

**PIERCING THE CORPORATE VEIL TO HOLD FOREIGN MULTINATIONALS  
LIABLE FOR THE ACT OF THEIR LOCAL SUBSIDIARIES: A CASE STUDY OF THE  
SHELL PETROLEUM DEVELOPMENT COMPANY OF NIGERIA LIMITED (SPDC)**

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## ABSTRACT

Foreign Direct Investment is an investment made by either an individual or business from one country in the businesses of another country. In as much as Foreign Direct Investment a measure of foreign ownership of productive assets such as factories, mines, lands and lots more can be used as one of the measures of growing economic globalization, the measure in which these direct investments are being carried out can infringe on the citizen's fundamental human right as embedded in the Constitution.

Shell Petroleum Development Company Nigeria Limited (SPDC) is a subsidiary of Royal Dutch Shell situate in Hague. SPDC engages in onshore, shallow and deep-water oil exploration, production, and a major contributor to Nigeria's economy. However, the activities of SPDC has also infringed on the fundamental human rights of the citizens where they carry out its operations.

Using the Niger-Delta, State in Nigeria, this work will look at such rights infringed by the activities of SPDC as seen in various suits filed against the corporation. Likewise, the possibility of holding the parent corporations liable the actions of its subsidiaries and in this context at what point SPDC's actions to the environment and occupants of these communities will warrant the lifting the veil of incorporation and holding Royal Dutch Shell responsible for the acts of SPDC in Nigeria.

Furthermore, the possibility of also suing SPDC in other foreign jurisdiction and having the corporate veil pierced in order to hold RDS liable for the negligent acts of its subsidiaries in those jurisdiction. The cases brought against SPDC in the United States Courts and in the Netherland shed more light on how other corporate law principles can hinder the court from even assuming jurisdiction to hear the suit or incapacitate the courts from piercing the corporate veil.

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## **LIST OF ABBREVIATION**

AGRA – Associated Gas Re-Injected Act

ATS – Alien Tort Statute

CAMA – Companies and Allied Matters Act

CCR – Center Constitutional Rights

CFRN – Constitution of the Federal Republic of Nigeria

DCCP – Dutch Code of Civil Procedure

ECJ – European Court of Justice

EGASPIN - Environmental Guidelines and Standards for the Petroleum Industry in Nigeria

FDI – Foreign Direct Investment

FRCP – Federal Rule of Civil Procedure

J.S.C – Justice of the Supreme Court

JVA – Joint Venture Agreement

JVOP – Joint Venture Operating Agreement

MOSOP – Movement for the Survival of the Ogoni People

NASDAQ – National Associations of Securities Dealers Automated Quotations

NESREA – National Environmental Standards and Regulations Agency

NNPC – Nigerian National Petroleum Company

NSE – Nigerian Stock Exchange

NYSE – New York Stock Exchange

RDS – Royal Dutch Shell

SPDC – Shell Petroleum Development Company

SPS – Shell People Services

TVPA – Torture Victim Protection Act

UDHR – United Nations Declaration of Human Rights

UNEP – United Nations Environment Programme

UNGP – United Nations Guiding Principles

US – United States

## INTRODUCTION

In Nigeria, foreign corporations who wish to extend their business activities must first register its subsidiary according to the Nigerian laws. The effects and benefits that come with the incorporation will be discussed in this work. However, it is mandatory for corporations to maintain ethical standards and it is the function of the officers, the board of directors to see to the compliance of these standards which not only includes the environmental laws as seen above but also human rights.<sup>1</sup>

Corporations, which fail to maintain these ethical standards and respect the human rights, could be found liable if sued in the local court and asked to pay damages or remedy such acts. Most often than not, these corporations may not have the resources or financially capable to carry out these remedies or pay such damages. In such cases, these victims may also be constrained by statute, corporate law principles or other factors from holding the parent corporations liable for the actions of its subsidiaries in the home state.

Using SPDC as a case study, this work though non-exhaustive sheds light on what citizens of developing country in this case Nigeria go through in the hands of subsidiaries of foreign corporations. It depicts some of the ways corporations violate human rights and may possibly not be held liable or no adequate remedy in their local court. It has become imperative that victims of corporate human right abuses to seek for adequate remedy. This could be by filing suits in foreign jurisdictions where the parent corporations are situated and asking the court to pierce the corporate

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<sup>1</sup> Nigerian Securities and Exchange Commission, 'Code of Corporate Governance in Nigeria' (October 2003), [www.sec.gov.ng/pdf/Corporate%20Governance%20%20Voluntary%20Code%202008](http://www.sec.gov.ng/pdf/Corporate%20Governance%20%20Voluntary%20Code%202008) accessed 4<sup>th</sup> April 2018



veil in order to hold the parent corporation liable due to the fact that often times, these subsidiaries may not be deep pocketed to pay the damages or carry out the necessary remedy needed.

Meanwhile, in Nigeria, cases that entail the piercing of the corporate veil is to determine which officer of the corporation would be held liable for the acts of the corporation and not the parent company. Factors like control and shareholdings could be used to determine who should be held liable. If the corporate veil of SPDC is pierced under Companies and Allied Matters Act (CAMA) would Nigerian National Petroleum Corporation be found to be liable considering that one of the criteria's to determine a parent company is by looking at the persons holding more than the nominal value of a corporation's share capital?<sup>2</sup> If the above is the case, then the chance of victims of corporate human right abuses by SPDC having an adequate remedy when the local court is asked to pierce the corporate veil in order to hold the parent corporation liable for its SPDC's negligent act is slim.

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<sup>2</sup>Companies and Allied Matters Act, Cap. C20, L.F.N 2004, § 338 (1) a (i) (ii), This section of the CAMA could leave one wondering if SPDC could be deemed to be a subsidiary of NNPC putting into consideration that NNPC holds 55% of the nominal value of SPDC's equity share capital.

## CHAPTER ONE

One of the ways States seeking to improve or develop their economy and to generate revenue is by looking for ways to attract foreign investors and investments into the State. Most states offer incentives such as entering into a concession with investors, tax reduction in order to achieve this purpose. This was no different for Nigeria an African country which granted exploration license to Shell D'Arcy Exploration Company (Shell D'Arcy) which is now known as Shell Production Development Company (SPDC) in November 1938 to explore oil throughout Nigeria.<sup>3</sup>

### 1.1 HISTORICAL BACKGROUND OF SHELL IN NIGERIA

Shell D'Arcy, an oil producing company was the first Shell Company was founded by the Royal Dutch/Shell Group in Nigeria.<sup>4</sup> The group successfully drilled its first oil well at Oloibiri in Ijawland, Niger Delta region of Nigeria in January 1956. In April 1956, Shell D'Arcy changed its name to "Shell-BP Petroleum Development Company of Nigeria Limited" (Shell-BP); and in December 1979 Shell-BP renamed to "Shell Petroleum Development Company of Nigeria" (SPDC).<sup>5</sup>

In April 1973, the Federal Government of Nigeria through its oil corporation Nigerian National Petroleum Corporation (NNPC) a corporation, which the federal government regulates and participates in the country's petroleum industry,<sup>6</sup> entered into a "First Participation Agreement" where it acquired 35% shares of Shell-BP. There were subsequent agreements after the first agreement such as the Second Participation Agreement where the NNPC increased its shares in

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<sup>3</sup> Shell Nigeria, 'The History of Shell in Nigeria' [www.shell.com.ng/about-us/shell-nigeria-history.html](http://www.shell.com.ng/about-us/shell-nigeria-history.html) accessed 29<sup>th</sup> March 2018

<sup>4</sup> Id.

<sup>5</sup> Id.

<sup>6</sup> *Social and Economic Rights Action Center (SERAC) & Center for Economic and Social Rights (CESR) v. Government of Nigeria* 155/96

Shell-BP to 55% and further to 66% in the Third Participation Agreement in April 1974 and July 1979 respectively.<sup>7</sup>

In August 1979, parties entered into a Fourth Participation Agreement where the Nigerian Government nationalized Shell-BP's shareholding hereby NNPC holding 80% shares of Shell-BP.<sup>8</sup> This nationalization came as a result of Britain trying to enter the South African's oil and gas market through its British Petroleum Company. However, the Nigerian Government perceived it as Britain trying to release the North Sea oil to South African while Nigerian oil floods the European market which as at then was seen by South Africans as enemies of Africans.<sup>9</sup>

However, the Nigerian Government entered into a Fifth Participation Agreement in June 1989, which saw the change in the share structure and included other corporations in the following percentages represented. NNPC held 60% of the shares in SPDC, while SPDC had 30%, Elf had 5% and Agip held 5% of shares in SPDC. In July 1993 in the Sixth Participation Agreement, the share structures were as follows, NNPC had 55%, SPDC 30%, Elf 10%, Agip 5% and this has remained the status to date.<sup>10</sup> The above data clearly shows the way the shareholdings of SPDC have revolutionized since the incorporation of SPDC and how the Nigerian government is an active actor in the corporation by virtue of the majority equity interest it holds through NNPC.

In August 1984 just before the Fifth Participation Agreement, there was a Joint Venture Agreement (JVA) consolidating NNPC and SPDC. Shortly afterwards in July 1991 both parties signed a Memorandum of Understanding and entered into a Joint Venture Operating Agreement (JVOA)

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<sup>7</sup> Id.

<sup>8</sup> Id.

<sup>9</sup> The New York Times, 'B.P.'s Nigerian Oil Nationalized' [www.nytimes.com/1979/08/01/archives/bps-nigerian-oil-nationalized.html](http://www.nytimes.com/1979/08/01/archives/bps-nigerian-oil-nationalized.html) accessed 29<sup>th</sup> March 2018

<sup>10</sup> Shell Nigeria, 'The History of Shell in Nigeria' [www.shell.com.ng/about-us/shell-nigeria-history.html](http://www.shell.com.ng/about-us/shell-nigeria-history.html) accessed 29 March 2018

which shows how parties to the agreement do not only share in the benefits but also in the risks and cost of its activities in the proportion agreed by parties.<sup>11</sup> In January 2004, SPDC underwent corporate restructuring and this exercise saw the placement of Nigerians in top Management positions of the corporation. This development took place after SPDC successfully reached the benchmark of producing one million barrel of oil per day in the previous year October 2003 and as the years went by, SPDC expanded its activities to other areas, which saw the corporation drilling more oil wells and production in various fields.<sup>12</sup>

However, just as every other business is expected to come with its own risks and challenges, the expansion of the activities SPDC which includes oil exploration and gas flaring came with its own challenges and risk especially within the communities where these activities are being carried out. One of the risks and challenges that SPDC face because of its activities is the environmental degradation, which leads to other legal issues in one of the communities discussed in the next sub-section, which ideally ought to be shared by the parties, and in accordance to the proportion agreed on in the JVA and JVOA.

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<sup>11</sup> Id.

<sup>12</sup> Id.

