OGONI ACTIVISM AND ACCESS TO REMEDY: BUSINESS AND HUMAN RIGHTS FROM THE BOTTOM UP

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Do court victories result in social change? Can victories in court result in losses outside of court? If victories in court are no guarantee of victory outside of court, how much worse are court defeats? This Article explores these questions in part through analyzing Ogoni litigation against Royal Dutch/Shell. In 2002, Esther Kiobel and several co-plaintiffs tried to hold Royal Dutch/Shell accountable for its role in the death of Kiobel's husband and for wider corporate abuses and related state human rights violations in Ogoniland. But in 2013, a unanimous United States Supreme Court held that the Alien Tort Statute (ATS) did not expressly grant extraterritorial jurisdiction to the federal courts to hear suits such as Kiobel's. Esther Kiobel's failed litigation in the United States (and in the Netherlands) merely exemplifies the extent to which foreign courts in the Global North—— the courts of the company—effectively insulate multinational corporations from accountability for human rights violations and environmental wrongs. Worse still, Kiobel's failure was not hers alone. Kiobel's activism led directly to the narrowing, and ultimately the shuttering, of the ATS mechanism for corporate accountability

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litigation—a victory for corporations rather than for their victims. Kiobel's activism suggests that courts may be a "hollow hope."

Despite these litigation failures and setbacks, I argue, the focus on ATS litigation in the United States and the failure to appreciate favorable outcomes in foreign corporate accountability litigation obscures the role that litigation plays in norm generation and norm diffusion processes. In the aggregate, there have been numerous positive outcomes from Ogoni litigation over the past three decades. Far from being a hollow hope, I argue that if one looks beyond Kiobel's case and other ATS cases that dominate the focus of much discourse in the U.S. legal academy, one might perceive how victim-plaintiffs have succeeded in other forums such as in Canada, England, the Netherlands, France, and elsewhere in Europe. I show, moreover, that whether Ogoni and other Indigenous victim-plaintiffs win or lose, their continued litigation generates positive benefits for society by challenging procedural barriers and by shifting the discourse around corporate accountability for human and environmental rights violations. Scholars have long recognized the role that corporations, among other non-state actors, can play in the formation of international law. Here, Indigenous peoples' transnational legal mobilization in the corporate accountability and environmental rights spaces constitutes an example of international lawmaking from the bottom up. I thus argue that it is time for scholars of international law and human rights to pay more attention to the international lawmaking—the agency—of Indigenous peoples and other marginalized demographic groups. Ogoni and other Indigenous victim-plaintiffs have brought into mainstream legal and political discourse the cultural and group rights claims of Indigenous populations (for example, self-determination and language claims). They have forged connections with Indigenous groups and environmentalists around the world who support each other's litigation and non-litigation campaigns. They have stimulated and enabled the capacity-building of non-profit public interest litigation organizations to sustain multi-year challenges against well-resourced multinational corporations.

Indeed, as I argue in this Article, the positive outcomes of Ogoni and other Indigenous peoples' transnational legal mobilization include the very making of international law from the bottom up. This lawmaking is reflected in soft law instruments such as the UN Guiding Principles on Business and Human Rights, which adopts "access to remedy" as one of its three central pillars, and in the text of the UN Human Rights Council open-ended intergovernmental working group's draft business and human rights treaty, which likewise declares access

to remedy to be a core purpose. Thus, there is an extent to which the Ogoni case study reveals an instance of "winning through losing."

TABLE OF CONTENTS

INTRODUCTION

In November 2022, after roughly two decades of litigation, Esther Kiobel seemed finally to have given up. Readers familiar with the U.S. Alien Tort Statute (ATS)[1] likely will be familiar with the name Kiobel. Esther Kiobel is the widow of Dr. Barinem Kiobel (sometimes spelled Barine), whom the Nigerian state executed on November 10, 1995, alongside Ken Saro-Wiwa and seven others known as the "Ogoni Nine."[2] In 2002, Esther Kiobel and several co-plaintiffs who had resettled in the United States sued Royal Dutch Petroleum and Shell Transport and Trading Corporation (Royal Dutch/Shell) in U.S. federal district court in an attempt to hold the corporation accountable for its role in her husband's death and for wider corporate abuses and related state human rights violations in Ogoniland. But in 2013, a unanimous United States Supreme Court held that the ATS did not expressly grant extraterritorial jurisdiction to the federal courts to hear suits such as Esther Kiobel's.[3]

In 2017, following her defeat in the U.S. Supreme Court, Kiobel and three other Ogoni Nine widows sued Royal Dutch Shell in its home state of the Netherlands.[4] In March 2022, however, after nearly five years of procedural wrangling that led ultimately to a hearing on the merits, a Dutch court found in Shell's favor, dismissing Kiobel's lawsuit

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1. 28 U.S.C. § 1350. *See generally* Beth Stephens, *The Curious History of the Alien Tort Statute*, 89 NOTRE DAME L. REV. 1467 [hereinafter Stephens, *The Curious History of the Alien Tort Statute*] (2014) (surveying Alien Tort Statute litigation).

2. Amended Class Action Complaint at paras. 1, 3, 6, Wiwa v. Shell Petroleum Development Co. of Nigeria Ltd., 335 Fed. App'x 81 (S.D.N.Y. 2002) (Civil Action No. 02 CV 7618), 2004 WL 7081121; IKE OKONTA, WHEN CITIZENS REVOLT: NIGERIAN ELITES, BIG OIL, AND THE OGONI STRUGGLE FOR SELF-DETERMINATION 229–30 (2008); ZAINAB LADAN MAI-BORNU, POLITICAL VIOLENCE AND OIL IN AFRICA: THE CASE OF NIGERIA 136–37 (2020).

3. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 118–24 (2013).

4. Rechtbank Den Haag [District Court of The Hague], 1 mei 2019, LJN 2019, 4233 m.nt. L. Alwin, B. Meijer en A.C. Bordes (Claimants/Royal Dutch Shell PLC). At the time of filing, Royal Dutch Shell PLC was headquartered in London with its registered office in The Hague, Netherlands. Shadia Naralla & Sachin Ravikumar, *Shell Ditches the Dutch, Seeks Move to London in Overhaul*, REUTERS (Nov. 15, 2021), https://www.reuters.com/world/uk/shell-proposes-single-share-structure-tax-residence-uk-2021-11-15/ (on file with the *Columbia Human Rights Law Review*). In 2021, the company dropped "Royal Dutch" from its name and moved its headquarters to London from the Netherlands. *Id.*

for insufficient evidence.[5] Initially, Kiobel vowed to fight on, but in November 2022, Kiobel indicated that it would be the end of the line for her.[6] Royal Dutch/Shell had defeated the face of the corporate accountability movement against it.[7] Despite litigating for eleven years in the United States, Kiobel never had a trial to adjudicate her substantive claims against Royal Dutch/Shell. It took her another five years to have the merits of her claim resolved in the Netherlands, although that trial resulted in a victory for Royal Dutch/Shell. An impoverished Nigerian refugee had hoped that the courts would provide some measure of justice: she sued one of the largest multinational corporations on two different continents across a twenty-year period. Was Esther Kiobel's faith in courts misplaced? Were the courts merely a "hollow hope"?[8]

Esther Kiobel's failed litigation in the United States and the Netherlands merely exemplifies the extent to which courts in the Global North effectively insulate multinational corporations from accountability for human rights violations and environmental wrongs.[9]

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5. *Nigeria: Dutch Court Rejects Suit of 'Ogoni Nine' Widows Against Shell*, ALJAZEERA (Mar. 23, 2022), https://www.aljazeera.com/news/2022/3/23/dutch-court-rejects-suit-of-nigerian-widows-against-shell [https://perma.cc/SJ3K-GMN3].

6. Lucas Roorda, *Inequality of Harms, Inequality of Arms:* Kiobel v. Shell *Comes to an End*, BUS. & HUM. RTS. RES. CTR. (Nov. 28, 2022), https://www.business-humanrights.org/en/latest-news/inequality-of-harms-inequality-of-arms-kiobel-v-shell-comes-to-an-end/ [https://perma.cc/82M7-AVPL].

7. Activists, corporate lawyers, and legal scholars have paid attention not only to the *Kiobel* litigation, but to Esther Kiobel in particular, who has become one of the prominent faces of the corporate accountability litigation movement through media and advocacy profiles. *See generally, e.g.*, ESTHER AND THE LAW: THE CASE AGAINST SHELL (Docmakers 2023); Amnesty International, *Nigeria: My Husband Was Executed—Esther Kiobel*, YOUTUBE (June 29, 2017), https://www.youtube.com/watch?v=F6Z-tCdhkFs [https://perma.cc/RWZ3-ZTEH] (last visited Mar. 22, 2024); Pulitzer Center, *Kiobel v. Royal Dutch Petroleum: Outside the Courthouse*, YOUTUBE (Oct. 2, 2012), https://www.youtube.com/watch?v=EAbWB4jr8E8 [https://perma.cc/JU3R-9GCZ] (last visited Mar. 22, 2024).

8. GERALD ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE 336–43 (1991) (arguing that litigation successes in the civil rights and women's rights movements have led to a misplaced faith in courts as agents of social change). *See infra* Section I.B.

9. *See* Daniel J. Dorward, *The Forum Non Conveniens Doctrine and the Judicial Protection of Multinational Corporations from Forum Shopping Plaintiffs*, 19 U. PA. J. INT'L ECON. L. 141, 142 (1998) ("[The] use of the *forum non conveniens* doctrine has evolved to solve the peculiar problems posed by international forum shopping and that U.S. courts should continue to make pragmatic use of the doctrine to protect MNCs from the burdens of defending foreign suits in the United States.").

Worse still, Kiobel's failure was not hers alone. Kiobel's activism led directly to the narrowing, and ultimately the shuttering, of the ATS mechanism for corporate accountability litigation in the United States—a victory for corporations rather than for their victims.[10]

Esther Kiobel was not the only Ogoni to seek to hold Royal Dutch/Shell accountable in a transnational forum. As I demonstrate in Part II, she was not even the first. In addition to human rights claimants such as Kiobel, numerous Ogoni people and other Niger Delta residents—individually and as parts of putative classes numbering in the tens of thousands—have sued Royal Dutch/Shell for environmental rights violations stemming from oil pipeline spills. Yet, after thirty years, the Ogoni litigation record is mixed at best. For victim-turned-activist-plaintiffs[11] who are seeking environmental cleanup or monetary compensation for injuries, for lost income from farming and fishing, or for health issues caused by environmental harms, perhaps little demonstrates the frustration of corporate accountability litigation more than the length between the filing date and the ultimate resolution of most Ogoni claims—frequently more than ten years.[12]

Additionally, the Ogoni experience, rather than being unique to the facts underlying their complaint, is all too typical for victim-turned-activist-plaintiffs from the Global South seeking justice in the courts of the Global North.[13] Futility in the courts is primarily a consequence of procedural hurdles—transnational barriers to justice—erected by legislators. Such procedural hurdles are enforced, and perhaps even expanded upon, by judges who opt to interpret narrowly statutes such as the Alien Tort Statute. That is, Ogoni and other corporate victim-plaintiffs quite often never make it to the merits stage of their claims.[14]

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10. *See, e.g.*, Beth Stephens, *The Rise and Fall of the Alien Tort Statute*, RESEARCH HANDBOOK ON HUMAN RIGHTS AND BUSINESS 46, 55–61 (Surya Deva & David Bilchitz eds., 2020) [hereinafter Stephens, *The Rise and Fall of the Alien Tort Statute*] (discussing the Supreme Court "gutting" of the ATS).

11. I discuss my use of this term in Section I.B, *infra*.

12. *See infra* Table 1.

13. *See generally* AMNESTY INTERNATIONAL, INJUSTICE INCORPORATED: CORPORATE ABUSES AND THE HUMAN RIGHT TO REMEDY (2014), https://www.amnesty.org/en/documents/POL30/001/2014/en/ [https://perma.cc/6G9D-FZH2] (discussing obstacles to obtaining a remedy for corporate human rights violations using four case studies as examples).

14. *See, e.g.*, Christopher Ewell et al., *Has the Alien Tort Statute Made a Difference?: A Historical, Empirical, and Normative Assessment*, 107 CORNELL L. REV. 1205, 1241 (2022) (surveying Alien Tort Statute litigation and concluding that

There is nothing close to consensus among law scholars, social movement theorists, historians, or activists as to whether legal mobilization is worthwhile, a waste of finite resources (time, energy, money), or counterproductive and harmful.[15] Despite these litigation failures and setbacks, however, in this Article I argue that Ogoni litigation has been far from fruitless.[16] The focus on Alien Tort Statute litigation in the United States and the failure to appreciate favorable outcomes in non-U.S. corporate accountability litigation obscures the role that litigation plays in norm generation and norm diffusion processes.

In the aggregate, there have been numerous positive outcomes from Ogoni litigation over the past three decades. Far from being a hollow hope, I argue that if one looks beyond *Kiobel* and other ATS cases that dominate the focus of much discourse in the U.S. legal academy, one might perceive how victim-turned-activist-plaintiffs have succeeded in other forums. Ogoni victim-plaintiffs have succeeded in holding corporations accountable in England[17] and the Netherlands,[18] while non-Ogoni litigants have held corporations

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"[o]nly 52 of the 300 lines of cases ultimately resulted in judgments in favor of the plaintiffs on the ATS claim").

15. *See* Steven E. Barkan, *Beware of Lawyers Bearing Gifts, or Why Social Movements Should be Wary of Litigation*, MOBILIZING IDEAS (Feb. 4, 2013), https://mobilizingideas.wordpress.com/2013/02/04/beware-of-lawyers-bearing-gifts-or-why-social-movements-should-be-wary-of-litigation/ [https://perma.cc/MT8G-FRWM] (arguing that while litigation can sometimes offer social movements significant victories, it often comes with trade-offs that may include diverting resources from other activities and creating dependency on legal strategies).

16. *See infra* Table 1.

17. Bodo Cmty. v. Shell Petroleum Dev. Co. of Nigeria Ltd. [2014] EWHC (TCC) 1973 (Eng.); His Royal Highness Emere Godwin Bebe Okpabi v. Royal Dutch Shell PLC [2017] EWHC (TCC) 89 (Eng.); Okpabi v. Royal Dutch Shell [2021] UKSC 3, [153] (appeal taken from Eng.).

18. Rechtbank's Gravenhage [District Court of The Hague], 30 januari 2013, NJF 2013, 99 m.nt. H. Wien, M. Nijenhuis en FM Bus (Akpan/Royal Dutch Shell PLC en Shell Petroleum Development Company of Nigeria, Ltd.); Gerechtshof Den Haag [Court of Appeal of The Hague], 29 januari 2021, RAV 2021, 38 m.nt. JM van der Klooster, MY Bonneur en SJ Schaafsma (Vereniging Milieudefensie en Akpan/Royal Dutch Shell PLC en Shell Petroleum Development Company of Nigeria Ltd.); Gerechtshof Den Haag [Court of Appeal of The Hague], 29 januari 2021, NJF 2021, 77 m.nt. J.M. van der Klooster, M.Y. Bonneur en S.J. Schaafsma (Oguru, Efanga & Vereniging Milieudefensie/Shell Petroleum N.V.); Gerechtshof Den Haag [Court of Appeal of The Hague], 29 januari 2021, JA 2021, 63 m.nt. van Bartman S.M. Steef, en Groot de C. Cees (Dooh en Milieudefensie/Royal Dutch Shell PLC.).

accountable in Canada[19] and are attempting to hold corporations accountable in France.[20] I show, moreover, that whether Ogoni and other Indigenous[21] victim-plaintiffs win or lose, their continued litigation generates positive benefits for society by challenging procedural barriers and by shifting the discourse around corporate accountability for human and environmental rights violations.

Victim-plaintiffs from Ogoniland litigating in Dutch court earned a judgment against Royal Dutch/Shell's Nigerian subsidiary, over which it could exercise jurisdiction because the court had jurisdiction over the Dutch entity and because the factual allegations against the parent and subsidiary were closely connected.[22] Royal Dutch/Shell has settled a small number of cases,[23] albeit for amounts

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19. *See generally* Nevsun Resources Ltd v. Araya, 2020 SCC 5 (Can.) (holding that three Ethiopian refugees, representing a class of some 1,000 conscripts of the Ethiopian military, may hold the Canadian corporation Nevsun liable under Canadian law for aiding and abetting slavery, forced labor, and other breaches of customary international law by a mining consortium in which Nevsun owned a 60%stake); Upendra Baxi, Nevsun: *A Ray of Hope in a Darkening Landscape?*, 5 BUS. & HUM. RTS. J. 241 (2020) (discussing the implications of the *Nevsun v. Araya* case for corporate human rights accountability).

20. *See French Bank BNP Paribas Sued by NGOs over Amazon Deforestation Link*, ECONOMIC TIMES, https://energy.economictimes.indiatimes.com/news/oil-and-gas/french-bank-bnp-paribas-sued-by-ngos-over-amazon-deforestation-link/98271967 [https://perma.cc/8JJ8-J3JQ] (reporting on a case brought by Brazilian and French NGOs against European bank BNP Paribas for financing corporations that contribute to the deforestation of the Amazon); *Yves Rocher Case in Turkey*, SHERPA, https://www.asso-sherpa.org/yves-rocher-case-turkey [https://perma.cc/3H7K-WUUE] (describing how a group of NGOs and former employees were suing the Rocher Group for violations of the French "Duty of Vigilance" law at a Turkish subsidiary).

21. Ken Saro-Wiwa and the Movement for the Survival of the Ogoni People (MOSOP) framed the Ogoni struggle within the crystallizing Indigenous peoples frame, for example, holding the first Ogoni Peoples Day rally on January 4, 1993, during the first International Year for the World's Indigenous People. *See*, *e.g.*, OKONTA, *supra* note 2, at 202–05 (analyzing how Ken Saro-Wiwa and MOSOP strategically utilized the Indigenous peoples' rights discourse to internationalize the Ogoni struggle).

22. Rechtbank's Gravenhage [District Court of The Hague], 30 januari 2013, NJF 2013, 99 m.nt. H. Wien, M. Nijenhuis en FM Bus (Akpan/Royal Dutch Shell PLC en Shell Petroleum Development Company of Nigeria, Ltd.); Gerechtshof Den Haag [Court of Appeal of The Hague], 29 januari 2021, RAV 2021, 38 m.nt. JM van der Klooster, MY Bonneur en SJ Schaafsma (Vereniging Milieudefensie en Akpan/Royal Dutch Shell PLC en Shell Petroleum Development Company of Nigeria Ltd.).

23. *See, e.g.*, Settlement Agreement and Mutual Release, Wiwa v. Shell Petroleum Development Co. of Nigeria, 04 Civ. 2665 (S.D.N.Y. 2009), https://ccrjustice.org/sites/default/files/assets/Wiwa_v_Shell_SETTLEMENT_AGR

that one might judge as insufficient to make the Ogoni victim-plaintiffs whole again, much less to alter a corporation's policies or to deter other corporations from negligent, reckless, or intentionally abusive behavior. Ogoni litigation in two alternative forums—the African Commission on Human and Peoples' Rights and the Economic Community of West African States Community Court of Justice—offered more expansive interpretations of international human rights law to include the right to a healthy environment, leading some commentators to reflect optimistically about the potential of African regional and subregional courts as corporate accountability mechanisms.[24]

More generally, I argue that Ogoni activism has yielded positive outcomes that are hard to quantify yet are just as important to appreciate.[25] Ogoni and other Indigenous victim-plaintiffs have brought into mainstream legal and political discourse the cultural and group rights claims of Indigenous populations (for example, self-determination and language claims).[26] They have forged connections with Indigenous groups and environmentalists around the world who support each other's litigation and non-litigation campaigns.[27] They

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EEMENT.Signed-1.pdf [https://perma.cc/3UA4-6Q4S] (a copy of the settlement agreement in *Wiwa v. Royal Dutch Petroleum Co.*).

24. *See* Adaeze Okoye, *Promoting Access to Justice For Corporate Human Rights Violations in Africa: The Role of African Regional and Sub-Regional Courts*, *in* BUSINESS AND HUMAN RIGHTS LAW AND PRACTICE IN AFRICA 211 (Damilola Olawuyi & Oyeniyi Abe eds., 2022) (examining how African regional and sub-regional judicial mechanisms can enhance accountability for corporate human rights abuses in Africa); Olufemi O. Amao, *The African Regional Human Rights System and Multinational Corporations: Strengthening Host State Responsibility for the Control of Multinational Corporations*, 12 INT'L J. HUM. RTS. 761 (2008) (analyzing the effectiveness of the African regional human rights framework in regulating the activities of multinational corporations).

25. *See*, *e.g.*, Judith Schrempf-Stirling & Florian Wettstein, *Beyond Guilty Verdicts: Human Rights Litigation and Its Impact on Corporations' Human Rights Policies,* 145 J. BUS. ETH. 545, 546 (2017) (describing the "educational effects" and "regulatory functions" of unsuccessful human rights litigation).

26. *See* Cathal M. Doyle, *Introduction*, *in* BUSINESS AND HUMAN RIGHTS: INDIGENOUS PEOPLES' EXPERIENCES WITH ACCESS TO REMEDY 1 (C. M. Doyle ed., 2015), https://www.iwgia.org/en/resources/publications/305-books/3193-business-and-human-rights-indigenous-peoples-experiences-with-access-to-remedy-case-studies-from-africa-asia-and-latin-america.html [https://perma.cc/M6JD-496P] (highlighting the wide scope of understandings of remedy and the insufficiency of monetary damages, for example, where Indigenous peoples' rights to sacred lands and ability to practice traditional customs are concerned).

27. Olufunmilola Ayotunde, Indigenous Peoples' Procedural Environmental Rights and Transnational Indigenous Advocacy Networks 64 (April 2023) (Ph.D.

have stimulated and enabled the capacity-building of non-profit public interest litigation organizations to sustain multi-year challenges against well-resourced multinational corporations—demonstrating what Beth Stephens has called a "multiplier effect"[28] or what I would call strategic spillover contributing to the diffusion of the corporate accountability norm. Thus, there is an extent to which the Ogoni case study reveals an instance of "winning through losing."[29] Indeed, as I argue in this Article, the positive outcomes of Ogoni and other Indigenous peoples' transnational legal mobilization go beyond transnational networking, capacity building, and discursive shifts, to include norm generation and diffusion and the very making of international law.[30] This lawmaking is reflected in soft law instruments such as the UN Guiding Principles on Business and Human Rights, which adopts "access to remedy" as one of its three central pillars[31] and in the text of UN Human Rights Council open-ended intergovernmental working group's draft business and human rights treaty, which likewise declares "access to remedy" to be a core purpose.[32]

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dissertation, University of Saskatchewan) (noting the role of litigation in establishing international Indigenous rights); *id.* at 185–93 (assessing the formation of Transnational Indigenous Advocacy Networks (TIANs) in the 1970s and their participation in the negotiation of the UN Declaration of the Rights of Indigenous People between 1985 and 2007); *id.* at 265–79 (discussing interactions between multinational corporations and TIANs); *id*. at 292–94 (presenting an anecdote regarding TIAN litigation).

28. Beth Stephens, *Making Remedies Work: Envisioning a Treaty-Based System of Effective Remedies, in* BUILDING A TREATY ON BUSINESS AND HUMAN RIGHTS 408, 432 [hereinafter Stephens, *Making Remedies Work*] (Surya Deva & David Bilchitz eds., 2017).

29. *See generally* Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941 (2011) (identifying several ways that advocates can turn litigation losses to their advantage, for example, through mobilizing constituents or sparking public discontent with the courts).

30. *See generally* Julie Mertus, *Considering Non-State Actors in the New Millennium: Toward Expanded Participation in Norm Generation and Norm Application*, 32 N.Y.U. J. INT'L L. & POL. 537 (2000) (arguing for the inclusion of non-state actors in the processes of creating and applying international norms).

31. U.N. Office of High Comm'r on Hum. Rts., *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, U.N. Doc. HR/PUB/11/04, at 27–35 (June 16, 2011), https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciples businesshr_en.pdf [https://perma.cc/7HMV-9LR3].

32. Open-Ended Intergov't'l Working Group on Transnat'l Corps. and Other Bus. Enters. with Respect to Hum. Rts., Updated Draft Legally Binding Instrument (Clean Version) to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, arts. 2(d), (e) (July

International law scholars have long conceded that non-state actors do engage in the making of international law. This thread perhaps has been developed best by students of the "New Haven School"[33] and of the Transnational Legal Process School[34] and by those who have adapted these frameworks to their ends.

However, much less has been said about the international lawmaking role played by marginalized actors from the Global South, especially Indigenous people.[35] Scholars likewise have paid

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2023), https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/igwg-transcorp/session9/igwg-9th-updated-draft-lbi-clean.pdf [https://perma.cc/VVZ7-HRJC].

33. The pioneers of the New Haven School approach were Yale Law School's Harold Lasswell and Myres McDougal. *See generally* Richard A. Falk, *Casting the Spell: The New Haven School of International Law*, 104 YALE L.J. 1991 (1995) (reviewing HAROLD D. LASSWELL & MYRES S. MCDOUGAL, JURISPRUDENCE FOR A FREE SOCIETY (1992) and the New Haven School framework).

34. *See generally* Harold Hongju Koh, *The 1994 Roscoe Pound Lecture: Transnational Legal Process*, 75 NEBRASKA L. REV. 181, 199–205 (1996) (consolidating Legal Process scholarship and certain strands of international law and international relations scholarship into a framework called Transnational Legal Process); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997) (contrasting and building upon the managerial and fairness accounts of state compliance with international law with the Transnational Legal Process perspective, which centers three phases leading toward obedience: (1) repeated transnational interaction, (2) interpretation of a global norm, (3) norm internalization); Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623 (1998) (discussing "agents" of state compliance processes, including: (1) non-state norm entrepreneurs; (2) state leaders; (3) transnational issue networks and epistemic communities (4) domestic and international judges, quasi-judicial mechanisms, and law scholars; (5) bureaucracies, foreign offices, and justice ministers; and (6) linkages across issue areas); Harold Hongju Koh, *How Is International Human Rights Law Enforced*? 74 IND. L.J. 1397 (1999) (explaining how Transnational Legal Process theory, which centers non-state actors, provides a framework for understanding whether and how norm internalization processes might generate obedience and thus state compliance with international law—a richer account than other perspectives); Regina Jefferies, *Transnational Legal Process: An Evolving Theory and Methodology*, 46 BROOK. J. INT'L L. 311 (2021) (providing a bibliographic overview of the generation and evolution of Transnational Legal Process theory).

35. *See*, *e.g.*, Gregory Shaffer, *Transnational Legal Process and State Change*, 37 L. & SOC. INQUIRY 229, 231 (2012) ("The primary difference between the United States and the European Union and the countries studied in this volume lies in the general direction of transnational flows, with the United States and European Union more likely being producers of transnational legal norms, as opposed to being appropriators of them."); *Id.* ("In a globalized world, much of law is subject to transnational influences and pressures, but more powerful states are the primary exporters of legal norms."). *But see* Lillian Aponte Miranda, *Indigenous People as*

insignificant attention to the role of individuals and groups engaging in lawmaking through litigation.[36] Few legal scholars have focused explicitly on victim-turned-activist-plaintiffs as lawmakers, erasing the role that aggrieved individuals and groups play, not just in putting a human face on a legal claim and fulfilling legal standing requirements, but in advancing innovative legal claims and arguments that judges ratify in their judgments, and in advancing other goals beyond individual remedy.[37]

But even in defeat, I argue, Ogoni agency has yielded positive results. Procedural delays and defeats in the United States—for example, delays and dismissals caused by application of the doctrine of *forum non conveniens*, by declining jurisdiction over corporations under international law, or by application of the presumption against the extraterritorial application of domestic statutes—stimulated conversations around corporate impunity.

In other words, while transnational barriers to justice generally frustrated Ogoni victim-plaintiffs pursuing individual remedies, litigating in foreign and international courts and quasi-judicial mechanisms outside the United States has been, and remains, one of the important tools available to marginalized groups in the Global South for advancing corporate accountability, environmental justice, and sustainable development agendas. So important, in fact, that once John Ruggie made "Access to Remedy" the Third Pillar of his "Ruggie Framework,"[38] civil society actors—displeased with the lack of

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International Lawmakers, 32 U. PA. J. INT'L L. 203, 205 (2010) (citing S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 56–72 (2d ed. 2004)) (highlighting the emerging role of Indigenous peoples as active participants in creating international law).

36. *But see*, *e.g.*, Hari M. Osofsky, *Is Climate Change International—Litigation's Diagonal Regulatory Role*, 49 VA. J. INT'L L. 585, 634–37 (2009) (discussing the fit between the fact of non-state actors engaging in climate change litigation and the transnational legal process framework); Melissa A. Waters, *Normativity in the "New" Schools: Assessing the Legitimacy of International Legal Norms Created by Domestic Courts*, 32 YALE J. INT'L L. 455, 457 (2007) (analyzing domestic courts' role in shaping international legal norms); Christopher J. Borgen, *Transnational Tribunals and the Transmission of Norms: The Hegemony of Process*, 39 GEO. WASH. INT'L L. REV. 685, 721 (2007) (exploring how transnational tribunals influence international legal norms through procedural means).

37. *See, e.g.*, Schrempf-Stirling & Wettstein, *supra* note 25 (examining changes in defendant and non-defendant corporations' policies as a response to human rights litigation, even in the absence of a finding of liability).

38. John Ruggie (Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises), Protect, Respect and Remedy: A Framework for Business and Human

"teeth" in the UN Guiding Principles[39] and the lack of attention that the Access to Remedy Pillar was receiving[40]—made it the centerpiece of their lobbying efforts.[41]

In the aggregate, human rights and environmental rights litigation by Ogoni and other victim-plaintiffs has made essential contributions to shifting the discourse around economic, social, and governance norms, corporate sustainability, and corporate accountability.

Scholars and policymakers have long recognized the role that corporations, among other non-state actors, can play in the formation of international law.[42] Here, Indigenous peoples' transnational legal mobilization[43] in the corporate accountability and environmental rights spaces constitutes an example of international lawmaking from the bottom up. I thus argue that it is time that scholars of international law and human rights pay more attention to the international

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Rights, A/HRC/8/5 (Apr. 7, 2008), https://media.business-humanrights.org/media/documents/files/reports-and-materials/Ruggie-report-7-Apr-2008.pdf [https://perma.cc/P5L9-8GH6].

39. *See* Erika R. George & Lisa J. Laplante, *Access to Remedy: Treaty Talks and the Terms of a New Accountability Accord*, *in* BUILDING A TREATY ON BUSINESS AND HUMAN RIGHTS, *supra* note 28, at 380–81 (noting several critiques of the operationalization of the Access to Remedy Pillar of the UN Guiding Principles on Business and Human Rights).

40. *See id.* at 383 (citing Hum. Rts. Council, Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse—Report of the United Nations High Commissioner for Human Rights, ¶ 8 A/HRC/32/19 (June 16, 2016)).

41. *See id.* at 383–84 (describing the 2014 launch of the UN Office of the High Commission for Human Rights' Accountability and Remedy Project and the special focus on access to remedy at the 2017 convening of the UN Working Group Forum on Business and Human Rights).

42. *See, e.g.*, Jennifer L. Johnson, *Public-Private-Public Convergence: How the Private Actor Can Shape Public International Labor Standards*, 24 BROOK J. INT'L L. 291, 292 (1998) (explaining the private actor's influence on government standards and policies); Mary Robinson, United Nations High Commissioner for Human Rights, The Business Case for Human Rights (Dec. 18, 1998), https://www.ohchr.org/en/statements/2009/10/business-case-human-rights-mary-robinson-united-nations-high-commissioner-human (explaining the Universal Declaration of Human Rights and its relation to business needs).

43. For the purposes of this Article, legal mobilization is: "the process by which individuals make claims about their legal rights and pursue lawsuits to defend or develop those rights." CHARLES R. EPP, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE 18 (1998).

lawmaking—the agency—of Indigenous people and other marginalized demographic groups.

This Article proceeds as follows: In Part I, I present a brief overview of the experiences of Ogoni victim-turned-activist-plaintiffs litigating in foreign and transnational forums between 1994 and 2023. I then situate this intervention within the literature on courts, social movements, social change, and transnational norm diffusion. In Part II, against the backdrop of the Ogoni experience, I discuss critiques of continued efforts to use these courts in pursuit of human and environmental rights. In Part III, I detail some of the specific victories that Ogoni and litigants have won, and some of the positive, if unintended, outcomes of Ogoni transnational legal mobilization, such as building legal capacity with the transnational litigation network and demonstrating the justiciability of economic, social, and cultural rights. Finally, in Part IV, placing Ogoni transnational legal mobilization within a wider context of the Indigenous peoples', environmental justice, and corporate accountability movements, I analyze provisions from the draft of the treaty on business and human rights to demonstrate how several of the provisions—the bulk of the operative paragraphs of Section II of the treaty—respond explicitly to the frustrating experiences of victim-plaintiffs, such as the Ogoni. Corporate accountability litigation by Ogoni and other victim-plaintiffs constitutes an instance of international lawmaking from the bottom-up. I conclude the Article by summarizing the argument and calling for continued domestic court litigation in the absence of a binding international treaty that obligates states to hold their corporate nationals accountable.

I. LITIGATION IN TRANSNATIONAL NORM GENERATION AND NORM DIFFUSION

A. Ogoni Transnational Legal Mobilization

In this Section, I summarize the numerous strands of Ogoni transnational legal mobilization—the use of foreign litigation in pursuit of policy change or social change.[44] Esther Kiobel was no "lone

44. While I focus on litigation, other scholars have expanded the concept of legal mobilization to include a broad array of *non*-litigation strategies and tactics. *See* Lisa Vanhala, *Legal Mobilization*, OXFORD BIBLIOGRAPHIES ONLINE, (Nov. 23, 2021), https://www.oxfordbibliographies.com/view/document/obo-

wolf." To the contrary, she was co-plaintiff in what amounted to a class action lawsuit. The *Kiobel* plaintiffs were among the thousands of Ogoni, often represented by named plaintiffs who, throughout the past thirty years, have sought to hold accountable Shell and its predecessor holding companies and subsidiaries, as well as the Nigerian state, for violations of human rights and environmental rights.[45] Kiobel and her fellow Ogoni activist plaintiffs have litigated in the United States, the United Kingdom,[46] and the Netherlands,[47] as well as before the African Commission on Human and Peoples' Rights[48] and the Community

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9780199756223/obo-9780199756223-0031.xml (on file with the *Columbia Human Rights Law Review*) (surveying conceptualizations of legal mobilization).

45. *See* Liesbeth F. H. Enneking, *Transnational Human Rights and Environmental Litigation: A Study of Case Law Relating to Shell in Nigeria*, *in* HUMAN RIGHTS IN THE EXTRACTIVE INDUSTRIES 519–34 (Isabel Feichtner et al. eds., 2019) (summarizing Ogoni litigation in the United States, Netherlands, and the United Kingdom); *see generally* Fons Coomans, *The* Ogoni *Case Before the African Commission on Human and Peoples' Rights*, 52 INT'L & COMP. L.Q. 749, 749 (2003) (discussing Social and Economic Rights Action Center & the Center for Economic and Social Rights v. Nigeria, Communication 155/96, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.] (May 27, 2002), https://www.worldcourts.com/achpr/eng/decisions/2001.10.27_SERAC_v_Nigeria.htm [https://perma.cc/AXX4-RS97]); Olufemi Amao, *Corporate Social Responsibility, Multinational Corporations and the Law in Nigeria*, 52 J. AFR. L. 89, 102 (2008) (discussing host-state litigation and other Nigerian accountability mechanisms).

46. Bodo Cmty. v. Shell Petroleum Dev. Co. of Nigeria Ltd. [2014] EWHC (TCC) 1973 (Eng.); His Royal Highness Emere Godwin Bebe Okpabi v. Royal Dutch Shell PLC [2017] EWHC (TCC) 89 (Eng.); Okpabi v. Royal Dutch Shell [2021] UKSC 3, [153] (appeal taken from Eng.).

47. Rechtbank's Gravenhage [District Court of The Hague], 30 januari 2013, NJF 2013, 99 m.nt. H. Wien, M. Nijenhuis en FM Bus (Akpan/Royal Dutch Shell PLC en Shell Petroleum Development Company of Nigeria, Ltd.); Gerechtshof Den Haag [Court of Appeal of The Hague], 29 januari 2021, RAV 2021, 38 m.nt. JM van der Klooster, MY Bonneur en SJ Schaafsma (Vereniging Milieudefensie en Akpan/Royal Dutch Shell PLC en Shell Petroleum Development Company of Nigeria Ltd.); Gerechtshof Den Haag [Court of Appeal of The Hague], 29 januari 2021, NJF 2021, 77 m.nt. J.M. van der Klooster, M.Y. Bonneur en S.J. Schaafsma (Oguru, Efanga & Vereniging Milieudefensie/Shell Petroleum N.V.); Gerechtshof Den Haag [Court of Appeal of The Hague], 29 januari 2021, JA 2021, 63 m.nt. van Bartman S.M. Steef, en Groot de C. Cees (Dooh en Milieudefensie/Royal Dutch Shell PLC).

48. Int'l PEN (on Behalf of Saro-Wiwa) v. Nigeria, Communication 137/94, 139/94, 154/96, 161/97 (joined), African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶¶ 113, 114, 116, 122 (Oct. 31. 1998), https://achpr.au.int/index.php/en/decisions-communications/international-pen-constitutional-rights-project-civil-liberties-13794 [https://perma.cc/A6F6-QFWM]; Rights Int'l v. Nigeria, Communication 215/98, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R] (1999),

Court of Justice of the Economic Community of West African States (ECOWAS).[49] It is these several decades of transnational corporate accountability litigation by Ogoni people and other Niger Delta residents against Royal Dutch/Shell that has provided the inspiration for this Article. In this Article, I tell the story of these cases, centering these victim-turned-activist-plaintiffs' narratives. I demonstrate Ogoni agency as contributing to the bottom-up generation of business and human rights norms—both through their numerous victories and through their defeats.[50]

Table 1. Ogoni Transnational Legal Mobilization

Filed	Parties	Forum	Year
1994	Con. Rts. Proj./Int'l Pen (Saro-Wiwa) v. Nigeria	African Commission	1998: violations found
1995/96	Interights/Civ. Lib. Org. (Ken Wiwa) v. Nigeria	African Commission	1998: violations found
1996	Ken Wiwa et al. (Ogoni Nine heirs) v. RDS, SPDC, Anderson	United States	2009: settlement, US$15.5m
1996	SERAC, CESR v. Nigeria (NNPC)	African Commission	2001: violations found
1998	Rights International (Charles Wiwa) v. Nigeria	African Commission	1999: violations found
2002	Kiobel, Ch. Wiwa (class action) v. RDS, STTC, SPDC	United States	2013: dismissed
2008	Eric Dooh (Goi) v. RDS, SPDC, SPNV, STTC	Netherlands	2021: SPDC only liable; 2022

https://www.globalhealthrights.org/wp-content/uploads/2013/10/Rights-Intl-Nigeria-1999.pdf [https://perma.cc/B6WC-C632].

