicts of Interest within the Regulatory System

Although Nigeria imposes regulations on the oil industry, it does not properly enforce them due to a lack of independent oversight by environmental agencies.<sup>147</sup> The federal government is both a partner in the oil industry as well as the party responsible for enforcing environmental laws and standards.<sup>148</sup> The oil industry is comprised of a number of joint ventures between the Nigerian government, which owns the Nigerian National Petroleum Corporation (NNPC), and subsidiaries of multinational oil companies like Shell.<sup>149</sup> The Nigerian government holds a 55% stake in its joint venture with Shell, making it the majority partner.<sup>150</sup> It is not uncommon for a government to be in partnership within an industry that it regulates.<sup>151</sup> However, in circumstances where the government is a majority stakeholder, independent regulatory agencies and oversight are essential to avoid a conflict of interest.<sup>152</sup>

Here, there is a significant lack of independent regulation and oversight of the oil industry. In Nigeria, the Nigerian Department of Petroleum Resources (DPR) has the authority to regulate and enforce environmental laws.<sup>153</sup> However, the DPR is closely aligned with the Ministry of Energy, whose role is to develop Nigeria's energy resources.<sup>154</sup> This creates a conflict of interest. The DPR cannot adequately regulate oil pollution while at the same time being aligned with the Ministry responsible for oil production.<sup>155</sup>

Conflicts of interest also arise from oil companies doing much of their own monitoring of oil spills and waste disposal.<sup>156</sup> Due to the general lack of independent monitoring by the Nigerian government, there is little data available to verify the accuracy of a company's reports.<sup>157</sup> As a result, there is no way to verify Shell's claims that a majority of oil spills are due to sabotage. Moreover, even where there are joint investigations into spills, oil companies have a significant influence over the results, including the "assessment of oil impacted sites and certification of clean up."<sup>158</sup>

146. See *id.* at 31-33.

147. See AMNESTY REPORT, *supra* note 2, at 41.

148. See *id.*; *Shell Petroleum Development Company of Nigeria*, SHELL, <http://www.shell.com.ng/aboutshell/shell-businesses/e-and-p/spdc.html> (last visited Jan. 5, 2014) (explaining the structure of Shell's joint venture with the NNPC).

149. AMNESTY REPORT, *supra* note 2, at 11-12.

150. *Id.*

151. *Id.* at 42.

152. *Id.*

153. *Id.*

154. *Id.*

155. See *id.*

156. See *id.* at 46.

157. See *id.*

158. See *id.*

### C. Lack of Effective Penalties and Sanctions for Violations of Environmental Laws

Shell's persistent violations of Nigerian environmental laws and international legal standards are also due to the government's light penalties. Imposing sufficient punishment for violations of environmental laws is an important part of the Nigerian government's obligation to protect under international law. Without real consequences for environmental violations, there is no incentive for multinational corporations to respect the environment in which they operate.

Nigeria's environmental laws require that oil operators adopt all practicable precautions to prevent land and water pollution,<sup>159</sup> and failing to comply with good oil field practice can result in revocation of a company's oil license.<sup>160</sup> However, "while some oil licenses and leases have been revoked, as far as Amnesty International could discern revocation has never been done on the grounds of environmental damage."<sup>161</sup> Also, the penalties for environmental pollution are relatively low. For example, failing to report an oil spill to the appropriate government agency results in a fine equivalent to U.S. \$3,500,<sup>162</sup> and failing to clean up an oil spill at an impacted site results in only a U.S. \$7,000 fine.<sup>163</sup> These fines are grossly inadequate in comparison to fines imposed on multinationals for oil spills in the United States.<sup>164</sup> Thus, the fines do not provide adequate incentives to Shell and other multinationals to clean up their oil spills. As discussed in the UNEP environmental assessment, prolonged clean up only worsens the severity of the damage.<sup>165</sup>

## IV. The Rights of Indigenous Groups

### A. The International Framework for Protecting Indigenous Rights

Environmental harms have a severe effect on indigenous people because such groups have a close dependence on their traditional lands and natural resources.<sup>166</sup> This is particularly true for oil pollution.<sup>167</sup> In

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159. See STEINER, *supra* note 1, at 16.

