Assignment granted by the Dutch Council for Legal Assistance in Amsterdam for Oguru and Efanga with the numbers 4GD4306 and 4GT0210

Today _____ two thousand and eight

at the request of:

Mr Fidelis Ayoro Oguru;

Mr Alali Efanga,

both residing in Oruma, Bayelsa State, the Federal Republic of Nigeria, as well as

the incorporated society Milieudefensie, established and having office in Amsterdam,

who all chose place of residence in this case at the office address of Mrs Liesbeth Zegveld, LL M, and Mr Michel J.G. Uiterwaal, LL M, at Keizersgracht 560-562 in Amsterdam, who in this case will be appointed as (acting) lawyer, with the right of substitution, as well as Mr W.P. den Hertog, LL M, having office in The Hague at Alexanderstraat 2, the latter being appointed by claimants as (proceedings) lawyer with the right of substition,

I have summoned:

1. The legal person according to foreign law Royal Dutch Shell plc., statutorily established in England and Wales and having office in The Hague at Carel van Bylandtlaan 16 (2596 HR), serving my writs at its office address and leaving a copy hereof to:

and

2. The legal person in accordance with foreign law Shell Petroleum Development Company of Nigeria Ltd, established in Port Harcourt, Rivers State, Nigeria, at Rumuobiakani, Shell Industrial Area, P.O. Box 263, who has chosen as place of residence Carel van Bylandtlaan 16 (2596 HR) in The Hague, serving my writs at the chosen domicile and leaving a copy hereof to:

to appear on Wednesday 18th Febuary Two Thousand and Nine at 10:00 hours, not in person but represented by a lawyer, at the sessionof the district court in The Hague in the Palace of Justice at Prins Clauslaan 60;

giving notification that if one or both of the defendant(s) will not appear at the latest at said session represented by their lawyer, the court will declare defendant(s) in default and will grant the claim to be formulated below unless the terms and formalities that are prescribed for this

summons were not observed and/or the summons appears to be unlawful or unsubstantiated as established in Article 111 sub 2 sub g and i juncto Article 139 of the Code of Civil Procedure;

giving notification that if only one of the defendants will appear (for the said manner), the defendant who did not appear will be declared in default if the formalities and terms that are prescribed for this were observed; between plaintiffs and the defendant who appeared the proceedings will be continued and the court will pass its verdict between all parties, that is regarded as a verdict of variance; in order to hear at aforementioned sessionthe claims and conclude in accordance with the following.

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All productions to be mentioned hereinafter will be presented by deed on the day of the court meeting.

1 INTRODUCTION

1. On the 26th June 2005 an oil spill was established from an oil pipeline in the vicinity of Oruma in Bayelsa State, Nigeria. The oil flowed from the pipeline until 7 July 2005 and spread fast. As a result of this, the rights and property of plaintiffs Oguru and Efanga as well as the environment suffered severe damage.

2. The oil leaked from the 20 inches (50.8 cm) Kolo Creek-Rumuekpe oil pipeline, a main pipeline of which defendant Shell Petroleum Development Company of Nigeria (hereinafter Shell Nigeria or defendant) is the operator (hereinafter: 'operator').

3. Shell Nigeria acted against the (legal and duty of care) standards that it should observe as an operator and is therefore liable for the spill and the results thereof. As will be clearly displayed hereinafter, the oil spill resulted from faulty maintenance; Shell Nigeria did not replace the oil pipeline on time. Shell Nigeria has also failed to take measures in order to suspend the oil flow after the spills occurred. Finally, Shell Nigeria did not timely and not completely clean up the spilled oil.

4. Royal Dutch Shell plc (hereinafter: Shell plc or defendant) is liable based on its own unlawful act (tort) since it has refrained from seeing to it that its subsidiary Shell Nigeria extracts oil in Nigeria in a careful way whereas it was capable and obliged to do so. As a result of that negligence the spills could occur, or were at least not timely remedied. As a result of the spills, plaintiffs sub 1 and 2 suffer property damage and immaterial damage; the spills have also caused damage to the environment.

5. Plaintiffs demand a judgement to be rendered that Shell Nigeria and Shell plc. are, based on an unlawful act, liable towards plaintiffs and are obliged to compensate the damages of plaintiffs sub 1 and 2, as well as that Shell Nigeria and Shell plc. discontinue their damage-causing acts.

6. Plaintiffs have held Shell Nigeria and Shell plc. liable in a letter dated 8 May 2008[1] for the damages mentioned above. The reaction of defendants on that letter,[2] containing a refusal to accept liability, is displayed below in as far as it is relevant.

2 PARTIES

2.1 Oguru and Efanga

7. Plaintiffs Fidelis A. Oguru and Alali Efanga both live in Oruma, in Bayelsa State, Nigeria. In the vicinity of Oruma runs the 20 inches Kolo Creek-Rumuekpe oil pipeline.

8. This oil pipeline runs along the fish ponds of the plaintiffs. During the spill of 26th June 2005 the oil flowed into the fish ponds that were polluted as a result of this and have since been unusable for fishing. The planting that was introduced by plaintiffs Oguru and Efanga in the area affected by the spill has been damaged irreparably as well, also because of a counterproductive attempt to clean up the area by assignment of Shell Nigeria. This planting not only provided the fish ponds

[1] Notice of liability of 8th May 2008 (**production A.1**)

[2] Letter of defendant Royal Dutch Shell plc (RDC) of 20th June 2008 (**production A.2**) and letter of defendant The Shell Petroleum Development Company of Nigeria Limited (SPDC) of 20th June 2008 (**production A.3**)

with shadow, but also supplied raw materials for products such as raffia palm, rubber, mangos and mahogany. As a result of this environmental disaster and the affection of their living environment, plaintiffs Oguru and Efanga suffer damage. As a result of a polluted living environment, the health of plaintiffs can be considerably affected and still be affected further, among other things by swallowing polluted drinking water, which is a violation of the human rights of plaintiffs. Apart from that, the damages of plaintiffs consist of an impairment of their property and income.

2.2 Milieudefensie

9. The incorporated society Milieudefensie is a Dutch non-governmental organisation (established in Amsterdam) that aims to improve the care for the environment globally.[3] In this procedure, it acts as protector of environmental interests of other persons, which interests have been violated because of the environmental pollution resulting from the oil spill near Oruma. Based on Article 3:305 Dutch Civil Code, Milieudefensie therefore has an independent interest in the established of the unlawfulness of the acts and omissions of defendants.

10. Already for many years Milieudefensie by means of discussions with defendants has attempted to achieve that they carry out their oil extraction in an environmentally friendly manner. So far these discussions have however not resulted in anything.

2.3 Shell Petroleum Development Company of Nigeria

11. Shell Petroleum Development Company of Nigeria Ltd (SPDC) is the largest private oil company in Nigeria and the largest foreign enterprise in the Nigerian industry. Shell Nigeria has over 6,000 kilometres of oil pipelines in Nigeria. Shell Nigeria is the 'operator' of a joint venture. Apart from Shell Nigeria (30%), this joint venture consists of the Nigerian National Petroleum Corporation (NNPC, a Nigerian state enterprise) (55%), Elf Petroleum Nigeria Limited (EPNL, a subsidiary of Total) (10%) and Agip (5%).[4]

12. 95 % of Nigerian export consists of oil and the oil accounts for 80% of the Nigerian government's income.[5]

13. Shell Nigeria is a 100% subsidiary of Royal Dutch Shell plc.

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[3] See Statutes Milieudefensie Association, (**production F.1**) Article 2 sub 1: "The Association has the objective to contribute to the solution and prevention of environmental problems and the maintenance of cultural heritage, as well as pursuing a sustainable society, and this at a global, national, regional and local level, in the broadest sense of the meaning and to the benefit of the members of the Association as well as to the benefit of the quality of the environment, nature and the landscape in the broadest meaning of the word, as well as future generations." To be consulted via: http://www.milieudefensie.nl/publicaties/beleidsstukken/statuten.pdf <viewed October 22, 2008>.

[4] Shell Petroleum Development Company of Nigeria Limited, 'Annual Report 2006: People and the Environment', p. 5; 'The Shell Sustainability Report 2007: Responsible Energy', p. 25. See also: http://www.shell.com/home/Framework?siteId=nigeria&FC2=/nigeria/html/iwgen/about_shell/what_we_do/zzz_lhn.html&FC3=/nigeria/html/iwgen/shell_for_businesses/exploration_production_shared/dir_spdc_1203_1027.html <lastly visited on 22 October 2008>.

[5] 'The Shell Sustainability Report 2007: Responsible Energy', p. 24:Responsible Energy', p. 24: "Onshore in the Delta, the government received 95% of the profits from each barrel of oil and gas equivalent produced by the SPDC joint venture based on average oil prices last year. (...) Energy production, concentrated in and off the coast of the Niger Delta, provides 80% of government revenues."

2.4 Royal Dutch Shell plc.

14. Royal Dutch Shell plc has been active in the oil extraction industry in Nigeria since 1958. Shell plc. is the holding company that, directly or indirectly, has participations in the numerous companies that together constitute the Shell Group.[6] Shell plc has its head office and fiscal place of residence in The Hague.[7] Shell has one sub-holding company, Shell Petroleum N.V., of which Shell Petroleum Company Ltd. in turn is a sub-holding company. These holding companies are 100% subsidiaries of Shell plc. Shell plc. is authorised to appoint the directors of the sub-holding companies. A sub-holding company of Shell holds 100% of the stock of the subsidiary company, Shell Nigeria.[8] In this way, Shell plc has a decisive influence, directly or indirectly via the sub-holding companies, on Shell Nigeria. Shell plc also has a share in the profit of its subsidiary in Nigeria.

15. On 20 July 2005 Shell plc was founded following a merger between Koninklijke Nederlandse Petroleum Maatschappij N.V. and The Shell Transport and Trading Company plc, the holding companies that together held the stock in the subsidiaries of Shell before the said date. Because of this merger, Shell plc is the legal successor of Koninklijke Nederlandse Petroleum Maatschappij N.V. and The Shell Transport and Trading Company plc and as such bearer of obligations that rest on those legal predecessors, including the obligations towards plaintiffs. This merger did not involve material changes in the group structure of Shell that are relevant in this case.

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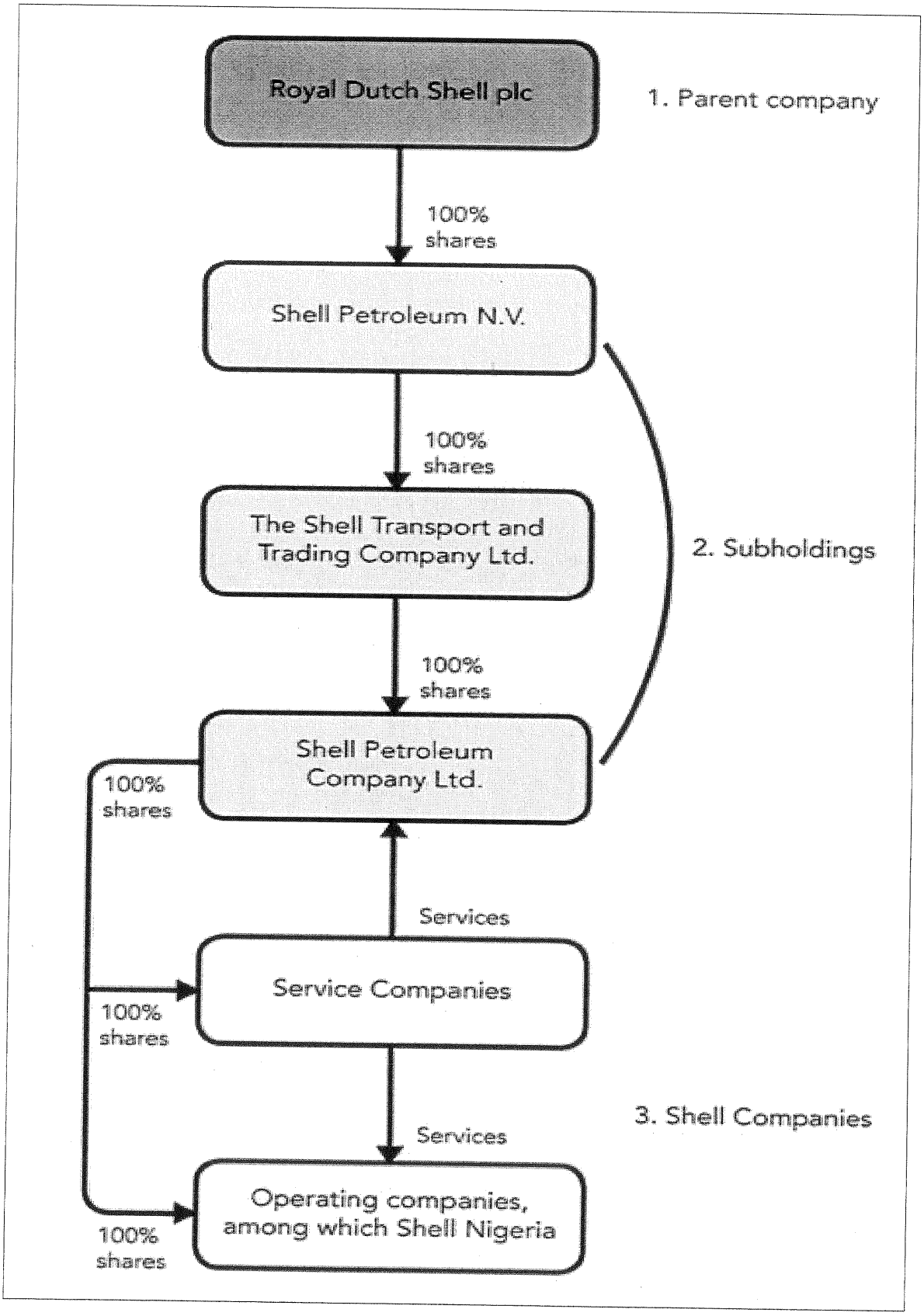
[6] Shell plc, 'Jaaroverzicht en verkorte jaarrekening 2007: Resultaat en Groei', (**production D.7**) p. 38.

[7] Shell plc. is incorporated in England and in Wales and has its statutory seat in Great Britain.

[8] Royal Dutch Shell plc holds 100% of the stock of Shell Petroleum Development Company of Nigeria Ltd. (Shell Nigeria). (See: United States Securities and Exchange Commission, Exhibit 8, Form 20-F, Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 for the fiscal year ended December 31, 2006, (**production D.8**).


Royal Dutch Shell plc
1. Parent company
100% shares
Shell Petroleum N.V.
100% shares
The Shell Transport and Trading Company Ltd.
2. Subholdings
100% shares
Shell Petroleum Company Ltd.
100% shares
Services
Service Companies
100% shares
3. Shell Companies
Services
Operating companies, among which Shell Nigeria
100% shares

3 COMPETENT JUDGE

16. Shell plc is a legal person established in accordance with English and Welsh law. Shell plc is a public limited company. Its statutory seat ("registered office") is located in England and Wales.[9] The head office of Shell plc is established in the Netherlands.[10] The Dutch judge therefore has the legal competence to be informed on this dispute (Article 2 sub 1 jo. Article 60 sub 1 EEX provisions);[11] the district court in The Hague is relatively competent.

17. The claims of plaintiffs against Shell plc are closely connected with the claims of plaintiffs against Shell Nigeria. Where plaintiffs reproach Shell plc to have taken insufficient measures in order to prevent its subsidiary Shell Nigeria from doing damage to mankind and the environment during the oil extraction in the Niger Delta and to have taken insufficient measures in order to see to it that Shell Nigeria timely and completely cleans up the pollution that was caused by the oil spill, they reproach Shell Nigeria that it, as operator of the pipeline, did not prevent the oil spill near Oruma and did not limit and clean up the damage.

18. Reasons of expediency justify the joint consideration of the claims against both defendants. Therefore, in the dispute against Shell Nigeria, the Dutch judge has legal competence and the district court in The Hague is competent as well (Article 7 of the Code of Civil Procedure).

4 APPLICABLE LAW

19. Dutch law applies to the present claim. The case is closely connected with The Netherlands. The unlawful behaviour that plaintiffs reproach Shell plc of was carried out, at least to an important extent, in the Netherlands, which will be shown below.

20. For that matter, plaintiffs point out that the applicability of Dutch law or Nigerian law is materially speaking not of major importance, since both legal systems do not conflict with each other. Both legal systems recognise unlawful act (tort), more specifically violation of a standard of due care, as foundation for liability. Under Nigerian law – which is based on English law – the person that causes damage to another person has to reimburse that damage as well. This means that the substantive legal result upon application of both legal systems will be the same.[12] Apart from that, the Dutch Act regulating the Conflict of Laws on Unlawful Acts provides that – also when Dutch law is applied – the applicable traffic and safety regulations on the location of the unlawful action, or other regulations that can be compared to that with regard to the protection of persons or property have to be taken into account.[13] The safety regulations in Nigeria and other

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[9] Memorandum of Association of Royal Dutch Shell plc (**production D.9**) Article 3: "The company's registered office is to be situated in England and Wales."

[10] Articles of Association of Royal Dutch Shell plc. (articles adopted on 17th May 2005) (**production D.10**) Article 87: "The headquarters of the company shall be in the Netherlands."

[11] Provisions (EC) no. 44/2001 of the Council of 22nd December 2000 regarding the judicial competence, the recognition and execution of decisions in civil and trade cases, EEX Provisions (Brussels I).

[12] Cf. President of Utrecht District Court, 8th August 1995, NIPR 1998, 118: "... that it does not to have to be decided whether Dutch or Belgian law applies, since this does not affect the outcome of the lawsuit". See also Th. M. de Boer, *Voorkeur voor de lex fori*, (Preference for the Lex Fori), Farewell Lecture University of Amsterdam, 26th September 2003.

[13] Act of 11th April 2001, concerning the regulation of conflict law with regard to obligations resulting from unlawful action (Act regulating the Conflict of Laws on Unlawful Acts), Dutch law gazette (effective as of 1 June

regulations that specifically provide for oil recovery are therefore, also when Dutch law is applied, relevant for this matter. It is only these regulations from Nigerian law that – via Article 8 Act on Conflict of Laws on Unlawful Acts – provide a relevant addition to Dutch law.

5 INTRODUCTORY CONSIDERATIONS ON PROOF AND BURDEN OF PROOF

21. Plaintiffs will base the liability of Shell plc and Shell Nigeria on documents and information that are currently available to them. However, plaintiffs do not have a number of important documents at their disposal that could further substantiate the points of view of plaintiffs. These documents are only in the possession of or available to the defendants.

22. In a letter of 8th May 2008 the plaintiffs have requested from the defendants a copy of, or perusal in 30 of these documents.[14] Shell Nigeria has thereupon provided a copy of two documents to the plaintiffs.[15] Defendants did not provide the other requested documents, nor did they provide perusal in them.[16]

23. Not having documents at their disposal that are of importance to plaintiffs in order to substantiate their claims seriously affects the equality of the legal parties in this case and results in a fundamental imbalance in the conduct of the case. Plaintiffs are of the opinion that this should have consequences for the obligation to produce prima facie evidence by defendants. Plaintiffs are of the opinion that an aggravated obligation to produce prima facie evidence rests on defendants. Plaintiffs also call upon Article 22 of the Code of Civil Procedure, based on which the judge can order defendants to provide certain documents that are related to the case.

24. The documents that are available to plaintiffs in order to sufficiently substantiate their claims will be discussed below, and the importance thereof for plaintiffs as well as a balanced conduct of the case will be amplified. At the end of this summons (Chapter 18, 'Considerations of proof and provision of proof') plaintiffs will further elaborate on the (legal) consequences that must in this case be linked to the fact that defendants did not provide documents.

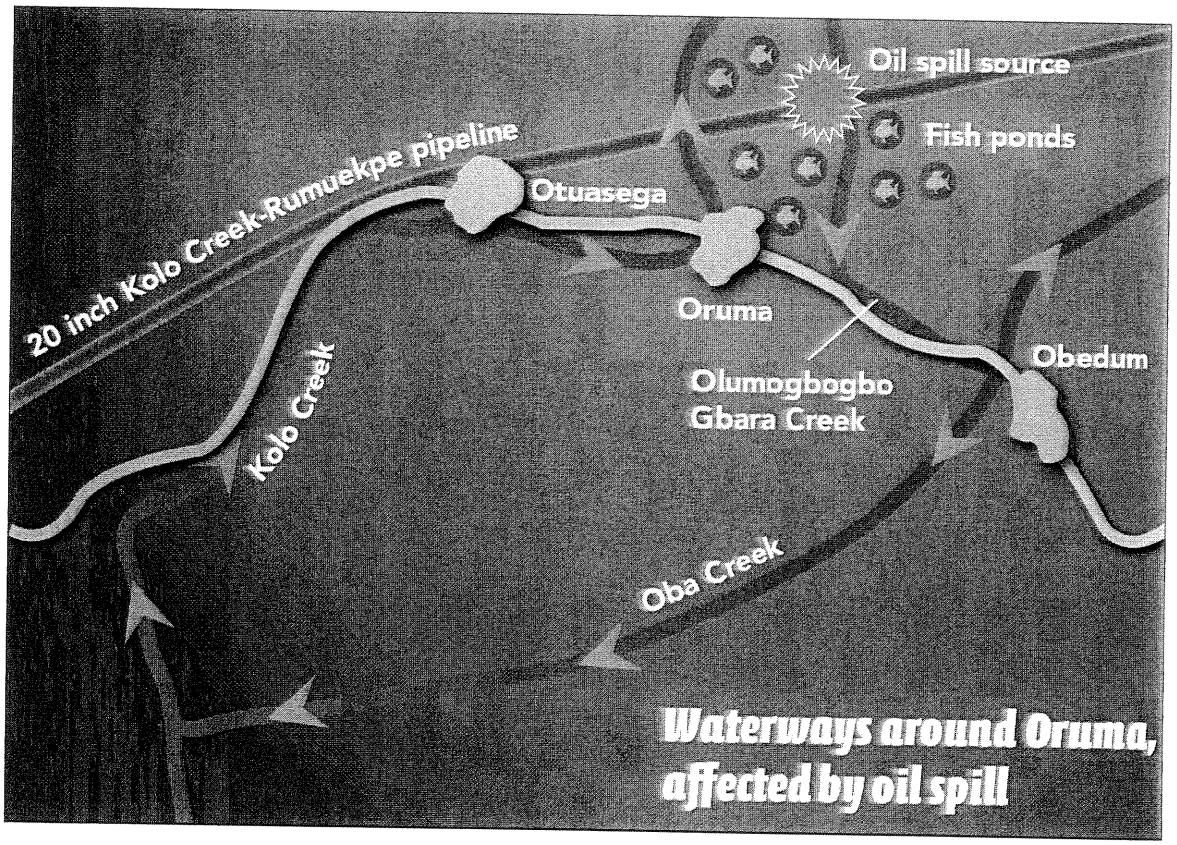
2001). Article 8 of this Act states: "What is stated in Articles 3 through 7 does not exclude that the applicable traffic and safety regulations at the location of the unlawful action or other comparable regulations with regard to the protection of persons or property will be taken into account".

[14] Notice of liability of 8th May 2008 (**production A.1**).

[15] This concerns a report that was formulated by Shell Nigeria as a result of the spill as well as a report on the clearing of the damage.

[16] Letters from defendants of 20th June 2008, (**production A.2, A.3**)

6 ORUMA OIL SPILL FACTS



25. The spill from the 20 inches Kolo Creek-Rumuekpe oil pipeline near Oruma was established on 26th June 2005.[17] Shell Nigeria, the operator of the pipeline, was informed immediately.[18]

26. The oil leaking from the pipeline flowed into farmland and fish ponds, among others those of plaintiffs, around the pipeline and around the Olumogbogbo-Gbara Creek. Via the Olumogbogbo-Gbare Creek the oil flowed into the Oba Creek, which flows out in the Kolo Creek.

27. The spill took place in a freshwater area with both forest and water land. Furthermore, the oil spill took place during the rainy season[19] because of which the oil could spread quickly through the area.

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[17] It is likely that the oil spill already occurred earlier, but was not discovered yet.

[18] Letters from defendants of 20th June 2008, (**productions A.2 and A.3**), p.4.

[19] The areas along the coast have two wet periods with a maximum of rain in May and June, and again in October. Although in the south of Nigeria no single month is completely dry, there are two relatively dry periods between December and February and between July and September.

28. Three days after the discovery of the spill on 29th June 2005, Shell Nigeria inspected the oil spill together with representatives of the community.[20] Shell Nigeria did not bring materials along in order to stop the spill or to limit the damage because of the spill, and left again.

29. Between 29th June 2005 and 5th July 2005 Shell Nigeria did not return in order to close the leakage from the pipeline. The residents of Oruma have – upon mediation by the Ministry of Environment of Bayelsa State – attempted to induce Shell Nigeria to start closing the leakage. Finally, these attempts have resulted in a meeting between the community, Shell Nigeria and the authorities of Bayelsa State, during which meeting it was agreed upon that Shell Nigeria would start the next day as of 7:00 AM to stop the oil spill. Shell Nigeria appeared on 6th July in the afternoon in Oruma, and then only announced that it was already too late to start the operation.

30. On 7th July 2005 Shell Nigeria closed the hole in the oil pipeline. The spill that was established on 26th June has therefore lasted at least twelve days. Shell Nigeria has not taken adequate actions in order to see to it that the leaked oil could not spread further into the environment. In its letter dated 20th June 2008 Shell states to have diverted the oil flow. Plaintiffs dispute this proposition. Video images taken during the closure of the spill show that the oil at that time was still flowing from the hole in the oil pipeline.[21] Furthermore, Oguru and Efanga have established that between 26th June and 7th July 2005 gas was uninterruptedly flared off from the close-by oil manifold. It can be concluded from this that the oil flow through this manifold to the Kolo Creek-Rumuekpe pipeline continued as well.

31. In order to stop the spill, Shell Nigeria took the following action. The 20 inches Kolo Creek-Rumuekpe oil pipeline is, at the location of the spill, around three metres under the ground.[22] In order to be able to stop the oil spill a hole had therefore to be dug. During the digging, the hole filled itself with oil from the leaking pipeline. After the pipeline was dug out, it was established that the oil spill was located at the bottom of the pipeline, as a result of which it could not be observed. The pipeline itself was covered in crude oil. Since the spill was hidden from sight, it could only be closed after repeated attempts. Finally, a wooden plug was struck into the pipeline with a sledgehammer.[23] Subsequently, an extra metal layer was applied to the pipeline on that same day in order to prevent a new spill. During inspection after the spill was closed, the hole turned out to be located at around 255 degrees, or the 8.30 o'clock position.[24]

32. The spill near Oruma is a so-called 'controllable spill': the cause of the spill is overdue maintenance of the pipeline. The 20 inches Kolo Creek-Rumuekpe oil pipeline near Oruma should have been replaced long before the spill of June 2005. Already in 2003 Shell Nigeria had carried out a survey on the condition of its pipelines (Asset Integrity Review or AIR). This showed that the Kolo Creek-Rumuekpe pipeline had to be replaced.[25] Among other things, this

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[20] See the Oruma guest book: On 29th June 2005 Prince Ben Mebitaghan arrives on behalf of Shell Nigeria in order to hold negotiations on the progress, (**production A.7**)

[21] See video images Oruma (**production A.11**). Shell Nigeria also states in the so-called Field Joint Investigation Report Form – Part A (**production A.4**) that there are video images and pictures available of the 'inspection'

[22] Defendants state in their letters of 20th June 2008 that the pipeline is located 1 metre under the ground. The video images that were taken during the closure of the leakage show however that the pipeline is located at a depth of around three metres. See video images Oruma, (**production A.11**).

[23] See video images Oruma (**production A.11**).

[24] See video images Oruma (**production A.11**).

[25] In the Annual Report of 2003 Shell Nigeria states that it will carry out a so-called Environmental Impact Assessment (EIA) with regard to the replacement of the Kolo Creek/Rumuekpe Trunk Line Replacement. *See:* Shell Nigeria, 'Annual Report 2003: People and the Environment' (**production C.1**), p. 8: "We carried out, and received regulatory approvals for 14 Environmental Impact Assessments (EIAs) in 2003. (...) EIA Approvals

appears from an email from then Deputy Managing Director of Shell Nigeria, from 24th June 2006:[26]

> "In 2003, a review of the integrity of all the trunk lines was undertaken and several pipelines were identified for replacement; e.g. the Nembe Creek Trunk Line and the Kolo Creek to Rumuekpe Trunk Line are currently being replaced."[27]

33. However, a *Memorandum of Understanding* from February 2006 between Shell Nigeria and the Oruma community shows that the pipeline near Oruma had still not been replaced in 2006:

> "Shell desires to replace the existing 20" by 38km Kolo Creek-Rumuekpe Trunk line that currently evacuates production from Kolo creek, Nun River, Etelebou, Gbaran, Diebu Creek and Enwhe Flowstations to Rumuekpe manifold. The scope of activities will include Scrapper trap (pig launcher) and associated pipings at Kolo Creek and Rumuekpe manifolds, 6" delivery line tie-in at Enwhe tie in manifold, River crossing block valves (upstream and downstream) at Orashi and Sambreiro rivers and 20" X 38km Carbon Steel Pipeline linking the above item. There activities will be executed and carried out by its major contractor, NESTOIL and other associated subcontractors."[28]

> In their notice of liability of 8th May 2008, plaintiffs have stated that the oil pipeline in Oruma started to leak because of overdue maintenance. At that, they have referred to the Asset Integrity Review carried out by Shell Nigeria in 2003 and requested to provide this survey as well as the documents that showed when the pipeline from which oil was spilt in Oruma was constructed and lastly replaced.[29] Defendants did not react on the proposition of plaintiffs that the pipeline suffered from overdue maintenance nor have they provided perusal in the requested documents, so that plaintiffs assume the correctness of their point of view.

