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"Touching the Concerns" of Kiobel: Corporate Liability and Jurisdictional Remedies in Response to Kiobel vs. Royal Dutch Petroleum

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Cover Page Footnote
Third-year student, University of Oklahoma College of Law. I am grateful to Professors Owen L. Anderson and Evelyn Aswad as well as Nazareth M. Haysbert for their insightful comments. I would also like to thank my parents, Chief Osita Ikegbunam (Obiwelugo of Eziowelle) and Lolo Gina Ikegbunam (Gold Chinyelu Diya), and my siblings Stephanie, Kingsley, Nicole, and Stanley for their unyielding love and support. Finally, I give my heartfelt thanks to Deans Joseph Harroz, Jr., Scott L. Palk, and Casey T. Delaney for selflessly investing in my life and career and for always believing in me.

COMMENTS

"TOUCHING THE CONCERNS" OF *KIOBEL*: CORPORATE LIABILITY AND JURISDICTIONAL REMEDIES IN RESPONSE TO *KIOBEL VS. ROYAL DUTCH PETROLEUM*

Chinyere Kimberly Ikegbunam[*]

Introduction

Esther Kiobel is doomed to remember the events that took the life of her husband and gave rise to the April 2013, United States Supreme Court decision *Kiobel vs. Royal Dutch Petroleum*. She alleges her adversaries were none other than the Nigerian Government, in a concerted effort with Royal Dutch Petroleum (Shell), one of Nigeria's largest oil producers. Mrs. Kiobel's sole purpose for bringing the suit was to "hold . . . Shell responsible for the alleged crimes committed against [her and her family] and the rest of humanity."[1]

Mrs. Kiobel claims that Shell aided and abetted the Nigerian government in acts of terrorism and extrajudicial killings of Nigerian citizens including her husband, Dr. Barimen Kiobel.[2] This Comment sheds light on the events which triggered Mrs. Kiobel's suit, and discusses the available remedies to her and her family following the Supreme Court's decision.

In April 2013, the United States Supreme Court determined that corporations could only be held liable for human rights violations which "touch and concern" the territory of the United States with "sufficient force."[3] The case involved Nigerian citizens of the oil-rich Ogoniland in the Niger Delta Region of Nigeria.[4] The Nigerian citizens brought suit against

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1. John Donovan, *Email Received from Esther Kiobel of Kiobel v. Royal Dutch Shell*, ROYAL DUTCH SHELL PLC.COM (Apr. 24, 2013), http://royaldutchshellplc.com/2013/04/24/email-received-from-esther-kiobel-of-kiobel-v-royal-dutch-shell/.
2. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1662 (2013).
3. *Id.* at 1669.
4. *Id.* at 1662.

Shell, alleging its affiliates assisted the Nigerian government in committing violations against the Law of Nations in Nigeria.[5] The unanimous Supreme Court decision has left much uncertainty regarding whether foreign individuals can bring alleged Law of Nations violations to United States district courts.[6]

This Comment seeks to answer three questions brought forth by the *Kiobel* decision. Firstly, what does it mean to "touch and concern" the territory of the United States, and to do so with "sufficient force"? Secondly, do any viable remedies remain for Mrs. Kiobel against Shell, should she continue to seek relief? Finally, what precautions can be taken to prevent the events that led to this suit from occurring again?

Part I of this Comment analyzes the *Kiobel* decision and offers a definition to Justice Kennedy's "touch and concern" language. Part II suggests solutions to the *Kiobel* Petitioners, and explores the available remedies for suit under Nigerian domestic law, international law, the law of the Netherlands, and United Kingdom law. Finally, Part III of this Comment offers mechanisms to improve transparency between the Nigerian government and Nigerian citizens, especially those most affected by petroleum operations.

I. Factual Background

The twelve *Kiobel* Petitioners, led by Esther Kiobel, were citizens of Ogoniland, a 250-square-mile area located in the Niger delta of Nigeria.[7] Respondents, Royal Dutch Petroleum Company and Shell Transport and Trading Company, p.l.c., were incorporated in the Netherlands and England, respectively.[8] The suit involved actions of a Shell affiliate, Shell Petroleum Development Company of Nigeria, Ltd. (SPDC), which is incorporated in Nigeria, and engages in oil exploration and production in Ogoniland.[9]

The citizens in Ogoniland began to protest oil development of their land, particularly the adverse environmental effects of SPDC's practices.[10] At the forefront of the protests were outspoken playwrights and authors Dr. Barimen Kiobel and Ken Saro-Wira, as well as leaders of the "popular

5. *Id.*
6. *Id.* at 1669 (Alito, J., concurring).
7. *Id.* at 1662 (majority opinion).
8. *Id.*
9. *Id.*
10. *Id.*

grassroots movement, known as the Movement for the Survival of the Ogoni People ("MOSOP.")"[11] The Petitioners' complaint alleged "throughout the early 1990's, . . . [the] Nigerian military and police forces attacked Ogoni villages, beating, raping, killing, and arresting residents and destroying and looting property."[12] Both Dr. Kiobel and Ken Saro-Wira were killed by the Nigerian government for their roles in the MOSOP protests.[13]

Mrs. Kiobel vividly recalls being "stripped naked, tortured, and locked up twice, while [her] husband and the rest of the Ogoni 9[14] were maimed, strangled, killed and acidized" by the Nigerian government.[15] Her claims were corroborated by affidavits of key witnesses, including fellow protester Boniface Ejiogu.[16]

The Petitioners were later granted political asylum in the United States.[17] Subsequently, they brought suit against the Respondents under the Alien Torts Statute, claiming violations of the Law of Nations.

A. The Alien Torts Statute

The *Kiobel* Petitioners sought relief under the Alien Torts Statute (ATS),[18] which provides: "district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations . . . ."[19] Since its inception, the ATS has rarely been used and has been difficult for the courts to apply.[20] The ATS was interpreted very

11. Brief for Petitioner at 3, Kiobel v. Royal Dutch Shell, 133 S. Ct. 1659 (2013) (No. 10-1491).

12. *Kiobel*, 133 S. Ct. at 1662.

13. Memorandum from Nazareth M. Haysbert on the Current Scope of the Alien Tort Statute Post Kiobel v. Royal Dutch Petroleum Co. (2013) (on file with author).

14. Group of nine activists from the Ogoni region in Nigeria that included Ken Saro-Wiwa, Saturday Dobee, Nordu Eawu, Daniel Gbooko, Paul Levera, Felix Naute, Baribor Bera, Barimen Kiobel, and John Kpuine, who were executed by hanging.

15. Donovan, *supra* note 1.

16. Letter from Esther Kiobel to Author (n.d.) (concerning statement written by Mr. Boniface Ejiogu) (on file with author). Ejiogu's statement further described Esther's detainment and also alleges among other accusations that he was promised "the sum of fifty million naira" to cease involvements in the Ogoni case. *Id.*

17. *Kiobel*, 133 S. Ct. at 1663.

18. *Id.* at 1662.

19. Alien Torts Claims Acts, 28 U.S.C. § 1350 (2012).

20. *See Kiobel*, 133 S. Ct. at 1663 ("[T]he ATS was invoked twice in the late 18th century, but then only once more over the next 167 years.").

narrowly in early case law.[21] Early courts limited the ATS to "'three principle offenses against the law of nations'[:] . . . violation of safe conducts, infringement of the rights of ambassadors, and piracy."[22] However, court interpretation of the ATS eventually broadened enough to give Mrs. Kiobel hope that the ATS would allow adjudication of her claim in a United States court.

Filartiga v. Pena- Irala provided the courts with their first opportunity to interpret the reach of the ATS. In this case, the Second Circuit established that United States' courts have "jurisdiction over claims brought by foreign plaintiffs for violations of the law of nations that occurred outside U.S. borders if the defendant was found and was provided a valid service of process in the U.S."[23] The Paraguayan plaintiffs in *Filartiga* filed suit in New York district court against a Paraguayan defendant,[24] "a former government official of Paraguay," who was accused of "kidnap[ping] and tortur[ing]" the plaintiff's son to death.[25] After allegedly killing the plaintiff's son in Paraguay, the defendant entered the United States, where he was served process by the plaintiffs.[26] The District Court for the Eastern District of New York initially dismissed the case for lack of subject matter jurisdiction.[27]

In reversing the district court, the Second Circuit held that the tortious conduct of the defendant "constituted a violation of the [L]aw of [N]ations."[28] *Filartiga* also held that, "whenever an alleged torturer is found within the borders of the U.S., the ATS grants jurisdiction."[29] Although *Filartiga* was brought against an individual, it is said to have eventually "opened the floodgates" for ATS litigation against corporations as well.[30]

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21. Yihe Yang, *Corporate Civil Liability Under the Alien Tort Statute: The Practical Implications from* Kiobel, 40 W. ST. U. L. REV. 195, 196 (2013).

22. *Kiobel*, 133 S. Ct. at 1661 (quoting Sosa v. Alvarez-Machain, 542 U.S. 692, 694 (2004)).

23. Yang, *supra* note 21, at 197 (quoting Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980)).

24. *Id.*

25. *Id.*

26. *Id.* (quoting *Filartiga*, 630 F.2d at 878).

27. *Filartiga*, 630 F.2d at 880.

