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COUNTRY REPORT: NIGERIA

Recent Developments in the Niger Delta of Nigeria

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Introduction

The Federal Government of Nigeria (FGN) requested the United Nations Environment Programme (UNEP) to carry out an environmental assessment of Ogoniland due to perpetual oil spillages and gas flaring by the multinational oil companies, specifically Shell Petroleum Development Company (Nigeria) Ltd (SPDC). The *Environmental Assessment Report*[1] (*EA Report*) was finalised and submitted to the FGN in August 2011 for review and implementation.

The aim of this country report is to determine the sincerity of the FGN in finding the lasting solution to the severe environmental degradation in Ogoniland. This is imperative because of the historic failures of the Nigeria Government to implement recommendations contained in environmental assessment reports of this nature and to enforce judicial decisions.[2] It is also necessary so as to ascertain whether the commissioning of the *EA Report* was simply a political gimmick to project to the world that Nigeria is working in the interest of establishing a healthy environment for the people of the Niger Delta, following civil unrests in the area which have been partly responsible for lowering crude oil exports. Another potential area of concern is whether there is any provision within Nigeria's domestic legislation for compelling the Government to implement the *EA Report*'s recommendations should it fail to do so.

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[1] UN Development Programme (Emergency Response Division), *Environmental Assessment of Ogoniland Report* (2011). The full *EA Report* is available at http://www.unep.org/nigeria/.
[2] Climate Justice Programme 'Shell Fails to Obey Court Order to Stop Nigeria Flaring, Again' (2007) available at http://www.climatelaw.org/media/2007May2.

Alternatively, would it be more desirable to invoke provisions of international laws to compel Nigeria to implement these recommendations? Whilst it has been suggested that SPDC and the FGN should contribute US$1 billion as starting capital for the implementation of the *EA Report*'s recommendations, it is unclear whether the SPDC and FGN are under any obligation to do so. What is furthermore unclear is the implication of their failure to make such a contribution.

The Ogoniland and Shell Petroleum Development Company

Ogoniland is situated in the Niger Delta Region of Nigeria. It has huge deposits of petroleum and natural gas. According to the national census conducted in 2006, about 1 million people inhabit the area.[3] The Ogoni people are predominantly farmers and fishermen due to natural endowment of creeks, rivers and mangroves surrounding them.[4]

The SPDC has been prospecting for oil in Ogoniland for decades without complying with oil exploration procedures. This has caused spillages that have contaminated the entire region. As a result, the environment has become unhealthy and there is a continuous imbalance in the ecosystems. The SPDC has failed persistently to comply with local regulatory requirements or international best practices due to complicity by the FGN. The FGN has entered joint ventures with SPDC, through which the Government, operating through the Nigerian National Petroleum Corporation (NNPC), acquires 55 percent of any such venture.[5] The relationship between the SPDC and the Ogoni community went sour after the killings of Ken Saro-Wiwa and eight others by the Nigerian Government in 1995.[6] These nine personalities were chieftains of the Movement for the Survival of the Ogoni People (MOSOP), which led many non-violent protests against the persistent environmental degradation of Ogoniland. The killings led to the suspension of Nigeria from the Commonwealth of Nations. Moreover, the massive protests by MOSOP in 1993 resulted in the

[3] National Population Commission Nigeria, *Population Distribution By Age, Sex and Marital Status Tables: 2006 Census Priority Tables* (2006) Vol 5, (available at http://www.population.gov.ng/.)
[4] *EA Report* (supra note 1).
[5] Shell Petroleum Development Company, *Shell at a Glance*, (available at http://www.shell.com.ng/home/content/nga/aboutshell/at_a_glance/.)
[6] Greenpeace, 'Ken Saro Wiwa and 8 Ogoni People Executed: Blood on Shell's Hands' (London, 10 November 1995), and BBC News, 'Nigeria Hangs Human Rights Activists' (London, 10 November 1995).

withdrawal of SPDC operations in Ogoniland.[7] Nevertheless, the environmental harms left behind continue to affect the ecosystems and the residents have no other alternative than to live in this highly polluted environment.