## 1.2 THE OGONI CRISIS

The true origin of the Ogoni people remains obscure though there have been various theories which have led to the general believe that the Ogoni people are either migrants from across the Imo River or Ghanaians as most of their names depict.<sup>13</sup> These people consist of six kingdoms settled in some part of the Niger Delta State of Nigeria currently known as the ‘Ogoniland’ and their main source of livelihood is agriculture and farming of which the farm products mainly yam and cassava do not yield high revenue.<sup>14</sup>

SPDC in its quest to expand in its oil production started operations in Ogoniland in 1958 drilling 96 wells, which produces up to 28,000 barrels of oil per day and by the end of 1922 Ogoniland, had contributed up to 3% of SPDC’s total production.<sup>15</sup> Over time, there was an outcry in Ogoniland as most of these farmers and fishermen had lost their lands and fish ponds to oil pollution. Thereby, causing a decline in productivity, reduction in their income, low revenue and ultimately increase in hardship as they became too poor to even pay for seedlings and labor.<sup>16</sup> The Ogoni people alleged that the environmental problem faced such as the oil pollution of the soil, water, and air was a result of oil spills and the gas flaring a result of the oil extraction process of SPDC from its oil wells and fields.<sup>17</sup> The effect of these pollutions seemed more pronounced as there was no government project to address the needs of the Ogoni people which they faced due to the recent development it had experienced.<sup>18</sup> There were no adequate health care facilities,

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<sup>13</sup> MOSOP, ‘The Ogoni Nation’ [www.chr.up.ac.za/chr\\_old/indigenous/documents/Nigeria/ILO/High%20light%20of%20Great%20Ogoni%20Kingdom%20from%20the%20official%20website%20of%20MOSOP.htm](http://www.chr.up.ac.za/chr_old/indigenous/documents/Nigeria/ILO/High%20light%20of%20Great%20Ogoni%20Kingdom%20from%20the%20official%20website%20of%20MOSOP.htm) accessed 30<sup>th</sup> March 2018

<sup>14</sup> Id.

<sup>15</sup> Shell Nigeria, ‘The Ogoni Issue’ [www.shell.com.ng/sustainability/environment/ogon-issue.html](http://www.shell.com.ng/sustainability/environment/ogon-issue.html) accessed 30<sup>th</sup> March 2018

<sup>16</sup> Id.

<sup>17</sup> MOSOP, ‘The Ogoni Nation’ [www.chr.up.ac.za/chr\\_old/indigenous/documents/Nigeria/ILO/High%20light%20of%20Great%20Ogoni%20Kingdom%20from%20the%20official%20website%20of%20MOSOP.htm](http://www.chr.up.ac.za/chr_old/indigenous/documents/Nigeria/ILO/High%20light%20of%20Great%20Ogoni%20Kingdom%20from%20the%20official%20website%20of%20MOSOP.htm) accessed 30<sup>th</sup> March 2018

<sup>18</sup> Id.

buildings were deteriorating to the extent of collapsing and there was no environmental education and sensitization for these people.<sup>19</sup> To the people of Ogoniland, it was obvious that the presence of SPDC had done more harm than good neither has the government which profits more from SPDC's exportation of the Nigerian oil done anything to improve the communities.<sup>20</sup>

In August 1990, the Ogoni people led by Ken Saro-Wiwa a well-known Nigerian writer and a poet formed a group called the Movement for the Survival of the Ogoni People (MOSOP).<sup>21</sup> Through MOSOP, the Ogoni community made known their grievances, as they were displeased with the high level of environmental degradation the community had had to face without any effort by both SPDC and the Nigerian government to improve the state of the community by adequately providing the necessary basic amenities and equipped health care system. SPDC had up to five oil fields in that community.<sup>22</sup>

In trying to address these issues, MOSOP through Ken Saro-Wiwa as one of its spokespersons and others prepared and adopted its own bill of rights known as the Ogoni Bill of Rights (OBR).<sup>23</sup> This OBR contained a list of grievances and part of its demand were environmental, social and economic justice.<sup>24</sup> It opposed the way the Nigerian government had allocated the distribution of the oil revenue and sought for the development of their community as SPDC oil production in the fields in Ogoni were quite productive without any form of compensation.<sup>25</sup>

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<sup>19</sup> Id.

<sup>20</sup> Id.

<sup>21</sup> CETIM, 'Cases of Environmental Human Rights Violations by Shell in Nigeria's Niger Delta' [www.cetim.ch/cases-of-environmental-human-rights-violations-by-shell-in-nigeria%E2%80%99s-niger-delta](http://www.cetim.ch/cases-of-environmental-human-rights-violations-by-shell-in-nigeria%E2%80%99s-niger-delta) accessed 30<sup>th</sup> March 2018

<sup>22</sup> Id.

<sup>23</sup> Id.

<sup>24</sup> MOSOP, 'The Ogoni Nation' [www.chr.up.ac.za/chr\\_old/indigenous/documents/Nigeria/ILO/High%20light%20of%20Great%20Ogoni%20Kingdom%20from%20the%20official%20website%20of%20MOSOP.htm](http://www.chr.up.ac.za/chr_old/indigenous/documents/Nigeria/ILO/High%20light%20of%20Great%20Ogoni%20Kingdom%20from%20the%20official%20website%20of%20MOSOP.htm) accessed 30<sup>th</sup> March 2018

<sup>25</sup> Id.

In due course, MOSOP began to seek political liberation and appealed to the International community.<sup>26</sup> In the appeal, MOSOP stated that the actions of the Nigerian Government were in violation of the United Nations Declaration of Human Rights (UDHR) and African Charter on Human and People's Rights (Ratification and Enforcement) Act (Banjul Charter) as it plans to use its resources to protect its environment from further degradation.<sup>27</sup>

The protest of the Ogoni people soon became a threat to SPDC as the Ogoni people demanded royalties from past oil production in the sum of US\$6 billion and US\$4 billion for alleged environmental damage.<sup>28</sup> This uprising led SPDC to quit its oil production in Ogoniland in 1993 as the company alleged that its staff and facilities were under attack.<sup>29</sup> However, the people of Ogoni alleged that SPDC went back to resume its production in Ogoniland later that year with the protection of the Nigerian military and also that in 1994, the Nigerian government launched a military intervention suppressing the community in the guise of restoring order.<sup>30</sup>

In 21<sup>st</sup> May 1994 there was a report that four prominent Ogoni leaders had been murdered by angry mobs and Ken Saro-Wiwa along with eight other MOSOP activists (hereinafter referred to as "The Ogoni 9") were arrested and accused of the murder which they apparently they denied being involved.<sup>31</sup> It was also alleged that the military dispatched to restore law and order in Ogoniland resorted to the burning of the villages which led to the Ogoni people taking refuge in the bush to avoid arrest and torture.<sup>32</sup> The Ogoni 9 were detained for eight months without any official charge,

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<sup>26</sup> Id.

<sup>27</sup> Ogoni Bill of Rights 1990

<sup>28</sup> Shell Nigeria, 'The Ogoni Issue' [www.shell.com.ng/sustainability/environment/ogon-issue.html](http://www.shell.com.ng/sustainability/environment/ogon-issue.html) accessed 30th March 2018

<sup>29</sup> Id.

<sup>30</sup> MOSOP, 'The Ogoni Nation', [http://www.chr.up.ac.za/chr\\_old/indigenous/documents/Nigeria/ILO/High%20light%20of%20Great%20Ogoni%20Kingdom%20from%20the%20official%20website%20of%20MOSOP.htm](http://www.chr.up.ac.za/chr_old/indigenous/documents/Nigeria/ILO/High%20light%20of%20Great%20Ogoni%20Kingdom%20from%20the%20official%20website%20of%20MOSOP.htm) accessed 30th March 2018

<sup>31</sup> Id.

<sup>32</sup> Id.

no legal representative, medical care nor visit until they were officially arraigned before a special tribunal in February 1995.<sup>33</sup> The special tribunal set up to try the Ogoni 9 found them complicit in inciting the murder of the four Ogoni leaders and ultimately the execution of the Ogoni 9 as ordered by the special tribunal.<sup>34</sup>

SPDC is been accused to have allegedly conspired, aided and abetted the Nigerian government in this Ogoni crisis by providing the necessary finance in harassing, torturing of this group and the complicit in the killing of the Ogoni 9.<sup>35</sup> SPDC has also been alleged to fail to observe the international environmental standard while exploiting its oil reserves in Ogoniland which led to increased poverty, ill health and untimely death of some of the Ogoni people due to inadequate health care.<sup>36</sup>

## CONCLUSION

These allegations against SPDC is further discussed in chapter three by analyzing the cases filed against SPDC in other jurisdictions, as there is less probability of these victims getting adequate remedy due to government complicity. This was also the time of military regime hence one of the great impediments to these victims having access to justice in Nigeria as many lived in fear during this era. However, it is imperative to discuss some corporate law principles played a vital role and in some cases influenced the decision of the judges in the suits filed against SPDC in other jurisdictions.

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<sup>33</sup> Id.

<sup>34</sup> Id.

<sup>35</sup> CETIM, 'Cases of Environmental Human Rights Violations by Shell in Nigeria's Niger Delta' [www.cetim.ch/cases-of-environmental-human-rights-violations-by-shell-in-nigeria%E2%80%99s-niger-delta](http://www.cetim.ch/cases-of-environmental-human-rights-violations-by-shell-in-nigeria%E2%80%99s-niger-delta) accessed 30<sup>th</sup> March 2018

<sup>36</sup> *Social and Economic Rights Action Center (SERAC) & Center for Economic and Social Rights (CESR) v. Government of Nigeria* 155/96



## CHAPTER TWO

Foreign Investors who chose to expand their business activities and invest in States directly most times incorporate a subsidiary in these states, which they use to carry out their operations. The Nigerian Companies and Allied Matters Act (CAMA) also made it compulsory for every foreign investor or foreign company that wishes to carry on business in Nigeria to incorporate its business as a separate entity before the foreign company will be able to carry on business in Nigeria.<sup>37</sup> The above provision of the CAMA also encompasses the principle of separate legal personality, which is part of the received law from England hence, why it was necessary for RDS to establish its subsidiary SPDC in Nigeria in order to engage in onshore, shallow and deep-water oil exploration and production.<sup>38</sup> The benefits that come with the incorporation of these subsidiaries cannot be over-emphasized as it comes with the protection of corporate law principles such as the principle of separate legal personality, which is associated with the corporate veil piercing as discussed below.

### 2.1 THE PRINCIPLE OF SEPARATE LEGAL PERSONALITY

The principle of Separate legal personality was first established in the *Salomon v. Salomon* where the House of Lords reversed a ruling and stated that a corporation is an entity with its own legal existence distinct from its shareholders, owners.<sup>39</sup> This principle was further consolidated in Nigeria under CAMA when it set out the consequences and the effects of incorporation. According to CAMA subscribers of the memorandum of the newly incorporated corporation automatically

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<sup>37</sup> Companies and Allied Matters Act, Cap. C20, L.F.N 2004, § 54 (1)

<sup>38</sup> Shell Nigeria, 'SPDC-Shell Petroleum Development Company of Nigeria' [www.shell.com.ng/about-us/what-we-do/spdc.html](http://www.shell.com.ng/about-us/what-we-do/spdc.html) accessed 31st March 2018

<sup>39</sup> *Salomon v. Salomon* [1987] AC 22

become members of the company and, contracts entered into in the name of the newly incorporated company with its common seal.<sup>40</sup>

Upon issuance of the certificate of incorporations, these subsidiaries become a separate legal personality distinct from its subscribers with has perpetual succession.<sup>41</sup> It also because of the principle laid down in *Salomon* has the right to sue, be sued in its corporate name and to be held personally liable for the debt or any liability incurred during the course of business.<sup>42</sup>

This principle is rigidly adhered to in the Nigerian courts as seen in the *Marina Nominees Limited* case where the Aniagolu JSC stated that “...the truth, however, is that it is a company registered under the Companies Act having its full legal status to all incidents of incorporation...”<sup>43</sup>

This shows to the extent the Judges rely on these corporate law principles when adjudicating over a matter as these principles form part of the judge’s ratio decidendi and this was no different in the SPDC cases.