49. Socio-Economic Rights and Accountability Project v. Nigeria, No. ECW/CCJ/JUD/18/12, Community Court of Justice of the Economic Community of West African States [ECOWAS] (2012).

50. *See infra* Table 1.

			Settlement €15m
2008	Oguru/Efanga (Oruma) v. RDS, SPDC, SPNV, STTC	Netherlands	2021: SPDC liable; RDS owes duty of care; 2022 Settlement €15m
2008	Apan (Ikot Ada Udo) v. RDS, SPDC/SPNV, STTC	Netherlands	2021: case continued; 2022 Settlement €15m
2009	SERAP v. Nigeria, NNPC, SPDC, Elf Nigeria, Agip Nigeria, Total Nigeria, Chevron Nigeria, Exxon Mobil	ECOWAS Court	2010: Corporate defendants dismissed 2012: Nigeria violation found
2012	Bodo Community v. SPDC	England and Wales	2015 Settlement £55m
2017	Kiobel et al. (ogoni Nine widows) v. RDS, SPDC	Netherlands	2022: dismissed (merits)

From 1958 to 1993, the dual corporation Royal Dutch Petroleum and Shell Transport and Trading Corporation (Royal Dutch/Shell)[51] operated an oil extraction venture in the Ogoniland region of Nigeria's Niger Delta. The venture severely damaged the

51. Between 1907 and 2005, Royal Dutch Petroleum Company of the Netherlands and Shell Transport and Trading Company of the United Kingdom—owned by the Royal Dutch Shell Group—operated as a dual-listed company, with separate legal identities and separate stock exchange listings, but functioning for business purposes as a single entity. In 2005, the two separate companies were dissolved and replaced by a single legal entity: Royal Dutch Shell PLC. *Our Company History*, SHELL GLOBAL https://www.shell.com/about-us/our-heritage/our-company-history.html [https://perma.cc/KNX9-XX9W]. In 2021, the company dropped "Royal Dutch" from its name and moved its registered office from the Netherlands to London. Naralla & Ravikumar, *supra* note 4.

region's environment and impoverished the local population.[52] This gave rise to internationally renowned author Ken Saro-Wiwa's Movement for the Survival of the Ogoni People (MOSOP).[53] From the late 1980s, Saro-Wiwa, who shrewdly framed the Ogoni struggle within the environmentalist and Indigenous peoples' movements,[54] pressured Royal Dutch/Shell to terminate their operations in the Niger Delta.[55] And in 1993, Royal Dutch/Shell claimed to do just that.[56] But neither the corporation nor the new Sani Abacha military regime—which had come to power in Nigeria via coup d'état in November

52. *See*, *e.g.*, IKE OKONTA & ORONTO DOUGLAS, WHERE VULTURES FEAST: SHELL, HUMAN RIGHTS, AND OIL IN THE NIGER DELTA 43–60 (2001) (detailing Shell's structure and operations in Nigeria).

53. *See*, *e.g.*, OKONTA, *supra* note 2, at 179–81 (2008) (reprinting the provisions of the Ogoni Bill of Rights that concerned oil extraction and the environment).

54. Scholars have continued to consider the Ogoni peoples' movement with this larger Indigenous peoples' rights frame. *See, e.g.*, LAURA WESTRA, ENVIRONMENTAL JUSTICE AND THE RIGHTS OF INDIGENOUS PEOPLES: INTERNATIONAL AND DOMESTIC LEGAL PERSPECTIVES app. 2 at 281–87 (2008); Oronto Douglas & Ike Okonta, *Ogoni People of Nigeria Versus Big Oil*, *in* PARADIGM WARS: INDIGENOUS PEOPLES' RESISTANCE TO GLOBALIZATION 153–56 (Jerry Mander & Victoria Tauli-Corpuz, eds., 2006) (covering the role of Shell in the Niger Delta and the response of the Ogoni people); Cyril I. Obi, *Globalization and Local Resistance: The Case of Shell versus the Ogoni*, *in* GLOBALIZATION AND THE POLITICS OF RESISTANCE 281 (B.K. Gills ed., 2009) ("Shell's interaction with the Ogoni environment is at the root of the conflict. The Ogoni—the indigenous landowners—have been increasingly alienated from the products of their land.").

55. *See* OKONTA & DOUGLAS, *supra* note 52, at 196–202 (discussing campaigns by Indigenous and grassroots organizations to put pressure on Shell to operate "according to internationally acceptable standards"). Saro-Wiwa put forward his most trenchant critique of Shell and the Nigerian state by alleging the company and the state were conspiring to eradicate Ogoni people. *See generally* KEN SARO-WIWA, GENOCIDE IN NIGERIA: THE OGONI TRAGEDY 44–83 (1992) (detailing complaints against Shell by the Ogoni people).

56. *See* OKONTA & DOUGLAS, *supra* note 52, at 120 ("Shell subsequently claimed that it had ceased operations and pulled out of Ogoni because of public hostility to its activities."); Richard Boele et al., *Shell, Nigeria and the Ogoni. a Study in Unsustainable Development: I. the Story of Shell, Nigeria and the Ogoni People – Environment, Economy, Relationships: Conflict and Prospects for Resolution,* 9 SUSTAINABLE DEV. 74, 74, 76, 79 (2001) (revealing that Royal Dutch/Shell "suspended operations" or "officially withdrew" all of their staff from Ogoniland in January 1993 after alleging that Ogoni protestors beat a company employee); Cyril Obi, *Globalization and Local Resistance: The Case of Shell Versus the Ogoni*, in THE GLOBAL RESISTANCE READER 324–25 (Lousie Amoore ed., 2005) (noting that the blocking of Shell oil wells by the Ogoni people "forc[ed] Shell to stop operations").

1993—was pleased.[57] The corporation was not ready to abandon its lucrative operations, nor was the military regime prepared to surrender a steady stream of national income that it was uniquely positioned to loot; in fact, the military dictatorship and the oil company were mutually dependent on one another, and that relationship structured inter-ethnic politics in the Niger Delta region.[58]

Royal Dutch/Shell insisted that the government intervene to restore its ability to exploit the oil resources in the Delta region, and the Babangida and subsequent Abacha military regimes responded by brutally suppressing the Ogoni people, including Saro-Wiwa and MOSOP.[59] Indeed, the Abacha regime went as far as to arrest and to prosecute Saro-Wiwa and nearly twenty others, allegedly for murdering more moderate Ogoni leaders.[60] The arrest, incommunicado and prolonged detention, cruel treatment and torture, and irregular prosecution of the Ogoni defendants before a national security tribunal received widespread criticism around the world.[61] Nevertheless, the tribunal judges convicted Saro-Wiwa, Dr. Barinem Kiobel, and seven of the accused and sentenced them to death.[62] On November 10, 1995, the tribunal hastily executed the "Ogoni Nine"—Ken Saro-Wiwa, Barinem Kiobel, Saturday Dobee, Felix Nuate, Nordu Eawo, Paul Levura, Daniel Gbokoo, John Kpuinen, and Baribor Bera.[63]

The arrest, torture, prosecution, and execution of the Ogoni Nine, as well as the ongoing repression of the Ogoni by the Abacha

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57. *See* OKONTA & DOUGLAS, *supra* note 52, at 121–23 (describing how Royal Dutch/Shell, with the support of the military junta, quickly sought to resume operations in Ogoni).

58. *See* Boele et al., *supra* note 56, at 78–80 (discussing the mutual dependence between the military dictatorship and the oil companies); OKONTA & DOUGLAS, *supra* note 52, at 120–21 (detailing Shell's efforts to re-enter Ogoni and the government's support in those efforts).

59. *See* OKONTA & DOUGLAS, *supra* note 52, at 123–24 (stating that the military junta arrested Saro-Wiwa in April and again in June 1993, security operatives in Rivers State massacred 132 Ogoni in July 1993, and the military regime killed more than one thousand Ogoni in September 1993).

60. OKONTA & DOUGLAS, *supra* note 52, at 128–31; KEN WIWA, IN THE SHADOW OF A SAINT: A SON'S JOURNEY TO UNDERSTAND HIS FATHER'S LEGACY 111–121 (2000) (discussing the trial of the Ogoni Nine).

61. MAI-BORNU, *supra* note 2, at 138.

62. OKONTA & DOUGLAS, *supra* note 52, at 134; WIWA, *supra* note 60, at 111–121 (2001).

63. OKONTA & DOUGLAS, *supra* note 52, at 134. John Kpuinen is sometimes spelled Kpuine or Kpuinem, and Paul Levura is sometimes spelled Levula.

military regime, led many Ogoni to flee the country.[64] It also led to twenty-six years of litigation to hold Royal Dutch/Shell accountable for its complicity in the killing of Saro-Wiwa and his compatriots.[65]

In November 1996, Ken Saro-Wiwa's son, Ken Wiwa,[66] filed a lawsuit in the Southern District of New York against Royal Dutch/Shell for the role that Shell played in the imprisonment, torture, and execution of his father.[67] He was joined by his uncle, Owens Wiwa,[68] by Blessing Kpuinen, widow of Ogoni Nine member John Kpuinen, and by a woman identified only as Jane Doe. Ken Wiwa's co-plaintiffs sought to hold Royal Dutch/Shell accountable for the death of Ogoni Nine member John Kpuinen and the torture and cruel treatment of Owens Wiwa and Jane Doe.[69] Ultimately, several others joined the litigation, including MOSOP members Karalolo Kogbara and Michael Tema Vizor, as well as Ogoni Nine relatives.[70]

They alleged Royal Dutch/Shell's complicity in human rights violations including summary execution; torture; cruel, inhuman, and degrading treatment; arbitrary arrest and detention; and violations of the right to life, liberty, security and the right to peaceable assembly and association. They also alleged tort law claims—wrongful death, assault and battery, intentional infliction of emotional distress, negligent infliction of emotional distress, negligence, and violations of

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64. *See* Kiobel v Royal Dutch Petroleum Co., 569 U.S. 108, 113 (2013) (stating that "police forces attacked Ogoni villages, beating, raping, killing, and arresting residents and destroying or looting properties").

65. The *Wiwa* plaintiffs filed the first ATS claim against Shell on November 6, 1996. Wiwa v. Royal Dutch Petroleum Co., 2002 WL 319887, at *1 (S.D.N.Y. Feb. 28, 2002). Esther Kiobel abandoned her litigation against Shell in November 2022. Roorda, *supra* note 6.

66. WIWA, *supra* note 60.

67. Complaint, Wiwa v. Royal Dutch Petroleum Co., 2002 WL 319887 (No. 96 Civ. 8386).

68. *See generally* Owens Wiwa, *People Before Profits: The Ogoni Experience and Shell*, *in* PEACE, JUSTICE, AND FREEDOM: HUMAN RIGHTS CHALLENGES FOR THE NEW MILLENNIUM (Gurcharan S. Bhatia ed., 2000) (providing the perspective of Owens Wiwa, who is Ken Saro-Wiwa's brother, a prominent MOSOP member, and one of the *Wiwa v. Shell* plaintiffs).

69. *Wiwa*, 2002 WL 319887, at *1.

70. The Ogoni Nine relatives joining the suit were Lucky Doobee (brother of Saturday Doobee), Friday Nuate (widow of Felix Nuate), Monday Gbokoo (brother of Daniel Gbokoo), David Kiobel (on behalf of his siblings, the children of Barinem Kiobel), as well as James N-nah, brother of N-nah Uebari, whom Nigerian security services shot and killed in October 1993. *See* Third Amended Complaint & Demand for Jury Trial, at 1, Wiwa v. Royal Dutch Petroleum Co. (No. 96 Civ. 8386) (S.D.N.Y. Sept. 30, 2003).

the Racketeer Influenced and Corrupt Organizations (RICO) Act. Under the ATS, U.S. federal courts have jurisdiction over claims by foreigners ("aliens") for torts in violation of the "law of nations."[71]

In 2009, some thirteenyears after Wiwa and his co-plaintiffs filed suit, Royal Dutch/Shell settled with the *Wiwa* litigation plaintiffs for $15.5 million.[72] Although the *Wiwa* and *Kiobel* litigations had been consolidated briefly, issues in the *Kiobel* litigation led to the two cases being bifurcated again.[73] Kiobel and her co-plaintiffs continued to litigate procedural issues until 2013 when the Supreme Court ultimately dismissed the case.[74]

In the African Commission on Human and Peoples' Rights and the Economic Community of West African States (ECOWAS) Community Court of Justice, non-governmental organizations representing Ogoniland victims made human rights and environmental (social and economic rights) claims against the Nigerian state under the African Charter on Human and Peoples Rights. In *SERAC & CESR v. Nigeria*, filed in 1996, the African Commission allowed the complaint to go forward without addressing the fact that the NGO complainants had named the state-owned oil corporation as a respondent.[75] The African Commission proceeded to find Nigeria liable for violations of the African Charter.[76] In *SERAP v. Nigeria*, regarding oil pipeline spills in Bodo and Ogbobo communities,

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71. 28 U.S.C. § 1350. *See* Kurtis A. Kemper, Annotation, *Construction and Application of Alien Tort Statute (28 U.S.C.A. § 1350)—Tort in Violation of Law of Nations or Treaty of United States, 28 U.S.C.A. § 1350*, 64 A.L.R. Fed.2d 417 (2012) (explaining the elements of a claim under the Alien Tort Statute).

72. Settlement Agreement and Mutual Release, Wiwa v. Shell Petroleum, 96 Civ. 8386, (June 8, 2009), https://ccrjustice.org/sites/default/files/assets/Wiwa_v_Shell_SETTLEMENT_AGREEMENT.Signed-1.pdf [https://perma.cc/694A-NQ6X]; *Settlement Reached in Human Rights Cases Against Royal Dutch/Shell*, CTR. CONST. RTS. (June 8, 2009), https://ccrjustice.org/home/press-center/press-releases/settlement-reached-human-rights-cases-against-royal-dutchshell [https://perma.cc/694A-NQ6X].

73. Kiobel by Samkalden v. Cravath, Swaine & Moore LLP, 895 F.3d 238, 241 (2d Cir. 2018).

74. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124–25 (2013).

75. Social and Economic Rights Action Center & the Center for Economic and Social Rights v. Nigeria, Communication 155/96, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶¶ 1, 50, 54 (May 27, 2002), https://www.worldcourts.com/achpr/eng/decisions/2001.10.27_SERAC_v_Nigeria.htm [https://perma.cc/AXX4-RS97].

76. *See generally id.* at 15 (finding that the "Federal Republic of Nigeria [is] in violation of Article 2, 4, 14, 16, 18(1), 21, and 24 of the African Charter on Human and People's Rights").

however, the individual communications named several corporate defendants involved as a consortium, including Shell Petroleum Development Corporation and the state-owned Nigerian National Petroleum Company, but the ECOWAS Court ruled that it lacked jurisdiction over corporate defendants.[77] Meanwhile, in Charles Wiwa's 1998 complaint to the African Commission, Nigeria declined to respond to the complaint, and the Commission found in favor of Wiwa by default, finding Nigeria in violation of the African Charter.[78] Nigeria, however, has never provided any remedy to Charles Wiwa for the wrongs he suffered.[79]

In the next Section, I situate this Article within scholarly discourses, particularly the 'Rosenberg-McCann' debate on the role of courts—i.e., litigants, lawyers, and adjudicators—in social change processes. Ogoni litigation appears to yield little in the way of individual remedy—whether compensation for loss of life, negative health impacts, or loss of income—and little in the way of collective remedy—such as environmental remediation. Ogoni litigation, however, generates positive outcomes, providing evidence for notions such as transnational legal process and bottom-up international lawmaking.

B. Courts as Hollow Hopes

Do court victories result in social change? In 1991, based partly on U.S. case studies of legal mobilizations that led to the landmark *Brown v. Board of Education* and *Roe v. Wade* judgments, Gerald Rosenberg concluded that litigation for social change rarely succeeds.[80] Courts are political actors constrained by the legislative and executive branches—capable of following shifts in public opinion,

77. *See* Socio-Economic Rights and Accountability Project v. Nigeria, No. ECW/CCJ/JUD/18/12, Community Court of Justice of the Economic Community of West African States [ECOWAS], ¶ 3, 8 (2012) (listing Nigerian National Petroleum Company, Shell Petroleum Development Company, ELF Petroleum Nigeria ltd, AGIP Nigeria PLC, Chevron Oil Nigeria PLC, Total Nigeria PLC and Exxon Mobil as corporations over which the Commission lacks jurisdiction).

78. Rights Int'l v. Nigeria, Communication 215/98, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R] ¶ 31 (1999), https://www.globalhealthrights.org/wp-content/uploads/2013/10/Rights-Intl-Nigeria-1999.pdf [https://perma.cc/B6WC-C632].

79. Interview with Charles Wiwa, in Chicago, Ill. (Dec. 7, 2018) (on file with Author).

80. GERALD ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE 336–43 (1991) (arguing that courts rarely act as agents of social change).

but rarely able to lead public opinion.[81] Can victories in court result in losses outside of court? Rosenberg suggested that they could, positing *Brown v. Board of Education*'s effect on the growth of White Citizens Councils and the Ku Klux Klan, and *Roe v. Wade*'s effect on countermobilization of the Right to Life movement.[82]

It has been more than thirty years since Rosenberg's book, *The Hollow Hope*, helped to generate skepticism—if not cynicism—about the efficacy of litigating in pursuit of societal change or even more modest policy changes. The text generated considerable debate.[83] Rosenberg doubled down on his findings in a second edition of the book seventeen years after the first edition.[84] This did not stop his interlocutors from pressing the matter,[85] nor did it stop Rosenberg from doubling down once again—publishing a third edition of *The Hollow*

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81. *See id.* at 10–21 (presenting the "Constrained Court" viewpoint); *id.* at 30–36 (concluding that "the Constrained Court view more closely approximates the role of the courts in the American political system" and that constraints can be overcome if four conditions are met).

82. *See id.* at 341–42 ("This interesting and anomalous finding . . . suggest[s] that one result of litigation to produce significant social reform is to strengthen the opponents of such change.").

83. *See generally* Malcolm M. Feeley, *Hollow Hopes, Flypaper, and Metaphors*, 17 L. & SOC. INQUIRY 745 (1992) (critiquing GERALD ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE (1991)); Gerald N. Rosenberg, *Hollow Hopes and Other Aspirations: A Reply to Feeley and McCann*, 17 L. & SOC. INQUIRY 761 (1992) (responding to his critics); MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION 290–93 (1994) (refuting the arguments of "neo-realist critical legal scholarship" such as Rosenberg's *Hollow Hope*); Gerald N. Rosenberg, *Positivism, Interpretivism, and the Study of Law*, 21 L. & SOC. INQUIRY 435 (1996) (critiquing MCCANN, *supra* note 83); Michael McCann, *Causal versus Constitutive Explanations (or, On the Difficulty of Being so Positive)*, 21 L. & SOC. INQUIRY 457 (1996) (responding to Rosenberg's critique); David Schultz & Stephen E. Gottlieb, *Legal Functionalism and Social Change: A Reassessment of Rosenberg's the Hollow Hope: Can Courts Bring About Social Change?*, 12 J. L. & POL. 63 (1996) (discussing how the "Hollow Hope" contributes to functionalism); LEVERAGING THE LAW: USING THE COURTS TO ACHIEVE SOCIAL CHANGE (David A. Schultz ed., 1998) (featuring chapters by Rosenberg, McCann, and others debating the role of courts in social change processes).

84. GERALD ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE xi (2d ed. 2008) ("[P]igheaded though I may be, I still think the argument is correct. While there has been no shortage of critics, for the most part I don't find the criticism particularly troubling.").

85. *See, e.g.*, Brendon Swedlow, *Reason for Hope? The Spotted Owl Injunctions and Policy Change*, 34 L. & SOC. INQUIRY 825, *passim* (2009) (using the Ninth Circuit injunctions as a case study for Rosenberg's theory).

Hope in 2023.[86] For Rosenberg, the evidence is clear: even landmark court victories are incapable of producing significant social change.[87] But if, according to Rosenberg, victories in court are no guarantee of victory outside of court, how much worse are court defeats such as those suffered by Esther Kiobel?[88]

Several critiques and challenges suggest that social movements and aggrieved individuals and groups should eschew transnational human rights litigation. First is the conceptual definitional puzzle: for some social movement scholars, litigation is anathema to social movements as a conceptual matter. Doug McAdam, for example, explicitly specified that, by definition, social movements engage in "noninstitutional forms of political participation" and "noninstitutionalized means" of activism[89]—a theoretical and conceptual problem for legal mobilization theory[90] given that litigation is a highly institutionalized, conventional form of challenge. The conceptual challenge perhaps explains why, as an empirical matter, environmental social movement organizations (SMOs) historically filed relatively few domestic challenges,[91] and litigation in foreign and international forums has been even less frequent.

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86. *See* GERALD ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE 575–77 (3d ed. 2023) (discussing the debates that the text has sustained across thirty years).

87. *Id.* at 575 ("What is radical is the belief that litigation can produce progressive change, that rights triumph over politics. This is a historically odd idea").

88. *See*, *e.g.*, JULES LOBEL, SUCCESS WITHOUT VICTORY : LOST LEGAL BATTLES AND THE LONG ROAD TO JUSTICE IN AMERICA 3 (2004) ("Even within the law-reform community, many, such as the former NAACP Legal Defense Fund general counsel Jack Greenberg, argue that the main result of losing cases is the creation of bad legal precedent and that, therefore, test cases generally 'should not be brought if they are likely to be lost.'").

89. DOUG MCADAM, POLITICAL PROCESS AND THE DEVELOPMENT OF BLACK INSURGENCY: 1930–1970, at 25, 37 (1999).

90. For an interpretivist work on the democratic validity of aggregate *individual* litigious behavior, see, for example, Frances K. Zemans, *Legal Mobilization: The Neglected Role of the Law in the Political System*, 77 AM. POL. SCI. REV., 690, 692 (1983).

91. *See, e.g.*, Lisa Vanhala, *Legal Opportunity Structures and the Paradox of Legal Mobilization by the Environmental Movement in the UK*, 46 L. & SOC. REV. 523, 526 (2012) ("In most cases, pursuing a legal campaign is a lengthy, costly and risky process."). On the other hand, litigation is prevalent in the United States. *See generally* THOMAS F. BURKE, LAWYERS, LAWSUITS, AND LEGAL RIGHTS: THE STRUGGLE OVER LITIGATION IN AMERICAN SOCIETY 1–21, 60–92 (2002) (presenting an empirical analysis of the policies that generate voluminous litigation practice in the United States); GORDON SILVERSTEIN, LAW'S ALLURE: HOW LAW SHAPES,

Beyond this conceptual puzzle—and beyond the long-standing debate about whether litigation results in social change[92]—litigation, generally speaking, is costly, slow, and frequently yields unsatisfying results: there is nothing close to consensus among social movement theorists, law scholars, or activists as to whether legal mobilization is worthwhile, a waste of finite resources (time, energy, money), or counterproductive/harmful.[93] Courts routinely dismiss litigation, decide in favor of defendants, or award insufficient money damages.[94] Trial court or lower appellate court victories often are overturned on appeal.[95] Where claimants seek monetary compensation or restitution rather than declaratory relief such as a finding of liability or international law violation, obtaining payouts from defendants often necessitates separate litigation, or judgment recognition.[96]

CONSTRAINS, SAVES, AND KILLS POLITICS 15–41 (2009) (describing the drawbacks of "juridification" or the turn to the courts to resolve political dilemmas in the United States). *But see generally* WILLIAM HALTOM & MICHAEL MCCANN, DISTORTING THE LAW: POLITICS, MEDIA, AND THE LITIGATION CRISIS 1–30 (2004) (arguing that corporate counter-movements against accountability and a complicit media have spread a myth that Americans are overly litigious and that tort claims have gotten out of hand).

92. *See supra* notes 83–86 and accompanying text.

93. *See* Barkan, *supra* note 15 (explaining the limits of legal mobilization and the arguments made in favor of and against it).

94. The exemplar of insufficient money damages might be the settlement between Union Carbide India, Ltd and the state of India for the 1984 Bhopal chemical disaster. *See* Upendra Baxi, *Human Rights Responsibility of Multinational Corporations, Political Ecology of Injustice: Learning from Bhopal Thirty Plus?* 1 BUS. & HUM. RTS. J. 21, 29–31 (2016) (contrasting the settlement sum of $470 million with the $3 billion that was demanded and noting that disbursement required first-generation and second-generation "Bhopal-violated" to prove their injuries beyond a reasonable doubt); Upendra Baxi, *Writing about Impunity and Environment: The "Silver Jubilee" of the Bhopal Catastrophe* 1 J. HUM. RTS. & ENV'T 23, 39 (2010) (criticizing the $470 million settlement).

95. This can be true of procedural victories as well. In *Kiobel*, the trial court permitted the claims of aiding and abetting arbitrary arrest and detention, crimes against humanity, and torture or cruel, inhuman, and degrading treatment to go forward, Kiobel v. Royal Dutch Petroleum, 456 F. Supp. 2d 457, 457 (S.D.N.Y. 2006), but then certified an interlocutory appeal to the Second Circuit, which overturned the district court. Kiobel v. Royal Dutch Petroleum, 621 F.3d 111, 111–12 (2d Cir. 2010), *rehearing en banc denied*, 642 F.3d 379 (2d Cir. 2011). Favorable precedents may also be overturned. The Supreme Court's holdings in Jesner v. Arab Bank, 138 S. Ct. 1386, 1386 (2018) and in Nestlé USA v. Doe, 593 U.S. 141 S. Ct. 1931, 1933–34 (2021), effectively overturned the Ninth Circuit's landmark holding in Doe v. Unocal, F.3d 915, 919 (9th Cir. 2001), that corporations may be held liable for human rights violations.

96. *See generally* Manuel A. Gómez, *The Global Chase: Seeking the Recognition and Enforcement of the Lago Agrio Judgment Outside of Ecuador* 1

Consequently, litigation can take many years to play out, especially where plaintiffs seek relief in the way of significant monetary damages, which incentivizes defendants to spend tens of millions in fear of losing hundreds of millions or even billions.[97]

Scholars within the legal realist strands of sociolegal theory specify that litigation diverts scarce resources while providing limited relief.[98] Some critical legal studies (CLS) scholars observe that

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STAN. J. COMPLEX LITIG. 429 (2013) (discussing efforts by Ecuadorian victim-plaintiffs to enforce a US$9.5 billion judgment against Chevron).

97. Texaco and Chevron likely have spent several hundred million dollars contesting Ecuadorian victim-plaintiffs' claims during the past thirty years—from 1993 to the present day—in the *Aguinda/Lago Agrio* litigation that resulted in a US$19 billion judgment. See PAUL M. BARRETT, LAW OF THE JUNGLE: THE $19 BILLION LEGAL BATTLE OVER OIL IN THE RAIN FOREST AND THE LAWYER WHO'D STOP AT NOTHING TO WIN 165 (2014) (remarking that Chevron was spending "tens of millions of dollars" annually on legal fees when, in hindsight, it would have been less expensive to settle the original claim well before the multi-billion dollar verdict, i.e., in 1993 when the case was pending in U.S. federal court). Other estimates state that Chevron was spending US$250 million per year in the aftermath of the Ecuadorian court judgment. *See* FLORA LU, GABRIELA VALDIVIA, & NÉSTOR L. SILVA OIL, REVOLUTION, AND INDIGENOUS CITIZENSHIP IN ECUADORIAN AMAZONIA 79 (2016) (citing Steven Mufson, *Patton Boggs Becomes Mired in an Epic Legal Battle with Chevron over Jungle Oil Pits*, WASH. POST (June 29, 2013), https://www.washingtonpost.com/business/economy/patton-boggs-becomes-mired-in-an-epic-legal-battle-with-chevron-over-jungle-oil-pits/2013/06/28/5933e834-cc91-11e2-8f6b-67f40e176f03_story.html). Pablo Fajardo has claimed that Chevron spent more than US$2 billion. *See The Empire Files: Chevron vs. the Amazon - The Environmental Trial of the Century*, TELESUR ENGLISH (13:38), https://youtu.be/F7oQTFVmaB4?si=WiMTEGHQVtHQtS5o [https://perma.cc/GD69-EQ9V](last visited May 7, 2024). Chevron did not only defend against the Ecuadorian plaintiffs' claims, but, beginning in 2009, before the final judgment was issued, Chevron went on the offensive—initiating international arbitration of the Ecuador-United States bilateral investment treaty, pursuing collateral injunctions against the plaintiffs, and pursuing civil litigation in the United States against the plaintiffs' attorneys under the Racketeer Influenced and Corrupt Organizations Act. *See* Gómez, *supra* note 96 at 442–49 (discussing Chevron's multi-pronged offensive strategy).

98. *See* Cheryl Holzmeyer, *Human Rights in an Era of Neoliberal Globalization: The Alien Tort Claims Act and Grassroots Mobilization in* Doe v. Unocal, 43 L. & SOC'Y REV. 271, 273 (2009) (noting legal realist studies that reveal gaps between favorable judgments and implementation). This tradition dates to at least the 1970s. *See generally* JOEL HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM 1–41 (1978). *But see* Javier A. Couso, *The Changing Role of Law and Courts in Latin America: From an Obstacle to Social Change to a Tool of Social Equity*, *in* COURTS AND SOCIAL TRANSFORMATION IN NEW DEMOCRACIES: AN INSTITUTIONAL VOICE FOR THE POOR? 61–79 (Roberto Gargarella et al. eds., 2006) (noting a shift from the view of courts as obstructing social and economic reform to courts as tools for reform). Interestingly, it is an open question whether this skepticism in the legal

litigation—an institutional strategy—preserves the status quo through limited relief that pacifies or even alienates movements and non-elites.[99] Thus, litigation marginalizes grassroots activism and eschews radical social goals while empowering legal elites to pursue individual remedies and incremental reforms.[100] On the other hand, as Critical Race Theorists have pointed out in their longstanding critique of "rights," some lawyers pursue impact litigation—seeking to change the rules of the game—while their clients might instead be seeking a more individualized remedy such as monetary compensation.[101] Meanwhile, litigation victory might mobilize a countermovement, leading to backlash or retrenchment of rights, and thus be politically

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academy reflects the views of the most marginalized. For a conversation about incorporating such views as a methodological and epistemological matter, see Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987) (critiquing Critical Legal Scholarship for failing to heed the needs and desires of the most marginalized groups); Devon W. Carbado, *Race to the Bottom*, 49 UCLA L. REV. 1283 (2002) (observing that much of Critical Race Theory consists of this reorientation in perspective, which has led others to critique CRT on this basis).

99. *See* Holzmeyer, *supra* note 98, at 274 (discussing CLS skepticism of legal strategies and tactics); *see also, e.g.*, Peter Gabel & Jay Feinman, *Contract Law as Ideology*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 497 (David Kairys ed., 3d ed. 1998).

100. *See* Holzmeyer, *supra* note 98, at 274 (discussing CLS critiques on individualizing claims in ways that hampers collective action and fractures movements); William H. Simon, *Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism*, 46 WM. & MARY L. REV. 127, 145–73 (2004) (summarizing a critique of the litigation paradigm that emerges from the activism of the ACLU and NAACP Legal Defense Fund, for example); *see generally* HARRI ENGLUND, PRISONERS OF FREEDOM: HUMAN RIGHTS AND THE AFRICAN POOR 1–24 (2006) (describing how the individual rights framework undermines collective action and grassroots mobilization). *But see* Jennifer Gordon, *The Lawyer Is Not the Protagonist: Community Campaigns, Law, and Social Change*, 95 CAL. L. REV. 2133 (2007) (observing that community lawyers seek to empower constituents rather than to use litigation to solve problems).

101. *See*, *e.g.*, Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 470–90 (1976) (discussing the tensions between NAACP movement lawyers' integration goals and the goals of individual plaintiff parents in obtaining a quality public education for their children—whether in segregated or in integrated public schools). *See generally* MARY ANN GLENDON, RIGHTS TALK 1–17 (1991) (offering a separate but equally important critique of the "rights revolution" in the U.S. context—the focus on individual rights to the detriment of notions of community and notions of responsibility).

costly.[102] Thus, the rise of environmental litigation might be harming rather than helping the cause of environmental justice.[103]

Within the human rights paradigm, there can be an additional shortcoming: Global North frameworks and approaches simply might be insufficient to challenge structures of impoverishment in the Global South. Consider, for example, Harri Englund's ethnography of legal aid in Malawi.[104] Englund argues that Western rhetoric on civil and political liberties ensnares Western human rights activists, donor governments, and agencies in a cycle of false activism within which these promoters of human rights spend enormous sums lobbying for rights-respecting domestic legislation and establishing rights-implementing institutions while systemically and systematically ignoring and invalidating the expressed needs, priorities, and claims of Malawians.[105] Englund's study revealed that this exclusive focus on the individual as the vessel in whom human rights are invested resulted in pyrrhic victories for claimants[106]—for example yielding monetary settlement amounting to a pittance while forsaking mass social mobilization and policy change (de facto improvements in working conditions).[107] In Englund's words:

> Human rights NGOs have not devised strategies of collective action . . . . Legal aid, despite its potential

102. This is especially true in the transnational human rights space, where states might assert their sovereignty when faced with oversight from supranational judicial mechanisms. *See generally* Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes*, 102 COLUM. L. REV. 1832 (2002) (discussing three Commonwealth Caribbean governments' withdrawal from the Judicial Committee of the Privy Council in London following judgments against the death penalty); Karen J. Alter et al., *Backlash Against International Courts in West, East and Southern Africa: Causes and Consequences,* 27 EURO. J. OF INT'L L. 293 (2016) (discussing certain African states' efforts to remove judges, to remove human rights jurisdiction, to eliminate the individual complaints mechanism, and to shutter regional courts of justice in East, West, and Southern Africa following rulings on torture, elections, and land expropriation).

103. *See, e.g.*, Cary Coglianese, *Social Movements, Law, and Society: The Institutionalization of the Environmental Movement*, 150 U. PA. L. REV. 85, 100–01, 105–07 (2001) (arguing that litigation has become a reactive strategy that maintains status quo rather than a proactive or transformative strategy, leading to schisms within the movement as "progressive" environmentalists reject the institutionalization of the movement).

104. *See generally* ENGLUND, *supra* note 100.

105. *Id.* at 7–11, 128–30.

106. *Id.* at 41.

107. *Id.*

> benefits to particular individuals, has represented a belief in piecemeal and technical solutions to widespread exploitation. No mobilization of workers to demand their rights as enshrined in laws has appeared on NGOs' agenda. . . . Treated as individuals by NGOs' legal officers, these workers [i.e., those at the very bottom of the work force] have been denied an opportunity to voice their grievances as a collective force demanding structural transformations.[108]

C. "Winning Through Losing" and Transnational Legal Processes

While New Haven School theorists are highly attuned to the role of non-state actors, including individuals, in the making of international law from the bottom up,[109] Transnational Legal Process theorists recognize and analyze the dynamics between top-down and bottom-up lawmaking processes, domestic and international processes, and public and private law processes.[110] For example, Gregory Shaffer has specified the roles of transnational legal processes in creating what he and Terence Halliday have called transnational legal orders.[111] Discussing changes to states that are influenced by transnational legal processes, Shaffer writes: "Transnational norms do not travel by

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108. *Id.* at 128–29.

109. *See* Jordan J. Paust, *Nonstate Actor Participation in International Law and the Pretense of Exclusion*, 51 VA. J. INT'L L. 977, 1001 (2011) (writing "[w]ith respect to the reality of nonstate actor participation in the formation, reaffirmation, and termination of international law," the New Haven School "compels one to seek to identify the realistic role played by individuals as individuals and in association with others in groups and entities of various sorts"); *id.* at 1002 ("Awareness of the reality of participation in processes of expectation and practice allows one to recognize that individuals are not merely objects of international law, but are also participants in the creation, shaping and termination of such law . . . ."); Janet Koven Levit, *Bottom-Up International Lawmaking: Reflections on the New Haven School of International Law*, 32 YALE J. INT'L L. 393, 398–410 (2007) (responding to a political realist critique of international law using examples of bottom-up lawmaking from international trade, climate change, and corporate social responsibility and human rights).

110. Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 183–84 (1996).

111. Terence C. Halliday & Gregory Shaffer, *Transnational Legal Orders*, *in* TRANSNATIONAL LEGAL ORDERS 3 (Terence C. Halliday & Gregory Shaffer eds., 2015); Gregory Shaffer, *International Law and Transnational Legal Orders: Permeating Boundaries and Extending Social Science Encounters*, 22 CHI. J. INT'L L. 168, 179–81 (2021).

themselves. They are constructed, conveyed, and carried by actors, including by government officials, members of international secretariats, professionals, business representatives, and civil society activists."[112]

In this Article, I use two terms interchangeably—"victim(s)-turned-activist-plaintiff(s)" and the shorthand "victim-plaintiff." I use the term "victim" to remind the reader of the corporate abuses that create victims. The term "victim" also tracks the language in the UN Human Rights Council open-ended intergovernmental working group's draft treaty on business and human rights.[113] Some scholars have criticized this use of the term "victim" in the human rights context that the draft treaty replicates. For example, some two decades ago, Makau Mutua coined the influential "Savages-Victims-Saviors" metaphor to explain the ways in which the human rights corpus only contemplates Global South states and individuals as savages that violate human rights and as victims of human rights violations, never as saviors, and only imagines Global North states and individuals as saviors, never as savages or victims.[114] The S-V-S prism obscures the reality of Global North savagery—consider chattel slavery, colonialism, the Holocaust, and World War II—while simultaneously denying Global South actors agency as saviors. Upendra Baxi, then, rejects the term "victim" in favor of "the violated" and "the Bhopal violated," while Sarah Knuckey and her co-authors refer to "rightsholder-advocates".[115]

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112. Gregory Shaffer, *Transnational Legal Process and State Change*, 37 L. & SOC. INQUIRY 229, 236 (2012).

113. Open-Ended Intergov't'l Working Group on Transnat'l Corps. and Other Bus. Enters. with Respect to Hum. Rts., Updated Draft Legally Binding Instrument (Clean Version) to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, art. 1.1 (July 2023), https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/igwg-transcorp/session9/igwg-9th-updated-draft-lbi-clean.pdf [https://perma.cc/VVZ7-HRJC] (defining victim as "any person or group of persons who suffered a human rights abuse in the context of business activities, irrespective of the nationality," which may include "the immediate family members . . . of victim," "regardless of whether the perpetrator of the human rights abuse is identified . . . or convicted").

