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When Oil Attacks: Litigation Options for Nigerian Plaintiffs in U.S. Federal Courts

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WHEN OIL ATTACKS: LITIGATION OPTIONS FOR NIGERIAN PLAINTIFFS IN U.S. FEDERAL COURTS

Lauren McCaskill[†]

TABLE OF CONTENTS

Introduction	536
I. Human Health Effects of Oil Spills	538
A. The Chemical Toxicity of Crude Oil.....	538
B. The Acute and Long-Term Health Effects of Exposure to Crude Oil.....	540
II. The Impact of Oil Spills on the United States	543
A. Exxon Valdez	543
B. Deepwater Horizon	545
III. The Impact of Oil Spills in the Developing World – Nigeria	546
A. History of the Nigerian Oil Industry	547
B. The Impact of Oil on Nigeria	549
1. Resource Control and the Cost of Doing Business...	549
2. Oil Spills	551
3. Gas Flaring	552
4. Oil and Violence in the Niger Delta	553
IV. Litigating a Solution	558
A. Domestic Suits against MNCs under Nigerian Law	558
1. The Nigerian Judicial System	558
2. Litigation Against Oil Companies in Nigerian Courts.....	562
B. U.S. Federal Tort Claims Under the Alien Tort Statute..	567
1. The Supreme Court and the Alien Tort Statute	569
2. Political and Procedural Obstacles to Plaintiffs’ Successful Use of the Alien Tort Statute	570
3. Environmental Degradation and Right to Health	

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Claims under the ATS	572
4. The Future of the ATS: The Corporate Liability Question.....	573
C. U.S. Federal Tort Claims under U.S. Tort Law	575
1. Success and Failure in Common Law	
Litigation Against an MNC: Texaco in Ecuador	577
a. Round 1 – New York	577
b. Round 2 – Ecuador.....	579
c. Round 3 – The Return to New York	581
2. Common Law Tort Claims Available to Nigerian Plaintiffs.....	584
a. Making the Prima Facie Case.....	584
b. Who Makes the Prima Facie Case?.....	586
c. Avoiding the Aguinda Quagmire	587
Conclusion.....	587

INTRODUCTION

When the Deepwater Horizon oil rig exploded in the Gulf of Mexico in April 2010, the world was horrified. That horror grew exponentially in the following weeks as the gallon count of spilled oil ballooned. That something so devastating threatened the Gulf Coast and the Mississippi River Delta, an area all too recently ravaged by Hurricane Katrina, ignited American indignation. Corporate irresponsibility, possibly even corporate malfeasance, threatened the economy and the ecology of the still-recovering region. The world demanded answers.

Thousands of miles away, residents of a different delta—Nigeria’s Niger Delta—have long since ceased to demand answers. For more than half a century, oil spills totaling twice that of Deepwater Horizon have become part of the status quo—the cost of doing business with multinational oil companies. The difference in the Niger Delta is that those who reap the benefits of that business, and those who bear its costs, are wholly different parties.

The region’s massive oil reserves are, in some respects, a blessing, forming the bedrock of the Nigerian economy. Those reserves have generated billions of dollars, and will continue to do so for the foreseeable future.¹ Those revenues have not trickled down, however. Oil wealth has been diverted for decades into the bank accounts of

¹ U.S. ENERGY INFO. ADMIN., COUNTRY ANALYSIS BRIEFS: NIGERIA 2 (August 2011), <http://www.eia.gov/cabs/Nigeria/pdf.pdf> [hereinafter EIA COUNTRY ANALYSIS BRIEF].

political elites who reside miles away from the oil pipelines.² For Delta residents, the region's vast oil reserves are a curse: black gold that has poisoned the earth, the water, the air, and the people.

The catastrophic damage to the region is by no means a new phenomenon. For fifty years, oil has spilled into the watershed—and the clean-up efforts by Shell, Chevron, and Exxon have been nominal at best. Disregard for damage to people and property that would be unthinkable in the United States is standard operating procedure in the Niger Delta. Because the Nigerian government has historically been both unwilling and unable to regulate the operations of its foreign partners, members of the local population have resorted to violence to voice their grievances.

The status quo cannot continue. Years of persistent cyclical conflict have entrenched opposing parties in their positions, and each side is responsible for enough of the blame for the region's degradation that neither side has been held liable. Reliance on the parties involved to negotiate a solution risks further environmental and human health damage to a region that should have to tolerate no more. Given these stark realities, this Note advocates for a solution that has not yet been tried: pursuit of common law tort claims by Nigerian citizens against American-owned oil companies in American courts. This Note aims to leverage increasing expectations of corporations as global citizens into legal action on behalf of victims of oil spills in the developing world. In so doing, this Note may thereby elucidate a potential, peaceful method of recovery for previously-marginalized populations.