28. Yang, *supra* note 21, at 197.

29. *Id.*

30. *Id.*

Over twenty years later, the Ninth Circuit heard the first ATS case against a corporate defendant.[31] In *Doe v. Unocal*, residents of Southeast Asia brought suit against Unocal Corporation, a subsidiary of Union Oil Company of California.[32] The plaintiffs alleged Unocal aided and abetted the Myanmar Military in forcing them "under threat of violence[] to work on and serve as porters" for Unocal's pipeline project.[33] During this time, the Military subjected the plaintiffs to "acts of murder, rape, and torture."[34]

The district court determined that private corporations are subject to the ATS for human rights violations.[35] Unocal was deemed liable under the ATS for subjecting the plaintiffs to rape and murder; however, they were not held liable for torture.[36] The court based its determination on *Prosecutor v. Furundzija*, where the court held that "knowing practical assistance [or] encouragement . . . which has a substantial effect on the perpetration of the crime," is a "standard for aiding and abetting . . . under the [ATS]."[37] *Doe* was settled before the Ninth Circuit could fully adjudicate the dispute.[38] Despite this, *Doe* is said to have paved the way for ATS litigation against multi-national corporations.[39]

Two years after *Doe*, the Supreme Court, in *Sosa v. United States*, limited the use of the ATS before United States courts. In *Sosa*, the Supreme Court ruled the ATS did not permit private individuals to bring suit against foreign citizens in United States courts for crimes committed in other countries in violation of the Law of Nations.[40]

Sosa was based on actions that took place in Mexico.[41] The plaintiffs, the United States and Humberto Alvarez-Machain et. al, brought suit against

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31. Doe I v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002), *on reh'g en banc sub nom.* John Doe I v. Unocal Corp., 403 F.3d 708 (9th Cir. 2005).

32. *Id.* at 937–38.

33. *Id.* at 939.

34. *Id.*

35. Doe v. Unocal Corp., 963 F. Supp. 880, 891 (C.D. Cal. 1997), *aff'd in part, rev'd in part*, 395 F.3d 932 (9th Cir. 2002).

36. *Doe I*, 395 F.3d at 955. Many of the plaintiff-appellant's claims could amount to torture involving victims other than Plaintiffs. Because the plaintiff-appellants did not form a class action with victims, the Ninth Circuit dismissed Doe's torture claims. *Id.*

37. *Id.* at 954 (quoting Prosecutor v. Furudzija, 38 I.L.M. 317 (1999) (Int'l Crim. Trib. for the Former Yugoslavia, decision of Dec. 10, 1998), *available at* 1999 WL 363473)).

38. *Id.* at 953.

39. Yang, *supra* note 21, at 198 (citing Donald J. Kochan, *The Political Economy of the Production of Customary International Law: The Role of Non-Governmental Organizations in U.S. Courts*, 22 BERKELEY J. INT'L L. 240, 242 (2004)).

40. Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

41. *Id.* at 697.

defendant, Jose Francisco Sosa, for violently abducting Alvarez-Machain who offered aid to Enrique Camarna-Salazar.[42] Camarna-Salazar was an agent of the Drug Enforcement Administration who was tortured and murdered by the Mexican government.[43] It was alleged that "Sosa[] abducted Alvarez from his house, held him overnight in a motel, and brought him [on a] private plane to El Paso, Texas, where [Alvarez] was arrested . . . ."[44]

Alvarez-Machain brought a false arrest claim against the United States under the Federal Torts Claim Act (FCTA) as well as an ATS claim against Sosa for violating the Law of Nations.[45] The Ninth Circuit ruled in favor of Alvarez-Machain, and Sosa appealed.[46]

The Supreme Court reversed the Ninth Circuit's judgment in favor of Alvarez-Machain, and held the ATS, "by its grant of jurisdiction, authorized the federal courts to recognize federal common law causes of action to redress violations of . . . international norms."[47] In addition to further defining the extent of grounds for ATS claims, *Sosa* served as the leading authority for the *Kiobel* decision.

Although the preceding case law helped to clarify the ATS, the Supreme Court would later make its unprecedented determination in *Kiobel*, drastically limiting the applicability of the ATS. Before *Kiobel*, the requirements of bringing suit under the ATS could be simplified to: "(1) the plaintiff must be an 'alien,' (2) the defendant must have committed a 'tort,' and (3) the 'tort' must violate either a treaty, or the 'law of nations.'"[48]

The alien status requirement under the ATS was never at issue in ATS cases. An alien is someone who "relat[es], belong[s to], or ow[es] allegiance to another country or government."[49] The second and third elements of the ATS require the defendant to commit a tort in violation of a treaty or the Law of Nations.[50] For a defendant to violate the Law of Nations, their offense must be "definable, obligatory, and universally

42. *Id.*
43. *Id.*
44. *Id.* at 698.
45. *Id.*
46. *Id.* at 699.
47. Brief for Petitioner at 1, Kiobel v. Royal Dutch Shell, 133 S. Ct. 1659 (2013) (No. 10-1491).
48. Yang, *supra* note 21, at 198 (citing Kadic v. Karadzic, 70 F.3d 232, 238 (2nd Cir. 1995)).
49. *Definition of Alien*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/alien (last visited May 10, 2014).
50. Yang, *supra* note 21, at 198.

condemned."[51] Initially, violations of the Law of Nations under the ATS was limited to "violation[s] of safe conducts, infringement of the rights of ambassadors, and piracy."[52] However, today courts have the discretion to interpret the ATS based on laws existing in the world today.[53]

The issue of corporate liability under the ATS remains somewhat of a mystery. *Doe* allowed a claim to be brought against Unocal, a corporation.[54] The majority in *Doe* reasoned because Unocal knew or should have known its conduct would assist the Myanmar military in committing human rights violations, it should be held liable as a corporation.[55] However, before the Ninth Circuit could make its determination, "the parties settled the case."[56] Thus, *Doe* never formally addressed the issue of corporate liability. Because *Sosa* "dealt with claims against individual person . . . rather than a corporation," prior to Kiobel, the Supreme Court had not had the opportunity to rule on corporate liability under the ATS.[57]

Kiobel presented the Court with a unique question of determining corporate liability under the ATS.[58] The *Kiobel* decision was important not only for its paramount determination on the ATS, but also for the important questions it raised for alien victims of human rights violations, corporate defendants, and foreign sovereigns alike.

B. Kiobel v. Royal Dutch Petroleum

The *Kiobel* case brought about the first opportunity for the Supreme Court to rule on corporate liability under the ATS. Mrs. Kiobel and the other Petitioners "allege[d] that [the Shell companies] aided and abetted these atrocities by . . . providing the Nigerian forces with food, transportation, and compensation, as well as allowing the Nigerian military to use respondents' property as a staging ground for attacks."[59] Documents

51. *Id.* at 199 (quoting Filartiga v. Pena-Irala, 630 F.2d 876, 881 (2d Cir. 1980)).

52. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1661 (2013) (quoting Sosa v. Alvarez-Machain, 542 U.S. 692, 694 (2004).

53. *Filartiga*, 630 F.2d at 881.

54. Doe I v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002), *on reh'g en banc sub nom.*, John Doe I v. Unocal Corp., 403 F.3d 708 (9th Cir. 2005).

55. *Id.* at 946.

56. Yang, *supra* note 21, at 200.

57. *Id.* at 202.

58. *Id.*

59. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1662–63 (2013).

in Mrs. Kiobel's possession revealed an approval by SPDC to use violent force against protesters,[60] and a request for arms.[61]

Shortly after the alleged human rights violations, the Petitioners moved to the United States, were granted political asylum, and became legal United States residents.[62] The Petitioners filed their suit in the District Court for the Southern District of New York.[63] They brought their claim under the ATS, alleging:

> [R]espondents violated the law of nations by aiding and abetting the Nigerian Government in committing (1) extrajudicial killings; (2) crimes against humanity; (3) torture and cruel treatment; (4) arbitrary arrest and detention; (5) violations of the rights to life, liberty, security, and association; (6) forced exile; and (7) property destruction.[64]

The first, fifth, sixth, and seventh claims were dismissed by the district court, because the claims did not violate the Law of Nations.[65] The Second Circuit dismissed the complaint entirely, "reasoning that the law of nations does not recognize corporate liability."[66] The Second Circuit based its dismissal on the notion that "corporate liability under the ATS [was] an issue of subject matter jurisdiction," and "placed great emphasis on . . . [a lack of] case law holding corporations accountable directly under international law for violations of international human rights norms . . . ."[67]

The Petitioners appealed, arguing "the Second Circuit erred by treating the issue of corporate liability as an issue of subject matter jurisdiction," and explained "[n]othing in the . . . ATS suggests that the drafters meant to

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60. Letter from the Managing Director, Shell Petroleum Dev. Co. of Nig. Limited to the Inspector General of the Nigeria Police (n.d.) (stating that on July 27, 1994, "approval was given for [SPDC] to import some arms and ammunition for the use of Police Force to enhance the security of . . . oil installations.").

61. Letter from the Managing Director, Shell Petroleum Dev. Co. of Nig. Limited to the Inspector General of the Nigeria Police Force (Aug. 17, 1994) (requesting additional firearms and ammunition).

62. *Kiobel,* 133 S. Ct. at 1663.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. Brief for Petitioner at 4–5, Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013) (No. 10-1491).

exclude entities from the tort liability recognized in the statute."[68] The United States Supreme Court granted certiorari on October 17, 2011.[69]

The *Kiobel* decision hinged upon "whether and under what circumstances courts may recognize a cause of action under the Alien Tort Statute, for violations of the law of nations occurring within the territory of a sovereign other than the United States."[70] Specifically, the question before the Court in *Kiobel* was "whether a claim may reach conduct occurring in the territory of a foreign sovereign," not merely whether an ATS claim was properly asserted.

The Court ultimately held in favor of Respondents, affirming the judgment of the Court of Appeals.[71] In determining the applicability of the ATS to Law of Nations violations occurring outside of the United States, the Court, led by Justice Roberts, sought to determine the legislative intent of the ATS's scope. The Court recognized the opaqueness of the statue which "does not expressly provide any causes of action."[72] However, it found the statute was not meant to be "stillborn,"[73] but instead enacted to "provide a cause of action for [a] modest number of international law violations."[74]

In absence of any clear language granting jurisdiction to foreign petitioners for actions taking place outside of the United States, the Court relied upon the presumption against extraterritorial application.[75] This canon of statutory interpretation provides "[w]hen a statute gives no clear indication of an extraterritorial application, it has none . . . ."[76] The presumption against extraterritoriality is often invoked whenever an act of Congress applies abroad.[77] Thus, since the ATS does not provide any clear indication of its extraterritorial application, the Court reasoned it could not

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68. *Id.* at 8-9.