114. Makua Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT'L L.J. 201, 214–17 (2001).

115. *See* Upendra Baxi, *Human Rights Responsibility of Multinational Corporations, Political Ecology of Injustice: Learning from Bhopal Thirty Plus?*, 1 BUS. & HUM. RTS. J. 21, 26–27 (2016) ("The terminology of 'victims' denies the violated of any agency or capacity to act as 'militant subject'; it denies them a history and future of their own."); *Id.* ("On the other hand, the violated speak differently to us, with distinct authorial voice, and crowd the agenda of governance and development with the voice for human rights."); Sarah Knuckey et al., *Power*

In some ways, Ken Saro-Wiwa's mobilization against Shell in the early 1990s represents both the difference-making agency of Global South actors and the globalization of the business and human rights movement.[116] But Saro-Wiwa was the kind of martyr—like Mahatma Gandhi or Martin Luther King, Jr.—that did not live to see the fruits of his labor. As I demonstrate in this Article, the litigation that the execution of Saro-Wiwa, Kiobel, and the Ogoni Nine spawned is a continuation of Saro-Wiwa's activism. Rather than the direct-action tactics of Saro-Wiwa and MOSOP, however, Saro-Wiwa's and Kiobel's heirs and successors from Ogoniland frequently turned to judicial institutions in pursuit of remedy and wider social reforms. Thus, despite the negative connotations of the term "victim" described by Mutua, Baxi, and Knuckey et al., I use the terms "victim-turned-activist-plaintiff" and "victim-plaintiff" to demonstrate the shift from (passive) victim to a litigation plaintiff—a legal claimant in a court or quasi-judicial proceeding.

This Article makes an important contribution to two different scholarly debates and discourses—litigating for social change and Transnational Legal Process theory. To skeptics who see victim-plaintiffs placing a "hollow hope" in courts, I present corporate accountability litigation as a rejoinder. To Transnational Legal Process theorists and norm diffusion theorists, I encourage increased attention to litigation.

Legal mobilization by activist litigants has been central to the "transnational legal process" of business and human rights norm generation and norm diffusion. In bottom-up judicialized norm diffusion processes, aggrieved and marginalized individuals and groups, as well as their cause lawyers and allies (*amici*), may serve as "norm entrepreneurs."[117] Judges and courts may serve as "platforms" whose decisions amplify innovative claims.[118] Judges and courts also

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in Human Rights Advocate and Rightsholder Relationships: Critiques, Reforms, and Challenges, 33 HARV. HUM. RTS. J. 1, 3 (2020).

116. Florian Wettstein, *The History of 'Business and Human Rights' and its Relationship with Corporate Social Responsibility*, *in* RESEARCH HANDBOOK ON HUMAN RIGHTS AND BUSINESS, *supra* note 10, at 23, 24–25 (arguing that Saro-Wiwa's execution internationalized the business and human rights movement and discourse, which had roots in the 1970s).

117. *See* Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT'L ORG. 887, 897 (1998) ("Norm entrepreneurs are critical for norm emergence because they call attention to issues or even 'create' issues by using language that names, interprets, and dramatizes them.").

118. *See id.* at 899 ("All norm promoters at the international level need some kind of organizational platform from and through which they promote their

serve as "norm leaders"[119] alongside early-adopter states that ultimately might convince "norm followers"[120]—later adopters—to adopt their procedural and substantive reforms.

Victim-plaintiffs as norm entrepreneurs demand corporate accountability in the form of monetary compensation, environmental clean-up, and other reparations. Their cause lawyers and allies are also norm entrepreneurs, as they challenge procedural barriers by asserting public interest standing, by seeking class certification, by attempting to pierce the corporate veil or to hold parent companies directly liable, and by arguing for corporations to have legal obligations under international human rights law. They advance innovative arguments that bolster the justiciability of social, economic, and environmental rights, including demands for remedies that move beyond monetary damages and reparations and involve policy measures such as environmental impact assessments and human rights impact assessments to ensure non-repetition of environmental rights and human rights violations.

Judges and courts that validate these claims could be seen as a type of organizational platform that amplifies the innovative claims through transnational judicial dialogue[121] and other persuasive[122] and

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norms."); *id.* ("Expertise . . . usually resides in professionals, and . . . professional training of bureaucrats in these organizations [platforms] helps or blocks the promotion of new norms within standing organizations [platforms].").

119. *See id.* at 895 ("The characteristic mechanism of the first stage, norm emergence, is persuasion by norm entrepreneurs. Norm entrepreneurs attempt to convince a critical mass of states (norm leaders) to embrace new norms.").

120. *See id.* ("The second stage is characterized more by a dynamic of imitation as the norm leaders attempt to socialize other states to become norm followers.").

121. *See generally* Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 RICH. L. REV. 99 (1994) (analyzing a phenomenon emerging in the 1980s and 1990s whereby national courts, supranational courts, and quasi-judicial mechanisms voluntarily refer to each other's jurisprudence as persuasive precedents or to distinguish their case from others); Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103 (2000) (similar); *see also* Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 323–26, 358–61, 370–73 (1997) (ascribing a role for "judicial cross-fertilization and dialogue" in the construction of a "community of law" through the UN Human Rights Committee); Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L.J. 487, 491–505 (2005) (arguing that, through transnational judicial dialogue, domestic and international law can become co-constitutive—with domestic jurisprudence creating international norms, not just the other way around).

122. *See generally* Jeffrey T. Checkel, *Why Comply? Social Learning and European Identity Change*, 55 INT'L ORG. 553 (2001) (discussing persuasion as a

acculturative processes.[123] Judges and courts can be seen more conventionally as norm leaders (early norm adopters). Particularly in common law jurisdictions, judges and courts exercise a judicial lawmaking function by interpreting jurisdictional statutes to permit claims by victim-plaintiffs such as the Ogoni to go forward and by interpreting common law principles such as the duty of care to impose direct liability on parent corporations.[124] Either through judicial lawmaking or through legislation, states such as the United Kingdom, the Netherlands, France, and Canada serve as norm leaders, whose early adoption of the corporate accountability norm helps to persuade or to socialize other states and organizations, such as the European Union, to follow the norm as well.[125]

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norm compliance mechanism); *International Institutions and Socialization in Europe: Introduction and Framework*, 59 INT'L ORG. 804 (2005) (same); Thomas Risse, *"Let's Argue!": Communicative Action in World Politics*, 54 INT'L ORG. 1 (2000) (presenting a theory of argumentative rationality in international relations based on Habermasian discourse theory); Harald Muller, *Arguing, Bargaining and All That: Communicative Action, Rationalist Theory and the Logic of Appropriateness in International Relations*, 10 EURO. J. INT'L RELS. 395 (2004) (similar); Nicole Deitelhoff, *The Discursive Process of Legalization: Charting Islands of Persuasion in the ICC Case*, 63 INT'L ORG 33, 35 (2009) ("Habermas's discourse theory posits that (legitimate) law arises out of public deliberations in which actors may change their views in response to superior normative arguments to arrive at a rational consensus.").

123. Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 630, 638 (2004) (arguing that in addition to the traditional discourses on coercion and persuasion, then-recent interdisciplinary scholarship was advancing acculturation as a third mechanism of influencing state compliance with international law); Ryan Goodman & Derek Jinks, *Incomplete Internalization and Compliance with Human Rights Law*, 19 EURO. J. INT'L L. 725 (2008) (explaining acculturation); RYAN GOODMAN & DEREK JINKS, SOCIALIZING STATES: PROMOTING HUMAN RIGHTS THROUGH INTERNATIONAL LAW 21–86 (2013) (explaining their concept of acculturation).

124. His Royal Highness Emere Godwin Bebe Okpabi v. Royal Dutch Shell PLC [2017] EWHC (TCC) 89 (Eng.); Okpabi v. Royal Dutch Shell [2021] UKSC 3, [153] (appeal taken from Eng.) (finding jurisdiction over the parent company Royal Dutch Shell based on a plausible duty of care claim under U.K. tort law); *see also* Radu Mares, *Liability Within Corporate Groups: Parent Companies' Accountability for Subsidiary Human Rights Abuses*, *in* RESEARCH HANDBOOK ON HUMAN RIGHTS AND BUSINESS, *supra* note 10, at 455–57 (discussing the duty of care under U.K. tort law); Lucas Roorda & Daniel Leader, Okpabi v Shell *and* Four Nigerian Farmers v Shell*: Parent Company Liability Back in Court*, 6 BUS. & HUM. RTS. J. 368, 370–72 (2021) (summarizing the judgments regarding parent company duty of care in Ogoniland cases in the U.K. and the Netherlands).

125. *See* discussion *infra* Section III.B.

D. Generalizability of the Ogoni Case

This Article is one of the first to examine comprehensively the Ogoni litigation against Shell before foreign and transactional judicial and quasi-judicial mechanisms.[126] It is not the first to study the Ogoni, however. Numerous scholars have looked to the Ogoni as a case study across the four decades that the Ogoni movement has been active, including international law scholars,[127] human rights scholars,[128] management ethics and corporate law scholars,[129] political economists,[130] globalization and development scholars,[131]

126. *But see, e.g.*, Enneking, *supra* note 45, at 511 (summarizing Ogoni ATS litigation); MAYA STEINITZ, THE CASE FOR AN INTERNATIONAL COURT OF CIVIL JUSTICE 70–76 (2018) (similar).

127. Chinedu Reginald Ezetah, *International Law of Self-Determination and the Ogoni Question: Mirroring Africa's Post-Colonial Dilemma*, 19 LOY. L.A. INT'L & COMP. L.J. 811 (1997); Obiora Chinedu Okafor, *International Law, Human Rights, and the Allegory of the Ogoni Question*, *in* LEGITIMATE GOVERNANCE IN AFRICA: INTERNATIONAL AND DOMESTIC LEGAL PERSPECTIVES (Edward Kofi Quashigah & Obiora Chinedu Okafor eds., 1999); KANIYE S. A. EBEKU, OIL AND THE NIGER DELTA PEOPLE IN INTERNATIONAL LAW: RESOURCE RIGHTS, ENVIRONMENTAL AND EQUITY ISSUES (2006); Kwagwo Appiagye-Atua, *Self-Determination v. State Sovereignty: A Critique of the African Commission's Decision in the Ogoni Case*, *in* INTERNATIONAL LAW AND INDIGENOUS PEOPLES (Joshua Castellino & Niamh Walsh eds., 2004).

128. OKONTA & DOUGLAS, *supra* note 52; JULIA RUTH-MARIA WETZEL, HUMAN RIGHTS IN TRANSNATIONAL BUSINESS: TRANSLATING HUMAN RIGHTS OBLIGATIONS INTO COMPLIANCE PROCEDURES 11–18 (2016).

129. JEDRZEJ GEORGE FRYNAS, OIL IN NIGERIA: CONFLICT AND LITIGATION BETWEEN OIL COMPANIES AND VILLAGE COMMUNITIES 42–58 (2000); Bronwen Manby, *Shell in Nigeria: Corporate Social Responsibility and the Ogoni Crisis*, *in* SAGE BUSINESS CASES (2000); David Wheeler, Heike Fabig & Richard Boele, *Paradoxes and Dilemmas for Stakeholder Responsive Firms in the Extractive Sector: Lessons from the Case of Shell and the Ogoni*, 39 J. BUS. ETHICS 297, 298–300 (2002); Uwem E. Ite, *Multinationals and Corporate Social Responsibility in Developing Countries: A Case Study of Nigeria*, 11 CORP. SOC. RESP. & ENV'T MGMT 1 (2004); Esther Hennchen, *Royal Dutch Shell in Nigeria: Where do Responsibilities End?*, 129 J. BUS. ETHICS 1 (2015).

130. Cyril Obi, *Because of Oil? Understanding the Globalization of the Niger Delta and Its Consequences*, *in* NATURAL RESOURCES, CONFLICT, AND SUSTAINABLE DEVELOPMENT: LESSONS FROM THE NIGER DELTA (Okechukwu Ukaga et al. eds., 2012).

131. Boele et al., *supra* note 56, at 74–86; Richard Boele et al., *Shell, Nigeria and the Ogoni. A Study in Unsustainable Development: II. Corporate Social Responsibility and Stakeholder Management Versus a Rights-Based Approach to Sustainable Development*, 9 SUSTAINABLE DEV. 121 (2001); Richard Boele et al., *Shell, Nigeria and the Ogoni: A Study in Unsustainable Development: III. Analysis and Implications of Royal Dutch/Shell Group Strategy*, 9 SUSTAINABLE DEV. 177 (2001); Edward T. Bristol-Alagbariya, *The Concept, Principle, Law and*

environmental law and environmental justice scholars,[132] Indigenous peoples' rights scholars,[133] social movement scholars,[134] conflict scholars,[135] political psychologists,[136] discourse theorists,[137] and at least one trained philosopher.[138] I suspect that these prior analysts have appreciated something about the Ogoni that I have as well: the Ogoni are distinct or even exceptional in the *extent* of their mobilization, but Ogoni transnational legal mobilization itself is not unprecedented.[139]

Developmental Practice of Environmental Democracy towards Sustainable Development in Resources-Rich Communities of Developing Countries: Focus on Nigeria's Oil Producing Delta Region, 94 J.L. POL'Y & GLOBALIZATION 53 (2020).

132. Phia Steyn, *Shell International, the Ogoni People, and the Environmental Injustice in the Niger Delta, Nigeria: The Challenge of Securing Environmental Justice in an Oil-based Economy*, *in* ECHOES FROM THE POISONED WELL: GLOBAL MEMORIES OF ENVIRONMENTAL INJUSTICE 371–87 (Sylvia Hood Washington, Paul C. Rosier & Heather Goodall eds., 2006); Claude Welch, *Human Rights, Environment and the Ogoni: Strategies for Non-governmental Organization*s, 7 BUFF. ENV'T L. J. 251 (1999–2000).

133. Oronto Douglas & Ike Okonta, *Ogoni People of Nigeria Versus Big Oil*, *in* PARADIGM WARS: INDIGENOUS PEOPLES' RESISTANCE TO GLOBALIZATION 153–56 (Jerry Mander & Victoria Tauli-Corpuz, eds., 2006); WESTRA, *supra* note 54, app. 2 at 281–87.

134. Clifford Bob, *Political Process Theory and Transnational Movements: Dialectics of Protest among Nigeria's Ogoni Minority*, 49 SOC. PROBS, 395–415 (2002); CLIFFORD BOB, THE MARKETING OF REBELLION: INSURGENTS, MEDIA, AND INTERNATIONAL ACTIVISM 54–116 (2005); JOHN AGBONIFO, ENVIRONMENT AND CONFLICT: THE PLACE AND LOGIC OF COLLECTIVE ACTION IN THE NIGER DELTA (2018).

135. OIL AND INSURGENCY IN THE NIGER DELTA: MANAGING THE COMPLEX POLITICS OF PETRO-VIOLENCE (Cyril Obi & Siri Aas Rustad eds., 2011); THE UNFINISHED REVOLUTION IN NIGERIA'S NIGER DELTA: PROSPECTS FOR ENVIRONMENTAL JUSTICE AND PEACE (Cyril Obi and Temitope Oriola eds., 2018); MAI-BORNU, *supra* note 2; OKONTA, *supra* note 2.

136. Zainab L. Mai-Bornu & Fidelis Allen, *Chosen Trauma, Emotions and Memory in Movements: The Ogoni and Ijaw in the Niger Delta*, 14 COSMOPOLITAN CIV. SOCIETIES 49 (2022).

137. Austin Tam-George, *Ken Saro-Wiwa, the Ogoni Struggle and the Logic of Spectacle*, *in* BONDAGE OF BOUNDARIES AND IDENTITY POLITICS IN POSTCOLONIAL AFRICA: THE NORTHERN PROBLEM AND ETHNO-FUTURES 117–29 (J. Ndlovu-Gatsheni & Brilliant Mhlanga eds., 2013).

138. Sanya Osha, *Birth of the Ogoni Protest Movement*, 41 J. ASIAN & AFR. STUD. 13 (2006); SANYA OSHA, KEN SARO-WIWA'S SHADOW: POLITICS, NATIONALISM AND THE OGONI PROTEST MOVEMENT (2007); Sanya Osha, *Ken Saro-Wiwa: Field Notes Twenty Years Later*, 29 SOCIALISM & DEMOCRACY 193 (2015); Sanya Osha, *Aspects of Ken Saro-Wiwa's Legacy*, 30 SOCIALISM & DEMOCRACY 106 (2016).

139. *See generally* AMNESTY INTERNATIONAL, INJUSTICE INCORPORATED: CORPORATE ABUSES AND THE HUMAN RIGHT TO REMEDY (2014), www.amnesty.org/en/documents/POL30/001/2014/en/ [https://perma.cc/C7E6-

Indigenous peoples' transnational human rights litigation and corporate accountability litigation experiences—whether those of the Ogoni Nine widows and heirs or the victims of oil pipeline spills—demonstrate that corporate accountability litigation can seem like a fool's errand. At best, plaintiffs might earn an unenforceable declaratory judgment from an international court or quasi-judicial mechanism, or they might earn a settlement or damage award after years or even decades of litigating.[140] At worst, plaintiffs spend years or decades litigating and either never overcome procedural barriers or lose at the merits stage. In Part II, I elaborate on the defeats that the Ogoniland litigants suffered, and I introduce several critiques of litigating for social change, of human rights litigation, and of environmental rights litigation.

It is central to the argument that I make in Part III, however, to understand that the Ogoni are representative of a much broader phenomenon of corporate accountability litigation as bottom-up lawmaking.[141] Corporate accountability litigants frequently suffer individual defeats. But sometimes, they also win. And sometimes, their victories are in the nature of collateral rewards, such as alliance formation and capacity building. As I argue in Part III, in the

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KTWL] (discussing the Bhopal gas leak disaster in India; the Omai gold mine dam rupture in Guyana; waste dumping in the Ok Tedi gold and copper mine in Papua New Guinea; and toxic waste dumping in Côte d'Ivoire). Lack of meaningful and lasting remedy for the 1984 Bhopal disaster in particular continues to resonate in the business and human rights (BHR) space decades after the disaster occurred. *See* Upendra Baxi, *Human Rights Responsibility of Multinational Corporations, Political Ecology of Injustice: Learning from Bhopal Thirty Plus?* 1 BUS. & HUM. RTS. J. 21, 28–33 (2016) (conceptualizing the Bhopal catastrophe as being constituted by four catastrophes: (1) the original disaster; (2) a 1989 settlement for US$470 million that India entered into on behalf of Bhopal residents, as opposed to the US$3 billion claimed; (3) a cumbersome disbursement process that requires Bhopal residents to prove a causal link between the disaster and their assorted ailments, resulting in many still awaiting compensation of being denied compensation; (4) the conviction of seven employees of the subsidiary Union Carbide India Ltd., who received minor sentences and fines, while the American officials from the parent company Union Carbide Corporation have never been prosecuted).

140. Given the myriad aims of victim-plaintiffs, it is possible that no one procedure would be appropriate or sufficient. *See generally* Lisa J. Laplante, *Just Repair*, 48 CORNELL INT'L L. J. 513 (2015) (describing the plural aims of reparations in the transitional justice space, as informed by reparative justice, restorative justice, civic justice, and socio-economic justice frameworks).

141. *See generally* Jonathan C. Drimmer & Sarah R. Lamoree, *Think Globally, Sue Locally: Trends and Out-of-Court Tactics in Transitional Tort Actions*, 29 BERKELEY J. INT'L L. 456 (2011) (analyzing ATS litigation outcomes).

aggregate, transnational legal mobilization for human and environmental rights generates and disseminates business and human rights norms. Victim-turned-activist-plaintiffs from the Global South thus help to create and to sustain the pressure on states to regulate corporate activity more strictly, for example, through due diligence statutes[142] and, perhaps, through the adoption of an international treaty on business and human rights—including one that might codify due diligence obligations.[143] They make international law from the bottom up.

II. TRANSNATIONAL HUMAN AND ENVIRONMENTAL RIGHTS LITIGATION AND ITS SHORTCOMINGS

In 2002, a group of expatriate Ogoni living in the United States, led by Charles Wiwa,[144] decided to bring an action against Royal Dutch/Shell to represent a plaintiff class of the corporations' victims from Ogoniland.[145] Esther Kiobel, Charles Wiwa, and a dozen others were the named plaintiffs who filed a class action lawsuit in the Southern District of New York against Royal Dutch/Shell under the ATS for aiding and abetting the Nigerian state's commission of crimes against humanity through deprivations of life, liberty, and security, including extrajudicial killings of the Ogoni Nine, the arbitrary arrest and detention and the torture of Charles Wiwa and other Ogoni, and the forced exile of several hundred Ogoni who fled Nigeria and were residing in the United States and elsewhere.[146] Following more than a decade of litigation, the U.S. Supreme Court dismissed Kiobel, Charles Wiwa, and their co-plaintiffs' claims in 2013.[147] The landmark

142. *See generally* Robert McCorquodale, *Human Rights Due Diligence Instruments: Evaluating the Current Legislative Landscape*, *in* RESEARCH HANDBOOK ON GLOBAL GOVERNANCE, BUSINESS AND HUMAN RIGHTS 121 (Axel Marx et al. eds., 2022) (surveying the landscape of due diligence laws and enforcement mechanisms).

143. *See* Robert McCorquodale & Lise Smit, *Human Rights, Responsibilities, and Due Diligence: Key Issues for a Treaty*, *in* BUILDING A BHR TREATY 216 (Surya Deva & David Bilchitz eds., 2017) (proposing certain provisions regarding due diligence in a business and human rights treaty).

144. Interview with Charles Wiwa, in Chicago, Ill. (Dec. 7, 2018) (on file with Author).

145. Kiobel v. Royal Dutch Petroleum Co., 456 F. Supp. 2d 457, 459 (S.D.N.Y. 2006).

146. *Id.*

147. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124–25 (2013).

judgment had wide-reaching negative implications for corporate accountability in the United States and elsewhere.[148]

In this Part, I use Esther Kiobel's experience litigating in the United States as an example that supports the critiques of litigating for social change and of transnational human rights litigation. I reference transnational barriers to justice that Ogoni victim-plaintiffs have faced in courts in the United States, United Kingdom, and the Netherlands. Those barriers demonstrate why the skepticism of some scholars regarding the utility of impact litigation is well warranted. Rather than forums for holding multinational corporations accountable for human rights violations and environmental harms that they have caused Indigenous people in the Global South, courts in the United States, the United Kingdom, the Netherlands, and elsewhere most often serve as *barriers* to justice. Courts in the Global North are failing to fulfill their ethical and perhaps legal obligations to provide access to a judicial remedy for aggrieved individuals and groups to have their anti-corporate grievances heard.[149]

A. Transnational Barriers to Justice

Various plaintiffs from Ogoniland litigated—mostly unsuccessfully—questions of personal jurisdiction over foreign

148. *See Kiobel v. Royal Dutch Petroleum*, SCOTUSBLOG (Apr. 17, 2013) http://www.scotusblog.com/case-files/cases/kiobel-v-royal-dutch-petroleum/ [https://perma.cc/3B7N-EYQ6] (providing expert commentary on the *Kiobel* judgment).

149. Access to remedy is a fundamental principle of international human rights law, codified in several legal instruments. *See* G.A. Res. 60/147, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Dec. 15, 2005) (citing, inter alia, the right to remedy codified in article 8 of the Universal Declaration of Human Rights, article 2 of the International Covenant on Civil and Political Rights, article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination, article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 39 of the Convention on the Rights of the Child, article 7 of the African Charter on Human and Peoples' Rights, article 25 of the American Convention on Human Rights, and article 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms); A. R. Harrington, *Don't Mind the Gap: The Rise of Individual Complaints Mechanisms within International Human Rights Treaties* 22 DUKE J. COMP. & INT'L L. 153, 160 (2012) (demonstrating how UN treaty bodies and other human rights mechanisms provide access to remedies).

subsidiary entities;[150] sovereign immunity for state-owned corporations;[151] subject-matter jurisdiction over their substantive claims;[152] the justiciability of social, economic, and cultural rights;[153] corporate liability under international law;[154] extraterritoriality of

150. Bodo Cmty. v. Shell Petroleum Dev. Co. of Nigeria Ltd. [2014] EWHC (TCC) 1973 (Eng.); *see also* Doe v. Unocal Corp., 248 F.3d 915, 930–31 (9th Cir. 2001) (affirming dismissal of the claims against Total for lack of personal jurisdiction); Gwynne L. Skinner et al., *Lack of* In Personam *Jurisdiction over TNCs and Their Affiliates*, *in* TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS: OVERCOMING BARRIERS TO JUDICIAL REMEDY 52 (2020) (comparing personal jurisdiction doctrines in the United States, Europe, the U.K., and Canada); Douglas Branson, *Holding Multinational Corporations Accountable? Achilles' Heels in Alien Tort Claims Act Litigation*, 9 SANTA CLARA J. INT'L L. 227, 227–30 (2011) (discussing the weak nature of the contacts aimed at establishing personal jurisdiction in federal court over defendants in ATS cases but noting that personal jurisdiction is not the main hurdle to ATS plaintiffs); MICHAEL KOEBELE, *CORPORATE RESPONSIBILITY UNDER THE ALIEN TORT STATUTE: ENFORCEMENT OF INTERNATIONAL LAW THROUGH US TORTS LAW* 305–22 (2009) (discussing personal jurisdiction in ATS cases); Austen Parrish, *Personal Jurisdiction: The Transnational Difference*, 59 VA. J. INT'L L. 97, 122–25 (2019) (discussing the U.S. Supreme Court's personal jurisdiction analysis in corporate accountability cases involving foreign defendants).

151. *See* Doe v. Unocal. Corp., 395 F.3d 932, 956–58 (9th Cir. 2002) (affirming the district court's dismissal of claims against the Myanmar Military and Myanmar Oil that did not fall within any exception to the Foreign Sovereign Immunities Act).

152. Wiwa v. Royal Dutch Petroleum Co., 626 F. Supp. 2d 377, 384–86 (S.D.N.Y. 2006).

153. Social and Economic Rights Action Center & the Center for Economic and Social Rights v. Nigeria, Communication No. 155/96, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶ 68 (May 27, 2002), https://www.worldcourts.com/achpr/eng/decisions/2001.10.27_SERAC_v_Nigeria.htm [https://perma.cc/AXX4-RS97]; Socio-Economic Rights and Accountability Project v. Nigeria [2012], No. ECW/CCJ/JUD/18/12, ¶¶ 38–40 (Nigeria).

154. *See* Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010) (holding that corporate liability will not lie under international law); *see also* Jesner v. Arab Bank, PLC, 584 U.S. 241 (2018) (holding that foreign corporations generally may not be sued under the Alien Tort Statute); Nestlé USA v. Doe, 141 S. Ct. 1931, 1933–1934 (2021) (dismissing on extraterritoriality grounds and leaving unresolved the question of whether foreign plaintiffs may sue U.S. corporations under the Alien Tort Statute); Surya Deva, *Multinationals, Human Rights and International Law: Time to Move beyond the "State-Centric" Conception*, *in* HUMAN RIGHTS AND BUSINESS: DIRECT CORPORATE ACCOUNTABILITY FOR HUMAN RIGHTS 27, 38–45 (J. Letnar Cernic & T. Van Ho eds., 2015) (arguing that corporations can and should have human rights obligations under international human rights law); Julian G. Ku, *The Curious Case of Corporate Liability under the Alien Tort Statute: A Flawed System of Judicial Lawmaking*, 51 VA. J. INT'L L. 353, 372–76 (2011) (citing the Second Circuit holding in *Kiobel* as evidence for a lack of consensus regarding corporate liability under international law); Caroline Zrinka Dzeba, *A Regional* Custos Morum*? Corporate Liability under International Law in North*

domestic legislation;[155] *forum non conveniens*;[156] piercing the corporate veil to bootstrap in parent corporations and to reach their deep pockets;[157] the duty of care that multinational corporations owe to host state populations,[158] and the duty of vigilance or due diligence that

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America after Nevsun Resources *and* Nestlé, 54 CASE WESTERN RESERVE J. INT'L L. 385, 400–05 (2022) (discussing the relationship between corporate liability under international law and extraterritoriality in the U.S. Supreme Court's analysis in *Kiobel*); Lee James McConnell, *Establishing Liability for Multinational Corporations: Lessons from* Akpan, 56 INT'L J. L. & MGMT. 88, 94–98 (2014) (discussing the Ogoni litigation in *Akpan* that generated Dutch corporate liability jurisprudence at the intersection of international human rights law and domestic private law of tort).

155. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124–25 (2013); *see also* Sigrun Skogly, *Regulatory Obligations in a Complex World States' Extraterritorial Obligations Related to Business and Human Rights, in* BUILDING A TREATY ON BUSINESS AND HUMAN RIGHTS, *supra* note 28, at 318, 335–45 (extending the extraterritoriality norms reflected in the Maastricht Principles to the draft legally binding instrument on business and human rights, moving states from an ability to regulate their corporate nationals' behavior abroad to an obligation to do so); Olivier De Schutter et al., *Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights* 34 HUM. RTS. Q. 1084, 1141 (2012) (discussing extraterritorial regulation of TNCs including for the behavior of subsidiaries and suppliers of their corporate nationals); Stéphanie Lagoutte, *New Challenges Facing States within the Field of Human Rights and Business*, 33 NORDIC J. HUM. RTS. 158, 174–78 (2015) (discussing extraterritoriality in business and human rights law).

156. Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 94 (2d Cir. 2000) (granting defendant's motion to dismiss on *forum non conveniens* grounds); *see also* Aguinda v. Texaco, Inc., 142 F.Supp.2d 534, 554 (S.D.N.Y. 2001) *aff 'd as modified*, 303 F.3d 470 (2d Cir. 2002) (granting defendant's motion to dismiss on *forum non conveniens* grounds); BETH STEPHENS ET AL., INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 391–401 (2d ed. 2008) (explaining *forum non conveniens* doctrine in ATS cases); KOEBELE, *supra* note 150, at 323–47 (discussing *forum non conveniens* in ATS cases); Donald Earl Childress III, Forum Conveniens*: The Search for a Convenient Forum in Transnational Cases*, 53 VA. J. INT'L L. 157, 164–73 (2013) (discussing *forum non conveniens* doctrine); Ronald A. Brand, *Challenges to* Forum Non Conveniens, 45 N.Y.U. J. INT'L L. & POL. 1003, 1011–30 (2013) (discussing challenges to *forum non conveniens* dismissals in Europe and Latin America); Maggie Gardner, *Retiring* Forum Non Conveniens, 92 N.Y.U. L. REV. 390, 398–400 (2017) (arguing that the U.S. Congress and the federal courts should abandon, rather than attempt to reform, the *forum non conveniens* doctrine).

157. Vivian Grosswald Curran, *Harmonizing Multinational Parent Company Liability for Foreign Subsidiary Human Rights Violations*, 17 CHI. J. INT'L L. 403, 408–15 (2016); Mares, *Liability Within Corporate Groups*, *supra* note 124, at 452–57; KOEBELE, *supra* note 150, at 285–96 (discussing corporate veil piercing in ATS cases).

158. Gerechtshof Den Haag [Court of Appeal of The Hague], 29 januari 2021, NJF 2021, 77 m.nt. J.M. van der Klooster, M.Y. Bonneur en S.J. Schaafsma (Oguru, Efanga & Vereniging Milieudefensie/Shell Petroleum N.V.); His Royal Highness

parent corporations must fulfill with regard to their foreign subsidiaries.[159] They also had to litigate conflict of law and choice of law issues that underlie many of these questions,[160] which might determine such critical procedural issues as whether Nigerian law recognizes class action.[161]

For roughly more than three decades from 1980 to 2013,[162] a 1789 federal statute granted U.S. federal courts the jurisdiction to hear

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Emere Godwin Bebe Okpabi v. Royal Dutch Shell PLC [2017] EWHC (TCC) 89 (Eng.); Okpabi v. Royal Dutch Shell [2021] UKSC 3, [153] (appeal taken from Eng.) (finding jurisdiction over the parent company Royal Dutch Shell based on a plausible duty of care claim under UK tort law); *see also* Mares *supra* note 124, at 455–57 (discussing the duty of care under UK tort law); Roorda & Leader, *supra* note 124, 370–72 (summarizing the judgments regarding parent company duty of care in Ogoniland cases in the U.K. and the Netherlands).

159. Daniela Chimisso dos Santos & Sara L. Seck, *Human Rights Due Diligence and Extractive Industries*, *in* RESEARCH HANDBOOK ON HUMAN RIGHTS AND BUSINESS, *supra* note 10, at 151, 155–57 (providing examples of due diligence jurisprudence). Failed corporate accountability litigation over the duty of vigilance or due diligence prompted France to implement a Duty of Vigilance law in 2017. *See* Almut Schilling-Vacaflor, *Putting the French Duty of Vigilance Law in Context: Towards Corporate Accountability for Human Rights Violations in the Global South?*, 22 HUM. RTS. REV. 109, 118–23 (2021) (examining the efficacy of the Duty of Vigilance law through a case study of the Total E&P litigation); Radu Mares, *Legalizing Human Rights Due Diligence and the Separation of Entities Principle*, *in* BUILDING A TREATY ON BUSINESS AND HUMAN RIGHTS, *supra* note 28, at 279–80 (observing and supporting the retention of the legal separation of entities principle in the face of the emerging human rights due diligence norm, which imposes liability on parent corporations for failures to regulate their subsidiaries). The focus on due diligence and supply chain regulatory logic assumes that the parent corporations hold all the power in the relationships with subsidiaries and suppliers. *But see generally*, Trang Nguyen, *Hidden Power in Global Supply Chains*, 64 HARV. INT'L L.J. 35 (2023) (indicating the subsidiaries and suppliers might be better or at least additional sites for focusing CSR and business and human rights efforts).

160. *See*, *e.g.*, Donald Earl Childress III, *When* Erie *Goes International*, 105 NW. U. L. REV. 1531, 1533–35 (2011) (arguing that U.S. federal courts should not apply the *Erie*/*Klaxon* conflict-of-law doctrine to private international law litigation); Christopher A. Whytock et al., *Foreword: After* Kiobel: *International Human Rights Litigation in State Courts and Under State Law*, 3 U.C. IRVINE L. REV. 1, 7 (2013) ("[S]tate choice-of-law principles might point toward the application of foreign rather than state law, and . . . the limits on the extraterritorial application of state statutes and state common law are unsettled.").

161. *See*, *e.g.*, Rechtbank's Gravenhage [District Court of The Hague], 30 januari 2013, NJF 2013, 99 m.nt. H. Wien, M. Nijenhuis en FM Bus (Akpan/Royal Dutch Shell PLC. en Shell Petroleum Development Company of Nigeria, Ltd.) ¶ 4.11 (contrasting Section 3:305a of the Dutch Civil Code with substantive Nigerian law, which does not have a section governing class actions).

162. Prior to 1980, aggrieved individuals and groups filed very few claims under the Alien Tort Statute. *See* Kenneth C. Randall, *Federal Jurisdiction over*

claims (1) by foreign plaintiffs (2) against foreign defendants (3) regarding foreign conduct—so-called "foreign-cubed" claims.[163] The federal courts of the United States had held themselves out as a tantalizing forum of almost universal civil jurisdiction[164]—a global cause of action, albeit implied[165]—over egregious violations of human and environmental rights by corporations, including the largest, wealthiest, and most influential corporations.[166]

International Law Claims: Inquiries into the Alien Tort Claims Statute, 18 N.Y.U. J. INT'L L. & POL. 1, 4–5 (1985) (discussing the fewer than two dozen ATS claims submitted in the first two centuries that the statute was in effect). The Second Circuit's 1980 judgment in *Filártiga v. Peña-Irala* marked the opening under the ATS that actors such as the Center for Constitutional Rights would go on to exploit. *See* Stephens, *The Curious History of the Alien Tort Statute*, *supra* note 1, at 1480 (discussing the role of the Center for Constitutional Rights in the *Filártiga* litigation); Logan Michael Breed, *Regulating Our 21st-Century Ambassadors: A New Approach to Liability for Human Rights Violations Abroad*, 42 VA. J. INT'L L., 1005, 1013–23 (2002) (surveying the emergence of the ATS litigation phenomenon in its first decade).

163. *See, e.g.*, Oona Hathaway, Kiobel *Commentary: The Door Remains Open to "Foreign-Squared" Cases*, SCOTUSBLOG (Apr. 18, 2013), https://www.scotusblog.com/2013/04/kiobel-commentary-the-door-remains-open-to-foreign-squared-cases/ [https://perma.cc/FXX8-XYQ9] (suggesting that, under the ATS, U.S. Courts may still hear cases in which the plaintiff or defendant is a U.S. national or where the harm occurred on U.S. soil).

164. The Alien Tort Statute has inspired some to call explicitly for universal civil jurisdiction as a corporate accountability mechanism. *See, e.g.*, Beth Stephens, *Translating* Filártiga: *A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT'L L. 1, 40 (2002) [hereinafter Stephens, *Translating* Filártiga] (discussing the conceptual and procedural disanalogies between human rights civil litigation in the United States and in non-U.S. jurisdictions, and calling for universal civil jurisdiction over certain gross human rights abuses).

165. *See* Meir Feder, *Commentary: Why the Court Unanimously Jettisoned Thirty Years of Lower Court Precedent (And What That Can Tell Us About How to Read* Kiobel, SCOTUSBLOG (Apr. 19, 2013), https://www.scotusblog.com/2013/04/commentary-why-the-court-unanimously-jettisoned-thirty-years-of-lower-court-precedent-and-what-that-can-tell-us-about-how-to-read-kiobel/ [https://perma.cc/G46T-4S8P] (explaining that, for decades, lower federal courts treated the ATS as a "global cause of action" because "[s]o long as the ATS provided federal jurisdiction and international law provided a substantive right, the leap to recognizing a damages action to enforce the right may not have seemed a great one").

166. *See generally* Drimmer & Lamoree, *supra* note 141 (noting litigation against Nike, Yahoo!, ExxonMobil, DaimlerChrysler, Dole, Firestone Tire, among others); *see id.* at 499–512 (discussing the *Aguinda/Lago Agrio* litigation against Texaco and Chevron); *see id.* at 512–20 (discussing litigation against Coca-Cola).

Esther Kiobel's case changed all of that—perhaps to the delight of critics of the mechanism.[167] And one might rightfully argue that overly ambitious human and environmental rights NGOs, such as the Center for Constitutional Rights (CCR) and EarthRights International (ERI), flew too close to the sun and got burned.[168] But it was seventeen years between the murder of the Ogoni Nine, which led to the initial attempt to hold Royal Dutch/Shell accountable, and the U.S. Supreme Court's final judgment in *Kiobel*. When CCR and ERI first took up the cause of the Ogoni, there were other procedural barriers that they needed to clear.

