THE EMPEROR'S NEW CLOTHES

SHELL'S CORPORATE SOCIAL RESPONSIBILITY EFFORTS IN NIGERIA'S NIGER DELTA

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"It is as light as a spider's web: one would think one had nothing on; but that is just the beauty of it."

- From 'the emperor's new clothes' by Hans Christian Andersen

"It was said, further, that the Kings, Chiefs, of various territories in the Basin of the Niger, recognizing the benefits received by them from the Company, had ceded the whole of their territories to the Company"

- The Queen of the United Kingdom granting the Royal Niger Company the right to rule over Nigeria (1879)

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ABSTRACT

Since the public outrage over Shell's role in the hanging of nine Nigerian activists in 1995, Shell has been a proactive proponent of Corporate Social Responsibility (CSR) while simultaneously vehemently resisting legal accountability for corporate human rights violations. This thesis argues that Shell's seemingly contradictory positions on CSR and human rights can best be understood by conceptualizing Shell's CSR as strategic action that serves to protect the status quo in the Niger delta against the external threat of enforceable legal obligations. Using Strategic Action Field Theory as a tool for analysis, this thesis approaches the phenomenon of CSR through a critical, post-colonial lens. It finds that because the field of oil extraction in the Niger delta emerged in Nigeria's colonial period, the power disparities that characterized the relations between European multinationals and African communities continue to shape the rules, practices and understandings that govern oil extraction in present day Nigeria. As a result, the key elements of the status quo of oil in the Niger delta have remained surprisingly stable amidst the continuous crisis and political turbulence that characterizes the Niger delta. Binding, enforceable human rights obligations could however fundamentally change the status quo of oil extraction in the Niger delta. So far, Shell has been able to forestall this development by presenting corporate social responsibility as an alternative to corporate legal accountability in global policy making spaces. However, analysis of two examples of Shell's CSR in the Niger delta shows that Shell's CSR by design only achieves marginal changes: all core aspects of the status quo in the Niger delta are left intact. This finding confirms a central hypothesis of Strategic Action Field Theory: stability, like change, is achieved through action.

ABBREVIATIONS

ATS	Alien Tort Statute
BP	British Petroleum
CSR	Corporate Social Responsibility
CHIS	Community Health Insurance Scheme
EU	European Union
ICCom	International Chamber of Commerce
ICMM	International Council of Mining and Metals
IOE	International Organization of Employers
JTF	Joint Task Force
MOSOP	Movement for the Survival of the Ogoni Peoples
MSI	Multi-Stakeholder Initiative
NGO	Non-Governmental Organization
NiDAR	Niger Delta Aids Response
NNPC	Nigerian National Petroleum Corporation
OECD	Organization for Economic Cooperation and Development
OHCHR	Office of the High Commissioner for Human Rights
OPEC	Organization of the Petroleum Exporting Countries
RDS	Royal Dutch Shell
RNC	Royal Niger Company
SAF	Strategic Action Field
SPDC	Shell Petroleum Development Company
UK	United Kingdom
UN	United Nations
UNEP	United Nations Environment Programme
UNGP	United Nations Guiding Principles on Business and Human Rights
US	United States
VPSHR	Voluntary Principles on Security and Human Rights

CONTENT

INTRODUCTION

In 1991, the Niger delta's Movement for the Survival of the Ogoni People (MOSOP)[1] demanded fifty percent of the revenue generated by oil extracted from their lands as well as compensation for the environmental damage sustained over three decades of oil extraction.[2] Shell, facing frequent attacks against its facilities and personnel, withdrew from the area inhabited by the Ogonis in 1993,[3] urging Nigeria's military government to address the situation.[4] The government concluded that the only way for "smooth economic activities to recommence"[5] was to undertake "ruthless military operations" and proceeded to establish the Rivers State Internal Security Taskforce.[6] In the summer of 1994 this taskforce raided approximately sixty Ogoni villages in order to round up young Ogoni men, committing rape, extortion and murder in each village.[7]

That same summer, the leader of MOSOP (Ken Saro-Wiwa) and fourteen others were arrested[8] and tried before a tribunal that had been established specifically for that purpose.[9] The integrity of the trials was widely questioned: for the first seven months of their detention, the men had not been allowed access to a lawyer and legal observers perceived that "the tribunal first decided on its verdict and then sought for arguments to justify it".[10] The trials received global attention, with Amnesty International campaigning vigorously for the release of the men, and Nelson Mandela and Bill Clinton attempting to intervene diplomatically.[11]

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[1] MOSOP is a mass based social movement that unites various Ogoni tribes, who live spread over the Rivers State, in the Niger delta.

[2] Movement on the Survival of the Ogoni People (MOSOP), 'Ogoni Bill of Rights' (Saros International Publishers 1992) available at http://www.bebor.org/wp-content/uploads/2012/09/Ogoni-Bill-of-Rights.pdf .

[3] M. de Bruyne, 'De Kruistocht van Shell' (*De Groene Amsterdammer*, 22 Februari 1995) available at https://www.groene.nl/artikel/de-kruistocht-van-shell last accessed 11 October 2020; P. Lewis, 'Blood and Oil: A Special Report; After Nigeria Represses, Shell Defends its Record' (*The New York Times*, 13 Februari 1996) available at https://www.nytimes.com/1996/02/13/world/blood-and-oil-a-special-report-after-nigeria-represses-shell-defends-its-record.html last accessed 11 October 2020.

[4] Amnesty International, 'In The Dock Shell's Complicity In The Arbitrary Execution Of The Ogoni Nine' (Amnesty International 2017) (No. AFR 44/6604/2017) ('Amnesty International 2017a'), 12-13; Amnesty International, 'A Criminal Enterprise? Shell's Involvement In Human Rights Violations In Nigeria In The 1990s' (Amnesty International 2017) (No. 44/7393/2017) ('Amnesty International 2017b'), 52-59.

[5] Oil makes up 80% of the federal government's total revenue and 95% of its export earnings (if these were to decrease, the Naira would depreciate, rendering Nigeria's high imports even more expensive). Shell, in turn, made up almost 50% of the Nigerian oil exports in 1995. OML 11, the oil field in Rivers state that is located in the land of the Ogonis is where Shell's most important on shore oil assets are located. Shell's retreat from Ogoniland therefore had a decisive effect on Nigeria's national economy and on the financial health of the federal government.

[6] Amnesty International 2017a, *supra* note 4, 12-13; Amnesty International 2017b, *supra* note 4, 8; Human Rights Watch, 'Nigeria – The Ogoni Crisis: A Case-study of Military Repression in Southeastern Nigeria' (Human Rights Watch 1995) available at <https://www.hrw.org/reports/1995/Nigeria.htm> last accessed 10 October 2020.

[7] Amnesty International 2017a, supra note 4, 6-9; Amnesty International 2017b, *supra* note 4, 19-32; Human Rights Watch 1995, *supra* note 6.

[8] The four men were arrested on allegations of murder of four dissenting members of MOSOP. Human rights organizations and MOSOP suspects that the four dissenting Ogonis were killed by the Nigerian military, see Amnesty International 2017a, *supra* note 4, 8-9; Amnesty International 2017b, *supra* note 4, 33-36; Human Rights Watch 1995, *supra* note 6.

[9] Amnesty International 2017a, *supra* note 4, 9-11; Amnesty International 2017b, *supra* note 4, 33-34; Human Rights Watch 1995, *supra* note 6; Amnesty International, 'Nigeria: Military government clampdown on opposition' (Amnesty International 1994) (No. AFR 44/13/94) ('Amnesty International 1994a'); Amnesty International, 'Extrajudicial executions/Fear for safety Members of the Ogoni ethnic group – Nigeria' (Amnesty International 1994) (No. AFR 44/06/94) ('Amnesty International 1994b').

[10] Amnesty International 2017a, *supra* note 4, 10; Amnesty International 2017b, *supra* note 4, 34; Human Rights Watch 1995, *supra* note 6; Amnesty International 1994a, *supra* note 9; Amnesty International 1994b, *supra* note 9.

[11] Amnesty International 2017a, *supra* note 4, 14-15; Human Rights Watch 1995, *supra* note 6; Amnesty International 1994a, *supra* note 9; Amnesty International 1994b, *supra* note 9; Amnesty International, 'Fear of ill treatment/Possible

When the nine men were sentenced to death in 1995, the pressure on Shell to push for clemency mounted.[12] Shell however refused, asserting that as a private commercial entity, its actions in Nigeria were guided strictly by business considerations.[13] When the men's appeal for clemency was rejected, Shell's CEO nonetheless faxed Nigeria's president asking for a pardon. These last minute efforts were in vain: days after, the men were executed in secret and buried in an unmarked grave.[14]

The backlash was enormous.[15] The outrage was not only directed at the government of Nigeria, but at Shell as well. Throughout the trials, Shell had met with the Nigerian government to negotiate its investment in Nigeria's Liquefied National Gas Project. Shell during these meetings expressed its desire for "the Ogoni situation" to be "dealt with", but on no occasion called for fairer trials or humane treatment for the nine men.[16] Five days after the executions, Shell announced it would invest 3.8 billion dollar in the gas project.[17] Shell, already facing reputational problems over its breaking of sanctions against the white minority government of South Africa and over its plan to dispose of the Brent Spar drilling platform by dumping it in the ocean, [18] became the target of boycotts and protests.[19] In 1997, Shell's stock price fell by 57 percent – an unprecedented drop.[20]

Prisoners of Consience/ MOSOP' (Amnesty International 1995) (AFR 44/16/95) (Amnesty International 1995a'); Amnesty International 'Nigeria - At least 17 supporters of the Movement for the Survival of the Ogoni People (MOSOP) detained since mid-1994 and four other prisoners arrested in October 1995' (Amnesty International 1995) (AFR 44/36/95) ('Amnesty International 1995b'); K. Obiejesi, 'Mandela Begged Abacha Not To Execute Ken Saro-Wiwa and Companions' (*International Centre for Investigative Reporting*, 18 July 2018) available at https://www.icirnigeria.org/mandela-begged-abacha-not-to-execute-ken-saro-wiwa-and-companions/ last accessed 22 October 2020.

[12] N.a. 'Shell en Nigeria overlegden Over Berechting Wiwa' (*Volkskrant* 16 November 1995) available at https://www.volkskrant.nl/nieuws-achtergrond/shell-en-nigeria-overlegden-over-berechting-wiwa~b3453408/ last accessed 22 October 2020; N. Cohen, 'Hangings Put Shell in Dock over Nigeria' (*Independent*, 12 November 1995) available at https://www.independent.co.uk/news/hangings-put-shell-in-dock-over-nigeria-1581524.html last accessed last accessed 22 October 2020.

[13] De Bruyne 1996, *supra* note 3; Lewis 1996, *supra* note 3; n.a. 'Shell Game in Nigeria' (*New York Times*, 3 December 1995) available at https://www.nytimes.com/1995/12/03/opinion/shell-game-in-nigeria.html last accessed 11 October 2020.

[14] Amnesty International 2017b, *supra* note 4, 39.

[15] Nigeria was suspended from the Commonwealth, the European Union and United States froze military cooperation with Nigeria and mass protests erupted in Nigeria's capita, see Research Directorate of the Immigration and Refugee Board of Canada, 'Issue Paper Nigeria Chronology Of Events February 1995-March 1996' (Immigration and Refugee Board of Canada 1996) available at https://www.justice.gov/sites/default/files/eoir/legacy/2013/12/18/ISSUES_PAPER_CHRONOLOGY-OF-EVENTS-FEBRUARY-1995-MARCH-1996.pdf; S. Crawshaw, 'World Fury as Nigeria Sends Writer to Gallows' (*Independent*, 11 November 1995) available at https://www.independent.co.uk/news/world-fury-as-nigeria-sends-writer-to-gallows-1581289.html last accessed 26 October 2020; C. Hoff, 'Nigeria Executes 9 Activists; World Outraged' (*CNN*, 10 November 1995) available at http://edition.cnn.com/WORLD/9511/nigeria/ last accessed 26 October 1995.

[16] New York Times 1995, *supra note* 13; Amnesty International 2017b, *supra* note 4, 52-72; Volkskrant 1995, *supra* note 12.

[17] Amnesty International 2017b, *supra* note 4, 39, 71.

[18] D. Rosen, 'Nationswide Boycott of Shell Oil Over South Africa Ties Hits L.A.' (*Los Angeles Times*, 12 April 1986) available at https://www.latimes.com/archives/la-xpm-1986-04-12-me-3593-story.html last accesed 22 October 2020; EC Newsdesk, 'Brent Spar: Battle that Launched Modern Activism' (*Reuters*, 5 May 2010) available at https://www.reutersevents.com/sustainability/business-strategy/brent-spar-battle-launched-modern-activism last accessed at 22 October 2020; K. Schwartz, 'De Harde Lessen van de Brent Spar voor Shell en Greenpeace' (*Trouw*, 29 January 1998) available at https://www.trouw.nl/nieuws/de-harde-lessen-van-de-brent-spar-voor-shell-en-greenpeace~b3cdab63/ last accesed 22 October 2020; J. G. Frynas, 'Royal Dutch/Shell' (2003) 8 *New Political Economy*, 278-279.

[19] Lewis 1996, *supra* note 3; M. Russell, 'Saro Wiwa's daughter urges Shell boycott' (*The Iris Times*, 11 November 1996) available at https://www.irishtimes.com/news/saro-wiwa-s-daughter-urges-shell-boycott-1.104699 last accessed 12 October 2020; J. Hattam, 'Boycott Shell Now' (*Mother Jones*, 12 May 1997) available at https://www.motherjones.com/politics/1997/05/boycott-shell-now/ last accessed 12 October 2020; A. Bainbridge,

Shell, since 1994, had already been undergoing extensive reorganization, and was in the process of fundamentally rethinking "the way business is done" at the company.[21] This, combined with the reputational and financial damage that had resulted from the Ogoni and the Brent Spar incidents, led Shell to reverse its previous assertion that businesses ought to operate based on business considerations alone. In its 1998 report 'Profits and Principles – Does there have to be a choice?', Shell explained that it had been "shaken by the tragic execution of Ken Saro-Wiwa and eight Ogonis by the Nigerian authorities" and that it had subsequently "looked in the mirror and neither liked nor recognized what [it] saw" and had "set about putting it right".[22] In the report, Shell committed to turning these words into action by setting up infrastructure for corporate social responsibility (CSR), engaging in regular dialogue with civil society and experts, and by reporting on its progress yearly.[23]

Twenty years later, Shell is firmly committed to "conducting business as responsible corporate members of society, (…) supporting fundamental human rights (…) and to giving proper regard to health, safety, security and the environment."[24] Since 1997, Shell has signed on to numerous voluntary codes,[25] and in the Niger delta Shell offers five years of funding for development projects of local communities' choosing.[26] Additionally, Shell provides loans to young entrepreneurs in the Niger delta,[27] offers scholarships to Niger delta students,[28] finances two research centers[29] and organizes a yearly eco-marathon in which students from across the world compete to build and race with vehicles that use as little fuel as possible.[30] Shell's NiDAR project provides comprehensive treatment for HIV/AIDS in five hospitals in the Niger delta[31] and Shell's mobile clinic offers free health services to rural communities.[32]

'Protest Against Shell' (*Green Left,* 28 November 1995) available at https://www.greenleft.org.au/content/protest-against-shell last accessed 12 October 2020.

[20] Royal Dutch Shell 33 Year Stock Price History available at https://www.macrotrends.net/stocks/charts/RDS.B/royal-dutch-shell/stock-price-history last accessed 22 October 2020.

[21] J. Guyon, 'Why is the World's most profitable company turning itself inside out? Royal Dutch/Shell looked at the future and didn't like the view – Now It Is Changing Everything From the way its managers act to the way it does business' (*Fortune Magazine*, 4 August 1997) available at https://archive.fortune.com/magazines/fortune/fortune_archive/1997/08/04/229713/index.htm last accessed 12 October 2020; Royal Dutch Shell, 'Profits and Principles – Does There Have to Be a Choice?' (Charterhouse Printing 1998) ('Shell sustainability report 1998'); T. Westerwoudt, 'Shell's Glasnost' (*NRC,* 5 May 1998) available at http://retro.nrc.nl/W2/Lab/Shell/herkstroter.html last accessed 12 October 2020; Frynas 2003, *supra* note 18, 276, 280-281.

[22] Shell sustainability report 1998, *supra* note 21, 2.

[23] *Ibid,* 48-51.

[24] Shell's business principles, 4 https://www.shell.com/about-us/our-values/_jcr_content/par/relatedtopics.stream/1572622107415/f3e59c06223516799f4a2d5fe63b824839f3a4f3/shell-general-business-principles-2014.pdf?

[25] External Voluntary Codes available at https://www.shell.com/sustainability/transparency/external-voluntary-codes.html last accessed at 22 October 2020; Royal Dutch Shell PLC Global Compact access date available at https://www.unglobalcompact.org/what-is-gc/participants/8082-Royal-Dutch-Shell-plc last accessed 24 October 2020.

[26] Shell Nigeria, 'Global Memorandum or Understanding (GMOU)' (*Shell website,* no date) available at https://www.shell.com.ng/sustainability/communities/gmou.html last accessed 24 October 2020.

[27] Shell Nigeria, 'Shell LiveWIRE' (*Shell website,* no date) available at https://www.shell.com.ng/sustainability/communities/livewire-nigeria.html last accessed 24 October 2020.

[28] Shell Nigeria, 'Scholarships and Education Programmes' (*Shell website,* no date) available at https://www.shell.com.ng/sustainability/communities/education-programmes.html last accessed 24 October 2020.

[29] *Ibid.*

[30] *Ibid.*

[31] Shell Nigeria, 'Health Care' (*Shell website,* no date) available at https://www.shell.com.ng/sustainability/communities/health-in-nigeria.html last accessed 24 October 2020.

[32] *Ibid.*

Corporate responsibility and corporate accountability: a paradox?

While Shell is at the forefront of the societal shift from the apolitical corporation to the socially responsible corporation, Shell also plays a central role in seemingly incompatible efforts to resist corporate legal accountability. Contemporaneously to corporations' increasing engagement with the communities they operate in, a group of lawyers and activists sought to extend the scope of international human rights law (and/or international criminal law) to include the conduct of multinational corporations.[33] Shell, who was among the first multinational corporations to be sued for human rights violations in 1997 [see 2.1][34] (and has been sued numerous times since),[35] has consistently and vehemently opposed these efforts [see 2.3 and 2.5]. Shell is not the only major corporation that simultaneously champions corporate social responsibility while vocally opposing legal accountability for corporate human rights violations. The corporations who have been most frequently sued for involvement in severe human rights violations and/or are most active in efforts to lobby against binding human rights instruments for corporations are also the corporations that have elaborate and well-publicized corporate social responsibility programs.[36]

Seemingly, the promotion of socially responsible business and the effort to create (or enforce)[37] human rights obligations for multinational corporations serve similar purposes: to ensure that local

[33] Currently, only states can commit human rights violations under international human rights law.

[34] Complaint of Ken Wiwa, Owens Wiwa and Blessing Kpuinen against Royal Dutch Petroleum Company and Shell Transport and Trading Company p.l.c. (then separate companies) before the United States district court for the southern district of New York, 8 November 1996 (no. 96 civ. 8386), available at https://ccrjustice.org/sites/default/files/assets/11.8.96%20%20Wiwa%20Complaint.pdf. For a timeline of the case and an overview of submissions and rulings in the case see Wiwa et al. v. Royal Dutch Petroleum et al. (*Center for constitutional rights*), available at https://ccrjustice.org/home/what-we-do/our-cases/wiwa-et-al-v-royal-dutch-petroleum-et-al last accessed 5 February 2021.

[35] In addition to the *Wiwa* case (*supra* note 34), Shell has been sued on several other occasions, examples include *Kiobel v. Royal Dutch Petroleum Co.* (United States Supreme Court), 569 U.S. 108 (2013), the ongoing case of *Kiobel and others v. Shell* in the Netherlands (see 'Interlocutory Verdict in Kiobel and Others v. Shell, (*Prakken d. Oliveira*, 2 May 2019) available at https://www.prakkendoliveira.nl/en/news/2019/interlocutory-verdict-in-the-kiobel-case last accessed 5 February 2021), *Dooh and Milieudefensie v. Shell Petroleum N.V. and the 'Shell' Transport and Trading Company Ltd*, ECLI:NL:GHDHA:2015:3586, 18 December 2015, *Okpabi and others v. Royal Dutch Shell Plc and another* [2017] EWHC 89 (TCC) (26 January 2017).

[36] Companies accused of severe human rights violations that simultaneously have extensive CSR programs include Coca Cola (Sinaltrainal et al. v. Coca-Cola Co. (United States Appeals Court, 11th circuit), 578 F.3d 1252 (2009), accusing Coca Cola of financing paramilitary forces in Colombia to target union leaders for extrajudicial executions and torture. Its most recent sustainability report is available at https://www.coca-colacompany.com/reports/business-sustainability-report-2019, last accessed 5 February 2021); Nestlé (Doe I v. Nestlé, S.A. (United States Appeals Court, 9t Circuit), 929 F. 3d 623 (2019), accusing Nestlé of complicity in human trafficking, child slavery and torture. Its sustainability report is available at https://www.nestle.com/sites/default/files/2020-03/creating-shared-value-report-2019-en.pdf); BNP Paribas (M. Arnold, 'BNP Paribas Under Investigation over Role in Rwanda Genocide' (*Financial Times*, 25 September 2017), available at https://www.ft.com/content/25abe656-a1f3-11e7-9e4f-7f5e6a7c98a2 last accessed 5 February 2021, accusing the French bank of funding the Rwandan genocide. Its latest sustainability report is available at https://invest.bnpparibas.com/sites/default/files/documents/bnp_paribas_2019_integrated_report_en.pdf , last accessed 5 February 2021); Mercedes Benz, (Daimler AG v. Bauman (United States Supreme Court), 571 U.S 117 (2014), accusing Mercedes Benz Argentina of complicity in enforced disappearances of union leaders during Argentina's military dictatorship. Its most recent sustainability report is available at https://www.daimler.com/documents/sustainability/other/daimler-sustainability-report-2019.pdf); FIFA (N. Hodge, 'Dutch Trade Union Brings Legal Action Against FIFA' (*Compliance Week*, 1 November 2016), available at https://www.complianceweek.com/dutch-trade-union-brings-legal-action-against-fifa/2887.article last accessed 5 February 2021, accusing FIFA of complicity in forced labor and human trafficking. FIFA's latest sustainability efforts are showcased at https://www.fifa.com/what-we-do/sustainability/, last accessed 5 February 2021).

[37] International Human Rights obligations do not currently bind corporations. States would therefore have to create a new set of human rights obligations specifically for corporations. International Criminal Law however currently (arguably) binds corporations, although there are no forums in which these norms are enforced (except for potentially through the ATS in the United States). States (or courts) could therefore also create opportunities for enforcement of

communities do not pay a disproportionate cost for the presence of a multinational corporation. Shell being simultaneously a pioneer in corporate social responsibility and one of the most fierce opponents of corporate accountability therefore strikes as paradoxical. Given the significant role of Shell (and specifically Shell Nigeria) in both the professionalization of corporate social responsibility and resistance of legal accountability, examining the case of Shell in the Niger delta represents a useful first step towards a better understanding of the puzzling relationship between corporate promotion of CSR and corporate opposition to legal accountability.

(Re)politicizing CSR: CSR as incumbent strategic action in a hierarchical field

Much of the literature about Shell's voluntary initiatives in the Niger delta (and on CSR in the developing world more generally) tends to center on whether these initiatives are effective and how they might be improved [see 1.2]. This focus on effectiveness implicitly renders the problem of corporate human rights violations in the global south a technical one; a problem that can be resolved through CSR, if only CSR were to be implemented in the correct manner. However, such an approach centers corporations as part of the solution, without acknowledging the role of corporate capitalism (and even specific multinationals) in creating, exacerbating or perpetuating the problem [see 1.2.1]. A technical approach moreover conflates shared problems with shared goals and negates that corporations and local communities may have different priorities or even fundamentally incompatible interests [see 1.2.2].

In this thesis I aim to re-politicize corporate human rights violations in the global south by re-contextualizing it as a phenomenon inextricably linked to the systems and structures that shape extractive economies in the global south. Because I believe stripping a topic from its entanglements with history and power is rarely serves the marginalized, [38] the purpose of this thesis is to contribute a critical perspective to the vast existing body of literature on CSR in the Niger delta (and CSR more generally) – one that acknowledges the political and historical context of CSR as a solution to business-related human rights problems. [39] This thesis thus does not provide an exhaustive overview of the merits and demerits of CSR in the developing world, nor does it aim to provide a comprehensive analysis of the Niger delta conflict.[40]

In this thesis, I analyze Shell's CSR initiatives through the lens of Fligstein and McAdam's theory of Strategic Action Fields, in which they conceptualize society as a complex network of interrelated Strategic Action Fields. [41] A Strategic Action Field (SAF) is a constructed social space in which socially skilled actors – challengers and incumbents – engage in strategic action in acknowledgement of and in response to one another with regard to a specific (set of) issue(s), vying

these existing obligations (e.g. the Malabo protocol, which creates an African criminal court with jurisdiction over corporations through its article 46E).

[38] See K. Crehan *Gramsci's Common Sense: Inequality and its Narratives* (Duke University Press 2016) 43-58; Mason describes this epistemological approach 'critical theory' J. Mason *Qualitative Researching* (SAGE 2018), 8.

[39] C. C. Ragin and L. M. Amoroso *Constructing Social Research: Unity and Diversity of Method* (SAGE 2019), 6, 37, the purpose of this research is to 'interpret a culturally or historically significant phenomenon'.

[40] In this thesis I argue interpretatively (see Mason 2018, *supra* note 38, 223). As I do not believe that it is possible to produce academic work (in social science) that is 'objective' in a scientific sense. I therefore have chosen to make explicit I am looking to contribute a specific perspective rather than give a 'neutral' account of a social world that I am myself a part of (see Ragin and Amoroso 2019, *supra* note 39, 37-38).

[41] N. Fligstein and D. McAdam *A Theory of Fields* (Oxford University Press 2012) (Fligstein and McAdam 2012a), 9-10.

to improve their (relative) positions in the field.[42] Strategic action in turn is "the attempt by social actors to create and sustain social worlds by securing the cooperation of others".[43]

Conceptualizing Shell's CSR initiatives as a form of strategic action serves as a tool to facilitate a meaningful discussion of the relevant political context in which Shell's CSR initiatives are introduced. Fligstein and McAdams argue that because change in social fields is the rule rather than the exception, the status quo (or the 'settlement') is fragile even in the most stable fields [see 1.3].[44] Therefore, the field is bound to change unless the incumbent actively defends the settlement in the field. The absence of social change, according to Fligstein and McAdam, is therefore as much a product of strategic action as social change itself.[45] This theoretical point of departure allows for a characterization of CSR as strategic action engaged in by Shell as the incumbent in the field of oil extraction in the Niger delta, rather than as projects initiated by a neutral partner in the promotion of human rights.[46] Shell, as the incumbent in the field, after all has interests that are different from, and perhaps even incompatible with, the interests of the Niger delta communities as challengers in the field.

Additionally, SAF theory acknowledges the significance of historical context and allows for discussion of the ways in which historically grown power structures shape present day problems. Fligstein and McAdams argue that the circumstances in which a SAF came to be significantly impacts the extent to which and ways in which the incumbent is able to defend and reproduce the field settlement. Once a field is settled the incumbent will be able to rely on the established rules, understandings, relations to state allies, established governance units and the fields allocation of resources – all of which benefit the field's incumbents more than they benefit the field's challengers – to defend and reproduce the status quo [see 1.3]. This theoretical point of departure acknowledges the role of colonialism, corporate capitalism and Shell itself in creating the problems that Shell endeavors to address through its CSR initiatives.

Research question, scope and terminology

The research question central to this thesis is *"In what ways has Shell strategically deployed CSR to defend its incumbent position in the SAF of oil extraction in the Niger delta in the face of exogenous challenges between 1998 and 2019?"*

The words 'to strategically deploy' in the research question refers to 'strategic action', defined by Fligstein and McAdams as "the attempt by social actors to create and sustain social worlds by securing the cooperation of others".[47] This should be distinguished from the term 'strategy'. Strategy, in this thesis, does not refer to an individual plan or a set of intentions shared by specific individuals, but to the ways in which particular interests are served through "a thoroughly heterogeneous ensemble consisting of discourses, institutions, architectural forms, regulatory

[42] Fligstein and McAdam 2012a, *supra* note 41, 9 -10.
[43] *Ibid*, 17 .
[44] N. Fligstein and D. McAdam, 'Response to Goldstone and Useem' (2012) 30 *Sociological Theory* (Fligstein and McAdam 2012b), 48, 50; D. N. Kluttz and N. Fligstein, 'Varieties of Sociological Field Theory' in S. Abrutyn (ed.) *Handbook of Contemporary Sociological Theory* (Springer 2016), 192, 199-200; Fligstein and McAdam 2012a, *supra* note 41, 12-13; N. Fligstein and D. McAdam 'Towards a General Theory of Strategic Action Fields' (2011) 29 *Sociological Theory*, 15-17.
[45] Fligstein and McAdam 2011, *supra* note 44 18-19, Fligstein and McAdam 2012a, *supra* note 41, 96-99.
[46] This thesis should not be read as 'evidence' for Fligstein and McAdam's hypothesis that society is most accurately conceptualized as a network of strategic action fields – Strategic Action Field theory serves as a tool for analysis rather than as ontological premise.
[47] Fligstein and McAdam 2012a, *supra* note 41, 17 .

decisions, laws, administrative measures, scientific statements, philosophical, moral and philanthropic propositions."[48] The main exogenous challenge to which the research question refers are the efforts of lawyers, activists and victims to hold multinational corporations legally accountable for gross human rights violations.

The temporal scope of the research is limited to the years between 1998 and 2019. Before 1998, Shell did engage in corporate philanthropy, but not in a systemic way. The year 1998 was chosen as a starting point, because that is the year in which Shell published its first sustainability report, as well as the year in which human rights obligations for businesses were first seriously considered in international policy making spaces. The year 2020 is excluded from the research as it saw a number of developments of which the impact is still unclear.[49] While the term Niger delta usually denotes eight or nine states in the south of Nigeria, the geographical scope of my research is limited to three states in the south of Nigeria: Delta, Bayelsa and Rivers. It is in these states where Shell's assets are located, where most of the armed activity is taking place, and where the environmental and human cost of oil has been the starkest.[50]

'Shell' in this thesis comprises two corporations: Royal Dutch Shell ('RDS' or Shell Netherlands, incorporated in the Netherlands and the UK) and Shell Petroleum Development Company ('SPDC' or Shell Nigeria, incorporated in Nigeria). While these are two legally separate companies, they are functionally integrated: RDS owns SPDC, directs SPDC and receives all of its profits.[51] The term 'government of Nigeria' refers to the executive branch of the federal government of Nigeria (unless otherwise specified).[52]

CSR refers to any voluntary corporate initiative that aims to increase the enjoyment of human rights of the populations in corporations' area of operations.[53] This includes corporate philanthropy (e.g. providing healthcare and scholarships) and self-regulation (e.g. signing up to a set of voluntary principles or a certification scheme), but excludes the corporation's treatment of its employees (e.g. improving safety standards) or corporate attempts to influence culture (e.g. making commercials featuring same-sex couples).Voluntarism (or voluntary approaches) refers to all approaches to businesses' infringements on human rights that do not include binding legal obligations. Although voluntarism includes CSR, it is not limited to CSR.

Methodology and structure

This thesis opens with a chapter that provides background to the phenomenon of CSR and elaborates on my theoretical approach to Shell's CSR in the Niger delta. After detailing the rise of the socially responsible corporation [1.1], I claim that current discussions of corporate social responsibility erroneously render CSR technical. I argue that such an approach to CSR ignores the

[48] N. Sum, 'Towards A Cultural Political Economy: Staging an Encounter between Marx, Gramsci and Foucault' (2018) 8 *Politeia,* 46 (quoting Foucault).

[49] In April of 2020, the price of oil dropped below zero as a consequence of Covid-19. Not long after, the Petroleum Industry Bill (containing far-reaching reforms for the oil industry), which had been stranded in parliament for over a decade, passed through all legislative bodies quickly in an attempt to stabilize the falling prices. There are also five ongoing lawsuits against Shell, that were decided only after the body text of this thesis was completed (see postscript).

[50] See Annex 1 for a map.

[51] For more information on the relation between parent companies and subsidiaries see R. W. L. Russell, 'Instructierecht van de moedervennootschap' (*Russell Advocaten*, 15 February 2018) available at last accessed https://www.russell.nl/publicatie/instructierecht-moedervennootschap 24 October 2020.

[52] As Nigeria is a federation, Nigeria comprises 36 state governments in addition to its federal government.

[53] This definition of CSR is specific to this thesis – the term CSR is somewhat ambiguous and to an extent even contested. Other papers on CSR therefore may define CSR differently.

role of corporate capitalism in creating the very problems these initiatives aim to address and obscures that corporations may have interests that diverge from (or even conflict with) those of the communities CSR initiatives aim to help [1.2]. I then outline the concepts and hypotheses of SAF theory that are relevant to the theoretical premise of CSR as incumbent strategic action in the field of oil extraction in the Niger delta [1.3].

After this introductory chapter, I answer the research question in three steps. First, I describe the ways in which Shell has promoted CSR as a solution to business-related human rights problems in the global south whilst resisting regulatory approaches and legal accountability [chapter 2]. After describing the role of the execution of the Ogoni 9 in early efforts to hold corporations legally accountable for gross human rights violations [2.1] I describe how Shell's voluntarism professionalized amidst the escalation of the Niger delta crisis [2.2]. I then examine Shell's role in the rejection of efforts to adopt a set of binding human rights norms[54] for multinational corporations in the UN Human Rights Commission [2.3] and Shell's role in the promotion of a set of voluntary guidelines[55] that was adopted unanimously [2.4]. I then explain how Shell succeeded in shutting down what seemed to be promising avenue towards legal accountability for corporate complicity in gross human rights violations by defeating the legal claims leveled against it for its alleged complicity in the execution of the Ogoni 9 [2.5]. The chapter closes with an analysis of current efforts to negotiate a binding treaty on business and human rights, with a particular focus on the significance of the UNGP's voluntary principles in efforts to oppose this treaty [2.6].

To this end, I analyzed a variety of documents. In order to gain an understanding of the arguments on which Shell relies to resist legal accountability, I analyzed lawsuits against Shell and related documents (including defense briefs, claimant briefs, amicus briefs and interim rulings and leaked documents about Shell's lobbying efforts) brought outside of Nigeria on human rights grounds. In order to describe Shell's efforts to resist the creation of new human rights obligations, I analyzed all documents associated with the drafting process of the 2004 UN Draft Norms and the 2011 UN Guiding Principles on Business and Human Rights (UNGP) in chronological order, paying special attention to business submissions and the evolution of the UN's attitudes towards binding human rights obligations for corporations. I also (re)read various papers of human rights scholars on the UNGP in order to reconstruct the main arguments of the legal debate about human rights obligations for business. For information on the emergence and proliferation of sets of voluntary principles I consulted an elaborate report on the adequacy of voluntary initiatives as a tool for human rights protection.[56]

The second step is to analyze the Niger delta's business-related human rights problems in historical context by conceptualizing Shell and various Niger delta populations as incumbent and challenger in the Strategic Action Field of oil extraction in the Niger delta [chapter 3]. I describe how the field emerged in colonial Nigeria and became settled during Nigeria's civil war and subsequent military rule, and reflect on how the circumstances in which the field came to be affect the power dynamics that currently govern the field [3.1]. I describe the rules that govern the extraction of the Niger

[54] The 2004 UN Draft Norms, see section 2.3.
[55] The 2011 United Nations Guiding Principles for Business and Human Rights or UNGP, see section 2.4.
[56] MSI Integrity, 'Not Fit-for-Purpose: The Grand Experiment of Multi-Stakeholder Initiatives in Corporate Accountability, Human Rights and Global Governance' (The Institute for Multi-Stakeholder Initiative Integrity 2020) available at https://www.msi-integrity.org/wp-content/uploads/2020/07/MSI_Not_Fit_For_Purpose_FORWEBSITE.FINAL_.pdf.

delta's oil [3.2], and explore how this arguably inequitable status quo persists despite continuous challenges to it [3.3].

In order to understand how the SAF of oil extraction emerged, I analyzed Nigeria's colonial and current law pertaining to the extraction of oil (on-shore) in chronological order. I did so with a specific focus on what interests were (or appeared to be) protected by the law (and at whose expense), and if there were any significant changes that corresponded to major political or social developments. I also read a number of academic papers on the history of oil extraction in Nigeria, papers on the history of Nigeria generally, and directly consulted original historical sources where they were particularly relevant to the history of Shell in the Niger delta.

In order to understand how the governance of oil extraction in Nigeria currently functions, I read a number of legal papers on the current laws and regulations pertaining to oil extraction, and academic papers on current political controversies around oil in Nigerian politics. In order to obtain insight into the ways in which the current governance of oil extraction falls short in protecting certain fundamental interests of Niger delta inhabitants I read reports of humanitarian organizations and intergovernmental organizations, ethnographies of Niger delta peoples and papers on oil and underdevelopment in the Niger delta.

In order to understand in what ways Niger delta populations have resisted the governance of oil extraction in the Niger delta, and to gather information on how the Nigerian government has responded to this resistance, I read papers on the Niger delta conflict, reports of human rights organizations on the Niger delta conflict, and re-consulted the historical papers. Additionally, I read press releases of armed groups and the government about attacks and military interventions in the Niger delta, and news articles on recent developments in the Niger delta conflict.

The third step is to evaluate Shell's CSR initiatives as an alternative solution to the Niger delta's business-related human rights problems: how, if at all, do Shell's CSR initiatives alter the status quo of (a lack of) human rights protection in the Niger delta [chapter 4]? I examine two of Shell's CSR initiatives, namely the Voluntary Principles on Security and Human Rights (VPSHR) [4.1] and Shell's healthcare programs [4.2]. I selected the VPSHR and Shell's healthcare programs for two reasons. First, they are representative of the two types of CSR that Shell engages in most frequently: self-regulation (VPSHR) and philanthropy (healthcare). Second, they pertain to issues directly relevant to the oil industry (public health and the conduct of security forces). I then reflect on whether Shell's CSR can adequately address the absence of human rights protections in the Niger delta [4.3], and compare my conclusions and observations to the narratives promoted by Shell itself in this regard [4.4].

In order to understand how the VPSHR has (or has not) altered the status quo of oil extraction in the Niger delta, I consulted the text of the VPSHR itself, the VPSHR website, documents related to the VPSHR such as the VPSRH training courses and complaint procedure, Shell's VPSHR implementation reports and NGO roundtables on the VPSHR. To gain insight into Shell's role in military interventions in the Niger delta, I referred back to the various papers, reports and news articles on military intervention in the Niger delta, this time with a particular focus on Shell's involvement in the interventions. I moreover consulted various reports of NGOs and intergovernmental organizations for information on specific human rights violations that were committed in the context of these interventions and read through Shell's press statements and public

reports with a particular focus on whether they requested, supported or welcomed military intervention in the Niger delta.

In order to learn more about specific health-related CSR initiatives I read Shell Nigeria's press statements and quarterly magazine (to learn about the existence and chronology of initiatives) and academic papers that evaluated various projects of Shell from a development perspective (to learn about the impact and efficacy of various initiatives). In order to gain insight into the health-related problems faced by Niger delta inhabitants and their relation to oil operations, I consulted health related statistics for the states of Bayelsa, Delta and Rivers and the United Nations Environmental Programme (UNEP) report about the environmental consequences of Shell's oil spills and the deficiencies in Shell's pipeline maintenance and clean up practices. I also studied scientific research on the health consequences of gas flaring and oil spills. In order to understand in what ways Shell has tried to mitigate or prevent the negative health impact of its operations, I analyzed Shell's statements on its own cleanup efforts in the Niger delta and its efforts to reduce gas flaring. I then contrasted those statements with Amnesty International's reports on the credibility of those statements and Amnesty's own assessment of the progress of Shell's clean-up efforts.

For the purpose of contextualizing Shell's CSR initiatives through the lens of critical political economy, I consulted Shell's strategy reports and asset maps and news articles on current business issues for Shell in the Niger delta. I furthermore read academic papers that evaluate whether CSR has a positive effect on reputation, academic papers on the commodification of CSR and Shell's policy on what it does and does not publish in sustainability reports. Additionally, I analyzed Shell's sustainability reports from 1998-2019 with a focus on the narratives around human rights promoted in them, and did the same for business submissions to the UN in which Shell had been involved (e.g. submissions by the International Chamber of Commerce). Finally, after summarizing my findings and answering the research question central to this thesis, I conclude with a number of observations on the effects of rendering a topic technical in a post-colonial, capitalist world.

1. THE SOCIALLY RESPONSIBLE CORPORATION IN CONTEXT

In this chapter, I argue that the socially responsible corporation ought to be viewed not as a neutral partner in development, but as a strategic actor within fields shaped by historically grown power relations. I first describe how the socially responsible corporation emerged as a response to shareholders capitalism's crisis of legitimacy in the late 1990s [1.1]. I then claim that the primary focus of research on CSR has been whether, how and when CSR initiatives are effective at achieving their stated aims [1.2]. However, responsible discussions on CSR ought to take stock of the role of the global south's colonial history in creating the very problems CSR aims to solve [1.2.1], and acknowledge the possibility that corporate interests and societal needs are not congruent [1.2.2]. I then outline the elements and analytical concepts of SAF theory that are relevant to my approach to CSR as incumbent strategic action in the settled field of oil extraction in the Niger delta [1.3].

1.1. THE RISE OF THE SOCIALLY RESPONSIBLE CORPORATION

The Anglo-Saxon limited liability corporation (an independent legal entity with a profit mandate and shareholders) that dominates the global economy today has long competed with differently designed corporations.[57] In the 1970s, shareholder capitalism (the model of capitalism which has the Anglo-Saxon limited liability corporation at its center) gained traction, and by the late 1980s, shareholder capitalism won the competition with other variants of capitalism, such as stakeholder capitalism. The belief that those running a corporation ought to "think and act like shareholders" became 'common sense'[58] and the proposition that the purpose of a corporation is to maximize its profits became dogma: "a belief so widely accepted that those who embraced it cannot recall where they first learned of it."[59]

In the late 1990s however, shareholder capitalism was losing favor.[60] Due to the deregulation of global trade subsequent to the dissolution of the Soviet Union, capital moved across the globe with unprecedented ease.[61]At the same time, technological developments made it easier for NGOs to raise awareness for issues affecting communities on the other side of the globe.[62] A series of

[57] R. Dore, 'Financialization of the Global Economy' (2008) 17 *Industrial and Corporate Change*; R. E. Freeman, K. Martin and B. Parmar, 'Stakeholder Capitalism' (2007) 74 *Journal of Business Ethics*; L. A. Stout, 'On the Rise of Shareholder Supremacy, Signs of Its Fall, and the Return of Managerialism (in the Closet)' (2013) 36 *Seattle University Law Review*.