34. Apart from that, neither the environment near Oruma nor the oil-polluted property of plaintiffs, have been adequately cleaned by Shell Nigeria.[30] In November 2005, a start was made with clearing out the leaked oil. Shell Nigeria has contacted third parties to that means. The cleaning activities have not been carried out properly. Various 'waste pits' were dug for instance, in which the oil refuse was dumped.[31] These waste pits are not protected against leakage of the oil, so that dissemination of the oil into the environment continues until today. Furthermore, during the cleaning activities a part of the leaked oil was burnt on open refuse dumps and in the waste pits. The heat and flames that resulted from this have scorched the surrounding forest and the crops.[32]

Received: (...) Kolo Creek/Rumuekpe Trunkline Replacement."

[26] Wicks is also a former member of the World Wildlife Fund United Kingdom. Wicks also participated in the Amnesty International mission to Nigeria.

[27] Email from Deputy Managing Director of Shell Nigeria, Mike Corner, to Clive Wicks, member of the IUCN CEESP Commission, also former member of the World Wildlife Fund United Kingdom. Apart from that, Wicks participated in the Amnesty International mission to Nigeria (**production A.10**).

[28] MOU between Shell and the Oruma Community, February 2006 (**production A.9**).

[29] Notice of liability of 8th May 2008 (**production A.1**), sub d and e.

[30] The 'Clean up and remediation certification format' states that 400 barrels of oil were leaked, which means 63,600 litres of oil (**production A.6.**).

[31] Shell Nigeria regularly uses this method of waste pits, see Inter Press Service, 15th May 1996, Haznews 1996 (**production I.1**); idem, 'Shell ignores environmental standards in Nigeria?' June 1st, 1996 (**production I.2**): "Interviewees said that any oil recovered from the spills is simply dumped in a pit where it leaks as soon as the rains come".

[32] Report Bryjark Environmental Services, 'Post impact assessment study of the oil spillage in Oruma', Bayelsa State, (Port Harcourt February 2008) (**production B.2**), p. 5 and 7. Defendants refer in their letters from 20th June

35. Contrary to what defendants state, the cleaning process was not completed. The oil in the waste pits is still not completely cleared.[33] In June 2007, two years after the oil spill, Dr Solomon Braide of the Bryjark Environmental Services agency has carried out research by assignment of the plaintiffs in the area around Oruma.[34] In Oruma six samples of ground water, soil and sediment were taken. In this research still clear hydrocarbon pollution of the area is established.[35] This despite the fact that the research was carried out 24 months after the oil spill. On the water, there was still oil sheen. At some places, the soil turned out to be heavily polluted with oil and polycyclic hydrocarbons.

Plaintiffs have requested defendants to provide them with a copy of the research on the consequences of the oil spill (Post Impact Assessment Study) from which should appear what damage the spill has caused to the environment.[36] Defendants have not provided this information.

7 FACTUAL CONTEXT: OIL SPILLS IN THE NIGER DELTA

36. As will be established hereinafter:

- The oil spill in June 2005 near Oruma resulted from overdue maintenance; Shell Nigeria did not timely replace the oil pipeline.
- Shell Nigeria has failed to take measures in order to suspend the oil flow after the spill occurred.
- Shell Nigeria did not timely and not completely clean up the spilled oil.

37. These claims will be further elaborated below. At that, it is always crucial to take the duty of care that Shell Nigeria has into account.

38. Shell Nigeria has acted negligently by letting the oil spill near Oruma in Nigeria occur, or at least not to prevent and to limit it, and by not adequately clearing the oil. Shell plc has acted negligently by refraining from taking care that its subsidiary Shell Nigeria carries out the oil production in Nigeria in a careful manner, although it was able and compelled to do so.

39. The duties of care of defendants must be placed in the factual context in which the spill near Oruma took place. The oil spill that has caused damage to plaintiffs and the environment, was not an incident but fits into a pattern of oil spills because of the oil extraction by Shell in the Niger Delta. It is also in the light of the systematic character of the oil spills in the Niger Delta that a strict duty of care for defendants with regard to the oil spill near Oruma in June 2005 has to be assumed.

2008 to the *clean-up and remediation form.* In there, the cleaning procedure is described as 'removing and ploughing the contaminated soil'.

[33] Report Bryjark Environmental Services, 'Post impact assessment study of the oil spillage in Oruma', Bayelsa State, (Port Harcourt February 2008) (**production B.2**), p. 59 picture A (waste pits that are not covered with a plastic lining, as is required).

[34] This agency often carries out research by assignment of Shell Nigeria.

[35] Report Bryjark Environmental Services, 'Post impact assessment study of the oil spillage in Oruma', Bayelsa State, (Port Harcourt February 2008) (**production B.2**).

[36] Notice of Liability of 8th May 2008 (**production A.1**), *sub t.*

40. Defendants were aware of this pattern of oil spills; by all means, they should have been aware of this as a carefully acting and globally operating oil company. The pattern is a fact that is commonly known and, for that matter, defendants themselves report on that as well. Apart from that, there are numerous reports of independent experts that establish the scope and severity of the situation. On this context within which the oil spill near Oruma has to be viewed as well as on the basis of which a serious responsibility to due care must be assumed, we will now further elaborate.

7.1 Oil is a dangerous substance

41. Oil operations such as those of defendants are inherently dangerous. This is already recognised since the commencement of industrial oil extraction.

> From the beginning of the production of petroleum as an industrial undertaking, it was recognised that the environment (and depending on circumstances the persons carrying out or involved in the operations) were put at risk by:
>
> (...) an oil well eruption (blow-out) at the drilling or production site, a grounding or collision of an oil tanker at sea, or the rupture of a pipeline and the subsequent massive release of oil into the environment (oil spillage)[37]

42. Oil extraction can therefore only be carried out safely if sufficient and extensive precautionary measures are taken.

43. This means that it must be requested from defendants, who have been active for decades in the oil extraction and are therefore very experienced, that they apply a great level of care at their oil operations.

7.2 Niger Delta is a densely populated and vulnerable nature reserve

44. Since 1958 large-scale oil extraction takes place in Nigeria.[38] The Nigerian oil fields are mainly located in the so-called Niger Delta in the utmost south of Nigeria, a densely populated, extremely vulnerable nature reserve, and the oil spill near Oruma took place in the Niger Delta as well.[39] It is a relatively flat area that is rich in water and swamps, which is difficult to access from the outside world. The original inhabitants mainly live from breeding fish in fishponds, from small-scale agriculture, and from producing palm oil.

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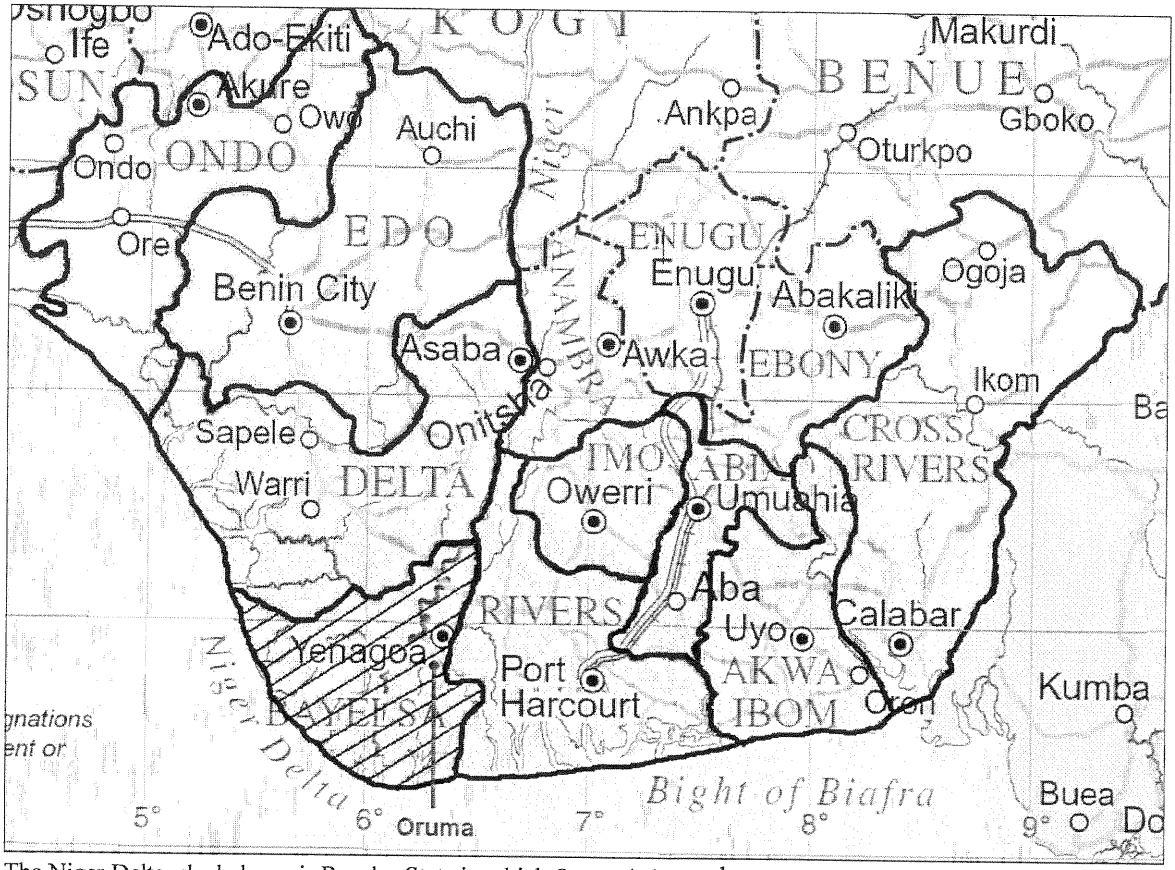
[37] B. Taverne, *Petroleum, Industry and Governments, An Introduction to Petroleum Regulation, Economics and Government Policies* (Kluwer Law International, 1999) (**production H.7**), p. 9-10.

[38] See S. Howarth & J. Jonker, *Geschiedenis van Koninklijke Shell, Part 2: Stuwmotor van de Koolwaterstofrevolutie 1939-1973*, Boom; Amsterdam, (**production H.3**), p. 191. See also <http://www.shell.com/home/content/nigeria/about_shell/who_we_are/history/history.html> <lastly visited on 4 November 2008>.

[39] The surface of the Niger Delta measures around 117,000 square kilometres. This equals the political borders of the area in which nine federal states are located. The population of the Niger Delta is about 32 million people. (Estimate of the Niger Delta Development Commission (NDDC), Niger Delta Regional Development Master Plan Executive Summary, 25th July 2007, p. 1. To be found at <www.bryjark.com/EXECUTIVE%20SUMMARY.pdf > <lastly visited on 21 October 2008> (**production B.3**).



The Niger Delta, shaded area is Bayelsa State in which Oruma is located

45. The area is populated by more than 3,000 different (long existing) communities. The consequence of the densely populated character of the Niger Delta is that the majority of the pipelines of Shell Nigeria run through or close to fishponds and farmland of local inhabitants. The oil spill of which the plaintiffs have become a victim also originates from a pipeline that runs directly near their fishponds and farmland.

46. Because of the limited differences in altitude and the large amount of rivers and creeks, oil spills in the Niger Delta always have an extra negative effect on the natural environment and therefore on the living environment of the inhabitants. The oil namely spreads quickly over the many waters and affects the fishponds, farmland and palm trees, and also poses health risks to the inhabitants who see their source of drinking water polluted. Oil extraction in the Niger Delta therefore poses grave dangers to the health and properties of the local residents and the environment. This also applies to the oil extraction near Oruma.

47. Defendants should – judging from their experience and knowledge – be aware of the very sensitive environment in the Niger Delta. In its annual report 2006, Shell Nigeria recognises the vulnerability of the Niger Delta:

> "The ecosystem [of the Niger Delta] is particularly sensitive to changes in water quality, such as salinity or pollution, or to changes in hydrology of the region."

48. Plaintiffs conclude that, apart from the inherent danger of oil extraction, the circumstances under which the oil extraction is carried out in the Niger Delta, are extremely unfavourable. This means

that in that area high requirements should be set to the care that defendants should apply in order to prevent or limit the damage as a result of oil pollution.

7.3 Long history of oil spills in Nigeria

49. The oil spill in June 2005 in Oruma fits into a long history of oil spills in Nigeria. Despite the serious consequences that oil spills have, for years on end very many oil spills occur in Nigeria. Reports from Shell Nigeria show that annually at least 250 oil spills take place from its oil installations. Shell Nigeria could have prevented 45 percent of the spills from the past ten years of Shell Nigeria[40]. This concerns the so-called *controllable spills*, with the main cause as corrosion because of faulty maintenance and material defects.[41] The table below provides an overview of the oil spills that were reported by Shell Nigeria itself over the past ten years. This report also shows that Shell Nigeria is aware of the large scale on which oil spills occur in the Niger Delta.

[40] And 33 percent of the spills from the past five years of Shell Nigeria.

[41] In 2007 Shell Nigeria reports that a large spill occurred because of corrosion of an important pipeline, without stating the amounts of leaked oil (Shell Nigeria, 'Environmental Performance: Oil Spills and Managing Our Facilities', 2007 (**production C.5**), p. 2: "In respect of those incidents that were in SPDC's operational control, two incidents made up a significant proportion of the barrels spilled in 2007. A leak along a 28-inch pipeline in the Cawthorne Channels due to corrosion, and a leak from manifold on a major export pipeline at Abalamabia, which was caused by operator error"); in 2006 there was a corrosion case with around 400,000 litres of leaked oil (2,500 barrels) ('Shell Nigeria Annual Report 2006: People and the Environment' (**production C.4**), p. 15: "We estimate that there was a significant increase in the total volume of oil spilled in 2006. Two incidents – leaks at the Nembe Creek Trunk Line (NCTL) at Krakrama (estimated to be 7,000 barrels) and the Nembe-IV (estimated to be 2,500 barrels) – contributed significantly to the volume of controllable spills. The Krakrama spill resulted from accidental damage to the line by a contractor laying a new pipeline along the existing right-of-way. The other spill was due to corrosion"); over 2005 there was a 45,000 litres spill as a result of corrosion and three distribution stations ('Shell Nigeria Annual Report 2005: People and the Environment' (**production C.3**), p. 16: "The number of spills caused by corrosion decreased slightly from 38 in 2004 to 33 in 2005, although the corresponding volume spilled was higher than in 2004 – 283 barrels (38 tonnes) in 2005 compared with 87 barrels (12 tonnes) in 2004 – mainly as a result of failures on two pipelines and three flowlines"); over 2004 there were 38 spills as a result of corrosion (The Shell Petroleum Development Company of Nigeria Limited (SPDC), 'Annual Report 2004: People and the Environment' (**production C.2**), p. 16: "Spills from corrosion increased from 18 in 2003 to 38 in 2004 (...)"); over 2003 Shell Nigeria reported a nreakage of a 28-inches pipeline near Rukpokwu that would have occurred as a result of internal corrosion (SPDC, 'Annual Report 2003: People and the Environment' (**production C.1**), p. 9: "An oil spill at Rukpokwu, Rivers State, along the Trans-Niger Pipeline has been in the news. (...) They confirmed the cause of the spill to be a tear at the bottom of pipe, most likely due to internal corrosion.")

Number of oil spills Shell Nigeria, according to annual reports of Shell Nigeria[42]					
	total	**sabotage**	***controllable***	**to be categorised**	**% sabotage**
1998	242	68	174		28%
1999	319	160	160		50%
2000	340	137	203		40%
2001	302	147	155		49%
2002	262	160	101		61%
2003	221	141	80		64%
2004	236	157	79		67%
2005	224	138	86		62%
2006	241	165	50	26	68%
2007	330	221	109		67%
Average 1998-2007	**272**	**149**	**120**		**55%**
Average 2003-2007	**250**	**164**	**81**		**67%**

50. Not only in the amounts of spills but also in quantities of leaked oil, have the *controllable spills* occupied a major place. According to the data in the reports of Shell Nigeria this concerned 41 percent of the volume in the past ten years, and 33 percent in the past five years.

51. The oil operations of Shell in Nigeria leak considerably more oil than those in other countries where Shell companies operate. In the period 1998-2007 Shell Nigeria was responsible for 38 percent of the total amount of the oil spilled by the Shell Group, according to reports of Shell Nigeria. In the period 2002-2007, this was 33 percent. At the same time, during the past five years Nigeria on average had a 15 percent share in the worldwide production of oil and liquid gas by the Shell Group.[43]

52. Research carried out by assignment of Shell Nigeria by WAC Global Services also shows that the oil extraction by Shell in Nigeria has caused very many problems in the Niger Delta, including countless oil spills.[44] The research shows that Shell Nigeria does not act timely on spills, does not clean them up in an adequate manner, and by default unjustly blames the cause of the oil spills on sabotage.[45] The report also states that Shell Nigeria applies low standards and unethical methods.

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[42] *See*: Shell Petroleum Development Company of Nigeria Limited, Annual Reports 1998-2006; Shell in Nigeria, 'Environmental Performance: Oil Spills and Managing Our Facilities' (**production C.6**), to be consulted via: http://www.shell.com/static/nigeria/downloads/pdfs/brief_notes/shell_nigeria_environmental_peformance.pdf <lastly visited on 21st October 2008>

[43] Royal Dutch Shell plc, 'Financial and Operational Information 2003-2007: Delivery and Growth' (**production D.1**), p. 52, to be consulted via: http://www-static.shell.com/static/investor/downloads/financial_information/reports/faoi/faoi_2007.pdf

[44] WAC Global Services, 'Peace and Security in the Nigerdelta: Conflict Expert Group Baseline Report' (**production C.7**), (Working Paper for SPDC, December 2003), pp. 8, 79.

> There is a "flexible" interpretation of [Shell corporations in Nigeria] policies, a low level of standardisation and continued unethical practices. Poor consequence management undermines policy compliance. Audit experts report that in cases where they had clear evidence of violation of business principles, the superiors of guilty staff failed to take action. This sends a message of impunity to the rest of the organisation.[46]

53. Now that Shell Nigeria has ordered the WAC research itself, it must be assumed that defendants are aware of the alarming contents thereof, or at least should be aware of it. For that matter, defendants have not published the research, it was leaked.

54. Except for defendants and, by assignment of defendants WAC Global Services, independent experts have also regularly carried out research on the oil spills in the Niger Delta and the harmful consequences thereof. Defendants were consulted on the outcome of those researches, which for that matter have also been published.

55. In almost every annual report, Amnesty International mentions the large damage that oil spills cause to human beings and the environment.[47] Furthermore, Amnesty International has published a number of specific reports on (the consequences) of oil spills in the Niger Delta. In one of those reports attention is paid as well to the bad condition of the pipelines and the damage that oil spills cause, apart from the social tensions:

> Frequent oil spills blacken the land and pollute the waterways.[48]

56. The human rights organisation Human Rights Watch (HRW) repeatedly reports on the circumstances in the Niger Delta:

> The Niger Delta's people have also had to cope with the environmental impacts of a poorly regulated oil industry. Every year the network of pipelines that criss-cross the region's maze of creeks and mangrove swamps records hundreds of oil spills that often spoil farmland and waterways.[49]

57. HRW also reports on the often-inadequate manner of clearing up oil spills.[50] HRW asks Shell plc to react to its reports.

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[45] WAC Global Services, 'Peace and Security in the Nigerdelta: Conflict Expert Group Baseline Report' (**production C.7**), (Working Paper for SPDC, December 2003), pp. 16, 17.

[46] WAC Global Services, 'Peace and Security in the Nigerdelta: Conflict Expert Group Baseline Report' (**production C.7**), (Working Paper for SPDC, December 2003), p. 25.

[47] See for example 'Amnesty International Report 2006', Nigeria (**production B.4**), p. 199: "Oil spills and gas flaring continued to contribute to environmental degradation and affect health and livelihoods." To be consulted via: http://www.amnesty.org/en/library/asset/POL10/001/2006/en/dom-POL100012006en.pdf <lastly visited on 22nd October 2008>

[48] Amnesty International: 'Nigeria: Ten Years On: Injustice and Violence Haunt the Oil Delta' (**production B.5**), to be consulted via: http://www.amnesty.org/en/library/asset/AFR44/022/2005/en/dom-AFR440222005en.html <lastly visited on 4 November 2008>. Except for the fact that these sources are publicly available, Amnesty International informs Shell plc actively on human rights violations in which Shell Nigeria is involved.

[49] Human Rights Watch: Chop Fine, (January 2007, Volume 19, Nr. 2(a)) (**production B.6**), p. 20, to be consulted via: http://hrw.org/reports/2007/nigeria0107/nigeria0107web.pdf <lastly visited on 4th November 2008>.

[50] Human Rights Watch, The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities' (**production B.7**), p. 57: "This method of clearing spills is not regarded as satisfactory by international standards..." To be consulted via: http://www.hrw.org/reports/1999/nigeria/nigeria0199.pdf <lastly visited on 21 October>

58. Also, in a report of the United Nations Development Programme (UNDP) the years on end lasting oil spills that resulted in grave damage to local residents and the environment are pointed out.[51]

59. For many years plaintiff Milieudefensie points defendants at the environmental pollution in Nigeria as a result of the oil extraction. The reaction of defendants on these reproaches shows that the oil companies are aware in detail and up to the highest management level of the situation in Nigeria, of the damage that was caused to the environment over there.

60. An independent team of environmental scientists from Nigeria, Great Brittain and the United States concluded in a preliminary survey on the damage to natural resources (Natural Resource Damage Assessment) as a result of the oil extraction that the Niger Delta is one of the world's ecosystems most affected by oil.[52] Among other things, they stated that the oil operations of the various oil companies in Nigeria – which in general did not comply with the standards to be set to them – have resulted in an estimated 1 to 1.5 million tonnes of spilt oil.

61. Based on various independent reports it can furthermore be concluded that the number of oil spills, the amount of leaked oil at Shell Nigeria's operations and the resulting damage to human beings and the environment is many times higher than the company itself states.[53]

62. Plaintiffs conclude that the oil spill near Oruma was not an incident, but fits into a pattern of environmental damage at the oil extraction by Shell Nigeria since this company has established itself in Nigeria. Defendants know, or should at least know, that oil extraction is inherently dangerous and that numerous oil spills occur in the Niger Delta that cause damage to human beings and the environment. As explained above, this shows from various reports and surveys of defendants themselves, from scientists van from NGOs. According to the own data of defendants more than half of the oil spills in Nigeria in the past decade (on average 270 cases per annum) were caused by overdue maintenance (that is almost three cases per week over a period of time of ten years).

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[51] United Nations Development Programme, 'Niger Delta Human Development Report 2006' (**production B.8**), p. 77, 81, to be consulted via:http://hdr.undp.org/en/reports/nationalreports/africa/nigeria/name,3368,en.html<lastly visited on 21 October 2008>

[52] 'Niger Delta Natural Resource Damage Assessment and Restoration Project', Phase 1 – Scoping Report by Federal Ministry of Environment (Abuja), Nigeria Conservation Foundation (Lagos), WWF UK, CEESP-IUCN Commission on Environmental, Economic and Social Policy (**production B.9**), p. 1: "Fifty years after the discovery of oil in Nigeria's Niger Delta, an independent team of experts from Nigeria, the UK and the United States convened by the Nigerian Conservation Foundation concluded that the Niger Delta is one of the word's most severely pertroleum-impacted ecosystems." Te raadplegen via: http://cmsdata.iucn.org/downloads/niger_delta_natural_resource_damage_assessment_and_restoration_project_recommendation.doc <viewed on October 21, 2008>. See also: R. Steiner, 'Double Standards? International Standards to Prevent and Control Pipeline Oil Spills, Compared with Shell Practices in Nigeria', University of Alaska (November 2008) (**production B.1**), pp. 5, 10, 14.

[53] See C.O. Orubu (Department of Economics, Delta State University, Abraka, Delta State, Nigeria), A. Odusola (National Centre for Economic Management and Administration (NCEMA), Ibadan, Nigeria) and W. Ehwarieme (Department of Political Science, Delta State University, Abraka, Nigeria), 'The Nigerian Oil Industry: Environmental Diseconomies, Management Strategies and the Need for Community Involvement, Journal of Human Ecology, 16(3), 2004 (**production H.5**), p. 208.

8 FACTUAL CONTEXT: INFLUENCE AND CONTROL SHELL NIGERIA

63. Above, the inherent danger of oil extraction, the vulnerability of the Niger Delta, and the pattern of oil spills in the Niger Delta has been explained. At their operations in Nigeria, defendants should be aware of the context in which they operate, of the implications of their operations, and the danger that their operations cause for damage to the rights of others.[54]

64. Below, it will be explained that a strict duty of care rests on Shell Nigeria with regard to the interests of plaintiffs, since they, as part of the global Shell Group, can have a wealth of knowledge, experience and means at their disposal in the field of oil extraction (section 8.1) and since they are, as operator of the joint venture in Nigeria, a powerful local player with a large factual influence and control (section 8.2).[55]

8.1 Shell Nigeria is part of the Shell Group

65. Shell Nigeria is part of a multinational company (the Shell Group) that, already for decades, has had a leading position in the world with regard to oil recovery. Shell profiles itself as a company that is far ahead with regard to technological knowledge on oil extraction and that adheres value to responsible oil extraction:[56]

> 'For us contributing to sustainable development (SD) means helping meet the world's growing need for energy in economically, socially and environmentally responsible ways.'[57]

66. The environment is a Group interest to the Shell Group. Shell plc. that (via subsidiaries) controls 100% of the stock of Shell Nigeria, pursues an intensive environmental policy within the Shell Group and maintains this policy strictly with regard to its subsidiary Shell Nigeria.[58]

67. Worldwide, Shell companies partake in a large number of initiatives at which standards for cautious oil extraction (good oil field practice) are developed.[59] As subsidiary of Shell plc, Shell

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[54] See UN Human Rights Council, 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises', John Ruggie, 7th April 2008, A/HRC/8/5 (**production B.10**), no. 19-20.

[55] See UN Human Rights Council, 'Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises', John Ruggie, 7th April 2008, A/HRC/8/5 (**production B.10**), no. 19-20.

[56] K. Sluyterman, *Geschiedenis van Koninklijke Shell, Deel 3: Concurreren in Turbulente Markten, 1973-2007* (Boom, Amsterdam 2007), (**production H.6**) p. 455: "Technological innovation was one of the enduring strong points of the Group."

[57] See:http://www.shell.com/home/content/responsible_energy/integrated_approach/sd_in_shell/sd_shell_08042008.html <viewed on November 4, 2008>: "For us contributing to sustainable development (SD) means helping meet the world's growing need for energy in economically, socially and environmentally responsible ways." See also 'The Shell Sustainability Report 2005: Meeting the energy challenge', (**production D.4**) p. 5: "Finding environmentally and socially responsible ways to provide more oil and natural gas is an important part of that energy future."

[58] Please refer to chapter 12.

[59] R. Steiner, 'Double Standards? International Standards to Prevent and Control Pipeline Oil Spills, Compared with Shell Practices in Nigeria', University of Alaska (November 2008) (**production B.1**), pp. 24, 28: "It is important to note that as these are U.S. Integrity Management standards codified by API, these are considered international 'good oil field practice,' and are thus required of operators by Nigerian law as well. (...) Shell participated in the Alaska technical review of Leak Detection System technology for pipelines, and was thus well aware of such technological development long ago. Again, as these Leak Detection System standards are codified by API, these

Nigeria therefore has, or at least Shell Nigeria could have, all relevant knowledge with regard to modern standards and technologies for cautious oil recovery at its disposal.

68. The care that Shell Nigeria should exercise at its oil extraction is therefore also highlighted by the experience, knowledge and means that the Shell Group, of which Shell Nigeria is a part, has at its disposal.

8.2 Shell Nigeria is the operator of the pipeline near Oruma

69. Shell Nigeria is the 'operator' of the joint venture that accounts for a large share of the oil recovery on the Nigerian mainland. This joint venture produces more than 40% of the total oil production in Nigeria.[60] In 2004 this was around one million barrels of oil per day.[61] Furthermore, Shell Nigeria by far has the largest share in the oil extraction industry on the Nigerian mainland.

70. Although the Nigerian state company NNPC has a share of 55% in the joint venture and Shell Nigeria a share of 30%, these percentages do not reflect the factual power and control of Shell Nigeria. Shell Nigeria surpasses the other partners of the joint venture as far as knowledge, experience and means are concerned. It is exactly this factual power of Shell Nigeria that constitutes the basis for the fact that the other partners in the joint venture as the operator have appointed this oil company.