Forum non conveniens provided the initial barrier to Ken Wiwa and his co-plaintiffs. In 1998, the U.S. District Court for the Southern District of New York (S.D.N.Y.) dismissed the *Wiwa* litigation, reasoning that England, where Shell was headquartered, would be a more suitable forum.[169] This made some sense, as Royal Dutch/Shell was headquartered in the United Kingdom and Ken Wiwa resided there.[170] Two of the plaintiffs were U.S. residents, however, and the plaintiffs together had selected the New York forum.[171] The plaintiffs included impoverished exiles from the Global South.[172] Forcing them to pursue their claims in the United Kingdom or the Netherlands would have created a significant financial hurdle, particularly compared to the well-heeled corporate defendants.[173] Thus, the Second Circuit court of appeals reversed the District Court on the *forum non conveniens* issue.[174] Perhaps most intriguingly, the Second Circuit held that the United States had a specific policy interest in providing a

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167. *See, e.g.*, John B. Bellinger, III, *Enforcing Human Rights in U.S. Courts and Abroad: The Alien Tort Statute and Other Approaches*, 42 VAND. J. TRANSNAT'L L, 1, 8 (2009) (critiquing ATS litigation); Emil Petrossian, *In Pursuit of the Perfect Forum: Transnational Forum Shopping in the United States and England*, 40 LOY. L.A. L. REV. 1257, 1263–65 (2007) (describing the "bad rap" that forum shopping by plaintiffs has received).

168. Wiwa et al v. Royal Dutch Petroleum et al. Historic Case, CENTER FOR CONSTITUTIONAL RIGHTS, https://ccrjustice.org/home/what-we-do/our-cases/wiwa-et-al-v-royal-dutch-petroleum-et-al [https://perma.cc/KZW8-UC9Q] (last visited Apr. 15, 2025).

169. Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 94 (2d Cir. 2000).

170. Wiwa v. Royal Dutch Petroleum Co., 2002 WL 319887, at *1 (Feb. 28, 2002) (citing Amended Complaint Against Royal Dutch/Shell, dated April 29, 1997 ["Am. Compl."] ¶ 7).

171. *Wiwa*, 226 F.3d at 101–03.

172. *Id.* at 91, 107.

173. *Id.* at 107.

174. *Id.* at 108.

forum for the adjudication of torture claims.[175] This was in the year 2000, however, more than three years after the filing of the case—the first costly delay.

In 2004, some eight years after the *Wiwa* plaintiffs and some two years after the *Kiobel* plaintiffs filed their claims, the U.S. Supreme Court decided *Sosa v. Alvarez-Machain*,[176] which created complications for both sets of plaintiffs. In the *Sosa* case, one Mexican national—Humberto Álvarez Machaín —sued another Mexican national—Jose Francisco Sosa—for kidnapping him and rendering him to the United States at the request of the U.S. Drug Enforcement Agency. The issue before the Court was mainly whether arbitrary arrest and detention was sufficiently analogous to acts that would be deemed "torts in violation of the law of nations" under the 1789 Alien Tort Statute (ATS).[177] In holding that arbitrary arrest and detention did not fall within the statute's jurisdictional ambit, the *Sosa* Court laid down a test for future courts to apply when facing ATS claims.[178]

Some five years later, in 2009, Judge Kimba Wood[179] found against Royal Dutch Shell and its CEO Brian Anderson in *Wiwa*'s companion cases. Writing for S.D.N.Y., Wood held that almost all of the claims alleged in the case concerned violations of customary international law that were "universally accepted", "defined with a specificity," and "acceded to by States out of a sense of legal obligation"—and thus satisfied the *Sosa* standard.[180]

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175. *Id.* at 103–07.

176. 542 U.S. 692 (2004).

177. *Id.* at 714.

178. *See generally* Tim Kline, *A Door Ajar or a Floodgate?: Corporate Liability After* Sosa v. Alvarez Machain, 94 KY. L.J. 691 (2006) (surveying the post-*Sosa* ATS jurisprudence in the federal circuits and speculating that the list of human rights violations that would trigger ATS jurisdiction would continue to grow).

179. Previously, Judge Wood had dismissed the *Wiwa* plaintiff's claims against Shell Petroleum Development Corporation (SPDC), a Nigerian subsidiary of Royal Dutch/Shell, holding that SPDC lacks sufficient minimum contacts with the United States to establish personal jurisdiction. Wiwa v. Shell Petroleum Development Co. of Nigeria Ltd., 2008 WL 591869, at *10 (S.D.N.Y Mar. 4, 2008).

180. Wiwa v. Shell Petroleum Development Co. of Nigeria Ltd., 626 F. Supp. 2d 377, 381 (S.D.N.Y. 2009) (stating the *Sosa* standard); *id.* at 382 n.4 (denying defendants' motion to dismiss with respect to plaintiffs' "ATS claims for (1) summary execution; (2) cruel, inhuman, and degrading treatment ('CIDT'); and (3) arbitrary arrest and detention"); *id.* at 386 (denying motion to dismiss plaintiffs' claim for crimes against humanity, but granting dismissal of plaintiffs' claim based on the right to peaceful assembly).

The *Kiobel* case suffered a different fate, however. While the *Wiwa* plaintiffs' complaints had surrounded the arrest, detention, torture, and execution of the Ogoni Nine, the *Kiobel* plaintiffs' complaints included not only these types of human rights claims, but also claims regarding forced exile and the rights to life, liberty, security, and association of a much wider class of Ogoni victims, as well as environmental rights claims related to property destruction.[181] In 2006, Judge Wood had dismissed the claims for property destruction, forced exile, and extrajudicial killing;[182] but had denied the defendants' motion to dismiss with respect to the remaining claims of aiding and abetting arbitrary arrest and detention; crimes against humanity; and torture or cruel, inhuman, and degrading treatment.[183] Subsequently, in 2010, the Second Circuit dismissed the entire litigation based on the doctrine that corporations cannot be held liable in the Second Circuit under the Alien Tort Statute because the law of nations applies only to states.[184]

The U.S. Supreme Court agreed in 2011 to hear the *Kiobel* plaintiffs' appeal and to resolve the split amongst the circuits on the question of corporate liability under the Alien Tort Statute.[185] But in 2013, the Court ended up dismissing the *Kiobel* complaint on the grounds that Congress in 1789 did not intend for the Alien Tort Statute to apply extraterritorially.[186] The Supreme Court majority explained that there is a presumption against extraterritoriality: U.S. statutes should be presumed not to apply extraterritorially, and must only apply extraterritorially when Congress has specified extraterritorial scope.[187] Given that Congress did not specify the extraterritorial reach of the Alien Tort Statute, the Supreme Court held that federal courts may only hear cases under the ATS that "touch and concern the territory of the United States."[188] The Court held that *Kiobel*, a case with foreign plaintiffs (despite plaintiffs having resided in the United

181. Kiobel v. Royal Dutch Petroleum Co., 456 F. Supp. 2d 457, 457 (S.D.N.Y. 2006).

182. *Id*. at 464–65, 467.

183. *Id.* at 465–67.

184. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010), *rehearing en banc denied*, 642 F.3d 379 (2d Cir. 2011).

185. Kiobel v. Royal Dutch Petroleum Co., 565 U.S. 961 (2011).

186. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124–25 (2013).

187. *Id.*

188. *Id*. at 124 (holding that Kiobel had failed to meet the presumption against extraterritoriality); *see also* Feder, *supra* note 165 (arguing that "mere corporate presence" in the United States would be insufficient to subject a corporation to suit under the ATS).

States more than fifteen years), foreign defendants, and foreign conduct, did not touch and concern the United States "with sufficient force."[189] Some eleven years after filing their complaint, this holding marked the end of the line in the United States for Esther Kiobel, Charles Wiwa, their fellow named plaintiffs, as well as the larger class of Ogoni whose interests they represented. As with the question of corporate liability under the ATS, the extraterritorial scope of the statute is not an issue that the parties had briefed or argued in district court or in the Court of Appeals.[190] Nevertheless, the holding left an enforcement gap that aggrieved individuals and groups, civil society, and cause lawyers would have to figure out how to fill.[191]

It is worth noting that Dutch courts have more favorable procedural conditions for corporate accountability litigation.[192] In the *Milieudefensie* cases,[193] for example, the plaintiffs—Dooh, Akpan, Oguru, and Efanga—did not need to overcome substantial personal jurisdiction hurdles or *forum non conveniens* doctrine, as that doctrine does not exist within European Union jurisdictions.[194] That does not

189. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 125 (2013).

190. Kiobel v. Royal Dutch Petroleum Co., 565 U.S. 1244, 1244 (2012) (directing parties "to file supplemental briefs addressing the following question: 'Whether and under what circumstances the Alien Tort Statute, 28 U.S.C. § 1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States.'").

191. *See generally* Roxanna Altholz, *Chronicle of a Death Foretold: The Future of U.S. Human Rights Litigation Post*-Kiobel, 102 CALIF. L. REV. 1495 (2014) (describing numerous avenues for corporate accountability litigation in the United States).

192. *See* Nicola M. C. P. Jagers & Marie-Jose van der Heijden, *Corporate Human Rights Violations: The Feasibility of Civil Recourse in the Netherlands*, 33 BROOK. J. INT'L L. 833, 840 (2008) (discussing Dutch tort law as a corporate accountability mechanism); Lucas Roorda, *The Netherlands: A Wide Open Window for Human Rights Norms?*, in CIVIL REMEDIES AND HUMAN RIGHTS IN FLUX 245, 256–62 (Ekaterina Aristova & Uglješa Gruši eds., 2022) (summarizing the utilization of human rights law in the application of Dutch 'wrongful act' litigation against corporations).

193. Gerechtshof Den Haag [Court of Appeal of The Hague], 29 januari 2021, NJF 2021, 77 m.nt. J.M. van der Klooster, M.Y. Bonneur en S.J. Schaafsma (Oguru, Efanga & Vereniging Milieudefensie/Shell Petroleum N.V.); Gerechtshof Den Haag [Court of Appeal of The Hague], 29 januari 2021, JA 2021, 63 m.nt. van Bartman S.M. Steef, en Groot de C. Cees (Dooh en Milieudefensie/Royal Dutch Shell PLC.); Rechtbank's Gravenhage [District Court of The Hague], 30 januari 2013, NJF 2013, 99 m.nt. H. Wien, M. Nijenhuis en FM Bus (Akpan/Royal Dutch Shell PLC. Enen Shell Petroleum Development Company of Nigeria Ltd.).

194. Cedric Ryngaert, *Tort Litigation in Respect of Overseas Violations of Environmental Law Committed by Corporations: Lessons from the* Akpan v Shell *Litigation in the Netherlands*, 8 MCGILL INT'L J. SUSTAINABLE DEV. L. & POL. 245,

mean that victim-plaintiffs can hold corporations fully accountable, however. Initially, in Oguru and Efanga's (the Oruma community) case in 2009, the District Court of the Hague exercised home-state jurisdiction over its corporate national, Royal Dutch/Shell, and bootstrapped in the subsidiary—SPDC—for the purposes of judicial economy, as the underlying claims were closely related. It held similarly in the *Akpan* (Ikot Ada Udo community's) case in 2010.[195] However, the Court of Appeal ultimately upheld the District Court's 2013 dismissal of Royal Dutch/Shell from the *Dooh* (Goi community) and *Akpan* cases while retaining jurisdiction over SPDC in all three cases and over Royal Dutch Shell in the Oguru and Efanga case).[196] The dismissal of Royal Dutch/Shell from two of the three cases potentially frustrated the goals of the litigants to reach the deeper pockets of the parent corporation or to prompt a shift in the parent corporation's understanding of the duty of care it owed to host communities in a way that would have global implications.

It took eleven years for the Supreme Court to decide that U.S. federal courts could not even hear claims such as Esther Kiobel's. As I discuss in Section II.B, Kiobel's experience litigating in the United States under the Alien Tort Statute provides fodder for critics of transnational human rights litigation.

B. Corporate Accountability Litigation: The New Hollow Hope?

After nearly thirty years of Ogoni and other Indigenous peoples' transnational legal mobilization, we must ask: Has corporate accountability litigation been the new "hollow hope"? In this Section, I

251–53 (2013) (discussing Dutch jurisdictional law and its application in Akpan); Enneking, *supra* note 45, at 527–29 (same); *see also* Channa Samkalden, *Foreign Direct Liability of Multinational Corporations in the Dutch Legal Order*, *in* HUMAN RIGHTS LITIGATION AGAINST MULTINATIONALS IN PRACTICE 201, 208–209 (Richard Meeran ed., 2021) (discussing the jurisdictional issues in the Milieudefensie cases).

195. Gerechtshof Den Haag [Court of Appeal of The Hague], 29 januari 2021, NJF 2021, 77 m.nt. J.M. van der Klooster, M.Y. Bonneur en S.J. Schaafsma (Oguru, Efanga & Vereniging Milieudefensie/Shell Petroleum N.V.); Rechtbank's Gravenhage [District Court of The Hague], 30 januari 2013, NJF 2013, 99 m.nt. H. Wien, M. Nijenhuis en FM Bus (Akpan/Royal Dutch Shell PLC. Enen Shell Petroleum Development Company of Nigeria Ltd.).

196. Gerechtshof Den Haag [Court of Appeal of The Hague], 29 januari 2021, NJF 2021, 77 m.nt. J.M. van der Klooster, M.Y. Bonneur en S.J. Schaafsma (Oguru, Efanga & Vereniging Milieudefensie/Shell Petroleum N.V.); Gerechtshof Den Haag [Court of Appeal of The Hague], 29 januari 2021, JA 2021, 63 m.nt. van Bartman S.M. Steef, en Groot de C. Cees (Dooh en Milieudefensie/Royal Dutch Shell PLC.).

briefly consider how an examination of the processes and outcomes in Ogoni transnational legal mobilization can lead one to that conclusion.

Monetary settlements might be insufficient compensation to the victims. For example, the Bodo community settled with Royal Dutch Shell for US$55 million.[197] Initially, the Bodo Community had insisted on damages of £300 million.[198] Additionally, settlement agreements, just as court damage awards, must be enforced, and therefore run the risk of falling apart. After SPDC settled with representatives of the Bodo Community in 2015, SPDC's delays in cleaning up the oil that leaked from the pipeline and in paying out on the settlement led to subsequent litigation.[199] The Bodo Community also alleged mismanagement against its legal representatives—the United Kingdom law firm Leigh Day—in withholding the

197. Martyn Day et al., *Justice at Last for the Ogoni People*, 4 ENV'T L. & PRAC. REV. 135, 138 (2015) (discussing the settlement between Shell and the 15,601 members of the Bodo community); *id.* at 145–47 (noting that the settlement included £35 million or approximately US$3000 per person to be distributed amongst the class, with £20 million to be deposited into a trust fund for community development projects including a health center, education scholarships, and infrastructure); Ben Ezeamalu, *Nigeria: Shell's N15 Billion Settlement to Ogoni Community "Inadequate"*, PREMIUM TIMES (Jan. 7, 2015), https://allafrica.com/stories/201501080129.html (on file with the *Columbia Human Rights Law Review*) (quoting Nnimmo Bassey, the director of Health of Mother Earth Foundation, who described the compensation that Shell agreed to pay the Bodo community plaintiffs as "inadequate for the severity of damage done").

198. Press Release, Shell, Shell's Nigerian Subsidiary Agrees £55 Million Settlement with the Bodo Community 6–7 (Jan. 7, 2015), https://www.shell.com/media/news-and-media releases/_jcr_content/root/main/section/simple_1285915735/call_to_action_11159_1188306930/links/item0.stream/1665756460827/7b075846d86cb8227cf630aee856fddd302cf46a/2015-press-releases.pdf (on file with the *Columbia Human Rights Law Review*). Compare the Bodo Community demand with the UN Environmental Programme's recommendation in 2011 that "an Environmental Restoration Fund for Ogoniland should be set up with an initial capital injection of USD 1 billion contributed by the oil industry and the Government." UNITED NATIONS ENVIRONMENT PROGRAMME, ENVIRONMENTAL ASSESSMENT OF OGONILAND 15 (2011), https://wedocs.unep.org/20.500.11822/7947 [https://perma.cc/X5MQ-EXKT]; *id.* at 226–227 (discussing the creation of an Environmental Restoration Fund and the cost estimate for the first five years of restoration).

199. Estelle Shirbon, *Nigeria's Bodo Community Claims Win Over Shell After Latest UK Court Ruling*, BUSINESS AND HUMAN RIGHTS RESOURCE CENTRE (May 24, 2018), https://www.business-humanrights.org/en/latest-news/nigerias-bodo-community-claims-win-over-shell-after-latest-uk-court-ruling/ [https://perma.cc/H4HS-FRGS].

disbursement of the funds to the community.[200] Fifteen years after the pipeline spills that created the underlying grievance, Bodo Community members remain in pursuit of environmental justice.[201] Similarly, the 2022 *Dooh* settlement can be assessed skeptically: it took nearly 15 years to obtain, it is questionable whether US$16 million is sufficient compensation, and it remains to be seen whether Dooh and his fellow community members will suffer a similar fate as the Bodo community with regard to delays in receiving payment.[202]

The reality of the challenges of enforcing judgments against corporations are not unique to the Ogoni environmental rights litigation against Shell and its predecessors. In the *Aguinda*/*Lago Agrio* litigation[203] from Ecuador, the Ecuadorian judge awarded the plaintiffs approximately US$19 billion.[204] But the judgment in the

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200. Emmanuel Addeh, Bodo vs. Shell*: Over 14,000 Beneficiaries Accuse British Lawyer of Underhand Dealings in £55m Oil Spill Compensation*, THIS DAY, https://www.thisdaylive.com/index.php/2022/01/19/bodo-vs-shell-over-14000-beneficiaries-accuse-british-lawyer-of-underhand-dealings-in-55m-oil-spill-compensation [https://perma.cc/8646-MHLQ].

201. *High Court Rejects Shell's Attempts to Block Nigerian Community's Legal Claim over Major Oil Spill Clean-up*, LEIGH DAY (Feb. 12, 2024), https://www.leighday.co.uk/news/news/2024-news/high-court-rejects-shells-attempts-to-block-nigerian-community-s-legal-claim-over-major-oil-spill-clean-up/ [https://perma.cc/VL4K-FXZ6].

202. Ekpali Saint, *Historic Victory for Niger-Delta Oil Spill* Victims, FAIR PLANET (Mar. 8, 2023). https://www.fairplanet.org/story/historic-victory-for-niger-delta-oil-spill-victims/ [https://perma.cc/Q453-LCZX] (noting the fifteen-year journey).

203. Aguinda v. ChevronTexaco Corp., Provincial Court of Justice of Sucumbíos, No. 2003-0002 (2011) (Ecuador); *see also* Aguinda v. Texaco, Inc., 142 F.Supp.2d 534, 554 (S.D.N.Y. 2001) *aff'd as modified*, 303 F.3d 470 (2d Cir. 2002) (granting defendant's motion to dismiss on *forum non conveniens* grounds).

204. *See* Judith Kimerling, *Lessons from the Chevron Ecuador Litigation: The Proposed Intervenors' Perspective*, 1 STAN. J. COMPLEX LITIG. 241, 271–74 (2013) (detailing that the total value of the award is more than US$19 billion, including: (1) US$8,646,160,000 in remedial damages; (2) US$8,646,160,000 in punitive damages; (3) US$1,729,232,000 to be paid to Amazon Defense Front under a provision in Ecuador's Environmental Management Law that awards rewards plaintiffs for asserting group rights in a public interest lawsuit; and (4) legal fees calculated at 0.1% of the value of the damages, awarded by the appellate division of the Lago Agrio court); *see also* Suraj Patel, *Delayed Justice: A Case Study of Texaco and the Republic of Ecuador's Operations, Harms, and Possible Redress in the Ecuadorian Amazon*, 26 TULANE ENV'T L.J. 71, 89–92 (2012) (detailing the process by which the Ecuadorian court considered how much to award as remedial damages). *But see* Chevron Corp. v. Naranjo, 667 F.3d 232, 236 (2d Cir.), cert. denied, 133 S. Ct. 423 (2012) (vacating the district court's preliminary injunction against the $17.2 billion judgment and reversing and remanding the case).

Ecuador court was not the end of the story. Chevron appealed the ruling, and an Ecuadorian appellate court overturned the punitive damage award, reducing the overall damages by half—to US$9.5 billion.[205] The plaintiffs then sought to enforce the judgment,[206] but they have failed in the United States,[207] Canada,[208] Brazil,[209] Gibraltar,[210] and Argentina.[211] They have never been paid.[212] A U.S.

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205. The Constitutional Court of Ecuador upheld this judgment in 2018. *See Texaco/Chevron lawsuits (re Ecuador)*, BUS. & HUM. RTS. RES. CTR., https://www.business-humanrights.org/en/latest-news/texacochevron-lawsuits-re-ecuador-1/ [https://perma.cc/BJ72-5K6M].

206. *See generally* Gómez, *supra* note 96 (discussing efforts by Ecuadorian victim-plaintiffs to enforce a US$9.5 billion judgment against Chevron).

207. Ultimately, the Second Circuit blocked the judgment from being enforced in the United States due to attorney Steven Donziger's conviction on bribery and fraud charges. Chevron Corporation v. Donziger, 833 F.3d 74 (2d Cir. 2016), *cert. denied*, 582 U.S. 915 (2017).

208. Nia Williams, *Canadian Court Dismisses Ecuador's $9.5 Billion Claim Against Chevron Canada*, REUTERS (Apr. 5, 2019), https://www.reuters.com/article/idUSKCN1RG2GP/ (on file with the *Columbia Human Rights Law Review*); Raymond Akamby, *Ecuadorans End Chevron Pollution Lawsuit in Canada*, SABC (July 9, 2019), https://www.sabcnews.com/sabcnews/ecuadorans-end-chevron-pollution-lawsuit-in-canada/ [https://perma.cc/322N-H9K3].

209. *Brazil's High Court Rejects Attempt to Enforce Fraudulent Ecuadorian Judgment Against Chevron*, CHEVRON (Nov. 30, 2017), https://www.chevron.com/909rgenti/press-releases/archive/brazils-high-court-rejects-attempt-to-enforce-fraudulent-ecuadorian-judgment-against-chevron [https://perma.cc/V982-YDTG].

210. *Gibraltar Supreme Court Awards Chevron $38 Million Against Ecuadorian Conspirators*, CHEVRON (May 25, 2018) https://chevroncorp.gcs-web.com/news-releases/news-release-details/909rgentine-supreme-court-awards-chevron-38-million-against [https://perma.cc/CT4U-5L2Y]; Michael I. Krauss, *Solid as The Rock of Gibraltar: Coup De Grâce to Ecuadorean Lawfare Against Chevron?*, FORBES (May 26, 2018), https://www.forbes.com/sites/michaelkrauss/2018/05/26/solid-as-the-rock-of-gibraltar-coup-de-grace-to-ecuadorean-lawfare-against-chevron/?sh=1399d0904836 [https://perma.cc/A3VS-7P4Y].

211. *Argentine Court Rejects Attempt to Enforce Fraudulent Ecuadorian Judgment Against Chevron*, CHEVRON (Nov. 1, 2017), https://www.chevron.com/ecuador/press-releases/archive/argentine-court-rejects-attempt-to-enforce-fraudulent-ecuadorian-judgment-against-chevron [https://perma.cc/3ASQ-T5L8].

212. *See* Katie Surma, *Their Lives Were Ruined by Oil Pollution, and a Court Awarded Them $9.5 Billion. But Ecuadorians Have Yet to See a Penny from Chevron*, INSIDE CLIMATE NEWS (Dec. 18, 2022), https://insideclimatenews.org/news/18122022/steven-donziger-chevron-ecuador-oil-pollution/ [https://perma.cc/S7X8-D3XR] (describing the ongoing *Lago Agrio* litigation and Chevron's efforts to prevent enforcement of the judgment).

judge even issued a worldwide injunction *against* enforcement—a judicial decree that itself was ruled unenforceable.[213] Meanwhile, Chevron engineered further delays by resorting to arbitration and countersuits to block the litigation and its enforcement. Chevron also pursued interim measures against enforcement of the judgment under a Bilateral Investment Treaty.[214] The litigation ultimately went before the Permanent Court of Arbitration in the Hague, Netherlands.[215] In 2009, Chevron sued the *Aguinda* plaintiffs' lead attorney Steven Donziger, other counsel, and other organizations affiliated with the plaintiffs such as the NGO Amazon Watch and the consulting firm Stratus Consulting, alleging fraud, coercion, and bribery.[216] As a result, Donziger was disbarred and placed on house arrest for roughly three years.[217]

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213. Chevron sought and received a Temporary Restraining Order blocking enforcement of the foreign judgment. Chevron Corp. v. Donziger, 768 F. Supp. 2d 581, 660 (S.D.N.Y. 2011); Marco Simons, *Judge Grants Chevron a Restraining Order, But Ecuador Plaintiffs' Lawyers Fight Back*, EARTH RTS. INT'L (Feb. 9, 2011), https://earthrights.org/blog/judge-grants-chevron-a-restraining-order-but-ecuador-plaintiffs-lawyers-fight-back/ [https://perma.cc/ZG48-65MA]. The Second Circuit vacated the TRO. Chevron Corp. v. Naranjo, 2011 WL 4375022 (2d Cir. 2011); Marco Simons, *Chevron Loses Appeal in Effort to Stop Ecuadorian Judgment*, EARTH RTS. INT'L (Sept. 20, 2011), https://earthrights.org/blog/chevron-loses-appeal-in-effort-to-stop-ecuadorian-judgment/ [https://perma.cc/HN2N-JT45]; Chevron Corp. v. Naranjo, 667 F.3d 232, 238 (2d Cir. 2012) (holding that a New York court lacks power to determine whether a foreign judgment is enforceable outside New York).

214. Chevron Corp. v. Ecuador, Case No. 2009-23, Fourth Interim Award (Perm. Ct. Arb. 2013), https://www.italaw.com/sites/default/files/case-documents/italaw1274.pdf [https://perma.cc/57MU-NZY3]; Marissa Vahlsing, *Lago Agrio Case Pits International Human Rights Against International Commercial Law*, EARTH RTS. INT'L (Feb. 16, 2012), https://earthrights.org/blog/us-appeals-court-rejects-chevrons-attempt-to-avoid-18bn-pollution-judgment-in-ecuador/ [https://perma.cc/PHJ8-2ABD].

215. Judith Kimerling, *Oil, Contact, and Conservation in the Amazon: Indigenous Huaorani, Chevron, and Yasuni*, 24 COLO. J. INT'L L. & POL'Y 43, 77–85 (2013) (discussing the 2009 arbitration claim in which Chevron alleged Ecuador violated its bilateral investment treaty with the United States by permitting the *Lago Agrio* litigation to proceed); Michael I. Krauss, *Dutch Tribunal Upholds Chevron's Award Against Ecuador*, FORBES (Sep 22, 2020), https://www.forbes.com/sites/michaelkrauss/2020/09/22/international-tribunal-upholds-chevrons-award-against-ecuador/?sh=576bc0e61875 [https://perma.cc/KFJ8-HYP5].

216. Chevron Corp. v. Donziger, 833 F.3d 74 (2d Cir. 2016); *see also* Kimerling, *supra* note 215, at 89–90 (discussing Chevron's RICO claims against Donziger and fifty-four co-defendants).

217. *Over 100 Environmental and Human Rights Organizations Join Amnesty International's Call For Biden to Pardon Steven Donziger*, AMNESTY INT'L (Mar. 15,

C. The Courts of the Colonized as Alternative Forums and Alternative Frames?

In 1994, during the Abacha military regime's detention and prosecution of the Ogoni Nine, representatives of the Ogoni Nine made appeals to the African Commission on Human and People's Rights, asking the Commission to intervene to halt the sham trial and to prevent the executions.[218] After Abacha's regime executed the Ogoni Nine, these communications were joined with 1996 and 1997 communications from Saro-Wiwa's son, Ken Wiwa, and from the Civil Liberties Organisation, alleging that Nigeria's incommunicado detention, treatment, biased trial, denial of appeal, and execution of the Ogoni Nine constituted violations of the African Charter.[219] On October 31, 1998, the Commission found Nigeria in violation of several provisions of the African Charter.[220]

In 1996, Ken Saro-Wiwa's nephew Charles Wiwa arrived in the United States after a short stay in a Benin refugee camp.[221] Charles Wiwa had been active on Ogoni issues in Nigeria, for example, distributing copies of the Ogoni Bill of Rights that his uncle Ken Saro-Wiwa had helped to author.[222] During his stay in Benin, where he was cut off from the Ogoni activist community and from the rest of the world, Charles Wiwa contemplated how to bring attention to the plight of the Ogoni.[223] Eventually, the United States granted Charles Wiwa asylum, and he resettled in Chicago.[224] Charles asked staff of

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2022), https://www.amnesty.org/en/latest/news/2022/03/organizations-call-biden-pardon-steven-donziger/ [https://perma.cc/N2WT-YQPD]; *After Almost 1,000 Days Of Arbitrary Detention, Steven Donziger's Release Highlights Urgent Need For Action Against SLAPPs*, AMNESTY INT'L (Apr. 25, 2022), https://www.amnesty.org/en/latest/news/2022/04/usa-steven-donzigers-release/ [https://perma.cc/Y3KZ-52U4].

218. Int'l PEN (on Behalf of Saro-Wiwa) v. Nigeria, Communication 137/94, 139/94, 154/96, 161/97 (joined), African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶¶ 113, 114, 116, 122 (Oct. 31, 1998), https://achpr.au.int/index.php/en/decisions-communications/international-pen-constitutional-rights-project-civil-liberties-13794 [https://perma.cc/A6F6-QFWM].

219. *Id.*

220. *Id.*

221. Interview with Charles Wiwa, Chicago, Ill. (Dec. 7, 2018) (on file with Author).

222. *Id.*

223. *Id.*

224. *Id.*

Heartland Alliance,[225] the organization that arranged for his resettlement, to connect him with human rights lawyers so that he could use litigation to bring attention to Ogoni struggles.[226] Heartland connected him with Rights International, a Florida-based NGO, which in 1998 filed a claim against Nigeria on Charles Wiwa's behalf in the African Commission on Human and Peoples' Rights.[227] Although the Commission found Nigeria in violation of the African Charter,[228] Nigeria has never provided any remedy to Charles Wiwa for the wrongs he suffered.[229]

In the Economic Community of West African States (ECOWAS) Community Court of Justice, non-governmental organizations representing Ogoni victims both in Nigeria and in the diaspora made social and economic rights claims against the Nigerian state under the African Charter on Human and Peoples' Rights. Several oil spills between 2004 and 2009 involved pipelines owned and maintained by Royal Dutch/Shell's subsidiary SPDC.[230] In 2008, two pipeline ruptures led to massive environmental harm in Bodo Creek in

225. *Id.*; *see Our History*, HEARTLAND ALLIANCE, https://www.heartlandalliance.org/about/history/ [https://perma.cc/BF45-FVNJ] ("We connect [refugees] with the services they need to reach their full potential.").

226. Interview with Charles Wiwa, in Chicago, Ill. (Dec. 7, 2018) (on file with Author).

227. *Id.*

228. Rights Int'l v. Nigeria, Communication 215/98, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R], ¶ 254 (1999), https://www.globalhealthrights.org/wp-content/uploads/2013/10/Rights-Intl-Nigeria-1999.pdf [https://perma.cc/B6WC-C632]. Nigeria declined to respond to the complaint, and the Commission found in favor of Charles Wiwa by default.

229. Interview with Charles Wiwa, in Chicago, Ill. (Dec. 7, 2018) (on file with Author).

230. *See, e.g.*, Socio-Economic Rights and Accountability Project v. Nigeria, No. ECW/CCJ/JUD/18/12 (2012), ¶ 18 (discussing a 2008 SPDC pipeline spill in Bodo Creek in Ogoniland); *see generally* Rechtbank's Gravenhage [District Court of The Hague], 30 januari 2013, NJF 2013, 99 m.nt. H. Wien, M. Nijenhuis en FM Bus (Akpan/Royal Dutch Shell PLC. en Shell Petroleum Development Company of Nigeria, Ltd.) ¶¶ 2.4, 2.6 (discussing 2006 and 2007 SPDC oil pipeline spills in Ikot Ada Udo in Ogoniland); Gerechtshof Den Haag [Court of Appeal of The Hague], 29 januari 2021, NJF 2021, 77 m.nt. J.M. van der Klooster, M.Y. Bonneur en S.J. Schaafsma (Oguru, Efanga & Vereniging Milieudefensie/Shell Petroleum N.V.) (discussing a 2005 SPDC oil pipeline spill near Oruma in Ogoniland); Rechtbank Den Haag [District Court of the Hague], 30 januari 2013, RO 2013, 33 ¶ 2.5, m.nt. H. Wien, M. Nijenhuis en FM Bus (Dooh en Milieudefensie/Royal Dutch Shell) (Neth.) (discussing a 2004 SPDC oil pipeline spill in Goi in Ogoniland).

Ogoniland and Ogbobo in Rivers State.[231] In 2009, the Socio-Economic Rights Accountability Project (SERAP) in Nigeria filed a claim against Nigeria in the ECOWAS Court of Justice on behalf of Niger Delta residents in the Bodo community.[232]

The SERAP claims are unrelated to the incommunicado detention and extrajudicial killing of the Ogoni Nine in 1995 and to the Sani Abacha military regime's detention, torture, and forced exile of Charles Wiwa. But all members of communities in the Niger Delta—including the Bodo community—suffer under the same strain of neocolonialist capitalism that Shell embodies in the region.[233] Even one of the fishermen from Bodo was present in 1993 when the Ogoni decided to stage their massive Ogoni Day protest against Shell in Bori, Nigeria.[234] SERAP is led by the Nigerian attorney Femi Falana, who was one of the attorneys for the Ogoni Nine during their incommunicado detention and trial in 1994–1995. Falana himself was assaulted by the guards when he tried to visit his Ogoni Nine clients.[235]

Initially, SERAP named several corporate defendants—the state-owned oil company Nigeria National Petroleum Corporation (NNPC), Shell's subsidiary SPDC, ELF Petroleum Nigeria Ltd., AGIP Nigeria PLC, Chevron Oil Nigeria PLC, Total Nigeria PLC, and Exxon Mobil—who were involved in a joint oil consortium.[236] In 2010,

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231. Socio-Economic Rights and Accountability Project v. Nigeria, No. ECW/CCJ/JUD/18/12, Community Court of Justice of the Economic Community of West African States [ECOWAS] (2012) ¶ 18.

232. *Id.*

233. *See, e.g.*, MAI-BORNU, *supra* note 2, at 7–16 (summarizing the interplay between oil resources and political violence in the Niger Delta as well as in Angola, Chad, Congo, and South Sudan); *see generally* OKONTA, *supra* note 2, 45–80, 119–146, 259–280 (detailing the role of oil extraction in Ogoniland and in Nigerian national politics); OKONTA & DOUGLAS, *supra* note 52, at 43–60 (describing how Royal Dutch/Shell's economic domination over the Niger Delta region contributes to political and military repression).

234. FRANCE 24 ENGLISH, *Polluted by the Oil Industry: Life in Nigeria's Ogoniland*, YOUTUBE, (July 5, 2021) https://www.youtube.com/watch?v=zP2OJmFsvp4 [https://perma.cc/B2MM-A673] (last visited Mar. 26, 2024).

235. AMNESTY INT'L, *Nigeria: My Husband was Executed—Esther Kiobel*, YOUTUBE, (June 29, 2017) https://www.youtube.com/watch?v=F6Z-tCdhkFs (last visited Mar. 26, 2024).

236. *See* Socio-Economic Rights and Accountability Project v. Nigeria, No. ECW/CCJ/JUD/18/12, ¶¶ 3, 8, Community Court of Justice of the Economic Community of West African States [ECOWAS] (2012) (listing Nigerian National Petroleum Company, Shell Petroleum Development Company, as corporations over which the Commission lacks jurisdiction).

however, the ECOWAS Court ruled that under international law, it lacked jurisdiction over corporate defendants. In 2012, the ECOWAS Court found Nigeria to have violated the right to healthy development in the African Charter.[237]

On the one hand, these forums are limited in their ability to hold corporations (and even states) accountable—which reflects not only the conventional understanding of international law as binding on states only but also generates impunity, practically sovereign immunity, for powerful corporations. I thus refer to international courts such as the ECOWAS Court of Justice and quasi-judicial forums such as the African Commission of Human and Peoples' Rights as the "courts of the colonized" because they represent the internalization by the Global South of the "iron cage" of capitalism and its superstructures—including international law and courts.[238]

On the other hand, as I discuss in Section III.A, the African Commission and the ECOWAS Court of Justice issued expansive views on the justiciability of economic, social, and cultural rights and the scope or content of those rights—including the right to a healthy environment.

How should we assess the fact that, arguably, the most innovative legal claims and the most expansive interpretations of international human rights law to include the right to a healthy environment emerge from individual communications before the

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237. *Id*. ¶ 112 (finding a violation of Article 24 of the African Charter, which guarantees "the right to a general satisfactory environment favourable to their development").

238. Sociologist Max Weber coined the idea of the "iron cage of capitalism" in *The Protestant Ethic and the Spirit of Capitalism* (1904). Since that time, scholars have appropriated the concept of the "iron cage" to describe a plethora of institutions and phenomena. *See generally, e.g*., Raza Mir & Ali Mir, *The 'Iron' in the Iron Cage: Retheorizing the Multinational Corporation as a Colonial Space*, *in* THE ROUTLEDGE COMPANION TO CRITICAL MANAGEMENT STUDIES 345 (Anshuman Prasad et al. eds., 2015) (centering corporations as the dominant institutions in the global order, i.e., the iron cage); Walden Bello, *The Iron Cage: The World Trade Organization, the Bretton Woods Institutions, and the South*, 11 CAPITALISM NATURE SOCIALISM 3 (2000) (calling for Global South states to advance structural challenges to the Bretton Woods institutions—i.e., the iron cage); Andrew Tickell, *Dismantling the Iron-Cage: The Discursive Persistence and Legal Failure of a 'Bureaucratic Rational' Construction of the Admissibility Decision-Making of the European Court of Human Rights*, 12 GERMAN L. J. 1786 (2011) (rejecting the common perception that European Court of Human Rights admissibility decisions follow a bureaucratic-rational logic, i.e., an iron cage). Here, I use the term superstructure to refer to international law and courts as the cultural products of a capitalist world system.

African Commission on Human and Peoples' Rights, a body that does not issue legally binding judgments and whose record of state compliance with its decisions is woeful?[239]

Among other things, we must consider the design of the institution. When African states, operating within their continental entity—the Organization of African Unity—adopted the African Charter on Human and Peoples' Rights, they declined to establish a human rights court. Instead, they only established a Commission, similar to the European Commission on Human Rights and the Inter-American Commission on Human Rights.[240] The African Charter language establishing the Commission was problematically vague: it failed to specify any protection mechanisms and thus to specify whether the Commission had jurisdiction to receive individual communications.[241] Additionally, although the Commission ultimately obtained the competence to receive individual complaints, the African Commission lacks a procedure for following up with the Commission's decisions on individual communications, in contrast with the UN treaty bodies.[242]

Meanwhile, the Commission rules inadmissible a significant portion of the individual communications that it receives.[243] On the other hand, those that make it to the merits stage have a very high

239. *See infra* notes 246–247 and accompanying text (describing the non-legally binding nature of and low compliance with African Commission decisions).