160. *Id.*

161. AMNESTY REPORT, *supra* note 2, at 52.

162. *Id.*

163. *Id.*

164. See *Oil Pollution Act Overview*, ENVTL. PROT. AGENCY, <http://www.epa.gov/emergencies/content/lawsregs/opaover.htm> (last updated Jan. 10, 2014) ("Civil penalties are authorized at \$25,000 per day for each violation or \$1,000 per barrel of oil discharged.")

165. See UNEP REPORT, *supra* note 20, at 17.

166. See Inter-Am. Comm'n on Human Rights, Org. of Am. States, Rep. on the Situation of Human Rights in Ecuador, 110 OEA/Ser.L/V/II.96, doc. 10 rev. 1 (Apr. 24, 1997) available at <http://www.cidh.org/countryrep/ecuador-eng/chaper-9.htm> [hereinafter IACHR Ecuador Report].

167. *Id.* (describing claims by indigenous groups from the Ecuadorian Amazon who "maintain that the effects of oil development and exploitation . . . have not only damaged the environment, but have directly impaired their right to physically and culturally survive as a people").



some cases, as the Inter-American Commission on Human Rights has noted:

Oil exploitation activities have proceeded through traditional indigenous territory with little attention to the placement of facilities in relation to existing communities: production sites and waste pits have been placed immediately adjacent to some communities; roads have been built through traditional indigenous territory; seismic blasts have been detonated in areas of special importance such as hunting grounds; and areas regarded as sacred, such as certain lakes, have been trespassed.<sup>168</sup>

The recognition of these concerns has led to the creation of several international instruments intended to protect the rights of indigenous groups. Of these, the Indigenous and Tribal Peoples Convention (ILO Convention 169) is the most comprehensive instrument, recognizing the rights of indigenous groups over their land and natural resources.<sup>169</sup> Article 14 of the convention protects “[t]he rights of ownership and possession of [indigenous and tribal] peoples . . . over the lands which they traditionally occupy,” and requires states to take the necessary steps to ensure effective protection of indigenous rights of ownership.<sup>170</sup> This protection gives indigenous peoples the right to participate in the use and conservation of their natural resources.<sup>171</sup> Although the state may retain ultimate control over the resources, Article 15(2) requires that states “establish or maintain procedures through which they shall consult [indigenous] peoples . . . before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to [indigenous] lands.”<sup>172</sup>

Similarly, the U.N. Declaration on the Rights of Indigenous Peoples (UNDRIP) provides that “[i]ndigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their . . . lands, territories, waters and coastal seas and other resources.”<sup>173</sup> The Proposed American Declaration on the Rights of Indigenous Peoples recognizes that “[i]ndigenous peoples have the right to a safe and healthy environment, which is an essential condition for the enjoyment of the right to life and collective well-being.”<sup>174</sup> Where governments or third parties force indige-

168. *Id.*

169. See Convention Concerning Indigenous and Tribal Peoples in Independent Countries, arts. 4.1, 7.4, 13, 14, June 27, 1989, 28 I.L.M. 1382 [hereinafter ILO Convention 169].

170. *Id.* art. 14.

171. *Id.* art. 15.

172. *Id.* art. 15(2).

173. U.N. Declaration on the Rights of Indigenous Peoples, art. 25, G.A. Res. 61/295, U.N. GAOR 61st Sess., U.N. Doc. A/RES/61/295 (Sept. 13, 2007), available at [http://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf) [hereinafter U.N. Declaration]. Another example of an international instrument that provides environmental rights to indigenous peoples is the Proposed American Declaration on the Rights of Indigenous Peoples (PADRIP). Proposed American Declaration on the Rights of Indigenous Peoples, art. XIII.1, Inter-Am. Comm’n on Human Rights, 95th Sess., 1333d mtg., OEA/Ser/L/V/II.95 Doc. 6 (Feb. 26, 1997), available at <https://www.cidh.oas.org/Indigenas/chap.2g.htm>.