> As operator of the joint venture, Shell Nigeria is responsible for the proper progress of the oil extraction in Nigeria, the transportation of the oil and the maintenance of the pipelines. These obligations have been established in the Joint Operating Agreement (JOA) that applies to the joint venture. In the letter of 8th May 2008, plaintiffs have requested a copy from the JOA in which the competences and obligations of the operator have been established. Defendants did not provide this document. The facts described above with regard to the role of Shell Nigeria within the joint venture are known to plaintiffs based on public sources. Plaintiffs offer proof of this proposition, among other things by hearing witnesses. Primarily on defendants rests the obligation to provide perusal in their plea on the tasks, responsibilities and obligations of Shell Nigeria as operator of the joint venture.

71. Important rights and competences that are assigned to the operator by virtue of the JOA are the exclusive right to carry out operations of the joint venture and the right to hire subcontractors as well as to make use of their services. From these competences the influence on and the control over the oil operations of the joint venture arises. Precisely because Shell Nigeria carries the operations by itself and decides who will be appointed as subcontractors at that, it is Shell Nigeria that can determine directly how oil will be extracted in a careful manner.[62]

72. Furthermore, Shell Nigeria as operator has the right to hire foreign and local personnel (under terms of employment to be determined by itself) as well as the right to make use of technical and human resource departments of the parent company and/or specialised third parties.[63] This means

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are considered international 'good oil field practice,' and are thus required of operators by Nigerian law as well."

[60] The Shell Sustainability Report 2006: 'Meeting the Energy Challenge', (**production D.5**) p. 33.

[61] The Shell Report 2004: 'Meeting the Energy Challenge – Our Progress in Contributing to Sustainable Development', (**production D.3**) p. 16.

[62] This is confirmed by the fact that Shell plc assumes that it has *operational control* over joint ventures of which Shell is the operator (see on this section 16.3.2).

[63] B. Taverne, Petroleum, Industry and Governments, An Introduction to Petroleum Regulation, Economics and Government Policies (Kluwer Law International, 1999), p. 372, (**production H.7**).

that Shell Nigeria can hire employees that have acquired expertise within the Shell Group in the field of cautious oil extraction. Shell Nigeria can also hire the services of the *service companies* of Shell plc such as Shell International B.V. and Shell International Ltd. In view of these far-reaching rights and competences, a strict duty of care with regard to the way in which oil is extracted rests on Shell Nigeria as operator.

73. The standard of due care that rests on Shell Nigeria is further completed by the obligations it has as operator of the joint venture. As operator, Shell Nigeria is for instance obliged to formulate plans of activity and budgets that are approved by the operating committee of the joint venture.

> In the notice of liability of 8th May 2008 (sub y) plaintiffs have requested the plans of activity and budgets for the benefit of the joint venture. Without adequate motivation defendants have failed to meet this request.

74. Filing of both evaluation and assessment plans and development plans for the benefit of the joint venture resorts under the obligations of Shell Nigeria as well. It is furthermore established in the JOA that the operator during operations should comply with the modern standards and technologies that apply internationally for cautious oil extraction, the so-called 'good oil field practices'.[64]

75. Finally, plaintiffs point at the fact that Shell Nigeria, as operator of the joint venture, has above-average knowledge on the scope and severity of the spills in Nigeria, or at least should have that. All spills are reported to the company and as operator, Shell Nigeria is responsible for cleaning up the leaked oil, regardless of the cause of the spill.[65] That means that Shell Nigeria, from all parties that constitute the joint venture, should have had the highest level of knowledge.

9 VIOLATION OF DUTY OF CARE THAT APPLIES TO SHELL NIGERIA

9.1 Increased duty of care as a result of influence and control of Shell Nigeria

76. In the aforementioned, plaintiffs have explained the inherent danger of oil extraction, as well as the severely negative effects of oil spills on the residents and the environment in the Niger Delta and the countless spills that have already taken place over there. Apart from that, Shell Nigeria, subsidiary of a globally leading concern with high internal environmental standards has, as operator of the most important joint venture in Nigeria, large influence on the cautious manner of oil extraction in Nigeria. This factual context results in an increased standard of due care that Shell Nigeria should comply with at the oil extraction in Nigeria.

77. In view of this factual context and the existing large risks of spills and damage, Shell Nigeria was obliged to take adequate (precautionary) measures. However, Shell Nigeria refrained from doing so.

78. Below, plaintiffs discuss the norms that apply to cautious oil recovery. These standards specifically prescribed that oil spills should be prevented, that the leaded oil should be limited, and that by all means and at any time the leaked oil should be cleaned up. In view of the above,

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[64] B. Taverne, *Petroleum, Industry and Governments, An Introduction to Petroleum Regulation, Economics and Government Policies* (Kluwer Law International, 1999), p. 373 (**production H.7**).

[65] Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN), Issued by the Department of Petroleum Resources (Lagos 1991), Revised Edition 2002 (**production G.2**), p. 152, section 4.1: "An operator shall be responsible for the containment and recovery of any spill discovered within his operational area, whether or not its source is known."

the obligation rests on Shell Nigeria to see to it that these standards are strictly observed during the exploitation of the oil pipeline. The oil extraction by Shell Nigeria does not comply with these standards. By not seeing to it that these standards are indeed observed, defendants act in violation with the duty of care that they have.

9.2 Nigerian safety regulations with regard to oil recovery

79. Nigerian regulations require that operators of oil fields observe internationally recognised standards with regard to 'good oil field practice'. The Nigerian Petroleum Act of 1969 states that the Minister of Petroleum Materials has the legal competence to withdraw the license of an operator when he does not comply with the 'good oil field practice'.[66]

80. The Mineral Oils (Safety) Regulations of 1962, which regulations come in addition to the Petroleum Act, determine that 'good oil field practice' is measured by international standards:

> '[good oil field practice] shall be considered to be adequately covered by the appropriate current Institute of Petroleum Safety Codes, the American Petroleum Institute [API] Codes, or the American Society of Mechanical Engineers [ASME] Codes.'[67]

81. The Petroleum Drilling and Production Regulations form 1969, which regulations come in addition to the Petroleum Act as well, oblige the operator to:

> 'adopt all practicable precautions including the provision of up-to-date equipment' in order to prevent pollution. In case pollution should occur, then it should take: 'prompt steps to control and, if possible, end it'.

82. These regulations also oblige the operator to properly maintain all oil installations in order to prevent:

> 'the escape or avoidable waste of petroleum', and to cause: 'as little damage as possible to the surface of the relevant area and to the trees, crops, buildings, structures, and other property thereon.'[68]

83. In 1991, the Nigerian Ministry of Petroleum Materials has further extended these conditions with the introduction of the Environmental Guidelines and Standards for the Petroleum Industry, EGASPIN, which were revised and modified in 2002. EGASPIN confirms that oil and gas operations are subject to the Petroleum Act and subsequent regulations.[69]

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[66] Article 8, sub 1(g): "The Minister may direct in writing the suspension of any operations which in his opinion are not being conducted in accordance with good oil field practice." (**production G.1**).

[67] Article 7. See on API and ASME standards, R. Steiner, 'Double Standards? International Standards to Prevent and Control Pipeline Oil Spills, Compared with Shell Practices in Nigeria', University of Alaska (November 2008) (**production B.1**), pp.19-21.

[68] Article 25: "adopt all practicable precautions including the provision of up-to-date equipment' and 'prompt steps to control and, if possible, end it"; Article 37, sub a: "the escape or avoidable waste of petroleum"; Article 37, sub e: "as little damage as possible to the surface of the relevant area and to the trees, crops, buildings, structures, and other property thereon". (**production G.1**).

[69] EGASPIN (**production G.2**), p. 145, section 1.1: "Oil and gas operations are governed by the Petroleum Act 1969 and subsequent regulations made pursuant to Section 8 (i) (b (iii) of the act which empowers the Minister of Petroleum Resources to make regulations for the prevention of pollution of water courses and the atmosphere."

9.3 Failing its duties in preventing the oil spill

9.3.1 Bad condition of the pipeline near Oruma

84. Shell Nigeria should prevent all oil leaks from its pipelines or from pipelines that are under its management. To that means, it should guarantee the good condition of the pipelines. Corrosion of the pipeline because of faulty maintenance and material defects as in the case of Oruma should be prevented.[70]

85. To that means it is necessary that Shell Nigeria informs itself on the condition of the pipelines. This should be done in two ways. Firstly, Shell Nigeria should timely and regularly carry out an 'Asset Integrity Review'. This assessment enables the defendant to determine which pipelines should be replaced and/or repaired within which term.[71]

86. In 2004, Shell Nigeria has concluded an 'Asset Integrity Review' that it started in 2003:

> '2004 saw the conclusion of a major review programme, which was initiated in 2003 to conduct a comprehensive assessment of our asset integrity management systems (covering wells, pipelines, flowlines and other production facilities). The review was intended to ensure compliance with required standards for the specific equipment whilst also supporting the drive for performance improvement. The review established the current physical condition of the assets and identified the scope and scale of work required to bridge the existing gaps.'[72]

87. This statement by Shell Nigeria suggests that in 2003 the required regulations were not complied with, and that there were shortcomings in the observation thereof. This points at a structural lack of urgency within Shell Nigeria to make its operations compliant with the international regulations with regard to 'good oil field practice'.

88. Secondly, a Pipeline Integrity Management System (PIMS) should be developed. This should be based on and fit in with the outcome of the Asset Integrity Review.

89. A PIMS is a continuous evaluation of the oil pipelines in order to monitor the good condition thereof. This requires that Shell Nigeria has a system at its disposal that is actually capable to trace the faults in the Pipelines as well as has means available in order to maintain the pipelines and to take precautionary and damage-limiting measures. Furthermore, as operator of the pipelines, Shell Nigeria should continuously evaluate and adjust its methods by means of the acquired experience during the operations and spills, as well as by using data that were obtained during the survey on the proper condition of the pipeline and the evaluation of previous faults on the oil pipeline.[73]

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[70] 'Shell Nigeria Annual Report 2006: People and the Environment', (**productions C.4**) p. 14, which discusses 'controllable incidents', namely corrosion, the breakage of the pipeline as a result of overpressure or human error.

[71] For the determination of the necessity to replace a pipeline and the terms within which this should be done, apart from the established condition of the pipeline the Environmental Sensitivity Index (ESI) is also of importance. In an ESI it is established how large the impact of a possible spill would be on the environment. To this means, the use and the sensitivity of the environment in the vicinity of the pipeline is of importance. The larger the impact of a spill on the vicinity where the pipeline is located, the earlier the replacement of the pipeline should be carried out. As explained above, the Niger Delta is a 'high consequence area' where the consequences of oil spill are extremely large. Because of the limited differences in altitude and the huge amount of rivers and creeks, oil spills in this area have a very negative effect on the natural environment and therefore on the living environment of the inhabitants. Formulating an ESI is part of cautious oil recovery. See EGASPIN (**production G.2**), pp. 146-147, section 2.3.2.1-2.3.2.2.

[72] SPDC, 'Annual Report 2004: People and the Environment', (**production C.2**) p. 12.

90. Among other things, a PIMS can consist of inspection for internal corrosion and irregularities of the pipeline (e.g. dents, grooves, and cracks) by means of so-called 'Pipeline Inspection Gadgets', ('PIGs'), testing whether the oil pressure in pipelines is correct; on-site checking for external corrosion, covering (weak parts of) the pipeline with a layer (so-called coating); survey on connection of welds of the welded parts, especially at so-called 'Electric Resistance Welded' (ERW) pipelines; inspection for external corrosion and other technologies from which the condition of the pipelines appears.[74]

91. The annual report for 2004 from Shell Nigeria states on the PIMS:

> 'The resulting SPDC Pipeline Integrity Management System (PIMS) involves a suite of activities required to properly manage the asset, assure asset integrity, fulfil health, safety and environmental (HSE) requirements, and deliver optimum life cycle performance.
>
> The SPDC PIMS is in line with the relevant American Standard for Mechanical Engineers (ASME) B31.8s, adapted to the local environment and supplemented with pipeline management experience from the Royal Dutch/Shell Group.
>
> As part of PIMS, a maintenance reference plan has been developed that is tied to the condition of the line. Thus, depending on the monitored condition of the lines, the frequency of maintenance actions is either increased or decreased - rather than being carried out at present intervals.'[75]

92. The spill near Oruma is a so-called 'controllable spill'. The cause of the spill is overdue maintenance of the pipeline. The 20 inches Kolo Creek-Rumuekpe oil pipeline near Oruma should have been replaced long before the spill of June 2005. Already in 2003, Shell Nigeria has carried out a survey on the condition of its pipelines (Asset Integrity Review or AIR). This showed that a number of oil pipelines, including the Kolo Creek-Rumuekpe pipeline, should be replaced.[76] Among other things, this appears from an email of then Deputy Managing Director of Shell Nigeria, from 24th June 2006:

> "In SPDC the replacement of pipelines is based on the integrity status and not on the age of the pipeline. Most of the leaks on the pipeline networks are the result of third party interference as opposed to integrity related leaks. The integrity status of the line is determined through the SPDC Pipeline Integrity Management System (PIMS) which was created in 2004 and is aligned with international and Shell group standards. In 2003, a review of the integrity of all the trunk lines was undertaken and *several pipelines were identified for replacement;* e.g. the Nembe Creek Trunk Line and *the Kolo Creek to Rumuekpe Trunk Line* are currently being replaced."[77] [added italics]

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[73] R. Steiner, 'Double Standards? International Standards to Prevent and Control Pipeline Oil Spills, Compared with Shell Practices in Nigeria', University of Alaska (November 2008) (**production B.1**).

[74] R. Steiner, 'Double Standards? International Standards to Prevent and Control Pipeline Oil Spills, Compared with Shell Practices in Nigeria', University of Alaska (November 2008) (**production B.1**), p. 23

[75] Shell Nigeria, 'Annual Report 2004: People and the Environment' (**production C.2**), p. 12.

[76] In the Annual Report of 2003 Shell Nigeria states that it will carry out a so-called Environmental Impact Assessment (EIA) with regard to the replacement of the Kolo Creek/Rumuekpe Trunk Line Replacement. See Shell Nigeria, 'Annual Report 2003: People and the Environment' (**production C.1**), p. 8.

[77] Email from Deputy Managing Director of Shell Nigeria, Mike Corner, to Clive Wicks, member of the IUCN CEESP Commission. Wicks is a former member of the World Wildlife Fund United Kingdom and member of the Amnesty International mission to Nigeria (**production A.10**).

93. The *Memorandum of Understanding* from February 2006 between Shell Nigeria and the Oruma community[78] shows that the pipeline near Oruma had still not been replaced in 2006.

> In their notice of liability plaintiffs have stated that the oil pipeline in Oruma started to leak as a result of overdue maintenance. They have requested the Asset Integrity Review that was carried out by Shell in 2003 and they requested to provide this survey, as well as to provide documents which show when the pipeline from which oil leaked in Oruma was constructed and lastly replaced (notice of liability of 8th May 2008, sub d and e.). Defendants have not reacted on the point of view that the pipeline suffered from overdue maintenance, nor have they provided perusal in the requested documents, so that plaintiffs have to assume the correctness of their point of view. Plaintiffs furthermore point at the fact that the survey of Shell Nigeria makes it clear that it factually knew in 2003 based on the survey carried out by itself that the oil pipeline had to be replaced, but that this does not exclude the fact that it should have been informed on this before that time.
>
> For that matter, it is surprising that defendants do not wish to present the requested documents. Andrew Palmer, Professor in petroleum engineering at Cambridge University, states on this:
>
> "Today, most pipelines are designed for a lifetime of about 40 years. Design, materials and construction standards, and technology, have changed a great deal since the 1960s, however, and if issues regarding the lifetime of pipelines are raised, responsible operators have nothing to hide and should apply the maximum transparency. That's the position taken in countries such as the US and Canada with high standards of freedom of information."[79]

94. Both before and after carrying out the Asset Integrity Review in 2003, the oil spill near Oruma could have been prevented by regularly checking the Kolo Creek-Rumuekpe oil pipeline, based on an adequately functioning Pipeline Integrity Management System (PIMS). For that, it is of importance that a PIMS is a management system. Establishing a PIMS is not sufficient: it should also be implemented and operated adequately. However, with regard to the pipeline near Oruma this did not take place. In as far as plaintiffs know, defendants never carried out checks with regard to the proper condition of the pipeline near Oruma. Checks on the pipeline near Oruma should have taken place by means of internal and external inspection of the pipeline, by means of technical aids.

> Plaintiffs have requested reports from defendants on such checks since 2003, when it was established that the pipeline should be replaced.[80] Plaintiffs therefore assume that such inspections did not take place.
>
> Plaintiffs have requested copies of the monthly log files of compulsory pipeline inspections, but defendants have refused to provide these.[81] Plaintiffs also have requested data that show which inspections have taken place of the pipeline near Oruma, what they consisted of and by whom they were carried out.[82] This request was also not granted by defendants, without stating a reason. Plaintiffs will therefore have to assume that no

[78] MOU between Shell Nigeria and the Oruma community, February 2006 (**production A.9**).

[79] Christian Aid, 'Behind the Mask: The Real Face of Corporate Social Responsibility' (2004) (**production F.2**), p. 30.

[80] Notice of liability of 8th May 2008, sub f (**production A.1**).

[81] Notice of liability of 8th May 2008, sub j (**production A.1**).

[82] Notice of liability of 8th May 2008, sub k (**production A.1**).

relevant inspections have taken place and that the pipeline near Oruma was not (adequately) inspected by Shell Nigeria.

95. Because of the lack of adequate inspections of the pipeline near Oruma, Shell Nigeria was not able to timely establish that repairs on the pipeline were necessary. Shell Nigeria states itself that the checking and repairs of the pipelines in 2004 and 2005 were open for improvement: "We do, however, have a substantial backlog of asset integrity work to reduce spills and flaring. That backlog is caused by under-funding by partners over many years, operational problems and, more recently, the lack of safe access to facilities."[83]

96. In its annual report on 2005 Shell Nigeria stated that 'a corrosion sampling campaign was launched in 2005 that will lead to an inhibition programme for [Shell Nigeria's] onshore oil and gas lines in the coming years.' In view of the fact that Best Practice protocols with regard to control and checks of corrosion of pipelines have been internationally known for decades, the fact that Shell Nigeria did not undertake such a programme is further proof of negligent behaviour. Furthermore, Shell Nigeria wrote in its annual report for 2003 that:

> 'internal obstructions in the pipelines have prevented some lines from being subjected to these internal inspections or cleaning operations.'

97. Although such internal obstacles constitue a well-known risk of overpressure and fatal cracks, the report neither provides for a further analysis of these limitations nor for a plan on how this dangerous situation can be remedied.

98. The overdue maintenance of the 20 inches Kolo Creek-Rumuekpe oil pipeline fits in a pattern of improper maintenance of pipelines by Shell Nigeria. In 1996, Bopp van Dessel, head of environmental studies for Shell Nigeria between 1992 and 1994, stated that Shell "consistently ignored internal warnings" that its operations in Nigeria "breached international standards and caused extensive pollution",[84] and:

> "Wherever I went, I could see that Shell were not operating their facilities properly. They were not meeting their own standards, they were not meeting international standards."

99. Robin Pellew, the British director of the World Wildlife Fund, strongly criticized the oil operations of Shell Nigeria:

> "Here you have an international company which is manifestly applying different environmental standards in different parts of the world".[85]

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[83] 'The Shell Sustainability Report 2006: Meeting the energy challenge' (**production D.5**), p. 33. In the report the following is added to the cited passage: "In 2006, we kept moving forward with asset integrity work, despite the security crisis. For example, of the 253 old spill sites that were scheduled for clean up in 2006, we successfully restored all the 179 sites where we could get access. We completed the pipeline inspection work we had planned for 2006 wherever we had access – about half the originally planned. We're currently discussing different ways of funding this work with the Government that would allow it to go much faster in the future." That backlog is caused by under-funding by partners over many years, operational problems and, more recently, the lack of safe access to facilities. In 2006, we kept moving forward with asset integrity work, despite the security crisis. For example, of the 253 old spill sites that were scheduled for clean up in 2006, we successfully restored all the 179 sites where we could get access. We completed the pipeline inspection work we had planned for 2006 wherever we had access – about half the originally planned. We're currently discussing different ways of funding this work with the Government that would allow it to go much faster in the future."

[84] Inter Press Service, 15th May 1996, Haznews 1996; idem, 'Shell ignores environmental standards in Nigeria?' June 1, 1996 (**production I.1**).

[85] Pellew in Inter Press Service, 15th May 1996, Haznews 1996; idem, 'Shell ignores environmental standards in Nigeria?' June 1st, 1996, (**production I.1**).

100. Thus Shell Nigeria, despite the available knowledge on the necessity to replace the oil pipeline near Oruma long before June 2005, has refrained from carrying out this replacement in order to thus prevent the spill in Oruma.

9.3.2 Untimely and inadequate reaction on oil spill near Oruma

101. If a spill has taken place, the damage thereof should be limited as much as possible. To that means, it should be established quickly *that* a spill has occurred, and an immediate reaction should follow in order to prevent that oil flows away and ends up in the environment. Shell Nigeria has not directly upon discovery of the oil spill near Oruma taken measures in order to prevent that the oil would spread or would mix with the ground water or the water in the creek.

102. The duty of care requires, especially in a country where oil extraction takes place on such large scale as in Nigeria and at which *so* many spills occur, that defendants have a properly functioning system of pipeline supervision as well as an adequate plan in order to act if despite this an oil spill occurs.

103. In order to be able to act cautiously, Shell Nigeria should in the first place make use of a *Leak Detection System* (LDS), a system that quickly recognises irregularities and that is accurate, reliable and robust.[86] Plaintiffs are not aware that Shell Nigeria is making use of such a system. Although the oil spill in Oruma already must have started before it was known to Shell Nigeria on 26th June 2005, Shell Nigeria only inspected the Spill on 29th June 2005. At that, it did not bring equipment in order to stop the spill or to limit the damage as a result of the leaking oil. This shows that Shell Nigeria did not implement an adequate plan for reactions on oil spills in the Niger Delta.

104. If – despite all precautionary measures that must be taken – an oil spill still occrus, defendants should see to it that a detailed plan is available in order to limit the damage thereof, to stop the spill and to clean up the polluted environment. Such a plan is called an Oil Spill Contingency Plan (OSCP). The OSCP should not only provide for measures in order to protect the environment, but also for the allocation of (financial) means for the benefit of the limitation of the oil pollution. The operator of the pipelines must implement the Nigerian National Oil Spill Contingency Plan (NOSCP), therefore by Shell Nigeria.[87]

105. Among other things, the NOSCP requires that measures are taken in order to prevent that the oil flows away and mixes with the groundwater. Also, clean drinking water should be provided to the local residents.[88]

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[86] The LDS should enable continuous monitoring by making use of the following technologies: volume registration of pipelines, flow meters, pressure transducers, acoustic flow monitors, time monitors, acoustic emissions, optical fibre sensors, and air monitoring of remote pipelines. Alaskan Law requires adequate alarm systems, as well as that the complete LDS is sensitive, accurate, reliable and robust. See R. Steiner, 'Double Standards? International Standards to Prevent and Control Pipeline Oil Spills, Compared with Shell Practices in Nigeria', University of Alaska (November 2008) (**production B.1**), p. 27.

[87] National Oil Spill Contingency Plan for Nigeria (NOSCP), Prepared for the Presidency by the Federal Ministry of Environment, Abuja, Approved by the Federal Executive Council (16th April 2003), (**production G.3**) section 1.0, p. 1: "This plan (...) is binding on all operators in the exploration, exploitation, production, distribution, marketing, transportation, storage and handling of petroleum products."

[88] NOSCP (**production G.3**), section 17.3, pp. 62-63: "Action will follow the principles set out below with utmost speed to prevent the oil from seeping into the ground. (...) provide alternative clean water for communities likely to be affected by the oil spill."

106. The Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN), which are binding for Shell Nigeria as operator of the pipeline near Oruma, also state regulations with regard to oil spills and the limitation of the harmful consequences thereof. In the EGASPIN is indicated that the spreading of oil on land can for example be countered by digging ditches.[89] To that means, the EGASPIN requires having sufficient trenchers available.[90] However, at that it has to be taken care of that the groundwater does not become polluted. If the spill has taken place close to creeks and rivers, high priority has to be given to preventing that the oil ends up in those waterways.[91]

107. On 7th July 2005, as the defendant repaired the spill, there was still oil flowing from the pipeline.[92] Shell Nigeria did not suspend the oil flow through the pipeline on 26th June 2005 or at any later moment. Firstly, this appears from the fact that when the spill was closed, there was still oil flowing from the hole in the pipeline.[93] Apart from that, Oguru and Efanga have established that between 26th June and 7th July 2005 gas was flared off uninteruptedly from the nearby manifold. From this, it can be concluded that the oil flow through this manifold to the Kolo Creek-Rumuekpe pipeline continued as well.

108. That fact that Shell Nigeria preferred not to close off the oil supply can be declared from the fact that this concerns a trunk line. Apparently, Shell Nigeria has decided on reasons pertaining to business economics that suspending the oil flow through this pipeline would be many times more disadvantageous than the loss of leaked oil near Oruma. However, the issue that is at stake in this liability procedure is that the costs that Shell Nigeria should have made in order to temporarily interrupt the oil supply, are lower than the sizeable damage to human beings and the environment that was caused by the oil spill. Based on the applicable duty of care, Shell Nigeria should have interrupted the oil supply or take other measures in order to limit the oil flow until the spill was repaired.

109. As far as the plaintiffs were able to establish, the Oil Spill Contingency Plan of Shell Nigeria was lastly revised in 1992.[94]

> Plaintiffs have requested from the defendants a copy from the (Nigerian) National Oil Spill Contingency Plan.[95] Defendants did not provide those documents, so that plaintiffs can assume that inadequate implementation and/or observance of the (Nigerian) National Oil Spill Contingency Plan is concerned.

110. The Oil Contingency Plan that Shell and/or Shell Nigeria should have at its disposal should also ensure that accurate data are collected and published. Also, Shell and/or Shell Nigeria should keep a report on the oil spill. To that means, among other things, a log file should be kept on all

[89] EGASPIN (**production G.2**), section p. 148, section 2.6.2: "For containment on land, the spill may be prevented from spreading by containment ditches."

[90] EGASPIN (**production G.2**), section p. 148, section 2.5.3 sub (ii): "For land facilities, operators shall stock equipment capable of moving earth to serve as barriers."

[91] EGASPIN (**production G.2**), section p. 148, section 2.6.2: "Due consideration should be given to prevent groundwater contamination. This is particularly necessary in areas where groundwater table is close to the surface. In a situation where a spill occurs adjacent to water courses and drainage systems, a high priority shall be given to containment procedures to prevent its spread into these areas."

[92] See video images Oruma, (**production A.11**); Shell Nigeria statet hat in total near Oruma 400 barrels of oil were leaked (see letter from 20th June 2008), which means 63,600 litres of oil.

[93] See video images Oruma, (**production A.11**)

[94] See NOSCP (**production G.3**), section p. 104: 'The Shell Petroleum Development Company of Nigeria Limited, 1992, Oil Spill Contingency Plan, Lagos, Nigeria.'

[95] Notice of liability of 8th May 2008, sub n (**production A.1**).

developments as from the moment that the oil spill is established until the moment that the clean-up is wrapped up. Within 24 hours after a spill has occurred, the operator should submit an 'oil spill/spill notification report' to the director of the 'Department of Petroleum Resources' of Nigeria. Furthermore, within fourteen days after the spill, a follow-up report should be submitted. Within four weeks after the spill, a clean-up report should be submitted.

111. The EGASPIN states requirements on the reporting and compilation of the report after an oil spill as well. As from the moment that an oil spill has occurred, a log file should be kept on the spill until the day that the clean-up operations have been wrapped up.[96]

Plaintiffs have requested perusal in the reports submitted by Shell Nigeria on the oil spill near Oruma on 26th June 2005 to the Department of Petroleum Resources[97] as well as the Nigerian authorities in general. The provision of this information by defendants would be in line with the accountability as stated in the NOSCP. Without any motivation, defendants have refused to provide these documents, so that it has to be assumed that these documents do not exist.

Plaintiffs have requested of the defendants a copy of the daily log files with regard to the oil spill in Oruma.[98] Defendants have not provided these documents either.

9.4 Failure to clean up the damage

112. Shell Nigeria is obliged to adequately clean up the damage caused by the oil spill near to Oruma and within fixed terms. The NOSCP points out that oil can have a very negative impact on the environment. Oil residue can remain various years in the soil if it is not adequately cleaned up.[99]

113. The obligation of Shell Nigeria as operator of the pipeline to clean up the environment after an oil spill is not related to the cause of this spill. The following appears from the EGASPIN:

> 'An operator shall be responsible for the containment and recovery of any spill discovered within his operational area, whether or not its source is known. The operator shall take prompt and adequate steps to contain, remove and dispose of the spill.'[100]

114. Shell Nigeria has a bad record with regard to cleaning up leaked oil. Experts state:

> "Over the period 1976 - 1996 the total number of reported spills is put at 4.835, resulting in a cumulative spill volume of 2.382.374 barrels of crude oil. Of this amount only about 15.91 percent was recovered, on the average, implying that about 84.09 percent of the cumulative spill was lost to the environment."[101]

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[96] EGASPIN (**production G.1**), section p. 150, section 2.10.1: "A log of daily events shall be kept from the time a spill is first noticed until clean-up operations are completed."