The UNEP *EA Report* on Ogoniland

The FGN requested UNEP to conduct an environmental assessment (EA) as a way of building trust - namely that the FGN is interested in achieving peace and a healthy environment in Ogoniland.[8] The UNEP *EA Report* is composed of assessments based on fieldwork undertaken in the area over a period of 14 months. During this period, different samples were taken from the soil, water, sediment, air and plant and fish tissue for analysis. The findings show that in most parts of Ogoniland, drinking water is largely contaminated, which poses health risks to the inhabitants. The mangroves and farmlands are severely polluted which undermines the operations of local farmers.[9] Poverty is rife and there are no basic amenities, no adequate health centres and schools.

Furthermore, the scope of the *EA Report* covers diverse issues such as industry practices, institutional issues, public health, land, sediment, vegetation, air pollution, contaminated groundwater and surface water. The *EA Report* shows that petroleum hydrocarbons are present in large quantities in contaminated soil, swamplands, sediments and groundwater systems.[10] The pollution of soil and water has been attributed to a loss of the clay layer across Ogoniland, which resulted in constant exposure of the groundwater to surface oil spillages. The same level of pollution is also detected in the vegetation, aquatic resources and public health, which have undermined the livelihoods of Ogoni people. There are other identified problems that are related to 'oil industry practices' and institutional issues, for example: the unregulated decommissioning of infrastructures; and the poor maintenance of existing infrastructure.[11] Similarly, the method of environmental remediation applied by SPDC has been historically weak and insufficient. These problems have been compounded by the failure of the regulatory bodies established to monitor the

[7] Human Rights, Watch *The Ogoni Crisis: A Case-Study of Military Repression in Southeastern Nigeria* (1995) (available at http://www.unhcr.org/refworld/docid/3ae6a7d8c.html.) See also: Shell 'Ogoni Land', (available at http://www.shell.com/home/content/environment_society/ society/nigeria/ogoni_land/.)
[8] *EA Report* (supra note 1).
[9] Ibid.
[10] Ibid.
[11] Ibid.

activities of these multinational oil companies to fulfil their responsibilities. These regulatory bodies not only lack competent technical expertise and resources, but also often rely on the oil companies for logistic reports.[12]

Ogoniland needs to be restored to its former glory after years of environmental degradation. The UNEP *EA Report* makes several recommendations to clean-up Ogoniland from oil pollution and gas flaring, because there is possibility for its environmental restoration.[13] Whilst there are numerous recommendations posited by UNEP, which may bring lasting improvements to Ogoniland and Nigeria, this country report focuses on two cogent ones, the clean-up process and the contribution of financing to implement it.

Implementation and Funding

Ogoniland has been projected to be one of the world's largest oil spillage rehabilitation projects. It has been estimated that it may take in the region of 25 to 30 years to rehabilitate the area. Whilst time is extremely important, it is not certain whether there will be imminent change in Ogoniland, specifically relating to the public health of its ageing population. Although, the *EA Report* provides procedures for funding and implementing its recommendations, it is not sure whether the Committee appointed to review the *EA Report* will adopt them. The *EA Report* recommends that the FGN should establish the Ogoniland Environmental Restoration Authority (OERA), which will manage and supervise the implementation of all the recommendations within the first period of ten years.[14] In relation to funding, the *EA Report* recommends that an Environmental Restoration Fund for Ogoniland (ERFO) should be set up as the 'overall cost of the clean-up should not be an obstacle to its implementation'. In addition, it recommends that starting capital in the sum of US$1 billion should be contributed by SPDC and FGN, capital which should be used to fund the activities of the OERA, such as the 'environmental restoration of Ogoniland, including capacity building, skills transfer and conflict resolution'. Whilst the *EA Report* does specify the manner in which the contributions should be made, it follows that neither the FGN nor the SPDC is under any obligation to make such contributions. Moreover, the *EA Report* does not constitute a legal obligation on the Government. The Government may therefore decide whether to adopt all the

[12] Ibid.
[13] Ibid.
[14] Ibid.

recommendations contained in the *EA Report* or a select few of them. Furthermore, the *EA Report* fails to clarify whether the initial sum of US$1 billion is a once-off investment, or subject to periodic renewal given that the clean-up of Ogoniland may take up to 30 years.[15] The *EA Report* contains no estimated overall cost for implementing its recommendations, probably owing to the fact that the initial capital may not be sufficient in the long run. The *EA Report* is also silent about the process to be followed should more funds be required, such as which parties will be responsible to contribute these funds and when.

