

EXHIBIT E
PARTIES' INSTRUCTIONS REGARDING GENERAL PRIVILEGES AND
DUTIES AND MISCELLANEOUS MATTERS UNDER NIGERIAN LAW

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I. PARTIES' INSTRUCTIONS REGARDING GENERAL PRIVILEGES AND DUTIES AND MISCELLANEOUS MATTERS UNDER NIGERIAN LAW

Plaintiffs' Proposed Jury Instruction No. 5.0: General Privileges and Duties; Miscellaneous Instructions

I am now going to instruct you on certain provisions of Nigerian law dealing with general privileges and duties, and other matters. You should consider these to the extent you find them relevant to the claims and defenses of the parties. None of these instructions is intended to alter any of the foregoing instructions, however. These instructions may assist you in determining whether conduct is reasonable and how evidence should be interpreted, but these instructions do not constitute claims or defenses unless explicitly noted.

Note: Plaintiffs believe it is important that the jury not think that these instructions constitute legal defenses (or new claims).

DEFENDANTS' OBJECTION: Defendants object to plaintiffs' use of the term "and other matters" to the extent it refers to "Plaintiffs' Proposed Jury Instruction No. 5.3: Watching Brief" or other miscellaneous instructions that do not affect a party's rights, duties or privileges under Nigerian law. Defendants also object to the sentence, "None of these instructions is intended to alter any of the foregoing instructions, however". This phrase is misleading to the jury. If the Nigerian Government was acting with legal justification pursuant to a privilege related to a specific claim, plaintiffs cannot meet the substantive elements for that claim, including claims brought under Nigerian law. Additionally, several of these instructions (e.g., Defendants' Proposed Jury Instruction No. 5.8 – Armed Security in Nigeria) are relevant to plaintiffs' theories of indirect liability. Finally, these instructions are relevant to defendants' overall defense of this case.

Defendants' Proposed Instruction Regarding General Privileges and Duties

I am now going to instruct you on certain provisions of Nigerian law dealing with general privileges and duties. You should consider these in determining the rights and obligations of the parties in connection with the other instructions I have given you.

PLAINTIFFS' OBJECTION:

This instruction gives insufficient guidance to the jury about the use of the following instructions.

Plaintiffs' Proposed Jury Instruction No. 5.1: Obligations of Oil Companies in Dealing with Communities Impacted by Their Activities, and Duty to Pay Fair and Adequate Compensation.

Nigerian law requires oil companies to pay "fair and adequate compensation" to the owner or occupier of land adversely affected by their operations, including pollution of farmland and fishing rivers and destruction of economically valuable trees or crops, and fishing rights. Moreover, oil companies are obliged to "adopt all practicable precautions" to prevent pollution caused by the company, and to maintain all of their facilities "in good repair and condition."

Plaintiffs are seeking damages to compensate for personal injuries. They do not bring claims for environmental harms, failure to pay adequate compensation for land or failure to adopt practicable precautions to prevent pollution. You can, however, consider these matters as general background information and as evidence.

Sources:

Nigerian Oil Pipelines Act, §§ 6(3), 11(5) ("The holder of a permit to survey acting under the authority of section 5 of this Act shall take all reasonable steps to avoid unnecessary damage to any land entered upon and any buildings, crops or profitable trees thereon, shall make compensation to the owners or occupiers for any damage done under such authority and not made good. . . . The holder of a licence shall pay compensation - (a) to any person whose land or interest in land (whether or not it is land respect of which the licence has been granted) is injuriously affected by the exercise of the rights conferred by the licence, for any such injurious affection not otherwise made good; and (b) to any person suffering damage by reason of any neglect on the part of the holder or his agents, servants or workmen to protect, maintain or repair any work structure or thing executed under the licence, for any such damage not otherwise made good; and (c) To any person suffering damage (other than on account of his own default or on account of the malicious act of a third person) as a consequence of any breakage of or leakage from the pipeline or an ancillary installation, for any such damage not otherwise made good.")

Nigerian Petroleum Act, Schedule 1, ¶ 37 ("The holder of an oil exploration licence, oil prospecting licence or oil mining lease shall, in addition to any liability for compensation to which he may be subject under any other provision of this Act, be liable to pay fair and adequate compensation for the disturbance of surface or other rights to any person who owns or is in lawful occupation of the licensed or leased lands.")