[97] Notice of liability of 8th May 2008 (**production A.1**), sub o, p and q.

[98] Notice of liability of 8th May 2008 (**production A.1**), sub l.

[99] NOSCP (**production G.3**), section 21.2, p. 75: (...) residual traces of oil which will otherwise take several years to degrade under natural conditions."

[100] Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN), Issued by the Department of Petroleum Resources (Lagos 1991), Revised Edition 2002, p. 152, (**production G.2**)

[101] C. O. Orubu, A. Odusola and W. Ehwarieme, The Nigerian Oil Industry: Environmental Diseconomies, Management Strategies and the Need for Community Involvement, Journal of Human Ecology, 16(3), 2004 (**production H.5**), pp. 203-214.

115. In 1996, Bopp van Dessel, former head of environmental studies for Shell Nigeria from 1992 to 1994, stated that Shell "consistently ignored internal warnings" that its operations in Nigeria "breached international standards and caused extensive pollution", [102] and:

> Any Shell site that I saw was polluted, any terminal that I saw was polluted. It is clear to me that Shell was devastating the area.

116. In Oruma, Shell Nigeria has cleaned up the leaked oil too late and inadequately as well. The EGASPIN requires that cleaning up the oil pollution commence within 24 hours.[103] The clean-up process is also bound to certain time frames.[104] However, the clean-up process near Oruma has only commenced in November 2005 and completed in June 2006. This means that the clean-up process has both commenced far too late and lasted too long.

117. In short, the clean-up process should bring the soil back into its original condition as much as possible.[105] The EGASPIN requires:

> For inland waters/wetland, the lone option for cleaning spills shall be complete containment and mechanical/manual removal. It shall be required that these clean-up methods be adopted until there shall be no more visible sheen of oil on the water.

118. Apart from that, the EGASPIN requires that no extra damage is done to the environment.[106] Contrary to this provision, the clean-up of the oil near Oruma did cause damage to the environment and the properties of Oguru and Efanga. During the clean-up activities Shell Nigeria has burnt a part of the leaked oil in open refuse dumps and in the waste pits. The heat and flames that resulted from this have scorched the surrounding forest and the crops (see above section 34). The burning of the oil has therefore had many harmful effects on the environment. The EGASPIN allows for controlled burning of oil.[107] However, in this case, there was no *controlled* burning.

119. At the request of plaintiffs[108] defendants have provided a copy of the 'clean-up and remediation' report. In there, the mode of the clean-up operation is described, such as removing and ploughing the contaminated soil.[109] However, this concerns 'inland waters' and then, based on EGASPIN, applies complete 'containment', i.e. stopping the spread and complete removal of oil residue and not just ploughing. The oil has still not been completely cleaned up. After the clean-up operation there was still 'oil sheen' on the water, and the soil and the water were not suited for farming and fishing after the clean-up. For substantiation, plaintiffs refer to the report from Bryjark

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[102] Inter Press Service, 15th May 1996, Haznews 1996; idem, 'Shell ignores environmental standards in Nigeria?' June 1st, 1996 (**production I.1**).

[103] EGASPIN (**production G.2**), p. 148, section 2.6.3: "Clean-up shall commence within 24 hours of the occurance of the spill."

[104] EGASPIN (**production G.2**), p. 149, section 2.6.7: "The duration of the cleaning up of oil spill shall be in accordance with the requirements of Oil Spill Report Forms A, B, and C (see Appendix VIII-B2)."==

[105] EGASPIN (**production G.2**), p. 150, section 2.11.1: "It shall be the responsibility of a spiller to restore to as much as possible the original state of any impacted environment."

[106] EGASPIN (**production G.2**), p. 148, section 2.6.3: "Clean-up of oil spills in contaminated environments shall be conducted in such a manner as not to cause additional damages to the already impacted environment. (...)."

[107] EGASPIN (**production G.2**), p. 149, section 2.8.1: "The approved methods for disposal [of oil and debris] shall be by controlled burning (in lined pits), incineration, land farming and sanitary landfill."

[108] Notice of liability of 8th May 2008 sub r. and s. (**production A.1**)

[109] The 'Clean-up and remediation certification format' also states that pictures of the location are available (**production A.6**).

Environmental Services, 'Post impact assessment study of the oil spillage in Oruma', Bayelsa State, in which it is indicated that the soil and the water are still polluted.[110]

120. The operator is responsible that no more than a fixed minimum percentage of oil residues [111] (in this case 50 mg per kg soil) remains in the soil.[112] As already indicated above, the required percentage of oil residue (TPH) after the 'clean-up' near Oruma does not comply with the requirements that are set to it.

121. If Shell Nigeria would have carried out a post-impact survey, a requirement according to the EGASPIN,[113] then it would have established that the damage was not cleaned-up adequately in 2006.

122. By these acts and omissions Shell Nigeria violates the standards of due care that rest on them.

10 CONCLUSION LIABILITY SHELL NIGERIA

123. In the previous text plaintiffs have elaborated on the inherent danger of oil extraction, as well as the seriously negative effects of oil spills in the Niger Delta and the countless spills that already have taken place over there. Apart from that, Shell Nigeria, subsidiary of a globally leading concern with high internal environmental standards has, as operator of the most important joint venture in Nigeria, large influence on the cautious manner of oil extraction in Nigeria. This factual context brings along an increased standard of due care that Shell Nigeria should comply with at the oil extraction in Nigeria.

124. Shell Nigeria operates the 20 inches Kolo Creek-Rumuekpe oil pipeline (trunk line) in Olumogbogbo-Gbara in Bayelsa State, from which oil was leaked because of which plaintiffs and the environment suffered damage. The oil spill from this pipeline near Oruma concerned a *controllable spill.*

125. In violation of the duty of care that rests on them, Shell Nigeria refrained from preventing the spill. The pipeline already should have been replaced in 2003, as the research by Shell Nigeria established. The spill occurred because of overdue maintenance. Furthermore, Shell Nigeria refrained, contrary to the duty of care standards that rests on them, to temporarily suspend the oil supply through the leaking pipeline. Apart from that, Shell Nigeria has acted carelessly by not immediately taking measures after the discovery of the oil spill near Oruma in order to prevent that the oil would spread or mix with the groundwater or the water in the creeks.

126. Finally, Shell Nigeria has acted negligently by starting the clean-up operation of the polluted environment too late. Furthermore, the operations took too long and were inadequate now that the soil was not returned to its original condition, but even caused extra damage to the environment and the rights of plaintiffs.

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[110] Report Bryjark Environmental Services, 'Post impact assessment study of the oil spillage in Oruma', Bayelsa State, (Port Harcourt February 2008), (**production B.2**).

[111] Also called TPH or Total Petroleum Hydrocarbon.

[112] EGASPIN (**production G.2**), p. 150, section 2.11.3 sub (iii): "For land/sediment, the quality levels ultimately aimed for (target value), is 50 mg/kg, of oil content."

[113] EGASPIN (**production G.2**), p. 153, section 7.1: "An operator responsible for a spill shall be required to conduct an Environmental Evaluation (Post Impact) Study of any adversely impacted environment, in accordance with Article 2.0 of the Environmental Impact Assessment Process guidelines."

127. The damage of Oguru and Efanga and to the environment is the result of these unlawful acts of Shell Nigeria and can be attributed to the company as a result of its knowledge, position and control.

128. Shell reports state that defendants accept complete liability for 'controllable spills'.[114] Plaintiffs agree with defendants that they are liable for 'controllable spills'. This case concerns a 'controllable spill'. Shell Nigeria is therefore liable for the damage because of the oil spill. Shell Nigeria is also liable for the damage that is the result of the other unlawful acts as described above.

11 LIABILITY OF SHELL PLC.

129. The oil spill in June 2005 near Oruma occurred because of faulty maintenance; Shell Nigeria did not timely replace the pipeline. Furthermore, Shell Nigeria failed to suspend the oil flow after the spill occurred, nor did it immediately take any other measure to limit the scope of the spill. Finally, Shell Nigeria refrained from cleaning up the leaked oil timely and completely. Apart from Shell Nigeria, Shell plc is also liable for the damage to the environment and the personal and property damage of Oguru and Efanga as a result of this oil spill.

130. This liability is the result of the actions of Shell plc that are in violation of the duty to the care that rests on it. Shell plc has thorough knowledge on the situation in Nigeria, on the numerous oil spills that occur over there, as well as the considerable damage that is the result of such spills, especially in the Niger Delta (see Chapter 7 and section 12.2). Apart from that, Shell plc has a management structure that enables the company to exert influence and control on the oil extraction by its subsidiary Shell Nigeria (see Chapter 12). These facts and circumstances oblige Shell plc to implement its means and expertise in order to prevent the damage as a result of the oil extraction by its subsidiary Shell Nigeria, or at least to limit the consequences thereof. Shell plc did not comply with this obligation.

131. The non-interference by Shell plc in Shell Nigeria is in violation of the standard of due care which must be observed in society and is, among other things, embodied by the internal environmental policy of Shell plc and international standards to which Shell plc has committed itself (see section 13.3).

132. The damage as a result of the oil spill near Oruma could have been prevented if Shell plc had acted in accordance with the duty of care that rests on them (see section 14). Shell plc is therefore liable for the damage. Plaintiffs will further amplify these issues below.

133. In its letter from 20th June 2008, Shell plc has denied liability. To this means, it has called upon the formal separation between Shell plc and its 100% subsidiary Shell Nigeria.

> Royal Dutch Shell plc (RDS) is a publicly listed holding company. As such, it has no operations of its own, but owns, directly or indirectly, investments in the companies that, together with RDS, constitute the Royal Dutch Shell group. As (publicly listed) holding company, RDS had no direct involvement in the operations of its subsidiaries.[115]

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[114] 'The Shell Sustainability Report 2005: Meeting the Energy Challenge', (**production D.4**) p. 27: "Compensation is only paid for operational spills."

[115] Letter Shell plc to plaintiffs, 20th June 2008, (**production A.2**) p. 2.

134. Plaintiffs do not dispute that Shell plc and Shell Nigeria have been established as two independent companies and are therefore formally separated. Plaintiffs also do not dispute the fact that for its operations Shell Nigeria has certain autonomy. However, this formal separation does not diminish the fact that Shell plc has formal control over the policy of Shell Nigeria as well as on the implementation thereof. Especially in important fields such as the environment and oil spills in Nigeria, Shell plc exerts this control on Shell Nigeria. In view of the potential consequences of oil pollution (violation of human rights of the residents and serious contamination of the environment) and the publicly incited trust by Shell plc with regard to its environmental policy, the obligation rests on Shell plc to exert this influence and control in such a way that damage to human beings and the environment is prevented as much as possible.

12 FACTUAL CONTEXT: CONTROL SHELL PLC OVER SHELL NIGERIA

12.1 Control over environmental policy of subsidiaries

135. Shell plc controls (via sub-holding companies) 100% of the stock of Shell Nigeria.[116] As a result of that, Shell plc has the factual opportunity to exert influence on and interfere in the operations of Shell Nigeria.[117]

> In their notice of liability plaintiffs have requested defendants to indicate via which Shell company/companies Shell plc controls the stock of Shell Nigeria (notice of liability of 8th May 2008, sub u and v). Defendants did not provide these data and only indicated that Shell plc controls the stock of Shell Nigeria via various sub-holding companies that are established in various countries.[118]

136. The way in which Shell plc exerts control over and interferes in the operations of Shell Nigeria has been displayed in detail in the Group Governance Guide (hereinafter also: GGG) established by Shell plc in 2001. This GGG shows that Shell plc is intensively involved in its subsidiaries.[119] The targets set by the Group determine the strategy that is implemented at a lower level. At that, the Shell Group uses a system of functional leadership.[120] The way in which the Group is managed has remained effectively unchanged after the merger, at least in as far as is of importance for this case (see for this footnote 46).

137. This far-reaching control and strong influence of Shell plc on Shell Nigeria certainly applies in the field of issues that affect the interest of the Group as a whole:

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[116] Shell plc, 'Annual Report and Form 20-F for the year ended December 31st, 2006: Delivery and growth', p. E2 (**production D.8**).

[117] See 'Group Governance Guide' *(GGG)* (**production E.1**), *p. 2:* "CMD advises the Group Holding Companies on investments in Shell companies and on the exercise of shareholder rights for their companies. CDM guides the Group by providing strategic direction, support and appraisal to Group Businesses." GGG, p.: "The Committee of Managing Directors advises the Group Holding Companies on their investments and on the exercise of shareholder rights for the companies they invest in."

[118] Letter Shell plc to plaintiffs, 20th June 2008, (**production A.2**) p. 2.

[119] GGG (**production E.1**), p. 3: "The Group Holding Companies – directly or indirectly – have a controlling interest in many Shell companies, usually through having a majority of shareholder voting rights. The Group Holding Company boards, supported by CMD, set clear expectations as to how such companies are to be run, by providing guidance on policy and strategy."

[120] GGG (**production E.1**), p. 8.

> Even where the Group does not have a controlling interest in a Shell company, the Group Holding Companies still try to influence how such companies are run, *particularly where necessary to protect Group reputation.*[121] (added italics)

138. Environment is such a Group interest for the Shell Group, and Shell plc also presents this as such to third parties. The Shell Group factually operates as an integrated company when it comes to the environment.[122]

139. The supervision that Shell plc exerts on Shell Nigeria when it comes to environmental pollution and oil spills furthermore shows from the almost identical letters that both defendants have written as an answer to the notice of liability.[123] Shell plc has included the point of view of Shell Nigeria under the header "SPDC's position regarding the incidents described in your letter" as if it were its point of view. It is clear that both letters originate from one pen.

140. The point of view that Shell plc has taken in reaction to the notice of liability of plaintiffs, namely that it has no direct control in the operations of its subsidiaries,[124] is therefore incorrect.

141. The result is that the formal autonomy of the subsidiary Shell Nigeria in practice does not, or at least to a far lesser extent, apply when it comes to the environment and the sizeable environmental damage in Nigeria. Factually, Shell plc had functional control over Shell Nigeria. Formally Shell Nigeria might evade this control, but in practice it is unthinkable that this happens.

142. Below, plaintiffs will elaborate on the way in which the management of Shell plc is organised and on the various ways in which the management directs the oil extraction by Shell Nigeria and implements or was obliged to implement the environmental policy at Shell Nigeria.

143. This clearly shows that to the outside world Shell plc sketches an organisation in which everything is organised clearly and strictly, within which the management sees to it that the subsidiary companies act cautiously. Plaintiffs reproach Shell plc to not or insufficiently have exerted its influence on and control over in Shell Nigeria.

12.2 Nigeria is a Group interest

144. During the past five years, Nigeria on average had a 15 percent share in the worldwide production of oil and liquid gas by the Shell Group.[125]

145. At Shell's oil extraction in Nigeria very many oil spills occur. In the period between 1998-2007 Shell Nigeria was responsible for 38 percent of the total amount of leaked oil by the Shell Group, according to reports of Shell Nigeria. In the period between 2002-2007 this was 33 percent. As has been explained above as well (see section 7.3), the oil spill near Oruma was therefore not an incident, but fits into a pattern of large-scale environmental damage during oil extraction by Shell Nigeria since this company has established itself in Nigeria. An important part of the spills is the

[121] GGG (**production E.1**), p. 3.

[122] GGG (**production E.1**), p. 8: "There are benefits in having a common approach to some functional matters - for example, environmental management, people management or financial control - across all Group Businesses."

[123] See letters of defendants 20th June 2008 (**productions A.2 and A.3**).

[124] Letter Shell plc to plaintiffs 20th June 2008 (**production A.2**), p. 2.

[125] Royal Dutch Shell plc, 'Financial and Operational Information 2003-2007: Delivery and Growth' (**production D.1**), p. 52. See: http://www-static.shell.com/static/investor/downloads/financial_information/reports/faoi/faoi_2007.pdf <viewed on October 28, 2008>.

result of overdue maintenance, as appears from the reports from defendants. Shell plc should therefore know that the oil extraction in Nigeria causes very much damage.

146. Shell plc itself also has carried out and has had carried out research on the facts and circumstances with regard to oil extraction by its subsidiary Shell Nigeria. The reason for this is that the Nigerian oil production is a constant point of concern for Shell plc. In the beginning of 2007, Shell plc CEO Jeroen van der Veer stated the following:

> We are continuously busy with [Nigeria], also at the highest level. Last year there were a lot of meetings between among others Malcolm Brinded[126] and the federal government. I have also talked to [then] president Obassanjo. The management of Shell Nigeria is of course continuously active on all political and societal levels.[127]

147. Annually, Shell reports on Nigeria in its annual reports and in the 'Shell Sustainability Report'. Already in 2000 the Businessplan Exploration and Production of the Shell Group stated (see on this section 12.4.6) on the operations of Shell Nigeria:

> 'Significant funds will continue to be required to maintain and upgrade [Shell Nigeria]'s vast infrastructure, including the major refurbishment of Bonny terminal.'[128]

148. In 2006, it turned out that the problem of too insufficient funds in order to achieve a proper condition of the oil installations was still not resolved. In the sustainability report for 2006 from Shell plc, Basil Omiyi, then director of Shell Nigeria, stated:

> We do, however, have a substantial backlog of asset integrity work to reduce spills and flaring. That backlog is caused by under-funding by partners over many years, operational problems and, more recently, the lack of safe access to facilities.[129]

149. In one of its reports, Shell plc recognises the necessity of inspection and repairs and concludes that – if this is implemented – the number of spills will decrease as a result of this.

> "Elsewhere in Nigeria, in areas where we could operate, spills from corrosion and operational failures were at their lowest in seven years as better inspection and repair continued to improve performance."[130]

150. The interest of Nigeria for Shell plc also appears from the frequent visits by its directors to Nigeria in order to assess oil spills. Wim Kok, in his capacity as Member of Shell plc's Board and Chairman of the Social Responsibility Committee (see section 12.4.5), visited Nigeria in March 2007. The objective of his visit was, among other things, to inspect the impact of the irregularities in the Niger Delta as far as the oil production was concerned. He reported on his visit in the following terms:

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[126] Malcolm Brinded is member of the Executive Committee of Shell plc and is since 27th October 2004 the Executive Director of Exploration & Production (see section 12.4.6) and regionally responsible for Nigeria (see section 12.4.7). To be consulted via: http://www.shellchemicals.com/news/1,1098,1217-biography_id=73,00.html <lastly visited on 28th October 2008> (**production E.6**).

[127] Shell Venster, 'Voor Shell is het CO2- en klimaatdebat over' (For Shell the CO2 and climate debate is over) (Issue of Shell Nederland B.V., January/February 2007) (**production E.7**), p. 6.

[128] Shell International Exploration and Production B.V. / Shell EP International BV, '2000 Business Plan, Exploration and Production Executive Committee', October 23, 2000 (**production E.5**).

[129] The Shell Sustainability Report 2006: Meeting the energy challenge (**production D.5**), p. 33.

[130] The Shell Sustainability Report 2006: Meeting the energy challenge (**production D.5**), p. 17.

> "I was deeply affected by what I saw there (...) Every day there is sabotage and oil leaks"[131]

151. Kok describes the circumstances in the Niger Delta as:

> "extremely difficult."[132]

152. Plaintiffs conclude that Nigeria is a Group interest for Shell plc because of the enormous oil production in this country as well as because of the large amount of spills. Shell plc has established that its subsidiary Shell Nigeria structurally causes damage to third parties during its oil operations and is therefore informed, or should at least be informed, on the risk for human beings and the environment, especially in the Niger Delta.

12.3 Central control over Shell Nigeria by Shell plc

153. Shell plc presents a detailed Group policy that provides it with control over Shell Nigeria and the opportunity to intervene in its holding company when it causes structural and severe damage to third parties.

154. The Group Governance Guide describes the way of management within the Shell Group and is a manual for all managers within the Group in order to ensure homogeneity and central control. This document also focuses on the central control of the Group. The document indicates both formal and informal decision structures:

> Executives in Shell operate through a combination of formal authority (such as for consideration of investment proposals) and personal influence, which flows from their organisational position and leadership qualities. In many cases executives have limited formal authority over the business units to whom they provide strategic direction, support and appraisal. Instead they operate through appropriate inter-company service agreements, and use their influence to ensure that their advice is taken into account. Executives see to it that the strategic direction they provide is linked into operating company decision-making and translated into action.[133]

155. The influence lines are used for carrying out the controlling majority stake that Shell plc has in its subsidiaries. As a result thereof, the Executive Committee,[134] which together with the Board of

[131] See http://english.peopledaily.com.cn/200705/17/eng20070517_375309.html <lastly visited on 4th November 2008> (**production I.5**).

[132] See http://english.peopledaily.com.cn/200705/17/eng20070517_375309.html <lastly visited on 4th November 2008> (**production I.5**).

[133] GGG (**production E.1**), p. 5.

[134] The Executive Committee of Shell plc carries responsibility for the general activities and day-to-day business of the Shell Group and provides management to all management levels within the Shell Group. The Executive Committee furthermore has the competence of all managerial issues (in as far as they do not belong to the Board). The Exective Committee currently consists of the Chief Executive Officer (CEO), Jeroen van der Veer; the Executive Director of Exploration and Production, Malcolm Brinded; the Executive Director of Gas and Electricity, Linda Cook; the Executive Director of Oil Products and Chemistry, Rob Routs; and the Chief Financial Officer, Peter Voser.

Directors[135] centrally manages the Shell Group, determines how the subsidiaries should be managed. As the GGG report puts it:

> The Group Holding Companies – directly or indirectly – have a controlling interest in many Shell companies, usually through having a majority of share holding voting rights. The Group Holding Company boards, supported by CMD [Executive Committee],[136] set clear expectations as to how such companies are to be run, by providing guidance on policy and strategy.[137]

156. Among other things, the "*guidance on policy and strategy*" is provided for by the Executive Committee through the development of objectives, plans and strategies for the Shell Group and by establishing group policy and standards, as well as - when necessary - adjusting those (see below section 12.4.3 and onward). Shell plc therefore has a strong hierarchic company culture within which the Executive Committee has a large amount of control over important policy decisions of it subsidiaries.

> CMD [EC] guides the Group by providing strategic direction, support and appraisal to Group Businesses. The strategy, planning, appraisal and assurance cycle (...) ensures that Group strategy is aligned with the interests of the Parent Companies.[138]

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[135] The Board has the general controlling management over the Shell Group, sees to unity of strategy within Shell plc and takes essential decisions. For the benefit of its meetings, but also between times, the Board regularly receives information from the Executive Directors on important developments within the Shell Group and the discussion of evaluations and reports on the activities and plans of the Group. See GGG (**production E.1**), p. 3. See also: Shell plc, 'Jaaroverzicht en verkorte jaarrekening 2007: Resultaat en groei' (Annual overview and summarized annual account), (**production D.7**) pp. 40-41. See for the competences of the Board: http://www.shell.com/home/content/investor/company_information/corporate_governance/matters_reserved_board/rds_matters_reseved_to_the_board.html <lastly visited on 29th October 2008>.

[136] What is currently called the Executive Committee, was called before the merger of the two parent companies from which Shell plc originated in July 2006 the Committee of Managing Directors (hereinafter: CMD). In October 2004 the name of the CMD was already changed into Executive Committee, in anticipation of the merger into Shell plc. The positions and competences of this body and its members have not changed with regard to content at that (see: N.V. Koninklijke Nederlandsche Petroleum Maatschappij, 'Verslag over 2004' (Report on 2004) (**production D.2**), p. 118.

Factually, the Board of Directors also existed before the merger, but was called the "Conference" back then, which – in a more complex structure – had the same positions that the Board currently has. Formally, the Conference was a discussion body in which the commissioners of the two parent companies and the two holding companies and the members of the CMD met each other. In practice, during this meeting important decissions for the Shell Group were taken. As a result of this, separate discussion within the various management structures became unnecessary. (See: S. Howarth & J. Jonker, *Geschiedenis van Koninklijke Shell, Deel 2: Stuwmotor van de Koolwaterstofrevolutie 1939-1973*, (Amsterdam: *Boom* 2007) (**production H.3**), p. 147. Thus the Shell Group functioned even before the merger as if only one parent company existed.

Because of the merger, only formally a new top layer came into being within the company that reflected the organisation structure that already factually existed before.

The tasks of the Executive Committee are the same as those of the CMD and the same applies for the Board with regard to the Conference. The Board members of Shell plc consititute the same group and have the same responsibilities as the Conference back then. The committees that had established the Conference, including the Social Responsibility Committee, still exist.

In the subsequent text, plaintiffs refer to the CMD and the Conference respectively if the terms Executive Committee or Board of Directors are used with regard to a moment before the merger in July 2005. Needless to say that in the sources to which a reference is made the then applicable term will be used, so that below the term 'CMD' is synonymous with 'EC' and the term 'Conference' is synonymous with 'Board'.

[137] GGG (**production E.1**), p. 3

[138] GGG (**production E.1**), p. 4.

157. The Executive Committee is informed on all serious environmental incidents and the cause thereof.[139] Shell Nigeria should submit an analysis of the cause of this incident to the Executive Committee.[140] Despite this fact, Shell plc has refrained from exerting that influence in order to intervene in Shell Nigeria in the way of oil production by Shell Nigeria, that already for decades results in serious damage to third parties.

158. The Board takes important decisions for the Shell Group with a long-term horizon than the Executive Committee. The Board decides on investment plans for sizeable projects and assesses the activities of holding companies in important countries, including Nigeria. The Board also receives the reports from the Social Responsibility Committee on the Health, Safety and Environment (HSE) policy of Shell, see section 12.4.3. Based on this controlling and coordinating task, the Board has thorough knowledge on the day-to-day business within the Shell Group, such as the situation in Nigeria, that it could also have implemented for directing changes in the policy with regard to Nigeria. However, the Board did not change the policy in such a way that the continuous damage during the oil extraction of Shell Nigeria was prevented or at least limited.

159. Plaintiffs conclude that the Executive Committee and the Board, that have the central management over the Shell Group, not only had the knowledge but also the control and the means at their disposal in order to intervene in the damage-causing actions by its subsidiary Shell Nigeria. Plaintiffs establish that Shell plc did not properly implement this control and means, namely that Shell plc has refrained from directing Shell Nigeria in such a way that damage to plaintiffs would have been prevented.

12.4 Way of central direction

160. The Executive Committee and the Board exert the management of the Group with regard to the environmental policy and the monitoring thereof by means of a number of policy instruments and structures. These are discussed below.

12.4.1 Investments

161. The Executive Committee indicates how the sub-holding companies must invest in subsidiaries and how they must exert their stockholder rights in those companies. The Executive Committee has to approve in advance of investments of a certain size[141] or where special circumstances have to be taken into account. This also means that the Executive Committee is informed on when such investments are made or not.

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[139] After July 2005, the Executive Committee is the body to which such information should be reported. See: Shell plc, Global Environmental Standards (**production E.4**), section 11: "The Committee of Managing Directors (CMD) is informed of all serious environmental accidents and a root cause analysis should be reported to CMD." See also: GGG (**production E.1**), p. 16.

[140] Global Environmental Standards (**production E.3**), section 11; this was already the case before the merger.

[141] In 2001 this meant each investment that exceeds the amount of US $ 100 million. The competence to decide on investments that do not exceed the value of US $ 100 million is delegated to the individual Executive Committee members and to the Director of Finance. For their part, they have delegated the competence to decide on investments that do not exceed a value of $ 20 million to their Business Executives. Each member of the Executive Committee and the Director of Finance works out to which Executives this applies. The competence cannot be delegated further. See: GGG (**production E.1**), p. 15.

162. Shell plc therefore decides whether Shell Nigeria makes large investments or not. In view of the conclusion that large investments are necessary in order to have the oil extraction in Nigeria take place in a careful manner (see what is stated in paragraph 147 onwards Exploration & Production Business plan and sustainability report 2006 of Shell plc), Shell plc therefore should have taken the decision on those investments, which it refrained to do.

12.4.2 Appointment of managers

163. As the sole shareholder, Shell plc exerts direct influence on the appointment of managers of Shell Nigeria. The right of dismissal is an instrument that the Group management can, and in some cases must exert as well.

> Plaintiffs have requested from the defendant in their notice of liability to indicate who were the managers of Shell Nigeria in the years 2000-2008, and what the Shell companies are via which the stock in Shell Nigeria is held and who were the managers thereof.[142] Defendants did not react on these requests in their letters of 20th June 2008.

164. Shell plc could have dismissed the managers of Shell Nigeria and replaced them by managers who were prepared to carry out the oil operations of Shell Nigeria in such a way that no or at least less damage for third parties would occur at that. Also, during the natural change of the managers of Shell Nigeria, Shell plc did not or insufficiently see to the appointment of managers that were prepared and capable to remove and/or limit the harmful effects of the oil extraction.

165. Apart from the direct influence that Shell plc as sole stockholder has on Shell Nigeria, it also exerts control in different ways.