The statute creates a corporations’ legal personality and its effectiveness is obtained from the applicable state law as seen from the provision of CAMA.<sup>44</sup> Therefore, when RDS incorporated SPDC in Nigeria, SPDC became a separate legal person by virtue of the issuance of the certificate of incorporation; SPDC became the right party to seek redress in court and to be sued in matters pertaining to the activities of SPDC.

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<sup>40</sup> Companies and Allied Matters Act, Cap. C20, L.F.N 2004, § 37

<sup>41</sup> Companies and Allied Matters Act, Cap. C20, L.F.N 2004, § 401

<sup>42</sup> *Salomon v. Salomon* [1987] AC 22

<sup>43</sup> *Marina Nominees Limited v. The Federal Board of Inland Revenue* (1986) 2 N.W.L.R (pt. 20) p. 61

<sup>44</sup> E. John Moye, *The Law of Business Organizations* (6<sup>th</sup> edn. 2004), p. 158

## 2.2 THEORY OF LIMITED LIABILITY

One of the effects of incorporation is that the corporation itself is held liable for any act of negligence or acts of the members of the corporations entered into on the corporations' behalf.<sup>45</sup>

It is one of the privileges that are conferred on the corporation once a certificate of incorporation has been issued and it is codified in the CAMA, which states that;

“As from the date of incorporation, the subscribers of the memorandum ... with other such persons ... from time to time ... shall be a body corporate ... but with such liability on the part of the members to contribute to the assets of the company in the event of its being wound up as is mentioned in the Act”<sup>46</sup>

This concept of limited liability also serves as an incentive and a means of protecting investors or subscribers to a corporations' memorandum and shareholders as their liability will be limited to their capital investment upon winding up.<sup>47</sup> Therefore, RDS as a parent corporation and shareholders of SPDC will generally not be held liable for an act, omission or negligence of SPDC and even debts incurred by SPDC is not the debt of its members.<sup>48</sup>

However, there are two limitations to this principle of limited liability which are; where practical realities may cause the limited liability protection to be diminished by agreement and the legal limitation which is piercing of the corporate veil and our main focus in this thesis.<sup>49</sup>

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<sup>45</sup> Companies and Allied Matters Act, Cap.20 LFN 2004, § 37

<sup>46</sup> Companies and Allied Matters Act, Cap. 20, LFN 2004, § 37

<sup>47</sup> K. Vanderkerckhove, *Piercing the Corporate Veil*, n.p.: Alphan aan den Rijn, the Netherlands: Kluwer Law International; Frederick, MD, USA: Sold and distributed in North, Central, and South American by Aspen Publishers, c2007

<sup>48</sup> *Banque De L'afriqueOccidentale v. Habu* (1964) N.N.L.R 30

<sup>49</sup> E. John Moye, *The Law of Business Organizations* (6<sup>th</sup> edn. 2004), pg. 159.

## 2.3 PARENT – COMPANY LIABILITY

A corporation by virtue of establishing a subsidiary in another jurisdiction or state automatically becomes the parent company to its subsidiary by virtue of the incorporation. A parent company can also be determined by not only through ownership of the subsidiary but also through the level of control it exerts over its subsidiary.<sup>50</sup>

In Nigeria, CAMA recognizes a corporation as a parent corporation of a subsidiary if the corporation holds majority of the equity shares of the subsidiary, a member of a group or control when it stated that:

“... a corporation shall for the purpose of this Act be deemed to be a subsidiary of another corporation if – (a) the company (i) is a member of it and controls the composition of its board of directors, or (ii) holds more than half in nominal value of its equity share capital; or...”<sup>51</sup>

From the provision of the CAMA and from the history of Shell as discussed in the preceding chapter, there is no doubt that RDS is the parent company of the Shell group, which SPDC is inclusive. Though, the latter part of CAMA may leave one wondering if NNPC which had earlier been stated to have the major equity share in SPDC is also the parent corporation; this is however not the case JVA and JVOA entered into by the parties is just for operational reasons and does not confer the status of a parent corporation upon parties (SPDC and NNPC) to those agreements.

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<sup>50</sup> Business Dictionary, ‘Parent Company’ [www.businessdictionary.com/definition/parent-company.html](http://www.businessdictionary.com/definition/parent-company.html) accessed 2nd April 2018

<sup>51</sup> Companies and Allied Matters Act, Cap. C20, L.F.N 2004, § 338 (1) a (i) (ii), This section of the CAMA could leave one wondering if SPDC could be deemed to be a subsidiary of NNPC putting into consideration that NNPC holds 55% of the nominal value of SPDC’s equity share capital.

Parent corporations reduce their liability risk by spreading their assets and establishing subsidiaries so that single subsidiary would be held liable and not the group. However, in a situation that these corporations cannot be separated from each other due to control making it hard to separate ownership then the parent corporation would not be excused from liability.<sup>52</sup>

Most scholars are of the view that for a parent corporation to be held liable and the corporate veil between the two corporations to be pierced there ought to be a direct responsibility of the parent corporation to the subsidiary, which may include financial responsibility and duty to responsibly manage the subsidiary regardless of its corporate form.<sup>53</sup> That means that plaintiffs seeking to have SPDC/RDS corporate veil pierce would have the burden of proving that RDS owes SPDC a fiduciary duty of care in order for the courts to find the parent corporation liable.

In the United States, which is one of the jurisdictions this work examined, parent company liability has not really been an easy thing to establish hence the Powell test in 1931 in deciding if the corporate veil should be pierced. The test laid down three conditions for liability with a list of actions by the corporations, which the court needs to factor into their decisions. The test finds the parent company liable in cases that it been proven that there is an excessive control on the subsidiary by the parent company, wrongful or inequitable conduct and a causal link between the conduct of the parent company and plaintiff's loss.<sup>54</sup>

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<sup>52</sup> K. Vanderkerckhove, *Piercing the Corporate Veil*, n.p.: Alphan aan den Rijn, the Netherlands: Kluwer Law International; Frederick, MD, USA: Sold and distributed in North, Central, and South American by Aspen Publishers, c2007 p. 9

<sup>53</sup> Westbrook J, "Theories of Parent Company Liability and the Prospects for an International Settlement." (1985) 20 (2) Tex Int'l L J 321

<sup>54</sup> K. Vanderkerckhove, *Piercing the Corporate Veil*, n.p.: Alphan aan den Rijn, the Netherlands: Kluwer Law International; Frederick, MD, USA: Sold and distributed in North, Central, and South American by Aspen Publishers, c2007, p. 81

Some of the factors to be considered by the court under the Powell test amongst others are cases that the stock of the subsidiary is fully or partially owned by the parent corporation. In addition is if the subsidiary is financed by the parent corporation, if the parent company is the decision making body of the subsidiary and the parent company is the biggest beneficiary to any contractual obligations between both corporations, if the assets used by the subsidiary was conveyed by the parent company amongst others'.<sup>55</sup> To hold these parent corporations liable for the acts of their subsidiaries the court would therefore, have to use the process of veil piercing to reach parent corporations.

## 2.4 THE CORPORATE VEIL

The principle of separate legal personality and the theory of limited liability leads us to another corporate law principle, which is the corporate veil. The corporate veil is “the legal assumption that the acts of a corporation are not the actions of its shareholders, directors and managers, so that they are exempt from liability for the corporation’s actions.”<sup>56</sup> The corporate veil is one of the benefits and effect of the issuance of certificate of incorporation as it automatically creates a veil between the corporation and its members, owners, shareholders. During the course of duty as their acts seen as the acts of the corporation. As stated by Per Suleiman Galadima J.S.C in the case of *Akinwumi Alade*, “The consequence of recognizing the separate personality of a company is to draw veil of incorporation over the company”<sup>57</sup> and in that, same manner the court recognizes the veil shielding RDS from the actions of SPDC.

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<sup>55</sup> Id. P. 82

<sup>56</sup> B. A. Garner, *Blacks Law Dictionary*, (7<sup>th</sup> edn, West Group Publishing 2000) note 2

<sup>57</sup> *Akinwunmi Alade v. ALIC Nigeria Ltd.* (2010) SCJ

The exceptions to the principle of separate legal personality and theory of limited liability have led to the concept of piercing the corporate veil. The corporate veil can be pierced by virtue of a court order or by an Act or legislature. Courts will be willing to pierce the corporate veil to determine who may be held liable in a suit especially when not doing so amount to a denial of justice to the claimant. The court in *Van Dorn* laid down two requirements that ought to be met for a court to pierce the veil shielding the corporation and the court in *Sea Land* relied on the United States Court of Appeal decision established in *Van Dorn* which states that:

“a corporate entity will be disregarded and the veil of limited liability pierced when two requirements are met: First, there must be such unity of interest and ownership that separate personalities of the corporation and the individual [or other corporation] no longer exist; and second, circumstances must be such that adherence to the fiction of separate corporate existence would sanction a fraud or promote injustice.”<sup>58</sup>

This means that in situations where it seems that the interest of a member of the corporation (which could be a shareholder or a parent corporation in the case of parent-subsidary) is closely knit that it is difficult to decipher who wields more control. The corporate veil will be pierced to determine and hold the member responsible for the said acts done by the corporation under his control. Though the above requirements above are non-exhaustive, such judicial precedents play a vital role to help parties who intend to bring suits against SPDC and RDS in this jurisdiction to frame their claims well. It can also help these victims foresee certain factors the judges put into consideration before arriving at the decision whether or not to pierce the corporate veil as would

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<sup>58</sup> *Sea-Land Services, inc. v. Pepper Source* 941 F.2d 519 (7<sup>th</sup> Cir. 1991) p. 2. See also *Van Dorn Co. v. Future Chemical and Oil Corp.*, 753 F.2d 565 (7<sup>th</sup> Cir. 1985)

be seen in cases against filed against SPDC in this jurisdiction. However, its best to first consider the statutory provisions available to plaintiffs who wish to bring a suit against SPDC and RDS in Nigerian court and probability of them having access and adequate remedy in these courts.