Corruption remains the bane of Nigeria's institutional authorities. The Niger Delta Development Commission (NDDC), for example, which is in charge of developing the region, has been undermined by high levels of corruption by its officials.[16] Recently, the Senate President of Nigeria's National Assembly (David Mark) described the NDDC as a failure. He accused the leadership of substituting their own personal interests for those of the Commission.[17] If the funding for rehabilitating Ogoniland is managed by the OERA (as recommended by UNEP) with Nigerian officials in full capacity, what is the assurance that the OERA will not suffer the same fate as that of the NDDC? Another obstacle, which may impede the successful review of the recommendations by the FGN, is ethnic discrimination. For instance, the lawmakers representing Ogoni people both at the state and federal level have accused the FGN special committee tasked with reviewing the *EA Report* of marginalisation.[18] They allege that the FGN has failed to consult them or include Ogoni indigenes in the process to review the Report. On 8 November 2011, three months after the *EA Report* was handed by UNEP to the FGN, members of MOSOP protested about the failure of the Nigerian Government to implement any of its recommendations.[19] This may lead to further civil unrest by the Ogoni people, which may in turn further delay the rehabilitation of the area.

Failure to Implement and Domestic Legal Solution

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[15] Ibid.
[16] K. Akogun, 'NDDC a Failure Says Mark' *Thisday Newspaper* (Lagos ,17 November 2011) (available at http://www.thisdaylive.com/articles/nddc-a-failure-says-mark/102995/.)
[17] Ibid.
[18] B. Abdullahi, 'Ogoni Lawmakers Flay FG over UNEP Report' *Dailytrust* (Port Harcourt, 21 November 2011) (available at http://dailytrust.com.ng/index.php?option=com_content&view=article&id=148156:ogoni-lawmakers-flay-fg-over-unep-report&catid=1:news&Itemid=2.)
[19] J. Onoyume, 'Ogoni Protest Non-Implementation of UNEP Report' *Vanguard* (Lagos, 8 November 2011) (available at http://www.vanguardngr.com/2011/11/ogoni-protest-non-implementation-of-unep-report/.)

So what are the potential legal consequences of the FGN and SPDC failing to implement the recommendations contained in the *EA Report*? For this type of report to have legal weight, the National Assembly must approve the review. Its legal status furthermore depends on whether the *EA Report* is adopted in whole or in part. Assuming, the *EA Report* is reviewed and adopted in whole by the National Assembly and backed by the assent of the President, it will become enforceable under the domestic laws through the judiciary. In Nigeria, both at the state and federal levels, there are three arms or institutions of governance. This justifies the idea that 'state powers in legal and political conceptions are divided between the three institutions: the executive, the legislature, and the judiciary'[20] and each institution should be independent of each other. In Nigeria, however, the opposite is the case. The executive often influences the activities of the legislature and the judiciary. Furthermore, the executive often fails to execute and comply with the laws made by the legislature or the decisions made by the judiciary. In *Jonah Gbemre vs. SPDC & Others*[21] the Federal High Court granted the relief sought by the plaintiff, namely that the SPDC immediately stop flaring gas near the plaintiff's community because its actions violated the enjoyment of community's right to life and dignity enshrined in the *Nigerian Constitution*.[22] This decision was a landmark victory for Niger-Delta communities, but the victory was short-lived because SPDC failed to comply with decision of the court due to complicity by the executive arm of the FGN. Nothing was done to enforce this decision or to make SPDC comply with existing laws against gas flaring. Therefore, there appears to be little hope in approaching the court to compel the FGN or SPDC to implement the recommendations in the *EA Report*, even were it to be ratified by the National Assembly.

As with many jurisdictions, Nigeria as a political state appears reluctant to enforce reports where its agencies and officials are implicated. The Report submitted by the Human Rights Violations Investigation Commission (HRVIC) headed by the retired Justice of the Supreme Court of Nigeria (Chukwudifu Oputa), for example, has not

[20] H. Yusuf, 'Calling the Judiciary to Account for the Past: Transitional Justice and Judicial Accountability in Nigeria' (2008) 30(2) *Law and Policy* 30 (2) 194-226. See also, M. Vile, *Constitutionalism and the Separation of Powers* (1967) Clarendon Press, Oxford.
[21] *Jonah Gbemre vs. Shell Petroleum Development Company (Nigeria) Limited & Ors*. Unreported Suit No. FHC/B/CS/53/05 delivered on the 14th of November, 2005.
[22] *Constitution of the Federal Republic of Nigeria* (1999), Sections 33(1) and 34(1). See also *African Charter on Human and People's Rights*, Articles 4, 16 and 24.

been reviewed let alone implemented.[23] There is little precedent of the FGN faithful implementing recommendations submitted to it whether in whole or part. Therefore, if the FGN fails to implement the UNEP *EA Report*, it appears that there is little to be done to compel it to do so, even were the judiciary to seek to compel it to do so.