174. *Id.*

nous groups from their lands or use their land without their consent, the U.N. Declaration also provides a right to compensation.<sup>175</sup>

To see how rights like those provided by the ILO Convention 169 and the UNDRIP can protect the environments of indigenous groups, consider the plight of the U'wa people. The U'wa are an indigenous group that live in northeastern Colombia.<sup>176</sup> According to the U'wa culture, the oil under their land is the "blood of Mother Earth," and therefore, any oil drilling would be an affront to God.<sup>177</sup> However, multinationals such as Occidental Petroleum Company (Occidental) have attempted to conduct oil exploration and drilling activities in the area.<sup>178</sup> Occidental, like Shell in Nigeria, operates through a subsidiary, Occidental of Colombia, that is in partnership with the state-owned Ecopetrol Oil Company.<sup>179</sup> In response to Occidental's efforts, the U'wa protested the threat of environmental damage posed by the extraction of oil from their land, which is estimated to hold up to 2.5 billion barrels of crude oil.<sup>180</sup> Despite these efforts, in 1995, the Colombian government granted an oil exploration license to Occidental.<sup>181</sup>

Fortunately for the U'wa, Colombia's domestic legal framework offers considerable legal protection to indigenous groups.<sup>182</sup> The Colombian Constitution, consistent with the UNDRIP and Convention 169, recognizes the right of indigenous peoples to own and manage their traditional lands and natural resources.<sup>183</sup> In particular, the Constitution requires prior consultation with indigenous peoples before commencing projects on their land.<sup>184</sup> So, in the case of oil exploration, companies seeking to drill on indigenous lands must first consult with indigenous groups and allow them to participate in the decision-making process that impacts their communities.<sup>185</sup>

Using this legal framework, the U'wa challenged the government's grant of the oil license to Occidental.<sup>186</sup> Before the Colombian Constitutional Court, the U'wa claimed that the license was issued without prior

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175. U.N. Declaration, *supra* note 173, art. 28.

176. Jennifer Evans, *U'wa Protests Stall Occidental's Development Plans in Colombia*, 9 COLO. J. INT'L ENVTL. L. & POL'Y 131 (1998).

177. *See id.* at 131, 133.

178. *See id.*

179. *See id.*; Lillian Aponte Miranda, *U'wa and Occidental Petroleum: Searching for Corporate Accountability in Violations of Indigenous Land Rights*, 31 AM. INDIAN L. REV. 651, 655-56 (2007).

180. *Occidental Petroleum Abandons Oil Development on U'wa Land*, ENV'T NEWS SERV. (May 3, 2002), <http://www.ens-newswire.com/ens/may2002/2002-05-03-01.html>.

181. *See Evans, supra* note 176, at 132.

182. *See Miranda, supra* note 179, at 654.

183. *See id.* at 657.

184. *See id.*; S. James Anaya & Robert A. Williams, Jr., *The Protection of Indigenous Peoples' Rights over Lands and Natural Resources Under the Inter-American Human Rights System*, 14 HARV. HUM. RTS. J. 33, 62 (2001).

185. *See id.*

186. Evans, *supra* note 176, at 132.

consultation with U'wa people.<sup>187</sup> After considering the issues, the Colombian Constitutional Court, which is the country's highest authority on constitutional issues, held that the grant of the oil license violated the U'wa people's right to prior consultation under the domestic law of Colombia.<sup>188</sup> The Council of State, the highest authority on government agencies, still approved the oil license.<sup>189</sup> However, since the decision, Occidental ceased oil operations, citing economic reasons for abandoning the project.<sup>190</sup>