Part I of this Note details the human health effects of oil spills, particularly the chemical toxicity of crude oil, and the dangerous illnesses that can result from severe, prolonged exposure. Part II presents the circumstances and impact of the two worst oil spills affecting the United States in recent history—Exxon Valdez and Deepwater Horizon—to directly contrast with Part III's discussion of the impact of oil spills in Nigeria. Part IV examines the three major litigation options for Nigerian plaintiffs: (1) domestic suits in Nigerian courts, (2) Alien Tort Claims in U.S. federal courts, and (3) common law tort claims in U.S. federal courts. Part IV advocates for the third option—the use of common law tort claims—as the road to recovery. It concludes by presenting the *prima facie* elements of a potential tort action by Nigerian plaintiffs against a U.S.-based multinational oil company.

² See *infra* Part III.B.1.

I. HUMAN HEALTH EFFECTS OF OIL SPILLS

Studies documenting the impact of exposure to crude oil are numerous and consistent in their findings: the toxic substances in crude oil and the waste products generated by oil extraction are hazardous to human health.³ The amount of attention paid to such findings varies by country, with the level of interest generally bearing an inverse relationship to how developed the country is.⁴ Whereas wealthy, developed nations like the United States have the resources and the institutional capacity to mitigate and manage severe ecological catastrophes like the Exxon Valdez and Deepwater Horizon oil spills, poorer, less-developed nations like Ecuador and Nigeria are much less capable. As a result, the human health impact of oil spills in these countries is understandably greater.

A. The Chemical Toxicity of Crude Oil

Crude oil, a naturally-occurring substance that is refined into commercially usable energy sources, is a complex, variable mixture of organic compounds.⁵ Though its composition varies across geographic sources, the primary organic compounds in crude oil are hydrocarbons, which chemically bond together and with other chemical molecules.⁶ The refining process and release of crude oil into the environment, where it can combine and interact with other naturally occurring substances, further modify crude oil's chemical composition.⁷

Some of the most dangerous organic compounds typically found in crude oil are benzene, toluene, and naphthalene.⁸ Benzene, a proven carcinogen which primarily enters the body through respiratory inhalation, is known to cause leukemia.⁹ As early as 1948, the Amer-

³ For thorough tables detailing the health studies conducted after oil spills, see Bernard D. Goldstein et al., *The Gulf Oil Spill*, 364 N. ENG. J. MED. 1334, 1336–38, 1340–43 (2011).

⁴ Compare Part II, with Part III.

⁵ U.S. DEP'T OF HEALTH & HUMAN SERVS., AGENCY FOR TOXIC SUBSTANCES & DISEASE REGISTRY, TOXICOLOGICAL PROFILE FOR TOTAL PETROLEUM HYDROCARBONS 1 (Sept. 1999), available at <http://www.atsdr.cdc.gov/toxprofiles/tp123.pdf> [hereinafter TOXICOLOGICAL PROFILE].

⁶ *Id.* at 18.

⁷ *Id.* at 19.

⁸ Gina M. Solomon & Sarah Janssen, *Health Effects of the Gulf Oil Spill*, 304 JAMA 1118, 1118 (2010)

⁹ TOXICOLOGICAL PROFILE, *supra* note 5, at 5. In 1987, the World Health Organization's International Agency for Research on Cancer classified benzene as a Group 1, or proven, carcinogen. See INT'L AGENCY FOR RESEARCH ON CANCER,

ican Petroleum Institute stated that “the only absolutely safe concentration of benzene is zero.”¹⁰ Both toluene and naphthalene are classified as “reasonably anticipated to cause cancer in humans” by the National Toxicology Program of the Department of Health and Human Services.¹¹ Respiratory exposure to toluene can cause fatigue, headache, and nausea, and long-term exposure can permanently damage the central nervous system.¹² Exposure to naphthalene can damage or destroy red blood cells, and cause hemolytic anemia.¹³ Benzene, toluene and naphthalene can all contaminate water and food sources, and can enter the body through ingestion of either.¹⁴