12.4.3 Health, Safety and Environment Policy

166. Shell plc has a policy for Health, Safety and Environment (HSE). Shell plc also uses Global Environmental Standards. These policy instruments are established and implemented by the central Shell plc management. Shell plc publicly states that it uses these policy instruments in order to see to it that all Shell sections 'do not cause damage to third parties' and to protect the environment:

> It includes a commitment to 'pursue the goal of no harm to people' and to 'protect the environment' and requires the use of risk-based management systems, which are audited regularly. All contractors, Shell companies and joint ventures we control are required to manage HSE in line with our Policy and Commitment.[143]

167. The HSE policy is established by Shell plc since it regards the environment as a topic that should be regulated at the highest level in order to guarantee a consistent Group policy.[144] Shell Nigeria

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[142] Notice of liability of 8th May 2008, (**production A.1**), sub u and v.

[143] See: http://www.shell.com/home/content/responsible_energy/integrated_approach/our_commitments_and_standards/hse_com_policy/health_safety_env_com_standard_25042007.html <last visited on 29th October 2008>

[144] GGG (**production E.1**), p. 8: "There are benefits in having a common approach to some functional matters – for example, environmental management, people management or financial control – across all Group Businesses." See also p. 16: "This section outlines the issues and responses to matters that have been assessed as important enough to justify a Group policy or standard." 'Environmental Management' is a standard that is part of the 'Group HSE Commitment and Policy', which, als the name already indicates, applies to the whole Group.

should therefore use those same environmental standards as other companies of the Shell Group.[145] Among other things, the HSE policy requires that environmental data from Shell Nigeria are verified by an independent authority.[146]

168. The Global Environmental Standards are used by Shell plc as well in order to pursue this objective, namely a centrally managed and homogenous environmental policy:

> We have a set of global environmental standards for all Shell companies and joint ventures we control. Describing in clear terms the things an operation is required to do in relation to environmental management, the global standards are an important tool to help us get consistent environmental performance in Shell.[147]
>
> Global environmental standards for our operations are in place and apply to all Shell companies and all joint ventures where we have operational control. The standards were instituted globally to ensure that Group operations in countries lacking standards or environmental enforcement maintained the same level of environmental protection as the OECD nations.[148]

169. By means of the HSE policy and the Global Environmental Standards, the environmental policy of Shell is directed and monitored centrally.[149] These are therefore policy instruments that Shell plc should use in order to exert its direct influence on environmental issues of Shell Nigeria. By means of these standards, Shell plc should have taken care that Shell Nigeria does not cause damage to third parties at its oil extraction.

170. Plaintiffs do not have the HSE policy at their disposal. Although Shell plc repeatedly refers to these norms on its website and claims to pursue a responsible environmental policy, the HSE and environmental standards are not publicly available. Plaintiffs therefore assume that this policy instrument is insufficiently tailored to the oil extraction by Shell Nigeria in the Niger Delta, or that the correct implementation thereof in the Niger Delta cannot be ensured by Shell plc.

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[145] The HSE policy also applies to the ventures over which Shell has control, such as the joint venture of which Shell Nigeria is a part. See for the latter below under "Plea of defendant", section 16.3 and onwards. Contractors of Shell companies are expected to adhere to the HSE policy as well; if they fail to do so, the contracts are cancelled. See: 'The Shell Sustainability Report 2005: Meeting the energy challenge', (**production D.4**) p. 17: "Contractors must manage HSE in line with our HSE standard and are expected to follow our, or equivalent, business principles. In many countries, we work with contractors to help them understand and comply with these requirements. If they cannot, we are required to review the relationship. In 2005, we cancelled 63 contracts because of such concerns. Multiple contracts were cancelled in Brazil, Cameroon, Greece, Honduras, Hungary, Indonesia, Kenya, Nigeria, the UK and the USA."

[146] Global Environmental Standards (**production E.3**), section 2: "Any Shell Company, the environmental impacts of whose operations is considered material at Group level by the external verifiers of the Group's HSE report, should have its reported Group HSE performance data verified by a competent, independent body."

[147] See: http://www.shell.com/home/content/responsible_energy/integrated_approach/our_commitments_and_standards/global_environmental_standards/minimum_environmental_standards.html.

[148] See: http://www.shell.com/home/content/envirosoc-en/making_it_happen/our_commitments_and_standards/health_safety_and_environment/minimum_environmental_standards/minimum_environmental_standards.html.

[149] GGG (**production E.1**), p. 16.

12.4.4 Shell General Business Principles

171. Apart from the HSE policy and the Global Environmental Standards, Shell plc makes use of the General Business Principles (SGBP) as Group policy. Shell Nigeria is obliged to observe these regulations.[150]

172. By means of the SGBP, Shell plc can tune the economic, social and environmental objectives of the Shell Group as well as direct them.[151] For Shell plc the SGBP are proof that it operates with the highest ethical standards within its company:

> Our Business Principles and Code of Conduct define our core values of honesty, integrity and respect for people, and are at the heart of how we manage our business. These are translated into specific requirements through a set of company-wide commitments and standards that define how we operate in a socially and environmentally responsible way.[152]

173. Part of the SGBP is for example the obligation of Shell Nigeria to comply with the national safety and environmental regulations of Nigeria.[153]

174. The problems at Shell's oil extraction in Nigeria have also resulted in the fact that Shell has modified its SGBP, with important additions with regard to human rights and sustainable development.

> The enduring, serious problems in the Niger Delta have a very negative impact on the reputation of the Group. Under pressure of the NGOs that support the residents of the Niger Delta, Shell rewrote its policy principles.[154]

175. Apart from that, the problems in Nigeria have been the reason for Shell to develop an internal control system that enables Shell to monitor whether all Shell companies indeed comply with the SGBP.[155]

176. Altogether, Shell plc recognises that by means of the SGBP it has the opportunity to exert control over Shell Nigeria. Nevertheless, the modifications of the SGBP in relation to the situation in Nigeria, at least the implementation of the SGBP, have proven inadequate. Shell plc has refrained from converting this establishment into further modification of the SGBP and/or improved monitoring of the implementation thereof.

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[150] The joint venture in Nigeria, of which Shell Nigeria is the operator, must comply with Shell's HSE policy and the SGBP as well. (See for this footnote 143).

[151] Shell plc, Statement of General Business Principles (SGBP) (**production E.2**), p.5: "These five areas of responsibility are seen as inseparable. Therefore it is the duty of management continuously to assess the priorities and discharge its responsibilities as best it can on the basis of that assessment."

[152] See:http://www.shell.com/home/content/responsible_energy/integrated_approach/our_commitments_and_standards/dir_commitments_standards.html <lastly visited on 29th October 2008>.

[153] SGBP (**production E.2**), principle 8.

[154] K. Sluyterman, Geschiedenis van Koninklijke Shell, deel 3: Concurreren in Turbulente Markten, 1973-2007 (Boom, Amsterdam) (**production H.6**), p. 461.

[155] See: K. Sluyterman, Geschiedenis van Koninklijke Shell, part 3: Concurreren in Turbulente Markten, 1973-2007 (Boom, Amsterdam, 2007) (**production H.6**), p. 359: "Naast de herziening van de beleidsuitgangspunten ontwikkelde Shell een intern controlesysteem om na te gaan of alle Shell-maatschappijen zich daadwerkelijk aan de beleidsuitgangspunten hielden." (Apart from the revision of the policy principles, Shell developed an internal control system in order to establish whether all Shell companies indeed adhered to the policy principles.)

12.4.5 Social Responsibility Committee

177. The Social Responsibility Committee is an instrument of the Board to take decisions with regard to the environment for the Shell Group as a whole. The Social Responsibility Committee assesses the environmental policy for the Shell Group as a whole. The Shell annual report for 2007 describes the Committee as follows:

> 'The Social Responsibility Committee has as its most important task to assess on behalf of the Board the policy and behaviour of Shell companies with regard to the Shell's General Business Principles, Shell's Code of Conduct, the policy of the Group with regard to safety, health and environment, the principles with regard to sustainability, and other issues that result to great concern in society.'
>
> 'The Committee does so by receiving reports and to assess together with the management the general performance of Shell (...).'[156]

178. Apart from that, the Social Responsibility Committee visits Shell Nigeria and assesses whether the Shell standards are complied with by Shell Nigeria, and reports on this to the Executive Committee and the Board of Shell plc.[157] The previously discussed HSE policy and the SGBP are instruments that the Social Responsibility Committee has in order to be able to exert direct influence on the way of oil extraction in Nigeria. The Social Responsibility Committee has refrained from developing sufficient action with regard to Shell Nigeria in order to prevent or limit the sizeable damage that is caused by Shell Nigeria during its oil extraction.

12.4.6 Business Exploration and Production

179. Exercising a control by the Executive Committee is largely done via the so-called 'businesses'. Businesses are clusters of various operations in which holding companies have been split up, which all operate in accordance with the same strategy and all pursue the same objective. The most important Business of the Shell Group is Exploration and Production (E&P), which includes the holding company Shell Nigeria.

180. One of the members of the Executive Committee – since April 2005 to present: Malcolm Brinded – manages as Chief Executive Officer of the Business E&P the various operations by means of support, evaluation and strategic direction. He tunes the objectives and strategy of the Business E&P with the Shell Group as a whole[158] and is accountable to the Executive Committee:

> 'Business CEOs define their objectives and strategies (including those for strategic planning units) consistent with those of the Group'.[159]
> 'Business CEOs consider strategy from a range of different perspectives (...) for example: - overall position in a country or region, - risks that cross organisation boundaries (...)'.[160]

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[156] Shell plc, 'Jaaroverzicht en verkorte jaarrekening 2007: Resultaat en groei' (**production D.7**), p. 42.

[157] Shell plc, 'Jaaroverzicht en verkorte jaarrekening 2007: Resultaat en groei' (**production D.7**), p. 42.

[158] GGG, (**production E.1**), p. 8: CEOs then develop their Business plan - in doing so they ask their business units to propose items for inclusion. Business unit proposals are ranked, and compared with Group and Business strategies, planning premises and ground rules. The Business plan is agreed after a consultation process which considers capabilities and resources: talent, technology and finance.

[159] GGG, (**production E.1**), p. 8.

[160] GGG, (**production E.1**), p. 9.

181. Furthermore, this Chief Executive Officer of Exploration and Production should see to it that the holding company Shell Nigeria complies with the Group policy and the Group standards.[161]

182. The Executive Committee approves the business plan of E&P.[162] In this way, the Executive Committee has direct influence on the compliance with Group policy and standards in Nigeria.

183. Plaintiffs conclude that the objectives and strategies as implemented by Shell plc as well as the business plans of the Business E&P as approved by Shell plc, have not sufficiently taken the many oil spills in Nigeria into consideration and did not see to oil extraction by Shell Nigeria at which no or less damage to third parties or the environment is caused.

12.4.7 Geographic organisation

184. Members of the Executive Committee furthermore direct geographical regions in their position as Regional Managing Director (hereinafter: RMD).[163] Each Regional Managing Director appoints a chair – the so-called country chair – for each country from its region where Shell has companies. As of March 2004 until present, Malcolm Brinded, member of the Executive Committee was, except as CEO for the Business E&P, also responsible for Nigeria as Regional Managing Director.[164] In 2005, Malcolm Brinded appointed Basil Omiyi as country chair. Omiyi was then also the managing director of Shell Nigeria.

185. The positions of Chief Executive Officer of E&P and the Regional Managing Director for Nigeria are therefore united in one person – currently Malcolm Brinded – who has a seat in the Executive Committee. In that way, Shell plc can direct the operations in Nigeria in various ways and along different channels.

186. RMDs see to the compliance with the plans and strategy of the group for their region. They are consulted with regard to all proposals that affect their region before these are presented to the Executive Committee.

187. The Executive Committee therefore has, because of its functional (Business E&P) and regional (region Nigeria) division, direct influence on the policy of Shell Nigeria with regard to oil extraction.

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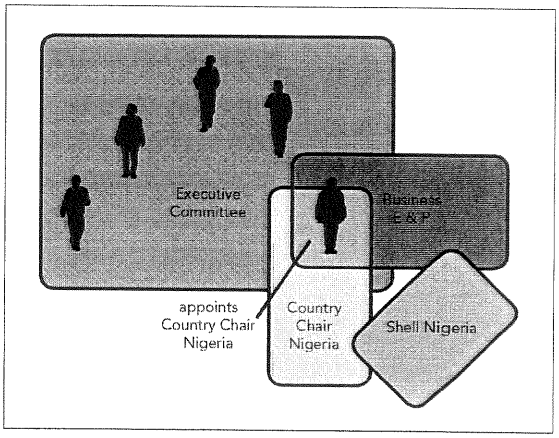
[161] GGG (**production E.1**), p. 4. As already indicated above, (footnote 143) the Joint Venture of which Shell Nigeria is the *operator* is also bound to the Shell Group policy and standards.

[162] GGG (**production E.1**), p. 12.

[163] GGG (**production E.1**), p. 4.

[164] Rob Routs was geographically responsible for Africa, with the exception of Nigeria. Apart from that he was, among other things, responsible for Oil Products, Chemistry, and Sustainable Energy. See <http://www.shellchemicals.com/news/1,1098,148-biography_id=51,00.html> <lastly visited on 31 October 2008>.



188. Despite its large influence as a result of its dual function as CEO of the Business E&P and Regional Managing Director for Nigeria, Malcolm Brinded – member of the Executive Committee of Shell plc – has refrained to exert his influence on the operations of Shell in Nigeria in such a way that this resulted in the fact that large-scale oil spills during the oil extraction in Nigeria were prevented. He has for example insufficiently directed the country chair – during (the clean-up operation of) the oil spill near Oruma, then Basil Omiyi, at that moment the managing director of Shell Nigeria as well – and he did not replace him when it turned out that he was not capable to prevent the large-scale damage as a result of the oil extraction by Shell Nigeria.

12.4.8 Assurance letters

189. If Shell plc establishes that Shell Nigeria does not comply with the group policy, Shell plc has the opportunity to intervene.

190. Annually, the Executive Committee receives various sorts of 'assurance letters', both via the geographical and the functional line. These letters provide Shell plc with the opportunity to check whether Shell Nigeria correctly implements the Shell policy. The businesses and the country chairs declare in the assurance letters that (among other things) the HSE policy and the SGBP have been complied with.[165]

> In their notice of liability, plaintiffs have requested a copy of the assurance letters from Shell Nigeria to Shell plc between 2000 and 2008.[166] Shell plc did not provide these documents. Plaintiffs will therefore have to assume that Shell plc has received assurance letters but did not or insufficiently take relevant action in this matter.

191. Shell plc has not (adequately) used the assurance letters for exerting influence on the oil operations of its subsidiary Shell Nigeria. It has for instance not accurately checked whether the operations of Shell Nigeria comply with the standards on cautious oil extraction that apply to Shell Nigeria. If Shell plc did exert this control, it has acted in violation with its obligations and opportunities based on the assurance letters to take measures in order to prevent or at least limit the damage at the oil extraction by its subsidiary.

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[165] GGG, (**production E.1**), p. 12: Business provide assurance on Group policies and standards through an annual assurance letter process. Country Chairs provide annual assurance on their relevant responsibilities.

[166] Notice of liability of 8th May 2008, (**production A.1**), sub dd.

12.5 Conclusion control Shell plc over environmental policy Shell Nigeria

192. The environment and the oil extraction in Nigeria are Group interests of the Shell Group. The environmental policy and the plans for the Business Exploration & Production are established and/or approved by Shell plc. In each case in these fields, subsidiary Shell Nigeria has had little or no freedom to determine its own actions.

193. Shell plc can therefore also modify this policy if the (local) situation requires so and as a result of the evaluation of the elaboration of the policy. The HSE policy, the SGBP, and the Exploration and Production Business plans are therefore management instruments that the top of Shell plc should use in order to implement changes within the company.

194. Shell plc obliges Shell Nigeria to carry out this environmental policy. Shell plc has various policy instruments, because of which it can exert direct influence on the cautious manner of oil extraction by Shell Nigeria. Shell plc has refrained from implementing its control and means with the objective to prevent or at least limit the damage that is consequently done to the environment and third parties by Shell Nigeria at its oil operations.

13 DUTY OF CARE SHELL PLC

13.1 Contents duty of care Shell plc

195. The liability of Shell plc for the damage suffered by plaintiffs rests on the violation of an obligation that rests on them to act socially responsible. This duty of care implies that Shell plc should exert its influence and control over its subsidiary Shell Nigeria in such as way that it is prevented as much as possible that its subsidiary Shell Nigeria causes damage to human beings and the environment during the oil extraction, and that pollution caused by oil spills is timely and completely cleaned up.

196. It more specifically holds that Shell plc has knowledge at its disposal of the inherent risks of oil extraction in general towards human beings and the environment, as well as knowledge on the specific risks of oil extraction in the vulnerable Niger Delta. Furthermore, Shell plc was aware of the fact that many pipelines in the Niger Delta were outdated (see section 12.2), that Shell Nigeria reacted inadequately on the large number of oil spills, and that the oil pollution due to this caused an enormous amount of damage to the residents of the Niger Delta and to the environment (see section 7.3). Moreover, the organizational structure of the Group enabled Shell plc to intervene in the way of oil extraction by Shell Nigeria (see chapter 12). Shell plc should therefore make use of its knowledge and control over Shell Nigeria in such a way that (i) Shell Nigeria effectively inspects and maintains the existing oil pipelines in the Niger Delta and timely replaces the existing oil pipelines when necessary, (ii) that for each case of oil pollution that occurs Shell Nigeria has an effective emergency plan at its disposal and that it then most urgently and adequately implements this plan, (iii) that Shell Nigeria after the occurrence of a case of oil pollution always sees to it that within the applicable time the complete clean-up of the polluted area is carried out, and (iv) that Shell Nigeria has sufficient financial resources and technical expertise at its disposal for adequately carrying out the activities as mentioned under i-iii.

197. Shell plc not only had the opportunity to intervene in the oil operations of its subsidiary Shell Nigeria, but was also obliged to seize that opportunity.

198. In the first place, this concerns oil extraction by a subsidiary of Shell plc in an area that is vulnerable in many ways. The Niger Delta is densely populated and a large number of residents

of the Delta directly depends on a clean environment for its livelihood. Furthermore, because of its structure with a large number of rivers and creeks the area is more vulnerable for a rapid and sizeable spread of oil pollutions. For the residents of the Niger Delta this concerns a potential infringement on their right to livelihood, their right to physical and mental health, and their right to a healthy living environment. In other words: the oil exploitation in the Niger Delta by Shell Nigeria not only poses a serious and foreseeable risk of environmental pollution, but also a serious and foreseeable risk of violating the human rights of the residents of the Niger Delta. In view of these considerable and fundamental risks, Shell plc was no longer at liberty to exert or not exert its competences in influencing opportunities with regard to Shell Nigeria. It was therefore obliged towards the residents of the Niger Delta and especially towards plaintiffs to make use of these means and competences.

199. In the second place, Shell plc is obliged to actively intervene in its subsidiary Shell Nigeria, since it has publicly stated that it considers the whole Group bound to various international codes and guidelines, such as the OECD Guidelines, that prescribe active duty of care for parent companies. Moreover, Shell plc has developed a strict environmental policy for the whole Group and has publicly declared that it regards itself as bound to this (see section 12.4.3). Because of this, Shell plc, not only towards the public but also towards the residents of the Niger Delta and more specifically towards plaintiffs, has given the impression that it would obey these strict duties to care. This impression of trust is of even greater importance now that potential victims of an oil spill can in no way take precautionary measures by themselves against the consequences thereof (let alone that they would be obliged to do so). For their safety, the potential victims therefore completely depend on the policy and the activities of Shell plc (which in this respect is also determining for the behaviour of its subsidiary Shell Nigeria). For this reason, Shell plc is not at liberty to exert or not exert its control over, and its influencing opportunities of Shell Nigeria. It is obliged to do so towards the potential victims, especially towards plaintiffs.

200. Shell plc did not comply with this duty of care towards plaintiffs. Despite the knowledge of Shell plc on the risks of oil extraction by Shell Nigeria, it has done too little in order to prevent the materialisation of these risks, or at least to limit the consequences thereof.

201. It can be required from Shell plc to take precautionary measures. In short, the scope of the precautionary measures to be taken should be balanced against the scope of the risk.[167] At that, it should also be weighed that the objective of the operations of Shell plc is to make profit, and that it actually makes a large percentage of its profit from the oil operations in Nigeria.[168] In the current case however, making profit is subordinate to the care for the safety of the residents and a clean environment. The costs of the precautionary measures to be taken by Shell plc (effectively influencing the policy and the activities of Shell Nigeria and providing Shell Nigeria with sufficient financial means and technical expertise) were bearable for Shell plc, and the proportion of these costs outweighed the proportion of the damage to human beings and the environment as a result of the enormous scope of the oil spills in the Niger Delta.

202. Below, this obligation of Shell plc will be further elaborated, as will the standard of due care that the defendant should have complied with. This will again demonstrate that Shell plc was not free

[167] C.C. van Dam, Aansprakelijkheidsrecht (Den Haag, 2000), no. 817 onwards; International Commission of Jurists, Corporate Complicity & Legal Accountability (Geneva, 2008) (**production H.4**), Volume 3, p. 19 onwards.

[168] In 2007, worldwide 1,818,000 barrels of oil were extracted per day by Shell. In that same year, Shell extracted 285,000 barrels of oil per day in Nigeria, which equals 15.7% of the total oil production. See: Organization of the Oil Producing Countries (OPEC), 'Annual Statistical Bulletin 2007', table 44 ('Parent companies' estimated gross share of crude oil production in OPEC Members', p. 70) and table 77 ('Principal operations of the major oil companies', p. 121).

to refrain from intervention in the oil operations of Shell Nigeria and was obliged to exert its influence and control over Shell Nigeria.

13.2 Duty of care parent company

203. There is sufficient ground to assume the previously described duty of care standard for Shell plc as parent company of Shell Nigeria as well. The fact that in principle a duty of care rests on the parent company in order to prevent damage by a subsidiary company is accepted in the jurisprudence of various legal systems. Parent companies are expected to let environmental issues weigh ever more importantly throughout their whole Group.

204. The duty of care of Shell plc equals the factual situation in the currently globalised community and is accepted in the jurisprudence of various legal systems. The criteria indicated above for liability because of unlawful behaviour, exist in various legal systems under many definitions - in essence, the criteria are largely comparable.[169]

205. Legal proceedings in the United States against parent companies for involvement in the actions of their subsidiaries have been instigated on several occasions. The case *Doe* v. *Unocal Corp.*[170] was, after rejection of the preliminary pleas, referred for judgment on the merits. Subsequently, this case was settled. From the rejection of the preliminary pleas it can be deducted that liability of the parent company was considered feasible.[171] In the case *John Roe* v. *Bridgestone Corporation,* the principle was accepted as well that a parent company can be responsible for - refraining from – directing a subsidiary.[172]

206. In the United Kingdom, various cases were held that to a greater or lesser extent have similarities with the current case. In the case *Connelly* v. *RTZ* the question was at stake whether a British parent company was liable for the health damage to an employee of a company in Namibia that was associated to it. This case was proceeded in four instances.[173] In all those instances, the option of the liability of RTZ was expressly not rejected. The Queen's Bench Division (QBD), the authority that finally dealt with the case after rejection by the House of Lords, finally rejected the case after a successful appeal for reasons of prescription. However, in its considerations the QBD explicitly indicated that – if the facts as stated by Connelly would appear to be correct – RTZ would be liable for the damage suffered by Connelly.[174]

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[169] The stated criteria not only exists in Dutch Law; in the United States for example the formula of Judge Learned Hand is known, at which "probability of the damage, gravity of the injury, burden of the adequate precautions" are of importance, just like the nature and/or the purpose of the behaviour.

[170] *Doe I v. Unocal Corp.* (Unocal III), U.S. Court of Appeals, 395 F.3d 932 (9th Cir. 2002) (**production J.1**).

[171] The previous description of the case was kept very concise out of necessity. Please refer for more information on this case to http://cases.justia.com/us-court-of-appeals/F3/177/755/475383/ <lastly visited on 30th October 2008>.

[172] *John Roe I v. Bridgestone Corporation*, U.S. District Court, Southern District of Indiana, Indianapolis Division, Case No. 1:06-cv-0627-DFH-JMS, 26th June 2007, p. 69. See: http://www.insd.uscourts.gov/Opinions/AP6270O1.pdf <lastly visited on 30th October 2008> (**production J.2**).

[173] Queen's Bench Division 25th October 1995, [1996] QB 361; English Court of Appeal 2nd May 1996, [1997] I.L.Pr. 643; House of Lords 24th July 1997, [1997] C.L.C. 1357, and finally Queen's Bench Division 4 December 1998, *Connelly v. RTZ plc & Anor*, [1999] C.L.C. 533. (**production J.3**)

[174] The point of view of Connelly was: "RTZ had devised RUL's policy on health, safety and the environment, or alternatively had advised RUL as to the contents of the policy. It was further alleged that an employee or employees of RTZ, referred to as RTZ supervisors, implemented the policy and supervised health, safety and/or environmental protection at the mine."

207. The case *Lubbe* v. *Cape plc* concerned a claim of South African asbestos victims against the British parent company of the South African subsidiary. The legal debate mainly concerned the question whether the United Kingdom was the correct forum. When this question was presented to the House of Lords, it again recognised the option in its considerations that under circumstances the liability of the parent company for damage caused by its subsidiary is possible.[175]

208. In a series of judgments, the Supreme Court of the Netherlands has accepted that a parent company is liable towards the creditors of its subsidiary because of unlawful acts. At that, it is always decisive that the parent company intensively intervenes in the policy of its subsidiary and has the factual power at its disposal in order to intervene, as well as the knowledge that the creditors of its subsidiary would be prejudiced, and despite that refrains from taking measures against that.[176] In some ways this case is comparable with the current one and provides clear insight that, under circumstances, the parent company has a duty of care towards third parties in order to prevent damage by its subsidiary.[177]

13.3 Duty of care based on international standards

209. The duty of care for the actions of subsidiary companies that pose serious damage to the environment and the rights of third parties can furthermore be filled in by international standards, which are for an important part endorsed by Shell plc. Compliance by Shell plc with these standards would have prevented the oil spills near Oruma to have taken place, or at least would not have resulted in the same damage.

210. Among other things, these standards concern the various ways of control by the parent company over subsidiary companies. If Shell plc would have carried out control in accordance with these standards, then Shell plc would have established that its subsidiary Shell Nigeria extracts oil in a way that is harmful for human beings and the environment.

211. Shell plc has publicly stated that it considers the whole Group bound to these international standards. These standards are for that reason also decisive for the implementation of the duty of care that legally rests on Shell. Because of its public commitment to these standards towards the general public, the residents of the Niger Delta, and especially the plaintiffs, Shell plc has made the impression that it would adhere to these standards of due care, and that it would therefore see to their safety. To potential victims, this impression of trust is of crucial importance, since they cannot protect themselves against the consequences of an oil spill. For their safety they therefore completely depend on the policy of Shell plc, that in this field is also decisive for the behaviour of its subsidiary Shell Nigeria.

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[175] Lubbe and others v. Cape Plc, House of Lords 20th July 2000, [2000] 4 All ER 268 (**production J.4**).

[176] HR 21 December 2001, NJ 2005/96 (SOBI/Hurks II); preceded by, among other things, HR 19th February 1988, NJ 1988/487 (Albeda Jelgersma II); HR 8th November 1991, NJ 1992/174 (Nimox/Van den End q.q.); HR 12 June 1998, NJ 1998/727 (Coral Stalt).

[177] The fact that this concerned a bankruptcy situation is no relevant difference with the current case, since that element is primarily focused on the financial capacity and not on the liability that is relevant in this case. The creditors of the subsidiary had entered into an agreement in Sobi / Hurks with the subsidiary. They could therefore have protected themselves at any time against insolvency of the subsidiary. Plaintiffs in the current case were not able in any way to foresee that exactly *they* would suffer damage because of oil spills. In as far as this difference might even be relevant, in the current case therefore even more reason exists to assume a duty of care for Shell plc than in the referred case.

212. A comparison can be found here in the medical liability law, in which it is accepted that self-imposed standards can fill in the duty of care. On the one hand this results from the fact that *self-commitment* is concerned and on the other hand from the fact that the standard of due care is also filled in by the standards.[178] Deviation from these standards to which it has committed itself without any motivation, can result in liability for the damage that results from that.

213. Self-commitment by Shell plc is concerned since it advertises these standards and thus indicates to third parties that it considers itself committed to these standards. Apart from that, these standards further elaborate the standard of due care of Shell plc, in that sense that it has indicated itself to consider these standards as the minimum standards to which a reasonable operating Group should commit itself in the relevant field.[179]

13.3.1 OECD Guidelines

214. The Organisation for Economic Cooperation and Development (OECD) has formulated the OECD Guidelines for Multinational Enterprises (the Guidelines). Shell plc publicly indicates to act in accordance with these Guidelines.[180] They are "recommendations that are made by governments to multinational enterprises. They contain a number of voluntarily implemented principles and standards for responsible entrepreneurship, in accordance with the applicable legislation."[181] These Guidelines are directed at all sections of multinational enterprises,[182] therefore both at parent companies and subsidiaries.