## B. Applying the Framework in Nigeria

In Nigeria, the government failed to consult with indigenous groups before allowing companies to begin exploration and extraction activities.<sup>191</sup> Unfortunately, the international legal framework offers little protection for the indigenous people of Nigeria. Unlike Colombia, Nigeria is not a party to any international agreements, like the ILO Convention 169, that protects indigenous rights.<sup>192</sup> Also, while Nigeria is a member of the U.N.,<sup>193</sup> the UNDRIP is not binding on Nigeria because it was only passed as a General Assembly resolution.<sup>194</sup> Instead of protecting indigenous people, the Nigerian constitution explicitly provides that the state owns the natural resources of indigenous groups.<sup>195</sup> There is no requirement that the government first seek permission from indigenous group leaders before commencing oil extraction on indigenous lands or to allow indigenous group to share in the profit earnings.<sup>196</sup> Therefore, indigenous groups like the Ogonis are precluded from asserting claims against the Nigerian government for allowing third parties to expropriate and waste the Ogonis' land without their consent.<sup>197</sup>

Oil extraction from indigenous lands often involves a triad of parties: indigenous people, a multinational corporation, and the government acting

187. See *Two High Courts Issue Contradictory Rulings on Environmental Viability of Big Oil Project*, 20 INT'L ENV'T REP. 292, Mar. 19, 1997, available at <http://www.dinehinfo.bravehost.com/uwa/legalsum.html>.

188. *Id.* Unfortunately, the Council of State, the highest authority on government agencies, still approved the oil license. *Id.*

189. See *id.*

190. See ENVIRONMENTAL NEWS SERVICE, *supra* note 180.

191. See *SERAC v. Nigeria*, Case No. ACHPR/COMM/A044/1, Afr. Comm'n Human & Peoples' Rights ¶ 55 (May 27, 2002).

192. See *Ratifications of C169*, *supra* note 16.

193. See *Member States of the United Nations*, U.N., <http://www.un.org/en/members/index.shtml> (last visited Jan. 8, 2013).

194. Ved P. Nanda, *The Protection of Human Rights Under International Law: Will the U.N. Human Rights Council and the Emerging New Norm "Responsibility to Protect" Make A Difference?*, 35 DENV. J. INT'L L. & POL'Y 353, 356 (2007).

195. CONSTITUTION OF NIGERIA (1999), § 44(3) ("[T]he entire property in control of all minerals, mineral oils and natural gas in, under or upon any land in Nigeria or in, under or upon the territorial waters and the Exclusive Economic Zone of Nigeria shall vest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly."); AMNESTY REPORT, *supra* note 2, at 9.

196. See *id.* at 24.

197. Nigeria is not one of the 22 countries listed for ratification. *Id.*

in joint venture with the corporation.<sup>198</sup> Even though indigenous groups often seek redress through domestic or international legal mechanisms, the alignment of interest in profit maximization that exists between the government and the corporate actor often overrides their claims.<sup>199</sup> These interests are always at odds with those of indigenous groups who seek to enforce their rights.<sup>200</sup>

## V. The Solution: The Creation of an Indigenous Oil Company

The solution that aligns the interests of the Ogoni people with Nigeria's interest in profit maximization is the creation of an indigenous oil company. Since the 1960s, Ogoniland has yielded an estimated \$30 billion in revenues to the Nigerian government and Shell.<sup>201</sup> Shell discontinued all oil production in Ogoniland in 1993, costing the Nigerian government a significant source of revenue.<sup>202</sup> However, by creating an indigenous oil company whereby the Nigerian government continues to benefit from the oil production, the Ogonis can align their interest in oil compensation with the interests of the Nigerian government in profit maximization.

While UNEP recommends that the Nigerian government create three independent institutions that will oversee and enforce the environmental restoration of Ogoniland, these recommendations have not been implemented.<sup>203</sup> Even though Shell announced that it welcomed the suggested remediation measures,<sup>204</sup> Shell placed much of the responsibility on the Nigerian government to develop the framework and governing structure for full implementation of the recommendations.<sup>205</sup>

UNEP made these recommendations in 2011. Since then, neither the Nigerian government nor Shell has made any remediation efforts.<sup>206</sup> With the responsibility to create these independent institutions in the hands of the Nigerian government,<sup>207</sup> the UNEP Report significantly underestimates the chaotic system within which the Nigerian government operates and ensures that these recommendations will continue to go unimplemented.