69. *Kiobel v. Royal Dutch Petroleum*, SCOTUS BLOG, http://www.scotusblog.com/case-files/cases/kiobel-v-royal-dutch-petroleum/ (last visited Dec. 12, 2013).

70. *Kiobel*, 133 S. Ct. at 1662.

71. *Id.* at 1669.

72. *Id.* at 1663.

73. *Id.*

74. *Id.* (quoting Sosa v. Alvarez-Machain, 542 U.S. 692, 724 (2004)).

75. *Id.* at 1664.

76. *Id.* (quoting Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 256 (2010)).

77. *Id.*; *see, e.g.,* EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 246 (1991) ("These cases present the issue whether Title VII applies extraterritoriality to regulate the employment practices of United States employers who employ United States citizens abroad."); *Morrison*, 561 U.S. at 254 (noting that the question of extraterritorial application was a "merits question," not a question of jurisdiction).

be used to grant jurisdiction to the petitioner's claims, which took place in Nigeria.

Petitioners argued that even if the presumption applied, "Congress . . . [could] indicate that it intends federal law to apply to conduct occurring abroad."[78] Petitioners further contended, "because Congress surely intended the ATS to provide jurisdiction for actions against pirates, it necessarily anticipated the statute would apply to conduct occurring abroad."[79] However, the Supreme Court countered, finding neither any evidence within the text or historical background of the ATS to displace the presumption against extraterritoriality."[80] The Supreme Court also rejected the Petitioners' argument that the ATS' application to piracy is evidence of its extraterritorial intent. The majority reasoned that applying the US law to pirates "does not typically impose the sovereign will of the United States onto conduct occurring within the territorial jurisdiction of another sovereign."[81] This reason was consistent with the ATS's policy of not infringing on the rights of other nations.[82] Thus, despite the Petitioners' arguments, the Court held the canon against extraterritoriality applied.[83]

For cases after *Kiobel*, any claim brought under the ATS can only be brought in United States courts if they "touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritorial application."[84] This requirement is arguably the most controversial language of the opinion. *Kiobel's* holding begs the questions of what "touch and concern" means, and what constitutes sufficient force. Justice Kennedy admits the Court's decision left "open a number of significant questions" pertaining to the reach and interpretation of the Alien Torts Statute.[85]

Both Justice Alito and Justice Breyer attempted to answer these questions in their concurring opinions. Justice Alito's concurrence suggests

78. *Kiobel*, 133 S. Ct. at 1665; *see, e.g.*, 18 U.S.C. § 1091(e) (2012) (providing jurisdiction over the offense of genocide "regardless of where the offense is committed" if the alleged offender is, among other things, "present in the United States").

79. *Kiobel*, 133 S. Ct. at 1667.

80. *Id.* at 1666; *see Morrison*, 561 U.S. at 265 (noting that "[a]ssuredly contact can be consulted" in determining whether a cause of action applies abroad).

81. *Kiobel*, 133 S. Ct. at 1667.

82. *Id.* at 1664; *see Morrison*, 561 U.S. at 256; Microsoft Corp. v. AT & T Corp., 550 U.S. 437, 454 (2007) ("[T]he presumption that the United States law governs domestically but does not rule the world applies . . . .").

83. *Kiobel*, 133 S. Ct. at 1669.

84. *Id.*

85. *Id.* (Kennedy, J., concurring).

that ATS causes of action should only fall outside the scope of the presumption against extraterritoriality when the action (1) meets "*Sosa*'s requirements of definiteness and acceptance" and (2) actually occurs within the United States.[86]

Justice Breyer concurred with the Court's conclusion, but not its reasoning.[87] He proposed that instead of using the presumption against extraterritorial jurisdiction, the ATS should apply in three specific instances: "where (1) the alleged tort occurred on American soil, (2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important American national interest . . . ."[88]

Despite the efforts of the concurring opinions, the *Kiobel* decision left many important questions unresolved. The following sections of this Comment discusses the Supreme Court and district court's application of *Kiobel*.

C. Supreme Court Treatment of ATS Claims Post-Kiobel

After the Supreme Court's decision, Court of Appeals for the Ninth Circuit had the first opportunity to apply the "touch and concern" language of *Kiobel*. On the same day as the *Kiobel* decision, the Supreme Court granted certiorari in the Ninth Circuit case, *Daimler AG v. Bauman*.[89] *Daimler* addressed the issue of whether personal jurisdiction could be exercised over a foreign corporation solely because its domestic subsidiary maintained continous activities within the forum state.[90]

The petitioners in *Daimler* brought a claim under the ATS, alleging that one of Daimler Chrysler's subsidiaries, Mercedes Benz Argentina, aided and abetted Argentinian security forces in Argentina's Dirty War by torturing, killing, kidnapping, and detaining the petitioners and their relatives.[91] The appellate court dismissed the claim for lack of personal jurisdiction.[92] The Supreme Court ultimately held that the petitioners' claim

86. *Id.* at 1670 (Kennedy, J., concurring).

87. *Id.* at 1670–71 (Breyer, J., concurring).

88. *Id.* at 1671.

89. Bauman v. DaimlerChrysler Corp., 644 F.3d 909, 917 (9th Cir. 2011), *rev'd sub nom.* Daimler AG v. Bauman, 134 S. Ct. 746 (2014).

90. *Id.*

91. *Id.* at 911.

92. *Id.* at 917.

was improperly brought under the ATS, and could not serve as a valid basis for personal jurisdiction.[93]

Again on the same day as *Kiobel*, the Supreme Court vacated the Ninth Circuit's ruling in *Rio Tinto PLC v. Sarei*. The Ninth Circuit permitted corporate liability under the ATS, and found Rio Tinto could be sued under the ATS for human rights abuses and thousands of deaths linked to pollution cause by the company's copper and gold mines in Papua New Guinea.[94] The Court remanded the case to the Ninth Circuit for additional rulings in light of the Court's decision in *Kiobel*.[95]

D. District Courts' Application of Kiobel

The district courts also moved to rule in light of the *Kiobel* decision. Most of the litigation in district courts has involved human rights violations taking place entirely abroad.[96] In these instances, the presumption against extraterritoriality has prevented plaintiffs from bringing suit.[97] Conversely, district courts have allowed claims brought under the ATS for claims with strong enough connections to "touch and concern" the United States with sufficient force.

In *Sexual Minorities Uganda v. Lively*, the district court determined that *Kiobel's* "touch and concern . . . with sufficient force" requirement was satisfied by the defendants actions, which took place in the United States.[98] The defendant was charged with planning and managing a campaign of repression in Uganda from his Massachusetts residence.[99] The district court for Massachusetts applied the ATS by distinguishing *Kiobel* in two ways.

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93. *Daimler AG*, 134 S. Ct. at 750.

94. Sarei v. Rio Tinto PLC, 671 F.3d 736 (9th Cir. 2011), *cert. granted, judgment vacated sub nom.* Rio Tinto, PLC v. Sarei, 133 S. Ct. 1995 (U.S. 2013).

95. *Rio Tinto PLC*, 133 S. Ct. at 1995.

96. Fotso v. Republic of Cameroon, No. 6:12 CV 1215-TC, 2013 WL 3006338, at *7 (D. Or. June 11, 2013) (dismissing Plaintiff's ATS claims for lack of jurisdiction in less than a paragraph based on the presumption against extraterritoriality enforced in *Kiobel*).

97. *See* Al Shimari v. CACI Intern, Inc., 951 F. Supp. 2d 857 (E.D. Va. 2013) (holding that the court lacked jurisdiction over claims by four Iraqi citizens against private security company CACI Premier Technologies, because the acts giving rise to Plaintiff's injuries occurred exclusively on foreign soil and outside the territory of the United States); *see also* Balintulo v. Daimler AG, 727 F.3d 174 (2d Cir. 2013) (dismissing plaintiff's ATS claim that alleged that South African subsidiaries of three U.S.-based companies, Ford, IBM, and DaimlerChrysler, aided and abetted the apartheid government of South Africa in acts of rape, torture, and extrajudicial killings against South African citizens because the actions took place in another sovereign).

98. Sexual Minorities Uganda v. Lively, 960 F. Supp. 2d 304, 322 (D. Mass. 2013).

99. *Id.* at 309.

Firstly, the defendant's conduct in *Sexual Minorities Uganda was* carried out by an American citizen.[100] Secondly, although the harm endured by the plaintiffs occurred in Uganda, nearly all of the defendant's conduct took place in the United States.[101] Consequently, the claims in *Sexual Minorities Uganda* were properly brought under the ATS and "touched and concerned the territory of the United States" with enough force to displace the presumption against extraterritoriality.

Given the response from the Supreme Court and district courts following *Kiobel*, it appears that United States courts are moving towards restricting extraterritorial application of human rights claims under the ATS.

E. Defining What It Means to "Touch and Concern" with "Sufficient Force"

As of yet, the Supreme Court has not had the opportunity to clearly define what it means to "touch and concern" the territory of the United States with "sufficient force."[102] This portion of the Comment speculates as to which claims would succeed under the ATS after *Kiobel*. Specifically, it addresses (1) whether conduct occurring outside of the United States can "touch" the United States; (2) whether the actions of a foreign subsidiary of a United States corporation can satisfy the "touch" requirement of *Kiobel*; (3) the type of conduct that could "concern" the United States, and (4) what conduct constitutes "sufficient force."