215. In accordance with these Guidelines, enterprises should respect the human rights of those to whom their activities have impact.[183] Apart from that, according to these Guidelines multinationals should protect the environment:

> The enterprises should, within the framework of the laws and regulations and administrative customs in the countries in which they are active, and under consideration of the relevant international agreements, principles, objectives, and standards, sufficiently take the necessity into account to protect the environment, public health and safety, and in general carry out their activities in a manner that contributes to a broader objective of a sustainable development.[184]

216. This general standard is elaborated in a number of guidelines that are relevant to this current case, with which Shell plc should comply. This includes the introduction and maintenance of a suitable environmental management system, for the benefit of which timely adequate information is

[178] Compare: I. Giesen, Alternatieve regelgeving en privaatrecht, (Deventer: Kluwer 2007) (**production H.2**).

[179] Compare: I. Giesen, Alternatieve regelgeving en privaatrecht, (Deventer: Kluwer 2007), (**production H.2**) p. 62 onwards.

[180] See http://www.shell.com/home/content/responsible_energy/approach_to_reporting/external_voluntary_codes/external_voluntary_codes_000407.html#the_organisation_for_economic_co-operation_and_development_guidelines_for_multinational_enterprises_3 <lastly visited on 16th October 2008>.

[181] OECD Guidelines for Multinational Enterprises, p. 1 http://www.oesorichtlijnen.nl/wp-content/uploads/Richtlijnen/NL%20tekst%20richtlijnen.pdf <lastly visited on 30th October 2008> (**production G.4**). The OECD Guidelines state that it is not necessary to provide a definition for 'multinational enterprise': a precise definition of the concept multinational enterprise is not necessary within the framework of the Guidelines. In general, these are enterprises or other entities that are established in several countries and are connected to each other in such a way that they can tune their activities in various manners.

[182] OECD Guidelines for Multinational Enterprises (**production G.4**), Article I , sub 3.

[183] OECD Guidelines for Multinational Enterprises (**production G.4**), Article II , sub 2.

[184] OECD Guidelines for Multinational Enterprises (**production G.4**), Article V.

collected on environmental, health and safety effects of the activities.[185] The environmental objectives of the company must furthermore be checked regularly.[186] Moreover, emergency plans should be available in order to prevent and/or limit damage to the environment and health.[187]

217. Furthermore, multinationals should, if based on the available knowledge that danger for serious damage to the environment exists, take cost-effective measures in order to prevent the damage according to the principle of 'better to prevent than to cure'. The procedures and technologies within the entire enterprise must be improved continuously in accordance with the *best practice* within the enterprise.[188]

218. As indicated above, Shell Nigeria insufficiently reacted with regard to the pipeline from which the spill in Oruma originated as far as the outcome of the Asset Integrity Review was concerned, which showed that the pipeline near Oruma had to be replaced (see paragraph 32) and did not have an adequate Oil Spill Contingency Plan in place (see paragraph 104 onwards). As a result of that, the oil spill near Oruma was not prevented, the reaction was too late and inadequate, and the damage was cleaned up too late and insufficiently.

219. Shell plc has acted in violation of the OEDC Guidelines with regard to a duty of care in order to see to it that as little harm is done with regard to human beings and the environment during oil extraction by Shell Nigeria.

13.3.2 Global Compact and Global Reporting Initiative

220. The UN Global Compact standards[189] also set standards for multinationals, to which Shell plc has committed itself.[190] These standards require that precautionary measures are taken with regard to environmental issues; that the enhancement of the care for the environment is stimulated; and that environmentally friendly technologies are developed. Indeed, Shell plc has publicly indicated that the environment continuously is a point of attention for the Group, but has refrained from exerting its influence and means in order to actually take adequate precautionary measures for the protection of the residents and the environment in the Niger Delta.

221. According to the Reporting Initiative[191] oil spills must be reported extensively by the Group. The document acknowledges the importance of a continuous pursuit of decreasing spills:

> Spills of chemicals, oils, and fuels can have significant negative impacts on the surrounding environment, potentially affecting soil, water, air, biodiversity, and human health. The systematic effort to avoid spills of hazardous materials is directly linked to the organization's compliance with regulations, its financial risk from the loss of raw materials, remediation costs, the risk of regulatory action, as well as damage to reputation.

[185] OECD Guidelines for Multinational Enterprises (**production G.4**), Article V, sub 1 sub a).

[186] OECD Guidelines for Multinational Enterprises (**production G.4**), Article V, sub 1 sub c).

[187] OECD Guidelines for Multinational Enterprises (**production G.4**), Article V, sub 5.

[188] OECD Guidelines for Multinational Entreprises (**production G.4**), Article V, sub 4.

[189] See: http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html <last visited on 30thOctober 2008> (**production G.5**).

[190] See: http://www.shell.com/home/content/responsible_energy/approach_to_reporting/un_global_compact/un_global_compact_000407.html <last visited on 16th October 2008>.

[191] See http://www.globalreporting.org/Home <last visited on 30th October 2008>; see for the Dutch text of the Guidelines: http://www.globalreporting.org/NR/rdonlyres/3940FCCB-77D7-465E-A7D6-AD1E59818BFB/0/G3_GuidelinesNED.pdf <last visited on 30th October 2008> (**production G.6**).

This Indicator also serves as an indirect measure for evaluating the monitoring skills of the organization.[192]

222. Among other things, this means the oil spills have to be documented extensively and displayed in public reports, stating the scope of the spill and the location.[193] Furthermore, the impact of a spill that occurs has to be indicated.

223. Shell plc states that it reports in accordance with the Global Reporting Initiative.[194] It scales itself as an A+ reporter (the highest category). However, Shell plc refrained from keeping proper documentation on the spills in the Niger Delta and especially of the spill near Oruma. In the reports of Shell plc it is not indicated what the impact of the many spills in the Niger Delta is; the spill near Oruma does not appear in the Shell plc report at all.

13.4 Conclusion duty of care Shell plc

224. Based on the above, the following can be stated with regard to the duty of care that rests on Shell plc.

225. Shell plc is aware of the inherent danger of oil extraction, of the serious and specific danger and damage as a result of oil extraction in the Niger Delta, of the structural spills of oil pipelines that occur in this area, and of the serious damage to human beings and the environment that has resulted as a consequence of the oil spills in the Niger Delta.

226. Shell plc is capable to exert influence in an important and decisive manner with regard to the (environmental) policy of Shell Nigeria. In practice, Shell plc is actually and intensively involved in its subsidiary Shell Nigeria with regard to the policy fields that are relevant in this respect, especially when it comes to the protection of the environment.

227. In view of the serious risks for human beings and the environment during the oil extraction in the Niger Delta, especially that of plaintiffs, and in view of the trust that Shell plc has tried to gain from residents and plaintiffs by publicly committing itself to strict duties of care, Shell plc is also bound towards plaintiffs to make use of its control over its subsidiaries in order to take effective precautionary measures as much as possible in order to prevent that its subsidiary Shell Nigeria causes damage to human beings and the environment, and specifically to plaintiffs.

228. However, Shell plc did not comply with this duty of care towards the residents of the Niger Delta, because of which the environment and many individuals, especially plaintiffs Oguru and Efanga, have suffered and still suffer serious damage.

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[192] Global Reporting Initiative, Indicator Protocols Set: EN, p. 30. Source: to be consulted via http://www.globalreporting.org/NR/rdonlyres/F9BECDB8-95BE-4636-9F63-F8D9121900D4/0/G3_IP_Environment.pdf <last visited on 30th October 2008> (**production G.7**).

[193] Global Reporting Initiative, Indicator Protocols Set: EN, p. 30 (**production G.7**): "2.1 Identify all recorded significant spills and the volume of these spills; 2.2 Report the total number and total volume of recorded significant spills; 2.3 For spills that were reported in the organization's financial statement, report the additional following information for each such spill: location of spill; volume of spill; and material of spill, categorized by: oil spills (soil or water surfaces); fuel spills (soil or water surfaces); spills of wastes (soil or water surfaces); spills of chemicals (mostly soil or water surfaces); and other; 2.4 Report the impacts of significant spills."
To be consulted via http://www.globalreporting.org/NR/rdonlyres/F9BECDB8-95BE-4636-9F63-F8D9121900D4/0/G3_IP_Environment.pdf.<last visited on 30th October 2008>

[194] See http://www.shell.com/home/content/responsible_energy/approach_to_reporting/reporting_against_gri/reporting_against_gri_000407.html <last visited on 4th November 2008>

14 CAUSALITY

229. Shell plc has refrained from complying with the strict duty of care that rests on the company. This refraining concerns all manners in which Shell plc could have – and should have – exerted influence. Plaintiffs have already explained these violations above. Currently, plaintiffs will elaborate on the causal connections between violation of the duty of care by Shell plc and the damage that resulted from that.

230. As explained before, the Executive Committee has refrained from taking investment decisions by means of which Shell Nigeria could have been directed to timely replace the pipelines in Nigeria in general, and especially to maintain and/or replace them near Oruma and/or implement its means to that effect. If the Executive Committee would indeed have taken investment decisions to this means, which was within its competences and possibilities, then the oil pipeline near Oruma would not have started leaking as a result of wear.

231. Furthermore, Shell plc should have exerted its influence and control with regard to Shell Nigeria by instructing Shell Nigeria to regularly and adequately inspect its pipelines so that the leakage thereof would have been prevented.

232. The Executive Committee of Shell plc, and more specifically the CEO of the business E&P, refrained from exerting his influence and control in order to see to it that Shell Nigeria complies with all Shell Group policies and standards. Part of this Group policy is the Shell General Business Principles that oblige Shell Nigeria to comply with the Nigerian national safety and environmental regulations. If the CEO of the business E&P should have seen to it that Shell Nigeria would have complied with the EGASPIN and other local Nigerian safety and environmental regulations, then the oil spill of which plaintiffs have become the victims, would have been prevented, or at least the damage would have been limited.

233. Also, Shell plc, based on the information that was submitted to the Executive Commitee and the Board, should have established that the Shell General Business Principles (SGBP) and the Health, Safety and Environment (HSE) policy were, as policy instruments, insufficiently tailored to the extraordinary situation in Nigeria. For Shell plc this should have been the reason to modify these policy instruments and/or to require better compliance with these instruments by Shell Nigeria. In this respect, it is also important that Shell plc has refrained from making (adequate) use of the assurance letters to specifically direct the policy. These acts and omissions by Shell plc are in violation of the standard of due care that rests on the company and have resulted in the fact that the oil operations of Shell Nigeria keep causing systematic damage to the environment and third parties.

234. In view of the seriousness of the problem, Shell plc could and should also have taken active measures in the management of Shell Nigeria, with the objective to appoint managers that would make the prevention of the consequent damage during oil operations in Nigeria into the core target of their policy. Shell Nigeria has refrained to act in that way, in accordance with the duty of care that rests on the company. The same applies for the Regional Managing Director, Malcolm Brinded, when appointing and/or not exchanging the country chair Nigeria.

235. As a conclusion, plaintiffs establish that Shell plc has refrained from exerting its influence and control on various issues where it could have, or at least has not done so adequately. Not implementing this influence and control with that knowledge is in violation of the duty of care that rests on Shell plc. If Shell plc would have made use of this influence adequately, then the oil pollution near Oruma would not have occurred, or at least then the consequences thereof would

have been considerably less, or at least the pollution would have been cleaned up adequately and completely in accordance with the applicable standards.

15 CONCLUSION LIABILITY SHELL PLC

236. Based on the above, the following can be concluded on the liability of Shell plc for the damage resulting from the oil spill near Oruma in June 2005.

237. For Shell plc, it was largely foreseeable that damage to the interests of third parties and the environment would occur if it would not intervene in the structurally damage-causing oil operations of its subsidiary Shell Nigeria. Shell plc could implement its influence and means in order to remove this threat. Nevertheless, in violation with the duty of care that rests on the company, Shell plc has refrained from intervention. Thus, it has created the danger that once again damage would occur to the interests of third parties and the environment. Because of refraining from action by Shell plc, this danger materialised in the oil spill near Oruma. If Shell plc had acted in accordance with the duty of care that rests on the company, the damage for plaintiffs and the environment would not have occurred, at least not to this extent. Shell plc is therefore liable for this damage.

16 PLEAS OF DEFENDANTS

16.1 Sabotage

238. Defendants state that the oil spill near Oruma was caused by third parties ('unauthorized third party interference')[195], also called sabotage.

239. Although this point of view is in controversy with the truth, plaintiffs are not surprised that defendants choose this point of view. It is the standard plea of defendants when they are reproached of negligent oil extraction. For example, Shell Nigeria states in its annual report of 2006 that 69% of the oil spills in Nigeria in that year would have been the result of sabotage.[196]

240. Plaintiffs explicitly dispute that the cause of the spill on 26th June 2005 near Oruma was a case of sabotage. Firstly, the proposition that sabotage was involved is untenable on intrinsic grounds. Secondly, the documents provided for by defendants do not have any power of persuasion since they have numerous formal and substantive deficiencies.

241. Apart form that, the point of view that this would concern sabotage would not benefit defendants since anyhow they have insufficiently taken care of adequate protection of the leaking pipeline. Finally, the plea of defendants does not diminish the reproach of plaintiffs that defendants reacted too late on the spill and have cleaned up the leaked oil too late and insufficiently.

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[195] See letter Shell Nigeria to plaintiffs 20th June 2008 (**production A.3**), and the Field Joint Investigation Report Form – Part A and Part B, sent as attachment. (**production A.4 and A.5**) See also section 7.3 on numbers of sabotage and section 16.1.1 on sabotage as standard – but premature – plea of defendants.

[196] Shell Nigeria, Annual Report 2006: People and the Environment (**production C.4**), p. 14: "In 2006, we recorded 241 oil spill incidents in Shell Nigeria, compared to 224 incidents in 2005. Of this number, sabotage accounted for 165 (69 per cent), while 50 (20 per cent) were controllable incidents (resulting from equipment failure, corrosion or human error). The remaining 26 incidents are yet to be classified or quantified due to access restrictions either by communities or the current insecurity in the Niger Delta."

242. For that matter, plaintiffs point out that defendants righteously do not state that plaintiffs were involved in any form of sabotage because of which the oil spill near Oruma occurred in 2005. See on this matter also what Basil Omiyi states on oil spills as a result of sabotage:

> We still do as a company [pay compensation]. Because we know that the villagers are not the ones who made the hole in the pipe. Maybe some individuals did, but not... not the ordinary people who take the blow.[197]

243. Plaintiffs will further elaborate the previous issues with regard to the plea of defendants below.

16.1.1 Sabotage standard plea of defendants

244. The sabotage plea is almost used by default by defendants, often in a reckless manner, in order to evade liability. [198] The 'Niger Delta Environmental Survey' (NDES) initiated by Shell, concluded in its report that many operators hide behind sabotage in order to prevent repairs in case of oil spills, dumps, and accidents.[199] In the case *Shell* v. *Enoch* for instance[200], a legal case on damage compensation as a result of oil spills, Shell Nigeria invoked the plea of sabotage, at which the judge contemplated the following:

> "It is clear here that the plaintiffs had shown that there was an explosion at the defendant's manifold and that there was crude oil spillage which was extensive as a result of that damage...There was evidence that no third party caused the explosion and that no one in the community did it."[201]

245. Similarly, in *Shell* v. *Isaiah*, the Nigerian Court of Justice branded Shell Nigeria's plea of sabotage as an 'afterthought'.[202]

246. An example that illustrates how defendants abuse the sabotage plea, is the oil spill near the village of Batan in Delta State, on 20th October 2002.[203] Plaintiffs present video images on the handling of this oil spill by Shell Nigeria.[204] The images are made by The Centre for Social and Corporate Responsibility. The video images on this spill can be described as follows.

247. Five days after the spill in Batan was established, on 25th October 2002 a Joint Investigation Team (JIT) arrives (consisting of representatives of the Nigerian Directorate for Petroleum Materials, the police, employees of Shell Nigeria, representatives of the Batan community, and divers) (see more in general on the JIT, below section 261 and 262) at the location of the oil spill

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[197] Transcript Basil Omiyi for shareholders meeting Shell plc 15th May 2006 (**production A.13**).

[198] *SPDC v. Chief Graham Otoko and five others* [1990] 6 Nigerian Weekly Law Reports (NWLR) (Part 159), p. 693 (**production J.5**).

[199] J.G. Frynas, 'Political instability and Businesses: focus on Shell in Nigeria', *Third World Quarterly* (Volume 19, issue 3rd September 1998)

[200] SPDC v. Chief Caiphas Enoch and two others [1992] 8 NWLR (Part 259) (**production J.6**), p. 335.

[201] *SPDC v.* Chief Caiphas Enoch and two others [1992] 8 NWLR (Part 259), p. 335, Jacks, JCA at 341 (**production J.6**).

[202] *SPDC v. Isaiah* [1997] 6 NWLR (Part. 508) (**production J.7**), p. 236.

[203] SPDC operates sinds the Sixties in these communities. Their 28 inch (71.12 cm) pipeline runs along this waterway and leads to the Fokados Terminal where the oil is exported. Pumping stations pump the oil through pipelines directly into this trunk line that is located 12 feet (3.66 m) below sea level. This is the location of the spill. 12 feet below the 8 inch (20.32 cm) connects to the 28 inch trunk line, from which oil and gas gush." See: video Batan (**production F.3**).

[204] Video Batan (**production F.3**).

in order to investigate the cause thereof. The investigation by the JIT shows that the bolts and nuts of the pipeline are loose and that the cause of the spill is therefore so-called 'equipment failure', the failure of the material.

248. However, three days after the oil spill but two days before the investigation by the JIT, on 23rd October 2002, Shell Nigeria writes a letter to the head governor of Delta State, in which it informs him on the saboteurs of the Batan oil spill. The letter confirms the point of view of plaintiffs that Shell Nigeria, even *before* the JIT had inspected the spill and in violation with the truth, invokes the plea of sabotage in order to evade liability.

249. Immediately after the JIT investigation on the Batan oil spill, disagreement occurs among the participants of the JIT on the formulation and signing of the JIT report. Both Shell Nigeria and the Nigerian authorities try to persuade the other members of the JIT to refrain from stating the actual cause of the spill in the JIT report. Finally, the actual cause of the spill – 'equipment failure' – is still stated in the JIT report.

250. However, the next day, Saturday 26th October 2002, Shell Nigeria writes the following messages to the Batan community:

> "Our representatives have narrated to us the gruesome ordeal, duress and manhandling to which they were subjected by people of your community, including some members of its executive committee, in the process of carrying out the Joint Investigation and writing the Joint Investigation Report. We strongly suspect that the conduct of your said people was a diversionary tactic to cover up the nefarious acts of some elements in your community who may have caused the oil spillage by tampering with the subject manifold. Consequently, Shell hereby repudiates the purported Joint Investigation Report of the above subject named incident in which our representatives were coerced into taking the cause of the incident as being production equipment failure, instead of an act of third party interference, sabotage, which it clearly was. The inspection report of the diver who inspected the leak point, leaves no reasonable person in doubt that the leakage occurred due to unauthorised tampering, by unknown persons, with two nuts and bolts on the flange of the manifold. In fact, we have reasonable ground to suspect that some members of your community might be the culprits, and this suspicion has been reported to the appropriate authorities for the necessary action. We trust that you will prevail on the members of your community to respect the rule of law in order to prevent further strains on our usually cordial relationship."

251. In this way, Shell Nigeria still twists the truth and brands the JIT report as if it was the result of pressure by local residents.

252. On 17th November 2002, almost a month after the oil spill near Batan, Shell's Director for External Relationships states the following in an interview with the Sunday Vanguard Newspaper:

> "The Batan oil spill is a clear case of a criminal act, there is no doubt about that. Nobody will receive a Kobo compensation for damages. Shell will clean-up the spill, though."[205]

253. The Batan oil spill is one of the many examples where Shell pretends that the spills would be the (exclusive) result of the sabotage. The oil spill near Oruma in June 2005 of which plaintiffs have become the victim, is another example. Plaintiffs conclude that defendants by default invoke the plea of sabotage, regardless and even in violation of the actual events.

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[205] Frank Efeduma in Sunday Vanguard Newspaper, 17th November 2002, pp. 39-41 (**production A.11**).

16.1.2 Sabotage factually unlikely

254. The proposition of defendants that the spill under consideration near Oruma on 26th June 2005 has been deliberately caused by third parties is furthermore factually implausible.

255. The pipeline near Oruma on the location of the spill is situated around three metres below the ground.[206] The video images mentioned above[207] show that the heads of the persons who are standing *on* the pipeline do not reach the rim of the pitch that was dug.

256. In order to drill a hole in the pipeline, a saboteur would have had to dig an enormous pitch in order to reach the bottom part of the pipeline, where the leakage was discovered by the JIT. It is implausible that this has happened. Furthermore, drilling in hard steel under an angle that would cause the hole at an 8:30 o'clock position is practically impossible.

257. Subsequently, the saboteur should have climbed very quickly out of the pitch that he/she dug, in order to very speedily close off the pitch, in order to prevent it from being completely filled with oil.

258. Should an alleged saboteur have had the objective to tap off oil, and should he have succeeded at that in the previously described circumstances, then he would not have benefited from this either: the nearest road is two kilometres from the location of the spill, and the swampy land could only be reached by foot due to the rainy season, and even then with difficultly. At any other location in the direct vicinity, the assumed saboteur would have reached the objective of his sabotage more effectively.

259. Also in view of these facts and circumstances, the proposition of defendants that it concerned sabotage in Oruma is untenable.

16.1.3 Joint investigation report is no proof of sabotage

260. The Joint Investigation Report[208] that was presented by defendants to plaintiffs, on which defendants base their proposition of sabotage, cannot support this proposition since the report was not formulated in the required manner.[209]

261. Nigerian regulations[210] require that after an oil spill research be carried out on the cause thereof as well as the damage. In this research, representatives of Shell Nigeria, the Department of Petroleum Resources (DPR) and representatives of the local community participate.[211] This research is specified with the term Joint Investigation Visit (JIV); the participants are specified as Joint Investigation Team (JIT).

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[206] And not one metre, as defendants state. See: video Oruma (**production A.11**).

[207] Source: video Oruma (**production A.11**), around 3:55 min.

[208] Field Joint Investigation Report Form – Part A and Part B, attachment letter SPDC to plaintiffs 20 June 2008 (**productions A.4 and A.5**).

[209] Of all documents that plaintiffs have requested from defendants, the Joint Investigation Team report is one of the only two documents that defendants have provided. The report was requested by letter of plaintiffs of 8th May 2008 sub h. and provided as appendix to the letter of Shell Nigeria of 20th June 2008.

[210] On the relevance of Nigerian law with regard to oil spills, see applicable law in section 4).

[211] EGASPIN, section 7.1.1.1, p. 59: 'In addition, a Joint Spillage Investigation (JSI) team, comprising of the Licencee/Operator/Spiller, Community and DPR shall be constituted, within 24 hours, of spillage notification to investigate the spillage.' (**production G.1**).

262. The JIT should unanimously establish what is the cause of the spill. Only if there is unanimity, the report is valid. Basil Omiyi, country chair for Nigeria, summarized it as follows:

> [T]he joint investigation team consists of (...) the communities, DPR, environmental protection agencies of both the state and federal... and... and the police and so on. The first thing you do is visit the site, determine the extent of the spill, and you all agree on the cause of the spill. And the agreement must be unanimous. ... If it is not unanimous then ... compensation will be paid.[212]

263. The JIT that visited Oruma on 7th July 2005 consisted of Shell Nigeria, state and federal Nigerian authorities (no representative of the DPR) and members of the Oruma community.[213] This JIT did however not reach agreement on the cause of the spill. The Field Joint Investigation Report is therefore not signed by representatives of the Department of Petroleum Resources nor by the representatives of the Oruma community.

264. This means that, based on the absence of unanimity, the JIT report was not established in accordance with the applicable Nigerian regulations.

265. Plaintiffs furthermore point out that during the investigation by the JIT in Oruma, on 7th July 2005, the leader of the JIT, Chris Afunwa, has indicated that Shell Nigeria had taken samples from the pipeline at the location of the spill and that these would be brought to Port Harcourt for analytical research, in order to establish the cause of the spill. The representatives of Oruma were promised that they would be informed on the results of this research by the next day. Therefore, although the final cause of the spill still had to be established, a number of participants in the JIT (not being the representatives of Oruma) has signed the so-called Joint Investigation report that very same day, therefore *before* the results of this sample research were known. The results of this research have never been published to the Oruma community or to plaintiffs.

> Plaintiffs have repeatedly requested the outcome of this research, lastly by notice of liability of 8th May 2008, but have never received this.[214]

266. Shell Nigeria has verbally informed the Oruma community that the fact that the spill was the result of sabotage would appear from pictures and video images that Shell Nigeria has in its possession.

> In their notice of liability, plaintiffs have requested those images but have not received a reaction on that.[215]

267. The report therefore has no power of persuasiveness and is no more than a document formulated by Shell Nigeria in line with its interests. The interest of defendants to state that a spill is caused by sabotage is based on the fact that, in that way, they are of the opinion that they are not liable for the spill and are not obliged to compensate the damage suffered by the residents as a result of the spill.

268. The fact that defendants try to fill in the JIT report in a way that coincides with the outcome that is desirable for them, namely that the spill was caused by sabotage, is also supported by the aforementioned report on the spill near Batan. This attempt to manipulate the JIT report indicates

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[212] Transcript Basil Omiyi, shareholders meeting Shell plc 15th May 2006 (**production A.13**).

[213] See: Visitors Book Oruma (**production A.7**); see also: Field Joint Investigation Report Form – Part A and Part B, attachment letter SPDC to plaintiffs 20th June 2008.

[214] Notice of liability of 8th May 2008 (**production A.1**), sub g.

[215] Notice of liability of 8th May 2008 (**production A.1**), sub i.

that JIT reports, especially when the local residents have not signed them, cannot serve as evidence.

269. For the sake of completeness, it is stated that the form 'Clean-up and remediation certification format' does not provide (additional) persuasiveness with regard to the cause of the spill. After all, the 'clean-up' form does not have the objective to establish the cause of the spill, but only to provide data on the way in which the environment has been cleaned up after an oil spill.

270. The JIT report provided by defendants is also incorrect with regard to its contents. Plaintiffs notice the following on that.

16.1.4 Contents of Joint Investigation report incorrect

271. The point of view of defendants that the oil spill would be the result of sabotage, which point of view is based on the contents of the Joint Investigation report, is incorrect.[216] The 'observations' that are listed in the JIT report are not credible since they *could* not have been established by the JIT participants.

272. In their letters from 20th June 2008, defendants state that the following observations were made by the JIT in Oruma on 7th July 2005:

> (i) around the area of the spill were traces of earlier digging and the soil was looser than in the area directly surrounding it;
>
> (ii) the coating layer on the pipeline stuck sufficiently to it; around the hole in the pipeline from which oil was leaked, the coating layer was however damaged, apparently as a result of third party actions;
>
> (iii) the outer surface of the pipeline was smooth and did not show signs of corrosions or dents;
>
> (iv) the hole from which the oil leaked was round with even rims and measured 8 mm in diameter; the hole was positioned at the 8:30 o'clock location and coincided with damage as a result of a drill.

273. The video images that were made during the visit of the JIT to Oruma on 7th July 2005[217] show that these supposed observations are not correct.

274. Sub (i) The video shows that the soil around the oil leakage was not dug over. The men that dig the pitch in order to reach the pipeline, must exert a lot of power in order to dig their spades into the ground. The clay soil is solid and untouched. Also in a later image in the video in which the – by then already dug pitch – can be seen, the wall of the ditch still exists of solid clay ground.

275. Sub (ii) The video shows that the coating layer around the hole in the pipeline was undamaged. Only on the location where the hole was, damage could be noticed. On the video, a person presses some centimetres away from the closed-off hole on the – undamaged – coating layer. At that, the coating layer gives in; this indicates that the wall of the pipeline is damaged. In as far as damage was done to the coating layer, this is probably the result of digging loose the soil around the pipeline or attempts to close off the hole in the pipeline with a wooden plug.

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[216] For that matter, the cause of the spill is not stated in the JIT report itself; therefore, it is not stated in this report that it concerns sabotage.

[217] Video Oruma (**production A.7**).

276. Sub (iii) It is not relevant whether the surface of the pipeline was smooth: corrosion in pipelines can namely also occur at one single spot, without anything to be seen around there on the outside. The assertion that pipelines do not corrode when it concerns separate holes, as in Oruma, is not correct. Pipeline engineers describe such failure as pinhole leaks, that can occur as a result of separate and local microbiological corrosion, on top of the general corrosion that all pipelines show. The local character of these pinhole leaks can often be attributed to design and welding failures as well as bacterial activity. Each of these causes can result in separate cracks. In 2000, Shell Nigeria even ordered a research to be carried out on so-called "Sulphate Reducing Bacteria Corrosion of the 20 x 37 km Kolo Creek Rumuekpe Trunk Line", carried out by engineer Oluseye Olugbenga. Therefore, drilling is not the only possible cause of a separate hole in a pipeline.

277. Sub (iv). Video images of the – closed-off – hole in the pipeline show that it concerns no round hole with even rims; nothing indicates that this concerns a drilled hole.

278. Apart from that, plaintiffs point out that the JIT could not have established on 7th July 2005 that sabotage was concerned *at all*. In the first place, the continuous oil flow from the spill has considerably hindered, if not made impossible, the possibilities of the JIT to establish the cause of the spill.