In Nigeria, one of the cases where the court is quick to pierce the corporate veil in order to hold the perpetrator(s) liable in cases of fraud or improper conduct. This was clearly portrayed in the words of Per Suleiman Galadima J.S.C of Nigeria when he stated that:

“The consequence of recognizing the separate personality of a company is to draw veil of incorporation over the company. One is therefore generally not entitled to go behind or lift this veil. However, since a Statute will not be allowed to be used as an excuse to justify illegality or fraud, it is a quest to avoid the normal consequences of the Statute which may result in grave injustice that the Court as occasion demands have to look behind or pierce the Corporate veil”<sup>59</sup>

The CAMA has various provisions which bothers on the issue of veil piercing with scenarios in which the court would pierce the corporate veil. Such scenarios includes in cases where the membership of the corporation falls below amount required by the statute,<sup>60</sup> fraudulent acts of the corporation which includes diversion of funds,<sup>61</sup> ultra vires act,<sup>62</sup> and in each of these cases, the veil is pierced to hold the officers, directors of the corporation liable. Therefore, veil piercing suits can be brought against SPDC under CAMA only if SPDC is in violation of any of these above

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<sup>59</sup> *Akinwunmi Alade v. ALIC Nigeria Ltd.* (2010) SCJ

<sup>60</sup> Companies and Allied Matters Act, Cap. C20, L.F.N 2004, § 93

<sup>61</sup> Companies and Allied Matters Act, Cap. C20, L.F.N 2004, § 290

<sup>62</sup> Companies and Allied Matters Act, Cap, C20, L.F.N 2004, § 300



provisions of CAMA and if found liable, it is the directors or persons aware of these violations that will be held liable and only SPDC will be a party in such suit not RDS.

Despite the CAMA having all these provisions that could trigger the piercing of the corporate veil, the exercise of this right can only be exercised by the members of the corporation in equity and the corporation. This is because the rule in *Foss v. Harbottle* states that only the corporation has the right to sue as regards a wrong done to the corporation or to ratify its conduct or irregularity.<sup>63</sup> This was further codified in the CAMA, which states, “where an irregularity has been committed in the course of a corporation’s affairs ... only the corporations can sue to remedy that wrong and ... ratify the irregular conduct.”<sup>64</sup> Therefore, in cases that SPDC is found liable, only SPDC has the burden to ratify such conduct or remedy the wrong done or pay the damages awarded and not RDS.

The CAMA only made provisions for piercing the corporate veil when it comes to holding and subsidiary corporations when the law wants to ascertain the real state of affairs between both corporations, to determine if the parent corporation is in control of the activities of its subsidiary, which is a body corporate by law.<sup>65</sup> Therefore, the only time the corporate veil can be pierced under CAMA in SPDC cases is to determine the state of affairs between SPDC and RDS when it comes to group financial statement.

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<sup>63</sup> *Foss v. Harbottle* (1843) 2H, 416 (also reported as 67 E.R. 189)

<sup>64</sup> Companies and Allied Matters Act, Cap. C20, L.F.N 2004, § 299

<sup>65</sup> Companies and Allied Matters Act, Cap. C20, L.F.N 2004, § 336 - 337

### **2.3.1 OTHER NIGERIAN LEGISLATIONS**

After carefully looking at the provisions of CAMA which deal on corporate veil, it is obvious that scenarios that will lead to veil piercing under CAMA does not favor these suits against SPDC to have the veil pierced in order to hold RDS liable for the acts of SPDC. It has therefore become imperative that other legislations, which address the affairs of FDI and veil piercing, be analyzed since there is no single statute in Nigeria specifically for this purpose especially in the oil and gas sector. To this effect, the next statute this work discusses besides CAMA is the National Environmental Standards and Regulations Enforcement Agency (Establishment) Act.

#### **A. THE NATIONAL ENVIRONMENTAL STANDARDS AND REGULATIONS ENFORCEMENT AGENCY**

The National Environmental Standards and Regulations Enforcement Agency (NESREA) is responsible for the ‘protection, development of environment by making sure that environmental guidelines, standards, policies, treaties, conventions, international agreements which Nigeria is a signatory to are implemented and observed in Nigeria’.<sup>66</sup>

NESREA provides that the corporation will pierce the corporate veil to hold the members of a corporation liable for the breach of the provisions of the Act.<sup>67</sup> Such breach could be a breach of the ‘environmental sanitation standard and regulations, pollution and degradation of natural resources, discharge of hazardous substances and other related offence, a violation of the federal water quality standards and air quality and atmospheric protection amongst other policies’.<sup>68</sup>

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<sup>66</sup> National Environmental Standards and Regulations Enforcement Agency, [www.nesrea.gov.ng/about-us](http://www.nesrea.gov.ng/about-us) accessed 1st April 2018

<sup>67</sup> Id.

<sup>68</sup> National Environmental Standards and Regulations Enforcement Agency (Establishment) Act 2007 Cap 123 L.F.N 2004 § 20 - 29

NESREA also gives its agents the right to enter premises of corporations with a court warrant and carry out inspection provided the agent believe the premises is in contravention of the environmental standards and the agent can with the order of the court shut down the activities carried out in such premises.<sup>69</sup>

Where a corporation is found to be in breach of these standards, without remedying same, every persons aware that the corporation committed such offence would be held liable.<sup>70</sup> Such persons could be fined as much as ₦1,000,000 depending on which particular provisions of the Act breached and subsequent fine of ₦50,000 every day the offence subsists that is if the offence is for the discharge of hazardous substance; while some specific breach of the provision have the inclusion of one year imprisonment as part punishment.<sup>71</sup>

Sadly, the NESREA clearly excludes investigations on oil spillage and applicability of the provisions of the statute from the oil and gas sector which has the highest environmental pollution in Nigeria.<sup>72</sup> Therefore, plaintiffs cannot even bring environmental claims against SPDC in the Nigerian court under NESREA let alone getting to the point of holding RDS liable for its negligent acts.

Since claims brought under NESREA does not cover the oil and gas sector which the activities of SPDC, it is now indispensable to look at legislations which borders on that sector such as the Petroleum Act and other subsidiary legislation would be looked at to determine if it makes provision for veil piercing would be in order.

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<sup>69</sup> Id. § 30

<sup>70</sup> Id. § 20

<sup>71</sup> Id. § 20 - 29

<sup>72</sup> National Environmental Standards and Regulations Enforcement Agency (Establishment) Act 2007 Cap 123 L.F.N 2004 § 7 (g) (h) (j) (k) (l), § 8 (g) (k) (l) (m) (n) (s)

## **B. THE PETROLEUM ACT AND OTHER SUPPORTING LEGISLATURES**

The Petroleum Act is applicable to every corporation in Nigeria which has oil exploration licenses, oil prospecting licenses and oil mining leases within the territorial waters of the State just like SPDC. The petroleum regulation only makes provision for scenarios where the licensee would be held liable for a breach of the provisions of the statute (such as letting petroleum escape into the sewer etc) by either paying a fine of ₦50,000, six month imprisonment or both and possibly have its license withdrawn.<sup>73</sup> Therefore, Plaintiffs who bring suits against SPDC as a licensee will only be entitled to the compensation in the worth stated above which may not even be enough to cover the losses of these plaintiffs. The Petroleum Act also makes no provision where the corporate veil will be pierced to hold RDS liable as technically and statutorily SPDC is the one licensed to explore oil in Nigeria.

Sequel to the above is the Petroleum (Drilling and Production) Regulation makes provision for adequate compensation in cases where the licensee or leasee interferes with the fishing rights of an individual and that the pollution of the environment should be prevented at all cost or adequate steps taken to control and if possible end such pollution in cases of spill.<sup>74</sup> SPDC if sued under the above legislation will only be held liable as the licensee and even at that there is no means of clearly spelt under the statute in determining what an adequate compensation would amount to.

The Oil Pipeline Act and Oil and Gas Pipeline Regulations made provisions for the piercing of the corporate veil to hold the directors and officials liable for any breach of the provisions of the Act especially if the breach of the provisions of the Act by the corporation is as a result of neglect on the

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<sup>73</sup> Petroleum Regulation Cap. 350 L.F.N 1990 § 106

<sup>74</sup> Petroleum (Drilling and Production) Regulation, Cap, 350, L.F.N 1990 § 23, 25

part of these officers.<sup>75</sup> Therefore, officers of SPDC can only be held liable in cases where suits are brought under these Acts against SPDC for the piercing of its corporate veil.

### C. ASSOCIATED GAS RE-INJECTED ACT

The Associated Gas Re-injected Act (AGRA) compels oil and gas producing corporations in Nigeria to submit its plans for implementation of gas re-injection and other preliminary programmes.<sup>76</sup> AGRA forbids and makes gas flaring illegal in Nigeria, however, corporations that can satisfy the conditions laid down in the Act, such as 75% of the gas produced been effectively utilized, amongst others, would be exempted and granted permit by the Minister of Petroleum to continue gas flaring.<sup>77</sup> However, the grounds on which SPDC holds this permit, which is not made public remains unknown, SPDC is still engaged in the act of flaring.<sup>78</sup>

In an unreported case, claimant from Iwhrekan community in the Delta State of Nigeria had filed a suit against SPDC and NNPC as regards the gas flaring. The Claimant claimed that the effects of the activities of the defendants infringes on the, right to life, right to dignity of human persons as contained in section 33 (1), 34 (1) of the 1999 Constitution of the Federal Republic of Nigeria (CFRN). Claimant also alleges the defendants to be in violation of Article 4, 16, 24 of the Banjul Charter; however the High Court only issued a recommendation to the then Attorney General of Federation to consult with the Federal Executive Council for the amendment of the AGRA and ordered SPDC to cease flaring within a year.<sup>79</sup> SPDC has seen appealed the said decision and there

<sup>75</sup> Oil Pipelines Act, Cap. 07, L.N.F 2004 § 30 See also, Oil and Gas Pipelines Regulations § 26

<sup>76</sup> Associated Gas Re-Injected Act, Cap. A25, L.F.N 2004

<sup>77</sup> Associated Gas Re-Injected Act, Cap. A25, L.F.N 2004 § 3 (1)

<sup>78</sup> Shell Sustainability Report 2016, 'Flaring' <http://reports.shell.com/sustainability-report/2016/energy-transition/our-work-to-address-climate-change/flaring.html> accessed 5<sup>th</sup> April 2018

<sup>79</sup> *Jonah Gbemre v. Shell Petroleum Development Company of Nigeria Limited & Ors.* (Unreported) Suit No. FHC/B/CS/53/05

is clear conflict of interest as NNPC which is a co-defendant in the above suit is a tool used by the Nigerian government through the JVA to earn profits from the oil produced by SPDC.

## CONCLUSION

The above scenarios go to show the vulnerability of the laws governing the oil and gas sector, the environment and corporations are in Nigeria. There is also no access to justice or adequate remedy in the Nigerian court when suits are brought against SPDC, as there is no provisions for parent company liability. Hence the reasons why victims of corporate human rights abuse have turned to the foreign courts hoping to have the corporate veil pierced and to hold RDS liable for the negligent acts of SPDC in Nigeria.

Securities of SPDC is not listed on the Nigerian Stock Exchange (NSE).<sup>80</sup> RDS on the other hand, is listed on National Associations of Securities Dealers Automated Quotations (NASDAQ) and the 2017 annual report shows RDS have 25.6% interest in the Nigerian LNG under its list of business and property and a consolidated financial statement of it and its subsidiaries.<sup>81</sup> Can this revelation not be enough for the court to factor in determining the piercing of the corporate veil under the Powell test?