[58] G. Baars, 'Corporate Accountability in the Global Political Economy' (2016) 4 *London Review of International Law* 133-134; Stout 2013, supra note 57**;** N. Fligstein, 'The End of Shareholder Value Ideology?' (2005) 17 *Political Power and Social Theory* 224-225; H. J. Smith, 'The Shareholders vs. Stakeholders Debate' (2003) 44 *MIT Sloan Management Review* 85.

[59] L. Stout, 'The Toxic Side Effects of Shareholder Primacy' (2011) 161 *University of Pennsylvania Law Review*, 2003; the idea of a shareholder-owned limited liability corporation remained controversial well into the 1950s, see Baars 2016, *supra* note 58, 134, 14; Dore 2008 *supra* note 57, 1105; A. Berle, 'Economic Power and the Free Society: A preliminary Discussion of the Corporation' (1957) *Fund for the Republic*, 16; J. Dewey, 'The Historic Background of Corporate Legal Personality'(1926) 35 *The Yale Law Journal*; D. James, 'Frankenstein, Incorporated by I. Maurice Wormser'(1931) *Indiana Law Journal*; P. Ireland, I. Grigg-Spall and D Kelly, 'The Conceptual Foundations of Modern Company Law' (1987) 14 *Journal of Legal Studies*.

[60] Smith 2003, *supra* note 58, 89; Fligstein 2005, *supra* note 58.

[61] M. Robinson, 'Business and Human Rights: A Progress Report' (Report by the Office of the United Nations High Commissioner for Human Rights) (United Nations 2000).

[62] See for instance M. Keck and K. Sikkink *Activists Beyond Borders* (Cornell University Press 1998).

corporate scandals[63] received widespread media coverage and shifted public opinion on the desirability of unregulated global trade.[64] Critics began to oppose "the new nomadic capital that never sets down roots, never builds communities and leaves behind toxic wastes and embittered workers"[65] and called for a greener, more people-oriented capitalism.[66] In 1999, the World Trade Organization conference in Seattle was disrupted by riots in protest of globalization.[67] That year, the Secretary General of the UN warned corporations that capitalism was unsustainable in its current form. According to the Secretary General, corporations could either voluntarily change their conduct, or the international community would have to (re)regulate global trade.[68]

As it became clear that continuing to assert that business was a purely economic affair and therefore amoral (that is, beyond the realm of the moral or inherently morally neutral) was a losing strategy,[69] Shell published its first sustainability report entitled 'profits and principles – does there have to be a choice?'. In the report, Shell asserted that "the basic interests of business and society are entirely compatible."[70] Authors and consultants argued that there was a 'business case' for social responsibility and respect for human rights. After all, if responsible business conduct helps appeal to customers, investors and the general public whilst also motivating employees and boosting brand value, there is no inherent conflict between profit maximization and responsible business conduct.[71] Viewed this way, responsible business conduct and enjoyment of human rights is not incompatible with the paradigm of profit maximization as the primary or even sole purpose of business activity – they may even be mutually reinforcing.[72] In a 2003 advertisement, Shell thus confidently boasted

[63] J. G. Ruggie, 'Reconstituting the Global Public Domain – Issues, Actors Practices' (2004) 10 *European Journal of International Relations* (these were, in addition to the dumping of Brent Spar and the execution of the Ogoni nine, the Bhophal disaster, the Exonn-Valdez oil spill and Nike's sweatshop scandal).

[64] Robinson 2000, *supra* note 61; Shell 1998, *supra* note 21, 2**.**

[65] A. Roddick, 'Business as Usual' (*Mother Jones*, 19 January 2001), available at https://www.motherjones.com/media/2001/01/business-unusual/ last accessed 28 July 2020.

[66] See R. C. Anderson, *Mid-Course Correction: Toward a Sustainable Enterprise* (Chelsea Green Publishing 1998); J.B. Elkington *Cannibals with Forks* (Capstone Publishing 1997); D. Grayson, and A. Hodges *Everybody's Business* (Dorling Kindersley Limited 2001).

[67]KIRO 7 Eyewitness News 'Four Days in Seattle: The 1999 WTO Riots Plus New Stories One Week Later' (*Youtube*, 2 May 2013) available at https://www.youtube.com/watch?v=pFamvR9CpYw last accessed 13 October 2020; H. Cooper, 'Globalization Foes Plan to Protest WTO's Seattle Round Trade Talks' (*Wall Street Journal*, 16 July 1999) available at https://web.archive.org/web/20090804174410/http://www.globalexchange.org/campaigns/wto/wsj071699.html https://www.youtube.com/watch?v=pFamvR9CpYw last accessed 13 October 2020.

[68] K. Anan 'Secretary-General Proposes Global Compact On Human Rights, Labour, Environment, In Address to World Economic Forum in Davos' (*United Nations*, 1 February 1999) available at https://www.un.org/press/en/1999/19990201.sgsm6881.html last accessed 13 October 2020.

[69] A. B. Carroll, 'Ethical Challenges for Business in the New Millenium: Corporate Social Responsibility and Models of Management Morality' (2000) 10 *Business Ethics Quarterly***.**

[70] Shell sustainability report 1998, *supra* note 21, 3.

[71] D.B. Spence, 'Corporate Social Responsibility in the Oil and Gas Industry: the Importance of Reputational Risk' (2011) 59 *Chicago-Kent Law* Review, 59; P. Wójick, 'The Business case for corporate social Responsibility: A Literature Overview an d Integrative Framework'(2018) 26 *Journal of Management and Business Administration*, 122; M. L. Barnett, 'The Business Case for Corporate Social Responsibility: A Critique and a an Indirect Path Forward' (2019) 58 *Business and Society* 167.

[72] B. A. Kazmi, B. Leca and P. Naccache, 'Is Corporate Social Responsibility a New Spirit of Capitalism'(2016) 23 *Organization* 742, 751; J. Roberts, 'The Manufacture of Corporate Social Responsibility: Constructing Corporate Sensibility' (2003) 10 *Organization*, 249; L. Zandvliet, 'Opportunities for Synergy: Conflict Transformation and the Corporate Agenda' (Report of the Berghof Research Center for Constructive Conflict Management 2005).

that "a company which cares as much about how it makes money, as how much money it makes, will make money".[73]

Multinationals' shift from apoliticism to CSR however did not constitute a departure from shareholder capitalism. CSR after all does not require businesses to consider metrics other than profitability; it does not ask corporations to 'do the right thing' even if doing so could hurt its profits. Instead, it posits that "doing good" will help the company "do well" financially.[74] A corporation therefore will not have to choose between social responsibility and profit maximization: it is asserted that corporations will not have to make a choice between observing societies principles and maximizing its profits.[75]

The socially responsible corporation thus fits neatly into the paradigm central to shareholder capitalism: that a corporation's primary or even sole purpose is to maximize shareholder value. While shareholder capitalism does not forbid corporations from making decisions that do not immediately lead to the maximal increase in shareholder value, it requires that corporate decisions boost shareholder value in the long run. Shareholder capitalism does not require that "there are to be no cakes and ale, but that there are to be no cakes and ale except such as are required for the benefit of the company."[76] CSR responds to the criticisms leveled against shareholder capitalism in the late 1990s not by departing from profit maximization as the central paradigm of the global economy, but by reframing profit maximization as entirely compatible with (or even conducive to) responsible business behavior.

1.2. RE-POLITICIZING CORPORATE SOCIAL RESPONSIBILITY: BUSINESS AND HUMAN RIGHTS IN A POST-COLONIAL, CAPITALIST WORLD

The emergent phenomenon of large multinationals' extensive engagement in CSR in the global south has sparked numerous academic articles: platforms such as Scopus see hundreds of new papers on CSR each year.[77] This research generally fits into three categories: it asks whether voluntary instruments can substitute binding instruments (from a legal perspective),[78] whether they

[73] From a 2003 Shell advertisement in the economist, T. Besley and M. Ghatak, 'Retailing Public Goods: The Economics of Corporate Social Responsibility' (2007) 91 *Journal of Public Economics* 1645.
[74] Smith 2003, *supra* note 58, 86.
[75] K. Bais, and M. Huijser *The Profit of Peace: Corporate Social Responsibility in Conflict Regions* (Routledge 2005) 18; C. O Christiansen, 'The Economic Rationality of "Doing Good to Do Well" and Three Critiques, 1990 to the Present' in J. Bek-Thomsen et al. (eds.), *History of Economic Rationalities: Economic Reasoning as Knowledge and Practice Authority* (Springer International 2017), 133-135; the title of Shell's 1998 report 'principles and profits – does there have to be a choice' references this argument directly.
[76] Quoted from a United Kingdom case concerning company law (Hutton v West Cork Railway Co (1883) 23 Ch D 654). The lawsuit was brought by the shareholders against the corporation, and concerned the question whether the director was allowed to spend the corporations funds in a manner that does not directly benefit the shareholders. In the case at hand, the company had bought cake and ale to appease its employees, who were threatening to go on strike. The ruling holds that this was legal: a corporations actions do not have to directly benefit the shareholders, as long as they are ultimately in the shareholders interest. Although the purchase of cake and ale increased corporate costs, it prevented a higher corporate cost (in the form of lost revenue due to a strike) in the long term. This legal rule is presently contained in a statute (section 172 of the Companies Act of 2006). Royal Dutch Shell is incorporated in the United Kingdom, and therefore subject to this norm.
[77] S. Ferramosca and R. Verona, 'Framing The Evolution Of Corporate Social Responsibility As A Discipline (1973–2018): A Large-Scale Scientometric Analysis' (2019) 27 *Corporate Social Responsibility and Environmental Management*.
[78] See E. O. Ekhator, 'Regulating the Activities of Oil Multinationals in Nigeria: A Case for Self-Regulation?' (2016) 60 *Journal of African Law*; B. Santoso, 'Just Business – is the Current Regulatory Framwork an Adquate Solution to Human Rights Abuses by Transnational Corporations' (2017) 18 *German Law Journal*; A. Ramasastry, 'Corporate Social Responsibility versus Business and Human Rights: Bridging the Gap Between Responsibility and

positively contribute to the communities' wellbeing (answered either from a development perspective through quantitative studies or from an anthropological perspective through ethnographies)[79] or it asks how various companies can best integrate CSR into their operations (from a business perspective).[80] What these categories of research have in common, is that they ask practical, technical questions, pertaining to the concrete impact of CSR on communities, the efficacy of CRS in a particular context and the merits and demerits of specific CSR initiatives.

Approaching business-related human rights issues in the developing world as a technical, practical matters obscures disagreement over the purpose of CSR: if CSR is the solution, then what is the problem? Rather than making explicit what CSR is meant to be effective at, these studies tend to defer to a common-sense explanation of business-related human rights problems in the global south – generally one related to globalization or lack of good governance.[81] In other words, researchers have moved on to evaluating and developing the cure without ever having stopped to diagnose the patient. Centering research on the effectiveness of CSR as a solution, without an adequate analysis of what problem CSR is expected to solve and how this problem came about is ahistorical and detaches the relation between communities in the global south and western multinationals from important historical context. In this thesis I therefore include analysis of how a lack of meaningful

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Accountability' (2015) 14 *Journal of Human Rights*; J. Schrempf-Stirling, 'State Power: Rethinking the Role of the State in Political Corporate Social Responsibility' (2018) 150 *Journal of Business Ethics*; J. Nolan, 'The Corporate Responsibility to Respect Human Rights: Soft Law or not Law?' in S. Deva and D. Bilchitz (eds.) *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect Human Rights* (Cambridge University Press 2013); N. Jägers, 'Will transnational private regulation close the governance gap?' in S. Deva and D. Bilchitz *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press 2013).

[79] D. Graham and N. Woods, 'Making Corporate Self-Regulation Effective In Developing Countries' (2006) 34 *World Development*; F. Melissen, K. Vaughana, N. Akwataghibeb, B. Fakunlec and L. Wolmaransd, 'Who benefits from the Obio Community Health Insurance Scheme in Rivers State, Nigeria? A benefit incidence analysis' (2016) 8 *International Health*; J. I. Uduji, E. N. Okolo-Obasib and S. A. Asongu, 'Multinational Oil Companies In Nigeria And Corporate Social Responsibility In The HIV/AIDS Response In Host Communities' (2019) 24 *The International Journal of Justice and Sustainability*; J. I. Uduji, E. N. Okolo-Obasib and S. A. Asongu 'The Impact of Corporate Social Responsibility Interventions on Female Education Development in the Rural Niger Delta Region of Nigeria' (2020) 20 *Progress in Development Studies*; J. I. Uduji, E. N. Okolo-Obasib and S. A. Asongu, 'Social Responsibility in Nigeria And Multinational Corporations In The Fight Against Human Trafficking in Oil-Producing Communities' (2019) 24 *The International Journal of Justice and Sustainability*; U. Nwoke, '(In)Effective Business Responsibility Engagements in Areas of Limited Statehood: Nigeria's Oil Sector as a Case Study' (2019) 00 *Business and Society*; U. Idemudia, 'Shell-NGO Partnership and Peace in Nigeria: Critical Insights and Implications' (2018) 31 *Organization and Environment*; W. Akpan, 'Between Responsibility and Rhetoric: Some Consequences of CSR Practice in Nigeria's Oil Province' (2006) 23 *Development Southern Africa*; O. Egbon, U. Idemudia and K. Amaeshi, 'Shell Nigeria's Globamal Memorandum of Understanding and Corporate-Community Accountability Relations'(2018) 31 *Accounting, Auditing & Accountability Journal*; J. I. Uduji, E. N. Okolo-Obasib and S. A. Asongu, 'Does CSR Contribute To The Development of Rural Young People In Cultural Tourism of Sub-Saharan Africa? Evidence From The Niger Delta In Nigeria' (2019) 17 *Journal of Tourism and Cultural Change*.

[80] D. Schoeneborn, M. Morsing and A. Crane, 'Formative Perspectives on the Relation Between CSR Communication and CSR Practices: Pathways for Walking, Talking, and T(w)alking' (2020) 59 *Business and Society*; U. Nwagbara 'The Effects of Social Media on Environmental Sustainability Activities of Oil and Gas Multinationals in Nigeria' (2013) 55 *Thunderbird International Business Review*; L. Raimi, 'Reinventing CSR In Nigeria: Understanding Its Meaning and Theories For Effective Application In The Industry' (2018) 13 *Developments in Corporate Social Responsibility*; U. Idemudia, 'Community Perceptions and Expectations: Reinventing the Wheels of Corporate Social Responsibility Practices in the Nigerian Oil Industry' (2007) 112 *Business and Society Review*; Wójick 2018, *supra* note 71; Barnett 2019, *supra* note 71.

[81] For similar opinions see M. Sandoval, 'From CSR to RSC: A Contribution to the Critique of the Political Economy of Corporate Social Responsibility' (2015) 47 *Review of Radical Political Economics*; G. Hanlon, 'Rethinking corporate social responsibility and the role of the firm' in M. Hardt and A. Negri *The Oxford Handbook of Corporate Social Responsibility* (Belknap Press 2009); Roberts 2003, *supra* note 72; P. Fleming and M. T. Jones *The End of Corporate Social Responsibility* (Sage 2013); J.G. Frynas, 'Beyond Corporate Social Responsibility – Oil Multinationals and Social Challenges' (Cambridge University Press 2009); P. Newell, 'Citizenship, Accountability and Community: The Limits Of The CSR Agenda' (2005) 81 *International Affairs*.

human rights protections against foreign extractive multinationals is in part rooted in Nigeria's colonial history, and what this implies for the viability of CSR as a solution to this lack of protection.

Additionally, approaching CSR in a technical fashion – as a solution to a common problem – obscures the political economy of business-related human rights harm, as it suggests all stakeholders involved share the same goal, namely solving the (unstated and presumed) problem. In this section I argue that corporations are not neutral partners in development, but entities with political and economic interests of their own, that do not necessarily coincide with (and may even be diametrically opposed to) those of local communities.[82] I therefore approach the business response to human rights issues and business participation in international policy making on this topic through a critical political economy lens, assuming that the interests of corporations are rarely fully aligned with those of local communities due to the design of the modern Anglo-Saxon limited liability corporation.

1.2.1. A POSTCOLONIAL APPROACH TO EUROPEAN CORPORATIONS IN AFRICAN COMMUNITIES

Academic articles as well as policy papers on CSR and business and human rights policy frequently state that business-related human rights problems generally involve communities in the global south and a multinational incorporated in the global north. Yet, this observation is rarely elaborated on or interrogated. In this section, I argue that that is an omission, as understanding the north-south dichotomy in global capitalism that resulted from the colonization of Africa, Asia and South America is essential to understanding why these business-related human rights problems in the global south occur and how they can (and cannot) be productively addressed.[83]

The current model of the corporation (a legally independent entity that sells its shares on the market, known as the 'limited liability public corporation') was first created as a vehicle to finance and profit from the European overseas trade in Asia, South America and Africa. Thus, the first multinational corporation was the Verenigde Oost-Indische Compagnie or 'VOC'.[84] Since no single Dutchman was able to (or willing) to invest the amount of capital required to build a ship and hire a crew ('company' or 'compagnie'[85]) when the ship might never return, businessmen pooled their capital together into a joint stock. Each holder of a 'stock' or a 'share' of the overseas 'venture' was entitled to the corresponding share of the goods that returned ('the returns'). This model proved successful in quickly and efficiently raising the capital needed to sail out to Africa, Asia and the America's, and other European states soon adopted this model.[86]

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[82] U. Idemudia, 'Oil Multinational Companies as Money Makers and Peace Makers: Lessons from Nigeria (2014) 8 *Critical Studies On Corporate Responsibility;* U. Idemudia, 'Business and Peace in the Niger Delta: What we Know and What We Need to Know' (2017) 26 *African Security Review*; A. Zalik, 'The Niger delta: 'Petro Violence' and 'Partnership Development' (2004) 31 *Review of African Political Economy*.

[83] For similar views see B. S. Chimni, 'Capitalism, Imperialism, and International Law in the Twenty-First Century' (2012) 14 *Oregon Review of International Law*.

[84] O. Gelderblom, A. de Jong and J. Jonker, 'The Formative Years of the Modern Corporation: The Dutch East India Company VOC, 1602-1623' (2013) 73 *The Journal of Economic History*; M. Schitthoff, 'The Origin of the Joint Stock Company' (1939) 3 *The University of Toronto Law Journal*, 75.

[85] E.g. Sierra Leone Company, New Zealand Company, Company of Merchant Adventurers to New Lands, Venice Company, Honduras Company, Royal Niger Company, West India Company, etc.

[86] L. O. Petram, 'The World's First Stock Exchange: How the Amsterdam Market for Dutch East India Company Shares Became a Modern Securities Market, 1602-1700' (PhD thesis submitted to the University of Amsterdam 2011) available at https://dare.uva.nl/search?identifier=807d06b5-5a35-43a7-8b73-3126d7bf0123 last accessed 26 October 2020; O. Gelderblom and J. Jonker, 'Completing a Financial Revolution: The Finance of the Dutch East India Trade and the Rise of the Amsterdam Capital Market, 1595-1612' (2004) 64 *The Journal of Economic History*.

The overseas trade by Europeans in turn was central to the establishment of (Westphalian/Weberian) state institutions in Africa and Asia. The first multinational companies relied on trade monopolies in order to be profitable.[87] They therefore usually negotiated a royal charter that granted them certain governmental powers for the purpose of establishing and defending a trade monopoly.[88] The WIC (the Dutch West Indies Company) for example could "in the Dutch name and authority make contracts and treaties with the Princes from Over There, build forts and reinforcements, appoint governors, army officers and prosecutors and other public offices as may be necessary as well as police and may proclaim rules as are necessary for the furtherance of trade and profit".[89] For many coastal states in Asia and Africa therefore, the purpose of its first (Westphalian/Weberian) state institutions (e.g. courts, police, armies, borders, taxes, permits, regulations) was to create and maintain a trade monopoly for the European-led 'company'.

In the 19th century, the purpose of Western state institutions/governments in Africa and Asia evolved. During the industrial revolution, demand for commodities such as coal and palm oil – required to keep Europe's rapidly emerging factories running – skyrocketed. At the same time, telegraph, railways and anti-malaria medication made the previously inhospitable inlands accessible for western 'explorers'. Soon, European states were competing fiercely for all of Africa's territory. While corporate armies and corporate governments had been able to defend their settlements on the coast, they were not equipped to hold on to or rule over such sizable territories. Corporate charters were revoked, and European governments formally claimed the territories as colonies. With public officials rather than private corporations in charge, the purpose of government in Africa was no longer to further the interest of a particular company by enforcing a monopoly. Instead, state institutions now facilitated the extraction and export of the colony's natural resources in accordance with the economic needs of the mainland.[90]

Upon independence, the economies of most former colonies remained bifurcated: the sector of the economy that consisted of the export of food crops and raw materials (formerly run by European colonists) existed separately from the rest of the economy, which consisted of subsistence farming, small trade and crafting (engaged in by 'natives').[91] Since the former sector produced far more tax revenue than the latter sector, the newly independent governments quickly became reliant on the

[87] S. R. H. Jones and S. P. Ville, 'Efficient Transactors or Rent-Seeking Monopolists? The Rationale for Early Chartered Trading Companies' (1996) 56 *The Journal of Economic History* 909-912, "The companies themselves stressed that 'trafique with infidels and barbarous nations' could only be developed and sustained by companies willing to finance the construction of forts and factories and bear the costs of commercial negotiations with; was hardly fair, they argued, that having established a trade at such vast expense and trouble, others should benefit 'that have had nothing of the burden and the charge.'"

[88] For more information on this subject see A. Phillips and J. C. Sharman *Outsourcing Empire: How Company-States Made the Modern World'* (Princeton University Press 2020); A. Phillips, 'Company Sovereigns, Private Violence and Colonialism' in R. Abrahamsen and A. Leander (eds) *Routledge Handbook of Private Security Studies* (Routledge 2016).

[89] Nationaal Archief Nederland, 'Octrooi Verleend Door de Staten-Generaal aan de West-Indische Compagnie' (3 June 1621) (1.05.01.01/A.1.13).

[90] For more information on the role of economic interests in 19th century imperialism see W. Rodney *How Europe Underdeveloped Africa* (Verso 1972) 176-207; E. Frankema, J. Williamson, and P. Woltjer, 'An Economic Rationale for the West African Scramble? The Commercial Transition and the Commodity Price Boom of 1835–1885' (2018) 78 *Journal of Economic History*; Phillips and Sharman 2020, *supra* note 88, 109-153; Secretary of State for the Colonies (1895-1903) Pasquale Fiore argued that "As a matter of principle, colonization and colonial expansion cannot be questioned. It is not permissible that savages who are unable to derive any profit from natural products should be allowed to leave sources of wealth unproductive, leaving the ground uncultivated."

[91] Y. K. Gandu, 'Oil Enclave Economy And Sexual Liaisons In Nigeria's Niger Delta Region' (PhD thesis submitted to Rhodes University) [on file with author], 38-52.

export of specific commodities. These circumstances were conducive to the emergence of a government whose interests converge with the (few) multinational(s) it relies on for the continued export of a specific product (be it bananas or petroleum) rather than with the general population: a banana-republic or petro-state. [92]

Yet, the prevailing understanding of business-related human rights problems in the global south is that their root cause "lies in the governance gaps created by globalization".[93] Human rights law requires states to protect their citizens from human rights harm by third parties (such as multinational corporations). Due to the rapid globalization of the 1990s however, regulators in home states (the country in which the corporation is incorporated/headquartered) could not keep up with the increasingly complex forms the supply chains of corporations headquartered in their state took on. Simultaneously, developing countries were engaged in a 'race to the bottom', lowering their regulatory standards in order to compete for foreign direct investment. In practice therefore, a gap had fallen in the human rights protection of local communities: neither the country in which the corporation was operating nor the country in which the corporation was incorporated/headquartered was regulating the activities of the corporation operating in their communities. [94]

This understanding of business-related human rights problems in the global south implies that they are a result of a (recent) *gap* in a previously functional system of human rights protection and negates the history of (European) multinational corporations in the global South. After all, state institutions in the global South, in each phase of their history, have either been designed to or incentivized to prioritize the interests of (European) multinationals over the needs of local communities (previously 'natives'). Prioritization of the continued extraction and export of natural resources over protection of local communities and the resulting business-related human rights problems in the global south therefore should not be thought of as the consequence of a globalization-induced gap in the governance of corporations' operations in the global south, but as a feature of that governance.[95]

[92] For more information on multinationals and the origin of 'banana republics' see P. Chapman *Bananas: How The United Fruit Company Shaped The World* (Canongate 2007); G.G. Jones, *The Octopus And The Generals: The United Fruit Company In Guatemala* (Harvard Business School 2005); M. Bucheli, 'Multinational Corporations, Totalitarian Regimes And Economic Nationalism: United Fruit Company In Central America' (2008) 50 *Business History*; the United Fruit Company (now Chiquita), like Shell, has quite an extensive CSR program: https://www.chiquita.com/sustainability/.

[93] Human Rights Council, 'Protect, Respect and Remedy: A Framework for Business and Human Rights' (Report Of The Special Representative Of The Secretary-General On The Issue Of Human Rights And Transnational Corporations And Other Business Enterprises) (7 April 2008) (A/HRC/8/5), para 3 ('the 2008 interim report'); Commission on Human Rights, 'Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises', 4 February 2006 (U.N. Doc. E/CN.4/2006/97), para 16 ('the 2006 interim report').

[94] This understanding of the 'governance gap' is reflected for instance in S. Baughen *Human Rights and Corporate Wrongs: Closing the Governance Gap* (Edward Elgar Publishing 2015); Mind the Gap, 'Governance Gaps' (*Mind the Gap,* no date) available at https://www.mindthegap.ngo/governance-gaps/ last accessed at 25 October 2020; Jägers 2013, *supra* note 78; Schrempf-Stirling 2018, *supra* note 78; MSI Integrity 2020, *supra* note 56, 26; J. Kyriakakis, 'Developments in International Criminal Law and the Case of Business Involvement in International Crimes' (2012) 94 *International Review of the Red Cross*, 985.

[95] Similar views are expressed in P. Simons *The Governance Gap: Extractive Industries Human Rights and the Home State Advantage* (Routledge 2015); C. Coumans, 'Minding the "governance gaps": Re-thinking Conceptualizations of Host State "Weak Governance" and Re-focusing on Home State Governance to Prevent and Remedy Harm by Multinational Mining Companies and their Subsidiaries' (2019) 6 *The Extractive Industries and Society*.

1.2.2. A CRITICAL APPROACH TO BUSINESS AND DEVELOPMENT

Corporations have organizational features that are distinct from NGOs or development agencies: their primary purpose is not to solve social problems, but to generate profit. This is inherent to the design and functioning of the public limited liability corporation as a result of three characteristics they were imbued with. First, corporations are separate legal entities, and are not identified legally with the persons running the corporation: "men creating themselves into a company" became "men creating a company".[96] Second, corporations were given limited liability: those in charge of the corporation were not personally liable for acts of and claims on the corporation.[97] The businessman was thus separated from the business he conducts.[98] Third, the (Anglo-Saxon) limited liability corporation was given a mandate to maximize profits: decisions made by the management of a corporation must always (ultimately) benefit the corporations' shareholders.[99] Separated from the personal values and liabilities of the businessman, and subject to a profit-mandate, the limited liability corporation is designed to only consider matters that can be translated into an economic cost-benefit analysis:[100] the modern public limited liability company does not provide cake and ale except as is required for the benefit of the company.[101]

Due to a number of developments, corporations' cost-benefit analyses increasingly prioritize quarterly profits over other metrics of economic success that are more compatible with responsible business conduct, such as the sustainability of the business model and monetary goodwill value.[102] The first cause of this trend is the successful push to "solve" the principal-agent "problem". When the normative view that corporations' primary purpose ought to be to maximize shareholder value became prevalent, the economic literature turned to the question of how the managers (the agents) could be incentivized to act in the best interests of the shareholders (the principals). This led to the popularization of a number of now common practices, such as cash bonuses, stock options and pay-for-performance remuneration models that ensure managers "think and act like shareholders".[103]

Secondly, because shares can (now) be owned by other corporations whose business model is (or includes) the buying and selling of shares (e.g. investment banks or hedge funds) and due to the rise of automated share trading, the average period of shareholding has declined from eight years in the 1960s to mere weeks, or even days.[104] Corporate managers therefore are not only pressured to think

[96] Baars 2016, *supra* note 58, 131-138.
[97] *Ibid.*
[98] *Ibid.*
[99] *Ibid*; see also P. Ireland, 'Capitalism Without the Capitalist' (1996) 17 *Journal of Legal History***;** Dewey 1926, *supra* note 56; Ireland, Grigg-Spall and Kelly 1987, *supra* note 59.
[100] H. Glasbeek, 'The Corporation as Legally Constructed Site of Irresponsibility' in H. Pontell and G. Geis (eds.) *The International Handbook of White Collar and Corporate Crime* (Springer 2007), 249; J, Bakan *The Corporation: The Pathological Pursuit of Profit and Power* (Robinson Publishing 2005), 134; E. Sutherland *White Collar Crime: The Uncut Version* (Yale University Press 1983), 236-238; N. Passas, 'Anomie and Corporate Crime' (1990) 14 *Contemporary Crises*, 153-155.
[101] See earlier quoted passage from the *West Cork Railway* case, *supra* note 76.
[102] Stout 2011, *supra* note 59, 2016-2019; M. J. Kelly Prosecuting Corporations for Genocide (Oxford University Press, 2016), 6.
[103] Stout 2011, *supra* note 59, 2007-2010; Fligstein 2005, *supra* note 58; Smith 2003, *supra* note 58; Dore 2008, *supra* note 57.
[104] M. Dowell-Jones, 'Financial Institutions and Human Rights' (2013) 13 *Human Rights Law Review*, 446; S. Chatterjee and T. Adinarayan, 'Buy, Sell, Repeat! No Room for 'Hold' in Whipsawing Markets' (*Reuters*, 3 August 2020) available at https://www.reuters.com/article/us-health-coronavirus-short-termism-anal-idUSKBN24Z0XZ last accessed 26 October 2020; S. Ro, 'Stock Market Investors Have Become Absurdly Impatient' (*Business Insider*, 8 August 2012) available at https://www.businessinsider.com.au/stock-investor-holding-period-2012-8 last accessed 26 October 2020; K. Makortoff, 'What Is High-Frequency Trading and How do You Make Money From It?' (*The*

like a shareholder, but to think like a short-term shareholder.[105] The modern multinational as a result is not only amoral (or 'economically rational') but also short-term oriented: in its cost-benefit analysis, a corporation will emphasize short term benefits over long-term costs.[106]

It cannot be presumed therefore that the interests of corporations align with the interests of the communities they operate in. It may be the case that a corporation and a local community have opposing interests (e.g. with regard to wages, pollution), or it may be the case that a corporation has different priorities than the local community (e.g. getting persons of working age vaccinated first as opposed to the elderly).[107] The interests of corporations and local communities may well align some of the time, but are not inherently compatible, as is implied by those making 'the business case for corporate social responsibility' or advocating for companies to 'do good to do well'.

1.3. CSR AS STRATEGIC ACTION

I use Fligstein and McAdam's Strategic Action Field theory as a tool to analyze Shell's CSR initiatives in the Niger delta in a manner that that acknowledges their political nature. I do so by placing providing context on the role of CSR in global policy debates on corporate human rights obligations as well as on the history of Shell in colonial Nigeria. In this section I introduce the analytical concepts of SAF theory relevant to understanding Shell's CSR in the Niger delta as a form of incumbent strategic action in the settled SAF of oil extraction in the Niger delta.

Strategic Action Fields

SAF theory conceptualizes society as a complex network of SAFs: constructed meso-level social orders in which socially skilled actors orient their strategic action[108] towards each other in relation to the same (set of) topics on the basis of a set of shared understandings as to what is going on in the field.[109] Within each strategic action field, challengers and incumbents are acting and reacting to one another, vying to improve their relative positions.[110] Incumbents are those actors whose interests are served by the status quo in the field, and who are most influential in the field.[111] Challengers are those actors who exert less power over the rules and allocation of resources in the field.[112] In addition to challengers and incumbents, (established) fields contain a governance unit, which works to facilitate the smooth functioning and continuation of the field.[113] SAFs relate to other SAFs in three different ways:[114] fields can be embedded hierarchically in other fields in a Russian doll-like manner,[115] one field can exercise influence over another field,[116] or fields can be

Guardian, 19 December 2019) available at https://www.theguardian.com/business/2019/dec/19/high-frequency-trading-explainer-bank-of-england-breach last accessed 26 October 2020.

[105] Stout 2013, *supra* note 57, 2016-2019.

[106] Kelly 2016, *supra* note 102, 6.

[107] S. Hites, 'Between Social Duty and the Greed of Giving: On Philanthrocapitalism and Gift-Patriotism' (2019) 56 *Comparative Literature Studies*.

[108] Strategic action is "the attempt by social actors to create and sustain social worlds by securing the cooperation of others" Fligstein and McAdam 2012a, *supra* note 41, 17.

[109] *Ibid*, 9 -10.

[110] *Ibid*, 12, 54; Fligstein and McAdam 2011, *supra* note 44, 5,14.

[111] Fligstein and McAdam 2012a, *supra* note 41, 13, 96-97; Fligstein and McAdam 2011, *supra* note 44,14.

[112] Fligstein and McAdam 2012a, *supra* note 41, 13, 97-98; Fligstein and McAdam 2011, *supra* note 44, 18.

[113] Fligstein and McAdam 2012a, *supra* note 41, 13-14, 77.

[114] *Ibid*, 58.

[115] E.g. the marine corps is embedded in the navy, which in turn is embedded in the military.

[116] E.g. the field on the constitutional right to freedom of speech exercises influence over the field of investigative journalism.

interdependent.[117] Changes in one SAF can 'ripple out' to other SAFs; the more closely connected the fields, the more impactful changes in one field are on another field.[118]

SAFs "tend toward one of three states: unorganized or emerging, organized and stable but changing, and organized and unstable and open to transformation".[119] A field is emerging when actors develop interdependent interests, forcing them to "increasingly take one another into account in their actions".[120] A field is considered to have emerged when the "overall account of the terrain of the field is shared by most field actors" – this is the case regardless of whether all actors consider the rules of the field and allocation of resources in the field to be legitimate.[121] At this stage the field often sees the creation of an internal governance unit that enforces the rules of the field.[122] A field is considered stable when the actors reproduce the field and their positions in it over a long period of time.[123] A field enters a contentious episode when the actors in it are engaging in forms of action that are not mutually understood, causing a "shared sense of uncertainty/crisis regarding the rules and power relations governing the field."[124] Such an episode of contention ends either with the "reassertion of the status quo by incumbents" or with the achievement of a "new institutional settlement regarding field rules", achieved through "sustained oppositional mobilization". Both outcomes signify the return of a sense of certainty regarding the rules of the field and the relative positions of the actors in the field.[125]

Change in strategic action fields

Fligstein and McAdam's theory of fields differs from other theories of fields[126] in two ways. First, Fligstein and McAdams view incumbents and challengers as actors that possess reflexive agency, rather than actors that merely 'act out' (and thereby reproduce) society's macro-structures.[127] Second, Fligstein and McAdams emphasize that a field cannot be analyzed in isolation: each SAF contains, is embedded in and is intimately connected with numerous other fields.[128] As a result of these features, change figures more prominently in SAF theory than it does in other theories of fields:[129] the actor's reflexive agency and the interconnectedness of fields are each a major source of societal change.[130]

Fligstein and McAdams argue that revolutionary change – where the field breaks down and actors are free to redefine both the rules and the goal of the game – is unlikely to occur absent some

[117] E.g. common military policy of EU members and NATO collective self-defense.
[118] Fligstein and McAdam 2012a, *supra* note 41, 19-20.
[119] Fligstein and McAdam 2011, *supra* note 44, 11.
[120] Fligstein and McAdam 2012a, *supra* note 41, 87-89.
[121] *Ibid*, 88, 204.
[122] *Ibid*, 14, 94-95.
[123] *Ibid*, 9.
[124] *Ibid*, 21.
[125] *Ibid*, 22.
[126] For an overview see Fligstein and McAdam 2012a, *supra* note 41, 23-33 and Kluttz and Fligstein 2016, *supra* note 44.
[127] Marco-level theories of society, such as Marxism, generally lack a suitable ontology of the individual and personify structures and systems, perceiving them as "doing things", see V. Jabri *Discourses on Violence: Conflict Analysis Reconsidered* (Manchester University Press 1996), 61; Bourdieu and Giddens, who have attempted to reconcile institutional theory with individual theory (implicitly) conceptualize actors as rule followers, be it consciously by imitation or coercion or unconsciously by internalization, see Fligstein and McAdam 2011, *supra* note 44, 7; Kluttz and Fligstein 2016, *supra* note 44, 194-196.
[128] Kluttz and Fligstein 2016, *supra* note 44, 192; Fligstein and McAdam 2012a, *supra* note 41, 58.
[129] Kluttz and Fligstein 2016, *supra* note 44, 192, 194; Fligstein and McAdam 2011, *supra* note 44, 20; Fligstein and McAdam 2012a, *supra* note 41, 179.
[130] Fligstein and McAdam 2012a, *supra* note 41, 58, 85, 113; Kluttz and Fligstein 2016, *supra* note 44, 198-200.

exogenous impulse due to the amount of influence incumbents exert over established fields.[131] Nevertheless, drastic change is not a rare phenomenon. [132] Fligstein and McAdam contend that due to the interconnectedness of fields, changes in proximate SAFs that 'ripple out' regularly open up new opportunities for challengers. The exogenous impulses required for drastic change in a stable SAF therefore occur regularly.[133]

Even absent any such exogenous impulses however, society would still be in constant flux: the continuous acting and reacting ('jockeying for position') of actors to gain a more advantageous position in the field produces piecemeal, gradual social change. Added up, these piecemeal changes may reach a threshold or tipping-point.[134] Revolutionary change is thus understood as "just a more extreme version" of gradual change.[135] In SAF theory therefore change in social orders (even in established and seemingly stable SAFs) is the rule rather than the exception: the opportunity (or threat) of change is permanently present.[136]

Incumbent strategic action and the status quo

By introducing change into the theory of fields, SAF theory offers an alternative account of the status quo as well. The status quo in SAF theory represents an "ongoing, negotiated accomplishment, threatened at all times by challenger resistance and exogenous change processes".[137] Since the status quo is "subject to entropy and decay unless it is maintained through active work" [138] socially skilled incumbents are continuously engaged in strategic action to protect the status quo from (perceived) threats.[139] Hence, like change, the absence of change too is a product of strategic action; it is not simply the result of "non-problematic social reproductions based on taken-for-granted routines and institutional logics".[140] Actors possess reflexive agency not only when they mobilize for social change, but also when they strive to have nothing change at all: reproducing the status quo too requires social skill.[141]

Despite the fragility of the status quo, incumbents in settled fields nevertheless tend to succeed at reproducing it, as a settled SAF sets the incumbent up for success in several ways.[142] Since the rules and understandings of the field generally represent the interests of the incumbents, the tactics and frames that are understood as legitimate tend to be more useful to incumbents than they are to challengers.[143] The internal governance units established to secure the smooth functioning of the

[131] Fligstein and McAdam 2012a, *supra* note 41, 12, 13; Fligstein and McAdam 2011, *supra* note 44, 7-8, 15-16; Kluttz and Fligstein 2016, *supra* note 44, 199.
[132] Kluttz and Fligstein 2016, *supra* note 44, 198-200.
[133] Fligstein and McAdam 2012b, *supra* note 44, 49; Kluttz and Fligstein 2016, *supra* note 44, 200.
[134] Kluttz and Fligstein 2016, *supra* note 44, 198-199; Fligstein and McAdam 2012b, *supra* note 133, 48.
[135] Fligstein and McAdam 2011, *supra* note 44, 15.
[136] Fligstein and McAdam 2012b, *supra* note 133, 13, 19.
[137] Fligstein and McAdam 2012b, *supra* note 133, 13; Fligstein and McAdam 2011, *supra* note 44, 15.
[138] J. Lok, 'Theorizing the 'I' in Institutional Theory: Moving Forward Through Theoretical Fragmentation, Not Integration' in A. D. Brown (ed) *The Oxford Handbook of Identities in Organizations* (Oxford University Press 2018); Fligstein and McAdam 2012a, *supra* note 41, 13.
[139] Fligstein and McAdam 2011, *supra* note 44, 14,18.
[140] Fligstein and McAdam 2012b, *supra* note 133, 49.
[141] Fligstein and McAdam 2012a, *supra* note 41, 96-97; Kluttz and Fligstein 2016, *supra* note 44, 194.
[142] Fligstein and McAdam 2012a, *supra* note 41, 96-97, 105-108; Kluttz and Fligstein 2016, *supra* note 44, 199; J. van Wijk, W. Stam, T. Elfring, C. Zietsma and F. den Hond, 'Activists And Incumbents Structuring Change: The Interplay Of Agency, Culture And Networks In Field Evolution' (2012) 56 *Academy of Management Journal*; Kluttz and Fligstein 2016, *supra* note 44, 199.
[143] Kluttz and Fligstein 2016, *supra* note 44, 199; Fligstein and McAdam 2011, *supra* note 41, 14; Fligstein and McAdam 2012b, *supra* note 133, 96-97, 105-108.

field in practice enforce "rules and logics designed by incumbents" and thus "will generally serve to preserve the incumbent-friendly status quo".[144] The distribution of resources in the field gives the incumbent an additional advantage over the challengers.[145] Resources upon which the incumbent can rely to reinforce or to restore the status quo include not only material resources, but may also include skill, experience, allies (especially state allies) [146] and institutions such as law and language.[147] Hence, although the status quo is subject to constant threats from both in and outside the field, incumbents tend to succeed at reproducing the status quo in stable fields: such fields are stable because the status quo itself equips the incumbent with the tools needed to reproduce it.

In the face of developments in proximate fields it perceives as a threat to the status quo, the incumbent in a field is thus expected to engage in strategic action in order to defend and maintain the status quo from which it benefits.[148] Defending the status quo may take the form of resisting developments that threaten the status quo, but can also take more complex forms. The incumbent may for instance endeavor to neutralize threats to the status quo not by resisting them, but by adopting them, stripping them from their transformative value in the process. [149] For instance, researchers have studied corporate responses to movements that aim to address problems that are in part rooted in corporate capitalism. They observed that if such movements are joined by corporations, "corporate interests come to … significantly shape discourses and practices initiated by the movement".[150]

Shell's CSR as strategic action in a settled field

Conceptualizing Shell's CSR initiatives in the Niger delta as a form of incumbent strategic action in a settled field facilitates an analysis that takes into account that Shell and Niger delta communities may have divergent or even conflicting interests and that is cognizant of the way in which Nigeria's history as a colony of the United Kingdom has shaped power relations between Shell, the Nigerian government and Niger delta communities. In the following chapter I will analyze how Shell has responded to developments in the field of international human rights law that could threaten Shell's incumbent position in the SAF of oil extraction in the Niger delta ('exogenous challenges'). In the third chapter of this thesis, I will analyze how Shell's incumbent position in the SAF of oil extraction in the Niger delta has come about and how the settlement in the field has been maintained in the face of persistent internal challenges. In the final chapter of this thesis I build on this context in order to assess CSR as an alternative to corporate human rights obligations in the specific case of oil extraction in Nigeria's Niger delta.