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198. Miranda, *supra* note 179, at 654.

199. *See id.* at 654-55.

200. Miranda, *supra* note 179, at 654.

201. *See Royal Dutch Shell in Nigeria*, FACING FINANCE, <http://www.facing-finance.org/database/cases/royal-dutch-shell-in-nigeria/> (last visited Apr. 20, 2014).

202. The discontinuance of oil production in Ogoniland meant that the Nigerian government was no longer able to receive proceeds from Ogoniland's oil reserves.

203. *See* UNEP REPORT, *supra* note 20, at 17-18 (recommending the creation of an Ogoniland Environmental Restoration Authority, an Integrated Soil Management Center, and a Centre for Excellence for Environmental Restoration in Ogoniland).

204. *SPDC Action on Matters Addressed in the UNEP Report*, SHELL (Sept. 2013), <http://www.shell.com.ng/environment-society/our-response.html>.

205. *Id.*

206. *See Nigeria: Human Rights in Perspective: Amnesty Int'l Submission to the UN Universal Periodic Review, October-November 2013* 7, AMNESTY INT'L (Mar. 2013), <http://www.amnesty.org/en/library/asset/AFR44/003/2013/en/476424b7-d772-44ec-aba3-35697fe00731/afr440032013en.pdf>.

207. The UNEP Report also suggests NGO involvement. *Id.*

Moreover, since the United States Supreme Court decided *Kiobel v. Royal Dutch Petroleum*,<sup>208</sup> the Ogoni people are not only foreclosed from asserting rights against Shell for environmental pollution under Nigeria's domestic law, but also unable to bring suits alleging human rights abuses in U.S. courts, at least under the Alien Tort Statute.<sup>209</sup>

In light of the lack of legal recourse available to the Ogoni people, the Ogoni must turn to a self-help approach by creating an indigenous oil company. That is, a company wholly-owned by Ogoni people, created for the sole purpose of the environmental restoration and development of Ogoniland. A company so invested in the future of Ogoniland and its people that it legally commits to an operating agreement, drafted by and between the Ogoni people and Ogoni management, with specific clauses designed to determine the ways in which monetary value will be reinvested in environmental efforts and development of the region.

It is legally permissible for a person to create an indigenous oil company under Nigeria's domestic law.<sup>210</sup> According to the Oil Pipelines Act, the Minister of Petroleum Resources has the authority to grant "permits to survey routes for oil pipelines" and "licenses to construct, maintain and operate oil pipelines."<sup>211</sup> Any person may make an application to the Minister for a permit to survey, including an Ogoni applicant.<sup>212</sup> In fact, there exists today various highly profitable indigenous oil companies in Nigeria, operating in other parts of the Niger Delta.<sup>213</sup> The country is now actively encouraging the participation of indigenous oil companies in its oil industry.<sup>214</sup> In 2010, Nigeria created the Nigerian Content Development and Monitoring Board (NCDMB), which is charged with supporting the operations of indigenous oil companies by ensuring that they are given first consideration in the award of oil licenses, oil lifting licenses, and all oil projects.<sup>215</sup> These indigenous companies are distinct from the proposed Ogoni indigenous oil company because they are not necessarily wholly-owned by indigenous groups. Instead, these companies are better consid-

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208. 133 S. Ct. 1659 (2013) (dismissing a suit by Nigerian nationals residing in the United States against foreign oil companies, alleging that the corporations sponsored human rights violations in Ogoniland). In *Kiobel*, the Court held that there is a presumption against extraterritorially applying the Alien Tort Statute (ATS), defeating the notion that the ATS was a viable way to sue for human rights violations that occurred abroad. *Id.* at 1665. The ATS states that "district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the laws of nations or a treaty of the United States." 28 U.S.C. § 1350.

209. *Kiobel*, 133 S. Ct. at 1663, 1669.

210. Oil Pipelines Act (1956), § 4(1) (Nigeria).

211. *Id.* § 3.

212. *See id.* § 4.