Failure to Implement and International Enforcement

An interesting question that remains is whether the *EA Report* creates any binding international obligation on Nigeria? The answer to this is negative as it does not constitute a bilateral agreement or treaty. Furthermore, UNEP cannot be regarded as an international organisation. It is rather a programme of the United Nations in the area of environmental development.[24] As a result, the *EA Report* is not binding on Nigeria. Invoking international legal principles such as the 'the no harm rule' or 'state responsibility'[25] to compel Nigeria to implement the Report's recommendations should prove futile as no harm has been done to the environment of another state. Before these international legal principles can be invoked, there must have been harm caused to the environment of another country[26] and this is not the case in respect of the oil pollution in Ogoniland. However, if it were possible to regard the grievous environmental damage in Ogoniland as crime against humanity based on the findings contained in the *EA Report*, it is may be possible to compel the FGN and SDPC to implement the *EA Report*'s recommendations and compensation could feasibly be awarded by the International Criminal Court in this regard. Therefore, making environmental damage by government, it's agencies and private entities a crime against humanity requires further research in legal scholarship.

[23] The Commission is regarded as 'The Oputa Panel'. The Report titled *Human Rights Investigation Violation Investigation Commission of Nigeria* is available at http://www.nigerianmuse.com/ nigeriawatch/oputa/.
[24] See generally the activities of the United Nations Environment Programme (http://www.unep.org/).
[25] P. Okowa, *State Responsibility for Transboundary Air Pollution in International Law* (2001) OUP, Oxford.
[26] See: *Trail Smelter Case* (United States v Canada) (1941), Vol III *Reports of International Arbitral Awards (1905-1982)* (2006) United Nations.

Conclusion

It is evident that an attempt to frustrate the cleanup of Ogoniland by the FGN and SDPC will aggravate civil unrest in the Niger Delta. More attacks on facilities of the NNPC and SDPC are imminent. The FGN should as soon as possible adopt the recommendations in the UNEP *EA Report*, by setting up appropriate authorities for its implementation. Furthermore, there should be transparency in the review of the *EA Report* by the Nigerian Senate, through involving the indigenes of the Ogoniland as members of the review committee. This would also aid in avoiding further allegations of marginalisation. If it is not realistic that the initial capital of US$ 1 billion can be contributed by the FGN and SDPC, the Nigeria Government may seek alternative sources. Nigeria is a member of the *United Nations Framework Convention on Climate Change* and the *Kyoto Protocol*. It is eligible as a developing country and a party of the *Kyoto Protocol* to apply for funding to 'finance concrete adaptation projects and programmes' such as the restoration of the mangroves in Ogoniland.[27] Nigeria could also seek to attract Clean Development Mechanism projects under the *Kyoto Protocol* (subject to willing developed country partners of course) to address some of the activities associated with cleaning up Ogoniland. Furthermore, Nigeria could also apply to the United Nations Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries (UN-REDD) for funding to implement programmes aimed at restoring Ogoniland's mangroves, which would qualify as National Programmes for Reducing Emissions from Deforestation and forest Degradation (REDD+).[28] These types of projects would not only be beneficial for Ogoniland, but the global community as a whole, as they have the capacity to remove or reduce greenhouse gases from the atmosphere.

Notwithstanding all my criticisms levelled against the FGN, it should perhaps be commended for requesting UNEP to carrying out the EA in Ogoniland. It is just hoped that that the so-called Nigerian factors[29] do not undermine the implementation of the *EA Report*'s recommendations.

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[27] Kyoto Protocol, Article 12. See further: A. Macdonald, 'Improving or Disproving Sustainable Development in the Clean Development Mechanism in the Midst of a Financial Crisis?' (2010) 6(1) *Law, Environment and Development Journal* 1.
[28] See generally on the activities UN-REDD Programme (http://www.un-redd.org).
[29] These are factors responsible for economic sabotage and mediocrity such as corruption, ethnic discrimination and politics to mention but a few.