[144] Fligstein and McAdam 2011, *supra* note 44, 6; Kluttz and Fligstein 2016, *supra* note 44, 191.
[145] Fligstein and McAdam 2012a, *supra* note 41, 20; Fligstein and McAdam 2011, *supra* note 44, 9.
[146] Fligstein and McAdam 2012a, *supra* note 41, 96-97, 105-108.
[147] Fligstein and McAdam 2012b, *supra* note 133, 49.
[148] Fligstein and McAdam 2012a, *supra* note 41, 106.
[149] P. G. Coy and T. Hedeen, 'A Stage Model of Social Movement Cooptation: Community Mediation in the United States' (2005) 46 *The Sociological Quarterly.*
[150] L. King and J. Busa, 'When Corporate Actors Take Over The Game: The Corporatization Of Organic, Recycling And Breast Cancer Activism' (2017) 16 *Social Movement Studies,* 550; D. Jaffee, 'Weak Coffee: Certification And Co-Optation In The Fair Trade Movement' (2012) 59 *Social Problems*; Wijk et al. 2012, *supra* note 142, 380; D. Jaffee and P. H. Howard, 'Corporate Cooptation of Organic and Fair Trade Standards' (2010) 27 *Agriculture and Human Value*.

1.4. CONCLUSION

The socially responsible corporation arose in response to the criticism that the capitalism of the late 1980s and early 1990s "never sets down roots, never builds communities and leaves behind toxic wastes and embittered workers".[151] Rather than reneging on the premise that the primary purpose of a corporation is to maximize profits, the socially responsible corporation insists that maximizing profits and responsible business are compatible and even mutually reinforcing, as the market will reward socially responsible corporations and sanction socially harmful business conduct. Literature on CSR initiatives generally fails to question the premise that corporations can productively be involved in addressing business-related human rights problems in the global south. Instead, research pertaining to CSR initiatives in the global south asks technical questions: how do these initiatives work, how do they impact local communities, and how can their efficacy be improved? Given the history of multinational corporations in the global south as well as corporations' economic rationality and short-term orientation, this is an oversight. SAF theory recognizes that Shell (as the incumbent) has interests that diverge from or even conflict with the interests of Niger delta communities (as challengers), and posits that the way in which the status quo of oil extraction in the Niger delta came about determines how it is maintained. Conceptualizing Shell's CSR in the Niger delta as incumbent strategic action thus allows for an analysis of Shell's CSR in the Niger delta in which CSR is re-contextualized and re-politicized.

[151] *Supra* note 65.

2. CORPORATE RESPONSIBILITY, CORPORATE ACCOUNTABILITY AND ROYAL DUTCH SHELL

Since business-related human rights violations in the global south gained global attention in the late 1990s, there has been fierce debate about how such problems are to be addressed. Activists and developing states advocate for legal approaches such as international human rights obligations for corporations and/or enforcement of existing laws in the courts of (European and North-American) corporations' home states. Corporations and governments of developed states on the other hand argue the problem is best addressed by promoting, facilitating and professionalizing the numerous existing voluntary corporate social responsibility initiatives. This chapter chronologically recounts the emergence both the movement for corporate accountability and for corporate social responsibility as well as the competition between both approaches. In doing so, I focus on the role of multinational corporations and Shell itself in influencing this debate and on the solutions that were eventually favored at the United Nations.

2.1. THE OGONI 9, THE ALIEN TORT STATUTE AND THE START OF A MOVEMENT

In the field of business and international human rights, at stake is whether – and if so, to what extent – businesses have human rights obligations directly under international law, and who has the authority to enforce those obligations. Historically, corporations have had rights under international law[152] but no direct obligations: human rights obligations are imposed on states, and states only.[153] However, the most severe human rights violations (such as torture, arbitrary arrest and arbitrary killings) may also amount to crimes against humanity if they are committed on a large scale or as part of a state policy.[154] The debate on whether corporations could commit – or be complicit in – crimes against humanity for a long time was a theoretical one, as existing international criminal courts (such as the Rwanda Tribunal, the Yugoslavia Tribunal or the International Criminal Court) cannot hear cases against corporations pursuant to their founding documents.[155]

The question of corporate liability under international criminal law gained practical relevance when an obscure United States statute (the Alien Tort Statute or ATS) was rediscovered as a tool through which to multinationals could be potentially held legally accountable for complicity in severe human rights violations committed abroad. The ATS had been adopted by the very first United States Congress to prevent the escalation of incidents involving foreigners present in the United

[152] A.K. Sacharoff, 'Multinationals in Host Countries: Can They Be Held Liable under the Alien Tort Claims Act for Human Rights Violations' (1998) 23 *Brooklyn Journal of International Law*, 932 – 934; for more information see J.W. Salacuse, The Law of Investment Treaties (Oxford: OUP, 2010); T. Gazzini, 'Bilateral Investment Treaties' in T. Gazzini (ed.) *International Investment Law: The Sources of Rights and Obligations* (Martinus Nijhoff 2012).

[153] J. G. Ruggie, 'The Social Construction of the UN Guiding Principles on Business and Human Rights' in S. Deva and D. Birchall (eds.) *Research Handbook on Human Rights and Business* (Edward Elgar Publishing ltd 2020), 63; S. Baughen, 'Customary International and its Horizontal Effect? Human Rights Litigation Between Non-State Actors' (2015) 67 *Rutgers University Law Review*; UN Human Rights Committee (HRC), *General comment no. 31, The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para 8.

[154] See for instance J. Pablo-Pérez-León Acevedo, 'The Close Relationship Between Serious Human Rights Violations and Crimes Against Humanity: International Criminalization of Serious Abuses' (2017) 17 *Anuario Mexicano de Derecho Internacional*.

[155] Rome Statute of the International Criminal Court, article 25(1); Statute of the International Criminal Tribunal for the Former Yugoslavia, article 6 and 7; UN Security Council, Statute of the International Criminal Tribunal for Rwanda, article 5 and 6.

States (e.g. diplomats, members of foreign governments).[156] It had only been used twice since its adoption in 1789, when in 1980 it was relied on by two Paraguayan citizens to sue a Paraguayan former police officer who now resided in the United States. The plaintiffs sued the policeman for damages for his alleged involvement in the torture and murder of their family member (the *Filartiga* case). After an initial dismissal, the court held that the ATS applied to violations of *current* norms of international law (the prohibition of torture did not exist as a norm of international law in 1789), and that under the ATS, US federal courts could hear cases filed by a foreigner against a foreigner concerning an incident that took place in a foreign country.[157]

When in 1995 the US courts held that ATS claims could not only be filed against (former) public officials (such as the police officer in *Filartiga*) but against private individuals as well, it opened the US federal courts for lawsuits against any corporation for grave violations committed anywhere in the world, regardless of where the corporation was headquartered.[158] Among the first of such claims in the fall of 1995 were the complaint against Unocal (now Chevron) for its complicity in in atrocities committed by Myanmar's military in relation to the construction of the Yadana gas pipeline, and the complaint against Shell (submitted by Ken Wiwa, son of MOSOP leader Ken Saro Wiwa) for its alleged involvement in the crimes against the Ogoni.[159]Although initially, this use of the ATS was regarded with surprise and skepticism,[160] in 1997 the courts proved to be receptive and agreed to hear the case against Unocal.[161] That same year, the value of Shell's shares dropped an unprecedented 57 percent.[162]

The case against Shell however was dismissed in the following year: while Unocal was incorporated in California, Shell was incorporated in the United Kingdom. The court therefore accepted Shell's argument that the case should have been filed in the United Kingdom, despite it

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[156] For background on the Alien Tort Statute, see A. J. Bellia Jr and B.R. Clark, 'The Alien Tort Statute and the Law of Nations' (2011) 78 *The University of Chicago Law Review*, 447-466, 507-525; J. A. Kirshner, 'Why is the U.S. Abdicating the Policing of Multinational Corporations to Europe: Extraterritoriality, Sovereignty and the Alien Tort Statute' (2012) 30 *Berkeley Journal of International Law*, 270; B. J. Kieserman, 'Profits and Principles: Promoting Multinational Corporate Responsibility by Amending the Alien Tort Claims Act' (1999) 48 *Catholic University Law Review*, 890 – 892.

[157] *Filartiga v. Pena-Irala*, 630 F2d 876 (2d Cir 1980); R. Goodman and D. P. Jinks, 'Filartiga's Firm Footing: International Human Rights and Federal Common Law'(1997) 66 *Fordham Law Review*; J.H. Works Jr, 'Filartiga v. Pena-Irala: Providing Federal Jurisdiction for Human Rights Violations through the Alien Tort Statute' (1981) 10 *Journal of International Law and Policy*; Bellia and Clark 2011, *supra* note 156, 459 – 462; Kieserman 1999, *supra* note 156, 897 -899; Kirshner 2012, *supra* note 156, 270 – 272.

[158] *Kadic v Karadzic*, 70 F3d 232, 236 (2nd Cir 1995); J. G. Ku, 'The Curious Case of Corporate Liability Under the Alien Tort Statute: A Flawed System of Judicial Lawmaking' (2011) 51 *Virginia Journal of International Law*, 365 - 366; K. Gallagher, 'Civil Litigation and Transnational Business – An Alien Tort Statute Primer' (2010) 8 *Journal of International Criminal Justice*, 749 – 750; Sacharoff 1998, *supra* note 152, 941 – 944; G. G. A. Tzeutschler, 'Corporate Violator: The Alien Tort Liability of Transnational Corporations for Human Rights Abuses Abroad' (1999) 30 *Columbia Human Rights Law Review*, 388 – 393.

[159] Gallagher 2010, *supra* note 158, 750; Plaintiffs Demand For Jury Trial, Wiwa v. Royal Dutch Petroleum Co., No. 96 Civ. 8386 (S.D.N.Y. Nov. 8, 1996); Kieserman 1999, *supra* note 156, 926 – 928; Sacharoff 1998, *supra* note 152, 958 – 963.

[160] Tzeutschler 1999, *supra* note 158, 418; Kieserman 1999, *supra* note 156, 887; Motions to dismiss filed by Shell declaration of Richard Meeran (filed before Magistrate Judge Henry B. Pitman on May 5, 1998); Two Declarations of Peter Duffy (filed before Magistrate Judge Henry B. Pitman on Aug. 26, 1997 and May 5, 1998); Three Declarations of Lawrence Collins (filed before Magistrate Judge Henry B. Pitman on Mar. 26, 1997, May 16, 1997, and Sept. 26, 1997), jointly available at https://ccrjustice.org/sites/default/files/assets/3.25.97%20D's%20Motion%20to%20Dismiss%20with%20Declarations.pdf

[161] Doe v. Unocal Co., 963 F. Supp. 880 (C.D. Cal 1997); Ku 2011, *supra* note 158, 366; Kirshner 2012, *supra* note 156, 273.

[162] *Supra* note 20.

being virtually certain that the case would be dismissed there (*forum non conveniens* doctrine).[163] Surprisingly, this decision was overturned on appeal. Now, the court held that the interest of providing victims of severe human rights violations an avenue for redress alone was sufficient reason to hear the case in the United States, despite there not being any other links to the US.[164]

In 2002 the courts handed down a ruling in the Unocal case that was extremely beneficial to the plaintiffs and other victims of human rights abuse: the plaintiffs only needed to show Unocal had assisted the military *knowing* they were aiding crimes against humanity. It was not necessary to prove that Unocal had assisted the military *for the explicit purpose* of facilitating these crimes against humanity.[165] After this ruling, Unocal and the victims settled out of court in a secret settlement just shortly before the case was scheduled to go to trial.[166] In this time period (between 1997 and 2003), the ATS emerged as an unexpected but promising (or, depending on the perspective, threatening) vehicle through which victims of corporate human rights abuse in the global south could claim damages in the United States.

These human rights cases filed under the ATS gained international attention from corporations and human rights lawyers alike, and inspired numerous similar claims.[167] Between 1996 and 2006, approximately forty cases were brought against corporations such as Coca Cola, IBM, Ford, Nestlé, Credit Suisse and various other multinationals for alleged complicity in genocide, apartheid, forced child labor, extrajudicial executions and forced displacement.[168] The flood of cases in turn led to an extensive debate over the legal questions on which these cases turned, transforming the question of the existence and extent of corporate obligations under international law from an abstract hypothetical into an independent and highly relevant subfield of international criminal law.[169] From the beginning, this field and the debate over whether, when and where corporations can be penalized for complicity in crimes against humanity and other severe abuses was intimately tied to the legal aftermath of the execution of Ken Saro Wiwa and the Ogoni 9 in 1995.

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[163] Wiwa v. Royal Dutch Petroleum Co., No. 96-8386 (S.D.N.Y Sept. 25, 1998), page 11-12, holding that England constitutes "an adequate alternate forum in which to conduct the present litigation" despite the fact that "such litigation in England would involve a very difficult path, likely failure, and low prospects of success", because "the questions presented by this case implicate significant and weighty issues, while none of the parties to this action is a citizen of the United States, there is no allegation that the defendant's actions had an effect on the United States, and the conduct at issue was engaged in by an English corporation." Order to dismiss available at https://ccrjustice.org/sites/default/files/assets/9.25.98%20Judge%20Wood's%20Order.pdf;

[164] Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 99-108 (2d Cir. 2000), page 8 stating that the United States does in fact have an interest in hearing the case, namely to "furnish a forum to litigate claims of violations of the international standards of the law of human rights". This constituted a major departure from the previous approach of US courts, see K. L. Boyd, 'The Inconvenience of Victims: Abolishing Forum Non Conveniens in U.S. Human Rights Litigation' (1998) 39 *Virginia Journal of International Law*.

[165] *John Doe v. Unocal Corporation et al* 395 F.3d 932 110 F.Supp.2d 1294 (C.D.Cal. 2000), 1306; Doe I v. Unocal Co., 395 F.3d 932 (9th Cir. 2002), para 59 – 60, 74.

[166] D. Campbell, 'Energy Giant Agrees Settlement With Burmese Villagers' (*The Guardian* 15 December 2004) available at https://www.theguardian.com/world/2004/dec/15/burma.duncancampbell last accessed 19 April 2021; M. Lifsher, 'Unocal Settles Human Rights Lawsuit Over Alleged Abuses at Myanmar Pipeline' (*Los Angeles Times*, 22 March 2005) available at https://www.latimes.com/archives/la-xpm-2005-mar-22-fi-unocal22-story.html last accessed 19 April 2021.

[167] Kirshner 2012, *supra* note 156, 274 estimates that between 1996 and 2012, roughly 150 lawsuits have been filed under the ATS, most of which name a multinational corporation as its defendant; see Gallagher 2010, *supra* note 158, 752 – 756 for an overview of the most representative cases.

[168] For the cases against Coca Cola and Nestlé see *supra* note 36; for the case against Ford, IBM and Credit Suisse see *In re* South African Apartheid Litigation, 617 F. Supp 2d 228 (Southern District of New York 2009).

[169] F. Wettstein, 'The History of Business and Human Rights and its Relationship with Corporate Social Responsibility in S. Deva and D. Birchall (eds.) *Research Handbook on Human Rights and Business* (Edward Elgar Publishing ltd 2020); Ku 2011, *supra* note 158, 373-374.

2.2. THE NIGER DELTA CRISIS AND THE RISE OF VOLUNTARISM

The rise of corporate social responsibility and proliferation of voluntary guidelines around the same period (1997-2003) likewise is closely linked with consequences of the execution of the Ogoni 9 and the military crackdown on Ogoni villages. After the executions, Shell shut down key oil fields located in majority Ogoni areas in response to massive protests and continuing attacks on Shell facilities and personnel.[170] The mass mobilization against Shell in turn inspired the Ijaw tribes to unite and issue a joint declaration similar to that of the Ogonis,[171] demanding an end to oil pollution of their lands and a fairer share in the resources extracted from Ijaw-majority areas.[172] This declaration was accompanied by a series of large protests in 1998 and 1999, each of which was brutally suppressed by Nigeria's military.[173]

When Nigeria transitioned to democracy in 1999, the situation escalated further. Proliferation of small arms in the Niger delta region and politicians' mobilization of armed youth groups in relation to the heavily contested 1999 elections (and later the 2003 elections) led to the emergence of several armed groups.[174] These armed groups (e.g. Niger Delta Vigilantes, Joint Revolutionary Council, the Niger delta Liberation Front, the Movement for the Emancipation of the Niger delta) used tactics such as oil bunkering, sabotage of pipelines, kidnapping of oil workers and occupying flow stations to either obtain a larger share of the oil wealth or to force oil multinationals to leave their area.[175]

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[170] *Supra* note 3; see also K. Omeje, 'Petrobusiness and Security Threats in the Niger Delta, Nigeria' (2006) 54 *Current Sociology* (Omeje 2006b), 480 on the enormous financial costs of Shell's withdrawal from Ogoniland.

[171] *Supra* note 1.

[172] Ijaw Youths of the Niger Delta, 'Communique Issued at the End of the All Ijaw Youths Conference held in the Town of Kaiama' (11 December 1998) ('Kaiama declaration'), available at http://www.unitedijaw.com/kaiama.htm last accessed 20 April 2021.

[173] Human Rights Watch, 'Nigeria: Crackdown in the Niger Delta' (Report 11.2.A) (Human Rights Watch 1999); O. Nwajah, 'A Tale of Military Massacres: From Ogoniland to Odi Town' (*The Lagos News*, 6 December 1999) available at http://www.waado.org/environment/fedgovt_nigerdelta/bayelsainvasion/FederalGovernInvadesBayelsa/MilitaryInOdi/MilitaryMassacres.html last accessed 20 April 2021; Human Rights Watch, 'The Destruction of Odi and Rape in Choba' (*Human Rights Watch*, 22 December 1999), available at https://www.hrw.org/legacy/press/1999/dec/nibg1299.html last accessed 20 April 2021.

[174] V. Ojakorotu and U. Okeke-Uzodike, 'Oil, Arms Proliferation and Conflict in the Niger delta of Nigeria' (2006) 2 *African Journal of Conflict Resolution*; International Crisis Group, 'Fuelling the Niger Delta Crisis' (Africa Report no. 118) (International Crisis Group 2006), 2-12; Human Rights Watch, 'Nigeria: The Warri Crisis' (Report A 1518) (Human Rights Watch 2003); T. Marclint Ebiede, 'Instability in Nigeria's Niger Delta: The Post Amnesty Programme and Sustainable Peace-Building' (FES Peace and Security 2017), 8, 13-18; J.M. Hazen and J. Horner, 'Small Arms, Armed Violence and Insecurity in Nigeria: The Niger Delta in Perspective' (Small Arms Survey 2007), 6-18; J. Shola Omotola, 'From Political Mercenarism to Militias: The Political Origin of Niger Delta Militias' in V. Ojakorotu (ed.) *Fresh Dimensions on the Niger Delta Crisis of Nigeria* (JAPSS Press 2009).

[175] S. Hanson, 'MEND: The Niger Delta's Umbrella Militant Group' (*Council on Foreign Relations*, 21 March 2007) available at https://www.cfr.org/backgrounder/mend-niger-deltas-umbrella-militant-group; E. Osaghae, A. Ikelegbe, O. Olarinmoye and S. Okhonmina, 'Youth Militia's Self Determination and Resource Control Struggles In The Niger Delta Region of Nigeria' (Research Report No. 5) (CODESRIA 2011), 13-32; A. Ikelegbe, 'Beyond the Treshold of Civil Struggle: Youth Militancy and the Militia-Ization of the Resource Conflicts in the Niger Delta Region of Nigeria' (2006) 27 *African Study Monographs*, 106 -113; M. Watts, 'So Goes Port Hartcourt… Political Violence and the Future of the Niger Delta' (*Center for Strategic and International Studies*, 27 September 2007) available at https://www.csis.org/analysis/so-goes-port-harcourt%E2%80%A6-political-violence-and-future-niger-delta last accessed 20 April 2021; M. Watts, 'Petro Insurgency or Criminal Syndicate? Conflict & Violence in the Niger Delta'(2007) 34 *Review of African Political Economy* (Watts 2007b), 644- 648, 651-656.

The Niger delta insurgency rapidly became costly,[176] since it frequently led to temporary shut-downs of oil production: in 2006 insurgent armed attacks in the Niger delta led to a 25 percent decrease in Nigeria's oil exports.[177] Shell had previously dealt with both armed and peaceful resistance against the company by calling for (and paying for) the Nigerian military to intervene.[178] The Nigerian military habitually used lethal force, on multiple occasions opening fire on peaceful protests.[179] In 1998 however, with the media fallout of the execution of the Ogoni 9 fresh in mind and with the resulting lawsuit ongoing, Shell had vowed to approach community relations differently. Instead of calling on the military to restore order, Shell pledged to consult regularly with human rights NGOs and set up corporate infrastructure in order to embrace its social responsibility and started working with the author of 'triple bottom line: people, planet, profit'[180] to integrate CSR into Shell's corporate structure.[181]

Throughout this period (1997-2007) the corporate social responsibility paradigm of "doing good to do well", becomes firmly established in mainstream discourse.[182] Shell itself is an early and prominent adopter and promoter of corporate social responsibility and sustainability reporting.[183] In January of 2000 Shell publishes 'corporate social responsibility: making good business sense'. In this document, the chair of Shell emphasizes that "business is not divorced from the rest of society" and that businesses must ensure, through CSR, the important role of business in "building a better future".[184] Shell was among the first major multinational corporations to publish CSR reports, and

[176] R. Adibe, E. Nwagwu and O. Albert, 'Rentierism and Security Privatisation in the Nigerian Petroleum Industry: Assessment of Oil Pipeline Surveillance and Protection Contracts'(2018) 45 *Review of African Political Economy*, 346, 348, estimating that in only 6 months the Niger delta crisis cost the Nigerian state 24 billion dollars.

[177] C. I. Obi, 'Nigeria's Niger Delta: Understanding the Complex Drivers of Conflict' (2008) 1 *FOI Lecture Series on African Security*, 2; Osaghae et al 2011, *supra* note 175, 31; Watts 2007b, *supra* note 175, 647 – 648, 653.

[178] Amnesty International 2017b, *supra* note 4, 40-66.

[179] K. Omeje, 'The State, Conflict and Evolving Politics in the Niger delta, Nigeria' (2004) 101 *Review of African Political Economy*, 431- 434

[180] The triple bottom line concept by John Elkington became the main frame through which CSR was understood.

[181] Shell sustainability report 1998, *supra* note 21, 53, 57 – 59.

[182] Ruggie 2004, *supra* 63**;** The Economist Intelligence Unit, 'The Road From Principles To Practice Today's Challenges For Business In Respecting Human Rights' (The Economist 2015); see for example J. Hancock, *Investing in Corporate Social Responsibility: A Guide to Best Practice, Business Planning & the UK's Leading Companies* (Sterling 2004); D. E. Hawkins *Corporate Social Responsibility: Balancing Tomorrow's Sustainability and Today's Profitability* (Palgrave Macmillian 2006); S. Hilton and G. Gibbons *Good Business—Making Money by Making the World Better* (Thomson Texere 2004); M. Hopkins *Corporate Social Responsibility and International Development: Is Business the Solution?* (Earthscan 2007); I. Jackson and J. Nelson *Profits with Principles: Seven Strategies for Delivering Value with Values* (Doubleday 2004); P. Kotler and N. Lee *Corporate Social Responsibility: Doing the Most Good for Your Company and Your Cause* (John Wiley and Sons 2005); S. Zadek *Civil Corporation* (Earthscan 2007); A. W. Savitz, *The Triple Bottom Line: How Today's Best-Run Companies Are Achieving Economic, Social and Environmental Success - and How You Can Too* (John Wiley & Sons 2006).

[183] In 1998, when Shell released its first sustainability report, "the nexus between sustainable development and human rights [was] emerging only slowly and grudgingly as a priority for global corporate management", Kieserman 1999, *supra* note 156, 883; E. Rabin, 'In the Hot Seat: Shell VP Robin Aram' (*GreenBiz*, 21 June 2004), available at https://www.greenbiz.com/article/hot-seat-shell-vp-robin-aram last accessed 21 April 2020, stating that "Shell has built a hard-won reputation for taking human rights seriously"; Ruggie 2020, *supra* note 153, 70; E. West, 'Shell scandal raises reservations about CSR' (*Corporate citizenship briefing*, 1 May 2004), available at https://ccbriefing.corporate-citizenship.com/2004/05/01/shell-scandal-raises-reservations-about-csr/, last accessed 9 May 2021, calling Shell 'CSR's poster child'; Frynas 2009, *supra* note 81, 2 calling Shell one of "the world's leaders in the CSR movement".

[184] R. Holme and P. Watts, 'Corporate Social Responsibility: Making Good Business Sense' (World Business Council for Sustainable Development 2000) available at http://www.ceads.org.ar/downloads/Making%20good%20business%20sense.pdf (the authors write on behalf of Royal Dutch Shell and Rio Tinto Mining corp), 2.

had published several such reports when NGOs and governments first made an effort to standardize and mainstream CSR reporting.[185]

It is also in this period that voluntary codes for responsible corporate conduct proliferate.[186] At the 2000 World Economic Forum in Davos the Secretary General of the UN urges corporations to "give a human face to the global market" and "lay the foundation for an age of prosperity" by "embracing, supporting and enacting a set of core values in the areas of human rights, labor standards and environmental practices".[187] Over a thousand businesses do so by signing the UN Global Compact, agreeing that "businesses should support and respect the protection of internationally proclaimed human rights and make sure that they are not complicit in human rights abuses".[188] Shell was invited to join by the secretary general personally, and the Mark Moody Stuart, then Royal Dutch Petroleum's chairman became the chairman of the human rights working group of the Global Compact.[189]

In 2001, the United Kingdom and the United States, together with Shell and various other oil, gas and mining corporations[190] adopted the Voluntary Principles on Security and Human Rights which set guidelines for oil companies engagement with public and private security forces in the global south.[191] By 2003 therefore Shell was not only among the first multinational corporation to be

[185] The Global Reporting Initiative was founded in 1997 and launched its first corporate sustainability guidelines in 2002. Shell thus began publishing corporate social responsibility reporting years before such practice became expected (and in some countries and industries, required) of multinational corporations; see for instance A. Kolk, 'Green Reporting' (*Harvard Business Review*, 1 February 2000), available at https://hbr.org/2000/01/green-reporting, last accessed 9 May 2021, calling Shell a "leader in the world of green reporting"; Mark Moody Stuart, the chairman of Royal Dutch Shell between 1998 and 2001 would go on to become a director of the Global Reporting Initiative until 2007.

[186] See for more information on role of business in the surge of private regulation in the late 1990 and early 2000s and their influence on policy frameworks MSI Integrity 2020, *supra* note 56, 32-40 and The Corner House, 'Codes in Context: TNC Regulation in an Era of Dialogues and Partnerships' (Briefing paper 26) (The Corner House 2002), available at http://www.thecornerhouse.org.uk/sites/thecornerhouse.org.uk/files/26codes.pdf.

[187] K. Anan 'Secretary-General Proposes Global Compact On Human Rights, Labour, Environment, In Address to World Economic Forum in Davos' (*United Nations,* 1 February 1999) available at https://www.un.org/press/en/1999/19990201.sgsm6881.html last accessed 13 October 2020.

[188] United Nations Global Compact, 'Business as a force for good: our mission' (*UN Global Compact*, no date) https://www.unglobalcompact.org/what-is-gc/mission last accessed 13 October 2020; M. L. Cattaui, 'Yes to Annan's Global Compact if it isn't a license to meddle' (*The New York Times*, 26 July 2000), available at https://www.nytimes.com/2000/07/26/opinion/IHT-yes-to-annans-global-compact-if-it-isnt-a-license-to-meddle.html, last accessed 1 May 2020 (Maria Livanos Cattaui was at the time the head of the International Chamber of Commerce); Corporate Europe Observer, 'The Global Compact: The UN's New Deal with 'Global Corporate Citizens'(*Corporate Europe Observer*, 1 October 1999) available at http://archive.corporateeurope.org/observer5/global.html .

[189] J. Martens, 'Corporate Influence on the Business and Human Rights Agenda of the United Nations' (Working paper) (Misereor, Global Policy Forum and Brot für die Welt 2014) available at http://ibfan.org/docs/Corporate_Influence_on_the_Business_and_Human_Rights_Agenda.pdf, 8-9; Mark Moody Stuart, who was chairman of Royal Dutch Shell between 1998 and 2001 was the first chairman of the Human Rights Working Group of the Global Compact https://d306pr3pise04h.cloudfront.net/docs/issues_doc%2Fhuman_rights%2FHuman_Rights_Working_Group%2FHRWG_Members.pdf; Transnational Resource and Action Center, 'Tangled Up in Blue: Corporate Partnerships at the United Nations' (*Corpwatch*, 1 September 2000) at 9, available at http://www.corpwatch.org/sites/default/files/Tangled%20Up%20In%20Blue.pdf

[190] Other corporate members of the VPSHR include Chevron, the subject of a formal complaint submitted to the ICC in 2014 pertaining to its alleged involvement in crimes against humanity in Ecuador, BP, which was sued in 2000 for its support to South Africa's apartheid Regime, Anglo Gold Ashanti, accused of complicity in crimes against humanity in both Colombia and Congo, and Rio Tinto which was actively involved in (and lost) litigation pertaining to its ordering of an ethnic cleansing in Papua New Guinea.

[191] See for a concise explanation of how the VPSHR came to be, their main aims and a summary of content B. Freeman, M. B. Pica and C. N. Camponovo, 'A New Approach to Corporate Responsibility: The Voluntary Principles on Security and Human Rights' (2001) 24 *Hastings International and Comparative Law Review*.

brought to court over its alleged complicity in crimes against humanity, but also one of the most proactive promotors of the emerging practice of encouraging responsible business conduct through voluntary guidelines.

2.3. THE DEFEAT OF THE UN DRAFT NORMS

The academic debates and media attention resulting from the ATS court cases combined with the attention for sustainable business that the UN Global Compact and the proliferation of voluntary business initiatives generated, led the UN Human Rights Commission to request an instrument on the human rights obligations of multinational corporations. In the document, the working group was asked to list corporations' existing legal obligations under international law, and formulate new obligations where appropriate. Additionally, the working group was asked to design a mechanism through which corporations could be held accountable to these norms.[192]

The final product presented in 2003 – the UN Draft Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights ('the UN Draft Norms') – consisted of a set of human rights obligations for businesses that was quite comprehensive in scope. Most importantly, the UN Draft Norms sought to establish a mechanism for "periodic monitoring and verification by the UN".[193] Given its set of explicit, wide-ranging obligations for business as well as its establishing of an independent enforcement mechanism, the adoption of the UN Draft Norms would end corporate voluntarism and definitively introduce internationally enforceable corporate human rights obligations.

Multinational corporations vehemently opposed the norms. The International Organization of Employers (IOE) and the International Chamber of Commerce (ICCom), led by a representative from Royal Dutch Shell,[194] jointly published a 42-page statement that attacked the UN Draft Norms from every possible angle.[195] In it, the corporations relied extensively on voluntarism, stating that they had "no problem at all with efforts that seek to encourage companies to do what they can to protect human rights". Their grievance instead was the "move away from the realm of voluntary initiatives" which conflicted with the approach of the Secretary General and his Global Compact.[196]

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[192] UN HRC res. 2001/3 'The effects of the Working Methods and Activities of Transnational Corporations on the Enjoyment of Human Rights' of 10 August 2001 (E/CN.4/SUB.2/RES/2001/3), para 4(b), 4(c) and 4(d) respectively; this request built on a 1996 report which concluded that "a new comprehensive set of rules should represent standards of conduct for TNCs", Sub-Commission on Prevention of Discrimination and Protection of Human Rights, *Report on the impact of the activities and working methods of transnational corporations on the full enjoyment of all human rights*, 2 July 1996, (UN Doc. E/CN.4/Sub.2/1996/12), para 74.

[193] UN Sub-Commission on the Promotion and Protection of Human Rights, *Economic, Social and Cultural Rights: Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 26 August 2003, (E/CN.4/Sub.2/2003/12/Rev.2), paras 3, 16 and 18.

[194] CEO, 'Shell Leads International Business Campaign Against UN Human Rights Norms' (*Corporate Europe Observatory*, 8 March 2004) available at http://archive.corporateeurope.org/norms.html last accessed 21 April 2021.

[195] International Chamber of Commerce and International Organization of Employers, 'Joint views of the IOE and ICC on the draft, "Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights"' of 22 July 2003 [on file with author] (the 2003 IOE/ICCom memo).

[196] Martens 2014, *supra* note 189, 10, quoting the IOE/ICCom memo, arguing that international corporate human rights obligations are obsolete because "[m]any IOE and ICC member companies have moved beyond such a legalistic approach to human rights, and have taken practical initiatives to promote and protect human rights in concrete ways within their own sphere of influence" and that carrying forward the Norms risked "(…) inviting a negative reaction from business, at a time when companies are increasingly engaging into voluntary initiatives to promote responsible business conduct."; CEO 2004, *supra* note 194; Ruggie 2020, *supra* note 153, 70 – 73; the 42 page memo recjecting the UN-Norms was accompanied by an ICCom memo emphasizing the potential of voluntarism: International Chamber of Commerce, 'Business in Society: A Voluntary Commitment

Shell itself publicly declined to comment, and instead endorsed and disseminated the joint statement of ICCom/IOE directly to the state representatives who would vote on the adoption of the UN draft norms in the UN Human Rights Commission on behalf of their countries.[197]

The talking points from the ICCom/IOE memorandum made frequent appearances in the debate between state representatives in the Human Rights Commission. The United States representative for instance lamented that the 2003 draft norms struck a "negative tone towards international and national business, treating them as potential problems rather than the overwhelmingly positive forces for economic development and human rights that they are."[198] The joint effort of the corporations achieved its desired result. In their memorandum they had asked the Human Rights Commission not only to reject the UN Draft Norms, but also to "clear up confusion" by stating expressly that they had no legal validity whatsoever.[199] The resolution that the Human Rights Council finally adopted indeed rejected the presented 2003 Draft Norms in no uncertain terms, stating that the set of binding norms "[had] not been requested by the Commission and, as a draft proposal, has no legal standing."[200]

2.4. THE ROAD TO THE UNGP: CORPORATE PARTICIPATION AND PRINCIPLED PRAGMATISM

After the 2004 vote on the UN Draft Norms, the UN was at a crossroads: should the Human Rights Commission reopen negotiations over the first draft of the 2003 UN Norms presented by the working group, or should the UN dismiss them altogether and instead focus on promoting voluntary initiatives?[201] In April of 2005 the Human Rights Commission called on the UN Secretary-General to appoint special representative on the issue of human rights and transnational corporations to identify the way forward. The mandate this time clearly favored a more cooperative attitude towards businesses and explicitly recognized that business can contribute to the promotion of respect for human rights".[202]

UN Secretary General Kofi Anan appointed John Ruggie to this position. Kofi Anan had closely cooperated with John Ruggie in designing and promoting the Global Compact – it had been Ruggie

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by Business to Manage its Activities Responsibly' (International Chamber of Commerce 2002), available at https://www.icc.fi/wp-content/uploads/B-in-Society-Booklet.pdf.

[197] CEO 2004, *supra* note 194.

[198] O. De Schutter, 'The Challenge of Imposing Human Rights Norms on Corporate Actors' in O. De Schutter (ed.) *Transnational Corporations and Human Rights* (Hart Publishing 2006), 32.

[199] The subtitle of their memorandum read "The Commission on Human Rights Needs to End the Confusions Caused by the Draft Norms by Setting the Record Straight", the memorandum concluded by requesting that the Human Rights Commission "state, in unambiguous terms, that the draft Norms are neither "UN Norms" nor "authoritative"; and that the Norms is a draft with no legal significance without adoption by the law-making organs of the United Nations."

[200] UN HRC 'Report on the Sixtieth Session – Supplement No. 3' (E/CN.4/2004/127) decision 2004/116 on the responsibilities of transnational corporations and related business enterprises with regard to human rights, section (c).

[201] Martens 2014, *supra* note 189, Page 10; UH HRC res 2004/116, *Responsibilities Of Transnational Corporations And Related Business Enterprises With Regard To Human Rights* of 20 April 2004 (UN Doc. E/CN.4/DEC/2004/116); UN Commission on Human Rights, *Report of the United Nations High Commissioner on Human Rights on the responsibilities of transnational corporations and related business enterprises with regard to human rights*, 15 February 2005 (E/CN.4/2005/91), para 18 -22; C. López, 'The 'Ruggie Process': From Legal Obligations to Corporate Social Responsibility?' in S. Deva and D. Bilchitz *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?*' (Cambridge University Press 2013), 62.

[202] UN Commission on Human Rights, *Human Rights Resolution 2005/69: Human Rights and Transnational Corporations and Other Business Enterprises*, 20 April 2005, (E/CN.4/RES/2005/69), preamble and para 3; 'Remarks at the Forum on Corporate Social Responsibility in Bamberg, Germany' (*German Network of Business Ethics,* 14 June 2006) (Ruggie 2006a).

who had proposed the idea of a global compact – and like Kofi Anan, Ruggie believed in "dialogue and cooperation between the United Nations and the private sector".[203] Ruggie's first interim report, issued in 2006, made clear that the UN would no longer pursue a binding human rights instrument for corporations. Instead, the UN Draft norms were dismissed in undiplomatic terms; Ruggie described them as a 'train wreck' and going as far as to declare them 'dead'. Ruggie argued that instead of regulating business, the UN ought to work *with* businesses. Multinational corporations after all "represent powers of major independent influence" and failure to include them would "result in rules that do not accurately reflect the realities of corporate interest and power", which in turn would lead to non-compliance and resistance to implementation.[204]

Throughout his mandate, Ruggie consulted with corporations extensively.[205] The International Council on Mining and Metals (ICMM) was among the most active participants: the ICCM sent in six submissions and participated in eight consultations throughout the six-year process. These submissions generally stressed that business "is able to contribute to social concerns without a need for formalized regulation".[206] The International Chamber of Commerce, the Business and Industry Advisory Committee to the OECD and the International Organization of Employers (in all of which Shell is an prominent member) also exercised considerable influence during the drafting process, endorsing Ruggie's "more positive attitude towards business", but pushing back against proposals for enforcement, such as a human rights ombudsman, or a UN-led follow up mechanism.[207]

In Ruggie's 2008 interim report, it was made clear that the final document would be based in *social expectations* rather than in any *legal obligations*: if corporations would fail to act in accordance with international human rights norms, corporations would be subjected "to the courts of public opinion, comprised of employees, communities, consumers, civil society and investors".[208] In the final product, the 2011 UN Guiding Principles on Business and Human Rights (UNGP), all wording

[203] Martens 2014, *supra* note 189, 9, 11.

[204] Ruggie 2006 a, *supra* note 202; Martens 2014, *supra* note 189, 12; the 2006 interim report, *supra* note 93, paras 12, 59-61; for an outline of Ruggie's philosophy on governance and voluntarism, see T. J. Melish, 'Putting Human Rights Back in to the UN Guiding Principles on Business and Human Rights' in C. Rodríguez-Garavito *Business and Human Rights: Beyond the End of the Beginning* (Cambridge University Press 2017), 81 – 86; J. G. Ruggie, *Just Business: Multinational Corporations and Human Rights* (Norton 2013).

[205] K. Buhmann 'Navigating from 'train wreck' to being 'welcomed': negotiation strategies and argumentative patterns in the development of the UN Framework' in S. Deva and D. Bilchitz (eds) *Human Rights Obligations of Business: Beyond the Corporate Social Responsibility to Respect* (Cambridge University Press 2013); Martens 2014, *supra* note 189, 11 – 14.

[206] See for instance International Council on Mining and Metals, 'Second Submission to UN Secretary General's Special Representative on Human Rights and Business: Mining and Human Rights: How the UN SRSG can Help Spread Good Practice and Tackle Critical Issues' (*ICCM*, 1 October 2006), available at www.icmm.com/document/216.

[207] See for instance IOE/ICC/BIAC, 'Joint initial views of the International Organisation of Employers (IOE), the International Chamber of Commerce (ICC) and the Business and Industry Advisory Committee to the OECD (BIAC) to the Eighth Session of the Human Rights Council on the third report of the Special Representative of the UN Secretary-General on Business and Human Rights' (*ICC/BIAC/IOE,* 1 May 2008) available at www.reports-and-materials.org/Letter-IOE-ICC-BIAC-re-Ruggie-report-May-2008.pdf, para 103; IOE/ICC/BIAC 'Joint comments and recommendations on the draft "Guiding Principles for the Implementations of the United Nations 'Protect, Respect and Remedy' Framework"' (*ICC/BIAC/IOE,* 26 January 2011), available at https://iccwbo.org/content/uploads/sites/3/2011/01/ICC-IOE-BIAC-joint-recommendations-to-the-UN-Working-Group-on-Business-Human-Rights.pdf.

[208] The 2008 interim report, *supra* note 93, para 58 – 63; Human Rights Council, 'Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts', 19 February 2007 (A/HRC/4/35) ('the 2007 interim report'), para 63; Martens 2014, *supra* note 189, 14 – 15; Buhmann 2013, *supra* note 205, 43 – 47; López 2013, *supra* note 201, 59, 61, 72.

that suggested that corporations have obligations under international law had been removed.[209] Instead of mentioning 'human rights violations', the UNGP spoke of "adverse human rights impact", and instead of the *obligation* to respect human rights, the UNGP spoke of the *responsibility* to respect human rights. The UNGP furthermore did not speak of 'preventing human rights violations' but of "mitigating future human rights risks".[210]

The approach taken in the UNGP was presented as a compromise between proponents of CSR and proponents of a legal mechanism. Rather than a set of principles or standards formulated by the corporations themselves, the UNGP placed existing human rights law front and center, and asked corporations to adhere to the norms of international human rights law. On the other hand, the UNGP did not contain legal rules, but instead clarifies social expectations. A failure to meet them therefore would not lead to legal sanctions, but to PR backlash.[211] This approach was praised as 'principled pragmatism', combining an "unflinching commitment to the principle of strengthening the promotion and protection of human rights" with the pragmatism required to "create change where it matters most – in the daily lives of people."[212] Unlike the 2003 UN Draft Norms, the UNGP were adopted unanimously in the Human Rights Council and lauded as "the universal declaration of human rights for business" and "a game changer".[213] The EU, OECD and the ISO 26000 (an organization that provides guidance on CSR) all endorsed the UNGP and adopted sets of similar principles in response.[214]

Proponents of the UNGP contended that although the final product may "not to win an award for academic excellence", Ruggie had succeeded at "producing tangible policy results" and had moved the UN beyond the stalemate that resulted from the rejection of the UN draft norms.[215] Critics however argued that the consensus Ruggie prided himself on had been a manufactured one.[216] Concerns of NGOs were easily dismissed at consultation sessions: according to Ruggie, "if you

[209] S. Deva, 'Treating Human Rights Lightly: A Critique of the Consensus Rhetoric and the Language Employed by the Guiding Principles' in S. Deva and D. Blichitz (eds) *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect Human Rights* (Cambridge University Press 2013), 91.