Crude oil also contains polycyclic aromatic hydrocarbons (PAHs).¹⁵ Also classified as “[r]easonably anticipated to be human carcinogens,” PAHs are released into the atmosphere in many ways, such as during the combustion of coal and wood, or through industrial emissions.¹⁶ Once released, PAH compounds can be inhaled or contaminate food and groundwater sources.¹⁷ Exposure to PAHs has been linked to bladder, skin, and lung cancers.¹⁸ Though the majority of toxic PAH exposure is via respiratory inhalation of toxins in the ambient air,¹⁹ contact with crude oil containing high concentrations of PAHs can lead to absorption through the skin.²⁰ Studies have shown

WORLD HEALTH ORG., IARC MONOGRAPHS ON THE EVALUATION OF CARCINOGENIC RISKS TO HUMANS, 4, 120 (Supp. 7, 1987), available at <http://monographs.iarc.fr/ENG/Monographs/suppl7/Suppl7.pdf>. Even low level exposure over a prolonged period can cause leukemia. R. Duarte-Davidson et al., *Benzene in the Environment: An Assessment of the Potential Risks to the Health of the Population*, 58 OCCUPATIONAL & ENVTL. MED. 2, 12 (2001).

¹⁰ AM. PETROLEUM INST., API TOXICOLOGICAL REVIEW: BENZENE 4 (1948), available at <http://www.hobsonbradley.com/articles/pdf/pdffile.pdf>.

¹¹ NAT’L TOXICOLOGY PROGRAM, PUB. HEALTH SERV., U.S. DEP’T OF HEALTH & HUMAN SERVS., REPORT ON CARCINOGENS, 276, 414 (12th ed. 2011), available at <http://ntp.niehs.nih.gov/ntp/roc/twelfth/roc12.pdf> [hereinafter REPORT ON CARCINOGENS].

¹² TOXICOLOGICAL PROFILE, *supra* note 5, at 4.

¹³ AGENCY FOR TOXIC SUBSTANCES AND DISEASE REGISTRY, TOXFAQS FOR NAPHTHALENE, 1-METHYLNAPHTHALENE, 2-METHYLNAPHTHALENE 1 (2005), available at <http://www.atsdr.cdc.gov/tfacts67.pdf>.

¹⁴ Duarte-Davidson, *supra* note 9, at 4; TOXICOLOGICAL PROFILE, *supra* note 5, at 3–4.

¹⁵ TOXICOLOGICAL PROFILE, *supra* note 5, at 6.

¹⁶ REPORT ON CARCINOGENS, *supra* note 11, at 353, 358; Carl-Elis Bostrom et al., *Cancer Risk Assessment, Indicators and Guidelines for Polycyclic Aromatic Hydrocarbons in the Ambient Air*, 110 ENVTL. HEALTH PERSP. 451, 451 (2002).

¹⁷ REPORT ON CARCINOGENS, *supra* note 11, at 358.

¹⁸ Bostrom, *supra* note 16, at 452.

¹⁹ *Id.* at 452–53.

²⁰ REPORT ON CARCINOGENS, *supra* note 11, at 358–59.

that skin contact with substances containing PAHs, like asphalt, oil, or tar, can result in topical skin infections, rashes, and skin tumors.²¹

B. The Acute and Long-Term Health Effects of Exposure to Crude Oil

The toxicity of crude oil varies according to its chemical composition and the duration and manner of an individual's exposure to the substance.²² Everyone is exposed to at least some of the compounds in crude oil in small doses, at gas stations and in parking garages, but symptoms generally do not present absent significant exposure.²³ Prolonged exposure to large amounts of environmental toxins has a greater adverse impact on human health.²⁴ For instance, the dizziness and fatigue caused by exposure to toluene will subside once exposure ends.²⁵ Continuous exposure can become toxic, however.²⁶ Assessment of the symptoms and impact of exposure to the toxins in crude oil is therefore best bifurcated into acute and long-term effects.

Acute symptoms related to short-term exposure to crude oil have been documented in a number of groups, particularly clean-up workers employed after spills.²⁷ In the past, workers and coastal residential populations impacted by oil spills reported and/or sought medical treatment for headaches, nausea, vomiting, dizziness, and respiratory distress.²⁸ These are the types of symptoms that would be expected in

²¹ Solomon & Janssen, *supra* note 8, at 1118; AGENCY FOR TOXIC SUBSTANCES & DISEASE REGISTRY, POLYCYCLIC AROMATIC HYDROCARBONS (PAHs) 1 (Sept. 1996), <http://www.atsdr.cdc.gov/tfacts69.pdf>.

²² TOXICOLOGICAL PROFILE, *supra* note 5, at 4.