213. *See Nigeria: Indigenous Companies to Determine Future of Oil, Gas, Says Orjiako*, ALL AFRICA (Oct. 27, 2013), <http://allafrica.com/stories/201310281206.html>.

214. The chairman of Seplat Petroleum Development Company projects that indigenous oil companies will soon make up 20% of Nigeria's oil production. *See id.*

215. Nigerian Oil and Gas Industry Content Development Bill, 2010 (Nigeria), *available at* [http://www.ncdmb.gov.ng/images/DOWNLOADS/NC-ACT/NC\\_ACT.pdf](http://www.ncdmb.gov.ng/images/DOWNLOADS/NC-ACT/NC_ACT.pdf); NIGERIA CONTENT DEVELOPMENT AND MONITORING BOARD, <http://www.ncdmb.gov.ng> (last visited Feb. 10, 2014).

ered as Nigerian independent operators owned by private individuals. The Ogoni indigenous oil company would be constructed similarly to these existing companies, with its key distinction resting within its purpose statement and ownership structure.

Moreover, the creation of an indigenous oil company is the key to funding the full environmental restoration of Ogoniland. Based on the findings of the UNEP Report, full environmental restoration will take around twenty-five to thirty years to complete, after the ongoing pollution has ended.<sup>216</sup> The findings in the report suggest that it will take at least \$1 billion in initial capital contribution from the oil industry to begin the clean up effort for the first five years of restoration.<sup>217</sup> Because this is only a preliminary estimate, the final cost of clean up is likely to be different and much higher.<sup>218</sup> Since 2011, neither Shell nor the Nigerian government has provided the \$1 billion capital contribution suggested by UNEP. Furthermore, given the fact that the environmental pollution is ongoing, waiting for the Nigerian government to implement UNEP's remediation recommendations is no longer an option for the Ogoni people. The Ogoni people's only viable option is to utilize the oil profits derived from the operations of an indigenous oil company for the environmental restoration of Ogoniland.

The creation of an indigenous oil company will also significantly reduce the risk of social and economic exploitation. Currently, the Nigerian government directly benefits from its 55% stake in its joint venture with Shell.<sup>219</sup> Very little from this arrangement directly compensates indigenous groups for the environmental harms incurred. However, the creation of an indigenous oil company wholly-owned by the Ogoni people will ensure that they have the right not only to participate in the decision-making process, but also to share in the earnings. Even though the government will inevitably profit from the operations of the company, the Ogonis are still economically better off in a system in which they have an ownership stake than in the current alternative.

Moreover, revenues from the oil company will assist in building necessary infrastructure in the severely underdeveloped Ogoniland. Most of the area is still without clean water, electricity, hospitals, or even schools. The company will have shared interests with all of Ogoniland, such as in investing in key economic drivers such as education and infrastructure. The company will invest in Ogoni education with the understanding that it will require talent and skilled labor for its unique operations. Similarly, the company will invest in Ogoni infrastructure fully aware that any roads or bridges it will build will have a joint benefit for the general Ogoni population and the efficiencies required of the company's supply chain. Ideally, over time, the Ogonis' standard of living will increasingly reflect the billions of dollars being extracted from their land.

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216. See UNEP REPORT, *supra* note 20, at 226.

217. *Id.* at 227.

218. *Id.* at 226.

219. See *supra* text accompanying note 150.

The creation and successful operation of the indigenous oil company will be challenging. Not only will there be direct financial costs and risks assumed in starting the company, but there will also be administrative challenges, such as convincing the Nigerian government to grant an oil prospecting license. However, the greatest challenge will be obtaining the widespread support of the Ogoni people, which, when obtained, will serve as the single most distinguishing competitive advantage over any entities competing for presence or market share in Ogoniland. Even though the Ogonis have no legal ownership over their land, given the history of oil exploitation and environmental pollution, it will be key for the company to seek the permission of local leaders and community members before commencing oil operations. Without the community's support, the company is likely to face the same political and reputational costs that have burdened other oil companies. However, given the fact that the individual seeking the permission of the Ogoni people will be an Ogoni applicant, a person sharing similar sentiments and values with the Ogonis, that individual will be uniquely positioned to gain the widespread support of the people.