[210] Office of the High Commissioner on Human Rights, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework'(HR/PUB/11/04) (United Nations 2011) ('the UNGP').

[211] C. Rodríguez-Garavito, 'Business and Human Rights: Beyond the End of the Beginning' C. Rodríguez-Garavito (ed.) in *Business and Human Rights: Beyond the End of the Beginning* (Cambridge University Press 2017), 22 – 26; López 2013, *supra* note 201, 65-68, 77 referring to them as "CSR with an added element of Human Rights"; S. Deva, 'Business and Human Rights: Time to Move Beyond the "Present"? in C. Rodríguez-Garavito, 'Business and Human Rights: Beyond the End of the Beginning' (Cambridge University Press 2017); Nolan 2013, *supra* note 79.

[212] The 2006 interim report, *supra* note 93, para 81; Melish 2017, *supra* note 204, 78; J. G. Ruggie, 'The Past as Prologue? A Moment of Truth for UN Business and Human Rights Treaty' (*Institute for Human Rights & Business*, 8 July 2014).

[213] Human Rights Council, 'Human Rights and Transnational Corporations and Other Business Enterprises', 6 July 2011 (A/HRC/Res/17/4) ('Human Rights Council resolution approving the UNGP'); Deva 2013, *supra* note 209, 78; Martens 2014, *supra* note 189, 16 – 17; Nolan 2013, *supra* note 79, 151, 159; López 2013, *supra* note 201, 59, 65; Buhmann 2013, *supra* note 205, 35.

[214] López 2013, *supra* note 201, 60; OECD, 'Guidelines for Multinational Enterpises' (OECD 2011), available at https://www.oecd.org/corporate/mne/48004323.pdf; ISO 26000, 'UN Human Rights and ISO 26000', available at https://iso26000sgn.org/iso-26000/about-iso26000/un-humand-rights-and-iso-26000/ last accessed 2 May 2021; European Commission, 'Oil and Gas Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights' (European Union 2014), available at https://op.europa.eu/nl/publication-detail/-/publication/e05fc065-f35c-4c0d-91e9-7e500374ee0f.

[215] F. Wettstein, 'Normativity, Ethics, and the UN Guiding Principles on Business and Human Rights: A Critical Assessment' (2015) 14 *Journal of Human Rights* 162-163; Melish 2017, *supra* note 204, 78.

[216] Deva 2013, *supra* note 209, 83 – 91; Melish 2017, *supra* note 204, 76-83.

accommodated everybody you would have nothing left".[217] With regard to businesses however, Ruggie insisted that the final product would "have to find resonance, or they will be resisted or ignored".[218] A similar discrepancy was visible in Ruggie's attitude towards the participation of victims of corporate human rights abuse. Ruggie initially declined to consult with victims of corporate human rights violations,[219] but among the businesses that participated in the consultation sessions were at least nine corporations involved in litigation pertaining to their alleged complicity in crimes against humanity.[220]

Critics moreover questioned the validity of consensus as an approach to human rights. Human rights after all, are *rights* rather than policy goals and therefore should not have been made subject to considerations of convenience, practicality or corporate buy-in. By presenting a 'business case' for compliance with human rights law, critics argued, Ruggie had stripped human rights of their normative foundations.[221] Leading human rights organizations such as Human Rights Watch, Amnesty International and the International Commission of Jurists expressed they feared the UNGP would do little to address the issue of corporate impunity for severe human rights abuses.[222] Human rights scholars remarked that while the compromises made in the UNGP were "perhaps understandable in light of the deadlock that followed after the rejection of the UN Norms" it was regrettable that the UN, as the world's leading human rights organization had outright dismissed the notion of corporate human rights duties.[223]

2.5. KIOBEL V. SHELL

The UNGP were drafted with the understanding that the most severe human rights abuses would nonetheless be subject to legal liability through international criminal law, enforced by national courts. In his interim reports, Ruggie frequently cited the ATS litigation as evidence for an "expanding web of potential corporate liability for international crimes imposed through national courts", and expressed the expectation that "corporations will be subject to increased liability for international crimes in the future".[224] Indeed, in the spring of 2009, the claim leveled against Shell by Ken Wiwa and other relatives of the nine executed Ogoni activists was settled only four days before the hearings in the *Wiwa v. Shell* trial were set to commence.[225] The 15.5 million dollar

[217] Deva 2013, *supra* note 209, 85, Ruggie likewise stated at a consultation with NGOs in 2010 that "some of you (the NGOs) may continue to disagree with my approach. I have no problem with that, but let's not spend too much on that".
[218] Deva 2013, *supra* note 209, 85; Buhman 2013, *supra* note 205, 33, 55-56, 70; López 2013, *supra* note 201, 70.
[219] López 2013, *supra* note 201, 70; Deva 2013, *supra* note 209, 83-84.
[220] Examples include BNP Paribas, Chevron, Citigroup, Coca-Cola, Nestlé, Rio Tinto and Royal Dutch Shell.
[221] Melish 2017, *supra note* 204, 76-80; Deva 2017, *supra* note 211, 67-70; Deva 2013, *supra* note 209; López 2013, *supra* note 201, 69-73; A. Ganesan, 'UN Human Rights Council: Weak Stance on Business Standard' (*Human Rights Watch*, 16 June 2011) www.hrw.org/news/2011/06/16/un-human-rightscouncil-weak-stance-business-standards last accessed 25 October 2020; C. Albin-Lackey, "Without Rules: A Failed Approach to Corporate Accountability" (Human Rights Watch 2013) https://www.hrw.org/sites/default/files/related_material/business.pdf.
[222] Martens 2014, *supra* note 189, 18; Amnesty International, Human Rights Watch, International Federation for Human Rights and others, 'Joint Civil Society Statement to the 17th Session of the Human Rights Council' (*Human Rights Watch*, 30 May 2011), available at https://www.hrw.org/news/2011/05/30/joint-civil-society-statement-17th-session-human-rights-council, last accessed 10 May 2021;Human Rights Watch, 'UN Human Rights Council: Weak Stance on Business Standard. Global Rules Needed, Not Just Guidance' (*Human Rights Watch*, 16 June 2011), available at www.hrw.org/de/news/2011/06/16/un-human-rights-council-weak-stance-business-standards last accessed 10 May 2021.
[223] N. Jägers, 'UN Guiding Principles on Business and Human Rights: Making Headway Towards Real Corporate Accountability?' (2011) 29 *Netherlands Quarterly of Human Rights*, 159-163.
[224] The 2007 interim report, *supra* note 208, paras 22, 84; the 2006 interim report, *supra* note 93, para 59.
[225] The settlement agreement can be found at http://www.ccrjustice.org/files/Wiwa_v_Shell_SETTLEMENT_AGREEMENT.Signed-1.pdf. The parties settled the case June 8th of 2009. June 3rd 2009 the

settlement - to be put in a trust fund for the development of the Ogoni people – was framed as a sign that "multinational corporations can no longer act with the impunity they once enjoyed."[226]

This all changed a few months later, when the US federal appeals court handed down a ruling in the case against Canadian oil corporation Talisman Energy in the fall of 2009. The case, brought by citizens of Sudan, accused the company of assisting the Sudanese government in killing and displacing populations living in the areas around Talisman oil fields.[227] Canada had objected to the US courts establishing jurisdiction over the claim against Talisman and had requested that the US courts abstain from hearing a claim pertaining to "activities of Canadian corporations that take place entirely outside the US."[228] While the US courts initially did agree to hear the case, they eventually dismissed the claims against Talisman.[229] The court found that Talisman had a "a legitimate need to rely on the military for defense", as it is "undisputed that … rebel groups viewed oil installations and oil workers as enemy targets".[230] The court therefore held that a corporation is only liable for complicity in crimes against humanity when it contributes to those crimes *for the purpose* of furthering them.[231]

In practice, this would exempt most corporations from liability under the ATS as corporations generally engage in their conduct primarily for economic reasons, and therefore will rarely meet this standard.[232] It is in this context that the *Kiobel* case – another case brought by relatives of the executed Ogoni activists[233] – went to trial in 2010. Kiobel v. Shell drew international attention: if the highly contested ruling in *Talisman* were to be confirmed in the *Kiobel* case, this would upend the possibility of suing corporations for complicity in human rights violations in a United States court. Surprisingly however, the court in the *Kiobel* case declined to weigh on this question. Instead, they held that the ATS only applied to individuals, and therefore could not be used to sue corporations at all.[234]

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appeals court had allowed Wiwa and the other plaintiffs to demand further disclosure of documents for evidence from Shell Nigeria, and April 23rd 2009 the court had confirmed the jurisdiction over and admissibility of all but one of the plaintiffs' claims.

[226] Judith Chomsky, the plaintiffs' lawyer, stated that the "settlement confirms that multinational corporations can no longer act with the impunity they once enjoyed." Center for Constitutional Rights, 'Settlement Reached in Human Rights Cases Against Royal Dutch/Shell (*Center for Constitutional Rights*, 8 June 2009), available at https://ccrjustice.org/home/press-center/press-releases/settlement-reached-human-rights-cases-against-royal-dutchshell, last accessed 10 May 2021.

[227] *The Presbyterian Church of Sudan v. Talisman Energy*, Inc 582 F.3d 244 (2d Cir. 2009).

[228] K. Patterson, 'Canada says U.S. can't hear lawsuit' (*The Leader-Post Regina* 26 May 2007), available at http://www.canada.com/reginaleaderpost/news/story.html?id=0b22a8b6-36a3-48c0-a8ed-86ecb9a86e98 last accessed 1 May 2021; Presbyterian Church of Sudan et al. v. Talisman Energy Inc. and the Republic of Sudan, 07-0016-cv (Brief of Amicus Curiae, the Government of Canada, in Support of Dismissal of the Underlying Action filed in See Presbyterian Church of Sudan v. Talisman Energy, Inc., 374 F. Supp. 2d 331 (S.D.N.Y. 2005).

[229] J. E. Marcovitz, 'Introductory Note to Presbyterian Church of Sudan v. Talisman Energy, Inc. (2nd Cir.)' (2010) 49 *International Legal Materials.*

[230] Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d (2d Cir. 2009), 262.

[231] Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d (2d Cir. 2009), 259; J. Morrissey, Presbyterian Church of Sudan v. Talisman Energy, Inc.: Aiding and Abetting Liability Under the Alien Tort Statute (2011) 20 *Minnesota Journal of International Law*; R. S. Lincoln, 'To Proceed with Caution: Aiding and Abetting Liability under the Alien Tort Statute' (2010) 28 *Berkeley Journal of International Law.*

[232] Gallagher 2010, *supra* note 158, 762 – 766.

[233] The Kiobel complaint was filed in 2002, shortly after the US court had approved the complaints in the Wiwa case. While the Wiwa case was brought by the children and brothers of the executed Ogoni 9, the Kiobel claim was brought by Esther Kiobel, widow of Barinem Kiobel, and three other widows of the Ogoni 9. While the Wiwa case was settled in 2009, the Kiobel case went to trial.

[234] Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010), 24 – 43; Ku 2011, *supra* note 158, 372.

This ruling attracted global attention, as the ruling, if confirmed, would put an end to the practice of suing corporations for human rights violations under the ATS in its entirety.[235] The ruling was controversial: it was accompanied by a fiery concurring opinion[236] dismissing majority opinion as illogical, strange, internally inconsistent and baseless.[237] One of the judges deciding on the request to rehear the case in full[238] passionately argued that the judgment had been a severe mistake – one that "betrays a basic misunderstanding of international law".[239] After the request to re-hear the case in full was denied on a 5-5 vote,[240] the plaintiffs filed for an appeal to the US Supreme Court. The Supreme Court agreed to hear the case in 2011, just four months after the UNGP had been adopted. The United States supreme court was now asked to re-litigate the question that John Ruggie had answered with a compromise after six years of research and consultation: do corporations have obligations under international law?[241]

Over eighty external parties weighed in on the *Kiobel* Supreme Court hearings through *amicus briefs*.[242] Several international human rights organizations, the US ambassador to the International Criminal Court, several prominent international law scholars, economist Joseph Stiglitz, several Nuremburg and legal history scholars, the UN High Commissioner on Human Rights, Yale Law School and the United States itself supported the claimants.[243] Shell on the other hand had found the

[235] Kirshner 2012, *supra* note 156, 259-260; López 2013, *supra* note 201, 73; M. Goldhaber, 'The Life and Death of the Corporate Alien Tort' (*Law.com*, 12 October 2010), available at http://www.law.com/jsp/law/international/LawArticlelntl.jsp?id=1202473215797, last accessed 2 May 2021; J. M. Stanisz 'The Expansion Of Limited Liability Protection In The Corporate Form: The Aftermath Of Kiobel V. Royal Dutch Petroleum Co.'(2011) 5 *Brooklyn Journal of Corporate, Financial & Commercial Law*.

[236] Concurring in judgment only, meaning that the concurring judge disagreed with nearly all of the reasons put forward by the majority, but agreed with the decision to dismiss the complaint (but for entirely different reasons).

[237] Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010) [judge Leval concurring], 1, 3.

[238] When the issue decided in a case is considered to be of exceptionally large social or political importance, courts can grant a 'rehearing *en banc'*. In this instance, the case will be reconsidered in full by 11 to 15 (rather than the original three) judges. This is different than an appeal a certiorari to the Supreme Court, where the Supreme Court reconsiders only a number specific legal questions relevant to the case.

[239] *Kiobel v. Royal Dutch Petroleum* Co., 621 F.3d 111 (2d Cir. 2010) (Petition for panel rehearing denied) (4 February 2011, no. 06-4800-cv (L)), Gerard E. Lynch, Circuit Judge, joined by Rosemary S. Pooler, Robert A. Katzmann, and 2 Denny Chin, Circuit Judges, dissenting from the denial of rehearing in banc, as he believed "that the panel majority opinion is very likely incorrect".

[240] *Kiobel v. Royal Dutch Petroleum* Co., 621 F.3d 111 (2d Cir. 2010) (Petition for panel rehearing denied) (4 February 2011, no. 06-4800-cv (L)).

[241] López 2013, supra note 201, 73-74; P. Weiss, 'The Question before the US Supreme Court in Kiobel v Shell' (*The Guardian*, 28 February 2012), available at https://www.theguardian.com/commentisfree/cifamerica/2012/feb/28/question-before-supreme-court-kiobel-v-shell, last accessed 29 July 2021; B. Prelogar, L. Ardito and J. Cook, 'Kiobel v. Royal Dutch Petroleum: U.S. Supreme Court Considers Corporate Liability under Alien Tort Statute for Extraterritorial Human Rights Claims'(Emerging Issues Analysis 6295) (LexisNexis 2012), available at https://www.steptoe.com/images/content/5/5/v1/5588/58709.EIC6295.1.pdf ; O. Murray, 'Exaggerated Rumors of the Death of Alien Torts: Corporations, Human Rights and the Peculiar Case of Kiobel' (2011) 12 *Melbourne Journal of International Law*; Amnesty International, 'A Shell Game: Kiobel v. Royal Dutch Petroleum' (*Amnesty International*, 3 October 2012), available at https://www.amnestyusa.org/a-shell-game-kiobel-vs-royal-dutch-petroleum/ last accessed 3 May 2021, referring to the *Kiobel* case as "a case poised to determine the future of US legal remedies for human rights abuses"; E. L Palmer and S. M. Nickelsburg, 'Supreme Court to Decide Corporate Liability Under Alien Tort Claims Act' (*Corporate Counsel Business Journal*, 18 November 2011), available at https://ccbjournal.com/articles/supreme-court-decide-corporate-liability-under-alien-tort-claims-act last accessed 3 May 2021.

[242] J. G. Ruggie, 'Kiobel and Corporate Social Responsibility' (*Harvard Kennedy School*, 4 September 2012), 1 available at https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/cri/files/KIOBEL_AND_CORPORATE_SOCIAL_RESPONSIBILITY%20(3).pdf.

[243] Amicus briefs available at (in order): https://ccrjustice.org/sites/default/files/assets/2011.12%20IHR%20Orgs%20Amicus%20Brief%20in%20Supp%20of%20Petitioners.pdf,https://ccrjustice.org/sites/default/files/assets/2011.12%20Ambassador%20David%20Scheffer%20Ami

support of various oil companies and other companies who had been sued under the ATS,[244] the governments of the UK (after extensive lobbying),[245] the Netherlands and Germany[246] as well as various chambers of commerce, the International Chamber of Commerce, the US foreign trade council, the American Petroleum Institute, and the US Council for International Business.[247]

In defending itself against the legal claims leveled against it, Shell not only contested it was complicit in the Nigerian military's crimes against humanity, but also that the ATS could be applied to events that took place in Nigeria (i.e. outside the United States) at all.[248] In doing so, it relied on the amicus briefs by the UK and the Netherlands, which urged the US courts to rethink its practice of establishing jurisdiction over foreign corporations regarding events that took place on foreign territory.[249] Amicus briefs in favor of Shell warned the US of the consequences of such practices becoming commonplace: "A US defense contractor with operations in Iraq or Afghanistan … might find themselves defending their business activities (and the national-security policies of this country) before a foreign court—possibly with billion-dollar damages claims on the line."[250] Other

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cus%20Brief%20in%20Supp%20of%20Petitioners.pdf,https://ccrjustice.org/sites/default/files/assets/2011.12%20Amicus%20Brief%20Intl%20Law%20Scholars%20in%20Supp%20of%20Petitioners.pdf,https://ccrjustice.org/sites/default/files/assets/2011.12%20Joseph%20Stiglitz%20Amicus%20Brief%20in%20Supp%20of%20Petitioners.pdf,https://ccrjustice.org/sites/default/files/assets/2011.12%20Nuremburg%20Scholars%20Amicus%20Brief%20in%20Supp%20of%20Petitioners.pdf,https://ccrjustice.org/sites/default/files/assets/2011.12%20UNHCHR%20Pillay%20Amicus%20Brief%20in%20Supp%20of%20Petitioners.pdf,https://ccrjustice.org/sites/default/files/assets/2011.12%20Yale%20Law%20School%20Amicus%20Brief%20in%20Supp%20of%20Petitioners.pdf,https://ccrjustice.org/sites/default/files/assets/2011.12%20United%20States%20Amicus%20Brief.pdf

[244] Brief of BP (for deepwater horizon spill), Caterpillar (for activities in Palestina) and others https://ccrjustice.org/sites/default/files/assets/2012.02%20BP%20America%20Amicus%20Brief.pdf; Brief of Chevron (for activities in Nigeria), Dole Food Company (for supporting death squads in Latin America), Dow Chemical Company (for the health effects of chemical agent orange on the Vietnamese populations, Ford (for supplying vehicles to apartheid south Africa and others https://ccrjustice.org/sites/default/files/assets/2012.02%20Chevron%20Corp%20Amicus%20Brief.pdf; brief of Coca-Cola and others (for supporting death squads in Latin America), https://ccrjustice.org/sites/default/files/assets/2012.02%20Coca-Cola%20Amicus%20Brief%20.pdf; brief of KBR, a private military company and former subsidiary of oil company Haliburton https://ccrjustice.org/sites/default/files/assets/2012.02%20KBR%20Inc.%20Amicus%20Brief%20.pdf; Brief of Rio Tinto (for ordering ethnic cleansing in Papua New Guinea) https://ccrjustice.org/sites/default/files/assets/2012.02%20Rio%20Tinto%20Group%20Amicus%20Brief%20.pdf;

[245] O. Bowcott, 'Documents Reveal Extent of Shell and Rio Tinto Lobbying in Human Rights Case' (*The Guardian*, 6 April 2014) available at https://www.theguardian.com/business/2014/apr/06/shell-rio-tinto-human-rights-nigeria-kiobel, last accessed 10 May 2021; P. Frankental, 'The Documents that Show the United Kingdom Caved in to Corporate Lobbying' (*Amnesty International*, 7 April 2014), available at https://www.amnesty.org.uk/blogs/yes-minister-it-human-rights-issue/uk-government-shell-rio-tinto-human-rights-niger-delta last accessed 10 May 2021.

[246] Brief of the Netherlands and United Kingdom (filed jointly) https://ccrjustice.org/sites/default/files/assets/2012.02%20UK%20Govt%20et%20al%20Amicus%20Brief%20.pdf; brief of Germany https://ccrjustice.org/sites/default/files/assets/2012.02%20Federal%20Republic%20of%20Germany%20Amicus%20Brief.pdf;

[247] Brief of German, Swedish, Swiss, Dutch and British trade organizations https://ccrjustice.org/sites/default/files/assets/2012.02%20German%20Chambers%20Amicus%20Brief%20.pdf; brief of various US based trade organizations and the petroleum institute https://ccrjustice.org/sites/default/files/assets/2012.02%20Nat'l%20Foreign%20Trade%20Council%20Amicus%20Brief%20.pdf; brief of the US chamber of commerce https://ccrjustice.org/sites/default/files/assets/2012.02%20US%20Chamber%20of%20Commerce%20Amicus%20Brief.pdf.

[248] Kiobel v. Royal Dutch Petroleum, No. 10-1491 (Brief for respondents on Writ of Certiorari to the United States Courts of Appeals for the Second Circuit) (27 January 2012), available at https://ccrjustice.org/sites/default/files/assets/2012.01.27%20Respondents'%20Brief.pdf at 53 to 56, where Shell argues that the ATS does not "apply to conduct within a foreign nation's borders".

[249] United Kingdom and Netherlands Amicus Brief, *supra* note 246, 3, 29.

[250] Amicus brief of the German, Swiss, Swedish, Dutch and British trade organizations (jointly), *supra* note 244, 22.

briefs pointed out that the ATS litigation could become – and already had become – a source of diplomatic disputes with Canada and European states.[251] Lastly, it was argued that ATS lawsuits generally "amount[ed] to little more than extortion" as they were often settled to avoid long and costly litigation and severe reputational damage, regardless of the merits of the claim. Corporations then would seek to avoid exposure to the ATS, which would drive business investment away from the United States.[252]

John Ruggie, the author of the UNGP, weighed in on the case through a neutral amicus brief.[253] While he declined to comment on the legal merits of various arguments – the other 81 briefs had already "addressed almost every conceivable question of law and interpretation" [254] – he criticized Shell for relying on his interim reports to argue that business have no obligations under international law at all. He clarified that his reports did not in fact support the assertion that corporations could not in any way be held liable under international law, and that Shell had misconstrued his position through "selective quotation". Instead, Ruggie had advocated against the creation of *new* (human rights) obligations for multinational corporations. Ruggie had been supportive of efforts to enforce *current* (criminal) norms through national courts.[255]

Ruggie moreover expressed concern at Shell's line of argumentation. He observed that the arguments made by Shell would not only lead to the dismissal of the claims against Shell, but would make it impossible in the future "to use U.S. courts as a forum to adjudicate civil liability for gross human rights violations committed abroad—even when those violations are committed by U.S. nationals, and even if the Americans are individuals rather than corporations."[256] In other words, if the United States supreme court were to accept the arguments put forward by Shell, this would dismantle the ATS as a vehicle for human rights litigation entirely. Ruggie warned that if Shell were to succeed at this attempt, Shell's "road back to the corporate social responsibility fold will be long and hard."[257]

The Supreme Court handed down its verdict in *Kiobel v. Shell* in 2013. Rather than deciding on the legal questions that had originally been the subject of contention, the US Supreme Court held that

[251] Amicus brief of BP and others, *supra* note 244, 5-12.
[252] US Chamber of Commerce brief, *supra* note 246, 14-22 on the financial threat ATS suits pose to multinational corporations, even if they are meritless and 22-29 on the chilling effect this has on international investment and the global economy; amicus brief of the German, Swiss, Dutch and United Kingdom Chambers of Commerce (jointly), *supra* note 244 16 -23; KBR brief, *supra* note 244, 30-33, arguing that "recognizing corporate liability will open the floodgates" for ATS claims, which usually "amount to little more than attempts at extortion."
[253] Amicus brief John Gerard Ruggie (supporting neither party), available at https://media.business-humanrights.org/media/documents/files/media/documents/kiobel-v-shell-amicus-brief-ruggie-alston-nyu-12-jun-2012.pdf.
[254] Ruggie 2012, *supra* note 242.
[255] Shell quoted from the 2007 interim report (*supra* note 208, para 44): 'it does not seem that the international human rights instruments discussed here currently impose direct legal responsibilities on corporations' in its defense brief to argue that 'international-law sources on the specific offenses at issue refute corporate responsibility' whilst emphasizing "that's the U.N. [speaking], not Congress" Transcript of Oral Argument in Kiobel v. Royal Dutch Petroleum Co., 28 February 2012 (Case No. 10–1491) at 49:7–15; Amicus brief of John Gerard Ruggie (supporting neither party), available at https://media.business-humanrights.org/media/documents/files/media/documents/kiobel-v-shell-amicus-brief-ruggie-alston-nyu-12-jun-2012.pdf, clarifying that Shell had misrepresented the report, and that he had recognized that potential corporate liability under international law exists for international crimes; Ruggie 2012, *supra* note 254, 4, lamenting Shell's "selective quotation".
[256] Ruggie 2012, *supra* note 254, 4.
[257] Ruggie 2012, *supra* note 254, 6.

the ATS did not apply outside United States territory.[258] With this surprising ruling, the US Supreme Court overturned every ATS case up to and including *Filartiga*, as ATS claims almost always concern incidents that took place outside of the United States and effectively shut down ATS litigation altogether.[259] Victims and their lawyers attempts to use the US court system to hold corporations liable for their role in the most severe category of human rights violations thus ended the same way that it had started: with litigation over Shell's involvement in the crimes against humanity committed against the Ogoni in 1994 and 1995.[260]

2.6. CORPORATE ACCOUNTABILITY AFTER KIOBEL

After the Human Rights Council unanimously endorsed the UNGP, the Human Rights Council created a new working group to implement the UNGP.[261] The working group's first report in 2012 focused predominantly on reporting and the extent to which corporations had adopted the UNGP; it was clear that the working group would not undertake any efforts to establish a mechanism for accountability and remedies, as the 2008 report originally had envisioned.[262] It thus appeared that proponents of voluntary codes and corporate social responsibility had won out: the most feasible way to address corporate wrongdoing was now to bring clarity, uniformity and specificity to existing CSR practices and to pressure corporations to stick to their voluntary commitments through activism and media campaigns.[263]

After the US supreme court had dismantled the ATS as a vehicle for human rights litigation through the *Kiobel* decision of 2013 however, efforts to find other avenues to enforce existing international criminal law norms on corporations were reinvigorated. In 2014, various African states signed a treaty establishing an African international criminal court – a regional version of the International Criminal Court in the Hague – that would have jurisdiction over both individuals *and* corporations.[264] Scholars who had spent the past decade debating the precise criteria under which a

[258] Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. 1659, 1665 (2013); for an explanation of the reasoning in and implications of the decision see D. P. Stewart, 'Kiobel v. Royal Dutch Petroleum Co.: The Supreme Court and the Alien Tort Statute' (2013) 107 *The American Journal of International Law*.

[259] This ruling surprised many legal commentators, see for instance Gallagher 2010, *supra* note 158, 766, speaking optimistically of "The first 30 years of litigation under the ATS" mere months before the Kiobel ruling shut down ATS litigation altogether; J. G. Ku, 'Kiobel and the Surprising Death of Universal Jurisdiction under the Alien Tort Statute'(2013) 107 *The American Journal of International Law*; R. P. Alford, 'The Future of Human Rights Litigation After Kiobel' (2013) 89 *Notre Dame Law Review*; R. McCorquodale, 'Waving Not Drowning: Kiobel Outside the United States' (2013) 107 *The American Journal of International Law*; E. Kontorovich, 'The Kiobel Surprise: Unexpected By Scholars But Consistent with International Trends' (2013) 89 *Notre Dame Law Review*; A. Grear and B. H. Weston, 'The Betrayal of Human Rights and the Urgency of Universal Corporate Accountability: Reflections on a Post-Kiobel Landscape' (2015) 15 *Human Rights Law Review*.

[260] Ruggie 2013, *supra* note 204, 10-13; Ruggie 2020, *supra* note 153, 70 (identifying public outrage against Nike and Shell as the start of the movement for corporate accountability and corporate social responsibility); for reflections on the course of the corporate accountability and corporate social responsibility movements and the role of Shell in them, see B. Stephens, 'The Rise and Fall of the Alien Tort Statute' in S. Deva and D. Birchall (eds.) *Research Handbook on Human Rights and Business* (Edward Elgar Publishing ltd 2020); S. Deva, 'From 'Business or Human Rights' to 'Business and Human Rights': What Next?' in S. Deva and D. Birchall (eds.) *Research Handbook on Human Rights and Business* (Edward Elgar Publishing ltd 2020).

[261] Human Rights Council resolution approving the UNGP', *supra* note 213, para 6.

[262] UN Human Rights Council, 'Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises', 10 April 2012 (A/HRC/20/29).

[263] Martens 2014, *supra* note 189, 17-20; C. Vargas, 'A Treaty on Business and Human Rights? A Recurring Debate in a New Governance Landscape' in C. Rodríguez-Garavito *Business and Human Rights: Beyond the End of the Beginning* (Cambridge University Press 2017) 113-116; Melish 2017, *supra* note 204, 76-78.

[264] For an introduction to corporate criminal liability before the African Criminal Court, see T. Michalakea, 'article 46C of the Malabo Protocol: A Contextually Tailored Approach to Corporate Criminal Liability and its Contours' (2018) 7 *International Human Rights Law Review*; J. Kyriakakis, 'Article 46C: Corporate Criminal Liability at the African

corporation would be liable under the ATS now focused their attention on legal developments that opened possibilities for civil lawsuits against corporations in Europe.[265] Various European states also attempted to *criminally* prosecute corporations for illegal business conduct in the global South.[266] Currently, there are five ongoing legal cases against Shell in the Netherlands and the United Kingdom,[267] including a new claim filed by Esther Kiobel against Shell, relying on the evidence accumulated during the 11 year long proceedings in the United States under the ATS.[268]

The *Kiobel* ruling also reinvigorated efforts to create binding human rights obligations for corporations that extend beyond the obligation to avoid complicity in crimes against humanity and genocide. In 2013, a coalition of 83 countries led by Ecuador and South Africa and supported by 610 NGOs submitted a resolution to the Human Rights Council that proposed to open negotiations on a binding treaty on business and human rights.[269] This initiative received a mixed response: while most Asian, African and South American countries responded positively, the United States and EU countries expressed "disappointment" that Ecuador had decided to table this "divisive resolution".[270] The United States expressed fears that opening negotiations for a human rights treaty for multinational business "contradicts the consensus-based approach of John Ruggie's mandate and … the UN Guiding Principles" and would undermine promising efforts to "promote responsible investment and encourage further collaboration" between corporations and local communities.[271] The EU[272] and the International Chamber of Commerce expressed similar concerns, warning that

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Criminal Court' in C. C. Jalloh, K. M. Clarke and V. O. Nmehielle (eds.) *The African Court of Justice and Human and Peoples' Rights in Context: Development and Challenges* (Cambridge University Press).

[265] For the most recent developments in this regard see postscript; for background see Kirshner 2012, *supra* note 156, 260, 279 – 291; J. G. Stewart, 'The Turn to Corporate Criminal Liability for International Crimes: Transcending the Alien Tort Statute' (2014) 47 *New York University Journal of International Law and Politics* 123- 136; D. Cassel, 'State Jurisdiction over Transnational Business Activity Affecting Human Rights' in S. Deva and D. Birchall (eds.) *Research Handbook on Human Rights and Business* (Edward Elgar Publishing ltd 2020); McCorquodale 2013, *supra* note 259.

[266] See M. Cupido, M. J. Hornman and W. Huisman, 'Individual Liability for Business Involvement in Core crimes,' (2017) 2017 *International Review of Penal Law*; S. Michalowski, 'Doing Business with a Bad Actor: How to Draw the Line between Legitimate Commercial Activities and Those That Trigger Corporate Complicity Liability,' (2015) 50 *Texas International Law Journal*; Kelly 2016, *supra* note 102; M. Kennedy, 'French Bank BNP Paribas Accused Of Complicity In Rwandan Genocide,' (*NPR*, 29 June 2017) https://www.npr.org/sections/thetwo-way/2017/06/29/534865238/french-bank-bnp-paribas-accused-of-complicity-in-rwandan-genocide?t=1587568801777 last accessed 20 April 2020; N. Rolander, 'Prosecutor Readies War Crime Charges Against Swedish Oil Bosses,' (*Bloomberg*, 26 October 2018) available at https://www.bloomberg.com/news/articles/2018-10-26/prosecutor-readies-war-crime-charges-against-swedish-oil-bosses, last accessed 29 July 2021.

[267] Amnesty International, 'On Trial: Shell in Nigeria – Legal Actions Against the Oil Multinational' (*Amnesty International* 2020) (AFR 44/1698/2020).

[268] G. van Calster, 'Kiobel v. Shell in The Netherlands: Court Confirms Jurisdiction' (*GAVC*, 17 May 2019), available at https://gavclaw.com/2019/05/17/kiobel-v-shell-in-the-netherlands-court-confirms-jurisdiction-anchored-unto-mother-holding-and-qualifies-the-suit-as-one-in-human-rights-not-tort-also-orders-limited-use-of-documents-obtained-in-us/ last accessed 3 May 2021.

[269] A. L. Parrish, 'Kiobel, Unilateralism, and the Retreat from Extraterritoriality' (2013) 28 *Maryland Journal of International Law*; Martens 2014, *supra* note 189, 23 – 26; www.treatymovement.com;

[270] Martens 2014, *supra* note 189, 23 – 25; S. Townley, 'Explanation of Vote: A/HRC/26/L.22/Rev.1 on BHR Legally-Binding Instrument - Statement by the Delegation of the United States of America' (*US Mission to International Organizations in Geneva*, 26 June 2014) available at https://geneva.usmission.gov/2014/06/26/proposed-working-group-would-undermine-efforts-to-implement-guiding-principles-on-business-and-human-rights/ last accessed 25 October 2020.

[271] Townley 2014, *supra* note 270.

[272] EU Delegate to the UN Human Rights Council, 'Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights: EU Explanation of Vote" (*Global Policy*, 26 June 2014) available at https://www.globalpolicy.org/images/pdfs/GPFEurope/HRC_resolution_Explanation_of_vote_EU.pdf.

opening negotiations for a binding treaty would "jeopardize the crucial consensus achieved by the UN Guiding Principles on Business and Human Rights."[273]

Despite the vocal resistance from the United States, the European Union and the International Chamber of Commerce, the resolution was narrowly adopted.[274] In 2015, the first draft of the treaty was presented and negotiations commenced.[275] The US and EU however – where a large amount of the largest multinational corporations are incorporated – declined to participate in the negotiations. Since then, the treaty draft has been frequently amended in yearly rounds of negotiations.[276] The treaty negotiations are still ongoing, as are all legal cases filed against Shell in the United Kingdom and the Netherlands. Currently therefore, the business and human rights movement is where it started: while large public multinationals have made numerous human rights commitments, it is still unclear whether, and if so, to what extent, business can be held to account for violating basic norms of international law.

2.7. CONCLUSION

As is typical for Strategic Action Fields, the field of business and international human rights has been in constant flux since its emergence in 1995. (One of) the main issue(s) at stake is whether the negative impact businesses can have on the developing communities in which they operate are best addressed by mobilizing businesses to improve their conduct through voluntary instruments, or by regulating businesses conduct internationally. In this field, Shell started out as a vocal proponent for corporate social responsibility, pioneering many of the practices that have now become commonplace in response to the public backlash from the execution of the Ogoni 9 and the costly Niger delta crisis. When the momentum for corporate responsibility resulted in the 2003 draft norms, which would place the UN in a position to monitor the human rights conduct of multinational corporations, Shell (through the international chamber of commerce) relied heavily on its voluntary efforts and the global compact to advocate against the need for any binding regulations.

Subsequently to the rejection of these norms, the man who proposed the Global Compact (John Ruggie) – and with whom senior board members had close relationships – was appointed to formulate the UN's new approach to business related human rights problems. Corporations, who had participated actively in this consultative process and stressed their distaste for binding regulations throughout, were pleased with the final result: the UN Guiding Principles were

[273] International Chamber of Commerce, 'Response of the international business community to the "elements" for a draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights' (*International Chamber of Commerce*, 20 October 2017) available at https://iccwbo.org/content/uploads/sites/3/2017/10/business-response-to-igwg-draft-binding-treaty-on-human-rights.pdf.

[274] Treaty Alliance, 'Resolution on Binding Human Rights Standards Passes in Human Rights Council' (*Global Policy*, 27 June 2014) available at https://www.globalpolicy.org/global-taxes/52651-treaty-alliance-press-release-on-resolution-on-binding-human-rights-standards.html last accessed 25 October 2020.

[275] For the first draft of this treaty see Office of the High Commissioner of Human Rights, 'Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises' (Zero Draft 16.7.2018), available at https://www.ohchr.org/documents/hrbodies/hrcouncil/wgtranscorp/session3/draftlbi.pdf.

[276] L. de Leeuw, 'Re-Cap: Negotiations over the Revised Draft of a Binding Treaty on Business and Human Rights' (*SOMO*, 24 October 2019) available at https://www.somo.nl/re-cap-negotiations-over-the-revised-draft-of-a-binding-treaty-on-business-and-human-rights/ last accessed 25 October 2020; J. Martens and K. Seitz, 'The Struggle for a UN Treaty: Towards Global Regulation on Human Rights and Business' (Global Policy Forum 2016) available at https://rosalux-ba.org/wp-content/uploads/2016/09/un_treaty_online18.pdf.

voluntary, and the plans for an accountability mechanism had never materialized. At the same time, Shell's drastic litigation strategy and relentless lobbying mobilized various governments and business organizations to support Shell when one of the ATS claims against it came before the Supreme Court. The Supreme Court then went on to issue a ruling that not only dismissed the claims against Shell, but also overturned all human rights litigation conducted under that law since 1980. Although various attempts have been made at enforcing international law on corporations and creating new human rights obligations for businesses, none have succeeded yet.

Currently, the status quo at the core of the field has remained mostly unaltered: businesses have no legal obligations towards the communities in which they operate. However, as this chapter demonstrated, this absence of change is not the result of passivity, but required consistent and concerted efforts on part of Shell and other multinationals. The surprising stability of the status quo throughout the last twenty-five years, in which it has been repeatedly threatened by various initiatives is not a result of self-reproducing macro-structures, but of incumbents engaging in strategic action to defend a status quo that suits them.

3. OF THE KERNEL AND THE SHELL: OIL EXTRACTION IN A PETRO-STATE

Like the settlement in the SAF of business and international human rights, the settlement in the related SAF of oil extraction in the Niger delta has remained (fundamentally) unaltered for decades, despite the consistent challenges to it. To shed light on the surprising lack of change in a field as turbulent as oil extraction in the Niger delta, I first describe how the field came to be, and how its emergence in an era of highly asymmetrical power relations between western multinationals and indigenous populations (or 'natives') has shaped the present field dynamics [3.1]. I then argue that as a result of those dynamics, the rules of the SAF of oil extraction in the Niger delta prioritize the continued extraction and export of oil over the needs and rights of Niger delta inhabitants [3.2]. This field settlement has been consistently challenged, but has nonetheless remained unaltered, because Shell, as the incumbent in the field, can rely on the Nigerian federal state to respond to such challenges with military force [3.3]. I conclude by reflecting on the ways in which the colonial context in which the SAF emerged continue to dictate both the rules and dynamics of the SAF decades after Nigeria declared its independence.

3.1. HOW NIGERIA BECAME A PETRO-STATE

Pursuant to SAF theory, the circumstances in which a field emerged and stabilized have a permanent influence on the field dynamics. If power disparities between various actors are stark when the field is emerging, the incumbent will be able to impose a settlement on the challenger. Moreover, incumbents in such established fields will be able to enforce and reproduce this settlement, even when challengers perceive the settlement as illegitimate or inequitable.[277] In order to understand how underlying power dynamics shape the governance of oil extraction in present day Nigeria, I therefore trace the origin and evolution of the rules, understandings and power relations that characterize the SAF of oil extraction in the Niger delta through Nigeria's colonial period [3.1.1.], the decolonization process [3.1.2.], Nigeria's civil war [3.1.3.] and the subsequent oil boom [3.1.4].

3.1.1. OIL IN COLONIAL NIGERIA: "WE CAME NOT TO GOVERN, BUT TO TRADE"[278]

The Niger delta's first central government was a multinational corporation named the Royal Niger Company (RNC) (now Unilever). The delta of the Niger river - a swampy land where one of Africa's longest and most important river meets the ocean[279] - is inhabited by approximately 40 ethnic groups organized as tribal societies.[280] Initially, tribes' contact with European companies (first the Dutch and British West India Companies and later the Royal Niger Company) was limited to the coast, as Niger delta tribes functioned as intermediaries between the companies and the

[277] Fligstein and McAdams 2012a, *supra* note 41, 90, 94-98, 186, 189.
[278] O. A. Lawal, 'From Colonial Reforms to Decolonization: Britain and the Transfer of Power in Nigeria' (2010) 19 *Journal of the Historical Society of Nigeria*, 58.
[279] M. Watts, 'Resource Curse? Governmentality, Oil and Power in the Niger Delta, Nigeria' (2004) 9 *Geopolitics*, 57 – 58.
[280] J. P. Afam Ifedi an J. Ndumbe Any, 'Blood Oil, Ethnicity and Conflict in the Niger delta Region of Nigeria' (2011) 22 *Mediterranean Quarterly*, 75; M. Rahmani, 'Constitutional Development in Nigeria (1945-1960)', (PhD Thesis for the Djillali Liabbes University, 2015), 7-19; S. T. Abejide, 'Oil and the Ijaw People of the Niger delta States: 1956 to 1998' (PhD dissertation in literature and philosophy) (University of Johannesburg 2012), 34-45; A. O. Y. Raji and T. S. Abedije, 'The British Mining and Oil Regulations in Colonial Nigeria (1914-1960)' (2014) 2 *Signaporean Journal of Business Economics and Management Studies*, 62.

inaccessible inland's slave traders and palm oil farmers.[281] By 1884 however intermediaries were no longer needed as the RNC had managed to gain full control over the river as well as the trade through gun boats. [282] On the basis of this territorial control,[283] the RNC was able to obtain a royal charter from the British crown which granted the RNC the authority to establish government agencies and enact laws.[284] The RNC immediately used its sovereign authority to establish and enforce a strict monopoly on trade through steep import barriers and a prohibition on local trade. With its own police force and courts, the RNC was able to quickly squash resistance against this drastic take-over of local trade.[285] With its own armies, the RNC was able to defend its territories against repeated incursions by German and French competitors.[286]

Due to the company's control of the Niger delta as well as territories upstream the river Niger, the UK could formally claim a set of territories it named 'Nigeria' at the 1885 Berlin Conference (in which the European powers divided up Africa).[287] Yet, the idea of the RNC ruling over the newly created 'Nigeria' grew increasingly unpopular. Local populations resisted the RNC's violent enforcement of the prohibition on local trade, and British elites lost patience with the RNC due to its exclusion of other British trading companies and its inability to consistently ward of French invasions of the territory. [288] In 1900, secretary of the colonies Joseph Chamberlain, who believed it fell to the UK to develop 'tropical Africa' economically, [289] transferred the Nigerian territories to the British crown: the Niger delta was now a part of the British protectorate of Southern Nigeria.[290]

Right away, the UK revoked previous treaties between private mining companies and "natives", and claimed the final authority over the acquisition, sale and use of Nigerian land. [291] Soon after quashing 'native resistance' against British control over the territories,[292] the colonial government

[281] E. E. Courson, 'Spaces of Insurgency: Petro-Violence and the Geography of Conflict in Nigeria's Niger Delta' (Dissertation for PhD in philosophy in geography) (University of California, 2016), 27 – 28; Abejide 2012, *supra* note 280, 50 – 58; Watts 2004, *supra* note 279, 58.