²³ *Id.* at 3.

²⁴ Through the process of bioaccumulation, organic contaminants can built up in the environment, and can then be absorbed by, consumed by, or otherwise transferred to, living organisms. This absorption/consumption of contaminated substances "can result in the consumer being exposed to high dosages of toxic chemicals." D. Mackay & A. Fraser, *Bioaccumulation of Persistent Organic Chemicals: Mechanisms and Models*, 110 ENVTL. POLLUTION 375, 375 (2000).

²⁵ TOXICOLOGICAL PROFILE, *supra* note 5, at 4.

²⁶ Mackay & Fraser, *supra* note 24, at 375.

²⁷ MARGARET A. MCCOY & JUDITH A. SALERNO, ASSESSING THE EFFECTS OF THE GULF OF MEXICO OIL SPILL ON HUMAN HEALTH: A SUMMARY OF THE JUNE 2010 WORKSHOP 48-49 (2010), *available at* http://books.nap.edu/openbook.php?record_id=12949&page=R1. *See also* BRADLEY S. KING & JOHN D. GIBBINS, NAT'L INST. FOR OCCUP. SAFETY & HEALTH, HEALTH HAZARD EVALUATION OF DEEPWATER HORIZON RESPONSE WORKERS 2-3 (2011), *available at* <http://www.cdc.gov/niosh/hhe/reports/pdfs/2010-0115-0129-3138.pdf>.

²⁸ Solomon & Janssen, *supra* note 8, at 1118; Naveed Zafar Janjua et al., *Acute Health Effects of the Tasman Spirit Oil Spill on Residents of Karachi, Pakistan*, 6 BMC PUB. HEALTH 84, 84 (2006).

persons exposed for short periods to toxic chemicals like benzene, toluene, and naphthalene.²⁹ While unpleasant, none of these symptoms are critical, and even minor symptoms can be prevented with proper training and equipment.³⁰ Use of gloves, coveralls, and safety goggles, allowing workers to take rest breaks, and encouraging adequate hydration can minimize health problems during clean-up efforts.³¹ A study of individuals involved in the clean-up efforts following a tanker spill off the coast of Karachi, Pakistan also noted decreased lung function in workers.³² But the study, which included a follow-up one year after the spill, noted that this impairment was reversible so long as exposure to crude oil ended.³³

The symptoms associated with long-term exposure to crude oil are much more serious. Paradoxically, far fewer studies document these much more serious problems.³⁴ While clean-up workers experience acute effects that typically dissipate with time once they have left the contaminated area, populations unfortunate enough to experience oil spills close to their homes typically cannot leave, even if getting away from the toxins is all it would take to avoid serious health consequences.³⁵ Health problems become even more pronounced when oil spills affect residential populations in developing countries.³⁶

²⁹ See Solomon & Janssen, *supra* note 8, at 1118; Ronan A. Lyons, et al., *Acute Health Effects of the Sea Empress Oil Spill*, 53 J. EPIDEMIOLOGICAL COMMUNITY HEALTH 306, 306 (1999).

³⁰ Solomon & Janssen, *supra* note 8, at 1119; Jose Miguel Carrasco et al., *Association Between Health Information, Use of Protective Devices and Occurrence of Acute Health Problems in the Prestige Oil Spill Clean-Up in Asturias and Cantabria (Spain): A Cross-Sectional Study*, 6 BMC PUB. HEALTH 1, 2 (2006).

³¹ Bryan Walsh, *Assessing the Health Effects of the Oil Spill*, TIME, June 25, 2010, <http://www.time.com/time/health/article/0,8599,1999479,00.html>.

³² Sultan Ayoub Meo, et al., *Lung Function in Subjects Exposed to Crude Oil Spill into Sea Water*, 56 MARINE POLLUTION BULLETIN 88, 92 (2008). Karachi is the largest city in Pakistan, with an estimated population of 13.125 million as of 2009. CENT. INTELLIGENCE AGENCY, THE WORLD FACTBOOK: PAKISTAN, <https://www.cia.gov/library/publications/the-world-factbook/geos/pk.html> (last updated Sept. 20, 2012). The dense population relative to the location of the oil spill is pertinent in the context of the problem this note addresses.

³³ Meo et al., *supra* note 32, at 92.