The Powell's test of excessive control doesn't acknowledge just a complete ownership of stock of SPDC by RDP as enough control; RDS contributing to the day to day decision making of SPDC is substantial enough to determine control.<sup>82</sup> Proving that RDS has an influence of the daily

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<sup>80</sup> The Nigerian Stock Exchange, 'Listed Companies' <http://www.nse.com.ng/issuers/listed-securities> accessed 2nd April 2018

<sup>81</sup> Shell Global, 'Annual Reports and Publications' [www.shell.com/investors/financial-reporting/annual-publications.html#iframe=L3JlcG9ydC1ob21lLzIwMTcv](http://www.shell.com/investors/financial-reporting/annual-publications.html#iframe=L3JlcG9ydC1ob21lLzIwMTcv) accessed 2nd April 2018

<sup>82</sup> K. Vanderkerckhove, *Piercing the Corporate Veil*, n.p.: Alphan aan den Rijn, the Netherlands: Kluwer Law International; Frederick, MD, USA: Sold and distributed in North, Central, and South American by Aspen Publishers, c2007, p. 81

operations of SPDC may be somewhat hard for the Plaintiffs to establish considering that the directors of a corporation are seen as the managers of such corporations in charge of the daily management of the business the corporation. It will be difficult to determine prima facie, as SPDC has its own directors distinct from those of RDS unless the corporate veil is pierced to determine the true persons behind the control of the group.

## CHAPTER THREE

The burden left to these plaintiffs to prove before the court will be willing to pierce the corporate veil cannot be over emphasized as there are lots of legal principles which if not established could easily get these cases struck out or dismissed by the court even before it gets to the point of determining the issue of corporate veil.

Some of these principles could be plaintiffs establishing that the parent corporation controls the subsidiary as we have in the Powell test, the presence of the duty of care of the subsidiaries by the parent corporation, forum non-conveniens. The issue of jurisdiction is usually in contest as plaintiffs will have to convince the court that it has the competence to decide the suit before it and in most cases it could even be the law these courts apply that could hinder the court from piercing the corporate veil.

A couple cases filed against SPDC/RDS will be looked at and to see how these legal principles played a major factor to the court having to lift the corporate veil or otherwise.

### **3.1 LEGAL PRINCIPLES THAT HAS HINDERED THE PIERCING OF CORPORATE VEIL IN SPDC CASES DECIDED IN THE UNITED STATES AND THE NETHERLANDS**

Sequel to the alleged human rights violations melted on the residents of Ogoniland as narrated in the first chapter, attempts have been made to hold SPDC and RDS liable outside of the Nigerian courts. The first legal issue is the issue of personal jurisdiction as would be seen in the case of Wiwa filed in the United States.



### A. THE ISSUE OF PERSONAL JURISDICTION IN WIWA V. RDS

In the United States (US), a non-profit organization Center for Constitutional Rights (CCR) situate in New York, and into human rights and legal advocacy<sup>83</sup> and EarthRight International a nonprofit organization into the defense of earth right, human rights and environment<sup>84</sup> brought a suit against SPDC and RDS on behalf of relatives of the murdered activists (the “Ogoni 9”) specifically the Wiwa family.<sup>85</sup>

The alleged that the defendants SPDC and RDS for complicity in the human right abuses against the Ogoni people as already seen above in the first chapter. The plaintiff has alleged that SPDC and RDS aided and abetted the Nigerian government by offering monetary and logistical support to the Nigerian Military dispatched to maintain order in Ogoni.<sup>86</sup>

They also alleged that the defendants colluded with the Nigerian government to have the Ogoni 9 executed.<sup>87</sup> SPDC as one of their defenses relied on the Federal Rule of Civil Procedure (FRCP) and filed a motion to dismiss the claims filed against it based on lack of personal jurisdiction.<sup>88</sup>

The onus was on the Plaintiffs to prove not only that the cause of action arose under a federal law but also that the “defendants are not subject to the general jurisdiction of one of the state. They also had the burden of discharging that the personal jurisdiction over the defendants is consistent with the standards of due process and most importantly that there is minimum contact with the

<sup>83</sup> Center for Constitutional Rights, ‘Mission and History’ <https://ccrjustice.org/home/who-we-are/mission-and-history> accessed 2nd April 2018

<sup>84</sup> EarthRights International, ‘About Us’ <https://earthrights.org/about/> accessed 2<sup>nd</sup> April 2018

<sup>85</sup> Center for Constitutional Rights, ‘Wiwa et al v. Royal Dutch Petroleum et al’ <https://ccrjustice.org/home/what-we-do/our-cases/wiwa-et-al-v-royal-dutch-petroleum-et-al> accessed 2nd April 2018 see also *Wiwa v. Royal Dutch Petroleum*, 226 F. 3d (2d Cir.2000)

<sup>86</sup> Id.

<sup>87</sup> Id.

<sup>88</sup> Id.

forum and reasonableness in the court assuming jurisdiction for there to be personal jurisdiction.”<sup>89</sup>

Physical contact with the forum US could be equated on the continuous business contact which the defendant have with US prior to before the suit was formed.

The plaintiff in trying to discharge this burden of prove stated that not only were products of SPDC sold in US through third-party entities, but that Shell People Services (SPS) another subsidiary of RDS served as recruitment agent of SPDC in US. Likewise officers, agents of SPDC in trying to influence the State’s opinion as regards their operation in Nigeria often times visited government and private persons in the US.<sup>90</sup> Plaintiffs also stated that employees of SPDC often travel to US not only for training but also for the annual conference on Offshore Technology which was always held in Houston likewise other related conferences.<sup>91</sup> Furthermore, that SPDC had some contractual obligations with some US corporations in connection with oil and gas exploration in Nigeria and have received financial assistance from one federal government agency by virtue of SPDC participating in a US based project.<sup>92</sup>

The Court in declining general jurisdiction over SPDC and establishing that allegations alleged on SPDC by the plaintiffs did not constitute “continuous and systematic business contacts” stated that plaintiffs’ failed to establish that SPDC itself carried out the alleged sale in US. and decided cases shows that sales of foreign corporation’s products by proxy or third parties in the forum state is not sufficient to confer general jurisdiction on the court over the defendant neither does the visit, attending of conferences and training by employees amount to same.<sup>93</sup>

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<sup>89</sup> Federal Rules of Civil Procedure 4 (k) (2) 1-3

<sup>90</sup> *Wiwa v. Shell Petroleum Development Company of Nigeria Limited*, Case 1:04-cv-02665-KMW-HBP

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

The court also stated that SPS was neither an agent nor a department of SPDC for an in-forum activities of an affiliate to confer general jurisdiction.<sup>94</sup> The court also stated that the plaintiff's failed to establish that the contracts entered into by SPDC with the US based corporations had any connection with the US. SPDC neither owned any real property nor operated a bank account in the forum hence its exercise of jurisdiction would be inconsistent with the principle of due process.<sup>95</sup>

The *Wiwa* case lingered for 13 years until the parties decided to settle out of court, which was just for the individual claims.<sup>96</sup> However, besides from the parties coming to consensus to settle out of court, it is obvious how the issue of personal jurisdiction led the court not to assume jurisdiction over the defendants let alone getting to the issue of corporate veil. A follow up case of *Kiobel* still under the US jurisdiction will now be examined to if the plaintiffs were able to finally have access to the US courts and have the corporate veil pierced in the Shell issue.

## **B. THE ISSUE OF EXTRATERRITORIALITY IN KIOBEL V. RDS**

Sequel to the *Wiwa case*, is *Kiobel v RDP et al*;<sup>97</sup> brought by the plaintiffs under the Alien Tort Statue (ATS) which confers original jurisdiction on district courts for any tortious civil action which violates the laws of nations or a treaty of the US brought by an alien in US irrespective if the violation occurred within fora or not.<sup>98</sup> The Plaintiffs who are relatives of the Ogoni 9 and other Ogoni citizens killed during the Ogoni crisis sought relieve under Customary International Law.<sup>99</sup> Just as in the case of *Wiwa*, the Petitioners alleged that the human rights of the residents of the Ogoniland violated by the Nigerian government was a violation of the law of the nations of

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<sup>94</sup> Id.

<sup>95</sup> Id.

<sup>96</sup> Id.

<sup>97</sup> *Kiobel v. Royal Dutch Petroleum Co. et al* U.S Dist. LEXIS 9746 (2017)

<sup>98</sup> 28 United States Code § 1350, 2011

<sup>99</sup> *Kiobel v. Royal Dutch Petroleum Co. et al* U.S Dist. LEXIS 9746 (2017)

Nigeria which would not have been successful without the help of the defendants who aided and abetted the Nigerian government.<sup>100</sup> As at the time ATS was enacted, there were three offenses recognized to be against law of the nations and those offenses were piracy, infringement of the rights of ambassadors and violation of safe conduct.<sup>101</sup> Therefore, the District Court in the second circuit dismissed the claims of the Plaintiffs on the ground that corporate liability is not an offense recognized under the law of nations.<sup>102</sup>

Upon further appeal, the Supreme Court ordered a certiorari for the determination of when a cause of action, which arose outside the forum, may be seen to constitute a violation of the law of nations.<sup>103</sup> Chief Justice Robert in his ruling relied on a case of where the court had previously held it may recognize private claims on violations under federal common law and assume jurisdiction where the cause of action for a fair number of international law violation is provided by the common law.<sup>104</sup> The court reasoned that the best way to determine the issue of extraterritoriality was for the Court to put themselves in the shoes of the Congress and what their thoughts were when they enacted the ATS.<sup>105</sup>

The Court came to a conclusion that the Congress would not have wanted to make the US a universal jurisdiction for all cause of action arising under the Federal Common Law in the territory of another sovereign as such amount of discretion could lead to conflict between US and the other sovereign state.<sup>106</sup> The court stated that the plaintiff's claim must concern the forum with force

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<sup>100</sup> Id.

<sup>101</sup> Id.

<sup>102</sup> *Kiobel v. Royal Dutch Petroleum Co. et al* U.S Dist. LEXIS 9746 (2017)

<sup>103</sup> *Kiobel v. Royal Dutch Petroleum Co. et al* U.S Dist. LEXIS 9746 (2017)

<sup>104</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712- 714 (2004) The ATS as part of the Judiciary Act of 1789 was passed by the first Congress to grant jurisdiction to the Federal District Courts who "shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case maybe, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States"

<sup>105</sup> *Kiobel v. Royal Dutch Petroleum Co. et al* U.S Dist. LEXIS 9746 (2017)

<sup>106</sup> Id.

sufficient enough to displace the presumption against extraterritoriality for the court to have jurisdiction.<sup>107</sup>

The Court went further to state that the cause of action, which arose in Nigeria, did not have sufficient force to the forum for it to confer jurisdiction on the courts and be adjudicated under ATS.<sup>108</sup> In addition to the above reasoning, the Court stated that the mere presence of the corporation does not suffice as touching and concerning the US irrespective of the fact that their stocks are been traded in the New York Stock Exchange (NYSE).<sup>109</sup> Therefore, that fact stocks of RDS was traded in the NYSE or has its corporate presence in the US is not enough for claims that arose out of the actions that took place in Nigeria to be adjudicated in Nigeria. The Victims of such actions were not US nationals neither is there connection strong enough to displace the presumption of extraterritoriality.