[282] Afam Ifedi and Ndumbe Any 2011, *supra* note 280, 77; Rahmani 2015, *supra* note 280, 36-38; Courson 2016, *supra* note 281, 29-30; Abejide 2012, *supra* note 280, 74 – 80; S. R. Pearson, 'The Economic Imperialism of the Royal Niger Company' (1971) *Food Research Institute Studies*, 71; A. A. Inyang and M. E. Bassey, 'Imperial Treaties and the Origins of British Colonial Rule in Southern Nigeria, 1860-1890' (2014) 5 *Mediterranean Journal of Social Sciences*, 1947 – 1952 on how the RNC managed to consolidate control over the Niger delta through a combination of 'treaties' and gun boats.

[283] See Annex 2 for a map.

[284] Rahmani 2015, *supra* note 280, 39; Pearson 1971, *supra* note 282, 72.

[285] Afam Ifedi and Ndumbe Any 2011, *supra* note 280, 77; Abejide 2012, *supra* note 280, 74 – 80; Courson 2016, *supra* note 281, 31- 47; Rahmani 2015, *supra* note 280, 40-41; Pearson 1971, *supra* note 282, 73-75.

[286] Rahmani 2015, *supra* note 280, 39; Pearson 1971, *supra* note 282, 75-76.

[287] O. A. Lawal, 'British Commercial Interests and the Decolonization Process in Nigeria (1950-1960)' (1994) 22 *African Economic History*, 94-95; Rahmani 2015, *supra* note 280, 37-38; Pearson 1971, *supra* note 282, 71; A.F. Mockler-Ferryman, 'British Nigeria' (1902) 1 *Journal of the Royal African Society*, 160, proclaiming that "The common theory that "trade follows the flag" hardly holds good with regard to the Niger, for that the Union Jack now floats over the greater part of these vast territories is due almost entirely to the efforts of traders and trading companies".

[288] Rahmani 2015, *supra* note 280, 41; Pearson 1971, *supra* note 282, 74 – 75; Mockler-Ferryman 1902, *supra* note 287, 163-164.

[289] Joseph Chamberlain believed that "the British race is the greatest of the governing races that the world has ever seen... It is not enough to occupy great spaces of the world's surface unless you can make the best of them. It is the duty of a landlord to develop his estate."; Pearson 1971, *supra* note 282, 75-76.

[290] Rahmani 2015, *supra* note 280, 41; Pearson 1971, *supra* note 282, 77; for a map see Annex 3.

[291] A. E. Afigbo, 'The Consolidation of British Imperial Administration in Nigeria: 1900-1918' (1971) 21 *Civilizations*, 436; Mockler-Ferryman 1902, *supra* note 287, 165.

[292] Afam Ifedi and Ndumbe Any 2011, *supra* note 280, 78; Abejide 2012, *supra* note 280, 84 – 91; Raji and Abedije 2014, *supra* note 280, 63; Afigbo 1971, *supra* note 291, 436-438, 441-443, 448 on how the British established control over Southern Nigeria through a combination of force, indirect rule through 'warrant chiefs' and infrastructure.

established a licensing system for mining.[293] If a British company or individual had obtained a mining license for a specific area, its claim to mining that area was protected by the government. While the licensee could enter the land at any time and use it in any way, 'native activities' such as farming, cutting wood or diverting water were only allowed to the extent that they did not interfere with the mining operations.[294] Occupants of the lands licensed to a mining company were entitled to a small compensatory sum for cash crops growing on the land (such as cocoa or rubber trees), but not for the loss of land itself.[295]

From 1907, oil mining was regulated separately from mining at the request of an influential early oil explorer who maintained close relations with the colonial governor of Southern Nigeria.[296] Like with mining, the colonial government claimed the right to license a third party to extract oil from the lands, and like with mining, interfering with licensed oil operations was criminalized.[297] The oil ordinance however departed from the mining ordinance in two ways: the areas to be licensed were far larger than in mining,[298] and unlike in mining, no consent whatsoever was required from any relevant native authorities.[299] Royalties and fees would not be split between the tribe and the colonial government, but would go to the colonial government in full.[300] Native authorities protested against this departure from the general mining ordinance, arguing that the oil mining ordinance would "give to the Government and the European prospector the kernel of the oil mining business, leaving to the Native the shell and the doubtful privilege of working to enrich the white man."[301]

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[293] E. A. Speed (ed.) *Laws of the Colony of Southern Nigeria Being the Schedule to the Statute Laws Revision Ordinance 1908* (Vol. 2) (Stevens 1908), containing the Mining Regulation (No. 6 - 1905) ('the 1905 Mining Regulation'); Abejide 2012, *supra* note 280, 84 – 91.

[294] 1905 Mining Regulation, art. 9, 12, 16, 20 and schedule I, art 9.

[295] 1905 Mining Regulation, Schedule II, arts 29, 54 (The licensee may build houses, make dams, deposit rubbish, construct roads and railways, cut trees, make shafts, etc. Actions that would render land unfit for farming or living had to be approved by the (British) District Commissioner rather than the native authority), Schedule II art 30 (native farmers whose land is required for mining get one months' notice and 'compensation as may be agreed').

[296] E. A. Speed (ed.) *Laws of the Colony of Southern Nigeria Being the Schedule to the Statute Laws Revision Ordinance 1908* (Vol. 2) (Stevens 1908), containing the Oil Mining Regulation (No. 12 - 1907) ('the 1907 Oil Mining Regulation'); P. Steyn, 'Oil Exploration in Colonial Nigeria' (2009) 37 *The Journal of Imperial and Commonwealth History*, 252-253, 256; L. Atsegbua, 'The Development and acquisition of Oil Licenses and Leases in Nigeria' (2002) 23 *OPEC Review*, 72**;** Raji and Abedije 2014, *supra* note 280, 64.

[297] 1907 Oil Mining Regulation, arts 5 (establishing the government's claim to native lands for the purpose of oil mining), 8 (establishing the exclusivity of an oil mining license), 12 (establishing the penalty for interference with mining rights at 'three months of imprisonment, with or without hard labor') and 16 (permitting 'native activities' such as hunting, farming and using water only to the extent that they do not interfere with oil mining operations).

[298] 1907 Oil Mining Regulation, art 7(2) ('not exceeding 500 square miles'); 1905 Mining Regulation, Schedule II, art 27 ('shall not exceed 5 square miles); the governor initially considered 5 square miles appropriate for oil mining as well, Steyn 2009, *supra* note 296, 256.

[299] 1907 Oil Mining Regulation, arts 5 (establishing the government's claim to native lands for the purpose of oil mining) in conjunction with arts 20 and 21, compare 1905 Mining Regulation, art. 7 (requiring the consent of a native chief for mining on native lands). However, a contextual reading of the ordinance suggests this required consent was mostly pro forma: consent was to be requested by "presenting the chief with the paperwork for signing" (Schedule II, arts 7, 23), despite the fact that most Niger delta chiefs were not able to read the English language. The British were aware of this fact: while all British people involved were to "sign their name", a chief could "sign his name or *make a mark*" (Schedule III, Forms A, B and D). The relevant native authority moreover was a person that was appointed unilaterally by the colonial government and received "half of the fees and rents and one third of the taxes" (Schedule I, art 2). If consent was nonetheless not granted, the colonial authority could overrule the chief's refusal by asserting that "the refusal was unreasonable and detrimental to the interests of [the] community" (art 21).

[300] 1907 Oil Mining Regulation, Schedule I, arts 4-6, compare 1905 Mining Regulation Schedule I, art 2.

[301] Steyn 2009, *supra* note 296, 256-257.

In the early days of British rule over the Nigerian protectorates prospecting for oil was mostly the prerogative of noblemen with capital to spare: demand for coal still far exceeded the demand for petroleum, and prospecting for oil was both highly speculative and capital intensive.[302] After the first World War however, petroleum became big business: in 1912 the British navy switched from coal to oil and the British state became the majority shareholder in BP (then known as the Anglo-Persian oil company or as D'Arcy).[303] As Shell and BP supplied petroleum to British ships and troops fighting the German military, it quickly became apparent that dependable access to petroleum was a matter of national security for the island of Great Britain.[304] Yet, in 1918 the entire British Empire only produced three percent of the world's oil, rendering the UK dependent on American oil for the defense of its territory.[305]

Early oil explorers in the Niger delta found that oil in the Niger delta was easy to locate, but difficult to extract from the swampy soil and even harder to profit from due to the absence of roads and electricity.[306] By 1922, explorers had stopped trying. This changed in 1933, when Shell and BP formed a joint venture (Shell/BP) [307] and applied for a license covering the entirety of Nigeria (920.000 km^2). Although legally, a license could only cover a territory of 1.300 km^2 it was granted at the expense of an application by an individual nobleman who requested a license for 0,25 km^2: Shell/BP was given the exclusive right to prospect for oil in the entire country Nigeria. [308] Now that extracting Nigeria's abundant oil was a matter of British national interest, the era of oil exploration as the rich individual's (ad)venture was over.

Shell/BP did have capital, equipment and know-how that oil prospecting in the Niger delta required: by the time the first shipment of Nigerian oil arrived in Rotterdam in 1958, Shell/BP had spent 32 years and the equivalent of 1.4 billion dollars on prospecting for Nigerian oil.[309] Shell/BP received ample support from the colonial government in its search for Nigerian oil: Shell for example paid only £1 for every 14.6 hectare of land it leased.[310] When several Niger delta tribes in 1948 and 1949 clashed with Shell/BP over its tendency to enter inhabited lands and start oil operations without disseminating any information to the locals, the British colonial government sent in the police to repress the protests through force.[311]

When these protests persisted, Governor McPherson suggested a number of reforms. He proposed that a Nigerian oil company be created whose shares could be bought by the Nigerian people and

[302] Steyn 2009, *supra* note 296, 251-252.
[303] Steyn 2009, *supra* note 296, 251, 253
[304] Royal Dutch Shell, 'Who we are: our history' (*Shell global*, 31 March 2015), available at https://web.archive.org/web/20150331032656/http://www.shell.com/global/aboutshell/who-we-are/our-history/early-20th-century.html
[305] Steyn 2009, *supra* note 296, 251.
[306] Steyn 2009, *supra* note 296, 253-259; from the diary of one of the 'explorers': "We got No 5 Well on oil again and it started to flow at the rate of about 2000 bbls per day. The lagoon is at present all covered with oil ... the Doctor got all covered last night when he went in swimming, which he does every evening."
[307] Steyn 2009, *supra* note 296, 259-260, After several a failed attempts in 1921, D'Arcy (Subsidiary of the Anglo-Persian oil company, later British Petroleum or BP) decided make another attempt at exploiting Nigerian oil after its geologists in 1933 published a report that noted the Nigerian coastline seeped oil. This time, D'Arcy created a joint venture with Royal Dutch Shell, with which it had previously formed Joint Ventures (notably in Myanmar). Shell brought with it the necessary capital and equipment, while D'Arcy on its part brought previous the knowledge obtained in its previous attempt to the partnership. Shell alone could moreover not apply for an exploration license, as it was 60% Dutch-owned and therefore barred from oil exploration in Nigeria.
[308] Steyn 2009, *supra* note 296, 260.
[309] Steyn 2009, *supra* note 296, 261.
[310] Steyn 2009, *supra* note 296, 262.
[311] Steyn 2009, *supra* note 296, 262-264; Raji and Abedije 2014, *supra* note 280, 70.

that a system where the Nigerian government would receive a share of Shell/BP's future revenue should be set up. Shell/BP rejected these suggestions as they would constitute an "undesirable precedent" that would complicate negotiations with other governments. To the frustration of the colonial governor, all of the other members of the Executive Council of the colonial government sided with Shell/BP, stating that the continued search for oil was a matter of national interest.[312]

3.1.2. INDEPENDENCE ON A PLATTER OF GOLD: ECONOMIC NATIONALISM AND ETHNICITY IN THE DECOLONIZATION PROCESS

After the second world war, a pan-Nigerian nationalist movement emerged in response to unpopular wartime policies for the colonies.[313] Nigerian elites of all ethnicities were demanding constitutional and economic reforms, but the colonial governor of Nigeria (McArthur) dismissed such demands out of hand as symptoms of "what appears to be a bitter hatred of the white man and a conviction that the only aim of the European in Africa has been to exploit the African."[314] Nevertheless, when India gained independence and riots broke out in the neighboring Accra (Ghana), boycotts and protests spread all over Nigeria as the nationalist movement continued to gain momentum.[315] Niger delta populations who were resisting Shell's access to their lands found supporters in these nationalists elites, as both resisted British control over Nigerian land and mineral resources.[316]

The UK colonial office replaced governor McArthur with a more reform-minded governor (McPherson). This aligned with its new policy to "sustain [the UK's] position as a world power, particularly in the economic and strategic fields" in the face of growing resistance in the colonies not through force and repression, but by creating "a class with a vested interest in cooperation with the colonial government".[317] The appointment of McPherson presented the nationalist movement with a dilemma: while its leader Nnamdi Azikiwe agreed to collaborate with McPherson on the announced reforms, his more radical youth following insisted that Nigerians should "declare [them]selves free and stand by it and face the music".[318] Azikiwe in turn dismissed his more radical followers as 'hotheads' and assured them that in a UK-led reform process, independence would eventually be handed to them "on a platter of gold".[319] In the 1950s amidst fears of communist infiltration in the colonies many of the leaders of the radical (leftist) wing of the nationalist movements were arrested in a crackdown on socialism.[320] As a result, the radical wing of the nationalist movement disintegrated and only 'moderate' nationalists participated in the UK-led reform process.[321]

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[312] Steyn 2009, *supra* note 296, 264-265.
[313] Rahmani 2015, *supra* note 280, 69-77**;** G. O. Olusanya, 'The Zikist Movement – A Study in Political Radicalism (1646-1950)' (1966) 4 *The Journal of Modern African Studies*, 323.
[314] Rahmani 2015, *supra* note 280, 112; in 1939 senior UK officials had still asserted that Nigeria's independence would still "take generations or even centuries", Rahmani 2015, *supra* note 280, 134.
[315] Lawal 2010, *supra* note 278, 40; Rahmani 2015, *supra* note 280, 110-118; Olusanya 1966, *supra* note 313, 326.
[316] Steyn 2009, *supra* note 296, 262; Abejide 2012, *supra* note 280, 106 – 107.
[317] Lawal 2010, *supra* note 278, 42; see UK Foreign Office CO 936/217/1 'The Problem of Nationalism' (21 June 1952).
[318] For more information on the tensions between the radical (leftist) wing of the nationalist movement and its reform-minded elders, as well as the role the UK played in the eventual prevailing of its 'moderate' voices H. I. Tijani, *Britain, leftist nationalists and the transfer of power in Nigeria* (Routledge 2006) and E. G. Iweriebor, *Radical Politics in Nigeria: The Significance of the Zikist movement* (Ahmadu Bello University Press 1996).
[319] Olusanya 1966, *supra* note 313, 331-332.
[320] Lawal 2010, *supra* note 278, 40-42; Olusanya 1966, *supra* note 313, 325, 330.
[321] Lawal 2010, *supra* note 278, 42, Sir John Macpherson wrote in 1952 that "we are now bringing into force ... a constitution which is not what the extremists want but is that chosen by the people".

The reform process would soon turn into a decolonization process. While the nationalist movement had spanned ethnic boundaries, the moderate elites that participated in the UK-led decolonization process soon became divided across ethnic lines, advocating for the interests of their tribe.[322] In 1914, the emirates and caliphates of Northern Nigeria had been amalgamated with the tribes and kingdoms of Southern Nigeria for budgetary purposes.[323] At its independence Nigeria would comprise 250-400 different ethnic groups with little more in common than being Nigerian – a word that, it was felt, was merely a "distinctive appellation to distinguish those who live in Nigeria from those who do not".[324] It was agreed therefore that independent Nigeria would be a federal state with relatively strong regional governments, so that the many distinct groups would be autonomous in affairs such as healthcare and education.[325]

However, in each of the three regions Nigeria would be divided into, one ethnic group would form a clear majority. Various ethnic groups that would become minorities in their respective regions thus feared oppression by the future regional government, and presented their grievances to the UK government.[326] The government after a formal inquiry and various hearings concluded that "it is seldom possible to draw a clean boundary which does not create a fresh minority" and declined to create additional regions.[327] The regions of independent Nigeria would thus become North (Hausa/Fulani), South (Igbo) and East (Yoruba), with the North being by far the largest and most populous region. The Niger delta populations were split between East and West, and would become minorities either under Yoruba or under Igbo rule.[328] To mitigate oppression by the regional governments, the UK made two recommendations. First, the police force was to be federalized to prevent the regional government from relying on the police force to abuse minorities.[329] Second, a Niger Delta Development Board should be set up to ensure the Niger delta – "one of the most backward areas in the country" – was not further neglected.[330]

Then it had to be determined how the federal government and regional governments would be financed. Especially the question regarding the allocation of fees and royalties from natural resources was divisive: should these be distributed on the basis of population size, needs, or should they accrue to the region in which the mine/oil field is located? Each region feared the rules would disproportionately benefit another region that might then come to dominate economically and

[322] Rahmani 2015, *supra* note 280, 256: "Azikiwe who, at a certain point of time, preached Nigerian unity was by the force of things compelled to become a sectional leader."
[323] C. U. Uche and O. C. Uche, 'Oil and the Politics of Revenue Allocation in Nigeria' (ASC Working Paper 54) (African Studies Centre Leiden 2004), 8-9; see Afigbo 1971, *supra* note 291, 441-443, 451-459 for an exploration of how the administrative structure of Northern Nigeria was (ineffectively) superimposed on Southern Nigeria; for a map see Annex 3 (note the difference in size between Northern and Southern Nigeria).
[324] Rahmani 2015, *supra* note 280, 143; for more on ethnicity, the nationalist movement and ethnic tensions during decolonization, see T. J. Davis and A. Kalu-Nwiwu, 'Education, Ethnicity and the National Integration in the History of Nigeria: Continuing Problems of Africa's Colonial Legacy' (2001) 86 *Journal of Negro History* and A. E. Afigbo, 'Background to Nigerian Federalism: Federal Features in the Colonial State' (1991) 21 *Publius*.
[325] Uche and Uche 2004, *supra* note 323, 10-13; J. B. Ejobowah, 'Who Owns the Oil?' The Politics of Ethnicity in the Niger Delta of Nigeria' (2000) 47 *Africa Today*, 32; Lawal 2010, *supra* note 278, 45.
[326] R. T. Akinyele, 'States Creation in Nigeria: The Willink Report in Retrospect' (1996) 39 *African Studies Review* 1996, 325-326; Courson 2016, *supra* note 281, 48-55.
[327] H. Willink, 'Report of the Commission Appointed to Inquire into Fears of Minorities and the Means of Allying Them' (C.O. 957/4) (Colonial Office 1958) ('Willink Report'), 18; Akinyele 1996, *supra* note 326, 74; Rahmani 2015, *supra* note 280, 230.
[328] Rahmani 2015, *supra* note 280, 227-228; for a map, see Annex 4.
[329] Akinyele 1996, *supra* note 326, 80; Rahmani 2015, *supra* note 280, 230.
[330] Willink Report, *supra* note 327, 95; Akinyele 1996, *supra* note 326, 80; Rahmani 2015, *supra* note 280, 230.

consequently, exercise outsized influence in the federal government.[331] The discovery of oil in commercial quantities in the East region in 1956 made this debate even more fraught: the revenue from oil was expected to (but not guaranteed to) skyrocket in the next few years.[332] Oil royalties were "at once too uncertain to build upon, and too sizeable to ignore."[333] Eventually, the UK recommended that a separate set of rules would apply to the oil revenues: 50 percent would accrue to the region of origin, 20 percent to the federal government, and 30 percent would be distributed between the regions on the basis of population size.[334]

Although the export-focused nature of the Nigerian economy had been a major issue during the period of 'nationalist agitation', this criticism seemed to disappear during the UK-led decolonization process: "less is heard of attacks on 'British imperialism' in Nigeria today than of intelligent discussion on economic problems now of practical and urgent importance".[335] Early on in the decolonization process, attempts by the RNC to entrench its interests had been rejected: it was feared that openly allowing corporations to participate in shaping the new Nigerian government would lead to public unrest.[336] When oil was discovered in 1956 however, this changed. New bids of corporations to have their interests safeguarded were led by Shell.[337] The UK this time was more receptive: in 1956 the Suez Canal – through which two thirds of Europe's oil was shipped – had become inaccessible for oil tankers to and from the UK due to the Suez crisis. It was therefore imperative for the United Kingdom that Nigeria would start to export oil to the UK sooner rather than later.[338]

The colonial administration adopted a series of ordinances to regulate Nigeria's emerging oil industry, establishing Shell's right to build pipelines and refineries and amending the license application processes to speed matters up for Shell.[339] Again, aside from minimal safety requirements and small compensations for the loss of cash crops, the ordinances did not contain any protections for Niger delta populations against potential harm caused by pipelines.[340] Shell managed

[331] Ejobowah 2000, *supra* note 325, 34-35; Rahmani 2015, *supra* note 280, 255; Uche and Uche 2004, *supra* note 323, 13-15.
[332] Uche and Uche 2004, *supra* note 323, 16-17.
[333] Uche and Uche 2004, *supra* note 323, 18.
[334] Rahmani 2015, *supra* note 280, 234; Uche and Uche 2004, *supra* note 323, 17.
[335] Lawal 1994, *supra* note 287, 97; on how colonial divide-and-rule policy shaped ethnic tension during decolonization, see Y. Guichaoua, 'Oil and Political Violence in Nigeria' in J. Lesourne and W. C. Ramsay (eds.) *Governance of oil in Africa: Unfinished Business* (Ifri 2009), 21-26; L. Diamond, 'Class, Ethnicity and the Democratic State: Nigeria: 1950-1966' (1983) 25 *Comparative Studied in History and Society*.
[336] Lawal 1994, *supra* note 287, 100-103, corporations asserted that their representation was required to bring to the deliberations of the Nigerian Legislature "experience and knowledge which are not available from its African members" as well as "the advice of men with practical experience in commerce, industry, mining, development and economic affairs".
[337] Lawal 1994, *supra* note 287, 103.
[338] Lawal 1994, *supra* note 287, 104, the Under Secretary in the Colonial Office stated at the time "I don't mind them [nationalists] messing up their own country: but they must not mess up other people's!"; History.com team, 'Suez Crisis' (*History.com*, 9 November 2009), available at https://www.history.com/topics/cold-war/suez-crisis last accessed 30 July 2021.
[339] J. G. Frynas, M. P. Beck and K. Mellahi, 'Maintaining Corporate Dominance after Decolonization: The First Mover Advantage of Shell-BP in Nigeria' (2000) 27 *Review of African Political Economy*, 411; Atsegbua 2002, *supra* note 296, 57-58, 61: "The laws were meant to induce the oil companies, by favorable contractual terms, to start exploring for petroleum in the Niger Delta's dense forests and mangrove swamps, despite the high expenditures necessary for exploring and developing in that area."
[340] Atsegbua 2002, *supra* note 296, 58, discussing the Mineral Oils (Safety) Regulations of 1952, the Oil Pipelines Act of 1956 and the Petroleum Profit Tax Act of 1959; U. Ukiwo, 'Nigeria's Oil Governance Regime: Challenges and Policies' in A. Langer, U. Ukiwo and P. Mbabazi (eds.) *Oil Wealth and Development in Uganda and Beyond* (Leuven University Press 2020), 313, discussing the Mineral act of 1958 and Petroleum Act of 1958.

to obtain permanent licenses (valid for 30 years) for 38.000 km^2 of Nigeria's most oil-rich land (most of it located in the Niger delta) just before Nigeria became independent. While newcomers such as Chevron and Exxon (who had been allowed into the country in 1955 under US pressure, despite the British monopoly law)[341] were able to establish themselves off-shore, Shell remained dominant on shore, as other oil companies only had access to the land that Shell had relinquished.[342]

Nigeria's first democratic national elections in 1959 were marred by ethnic violence.[343] When the newly elected Nigerian government formally requested independence shortly afterward, previously adopted colonial ordinances were left intact.[344] Prior to independence, nationalist Nigerian elites had supported the grievances of Niger delta populations and had advocated against British control of the Niger delta's land and oil.[345] In the ethnically tense climate of the newly independent Nigeria however Nigerian elites now competed over access to the rents of the rapidly emerging oil industry.[346] Nigeria thus became independent as a nation simultaneously deeply divided and heavily reliant on European multinationals. Although the UK had indeed yielded to the demands of the nationalists and had offered the Nigerians 'independence on a platter of gold', Nigerian independence had come with strings attached, too.[347]

3.1.3. THINGS FALL APART: OIL AND THE NIGERIAN CIVIL WAR

In the first years of Nigerian independence, oil grew rapidly in relative importance: while in 1960 oil had made up 2.5 percent of exports, oil made up a third of exports in 1966.[348] Competition over oil resources likewise intensified: in 1963 North and East created a fourth region comprising most of the Niger delta (Mid-West, in between the East and West region). The opposition party (consisting mostly of Yoruba people from the West region) thus lost access to the royalties from oil that had previously been in its territory.[349] The laws promulgated by the coalition did not significantly depart from the British ordinances: they placed more emphasis on the scope of and protection of Shell's property rights than on instating meaningful protections for the environment and people of the Niger delta. Talk of reforming Nigeria's extraction-oriented economy had now fully made place for competition over the revenue that the extraction of resources generated.[350]

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[341] Ukiwo 2020, *supra* note 340, 313.

[342] S. O. Osoba, 'The Transition to Neo-Colonialism' in T. Falola *Britain and Nigeria: Exploitation or Development* (ZED Books 1987), 228, referring to the license as "the crooked 30-year agreement which the departing colonial authorities had signed with Shell-BP."; Frynas, Beck and Mellahi 2000, *supra* note 339, 410-413; Atsegbua 2002, *supra* note 296, 58; C. U. Uche, 'Oil, British Interests and the Nigerian Civil War' (2008) 49 *The Journal of African History*, 122.

[343] Rahmani 2015, *supra* note 280, 240.

[344] Lawal 1994, *supra* note 287, 105; Section 55 of The Nigerian Independence Constitution 1960.

[345] Steyn 2009, *supra* note 296, 262-263.

[346] S. M. Tarzi, "Third World Governments and Multinational Corporations: Dynamics of Host's Bargaining Power" (1991) 10 *International Relations*, 237; Guichaoua 2009, *supra* note 335, 21-26.

[347] For a similar view, see Lawal 1994, *supra* note 287, 106-107; Lawal 2010, *supra* note 278, 56-58.

[348] Abejide 2012, *supra* note 280, 122-124; Uche 2008, *supra* note 323, 134, stating that oil exports rose from 17000 barrels per day at independence to 266000 barrels per day in 1965; K. A. Klieman, 'U.S. Oil Companies, the Nigerian Civil War and the Origins of Opacity in the Nigerian Oil Industry' (2012) 99 *Journal of American History*, 157; I.A. Badmus, 'Oiling the Guns and Gunning for Oil: Oil Violence, Arms Proliferation and the Destruction of Nigeria's Niger-Delta' (2010) 2 *Journal of Alternative Perspectives in the Social Sciences* 2010, 334.

[349] Uche 2008, *supra* note 342, 116; Ejobowah 2000, *supra* note 325, 33; Klieman 2012, *supra* note 348, 156-157; Uche and Uche 2004, *supra* note 323, 20.

[350] Uche 2008, *supra* note 342, 115-117; Atsegbua 2002, *supra* note 296, 58; Abejide 2012, *supra* note 280, 134-135; see for instance the Mineral Oil (Safety) Regulations of 1963 and the Oil Pipelines Act (No. 24) of 1965; on how the UK-lead decolonization process incentivized competition (and conflict) over natural resources, see C. E. Malachy and

Since oil exports had started in 1958, oil revenues included not only fees and royalties, but also taxes. Unlike the fees and royalties, the 50 percent profit tax was to be paid fully to the federal government.[351] Corruption in the federal government at this point had become rampant, and the rapidly increasing federal income from oil taxes was poorly accounted for.[352] In January of 1966 Igbo military officers killed the Northern head of state as well as some northern military officers and politicians, accusing them of plundering the East's oil wealth.[353] After suspending the constitution, the new Igbo head of state dissolved parliament and abolished the regional governments: the entirety of Nigeria was now under the new military administration's control.[354] An armed group in the Niger delta – the Niger Delta Volunteer Force – attempted (but failed) to secede in an attempt to reclaim local control over the Niger delta's oil resources.[355] Northern soldiers responded to the Igbo coup with a bloody counter coup, appointing general Gowon as the new military leader of Nigeria, who immediately revoked the unification decree.[356]

On 30 December of 1966, the Gowon administration passed an amendment to the tax law that required oil corporations to pay taxes on the basis of the (higher) posted prices instead of on realized prices.[357] Shell had been negotiating this law in secret for several years: Shell hoped that by agreeing to these terms, it could prevent Nigeria from joining OPEC. The US oil corporations perceived the law as an attempt to keep any competition at bay: while Shell with its established presence could afford the higher taxes, oil companies who were new to Nigeria could not.[358] In January of 1967, the oil corporations, aided by the CIA, campaigned vigorously against the oil law. An article by the non-existent Nigerian 'Ista Man' ("Review that Tax Law Please: Oil Monopoly in Nigeria—A Question of Time") alleged that the tax law would lead to the East's dominance over the other regions, leading "to an explosive discontent in these areas, hungering for equitable distribution of amenities."[359] The timing of this campaign was rather unfortunate because it sought to exploit existing anxieties over the distribution of the East's oil revenues right when Gowon and Ojukwu (the military governor of the East region) were negotiating about greater autonomy for the East region under northern federal rule. Just a week after the publication of the series of articles, Gowon reneged on the agreement they had been able to reach on the matter.[360]

F. O Nwobi, 'Integration Policies as Structures of Disintegration: the Political Economy of Nationhood and Resource Control in Nigeria' (2014) 6 *Journal of African Studies and Development*; Diamond 1983, *supra* note 335.

[351] Petroleum Profit Tax Ordinance (Colonial Ordinance 1959 no. 15); Abejide 2012, *supra* note 280, 131; Ejobowah 2000, *supra* note 325, 34; Ukiwo 2020, *supra* note 340, 310.

[352] K. Omeje, 'The Rentier State: Oil-Related Legislation and Conflict in the Niger Delta, Nigeria' (2006) 6 *Conflict, Security and Development*, 217; M. M. Ogbeidi, 'Political Leadership and Corruption in Nigeria since 1960: A Socio-Economic Analysis' (2012) 1 *Journal of Nigeria Studies*, 6-7.

[353] Uche 2008, *supra* note 342, 117; Klieman 2012, *supra* note 348, 156-157.

[354] Uche 2008, *supra* note 342, 119; Uche and Uche 2004, *supra* note 348, 21.

[355] Ejobowah 2000, *supra* note 325, 33; Afam Ifedi and Ndumbe Any 2011, *supra* note 280, 82; Abejide 2012, *supra* note 280, 234 – 237; Courson 2016, *supra* note 281, 56 – 60; upon announcing the secession, Isaac Boro called on the Niger delta people to "remember your 70-year-old grandmother who still farms before she eats; remember also your poverty-stricken people; remember, too, your petroleum which is being pumped out daily from your veins; and then fight for your freedom."

[356] Uche 2008, *supra* note 342, 119; Klieman 2012, *supra* note 348, 157.

[357] Ejobowah 2000, *supra* note 325, 34; Abejide 2012, *supra* note 280, 132-133.

[358] Uche 2008, *supra* note 342, 122, explaining that despite having lost its monopoly on Nigerian oil in 1955, Shell still accounted for 84% of Nigeria's oil exports at the beginning of the civil war in 1967; Klieman 2012, *supra* note 348, 159-161.

[359] Klieman 2012, *supra* note 348, 161.

[360] Klieman 2012, *supra* note 348, 161.

In May of 1967 Gowon proceeded to divide Nigeria into twelve states, separating the Igbo-majority areas from the oil-rich areas of southern Nigeria.[361] In response, the military governor of the East region announced the independent republic of Biafra, which comprised East and the Niger delta – together, these regions contained approximately two third of Nigeria's oil reserves.[362] Shell was then faced with a choice: both Biafra and Nigeria demanded the payment of oil royalties.[363] The UK advised to pay out royalties to Nigeria: Gowon "espoused a sane, moderate and essentially practical approach" towards the UK and British corporations in Nigeria, whereas Igbo-rulers were "less sensible in attitude towards expatriate economic interests."[364] Importantly, if Shell were to anger Nigeria, Nigeria might renege on its promise to exempt oil tankers from the sea and air blockades it had put in place around Biafra.[365] Since most Arab nations were boycotting the UK due to its involvement in the war between Israel and Egypt, a Nigerian oil blockade would seriously raise the price of fuel in the UK.[366] Eventually, Shell opted to pay royalties to Biafra, but only a symbolic amount. This angered both sides: Biafra moved to seize and destroy Shell's assets, and Nigeria extended its sea blockade to oil tankers.[367]

The UK then reneged on its promise to provide Nigeria military support, but Nigeria would not budge on its oil blockade.[368] Now that oil production had stopped, the UK urged Shell to "clamber hastily back on the Lagos side of the fence with the cheque book at the ready".[369] Shell, the government of Nigeria and the UK now shared an interest in Nigerian control of the East region and a quick resumption of oil production.[370] With the advance payments made by Shell, Nigeria was able to purchase weapons from the UK.[371] In 1969, Shell completed a second terminal in Nigerian territories, and oil exports rose to their previous levels.[372] While Nigeria had access to military support from the US, the USSR and the UK as well as oil revenues, Biafra was still under an air and sea blockade – which by then was causing a humanitarian disaster – and lost the war soon after.[373]

It was in this last year (in which the government of Nigeria was reliant on Shell and at war with the people who inhabited the oil rich regions) that oil was comprehensively regulated in the 1969 oil decree. The oil decree was strikingly similar to the 1907 oil ordinance: the ownership of oil was vested in the federal government, and the standards which were meant to protect local communities were overly flexible.[374] Most importantly, the power to further regulate the oil industry was vested

[361] Uche and Uche 2004, *supra* note 323, 21; Uche 2008, *supra* note 342, 120.
[362] Omeje 2006, *supra* note 352, 217, stating that if Biafra had successfully seceded Nigeria would have lost 75% of its oil reserves; Ukiwo 2020, *supra* note 340, 311; see Annex 5 for a map.
[363] Uche 2008, *supra* note 342, 122-127; Klieman 2012, *supra* note 348, 162; Ejobowah 2000, *supra* note 325, 35.
[364] Uche 2008, *supra* note 342, 113, 118-119, 121.
[365] *Ibid*, 131; Klieman 2012, *supra* note 348, 163.
[366] Uche 2008, *supra* note 342, 113, 131.
[367] *Ibid*, 123-124, 132.
[368] *Ibid*, 131-133.
[369] *Ibid*, 126.
[370] *Ibid*, 130, describing how Shell worked behind the scenes to influence public opinion as it was agreed that "that it would be most unwise for us to refer publicly in the House to the importance of oil interests in our calculations".
[371] *Ibid*, 132.
[372] *Ibid*, 134, summing up that before the war, oil export had stood at 380 000 barrels per day. At the height of the war, this figure had dropped to 142 000 barrels per day. When the terminal connecting the Niger delta's oil fields located in Nigeria (as opposed to Biafra) to the harbor was completed, this number rose up to 990 000 barrels per day.
[373] *Ibid*, 133.
[374] Nigerian Petroleum Decree (No. 51, 1969), which vests ownership of oil in the federal government and formulates ambiguous standards for oil corporations (e.g. end oil spills "if possible" and take "practical precautions" to prevent oil spills); Oil in Navigable Waters Act of 1968, articles 4 (containing a loophole that allows oil corporations to evade liability for oil spills) and 10(1) (establishing establishes the maximum fine for failing to report an oil spill at 400 Naira

in the federal minister of petroleum.[375] The rules, understandings and institutions that govern oil extraction in the Niger delta that were put in place in 1969 have not been substantially altered since and continue to form the foundation of the SAF of oil extraction in the Niger delta.[376]

3.1.4. SLICING THE OIL CAKE: NATIONALIZATION, CENTRALIZATION AND THE OIL BOOM

After the war, Nigeria's military government centralized control over the oil industry. The share of the oil royalties that the federal government received was increased from 20 to 80 percent, and the federal government claimed 100 percent of the royalties from offshore oil production.[377] Additionally, the federal government created new states. Currently, Nigeria comprises not twelve, but 36 states.[378] Thus, while Nigeria became independent as a loose federation of three financially independent large regions and a federal government financed by these regional governments; Nigeria now is a centralized federation of smaller states who are financially dependent on the federal government rather than vice versa.[379]

Simultaneously, the federal government nationalized the oil industry by establishing the Nigerian National Oil Company (NNOC), which seized between 55 percent and 60 percent of the shares of each of the multinational oil corporations operating in Nigeria.[380] In 1979, the Nigerian government fully nationalized BP in order to loosen its ties to the UK (who was BP's majority shareholder).[381] As a result, what was formerly Shell/BP became the joint venture Shell Nigeria of which the Nigerian government owned 80 percent.[382] Moreover, in 1977, the NNOC and the ministry of petroleum merged into the Nigerian National Petroleum Company (NNPC), erasing the distinction between the state oil company and the ministry that regulated Nigerian oil.[383] Nigeria's oil industry was now firmly under centralized control: the ministry of petroleum had become both Shell Nigeria's co-owner and regulator.

(the equivalent of 1 US dollar)); Atsegbua 2002, *supra* note 296, 66 "The Petroleum Act, to which much economic hope had been pinned, proved to be hollow, in that … no worthwhile changes in the rights of the transnational concessionaries had taken place in Nigeria's favor"; Ejobowah 2000, *supra* note 325, 35.

[375] Ukiwo 2020, *supra* note 340, 313-314.

[376] E. O. Ekhator, 'Public Regulation of the Oil and Gas Industry in Nigeria: An Evaluation' (2016) 21 *Annual Survey of International & Comparative Law*, 53, 56 – 57, 61, 67; K. G. Kingston, 'The Negative Effects of Petroluem Gaming on Nigeria's Institutional and Legal Regimes' (2019) 6 *Port Harcourt Journal of Business Law*, 161-162.

[377] Uche and Uche 2004, *supra* note 323, 24-30; Distributive Pool Account (DPA) Decree No. 13 of 1970, decree No. 6 of 1975; Decree No 9 of 1971; Exclusive Economic Zone Act of 1978; Omeje 2004, *supra* note 179, 425; Ekhator 2016, *supra* note 376, 53, 55; Omeje 2006, *supra* note 352, 218; Kingston 2019, *supra* note 376, 159; S. Ruffin, 'Royal Dutch Shell Environmentally Degrades Nigeria's Niger delta Region: A Land of Blacks' (2012) 5 *Environmental Justice*, 148; Badmus 2010, *supra* note 348, 331-332; Ejobowah 2000, *supra* note 325, 35, detailing that oil revenue went from 5 % of total national revenue in 1965 to 80% by 1980.

[378] Omeje 2006, *supra* note 352, 218; Ejobowah 2000, *supra* note 325, 35-36; Uche and Uche 2004, *supra* note 323, 25; Decree Number 12 of 1976; Watts 2004, *supra* note 279, 73 – 74.

[379] Ejobowah 2000, *supra* note 325, 42, Ejobowah goes as far as calling Nigeria a 'de facto unitary' state, because the 'federal government's exercises of absolute powers' has rendered the concept of states' rights a legal fiction; Akinyele 1996, *supra* note 326, 87-88 on the various incentives for creating additional states; Uche and Uche 2004, *supra* note 323, 25; Omeje 2004, *supra* note 179, 426 Ekhator 2016, *supra* note 376, 52.

[380] Omeje 2006, *supra* note 352, 218; Frynas, Beck and Mellahi 2000, *supra* note 339, 414-415; Atsegbua 2002, *supra* note 296, 64; Abejide 2012, *supra* note 280, 136-139; Ukiwo 2020, *supra* note 340, 315.

[381] Frynas, Beck and Mellahi 2000, *supra* note 339, 415-416; Ukiwo 2020, *supra* note 340, 315; for a more in depth examination of the impact the nationalization of BP had on the economic and political dependence on Shell Nigeria see A. Genova, 'Nigeria's Nationalization of British Petroleum' (2010) 43 *The International Journal of African Historical Studies*.

[382] Omeje 2006, *supra* note 352, 218; Abejide 2012, *supra* note 280, 136-139.

[383] Atsegbua 2002, *supra* note 296, 64; Ukiwo 2020, *supra* note 340, 315-316.