Nigerian Petroleum (Drilling and Production) Regulations §§ 21, 25, 37 (1969) ("If the licensee or lessee cuts down or takes any other productive tree, he shall pay fair and adequate compensation to the owner thereof. . . . 'other productive tree' means a tree having commercial value which is not a protected tree; 'protected tree' means a tree protected by law, and includes all trees in a forest reserve." "The licensee or lessee shall adopt all practicable precautions, including the provision of up-to-date equipment approved by the Director of Petroleum Resources, to prevent the pollution of inland

waters, rivers, watercourses, the territorial waters of Nigeria or the high seas by oil, mud or other fluids or substances which might contaminate the water, banks or shoreline or which might cause harm or destruction to fresh water or marine life, and where any such pollution occurs or has occurred, shall take prompt steps to control and, if possible, end it.” “The licensee or lessee shall maintain all apparatus and appliances in use in his operations, and all boreholes and wells capable of producing petroleum, in good repair and condition . . . and without prejudice to the generality of the foregoing he shall, in accordance with those practices, take all steps practicable—(a) to control the flow and to prevent the escape or avoidable waste of petroleum discovered in or obtained from the relevant area. . . . (d) to prevent the escape of petroleum into any water, well, spring, stream, river, lake, reservoir, estuary or harbour; and (e) 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.”)

DEFENDANTS’ OBJECTION TO PLAINTIFFS’ PROPOSED INSTRUCTION NO. 5.1

Defendants object to this instruction because it is confusing and misleading in that there are no property or environmental claims at issue in this case. Plaintiffs’ instruction is prejudicial in that it instructs the jury to consider claims not in this case.

Defendants' Proposed Instruction on Ownership and Control of Oil in Nigeria

Under Nigerian law, the Nigerian Government has ownership and control over all minerals including oil in, under, or upon any land in Nigeria. This includes all land (including land covered by water) which is in Nigeria, or is under the territorial waters of Nigeria.

SOURCE: Nigerian Petroleum Act §§ 1, 2, Cap. P10 LFN 2004.

Plaintiffs' Objections to Defendants' Proposed Instruction on Ownership and Control of Oil in Nigeria

Plaintiffs object that this instruction is irrelevant to any claim or defense. The parties' stipulations of fact should explain how the joint venture structure works to produce oil. Furthermore, this is not an accurate statement of the source cited. The statute cited states that "ownership and control of all petroleum . . . shall be vested in the State." Nigerian Petroleum Act § 1 Cap. P10 LFN 2004. It does not mention other minerals, and the vesting of ownership in the State does not mean that other parties, such as private corporations, may not have ownership rights as well. Indeed, the following section states that the government may "grant . . . a lease, to be known as an oil mining lease, to search for, win, work, carry away and dispose of petroleum." *Id.* § 2. Thus, if the issue is relevant at all, it would be more accurate to say that "the Nigerian government has an original right of ownership and control of oil in Nigeria, but may grant leases to private corporations to explore for, produce, and profit from Nigerian oil."

Defendants' Proposed Instruction on Interference with Oil Operations Under Nigerian Law

Under Nigerian law, any person who interferes with or obstructs the holder of an oil exploration, oil prospecting, or oil mining lease or license (or his servants or agents) in the exercise of any rights, power or liberty conferred by the license or lease is guilty of an offense punishable by imprisonment, a fine, or both.

SOURCE: Nigerian Petroleum Act § 13(1) (Supp.), Cap. P10 LFN 2004.

Plaintiffs' Objections to Defendants' Proposed Instruction on Interference with Oil Operations Under Nigerian Law

Plaintiffs object to this instruction as irrelevant to any claim or defense. Plaintiffs have inquired as to the relevance of this crime. Defendants answered that they believe this is relevant because letters between Shell Nigeria and the Governor of Rivers State concerning "sabotage" may be admitted, and defendants want to defend against any assertion that these letters were requesting an attack on local communities. Plaintiffs do not believe this makes this criminal law provision relevant; no one would doubt that actual sabotage of oil installations is a crime, and placing this instruction here makes it seem far more important to the case than it actually is.