240. *See*, *e.g.*, Frans Viljoen & Lirette Louw, *State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights*, 1994–2004, 101 AM. J. INT'L L. 1, 2 (2007) (discussing the perception among African Charter drafters that establishing a human rights court would be premature).

241. *See* African Charter on Human and Peoples' Rights, arts. 55–56 (indicating that the Commission may receive "communications other than those of States parties" and setting out criteria for admissibility of such communications); Frans Viljoen & Lirette Louw, *The Status and Findings of the African Commission: From Moral Persuasion to Legal Obligation*, 48 J. AFR. L. 1, 4–6 (2004) (discussing the African Commission's lack of explicit competence to receive individual communications).

242. *See* Markus G. Schmidt, *Follow-up Mechanisms Before UN Human Rights Treaty Bodies and the UN Mechanisms Beyond*, *in* THE UN HUMAN RIGHTS TREATY SYSTEM IN THE 21ST CENTURY 233 (Anne F. Bayefsky ed., 2000) (describing the increasing strength of follow-up mechanisms utilized by the UN Human Rights Committee and other UN treaty bodies to monitor state compliance with treaty bodies' views on individual complaints and concluding observations on periodic reports).

243. *See*, *e.g.*, Viljoen & Louw, *supra* note 240, at 2 (noting that the Commission ruled inadmissible 63 of 122 communications between 1987 and 2003).

likelihood of resulting in a finding of a state violation of the African Charter.[244]

Indeed, under the African Commission's human rights compliance monitoring model, the African Commission makes "decision[s] on the merits of the Communication."[245] Arguably, however, African Commission decisions on individual communications are not legally binding; they present the Commissions views on the international wrongfulness of the state behavior being complained against, after which the Commission makes "recommendations."[246] African states' early record of non-compliance with African Commission decisions on individual complaints was thus woeful.[247] The compliance flaws are inherent in the design and quite likely are intentional. After all, the states of the Organization of African Unity had copied the Commission mechanism from European international legal institutions such as the European Commission on Human Rights and the UN Human Rights Committee.[248] They had options.

More than fifteen years ago, in the mid-to-late-2000s, African regional trade courts such as the ECOWAS Court, the East African Community Court of Justice (EACJ), and the Southern African Development Community Tribunal (SADC Tribunal) seemed to evolve

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244. *See id*. (noting a Commission finding of violation in 44 of 46 admissible communications).

245. Rule 110(1) of the Rules of Procedure of the African Commission.

246. RACHEL MURRAY & DEBRA LONG, THE IMPLEMENTATION OF THE FINDINGS OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS 50–58 (2015).

247. *See* Viljoen & Louw, *supra* note 240, at 3 (noting the perception, common among commentators, that non-compliance with African Commission decisions was high, but arguing that data to support such a perception was limited).

248. *See*, *e.g*., RACHEL MURRAY, THE AFRICAN COMMISSION ON HUMAN AND PEOPLE'S RIGHTS AND INTERNATIONAL LAW 9–22 (2000) (noting that the African human rights system "follows its counterparts"—the European and Inter-American human rights systems—in terms of design); Frans Viljoen, *Admissibility Under the African Charter*, *in* THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: THE SYSTEM IN PRACTICE, 1986–2000, at 61, 61–62 (Malcolm D. Evans & Rachel Murray eds., 2002) (observing that the European Commission laid the foundation for grappling with admissibility issues, which subsequent mechanisms such as the African Commission followed but also deviated from); Julia Harrington, *The African Court on Human and Peoples' Rights*, *in* THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: THE SYSTEM IN PRACTICE, 1986–2000, *supra*, at 305, 316–17 (contemplating whether, and the extent to which, African states intended to mimic the problematic designs of the European and Inter-American human rights systems); FRANS VILJOEN, INTERNATIONAL HUMAN RIGHTS LAW IN AFRICA 293–99 (2012) (assessing the performance of the African Commission against its design after positing, "the Commission has clearly been designed to accomplish very little").

or drift from their original missions to begin issuing human rights judgments.[249] Alongside ongoing assessments of the continental human rights system,[250] these developments generated discussion among international court scholars, human rights scholars, and activists about whether to view these developments with optimism, skepticism, or something in between. These discussions occur from the vantage point of human rights, human security, and anti-poverty alleviation in the developing world.[251]

Recent analysis comparing Africa's myriad international courts suggests that activists are constrained and enabled by the design of these courts.[252] Access hurdles are largely determinative of transnational legal mobilization—permitting individuals and civil society organizations to bring cases in some instances, limiting these complaint mechanisms in others.[253] But in all instances, African states have created judicial mechanisms that states may opt in to and may opt out of, resulting in a scenario where most states have not opted in, and situations where, facing a complaint, states may withdraw.[254] The African states, in adopting the fundamental norms of sovereignty and

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249. *See generally* James Gathii, *Mission Creep or a Search for Relevance: The East African Court of Justice's Human Rights Strategy*, 24 DUKE J. COMP. & INT'L L. 249, 249–96 (2013) (discussing whether and how political science and international relations theories explain the shift of Africa's international courts from trade dispute adjudication to human rights enforcement).

250. *See generally*, *e.g.*, Makau Mutua, *The African Court: A Two-Legged Stool?*, 21 HUM. RTS. Q. 342 (1999) (speculating as to the effects that the African Court on Human and Peoples' Rights would have on human rights in Africa); Obiora Okafor & Basil Ugochukwu, *Have the Norms and Jurisprudence of The African Human Rights System Been Pro-Poor?*, 11 AFR. HUM. RTS. L. J. 396, 410–20 (2011) (assessing the economic and social rights jurisprudence of the African Commission under a critical human rights framework to determine whether the jurisprudence favors global capitalism or poverty reduction).

251. *See generally* James T. Gathii, *The Under-Appreciated Jurisprudence of Africa's Regional Trade Judiciaries*, 12 OR. REV. INT'L L. 245 (2010) (comparing the expanded and self-proclaimed jurisdiction and bold human rights jurisprudence of tribunals as well as a lack of government support and some pushback from states against these tribunals).

252. *See generally* James Thuo Gathii & Jacquelene Wangui Mwangi, *The African Court of Human and Peoples' Rights as an Opportunity Structure*, *in* THE PERFORMANCE OF AFRICA'S INTERNATIONAL COURTS 211 (James Thuo Gathii ed., 2020) (discussing the ability of opposition politicians, criminal defendants, and NGOs to bring their claims to the African Court on Human and Peoples' Rights, but only in the handful of states that have granted the African Court the competency to hear such claims).

253. *Id.* at 217–22.

254. *Id. at* 220–22; James Thuo Gathii, *Introduction*, *in* THE PERFORMANCE OF AFRICA'S INTERNATIONAL COURTS, *supra* note 252, at 1, 10, 27.

voluntarism from European states, have inherited all of the accountability limitations of the system.

Through the lens of legal opportunity structure, one can assess both domestic and transnational access as well as other dimensions such as elite alignment among domestic versus transnational legal elites, domestic versus transnational alliances and opponents, and domestic versus transnational cultural and legal frames. Consequently, one might ask what were and are the domestic alternatives to transnational legal mobilization for Ogoni victim-plaintiffs.[255] What is the utility of civil litigation frameworks such as tort law for holding corporations accountable for human and environmental rights violations?[256] Among litigation options, what was or is the alignment among Nigerian legal elites such as members of the judiciary, and what were or are the access hurdles in Nigerian courts?[257] In other words, to understand fully Ogoni peoples' resort to the courts of the Global North (e.g., in the United States, the Netherlands, the United Kingdom) and to the courts of the colonized (e.g., the African Commission and the ECOWAS Court), one must consider the full range of options available to them in addition to their goals. That is, one must consider the agency of Ogoni victim-plaintiffs.[258]

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255. OYENIYI ABE, IMPLEMENTING BUSINESS AND HUMAN RIGHTS NORMS IN AFRICA: LAW AND POLICY INTERVENTIONS 90–104 (2022) (discussing judicial and non-judicial mechanisms to address corporate human rights violations in Africa).

256. *See* Hassan M. Ahmad, *The Missing Forum for Corporate Human Rights Violations*, *in* BUSINESS AND HUMAN RIGHTS LAW AND PRACTICE IN AFRICA 211 (Damilola S. Olawuyi & Oyeniyi Abe, eds., 2022) (proposing the strengthening of tort law in Africa's domestic courts in order to fulfill the Third Pillar of the UNGP framework of providing access to remedy).

257. *See* Oyeniyi Abe, *The Feasibility of Implementing the United Nations Guiding Principles on Business and Human Rights in the Extractive Industry in Nigeria*, 7 J. SUSTAINABLE DEV. L. & POL'Y 137, 151–55 (2016) (discussing whether and how the Nigerian Constitution, corporate law, and property law might help or hinder the corporate respect for human rights in Nigeria).

258. *See*, *e.g.*, Obiora Chinedu Okafor & Basil Ugochukwu, *Raising Legal Giants: The Agency of the Poor in the Human Rights Jurisprudence of the Nigerian Appellate Court*s, *1990–2011*, 15 AFR. HUM. RTS. L. J. 397, 401–06 (2015) (discussing the capacity of Nigerian appellate courts to constrain or to enable the agency of Nigeria's poor people).

D. Cooptation and Domination in North-South Transnational Alliance

Transnational litigation in the Global North carries the potential for legal elites in litigation-minded social movement organizations (SMOs), such as the Center for Constitutional Rights and EarthRights International, to influence a social movement's choice of strategy and even goals, not merely to support the movement's goals or chosen strategy.[259] Some NGOs, often collectives of cause lawyers, frequently shepherd social movements toward institutional strategies such as litigation[260]—toward the realm where the NGOs are "repeat players" that commit the resources to advance a broad agenda.[261] It is frequently the foreign actors within the transnational advocacy network who seek out local movements with which to ally—seeking out local testimonials and, crucially, test cases.[262] And when this occurs, it

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259. *See, e.g.*, VÉRONIQUE VAN DER PLANCKE ET AL., CORPORATE ACCOUNTABILITY FOR HUMAN RIGHTS ABUSES—A GUIDE FOR VICTIMS AND NGOS ON RECOURSE MECHANISMS 32, 38, 48, 51, 61 (3rd ed. 2016) (discussing the formal role of NGOs in UN treaty body and UN Human Rights Council procedures).

260. The alliance dimension of the legal opportunity structure preserves a role for legal, political, and social elites (including cause lawyers) in legal mobilization. Some critiques of legal mobilization are based on an aversion to this elite centrism and to institutional strategies of reform on the grounds that litigation diverts important resources without clear benefit; coopting, pacifying, and fragmenting movements; reinforcing the status quo; and validating institutions and processes that oppress and subdue. *See* Barkan, *supra* note 15 ("[S]ocial movement strategies that do not involve protest will be much less likely, and perhaps not at all likely, to be able to win important movement goals."); Scott Barclay et al., *Two Spinning Wheels: Studying Law and Social Movements*, 54 STUDS. IN L., POL. & SOC'Y 1, 8–9 (2011) (acknowledging scholarship that is critical of elite intervention in social movements); Holzmeyer, *supra* note 98, at 273–74 (summarizing the Critical Legal Studies pessimism toward litigation by social movements); Siri Gloppen, *Litigation as a Strategy to Hold Governments Accountable for Implementing the Right to Health,* 10 HEALTH HUM. RTS. 21, 24 (2008) ("[L]itigation . . . is prone to privilege some groups over others, and thus reinforce inequalities.").

261. *See* Marc Galanter, *Why the 'Haves' Come Out Ahead*: *Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95, 97-104 (1974) (conceptualizing "repeat players").

262. *See, e.g.*, Holzmeyer, *supra* note 98, at 289–90 ("ATCA cases often result in the growth of TANs because such networks are needed in order to initiate cases, and lawsuits may then serve as nodes for further mobilizing across borders, including among actors not directly involved in litigation processes."). *But see* Mindy Jane Roseman & Siri Gloppen, *Litigating the Right to Health: Are Transnational Actors Backseat Driving?*, in LITIGATING HEALTH RIGHTS: CAN COURTS BRING MORE JUSTICE TO HEALTH? 264 (Alicia Ely Yamin & Siri Gloppen eds., 2011) ("Transnational agents rarely 'drive' litigation. . . . In most cases, the drivers of health rights litigation are domestic to each country . . . responding to

is often the foreign network actors—in possession of monetary resources and international legal expertise—rather than the social movement, who end up controlling strategic decision-making.[263] In other words, according to this critique, under-resourced victims in and from the Global South—such as Ken Wiwa, Charles Wiwa, and Esther Kiobel—might opt for litigation, including transnational litigation, at the insistence of Global North actors with which they are allied.

It is important to note that Ken Wiwa, Charles Wiwa, and Esther Kiobel somewhat defy these stereotypes. In 1996, Ken Wiwa chose to partner with the Center for Constitutional Rights to initiate litigation in the United States under the Alien Tort Statute.[264] Almost exactly one year earlier, he had partnered with the transnational NGO Interights and with Civil Liberties Organizations to file a complaint with the African Commission seeking the Commission's intervention to halt the impending execution of his father and the Ogoni Nine.[265] International PEN and Charles Wiwa also filed a complaint with the African Commission in 1998. According to Charles Wiwa, he started thinking about how he could shine a spotlight on Shell's involvement in Ogoni repression while he was in the refugee camp in Benin; and it was his idea to pursue an Alien Tort Statute claim to represent Ogoniland victims beyond the Ogoni Nine.[266] Similarly, it was Esther Kiobel and Channa Samkalden who sought out litigation in the Netherlands.[267] In other words, Ogoni victim-turned-activist-plaintiffs

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local opportunity structures. We have found little to suggest that transnational actors impose or infuse litigation that is 'foreign' to the context.").

263. Int'l PEN (on Behalf of Saro-Wiwa) v. Nigeria, Communication 137/94, 139/94, 154/96, 161/97 (joined), African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶¶ 113, 114, 116, 122 (Oct. 31. 1998), https://achpr.au.int/index.php/en/decisions-communications/international-pen-constitutional-rights-project-civil-liberties-13794 [https://perma.cc/A6F6-QFWM].

264. *Wiwa et al v. Royal Dutch Petroleum et al.*, CTR. FOR CONST'L RTS., https://ccrjustice.org/home/what-we-do/our-cases/wiwa-et-al-v-royal-dutch-petroleum-et-al [https://perma.cc/6UGD-2WFQ].

265. Rights Int'l v. Nigeria, Communication 215/98, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R] (1999), https://www.globalhealthrights.org/wp-content/uploads/2013/10/Rights-Intl-Nigeria-1999.pdf [https://perma.cc/B6WC-C632].

266. Interview with Charles Wiwa, in Chicago, Ill. (Dec. 7, 2018) (on file with Author).

267. *See* John Donovan, *Widows Hold Shell Liable for 'Judicial Murder'*, ROYAL DUTCH SHELL PLC .COM (June 29, 2017), https://royaldutchshellplc.com/2017/06/29/widows-hold-shell-liable-for-judicial-murder/ [https://perma.cc/56PY-TET4] (describing anti-Shell activist John Donovan's involvement in connecting Esther Kiobel with his former legal advisor Channa Samkalden following the U.S. Supreme Court's dismissal of Kiobel's suit);

have been litigious just about as long as organizations such as the Center for Constitutional Rights and EarthRights International have been utilizing the ATS to hold corporations accountable. Ironically, it might be a denial of the agency of Global South actors to assume that it is always the Global North actors who are deciding to pursue strategic litigation and thus denying the agency of Global South actors.

E. Summary

In this Part, I have shown that Ogoni transnational human rights legal mobilization has yielded largely negative results. Esther Kiobel, Charles Wiwa, and their co-plaintiffs lost both in the United States and in the Netherlands. They never even reached the merits stage in the United States after an eleven-year battle over personal and subject-matter jurisdiction. It was another six years for Esther Kiobel and the Ogoni widows litigating in the Netherlands, merely to lose at the merits stage. In Parts III and IV, I turn this assessment on its head by considering myriad positive outcomes and effects of Ogoni and other Indigenous peoples' transnational legal mobilization that have made it more possible to hold corporations accountable for human and environmental rights violations – effects such as establishing legal standing for civil society organizations in corporate accountability cases; unsettling common law doctrines such as *forum non conveniens*; codifying a parent company duty of care owed to host communities; winning precedent-setting settlements and judgements; normalizing the justiciability of economic, social, and cultural rights; creating strategic spillovers; forging transnational alliances; building corporate accountability litigation capacity within civil society and within the legal community; and, ultimately, shifting the scope of the discourse around Indigenous peoples' rights and access to remedy and thus demonstrating the urgency of a legally binding treaty on business and human rights.

III. POSITIVE OUTCOMES OF OGONI TRANSNATIONAL LEGAL MOBILIZATION

In the face of persistent transnational barriers to justice and potentially significant negative unintended consequences, one might

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John Donovan, *Shell Continues to Evade Justice for Complicity in Ogoni 9 Murders*, ROYAL DUTCH SHELL PLC (July 12, 2018) https://royaldutchshellplc.com/2018/07/12/shell-continues-to-evade-justice-for-complicity-in-ogoni-9-murder/ [https://perma.cc/4EEF-4FUM] (same).

rightfully ask whether transnational human and environmental rights litigation is really in service of Indigenous peoples in the Global South. The Ogoni experience, however, provides an illuminating case study for explicating what some analysts miss when they narrow the debate to a false choice between the either-or of legal mobilization.[268] Steven Boutcher and Doug NeJaime, for example, have discussed the idea of "winning through losing"—noting the potential galvanizing effects of litigation losses.[269] Much depends on definitions of success or failure—that is, the short-term and long-term goals of litigants.[270]

Even conceding that litigation, vis-à-vis mass mobilization, runs the risk of reifying power imbalances and thus further marginalizing the aggrieved individuals and groups, in this Part, I argue that critiques of (transnational) human rights litigation are misplaced and somewhat defeatist. There is much value to be gained from continuing to pursue accountability for corporate violations of human rights and environmental rights, including helping to frame the agenda for legislators and state actors by shifting the discourse around corporate responsibility and accountability. I demonstrate that litigation by Ogoni and other aggrieved Indigenous groups have yielded positive outcomes. Ogoni environmental rights litigation against the state of Nigeria in the 1990s resulted in African Commission procedural rulings regarding organizations' standing to initiate public interest litigation in international forums (*actio*

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268. Under this framework, human rights litigation is thought to be either a potent weapon of the weak, or at best, wasteful and, at worst, marginalizing of the already marginalized. *See* Michael McCann & Helena Silverstein, *Rethinking Law's "Allurements": A Relational Analysis of Social Movement Lawyers in the United States*, in CAUSE LAWYERING 262–64 (Austin Sarat & Stuart Scheingold eds., 1998) (challenging the "conventional critical picture").

269. *See* Steven A. Boutcher, *Mobilizing in the Shadow of the Law: Lesbian and Gay Rights in the Aftermath of* Bowers v. Hardwick 31 RSCH. IN SOC. MOVEMENTS, CONFLICT & CHANGE 175, 187–96 (2011) (describing gay and lesbian activists' and communities' responses to the U.S. Supreme Court's *Bowers v Hardwick* decision upholding the criminalization of same-sex sexual conduct by staging nationwide protests, raising funds, starting new organizations, and prioritizing decriminalization litigation); Doug NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 947 (2011) (observing that advocates may use litigation loss "(1) to construct organizational identity and (2) to mobilize outraged constituents" or "(1) to appeal to other state actors, including courts and elected officials, through reworked litigation and nonlitigation tactics and (2) to appeal to the public through images of an antimajoritarian judiciary").

270. For discussions of the aims of litigants, including activists and social movement organizations, see, e.g., Gordon Silverstein, *Motives, Incentives, Patterns, and Process*, *in* LAW'S ALLURE: HOW LAW SHAPES, CONSTRAINS, SAVES, AND KILLS POLITICS 1, 15–41 (2009).

popularis).[271] Moreover, they produced judgments that were early contributions to the demonstrable justiciability of economic and social rights.[272]

Ogoni litigation in the Netherlands and the United Kingdom yielded procedural victories on jurisdictional questions,[273] landmark enunciations of parent company duty of care to host communities,[274] and monetary settlements.[275] Ogoni and other corporate accountability litigation—aided by organizations such as the Center for Constitutional Rights, EarthRights International, and Milieudefensie—resulted in strategic spillover, the building of capacity and expertise of cause lawyers and law firms, as well as the building of transnational litigation networks to litigate against corporations. Corporate accountability litigation by the Ogoni and other Indigenous groups and victim-turned-activist-plaintiffs also generates an evidentiary record regarding violations of human and environmental

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271. Soc. and Econ. Rts. Action Ctr. & the Ctr. for Econ. and Soc. Rts. v. Nigeria, Communication 155/96, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶¶ 35, 49 (May 27, 2002), https://www.worldcourts.com/achpr/eng/decisions/2001.10.27_SERAC_v_Nigeria.htm [https://perma.cc/AXX4-RS97]; Socio-Economic Rts. and Accountability Project v. Nigeria, No. ECW/CCJ/JUD/18/12, ¶¶ 41–45 Community Court of Justice of the Economic Community of West African States [ECOWAS] (2012) (citing Ruling No. ECW/CCJ/APP/07/10).

272. Soc. and Econ. Rts. Action Ctr. & the Ctr. for Econ. and Soc. Rts. v. Nigeria, Communication 155/96, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶ 68 (May 27, 2002), https://www.worldcourts.com/achpr/eng/decisions/2001.10.27_SERAC_v_Nigeria.htm [https://perma.cc/AXX4-RS97]; Socio-Economic Rights and Accountability Project v. Nigeria, No. ECW/CCJ/JUD/18/12, ¶¶ 38–40 Community Court of Justice of the Economic Community of West African States [ECOWAS] (2012).

273. *See, e.g.*, His Royal Highness Emere Godwin Bebe Okpabi v. Royal Dutch Shell PLC [2017] EWHC (TCC) 89 [¶180], UKSC 2018/0068 (Eng.); Okpabi v. Royal Dutch Shell [2021] UKSC 3, [153] (appeal taken from Eng.) (finding jurisdiction over the parent company Royal Dutch Shell).

274. *See, e.g.*, Gerechtshof Den Haag [Court of Appeal of The Hague], 29 januari 2021, NJF 2021, 77 m.nt. J.M. van der Klooster, M.Y. Bonneur en S.J. Schaafsma (Oguru, Efanga & Vereniging Milieudefensie/Shell Petroleum N.V.) (holding that the parent company Royal Dutch Shell owed a duty of care to its Orumu host community in Ogoniland/Niger Delta).

275. *See, e.g.*, Press Release, Shell, SPDC Agrees £55 Million Settlement with the Bodo Community (Jan. 7, 2015), https://www.shell.com.ng/media/2015-media-releases/spdc-agrees-p55-million-settlement-with-bodo-community.html; *Shell to Pay €15m Compensation for Oil Spills in Niger Delta Communities*, ENVIRONEWSNIGERIA (Dec. 23, 2022), https://www.environewsnigeria.com/shell-to-pay-e15m-compensation-for-oil-spills-in-niger-delta-communities [https://perma.cc/L5P2-W73K].

rights that are at once horrific and commonplace, particularly in the extractive industries,[276] which demonstrates the urgency of the business and human rights treaty and domestic legislation—the development of which I will discuss in Part IV.

These positive outcomes lead to the observation that Ogoni transnational legal mobilization has contributed significantly to the making of international law from the bottom up:

> Bottom-up lawmaking is a soft, unpredictably organic process that generates hard, legal results. Private parties, nongovernmental organizations (NGOs), and/or mid-level technocrats coalesce around shared, on-the-ground experiences and perceived self-interests, "codifying" norms that at once reflect and condition group practices. Over time, these informal rules embed, often unintentionally, in a more formal legal system and thereby become "law."[277]

> [I]nternational lawmaking in an era of globalization is not merely the realm of the state's diplomatic elites; it is also the domain of corporations, insurance companies, NGOs, inter-governmental organizations, sub-national entities, cities, judges, bureaucrats, technocrats, the media, and individuals.[278]

This Part thus lays the empirical foundation for the methodological and epistemological reorientation that I assert in this Article—that scholars of international law and international relations, including students of transnational legal process and norm diffusion, should pay increased attention to the roles that aggrieved individuals and groups in the Global South play in the making of international law from the bottom up.

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276. Scholarship focused on human rights in the extractive industries includes: PENELOPE SIMONS & AUDREY MACKLIN, THE GOVERNANCE GAP: EXTRACTIVE INDUSTRIES, HUMAN RIGHTS, AND THE HOME STATE ADVANTAGE (2014); Abe, *supra* note 257, at 137–57 (2016); Sumudu Atapattu, *Extractive Industries and Inequality: Intersections of Environmental Law, Human Rights, and Environmental Justice*, 50 ARIZ. ST. L.J. 431 (2018); Anil Yilmaz-Vastardis & Tara Van Ho, *Integrating Human Rights into the Extractive Industries: How Investment Contracts Can Achieve Protection*, *in* NATURAL RESOURCES GRABBING: AN INTERNATIONAL LAW PERSPECTIVE 225 (Francesca Romanin Jacurm at al. eds., 2015); HUMAN RIGHTS IN THE EXTRACTIVE INDUSTRIES (Isabel Feichtner et al. eds., 2019).

277. Koven Levit, *supra* note 109, at 395.

278. *Id.* at 410.

A. Justiciability of Economic, Social, and Cultural Rights

In March 1996, at roughly the same time that Ken Wiwa was filing his complaint against Nigeria with the African Commission and his Alien Tort Statute claim in the United States, two NGOs—Social and Economic Rights Action Center (SERAC) in Nigeria and Center for Economic and Social Rights (CESR) in Brooklyn, New York—filed communications against Nigeria on behalf of residents of Ogoniland before the African Commission on Human and Peoples' Rights.[279] This was approximately four months following the execution of the Ogoni Nine in November of 1995.

The Commission issued its opinion in 2002 that Nigeria had *directly* violated the rights of its citizens and subjects through the activity of the Nigerian military and security forces and of the state-owned Nigerian National Petroleum Corporation—which was the majority shareholder in a consortium with Shell Petroleum Development Corporation.[280] Namely, the African Commission found that Nigeria had violated not only the civil rights (the right to life and other physical integrity rights) contained in the African Charter,[281] but, in landmark fashion, the Commission also found violations of economic and social rights including: (i) the right to enjoy the best attainable state of physical and mental health (Art. 16); (ii) the right to a general satisfactory environment favorable to development (right to a healthy environment, Art. 24);[282] (iii) the right to adequate housing (an implied right to shelter and collective right to freedom from forced eviction that the Commissioners found in the right to property (Art. 14) and the obligation to protect the family (Art. 18(1) in conjunction with Article 16);[283] and (iv) an implied right to food (which the Commissioners read into the right to life (Art. 4), the right to health (Art. 16) and the right to economic, social and cultural development (Art. 22)).[284] The Commission also found that Nigeria indirectly violated rights of inhabitants by failing to protect them from harms

279. Social and Economic Rights Action Center & the Center for Economic and Social Rights v. Nigeria, Communication 155/96, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶ 2 (May 27, 2002), https://www.worldcourts.com/achpr/eng/decisions/2001.10.27_SERAC_v_Nigeria.htm [https://perma.cc/AXX4-RS97].

280. *Id.* ¶ 1.

281. *Id.* ¶ 67.

282. *Id.* ¶ 50.

283. *Id.* ¶¶ 62–63.

284. *Id.* ¶ 66.

caused by private or non-state actors—i.e, Royal Dutch/Shell through its subsidiary SPDC.[285]

At the beginning of Ogoni and other Indigenous peoples' mobilization in the 1990s, the justiciability of economic, social, and cultural rights was an open question.[286] After thirty years of litigating, this question is largely resolved in favor of the justiciability of these rights,[287] at least outside of the United States.[288] Credit for this development in law must go to the victim-plaintiffs and their activist allies who continued to press the issue before adjudicative tribunals, rather than to the judges themselves or to the states in the international system. And through these efforts, Ogoni and other Indigenous activist litigants have created an evidentiary record to supplement efforts to legalize corporate social responsibility and environmental, social, and governance norms through the business and human rights regime. The multi-year litigation campaigns of the Ogoni and other Indigenous victim-plaintiffs, chronicled in publications with a wide readership such as the Business and Human Rights Resource Centre, helped to provide the impetus for, and to sustain the momentum toward, legalization of the business and human

285. *Id*. ¶ 55(4) ("right to free disposal of their wealth and natural resources"); *id*. at ¶¶ 57–58 (explaining a government's duty to protect citizens' rights against violations by private parties, namely the right to freely dispose of their wealth and natural resources).

286. *See*, *e.g*., Michael K. Addo, *The Justiciability of Economic, Social and Cultural Rights*, 14 COMMW. L. BULL. 1425, 1425 (1988) (assessing the extent to which economic, social, and cultural rights may be litigated); Julia Häusermann, *The Realisation and Implementation of Economic, Social and Cultural Rights*, *in* ECONOMIC, SOCIAL AND CULTURAL RIGHTS: PROGRESS AND ACHIEVEMENT 47, 47 (Beddard Ralph & Dilys M. Hill eds., 1992) (same); Michael K. Addo, *Justiciability Re-examined*, *in* ECONOMIC, SOCIAL AND CULTURAL RIGHTS, *supra*, at 93; Jackbeth K. Mapulanga-Hulston, *Examining the Justiciability of Economic, Social and Cultural Rights*, 6 INT'L J. HUM. RTS. 29, 29 (2002) (same).

287. *See*, *e.g*., OLIVIER DE SCHUTTER, ECONOMIC, SOCIAL AND CULTURAL RIGHTS AS HUMAN RIGHTS Section II (2013) (providing a summary of the debate and the ultimate conclusion); Rhuks Ako et al., *Overcoming the (Non)justiciable Conundrum: The Doctrine of Harmonious Construction and the Interpretation of the Right to a Healthy Environment in Nigeria*, *in* JUSTICIABILITY OF HUMAN RIGHTS LAW IN DOMESTIC JURISDICTIONS 123 (Alice Diver & Jacinta Miller eds., 2016) (exploring the debates of justiciability).

288. *See End of Session General Statement-U.N. Human Rights Council 48th*, U.S. MISSION TO INTERNATIONAL ORGANIZATIONS IN GENEVA (Oct. 13, 2021), https://geneva.usmission.gov/2021/10/13/un-human-rights-council-48th-end-of-session-general-statement/ ("The United States is not a party to the ICESCR, and the rights contained therein are not justiciable as such in U.S. courts.").

rights regime.[289] Thus, transnational human rights litigation can be a vehicle for international lawmaking from the bottom up.[290]

B. Procedural Reforms via the Judiciary

In Section II.A, I discussed the transnational barriers to justice that Ogoni and other victim-plaintiffs have encountered, especially the *forum non conveniens* doctrine that Royal Dutch/Shell and Texaco/Chevron relied upon to prevent victim-plaintiffs from proceeding under the Alien Tort Statute. The common experience of these victim-plaintiffs has created an impetus for procedural reforms. Indeed, victim-plaintiffs' refusal to have their corporate accountability litigation chilled by the existence of *forum non conveniens* and other procedural barriers has resulted in court holdings that serve as binding precedents for subsequent litigation within the jurisdiction. These decisions obtained by victim-plaintiffs also serve as persuasive precedents for subsequent victim-plaintiffs to offer to the courts of other jurisdictions and for the judges of those jurisdictions to consider. And, finally, they serve as models for legislatures to consider as potential procedural reforms within their judiciaries.

The explosion in U.S. Alien Tort Statute litigation can be traced to the Second Circuit's 1980 judgment in *Filártiga v. Peña-Irala*.[291] Human rights litigation against individual state actors for torture and due process violations[292] opened the door for human rights litigation against corporations.[293] What is interesting about the effects of ATS litigation is that, despite trial and appellate courts arriving at conflicting conclusions regarding jurisdictional questions under the ATS, the litigation quite plausibly resulted in legislation that extended

289. *See infra* Part IV (positing the link between corporate accountability litigation and bottom-up lawmaking).

290. *See* George I. Lovell et al., *Covering Legal Mobilization: A Bottom-up Analysis of* Wards Cove v. Atonio, 41 L. & SOC. INQUIRY 61, 62 (2016) ("[Robert] Cover's concept of *jurisgenesis* can deepen the legal mobilization framework's understanding of activists' engagement of law by directing attention to the foundational normative universe, or *nomos*, that inspired activists' bottom-up strategies for advancing social rights and political transformation.").

291. *See* Stephens, *The Curious History of the Alien Tort Statute*, *supra* note 1, at1473 (discussing *Filártiga*); Stephens, *The Rise and Fall of the Alien Tort Statute*, *supra* note 10, at 46, 49–50 (same).

292. Ewell et al., *supra* note 14, at 1213–35 (discussing the shift from individual defendants such as Dr. Peña Irala in the *Filártiga* case to corporate defendants).

293. Stephens, *The Curious History of the Alien Tort Statute*, *supra* note 1, at 1469.

federal court jurisdiction over corporations[294]—for example, in the Anti-Terror Statute (1994) and in the Trafficking Victim Protection Act (2000).

In the United Kingdom, a series of cases led to the conclusion that UK-domiciled parent companies could owe a duty of care to the host-state community of a foreign subsidiary. In 2008 and 2009, oil spills in the Bodo community caused severe environmental damage and adversely impacted the health and livelihood of community residents.[295] In 2012, the Bodo community filed a lawsuit against Royal Dutch/Shell and SPDC in London High Court, assisted by the law firm Leigh Day.[296] The community consists of between 31,000 and 50,000 Ogoniland residents, some 15,600 of which joined the lawsuit against Royal Dutch/Shell.[297] As was typical, Royal Dutch/Shell initially resisted being held accountable by arguing that oil thieves and saboteurs, not SPDC negligence, were responsible for the pipeline spills.[298] The parties eventually agreed that the Nigerian subsidiary SPDC would accept liability and U.K. court jurisdiction if the plaintiffs withdrew their claims against the parent corporation Royal Dutch/Shell.[299]

Initially, defendant corporations relied on the common law doctrine of *forum non conveniens* to thwart corporate accountability litigation.[300] But in 2005, in the European Court of Justice case *Owusu v. Jackson*, which involved a U.K. plaintiff and Jamaican defendant, as

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294. *Id.* at 1488–89 (discussing the inability of victim-plaintiffs to prevail in ATS claims as part of the impetus behind passage of the Torture Victim Protection Act (1992), the Anti-Terrorism Act (1994), and the Foreign Sovereign Immunities Act, which Congress amended in 1996 to permit claims alleging torture and extrajudicial killing).

295. Bodo Cmty. v. Shell Petroleum Dev. Co. of Nigeria Ltd. [2014] EWHC (TCC) 1973 [7] (Eng.).

296. *Id.*; *Shell—Bodo*, LEIGH DAY, https://www.leighday.co.uk/news/cases-and-testimonials/cases/shell-bodo/ [https://perma.cc/72AY-CQ68].

297. Day *supra* note 197, at 135 (2015) (estimating the Bodo community population at approximately 31,000); *Shell—Bodo*, *supra* note 296 (estimating the population at approximately 50,000).

298. Bodo Cmty. v. Shell Petroleum Dev. Co. of Nigeria Ltd. [2014] EWHC (TCC) 1973, ¶¶ 92–93 (Eng.); Day et al., *supra* note 197, at 141.

299. Bodo Cmty. v. Shell Petroleum Dev. Co. of Nigeria Ltd. [2014] EWHC (TCC) 1973 [7]–[8] (Eng.); Enneking, *supra* note 45, at 530; Richard Meeran, *Access to Remedy: The United Kingdom Experience of MNC Tort Litigation for Human Rights Violations, in* HUMAN RIGHTS AND OBLIGATIONS OF BUSINESS 378, 386 n.39 (2013); *see also* Day et al., *supra* note 197, at 139–40 (discussing SPDC's acceptance of liability).

300. Meeran, *supra* note 299.

well as several Jamaican corporations, the Court eradicated the doctrine for European Union member states that had applied the doctrine such as the United Kingdom, Ireland, and Denmark.[301]

Corporations domiciled in the United Kingdom turned to the duty of care argument as a procedural hurdle, arguing that if they owed no duty of care, plaintiffs could not proceed to the merits stage. English courts in *Lubbe v. Cape Plc* determined that parent corporations conceivably could owe a duty of care to foreign plaintiffs and permit the plaintiffs case to proceed.[302] But a subsequent court in *Chandler v. Cape Plc* narrowly interpreted the circumstances within which such a duty of care would emerge.[303] Cape Plc, the defendant in both cases, is a U.K. company that owns subsidiaries in South Africa.[304] The South African subsidiary in *Lubbe* was essentially bankrupt and in *Chandler* had been completely dissolved.[305] The parent company, Cape Plc, had deep pockets from which the plaintiffs in the *Lubbe* and *Chandler* litigations could obtain damages.[306] Mrs. Lubbe was one of 3,000 plaintiffs suing Cape Plc for asbestos poisoning.[307] But Cape Plc held no assets in South Africa.[308]

It was against this backdrop that the London High Court ruled in 2014 that the Bodo Community lawsuit against Royal Dutch/Shell and SPDC could proceed.[309] Royal Dutch/Shell had argued that oil theft, rather than corporate negligence, was responsible for the 2008 and 2009 pipeline spills in the Bodo Community.[310] The London High Court opined that SPDC owed no general duty of care to local populations, but it was conceivable that SPDC could be held liable for neglect in failing to protect their pipeline installations against theft and sabotage.[311] After the Bodo Community victim-plaintiffs secured

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301. Case C-281/02, Owusu v. Jackson, 2005 E.C.R. I-1383.

302. Lubbe v. Cape Plc [2000] WLR 1545 at ¶¶ 6, 8–9 (Eng.). Subsequently, this judgment was overturned. *Id.* ¶¶ 9–14

303. Chandler v. Cape Plc [2012] EWCA Civ 525, [2011] QB 951 (Eng.).

304. *Id.* at ¶ 1.

305. Lubbe v. Cape Plc [2000] WLR 1545 at ¶ 42; ¶ 53.

306. Lubbe v. Cape Plc [2000] WLR 1545 at ¶ 11 (Eng.) (noting allegations that the attorneys intended to bring a multi-plaintiff group action on behalf of some 3,000 plaintiffs).

307. Lubbe v. Cape Plc [2000] WLR 1545 at ¶ 2 (Eng.).

308. *Id.* at ¶ 4.

309. Bodo Cmty. v. Shell Petroleum Dev. Co. of Nigeria Ltd. [2014] EWHC (TCC) 1973 (Eng.).

310. *Id.* at ¶ 5.