The centralization and nationalization of oil amidst the 1970s oil boom resulted in an unprecedented inflow of cash into Nigeria's military government – not long after the civil war Gowon remarked that "Nigeria's problem was not absence of money, but how to spend it".[384] This large inflow of cash had had two major consequences. The circumstance that the money was not allocated to an expenditure in advance,[385] the oil industry's opacity,[386] the Niger delta's culture of intermediaries as well as the prevalence of clientelism and prebendalism in Nigerian politics[387] contributed to a culture of corruption: billions of oil-boom dollars disappeared into foreign bank accounts of individual politicians.[388] Secondly, the costs of labor rose: with the large demand for workers in the oil industry, the agricultural sector could not afford to offer competitive salaries. Agriculture, which had accounted for a major share of Nigerian export, declined in relative importance and soon became irrelevant in relation to the federal budget and the valuation of the Naira.[389]

3.1.5. OIL EXTRACTION AS AN ENDURING LOGIC OF GOVERNANCE

Oil was discovered in Nigeria in the beginning of the 20th century, when Nigeria was under British rule. The foundational logic of oil governance then was one of extraction and export. The interests of the entity regulating oil were closely aligned with those of Shell. While the UK government had a vested interest in extracting the Niger delta's oil and to ship it to the United Kingdom, where it fueled the navy and the emerging industrial economy, it had no significant investment in the wants and needs of the Niger delta's indigenous population (whom the UK government did not represent). Upon independence however, the colonial logic of export and extraction continued to be central to the governance of the Niger delta's oil. Although nationalists had initially resisted and challenged the colonial logic of extraction, it was reproduced through the UK led decolonization process, which incentivized competition over the rents of the Nigerian economy rather than rethinking and rebuilding the Nigerian economy.

This dynamic was solidified when the competition over resources escalated into a civil war which was won by the North. During the civil war, when the future of both Nigeria and Biafra was dependent on oil revenue, the regulatory framework for oil extraction that remains in force until this day was laid down. As with the British colonial government, the northern-led military government's interests were aligned with those of Shell (namely to extract the Niger delta's oil, export it and sell it for profit). As the British colonial government, the northern-led military government had no investment in the needs and rights of the communities living in the oil-rich territories with whom they were at war. The re-unification and re-building of Nigeria coincided with a massive boom in oil prices, leading to a number of policies (centralization and nationalization) and developments (corruption and the creation of a rentier economy) that have permanently tied the interests (and even the very viability) of the federal government to the continued extraction and export of the Niger delta's oil.[390]

[384] S. O. Usman, 'The Opacity and Conduit of Corruption in the Nigeria Oil Sector: Beyond the Rhetoric of the Anti-Corruption Crusade' (2011) 13 *Journal of Sustainable Development in Africa*, 295.
[385] Usman 2011, *supra* note 348.
[386] Klieman 2012, *supra* note 348, 163-164.
[387] D. Babalola, 'The Underdevelopment of Nigeria's Niger Delta Region: Who is to Blame?' (2014) 7 *Journal of Sustainable Development*, 123-124; Ogbeidi 2012, *supra* note 352, 6.
[388] Babalola 2014, *supra* note 387, 124-126; Ogbeidi 2012, *supra* note 352, 7; Ekhator 2016, *supra* note 376, 50.
[389] Abejide 2012, *supra* note 280, 120-121, 207.
[390] Ukiwo 2020, *supra* note 340, 310.

Despite the turbulent history of Nigeria and the Niger delta, the logic that presently informs the governance of the Niger delta's oil is fundamentally the same logic of extraction without regard for the human or environmental cost that informed the first oil ordinance of 1907. Paradoxically, this colonial logic was not dismantled, but entrenched during the decolonization process and solidified through the resulting civil war. In the SAF of Nigerian oil, it appears, "the more things change, the more they stay the same". This is consistent with Fligstein and McAdams hypothesis that a field – especially one in which the incumbent is far more powerful than the challengers – remains relatively stable after it is first settled. If a field emerges amidst large power disparities, the settlement in the field is likely to be imposed rather than negotiated, and thus more starkly reflects the interests and priorities of the incumbent at the expense of the interests and needs of the challengers. After a field has stabilized, the incumbent will generally be able to defend this inequitable settlement, as the inequitable settlement itself gives the incumbent considerable advantages.[391]

The absence of meaningful protection of the human rights and basic needs of the Niger delta populations against infringement by multinational oil companies therefore can hardly be understood as a 'gap' in the governance of oil extraction in the Niger delta. Instead, it is inherent to the governance of oil extraction in the Niger delta and a feature of that governance. Absence of meaningful protection of Niger delta communities needs and rights does not result from a failure or inability to govern or an absence of the state, but from a logic of governance characteristic of a state that is dependent on the continued extraction and export of oil: a petro-state. The lack of meaningful protection of the human rights and basic needs of the Niger delta populations against infringement by multinational oil companies therefore cannot be adequately characterized as a consequence of the rapid globalization and privatization of the 1980s and 1990s. [392] Instead, this lack is the product of a globalization that occurred a century before in the 1880s and 1890s, when the industrial revolution triggered Europe's battle for Africa's natural resources and land.

3.2. THE RULES OF OIL IN PRESENT DAY NIGERIA

By the 1980s, the systems and structures that shape the political economy of oil extraction in the Niger delta were all firmly in place.[393] By then, the SAF of oil extraction in the Niger delta was a settled field in which the incumbent (Shell) and the challengers (various Niger delta populations) shared an understanding of what was going on in the field and of who had power and why. The issues at stake had mostly been decided: the federal government owns the Niger delta's oil, Shell can extract the Niger delta's oil by virtue of a license issued by the federal government and the minister of petroleum determines what limits there are to Shell's extraction of the Niger delta's oil.[394] As the governance entity in the field of oil extraction in the Niger delta, the federal

[391] Fligstein and McAdams 2012a, *supra* note 41, 90, 94-98, 186, 189.
[392] For an example of the ubiquitous understanding of business-related human rights problems in the global south as a product of globalization, see https://www.fidh.org/en/issues/globalisation-human-rights/.
[393] Watts calls this the oil complex: a statutory monopoly over mineral exploitation (the 1969 Petroleum Law in Nigeria, reinforced by a number of key laws including the 1978 Land Use Decree), a nationalized oil company (NNPC) that operates through joint ventures with oil majors who are granted territorial concessions, the security apparatuses of the state (and the companies) to ensure that costly investments are secured, the oil producing communities, and a political mechanism through which oil revenues accrue to the federal state, M. Watts, 'Economies of Violence: More Oil, More Blood' (2003) 38 *Economic and Political Weekly*, 5092 and Watts 2004, *supra* note 279, 54, 60.
[394] Section 44(3) of the 1999 constitution vests mineral rights in the federal government; for an exploration of the way these rules and understandings are entrenched in Nigerian law and politics see Ekhator 2016, *supra* note 376, 49, 52 - 53, 64-65, 67, 90 and Kingston 2019, *supra* note 376, 161-163.

government does not function as an independent arbiter of Shell and the Niger delta population's interests, but – as the governance entity does in most stable fields[395] – enforces a set of rules that reflect the needs of Shell as the incumbent at the expense of the needs of the Niger delta communities.

This is a product of the fact that the interests of the federal government are aligned with those of Shell. Oil revenues make up approximately 80 percent of the federal budget. If oil revenues were to decline, this would directly and drastically impact the federal government's funding and threaten the viability of the federal government itself.[396] Oil moreover makes up 95 percent of Nigeria's exports.[397] If oil exports dropped significantly, the value of the Naira would drop with it, making petroleum and food – which Nigeria imports from countries such as the UK and the Netherlands – much more expensive,[398] which in turn might lead (and has lead)[399] to social unrest. Furthermore, since the federal government owns 55 percent of Shell Nigeria, it shoulders 55 percent of the costs Shell Nigeria incurs, and receives 55 percent of Shell Nigeria's profits. Measures that increase the cost of business for Shell or that decrease Shell's profit margin will (in part) be paid for by the federal government itself.[400]

Federal politicians are also more likely to be reliant on Shell than on the Niger delta inhabitants. Given the clientelist nature of Nigerian politics, a successful career in politics is dependent on a politician's ability to secure benefits for their constituents – relations are maintained by favors and gifts.[401] Because ethnicity plays a major role in elections, federal politicians are generally members of one of the three major ethnic groups. The politicians with access to oil wealth (through the presidency, the ministry of petroleum or the NNPC) therefore have a greater stake in securing good relations with the major oil corporations so that they can ensure access to oil rents for their in-group than they have in catering to the Niger delta's ethnic minorities that are unlikely to vote for them.[402] As a result, the regulations and practices that govern oil extraction in the Niger delta tend to prioritize oil extraction and exports over basic human rights protections for Niger delta inhabitants.

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[395] Fligstein and McAdam 2012a, *supra* note 41, 94.

[396] Ruffin 2012, *supra* note 377, 147; Watts 2003, *supra* note 393, 5089; Badmus 2010, *supra* note 348, 330; Omeje 2006, *supra* note 352, 212.

[397] Ruffin 2012, *supra* note 377, 147; Watts 2003, *supra* note 383, 5089.

[398] Because oil makes up most of Nigeria's exports, export decreases when oil production decreases. With decreased export, demand for the Naira, and thereby the price of the Naira, falls. This in turn makes it more expensive to import goods. As Nigeria imports most of its food and petroleum from Europe, prices of petrol and food will rise. When a large group of Nigerians suddenly becomes unable to afford basic needs, this tends to lead to social unrest.

[399] See for instance A. Maja-Pearce, 'The mark of the beast: Nigeria in the year 1989' (1989) 9 *Index on Censorship* on the wave of protests sparked by (the human consequences of) the fiscal and economic measures through which Nigeria responded to the falling oil prices of the 1980s.

[400] N. A. Izoukumor, 'A Critical Assessment of the Pollution Prevention Laws and Regulations of Nigeria: Why They Failed to Protect the Environment of Nigeria' (2019) 87 *Journal of Law, Policy and Globalization*, 46; M. van Dorp, 'How Shell, Total and Eni Benefit from Taks Breaks in Nigeria's Gas Industry' (Stichting Onderzoek Multinationale Ondernemingen 2016), 30 – 33 available at https://www.somo.nl/wp-content/uploads/2016/02/How-Shell-Total-and-Eni-benefit-from-tax-breaks-in-Nigerias-gas-industry.pdf.

[401] D. Pratten, 'The Precariousness of Prebendalism' in W. Adebanwi and E. Obadare (eds.), *Democracy and Prebendalism in Nigera: Critical Interpretations* (Palgrave Macmillan 2013); Omeje 2006, *supra* note 352, 212-213; Babalola 2014, *supra* note 387, 125, arguing that due to the scale and salience of corruption, "public office brings enormous opportunities to the office holders, and this explains why politics in the country is a zero-sum game and a matter of life and death"; Adibe, Nwagwu and Albert 2018, *supra* note 176, 347.

[402] Omeje 2006, *supra* note 352, 212; R. T. Suberu, 'Prebendal Politics and Federal Governance in Nigeria' in W. Adebanwi and E. Obadare (eds.), *Democracy and Prebendalism in Nigera: Critical Interpretations* (Palgrave Macmillan 2013); Ruffin 2012, *supra* note 377, 149; Omeje 2004, *supra* note 179, 428; Adibe, Nwagwu and Albert 2018, *supra* note 176, 345.

Two examples illustrate this: the absence of adequate compensation for loss of land and the non-existent enforcement of the prohibition on gas-flaring.

Compensation for loss of land

In Nigeria, individuals who lose land due to the construction of a pipeline or oil facility formally have no right to compensation: inhabitants of land do not own, but 'occupy' the land, and their right to occupy it can be revoked for the purpose of constructing oil pipelines or facilities.[403] Nevertheless, Shell usually voluntarily compensates the inhabitants of the land in such cases.[404] This sum however is not nearly sufficient to cover the loss, as Shell pays compensation on the basis of a unilateral estimate of the land's market value.[405] Much of the Niger delta's land is used for subsistence farming; what is lost is not the property value of the land, but a family's (or even community's) primary source of food and income. While the market value of land in the Niger delta is low, the price of food in the Niger delta is high due to the presence of numerous oil workers who earn an internationally competitive salary.[406] As a result, when a family (or community) goes from growing their food to having to buy their food, the compensation is rarely enough to sustain them, even for a brief period: in one case in 2003 for example the loss of 100.000 m^2 of land resulted in a one-off compensatory sum of approximately 210 dollars.[407]

Individuals or communities whose land becomes unusable due to an oil spill can sue Shell on the basis of negligence. However, there are various obstacles to successfully obtaining compensation in this way. Claimants have to prove that the spill was caused by Shell's negligence.[408] This is rather difficult, for three reasons. First, claimants have to show that Shell disregarded standards of care that are either quite vague ("in accordance with good oilfield practice, in a "workmanlike manner", "take precautions where practicable") or incredibly complex and technical.[409] Secondly, the claimants have to prove that it was not another oil spill, sabotage or a weather event that caused or contributed to the spill. Third, unlike in other jurisdictions, there are no provisions that reverse the burden of proof in such cases: Shell does not have to release its internal documents or show that it has kept up with maintenance. The court is also unwilling to presume that any negligence caused the spill unless Shell shows otherwise: instead, claimants have to commission and finance their own scientific studies in order to prove that the negligent act(s) were the cause of the spill.[410]

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[403] Land Use Decree (No.6 1978) ('1978 Land Use Act'), articles 1, 27 and 28; Ekhator 2016, *supra* note 376, 53, 68-72, 77; Kingston 2019, *supra* note 376, 159; Section 28(1) of the 1978 Land Use Decree; Ruffin 2012, *supra* note 377, 148; W. Akpan, 'Putting Oil First? Some Ethnographic Aspects of Petroleum-related Land Use Controversies in Nigeria' (2005) 9 *African Sociological Review*, 145-149; Abejide 2012, *supra* note 280, 195.

[404] Omeje 2006, *supra* note 352, 221; Akpan 2005, *supra* note 403, 140 - 142, 149, explaining that section 77 of the Petroleum Act of 1969 sets 'fair and reasonable' as the only guideline for the amount of the compensation. Given the imbalance in knowledge, resources and power and given the fact that the 1978 Land Use Act abolished any legal or administrative recourse when land is expropriated, Shell sets these rates practically unilaterally.

[405] Akpan 2005, *supra* note 403, 142.

[406] Ekhator 2016, *supra* note 376, 73,77; Gandu 2011, *supra* note 91, 17, 23, 187.

[407] Akpan 2005, *supra* note 403, 142-144.

[408] J. G. Frynas, 'Legal Change in Africa: Evidence from Oil-Related Litigation in Nigeria' (1999) 43 *Journal of African Law*, 123 – 125.

[409] Izoukumor 2019, *supra* note 400, 44 – 45, 47; Ekhator 2016, *supra* note 376, 63, 65; Mineral Oil (Safety) Regulations article 7; Regulations 25 and 36 of the Petroleum (Drilling and Production) regulation each contain vague and lax standards, such as "shall take, where possible, prompt steps to clean up"; the Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN) on the other hand runs 415 and is filled with very specific standards not comprehensible for lay people.

[410] Frynas 1999, *supra* note 408, 130 – 132; Ekhator 2016, *supra* note 376, 72.

Due to Nigeria's strict procedural laws, bringing a case against Shell is quite expensive. Negligence claims require professionally conducted scientific studies, and testimonies by experts in *each relevant field*; often, plaintiffs have to hire several experts to prove one claim.[411] Strict procedural laws also prevent villages from joining their resources to file a lawsuit: claims for damage to individual property have to be filed individually, and claims for damage to communal property communally – the individual lawsuits cannot be joined to the communal one.[412] Strict laws on statutory limitation require that the claim is filed within six years of the moment the negligence *occurred*. That means that if Shell's negligence has not led to harmful consequences within the first six years, no suit can be filed. Even if the consequence of the negligence does occur within six years, the Niger delta inhabitants must have become aware of their legal right to sue, familiarized themselves with the complex Nigerian court system to file a suit in the appropriate manner, have found a lawyer, and have raised the funds to conduct elaborate scientific studies before this time period lapses.[413]

If claimants do manage to file and prove their case, this often does not suffice in fully redressing the harm caused by the spill. To begin with, judges are often reluctant to grant an injunction (a court order to start or stop doing something) against Shell, sometimes explicitly citing that they are taking into account the importance of Shell's operations to the national economy.[414] While Shell in such cases is ordered to pay compensation, Shell is not ordered to either change its maintenance procedures, close a leaking terminal or clean up the spills. In cases where courts have issued significant injunctions against Shell, they have not been enforced, since it is up to the executive branch of the government to do so.[415] The compensation Shell is ordered to pay moreover tends to be quite low in comparison to the economic damage that results from the spill.[416]

Gas flaring

Routine gas flaring (production flaring) is the practice of burning off petroleum gas present in oil reservoirs in order to get rid of it in a cost-effective way.[417] Technology to capture the associated petroleum gas and stop routine flaring has long been available.[418] Nevertheless, routine gas flaring remains common in Nigeria: in the Niger delta, approximately 2 million people live within four kilometers of a flaring site.[419] The gasses released by the practice of gas flaring have been associated with cancer, lung damage, skin problems, neurological defects and reproductive problems. The light pollution that results from flaring – near flaring sites, it never gets dark – has

[411] Frynas 1999, *supra* note 408, 137 – 138.
[412] Frynas 1999, *supra* note 408, 132 – 136.
[413] Frynas 1999, *supra* note 408, 128 – 130.
[414] Frynas 1999, *supra* note 408, 122 – 123; one judge explained his choice to not grant the requested injunction by citing the oil industry as "the main source of this country's revenue": to grant an order that would complicate Shell's operations in the Niger delta would therefore negatively impact the interests of third persons; Ekhator 2016, *supra* note 376, 87 citing Allan Irou v. Shell (W/89/71) (26 August 2008), where the court declined to order Shell to cease polluting farmland and fishing points, as "such an injunction will tamper with the operations of the company and have a negative impact on the revenue accruing to the federal government."
[415] Ekhator 2016, *supra* note 376, 66-67.
[416] Frynas 1999, *supra* note 408, 138 -143; Ekhator 2016, *supra* note 376, 72.
[417] Ruffin 2012, *supra* note 377, 141; Ekhator 2016, *supra* note 376, 78.
[418] M. Davis and J. Charles, 'Tackling Flaring: Lessons from the North Sea' (*Energy Voice*, 8 October 2020), available at https://www.energyvoice.com/opinion/270340/tackling-flaring-lessons-from-the-north-sea/ last accessed 18 July 2021.
[419] L. Schick, P. Myles and O. E. Okelum, 'Gas Flaring Continues Schorching Niger Delta' (*Deutsche Welle,* 14 November 2018) available at https://p.dw.com/p/37Ned last accessed 18 July 2021.

been shown to have a negative impact on mental health, to disturb wildlife and reduce biodiversity. The gasses also cause acid rains that make the soil too acidic for farming.[420]

Routine gas flaring remains standard practice for Shell Nigeria, despite the fact that in 1979 oil corporations were given until 1980 to submit their plans to capture petroleum associated gas and were ordered to cease all gas flaring by 1 January 1984.[421] Oil corporations objected that this would be difficult to achieve on such short notice.[422] To accommodate the oil companies, the regulation that was passed a year later to implement this law (the 1985 gas flaring regulation) included a transitory provision that exempted approximately half of all oil fields from the prohibition.[423] Although these provisions were meant to be transitory ones, they were was never revoked and remain in force until today.[424]

Even in cases where flaring is prohibited however corporations continue to routinely flare excess gas.[425] Although Nigerian law allows for the revocation of oil licenses or imprisonment as a penalty for a failure to observe the prohibition of gas flaring, no oil company has been sanctioned in this way for their routine violation of Nigerian law.[426] In 2005, Niger delta residents sued Shell for their continued flaring and won: Shell was ordered to take immediate steps to stop gas flaring.[427] Shell however ignored the ruling, and the executive branch of the federal government made no effort to enforce it.[428] In its latest efforts to reduce flaring, the Nigerian legislature has increased the fine for production flaring from four cents per cubic meter to two dollars per cubic meter. Nevertheless, as the fine is tax-deductible, flaring continues to be the most cost-effective option for Shell.[429] Shell

[420] Abejide 2012, *supra* note 280, 158 -165; Ruffin 2012, *supra* note 377, 141; Schick, Myles and Okelum 2018, *supra* note 419; A. O. Ajugwo, 'Negative effects of Gas Flaring: The Nigerian Experience' (2013) 1 *Journal of Environment Pollution and Human Health;* A. E. Ite and U. J. Ibok, 'Gas Flaring and Venting Associated with Petroleum Exploration and Production in Nigeria's Niger Delta' (2013) 1 *American Journal of Environmental Protection*; C. A. Osuoha, 'Gas Flaring in Niger Delta Region of Nigeria: Cost, Ecological and Human Health Implications' (2017) 6 *Environmental Management and Sustainable Development;* C. Chuwa and D. Santillo, 'Air Pollution Due to Gas Flaring in the Niger Delta: A Review of Current State of Knowledge' (Research Laboratories Technical Report) (Greenpeace 2017) available at https://www.greenpeace.to/greenpeace/wp-content/uploads/2017/06/Niger-Delta-flaring_GRL-TRR-04-2017.pdf.

[421] Ekhator 2016, *supra* note 376, 78-79.

[422] Ekhator 2016, *supra* note 376, 79.

[423] Ekhator 2016, *supra* note 376, 79-80.

[424] Ekhator 2016, *supra* note 376, 80-82.

[425] Ruffin 2012, *supra* note 377, 145.

[426] K. Ebiri and K. Jeremiah, 'How Oil Companies Evade Over N258b Gas Flare Penalty Yearly' (*The Guardian*, 31 May 2020) available at https://guardian.ng/news/how-oil-companies-evade-over-n258b-gas-flare-penalty-yearly/ last accessed 18 July 2021; see A. R. Ejiogu, 'Gas Flaring in Nigeria: Costs and Policy' (2013) 24 *Energy and Environment*, 997 for statistics on the percentage of gas that is flared each year.

[427] Gbemre v. Shell Petroleum Development Company of Nigeria Ltd. And Others (FHC/B/CS/53/05) (14 November 2005) (Federal High Court of Nigeria Benin Division) available at http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2005/20051130_FHCBCS5305_judgment-1.pdf

[428] Friends of the Earth, 'Shell Ignores Court Order to Stop Gas Flaring in Nigeria – Company Faces Contempt Action' (*Friends of the Earth International*, 16 December 2005) available at https://www.foei.org/press_releases/shell-ignores-court-order-to-stop-gas-flaring-in-nigeria-company-faces-contempt-action last accessed 19 July 2021; J. Scholz, 'Gas Flaring in the Niger Delta Ruins Lives, Business' (*Deutsche Welle*, 3 November 2017), available at https://p.dw.com/p/2mxdN last accessed 18 July 2021.

[429] Izoukumor 2019, *supra* note 400, 46; Ekhator 2016, *supra* note 376, 80; A. Okoye, 'Tax Deductible Flare Gas Penalty Payments in Nigeria: Context, Responsibilities and Judicial Interpretation' (2020) 1 *Journal of Energy & Natural Resources Law*.

therefore reduces gas flaring at its own pace: Shell hopes to have reduced routine gas flaring to zero in 2030 – some 46 years after Nigerian law required Shell to cease all gas flaring.[430]

3.3. ENFORCING THE RULES OF NIGERIAN OIL: RESISTANCE AND REPRESSION

Niger delta communities experience the current settlement in the SAF as illegitimate and inequitable. Since oil was first found in the Niger delta, the equivalent of 2500 BP Deepwater Horizon oil spills has seeped into the Niger delta's soil.[431] Because primary occupations of the majority of Niger delta inhabitants are farming, fishing and hunting, this has a compounded impact on the quality of life for Niger delta populations. Loss of land often means loss of income and loss of one's primary food source.[432] Men who lose their livelihood due to oil turn to illegal income-generating activities such as amateur oil theft (which leads to more spills), joining a militant group or organized crime syndicate (which leads to increased violence that injures and kills inhabitants and scares away aid workers).[433] Women who lose their livelihood may choose to engage in sexual liaisons with oil workers (which leads to increased incidence of HIV/AIDS and single-parent households).[434] Communities whose land has become unusable for farming also may migrate to nearby communities (leading to inter-community conflict and escalating violence) or to the city (where they are vulnerable targets for the rampant human trafficking).[435] Life expectancy in the Niger delta is ten years compared to Nigeria as a whole,[436] and the prevalence of HIV/AIDS is almost twice as high.[437] While Niger delta inhabitants have borne the brunt of the costs of oil extraction, they have seen little benefits: many have no access to clean drinking water or to

[430] Royal Dutch Shell, 'Responsible Energy: Sustainability Report 2020' (Royal Dutch Shell 2020)('Shell sustainability report 2020'), 41; The World Bank 'Zero Gas Flaring by 2030' (*The World Bank*, 9 March 2021) https://www.worldbank.org/en/programs/zero-routine-flaring-by-2030#1.

[431] Abejide 2012, *supra* note 280, 166-179; Izoukumor 2019, *supra* note 400, 43; Ruffin 2012, *supra* note 377, 142, observing that the Niger delta accounts for most of Shell's oil spills, by far; Badmus 2010, *supra* note 348, 335-336, describing that between 1982 and 1992 Shell alone spilled 6 million liters into the Niger delta; Watts 2004, *supra* note 279, 68.

[432] Abejide 2012, *supra* note 280, 250 – 253; Ruffin 2012, *supra* note 377, 141, Ruffin estimates that 10 million people depend on the Niger delta's steams and land for sustenance; Ekhator 2016, *supra* note 376, 77; I.A. Udoh, 'Oil, Migration and the Political Economy of HIV/AIDS Prevention in Nigeria's Niger Delta' (2013) 43 *International Journal of Health Services*, 685-686, estimating that 70% of the Niger delta population depends on fishing and farming for sustenance; for a full exploration of the impact oil pollution has had had on life in the Niger delta see O. Douglas and I. Okonta, *Where Vultures Feast: Forty Years of Oil in the Niger Delta* (Verso 2001).

[433] Abejide 2012, *supra* note 280, 254; for analysis of the vicious cycle of poverty, oil theft, violence and underdevelopment that characterizes the Niger delta see J. O. Arowosegbe, 'Violence and National Development in Nigeria: The Political Economy of Youth Restiveness in the Niger Delta' (2009) 36 *Review Of African Political Economy*; G. Wilson, 'The Nigerian State and Oil Theft in the Niger Delta Region of Nigeria' (2014) 16 *Journal of Sustainable Development in Africa*; M. Obenade and G. T. Amangabara, 'The Environmental Implications of Oil Theft and Artisinal Refining in the Niger Delta Region' (2014) 1 *Asian Review of Environmental and Earth Sciences*; A. Ikelegbe, 'Beyond the Threshold of Civil Struggle: Youth Militancy and The Militia-Ization of the Resource Conflicts in the Niger Delta Region of Nigeria' (2006) 27 *African Study Monographs*.

[434] Udoh 2013, *supra* note 432, 686-687; I.A. Udoh, J. E. Mantell, T. Sandfort and M. A. Eighmy, 'Potential Pathways to HIV/Aids Transmission in the Niger delta of Nigeria: Poverty, Migration and Commercial Sex' (2009) 21 *AIDS care*, 567-571; Gandu 2011, *supra* note 91, 213-236.

[435] See Courson 2016, *supra* note 281, 67 – 108, 159 – 174 on the long and complex history of inter-clan and intra-clan conflict in the Niger delta; Abejide 2012, *supra* note 280, 253- 254; Udoh 2013, *supra* note 432, 687; Udoh et al. 2009, *supra* note 434, 571; Watts 2004, *supra* note 279, 71-72; Omeje 2004, *supra* note 179, 434-436; Badmus 2010, *supra* note 348, 338.

[436] Babalola 2014, *supra* note 387, 119; Ruffin 2012, *supra* note 377, 141.

[437] I.A. Udoh, R. M. Stammen and J. E. Mantell, 'Corruption and Oil Exploration: Expert Agreement about the Prevention of HIV/AIDS in the Niger Delta of Nigeria' (2008) 23 *Health Education Research*, 671-672, 677-678; Uduji, Okolo-Obasi and Asongu 2019, *supra* note 79, 395-396; Udoh et al. 2009, *supra* note 434, 567.

electricity, even though the Niger delta's oil and gas provides one fifth of the United States' energy needs.[438]

Niger delta populations have consistently rejected the federal government's assertion that ownership of all Nigerian land and mineral resources is vested in the federal government and that it is the federal government who decides whether, where and how Shell can extract the Niger delta's oil.[439] Nevertheless, this core rule of the SAF of oil extraction in the Niger delta has remained in place for decades despite continuous challenges to it. As many incumbents in a hierarchical, stable field, Shell is able to rely on its state allies to swiftly re-impose the settlement through the use of force when Niger delta populations reject and ignore the rules of the field.[440]

Thus, in the 1940s when Niger delta populations refused Shell access to their land the colonial police force intervened on Shell's behalf.[441] In 1966, the Niger Delta Volunteer Force declared the independence of the Niger delta Republic in order to regain control over their oil resources; they were defeated by the federal military government after twelve days.[442] In 1970 several Chiefs petitioned the local military governor alleging that Shell was "seriously threatening [their] well-being, and even the very lives" and that their water "can no longer be drunk unless one wants to test the effect of crude oil on the body"; their concerns were dismissed.[443] In the late 1980s and early 1990s, Niger delta communities' resistance became increasingly organized and culminated into mass protests against Shell and the federal government.[444] A 1987 protest against Shell was dissolved by the mobile police force (also known as the "kill-and-go squad"); 350 people became homeless as a result of the armed response.[445] During a protest against Shell in 1990, the mobile shot and killed eighty protesters and destroyed approximately 500 houses after Shell had requested their presence.[446] Throughout the late 1990s the resistance as well as the repression of it ramped up, with the Nigerian military frequently and violently cracking down on Niger delta communities, including by using grenades and mortar bombs, leading to large amounts of civilian casualties.[447]

When Nigeria transitioned to a democracy in 1999. The newly elected democratic leader of Nigeria was Olegun Obasanjo, a former military ruler of Nigeria who had been responsible for the nationalization of all Nigerian land in the 1970s – the election had been between Obasanjo and

[438] Klieman 2012, *supra* note 348, 155; Babalola 2014, *supra* note 387, 119; Watts 2003, *supra* note 393, 5089; Ruffin 2012, *supra* note 377, 145, observing that for many Niger delta communities their only light at night comes from the incessant gas flares.
[439] Human Rights Watch 1999, *supra* note 173, 4-6; S. Cayford, 'The Ogoni Uprising: Oil, Human Rights and a Democratic Alternative in Nigeria' (1996) 43 *Africa Today*; B. Naanen, 'Oil Producing Minorities and the Restructuring of Nigerian Federalism' (1995) 33 *Journal of Commonwealth & Comparative Politics*; Akpan 2005, *supra* note 403, 134.
[440] Omeje 2004, *supra* note 179, 429-433; Fligstein and McAdam 2012a, *supra* note 41, 107-108.
[441] Steyn 2009, *supra* note 296, 263.
[442] M. Orodare, 'Isaac Adaka Boro – the Ijaw Soldier Who Declared the Secession of the Niger Delta Republic' (10 January, *Neusroom*) available at https://features.neusroom.com/isaac-adaka-boro-the-revolutionary-ijaw-soldier/ last accessed 20 July 2021.
[443] Douglas and Okonta 2001, *supra* note 432, 76.
[444] Courson 2016, *supra* note 281, 112- 116; Abejide 2012, *supra* note 280, 237 – 241.
[445] Afam Ifedi and Ndumbe Any 2011, *supra* note 280, 88-89; Ejobowah 2000, *supra* note 325, 30; E. E. Osaghae, 'The Ogoni Uprising: Oil Politics, Minority Agitation and The Future of The Nigerian State' (1995) 94 *African Affairs*; Cayford 1996, *supra* note 439.
[446] Amnesty International *2017b*, *supra* note 4.
[447] Afam Ifedi and Ndumbe Any 2011, *supra* note 280, 88-90; Abejide 2012, *supra* note 280, 205, 241 – 250; Courson 2016, *supra* note 281, 116 – 128; Badmus 2010, *supra* note 348, 339-343; Watts 2004, *supra* note 393, 59.

Buhari, another former military ruler of Nigeria.[448] During the transition to democracy social unrest in the Niger delta escalated even further: Between 2003 and 2005, several armed groups emerged. Their aim was to achieve control over their land and resources through kidnappings of oil workers and attacks on oil company assets.[449] Despite its transition to democracy, Nigeria did not cease to rely on the military in its response to social unrest.[450] Between 2002 and 2009 the military was sent on six oil-related operations in the Niger delta, each resulting in severe and large-scale human rights violations, of which the most severe example is the bombardments on Odi, where approximately 2300 bystanders were killed.[451]

In 2009, Nigeria's approach to the insurgency in the Niger delta changed. In the 2007 election, Goodluck Jonathan (former governor of Bayelsa and an Ijaw indigenous to the Niger delta) became vice president. Umaru Yar'Adua, who had won the elections, had chosen him as his running mate since the Niger delta crisis was one of the major issues a new president would face.[452] After an initial violent military intervention in the Niger delta, Yar'Adua offered the insurgents amnesty (as Goodluck Jonathan had advocated for): in exchange for handing over their weapons, militants would receive education and employment opportunities.[453] When Yar'Adua died the year after, Jonathan became the first president from the Niger delta.[454] In 2012, he implemented a policy where former rebels could start a private security firms to bid for security contracts to protect Shell's pipelines and facilities.[455] Although insurgent activities subsided, criminal activity surged: the poverty-driven oil theft, corrupt politicians, former insurgent-led security companies and organized crime had become intertwined and coalesced to form highly effective transnational smuggling networks.[456]

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[448] Since 1999, Nigeria has been able to elect their president from a pool of two or more candidates. In most elections, both candidates have been former military rulers (General Olegun Obasanjo and General Muhammadu Buhari). While Obasanjo is the author of the 1978 Land Use Decree that legalized the expropriation of land for the sake of oil operations, Buhari launched the 'War Against Indiscipline' in 1984 in which offences such as cheating on an exam would be sanctioned by a 20-year prison sentence. Between Obasanjo (1999-2007) and Buhari (2015-Present) Nigeria has had two civilian leaders: Yar'adua and Goodluck. Yar'adua was selected in 2007 by Obasanjo when Obasanjo was denied the third term he sought after. This, combined with the fact that Yar'adua was the brother of Obasanjo's vice president and that the 2007 elections were marred by fraud has led to allegations that Yar'Adua's presidency was a 'puppet presidency'.Yar'Adua's vice president Jonathan Goodluck (a biologist from the Niger delta) came to power in 2010, when Yar'Adua unexpectedly died.

[449] Afam Ifedi and Ndumbe Any 2011, *supra* note 280, 86, 90-91; Courson 2016, *supra* note 281, 131-142, 183-217; Adibe, Nwagwu and Albert 2018, *supra* note 176, 346 -348; Watts 2003, *supra* note 393, 5090, 5092-5094, 5096; Watts 2004, *supra* note 279, 51, 59, 65, 70; Badmus 2010, *supra* note 348, 345; O S. Oyewole, 'Flying and Bombing: The Contributions of Air Power to Security and Crisis Management in the Niger Delta Region of Nigeria' (2018) 18 *Defence Studiesizou*, 520.

[450] Courson 2016, *supra* note 281, 128 – 130; Badmus 2010, *supra* note 348, 343.

[451] Omeje 2004, *supra* note 179, 429, 431- 434; Badmus 2010, *supra* note 348, 343-344; O. A. Oluyemi, 'The Military Dimension of the Niger delta Crisis and its Implications on Nigerian National Security' (2020) 19 *Sage journals*, 6,8.

[452] J. Ibrahin, 'Nigeria's 2007 Elections: The Fitful Path to Democratic Citizenship' (Special report 182) (United States Institute of Peace 2007), 6-7; Badmus 2010, *supra* note 348, 349-350; Adibe, Nwagwu and Albert 2018, *supra* note 176, 346, recounting that around 2007, attacks by Niger delta militants shut down approximately half of Nigeria's on-shore oil fields, losing Nigeria around 24 billion dollars in oil revenues.

[453] Afam Ifedi and Ndumbe Any 2011, *supra* note 280, 91; Adibe, Nwagwu and Albert 2018, *supra* note 176, 346.

[454] 'Nigeria's President Yar'Adua Dies' (*Al Jazeera*, 6 May 2010), available at https://www.aljazeera.com/news/2010/5/6/nigerias-president-yaradua-dies last accessed 27 July 2021.

[455] Editorial Board, 'The Oil Pipeline Surveillance Contracts' (*The Guardian*, 6 July 2015) available at https://guardian.ng/opinion/the-oil-pipeline-surveillance-contracts/ last accessed 20 July 2021; Adibe, Nwagwu and Albert 2018, *supra* note 176, 346.

[456] S. J. Eke, 'No Pay, No Peace: Political Settlement and Post-Amnesty Violence in the Niger Delta, Nigeria' (2015) 50 *Journal of Asian and African Studies*; O. H. Boris, 'The Upsurge of Oil Theft and Illegal Bunkering in the Niger Delta

In 2015, Jonathan lost the election to general Muhammadu Buhari (who had been the opposing candidate in every election since 1999) – a former military ruler infamous for his 'war on indiscipline' in the 1980s.[457] Jonathan had become unpopular due to allegations of corruption (he had received a 1.1 billion dollar bribe from Shell)[458] and accusations of being soft on the insurgencies (in the Niger delta and by Boko Haram in the north).[459] Jonathan lost his re-election bid, although most oil rich states had overwhelmingly voted for Jonathan.[460] After the election, Buhari immediately moved to reinstate the military's Joint Task Force, which was deployed to the Niger delta to combat oil theft.[461] This in turn led to the resurgence of some of the old armed groups as well as a dozen of new, smaller ones, who threaten to attack and cripple oil production in order to compel both Shell and the military to leave their lands.[462] Under Buhari's presidency, the military continues to be the main instrument through which the federal government interacts with the people and problems in the Niger delta to this day.[463]

3.4. CONCLUSION

The SAF of oil extraction emerged in Nigeria's colonial period. Given the disparities of resources between Shell and the Niger delta inhabitants as well as the UK's dependence on petroleum for its national security and industrial economy, the initial settlement heavily reflected the interests of Shell at the expense of the those of the Niger delta inhabitants. Despite Nigeria's transition to democracy, this colonial logic of extraction has been codified into Nigeria's laws and regulations and has been consistently reproduced throughout Nigeria's turbulent history. Today, the colonial logic of extraction is as entrenched in the governance of oil extraction in the Niger delta as it was when the colonial governor issued his first oil mining ordinance in 1907. As a result, the rules, policies and practices that pertain to oil extraction in the Niger delta show little regard for the basic needs of Niger delta inhabitants, as was illustrated through the examples of gas flaring and compensation for land loss. Although this status quo has been persistently rejected by the field's

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Region of Nigeria: Is There a Way Out?' (2015) 6 *Mediterranean Journal of Social Sciences*; Adibe, Nwagwu and Albert 2018, *supra* note 176, 349-351.

[457] BBC, 'Nigeria Election: Muhammadu Buhari Wins Presidency' (*BBC*, 1 April 2015) available at https://www.bbc.com/news/world-africa-32139858 last accessed 20 July 2021.

[458] J. Turner, 'Shell and Eni's OPL 245 deal: a catalogue of schandal' (*Offshore Technology*, 22 May 2019), available at https://www.offshore-technology.com/features/shell-and-enis-opl-245-deal-a-catalogue-of-scandal/; A. Lee and B. Pace, 'New Leaked Emails Put Shell At Centre Of Billion Dollar Bribery Scheme Involving Some Of The Most Powerful Officials In Nigeria' (*Global Witness*, 10 April 2017) available at https://www.globalwitness.org/en/press-releases/new-leaked-emails-put-shell-centre-billion-dollar-bribery-scheme-involving-some-most-powerful-officials-nigeria/ last accessed 20 July 2021.

[459] D. Zane, 'Nigeria's Goodluck Jonathan: Five Reasons Why He Lost' (*BBC*, 31 March 2015) available at https://www.bbc.com/news/world-africa-32136295 last accessed 20 July 2021; M. Siollun, 'How Goodluck Jonathan Lost the Nigerian Election' (*Guardian*, 1 April 2015), available at https://www.theguardian.com/world/2015/apr/01/nigeria-election-goodluck-jonathan-lost last accessed 20 July 2021.

[460] See Annex 6 for a map.

[461] F. Onuah and A. Igboeroteonwu, 'Nigeria's Buhari Orders Heightened Military Presence in Restive Niger Delta' (*Reuters*, 20 May 2016), available at https://www.reuters.com/article/us-nigeria-gas-idUSKCN0YB1YW last accessed 20 July 2021.

[462] 'Nigerian Army Presence Prompts Niger Delta Attacks' (*Al Jazeera*, 13 November 2016), available at https://www.aljazeera.com/news/2016/11/13/nigerian-army-presence-prompts-niger-delta-attacks last accessed 20 July 2021; M. Caldwell, 'Niger Delta Crisis Escalates' (*Deutsche Welle*, 31 May 2016) available at https://www.dw.com/en/niger-delta-crisis-escalates/a-19295547 last accessed 20 July 2021; Oluyemi 2020, *supra* note 451, 11; F. C. Onuoha, 'The Resurgence of Militancy in Nigeria's Oil-Rich Niger Delta and the Dangers of Militarisation' (*Al Jazeera*, 8 June 2016), available at https://studies.aljazeera.net/en/reports/2016/06/resurgence-militancy-nigerias-oil-rich-niger-delta-dangers-militarisation-160608065729726.html last accessed 17 June 2021.

[463] Oluyemi 2020, *supra* note 451, 1-2, 8-10.

challengers, at its core it has remained unaltered for decades, since Shell can rely on the Nigerian military to forcefully re-impose the settlement after a contentious episode.

The lack of any meaningful human rights protection against harmful conduct of oil multinationals in the Niger delta thus cannot be characterized as a 'gap' in governance produced by the rapid globalization and privatization of the 1990s – at the core of the lack of regard for the needs of Niger delta populations is neither a failure of the state to 'catch up' to globalization nor an absence of the state. To the contrary, the Nigerian state is very much present in every aspect of oil extraction in the Niger delta. Thus, the absence of protection for challengers is not the consequence of the *absence* of governance, but instead is the *product* of governance; of a type of governance rooted in the colonial logic of extraction and export that has its roots in global developments which took place decades before business and human rights appeared on the agenda of the UN Human Rights Commission.

4. RESPONSIBLE BUSINESS IN THE NIGER DELTA'S 'GOVERNANCE GAP'

Chapter 2 explored the role of business in the rise of voluntarism and CSR as an alternative to binding and enforceable human rights obligations for business, while chapter 3 traced the true cause of the absence of meaningful human rights protections in the SAF of oil extraction in the Niger delta to the colonial context in which the field emerged (as opposed to a failure to catch up with the rapid globalization of the 1990s). This chapter analyzes how the corporate social responsibility projects and voluntary codes that are put forward as an alternative to binding human rights obligations alter – or fail to alter – the rules and power dynamics of the SAF of oil extraction in the Niger delta that enable the occurrence of routine human rights violations.