Moreover, defendants do not claim that any plaintiff committed this crime. There is no evidence that any of the victims here were obstructing oil operations at the time of their arrests or shootings, nor was anyone arrested or prosecuted for this crime. At the very least, the following should be added: "Defendants do not claim that any plaintiff or decedent in this case committed this crime, but it may be relevant to understanding the evidence."

Defendants' Proposed Instruction on Duty to Assist Police

Under Nigerian law, citizens have a duty to assist the police in maintaining the peace and suppressing criminal activity.

SOURCES: Constitution of the Federal Republic of Nigeria § 24(e) (“It shall be the duty of every citizen to render assistance to appropriate and lawful agencies in the maintenance of law and order”.); Nigerian Criminal Code Act § 201 (“Any person who, having reasonable notice that he is required to assist any peace officer or member of the police force in arresting any person, or in preserving the peace, without reasonable excuse omits to do so, is guilty of a misdemeanour, and is liable to imprisonment for one year”.); *id.* § 202 (“Any person who, without lawful excuse, the proof of which lies on him, does any act which he is, by the provisions of any Act, Law, or Statute, forbidden to do, or omits to do any act, which he is, by the provisions of any such Order, Act, Law or Statute, required to do, is guilty of a misdemeanour, unless some mode of proceeding against him for such disobedience is expressly provided by Order, Act, Law, or Statute, and is intended to be exclusive of all other punishment”.); *id.* § 515 (“Every person who, knowing that a person designs to commit or is committing a felony, fails to use all reasonable means to prevent the commission or completion thereof, is guilty of a misdemeanour, and is liable to imprisonment for two years”.).

Plaintiffs' Objections to Defendants' Proposed Instruction on Duty to Assist Police

Plaintiffs object to this instruction as irrelevant to any claim or defense. Plaintiffs have inquired, but defendants have not answered, as to what assistance they claim to have provided to the Nigerian police in relation to plaintiffs' claims. Karalolo Korgbara and Uebari N-Nah were shot by the Nigerian military, not the police. Nor have defendants identified what criminal activity they were allegedly suppressing.

Defendants' Proposed Instruction on Duty to Report Crime

Citizens and residents of Nigeria have a legal duty to report crime to the Nigerian authorities, and to assist them in stopping and preventing crime and apprehending perpetrators. If you find that SPDC reasonably believed that plaintiffs were committing any crime, then defendants cannot be liable for SPDC's reporting of such activity to the Nigerian authorities.

SOURCES: Constitution of the Federal Republic of Nigeria § 24(e) ("It shall be the duty of every citizen to render assistance to appropriate and lawful agencies in the maintenance of law and order"); Nigerian Criminal Code Act § 515 ("Every person who, knowing that a person designs to commit or is committing a felony, fails to use all reasonable means to prevent the commission or completion thereof, is guilty of a misdemeanour, and is liable to imprisonment for two years").

Plaintiffs' Objections to Defendants' Proposed Instruction on Duty to Report Crime

Plaintiffs object to this instruction as irrelevant to any claim or defense. Plaintiffs have inquired, but defendants have not answered, as to what crime by what plaintiff they claim to have reported, or even what injuries they believe resulted from reporting a crime to the Nigerian authorities.

Defendants' Proposed Instruction on Armed Security in Nigeria

Under Nigerian law, the only lawful source of armed security for companies doing business in Nigeria is the Nigerian Government Security Forces.

SOURCE: Private Guard Companies Act, (2004) Cap. P30, §§ 1, 17, 21 (Nigeria).

Plaintiffs' Objections to Defendants' Proposed Instruction on Armed Security in Nigeria

Plaintiffs object to this instruction as irrelevant to any claim or defense. Defendants have not identified what claim this instruction relates to or whether they believe it should be a defense of some sort. Including this instruction risks the jury believing that, if the "government security forces" is the only choice, then defendants are necessarily not liable for their actions. The instruction is confusing and not tied to any claim or defense. Moreover, the term "government security forces" is not defined.

No instruction should be given on this topic, but if any instruction is given, plaintiffs' proposed alternative explains what the government security forces are and reliance on these forces does not shield defendants from liability.