1. Absent a Clear Indication of Extraterritoriality, Can the ATS Apply To Conduct Occurring Outside the United States?

The concurring opinions in *Kiobel* read a requirement of conduct occurring within the territory of the United States into the "touch and concern with sufficient force" language.[103] Presumably, this interpretation is consistent with the majority's analysis of the intentions of the ATS. The majority reasoned the fact the ATS applies to aliens does not make its application automatically extraterritorial.[104] Further, the majority opined the petitioners were incorrect to contend that the "text, history, and purposes of the ATS rebut" the presumption against extraterritoriality.[105]

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100. *Id.* at 321.
101. *Id.*
102. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1669 (2013).
103. *Id.* at 1671 (Breyer, J., concurring).
104. *Id.* at 1665 (majority opinion).
105. *Id.*

However, just six years after the enactment of the ATS, an opinion by Attorney General William Bradford applied the ATS to a violation of the Law of Nations that occurred in Sierra Leone.[106] Bradford noted:

> [T]here can be no doubt that the company or individuals who have been injured by these acts of hostility have a remedy by a civil suit in the courts of the United States; jurisdiction being expressly given to these courts in all cases where an alien sues for a tort only, in violation of the laws of nations, or a treaty of the United States . . . .[107]

Bradford's statements give a very clear indication that the ATS could apply extraterritorially. Thus, the text and history of the ATS does not clearly provide that conduct must occur within the territory of the United States for jurisdictional relief.

Bradford's statements provide support that the text and history of the ATS *does* in at least one instance rebut the presumption against extraterritorality. Thus, even without any clear indication of extraterritorial intent, the text and history of the ATS support its application to conduct occurring outside the United States.

2. Can the Actions of a Foreign Subsidiary of a United States Corporation "Touch" the Territory of the United States?

The requirement of "touching" the territory of the United States could be purely jurisdictional. *Kiobel* has taught us that the ATS will not support a claim against a company merely because an entity of the company exists in the United States. Subsidiaries of transnational oil company, such as SPDC, are only subject to United States' authority to the extent that its actions can be attributed to the parent corporation as a whole. Many multinational oil companies, including Shell, have been carefully crafted with multiple subsidiaries, holding companies, and other entities "designed to minimize accountability and liability for the impact of operations . . . ."[108] As a result,

106. Beth Stephens, *Extraterritoriality and Human Rights After* Kiobel, 28 MD. J. INT'L L. 256, 268 (2013), *available at* http://digitalcommons.law.umaryland.edu/mjil/vol28/iss1/13; Breach of Neutrality, 1 Op. Att'y Gen. 57, 59 (1795). For an extensive discussion of the *Bradford* opinion, including contemporaneous documents confirming that Bradford knew that the events had occurred in the territory of a foreign state, see Supplemental Brief of Amici Curiae Professors of Legal History et al. in Support of Petitioners at 18–25, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491).

107. Stephens, *supra* note 106, at 268–69 (quoting Breach of Neutrality, 1 Op. Att'y Gen. at 59).

108. *Id.* at 260.

a conjectural ATS case that adequately "touched" the United States would likely involve a foreign corporation with a corporate structure that can easily be traced to the United States. However, after the 2014 *Daimler* decision, it is doubtful personal jurisdiction could be obtained over a multi-national corporation with actions closely tying it to a United States corporation, even if the claim was brought successfully under the ATS.

3. What Type of Conduct "Concerns" the Territory of the United States?

With respect to the majority's analysis on the history of the ATS, it is troubling to decipher which human rights violations "concern" the United States. This could imply certain human rights violations are not important enough to be heard in United States courts. By the broadest translation, any human rights violation could concern the United States. Certain comparative law theorists contend that violations of human rights by their very nature are extraterritorial.[109] International law prohibits human rights violation regardless of where the conduct occurs.[110] Universal norms have no geographical limitations.[111]

Another broad reading of "concern" could be to interpret it as an effect on the moral compass of the United States. When the United States was first alerted of the abuses in Ogoniland, the Congressional Human Rights Caucus wrote to Nigeria's Head of State and Commander In Chief General Sani Abacha. In the letter dated May 6, 1994, United States Chairman Tom Lantos urged the Nigerian government to "protect the fundamental rights of . . . the Ogoni people."[112] Under the moral definition of concern, it is clear that *Kiobel* "concerned" the United States.

Under a more narrow interpretation of "concern," a cause of action would need strong enough ties to the United States without infringing on the sovereignty of the jurisdiction in which the offenses took place. Hypothetically, a case in which American citizens working abroad in a United States embassy or a similar agency committed human rights violations against foreigners could "concern" the United States. However the facts in *Kiobel* make the "concern" language even more troubling. If actions which took place in Nigeria, a country which has been one of the

109. *Id.* at 258 ("[U]niversal human rights . . . are 'extraterritorial' by definition.").

110. *Id.* (listing genocide, slavery, and torture by name rather than human rights violations generally).

111. *Id.*

112. Letter to General Sani Abacha from Congress, provided by Esther Kiobel to author (n.d.) (on file with author).

United States' top five oil producers,[113] involving Shell, a company which has a strong presence in the United States, did not "concern" the United States, it is difficult to imagine what could.

4. "With Sufficient Force": The "Catch All" Provision of the Kiobel Requirements

The "sufficient force" language appears to place another barrier on claims brought under the ATS which clear the hurdles of "touching" and "concerning" the United States. Hypothetically, an incident which violates human rights norms and is considered to touch and concern the territory of the United States could still fall short of *Kiobel*'s requirements. The "sufficient force" language of the *Kiobel* decision is arguably the most challenging. Future ATS cases will have to set the scopes and bounds of when a claim which touches and concerns the United States does so with sufficient force and when one does not.

Part I of this Comment's analysis was strictly confined to the immediate ramifications of the *Kiobel* decision. It offered an answer to what it means to "touch and concern" and to do so with "sufficient force." The questions raised by *Kiobel* beg the bigger question on the state of human rights violations under the ATS after *Kiobel*'s ruling. The concurring opinions indicate to "touch and concern with sufficient force" requires actions to take place in the United States. However theoretically there are a number of scenarios in which actions occurring abroad meet *Kiobel*'s requirements under the ATS. The scenarios offered above are of course mere conjecture. In truth, only time will tell if the Supreme Court will expand or restrict the scope of the ATS.

II. Possible Avenues for Remedy

The door to corporate liability for Shell Petroleum Development Company's actions has been tightly shut under the ATS. Despite this, several avenues for relief for the *Kiobel* Petitioners and/or for holding Shell accountable may still exist. Recall that the actions in *Kiobel* took place in Nigeria, the Petitioners soon after moved to the United States, and that Shell is incorporated in the United Kingdom and headquartered in the Netherlands.[114] In addition to bringing suit in the United States, the *Kiobel* Petitioners had the opportunity to bring suit in Nigeria, the Netherlands, and

113. *Shell at a Glance*, SHELL.COM, http://www.shell.com/global/aboutshell/at-a-glance.html (last visited May 10, 2014).

114. *Id.*

the United Kingdom. This section explores all of the possible avenues for holding Shell and similarly situated multi-national companies liable for human rights violations.

A. Domestic Relief in Nigeria

> *[T]here is adequate evidence [to] expose Shell Petroleum Development Company's evil collaboration with Nigerian government, which invariably poses legitimate and explainable fear that if ever the case is referred to Nigeria, the oil giant will be exonerated.*
>
> *. . . It would discredit the United States Supreme Court's judgmental competence if this case is referred to Nigeria, because even a child in the crèche knows that you cannot ask an abuser to be his or her own judge.*
>
> –Esther Kiobel on relief under Nigerian law[115]

The Nigerian government itself allegedly carried out the heinous acts against the *Kiobel* Petitioners,[116] this likely created significant doubt in the viability of relief in Nigerian courts.[117] The Nigerian government showed a strong interest in resolving the dispute at home. Upon the Petitioner's grant of jurisdiction in the United States, the Nigerian government expressed to the U.S. Attorney General that

> the suit would improperly assert "extra territorial jurisdiction of a United States court . . . for events which took place in Nigeria;" "jeopardize the on-going process initiated by the current government to reconcile with the Ogoni people in Nigeria;" "compromise the serious efforts by the Nigerian Government to guarantee the safety of foreign investments, including those of the United States;" and "gravely undermine [Nigeria's] sovereignty and place under strain the cordial

115. Esther Kiobel, *Dr. Kiobel's Widow: A Living Story of Shell Cruelty*, OGONI-NIGER DELTA NEWS, Sept. 17, 2012, http://news.huraclub.org/2012/09/17/dr-koibels-widow-living-story-shells-cruelty-2/.

116. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1660 (2013).

117. *See* cases cited *infra* note 132.

> relations that exist with the Government of the United States of America."[118]

Considering the breadth of legal remedies for tortious conduct, environmental damages, and human rights violations available under Nigerian law alone, the *Kiobel* Petitioners may have been able to receive justice in their own backyard.

Nigerian law provides relief for tortious conduct between Nigerian citizens and multinational companies such as Shell.[119] The *Kiobel* Petitioners sought redress for numerous claims that could give rise to tort liability under Nigerian law, including "arbitrary detention," which could give rise to a false imprisonment claim, "burning, destroying or looting property," which equates to trespass by chattels claims, and "beat[ing], and flog[ing]" Petitioners, which could lead to assault and battery claims.[120] If these claims were successfully brought in a court in Nigeria, the Nigerian Petitioners could receive "monetary compensation for damages or an injunction" against the defendants.[121] In addition to this, the parties could have opted to settle the dispute privately.[122]

Nigerian courts also offer prohibitory injunctions. An order granting prohibitory injunctive relief would prevent Shell from acting in a way that would further harm the Petitioners. However, It is unlikely that the *Kiobel* Petitioners (or similarly situated plaintiffs) would be granted injunctive relief against Shell. Nigerian courts do not typically grant injunctive relief against multinational oil companies.[123] Instead, Nigerian courts have chosen to forego injunctive relief against oil companies drilling in indigenous communities to prevent "disturb[ing] the oil industry which is the main

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118. Jonathan S. Massey, *The Two That Got Away:* First American Financial Corp. v. Edwards and Kiobel v. Royal Dutch Petroleum Co., 7 CHARLESTON L. REV. 63, 83 (2012) (quoting Joint Appendix at 129, 130, 131, Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013) (No. 10-1491)).