³⁴ “While extensive data exists on the effects of oil spills on wildlife and ecosystems, the effects on human health from these exposures have not been well studied.” Cal Woodward, *Gulf Oil Spill Exposes Gaps in Public Health Knowledge*, 182 CANADIAN MED. ASSOC. J 1290, 1290–91 (2010) (quoting Dr. Aubrey Miller, Senior Medical Adviser to the National Institute of Environmental Health Sciences and the National Toxicology Program). MCCOY & SALERNO, *supra* note 26, at 52 (“[O]f the thousands of chemical structures in crude oil . . . only a very few of these structures have been tested individually for their toxic potential.”)

³⁵ Residents in the Ecuadorian Amazon have been gravely impacted by oil extraction in the region. Increasing rates of cancer in the region’s native populations

The overall damage done by oil spills in or near developed countries is not insignificant, but the relative magnitude of effect on a country like the United States or United Kingdom is significantly less than on a country like Ecuador or Nigeria. This relative difference is illustrated by what is known about the health impact of oil spills more generally. In the developed world, much of what is known about acute effects is based on reports from clinics or other health facilities that have treated symptomatic individuals.³⁷ The majority of the information available about the health impact of exposure to crude oil is therefore known about acute symptoms, because data collection predominately occurs in countries able to halt the detrimental effects at the acute stage.³⁸ In summer 2010, following the Gulf oil spill, the Institute of Medicine convened a conference in New Orleans to discuss the potential human health impact of such occurrences.³⁹ Attendees “expressed frustration that they know little about the health risks of a substance that courses so ubiquitously through daily life.”⁴⁰ Because long-term health effects associated with toxic crude oil exposure have not presented en masse in the United States, the opportunities for research and documentation have not presented either.

These realities have generated a gap in the available data regarding the human health consequences of oil spills. Minor symptoms are best understood, while little is known about potentially fatal long-term

have been documented since the mid-1980s. See James Brooke, *Pollution Of Water Tied to Oil In Ecuador*, N.Y. TIMES, Mar. 22, 1994, <http://www.nytimes.com/1994/03/22/science/pollution-of-water-tied-to-oil-in-ecuador.html>; Anna-Karin Hurtig & Miguel San Sebastian, *Geographical Differences in Cancer Incidence in the Amazon Basin of Ecuador in Relation to Residence Near Oil Fields*, 31 INT’L J. EPIDEMIOLOGY 1021, 1023 (2002); see *infra* Part IV.C.1 for discussion of the litigation related to this pollution.

³⁶ Meo et al., *supra* note 32, at 92; Hurtig & San Sebastian, *supra* note 35, at 1021–23.

³⁷ See Solomon & Janssen, *supra* note 8, at 1118; Lyons et al., *supra* note 29, at 309.

³⁸ See, e.g., Stuart Fox, *Gulf Spill Has Little Impact on Human Health*, MSNBC.COM (May 3, 2010), http://www.msnbc.msn.com/id/36921960/ns/health-more_health_news/. The author indicates that Americans need not be concerned about exposure to oil from the Gulf Spill (discussed *infra* Part II.B), and categorically states that “oil by itself cannot kill or seriously harm a human.” Fox, *supra*. However, other studies disprove this summary thesis, and instead indicate how much, we do not know about the health effects of human exposure to crude oil. A 2010 research review noted that although there have been thirty-eight major oil spills, only seven were followed by subsequent studies of the effects on human health. Further, those studies that were conducted looked primarily at acute and psychological symptoms. Francisco Aguilera et al., *Review on the Effects of Exposure to Spilled Oils on Human Health*, 30 J. APPLIED TOXICOLOGY 291, 298 (2010).

³⁹ See generally MCCOY & SALERNO, *supra* note 27.

⁴⁰ Woodward, *supra* note 34, at 1290.

exposure to crude oil.⁴¹ Though a number of studies of oil-affected populations have been conducted in developing states, data collectors face significant problems.⁴² Researchers must often make concerted efforts to seek out subjects for their studies. Reliance on reports from medical facilities is impractical because treatment is often unavailable for those affected by oil spills.⁴³ Though something of a “chicken and egg” problem, the majority of accurate public health data is typically collected from a network of providers,⁴⁴ but particularly in places where resources are limited, it is difficult to provide adequate medical services without understanding the scale of services needed.⁴⁵ Data regarding a particular localized health problem and treatment of that health problem are inextricably linked. Without sufficient data to demonstrate the severity of the problem, it is difficult to truly justify the need for treatment.⁴⁶ And without adequate treatment options, individuals have few reasons to self-report. These types of practical, societal problems further compound the public health impact of oil spills.