311. *Id.* at ¶ 90, 93.

this favorable ruling on the preliminary objection, Royal Dutch/Shell decided to settle the case.[312]

Spill from oil pipelines owned and maintained by SPDC also led to the *Okpabi* litigations, first filed in the United States under the Alien Tort Statute, and then in the United Kingdom.[313] Like the *Milieudefensie* and *Bodo Community* cases, the *Okpabi* case involves two plaintiff classes—approximately 40,000 members of the Ogale community in Rivers State, Nigeria, and 2,335 residents of the Bille community in Rivers State, Nigeria.[314] The *Okpabi* plaintiffs from Ogale and Bille communities in Rivers State were also proceeding in English court and encountering Royal Dutch/Shell's preliminary objection that it did not owe a duty of care to SPDC's host community.[315] *Okpabi* overlapped with another case, *Vedanta Resources Plc v. Lungowe*.[316]

The *Okpabi* court affirmed the approach of *Vedanta* for determining whether a parent company owes a duty of care to the local community within the host state of its subsidiary.[317] In 2021, the U.K. Supreme Court held that Royal Dutch/Shell arguably owed a duty of care to Okpabi and his co-plaintiffs, thus allowing the claim to proceed in English courts against both Royal Dutch/Shell and its subsidiary, SPDC.[318] At the time of this writing, the case is still pending. On January 16, 2024, however, Royal Dutch/Shell announced that it was selling off SPDC.[319] A court order in the *Okpabi* case had held up the sale since 2022.[320] The sale of SPDC has raised concerns among civil

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312. Jon Vidal, *Shell Announced £55m Payout for Nigeria Oil Spills*, GUARDIAN (Jan. 6, 2015), https://www.theguardian.com/environment/2015/jan/07/shell-announces-55m-payout-for-nigeria-oil-spills [https://perma.cc/FU8Y-GTMT].

313. Okpabi v. Royal Dutch Shell [2021] UKSC 3, [153] (appeal taken from Eng.) (finding jurisdiction over the parent company Royal Dutch Shell).

314. *Id.* ¶ 3.

315. *Id.*

316. Vedanta Resources Plc v. Lungowe [2019] UKSC 20.

317. Okpabi v. Royal Dutch Shell [2021] UKSC 3 [153].

318. *Id.* at ¶ 1.

319. *Shell Agrees to Sell Nigerian Onshore* Subsidiary, *SPDC*, SHELL (Jan. 16, 2024), https://www.shell.com/media/news-and-media-releases/2024/shell-agrees-to-sell-nigerian-onshore-subsidiary-spdc.html [https://perma.cc/82RS-4DDR]; *Shell Ends Nearly a Century in Nigeria's Troubled Onshore Oil, Sells Subsidiary for $2.4 Billion*, PIPELINE & GAS J. (Jan. 16, 2024), https://pgjonline.com/news/2024/january/shell-ends-nearly-a-century-in-nigerias-troubled-onshore-oil-sells-subsidiary-for-24-billion [https://perma.cc/2JKU-NFNU],

320. Ronald Adamolekun & Mary Izuaka, *Shell to Sell Nigeria Onshore Oil Business for $2.4 Billion*, PREMIUM TIMES (Jan. 16, 2024),

society actors that Royal Dutch/Shell will not clean up from its oil pipeline spills or pay monetary compensation to its thousands of victims.[321]

With its ruling in *Kiobel*, the U.S. Supreme Court might have rendered moribund the prospects for corporate accountability litigation in the United States, at least where the defendants are foreign corporations.[322] But it is clear that corporate accountability litigation will continue so long as corporations continue to operate in ways that violate human and environmental rights. Canadian courts represent especially important judicial forums in the business and human rights landscape because of the dominance of Canadian mining companies in the global extractives industry: more than 50% [fifty percent] of the world's mining corporations that are listed on public stock exchanges are Canadian.[323] Consequently, corporate accountability litigation in Canada, like litigation in the United States under the Alien Tort Statute, has global implications. Business and human rights lobbying for legislative reform in Canada also becomes increasingly important.[324]

In this Section, I have demonstrated that victim-turned-activist-plaintiffs from Ogoniland and elsewhere have succeeded in generating procedural reforms in common law jurisprudence. These endeavors by victim-plaintiffs will continue in the United States against U.S. domestic corporations[325] or wherever large multinationals

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https://www.premiumtimesng.com/news/top-news/659512-shell-to-sell-nigeria-onshore-oil-business-for-2-4-billion.html [https://perma.cc/SJ79-JX89].

321. David Owei, *Address Impact of Operations in Niger Delta Before Selling SPDC—CSOs Tell Shell*, WILL (Jan. 18, 2024), https://thewillnews.com/address-impact-of-operations-in-niger-delta-before-selling-spdc-csos-tell-shell/ [https://perma.cc/CUS2-NSDX].

322. *See supra* notes 185–191 and accompanying text (discussing the U.S. Supreme Court's reasoning in dismissing *Kiobel*).

323. *See* Charis Kamphuis, *Building the Case for a Home-State Grievance Mechanism: Law Reform Strategies in the Canadian Resource Justice Movement*, *in* HUMAN RIGHTS IN THE EXTRACTIVE INDUSTRIES 455, 459–62 (Isabel Feichtner et al. eds., 2019) (discussing the global dominance of Canadian mining companies); *id*. at 465 (citing a 2009 report of the Prospectors and Developers Association of Canada that indicated that 33% of 171 incidents of human rights violations in the preceding ten years involved Canadian mining companies—a figure four times greater than that for any other country).

324. *See id.* at 488–502 (describing Canadian civil society lobbying in support of various draft corporate accountability bills).

325. Rachel Chambers & Jena Martin, *United States: Potential Paths Forward after the Demise of the Alien Tort Statute*, *in* CIVIL REMEDIES AND HUMAN RIGHTS IN FLUX, *supra* note 192, at 351–70.

are domiciled (such as in Canada[326] and in England,[327] the Netherlands,[328] France,[329] and elsewhere in Europe[330]), if not in the

326. The scholarship on procedural reforms in corporate accountability litigation in Canada includes: Lucas Roorda & Cedric Ryngaert, *Business and Human Right Litigation in Europe and Canada: The Promises of Forum of Necessity Jurisdiction*, 80 RABEL J. COMP. & INT'L PRIV. L. 783, (2016) (discussing *forum necessitatis* doctrine); Cynthia Kwakyewah & Uwafiokun Idemudia, *Canada-Ghana Engagements in the Mining Sector: Protecting Human Rights or Business as Usual?*, 4 TRANSNAT'L HUM. RTS. REV. 146 (2017); Penelope Simons & Heather McLeod-Kilmurray, *Canada: Backsteps, Barriers and Breakthroughs in Civil Liability for Sexual Assault, Transnational Human Rights Violations and Widespread Environmental Harm*, *in* CIVIL REMEDIES AND HUMAN RIGHTS IN FLUX, *supra* note 192, at 109, 118–32.

327. The scholarship on procedural reforms in corporate accountability litigation in the United Kingdom includes: Russell Hopkins, *England and Wales: The Common Law's Answer to International Human Rights Violations*, *in* CIVIL REMEDIES AND HUMAN RIGHTS IN FLUX, *supra* note 192, at 135 (describing conventional tort law claims as well as claims relying on the Human Rights Act (1998), which implements the European Convention of Human Rights, filling gaps in tort law); Shubhaa Srinivasan, *Current Trends and Future Effects in Transnational Litigation against Corporations in the United Kingdom*, *in* CORPORATE RESPONSIBILITY FOR HUMAN RIGHTS IMPACTS 331 (Lara Blecher et al. eds., 2015); Rachel Chambers & Katherine Tyler, *The UK Context for Business and Human Rights*, *in* CORPORATE RESPONSIBILITY FOR HUMAN RIGHTS IMPACTS, *supra*, at 301; ROBERT MCCORQUODALE, BRIT. INST. INT'L & COMP. L., SURVEY OF THE PROVISION IN THE UNITED KINGDOM OF ACCESS TO REMEDIES FOR VICTIMS OF HUMAN RIGHTS HARMS INVOLVING BUSINESS ENTERPRISES (2015); Ekaterina Aristova, *Tort Litigation against Transnational Corporations in the English Courts: The Challenge of Jurisdiction*, 14 UTRECHT L. REV. 6 (2018).

328. The scholarship on procedural reforms in corporate accountability litigation in the Netherlands includes: Jagers & van der Heijden, *supra* note 192; Roorda, *supra* note 192.

329. The scholarship on procedural reforms in corporate accountability litigation in France includes: Virginie Rouas, *France: Untapping the Potential of Civil Liability to Remedy Human Rights Violations*, *in* CIVIL REMEDIES AND HUMAN RIGHTS IN FLUX, *supra* note 192, at 159, 166 (noting that accessory liability does not exist in France, making vicarious liability against parent corporations challenging, but nothing that the passage of the duty of vigilance law remedies this loophole); Benjamin West Janke & François-Xavier Licari, *Enforcing Punitive Damage Awards in France after* Fountain Pajot, 60 AM. J. COMP. L. 775 (2012) (speculating on the implication of a recent Court of Cassation judgment for the fact that, historically, punitive damage awards do not exist under French law, which narrows the range of remedies available against French corporations).

330. The scholarship on procedural reforms in corporate accountability litigation in Europe includes: Liesbeth Enneking, *Crossing the Atlantic? The Political and Legal Feasibility of European Foreign Direct Liability Cases*, 40 GEO. WASH. INT'L L. REV. 903 (2009); Jan Wouters & Leen Chanet, *Corporate Human Rights Responsibility: A European Perspective*, 6 NW. J. INT'L HUM. RTS. 262 (2008).

host states where they operate.[331] In the next Section, I discuss settlements and liability judgments as another positive outcome arising from Ogoniland and the wider Niger Delta region.

C. Human Rights Settlements and Environmental Rights Judgments

In 2008, the NGO Friends of the Earth Nigeria and the Dutch NGO Milieudefensie joined four farmers from the Niger Delta in their lawsuit against Royal Dutch/Shell and its Nigerian subsidiary, SPDC. The farmers were Paramount Chief Baariza Dooh of the Goi community,[332] Friday Alfrad Akpan of the Ikot Ada Udo community,[333] and Paramount Chief Fidelis Oguru and Alali Efanga of the Oruma community.[334] The farmers engaged in home-state litigation (litigation in the home state of the corporation) rather than in host-state litigation (litigation in the local or domestic courts where the harms occurred—in this case, Nigeria).[335] They were represented by Channa

331. The scholarship on procedural reforms in corporate accountability litigation in Africa includes: Ahmad, *supra* note 256 (discussing tort law claims in Africa).

332. Gerechtshof Den Haag [Court of Appeal of The Hague], 29 januari 2021, JA 2021, 63 m.nt. van Bartman S.M. Steef, en Groot de C. Cees (Dooh en Milieudefensie/Royal Dutch Shell PLC.). Initially, Baariza Dooh of the Goi community filed a claim against Royal Dutch Shell. Eric Dooh, Baariza's son, took over as plaintiff when Baariza passed away. *Id*. ¶¶ 4.9–4.13

333. Rechtbank's Gravenhage [District Court of The Hague], 30 januari 2013, NJF 2013, 99 m.nt. H. Wien, M. Nijenhuis en FM Bus (Akpan/Royal Dutch Shell PLC. en Shell Petroleum Development Company of Nigeria, Ltd.).

334. Rechtbank's Gravenhage [District Court of The Hague], 30 januari 2013, NJF 2013, 99 m.nt. H. Wien, M. Nijenhuis en FM Bus (Akpan/Royal Dutch Shell PLC. en Shell Petroleum Development Company of Nigeria, Ltd.); Gerechtshof Den Haag [Court of Appeal of The Hague], 29 januari 2021, RAV 2021, 38 m.nt. JM van der Klooster, MY Bonneur en SJ Schaafsma (Vereniging Milieudefensie en Akpan/Royal Dutch Shell PLC en Shell Petroleum Development Company of Nigeria Ltd.); Gerechtshof Den Haag [Court of Appeal of The Hague], 29 januari 2021, NJF 2021, 77 m.nt. J.M. van der Klooster, M.Y. Bonneur en S.J. Schaafsma (Oguru, Efanga & Vereniging Milieudefensie/Shell Petroleum N.V.); Gerechtshof Den Haag [Court of Appeal of The Hague], 29 januari 2021, JA 2021, 63 m.nt. van Bartman S.M. Steef, en Groot de C. Cees (Dooh en Milieudefensie/Royal Dutch Shell PLC.).

335. *See generally* Ahmad, *supra* note 256, at 211 (comparing home-state litigation in the United Kingdom, the Netherlands, the United States, and Canada with the potential for host-state litigation in Africa).

Samkalden,[336] who later would represent Esther Kiobel and the Ogoni widows in Dutch court.

The result in Fidelis Ayoro Oguru and Alali Efanga's case set a landmark precedent in corporate accountability litigation, establishing direct liability for a parent company's failure to meet the duty of care that it owed to the Oruma host community because of the significant control that it exercised over SPDC.[337] Unfortunately, Efanga died in 2016, eight years after filing his complaint, and nearly five years before final resolution in the Court of Appeal in the Hague.[338] The outcome in *Oguru and Efanga* differed from that in *Dooh* based on *Dooh*'s slightly different facts. As in *Oguru and Efanga*, the Hague District Court in *Dooh* found that it had jurisdiction over both Royal Dutch/Shell and its subsidiary SPDC.[339] On the merits, the District Court applied Nigerian tort law, and found that SPDC owed no general duty of care to Milieudefensie or to Dooh; it then dismissed the tort claims for nuisance, negligence, and trespass to chattel for SPDC's delay in responding to the oil spill and for its failure to remediate the spill.[340] The District Court likewise ruled that Royal Dutch/Shell did not owe a duty of care to the Goi community, nor did it have a duty of

336. *See* Rechtbank's Gravenhage [District Court of The Hague], 30 januari 2013, NJF 2013, 99 m.nt. H. Wien, M. Nijenhuis en FM Bus (Akpan/Royal Dutch Shell PLC. en Shell Petroleum Development Company of Nigeria, Ltd.) (EP); Gerechtshof Den Haag [Court of Appeal of The Hague], 29 januari 2021, RAV 2021, 38 m.nt. JM van der Klooster, MY Bonneur en SJ Schaafsma (Vereniging Milieudefensie en Akpan/Royal Dutch Shell PLC en Shell Petroleum Development Company of Nigeria Ltd.) (listing Samkalden as Akpan's lawyer); Gerechtshof Den Haag [Court of Appeal of The Hague], 29 januari 2021, NJF 2021, 77 m.nt. J.M. van der Klooster, M.Y. Bonneur en S.J. Schaafsma (Oguru, Efanga & Vereniging Milieudefensie/Shell Petroleum N.V.) (listing Samkalden as Oguru and Efanga's lawyer); Gerechtshof Den Haag [Court of Appeal of The Hague], 29 januari 2021, JA 2021, 63 m.nt. van Bartman S.M. Steef, en Groot de C. Cees (Dooh en Milieudefensie/Royal Dutch Shell PLC) (listing Samkalden as Dooh's lawyer).

337. Gerechtshof Den Haag [Court of Appeal of The Hague], 29 januari 2021, NJF 2021, 77 m.nt. J.M. van der Klooster, M.Y. Bonneur en S.J. Schaafsma (Oguru, Efanga & Vereniging Milieudefensie/Shell Petroleum N.V.) (Neth.).

338. Gerechtshof Den Haag [Court of Appeal of The Hague], 29 januari 2021, NJF 2021, 77 m.nt. J.M. van der Klooster, M.Y. Bonneur en S.J. Schaafsma (Oguru, Efanga & Vereniging Milieudefensie/Shell Petroleum N.V.) (Neth.).

339. Rechtbank Den Haag [District Court of the Hague], 30 januari 2013, RO 2013, 33 ¶ 4.2, 4.8, m.nt. H. Wien, M. Nijenhuis en FM Bus (Dooh en Milieudefensie/Royal Dutch Shell) (Neth.) (citing interlocutory judgment in the incidental jurisdiction of 24 February 2010 (LJN BM1470)).

340. Rechtbank Den Haag [District Court of the Hague], 30 januari 2013, RO 2013, 33 ¶¶ 4.40, 4.50, 4.51, 4.58, 4.59 (Dooh en Milieudefensie/Royal Dutch Shell) (Neth.).

vigilance to oversee the day-to-day operations of its subsidiary. Accordingly, the District Court dismissed the parent companies from the case.[341] The District Court also dismissed Dooh's human rights claim that SPDC had violated the physical integrity rights of class members.[342] Dooh and Milieudefensie appealed to the Court of Appeal of the Hague, at which point, Royal Dutch/Shell challenged the Dutch courts' jurisdiction over the parent companies and the subsidiary, SPDC.[343] In 2015, the Court of Appeal ruled that Dutch courts had jurisdiction over both the parent companies and the subsidiary, and, in 2021, the Court of Appeal rejected RDS and SPDC's appeal.[344] The Court of Appeal ordered SPDC to compensate the Goi and Oruma communities.[345] Although in the *Akpan* case from the Ikot Ada Udo community, the Court of Appeal merely continued the case,[346] Shell ultimately settled with all three communities in 2022 for a total of €15 million.[347]

Victim-plaintiffs who have been able to overcome procedural barriers such as *forum non conveniens* or parent company duty of care to make it to the merits stage of their case might get a favorable judgment or settle with the corporate defendant. A favorable judgment might consist of a declaration that the corporation violated its duty of care or duty of vigilance or violated the human and environmental

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341. *Id.* at ¶¶ 4.37, 4.39.

342. *Id.* at ¶¶ 4.60.

343. *Id.* at ¶¶ 4.4.

344. Gerechtshof Den Haag [Court of Appeal of The Hague], 29 januari 2021, JA 2021, 63 m.nt. van Bartman S.M. Steef, en Groot de C. Cees (Dooh en Milieudefensie/Royal Dutch Shell PLC.) at ¶¶3.8, 3.9.

345. Gerechtshof Den Haag [Court of Appeal of The Hague], 29 januari 2021, JA 2021, 63 m.nt. van Bartman S.M. Steef, en Groot de C. Cees (Dooh en Milieudefensie/Royal Dutch Shell PLC.) at ¶¶5.4; Gerechtshof Den Haag [Court of Appeal of The Hague], 29 januari 2021, NJF 2021, 77 m.nt. J.M. van der Klooster, M.Y. Bonneur en S.J. Schaafsma (Oguru, Efanga & Vereniging Milieudefensie/Shell Petroleum N.V.) at ¶¶3.8.

346. Gerechtshof Den Haag [Court of Appeal of The Hague], 29 januari 2021, RAV 2021, 38 m.nt. JM van der Klooster, MY Bonneur en SJ Schaafsma (Vereniging Milieudefensie en Akpan/Royal Dutch Shell PLC en Shell Petroleum Development Company of Nigeria Ltd.).

347. *Our Lawsuit Against Shell in Nigeria*, MILIEUDEFENSIE, https://en.milieudefensie.nl/shell-in-nigeria/milieudefensie-lawsuit-against-shell-nigeria [https://perma.cc/E2KU-7DMF]; *see also* Jess Craig, *The Village that Stood Up to Big Oil and Won*, GUARDIAN (June 1, 2022) https://www.theguardian.com/environment/ng-interactive/2022/jun/01/oil-pollution-spill-nigeria-shell-lawsuit [https://perma.cc/4YN6-FNY3] (providing background to the case).

rights of the victim-plaintiffs. But in some cases, a court may award monetary damages.

Similarly, a settlement might amount to some nominal sum. In 2009, Royal Dutch/Shell settled with the *Wiwa* litigation plaintiffs for $15.5 million.[348] Although Royal Dutch/Shell had contested the claims for nearly fourteen years, the parties agreed to establish The Kiisi Trust, which was "intended to benefit the Ogoni people."[349] According to the Center for Constitutional Rights press release, "Kiisi means "Progress" in the plaintiffs' Ogoni language."[350] The Trust would support "initiatives in Ogoni for educational endowments, skills development, agricultural development, women's programs, small enterprise support, and adult literacy."[351] It is arguable whether $15.5 million is sufficient compensation for executing the Ogoni Nine, for shooting and torturing the other plaintiffs, for the fourteen-year legal battle that Royal Dutch/Shell waged against the *Wiwa* plaintiffs, and for establishing a trust meant to benefit Ogoni residents. But the plaintiffs viewed the settlement as a victory. In a press release, they explained:

> [I]t is time to move on with our lives and we have decided to put this sad chapter behind us.
>
> Although our journey to this victory has been drawn out and emotionally draining, we are extremely satisfied with the result. For fourteen years and more we have suffered our loss privately and publicly but for the most part we have endured our pains away from the media spotlight. It has been a lonely, agonising and traumatic period for many of us but we were sustained in our grief by this lawsuit, holding out for the day

348. Settlement Agreement and Mutual Release, Wiwa v. Shell Petroleum, N.V. and Shell Transport and Trading Company, Ltd., 96 CIV. 8386, (June 8, 2009), https://ccrjustice.org/sites/default/files/assets/Wiwa_v_Shell_SETTLEMENT_AGREEMENT.Signed-1.pdf [https://perma.cc/694A-NQ6X]; Ed Pilkington, *Shell Pays Out $15.5 Million Over Saro-Wiwa Killing*, THE GUARDIAN, (June 8, 2009) https://www.theguardian.com/world/2009/jun/08/nigeria-usa [https://perma.cc/4BY5-TGP3].

349. *Settlement Reached in Human Rights Cases Against Royal Dutch/Shell*, CTR. CONST. RTS. (June 8, 2009) https://ccrjustice.org/home/press-center/press-releases/settlement-reached-human-rights-cases-against-royal-dutchshell [https://perma.cc/LD2T-5BBF].

350. *Id.*

351. *Id.*

> when we might finally be given the opportunity to exorcise our grief.
>
> It is said that justice delayed is justice denied but today our private agonies and our long struggle for justice have finally been vindicated and we are gratified that Shell has agreed to atone for its actions.[352]

It should also be noted that whether a defendant corporation ever pays a monetary damage award might depend on additional litigation. One of the most conspicuous damage awards came out of the *Aguinda/Lago Agrio* litigation from Ecuador, where an Ecuadorian judge awarded the plaintiffs approximately US$19 billion, which an appeals court initially upheld,[353] but ultimately reduced to US$9.5 billion.[354] The plaintiffs have never collected on the judgment. This outcome might be unique to the facts of the *Aguinda/Lago Agrio* litigation, where Chevron alleged that the Ecuadorian plaintiff's lawyers bribed Ecuador's corrupt judges.[355] But enforcement of foreign judgments is a notoriously thorny area of transnational litigation.[356]

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352. Press Release, Center for Constitutional Rights, Statement of the Plaintiffs in Wiwa v. Royal Dutch/Shell, Wiwa v. Anderson and Wiwa v. SPDC (June 8, 2009), https://ccrjustice.org/home/press-center/press-releases/statement-plaintiffs-wiwa-v-royal-dutchshell-wiwa-v-anderson-and [https://perma.cc/7R8G-ZHC8].

353. Rick Herz, *Ecuadorean Appeals Court Upholds Huge Judgment Against Chevron for Pollution in the Amazon*, EARTHRIGHTS INT'L (Jan. 4, 2012), https://earthrights.org/blog/ecuadorean-appeals-court-upholds-huge-judgment-against-chevron-for-pollution-in-the-amazon/ [https://perma.cc/UE9K-BCBT].

354. *Texaco/Chevron Lawsuits (re Ecuador)*, BUS. & HUM. RTS. RES. CTR., https://www.business-humanrights.org/en/latest-news/texacochevron-lawsuits-re-ecuador-1/ [https://perma.cc/E65Z-8AT6]. Judgment in Spanish available at https://chevroninecuador.org/assets/docs/2013-11-12-final-sentence-from-cnj-de-ecuador-spanish.pdf [https://perma.cc/Z2HS-XE7J].

355. *See* Katie Surma, *Their Lives Were Ruined by Oil Pollution, and a Court Awarded Them $9.5 Billion. But Ecuadorians Have Yet to See a Penny from Chevron*, INSIDE CLIMATE NEWS (Dec. 18, 2022), https://insideclimatenews.org/news/18122022/steven-donziger-chevron-ecuador-oil-pollution/ [https://perma.cc/7UMC-63ZY] (suggesting that the case has shifted from litigation by Indigenous people and other Ecuadorians—*Los Afectados*—seeking to hold Texaco accountable for its failure to remedy environmental damages to a case about bribery by the plaintiffs' lawyers Steven Donziger and Pablo Fajardo). For a journalistic account of the case, see BARRETT, *supra* note 97. On Pablo Fajardo, see William Langewiesche, *Jungle Law*, VANITY FAIR (Apr. 3, 2007), https://www.vanityfair.com/news/2007/05/texaco200705 [https://perma.cc/6UYZ-GUTZ].

356. *See* Lucien J. Dhooge, Aguinda v. ChevronTexaco*: Mandatory Grounds for the Non-Recognition of Foreign Judgments for Environmental Injury in the United*

Failures like these tend to validate civil society demands for improved oversight of corporations and accountability mechanisms, including through a business and human rights treaty. After the Canadian Supreme Court affirmed a lower court holding that the *Lago Agrio* plaintiffs could not enforce their hard-won $9.5 billion damage against a Chevron subsidiary in Canada, a corporate accountability coalition called the Global Campaign to Reclaim Peoples Sovereignty, Dismantle Corporate Power and Stop Impunity stated in a press release:

> The decision of the Supreme Court of Canada exposes once again the legal architecture that protects the impunity of transnational corporations. The case of Chevron is not unique or the only one. In response to the huge amount and the systematic nature of the social and environmental conflicts generated by transnational corporations around the planet, the Global Campaign urges States to consistently advance in the negotiations for an international binding treaty on transnational corporations and human rights, and calls for international solidarity with Amazonian communities affected by Chevron.[357]

Another dilemma concerns to whom and how funds are to be distributed. In 2015, representatives of the Bodo community in Ogoniland settled against SPDC for £55 million.[358] Importantly, Shell accepted responsibility for the spill and agreed to undertake environmental cleanup.[359]

States, 19 J. TRANSNAT'L L. & POL'Y 1, 24–26, 40–56 (2009) (noting numerous reasons why U.S. courts would be obligated to reject foreign judgments); Lucien J. Dhooge, Aguinda v. ChevronTexaco*: Discretionary Grounds for the Non-Recognition of Foreign Judgments for Environmental Injury in the United States*, 28 VA. ENV'T L.J. 241, 291–95 (2010) (discussing U.S. jurisprudence on punitive damages and its potential implication for enforcing the Ecuadorian court judgment in *Aguinda*); Patel, *supra* note 204, at 95–96 (discussing enforcement of foreign judgments in the United States).

357. Press Release, Global Campaign to Reclaim Peoples Sovereignty, Dismantle Corporate Power and Stop Impunity, The Case of Chevron in the Ecuadorian Amazon: The Ruling of the Supreme Court of Canada Closes the Doors to End Impunity, (Apr. 4, 2019), https://www.stopcorporateimpunity.org/the-case-of-chevron-in-the-ecuadorian-amazon-the-ruling-of-the-supreme-court-of-canada-closes-the-doors-to-end-impunity/ [https://perma.cc/4MV3-7XM9].

358. *Id.*

359. *Id.*

D. From Strategic Spillover to the Business and Human Rights Transnational Litigation Networks

In this Section, I discuss how corporate accountability litigation has proliferated since the mid-1990s. This proliferation is no accident. Nor is it only the result of copycat litigation or "strategic spillover."[360] International NGOs such as the Center for Constitutional Rights (CCR) and EarthRights International (ERI) created the model for corporate accountability litigation under the U.S. Alien Tort Statute in the early 1990s.[361] But CCR and ERI continued to work alongside aggrieved individuals and groups, participating directly in litigation around the world based on their own model and building up expertise in business and human rights litigation.[362] They also work alongside other litigation-minded NGOs, for example, filing *amicus* briefs that refer to the global jurisprudence that they and their clients have helped to generate.[363] In doing so, CCR and ERI have helped to construct a business and human rights transnational litigation network.

The Ogoni and other aggrieved individuals and groups undertaking corporate accountability litigation have benefited from the ability to form linkages with allies in the Global North—repeat

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360. *See, e.g.*, Stephens, *Making Remedies Work*, *supra* note 28, at 408, 432 ("During the heyday of human rights litigation in the United States, the courts resolved only a handful of cases each year. Those cases resonated with people suffering from similar human rights abuses and helped trigger an ever-growing number of cases filed in domestic court systems around the world."); *id.* ("Potential defendants were acutely aware of the cases and the possibility that they might be sued.").

361. *What We Do*, CTR. CONST. RTS., https://ccrjustice.org/home/what-we-do/issues/corporate-human-rights-abuses [https://perma.cc/D873-6MGA] (describing the Center for Constitutional Rights as a pioneer in the use of the Alien Tort Statute to hold corporations accountable); *Alien Tort Statute*, EARTHRIGHTS INT'L, https://earthrights.org/litigation-and-legal-advocacy/legal-strategies/alien-tort-statute/ [https://perma.cc/EMX6-EJ4V] (discussing ERI's participation in *Doe v. Unocal*).

362. *See Our Cases*, EARTHRIGHTS INT'L, https://earthrights.org/litigation-and-legal-advocacy/our-cases/ [https://perma.cc/T85V-V4B4] (listing ERI cases); *Corporate Human Rights Abuses*, CTR. CONST. RTS., https://ccrjustice.org/home/what-we-do/issues/corporate-human-rights-abuses [https://perma.cc/N48S-VZA6] (listing CCR's corporate accountability litigation).

363. *See Amicus Briefs*, EARTHRIGHTS INT'L, https://earthrights.org/litigation-and-legal-advocacy/amicus-briefs/ [https://perma.cc/WUW5-5AW4] (listing ERI's amicus briefs); *Corporate Human Rights Abuses*, CTR. CONST. RTS., https://ccrjustice.org/home/what-we-do/issues/corporate-human-rights-abuses [https://perma.cc/7TAJ-8P8E] (amicus filings denoted as "(amicus)").

players who bring to bear their financial resources and legal expertise on behalf of the aggrieved. However, one of the positive outcomes is that litigation under the Alien Tort Statute is *creating* capacity within the U.S. bar for litigating these types of cases. In other words, Ogoni transnational litigation has significant capacity-building and spillover effects within the practice of law, for example, in the areas of corporate accountability litigation and environmental law.

The Ogoni Nine families were represented in the *Wiwa* litigation by an international human rights NGO based in New York—CCR.[364] Founded in 1966, it was CCR that represented Joel and Dolly Filártiga in the landmark 1980 U.S. Supreme Court case that resuscitated the Alien Tort Statute.[365] ERI jointly filed with CCR the Ogoni Nine complaint.[366] While CCR typifies a public interest litigation organization focused on human rights, ERI also engages in grassroots environmental justice mobilization.[367] ERI explicitly uses the legal opportunity structure of the Alien Tort Statute to hold corporations accountable for environmental damage abuses.[368]

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364. Wiwa et al v. Royal Dutch Petroleum et al: *Historic Case*, CTR. CONST. RTS. (Jan. 4, 2022), https://ccrjustice.org/home/what-we-do/our-cases/wiwa-et-al-v-royal-dutch-petroleum-et-al [https://perma.cc/9335-ABWS].

365. *See Creative Legal Strategies*, CTR. CONST. RTS. (July 14, 2015), https://ccrjustice.org/home/how-we-work/creative-legal-strategies [https://perma.cc/9RQ6-MSS5] (discussing CCR ATS litigation); *see also Filártiga v. Peña-Irala*, CTR. CONST. RTS. (Jan. 3, 2019) https://ccrjustice.org/home/what-we-do/our-cases/fil-rtiga-v-pe-irala [https://perma.cc/5VHF-D7VG] (discussing CCR's involvement in *Filártiga*); Beth Stephens, Filártiga v. Peña-Irala*: From Family Tragedy to Human Rights Accountability*, 37 RUTGERS L.J. 623, 625–26 (2006) (introducing a special symposium issue regarding the important role of the Filártigas' search for justice in producing Alien Tort Statute jurisprudence and in paving the way for corporate accountability litigation and accountability for private and state military violence); Beth Stephens, *Translating* Filártiga, *supra* note 164, at 2 n.3 (2002) (discussing the author Beth Stephens' first-hand involvement with the Center for Constitutional Rights and ATS litigation).

366. *See Wiwa et al v. Royal Dutch Petroleum et al.*, CTR. CONST. RTS. https://ccrjustice.org/home/what-we-do/our-cases/wiwa-et-al-v-royal-dutch-petroleum-et-al [https://perma.cc/4D83-GRZL] (discussing CCR involvement in *Wiwa*); *Wiwa v. Royal Dutch/Shell*, EARTHRIGHTS INT'L, https://www.earthrights.org/legal/wiwa-v-royal-dutchshell) [https://perma.cc/AP3U-Z9SC] (discussing ERI involvement in *Wiwa*).

367. *See How We Work: In the Field*, EARTHRIGHTS INT'L, https://www.earthrights.org/campaigns/how-we-work-field [https://perma.cc/SXG6-QYBW] (discussing ERI strategy).

368. *See Alien Tort Statute*, EARTHRIGHTS INT'L, https://earthrights.org/litigation-and-legal-advocacy/legal-strategies/alien-tort-statute/https://www.earthrights.org/legal/alien-tort-statute [https://perma.cc/H8T7-AJ25] (discussing ERI's Alien Tort Statute strategy).

EarthRights International did not represent Esther Kiobel, Charles Wiwa, and their co-plaintiffs in the *Kiobel* ATS case in the United States. After the U.S. Supreme Court's *Kiobel* decision, Esther Kiobel and several other widows[369] decided to file a claim in the Netherlands similar to the claims that the *Wiwa* case co-plaintiffs had filed.[370] That is, Esther and the other widows effectively abandoned the class action suit in favor of individual relief. In addition to their claim against Royal Dutch Shell Plc, Kiobel and the Ogoni widows filed claims against several other entities: Shell Transport and Trading Company (STTC), which was the English half of the predecessor entity to Royal Dutch Shell plc., a Dutch subsidiary Shell Petroleum N.V. (SPNV), and the Nigerian subsidiary SPDC.[371] In prototypical transnational advocacy network fashion, Amnesty International and a human rights law firm called Prakken d'Oliveira—specifically the attorney Channa Samkalden—represented the Ogoni widows in filing the litigation.[372] Samkalden had represented plaintiffs in the

369. The other widows were Victoria Bera, Blessing Eawo, and Charity Levula. Melody Cheronda, *Dutch Court Rejects Nigerian Widows' Suit Against Shell*, PREMIUM TIMES (Mar. 24, 2022), https://www.amnesty.org/en/latest/news/2018/06/i-will-fight-to-my-last-breath-esther-kiobel-on-her-22year-battle-to-get-shell-in-court/ [https://perma.cc/CKN4-J38H]. On Bera, see Sabrina Tucci, *Victoria's Story: Shell Must Face Justice for Its Role in My Husband's Execution*, MEDIUM (May 13, 2019), https://medium.com/amnesty-insights/victorias-story-shell-must-face-justice-for-its-role-in-my-husband-s-execution-6a3a26e4798b [https://perma.cc/B6FH-EX4R]. On Eawo, see Ogonitv, *Widow of One of the Ogoni 9 Mrs Blessing Kem Nordu Eawo speaks to Ogoni people*, FACEBOOK (Nov. 10, 2020), https://www.facebook.com/100057664675483/videos/widow-of-one-of-the-ogoni-9-mrs-blessing-kem-nordu-eawo-speaks-to-ogoni-people/824375055061597/ [https://perma.cc/D8JG-6TDG]; FRANCE 24 ENGLISH, *Polluted by the Oil Industry: Life in Nigeria's Ogoniland*, YOUTUBE (July 5, 2021) https://www.youtube.com/watch?v=zP2OJmFsvp4 [https://perma.cc/TD9H-J8TK].

370. Rechtbank Den Haag [District Court of the Hague], 1 mei 2019, PS.Updates.nl 2019, 0685, m.nt L. Alwin, B. Meijer and AC Bordes (Kiobel / Royal Dutch Petroleum Co.) at ¶¶ 2.43, 4.53.

371. *Id*.

372. *See* Oladeinde Olawoyin, *Nigeria: Widows of Ogoni Leaders Killed By Abacha Sue Shell in Netherlands*, PREMIUM TIMES (June 29, 2017), https://allafrica.com/stories/201706290125.html (referencing Samkalden); *Nigeria: Shell Complicit in the Arbitrary Executions of Ogoni Nine as Writ Served in Dutch Court*, AMNESTY INT'L (June 29, 2017), https://www.amnesty.org/en/latest/news/2017/06/shell-complicit-arbitrary-executions-ogoni-nine-writ-dutch-court/ [https://perma.cc/5NAF-LWRK] (referencing Samkalden).

Milieudefensie cases from Ogoniland.[373] The evidence that Samkalden presented on behalf of the widows, which had to be recalled from twenty-seven years prior, was significant, including testimony of five witnesses who testified to taking bribes from Shell in order to lie against the Ogoni Nine.[374] In the judges' subjective opinions, however, the evidence was insufficient to hold Shell accountable.[375]

EarthRights International was not involved with Esther Kiobel and the Ogoni widows' case in the Netherlands. On behalf of Kiobel and the Ogoni widows, however, ERI had engaged in an innovative legal strategy under the U.S. Foreign Legal Assistance (FLA) statute.[376] In 2012, ERI had assisted other Niger Delta plaintiffs attempting to use the FLA to obtain discovery from Chevron for litigation against Chevron in Nigeria—in what is believed to be the first time a public interest organization attempted to use the FLA this way.[377] In 2014, Chevron settled the FLA case.[378] Between 2016 and 2018, ERI assisted a group called the Sonora River Basin Committees attempting to use the FLA to obtain discovery from the Southern

373. *See generally* Rechtbank's Gravenhage [District Court of The Hague], 30 januari 2013, NJF 2013, 99 m.nt. H. Wien, M. Nijenhuis en FM Bus (Akpan/Royal Dutch Shell PLC. en Shell Petroleum Development Company of Nigeria, Ltd.) (listing Samkalden as lawyer for the plaintiff); Gerechtshof Den Haag [Court of Appeal of The Hague], 29 januari 2021, RAV 2021, 38 m.nt. JM van der Klooster, MY Bonneur en SJ Schaafsma (Vereniging Milieudefensie en Akpan/Royal Dutch Shell PLC en Shell Petroleum Development Company of Nigeria Ltd.) (listing Samkalden as lawyer for the plaintiff); Gerechtshof Den Haag [Court of Appeal of The Hague], 29 januari 2021, NJF 2021, 77 m.nt. J.M. van der Klooster, M.Y. Bonneur en S.J. Schaafsma (Oguru, Efanga & Vereniging Milieudefensie/Shell Petroleum N.V.) (listing Samkalden as lawyer for the plaintiff); Gerechtshof Den Haag [Court of Appeal of The Hague], 29 januari 2021, JA 2021, 63 m.nt. van Bartman S.M. Steef, en Groot de C. Cees (Dooh en Milieudefensie/Royal Dutch Shell PLC.) (listing Samkalden as lawyer for the plaintiff).