Other justices in concurring with the decision of the court referred to the Torture Victim Protection Act of 1991 (TVPA) as one of the statutes embodied with human right abuse outside the violations of international law.<sup>110</sup> Justice Alito was of the opinion that the international law norms violated must have “definite” content accepted among civilized nations for the claims to be brought under ATS.<sup>111</sup> This means that private claims under federal common law brought before the Federal Courts will not be recognized if such international law norm violated is not universal, specific and obligatory hence automatically classifying the claims against SPDC/RDS as a narrow subset of international law norms.<sup>112</sup>

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<sup>107</sup> Id.

<sup>108</sup> Id.

<sup>109</sup> *Kiobel v. Royal Dutch Petroleum Co. et al* U.S Dist. LEXIS 9746 (2017)

<sup>110</sup> Id. By Justice Kennedy

<sup>111</sup> Id. By Justice Alito

<sup>112</sup> Id.

Justice Breyer in differing from the reasoning of the court reiterated the four positions set down by the Court which are that firstly, that based on assumption and prediction “presumption against extraterritoriality applies to claim under” the ATS.<sup>113</sup> Secondly, that “nothing in the statute rebuts that presumption”.<sup>114</sup> Thirdly, that there was “no clear indication of extraterritorial application” in the facts of the case considering that the alleged conduct took place outside US neither did the claims touch nor concern the forum.<sup>115</sup> Fourthly that though “corporations are often present in many countries ... it would reach too far to say that mere corporate presence suffices.”<sup>116</sup>

The justice was of the opinion that the court would be conferred with jurisdiction under the ATS where the alleged “tort occurred on the American soil, where the defendant is a national and where defendants’ conducts substantially and adversely affects a national ... preventing the US from becoming a safe harbor for a torturer or other enemy of mankind.”<sup>117</sup> That to help determine the scope ATS when it comes to jurisdiction, the norms of international jurisdiction should be examined and used as a yardstick.<sup>118</sup>

He went further to look at the Restatement (Third) of Foreign Relations Law in establishing when it would be deemed reasonable for a nation to apply its law. Amongst the provision of the statute includes those conducts directed against the security of the state or against a limited class of other state interest which occurred outside territory of the forum.<sup>119</sup> Though the Justice differed in his reasoning, it equally arrived at the same conclusion that the claims against the SPDC and RDS

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<sup>113</sup> Id. By Justice Breyer

<sup>114</sup> Id.

<sup>115</sup> Id.

<sup>116</sup> Id.

<sup>117</sup> Id.

<sup>118</sup> Id. Justice Breyer

<sup>119</sup> Id. The Restatement (Third) of Foreign Relations Law § 402 states that a nation may apply its law to conduct that takes place with the territory, activities of nationals even outside its territory, conducts with substantial effect within its territory irrespective of the fact that such occurred outside its territory and to conduct directed against the security of the state or against limited class of other state interest though such conduct occurred outside its territory.

could not be heard in the for a hence another case scenario where other legal principles was sufficient enough for the Court to dismiss the suit against SPDC and RDS hindering the chances Plaintiffs had to have the corporate veil pierced and RDS held liable in a foreign jurisdiction.

After the Kiobel case, the ATS, which was seen as granting a universal jurisdiction, brought about its own legal issues such as establishing personal jurisdiction, which may be difficult for the plaintiffs considering that most of these foreign corporations operate in other States through their subsidiaries. The decision of the court limited the jurisdictional scope of the ATS hence SPDC was struck off from this case as the court found that it had not personal jurisdiction over the corporation.

The court's holding that the mere corporate presence was not enough to determine jurisdiction shows that it takes more than just trading in the US capital market for the forum to be conferred with jurisdiction over RDS especially in cases where international norms have been violated by its subsidiary in other states.

There are also the different opinions of the justices of different circuits in what may be amount to a conspicuous force to the forum. There is no uniform standard of what may amount to a conspicuous force when it comes to the application of the "touch and concern" test on the forum and if a show of knowledge or purpose should be used in ascertaining liability when it comes to allegations of aiding and abetting by these corporations.<sup>120</sup> This creates difficulty in holding RDS liable for the negligent acts of the SPDC considering that the cause of action arose in Nigeria, which involves Nigerian citizens with a corporation registered in Nigeria. The acts have no connection with US nationals neither are there sufficient nexus to connecting plaintiff's claims to

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<sup>120</sup> D Baumann and J. Nolan, *Business and human rights: from principles to practice* (Abingdon, Oxon; New York, NY: Routledge, 2016) p.249

the forum asides from the stocks of RDS being sold in NYSE and as seen above insufficient to confer jurisdiction hence the suit was dismissed.

While claims against RDS might have been dropped in this suit, there is a rare of hope as in 2017 Kiobel et al had filed a suit in the Dutch court against RDS and SPDC for aiding and abetting the Nigerian government in the killings of their late husbands' amongst other claims.<sup>121</sup> In addition, one of the documents submitted in the New York court is a letter written by Shell agreeing to pay for the services rendered by the Nigerian army, which left one dead, and men wounded in Ogoni.<sup>122</sup>

In the meantime, it is relieving that the Dutch court has in another case filed against SPDC and RDS assumed jurisdiction over both defendants. The Netherlands is the next jurisdiction this work deals on and which will be discussed in the next sub-section to see if the court was able to successfully pierce the corporate veil or if another legal principle was a hindrance to attaining such feat.

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<sup>121</sup> AllAfrica, 'Nigeria: Widows of Ogoni Leaders Killed By Abacha Sue Shell in Netherlands' (29<sup>th</sup> June 2017) <http://allafrica.com/stories/201706290125.html> accessed 4<sup>th</sup> April 2018

<sup>122</sup> The Guardian, 'Shell pays out \$15.5m over Ken Saro-Wiwa Killing', <https://www.theguardian.com/world/2009/jun/08/nigeria-usa> accessed 4<sup>th</sup> April 2013 "...the unit had retrieved one of the company's fire trucks from the village of Korokoro- an action that according to reports at the time left one Ogoni man dead and two wounded. Shell wrote it was making the payment as a show of gratitude and motivation for a sustainable favorable disposition in future assignments"



### C. VEIL PIERCING AND OTHER LEGAL ISSUES IN THE CASE OF AKPAN V. SPDC

In the Netherlands, the issue of the Dutch courts having jurisdiction over SPDC and RDS took a different turn as the court held that it was competent to hear the cases against RDS and SPDC applying the Nigerian law in the case of *Akpan*.<sup>123</sup>

This case was first filed with the District Court (Rechtbank) in Hague by four farmer, Friends of the Earth Nigeria and Milieudefensie (Friends of the Earth Netherlands (the “Plaintiffs”) against RDS and SPDC for its acts of negligence which caused the pollution of their farms, drinking water from the oil leakage by the SPDC’s pipeline near Oruma Bayelsa, Nigeria.<sup>124</sup> The polluted stream, ponds besides from killing their fishes caused a deterioration of their health.<sup>125</sup> The plaintiffs included RDS in this suit for its lack of its fiduciary duty of care on SPDC.<sup>126</sup> Plaintiffs amongst other reliefs sought asked Rechtbank to find SPDC in violation of its duty of care and negligence evidentially seen by it not taking all measures to prevent the oil leakage, no active response to the leak when informed and the incomplete remediation done.<sup>127</sup> To find RDS jointly and severally liable for not using its control as the parent of SPDC to see to it that SPDC adhered to its environmental policy hence violated its duty of care it owns on SPDC.<sup>128</sup>

One of the legal issues brought up by the defendants was the issue of forum non-conveniens. The defendants argued that the forum was not convenient for SPDC and they did not foresee that they will be tried in the Dutch Court.<sup>129</sup> The court in dismissing the defense of forum non conveniens

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<sup>123</sup> *Akpan et al v. Shell Petroleum Development Company et al* ECLI:NL:RBSGR:2009:BK8616

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Akpan et al v. SPDC et al* ECLI:NL:RBSGR:2009:BK8616

<sup>129</sup> *Id.*

held that both RDS and SPDC was seen as a single unit and it was foreseeable that SPDC would be joined as a party in a suit and summoned in the Dutch court for an alleged liability of an oil spill from its oil wellhead.<sup>130</sup>

The court's reasoning was also in line with the *Painer rule* a ruling of the European Court of Justice (ECJ), which relied on the Brussels Regulations on allocating jurisdiction on the fact that a defendant could foresee it been sued alongside with other defendants who are members of the European Union (EU) in their place of domicile.<sup>131</sup> The defendants dissatisfied with the decision of the court on assuming jurisdiction over the defendants appealed because Rechtbank has no jurisdiction to adjudicate claims against SPDC since it is a body corporate registered outside the Netherlands. That the Plaintiffs used the fact that RDS is registered in the Netherlands to create jurisdiction over SPDC, which is an abuse of procedural law.<sup>132</sup>

Another legal issue that arose in this suit was the issue of control and as early stated in the preceding chapter, control can be used to determine liability hence plaintiffs must establish that RDS had control over SPDC.<sup>133</sup> The plaintiffs in order to discharge this burden and proof that RDS had control over the activities of SPDC sought an order of the court requesting for additional documents which was believed to be in the custody of the defendants.<sup>134</sup> Two of those documents amongst others is the "Joint Operating Agreement" and the "Memorandum of Understanding"

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<sup>130</sup> Id.

<sup>131</sup> Painer rule of European Court of Justice of 1st December 2011, No C-145/10 In paragraph 81 of the Painer ruling, the ECJ found that in the event of a difference in the basis of claims initiated against various defendants, in and of itself this fact does not preclude application of Article 6(1) of the Brussels Regulation, provided that the defendants could foresee that they might be sued in the Member State where at least one of them was domiciled.

<sup>132</sup> *Akpan et al v. SPDC et al* ECLI:NL:RBSGR:2009:BK8616

<sup>133</sup> Id.

<sup>134</sup> Id.

between both defendants, which has the control clause, covenants between both parties and tasks regulated as “Joint Venture Partners”.<sup>135</sup>

The district court however, dismissed this request on the grounds laid down in Article 834a Dutch Code of Civil procedure which states that applicants seeking for such documents must have and exhibit legitimate interest in such exhibits, the claims must relate to the documents sought and the applicant a party to the legal relationship contained in the document and that the defendants have access to such document.<sup>136</sup> Though it is uncontroversial that the plaintiffs are not parties to these documents sought, the facts cannot be denied that such documents if given a chance to be relied on in court as exhibits is evident enough to be used and ascertain the level of control RDS have over SPDC and its subsidiaries.