II. THE IMPACT OF OIL SPILLS ON THE UNITED STATES

A. Exxon Valdez

In 1989, the Exxon Valdez supertanker ran aground on a reef off the coast of Alaska, spilling 11 million gallons of crude oil into Prince

⁴¹ Walsh, *supra* note 31 (“As catastrophic as the Gulf oil spill has been for the region’s environment and residents’ livelihoods, experts say the impact of the disaster on human health and well-being has not even begun to be quantified.”).

⁴² Meo et al., *supra* note 32, at 92.

⁴³ *Id.* Authors noted practical difficulties in obtaining results for their study, including unwillingness of individuals to participate because they feared they would be forced to retire if poor health was disclosed to their employers. Participants had to be actively recruited, and assured that the study was actually for their individual benefit. See also Judith Kimerling, *Indigenous Peoples and the Oil Frontier in Amazonia: The Case of Ecuador, Chevrontexaco, and Aguinda v. Texaco*, 38 N.Y.U. J. OF INT’L L. & POL. 413, 466 (2006) (“These findings are likely just the tip of the iceberg because diagnostic services and health data are limited, especially in indigenous communities; exposures to toxic chemicals continue; and in cases of cancer, latency periods delay the onset of disease, and five to forty years can pass between the date of the harmful exposures and the first appearance of symptoms of the disease.”).

⁴⁴ See generally *Division of Preparedness & Emerging Infections*, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/ncpdcid/deiss/about.html> (last updated Apr. 1, 2011).

⁴⁵ See generally Junaid A. Razzak & Arthur L. Kellermann, *Emergency Medical Care in Developing Countries: Is it Worthwhile?*, 80 BULL. WORLD HEALTH ORG. 900 (2002).

⁴⁶ *Id.* at 904.

William Sound.⁴⁷ At the time, the spill was the largest in U.S. history, and its remote location hampered clean-up efforts and exacerbated the already-devastating magnitude of damage to the environment and the economy.⁴⁸ In the context of the problem that this note presents, however, the remote location of the Exxon Valdez spill was, in some ways, fortuitous. The spill is infamous for damaging the ecosystem, which has still not recovered more than two decades later.⁴⁹ But there have been few, if any, physical health consequences attributed to the spill.⁵⁰ No major studies on the physical health impact of the spill have been conducted.⁵¹

In addition to paying hundreds of millions of dollars in fines and restitution,⁵² Exxon contributed \$2.1 billion to clean-up efforts.⁵³ The Exxon Valdez Trustee Council and Public Advisory Committee—comprised of state and federal experts on marine transportation, commercial fishing, environmental conservation, and other matters—were formed.⁵⁴ Two decades later, the Trustee Council continues to oversee restoration efforts and manages the \$900 million of settlement

⁴⁷ Exxon Shipping Co. v. Baker, 554 U.S. 471, 478 (2008).

⁴⁸ *Emergency Management: Exxon Valdez*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/oem/content/learning/exxon.htm> (last updated Jan. 27, 2011).

⁴⁹ Doug Struck, *Twenty Years Later, Impacts of the Exxon Valdez Linger*, YALE ENV'T 360 (Mar. 24, 2009), <http://e360.yale.edu/content/feature.msp?id=2133>.

⁵⁰ A number of studies have been conducted surveying the negative psychological impacts of the spill, and have noted general patterns of depression in the local population. These mental health problems have been attributed in part to the economic consequences of the oil spill (e.g. stress over financial concerns due to the tremendous impact on the local fishing industry), and are considerably different than the types of physical and epidemiological problems noted in other spills. See, e.g., Lawrence A. Palkinkas, et al., *Community Patterns of Psychiatric Disorders After the Exxon Valdez Oil Spill*, 150 AM. J. PSYCHIATRY 1517, 1517 (1993); see also Goldstein et al., *supra* note 3, at 1340–43.

⁵¹ Recently, though, in the wake of the Deepwater Horizon disaster, individuals involved in the Exxon Valdez clean-up have begun to come forward with health complaints. Drew Griffin, *Critics Call Exxon Valdez Clean-up A Warning for Gulf Workers*, CNN NEWS, (July 8, 2010, 10:33 AM), <http://www.cnn.com/2010/US/07/07/oil.spill.valdez.workers/index.html>.

⁵² “More than a hundred law firms were involved in over two hundred suits, involving more than thirty thousand claims. The total damage claims exceeded fifty billion dollars. Although some of the claims were settled or dismissed, more than ten thousand remained.” Daniel A. Farber, *Tort Law in the Era of Climate Change, Katrina and 9/11: Exploring Liability for Extraordinary Risks*, 43 VAL. U. L. REV. 1075, 1102 (2009).