119. OLUFEMI AMAO, CORPORATE SOCIAL RESPONSIBILITY, HUMAN RIGHTS AND THE LAW: MULTINATIONAL CORPORATIONS IN DEVELOPING COUNTRIES 141 (2011).

120. Amended Class Action Complaint at 6, Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013) (No. 10-1491).

121. AMAO, *supra* note 119, at 129.

122. For example, Shell settled a similar case with the Ogoni people for numerous tortious and human rights violations including the killing of activist Ken Saro-Wiwa. Ed Pilkington, *Shell Pays Out $15.5m over Saro-Wiwa Killing*, GUARDIAN, June 8, 2009, http://www.theguardian.com/world/2009/jun/08/nigeria-usa.

123. Jedrzej George Frynas, *Legal Change in Africa: Evidence from Oil-Related Litigation in Nigeria*, 43 J. AFR. L. 121, 122 (1999).

source of the country's revenue."[124] However, Nigerian courts have granted injunctive relief where companies have violated human rights under the African Charter and other international law.[125]

The claims against Shell could also be brought under a theory of negligence under Nigerian tort law. To sustain an action for negligence, the Petitioners would have to show that the defendants (1) owed them a duty of care, (2) breached that duty of care, and (3) the breach caused the Petitioners' injuries.[126]

In cases regarding multinational companies and indigenous populations, the biggest challenge faced by a plaintiff is showing that the defendant acted negligently, or did not act as a reasonable operator under the circumstances. The *Kiobel* Petitioners could prove this element through two angles. First, they could compare Shell's operations in Ogoniland to other operators in Nigeria; however, doing so would likely produce favorable results for Shell. Unfortunately, the torts alleged here, which amount to destruction of property and nuisance in the Nigerian community, are commonplace practice by operators in Nigeria. Several multinational oil companies drilling in Nigeria have also been subject to suit by indigenous populations.[127] Thus, it would be difficult to establish Shell's practices in Ogoniland are unreasonable compared to the practices of other operators in Nigeria. Consequently, a negligence claim rooted in such a comparison is unlikely to prevail.

Secondly, the Kiobel Petitioners could attempt to establish the unreasonableness of Shell's operations in Nigeria by contrasting Shell's operating practices in in Ogoniland to its operations in other countries. In order to do this, the *Kiobel* Petitioners would first be tasked with establishing that the comparison country is similarly situated to Ogoniland. A non-exhaustive list of factors to be weighed into this comparison would

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124. AMAO, *supra* note 119, at 130; *see* Irou v. Shell-BP, Unreported Suit No. W/89/71 (Warri High Ct. Nov. 26, 1973) (Nigeria) (plaintiff whose land, fish pond and creek had polluted by Shell-BP operations was denied injunctive relief to restrain the company from further pollution); *see also* Chinda v. Shell-BP, [1974] 2 RSLR 1 (Nigeria) (denying plaintiff injunctive relief for illegal gas flaring against Shell-BP.)

125. AMAO, *supra* note 119, at 140; *see* Gbemre v. Shell Petroleum Dev. Co. Nigeria, Ltd., No. FHC/B/CS/53/05 (F.H.C. Nov. 14, 2005) (Nigeria) (granting injunctive relief against plaintiff where court found that failure to grant relief would violate fundamental human rights and international standards).

126. *See* Jill Cottrell, *The Tort of Negligence in Nigeria*, 17 J. AFR. L. 30 (1973) (implying that Nigeria follows the traditional common law elements of negligence).

127. *See* Bowoto v. Chevron Texaco Corp., 621 F.3d 1116, 1119 (9th Cir. 2010); Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 91 (2d Cir. 2000).

include: socioeconomic status, topical similarities, comparable natural resources, etc.

A claim of negligence could also be brought under the doctrine of *res ipsa locquitor*, Latin for "the thing speaks for itself."[128] When this type of negligence is alleged, the plaintiff need not show any lack of due care on the part of the defendant, but instead must show that the fact the accident occurred alone constitutes negligence for which the defendant is strictly liable.[129] Nigerian courts have found for plaintiffs, holding Shell-BP liable in *res ipsa locquitor* negligence cases involving environmental damage.[130] Thus, the *Kiobel* Petitioners could have remedies in the form of settlement, monetary damages, or injunctive relief for a variety of tortious theories, including ordinary negligence and strict liability.[131]

B. Avenues for Relief in Nigeria Based on Nigerian and International Human Rights Law

Nigerian human rights law also provides a viable avenue for holding Shell accountable for their violations against the *Kiobel* Petitioners. In the landmark decision of *Gbemere v. Shell*, the plaintiffs claimed

> oil exploration and production activities of Shell which led to incessant gas flaring . . . violated their right to life and dignity of the human person under sections 33(1) and 34(1) of the [Nigerian] Constitution, and articles 4, 16, and 24 of the African Charter [on Human and People's Rights].[132]

The plaintiffs in *Gbemere* were successful in their suit against Shell Nigeria, the Nigerian National Petroleum Corporation, and the attorney general of the federation "under the fundamental rights enforcement

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128. RESTATEMENT (SECOND) OF TORTS § 328D cmt. a (1965).

129. *Id.* § 328D cmt. e.

130. AMAO, *supra* note 119, at 130 (citing Mons v. Shell-BP, [1970-1972] 1 RSLR 71 (Nigeria)).

131. While this section only explored a few remedies under Nigerian tort law. Claimants have also had success against multi-national oil companies for violations under the Rule in *Rylands v. Fletcher*. *See* Umudje v. Shell-BP, [1975] 9-11 SC 155 (Nigeria) (holding that *Rylands v. Fletcher* applies where the plaintiffs claim that materials from Shell's waste pit escaped unto the plaintiff's farms, ponds, and lakes). *But see* Shell Petroleum Dev. Corp. (Nig) Ltd. v. Amaro, [2000] 10 NWLR 248 (C.A.) (Nigeria) (finding the defendants are not liable under *Rylands v. Fletcher* because the establishment of a crude oil pipeline on land with potential of escape or spill was not a natural use of the land).

132. AMAO, *supra* note 119, at 139 (citing Gbemre v. Shell Petroleum Dev. Co. Nigeria, Ltd., No. FHC/B/CS/53/05 (F.H.C. Nov. 14, 2005) (Nigeria)).

procedure in the Nigerian Constitution . . . ."[133] The Nigerian federal high court held the Nigerian Constitution protects the "rights to clean, poison-free, pollution-free environment."[134]

Gbemere confirms that claims can be brought under the African Charter on Human and People's Rights where no such claim exists under Nigerian national law.[135] The African Charter on Human and People's Rights is one of multiple international human rights law provision that provide another avenue for relief for the Kiobel Petitioners.

Nigeria is currently a member of various international treatises including the International Covenant on Economic, Social, and Cultural Rights; the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment; and the African Charter on Human and People's Rights.[136] As a member to these organizations, Nigeria is subject to sanctions for human rights violations, which provides another avenue of relief for the *Kiobel* Petitioners and for similarly situated plaintiffs. In addition to this, as *Gbemere* implies, Nigerian courts have a greater incentive to enforce fundamental rights when a plaintiff's claims violate both domestic law *and* an international treatise.

Should the *Kiobel* Petitioners seek redress in Nigerian courts, their claims would have the greatest force if coupled with a claim under the African Charter on Human and People's Rights. "Nigeria has ratified nine of the 13 core current international human rights treatises in force . . . ."[137] However, Nigeria has failed to ratify necessary provisions to give make give these treatises full effectiveness.[138]

The African Charter on Human and People's Rights provides many relevant provisions to the claims of the *Kiobel* Petitioners, including Article 5, which protects human dignity by preventing "[a]ll forms of exploitation and degradation particularly . . . torture, cruel, inhuman, or degrading . . .

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133. *Id.*
134. *Id.*
135. *Id.* at 140.
136. *Id.* at 136–37.
137. *Id.* at 136.
138. *Id.* For example,

> Nigeria has not signed the optional protocol on the Convention against Torture (2002) and does not recognize the competence of the Committee against Torture to receive communications from individuals under article 22 of the convention. Also, Nigeria has not taken its reporting obligations under the treaties seriously. Its reports have been few and far between.

Id. (citing Human Rights Committee, Concluding Observations of the Human Rights Committee: Nigeria 16/09/95, UN Doc. A/51/40, para. 42 (1997)).

treatment . . . ."[139] Article 21 provides "[i]n case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation."[140] Article 21 also ensures Nigerian citizens protection against foreign companies such as Shell, prescribing that "States parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation . . . so as to enable their peoples to fully benefit from the advantages derived from their national resources."[141]

The African Charter has been formally incorporated into the Nigerian domestic law,[142] and "can be enforced through the procedure provided under the Nigerian Constitution."[143] However, the text of the Charter provides its own sanctions for any provisional breaches. Article 47 requires all participating states to report any actions, which may violate the Charter's provisions.[144] If the violating parties do not reconcile their actions within a certain time frame, the Charter will make a formal report of the finding, subjecting the violating nation to international scrutiny.[145]

The Nigerian government might also be subject to accountability under the International Labour Organisation's Convention 169 (ILO 169). The International Labour Organisation is a specialized agency of the UN and sets international standards by adopting conventions, recommendations, and strategies for their implementation.[146] The provisions of ILO 169 are unique in that they promote the advancement and protection of indigenous populations.[147] It stipulates, "wherever possible[;][148] [indigenous groups]

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139. *African Charter on Human and Peoples' Rights*, AFRICA COMM'N ON HUMAN & PEOPLES' RIGHTS, art. 5, http://www.achpr.org/instruments/achpr/ (last visited May 10, 2014).