279. In the second place, plaintiffs conclude that Shell Nigeria could not have inspected the spill before it had been closed off. The hole from which the oil leaked, was namely located underneath the pipeline. Because of the oil that was flowing from the pipeline, the hole was not visible to the JIT participants.

280. In the third place, because of the closing off of the hole with a sledgehammer and a wooden plug as well as the huge amount of oil around the pipeline, it was still after the closing off of the hole that it was difficult if not impossible to establish the scope and nature of the leakage. Furthermore, when the plug was inserted, the hole was missed a number of times, because of which damage to the coating layer and/or pipeline occurred.

281. In view of this factual situation on location, it is remarkable that the JIT report as formulated by Shell Nigeria contains so much detailed information on the origin and nature of the hole in the pipeline. The facts and circumstances during the visit of the JIT to Oruma on 7th July 2005 show that no value can be attributed to the Joint Investigation Report mentioned by defendants for the substantiation of the proposition that it involved sabotage.

282. As a result of this, plaintiffs offer to further substantiate their propositions by calling witnesses to the stand who were present at the JIT.

16.1.5 Conclusion: no sabotage

283. The proposition of the defendants that the oil spill in Oruma in June 2005 was deliberately caused by third parties is insufficiently substantiated and for that matter factually incorrect. This proposition cannot be supported by the Joint Investigation report, now it has turned out that this report was established in an invalid way. The proposition is furthermore at odds with the video images that were made during the visit of the JIT to Oruma on 7th July 2005 on the closing of the leakage, and that have been presented by plaintiffs. For that matter, the proposition is factually unlikely as well. The proposition therefore has to be rejected/dismissed.

16.1.6 Alternative: insufficient protection of the pipeline

284. The plea of defendants that the oil spill near Oruma in 2005 would intentionally have been caused by third parties is not alone insufficiently substantiated and incorrect, but could also not be successful since possible sabotage can only have taken place as a result of negligent acts by Shell Nigeria. Shell Nigeria namely did not comply with the specific standard of due care that rests on the company, which is to sufficiently protect the oil pipeline near Oruma where the Spill occurred against interference by third parties. Furthermore, Shell plc has failed its duties with regard to the obligation that rests on the company to direct the activities of Shell Nigeria in such a way that the oil Pipelines were sufficiently protected against interference by third parties.

285. These obligations of Shell Nigeria and Shell plc apply especially since sabotage and vandalism often occur in Nigeria. In total, the oil extraction in Nigeria leaks around 8,000 to 15,000 tonnes of oil per annum.[218] Defendants consistently state in their annual reports and interviews that sabotage is the main cause of the many oil spills in Nigeria.[219] Because of the frequency of this type of cases, it pays off to take precautionary measures against the sabotage of oil pipelines, especially since this sabotage results in serious damage to human beings and the environment. Shell Nigeria is therefore obliged to take measures against sabotage on the basis of the applicable duty of care as results from socially responsible behaviour (there is no reason to assume that it is the victims of the oil pollution that are responsible for sabotage, and defendants also do not state so). The obligation of Shell Nigeria to take precautionary measures against sabotage does not diminish the fact that these measures will and cannot be able to completely prevent sabotage. By not taking any action at all against cases of sabotage, Shell Nigeria has acted negligently towards the residents of the Niger Delta as well as towards plaintiffs.

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[218] Shell Nigeria, 'Shell Annual Report 2003: People and the Environment', (**production C.1**) p. 7: "In 2003, there were 221 such incidents in which a total of some 9,900 barrels of oil were spilled"; SPDC, 'Shell Annual Report 2004: People and the Environment', (**production C.2**) p. 16: "A reduction of 19 per cent was recorded in the total volume of oil spilled in 2004 (from 9,900 barrels in 2003 to 8,317 barrels in 2004)"; 'Shell Nigeria Annual Report 2005: People and the Environment', (**production C.3**) p. 15. We estimate that there was an increase of 43 per cent in the total volume of oil spilled in 2005 – from 8,317 barrels (1,124 tonnes) in 2004 to 11,921 barrels (1,611 tonnes) in 2005); 'Shell Nigeria Annual Report 2006: People and the Environment', (**production C.4**) p. 15: "We estimate that there was a significant increase in the total volume of oil spilled in 2006. Two incidents – leaks at the Nembe Creek Trunk Line (NCTL) at Krakrama (estimated to be 7,000 barrels) and the Nembe-IV (estimated to be 2,500 barrels) – contributed significantly to the volume of controllable spills.'

[219] Shell Nigeria Annual Report 2003, (**production C.1**) p. 8: "Sadly, the remaining 141 (about two-thirds) were caused by wilful damage to facilities (sabotage) that accounted for 68 per cent of the total volume of oil spilled." Shell Nigeria Annual Report 2004, (**production C.2**) p. 16: "Significantly, only three per cent of the volume of oil spilled in 2004 resulted from controllable incidents. The remaining 97 per cent was caused by wilful damage to facilities (sabotage)." Shell Nigeria Annual Report 2005, (**production C.3**) p. 15: "The total number of oil spill incidents in 2005 for Shell Nigeria was 224 (236 in 2004) comprising 138 sabotage and 86 controllable incidents (i.e. those resulting from equipment failure, corrosion or human error). [...] Oil spills resulting from sabotage continued to be a significant challenge and a cause for concern, especially as over half of these incidents (73) occurred along our major pipelines and manifolds." Shell Nigeria Annual Report 2006, (**production C.4**) p. 14: "In 2006, we recorded 241 oil spill incidents in Shell Nigeria, compared to 224 incidents in 2005. Of this number, sabotage accounted for 165 (69 per cent), while 50 (20 per cent) were controllable incidents (resulting from equipment failure, corrosion or human error). The remaining 26 incidents are yet to be classified or quantified due to access restrictions either by communities or the current insecurity in the Niger delta." WAC Global Services 2003, Peace and Security in the Nigerdelta: Working Paper for SPDC (Conflict Expert Group Baseline Report, December 2003), (**production C.7**) p. 16: "SCIN (short for Shell Companies in Nigeria) staff claim that communities frequently cause spills [...]." Sunday Tribune Nigeria, 'Shell is in Nigera to stay', interview with SPDC's Managing Director, Mutiu Sunmonu, on 10th August 2008: "It is well known that more than two thirds of oil spills which occurred last year, were due to sabotage."

286. Shell Nigeria could have realised an adequate protection of the oil pipeline by means of a so called *enhanced pipeline surveillance.*[220] For such surveillance, various methods are available, such as stricter control from the air, optical fibre sensors along the pipeline, or sensor with which from a remote distance sounds (for example drilling) can be recorded. With such sensors, 40 kilometres of pipeline can be monitored. Defendants do not have an adequate system of pipeline observation in place in Nigeria.

287. Plaintiffs conclude that - even apart from the fact that it is implausible that the spill was caused by third parties - defendants can by no means invoke this plea since they wrongfully took insufficient precautionary measures in order to protect the oil pipeline against interference by third parties. The large number of oil spills, which according to defendants is mainly to be attributed to sabotage, and the danger of oil for human beings and the environment, oblige defendants to take sufficient precautionary measures against sabotage. Defendants did not take any precautionary measures against sabotage, or at least these were insufficient.

16.1.7 Sabotage irrelevant for failing to react to spill and cleaning up damage

288. Finally, this plea of defendants that the spill would have been caused by sabotage, does not affect the reproach of plaintiffs that defendants have reacted too late and inadequately to the spill and furthermore have cleaned up the leaked oil too late and insufficiently.

289. Shell Nigeria did not take measures immediately after the discovery of the oil spill near Oruma in order to prevent that the oil would spread or would mix with the groundwater or the water in the creek. After having been informed on 26th June 2005 on the spill, Shell Nigeria only reacted on 29th June 2005. Shell Nigeria did not suspend the oil flow through the pipeline on 26th June 2005 or at any later date (see for this paragraph 107).

290. The obligation of Shell Nigeria as operator of the pipeline to clean up the environment after an oil spill is not related to the cause of said spill (see section 9.4). In Oruma, Shell Nigeria has cleaned up the leaked oil too late and inadequately. The clean-up operation in Nigeria only started in November 2005 and was completed in June 2006. This means, that the clean-up operation both started far too late and has lasted too long. Apart from that, the clean-up operation did not bring the soil back in its original condition as much as possible, and the clean-up operation caused, because of burning the oil, extra damage to the environment.

291. These reproaches of negligent acts from plaintiffs are not connected to the cause of this spill.

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[220] See: R. Steiner, 'Double Standards? International Standards to Prevent and Control Pipeline Oil Spills, Compared with Shell Practices in Nigeria', University of Alaska (November 2008) (**production B.1**), p. 31: "A crucial component of pipeline sabotage prevention system is enhanced pipeline surveillance. Pipeline surveillance regimes can include remote closed-circuit television cameras, fibre-optic sensor technology along the entire length of the pipeline, more frequent aerial patrols, remote listening devices (e.g. hydrophones, etc.) to detect drilling, digging, tapping, engine noise, explosions; satellite imaging; and so forth. Additional technologies that should be considered for Nigeria include the Westminster DDS-J Diver Detection Sonar system that scans a distance underwater of 1 km / node, 25 m on each side and 50 m vertically, has hydrophones to detect any disturbance, and sounds an alarm when a disturbance occurs in the scanned area. As well, fibre-optic cable sensors can detect digging, tapping, or other disturbance, with one sensor capable of scanning a 40 km pipeline segment. Once an enhanced surveillance system is implemented, a robust public information campaign to inform local residents that enhanced security is in place will act as a deterrent to sabotage and illegal bunkering."

16.2 Access to spill

16.2.1 Incorrect propositions of defendants with regard to access

292. Defendants state in their letters to plaintiffs that Shell Nigeria has already contacted the local residents on 26th June, the day after the oil spill near Oruma was established, and that access to the location of the spill was refused.

> [D]iscussions [were initiated] with the Oruma community on the issue of access to the spill site. Regrettably, [Shell Nigeria] was not granted access to the spill site by the Oruma community until the 7th of July 2005 when the Joint Investigation Team (JIT) visited the site".[221]

293. This point of view of defendants is incorrect and can for that matter not diminish the liability of defendants. Plaintiffs will below answer the question whether and, if so, in how far the delayed access of Shell Nigeria to the location of the spill is rightfully used as a plea against the claims of plaintiffs. Currently, we will further elaborate on the actual events with regard to the oil spill near Oruma.

294. On 26th June 2005, residents of Oruma in the area of the Oruma community encountered employees of Shell Nigeria. By being present, they violated to Nigerian custom of the right of access. According to traditional custom, outsiders should ask permission from the *paramount ruler* (village chief) before they are granted access to the land and the village of the local residents. Asking permission is a formality: the permission is always granted if a small gift for the village chief is brought along.[222] Defendants should be aware of these local customs.

295. As the village residents encountered the employees of Shell Nigeria, they escorted them to the village chief in order to enable them to yet ask for permission. However, at the time the employees of Shell Nigeria did not bring a traditional access gift along. Shell Nigeria left with the notification to return in order to still comply with the condition for access. Only three days later, on 29th June 2005, with the mediation of the Ministry of Environment of Bayelsa State as requested by the Oruma community, Shell Nigeria returned in order to yet inspect the oil spill.

296. Together with village residents of Oruma, Shell Nigeria then inspected the location of the spill. However, Shell Nigeria did not bring materials in order to plug the spill or to limit the damage as a result of the spill, and left again. Subsequently, on the initiative of the community, on 5th July 2005 a meeting took place at which it was agreed that Shell Nigeria would start with plugging the spill on 6th July, which Shell Nigeria only did on 7th July 2005. During this whole period of 12 days, oil flew from the hole in the pipeline.

297. A matter that is separated from the local customs in order to gain access to the villages and surroundings thereof in the Niger Delta concerns the delayed access as a result of the disturbed relationship between Shell Nigeria and local communities. The WAC report that was formulated by assignment of Shell states on this:

> [Shell Nigeria] staff and contractors have problems accessing sites for investigation or clean up.[223]

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[221] Letter SPDC to plaintiffs 20 June 2008.

[222] For example a small amount of (alcoholic) beverage, or a sum of money of around 1 dollar.

[223] WAC Global Services, 'Peace and Security in the Nigerdelta: Conflict Expert Group Baseline Report' (**production C.7**), p. 13.

298. An important cause of this access problem is that Shell Nigeria has outstanding promises towards the local communities and does not honour these promises. The WAC report indicates the problem as "resource control conflicts" and the cause as "unfulfilled promised and non-completion of tangible projects". The WAC report advises the following:

> 'Create a database of all outstanding promises that have been made in the past. Verify if these promises are still valid and consequently be seen to be addressing the old promises in order to restore trust.[224]

299. If unfulfilled promises are concerned, Shell Nigeria must therefore expect this access problem and should tune its reaction on oil spills to that.

300. Also in the case of Oruma, it was to be expected that Shell Nigeria would not be granted access to the spill without permission.[225] The main cause of the delayed access after 29th June 2005 was here as well that previously made promises had not been honoured, especially the construction of a 1.5 kilometre road for the benefit of the Oruma community.[226] The Oruma community has pointed out to Shell that this road would also be of the greatest importance for them, since during the rainy season the access to the spill with heavy material would otherwise be very difficult. After Shell Nigeria had yet again promised to start constructing the promised road within a specific period of time, it was granted access to the spill.[227]

301. With regard to the construction of this road it is important to establish that Shell Nigeria has only chosen to gain access via Oruma to the oil spill because of its own interests. After all, Shell Nigeria could also have chosen to access from the public road before the village of Otuasega along the pipeline to the location of the spill. The fact that Shell Nigeria did not choose for this option (maybe because the rainy season complicated this way in reaching the spill), cannot be held against plaintiffs.

302. The propositions of defendants therefore suggest incorrectly that Shell Nigeria was refused access to the oil spill by the Oruma community.

16.2.2 Access problems do not affect the liability of plaintiffs

303. For that matter, the propositions of defendants with regard to the delayed access to the location of the oil spill cannot be of any avail as a plea against the claims of plaintiffs. Plaintiffs reproach Shell Nigeria that it did not prevent the spill, reacted too late and inadequately to the spill, and has cleaned up the damage too late and insufficiently. The alleged delayed access does not affect these claims. To that means, plaintiffs point out the following.

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[224] WAC Global Services, 'Peace and Security in the Nigerdelta: Conflict Expert Group Baseline Report' (**production C.7**), pp. 52, 89.

[225] Visitors Book Oruma Community: "Ogoriba. W.B. & crew – inspection" (**production A.7**).

[226] See Visitors Book Oruma Community "Access negotiation to spill site for clamping" (**production A.7**). There is a pattern at oil spills in Nigeria, at which Shell makes promises to the local community, but refuses to live up to those promises after the spill has been repaired. In this case Shell tried to gain access to the leaking pipeline without contacting the residents of Oruma. However, the residents first demanded promises on the implementation of an earlier agreement on the construction of the road.

[227] See Agreement reached between representatives of the Oruma Community in Ogbia Local Government Area of Bayelsa state and [Shell Nigeria] at a meeting held on 5th July 2005 in Yenagoa at the instance of the Bayelsa State Government (**production A.8**). The community asks something in return as compensation for the oil that is extracted from their area.

304. Defendants are firstly liable for the occurrence of the oil spill because of overdue maintenance on the pipeline near Oruma. Shell Nigeria did not timely replace the oil pipeline and did not inspect it timely and adequately. Shell Nigeria was never denied access for such activities.

305. Secondly, defendants are liable for the fact that Shell Nigeria did not suspend the oil flow through the pipeline immediately when it was informed of the spill, namely on 26th June 2005. For suspending the oil flow through the pipeline defendant did not need access to the location of the spill. The issue of access, of which it was to be expected that it would present itself, would in that case not have had any influence on the scope of the spill.

306. Thirdly, defendants are liable since Shell Nigeria did clean up the leaked oil too late and insufficiently. For the clean-up operation of the oil, access to the location did not pose a problem and defendants also do not state that. This defence of the defendant can therefore not benefit them with regard to this.

307. Fourthly, defendants indicate the period during which the access to the spill was discussed, is incorrectly stated. Defendants suggest that this period was between the establishment of the Spill until 7th July 2005. In fact, it concerns the period between 29th June 2005 to 5th July 2005.

308. The negotiations on access to the Spill only started on 29th June 2005, three days after the spill was reported by the local residents to Shell Nigeria. During those three days, between 26th and 29th June, Shell Nigeria did not undertake a serious attempt to gain access and/or take measures in order to stop or limit the spill. On the contrary, only after the exhortation by the Ministry of Environment of Bayelsa State to do so, Shell Nigeria inspected the spill on the 29th of June. Subsequently, Shell Nigeria already had access to the spill on 6 July 2005. In the 'Agreement reached between representatives of the Oruma Community in Ogbia Local Government Area of Bayelsa state and [Shell Nigeria] at a meeting held on 5thJuly 2005 in Yenagoa at the instance of the Bayelsa State Government' it was agreed that repair of the pipeline would start on 6th July 2005 as of 7:00 AM.[228]

309. The fact that Shell Nigeria subsequently has chosen to arrive in Oruma not until the afternoon of 6th July 2005, in order to subsequently realise that it was meanwhile too late to start with activities and only to return to the location of the spill on 7th July, is completely at its own account. This means that the issue of access to the spill could only have delayed the repair thereof with a maximum of six days. The total spill lasted for twelve days. The plea of access can therefore not benefit Shell Nigeria with regard to its inactivity during the other six days.

310. Fifthly, Shell Nigeria has created its own problems by not honouring pledges made earlier on. Already long before the spill, Shell Nigeria made the promise to construct a road in Oruma that, for that matter, would also be in the interest of Shell. By not living up to this promise, defendants should have known, especially in view of the general context in the Niger Delta that is characterised by an extremely difficult relationship between Shell Nigeria and the local communities, that this could constitute an obstacle in the relationship between Shell Nigeria and the residents of Oruma. By not living up to its promises, Shell Nigeria should have known that it would not be granted access to the village and the land just like that.

311. Plaintiffs conclude that the plea of defendants with regard to delayed access cannot explain the spill, nor the scope of the spill, nor the too late and incautious clean-up procedure of the polluted environment, nor that it can eliminate their culpability. Alternatively, plaintiffs take the point of view that the refused access does not eliminate the causal connection between the negligent acts

[228] See Agreement (**production A.8**).

by defendants and the damage, but only decreases the scope of the obligation to reimburse for defendants, for damage that occurred between 29th June and 6th July 2005.

16.3 Joint Venture agreement does not diminish liability of defendants

312. Defendants have pointed out in general that Shell Nigeria operates as 'operator' of a Joint Venture (JV) between Shell, AGIP, ELF and NNPC (Nigerian National Petroleum Corporation). They state that the Joint Operating Agreement (JOA) between the JV partners as well as the limitations imposed by the Operating Committee binds Shell Nigeria.[229]

313. Furthermore, according to defendants, the NNPC, the Nigerian state enterprise with a 55% stake in the JV, would have the final competence in as far as all important decisions of the JV are concerned.[230] Defendants have not indicated how these propositions – in as far as they are correct – could diminish their liability, but it appears that defendants wish to state that the damage as a result of the spill near Oruma cannot be held against defendants, since defendants are limited in their actions because of agreement within the JV. This point of view is incorrect.

> Plaintiffs have requested a copy of the JOA as well as other documents that show which parties are involved in this JV.[231] Defendants namely state in all their reports that Shell is part of the JV, without indicating which legal person is concerned, and that Shell Nigeria the operator is of the JV. Plaintiffs assume – now that defendants did not provide the JOA - that not Shell Nigeria but another Shell entity takes part in the JV in Nigeria, of which Shell Nigeria is the operator.

314. Firstly, defendants have not substantiated their propositions, which are of a general nature. Secondly, according to its own standards Shell plc has 'operational control' over the JV, from which liability arises. Thirdly, defendants should have withdrawn from specific operations of the JV or from the JV, if indeed the JV agreement hindered them to prevent the structural and foreseeable damage caused by the oil operations of the JV. Fourthly, defendants are by all means liable, since JV partners are jointly and severally liable. These issues will be further elaborated below.

16.3.1 Unfounded propositions

315. The plea of defendants is insufficiently substantiated.

316. Firstly, defendants state in a general context that they operate in Nigeria within a JV with AGIP, ELF and NNPC. This single proposition is not sufficient to remove the liability of defendants. Plaintiffs point at it that not *all* operations of defendants in Nigeria are as a rule carried out within the framework of the JV. In addition, within the JV, Shell Nigeria does not by definition carry out all operations as a joint operation of the JV.[232] In none of the documents provided by Shell Nigeria with regard to the oil Spill near Oruma a reference to the JV is made. In addition, the fact

[229] Letter from defendant Shell Nigeria 20th June 2008 (**production A.3**).

[230] Letter from defendant Shell Nigeria 20th June 2008 (**production A.3**).

[231] Notice of liability of 8th May 2008 (**production A.1**), sub x.

[232] B. Taverne, Petroleum, Industry and Government, An introduction to Petroleum Regulation, Economics an Government Policies (Kluwer Law International 1999) (**production H.7**), p. 370: "Not all operations falling under the authorisation are carried out as joint operations for the joint account of all participants. Departures from the joint venture principle are allowed".

that Shell Nigeria provides these documents to plaintiffs although defendants claim that the documents of the JV are subject to a pledge of secrecy, indicates that the documents on the spill near Oruma do not resort under the JV. This means that it is up to defendants to justifiably state and to prove that the oil spill near Oruma in 2005 and/or the prevention and/or the control and/or the clean up thereof falls under the JV. In the absence of such proof, plaintiffs assume that the oil spill near Oruma resorts under the exclusive responsibility of defendants. Already on that basis, the plea of defendants cannot be successful.

317. Secondly, defendants have never indicated let alone substantiated what the limitations of Shell Nigeria as operator of the JV exactly contain. The point of view of defendants is not new and keeps coming back – just like under the sabotage argument discussed in section 16.1 – when defendants are addressed on the countless oil spills in Nigeria. However, defendants have never indicated what the limitations of the JV actually consist of and on which basis they apply. The Nigerian authorities that hold the majority stake in the JV also do not indicate anywhere how the competence of decision-making of the NNPC is constructed. Therefore, a substantiation of this point of view becomes even more necessary.

318. This all applies even more since plaintiffs in their notice of liability have explicitly requested information with regard to the JV and the decisions that are taken therein.

> By letter of 8th May 2008 plaintiffs have requested the Joint Operating Agreement with regard to the Joint Venture that engages in the exploitation of the oil pipeline near Oruma and the Memorandum of Understanding, as well as any other document from which appears (i) which parties are involved in the Joint Venture and (ii) how the control, competences, responsibilities, and tasks of the Joint Venture partners are arranged; the annual policy plans ('work programmes'), and maintenance plans and the accompanying budgets; reports on the discussions of the executive body ('committee') of the Joint Venture in which the aforementioned proposals are discussed and of meetings during which is decided on these proposals, and in which those were approved, accepted or rejected.[233]
>
> Defendants have refused to provide these data, referring to the pledge of secrecy within the JV.[234] In as far as the operations near Oruma indeed resort under the JV, the provision of documents with regard to the spill already shows that this pledge of secrecy is not absolute.[235]

319. It could have been deduced from the documents requested by plaintiffs how the control, competences, responsibilities, and tasks of the Joint Venture partners are arranged.

320. Defendants have refused to provide these documents. Their dispute of liability based on limitations of competences as a result from the JV must therefore be passed as insufficiently substantiated.

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[233] Notice of liability of 8th May 2008 (**production A.1**), sub x, y, and z.

[234] Letter from defendant Shell Nigeria 20th June 2008 (**production A.3**).

[235] See attachment to letter from Shell Nigeria: Field Joint Investigation Report Form - Part B, (**production A.5**). This states that this report is 'confidential'. See attachment to letter from Shell Nigeria: Clean-up and Remediation Certification Format (**production A.6**).

16.3.2 Shell Nigeria is operator of the Joint Venture

321. The reference by defendants to the JV in which Shell participates in Nigeria can furthermore not be successful since Shell Nigeria is the 'operator' of the JV and in that capacity has far-reaching obligations and responsibilities concerning the oil operations of the JV. Apart from that, the fact that Shell Nigeria is the 'operator' of the JV means that – according to the own point of view of Shell plc – the JV resorts under the 'operational control' of Shell, and should therefore comply with the Shell Group policy and the Shell standards. Plaintiffs elaborate on this as follows.

322. Shell Nigeria is the operator of the JV in which it carries out its oil operations in Nigeria. Normally, as operator is appointed "the participant having the largest participating interest".[236] Above (section 8.1 and 8.2) the fact has already been pointed out that Shell Nigeria, among other things in view of its position within the Shell Group and its role as operator, by far exceeds the state enterprise NNPC as far as experience and control are concerned, and that therefore - despite the majority stake of NNPC - Shell Nigeria indeed is the most important participant in the JV.

323. Apart from that, as has been indicated as well, as operator Shell Nigeria has comprehensive and important tasks, such as the care of the proper progress of the oil extraction that it carries out in Nigeria on behalf of the Joint Venture. For example, Shell Nigeria formulates the budgets for the benefit of the Joint Venture, in which it should pay sufficient attention to the prevention and management of oil spills. Shell Nigeria should also convene the Operating Committee of the JV when it deems necessary to do so for the fight against the many oil spills.[237]

324. The consequence of these far-reaching competences and obligations of the operator is that acts and omissions of the operator therefore comes exclusively to its own account. Plaintiffs state that the negligence is the case in this matter, resorts under the exclusive responsibility of Shell Nigeria as operator.

325. In any case, these far-reaching competences and obligations of Shell Nigeria as operator mean that the duty of care of Shell Nigeria not only includes its own behaviour but also the behaviour of the JV with which it maintains close ties. Because of its power as operator as well as its economic power, Shell Nigeria is capable and obliged to largely influence the behaviour of the JV.[238]

326. For the plea of defendants this means that the reference to the JV does not diminish their liability. The JV is not an unresisting entity but is actually managed by Shell Nigeria, and Shell plc has the most important role and the most factual power in that.

327. When maintaining its Group policy, Shell plc assumes that joint ventures, of which a Shell entity is the operator, resort under the so-called 'operational control' of Shell plc.

328. According to Shell, 'Operational control' is namely not dependant on shareholder meetings but on the fact whether the role of operator is performed or not. This means that Shell has operational control in a Joint Venture of which Shell holds less than 50% of the stock, but *is* indeed the operator. The JV in Nigeria of which Shell Nigeria is the operator therefore resorts under the operational control of Shell plc.

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[236] B. Taverne (**production H.7**), p. 368.

[237] B. Taverne (**production H.7**), p. 375: Meetings of the management committee are called by the operator.

[238] C. van Dam, 'Onderneming en Mensenrechten: Zorgplichten van Ondernemingen ter Voorkoming van Betrokkenheid bij Schending van Mensenrechten', (Boom Juridische Uitgevers, The Hague, 2008), (**production H.1**) p. 61.

329. According to Shell, the importance of operational control can especially be found in the fact that such a JV is obliged to adhere to the Shell Group policy and the Shell standards.[239] The HSE policy and the SGBP therefore also apply to the JV of which Shell is a part in Nigeria. The CEO of the business Exploration and Production under which the JV resorts, is responsible for the fact that this policy is implemented by the JV. The JV is also bound to the internal Shell reporting obligations.

Asset Owner	Asset Operator	Who reports HSE data
Shell	Shell	Shell has operational control and reports HSE data to the Group.
Shell	3rd party	Shell does not have operational control and does not report the HSE data.
3rd party	Shell	Shell has operational control and reports HSE data to the Group.
JV where Shell owns < 50% of the shares	JV	Shell does not have operational control and does not report the HSE data.
JV where Shell owns > 50% of the shares	JV	Shell does not have operational control and does not report the HSE data.
JV where Shell owns < 50% of the shares	Shell	Shell has operational control and reports the HSE data to Group.
JV where Shell owns > 50% of the shares	Shell	Shell has operational control and reports the HSE data to Group.

330. It is concluded that Shell has 'operational control' over the joint venture in Nigeria of which it constitutes a part. The joint venture in Nigeria reports in the field of the HSE policy, including the oil spills, via the business Exploration and Production to the Executive Committee of Shell plc. In turn, the business Exploration and Production has to see to it that the joint venture of which Shell Nigeria constitutes a part and is the operator, implements and observes the Shell policy.

331. Defendants can therefore not take the point of view that participation in the Joint Venture results in the fact that their responsibility diminishes, firstly since Shell Nigeria is by far the most important entity within the Joint Venture, and secondly because the Joint Venture reports to Shell plc and applies the Shell policy and Group standards. Defendants are therefore not an unresisting part of the Joint Venture but the most important link in it.

[239] See the scheme in Annex 5 of Shell's HSE Performance Monitoring & Reporting Manual 2007 (http://www.shell.com/static/envirosoc-en/downloads/making_it_happen/our_commitments_and_standards/ our_approach /performance_monitoring_manual.pdf, p. 64)

16.3.3 Withdrawal from the Joint Venture or from projects of the Joint Venture

332. Even if based on the above the plea of defendants would be successful, this can nevertheless not diminish their liability. If defendants indeed, as they state, are limited in their acts and omissions by the JV, which apparently results in the negligent behaviour that is concerned in this case, then it should withdraw from projects of the JV that case damage, or completely withdraw from the JV as such.