374. *Nigeria: Dutch Court Rejects Suit of 'Ogoni Nine' Widows Against Shell*, ALJAZEERA (Mar. 23, 2022), https://www.aljazeera.com/news/2022/3/23/dutch-court-rejects-suit-of-nigerian-widows-against-shell [https://perma.cc/35KJ-2QYZ]; Lucas Roorda, *supra* note 6.

375. Roorda, *supra* note 6.

376. 28 U.S.C. § 1782; *see also Foreign Legal Assistance*, EARTHRIGHTS INT'L, https://earthrights.org/litigation-and-legal-advocacy/legal-strategies/foreign-legal-assistance/ [https://perma.cc/UCX3-GPWE] (discussing ERI's FLA litigation).

377. Metsagharun v. Chevron Nigeria*: Chevron Illegally Flares Gas in Nigeria*, EARTHRIGHTS INT'L, https://earthrights.org/case/metsagharun-v-chevron-nigeria/ [https://perma.cc/CL2Y-PLWT] (last visited April 25, 2023). Ironically, Chevron lawyers from Gibson, Dunn & Crutcher had used the FLA statute beginning in January 2010 against plaintiffs' lawyers in the *Aguinda/Lago Agrio* litigation in 2009. See BARRETT, *supra* note 97, at 176–78.

378. *Id*.

Copper Corporation in relation to a massive copper sulfate spill in Mexico.[379] After Esther Kiobel and Charles Wiwa lost their ATS case in 2013, Kiobel sued the law firm Cravath, Swaine & Moore, LLP, which had represented Royal Dutch/Shell in the U.S. proceedings, for discovery that would aid the litigation Kiobel was bringing against Shell in the Netherlands.[380] The FLA allows litigants to obtain information from individuals or companies in the United States *for use in foreign litigation*.[381]

The presence of repeat players exists beyond CCR and ERI. In 1996, the Burmese political dissident Ka Hsaw Wa and U.S. environmental justice lawyers Katie Redford and Tyler Giannini, who had co-founded ERI in 1995, assisted plaintiffs from Burma/Myanmar to file *Doe v. Unocal* in California, alleging Unocal's complicity in the Myanmar military's forced labor, rape, and torture of locals in securing Unocal's Yadana Gas Pipeline.[382] The plaintiffs chose to litigate in the United States because of the closed nature of the Myanmar legal and political system.[383] *Doe v. Unocal* survived the defendants' motion to dismiss and became the model for transnational ATS litigation against

379. *Salcido-Romo v. Southern Copper Corp*, EARTHRIGHTS INT'L, https://earthrights.org/case/salcido-romo-v-southern-copper-corp/ [https://perma.cc/QP8V-7PAY].

380. *Kiobel v. Cravath, Swaine & Moore, LLP*, EARTHRIGHTS INT'L, https://earthrights.org/case/kiobel-v-cravath-swaine-moore-llp/[https://perma.cc/68TU-92FQ].

381. *See* Maryum Jordan, *Utilizing Foreign Legal Assistance Actions to Promote Corporate Accountability for Human-Rights Abuses*, 132 YALE L.J. F. 844, 856 (2022) ("The law 'is the product of congressional efforts, over the span of nearly 150 years, to provide federal-court assistance in gathering evidence for use in foreign tribunals.'").

382. *See* Katie Redford & Beth Stephens, *The Story of* Doe v. Unocal*: Justice Delayed but Not Denied*, *in* HUMAN RIGHTS ADVOCACY STORIES 433, 441–42 (Dina Hurwitz & Margaret L. Satterthwaite eds., 2009) (discussing the founding of EarthRights International); *id.* at 449–51 (discussing ERI's filing of *Doe v. Unocal* with the assistance of CCR, Judith Brown Chomsky, and Paul Hoffman); Doe I v. Unocal Corp., 395 F.3d 932, 942–43 (9th Cir. 2002) (describing how "four villagers from the Tenasserim region, the Federation of Trade Unions of Burma . . . , and the National Coalition Government of the Union of Burma . . . brought an action against Unocal and the Project," followed by "fourteen other villagers from the Tenasserim region [bringing] another action against Unocal, Total, Myanmar Oil, the Myanmar Military, Unocal President Imle and Unocal CEO Beach"). On Burma/Myanmar naming conventions, see Redford & Stephens, *supra*, at n. 2.

383. *See* Holzmeyer, *supra* note 98, at 285 (describing the difficulties of litigation in Burma).

multinational enterprises.[384] The *Unocal* plaintiffs' legal representation included Christobal Bonifaz and Kohn, Swift & Graf—the same Bonifaz and the same Philadelphia law firm that initiated and financed the legal mobilization in *Aguinda*.[385]

That there are "repeat players" who appear in corporate accountability litigation is not unique to Alien Tort Statute litigation in the United States. In the Netherlands, Channa Samkalden of the Dutch law firm Prakkan D'Oliviera is an example of such a repeat player. In the *Milieudefensie* cases, the plaintiffs, proceeding in Dutch courts, set important precedents regarding class actions and the standing of the NGO itself to represent the public interest in environmental rights cases filed in the Netherlands.[386] The district court and the Court of Appeal allowed members of the Goi, Ikot Ada Udo, and Oruma communities in all three cases—*Dooh*, *Akpan*, and *Oguru and Efanga*—to proceed as a class because the interests of all of the plaintiffs were stemming from the same incident and injuries and thus sufficiently related.[387] Importantly, the courts found it unnecessary to address the representativeness of the class.[388] As for the NGO, Milieudefensie, the courts held that its standing is a question of Dutch law, not Nigerian law.[389] Under Dutch law—Article 3:305a of the Dutch Civil Code—Milieudefensie did not need to operate in the

384. *See id.* at 291 (describing the helpfulness of *Doe v. Unocal* in the tactical repertoires of activists and litigators); Drimmer & Lamoree, *supra* note 141, at 458 n.15 (acknowledging the rise of ATS litigation that "emerged co-extensively from *Doe v. Unocal*); Redford & Stephens, *supra* note 382, at 451, 456, 459.

385. *See Doe I*, 395 F.3d at 936 (listing the law firm and Christobal Bonifaz as part of the case); Aguinda v. Texaco Inc., 142 F.Supp.2d 534, 536 (S.D.N.Y 2001) (naming Christobal Bonifaz as an attorney, and Kohn, Swift & Graf as a law firm involved in the case); BARRETT, *supra* note 97, 39–53, 70–77, 135–37 (discussing the roles of Bonifaz and of Kohn, Swift & Graf in the *Aguinda*/*Lago Agrio* litigation and in the ATS litigation against Ferdinand Marcos, as well as the role of Judith Kimerling in inspiring the *Aguinda*/*Lago Agrio* litigation following her involvement in the Love Canal corporate accountability litigation against Occidental and the Natural Resources Defense Council's promotion of her book *Amazon Crude*).

386. *See* Channa Samkalden, *supra* note 194, at 214–19 (explaining how the *Milieudefensie* court allowed Milieudefensie to represent the public interest of the people and how eventually the laws came to reflect the court's decision).

387. *See id.* at 202 n.2, 216 (establishing that *Milieudefensie* is actually a combination of three separate cases and explaining that the court allowed these to proceed as one).

388. *See id.* at 216 (describing how the case was allowed to move forward without the court explaining the representativeness of the class).

389. *See id.* at 215–16 (explaining the Court of Appeal holding in the *Milieudefensie* cases that Dutch procedural law rather than Nigerian substantive law controls the question of organizational standing).

physical area that gave rise to the case (i.e., Nigeria) in order to have an interest in the case sufficient for it to have standing as a plaintiff, as long as Millieudefensie's articles of association indicated a mission to advocate the specific interests of the plaintiff class.[390]

Notably, in 2020, the Netherlands amended Article 3:305a to allow organizations to sue for damages directly.[391] Previously, the organization could only pursue a declaratory judgment on behalf of a class, and the class would then rely on the declaratory judgment in a separate proceeding for damages. Channa Samkalden, who represented *Milieudefensie* plaintiffs as well as Esther Kiobel and the Ogoni widows, anticipates that the Dutch courts will see an increase in collective actions (class actions).[392]

As I have shown in this Section, the outcomes of Ogoni and other victim-plantiffs' transnational legal mobilization are generally much more positive that one would imagine if only considering Esther Kiobel's Alien Tort Statute litigation in the United States and her additional failure in the Netherlands. Among the human rights claimants, the Ogoni Nine heirs and widows, Ken Wiwa, and Charles Wiwa can claim victory in their African Commission proceedings.[393] Ken Wiwa, Owens Wiwa, Blessing Kpuinen, and their co-plaintiffs can also claim a victory in the $15.5 million settlement they negotiated with Shell as an outcome of the ATS litigation.[394] Among the environmental rights claimants, however, the results were even more positive. In Part IV, I discuss how the positive outcomes of the transnational legal mobilization of victim-plaintiffs from Ogoniland, the Niger Delta, and elsewhere transcend justiciability, procedural reforms, settlements, liability judgments, capacity building, and transnational networking. These other positive outcomes reflect the many streams of a transnational legal process of making international law from the bottom up.

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390. *See id.* at 217 ("Finally, the Court of Appeal also held that it was not required for Milieudefensie under Article 3:305a DCC to work or to be established in the respective area.").

391. *See id.* at 215 ("Under the new law this has changed, and damages may now be claimed on behalf of those people by the foundation or association acting in a representative capacity.").

392. *See id.* at 215 ("It is likely that as a consequence, the popularity of collective actions, as opposed to grouped claims, will increase.").

393. *See* discussion *supra* Section II.C.

394. *See* discussion *supra* Section III.C.

IV. BUSINESS AND HUMAN RIGHTS: INTERNATIONAL LAWMAKING FROM THE BOTTOM UP

> Transnational legal process . . . is nontraditional: it breaks down two traditional dichotomies that have historically dominated the study of international law: between domestic and international, public and private. Second, it is non statist: the actors in this process are not just, or even primarily, nation-states, but include nonstate actors as well.[395]

Much scholarship that focuses on the lawmaking effects of litigation primarily discusses judicial lawmaking.[396] Scholarship that focuses on the role of non-governmental organizations[397] and even law

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395. Harold Hongju Koh, *Trasnational Legal Process*, 75 NEB. L. REV. 181, 184 (1996). The idea of transnational legal process is rooted in the work of Harold Koh, whose experiences with "transnational public law litigation" as an attorney and through Yale Law School's Lowenstein Human Rights Clinic led him to assert a role for litigation in transnational legal process. *Id.* at 183, 194, 197 (discussing the Yale clinic); *see also* Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2398 (1991) (calling for a new model of the international legal process on the basis of observing and participating in transnational public law litigation); *see generally* Harold Hongju Koh, *The "Haiti Paradigm" in United States Human Rights Policy*, 103 YALE L.J. 2391, 2394–98 (1994) (discussing Koh and the Yale clinic's litigation on behalf of Haitian migrants).

396. *See generally* Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L.J. 487 (2005) (discussing how domestic courts and internationally set precedent interact with each other); Ernest A. Young, *Supranational Rulings as Judgments and Precedents*, 18 DUKE J. COMP. & INT'L L. 477 (2008) (analyzing the difference between how domestic courts treat arbitral awards (judgements) and international precedent); Marc Jacob, *Precedents: Lawmaking Through International Adjudication*, 12 GER. L.J. 1005 *passim* (2011) (explaining the role of judicial decisions in international adjudication); Ingo Venzke, *The Role of International Courts as Interpreters and Developers of the Law: Working out the Jurisgenerative Practice of Interpretation*, 34 LOY. L.A. INT'L & COMP. L. REV. 99 (2011) (describing how adjudication in International Courts is a form of lawmaking); Harlan Grant Cohen, *Theorizing Precedent in International Law*, *in* INTERPRETATION IN INTERNATIONAL LAW 268 (Andrea Bianchi, Daniel Peat & Matthew Windsor eds., 2015) (discussing how precedent is used in international law and the effects it has on jurisprudence).

397. *See generally* Filiz Kahraman, *A New Era for Labor Activism? Strategic Mobilization of Human Rights against Blacklisting*, 43 L. & SOC. INQUIRY 1279 (2018) (discussing how labor movements use human rights law); Lisa McIntosh Sundstrom, *Russian NGOs and the European Court of Human Rights: A Spectrum of Approaches to Litigation*, 36 HUM. RTS. Q. 844 (2014) (describing how Russian non-governmental organizations have different approaches to litigation); Freek van der Vet, *Seeking Life, Finding Justice: Russian NGO Litigation and Chechen Disappearances Before the European Court of Human Rights*, 13 HUM. RTS. REV.

school human rights clinics[398] has been a welcome addition to this field. Others have examined how the authors of *amicus curiae* briefs, such as academics and other experts, can serve as lawmakers.[399] But legal scholarship too often ignores the victim-turned-activist-plaintiffs,[400] who very well might be the sources of legal innovation or at least of shifting the discourse around business human rights norms. Even legal scholars who acknowledge bottom-up lawmaking sometimes focus on legal and technocratic elites.[401] In this Part, I argue that Ogoni and other Indigenous victim-turned-activist-plaintiffs who have engaged in transnational legal mobilization to hold corporations accountable for violation of human and environmental rights represent an instance of international lawmaking from the bottom up. More broadly, transnational legal process theorists, who recognize the role of non-state actors in generating international law and state compliance with

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303 (2012) (explaining how Russian non-governmental litigation help individuals by acting as intermediaries between the European Court of Human Rights and relatives of disappeared individuals in Chechnya); LOVEDAY HODSON, NGOS AND THE STRUGGLE FOR HUMAN RIGHTS IN EUROPE (2011); HEIDI NICHOLS HADDAD, THE HIDDEN HANDS OF JUSTICE: NGOS, HUMAN RIGHTS, AND INTERNATIONAL COURTS (2018) (analyzing "non-governmental organization participation at International and human rights courts"); Lisa Harms, *Claiming Religious Freedom at the European Court of Human Rights: Socio-Legal Field Effects on Legal Mobilization*, 46 L. & SOC. INQUIRY 1206 (2021) (describing how different religious groups approach international litigation and how they deal with judicial outcomes).

398. *See generally* Arturo J. Carrillo, *Bringing International Law Home: The Innovative Role of Human Rights Clinics in the Transnational Legal Process*, 35 COLUM. HUM. RTS. L. REV. 527 (2004) (describing the growing relationship between clinical legal education and international law); *see also* Deena R. Hurwitz, *Lawyering for Justice and the Inevitability of International Human Rights Clinics*, 28 YALE J. INT'L L. 505, (2003) (discussing the rise in human rights lawyering as a kind of clinical legal education and the reasons they benefit each other).

399. *See* Rachel Cichowski, *The European Court of Human Rights, Amicus Curiae, and Violence Against Women*, 50 L. & SOC'Y REV. 890, *passim* (2016) (discussing how amicus curiae effects laws regarding violence against women and using that to demonstrate that international courts and legal mobilization groups can help shape human rights law).

400. *But see*, *e.g.*, Ewell et al., *supra* note 14, at 1243–76 (setting out to "develop[] a fuller account of the main litigation aims that have fueled ATS suits and provid[e] an initial assessment of whether those aims were met").

401. *See, e.g.*, Koven Levit, *supra* note 109, at 395 ("Bottom-up lawmaking is a soft, unpredictably organic process that generates hard, legal results. Private parties, nongovernmental organizations (NGOs), and/or mid-level technocrats coalesce around shared, on-the-ground experiences and perceived self-interests, 'codifying' norms that at once reflect and condition group practices."); *id.* ("Over time, these informal rules embed, often unintentionally, in a more formal legal system and thereby become 'law.'").

international law, could benefit from paying increased attention to the role of litigation in transnational legal processes.

It has been roughly fourteen years since the adoption of the United Nations Guiding Principles on Business and Human Rights (UNGPs),[402] and eleven years since the UN Human Rights Council's "open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights" (OEIGWG) began the process of drafting such a treaty,[403] but none yet exists.[404] Nevertheless, the Human Rights Council's adoption of the UNGPs and the institutionalization of the OEIGWG led to efforts to collect data from corporate accountability litigation cases around the world to better inform the treaty-making process, particularly surrounding the Third Pillar of the UNGPs—Access to Remedy.[405] The third revised draft of the business and human rights treaty suggests that, as human and environmental rights activists observed the tangled web of jurisprudence that emerged from corporate accountability litigation, questions such as the applicability of international law to corporations ironically fueled the debate over an

402. U.N. Office of the High Commissioner, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, U.N. Doc HR/PUB/11/04 (2011), https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf [https://perma.cc/N95G-ECER].

403. *See* Olivier De Schutter, *Towards a New Treaty on Business and Human Rights*, 1 BUS. & HUM. RTS. J. 41, 45 (2016) ("On 26 June 2014 the Human Rights Council (HRC) adopted a resolution calling for the establishment of an open-ended intergovernmental working group (IGWG) 'to elaborate an international legally-binding instrument to regulate . . . transnational corporations and other business enterprises.").

404. *See BHR Treaty Process*, UN OFF. HIGH COMM'R, https://www.ohchr.org/en/business-and-human-rights/bhr-treaty-process (on file with the *Columbia Human Rights Law Review*).

405. *See, e.g.*, Gwynne Skinner et al., INT'L CORP. ACCOUNTABILITY ROUNDTABLE, THE THIRD PILLAR: ACCESS TO JUDICIAL REMEDIES FOR HUMAN RIGHTS VIOLATIONS BY TRANSNATIONAL BUSINESS 18–65 (2013), https://corporatejustice.org/wp-content/uploads/2021/04/the_third_pillar_-access_to_judicial_remedies_for_human_rights_violation.-1-2.pdf [https://perma.cc/UWA6-YBWT] (mapping the procedural and practical barriers in corporate accountability litigation); JENNIFER ZERK, UN OFF. HIGH COMM'R FOR HUM. RTS., CORPORATE LIABILITY FOR GROSS HUMAN RIGHTS ABUSES (2014), www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticeLawRemedies.pdf [https://perma.cc/4NUV-QSX3] (surveying the case law regarding procedural barriers to justice in corporate accountability litigation).

international treaty to hold corporations accountable for violations of labor and environmental rights.[406]

If nothing else, constant litigation failure inside the United States—and lengthy delays outside the United States—provides evidence of unreasonable and unnecessary procedural barriers to justice, gaps in domestic law, failure to implement international law, cumbersome class certification, lack of sufficient monetary and punitive damages to deter other corporations, and challenges in enforcing foreign judgments. On the other hand, corporate accountability litigation has engendered legislative backlash[407] and corporate countermobilization, namely, attempts to slow-walk the treaty-making process and to water down the substantive commitments and enforcement mechanisms,[408] as well as attempts at retribution against victim-plaintiffs and their advocates through Strategic Lawsuit Against Public Participation (SLAPP) litigation.[409]

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406. *See* George & Laplante, *supra* note 39, at 384–92 (summarizing the OEIGWG's early debates regarding access to remedy); Carlos Lopez & B. Shea, *Negotiating a Treaty on Business and Human Rights: A Review of the First Intergovernmental Session*, 1 BUS. & HUM. RTS. J. 111, 113–15 (2016) (summarizing the various substantive debates regarding the extent of human rights law in the treaty). For a broader discussion of treaty debates, see Radu Mares, *Regulating Transnational Corporations at the United Nations: The Negotiations of a Treaty on Business and Human Rights*, 26 INT'L J. HUM. RTS. 1522 (2022).

407. Legislative backlash against court judgments is possible. *See, e.g.*, Richard Meeran, *Tort Litigation against Multinational Corporations for Violation of Human Rights: An Overview of the Position Outside the United States* (2011) 3 CITY U. H.K. L. REV. 1, 29 (discussing legislation proposed in the aftermath of the *Connelly* litigation in the United Kingdom, seeking to overturn a ruling against the corporate defendant).

408. The treaty-drafting process takes place against the assumed backdrop of state consent and states as the primary enforcers of any legally binding instrument on business and human rights. *See*, *e.g.*, Duncan B. Hollis, *Why State Consent Still Matters: Non-State Actors, Treaties, and the Changing Sources of International Law*, 23 BERKELEY J. INT'L L. 137, 140 (2005) (analyzing "whether the role non-state actors play in making, applying, and interpreting treaties has changed who is truly authorized to form treaties," and concluding that "although non-state actors have a proven capacity to make treaties and participate in their application and implementation, the treaty paradigm generally continues to be pre-conditioned on the presence of state consent").

409. *See generally*, George & Laplante, *supra* note 39 (arguing that a business and human rights treaty's should prioritize addressing remedies); Stephens, *Making Remedies Work*, *supra* note 28, at 408 (setting out a framework regarding access to remedy issues that any future business and human rights treaty must address).

This Article thus stands as an important contribution to debates on litigating for social change and on transnational legal process theory.

A. Activist Plaintiff Litigants as Norm Entrepreneurs

Martha Finnemore and Kathryn Sikkink's "norm lifecycle" model[410] offers an explanation for how the vast majority of states in the international system come to adopt a norm. Individuals ("norm entrepreneurs") are able to use platforms such as transnational non-governmental organizations (NGOs) or intergovernmental organizations (IGOs) to convince politically significant states, NGOs, or IGOs ("norm leaders") to adopt a norm possibly through adoption of an international treaty. As an example, Finnemore and Sikkink describe how Swiss humanitarian Henri Dunant in the 1860s used his platform to argue for neutrality and protection on the field of battle for wounded soldiers and medical personnel—a normative innovation that states codified in the 1864 Geneva Conventions.[411] States and other norm leaders' adoption of the norm creates ethical, social, and perhaps material pressures on other states ("norm followers") to do the same. This process continues until a critical mass of states has adopted the norm (a "tipping point"), after which the remaining states fall into line with the norm (a "norm cascade"). This is symbolized, for example, by widespread ratification of an international treaty or by the emergence of customary international law.[412]

Building from Finnemore and Sikkink's norm lifecycle concept, I propose that, in bottom-up judicialized norm diffusion processes, aggrieved and marginalized individuals and groups, as well as their cause lawyers and allies (*amici*), may serve as norm entrepreneurs; judges and courts may serve as platforms that validate and amplify these norms; and the compliance mechanisms driving diffusion processes are persuasion, acculturation, and even consensus through communicative action,[413] rather than coercion. Legal mobilization by

410. Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT'L ORG. 887, 896 (1998).

411. *Id.* at 896–97.

412. *Id.* at 895–900.

413. Although it is not my focus in the present Article, a fuller picture of norm generation processes would account for courtrooms as discursive spaces where activist litigants, cause lawyers, and their allies engage opponents—the state, religious groups and their allies, and defenders of the status quo—in a process that approaches consensus-making under close-to-Habermasian ideal conditions. *See, e.g.*, Thomas Risse, *Let's Argue! Communicative Action in World Politics*, 54 INT'L

activist litigants is central to the "transnational legal process" of business and human rights norm generation and norm diffusion.

I must reiterate that Ogoni transnational legal mobilization is part of a broader phenomenon.[414] Litigation activity by aggrieved individuals and groups and in the aggregate operates in conjunction with and parallel to non-litigation activity. In the case of the Ogoni, transnational legal mobilization to hold Royal Dutch/Shell accountable for its role in suppressing Ogoniland protests and in the torture and execution of Ogoni people grew out of a broader domestic social movement to become part of transnational social movements for Indigenous peoples' rights, environmental justice, and human rights.[415] The Ogoni thus contributed to and benefited from openings in these legal discourses or discursive opportunity structures. Alongside corporate accountability litigation more generally, Ogoni transnational legal mobilization is an underappreciated part of the

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ORG. 1. *passim* (2000) (discussing a theory of discourse in international politics based on Habermas' concept of "argumentative rationality," which requires interlocutors to inhabit a common lifeworld and to be open to changing their minds, and also requires a space largely absent of coercion based on power imbalances). In other words, the substance (scope, content, justiciability) of the human rights norms (judge-made laws and policies) that emerge from litigation processes are influenced by *opponents* of progressive development of law (i.e., corporations, status-quo defending states, and their allies) as well as by proponents of progressive development.

414. Stephens, *The Rise and Fall of the Alien Tort Statute*, *supra* note 10, at 46, 60. According to Stephens, "ATS corporate-defendant litigation is part of a global movement seeking means to hold corporations accountable for human rights violations and should be understood as both a product of and an impetus to that movement." *Id.* at 60. Within this framework, "[t]he legal theories and fact investigations developed by activists around the world helped US lawyers develop ATS claims," while "the attention and legal victories garnered by the US litigation fueled the international movement for corporate human rights accountability." *Id.*

415. For a brief account of the historical development of corporate social responsibility (CSR), see Douglas M. Branson, *Corporate Governance "Reform" and the New Corporate Social Responsibility*, 62 U. PITT. L. REV. 605, 608–17 (2001). Harwell Wells has demonstrated that CSR went through cycles of prominence in the twentieth century—1920s, 1950s, 1970s, 1990s. C.A. Harwell Wells, *The Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-first Century*, 51 U. KAN. L. REV. 77 (2002). What is interesting then, is that CSR has been so heavily critiqued as to be supplanted entirely by environmental, social, and governance (ESG) and by business and human rights, despite being the dominant framework in the twentieth century. On the concept of corporate social responsibility and its legalization, see JENNIFER A. ZERK, MULTINATIONALS AND CORPORATE SOCIAL RESPONSIBILITY: LIMITATIONS AND OPPORTUNITIES IN INTERNATIONAL LAW 29–32, 133–40, 145–97, 278–84 (2006); Ilias Bantekas, *Corporate Social Responsibility in International Law*, 2 B.U. INT'L L. J. 335 (2002).

broader phenomenon. It has played a causal role in the generation and diffusion of business and human rights norms.

Before Ken Saro-Wiwa formally founded Movement for the Survival of the Ogoni People (MOSOP) in 1990, a group of prominent Ogonis promulgated an Ogoni Bill of Rights.[416]

Key demands in the Ogoni Bill of Rights include (a) the political control of Ogoni affairs by Ogoni people, (b) the right to control and use of a fair proportion of Ogoni economic resources for Ogoni development, (c) adequate and direct representation, as a right in all Nigerian institutions, and (d) the right to protect the Ogoni environment and ecology from further degradation.[417]

In 1990, the same year of MOSOP's founding, the OAS Inter-American Commission on Human Rights created the Rapporteur on the Rights of Indigenous People.[418] In December 1990, the UN General Assembly declared that 1993 would be the International Year for the World's Indigenous People.[419] In 1992, the United Nations adopted Agenda 21,[420] the Rio Declaration on Environment and Development,[421] as well as the Framework Convention on Climate Change.[422] In 1993, the United Nations declared that 1995 would begin the International Decade of the World's Indigenous People.[423] And in 1994, the UN decided that it would recognize International Day of the

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416. *Ogoni Bill of Rights*, MOVEMENT FOR THE SURVIVAL OF THE OGONI PEOPLE (MOSOP) (Oct. 10, 2015), http://www.mosop.org/2015/10/10/ogoni-bill-of-rights/ [https://perma.cc/C5PZ-XHLJ]. *See* SARO-WIWA, *supra* note 55, 92–103 (discussing the October 2, 1990, Ogoni Bill of Rights declared by "Chiefs and elders" as well as the August 26, 1991, Addendum to the Ogoni Bill of Rights calling on support from the international community).

417. Tam-George, *supra* note 137, at 118.

418. *Rapporteurship on the Rights of Indigenous Peoples*, INTER-AM. COMM'N ON HUM. RTS., http://www.oas.org/en/iachr/indigenous/default.asp [https://perma.cc/YR45-PW9B].

419. G.A. Res. 45/164, Resolutions adopted on the reports of the Third Committee (Dec. 18, 1990).

420. Agenda 21, A/CONF.151/26/Rev.l (Vol. l), 9-479, https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf (on file with the *Columbia Human Rights Law Review*).

421. Rio Declaration on Environment and Development, A/CONF.151/26/Rev.l (Vol. l), 3-8.

422. UN Framework Convention on Climate Change (1992), http://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf [https://perma.cc/R43H-9BSL].

423. *See International Decades of the World's Indigenous People*, OHCHR, http://www.ohchr.org/EN/Issues/IPeoples/Pages/InternationalDecade.aspx [https://perma.cc/4FNR-389N].

World's Indigenous People on August 9th every year.[424] The first half of the 1990s, the period overlapping with Ogoni and other Indigenous groups' legal mobilizations against multinational corporations, thus perfectly coincided with the confluence of the global environmentalism and Indigenous peoples' movements.[425] In some ways, the rise of an Ogoni peoples movement from the 1970s[426] prefigures the Indigenous peoples and environmental justice frames that were to dominate the 1990s. Yet, Ogoni leaders were unsuccessful in their appeals to international NGOs for support.[427] But Saro-Wiwa and MOSOP

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424. G.A. Res. 49/214, International Decade of the World's Indigenous People (Feb. 17, 1995).

425. More generally, Indigenous peoples' mobilization benefited from the wave of democratization that swept through Latin America in the 1980s coinciding with the fall of communism and the decline of socialist agitation: democratization brought a decline in government repression of Indigenous populations, a decline in targeting and cooptation by rebel groups, and an opening up of space in civil society for Indigenous mobilization, filling a political vacuum created by the retreat of socialist groups. Donna Lee Van Cott, *Indigenous Peoples and Democracy: Issues for Policymakers*, *in* INDIGENOUS PEOPLES AND DEMOCRACY IN LATIN AMERICA 10 (1994).

426. OKONTA, *supra* note 2, at 119–88 (discussing the 1960s origins of Saro-Wiwa's involvement in a distinctly Ogoni peoples' movement, culminating in the founding of MOSOP in 1990 and the proclamation of the Ogoni Bill of Rights)

427. Although violent, deadly repression by the local and government authorities included the shooting death of eighty Ogoni people in Umuechem village in October 1990, Amnesty International only issued its first report on Ogoniland in May 1993, following attacks against and killing of Ogoni protestors in Biara and Nonwa by Nigerian military. *See Nigeria: Possible Extrajudicial Execution / Legal Concern: Agbarator Otu, Killed, and 11 Injured Including Karalolo Korgbara; One Other Detained Without Charge or Trial, Index Number: AFR 44/004/1993* (May 18, 1993), https://www.amnesty.org/en/documents/afr44/004/1993/en/ [https://perma.cc/6UD3-AM7C]. Before Rivers State and ultimately the Abacha regime intensified the political repression in Ogoniland that led to the arrest, prosecution, and execution of Saro-Wiwa, Kiobel, and the Ogoni Nine, only Greenpeace, Milieudefensie (Friends of the Earth Nigeria), and the Body Shop, a cosmetics corporation demonstrating an unusual commitment to corporate social responsibility, supported the Ogoni by attempting to amplify their grievances at the international level. But these organizations were not interested in the self-determination claims of the Ogoni. *See* OKONTA, *supra* note 2, at 10; (noting that "[t]he Body Shop and Greenpeace made no headway in their effort to help Ken Saro-Wiwa and MOSOP realize their goal of self-determination" and arguing that instead "they sought to impose a hegemonic 'one issue' agenda, appropriate in the North where concerns in the 1990s were largely focused on the environmental and ethical record of transnational corporations like Shell . . . "); *id.* at 261; *id.* at 265–69. It was after the arrest of the Ogoni Nine and others that Amnesty International and Human Rights Watch issued investigative reports based on staff visits to the country. *See generally The Ogoni Crisis: A Case-Study of Military Repression in Southeastern Nigeria*, HUM. RTS. WATCH (July 1995),

leadership continued to adapt the organization's strategies based on prior failures and its limited successes. The most important adjustment for MOSOP was to mute its self-determination claims in favor of the Indigenous peoples and environmental justice frames.[428]

Despite favorable rhetoric from Woodrow Wilson at the turn of the century, calling for the self-determination of peoples,[429] the League of Nations established by European Powers in 1919 concocted a "mandate system" to govern colonial territories and the former imperial holdings of Germany, Austria-Hungary, and the Ottoman Empire.[430] Colonial powers effectively extended the mandate system under the UN Charter,[431] and continued to view self-determination claims problematically in the 1940s and 1950s and into the 1960s.[432]

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https://www.hrw.org/legacy/reports/1995/Nigeria.htm [https://perma.cc/E4JG-WTZZ]; *Nigeria: The Ogoni Trials and Detentions*, AMNESTY INT'L (Sept. 1995), https://www.amnesty.org/en/documents/AFR44/020/1995/en/ [https://perma.cc/K65L-8BVQ]. Human Rights Watch continued to shine a spotlight on Ogoniland thereafter. *See generally*, *e.g.*, *The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities*, HUM. RTS. WATCH (Feb. 1999), https://www.hrw.org/reports/1999/nigeria/nigeria0199.pdf [https://perma.cc/4TFG-QU3K].

428. OKONTA, *supra* note 2, at 196–205 (describing the explicit nature of Saro-Wiwa and MOSOP's pivot to the Indigenous peoples and environmental justice frames).

429. Woodrow Wilson, Address to Congress (The Fourteen Points Speech) (Jan. 8, 1918), https://avalon.law.yale.edu/20th_century/wilson14.asp [https://perma.cc/EE8Y-L7LX] ("A free, open-minded, and absolutely impartial adjustment of all colonial claims, based upon a strict observance of the principle that in determining all such questions of sovereignty the interests of the populations concerned must have equal weight with the equitable government whose title is to be determined.")

430. *See generally* SIBA N'ZATIOULA GROVOGUI, SOVEREIGNS, QUASI SOVEREIGNS, AND AFRICANS: RACE AND SELF-DETERMINATION IN INTERNATIONAL LAW 111–42 (1996) (demonstrating the continuity between colonialism, the League of Nations Mandate system of the 1920s through 1940s, and the post-colonial international order that renders Africa states as only "quasi-sovereign"); ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW 115 (2005) (describing the centrality of the colonialist League of Nations mandate system in the origins of international law in the twentieth century).

431. U.N. Charter art. 73–77 (discussing the obligations of states parties with regard to non-self-governing territories and the establishment of an international trusteeship system to govern such territories).

432. Perhaps most emblematic of European colonialist views is the International Court of Justice judgment in the *South West Africa* case. *See* South West Africa, Second Phase, Judgment, 1966 I.C.J. Reports, at 6 (July 18, 1966) (rejecting, on the basis of standing, the applications of Ethiopia and Liberia seeking

This led the Soviet Union to propose, and Cambodia and some forty-three African and Asian states to draft, what would become the landmark UN General Assembly Resolution 1514 of 1960.[433]

Nevertheless, after the decolonization period of the 1960s, the dominant international law doctrine cemented colonial boundaries. International law retains a presumption in favor of the sanctity of territorial boundaries and a presumption against territorial secession, even in the text of Resolution 1514 itself.[434] Although they were not advocating secession, some segments of Ogoni society previously had advocated in 1958 for the creation of Rivers State—seeking to devolve autonomy from the regional to the local level. The failed 1958 effort was revived in 1966, and a young Ken Saro-Wiwa joined the committee tasked with drafting a memorandum to revive the Rivers State issue.[435] According to Ike Okonta, the Ogoni Bill of Rights of 1990 echoed many of the autonomy claims from the 1950s Rivers State movement.[436] And most Ogoni, though not Saro-Wiwa, had joined the Igbo-led Biafran (separatist) side of the Nigerian Civil War.[437]

Ogoni self-determination claims were problematic both domestically and internationally. The international legal principle of *uti possidetis juris* dictates that post-colonial and newly independent states—from Latin America in the nineteenth century to Southeast Asia and Africa in the 1950s and 1960s to post-Soviet states in the 1990s—would accept the administrative and international boundaries used by the former colonial or imperial ruler. That is, these newly independent states agreed in principle (though not in practice) to

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to declare unlawful and to terminate apartheid South Africa's mandate (colonial rule) over South West Africa (Namibia)).

433. Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A., 12th Sess. (Dec. 14, 1960), A/RES/1514(XV); *see* Yearbook of the United Nations 44 (1960) at 32 (discussing the process leading to the adoption of G.A. Res. 1514 (XV)).

434. *See* Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A., (14 Dec. 1960), A/RES/1514(XV), para. 7 ("All States shall observe faithfully and strictly the . . . respect for the sovereign rights of all peoples and their territorial integrity."); Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV) 25th Sess. (Oct. 24, 1970) ("Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.").

435. OKONTA, *supra* note 2, at 97.

436. *Id*. at 90–92.

437. *Id*. at 101–05.

respect the territorial integrity of the successor states.[438] The UN General Assembly affirmed the principle in a 1970 declaration.[439] Post-colonial African states explicitly affirmed the principle of *uti possidetis* in the founding charter of the Organization of African Unity (OAU).[440] African states re-affirmed the principle of *uti possidetis* when replacing the OAU with the African Union.[441] Shell tried to tap into these

438. *See* Giuseppe Nesi, *Uti Possidetis Doctrine*, MAX PLANCK ENCYCLOPEDIA OF INTERNATIONAL LAW (2008), https://opil-ouplaw-com.peacepalace.idm.oclc.org/view/10.1093/law:epil/9780199231690/law-9780199231690-e1125 [on file with the *Columbia Human Rights Law Review*]; Stephen R. Ratner, *Drawing a Better Line:* Uti Possidetis *and the Borders of New States*, 90 AMERICAN JOURNAL OF INTERNATIONAL LAW 590, 590 (1996); Malcolm N. Shaw, *The Heritage of States: The Principle of* Uti Possidetis Juris *Today*, 67 THE BRITISH YEAR BOOK OF INTERNATIONAL LAW 75, 125–28 (1997). For discussions of the *uti possidetis* principle, the territorial integrity principle, and the tension between the right to self-determination and the default norm against secession, see *id.* at 119–25; *see also* Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, 16 YALE J. INT'L L. (1991); ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 67–133 (1995); JOHN DUGARD, THE SECESSION OF STATES AND THEIR RECOGNITION IN THE WAKE OF KOSOVO (2013); Lea Brilmayer, *Secession and the Two Types of Territorial Claims*, 21 ILSA J. INT'L & COMP. L. 325 (2015); Milena Sterio, *Self-Determination and Secession Under International Law: The New Framework*, 21 ILSA J. INT'L & COMP. L. 293 (2015); Arnold N. Pronto, *Irredentist Secession in International Law*, 40 FLETCHER F. WORLD AFF. 103 (2016).

439. *See* Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the 25 U.N. GAOR, 25th Sess., U.N. Res. 26/25 (XXV) Supp. (No. 28) at 124 (1970) ("Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples . . . .").