140. *Id.* at art. 21.

141. *Id.*

142. AMAO, *supra* note 119, at 137 (citing 21 I.L.M. 58 (1981)).

143. *Id.* (quoting Garba v. Lagos State Attorney Gen., Suit ID/599m/91 (Oct. 31, 1991) (Nigeria), and Agbakoba v. Director State Sec. Servs., [1994] 6 NWLR (Pt 351) 475 (Nigeria)).

144. *African Charter on Human and Peoples' Rights*, *supra* note 139, at art. 47.

145. *Id.* at art. 52.

146. *See, e.g.*, BRIGITTE FEIRING, INT'L LABOUR ORG., INDIGENOUS AND TRIBAL PEOPLES' RIGHTS IN PRACTICE: A GUIDE TO ILO CONVENTION NO. 169 (2009), *available at* http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_106474.pdf.

147. The ILO is designed to protect the rights of indigenous people groups such as the Ogonis by "stimulat[ing] a dialogue between governments and indigenous and tribal peoples." *Convention No. 169*, INT'L LABOUR ORG., http://www.ilo.org/indigenous/Conventions/no169/lang--en/index.htm (last visited Oct. 28, 2013).

shall participate in the benefit of . . . [resource exploitation] and receive a fair compensation for any damages which they may sustain as a result of such activities."[149] Thus, once ratified, the provisions of ILO 169 provide a means to further pressure the Nigerian government to protect the rights of indigenous people, as well as allow for compensation for damages of the exploration activities.[150]

C. Avenues for Relief in Nigeria on Environmental Law Violations

The *Kiobel* petition lacked detail of the environmental damage suffered as a result of Shell's operations.[151] However, petroleum exploitation in the Niger Delta (where Ogoniland is located) has greatly degraded the community's environment.[152] When oil is produced through improper methods, "forests are destroyed . . . leading to deforestation, noise pollution, threat to marine life, erosion and loss of vegetation and biodiversity."[153] In addition, oil production causes "air pollution, pipeline leakages, operational and accidental spills from well blow-outs, gas flaring, and venting, [which] result in harmful consequences on the people's health, environment, infrastructural development and socio-economic livelihood."[154] As a result, Nigeria has enacted legislation to regulate the

148. The "wherever possible" language of the provision may greatly limit the effectiveness of ILO 169. This language "casts a sore point on this right as it could serve as an alibi for government to renege on its responsibilities." ADEBOLA OGUNLADE, PETROLEUM EXPLOITATION AND INDIGENOUS PEOPLES' (IP) RIGHTS IN NIGERIA: CAN THE INTERNATIONAL LABOUR ORGANISATION (ILO) CONVENTION 169 HELP? at 20 (2010).

149. *Id*.

150. Nigeria has been a member of the ILO since 1969, but only enforces thirty-four of the thirty-eight provisions that it ratified. *Id.* at 21.

151. The petitioners did originally make a claim for destruction of property. *See* Kiobel vs. Royal Dutch Shell Petroleum Co., No. 02 Cir. 7618, 2004 WL 5719589, at *7 (S.D.N.Y. Mar. 31, 2004).

152. OGUNLADE, *supra* note 148, at 1.

153. *Id.* In a Shell Internal Position Paper, it was reported that 56.4km2 of mangrove forest had been destroyed by Shell in Rivers State of Nigeria during seismic operations in 1995. *See* J.P. Van Dessel, The Environmental Situation in the Niger Delta 15 (Feb. 1995) (internal position paper); *see also* Shell-BP v. Usoro [1960] SCNLR 121 (Nigeria); Seismograph Serv. v. Mark, [1993] 7 NWLR (Pt 304) 203 (Nigeria).

154. OGUNLADE, *supra* note 148, at 1-2. "Recently, it was reported that coastal communities near the Qua Iboe Oil Export Terminal operated by ExxonMobil experienced spill incidents recurrently on December 4, 2009; March 24, 2010 and May 1, 2010." *Id.* at 1 n.4 (citing SaharaReporters, New York, *ExxonMobil Oil Spill in Niger Delta Exposes Nigerians to Poisoned Fish*, SAHARA REPORTERS, June 9, 2010, https://web.archive.org/web/20100616040246/http://sahara reporters.com/real-news/sr-headlines/6244-exxonmobil-oil-spill-in-niger-delta-exposes-nigerians-to-poisoned-fish.html). "A World Bank Report stated that about 2,300m3

drilling of multinational oil companies. For example, the Petroleum Act of 1969 require "oil licensees or lessees . . . [to] adopt all possible precautions to prevent pollution and where it occurs or has occurred . . . take prompt steps to control [it] and if possible end it."[155]

In addition, Nigeria's Associated Gas Re-injection Act of 1979 was enacted to ban gas flaring.[156] The act provides for strict penalties on oil companies that fail to comply with its provisions.[157] Unfortunately, there have been several delays in the ratification of this provision, making its enforcement impractical[158] Once the act is in full effect, corporations such as Shell will suffer penalties for gas flaring. Regardless of their imperfections, provisions such as the Petroleum Act of 1969 and the Gas Re-injection Act serve as additional means to hold multinational oil companies accountable for environmental destruction under Nigerian law.[159]

In sum, Nigerian law provides several modes of redress for the Petitioners ranging from tort damages to sanctions under international law. For relief under Nigerian tort law, *Gbereme* illustrates Nigerian courts have are willing to offer injunctive relief when citizens' human rights have been violated. Despite the existence of these remedies, relief under Nigerian law may have greater viability in theory than in practice. The impracticability of relief under Nigerian law is confirmed by Nigeria's failure to ratify multiple provisions of domestic and international law. Further, as Mrs. Kiobel predicted, many remedies in Nigeria may also fail to actuate in cases such as *Kiobel* where the government itself played a role in the offenses.

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of oil in about 300 oil spill incidents were recorded in Nigeria annually between 1991 and 1993 in Rivers and Delta States." *Id.* (citing 1 WORLD BANK, DEFINING AN ENVIRONMENTAL DEVELOPMENT STRATEGY FOR THE NIGER DELTA 49 (1995); 2 *id.* tbl. A.12, at 95; Shell v. Farrah [1995] 3 NWLR (Pt 382) 148 (Nigeria)).

155. *Id.* at 12.

156. Associated Gas Re-Injection Act (1984) Cap. A2 LFN 2004.

157. OGUNLADE, *supra* note 148, at 12.

158. *Id.* Enactment dates include: Jan. 1, 1985; Jan. 1, 2004; Dec. 31, 2012.

159. Similar provisions include: (1) the Federal Environmental Protection Agency Act of 1988, which was established to "centrally administer a national environmental policy in Nigeria. . . . [that] advocates the adoption of mechanisms to . . . prescribe operational standards aimed at eliminating or minimizing adverse environmental effects of mineral and oil development." *Id.* at 13 (citing Federal Environmental Protection Amendment Decree No. (59) (1992) ch. 4.11, 4.14 (Supplement to Official Gazette Extraordinary No. 68, Vol. 79, 23 December, 1992)), and (2) the Environmental Impact Assessment Decree of 1992.

D. A Gleam of Hope: Avenues for Relief Under the Law of the Netherlands

The Kiobel Petitioners could also seek relief under the Law of the Netherlands. Royal Dutch Shell is incorporated in the United Kingdom, and is headquartered in the Netherlands.[160] According to *Kiobel*, "the defendants and representatives of the Nigerian government met in the Netherlands in February 1993 to formulate a plan to restore the peace necessary for defendants to resume their operations."[161] This instance alone may be enough to link the defendants' actions to the Netherlands. Even if this is not the case, the Netherlands courts might be hospitable to Mrs. Kiobel's claims.

Dutch courts appear to be more favorable to cases against Shell Petroleum Development Company (SPDC), for actions that took place in Nigeria. In 2013, the Hague District Court in the Netherlands issued a judgment against SPDC for environmental damages as a result of SPDC's activities in Orobiri Village, Delta State, Nigeria.[162] Plaintiff Freddy Akpan brought suit after SPDC's oil spill "damaged 47 fishing ponds, killed all the fish and rendered the ponds useless."[163] This ruling is said to have opened "new avenues" for Nigerian plaintiffs against SPDC, and can offer much hope to the *Kiobel* Petitioners.[164] The ruling in Akpan's case not only "examin[ed] the role of the parent company, but also looked 'at abuses committed by Shell Nigeria, where the link with the Netherlands is extremely limited'".[165]

Legal provisions in the Netherlands prove to extend additional modes of relief for the Kiobel Petitioners. The Law of the Netherlands recognizes criminal liability for any offense in principle; "its liability is therefore no longer restricted to the class of "economic offences."[166] The Dutch Supreme

160. *Shell at a Glance*, *supra* note 113.

161. Amended Class Action Complaint, *supra* note 120, at 17.

162. Ivana Sekularac & Anthony Deutsch, *Dutch Court Says Shell Responsible for Nigeria Spills*, REUTERS, Jan. 30, 2013, http://uk.reuters.com/article/2013/01/30/uk-shell-nigeria-lawsuit-idUKBRE90T0DC20130130.

163. *Id.*

164. *Id.* (quoting Menno Kamminga, Professor of International Law at Maastricht University) ("The fact that a subsidiary has been held responsible by a Dutch court is new and opens new avenues . . . ."); *id.* (paraphrasing Geert Ritsema, Friends of the Earth spokesman) ("Ritsema said hundreds of other Nigerians in the village of Icot Ada Udo, where Farmer Friday Akpan lives, can now take similar legal action.").