## Conclusion

The Nigerian government has breached its obligations to protect the right to health and the right to a healthy environment under the ICESCR and the African Charter.<sup>220</sup> By failing to effectively monitor and enforce its own environmental laws, the Nigerian government has allowed Shell and other corporate actors to exploit the country's natural resources to the detriment of indigenous groups.<sup>221</sup> Moreover, the government's failure to monitor and enforce is ongoing, meaning that Nigeria is still in breach of its obligations today.<sup>222</sup>

Unfortunately, while Nigeria has violated the ICESCR and the African Charter, it appears that the Ogoni people have few, if any, means for redress. Under the Nigerian constitution, violations of economic, social, and cultural rights—under which the rights to health and a healthy environment would fall—are not justiciable before Nigerian courts.<sup>223</sup> Outside domestic courts, the limited mandate of the African Commission on Human and Peoples' Rights means that violations of the African Charter are effectively unenforceable by the Commission.<sup>224</sup> Moreover, Nigeria has not adopted the Optional Protocol to the ICESCR,<sup>225</sup> which provides the

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220. See *supra* notes 101-110 and accompanying text.

221. See *supra* notes 147-165 and accompanying text.

222. See *supra* notes 105-108 and accompanying text.

223. See CORLETT LETJOLANE ET AL., THE OBSERVATORY - FRONT LINE, NIGERIA: DEFENDING HUMAN RIGHTS: NOT EVERYWHERE NOT EVERY RIGHT 8 (2010), available at <http://www.refworld.org/pdfid/4ca043fa2.pdf>.

224. See African Charter, *supra* note 18, arts. 30-45 (containing no provision describing how the African Commission's decisions will be enforced or carried out).

225. See *Status of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, U.N. TREATY COLLECTION, [https://treaties.un.org/Pages/ViewDetails.aspx?mtdsg\\_no=IV-3-a&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-3-a&chapter=4&lang=en) (last visited Jan. 10, 2014).

only means for individuals to assert a complaint to the CESCR for a violation of the ICESCR.<sup>226</sup>

In addition, while the actions of the Nigerian government and third-party oil companies in the Niger Delta would constitute a violation of many citizens' indigenous rights under international instruments,<sup>227</sup> these violations are not actionable. Nigeria is not member to the ILO Convention 169,<sup>228</sup> and the UNDRIP is merely a non-binding General Assembly resolution.<sup>229</sup>

Today, the Ogonis have no other avenue for seeking redress for the environmental pollution from which they suffer and the human rights abuses committed against them. Hence, the Ogonis must turn to a self-help approach by creating an indigenous oil company, permissible under Nigeria's domestic law, and utilize the company's financial resources for the cleanup and development of Ogoniland.

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226. Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, G.A. Res. 63/117, Annex, Art. 1, U.N. Doc. A/RES/63/117 (Dec. 10, 2008) ("A State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and consider communications as provided for by the provisions of the present Protocol. No communication shall be received by the Committee if it concerns a State Party to the Covenant which is not a Party to the present Protocol."). See Alexandra R. Harrington, *Don't Mind the Gap: The Rise of Individual Complaint Mechanisms Within International Human Rights Treaties*, 22 DUKE J. COMP. & INT'L L. 153, 162-66 (2012). It is also worth noting that since the United States Supreme Court decision in *Kiobel v. Royal Dutch Petroleum Co.*, the Ogoni people are also unable to bring suits alleging human rights abuses in U.S. courts under the Alien Tort Statute (ATS). See 133 S. Ct. 1659, 1665 (2013) (holding that there is a presumption against extraterritorially applying the ATS, 28 U.S.C. § 1350, defeating the notion that the ATS was a viable way to sue for human rights violations that occurred abroad).

227. See *supra* notes 182-200 and accompanying text.

228. See *Ratifications of C169*, *supra* note 16.

229. See Nanda, *supra* note 194, at 356.