440. *See* Charter of the Organization of African Unity, Preamble (1963) ("We, the Heads of African States and Governments . . . Determined to safeguard and consolidate the hard-won independence as well as the sovereignty and territorial integrity of our states."); art. II(1)(c) ("The Organization shall have the following purposes: . . . (c) To defend their sovereignty, their territorial integrity and independence."); art. III(3) ("The Member States, in pursuit of the purposes stated in Article II solemnly affirm and declare their adherence to the following principles: . . . Respect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence.").

441. *See* Constitutive Act of the African Union (2000), art. 3(b) ("The objectives of the Union shall be to: . . . (b) defend the sovereignty, territorial integrity and independence of its Member States.").

tensions in international law by branding MOSOP as a secessionist movement.[442]

Environmental justice and Indigenous peoples' frames, on the other hand, increasingly became salient. Rather than the 1960s claims for statehood or even the 1980s calls for political autonomy within the federalist structure of the Nigerian nation, the Ogoni accentuated calls for increased civil and political rights as an ethnic identity group and for environmental justice.[443] The clearest symbol of this pivot from the self-determination legal frame to the identity politics of the transnational Indigenous peoples' movement and to the politics of environmental justice came with a rally MOSOP organized for January 4, 1993—the first International Year for the World's Indigenous People, which MOSOP called Ogoni Peoples' Day. Three hundred thousand Ogoni—roughly three-fifths of the population—attended the rally.[444] Indigenous peoples' transnational legal mobilization in pursuit of corporate accountability and the Indigenous peoples' and environmental justice movements thus have been mutually constitutive, leading to new understandings of the justiciability of social, economic, and cultural rights, such as the right to a healthy environment, and to environmental law doctrines such as free prior informed consent.

B. Towards a Business and Human Rights Treaty

The emergence of the Indigenous peoples' and environmental justice movements in the 1970s led to soft law declarations in the 1990s. Nevertheless, no international treaty exists to bind states to enforce corporate social responsibility norms (much less human rights

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442. *See, e.g.*, OKONTA, *supra* note 2, at 267 ("In their public presentation of the Ogoni matter, however, they [Shell] were anxious to depict MOSOP as a terrorist organization waging a violent war against the Nigerian state and [against] legitimate business concerns in Ogoni."); *Id.* ("Attempt was also made to pit the Nigerian state against MOSOP by alleging that the organization's leaders were pursuing a secessionist agenda. Saro-Wiwa, company officials claimed, was cynically using Shell to internationalize a campaign that was fundamentally political.").

443. OKONTA, *supra* note 2, at 196–205; *see* SARO-WIWA, *supra* note 55, at 92–103 (presenting the Ogoni Bill of Rights, which epitomized the 1980s demand for political autonomy, and the Addendum to the Ogoni Bill of Rights, which called on the international community to intervene to prevent the genocide of an Indigenous people).

444. EARTHRIGHTS INT'L, *Case Study: Wiwa v. Shell*, YOUTUBE (Oct. 23, 2014) https://www.youtube.com/watch?v=VC9qBPJk_mI&t=2s [https://perma.cc/B6DH-PQW2].

norms) against corporations, or to bind corporations directly, to protect the environment and the environmental rights of Indigenous people and other impoverished and marginalized groups in the Global South. The international forums that exist with jurisdiction over corporations (i.e., investor-state dispute mechanisms) exist primarily to provide legal remedies to corporate plaintiffs—to enforce against the local populations and their government representatives for expropriation.

For at least the last two decades, civil society and business and human rights cause lawyers have been pondering what the future corporate accountability landscape might entail.[445] In 2003—a decade after groups such as the Center for Constitutional Rights and EarthRights International began filing Alien Tort Statute claims against the likes of Texaco, Unocal, and Royal Dutch Shell—a body of experts at the United Nations, the Sub-Commission on the Protection and Promotion of Human Rights, endorsed the *Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*,[446] and committed them to the Commission on Human Rights (the current Human Rights Council).[447] The *Human Rights Norms for Transnational*

445. *See generally* Steven Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility* 111 YALE L. J. 460 (2001) (proposing a regime for corporate human rights liability under international law); Philip Blumberg, *Asserting Human Rights against Multinational Corporations Under United States Law: Conceptual and Procedural Problems* 50 AM. J. COMP. L. SUPP. 493 (2002) (discussing how fundamental aspects of corporations law—the entity principle and the limited liability corporation—make transnational human rights litigation difficult, for example, through the difficulties of exercising personal jurisdiction over foreign subsidiaries, of proving various theories of parent company control or vicarious liability, through *forum non conveniens*, and through rules of joinder that destroy diversity); Surya Deva, *Human Rights Violations by Multinational Corporations and International Law: Where from Here?* (2003) 19 CONN. J. INT'L L. 4 (2003) (discussing the shortcomings of international corporate accountability mechanisms, proposing a UN and WTO international corporate accountability mechanism, and arguing that MNCs should be held accountable under international human rights law); Barbara A. Frey, *The Legal and Ethical Responsibilities of Transnational Corporations in the Protection of International Human Rights*, 6 MINN. J. GLOBAL TRADE 153 (1997) (assessing codes of conduct and observing that human rights responsibilities are arrayed under these codes along a continuum of proximity to the violation).

446. Economic and Social Council, Economic, Social and Cultural Rights: Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003), http://undocs.org/en/E/CN.4/Sub.2/2003/12/Rev.2 (on file with the *Columbia Human Rights Law Review*).

447. *Id.*

Corporations—effectively a draft treaty—included rights to non-discrimination, security of persons (physical integrity), labor rights, and children's rights.[448]

States eschewed the legalization of corporate social responsibility (CSR) norms through an international treaty, choosing instead to announce non-binding soft law principles and to encourage voluntarist corporate codes of conduct and other private enforcement mechanisms (e.g., "socially responsible investing"). One of the most acclaimed—and most heavily criticized—of the soft-law instruments is the UN's Guiding Principles on Business and Human Rights.[449] Endorsed by the UN Human Rights Council in 2011, the UN Guiding Principles was the outcome of the mandate of the UN Special Representative to the Secretary-General on business and human rights, John Ruggie, who was first appointed in 2005. Essentially, the 2003 *Draft Norms for TNCs* was set aside in favor of Ruggie's 2005 mandate.[450]

Ruggie conducted numerous studies throughout his six-year mandate (2005–2011), including a study of Ogoni and other Alien Tort Statute litigation,[451] which led Ruggie to turn his attention to "Access to Remedy" as a central "Pillar" of the UN Guiding Principles on

448. *Id.*

449. Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, HR/PUB/11/04, https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf.

450. *See* STÉFANIE KHOURY & DAVID WHYTE, CORPORATE HUMAN RIGHTS VIOLATIONS: GLOBAL PROSPECTS FOR LEGAL ACTION 34–40, 48–53 (2017) (criticizing Ruggie's role in the setting aside of the *Draft Norms for Transnational Corporations*).

451. *See* JOHN GERARD RUGGIE, JUST BUSINESS: MULTINATIONAL CORPORATIONS AND HUMAN RIGHTS 19 (2013) (discussing the research methodology that involved mining the Business and Human Rights Resource Centre database of allegations against corporations between February 2005 and December 2007); *id.* at 6–14 (summarizing "emblematic cases" of ATS litigation against Union Carbide for a chemical plant disaster in Bhopal, India and against Shell for aiding and abetting human rights violations in Nigeria); *id.* at 42–44 (discussing potential accountability under the ATS and under other mechanisms such as international criminal tribunals); *id.* at 117 (arguing that "[t]he text [of the UN Guiding Principles] elaborates on several key legal and practical barriers [to litigation] I raised in the Framework, drawing on extensive research and also collaborative work with human rights organizations" because "[t]he experience of advocates and my own research did identify several barriers that needed to be addressed"); *id.* at 192–201 (describing the role that ATS litigation and the *Kiobel* case specifically played in his thinking about the Guiding Principles and the business and human rights landscape).

Business and Human Rights and thereby of the emerging business and human rights regime.[452] Relatedly, state actors in Ecuador and South Africa drafted and submitted a resolution to the UN Human Rights Council to create a business and human rights treaty to impose obligations directly on corporations under human rights law.[453] Drafts of the "Legally Binding Instrument" reveal that one of the central purposes of the treaty is to ensure access to remedy,[454] which the treaty would do through specific provisions requiring states to extend subject-matter jurisdiction over corporate human rights abuses[455] and

452. *See* Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, U.N. Doc. HR/PUB/11/04 (2011) Principle 25 ("States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy."); RUGGIE, *supra* note 451, at 102–04 (discussing the Access to Remedy Pillar in the 2008 Framework document); *id*. at 116–19 (discussing operationalization of Access to Remedy in the 2011 UN Guiding Principles).

453. The BRICS states of Russia, India, China, and South Africa, and sixteen other African, Asian, and Latin American states of the Global South voted in favor of the resolution. The United States, the United Kingdom, Japan, South Korea, and ten European, states voted against. Brazil, Mexico, and eleven other Global South states abstained. UN Human Rights Council Resolution 26/9, Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, A/HRC/RES/26/9 (July 14, 2014).

454. Human Rights Council, Text of the Third Revised Draft Legally Binding Instrument With Textual Proposals Submitted by States During The Seventh and the Eighth Sessions of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises With Respect to Human Rights, art. 2, A/HRC/52/41/Add.1 (Jan. 23, 2023), https://documents.un.org/doc/undoc/gen/g23/008/93/pdf/g2300893.pdf?token=hbbuX0IqNqR84PITfc&fe=true [hereinafter Third Revised Draft Business and Human Rights Treaty]; Open-Ended Intergovernmental Working Group On Transnational Corporations And Other Business Enterprises With Respect To Human Rights, Updated Draft Legally Binding Instrument (Clean Version) To Regulate, In International Human Rights Law, The Activities Of Transnational Corporations And Other Business Enterprises, art. 2, (July 2023) https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/igwg-transcorp/session9/igwg-9th-updated-draft-lbi-clean.pdf [https://perma.cc/3N5Q-UKHF] [hereinafter Updated Draft Business and Human Rights Treaty] ("The purpose of this (Legally Binding Instrument) is . . . (d) To ensure access to . . . justice and effective, adequate and timely remedy for victims of human rights abuses in the context of business activities.").

455. Third Revised Draft Business and Human Rights Treaty, *supra* note 454, arts. 7.1, 9.1.

personal jurisdiction over corporations,[456] to remove barriers such as *forum non conveniens*,[457] and to provide reparations to victims of corporate human rights abuses.[458] UN officials, states, and civil society thus responded to the corporate impunity revealed by Ogoni and other victim-turned-activist-plaintiffs through their litigation by asserting that access to remedy was essential to the state duty to protect human rights and the corporate responsibility to respect human rights.

Ruggie had issued a framework document in 2008 that was the basis of the UN Guiding Principles on Business and Human Rights.[459] Access to remedy, including through court litigation and quasi-judicial mechanisms was one of the three pillars of Ruggie's "Protect, Respect, Remedy" framework. Citing more than forty cases filed in the United States against corporations under the Alien Tort Statute, as well as cases from the United Kingdom, Australia, and the European Court of Justice,[460] Ruggie called for strengthening judicial enforcement of human rights through increasing access for plaintiffs. He wrote:

> States should strengthen judicial capacity to hear complaints and enforce remedies against all corporations operating or based in their territory, while also protecting against frivolous claims. States should address obstacles to access to justice, including for foreign plaintiffs—especially where alleged abuses reach the level of widespread and systematic human rights violations.[461]

The following year, in 2009, Ken Wiwa, Owens Wiwa, and Blessing Kpuinen's $15.5 million settlement with Royal Dutch Shell

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456. Third Revised Draft Business and Human Rights Treaty, *supra* note 454, art. 8.1. Palestine even proposed universal jurisdiction over corporate international crimes. See Third Revised Draft Business and Human Rights Treaty, *supra* note 454, art. 6.7 bis.

457. Third Revised Draft Business and Human Rights Treaty, *supra* note 454, art. 7.3(d).

458. Third Revised Draft Business and Human Rights Treaty, *supra* note 454, art. 8.4.

459. "Protect, Respect and Remedy: A Framework for Business and Human Rights," Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, A/HRC/8/5 (Apr. 7, 2008), https://media.business-humanrights.org/media/documents/files/reports-and-materials/Ruggie-report-7-Apr-2008.pdf [https://perma.cc/9Z2F-2LVN].

460. *Id.* ¶ 90 nn.50–52.

461. *Id.* ¶ 91.

made international headlines.[462] It had taken the *Wiwa* plaintiffs an outlandish thirteen years to provoke a settlement by initiating litigation, which suggests that such plaintiffs lacked meaningful access to justice, a problem Ruggie had critiqued explicitly.[463] But Ruggie himself was opposed to a binding international treaty,[464] even though a treaty could have helped to operationalize the "Remedy" pillar of the framework by imposing an international legal obligation of states to grant their courts jurisdiction over corporate defendants for international human rights law violations.[465]

In 2013, however, the same year that the U.S. Supreme Court dismissed the *Kiobel* case, several states planted the seeds of

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462. *See, e.g.*, Ed Pilkington, *Shell Pays Out $15.5 Million Over Saro-Wiwa Killing*, GUARDIAN (June 8, 2009), https://www.theguardian.com/world/2009/jun/08/nigeria-usa [https://perma.cc/V3YJ-LGAC] (discussing the *Wiwa* settlement).

463. *See* "Protect, Respect and Remedy: a Framework for Business and Human Rights," Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, A/HRC/8/5 ¶ 9 (Apr. 7, 2008), https://media.business-humanrights.org/media/documents/files/reports-and-materials/Ruggie-report-7-Apr-2008.pdf [https://perma.cc/9Z2F-2LVN] ("[A]access to judicial redress is often problematic, and non-judicial means are limited in number, scope and effectiveness."); *id.* at ¶26 ("Currently, access to formal judicial systems is often most difficult where the need is greatest. And non-judicial mechanisms are seriously underdeveloped - from the company level up through national and international levels."); *id.* at ¶¶102–03 ("[C]onsiderable numbers of individuals whose human rights are impacted by corporations, lack access to any functioning mechanism that could provide remedy. . . . It . . . reflects intended and unintended limitations in the competence and coverage of existing mechanisms.").

464. *See* KHOURY & WHYTE, *supra* note 450, at 34–40, 48–53 (discussing and critiquing Ruggie's views on the treaty mechanism); *see also* RUGGIE, *supra* note 451, at 55–68 (presenting the recent history of failed treaty efforts as justification for his rejection of the treaty mechanism).

465. The 2003 *Draft Norms for TNCs* included a provision requiring corporations to remedy violations of the norms, including through domestic and international judicial processes. *See* Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights, art. 18, E/CN.4/Sub.2/2003/12/Rev.2 (August 26, 2003) available at https://digitallibrary.un.org/record/501576?v=pdf [[https://perma.cc/6JRZ-DNGJ] ("Transnational corporations and other business enterprises shall provide prompt, effective and adequate reparation to those persons, entities and communities that have been adversely affected by failures to comply with these Norms through, inter alia, reparations, restitution, compensation and rehabilitation for any damage done or property taken.") *Id.* ("In connection with determining damages, in regard to criminal sanctions, and in all other respects, these Norms shall be applied by national courts and/or international tribunals, pursuant to national and international law.").

such an instrument. Ecuador and South Africa proposed, and the UN Human Rights Council resolved, to commission a study to move toward a treaty to impose justiciable legal obligations on corporations—establishing the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, or OEIGWG.[466] More than eighty countries supported the proposal to create such a study.[467] Additionally, in 2013, the UN Office of the High Commissioner for Human Rights (OHCHR) "initiated a process aimed at helping States strengthen their implementation of this third pillar [Access to Remedy], particularly in cases of severe business-related human rights abuses."[468] In 2014, the OHCHR launched the Accountability and Remedy Project to continue these efforts.[469] The ARP produced a report in 2016 entitled "Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse," which included a series of recommendations that states can take to strengthen both public law accountability (e.g., individual and corporate criminal liability) and private law accountability (e.g., tort liability).[470]

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466. Carlos Lopez & Ben Shea, *Negotiating a Treaty on Business and Human Rights: A Review of the First Intergovernmental Session*, 1 BUS. & HUM. RTS. J. 111, 111 (2016) (discussing the important role played by Ecuador and South Africa in the early stages of the treaty negotiations). The negotiations of the legally binding instrument do not take place in the context of general optimism about international treaties—their legitimacy, their efficacy, etc. This does not mean, however, that adopting a legally binding treaty would be futile. What will matter ultimately is practice—how governments, corporations, aggrieved individuals and groups, civil society, lawyers, judges and other stakeholders act in the face of such an instrument. *See* GEORG NOLTE, TREATIES AND THEIR PRACTICE—SYMPTOMS OF THEIR RISE OR DECLINE 94–98 (Brill Nijhoff ed., 2018) (identifying factors such as proliferation of treaties, ratification, and jurisprudence that would indicate whether treaties are on the rise). And how they act will depend significantly not only on the content of the treaty but the process that leads to its creation.

467. *See* Human Rights Council, Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises With Respect To Human Rights, A/HRC/26/L.22/Rev.1, https://documents-dds-ny.un.org/doc/UNDOC/LTD/G14/064/48/PDF/G1406448.pdf?OpenElement (describing the OEIGWG's mandate as "to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises").

468. Human Rights Council, Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse, ¶ 8, A/HRC/32/19 (May 10, 2016).

469. *Id.* ¶ 10.

470. *Id.* ¶ 17.

It has been eleven years, within which the OEIGWG is proceeding with caution toward its possible fruition.[471] The treaty aims at providing or increasing access to remedy. The third revised draft[472] declares that its purpose is to provide access to remedy, particularly to marginalized groups such as women, children, and Indigenous people. This it achieves by (i) legally binding states to provide access to justice and effective remedy;[473] (ii) guaranteeing access to information and legal aid;[474] (iii) granting their courts competence to receive claims;[475] (iv) removing procedural obstacles to access such as *forum non conveniens*;[476] (v) enforcing foreign judgments;[477] (vi) requiring reparations;[478] (vii) passing a due diligence law;[479] (viii) extending jurisdiction over cases filed by domestic plaintiffs or against domestic corporate defendants;[480] and (ix) extending jurisdiction over cases connected to domestic corporations.[481]

Victories such as those that I describe in Section III.C have a direct connection to the civil society advocates pressing for a legally binding international treaty on business and human rights. The text of the draft treaty must be considered as at least partly the result of transnational legal mobilization. Consider, for example, proposals in

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471. In its first four years, the open-ended intergovernmental working group (OEIGWG) did not produce a draft treaty for forwarding to the General Assembly, but it did produce a framework document after various stakeholders held more than two hundred meetings on the subject. *See* Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect To Human Rights, Elements for the Draft Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights (Sept. 29, 2017) http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/LegallyBindingInstrumentTNCs_OBEs.pdf [https://perma.cc/5KD8-3KJU].

472. Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, Third Revised Draft Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises (Aug. 17, 2021) https://www.ohchr.org/sites/default/files/LBI3rdDRAFT.pdf [https://perma.cc/KQS3-K83Z].

473. *Id.* ¶ 4.2(c).

474. *Id.* ¶ 4.2(f).

475. *Id.* ¶ 7.1.

476. *Id.* ¶ 7.3(d).

477. *Id.* ¶ 7.6.

478. *Id.* ¶ 8.4.

479. *Id.* ¶ 8.6.

480. *Id.* ¶ 9.1.

481. *Id.* ¶ 9.4.

the draft business and human rights treaty to add two separate provisions discouraging the doctrine of *forum non conveniens*:

> 7.3. States Parties shall provide adequate and effective legal assistance to victims throughout the legal process, including by:
>
> . . .
>
> d. Removing legal obstacles, including the doctrine of *forum non conveniens*, to initiate proceedings in the courts of another State Party in appropriate cases of human rights abuses resulting from business activities of a transnational character.[482]
>
> 9.3. Courts vested with jurisdiction on the basis of Article 9.1 and 9.2 shall avoid imposing any legal obstacles, including the doctrine of *forum non conveniens*, to initiate proceedings in line with Article 7.5 of this (legally binding instrument).[483]

The focus on access to remedy in the draft business and human rights treaty demonstrates civil society's reaction to the frustrations of victim-plaintiffs, especially ATS litigants such as Esther Kiobel, and to the access possibilities that procedural victories such as in the *Milieudefensie* cases reveal. That is, whether the Ogoni and other victims of human rights and environmental rights violations prevail in court or spend decades without obtaining justice, their legal mobilization contributes to international lawmaking by providing data and context for states, civil society, and corporation to turn to as they negotiate the draft business and human rights treaty.

To be clear, it would be unreasonable to assume that states suddenly will decide to rein in the multinational corporations of the Global North that desire to exploit natural resources in the Global South while benefiting from the lax regulatory environments therein. Questions remain regarding the complementarity of the treaty with other mechanisms,[484] regional perspectives on the treaty, and access to

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482. *Id.* ¶ 7.3.

483. *Id.* ¶ 9.3.

484. The OEIGWG draft treaty need not be seen as the only option for a business and human rights treaty. At least one scholar has called for the International Labor Organization to undertake its own treaty-drafting process in order to protect workers. *See* James J. Brudney, *Hiding in Plain Sight: An ILO Convention on Labor Standards in Global Supply Chains*, 23 CHI. J. INT'L L. 272, 322–33 (2023) (arguing that a convention is appropriate and feasible).

justice for affected communities.[485] And nearly eleven years on from the creation of the OEIGWG, corporations and the states that they have captured have dug in their heels to delay, if not to thwart entirely, the adoption of a business and human rights treaty.

Yet, Ogoniland residents and Indigenous groups residing elsewhere should continue to utilize all available judicial and quasi-judicial mechanisms in pursuit of some modicum of environmental justice and continue to shift the discourse around these rights and around corporations' legal obligations related to these rights. What should be clear is that the last three decades of corporate accountability litigation has revealed where the barriers, gaps, and shortcomings are in terms of access to judicial remedy for corporate violations of human and environmental rights. And this is a critical part of the transnational legal process.

C. Due Diligence Legislation

Despite more than thirty years of Ogoni activism, the situation facing Niger Delta residents, in Rivers State and elsewhere, remains one of exploitation and devastation. On March 3, 2023, an explosion in the village of Emohua on Shell Petroleum Development Company's Rumuekpe-Nkpoku pipeline killed dozens.[486] Oil extraction in the Niger Delta—in Ogoniland and Rivers State—likely is not going away, which means that the environmental degradation and devastation that comes from oil-related disasters likely is not going away. Corporate accountability litigation in the extractive industries and beyond—of the type engaged in by the Ogoni and by others in Rivers State, and by Indigenous victims and activist plaintiffs—is here to stay.

The norm or right to access to a judicial remedy lost a significant backstop when the U.S. Supreme Court shuttered the Alien Tort Statute mechanism.[487] The Alien Tort Statute *was* a potential

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485. BUS. & HUM. RTS. RES. CTR., *Bridging the Gap: A Stronger Binding Treaty for All—Webinar Series*, YOUTUBE (July 13, 2023), https://youtu.be/t7kKIc4VQMs.

486. Tife Owolabi, *Blast at Shell's Nigeria Oil Pipeline Kills 12—Police*, REUTERS (Mar. 3, 2023), https://www.reuters.com/world/africa/nigeria-oil-pipeline-blast-kills-least-one-niger-delta-2023-03-03/ (on file with the *Columbia Human Rights Law Review*).

487. *But see* Roxanna Altholz, *Chronicle of a Death Foretold: The Future of US Human Rights Litigation Post-*Kiobel, 102 CALIF. L. REV. 1495, 1513–42 (2014) (describing numerous avenues for corporate accountability litigation in the United States).

compliance-generating mechanism.[488] For, as Michael Koebele had suggested prior to the Supreme Court's holdings in *Kiobel*, *Jesner v Arab Bank*, and *Nestle v Doe*, "[transnational corporations] liability under the ATS merely fills a gap which is not adequately filled by international law."[489]

Now, the U.S. federal courts are back to being the "courts of the company," reifying corporate veils that multinational firms use for the very purpose of evading jurisdiction.[490] The question is whether the United States will reopen its courthouse doors to victim-plaintiffs. States do not need to wait for a business and human rights treaty to implement the access to remedy and human rights due diligence that aggrieved individuals and groups, civil society organizations, John Ruggie and other norm entrepreneurs have called for. They may use domestic legislation in advance of any treaty obligation, and indeed, in the area of human rights due diligence,[491] some states are operating as norm leaders in already doing so.

The 2017 French Duty of Vigilance Law is one example of such entrepreneurial legislation. The Law establishes a duty of care and a due diligence obligation for French corporations with more than 5,000 employees (or more than 10,000 employed by its subsidiaries) to develop and to publish a vigilance plan to identify, to mitigate, and to prevent human rights abuses and environmental harms and to monitor implementation of the plan throughout its enterprise—including

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488. *See, e.g.*, Mirela V. Hristova, *The Alien Tort Statute: A Vehicle for Implementing the United Nations Guiding Principles for Business and Human Rights and Promoting Corporate Social Responsibility*, 47 U. S.F. L. REV. 89, 94–106 (2012) (surveying Circuit Court procedural jurisprudence to examine how certain circuits were more tolerant of ATS suits); SURYA DEVA, REGULATING CORPORATE HUMAN RIGHTS VIOLATIONS: HUMANIZING BUSINESS 66–74 (2012) (discussing Alien Tort Statute litigation and overlapping Torture Victims Protection Act litigation as possible regulatory mechanisms).

489. KOEBELE*, supra,* note 150*,* at 8.

490. *See id.* at 12 ("[A]lthough economically a TNC is conducting one business operating on a worldwide scale and strategy, legally however, a TNC consists of a group of separate corporations headed by one or more parent company(ies)."); *id.* ("This legal fragmentation may render it difficult for plaintiffs in ATS cases to hold the parent company liable which has the deeper pockets as opposed to the subsidiary in the country where the infringements of international law typically occurred."); *id.* at 279–304 (discussing the "Corporate Shield").

491. Mark B. Taylor, *Human Rights Due Diligence in Theory and Practice*, *in* RESEARCH HANDBOOK ON HUMAN RIGHTS AND BUSINESS, *supra* note 10, at 88, 90–92 (describing the conceptualization of human rights due diligence in the UN Guiding Principles on Business and Human Rights).

amongst its subsidiaries, subcontractors, and routine suppliers.[492] The Law permits NGOs to serve formal notice to a company that it must develop or improve upon its vigilance plan, and it permits harmed individuals to seek damages from corporations under French tort law for failing its duty of care to establish a vigilance plan that could have mitigated or prevented the harm.[493] Prospective assessments and more recent analyses have been mixed, however, as to whether the law would play a significant role in changing corporate behavior in a pro-human rights and pro-environmental rights direction or in spurring corporate accountability litigation.[494]

Mostly, cases brought under the Duty of Vigilance Law have failed or have encountered significant roadblocks. The Paris Civil Court of Justice dismissed the first challenge under the Law—filed on behalf of roughly 100,000 Ugandans alleging deprivation of their lands and their right to food by French parent company Total—when it ruled that the plaintiffs violated procedural rules by submitting "substantially different" claims in 2019.[495]

The Civil Court dismissed Chileans' claims against the French parent company Suez/Vigie—which alleged the Chilean subsidiary caused a health crisis by contaminating water supply in Osorno—

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492. *See e.g.*, Sandra Cossart et al., *The French Law on Duty of Care: A Historic Step towards Making Globalization Work for All*, 2 BUS. & HUM. RTS. J. 317, 320–21 (2017) (describing the Duty of Vigilance law); Dalia Palombo, *The Duty of Care of the Parent Company: A Comparison Between French Law, UK Precedents and the Swiss Proposals*, 4 BUS. & HUM. RTS. J. 265, 275–76 (2019) (same).

493. Rouas, *supra* note 329, at 174–78 (describing the Duty of Vigilance law).

494. *See id.* (noting that the vagueness in the legislation leaves ample room for judges to reject plaintiffs' claims or to hold corporations liable for a wide variety of harms); Palombo, *supra* note 492 at 279–84 (observing the absence of successful litigation and suggesting that the procedural hurdles and the burden of proof in French tort litigation might be too high for meaningful corporate accountability litigation to be forthcoming).

495. *See, e.g.*, Juliette Renaud, *Total in Court, Act 2: Uganda Communities Sue the French Oil Giant in France*, https://www.amisdelaterre.org/wp-content/uploads/2023/06/total-in-court-act-2-briefing-june-2023.pdf [https://perma.cc/6AJE-SHHA] (providing background to the case); *French Court Dismisses Case Against Totalenergies E. Africa Oil Project*, RFI (Feb. 28, 2023), https://www.rfi.fr/en/business-and-tech/20230228-french-court-dismisses-case-against-totalenergies-e-africa-oil-project [https://perma.cc/LF7M-GZ9S] (discussing the procedural dismissal); *Total Lawsuit (Re Failure to Respect French Duty of Vigilance Law in Operations in Uganda)*, BUS. & HUM. RTS. RES. CTR., https://www.business-humanrights.org/en/latest-news/total-lawsuit-re-failure-to-respect-french-duty-of-vigilance-law-in-operations-in-uganda/ [https://perma.cc/R7K7-JVR5] (explaining the numerous procedural setbacks in the Ugandans' case against Total).

because the plaintiffs did not know what corporate defendant to name based on the conglomerate's unsigned vigilance plan.[496]

The Court declined to grant precautionary measures against French company EDF to enjoin it from constructing a wind park project in Oaxaca, Mexico because the plaintiffs—an Indigenous group Unión Hidalgo that alleges the company failed to obtain the group's the free, prior, and informed consent to build the wind park on its territory—failed to refer to the correct EDF vigilance plan in its filing.[497]

At the time of this writing, other cases remain pending. In February 2023, Brazilian and French NGOs filed suit against BNP Paribas alleging that the bank failed to do its due diligence before agreeing to provide financing to corporations that are contributing to Amazon deforestation.[498] Additionally, eighty-one former employees in Turkey have filed claims against the Rocher Group, alleging gender discrimination and violations of freedom of association and other fundamental labor rights when its subsidiary terminated 130 mostly female employees after they joined a union in order to bargain for increased pay, improved working conditions, and an end to workplace gender discrimination.[499]

Depending on the ultimate outcome of these cases, it remains to be seen whether France will really be a norm leader, or if activists' and legislators' efforts to lead will be thwarted by corporations and judges. Meanwhile, a tiny cadre of European states appear to have joined France as norm leaders through human rights due diligence laws—the Netherlands (Child Labour Due Diligence Act, 2019); Germany (Corporate Due Diligence in Supply Chains Act, 2021); and

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496. *Suez Case (Chile): Court Dismisses Legal Action—The French Duty of Vigilance Law Gutted of its Purpose*, FIDH, https://www.fidh.org/en/issues/litigation/litigation-against-companies/suez-case-chile-court-dismisses-legal-action-the-french-duty-of [https://perma.cc/ETU3-7KGN].

497. *EDF In Mexico: Paris Court Misses Opportunity to Prevent Human Rights Violations: French Wind Park Project Continues to Endanger Indigenous Community*, ECCHR (Dec. 1, 2021), https://www.ecchr.eu/en/press-release/edf-mexico-wind-park-decision/ [https://perma.cc/C29Q-FL7P].

498. *See French Bank BNP Paribas Sued by NGOs over Amazon Deforestation Link* (Feb. 27, 2023), https://energy.economictimes.indiatimes.com/news/oil-and-gas/french-bank-bnp-paribas-sued-by-ngos-over-amazon-deforestation-link/98271967 [https://perma.cc/N8UB-A8N4].

499. *Yves Rocher Case in Turkey*, SHERPA, https://www.asso-sherpa.org/yves-rocher-case-turkey [https://perma.cc/E6JT-9KGT].

Norway (Transparency Act, 2021).[500] The U.S. state of California is another norm leader through its California Transparency in Supply Chains Act (2010).[501]

The flurry of legislative activity around due diligence has generated a voluminous academic commentary, not all of which is optimistic about due diligence as a boon for human rights protection. Justine Nolan and Nola Frishling, for example, argue: "the continued reliance on social auditing as a primary tool for conducting due diligence is not likely to lead to better outcomes for the rights of supply chains workers because social auditing is, in and of itself, an ineffective tool for achieving meaningful and consistent human rights improvements."[502] Daniela Chimisso dos Santos and Sara Seck worry: "HRDD [Human Rights Due Diligence] may become merely another checkbox process that is incorporated as a cost of doing business, with human rights violations as quantifiable collateral damage."[503] And Robert McCorquodale and Justine Nolan conclude: "[i]t is evident, that after 10 years of implementation of HRDD, its effectiveness in business practice remains limited."[504] Meanwhile, Jonathan Lipson observes that there are thorny litigation and remedies complexities that might arise from attempts to enforce due diligence frameworks.[505]

After the emergence of French, Dutch, German, and Norwegian human rights due diligence legislation, the European Union began moving toward a coordinated or harmonized approach, through the European Union Corporate Sustainability Due Diligence Directive (CSDDD),[506] the watered-down text of which was finally

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500. *See generally, e.g.*, McCorquodale, *supra* note 142, at 133–39 (providing examples of human rights due diligence legislation).

501. *See id.* at 137 (explaining the Act).

502. Justine Nolan & Nora Frishling, *Human Rights Due Diligence and the (Over) Reliance on Social Auditing in Supply Chains*, *in* RESEARCH HANDBOOK ON HUMAN RIGHTS AND BUSINESS, *supra* note 10, at 108, 109.

503. Daniela Chimisso dos Santos & Sara L. Seck, *Human Rights Due Diligence and Extractive Industries*, *in* RESEARCH HANDBOOK ON HUMAN RIGHTS AND BUSINESS, *supra* note 10, at 151, 167.

504. Robert McCorquodale & Justine Nolan, *The Effectiveness of Human Rights Due Diligence for Preventing Business Human Rights Abuses*, 68 NETH. INT'L L. REV. 455, 468 (2021).

505. *See* Jonathan C. Lipson, *Something Else: Specific Relief for Breach of Human Rights Terms in Supply Chain Agreements*, 68 AM. U. L. REV. 1751, 1761–73 (2019) (discussing why the doctrines of specific performance and injunctive relief will limit the available contract remedies in supply chain cases).

506. Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859,

approved by the European Council on March 15, 2024 and entered into force on July 25, 2024.[507] Similar to the French law, large EU corporations (more than €450 million in annual profit globally and more than one thousand employees) are obligated to develop and to publish a due diligence plan throughout their supply chain for identifying and mitigating or preventing human right abuses and environmental harms; unlike the French law, companies must create a complaints procedure.[508]

Although an early draft of the CSDDD suggested amending the recast Brussels I Regulation[509] to grant European courts jurisdiction to hear cases automatically that involve EU-domiciled corporations, even where the allegations concern conduct occurring outside the European Union,[510] it appears the final draft does not specify extraterritorial jurisdiction. It does instruct EU member states not to impose short statutes of limitation[511] and to grant standing to trade unions and NGOs to represent the interests of the individuals most directly harmed.[512] The United States Congress should, at a minimum, follow the Netherlands in adopting a due diligence or duty of care standard as well as procedural rules that grant more access to corporations'

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https://data.consilium.europa.eu/doc/document/ST-6145-2024-INIT/en/pdf [https://perma.cc/LYX2-DZPT].

507. *EU Due Diligence Directive: Member States Reach Political Agreement*, FIDH (Mar. 15, 2024), https://www.fidh.org/en/issues/business-human-rights-environment/business-and-human-rights/eu-due-diligence-directive-member-states-reach-political-agreement [https://perma.cc/XB7K-NEQR]; *Corporate Sustainability Due Diligence*, EUR. COMM'N, https://commission.europa.eu/business-economy-euro/doing-business-eu/sustainability-due-diligence-responsible-business/corporate-sustainability-due-diligence_en.

508. *EU Governments Back Human Rights and Environmental Due Diligence Law for Supply Chains*, WORLD ECONOMIC FORUM (Mar. 27, 2024), https://www.weforum.org/agenda/2024/03/eu-human-rights-environment-due-diligence-supply-chains/ [https://perma.cc/7E7Q-PW9S].

509. Council Regulation No 1215/2012 of 12 December 2012, On Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2012 O.J. (L 351) 1 (EU).

510. *See*, *e.g.*, Daniel Bertram, *Judicializing Environmental Governance? The Case of Transnational Corporate Accountability*, 22 GLOB. ENV'T POL. 117, 125–27 (2022) (discussing the draft language).

511. Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859, ¶ 22.2a(a), https://data.consilium.europa.eu/doc/document/ST-6145-2024-INIT/en/pdf [https://perma.cc/UB8A-4SHY].

512. *Id.* at ¶ 22.2a(d).

victims by asserting jurisdiction over U.S. corporations and their subsidiaries. More ideally, Congress could consider abandoning the *forum non conveniens* doctrine as called for in drafts of the business and human rights treaty.

CONCLUSION

The civil rights litigator Jules Lobel once wrote:

> [T]he prophetic vision of justice articulated by Amos in the Old Testament calls forth the image of a mighty, turbulent, cascading river. This justice is not merely the technical legal process employed to reach a decision, nor even the set of norms that might constitute a just society, but also the continual, turbulent process of struggle. To maintain its meaning, substantive justice must be linked to movement. And, if justice is the mighty stream of struggle against oppression, then losing efforts constitute some of the myriad rivulets that constantly feed that stream and inspire further struggle.[513]

Transnational human rights litigation by aggrieved Indigenous individuals and groups—a form of lawmaking from the bottom up—must remain available as a strategy for holding corporations accountable for the human and environmental rights harms that they cause.

Additionally, although critiques of transnational human rights litigation are valid and central to any reform efforts, a broader assessment of the outcomes of Ogoni legal mobilization is necessary and appropriate. Assessing Ogoni litigation only on the basis of settlements or money judgements that were enforced assumes that collecting money damages was the only goal of such litigations. Conversely, a broader assessment takes into account the wider array of goals of Ogoni victim-plaintiffs as well as unforeseen outcomes of litigating in numerous forums around the world for nearly thirty years.

Norm diffusion theory in international law and relations scholarship can be enriched by paying increased attention to the ways in which human rights and social justice activists—particularly those embedded in transnational advocacy networks and transnational

513. JULES LOBEL, SUCCESS WITHOUT VICTORY: LOST LEGAL BATTLES AND THE LONG ROAD TO JUSTICE IN AMERICA 9 (2004).

litigation networks—are frequently engaging in strategic litigation before domestic courts, calling on those courts not only to interpret existing international human rights treaty law, but generating a jurisprudence on human rights by invoking the individual rights protections in constitutional bills of rights and the private law of tort. Rather than furthering a narrative that attributes to the states and corporations of the Global North the generation of business and human rights norms, in this Article, I center Indigenous peoples' oppression, cognitive liberation, legal innovation, and determination as drivers of this normative and legal change. The Ogoni case study demonstrates the crucial role of aggrieved Indigenous groups in a bottom-up process of international lawmaking.