165. *Id.*

166. B.F. Keulen & E. Gritter, *Corporate Criminal Liability in the Netherlands*, ELECTRONIC J. COMP. L., Dec. 2010 (vol. 14.3), at 3, http://www.ejcl.org/143/art143-9.pdf (citing J. DE HULLU, MATERIEEL STRAFRECHT – OVER ALGEMENE LEERSTUKKEN VAN

Court has established that for a corporation to be criminally liable in the Netherlands, the conduct which gave rise to the actions in question has to be "reasonably" imputed to the corporation.[167] Conduct is reasonably imputed to the corporation if it took place within the corporation's scope.[168] The Supreme Court of the Netherlands has "enunciatively summed up four situations or 'groups of circumstances' in which conduct, in principle, may be said to be carried out 'within the scope of a corporation.'"[169] Two situations particularly relevant to the *Kiobel* Petitioners are where (1) "the corporation gained profit from the conduct concerned" and (2) "the course of action was at the 'disposal' of the corporation, and the corporation has 'accepted' the conduct—acceptance including the failure to take reasonable care to prevent the conduct from being performed."[170]

If Shell is found to have violated criminal law of the Netherlands, they are subject to primary and secondary sanctions under the Dutch Penal Code.[171] A corporation disciplined under a primary sanction can be fined for each individual violation committed.[172] A corporation disciplined under a secondary sanction could face the forfeiture of certain rights, assets, or

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STRAFRECHTELIJKE AANSPRAKELIJKHEID NAAR NEDERLANDS RECHT, VIERDE DRUK 163 (2009)).

> Some scholars tend to restrict the scope of Art. 51 DPC by excluding offences of a more physical nature, such as rape. In our opinion, a corporation can be criminally liable, regardless of the nature of the offence. Whether a corporation in a particular case should be prosecuted for a more physical offence like rape or battery is another matter (please note that the Dutch prosecution service (*Openbaar Ministerie*) does not operate a system recognising the principle of mandatory prosecution, meaning that the legality principle does not apply).

Id.

167. *Id.* at 5.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.* at 7.

172. *Id.* ("The DPC [Dutch Penal Code] sets a maximum fine for each criminal offence. There are six categories. The first category maximum is EUR 370; the sixth category maximum is EUR 740,000. Every criminal offence is assigned to one of the first five categories. However, the DPC has a special provision for fines and legal persons. Where a legal person is convicted and the applicable category does not allow for appropriate punishment, a fine from the next higher category may be imposed (Article 23 DPC). Therefore, if the criminal offence is assigned to the fifth category (EUR 74,000) a fine of EUR 740,000 may be imposed on conviction of a legal person. However, the question remains whether EUR 740,000 is an appropriate punishment in the most serious cases.").

publication of the verdict.[173] Finally, outside of the Dutch Penal Code, corporations committing criminal offenses may be sanctioned under the Economic Offenses Act, "regarding specified criminal offenses related to regulation of economic activities, including environmental law."[174]

The Dutch Penal Code is applicable to any Dutch person who commits a crime outside of the Netherlands, "where the act constitutes a criminal offense according to the law of the State whose territory the crime was committed."[175] Shell's actions in Nigeria constituted human rights violations under the Nigerian constitution, tort law, and international law. Thus, the actions which gave rise to *Kiobel* in Nigeria could be a basis for liability under Dutch law, provided that any Dutch citizens were directly involved in enforcing the criminal offenses in Nigeria. Alternatively, if the actions of Shell Nigeria can be directly attributable to Shell in the Netherlands, Shell could also be subject to Dutch law.

The first of two options requires showing that a Dutch citizen is directly involved in enforcing the criminal offenses in Nigeria. Although this would be the easiest way to satisfy the requirements under Dutch law, it places a heavier evidentiary burden on the Kiobel Petitioners. This claim requires the names of individual Dutch actors who played a role in aiding and abetting the Nigerian government in harming the Petitioners. This information could, however, be in Mrs. Kiobel's possession, as she has openly offered to share private documents including affidavits of key witnesses and other relevant case documents.[176]

The second option would be to show that the actions of Shell Nigeria are directly attributable to Shell in the Netherlands. In other words, under the second option, Shell as the parent company would be accountable for SPDC's actions. Unless a pure vicarious liability theory could prevail, the Kiobel Petitioners would also have the burden of proving that Shell had actual or constructive knowledge of SPDC's violative practices in Ogoniland.

Regardless of the theory by which Shell of the Netherlands is criminally liable for the actions which gave rise to *Kiobel*, Shell might still be able to

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173. *Id.* "Publication of the verdict can be a very effective sanction but is not often imposed, perhaps because the media attention surrounding the prosecution will usually already done a lot of damage to the legal person." *Id.* (citing Court of Rotterdam 13 June 2000, LJN: AA6189).

174. *Id.*

175. *Id.*

176. Esther Kiobel is cited to have offered to disclose materials to rebut claims that Shell had no financial relationship with the Nigerian military.

raise a defense to excuse them from culpability. Under the Dutch Penal Code, Shell could raise any available defense allowed under Dutch criminal law.[177] Their strongest defense against the conduct in Nigeria would be a lack of sufficient culpability, which also requires specific important grounds for exculpation such as a showing of due diligence.[178] Again, the feasibility of vindication on these grounds hinges on the level of engagement the Dutch actors themselves had with the Nigerian government and Shell Nigeria, and the extent to which Shell Nigeria's offenses can be attributed to them.

If the *Kiobel* Petitioners cannot successfully bring a claim in the Netherlands, then Shell of the Netherlands could still face a direct or derivative liability suit from its shareholders. The Dutch civil code requires "managing directors to fulfil [sic] their duties towards the legal entity with due care and attention."[179] If they fail to fulfill this duty, the managing directors of the company are personally responsible for any damage caused to the company as a result.[180] Similar to a derivative liability suit in the United States, Dutch law requires showing that Shell's directors engaged in "serious misconduct."[181] The Dutch Supreme Court has found the actions of managing directors to amount to serious misconduct in situations where a reasonably prudent manager acting in a similar circumstance would not take the same measures.[182] Examples of this type of conduct include engaging in fraud or illegal conduct.[183] Thus, depending on Royal Dutch Shell's involvement in SPDC's human rights violations in Ogoniland, its chief officers may be liable to its shareholders for their role in the actions that led to the *Kiobel* complaint.

E. Avenues for Relief Under United Kingdom Law

Royal Dutch Shell's registered office is in London, United Kingdom.[184] Given this presence in the United Kingdom, the *Kiobel* Petitioners could seek relief under the law of the United Kingdom. Ongoing developments in

177. Keulen & Gritter, *supra* note 166, at 6.

178. *Id.*

179. *Liability of Directors*, LEEMAN VERHEIJDEN HUNTJENS, http://www.kernkamp.nl/en/services/company-and-corporate-law/personal-liability-of-directors-in-the-netherlands/ (last visited Dec. 14, 2013).

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Shell at a Glance*, *supra* note 113.

United Kingdom case law could make United Kingdom courts more hospitable to claims against SPDC.

Recent developments in the United Kingdom case law offer hope for the *Kiobel* Petitioners. The High Court of London is set to hear an oil spill case by 11,000 Nigerian citizens of the Bodo community against SPDC.[185] The Bodo community plaintiffs allege that SPDC spilled 500,000 barrels of oil in 2008.[186] Shell has admitted liability for two of the spills, but maintains that the amount of oil spilled is less than the Bodo community alleges.[187]

Akin to the Netherlands courts, the actions of Shell's parent company have not been challenged in the United Kingdom.[188] In *Bodo*, SPDC admitted liability in return for the dismissal of its parent company's liability.[189] The *Financial Times* projects *Bodo* will payout at $400 million, a number Shell maintains is "highly over-exaggerated."[190] Regardless of the case's settlement, this action seems to show a positive shift in United Kingdom courts towards actions against SPDC.

Reform in European Law also supports a positive shift towards liability against multi-national companies for actions taking place outside of the United Kingdom. In 2005, the European Court of Justice[191] (ECJ) effectively abolished forum non-conveniens.[192] The ECJ "interpreted the Brussels I regulation on jurisdiction to require courts in each European

185. Bodo Cmty. v. Shell Petroleum Dev. Co. of Nigeria, [2012] EWHC (QB) HQ11X01280 (Nigeria); Michael D. Goldhaber, *U.K. Shell Deal Spotlights Value of Common Law Model for Human Rights Litigation*, ROYAL DUTCH SHELL PLC.COM (Aug. 31, 2011), http://royaldutchshellplc.com/2011/08/31/u-k-shell-deal-spotlights-value-of-common-law-model-for-human-rights-litigation/.

186. Erik Larson, *Shell Sued in U.K. over 'Massive' 2008 Nigerian Oil Spills*, BLOOMBERGBUSINESS (Mar. 23, 2012, 12:02 PM CDT), http://www.bloomberg.com/news/articles/2012-03-23/shell-sued-in-u-k-over-massive-oil-spills-in-nigeria-in-2008.

187. *Id.*

188. Michael D. Goldhaber, *Corporate Human Rights Litigation in Non-U.S. Courts: A Comparative Scorecard*, 3 U.C. IRVINE L. REV. 127, 130 (2013) [hereinafter Goldhaber, *Corporate Human Rights Litigation*].

189. *Id.*

190. *Id.* (quoting Sylvia Pfeifer & Jane Croft, *Shell's Nigeria Pay-Out Could Top £250m*, FIN. TIMES (Aug. 3, 2011, 7:21 PM), http://www.ft.com/intl/cms/s/0/4209f536-bde8-11e0-ab9f-00144feabdc0.html#axzz3TyY3nxLG).

191. The European Court of Justice interprets European Union (EU) Law and ensures its proper application. In addition to this, the ECJ decides legal disputes between EU governments and institutions, or any claim against an EU. *Court of Justice of the European Union*, EUROPEAN UNION, http://europa.eu/about-eu/institutions-bodies/court-justice/index_en.htm (last visited Aug. 14, 2014).

192. *Id.*

nation to assert jurisdiction over corporations that are domiciled or centrally administered in the EU."[193] Consequently, the *Kiobel* Petitioners could seek redress in United Kingdom courts.