Plaintiffs' Proposed Alternative to Defendants' Instruction on Armed Security in Nigeria

Under Nigerian law, the only lawful source of armed security for companies doing business in Nigeria are the Nigerian government security forces. These security forces include:

- 1) The Nigerian military, which includes
 - a) the army,
 - b) the navy, and
 - c) the air force; and
- 2) The Nigerian Police Force (NPF), which includes
 - a) regular police,
 - b) the Mobile Police or "Mopol,"
 - c) a Quick Intervention Force, and
 - d) supernumerary or "spy" police which are seconded to private companies, including oil companies and security companies, are paid by those companies, and may be trained by those companies.

If you find that plaintiffs have proved any of their claims and theories of liability, you may hold defendants liable notwithstanding the fact that the government security forces are the only lawful source of armed security in Nigeria.

Sources

Private Guard Companies Act, (2004) Cap. P30, §§ 1, 17, 21 (Nigeria).

Royal Dutch Shell plc, "Security in Nigeria,"

http://www.shell.com/home/content/nigeria/about_shell/issues/security/security.html

(noting that supernumerary police "are trained using Shell Nigeria's Security Management System and Guidelines on the use of External Security Forces, developed in line with United Nations (UN) norms and codes, as well as the UN's Code of Conduct for Law Enforcement Officials").

DEFENDANTS' OBJECTION:

Plaintiffs' proposed alternative instruction is misleading and prejudicial because it combines all the different security forces in Nigeria into one category, and reads as though all of these forces are paid and trained by private companies, which is not the case. All of these forces should not be placed within the same category together as it is misleading to the jury and prejudicial to defendants. Furthermore, security forces are not just lent out to "oil companies and security companies". Rather, security forces are required by law for all companies under Nigerian law. Private Guard Companies Act, (2004) Cap. P30, §§ 1, 17, 21 (Nigeria).

Plaintiffs' Proposed Jury Instruction No. 5.2: Criminality of Excessive Force

The Nigerian military and police is authorized to use reasonable force where necessary to enforce the law. However, a person authorized to use force commits a crime if he uses excessive or unreasonable force.

Sources:

Nigerian Criminal Code Act § 298 (“Any person authorized by law to use force is criminally responsible for any excess, according to the nature and quality of the act which constitutes the excess.”)

DEFENDANTS' OBJECTION TO PLAINTIFFS' PROPOSED INSTRUCTION NO. 5.2

Defendants object to this instruction because this privilege applies to any “person who is engaged in the lawful execution of any sentence, process or warrant, or in making any arrest, and for any person lawfully assisting him”, not just the Nigerian military. It is also internally inconsistent in that it refers to “Nigerian military and police” in the first sentence and “person” in the second. It is unduly restrictive. Defendants further object because the phrase “excessive and unreasonable force” is not a legal term under Nigerian law, nor is it found in the Nigerian Criminal Code.

Furthermore, plaintiffs' instruction is misleading in that it does not state that a person authorized to use force may have a legal justification for his or her use of force. Plaintiffs' instruction reads such that the force used by a person must be viewed in isolation to determine whether it is “unreasonable or excessive”. However, the force used must be viewed in relation to that force used by the individual resisting the authority or acting unlawfully. A person authorized to use force may use “such force as is reasonably necessary to overcome any [unlawful] force”. *See* Nigerian Criminal Code Act § 261.

Defendants' Proposed Instruction on Use of Force Under Nigerian Law

The Nigerian Government's security forces and police are legally entitled to use force as may be reasonably necessary to overcome any force used in resisting arrest, and cannot be found to have engaged in wrongful conduct for doing so.

SOURCE: Nigerian Criminal Code Act § 261.

Plaintiffs' Objections to Defendants' Proposed Instruction on Use of Force Under Nigerian Law

Plaintiffs object to this instruction as irrelevant to any claim or defense, because it is phrased in terms of resisting arrest. There is no evidence that any victim here resisted arrest.

Defendants' Proposed Instruction on Arrest Without Warrant Under Nigerian Law

Under Nigerian law, a peace officer or police officer may arrest a person without a warrant if the person is found committing any misdemeanor or felony.

SOURCE: Nigerian Criminal Code Act §§ 5, 80.