⁵³ Exxon Shipping Co. v. Baker, 554 U.S. 471, 479 (2008).

⁵⁴ EXXON VALDEZ OIL SPILL TRUSTEE COUNCIL 2009 STATUS REPORT 7 (2009), *available at* [http://www.evostc.state.ak.us/Universal/Documents/Publications/20th%20Anniversary%20Report/2009%20Status%20Report%20\(Low-Res\).pdf](http://www.evostc.state.ak.us/Universal/Documents/Publications/20th%20Anniversary%20Report/2009%20Status%20Report%20(Low-Res).pdf).

funds allotted to repair the ecosystem.⁵⁵ At the height of the clean-up efforts, more than 11,000 people were participating, “ultimately becoming the largest private project in Alaska since construction of the Trans-Alaska Pipeline.”⁵⁶ Of course, the damage to the region’s ecosystem was tremendous, but short of undoing the spill itself, there is little more that could have been done in terms of disaster relief efforts.

B. Deepwater Horizon

The Exxon Valdez’s position as the worst oil spill in U.S. history was overtaken on April 20, 2010, when the British Petroleum (BP) offshore oil rig Deepwater Horizon exploded, killing eleven workers and opening an oil gusher a mile below sea level on the ocean floor.⁵⁷ Over the next eighty-six days, until the leak was capped on July 15, 205 million gallons of oil were released into the Gulf of Mexico.⁵⁸ Though just how much damage the BP spill will eventually cause is yet undetermined, what was undeniably remarkable was the scope and rapidity of the clean-up efforts.⁵⁹ By April 28, responders were ready to execute an in situ burn: corralling the oil with fire-proof booms and lighting it ablaze to burn off the petroleum before the oil becomes too dispersed.⁶⁰ Though this technique is not without its dangers, primarily via the inevitable release of toxins into the air,⁶¹ it is known to be an effective technique for ridding a contained area of oil in a very short period.⁶² In addition, before the end of May, BP established a

⁵⁵ *Id.* at 30–31.

⁵⁶ *Id.* at 5.

⁵⁷ Jonathan Weisman et al., *Spill Tops Valdez Disaster*, WALL ST. J., May 28, 2010, at A1.

⁵⁸ Campbell Robertson & Clifford Krauss, *Gulf Spill Is the Largest of Its Kind, Scientists Say*, N.Y. TIMES, Aug. 3, 2010, at A14; Jeremy Repanich, *The Deepwater Horizon Spill by the Numbers*, POPULAR MECHANICS, (Aug. 10, 2010, 12:39 PM),

<http://www.popularmechanics.com/science/energy/coal-oil-gas/bp-oil-spill-statistics>.

⁵⁹ See generally *Recovery Plan*, RESTORETHEGULF.GOV, <http://www.restorethegulf.gov/task-force/recovery-plan> (providing the US government’s official information on the response, assistance, health and safety, the environment and news) (last visited Oct. 24, 2011).

⁶⁰ *TIMELINE – Gulf of Mexico Oil Spill*, REUTERS (June 3, 2010, 9:10 AM), <http://www.reuters.com/article/2010/06/03/oil-spill-events-idUSN0322326220100603>.

NIR BARNEA, NAT’L OCEANIC & ATMOSPHERIC ASS’N, HEALTH AND SAFETY ASPECTS OF IN-SITU BURNING OF OIL 1 (last visited Aug. 24, 2012), <http://response.restoration.noaa.gov/sites/default/files/health-safety-1SB.pdf>

⁶¹ BARNEA, *supra* note 60, at 2–6.

⁶² *Id.* at 1.

tip hotline and email address for suggestions for clean-up methods.⁶³ It received close to 100,000 tips and emails and reportedly seriously looked into 700 of them.⁶⁴ As of August 2010, the National Institutes of Health had pledged \$10 million to fund research on potential human health effects, and BP had pledged \$500 million to fund research on the environmental and public health impact of the spill.⁶⁵ And as of October 2010, the number of response workers involved in the Gulf clean-up was more than 55,000.⁶⁶ Movie director/producer James Cameron offered BP the use of his private submarines,⁶⁷ and actor Kevin Costner offered the centrifugal oil separator technology he began inventing fifteen years ago after starring in the film *Waterworld*.⁶⁸ As was true for the Exxon Valdez spill, the efforts of the best and the brightest will never be able to completely undo the damage, but at least some of the harm has been mitigated, and massive clean-up efforts are ongoing.⁶⁹

III. THE IMPACT OF OIL SPILLS IN THE DEVELOPING WORLD – NIGERIA

In the developing world, oil spills garner far less attention than they do in the United States or Europe. Unfortunately, developing states have other equally critical crises occurring simultaneously.