III. Increasing Transparency Between Oil Companies and Nigerian Citizens

Another key concern raised by the *Kiobel* decision is the proper means of interaction between international oil companies, such as Shell, and the indigenous communities in which they operate. Perhaps the greatest insult to Nigeria's existence is despite its vast potential revenue from oil production, its citizens—particularly in the Niger Delta where the majority of Nigeria's oil and gas is produced—have yet to reap any of the benefits of production.[194] At the heart of the *Kiobel* case are Nigerian citizens protesting the unsafe operating practices in their communities. Their primary purpose in protesting was simply to have their voice heard. Oil companies should take measures to reduce the harsh impact on the Nigerian environment and to foster better relationships with Nigerian tribes.

The easiest fix to the problems leading to the protests in *Kiobel* would be to provide safer operating practices. Nigeria flares 17.2 billion cubic meters of natural gas per year in the Niger Delta.[195] Gas flaring is the "burning of natural gas from the ground."[196] Residents in the Niger Delta complain of "respiratory problems, skin rashes, and eye irritations" as a result of gas flaring.[197] The Nigerian government has responded to this problem by passing the Associated Gas Re-Injection Act, which requires "every company producing oil and gas in Nigeria to submit preliminary

193. Goldhaber, *Corporate Human Rights Litigation*, *supra* note 188, at 132 (quoting Case C-281/02, Owusu v. Jackson, 2005 E.C.R. 1383 (interpreting Council Regulation 44/2001, 2000 O.J. (L12/1) (EC) "on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters")).

194. "Th[e] rise in oil wealth has not translated into significant increases in living standards in Nigeria, however. In fact, the rise in poverty and inequality coincides with the discovery and export of oil in Nigeria." Kate Higgins, *Regional Inequality in the Niger Delta: Policy Brief No. 5*, OVERSEAS DEVELOPMENT INST., http://www.odi.org.uk/sites/odi.org.uk/files/odi-assets/publications-opinion-files/3383.pdf (last visited May 19, 2014).

195. Anslem O. Ajugwo, *Negative Effects of Gas Flaring: The Nigerian Experience*, SCI. & EDUC. PUBLISHING, http://pubs.sciepub.com/jephh/1/1/2/ (last visited Dec. 15, 2013).

196. *Id.*

197. *Nigeria: Gas Flares Still a Burning Issue in the Niger Delta*, IRN NIGERIA (Mar. 8, 2012), http://www.irinnews.org/report/95034/nigeria-gas-flares-still-a-burning-issue-in-the-niger-delta.

programmes for gas re-injection and detailed plans for implementation of gas re-injection."[198]

Unfortunately, little has been done to actually enforce this act. Gas flaring renders communities uninhabitable. Contaminants from gas flaring can "acidify the soil," depleting its nutrients.[199] This destroys the livelihood of the villagers who depend on agriculture for subsistence.

Nigerian law requires oil companies to either save or re-inject natural gas into the subsurface to eliminate the need for flaring.[200] When gas is re-injected into the ground, it increases the reservoir pressure and ultimately enhances oil recovery.[201] However, gas flaring is less expensive than re-injection, and many of Nigeria's reservoirs make re-injection difficult.[202]

Another alternative to gas flaring is to collect, process, and sell the gas to international markets.[203] This alternative benefits international oil companies while eliminating the harsh effects of flaring. However, like re-injection, selling excess gas may not be feasible in Nigeria. Unfortunately, there is not as great of enough market for buying gas to offset costs of creating the requisite infrastructure to sell gas.[204]

Apart from safer drilling practices, such as gas re-injection, events that gave rise to *Kiobel* could be prevented with increased communication between oil companies and indigenous groups such as the Ogonis. "The oil companies in Nigeria have historically maintained the basic position that to take a stance on human rights issues would be to interfere in the internal politics of the country, something that would not be a legitimate activity for a foreign commercial entity."[205] An ideal system of accountability would have to actively involve a "triad of parties: indigenous peoples, the

198. *Associated Gas Re-Injection Act*, POL'Y & LEGAL ADVOC. CENTRE, http://www.placng.org/lawsofnigeria/node/26 (last visited Dec. 16, 2013).

199. Ajugwo, *supra* note 195.

200. Ashley Palomaki, *Flames Away: Why Corporate Social Responsibility Is Necessary to Stop Excess Natural Gas Flaring in Nigeria*, 24 COLO. NAT. RESOURCES, ENERGY & ENVTL. L. REV. 499, 507 (2013) (citing *Global Gas Flaring Reduction Initiative: Report on Consultations with Stakeholders* 8 (World Bank, Working Paper No. 27275, 2004)).

201. *Id.* at 504 (citing INT'L ASS'N OF OIL & GAS PRODUCERS, REPORT NO. 2.79/288, FLARING & VENTING IN THE OIL & GAS EXPLORATION & PRODUCTION INDUSTRY: AN OVERVIEW OF PURPOSE, QUANTITIES, ISSUES, PRACTICES, AND TRENDS 8 (2000)).

202. *Id.* at 507.

203. *Id.*

204. *Id.*

205. *The Roles and Responsibilities of the International Oil Companies*, HUMAN RIGHTS WATCH, http://www.hrw.org/reports/1999/nigeria/Nigew991-10.htm (last visited Jan. 8, 2014).

corporate or business actor engaged in the project, and the government which grants the corporate actor rights over the lands or resources at issue."[206]

The U'wa tribe of Columbia and the Canadian based company Occidental Petroleum provide an imperfect example for facilitating cooperation between indigenous tribes, government, and multinational oil companies.[207] Under the U'wa tribe's model, exploration licenses cannot be granted to any major oil company without first consulting the U'wa tribe.[208] This level of autonomy for the U'wa tribe was made possible after several years of Columbian constitutional reform.[209] As of 1991, indigenous people in Columbia now fully possess ownership over traditional lands and resources.[210]

The U'wa example is imperfect for Nigeria because the Nigerian government owns all of the land and oil resources in Nigeria.[211] The Nigerian government may be unwilling to yield this power to indigenous groups. Despite this, the Nigerian government could benefit from borrowing the U'wa prior consultation system. As owners of the resources, the Nigerian government would still have the ultimate say. However, creating a forum for indigenous groups to voice their grievances could lead to more peaceful relations between oil companies and local communities.

Conclusion

Kiobel vs. Royal Dutch Petroleum held that the presumption against extraterritoriality applies to the ATS, and can only be displaced where claims asserted under the ATS "touch and concern the territory of the United States . . . with sufficient force."[212] The *Kiobel* decision begged many questions, including: (1) under which circumstances can a future ATS claim meet the *Kiobel* requirements; (2) what can be done to ease tensions between indigenous groups and multi-national companies to prevent the

206. Lillian Aponte Miranda, *The U'Wa and Occidental Petroleum: Searching for Corporate Accountability in Violations of Indigenous Land Rights*, 31 AM. INDIAN L. REV. 651, 655 (2006-2007).

207. *Id.* at 651.

208. *Id.* at 656.

209. *Id.* at 657.

210. *Id.*; *see* Charles H. Roberts, *U'wa vs. Oxy*, COVERT ACTION Q., Summer 2002, *available at* http://www.thirdworldtraveler.com/Oil_watch/U%27Wa_Oxy.html.

211. *See* Trustec Oil & Gas, Inc. v. W. Atlas Int'l, Inc., 194 S.W. 3d 580, 582 n.5 (Tex. App. 2006).

212. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1669 (2013).

alleged atrocities in *Kiobel*; and (3) do any avenues for relief exist outside of the United States for the *Kiobel* petitioners?

The first major concern raised by *Kiobel* is the touch and concern requirement. This language left lower courts and legal scholars alike scrambling to predict if and when a case can meet these requirements or if the ATS lives on after *Kiobel*. The district courts have offered that a claim by an alien plaintiff against a US citizen defendant, for actions which took place in the United States, yet caused harm outside of the United States is sufficient to displace the ATS' presumption against extraterritoriality.

Although the Supreme Court dismissed the *Kiobel* Petitioners' claims, the *Kiobel* Petitioners may still pursue several avenues of relief outside of the United States. Shell may still be liable under Nigerian law, the law of the Netherlands, and the law of the United Kingdom.

Under Nigerian Law, the Kiobel respondents could be liable for violating domestic tort law, domestic environmental law, human rights law, and International human rights law. However, many of the remedies under Nigerian law prove to be more sound in theory than in practice. The *Kiobel* petitioners will likely be prejudiced in Nigerian courts for domestic law claims against the Nigerian government and oil giant, Shell. In addition to this, environmental provisions such as the Gas Re-Injection Act are unenforceable, as they have yet to be fully enacted. Finally, Nigeria has yet to ratify many of the International provisions, such as ILO 169, which could provide greater accountability for the Nigerian government and multinational corporations.

The second major concern raised by *Kiobel* is what mechanisms can multinational oil companies employ to prevent similar causes of action in the future. Suits such as *Kiobel* can certainly be prevented by improving transparency levels between oil companies, the Nigerian government, and indigenous groups such as the Ogoni tribe. Nigeria could greatly benefit from fashioning a system similar to that of the U'wa tribe of Colombia. This type of system would likely improve relations between multinational oil companies and indigenous groups.

Fortunately for Mrs. Kiobel, the answer to the final major question raised by *Kiobel*—what avenues for relief remain after the *Kiobel* ruling—has a simpler remedy. Recent developments in the laws of both the Netherlands and the United Kingdom offer hope for redress for the *Kiobel* petitioners. Both the Netherlands and the United Kingdom are becoming more hospitable to claims brought against local based corporations such as Shell for actions which occurred in Nigeria. Mrs. Kiobel could have a viable claim under the law of the Netherlands or the United Kingdom. Thus, for

her purposes she need not "touch" the territory of the United States with *any* force in order to gain the relief she has sought for over a decade.