After studying two examples of Shell's voluntarism and CSR in the Niger delta – namely, the Voluntary Principles on Security and Human Rights [4.1] and Shell's healthcare programs [4.2] – I reflect on whether CSR can adequately address the sustained violations of human rights that occur in the Niger delta's "governance gap" [4.3]. I then contrast my finding that CSR is not suited to address systemic violations of human rights to the narratives promoted by business pushing for CSR as an alternative to binding human rights obligations and question benefits from the narratives around "governance gaps" and "weak governance zones" that dominates the global business and human rights debate [4.4].

4.1. THE VOLUNTARY PRINCIPLES ON SECURITY AND HUMAN RIGHTS

The Voluntary Principles on Security and Human Rights are an initiative by the US and UK governments that includes both human rights NGOs and multinational corporations in the extractive sector. The principles were developed between 1997 and 2000 in response to various controversies regarding oil and mining corporations' involvement with abusive security forces (e.g. Shell in Nigeria, Unocal in Myanmar, Talisman in Sudan and Rio Tinto in Papua New Guinea).[464] When the principles were adopted in 2001, Shell was among the first corporations to sign on.[465] The principles – written like a UN resolution – contain various non-binding guidelines for how extractive corporations ought to approach their collaboration with both public and private security forces.[466]

It asks corporations to conduct a human rights risk assessment of their security arrangements[467] and take various steps to minimize these risks. With regard to public security forces, the VPSHR asks corporations to regularly meet with the government to stress the importance of human rights, to urge investigations if there are credible reports of human rights abuses, and to monitor, to a

[464] *Wiwa v. Royal Dutch Shell Co*, filed in the US 1996 concerning alleged crimes against humanity in Nigeria; *Doe v. Unocal*, filed in the US in 1996 concerning alleged crimes against humanity in Myanmar; *Prebysterian Church of Sudan v. Talisman Energy*, filed in 2001 concerning alleged genocide in Sudan; *Sarei v. Rio Tinto* filed in 2000 concerning alleged genocide in Papua New Guinea; for background on the development of the VPSHR generally see C. Pitts, 'Voluntary Principles on Security and Human Rights' in T. Hale and D. Held (eds.) *Handbook of Transnational Governance* (Polity Press 2011), 357 -358; Freeman, Pica and Camponovo 2001, *supra* note 191; MSI Integrity 2020, *supra* note 56, 34.

[465] Royal Dutch Shell, 'People, Planet & Profits: The Shell Report' (Royal Dutch Shell 2000), 22; Royal Dutch Shell, 'People, Planet & Profits: The Shell Report 2001' (Royal Dutch Shell 2001), 10.

[466] The full document can be downloaded at https://www.voluntaryprinciples.org/the-principles/('VPSHR'); for a brief overview of the content of the VPSHR, see J. Shankleman, 'Mitigating Risks and Realizing Opportunities: Environmental and Social Standards for Foreign Direct Investment in High-Value Natural Resources' in P. Lujala and A. Rustad (eds.) *High Value Natural Resources and Peacebuilding* (Earthscan 2012), 60-62.

[467] VPSHR, *supra* note 466, 2-3.

reasonable extent, how arms provided by the company are used by the police and/or military.[468] With regard to private security, the VPSHR asks corporations to include the terms of the VPSHR in their contracts with private security companies, to have a company policy on the conduct of private security, to investigate credible allegations of abuse by private security and to ascertain that persons employed as private security do not have a past record of using excessive force.[469]

The VPSHR in Nigeria

In Nigeria, Shell has implemented the VPSHR in several ways. Since 2005, Shell has – in cooperation with a human rights NGO – organized yearly trainings that teach Shell employees how to react to demonstrations and how to interact with the military and police.[470] Shell's security personnel receives a mandatory standard training, and is briefed on the company's policy on the use of force quarterly.[471] Shell explicitly references the VPSHR in their contracts with private security corporations,[472] and conducts yearly human rights risks assessments, revising their company security policy if necessary.[473] Shell meets with the Nigerian security forces (military and police) on a quarterly basis to emphasize the importance of human rights,[474] and addresses the VPSHR at the monthly security workshops Shell provides to the Nigerian police and military.[475] Shell liaised with the military operation Delta Safe (which protect Shell's assets)[476] to observe its impacts on the local communities.[477] Prior to their departure on a security operation that relates to Shell's assets, Shell briefs the military and police on the relevant restrictions on the use of force, and provides laminated cards with the 'Rules of Engagement' listed on them to forces deployed to the Niger delta.[478]

In practice however, the VPSHR does not seem to have made a large impact. One reason is that the VPSHR does not have an accessible grievance mechanism: only human rights NGOs that are members of the VPSHR can report potential violations. These NGOs are not based in the Niger delta, and therefore are not necessarily privy to abuses committed in the Niger delta (as the Niger delta is quite inaccessible to outsiders).[479] Furthermore, it appears that relevant actors are generally

[468] VPSHR, *supra* note 466, 3-5.
[469] VPSHR, *supra* note 466, 5-7.
[470] Royal Dutch Shell, 'The Voluntary Principles on Security and Human Rights: Summary Report of Implementation By Shell in 2018' (Royal Dutch Shell 2018), para 12 ('Shell VPSHR report 2018'); Royal Dutch Shell, 'Sustainability Report: Royal Dutch Shell PLC Sustainability Report 2012' (Royal Dutch Shell 2012), 6 ('Shell sustainability report 2012').
[471] Royal Dutch Shell, 'The Voluntary Principles on Security and Human Rights: Summary Report of Implementation By Shell in 2019' (Royal Dutch Shell 2019), para 5 ('Shell VPSHR report 2019'); Shell VPSHR report 2018, *supra* note 470, para 15; Royal Dutch Shell, 'Responsible Energy: The Shell Sustainability Report 2007' (Royal Dutch Shell 2007), 31 ('Shell sustainability report 2007').
[472] Shell VPSHR report 2018, *supra* note 470, para 10; Shell sustainability report 2012, *supra* note 470, 6; Shell sustainability report 2007, *supra* note 471, 31.
[473] Shell VPSHR report 2019, *supra* note 471, para 5; Shell VPSHR report 2018, *supra* note 470, para 9; Shell sustainability report 2012, *supra* note 470, 6; Shell sustainability report 2007, *supra* note 471, 31.
[474] Shell VPSHR report 2019, *supra* note 471, para 5
[475] *Ibid*; Royal Dutch Shell, 'The Voluntary Principles on Security and Human Rights: Summary Report of Implementation By Shell in 2020', para 5; Royal Dutch Shell, 'Meeting the Energy Challenge: The Shell Sustainability Report 2006' (Royal Dutch Shell 2006), 32 ('Shell sustainability report 2006').
[476] Consisting of army, navy, air force, police and secret service, deployed in 2016 to the Niger delta to prevent oil theft and transnational oil smuggling.
[477] Shell VPSHR report 2018, *supra* note 470, para 15
[478] *Ibid*, "Training was also conducted for governmental security agency personnel [police and military] prior to **deployment on Shell operations**, with briefing cards issued on VPSHR requirements; Shell VPSHR report 2019, *supra* note 471, para 5, "aide memoires on plasticized cards"; Shell sustainability report 2006, *supra* note 475, 32.
[479] MSI Integrity 2020, *supra* note 56, 167, 177 and 205; MSI Integrity and Social Action ' Understanding Community Experiences of Certified Cocoa Farming and Extractive Site Security' (summary workshop report) (20 June 2017, Port

unaware of the VPSHR. Although there is no quantitative research on familiarity with the VPSHR within Nigerian security forces, anecdotal evidence does not look promising. The commander of the military Joint Task Force (JTF) that is tasked with policing oil theft in the Niger delta warned Niger delta militants that they should expect "no mercy and a though time", (which does not signal a commitment to proportionality and restraint)[480] and a general lack of awareness of the VPSHR amongst both the Niger delta communities and Nigerian security forces.[481]

Moreover, while some of the training material is helpful, other training materials are far too rudimentary to properly equip security personnel to ethically approach the complexities of security operations in the Niger delta. For instance, the last four steps of the VPSHR 'ethical decision making tool' are " -examine each choice - what are the risks and benefits - would I feel proud - make a choice!"[482] Obviously, this does not provide any real guidance to the legal and ethical use of force in an environment where the joint task force (consisting of police, secret police, army navy and air force) as well private security companies owned by former militants, militant youth groups, organized crime syndicates and company security personnel are all simultaneously involved in both the theft and protection of Shell's oil. [483]

The VPSHR and military intervention in the Niger delta

Most importantly however, the VPSHR leaves a rule/understanding at the core of the SAF to which systemic human rights abuse as a feature of the field can be attributed unaddressed: that only Shell can legitimately extract the Niger delta's oil, and that military intervention is an appropriate means trough which to re-establish Shell's exclusive right to extract the Niger delta's oil when it has been challenged by either petty oil theft, large scale illegal oil trade, protests or an insurgency. Protecting Shell's exclusive right to the Niger delta's oil has been the core mandate of most military interventions in the Niger delta, and frequently the use of force in these military interventions is excessive.[484] Nevertheless, Shell is accustomed to relying on and closely cooperating with the Nigerian military and police: it has requested intervention and even paid for interventions on various occasions. [485] The VPSHR does not ask Shell to depart from this practice, but simply to take (limited) steps to mitigate (some of) the human rights risks inherently involved with this practice.

Hartcourt), 10, 14 available at http://www.msi-integrity.org/wp-content/uploads/2019/07/171017-Nigeria-Convening-Summary-Report-SCrevd.pdf; Shell also chaired the corporate pillar of the Voluntary Principles Initiative and was a member of the Voluntary Principle Initiative steering committee (the VPSHR's oversight bodies), Shell VPSHR report 2018, *supra* note 470 para 4.

[480] Sahara Reporters, 'New Joint Task Force Commander in the Niger Delta Promises Oil Thieves 'No Mercy, Though Time' (*Sahara Reporters*, 7 April 2019), available at http://saharareporters.com/2019/04/07/new-joint-task-force-commander-niger-delta-promises-oil-thieves-no-mercy-tough-time last accessed at 22 July 2021.

[481] MSI Integrity 2017, *supra* note 479, 10, 14.

[482] Available at http://www.voluntaryprinciples.org/wp-content/uploads/2019/12/LearningTool6-EthicalDecision-MakingTool.pdf.

[483] Omeje 2006b, *supra* note 170, 482-489; Ruffin 2012, *supra* note 377, 143; Watts 2004, *supra* note 279, 63-64; Adibe, Nwagwu and Albert 2018, *supra* note 176, 346, 348-350; Badmus 2010, *supra* note 348, 325-326; K. Ebiri and A. Momoh Jimoh, 'Niger Delta Militants Accuse Joint Task Force of Complicity in Oil Theft' (*The Guardian Nigeria*, 29 June 2018), available at https://guardian.ng/news/niger-delta-militants-accuse-jtf-of-complicity-in-oil-theft/ last accessed 28 July 2021.

[484] The goal of operation 'pulo shield' (Ijaw for 'oil shield') for instance was to "restore smooth economic activity". The operation was characterized by excessive violence as well as rape and plunder: Adibe, Nwagwu and Albert 2018, *supra* note 176, 346, 348; Oluyemi 2020, *supra* note 451, 8-9; Oyewole 2018, *supra* note 449, 528 – 530.

[485] A. Hirsch and J. Vidal, 'Shell Spending Millions of Dollars on Security in Nigeria, Leaked Data Shows' (*The Guardian*, 19 August 2012), available at https://www.theguardian.com/business/2012/aug/19/shell-spending-security-nigeria-leak last accessed at 22 July 2021; Amnesty International 2017b, *supra* note 4; J. Vidal, 'Shell Oil Paid Nigerian

After all, even if the VPSHR were implemented more effectively, and Shell would be successful at limiting the frequency with which the Nigerian military and police engage in human rights abused such as rape, plunder, and the murder of civilians,[486] severe human rights abuse would still be inherent to the practice of relying on a military force to protect the property of a private corporation against vandalism and theft.[487] The VPSHR asks military forces to comply with international humanitarian law. However, as the military forces in the Niger delta are engaging in police work (combatting oil theft) rather than fighting a war,[488] it is not the law of armed conflict but human rights law that applies. The practice of shooting 'suspected criminals' on sight, bombing militant camps and destroying communities where suspected oil thieves and/or militaries reside[489] thus inherently violates various human rights, even if soldiers refrain from rape and extortion.[490]

The VPSHR does not prevent Shell from endorsing and actively cooperating with this mode of operating. Instead, it asks Shell to take stock of the effect the operations have on the local populations, which Shell has done by liaising with the Joint Task Force deployed to the Niger delta.[491] It does not prevent Shell from supplying weapons to the Joint Task Force, but instead asks Shell to "consider the risk of such transfers, any relevant export licensing requirements, and the feasibility of measures to mitigate foreseeable negative consequences".[492] When security forces commit severe human rights abuses in the process of guarding company assets, Shell is asked to

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Military to Put Down Protests, Court Documents Show' (*The Guardian*, 3 October 2011), available at https://www.theguardian.com/world/2011/oct/03/shell-oil-paid-nigerian-military last accessed at 22 July 2021.

[486] Omeje 2004, *supra* note 279, 431- 434; Oluyemi 2020, *supra* note 451, 6, 8-9; Oyewole 2018, *supra* note 449, 530-531; Gandu 2011, *supra* note 91, 92-99; Amnesty International, 'Nigeria 2020' (*Amnesty International*, 1 January 2021) available at https://www.amnesty.org/en/countries/africa/nigeria/report-nigeria/ last accessed 22 July 2021.

[487] Oluyemi 2020, *supra* note 451, 2, 6-8; Omeje 2004, *supra* note 179, 429.

[488] Stories such as J. Osahon, 'Military Arrest Rivers Community Leader for Alleged Unlawful Shutdown of Oil Wells' (*The Guardian Nigeria*, 22 March 2017), available at https://guardian.ng/news/military-arrests-rivers-community-leader-for-alleged-unlawful-shutdown-of-oil-wells/, last accessed 28 July 2021 and A. Abdullahi, 'Operation Delta Safe Intensifies Clamp Down on Sponsors of Crude Oil Theft, Destroys 80 Illegal Refineries' (*Nigerian Army*, 7 March 2017), available at https://army.mil.ng/category/operation-delta-safe/, last accessed 30 July 2021, make it clear that the Joint Task Force is deployed to protect oil companies' assets against vandalism and theft, and not to fight an insurgent war. The Niger delta 'conflict' therefore does not qualify as a 'non-international armed conflict' in the legal sense of the word, meaning that it is human rights law rather than the laws of armed conflict that apply.

[489] 'Joint Military Force Arrest 5 Suspected Vandals, Repel Vessel Hijack Attempt' (*The Guardian Nigeria*, 23 October 2016), available at https://guardian.ng/news/joint-military-force-arrests-5-suspected-vandals-repel-vessel-hijack-attempt/, last accessed 28 July 2021 makes it clear that "suspected criminals" are shot on sight; J. Osahon, 'Military Reads Riot Act to Militants, Pipelines Surveillance Contractors', (*The Guardian Nigeria*, 10 December 2016), available at https://guardian.ng/news/military-reads-riot-act-to-militants-pipelines-surveillance-contractors/, last accessed 28 July 2021, makes it clear that the Nigerian military views entire communities as guilty, not only killing the 'suspected criminal' but destroying their entire community.

[490] See for an introduction into the content and interpretation of the right to life under article 6 of the ICCPR the analysis of 'The Right Not to Be Arbitrarily Killed by the State' by the Icelandic Human Rights Centre, available at https://www.humanrights.is/en/human-rights-education-project/comparative-analysis-of-selected-case-law-achpr-iachr-echr-hrc/the-right-to-life/the-right-not-to-be-arbitrarily-killed-by-the-state, last accessed 27 July 2021.

[491] S. Tripathi, W. Godnick and D. Klein, 'Voluntary Principles on Security and Human Rights: Performance Indicators' (International Alert 2008) available at https://www.international-alert.org/sites/default/files/publications/VoluntaryPrinciplesOnSecurityHumanRights.pdf; J. Shankleman and D. Baharoglu, 'The Voluntary Principles on Security and Human Rights: An Implementation Toolkit for Major Project Sites' (World Bank Group: Multilateral Investment Guarantee Agency 2008), available at https://www.miga.org/sites/default/files/archive/Documents/VPSHR_Toolkit_v3.pdf; MSI Integrity 2020, *supra* note 56, 101 noting the large amount of caveats in the VPSHR.

[492] The "foreseeable negative consequences" that the VPSHR asks Shell to mitigate are genocide, mass rape, mass murder, and widespread use of torture, arbitrary arrests and extrajudicial executions by law enforcement.

"express their desire that security be provided in a manner consistent with the company's policies on ethical conduct and human rights".[493]

The VPSHR thus accommodates the rules central to the SAF of oil extraction in the Niger delta (that Shell has the exclusive right to extract the oil and that military intervention is an appropriate tool to enforce this right). The measures Shell is asked to take by the VPSHR do not amount from a departure from that status quo, but are efforts to mitigate the harm resulting from that status quo. And even there, Shell is only asked to do so to the extent that it is feasible without departing from existing business practices. The VPSHR thus adapts human rights protection to the needs and interests of business, rather asking businesses to adapt their practices to fit the requirements of international human rights law. Like the Nigerian federal government, the VPSHR thus prioritizes the protection of Shell's assets over the basic human rights of Niger delta inhabitants. This is reflected in some of the VPSHR language, which emphasizes "the importance of safeguarding the integrity of company personnel and property" and stresses that "security is a fundamental need [for] businesses".[494]

4.2. HEALTHCARE

Shell provides material support to twenty-seven healthcare facilities in the Niger delta. Shell for example has set up the Obio Cottage hospital in port Hartcourt (from where oil is shipped) and has completely refurbished the general hospital in Oloibiri (where oil was first discovered).[495] Shell provides logistical support to the state governments' efforts to address Ebola and malaria and provides healthcare to rural communities by setting up mobile healthcare centers that provide health services such as HIV screenings and eye-tests for the duration of a week. In addition, Shell initiated, finances and oversees the Niger delta Aids Response (NiDAR), which (in cooperation with the local government and an NGO) provides comprehensive HIV/AIDS treatment in five hospitals in the Niger delta.[496] Shell also helps provide affordable health insurance: together with the Rivers state government, Shell created the Community Health Insurance Scheme (CHIS). Shell, by providing its name and capital to the initial fund, ensured that Rivers State residents could buy into

[493] VPSHR, *supra* note 466, 1.
[494] VPSHR, *supra* note 466, 1.
[495] Uduji, Okolo-Obasi and Asongu 2019, *supra* note 79, 398; Shell Nigeria, 'Shell Delivers Multiple Healthcare Projects in Oloibiri: Over 17000 Persons, 20 Communities Benefit in 2 Years' (*Shell.com*, 31 July 2019) available at https://www.shell.com.ng/media/2019-media-releases/shell-delivers-multiple-healthcare-projects-in-oloibiri.html last accessed 21 July 2021; News Express, 'Oloibiri: Shell Remodels, Equips Kolo General hospital to Commemorate Oil Discovery' (*News Express*, 31 July 2019), available at https://newsexpressngr.com/news/79879-Oloibiri-Shell-remodels-equips-Kolo-General-Hospital-to-commemorate-oil-discovery last accessed 21 July 2021; APO Group Consultancy 'Oloibiri Health Programme: Public-Private Partnerships in Advancing Sustainable Healthcare Systems in Nigeria' (*Africa News*, 9 December 2019), available at https://www.africanews.com/2019/09/12/oloibiri-health-programme-public-private-partnerships-in-advancing-sustainable-healthcare-systems-in-nigeria/ last accessed 21 July 2021.
[496] Shell Nigeria, 'Health Care Programs' (*Shell.com*, n.d.), available at https://www.shell.com.ng/sustainability/communities/health-in-nigeria.html last accessed 21 July 2021; FHI 'Establishing and sustaining HIV comprehensive care services in cottage hospitals in the Niger Delta' (end of project report) (FHI 2009), available at https://www.fhi360.org/sites/default/files/media/documents/Report%20of%20the%20NIDAR%20Project.pdf; S. Oyadongha, 'Hospitals Offer HIV/AIDS Service under SPDC's NiDAR Project' (*Vanguard*, 6 December 2009), available at https://www.vanguardngr.com/2009/12/hospitals-offer-hivaids-service-under-spdcs-nidar-project/ last accessed 30 July 2021; KIT Royal Tropical Institute, 'Benefit Incidence Analysis of Nigerian Community Health Initiatives' (*KIT*, 1 August 2013), available at https://www.kit.nl/project/benefit-incidence-analysis-of-nigerian-community-health-initiatives/ last accessed 21 July 2021.

the insurance pool at a subsidized rate: for approximately three dollars a month, residents have access to almost all services provided by Obio Cottage Hospital.[497]

The results of these efforts have been tangible. In 2009 for example, the NiDar program provided testing to 14.000 individuals, medication that prevents mother-to-child transmission to 3700 pregnant women, and provided treatment to 2400 HIV-positive individuals.[498] The CHIS has majorly improved the Niger delta residents' access to healthcare: since the implementation of the insurance scheme, Obio Cottage Hospital has seen a massive increase in patients. It is believed that the insurance scheme is helping to reduce infant and maternity deaths, as almost 75 percent of the health services provided under the insurance scheme are related to maternal health and infant health.[499]

The oil industry and the Niger delta's public health crises

However, although the poor accessibility of health care in the Niger delta is an important contributor to the Niger delta's abysmal state of public health in the Niger delta, the main cause of the Niger delta's public health crises is the incessant and severe pollution of the region. Decades of oil spills and gas flaring have contaminated the soil and water with heavy metals and the air with toxic fumes, which has led to increased salience of a myriad of health problems. Communities affected by oil spills report headaches and diarrhea and coughs three times as much, nausea four times as much, sore eyes seven times as much and rashes eight times as much as communities not affected by oil spills.[500] Research moreover found that in communities affected by oil spills the infant mortality rate was on average twice as high as it had been in the same community before the oil spill.[501] Research also found that presence of a gas flaring site is associated with an increase in the incidence of cancer, as well as neurological conditions, lung damage and respiratory issues, deformities in children, reproductive issues and skin problems.[502]

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[497] K. Vaughan, N. Akwataghibe, B. Fakunle and L. Wolmarans, 'Who Benefits from the Obio Community Health Insurance Scheme in Rivers State Nigeria? A Benefit Incidence Analysis' (2016) 8 *International Health*, 405-406, 408.

[498] Shell Nigeria, 'Health Care Programs' (*Shell.com*, n.d.), available at https://www.shell.com.ng/sustainability/communities/health-in-nigeria.html last accessed 21 July 2021.

[499] C. Ogbonna, F. Nwagagbo and B. Fakunle, 'Utilization and Perception of Community Health Insurance Scheme Services by Enrolees in Obio Cottage Hospital, Port Hartcourt, Nigeria' (2013) 24 *Journal of Community Medicine and Privary Health Care*; B. Fakunle et al. 'Community Health Insurance as a Catalyst for Uptake of Family Planning and Reproductive Health Services: The Obio Cottage Hospital Experience' (2014) 34 *Journal of Obstetrics and Gyneacology*.

[500] Izoukumor 2019, *supra* note 400, 43; Ruffin 2012, *supra* note 377, 141; Badmus 2010, *supra* note 348, 336; J. Nriagu, E. A. Udofia, I. Ekong and G. Ebuk, 'Health Risks Associated with Oil Pollution in the Niger Delta, Nigeria' (2016) 13 *International journal of environmental research and public health*; B. Ordinioha and S. Brisibe, 'The Human Health Implications of Crude Oil Spills in the Niger delta, Nigeria: An Interpretation of Published Studies' (2013) 54 *Nigerian Medical Journal*; O. E. Orisakaw, 'Crude Oil and Public Health Issues in Niger Delta, Nigeria: Much Ado about the Inevitable' (2011) 194 *Environmental Research*; B. Ordinioha and W. Sawyer, 'Acute Health Effects Of a Crude Oil Spill In a Rural Community In Bayelsa State, Nigeria' (2010) 19 *Nigerian Journal of Medicine.*

[501] Orisakaw 2011, *supra* note 500; O. B. Oghenetega, G. R. E. E. Ana, M. A. Okunlola, O. A. Ojengbede, 'Miscarriage, Stillbirth and Infant Death in an Oil-Polluted Region of the Niger Delta, Nigeria: A Retrospective Cohort Study' (2020) 150 *International Journal of Gynecology*; K. Hodal, 'Absolutely Shocking: Niger Delta Oil Spills Linked With Infant Deaths' (*The Guardian*, 6 November 2017), available at https://www.theguardian.com/global-development/2017/nov/06/niger-delta-oil-spills-linked-infant-deaths, last accessed 23 July 2021; A. Bruederle and R. Hodler, 'Effect of Oil Spills on Infant Mortality in Nigeria' (2019) 116 *Proceedings of the National Academy of Sciences*.

[502] M.C. Nwosisi et al., 'Spatial Patterns of Gas Flaring Stations and the Risks to the Respiratory and Dermal Health Resident of the Niger Delta, Nigeria' (2021) 12 *Scientific African*; Scholz 2017, *supra* note 428; A. E. Gobo, G. Richard, I. U. Ubong, 'Health Impact on Gas Flares on Igwuruta/Umuechem Communities in Rivers State' (2009) 13 *Journal of Applied Sciences and Environmental Management*.

The oil industry also contributes to health problems indirectly, as it causes poverty, malnutrition and stress, which in turn have a negative effect on the outcomes of diseases unrelated to oil pollution such as HIV/AIDS, malaria, Ebola and Covid-19.[503] 97 percent of communities affected by oil spills report struggling with hunger, compared to 33 percent of communities not affected by oil spills.[504] Loud noise and visual cues such as the flame of a gas flare, sensory cues such as a weird taste in the food or water and fear of explosions and fires furthermore were found to cause high levels of stress communities living near oil company assets.[505] Additionally, HIV/AIDS is also far more prevalent in oil communities for several reasons.[506] First, oil companies' workforces consist mostly of single men, and oil workers are more likely to have HIV/AIDS. Secondly, the presence of oil assets often leads to an increase in commercial sex as a way to cope with loss of land and income. Third, the presence of oil assets leads to increased presence of military and police, who are known to spread HIV through rape and enforced prostitution.[507]

Cleaning up

With regard to alleviating pollution in the Niger delta, Shell has been far less proactive then it has been in providing access to healthcare in the Niger delta. Shell, as a consequence of poor pipeline technology and negligent maintenance practices, is responsible for between 55 and 130 oil spills in the Niger delta each year.[508] Occasionally, these oil spills are major: in 2008 and 2011, Shell was responsible for spills of 7100 tonnes and 5300 tonnes of oil respectively.[509] The effect of these continuous oil spills compound: due to the Niger delta's climate and soil, the oil seeps deep into the ground, where it stays for up to forty years.[510] Shell's efforts to clean up its spills have been found lacking. In 2011 UNEP concluded after an in depth investigation of the 2008 Bodo oil Spill that "the difference between a cleaned-up site and a site awaiting clean-up was not always obvious",[511] and that "clean-up efforts by Shell Nigeria ... are not leading to environmental restoration nor legislative compliance, nor even compliance with its own internal procedures".[512] Despite the fact

[503] Udoh 2013, *supra* note 432, 691; Udoh et al. 2009, *supra* note 434, 567-568.
[504] Ordinioha and Brisibe 2013, *supra* note 500; E. Dung, L. Bombom and T. Agusomu, 'The Effects Of Gas Flaring On Crops In The Niger Delta, Nigeria' (2008) 73 *Geo Journal*; Ruffin 2012, *supra* note 377, 141; Udoh 2013, *supra* note 432, 685-686.
[505] Nriagu et al. 2016, *supra* note 500.
[506] Uduji, Okolo-Obasi and Asongu 2019, *supra* note 79, 395-396; Udoh, Stammen and Mantell 2008, *supra* note 437, 671.
[507] Udoh, Stammen and Mantell 2008, *supra* note 437, 672, 677-678; Udoh et al. 2009, *supra* note 434, 567-571; Gandu 2011, *supra* note 91, 92-93, 277; I. A. Udoh and I. A. Udoh, 'Oil, Migration, And the Political Economy of HIV/AIDS Prevention in Nigeria's Niger delta' (2013) 43 *International Journal of Health Services*, 686-687.
[508] Badmus 2010, *supra* note 348, 335-336; Ruffin 2012, *supra* note 377, 142-144; Amnesty International 'Negligence in the Niger Delta: Decoding Shell and Eni's Poor Record on Oil Spills' (AFR 44/7970/2018) (Amnesty International 2018), 11, 15-18; M. Watts and A. Zalik, 'Consistently Unreliable: Oil Spill Data and Transparency Discourse' (2020) 7 *The Extractive Industries and Society*; United Nations Environment Programme, 'Environmental Assessment of Ogoniland' (United Nations 2011), 9 available at https://postconflict.unep.ch/publications/OEA/UNEP_OEA.pdf 99-100, 150 ('UNEP report'); R. Steiner, 'Double Standard: Shell Practices in Nigeria Compared with International Standards to Prevent and Control Pipeline Oil Spills' (Friends of the Earth 2010), available at https://www.foei.org/wp-content/uploads/2014/01/20101109-rapport-Double-Standard.pdf.
[509] J. Vidal, 'Shell Oil Spills in the Niger delta: Nowhere and No One Has Escaped' (*The Guardian*, 3 August 2011), available at https://www.theguardian.com/environment/2011/aug/03/shell-oil-spills-niger-delta-bodo last acces 24 July 2021; S. Horn, '2008 Shell Nigeria Oil Spill 60 Times Larger Than Originally Claimed' (*The Guardian*, 23 April 2012), available at https://www.theguardian.com/environment/2012/apr/23/shell-nigeria-oil-spill-bigger last accessed 30 July 2021; J. Vidal, 'Nigeria on Alert as Shell Announces Worst Oil Spill in a Decade' (*The Guardian*, 22 December 2011), available at https://www.theguardian.com/environment/2011/dec/22/nigerian-shell-oil-spill last accessed 24 July 2021.
[510] UNEP report, *supra* note 508, 9.
[511] UNEP report, *supra* note 508, 150.
[512] UNEP report, *supra* note 508, 100.

that UNEP urged Shell to fully revise its pipeline maintenance practices and its oil spill remediation methodology, Shell has not yet made any systemic changes in that regard.[513]

Shell shows a similar reluctance to take decisive action when it comes to reducing gas flaring, despite the technology to capture petroleum associated gas has long been available.[514] Although Shell has managed to cease gas flaring in the European countries in which it operates, Shell's volume of gas flaring in Nigeria increased in 2010, 2013 and 2017.[515] Shell stated in its 2019 sustainability report that it aims to "reduce routine flaring to as low a level as is *reasonably practical*".[516] Shell has set itself the goals of reaching zero routine flaring by 2030, despite the fact that Shell had already been ordered to cease all gas flaring in 1984, 2005, and on various other occasions.[517]

4.3. HELPFUL CORPORATIONS, WEAK GOVERNMENTS

In the global policy debate on how best to close "the governance gaps created by globalization", [518] CSR has been championed as an alternative to binding human rights obligations. The analysis of two examples in this chapter however shows that in the case of Shell in the Niger delta, CSR does not adequately protect Niger delta populations' human rights against corporate infraction. This is because neither the VPSHR nor Shell's healthcare initiatives alter the rules at the core of the field which together create the conditions for systemic human rights abuse. The VPSHR accepts that corporations request and fund military interventions that serve to protect corporate assets; it only asks the corporation to endeavor to mitigate the consequences of this status quo to the extent practicable for the corporation. Shell's healthcare initiatives do not attempt to change that Niger delta populations farm on polluted land, drink and bathe in polluted water and breathe polluted affected by air; they aim to increase the accessibility of healthcare so that Niger delta inhabitants whose health is (directly or indirectly) affected by these conditions have access to treatment.

Moreover, Shell's CSR does not meaningfully alter the power dynamics of the field, as CSR inherently constitutes concessions made voluntarily by the field's incumbent – Shell determines whether, when, where and how it helps local communities. Shell's CSR may even reinforce current power dynamics, since in both cases, Shell's CSR consists of Shell taking on certain public functions. Thus, to implement the VPSHR, Shell briefs the military and police on the appropriate use of force in relation to the protection of its own assets. With regard to healthcare, Shell subsidizes health insurance for the state government of Rivers and is integral to the AIDS response in Rivers, Bayelsa and Delta. Shell's CSR in the Niger delta thus further blurs the boundaries between public policy-making and Shell's private interests and strengthens the very entanglement between corporation and state that is at the core of a field settlement in which the human rights of Niger delta inhabitants are routinely violated.

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[513] Amnesty International, 'Clean it Up: Shell's False Claims About Oil Spill Response in the Niger Delta' (AFR 44/2746/2015) (Amnesty International 2015); Amnesty International 2018, *supra* note 508.
[514] Ruffin 2012, *supra* note 377, 145; Davis and Charles 2020, *supra* note 418.
[515] Royal Dutch Shell, 'Delivering Energy in a Responsible Way: Sustainability Report' (Royal Dutch Shell 2018), 81, showing that Shell's gas flaring increased between 2009 and 2010, between 2013 and 2014 and between 2016 and 2017.
[516] Shell sustainability report 2020, *supra note* 430, 7, 41.
[517] Ekhator 2016, *supra* note 376, 87; O. J. Olujobi, 'Analysis of the Legal Framework Governing Gas Flaring in Nigeria's Upstream Petroleum Sector and the Need for Overhauling' (2020) 9 *Social Sciences*.
[518] The 2008 interim report, *supra* note 93, para 3; the 2006 interim report, *supra* note 93, para 16.

Corporate Social Responsibility initiatives such as the ones Shell engages in, are designed to supplement or complement a state with limited presence. The corporation, of its own volition, seeks to improve enjoyment of human rights by promoting human rights in a way that a state normally would, be it by briefing the military and police on the appropriate use of force, or by subsidizing health insurance. This form of CSR remedies "governance gaps created by globalization": if governments lack the capacity to govern or regulate due to the pace at which the global economy and domestic situations have developed over the past decades, corporations could usefully contribute by temporarily taking on certain public functions. However, as shown in chapter 3 of this thesis, the Niger delta's problems are caused by a form of governance in which a single corporation has an outsized influence on the state – they are not a symptom of a failed state, an absent state or a limited state, but of a petro-state. Having an oil corporation exercise public functions related to health and security will do little to meaningfully address the health and security problems caused by the oil industry, and may even perpetuate them.

4.4. A USEFUL PROBLEM

While understanding the Niger delta's problems as a consequence of the "governance gaps created by globalization" is neither useful nor accurate, it is the main frame through which business-related human rights issues are approached at the United Nations. While the frame proliferated after John Ruggie published his 2008 interim report and has since become ubiquitous,[519] it was only introduced at the UN in 2005. After Ruggie had held his first consultation session with the International Chamber of Commerce, the International Organization of Employers and number of individual large corporations at the start of his mandate in 2005, Ruggie asked corporations' to contribute their expertise on the challenges of doing business in "weak governance zones".[520] The International Organization of Employers volunteered to author this report, in cooperation with the International Chamber of Commerce.[521] The International Council of Mining and Metals then contributed a follow up study into the challenges of extractive businesses operating in "weak governance zones".[522] Ruggie's interim report of 2008 then diagnosed that "the root cause of the business and human rights predicament today lies in the governance gaps created by globalization".[523]

Shell has been proactive in framing business-related human rights problems in the global south as a state capacity problem and the business-and-human rights debate as a debate centering on what role business ought to play in resolving these human rights problems. For instance, when Shell

[519] This is an observation based on my personal experience as a researcher in the business and human rights fields.
[520] J.G. Ruggie, 'Business and Human Rights: The Evolving International Agenda' (2007) 101 *American Journal of International Law*, 834.
[521] International Organization of Employers, International Chamber of Commerce and the Business and Industry Advisory Committee to the OECD, 'Business And Human Rights: The Role Of Business In Weak Governance Zones: Business Proposals For Effective Ways Of Addressing Dilemma Situations In Weak Governance Zones' (IOE, ICCom and BIAC 2006), available at https://media.business-humanrights.org/media/documents/files/reports-and-materials/Role-of-Business-in-Weak-Governance-Zones-Dec-2006.pdf. The study includes conclusions such as "action by a company will not of itself resolve the problems and issues of a weak governance zone; only governments have the ability to achieve that" and "responses to the dilemmas of weak governance zones needs to be relevant and dependent on the characteristics of the individual companies involved … this includes the affordability, costs and consequences on the company's economic activity."
[522] International Council on Mining And Metals 'Clarity and Consensus on Legitimate Human Rights Responsibilities for Companies could Accelerate Progress: Submission to UN Secretary-General's Special Representative on Human Rights and Business' (Second ICMM submission to the Ruggie consultation process) (ICMM 2006), available at www.icmm.com/document/217.
[523] The 2008 interim report, *supra* note 93.

published its first CSR report in 1998, it opened the dialogue on the role of corporations in society by asking whether "businesses ought to play a bigger role in society, by providing infrastructure and social services where government does not" or if businesses should instead "concentrate on what it does best: serving its customers and getting the best return for shareholders".[524] In 2003, the 42-page memo published by the International Chamber of Commerce's campaign (under the leadership of a senior Shell executive) stressed that "corporations are more often than not part of the solution to human rights challenges rather than part of the problem" and that the UN's focus ought to be on how corporations could be "helping a state build its capacity" rather than on regulating corporate conduct. [525]

The misdiagnosis of the long-term consequences of the extraction-driven colonization of the global south as globalization-induced ills is related to the usefulness of the problem of a 'governance gap': do hegemonic groups in society "need" a certain problem, or is it in their interest to leave the issue unaddressed?[526] While supplementing a gap in government through corporate charity can co-exist with the current design of the global economy as well as Shell's business model, assuring that resource extraction in the global south is compatible with indigenous populations' rights to health and security requires fundamentally rethinking both Shell's business model and international trade. The adage of "doing good to do well" appears to apply to voluntary codes and CSR, but not to compliance with international human rights law.

CSR projects come at a relatively low cost: over the past decade, Shell has spent anywhere between 50 million and 200 million dollars on Corporate Social Responsibility in Nigeria.[527] The cost of fully respecting Niger delta communities' human rights on the other hand, would be prohibitive to a for-profit corporation. After all, doing so would not only require Shell to clean up and pay compensation for each of the oil spills it is responsible for, but also would require large scale maintenance of corroded pipelines, installing available leak detection technology and redesigning its clean-up methodology. [528] Additionally, Shell would have to cease relying on the Nigerian military for protection and hire its own security force – a security force that would cost far more, but would not be permitted to use of lethal force to protect Shell's assets in the way the Nigerian military does.

Additionally, CSR has repeatedly been shown to contribute positively to corporate reputation.[529] Shell has a lot to gain from such a reputational boost, since Shell identifies "an erosion of our

[524] Sustainability report 1998, *supra* note 21, 4.
[525] The 2003 IOE/ICCom memo, *supra* note 195.
[526] J. Demmers *Theories of Violent Conflict* (Routledge 2017), 139-144.
[527] Shell Nigeria, 'Shell Spent N9 Billion on Community Development in Niger Delta in 2010' (*Shell.com*, 21 November 2011) available https://www.shell.com.ng/media/2011-media-releases/nigerdelta-cdspent.html at last accessed 25 July 2021; Shell Nigeria, 'Shell Nigeria Tops Shell Group's Spending on Social Investments' (*Shell.com*, 19 June 2016) available at https://www.shell.com.ng/media/2016-media-releases/nigeria-tops-shell-group-spend-on-social-investments.html last accessed 25 July 2021.
[528] Cleaning up the Niger delta in full would cost 50 billion dollars, cleaning up Shell's 2008 spill alone would cost 6 billion dollars U. Akpan, E. Ejoh and P. Okafor, 'Cleanup of Oil Producing Areas to Cost 50 Billion dollars' (*Vanguard*, 6 June 2017), available at https://www.vanguardngr.com/2017/06/cleanup-oil-producing-areas-cost-50-billion/ last accessed 25 July 2021; this figure does not include the cost of the large scale pipeline maintenance and overhaul of oil spill prevention and response methods that are required, UNEP report, *supra* note 508, 99-100, 150.
[529] R. Nikole and M. Bicho 'The Role Of Reputational Factors In The Voluntary Adoption Of Corporate Factors In The Voluntary Adoption Of Corporate Social Responsibility Reporting Standards' (2011) 39 *Journal of the Academy of Marketing Science*; H.C. Cho, R.P. Guidry, A.M. Hageman and D. M. Patten, 'Do Actions Speak Louder than Words? An Empirical Investigation of Corporate Environmental Reputation' (2011) 37 *Accounting, Organization and Society*; A. Axjonow, J. Ernstberger and C. Putt, 'The Impact of Corporate Social Responsibility Disclosure on Corporate

business reputation, particularly in relation to Nigeria" as one of the major threats to its future profits, as it could seriously hamper Shell's access to capital markets and/or its ability to secure access new resources.[530] Shell therefore relies heavily on its CSR initiatives in Nigeria to improve its reputation. Shell's CSR reports (the content of which is determined on the basis of a global media review, investor feedback, social media feedback, a reputation tracker survey, its website visits and specific reputational and financial risks identified by the board)[531] consistently mentions Nigeria far more than any other country.[532] Shell Nigeria makes concerted efforts to draw attention to its CSR in the Niger delta: press releases on the website of Shell Nigeria relate almost exclusively to its CSR initiatives,[533] and Shell Nigeria publishes a quarterly magazine in which it documents its CSR activities.[534] In the case of Nigeria, this effort appears to have been successful: Shell's CSR in the Niger delta is regularly featured in the Nigerian media,[535] and has won Nigerian CSR awards multiple times.[536] Conversely, unlike CSR projects that consist of Shell voluntarily taking on certain public functions to support local communities, compliance with basic human rights in its core business operations is already *expected* of Shell and therefore would not likely be rewarded by consumers.

4.5. CONCLUSION

This chapter analyzed how the corporate social responsibility projects and voluntary codes that are put forward as an alternative to binding human rights obligations alter – or fail to alter – the rules and power dynamics of the SAF of oil extraction in the Niger delta that enable the occurrence of routine human rights violations. Analyzing both the VPSHR and Shell's healthcare initiatives, I found that neither meaningfully altered the status quo in the field, and that neither initiative fundamentally changes the power dynamics of the field. The initiatives might even increase the

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Reputation: A Non-Professional Stakeholder Perspective' (2018) 151 *Journal of Business Ethics*; G. Riana, W. P. Wirasedena and G. Rihyana, 'Developing A Reputation And Business Performance Through Corporate Social Responsibility' (AFBE Conference Papers) (Thaksin University 2014), available at https://repository.bbg.ac.id/bitstream/391/1/AFBE-2014.pdf#page=62

[530] Royal Dutch Shell, 'Strategic Report' (Royal Dutch Shell 2019), 30-31, 34 available at https://reports.shell.com/annual-report/2019/servicepages/downloads/files/strategic_report_shell_ar19.pdf.