The Dutch court in ruling on the plaintiffs’ claim that RDS owed SPDC the duty of care decided to not just assess if there are case scenarios whereby RDS had interfered in the operations of SPDC to determine if it has duty of care, but also looked at the tripartite test laid down in *Caparo Industries plc v. Dickman* which includes the foreseeability, proximity and just, fairness and reasonableness in imposing such a duty of care on RDS.<sup>137</sup>

The court reasoned that the fact RDS is involved in SPDC environmental policy of 2013 is insufficient of assume proximity between RDS and the Plaintiffs hereby conferring the duty of care of SPDC on RDS.<sup>138</sup> However, the court was of the opinion that RDS could have used its

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<sup>135</sup> Id.

<sup>136</sup> Id.

<sup>137</sup> *Caparo v. Dickman* [1990] UKHL 2, [1990] All ER 56

<sup>138</sup> *Akpan v. Royal Dutch Shell & SPDC*, LJN: BY9854, C/09/337050/HA ZA 09-1580 (District Court of The Hague, 30 January 2013)

influence on SPDC to ensure that its subsidiary took precautionary measures to prevent the damages caused by the activities of SPDC.<sup>139</sup>

In the Court of Appeal, the defendants argued that the oil spillage had already occurred before RDS became its parent company in 2005.<sup>140</sup> The Court of Appeal in affirming the decision of Rechtbank over jurisdiction gave a two-step reasoning stating.<sup>141</sup> The Court stated that statutory seats of a corporation can also be used to determine jurisdiction since the Article 60 of the Brussel I Regulations clearly stated the domicile of a corporation to be the place where the corporation has its statutory seat and in our case RDS has its statutory seat in The Hague.<sup>142</sup> The Court of Appeal also looked at Article 7 (1) Dutch Code of Civil Procedure which gave the court jurisdiction to hear suits arising from the claim even though the defendant is not within the fora hence reaffirming the power the Dutch Court has to adjudicate over SPDC.<sup>143</sup>

The court also stated that the defendants are of the same group therefore RDS could be held liable for failing in its fiduciary duties as a group and above all the transition which happened in 2005 was just for the corporate records.<sup>144</sup> RDS was also not in a better position to prevent the harm from happening unlike SPDC therefore, it was unreasonable to assume there is close proximity of RDS to the plaintiffs harm and SPDC operations therefore it was unreasonable to impose such duty of care on RDS.<sup>145</sup>

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<sup>139</sup> Id.

<sup>140</sup> *Shell Petroleum Development Company et al v. Akpan et al* ECLI:NL:GHDHA:2015:3587 (Court of Appeal The Hague 17<sup>th</sup> December 2015)

<sup>141</sup> Id.

<sup>142</sup> Id.

<sup>143</sup> Id.

<sup>144</sup> Id.

<sup>145</sup> Id.

Furthermore, the Court of Appeal stated that the plaintiffs failed to satisfy the burden of proving to the court that the oil spillage was strictly caused by the act of negligence by SPDC and not an act of sabotage.<sup>146</sup> Since Nigerian tort law was the applicable law used in adjudicating this suit, a licensee is not liable for any oil spillage where the immediate cause is sabotage.<sup>147</sup>

However, in one of the SPDC cases, it has been held that a licensee will be held liable in cases that the operator could have foreseen the sabotage and failed to take adequate measures to prevent such sabotage from happening.<sup>148</sup> The court found SPDC to be in violation of the duty of care owed by the corporation to the plaintiff as it was these violation and its failure to adequately respond to the oil spill from the IBIBIO I that resulted to the damages incurred by the plaintiff.<sup>149</sup>

Finally, on the issue of veil piercing, the court in discharging the claims against RDS stated that the veil between SPDC and RDS cannot be pierce to hold RDS liable for the negligence acts of SPDC because under the Nigerian law which is the applicable law in this suit there is no parent company liability.<sup>150</sup> The Nigerian law, also does not make provision for tort of negligence of the parent company hence RDS does not owe the plaintiffs any general duty from preventing third party damage inflicted on them through the activities of SPDC.<sup>151</sup>

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<sup>146</sup> Id.

<sup>147</sup> Id.

<sup>148</sup> *Akpan v. Royal Dutch Shell & SPDC*, LJN: BY9854, C/09/337050/HA ZA 09-1580 (District Court of The Hague, 30 January 2013), see also *Shell Petroleum Development Company Limited v Otoko* (1990)

<sup>149</sup> *Akpan v. Royal Dutch Shell & SPDC*, LJN: BY9854, C/09/337050/HA ZA 09-1580 (District Court of The Hague, 30 January 2013)

<sup>150</sup> Id.

<sup>151</sup> Id.

## CONCLUSION

The application of the Nigerian law to this suit was a major hindrance to the plaintiff's claims against RDS as the court were not willing to pierce the corporate veil. This goes to affirm what was earlier stated on the vulnerability of the Nigerian law and the need to make new laws to cover these lapses especially when it comes to the violation of human rights by corporations. Victims of such corporate human rights abuse could gain access to justice and adequate remedy if the recommendations made in the next chapter would be incorporated in Nigeria and other jurisdictions.

## CHAPTER 4

### 4.1 SUMMARY

This work has taken a critical look at the conceptual framework of the principles of veil piercing and other corporate law principles related to the principle of veil piercing such as the principle of separate legal personality and the theory of limited liability. The work examined how these principles could incapacitate the court from piercing the corporate veil hindering access to remedy by victims of corporate human rights abuse.

In Nigeria, it is mandatory for corporations to maintain ethical standards and it is the function of the officers, board of directors to see to the compliance of these standards which not only includes the environmental laws as seen above but also respecting the human rights of its employees and the residents of the community where its activities are carried out.<sup>152</sup>

The work identified some facts and impediment to victims of corporate human rights abuse having access to justice in their human countries. Using the Ogoni case, it identified the complicity of the government, corruption and because that was during the Military regime the independency of the judiciary can not be ascertained.

There is also the case of the vulnerability of the Nigerian laws bordering not just on FDI, but also in the oil and gas sector as there is no set guidelines to access damages or criteria for compensation, likewise laws bordering on the environmental standards in Nigeria.<sup>153</sup> The lack of these clear provisions and adequate remedy for its breach cannot be over emphasized as corporations can

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<sup>152</sup> Nigerian Securities and Exchange Commission, 'Code of Corporate Governance in Nigeria' (October 2003), [www.sec.gov.ng/pdf/Corporate%20Governance%20%20Voluntary%20Code%202008](http://www.sec.gov.ng/pdf/Corporate%20Governance%20%20Voluntary%20Code%202008) accessed 4<sup>th</sup> April 2018

<sup>153</sup> *Shell Petroleum Development Company (Nigeria) Limited v. Otoko* (1990)

easily be relieved of the liability suit filed against it once it raises the issue of sabotage as its defense which is hardly counter argued by the plaintiffs.<sup>154</sup>

There is therefore an urgent need for the modification of the Nigerian laws and also the need for the prevalence of human rights above corporate law principles especially where there is an outcry of infringement of human rights by corporations.

## 4.2 RECOMMENDATIONS

Human rights are universal, indivisible and inalienable<sup>155</sup> and in Nigeria, these fundamental human rights are enshrined in Chapter IV of the 1999 Constitution of the Federal Republic of Nigeria (As Amended)<sup>156</sup>. One of these rights included in the Constitution is the Right to life which when put in practice entails that the government needs to provide well-equipped health care, make bylaws for the sustainable environment, provide security and not to use them as tools to oppress and suppress citizens as seen from the Ogoni crisis; this position is also reflected in the Banjul Charter.<sup>157</sup>

These right is ultimate and should be reflected in every other laws to see that statutes covering other sectors observe these rights as it ought not to be jeopardized on. In light of these, the legal issues raised in the previous chapter should be tackled in the proposed ways stated below.

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<sup>154</sup> Oil Pipelines Act, Cap. 07, L.N.F 2004 § 11 (5)c

<sup>155</sup> United Nations, 'Universal Declaration of Human Rights' <http://www.un.org/en/universal-declaration-human-rights> accessed 5th April 2018, see also African Commission on Human and Peoples' Rights, 'African Charter On Human and Peoples' Rights' (Banjul Charter) <http://www.achpr.org/instruments/achpr> accessed 5th April 2018

<sup>156</sup> Constitution of the Federal Republic of Nigeria (1999), Chapter IV

<sup>157</sup> African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Cap. A9 L.F.N 2004, Article 4 16, 24



### A. The vulnerability of the Nigerian laws

Firstly, the laws governing the oil and gas sector should be overhauled and amended to meet up to the standard especially with the increase in population, advancement and development of new technologies have serious impact on these communities.

On the issue of gas flaring, the Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN) though prohibits flaring also grants permit to licensee to flare gas however, such licensee is subject to a fine for every standard cubic meter flared in accordance with existing laws.<sup>158</sup> This is too minute to these corporations to serve as deterrence and desist the corporations from flaring. Imagine how ridiculous to assign a fine in the sum of N500,000 (Five Hundred Naira) to an oil producing corporation which produces more than one million barrel of oil per day. It is also economically prudent for these corporations to flare gas than to re-inject it into the well hence why most of these corporation will rather want a permit granted to it. All these waivers can be seen as patting these corporations at the back and encouraging gas flaring which its health implications cannot be over emphasized. The rights to life of these citizens comes and it is the State's duty to protect human rights hence the conflicting interest the Nigerian government has comes after it has exercised its duty.<sup>159</sup>

Therefore, anti-flaring policies should be implemented and strictly monitored to ensure compliance. Any corporation in breach of such policies should be fined excessively and such fine once remitted be used to clean up such environment along with providing free medical services and relieve materials to these victims who due to such flare are marred with terminal illness.

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<sup>158</sup> Environmental Guidelines and Standard for the Petroleum Industry in Nigeria, 2002 Clause 3.8.8

<sup>159</sup> U.N. Human Rights Office of the High Comm'r, *United Nations Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, Human Rights Council, 17<sup>th</sup> Sess., Mar. 21, 2011, U>N Doc. A/HRC/17/L.17/31 (June 16, 2011)

In addition to the above, it is not enough for these Acts to only hold officers of these corporations' liable, provisions should be made to have the parent corporation liable. Some of the factors that the court could use to determine this liability and pierce the corporate veil could be a scenario whereby both subsidiary and parent corporation maintain a joint financial statement or where the subsidiary is not financially capable to carry out such environmental cleanup or to pay the fine alone. By so doing, plaintiffs will also be adequately compensated according to the fair market value of the property lost to such environmental pollution along with interest.

### **B. Parent Company Liability**

Liabilities arising from the activities of these subsidiaries are limited to the assets which they own and often times, these subsidiaries may not be as deep-pocketed as the parent corporation who control the activities of the subsidiaries, reaps the benefit of profits made by the subsidiaries but the liabilities incurred by the subsidiaries are those of the subsidiary alone. Thus, the ultimate parent in a group can externalize the risk of its subsidiaries' activities as majorities are not mindful of the local issues. Therefore, the provisions of CAMA should be amended to incorporate parent company liability. Parent corporations can be held accountable for human right abuses when there are statutory provisions mandating its responsibility for the actions of its subsidiaries. This mandatory duty of care to a reasonable extent will make the parent corporation stay woke and supervise the activities of its subsidiaries and its breach will attract direct liability.