Plaintiffs' Objections to Defendants' Proposed Instruction on Arrest Without Warrant Under Nigerian Law

Plaintiffs object to this instruction as irrelevant to any claim or defense, because no claim is predicated on the legality of a warrantless arrest. Plaintiffs' proposed instruction on arbitrary arrest and detention does not include the warrantless nature of the arrest as an element. Moreover, plaintiffs have not explained whom they believe was arrested because he or she was found committing a misdemeanor or felony. Finally, this instruction misstates the law cited. Section 5 of the Criminal Code Act states in part that "the fact that an offence is within the definition of a felony as set forth in this code imports that the offender may be arrested without warrant"; it does not say the same for misdemeanors. Defendants' proposed instructions do not contain any instructions about felonies:

- Section 80, cited here, is inapposite; it states: "Any person who goes armed in public without lawful occasion in such a manner as to cause terror to any person is guilty of a misdemeanour, and is liable to imprisonment for two years, and his arms may be forfeited." Even if this crime were relevant, it is a misdemeanor and the code does not say the offender may be arrested without warrant.
- Interference with oil operations is defined in the Petroleum Act, and it is punishable by "a fine not exceeding N200 or to imprisonment for a period not exceeding six months, or to both." Nigerian Petroleum Act § 13(1) (Supp.), Cap. P10 LFN 2004. Under section 3 of the Criminal Code Act, this makes the offense a misdemeanor as well: "A misdemeanour is any offence which is . . . punishable by imprisonment for not less than six months, but less than three years."
- Under section 70 of the Criminal Code Act, unlawful assembly is also a misdemeanor: "Any person who takes part in an unlawful assembly is guilty of a misdemeanour, and is liable to imprisonment for one year."

Defendants' Proposed Instruction on Crime of Unlawful Assembly Under Nigerian Law

Under Nigerian law, any person who takes part in an unlawful assembly is guilty of a misdemeanor punishable by one year imprisonment.

Unlawful assembly means when three or more persons, with intent to carry out some common purpose, assemble in such a manner or being assembled, conduct themselves in such a manner as to cause persons, in the neighborhood to fear on reasonable grounds that the persons so assembled will tumultuously disturb the peace, or will by such assembly needlessly and without any reasonable occasion provoke other persons tumultuously to disturb the peace, they are unlawfully assembled.

SOURCE: Nigerian Criminal Code Act §§ 69, 70.

Plaintiffs' Objections to Defendants' Proposed Instruction on Crime of Unlawful Assembly Under Nigerian Law

Plaintiffs object to this instruction as irrelevant to any claim or defense. Plaintiffs have inquired, but defendants have not answered, as to whom they claim committed this crime or what its relevance might be. There is no evidence that any of the victims here were unlawfully assembled at the time of their arrests or shootings, nor was anyone arrested or prosecuted for this crime.

Plaintiffs' Proposed Jury Instruction No. 5.3: Watching Brief

In Nigeria, a "watching brief" is a form of participation in a criminal case by a lawyer representing a client. In order to hold a watching brief, the client must have some interest in the case which the lawyer is seeking to protect. The lawyer then enters an appearance on behalf of the client and watches the proceedings on behalf of the client.

Sources:

Federal Republic of Nigeria v. Abiola [1994] FHCLR 156, 160 ("... the practice of watching brief is not unknown to our Courts. It is part of our unwritten rules of practice in our Criminal Courts. . . . My understanding of this system which applies only in criminal cases is that a person seeking to watch brief in a case must not necessarily be a party to that case but **he must have an interest in the case which he seeks to protect. Such a person then appoints a Counsel to appear in Court and watch the proceedings on his behalf to ensure that his interest is not willfully jeopardized.** A Counsel so appointed then enters an appearance as watching brief, sits and watches the proceedings and may take notes of the proceedings which he can use in reporting to his client."); *id.* at 162 (refusing application for a watching brief where the client "has no interest in this case").

DEFENDANTS' OBJECTION TO PLAINTIFFS' PROPOSED INSTRUCTION NO. 5.3

Defendants object to this instruction as prejudicial. This instruction is also confusing for jurors as its clear implication is that the "client" is a party to the proceeding. However, plaintiffs' own source states that a person seeking a watching brief is not necessarily a party to the case. Plaintiffs' instruction fails to state that a lawyer has no "right of audience" through a watching brief. Furthermore, there is no context given to this instruction. Plaintiffs' use of the terms "form of participation" and "some interest" are vague and ambiguous.