[531] Royal Dutch Shell, 'Sustainability Report' (Royal Dutch Shell 2016), 6.

[532] For instance, in Shell's sustainability report of 2020, Nigeria is mentioned 84 times, while the second most frequently mentioned countries are India and China, at 8 and 11 mentions respectively. In the 2016 report, Nigeria is mentioned 78 times, while China and India are again the second most frequently mentioned countries at 11 and 8 mentions. The 2020 and 2016 reports were randomly selected, and do not appear to mention Nigeria more frequently than Shell's other sustainability reports.

[533] Shell press releases available at https://www.shell.com.ng/media.html.

[534] Shell Nigeria magazine available at https://www.shell.com.ng/media/shell-world-nigeria.html.

[535] See for instance News Express, 'Oloibiri: Shell Remodels, Equips Kolo General Hospital to Commemorate Oil Discovery' (*News Express Nigeria*, 31 July 2019), available at https://newsexpressngr.com/news/79879-Oloibiri-Shell-remodels-equips-Kolo-General-Hospital-to-commemorate-oil-discovery last accessed 25 July 2025; R. Okere, 'SPDC JV Expends N14.85 Billion on GMoU's in Rivers State' (*The Guardian Nigeria*, 23 May 2018), available at https://guardian.ng/business-services/spdc-jv-expends-n14-85-billion-on-gmous-in-rivers-state/ last accessed 25 July 2021.

[536] Shell Nigeria, 'Shell Wins Seras Awards for CSR Innovations' (*Shell.com*, 13 November 2016), available at https://www.shell.com.ng/media/2016-media-releases/shell-wins-seras-awards.html last accessed 25 July 2021; Shell Nigeria, 'Recognition and Awards' (*Shell.com*, n.d.), available at https://www.shell.com.ng/media/nigeria-reports-and-publications-briefing-notes/recognition-and-awards.html last accessed 25 July 2021; 'Award Winner 2009: Shell Petroleum Development Company Nigeria' (*GBC Health*, 26 June 2009), available at http://archive.gbchealth.org/award/68/ last accessed 25 July 2021; A. Amana, 'Sustainable Development and CSR: The SPDC Example' (*African Leadership Magazine*, 28 November 2020), available at https://www.africanleadershipmagazine.co.uk/sustainable-development-csr-the-spdc-example/ last accessed 25 July 2021.

influence the incumbent has over the settlement, as the initiatives give Shell sway over the Niger delta's healthcare policy as well as over the use of lethal force by public security. I thus conclude that CSR is not a suitable alternative to human rights obligations in remedying the Niger delta's business-related human rights problems. Nevertheless, Shell actively promotes CSR as such. Rather than addressing that the solutions it promotes are not suited to remedy the systemic business-related human rights problems that proponents of regulation aim to address, corporations promote a framing in which these problems are the result of weak states facing rapid globalization. By doing so, Shell avoids having to make the costly adjustments that full compliance with international human rights law entails, and boosts its faltering reputation in the process.

CONCLUSION

In this thesis I sought to provide a critical, post-colonial perspective on Shell's Corporate Social responsibility initiatives in the Niger delta. Too often, research into extractive multinationals' CSR activities focuses on efficacy. Frequently, what is missing from the wealth of studies that examine Shell's CSR in the Niger delta is any questioning of the premise that corporations can and should try to promote human rights and development. Absent from these studies also is any contextualization of CSR into the broader relationship between extractive multinational corporations (often incorporated in the EU and the US) and developing communities in the global south.

Through this thesis, I aimed to provide that context by basing my research question on two premises. First, I presumed that given the structure of the corporation and the global economy, multinational corporations and local communities do not inherently share the same interests and priorities, and may even have conflicting interests. Second, I presumed that the history of European multinational corporations in the global south[537] continues to shape the relationship between today's multinational corporations and the communities they operate in. Fligstein and McAdams theory of fields is compatible with both of these assumptions.

SAF theory after all conceptualizes incumbents and challengers as continuously jockeying for position: while some of the Niger delta communities' and Shell's interest may align or overlap, they cannot be presumed to be neutral partners in the project of promoting human rights. SAF theory also recognizes that the disparity in power between actors at the time of a fields emergence determine the extent to which the interests of the incumbent are reflected in the field settlement, and the ease with which the incumbent can re-impose the status quo after it has been challenged.[538] SAF theory thus acknowledges the large influence of the colonial context in which the Nigerian oil industry emerged on the present rules, understandings and power dynamics governing oil extraction in the Niger delta. The research question I set out to answer – informed by a critical, post-colonial perspective and phrased in the terminology of SAF theory – thus became:

"In what ways has Shell strategically deployed CSR to defend its incumbent position in the SAF of oil extraction in the Niger delta in the face of exogenous challenges (between 1998 and 2018)?"

Change without difference

The rules, practices and understandings that governed oil extraction in the Niger delta first took shape in the early 1900s, when the UK established Nigeria as a British protectorate and oil prospector Charles Bergheim lobbied for the 1907 mining (oil) ordinance. At the time, the UK relied on petroleum for the functioning of its military and its industrializing economy. While the UK government thus had a significant stake in the extraction and export of the Niger delta's oil it had little investment in the wellbeing of Niger delta populations, whom it did not understand and did not represent. As a result, practices, rules and understandings established by Nigeria's colonial administration prioritized the extraction and export of Nigerian oil over the basic needs and rights of Niger delta populations, granting oil corporations numerous rights and placing few limits on those rights.

[537] Including the transatlantic slave trade, imperialism through chartered 'companies', the establishment of colonies, the shaping of the de-colonization process and independence constitutions and the autocratic regimes that followed independence.
[538] Fligstein and McAdam 2012a, *supra* note 41, 90, 92, 96-98, 105-106.

When Nigeria ceased to be a British colony these rules, practices and understandings were not transformed, despite the fact that Nigerian nationalists had vigorously advocated against them in the decades prior to independence. Instead, through the UK led independence process and the subsequent contentious elections, Nigerian elites came to compete over the revenues generated by the Niger delta's oil. When these tensions culminated in a civil war in which Shell was a key ally of the Nigerian federal military government, the logic of extraction and export was only further entrenched in Nigerian law, culture and politics. The centralization, nationalization and the oil boom that characterized Nigerian politics directly after the civil war again deepened both the Nigerian federal government's dependence on oil and its control over the oil industry. As a result, the logic of extraction and export that dominated in colonial Nigeria continues to shape the rules, practices and understanding that govern the field of oil extraction in the Niger delta today.

This field settlement has been the subject of constant contestation, as challengers in the field view it as illegitimate and inequitable. Nevertheless, the field's three core rules – that the federal government owns the Niger delta's oil, that Shell has the exclusive right to extract the Niger delta's oil and that local environmental and health concerns do not supersede Shell's economic interests – have remained unaltered. Each time these rules are contested by the field's challengers, the federal government (which depends on oil taxes to fund its agencies and on oil exports to stabilize the Naira) intervenes militarily to end the contentious episode and forcefully re-impose the controversial settlement. The SAF of oil extraction in the Niger delta thus is a clear example of an SAF that remains relatively stable once an initial settlement has been reached, precisely because of the substantial advantages the initial settlement provides to incumbent.

Yet, as Fligstein and McAdams theorize, even the most stable fields are vulnerable to change in a hyper-connected world. Each SAF is connected to numerous other fields, and changes in one field may 'ripple out' and disturb the status quo in fields closely connected to it. Shell's attitude towards (and alleged involvement with) the crimes committed against the Ogoni in 1994 and 1995 failed to change anything in Nigeria itself, but set major development in motion in the international arena. While the lawsuit filed against Shell by Nigerians late 1995 was (among) the first of its kind, it appears increasingly likely that in the future corporations could be held legally accountable for their involvement in (severe) human rights violations.[539] This in turn would have profound implications for the field of oil extraction in the Niger delta, as it would introduce an additional body that could place limits on Shell's conduct in the Niger delta – one whose interests are not (as) deeply and inextricably linked with those of Shell.

Still, despite the fact that the field of business and international human rights has been in constant flux for the past twenty-five years, the core rules and understandings of the field – that multinational corporations do not have human rights obligations and that they can only be sued in the state where the human rights violation has been committed (Nigeria in this case) – remain unchanged.[540] This lack of change is not the result of the passive reproduction of structures in the absence of action, but of action itself: Shell (in cooperation with others) had to engage in strategic action consistently and proactively to prevent the formation of a new status quo in which corporations do not only have rights, but obligations too. For instance, Shell lobbied vehemently and successfully against the 2003 UN Draft norms, opted for the most drastic litigation strategy in the *Kiobel* case and engaged extensively with the UNGP process to steer it away from binding

[539] See postscript.
[540] See postscript.

norms and enforcement mechanism and towards voluntarism. Instead of outright rejecting the idea that a corporation ought to be mindful of its impact on society (as it had done in the 1980s), Shell relied on the concept of corporate social responsibility: corporations, if encouraged, can be part of the solution rather than part of the problem, rendering any binding regulation superfluous.

A closer examination of one set of voluntary principles (the VPSHR) and one type of corporate charity (Shell's healthcare initiatives) however revealed that CSR and voluntary codes and charity are not adequate substitutes for international human rights in the case of the Niger delta. Both the VPSHR and Shell's healthcare initiatives failed to address systemic human rights abuse: the VPSHR did not challenge the practice of relying on military force to protect corporate property rights, while Shell's healthcare initiatives made no serious effort to reduce the amount of metal in the Niger delta's water and the amount of toxic gas in the Niger delta's air. Instead, even if each of these initiatives was implemented perfectly they would only achieve marginal improvement by design. The military permanently present in Niger delta communities would refrain from rape and plunder as they target and kill 'terrorists and thieves', while those sick from lead poisoning and malnutrition would obtain access to quality health care at a fair price.

The preference for CSR amongst developed states and multinational corporations therefore can hardly be attributed to its efficacy as a substitute for international human rights protections. CSR boosts corporate reputation, which often – and certainly in the case of Shell Nigeria – meets a dire need for a better corporate image. Unlike complying with international human rights law, which would require a fundamental and costly overhaul of Shell's operations, CSR projects and voluntary initiatives can be pursued in addition to a corporation's day-to-day operations. Moreover, where compliance with international human rights law mostly places limits on corporate conduct, Shell's CSR expands Shell's influence over the Niger delta's affairs in vital policy areas. While John Ruggie's 'business case for human rights' appears to be a fiction, there is certainly a 'business case' for CSR. That CSR has not and cannot meaningfully change the status quo in the Niger delta may be, for Shell as the incumbent in the field, one of its perks rather than one of its flaws.

The emperor's new clothes: CSR and the status quo

The case of Shell in Nigeria illustrates two things about the durability of an inequitable status quo. First, inequitable field settlements are durable precisely because they are inequitable: because inequitable field settlements came to be in a context of large power disparities between actor's, the incumbent is better positioned to defend the status quo against challenges.[541] Second, precisely because the status quo is inequitable, it is highly beneficial to the field's incumbent, who will vehemently defend it in a crisis of legitimacy. The incumbent can do so by enlisting its state allies to re-impose the status quo through the use of force [see 3.3 on how Shell specifically has done this], but it can also cooperate in establishing a new order that has all of the key features of the prior order [see 4.3 on how Shell specifically has done this].[542] From these observations, it can be concluded that the absence of meaningful change in the face of inequality is not the product of macro-structures such as 'capitalism' and 'colonialism' passively reproducing themselves, but of concerted and sustained efforts by incumbents: stability, like change, is achieved through action.[543]

[541] Fligstein and McAdam 2012a, *supra* note 41, 90, 92, 96-98, 105-106.
[542] Fligstein and McAdam 2012a, *supra* note 41, 105-106, 189.
[543] Fligstein and McAdam 2012a, *supra* note 41, 96-97; Kluttz and Fligstein 2016, *supra* note 44, 194.

Understanding Shell's CSR as a form of incumbent strategic action elucidates the apparent paradox of Shell's proactive promotion for socially responsible business and its vehement resistance against legal accountability for socially irresponsible business conduct. Corporate responsibility conceptualizes human rights as *aspirations* – policy goals or benchmarks of development towards which governments strive and towards which corporations can contribute. Corporate accountability on the other hand is based on human rights as *rights* – basic protection of fundamental human needs and inherent human dignity. The former conceptualization of human rights evokes a debate on how profits are *spent*: do all of a corporation's profits accrue to the corporation, or should a corporation reinvest part of its profits into the communities in which it operates? The latter conceptualization of human rights on the other hand requires a reckoning with how profits are *made*. While the former debate fits well within the current framework of shareholder-driven corporate capitalism – a corporation can do good for society and do well for its shareholders at the same time – ethical answers in the latter debate may well be fundamentally at odds with the current design of the post-colonial global economy.

Similarly, understanding CSR as a form of incumbent strategic action sheds new light on the near simultaneous emergence of the movement for corporate accountability and the socially responsible corporation. Rather than alternative responses to the same problem – "the government gaps created by globalization" – the socially responsible corporation is incumbents' joint answer to the threat that corporate legal accountability represents to numerous field settlements. Neither globalization nor corporate abuse of indigenous people's human rights is a phenomenon that emerged in the 1980s and 1990s. Ever since the first companies were incorporated in the early 17th century, European (and later American) corporations such as the Dutch East India Company and the British West India Company have abused the indigenous communities that live on the land from which the companies got their resources. Instead, what changed in the 1990s was the rise of information technology that enabled victims, activists and lawyers to mobilize and find new ways to challenge old practices. Amidst falling share prices, boycotts, protests, reports, documentaries and newspaper articles it became clear that outright denying these demands for justice was unsustainable. It is a testament to Shell's social skill as an incumbent[544] that Shell was able to recognize this threat and forestall a seemingly imminent collapse of the field's settlement by presenting corporate charity as a substitute for economic justice.

The risks of rendering technical in a post-colonial, capitalist world

Conspicuously absent from this thesis has been the question as to whether or not CSR makes a net positive difference in Niger delta communities' lifes. This question has been asked and answered by most other literature on the subject of CSR in the Niger delta and CSR more broadly. Instead, this thesis has been committed to placing CSR back into its context: how should we understand CSR in a capitalist, post-colonial world? The understanding that the Niger delta's problems do not result from a gap in governance or weak governments, but from a *type of government* – a government that, due to the colonial, extraction-oriented logic of the economy remains dependent on a small number of large foreign extractive corporations – should inform the debate on *whether* Shell taking on public functions would address these problems in any meaningful way. Such a debate is a necessary corollary to research into *how* Shell can best address the Niger delta's problems.

[544] Fligstein and McAdams 2012a, *supra* note 41, 105-106, theorizing that the social skill of incumbent is essential in either re-establishing the prior order after a contentious episode, or forging a new order that preserves (almost) all key components of the prior field order.

Focusing on the latter question regarding efficacy alone (e.g. by recommending how Shell might be more efficient in combatting human trafficking, how it can assure its HIV/AIDS treatment also reaches the poorest individuals and how Shell might ensure its vocational craft schools benefit rural youths) [545] erases essential context in two ways. First, removes the Niger delta's problems from the political realm and renders them technical by conceptualizing Shell as neutral partner in development, obscuring that Shell has interests that are different from those of Niger delta populations. Secondly, by (implicitly) promoting the corporation as better suited than the Nigerian state to solve the Niger delta's problems, it strips away important historical context – context which includes that it is precisely Shell's unique position vis-à-vis the Nigerian state that is at the root of the Niger delta's underdevelopment.

A solution presented to a problem out of context – even a well implemented, well researched solution – risks participating in "piecemeal institutional adjustments" that seek to preserve "the key features of the prevailing field settlement" instead of achieving meaningful change.[546] After all, even if Shell were successful in solving the Niger delta's problems, this would take the Niger delta into a direction that is as old as it is new. The Niger delta would, for the second time, be governed by a private corporation whose primary stake in the area is the extraction of its natural resources. Like the Royal Niger Company, Shell has access to a police force and an army to safeguard its economic interests, and like the Royal Niger Company, Shell is not (meaningfully) accountable to any local government. Shell's position as a provider of healthcare, education and opportunity undoubtedly benefits individual inhabitants, but also expands Shell's power over the region by lending legitimacy to Shell's control over the area, which would otherwise be mostly coercive in nature.

The legitimacy derived from CSR is also more familiar than it is new: the Royal Niger Delta was able to claim that the inhabitants of the Niger delta had ceded their lands to the RNC "recognizing the benefits received by them from the Company".[547] In reality, the arrival of the RNC did not bring development, but the loss of sovereignty, control and a way of life. A century later, a villager in Bayelsa state laments that Shell, when it first arrived, "said they will give us development, they gave us a generator for the community". In actuality, Shell's arrival to the community meant the loss of control over their land, lives and resources: "they did not say that they would destroy Boupere … and deprive us of our culture and our land".[548] A failure to recognize the historically grown power disparities between challengers and incumbents – and instead understanding them as equal parties in the project of promoting human rights in the Niger delta – opens researchers up to the risk of treating marginal adjustments conceded by the incumbent as meaningful change.

[545] See *supra* note 79.
[546] Fligstein and McAdams 2012a, *supra* note 41, 189.
[547] The full quote (*"It was said, further, that the Kings, Chiefs, of various territories in the Basin of the Niger, recognizing the benefits received by them from the Company, had ceded the whole of their territories to the Company"*) can be found in the document accepting the RNC's application for a royal charter [on file with author].
[548] J. Adekola, O. Adekola, M. Fischbacher-Smith and D. Fischbacher-Smith, 'Health Risks from Environmental Degradation in the Niger Delta, Nigeria' (2017) 35 *Environment and Planning,* Shell was the oil corporation active in the area in which Oporoma was located at the time.

Postscript

After the completion of the body text of this thesis, Shell was held liable for the 2008 oil spill in the Netherlands, and for the 2011 oil spill in the UK.[549] Both for the Netherlands and the UK this marked the first time that a parent corporation (Royal Dutch Shell) was held responsible for the conduct of its subsidiary abroad, setting a new precedent in both countries.[550] Subsequently, Shell lost the final appeal in Nigeria that ruled Shell was liable for the persisting damage of a 1970 oil spill. An international investment dispute between Nigeria and Shell pertaining to the ruling is currently ongoing: while Shell has not disclosed the content of the complaint it filed, Shell stated it is "seeking protection of our legal rights from an international tribunal".[551] Shell has begun talks with Nigeria to divest from the Niger delta, as they have come to conclude that it "cannot solve community problems in the Niger delta" and that its assets in the Niger delta are "an exposure that doesn't fit with our risk appetite anymore".[552]

[549] B. van de Weijer, 'Shell moet Nigeriaanse Boeren Schadevergoeding Betalen voor Vervuiling' (*de Volkskrant*, 29 Januari 2021), available at https://www.volkskrant.nl/nieuws-achtergrond/shell-moet-nigeriaanse-boeren-schadevergoeding-betalen-voor-vervuiling~b27a8995/ last accessed 28 July 2021; S. Reed, 'U.K. High Court Says Nigerians Can Sue Shell in Britain Over Oil Spills' (*New York Times*, 12 February 2021), available at https://www.nytimes.com/2021/02/12/business/shell-oil-spills-nigeria-lawsuit-britain.html last accessed 28 July 2021.

[550] M. de Bruyne, 'De Multinational Ontkomt Niet aan Zijn Zorgplicht' (*NRC*, 10 Februari 2021), available at https://www.nrc.nl/nieuws/2021/02/19/de-multinational-ontkomt-niet-aan-zijn-zorgplicht-a4032530 last accessed 28 July 2021.

[551] L. George and C. Eboh, 'Shell Files International Arbitration Against Nigeria over Oil Spill Case' (*Reuters*, 15 February 2021), available at https://www.reuters.com/article/uk-shell-nigeria-arbitration-idUSKBN2AF0VF last accessed 28 July 2021.

[552] R. Bousso and F. Onuah, 'Shell Talks with Nigeria to Divest Onshore Oil Stakes' (*Reuters*, 18 May 2021), available at https://www.reuters.com/business/energy/shell-talks-with-nigeria-divest-onshore-oil-stakes-2021-05-18/ last accessed 28 July 2021.

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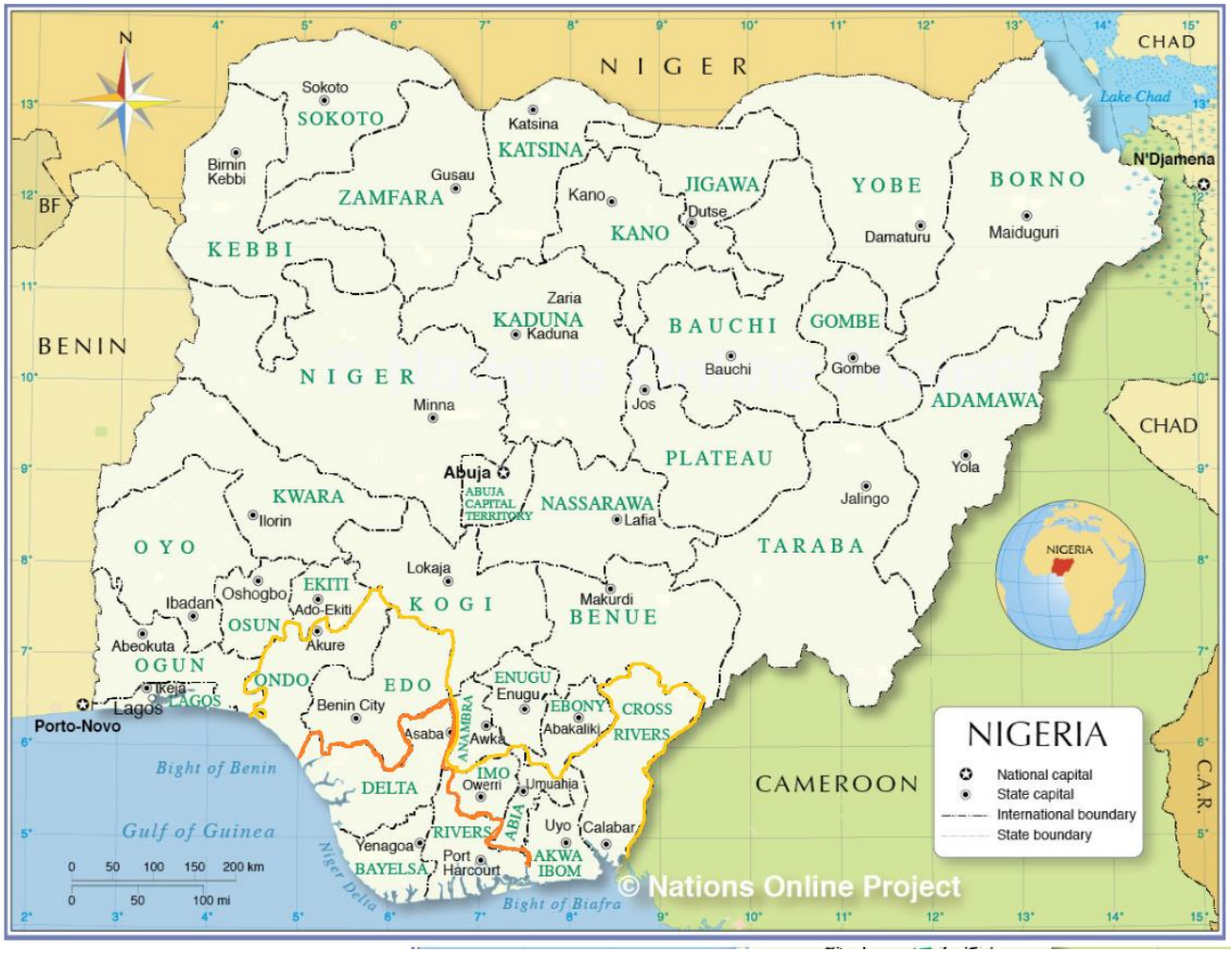
ANNEXES

Annex 1

A map of the states that currently compose the federal republic of Nigeria. The states delineated in orange (Delta, Bayelsa, Rivers) are the states this thesis refers to as the 'Niger delta'. The states delineated in yellow, (Delta, Bayelsa, Rivers, Ondo, Edo, Imo, Abia, Akwa Ibom, Cross Rivers) are the states that are generally referred to as the 'Niger delta'.



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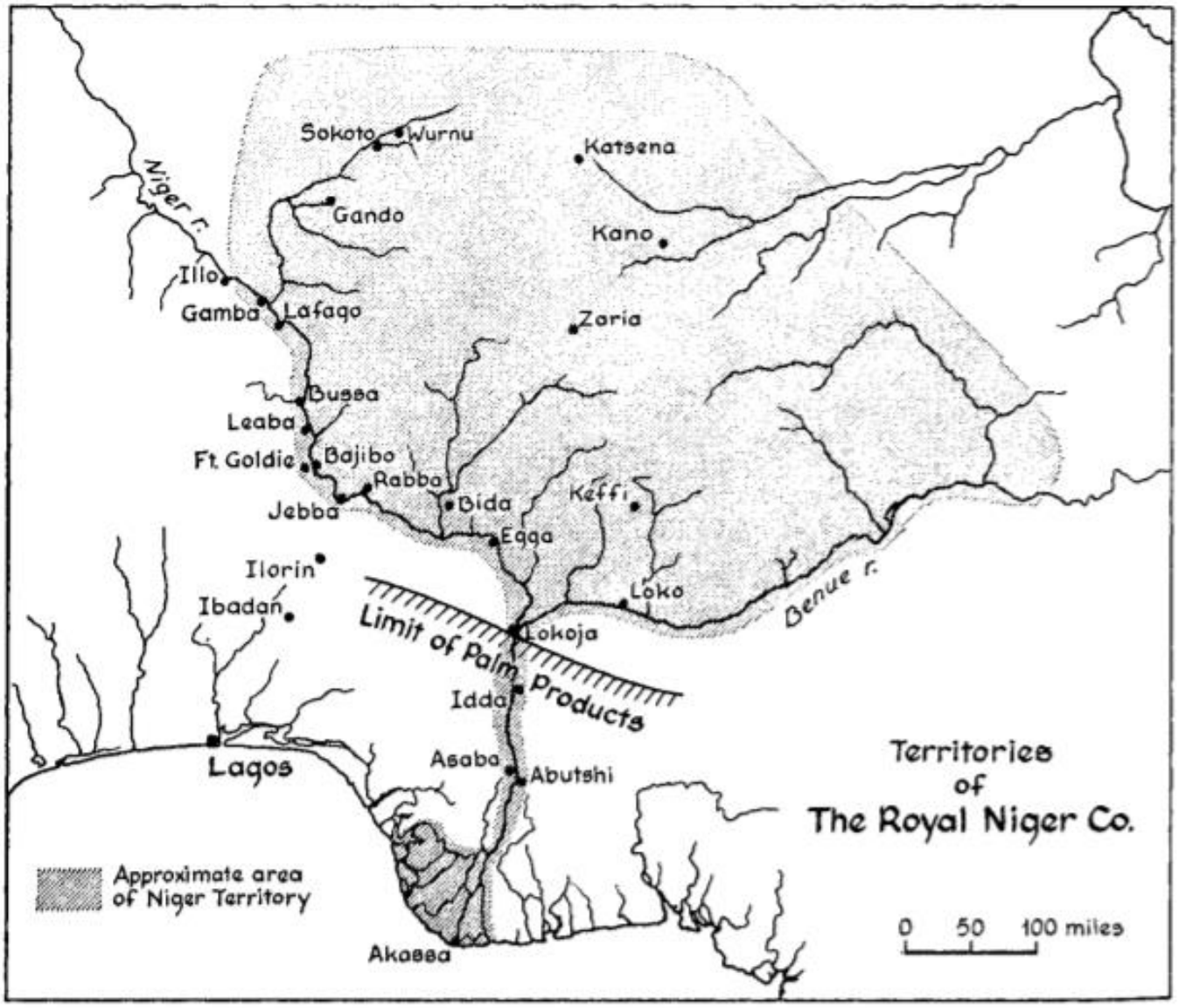
Annex 2

Territory controlled by the Royal Niger Company 1884-1900: the area below the line is where the RNC acquired palm oil ('oil rivers' or 'Niger delta'), the area above is where the RNC traded various products ('Northern Nigeria').



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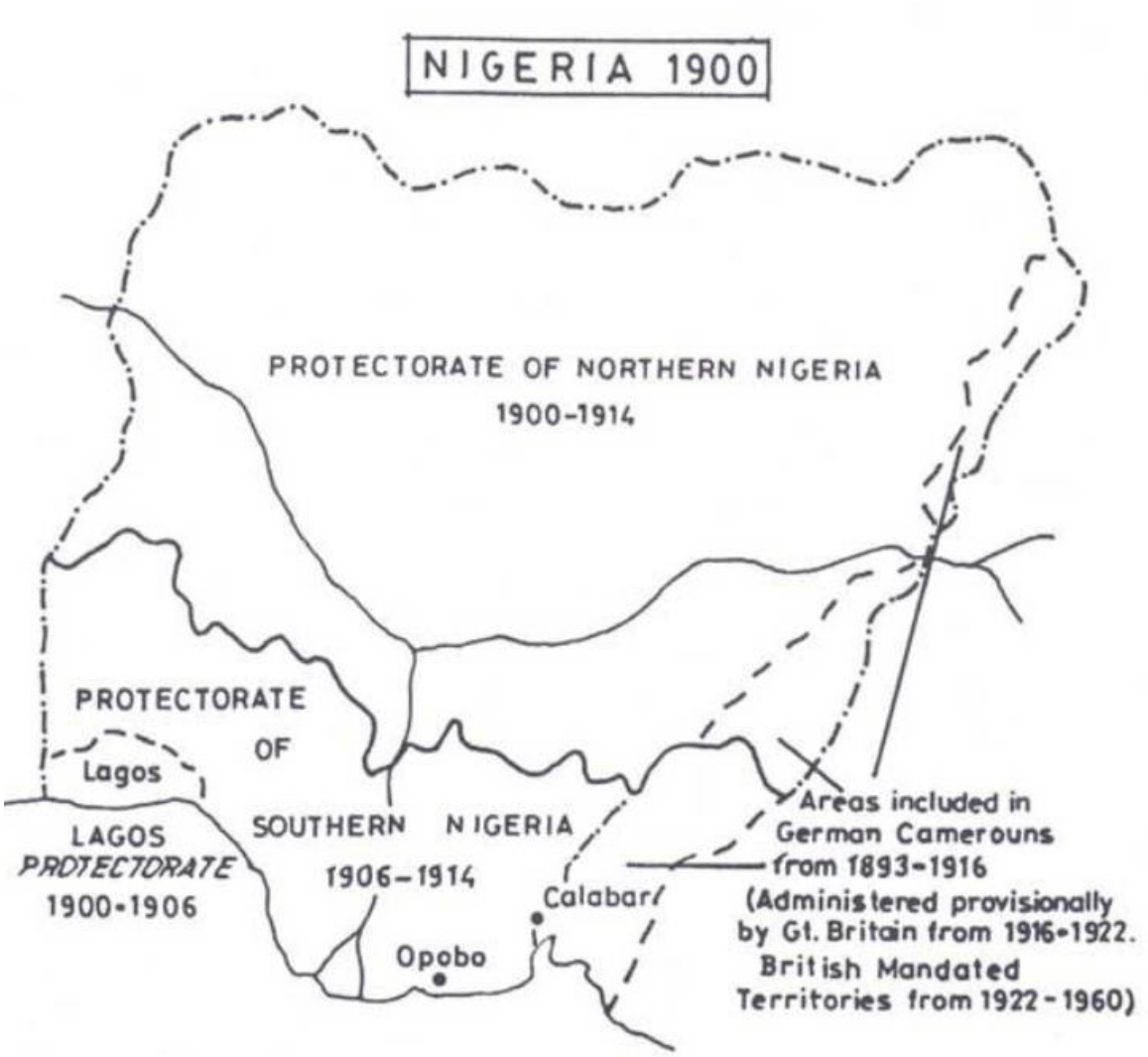
Annex 3

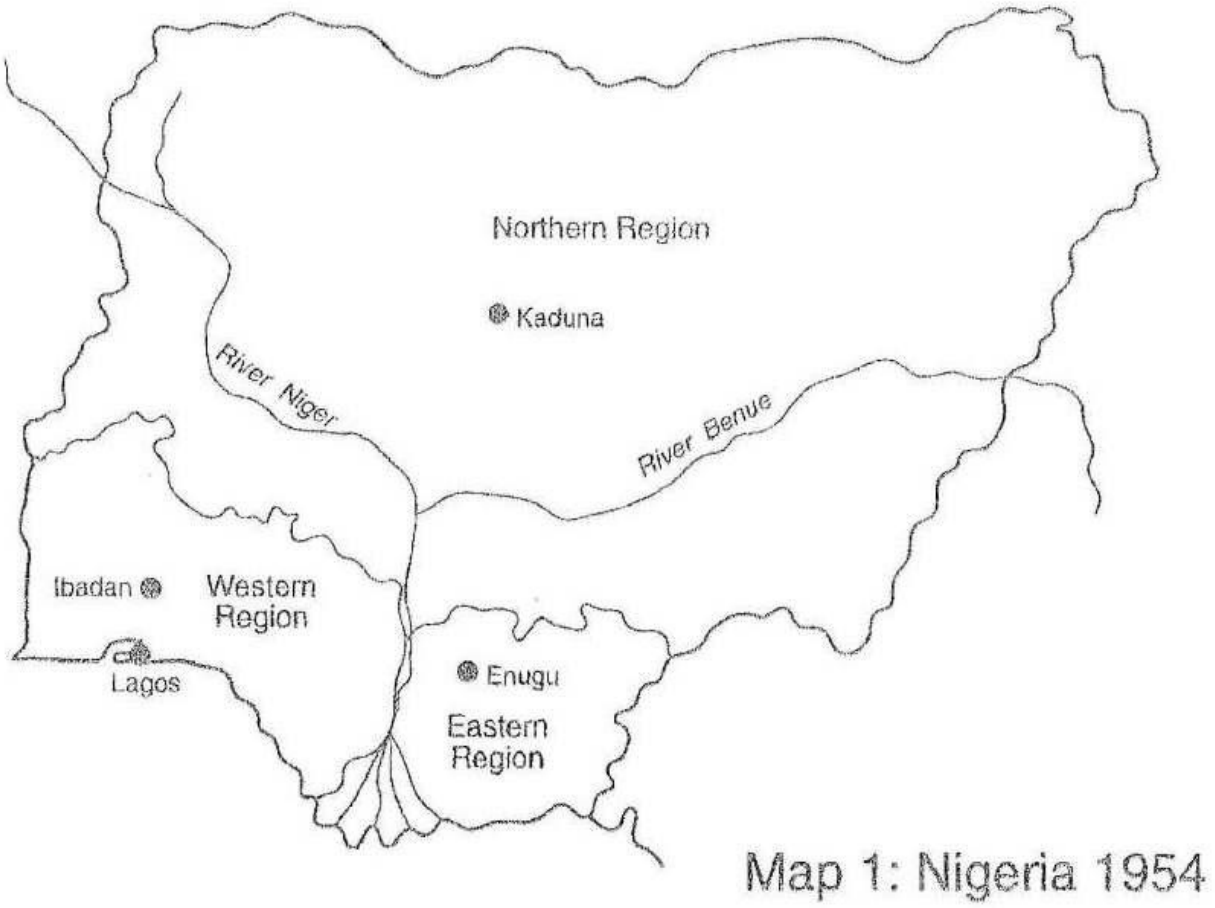
Early colonial Nigeria (1900-1914), consisting of Northern Nigeria, Lagos, The protectorate of Southern Nigeria and parts of Cameroun. Lagos and Southern Nigeria were amalgamated to form Southern Nigeria in 1906. Southern Nigeria and Northern Nigeria were amalgamated to form Nigeria in 1914. The thinner line indicates the river Niger, the thicker line indicates the administrative border between Northern and Southern Nigeria.



D. Steve, 'Colonial Administration of Southern Protectorate' (*Succes Hub: Free Educational Resources*, 30 March 2020), retrieved from https://www.austintommy.com.ng/2020/03/30/colonial-administration-of-southern-protectorate/.

Annex 4

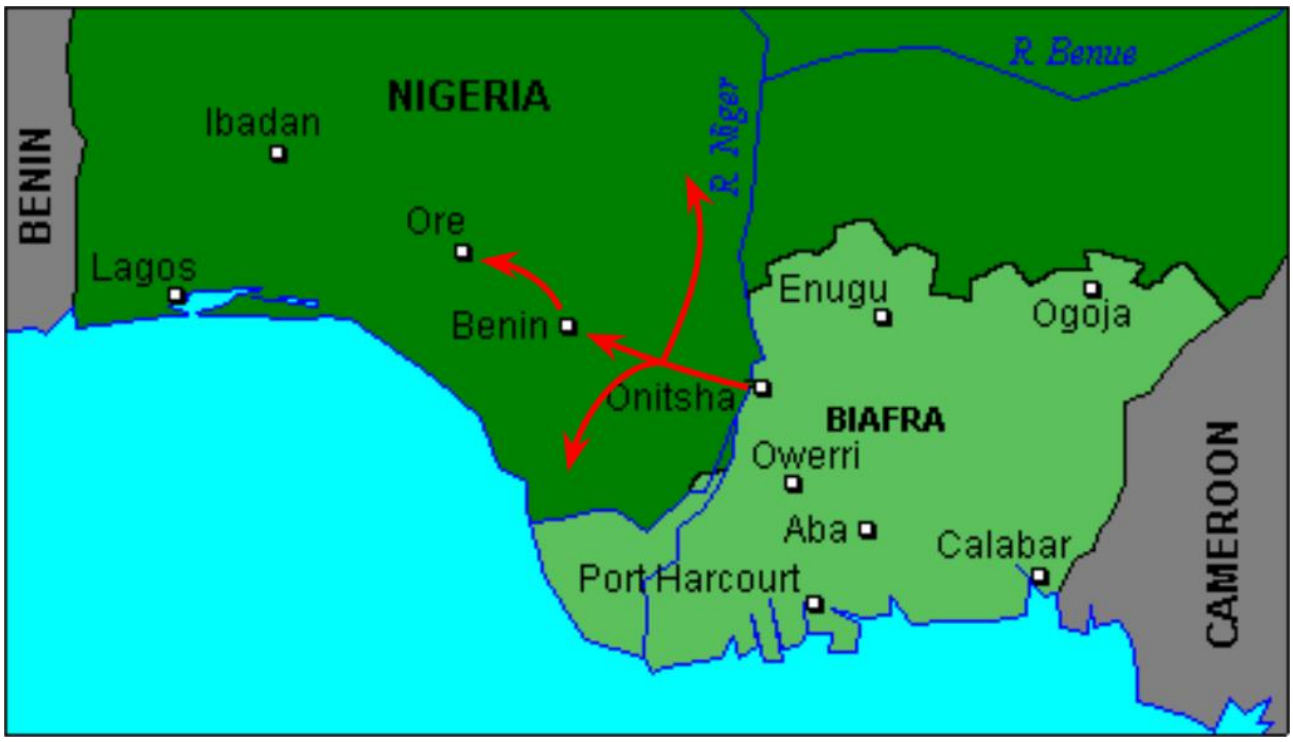
Nigeria in during the decolonization process, and upon independence (1946-1963). Nigeria consisted of three regions that were highly autonomous: Northern Region (Hausa and Fulani), Western Region (Yoruba), Eastern Region (Igbo). Half of the delta of the river Niger is located in Eastern Region, and half in Western Region.



'An Historical Map of Nigeria Showing Three Federal Regions Created by British Colonial Rule' retrieved from http://www.waado.org/nigerian_scholars/archive/pubs/wilber1_map1.html.

Annex 5

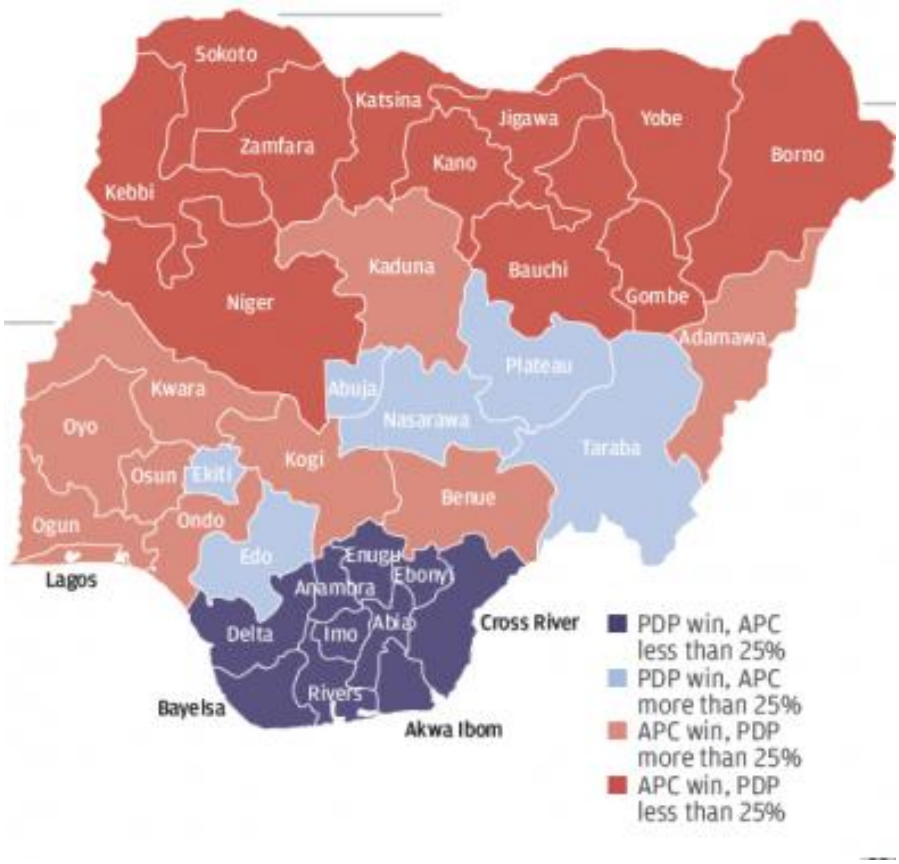
The territory of the republic of Biafra, which seceded from Nigeria in 1967. The red lines show where most fighting took place in 1967. Two thirds of Nigeria's oil reserves were located in Biafra's territory. The other share of Nigeria's oil was located in the area where the fighting took place (marked by red arrows).



Retrieved from https://en.wikipedia.org/wiki/Midwest_Invasion_of_1967

Annex 6

The vote breakdown in the 2015 presidential elections between Jonathan Goodluck (PDP) and Muhammadu Buhari (APC). Despite Buhari winning the elections, the oil rich territories each overwhelmingly voted for Goodluck (indicated in dark blue).



Retrieved from New African, 'How Buhari won' (*New African*, 7 May 2018), available at https://newafricanmagazine.com/10818/