### **C. Access to justice in Home State Court**

There are obstacles to access to justice in the home state court such as, where there is a probability of the state not ensuring effective domestic judicial mechanism. This may be by virtues of delay in judicial process, strike by judicial officers or government complicity as in our case, suits

regarding corporate human rights abuse should be brought under fast track and under an impartial panel selected by both parties and free from government interference.<sup>160</sup>

The laws applicable by the tribunal should also be amended and the tribunal granted the right to pierce the corporate veil in such suits. It is also foreseeable that in most cases these victims may not have enough standing and finances to pursue these suits against these giant corporations there should be Non-Governmental Organizations or even Human Rights Institutes willing to help these victims by rendering pro-bono services

#### **D. Veil Piercing in Foreign Jurisdiction**

Following the jurisdictions looked at in this work; it is evident that veil piercing to hold parent corporations liable in foreign jurisdiction is not without its own legal issues. Legal issues such as the limited liability covering a parent corporation, forum non-conveniens, conflict of laws, jurisdiction, extraterritoriality amongst others posing greater barriers to the remedy sought in these jurisdictions by these victims of corporate human right abuse in Nigeria.

However, all states have international obligations to these victims of corporate human rights abuse to provide them with access to remedy which is among the three pillars of the United Nations Guiding Principles (UNGP).<sup>161</sup> This obligation applies to all business enterprise irrespective of the size, ownership and even when engaged in extraterritorial human rights violations.<sup>162</sup> The UNGP does not equally prohibit states from regulating extraterritorial activities provided it is competent

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<sup>160</sup> Id. Principle 26,

<sup>161</sup> U.N. Human Rights Office of the High Comm'r, *United Nations Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, Human Rights Council, 17<sup>th</sup> Sess., Mar. 21, 2011, U>N Doc. A/HRC/17/L.17/31 (June 16, 2011)

<sup>162</sup> U.N. Human Rights Office of the High Comm'r, *United Nations Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, Human Rights Council, 17<sup>th</sup> Sess., Mar. 21, 2011, U>N Doc. A/HRC/17/L.17/31 (June 16, 2011)

to do so on jurisdictional basis therefore it is necessary for Nigeria to institute an Act which deals on FDI of different sectors and cases where subsidiaries of these corporations will be held liable for negligent acts of its subsidiaries.<sup>163</sup> This law should be enforceable and can be periodically amended with ease in order to address any future gaps in these sectors.

It is a common thing that most corporations in Nigeria most often choose CSR policies like fighting against malaria, AIDS awareness when there are issues that are more vital that needs to be addressed because of the activities of these corporations. A compulsory CSR should be imposed on corporations especially in areas its carries out its operations. Likewise to mitigate the harm caused such as sending relief materials to the hospitals in these communities where they operate, carrying out environmental cleanup yearly, environmental sensitization just to mention but a few and where subsidiaries fail to carry out such compulsory CSR, the parent corporation should be held liable.

#### **i. The issue of ATS and TVPA**

As earlier stated, the aftermath of *Kiobel* brought a lot of barriers to bringing of suits under a one thing statute ATS with universal jurisdiction. These barriers should be less strict to these victims of corporate human right abuse as they should have access to remedy in this jurisdiction once the court is competent enough to decide of the suit before it. The corporate seat, corporations having their stock traded in the US is enough to pass the touch and concern test especially in our case that the securities of SPDC is not traded on the NSE hence conducts which though may have occurred outside the forum could also be brought under ATS.

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<sup>163</sup> Id. Principle 2, commentary.

Aiding and abetting should be recognized as a law of the nation especially if such actions aided the defendants or accused to violate human rights. Once plaintiffs can prove that the purpose of such aids was to assist the culprits in the violation of human rights it should be governed under customary international law. By so doing victims of corporate human right abuse can bring suits against parent corporations under the ATS.

The Torture Victim Protection Act (TVPA), which only applied to individuals can be amended to apply to legal persons as well as claims such as, cases where such legal persons have aided and abetted an authority or even in case of conspiracy.<sup>164</sup> Legal persons ought to be held liable for tortious acts under customary international law as the principle of separate legal entity can be disregarded in certain circumstances especially when it comes to human rights violations or crimes against humanity to mention but a few.<sup>165</sup>

## **ii. The Touch and Concern Test**

There was also no uniformity in the reasoning of the district courts making it hard to determine the when an event is bound to have the force relative enough to pass the touch and concern test for extraterritoriality not to be presumed. The touch and concern test of either party to the suit been nationals or cause of action arising in the US is stringent. It should be enough that one of the parties resides in the US when the suit was initiated, or corporations trading stocks in the forum especially as it has been revealed that securities of SPDC are not traded in NSE while RDS is traded in NASDAQ and NYSE.

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<sup>164</sup> Torture Victim Protection Act § 2

<sup>165</sup> Thompson RB, 'United States Jurisdiction over Foreign Subsidiaries: and International Law Aspects' (1983) 15 (2) Law & Pol'y Int'l Bus 319

### iii Parent Company Interference in the business of its subsidiary by the Dutch Court

One of the factors looked into by the Dutch court when discharging the claims against RDS is if RDS had interfered in any suit concerning SPDC.<sup>166</sup> “Shell” as a whole had paid out over \$15.5m in the case of Wiwa, the corporation however, said it was just a token in recognition of the tragic turn of event in Ogoniland, can be seen as the nicest way to avoid been linked to issues of SPDC and liability. Shell is not that magnanimous enough to be give out such huge amount of money when the main obligation of a corporation is towards its shareholders who are interested in the profitability of their investment.<sup>167</sup> Therefore parent company interference should not be used as a criteria to determine piercing the corporate veil as it may be difficult for plaintiffs to be able to discharge the burden in court.

### iv The defense of Sabotage

The defense of sabotage should not be used to easily dismiss the claims against the defendant as it is hard for the plaintiff to rebut. It is also foreseeable that in Nigeria most oil pipes are being sabotaged and it is the duty of the licensee to put up every necessary measures to protect these oil pipes and to see that they are not being damaged.<sup>168</sup> It is expected or foreseeable that the objectives of SPDC comes with certain environmental risks which in turn manifests to a health and safety issue to not just only the employee but also to the occupants of these polluted communities. A reasonable man will also believe that RDS being the parent company of SPDC in which it uses to carry out its oil exploration in Nigeria ought to be well-grounded and actively finding ways to curtail the risk posed by the objectives of SPDC. The Nigerian law should also make provisions

<sup>166</sup> *Akpan et al v. Shell Petroleum Development Company et al* ECLI:NL:RBSGR:2009:BK8616

<sup>167</sup> The Guardian, ‘Shell pays out \$15.5m over Saro-Wiwa Killing’ 9<sup>th</sup> June 2009 <https://www.theguardian.com/world/2009/jun/08/nigeria-usa> accessed 6<sup>th</sup> April 2018

<sup>168</sup> *Shell Petroleum Development Company (Nigeria)Limited v. Otoko* (1990)

for license holders to prevent sabotage as part of its general obligations and where corporations do not put adequate measures to prevent sabotage such license the parent corporation should be held liable.

#### **v. The issue of control**

Plaintiffs proving a direct control of the subsidiary by its parent company is hard to discharge considering that by law these subsidiaries are their own body corporate distinct from their owners. Moreover, these plaintiffs or victims of corporate human rights above are not members of these subsidiaries hence there may be no evidence to back up their claims. It is hard for a parent company not to be in control of its subsidiaries either directly or indirect control. The current Managing Director of SPDC Osagie Okunbor was once the Senior Advisor in Shell Upstream International Operated Business based in Hague, Netherlands.<sup>169</sup> Such heavy presence of someone who once worked with the RDS could be seen to be strategically positioned by the RDS in SPDC in order to control its activities indirectly using a local (Nigerian citizen) to achieve its aim. Control should not be the part of the burden these victims would have to discharge in the court before the corporate veil will be pierced. On the contrary, the court should be willing to pierce the corporate veil, determine with whom the control lies, and thereby hold such persons liable.

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<sup>169</sup> Shell Nigeria, 'SPDC – Shell Petroleum Development Company of Nigeria' [www.shell.com.ng/about-us/what-we-do/spdc.html](http://www.shell.com.ng/about-us/what-we-do/spdc.html) accessed 6<sup>th</sup> April 2018

## 4.2 CONCLUSION

In conclusion, it is no longer in contention that the burden to protect human right does not fall on these corporations but rather on the state as their own duty is just to respect these rights.<sup>170</sup> State legislatures should address the issue of limited liability on Parent Corporation especially in cases that its subsidiary is alleged to violate human rights in its place of operation. In fact, corporations should remove legal, practical and other barriers especially in cases that clear violations of human rights.

A parent company ought to be liable for the negligent acts of its subsidiary because it has a fiduciary duty on its subsidiary and that includes making sure that they comply with all its policies. RDS is in a more developed state than SPDC which is in a developing country Nigeria and the ball is in their court to educate employees or even the management of its subsidiaries on better ways to dispose these waste so that they are not harmful to the environment and also the best technology to use in doing so or better ways to recycle these wastes.

It is immaterial if both corporations are into the same business objectives because most often than not, these subsidiaries were incorporated to carry out other business of the main group and it is also evident that the parent corporation aims to avoid being held liable especially in our case where there is consolidated report reflecting all of RDS business and property which includes its subsidiaries.

Considering that most times the parties in these human rights suits are not equal in all ramification especially financially like in our case between two giant corporations and ordinary farmers who

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<sup>170</sup> U.N. Human Rights Office of the High Comm'r, *United Nations Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, Human Rights Council, 17<sup>th</sup> Sess., Mar. 21, 2011, U>N Doc. A/HRC/17/L.17/31 (June 16, 2011)



can afford to be ably represented in any forum without having any significant effect in their yearly turn over, it will be a welcomed idea if in cases where plaintiff's win such suit, the legal cost incurred by the plaintiff be awarded as cost to be paid by the defendants.

It is inevitable that there may be complicity of the government of the host state whose judiciary though supposed to be independent may not really be independent in such suits. The presence of corruption in these host state, the inefficiency of its judiciary and in most cases these suits outlive these victims which may be as a result of judicial strikes, or judges going on vacation to mention but a few. However, the State and the Corporation have a joint responsibility of providing access to remedy which is the third pillar of the UNGP<sup>171</sup> and in cases that it is clear such cannot be obtained in the host states, foreign states should be willing to hear such suit once the plaintiffs have locus standi which includes the mere presence of foreign corporations in those states or trading of securities.

In addition, having an international court, and having parties to international treaties agree on an internationally set out standards which the court use as factors to determine the when corporate veil will be pierced once suits are brought before this court will be a welcome development to the issue of piercing the corporate veil in foreign jurisdictions. It will also help reduce the uncertainty of having access to adequate remedy or justice these victims face as there is a clear guideline as to what will make the court adjudicate over the suit and pierce the corporate veil instead having these suits thrown out due to the applicable law or other corporate law principles.

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<sup>171</sup> Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', Report of the Special Representative of the Secretary- General on the issues of Human Rights and Transnational Corporations and Other Business Enterprises, UN Doc. A/HRC/17/31/Annex (21 March 2011)

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