333. Withdrawal from the JV is possible at all times and only requires a written statement some months prior to the actual withdrawal.[240]

> Plaintiffs have requested from the defendants information on the possibility to withdraw from the JV.[241] Since the defendants have refused to provide this information, it has to be assumed that Shell Nigeria can indeed discontinue its participation in the Joint Venture.

16.3.4 Joint responsibility of Joint Venture partners

334. Even if defendants, despite what was stated before, could successfully refer to the Joint Venture, then defendants are nevertheless liable for the damage because of the oil spill near Oruma.

335. After all, defendants state that they are part of a Joint Venture. If that point of view appears to be correct, then it still does not exclude the liability of defendants. Plaintiffs point out in this matter that it is decisive that the behaviour of defendants has contributed to the occurrence of damage. The behaviour of defendants has not necessarily been the only cause of the damage. Partners within a joint venture are jointly and severally liable for the damage for which the Joint Venture is liable. That establishes the liability of defendants for the damage as result of the oil spill.

17 DAMAGE

336. The acts and omissions of the defendants have resulted in immaterial and material damage to the side of the plaintiffs Oguru and Efanga.

337. Plaintiffs Oguru and Efanga both had fishponds before the spill of 26th June 2005, with in it a healthy and living fish population. During the spill, oil flew into the fishponds because of which the fish population has died and the fishponds are unusable for the breeding and catching of fish. The planting that was done by them in the area that was affected by the spill has been irreparably damaged as well, also because of a counter-productive clean-up operation. The planting not only provided the fishponds with shadow, it also provided the raw materials for products such as raffia palm, rubber, mangos and mahogany. Because of this, they are affected in their right on livelihood and their source of income has been lost. The damage also consists of a value depreciation of the soil and the fishponds. Apart from that, their living environment is seriously affected. Furthermore, because of the oil pollution of the soil and the drinking water, Oguru and Efanga suffer potential health damage, also when this so far has not manifested itself.

[240] B. Taverne (**production H.7**), p. 379: "As a rule, any participant may withdraw from the joint venture at any time subject only to giving a few months written notice". At their notice of liability of 8th May 2008 plaintiffs have requested defendants to provide documents, which show under which conditions and in which way Shell and Shell Nigeria can discontinue their participation in or exerting the role as operator of the Joint Venture. Defendants did not react on that.

[241] Notice of liability of 8th May 2008 (**production A.1**) *sub cc.*

338. Because of this environmental disaster, Oguru and Efanga therefore suffer damage, both because of damage to their living environment, their health and their property and income capacity.

339. The damage of plaintiffs encompasses an infringement on the right to a private life, more specifically the right to a clean living environment. This right is codified in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[242] and in Article 24 of the African Charter of Human and People's Rights (African Charter).[243] In various cases it has been assumed that severe environmental pollution can result in a violation of the right to a clean living environment.[244]

340. The oil spill of 26th June 2005 caused damage to the environment near Oruma as well. No measures were taken in order to prevent that the oil would spread. The oil has affected the environment in a large area, both as a result of the rainy season and as a result of the fact that the oil flew into the creeks. The oil that was leaking from the pipeline flew into the Olumogbogbo-Gbara creek. Via the Olumogbogbo-Gbara creek, the oil flew into the Oba creek, which flows out into the Kolo creek. In that way, fishponds, agricultural land and drinking water of many people became polluted with oil. Furthermore, the soil and the water near Oruma are polluted. For instance, the soil through which the pipeline runs is polluted because of the spill.

341. The 'clean-up operation' has furthermore not taken place in a careful manner. By storing the oil in unprotected waste pits, the oil could mix with the groundwater and cause damage because of the oil spill becoming ever larger.

342. Plaintiffs had an expert report formulated in order to record their damage.[245] The report was formulated by dr Solomon Braide of the Bryjark Environmental Services agency in 2007, and therefore does not establish the pollution directly after the spill in June 2005. However, the report concludes that also in 2007, two years after the spill, oil pollution was still present. In this research, still clear hydrocarbon pollution of the area was established.[246] On the water there was still oil sheen. At some locations the soil was still heavily polluted with oil and polycyclic hydrocarbons.

343. The damage of Efanga and Oguru also includes the costs that plaintiffs had to make for the assessment of the damage by means of this expert report. It concerns reasonable costs for the establishment of damage and liability that based on Art. 6:96 sub 2 sub b Dutch Civil Code are eligible for remuneration by defendants.

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[242] European Convention for the Protection of Human Rights and Fundamental freedom, as modified by Protocol No. 11, Article 8, section 1: "Every human being has the right on respect for his private life, his family and domestic life, his housing and his correspondence."

[243] African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986, Article 24: "All peoples shall have the right to a general satisfactory environment favourable to their development".

[244] Federal High Court of Nigeria, Benin City, *Gbemre and Others* v. *Shell Petroleum Development Company Ltd and Others* 14th November 2005, Suit No: FHC/B/CS//53/05, in: Olufemi O. Amao, 'Corporate Social Responsibility, Multinational Corporations and the Law in Nigeria: Controlling Multinational in Host States', *Journal of African Law*, 52, 1 (2008) (**production J.8**), p. 109; African Commission on Human and Peoples' Rights, *The Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights (CESR) v. Nigeria*, Communication 155/96 27th October 2001 (**production J.9**) European Court of Human Rights, *López Ostra v. Spain*, 9 December 1994, Series A, No. 303-C, p. 54 (1995) 20 EHRR 277, section 51 (**production J.10**).

[245] Report Bryjark Environmental Services, 'Post impact assessment study of the oil spillage in Oruma', Bayelsa State, (Port Harcourt February 2008) (**production B.2**).

[246] Report Bryjark Environmental Services, 'Post impact assessment study of the oil spillage in Oruma', Bayelsa State, (Port Harcourt February 2008) (**production B.2**).

344. The precise scope of the damage of Efanga and Oguru and to the environment has yet to be formulated.

17.1 Extrajudicial costs

345. Milieudefensie has made costs within the framework of extra judicial settlement. These costs are, based on the report Voor Werk II, eligible for remuneration. These costs are related to the activities of Mr Uiterwaal and Mrs Zegveld. It concerns costs for formulating the notice of liability, the research prior to that, and making contacts with experts and witnesses. Furthermore, Milieudefensie has made costs for the formulation of an expert report. The costs are reasonable and should be remunerated by defendants by virtue of Art. 6:96 sub 2 sub c Dutch Civil Code.

18 CONSIDERATIONS OF PROOF AND PRESENTATION OF PROOF

346. Plaintiffs are of the opinion that in the above their propositions were sufficiently substantiated. Furthermore, plaintiffs have sufficiently refuted the pleas that were presented by defendants. Plaintiffs have also supported their points of view with evidence. Should defendants further dispute the propositions of plaintiffs than they already did in answer to the notice of liability, then the following should be observed at the assessment of such a dispute.

347. For an important part of the propositions of the plaintiffs it applies that the further substantiation thereof is only possible by means of documents that they do not have at their disposal. These documents are at the exclusive availability of defendants. Among other things, it concerns documents from which the faulty condition of the oil pipeline near Oruma appears as a result of insufficient maintenance; documents that demonstrate the failing control mechanisms because of which the oil spill could occur; documents related to the faulty damage-limiting measures and the faulty clean-up operation in the area that was affected by the spill; and finally documents that demonstrate the control of and influence over the environmental policy of Shell Nigeria by Shell plc. The HSE policy, the implementation by Shell Nigeria of the Oil Spill Contingency Plan, and the documents with regard to the Joint Venture are in the exclusive possession of defendants as well. Plaintiffs cannot be required to present these documents, simply because these documents are in the possession of defendants and are unavailable to plaintiffs.

348. Defendants have refused to make documents available to plaintiffs in which they have a direct interest. An example of this is the previously (paragraph 32) already mentioned Asset Integrity Review which defendants have refused to present, despite the fact that there are solid reasons for defendants to operate transparently.

349. Defendants have also refused to provide information on the shareholder meetings and managers of Shell Nigeria and the subsidiary companies of Shell plc that hold the stock of Shell Nigeria. It cannot be properly conceived which interest defendants would have when not providing this information.

350. An example of the unnecessary withholding of information to the parties directly involved is the Joint Investigation Report that was formulated as a result of the oil spill. As the name of the report states - *Joint* Investigation Report – this should be formulated jointly with all parties

involved – local residents, Shell Nigeria and the local government.[247] Although one of the plaintiffs (Alali Efanga) was present during the investigation,[248] the report has not been presented by defendants to him or to other residents of Oruma. Only after their request by letter from 8th May 2008 from their lawyers - three years after the oil spill - did plaintiffs receive a copy of this report.

351. Defendants therefore operate far from transparently. It is generally known that multinationals make lawsuits against them impossible or at least very difficult by a lack of transparency.[249]

352. Relevant in this context is that the previously described OECD Guidelines require that multinationals make information available to the public,[250] which with regard to the environment means that the public is informed on the potential environmental aspects of the company and the improvement of the environmental performance.[251] Also, multinationals should assess the environmental effects of their enterprise and formulate a report on that.[252] This accountability, to which Shell plc has committed itself, is of specific importance in this case.

353. Apart from this, plaintiffs point out that they are not experts in the field of oil extraction and the safety regulations that apply to that. Within this framework it is of importance that the oil spill took place during the execution of oil extraction by defendants and therefore in the sphere of risk. For them, this brings along that an increased duty to state reasons has to be assumed. Defendant Shell plc does not only have the data available that are necessary for a reasonable litigation, but also has the expertise to properly inform the Court now that it extracts oil on a large scale worldwide since 1907[253] and in Nigeria since 1956[254].

354. There is therefore reason to adjust the division of the obligations to produce prima facie evidence and obligation to provide grounds in the current case in accordance with the previously described reality.

355. A reasonable and balanced litigation that enables the actual implementation of the substantive standards on the acts and omissions of defendants, therefore brings along that defendants must be

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[247] See section 16.1.3

[248] See Field Joint Investigation Report Form – Part B, attachment to letter Shell Nigeria to plaintiffs of 20th June 2008 (**production A.5**).

[249] See: Resolution General Assembly of the United Nations A/62/L.41, 'Strenghtening transparency in industries' (22nd February 2008) http://eitransparency.org/files/document/UNGA%20Resolution%20A-62-L.41-rev1.doc <lastly visited on 29th October 2008> (**production G.9**), section 7: "Urges the private sectors, including corporations engaged in the extractive industries to ensure transparency and verifiable processes, while adhering to and promoting the principles of honesty, transparency and accountability, in order to maximise private sector's contribution to the realisation of social and people-centred sustainable development". Defendants are associated with the Extractive Industries Transparency Initiative [EITI], which has the objective to increase the transparency in the sector in which defendants operate. See: Extractive Industries Transparency Initiative, 'Statement of Principles and Agreed Actions' (London Conference, 17th June 2003) http://www.dfid.gov.uk/pubs/files/eitidraftreportstatement.pdf <lastly visited on 29th October 2008> (**production G.8**); see also: UN Human Rights Council, 'Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development', para. 95 (A/HRC/8/5, 7th April 2008, Advance Edited Version) (**production B.11**).

[250] OECD Guidelines for Multinational Enterprises (**production G.4**), Article III.

[251] OECD Guidelines for Multinational Enterprises (**production G.4**), Article V, sub 2 sub a).

[252] OECD Guidelines for Multinational Enterprises (**production G.4**), Article V, sub 3.

[253] See:http://www.shell.com/home/content/aboutshell/who_we_are/our_history/the_beginnings/the_beginnings_history_of_shell_22112006.html <last visited on 29th October 2008>.

[254] See:http://www.shell.com/home/content/nigeria/about_shell/who_we_are/history/history.html <last visited on 23rd October 2008>.

enforced to provide the information requested by plaintiffs in order to accommodate plaintiffs in their furnishing of evidence.[255]

356. Various provisions of the Dutch Code of Civil Procedure offer a legal basis for the division of burden of proof as preferred by plaintiffs. Firstly, plaintiffs request the Court based on Article 22 of the Code of Civil Procedure to order that defendants provide the documents as described in this summons which were not provided by defendant.

357. Secondly, plaintiffs take the point of view that the Court should apply a reasonable implementation of Article 150 of the Code of Civil Procedure. This should result in an increased duty to produce prima facie evidence for defendants and a shift of (parts of) the burden of proof to defendants.

358. Should in the opinion of the Court the Articles 22 and 150 of the Code of Civil Procedure provide insufficient basis for an adjusted duty to produce prima facie evidence and division of burden of proof, then plaintiffs will contemplate to demand perusal in or copy or excerpt of the documents as mentioned in this summons, based on Article 843a of the Code of Civil Procedure. In view of the above, they have a lawful interest at that.

359. Plaintiffs point out that the importance of written document is also based on the fact that various relevant witnesses are residing in Nigeria and can therefore not (easily) be called as a witness. There is no treaty on mutual legal assistance between the Netherlands and Nigeria on the basis whereof these persons can be called as a witness.

360. However, plaintiffs do make witnesses available that are residing in the Netherlands or of whom it may be expected that they will voluntarily come to the Netherlands in order to testify. In as far as the Court is of the opinion that plaintiffs should prove their points of view, plaintiffs offer, without being willing to take the burden of proof that does not legally rest on them, to prove their propositions by means of hearing witnesses. At that, plaintiffs refer to employees, contractors and subcontractors of defendants who can testify on the cause and scope of the oil spill near Oruma and the reaction of defendants on that, as well as witnesses that can testify with regard to the operations of the Joint Venture of which Shell Nigeria is the operator. The written documents that defendants have at their disposal and that plaintiffs have requested for in the previous text, will enable plaintiffs to further specify these witnesses.

19 CONCLUSION

361. The oil spill near Oruma that was discovered on 26th June 2005 is the result of acts of both Shell Nigeria and Shell plc in violation with the respective duties of care that rest on them.

362. The oil spill occurred as a result of overdue maintenance, or at least insufficient supervision over the pipeline, has lasted too long, and has not been timely and adequately cleaned up. As a result of that, plaintiffs Oguru and Efanga have suffered personal and property damage and damage was caused to the environment.

363. Shell Nigeria, among other things as company of the worldwide Shell Group and in its role as operator of the joint venture in Nigeria, rest far-reaching duties of care that encompass to prevent the damage suffered. This includes at least the obligation to properly maintain the pipelines, the

[255] Compare: *Timmer/Deutman*, HR 20 November 1987, NJ 1988, 500, consideration 3.4; *Schepers/De Bruijn*, HR 18 February 1994, NJ 1994, 368; *NNEK/[A]*, HR 15 December 2006, NJ 2007, 203.

adequate and timely checking and maintaining of the pipelines, the timely and adequately reaction to an oil spill, and the cleanup operation after a spill has occurred. Shell Nigeria has refrained to act in accordance with these standards of due care that rest on them. As a result thereof, the oil spill near Oruma occurred, or at least it resulted in more serious damage. Shell Nigeria is liable for this damage arising from an unlawful act.

364. Shell plc knows that the oil production in the Niger Delta results in large dangers for human beings and the environment, and is aware of the large amount of oil spills as well as the structural character thereof. Although Shell plc is formally a company that is separated from Shell Nigeria, Shell Nigeria is directly or indirectly via sub-holding companies directed in various functional fields by Shell plc. Shell plc also has the means and expertise at its disposal to enforce Shell Nigeria to extract oil in a careful manner, therefore without causing damage to human beings or the environment. Shell plc was actually intensively involved in Shell Nigeria with regard to the environmental aspects of the oil extraction. Therefore the duty of care rests on Shell plc to prevent the foreseeable damage of plaintiffs as a result of the oil operations of Shell Nigeria.

365. Shell plc should, in view of its knowledge on and familiarity with the specific situation with regard to the exploitation in Nigeria, exert its influence and control in order to demand and if necessary instruct Shell Nigeria to take the necessary measures in order to see to it that the oil extraction by Shell Nigeria does not cause damage to third parties, as well as see to it that Shell Nigeria complies with its requests and instructions. Shell plc has such perusal in and control over the policy of Shell Nigeria, that it knew or should have anticipated at the time of acting as previously stated, that damage to property and the environment would occur because of overdue maintenance on the pipelines and the untimely and inadequate actions in case oil spills occur. Under these circumstances, Shell plc acts unlawfully by nevertheless refraining from seeing to it that the damage is prevented or limited.

366. Shell plc has refrained to act in accordance with the duty of care that rests on them and has therefore acted unlawfully. Therefore, Shell plc is liable for the foreseeable damage to the environment and that suffered by plaintiffs as a result of unlawful acts.

367. The pleas stated by defendants in their almost identical letters cannot affect the liability of defendants. The plea that defendants always invoke with regard to oil spills in Nigeria, namely that the spill is caused because of sabotage, is in this case highly unlikely and has not been substantiated by defendants at all, and for that matter does not affect the liability of defendants.

368. The fact that Shell Nigeria was refused access to the oil spill that had already occurred during some days, does not affect the liability of defendants and should – in as far as this plea would already be successful, which plaintiffs have disputed – only limit the scope of the obligation of compensation of defendants.

369. The by no means motivated propositions of defendants with regard to the Joint Venture cannot affect their liability either. Shell Nigeria is not a passive part of the Joint Venture but the operator, and therefore leading partner, which also results in the fact that the Joint Venture should comply with the Shell Group standards. Should the propositions of defendants with regard to the Joint Venture be correct, then they should have cancelled those parts of the Joint Venture agreement that are related to damage-causing projects and/or completely withdrawn from the JV.

370. Shell Nigeria and Shell plc have therefore acted accountably unlawful as a result of which infringement of the rights of Oguru and Efanga and damage to the environment occurred that was foreseeable for defendants. The plea invoked by defendants cannot be justifications for their

unlawful acts. Based on this, defendants are obliged to compensate the damage suffered by Oguru and Efanga as well as to repair the damage to the environment.

20 CLAIM

Plaintiffs request your Court, in as far as possible provisionally enforceable:

I. To rule that defendants have acted unlawfully towards Fidelis A. Oguru and/or Alali Efanga based on the above, as well as are jointly and severally liable for the damage that Fidelis A. Oguru and/or Alali Efanga have suffered and will suffer as a result of these unlawful acts of defendants; said damage can be calculated and settled in accordance with the law, and should be increased by the legal interest as of the day of the summons until the day of the final settlement;

II. To rule that defendants have acted unlawfully against Milieudefensie based on the above and are jointly liable for the damage to the environment near Oruma as a result of these unlawful acts of defendants;

III. To order defendants to start within 2 months after signing the judgment with regard to this case, or at least within a term to be set by the Court, with the replacement of outdated (parts of) the oil pipeline near Oruma and to complete this replacement within 3 months after commencement, or within a term to be set by the Court;

IV. To order defendants to start within 2 weeks after signing of the judgment in this case with the clean-up operation of the soil around the oil spill, so that this will comply with the international and locally applicable environmental standards, and to complete this clean-up operation within 1 month after commencement, as proof of which defendants will present plaintiffs 1 month after completion of the clean-up operation with a unanimous statement on the clean-up operation by a panel of three experts; said experts will be appointed within 2 weeks after the verdict in this case, at which one expert will be appointed by defendants jointly, one by plaintiff Milieudefensie, and one by the thus appointed two experts, at least within the terms to be set by the Court and by a way of proof of the clean-up operation to be set by the Court;

V. To order defendants to start within 2 weeks after signing of the verdict in this case with the clearing of the water sources in and around Oruma, and to complete this clearing operation within 1 month after commencement, as proof of which defendants will present plaintiffs 1 month after completion of the cleanup operation with a unanimous statement on the cleanup operation by a panel of three experts; said experts will be appointed within 2 weeks after the verdict in this case, at which one expert will be appointed by defendants jointly, one by plaintiff Milieudefensie, and one by the thus present two experts, at least within the terms to be set by the Court and by a way of proof of the clearing operation to be set by the Court;

VI. To order defendants to keep the oil pipeline near Oruma after replacement in good condition, in accordance with the *good oil field practices*, which includes at least the compliance with obligatory inspections of the pipelines, formulating or maintaining an adequate system of pipeline inspections and in accordance with that careful acts; to order defendants to provide plaintiffs within two weeks after these inspections have taken place with a written report;

VII. To order defendants to implement an adequate plan of reaction on oil spills in Nigeria, and to see to it that all conditions are met for a timely and adequate reaction in case an oil

spill should occur again near Oruma; for plaintiffs, this includes at least making sufficient material and means available – as proof of which defendants will provide plaintiffs with overviews – in order to limit the damage of a potential oil spill as much as possible;

VIII. To order defendants to pay plaintiffs a penalty of EUR 100,000 (or another amount to be determined by the judge in good judgment) for each time that defendants each by themselves or jointly act in violation with the orders as mentioned under III, IV, V and/or VI;

IX. To sentence defendants jointly and severally to pay remuneration of the extrajudicial costs;

X. To sentence defendants jointly and severally to the costs of these legal proceedings, at least to compensate the costs of parties.

Costs of writ:

21 LIST OF ABBREVIATIONS

AIR	Asset Integrity Review
ASME	American Standard for Mechanical Engineers
CEESP	Commission on Environmental, Economic and Social Policy
CEO	Chief Executive Officer
CMD	Committee of Managing Directors
DPR	Department of Petroleum Resources
EC	Executive Committee
EGASPIN	Environmental Guidelines and Standards for the Petroleum Industry in Nigeria
EPNL	Elf Petroleum Nigeria Limited
ESI	Environmental Sensitivity Index
ECHR	European Convention on Human Rights
E&P	Exploration and Production
GGG	Group Governance Guide
HRW	Human Rights Watch
HSE	Health Safety and Environment
IUCN	International Union for Conservation of Nature
JIT	Joint Investigation Team
JOA	Joint Operation Agreement
JV	Joint Venture
LDS	Leak Detection System
Ltd	Limited
NDES	Niger Delta Environmental Survey
NGO	Non Governmental Organisation
NNPC	Nigerian National Petroleum Corporation
NOSCP	National Oil Spill Contingency Plan
MOU	Memorandum of Understanding
SCIN	Shell Companies in Nigeria
SD	Sustainable Development
OECD	Organisation for Economic Co-operation and Development
OSCP	Oil Spill Contingency Plan
PIMS	Pipeline Integrity Management System
Plc	public limited company
QBD	Queens Bench Division
RDS	Royal Dutch Shell plc
RMD	Regional Managing Director
SGBP	Shell General Business Principles
SPDC	Shell Petroleum Development Company of Nigeria Limited
TPH	Total Petroleum Hydrocarbon
UN	United Nations
UNDP	United Nations Development Programme
WWF	World Wide Fund for Nature

22 LIST OF PRODUCTIONS

Documents and images with regard to Oruma

A.1 Notice of liability of 8th May 2008

A.2 Letter from defendant Shell plc of 20th June 2008

A.3 Letter from defendant Shell Nigeria of 20th June 2008

A.4 Attachment to letter from Shell Nigeria: Field Joint Investigation Report Form – Part A

A.5 Attachment to letter from Shell Nigeria: Field Joint Investigation Report Form – Part B

A.6 Attachment to letter from Shell Nigeria: Clean-up and remediation certification format

A.7 Visitors Book Oruma

A.8 Agreement reached between representatives of the Oruma Community in Ogbia Local Government Area of Bayelsa state and [Shell Nigeria] at a meeting held on 5th July 2005 in Yenagoa at the instance of the Bayelsa State Government

A.9 Memorandum of Understanding between Shell and the Oruma Community, February 2006

A.10 Email from Deputy Managing Director of Shell Nigeria, Mike Corner, to Clive Wicks, member of the IUCN CEESP Committee, also former member of the World Wildlife Fund United Kingdom. Apart from that, Wicks has participated in the mission of Amnesty International to Nigeria

A.11 Video images repair oil spill near Oruma on 7th July 2005

A.12 Transcript video images repair oil spill near Oruma on 7th July 2005

A.13 Transcript Basil Omiyi for stockholder meeting Shell plc 15th May 2006

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B.2 Report Bryjark Environmental Services, 'Post impact assessment study of the oil spillage in Oruma', Bayelsa State, (Port Harcourt February 2008)

B.3 Niger Delta Development Commission (NDDC) Niger Delta Regional Development Master Plan Executive Summary, 25th July 2007, p. 1. To be consulted via < www.bryjark.com/EXECUTIVE%20SUMMARY.pdf> (last visited on 21st October 2008)

B.4 'Amnesty International Report 2006', Nigeria, p. 199

B.5 Amnesty International: 'Nigeria: Ten Years On: Injustice and Violence Haunt the Oil Delta'

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B.9 Niger Delta Natural Resource Damage Assessment and Restoration Project', Phase 1 – Scoping Report by Federal Ministry of Environment (Abuja), Nigeria Conservation Foundation (Lagos), WWF UK, CEESP-IUCN Commission on Environmental, Economic and Social Policy, p. 1. To be consulted via: http://cmsdata.iucn.org/downloads/niger_delta_natural_resource_damage_assessment_and_restoration_project_recommendation.doc <lastly visited on 21 October 2008>

B.10 UN Human Rights Council, 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises', John Ruggie, 7 April 2008, A/HRC/8/5

B.11 UN Human Rights Council, 'Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development', section 95 (A/HRC/8/5, 7 April 2008, Advance Edited Version)

Reports and documents of Shell Nigeria

C.1 Shell Nigeria, Annual Report 2003: People and the Environment

C.2 Shell Nigeria, Annual Report 2004: People and the Environment

C.3 Shell Nigeria, Annual Report 2005: People and the Environment

C.4 Shell Nigeria, Annual Report 2006: People and the Environment

C.5 Shell Nigeria, Environmental Performance: Oil Spills and Managing Our Facilities, 2007

C.6 Shell Nigeria, Annual Reports 1998-2006; Shell in Nigeria, 'Environmental Performance: Oil Spills and Managing Our Facilities', to be consulted via: http://www.shell.com/static/nigeria/downloads/pdfs/brief_notes/shell_nigeria_environmental_peformance.pdf <last visited on 21st October 2008>

C.7 WAC Global Services, 'Peace and Security in the Niger Delta: Conflict Expert Group Baseline Report', (Working Paper for SPDC, December 2003)

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D.2 N.V. Koninklijke Nederlandsche Petroleum Maatschappij, 'Verslag over 2004' (Report on 2004), p. 118

D.3 Shell plc, The Shell Report 2004: Meeting the Energy Challenge – Our Progress in Contributing to Sustainable Development

D.4 Shell plc, The Shell Sustainability Report 2005: Meeting the Energy Challenge

D.5 Shell plc, The Shell Sustainability Report 2006: Meeting the Energy Challenge

D.6 Shell plc, The Shell Sustainability Report 2007: Responsible Energy

D.7 Shell plc, Jaaroverzicht en verkorte jaarrekening 2007: Resultaat en Groei, p. 40-42

D.8 Shell plc, Annual Report and Form 20-F for the year ended December 31, 2006: Delivery and growth, p. E2

D.9 Shell plc, Memorandum of Association, Article 3

D.10 Shell plc, Articles of Association, Article 58

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E.1 Group Governance Guide' (GGG)

E.2 Statement of General Business Principles (SGBP)

E.3 Global Environmental Standards

E.4 The Shell Group Environmental Standards (Shell 2002)

E.5 Shell International Exploration and Production B.V. / Shell EP International BV, '2000 Business Plan, Exploration and Production Executive Committee', 23 October 2000

E.6 CV Malcolm Brinded, to be consulted via: http://www.shellchemicals.com/news/1,1098,1217-biography_id=73,00.html <lastly visited on 28th October 2008>

E.7 Shell Venster, 'Voor Shell is het CO2- en klimaatdebat over' (Issue of Shell Nederland B.V., January/February 2007), p. 6

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F.3 Video Batan Oil Spill

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G.3 National Oil Spill Contingency Plan for Nigeria (NOSCP), Prepared for the Presidency by the Federal Ministry of Environment, Abuja, Approved by the Federal Executive Council (16th April 2003)

G.4 OECD Guidelines for Multinational Enterprises, http://www.oesorichtlijnen.nl/wp-content/uploads/Richtlijnen/NL%20tekst%20richtlijnen.pdf

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G.9 Resolution General Assembly of the United Nations A/62/L.41, 'Strengthening transparency in industries' (22nd February 2008) http://eitransparency.org/files/document/UNGA%20Resolution%20A-62-L.41-rev1.doc

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I.3 Frank Efeduma in Sunday Vanguard Newspaper, 17th November 2002, pp. 39-41

I.4 Sunday Tribune Nigeria, 'Shell is in Nigeria to stay', interview with SPDC's Managing Director, Mutiu Sunmonu, on 10th August 2008

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J.8 Federal High Court of Nigeria, Benin City, Gbemre and Others v. Shell Petroleum Development Company Ltd and Others, 14th November 2005, Suit No: FHC/B/CS//53/05, in: Olufemi O. Amao, 'Corporate Social Responsibility, Multinational Corporations and the Law in Nigeria: Controlling Multinational in Host States', Journal of African Law, 52, 1 (2008), p. 109

J.9 African Commission on Human and Peoples' Rights, The Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights (CESR) v. Nigeria, Communication 155/96 27th October 2001

J.10 European Court of Human Rights, López Ostra v. Spain, 9 December 1994, Series A, No. 303-C, p. 54 (1995) 20 EHRR 277, section 51