⁶³ Matt Gutman & Jessica Hopper, *The BP Bounce: Got an Oil Spill Idea for BP? Don't Hold Your Breath*, ABC NEWS, (May 24, 2010), <http://abcnews.go.com/WN/bp-suggestion-box-overflows-inventions/story?id=10730071>.

⁶⁴ *Id.*

⁶⁵ Anita Slomski, *Experts Focus on Identifying, Mitigating Potential Health Effects of Gulf Oil Leak*, 304 JAMA 621, 624 (2010). In addition, “[m]ore than 300 staff from the Centers for Disease Control and Prevention (CDC) and the Agency for Toxic Substance and Disease Registry (ATSDR) are monitoring health threats from the oil spill in five Gulf states through the National Poison Data System.” *Id.*

⁶⁶ The National Institute for Occupational Safety and Health compiled a voluntary roster of response workers. *Deepwater Horizon Response – NIOSH Voluntary Roster of Deepwater Horizon Response Workers*, NAT’L INST. FOR OCCUP. SAFETY & HEALTH, <http://www.cdc.gov/niosh/topics/oilspillresponse/workerroster.html> (last updated Dec. 13, 2011).

⁶⁷ James Quinn, *Gulf of Mexico Oil Spill: James Cameron Offers Private Submarines to Help BP Clean-Up*, THE TELEGRAPH (U.K.), (May 13, 2010, 4:01 PM), <http://www.telegraph.co.uk/finance/newsbysector/energy/oilandgas/7719941/Gulf-of-Mexico-oil-spill-James-Cameron-offers-private-submarines-to-help-BP-clean-up.html>.

⁶⁸ Louis Sahagun, *Costner to Gulf's Rescue?*, LOS ANGELES TIMES, May 21, 2010, at AA1.

⁶⁹ *See supra* note 59.

Spill-related problems tend to lie dormant because the most serious health damage done by oil spills only occurs when exposure is severe and protracted, and that damage takes time to manifest. Even the damage from a serious spill near a densely populated urban area like Karachi, Pakistan, may be mitigated over time,⁷⁰ so long as the spill is an isolated event and not part of a pattern.⁷¹ In a number of countries, however, severe oil spills have become regular occurrences, and the serious health consequences caused by exposure to crude oil are presenting en masse. One such country is Nigeria.

A. History of the Nigerian Oil Industry

The Niger Delta, located where the biggest river in West Africa meets the Atlantic Ocean, is one of the largest wetlands in the world,⁷² covering approximately 27,000 square miles, and eleven states.⁷³ The terrain is made up of swamps, estuaries, and dense mangrove forests, so much of the area is inaccessible by road,⁷⁴ and “75% of the area . . . is regularly flooded by water.”⁷⁵ Despite its inaccessibility, the greater region is home to more than 30 million people from forty ethnic groups.⁷⁶ Annual population growth is estimated at three percent—making the Delta one of the most densely populated areas in the world.⁷⁷ Oil was first discovered in the region in 1956, and commercial export began two years later.⁷⁸ Due to its considerable reserves (estimated at 37.2 million barrels as of January 2011) and high quality product (the chemical composition of Nigerian oil is preferable for gasoline because it requires less refining), Nigeria is now one of the

⁷⁰ See THE WORLD FACTBOOK: PAKISTAN, *supra* note 32.

⁷¹ See Meo et al., *supra* note 32, at 92.

⁷² Ibibia Lucky Worika, *Deprivation, Despoilation and Destitution: Whither Environment and Human Rights in Nigeria's Niger Delta?* 8 ILSA J. INT'L & COMP. L. 1, 4 (2001).

⁷³ John Ghazvinian, *The Curse of Oil*, VIRGINIA Q. REV. (2007), available at <http://www.vqronline.org/articles/2007/winter/ghazvinian-curse-of-oil/>; DUNCAN CLARKE, *CRUDE CONTINENT: THE STRUGGLE FOR AFRICA'S OIL PRIZE* 89 (2008).

⁷⁴ Paul S. Orogun, *Resource Control, Revenue Allocation, and Petroleum Politics in Nigeria: The Niger Delta Question*, 75 GEOJOURNAL 459, 477 (2010).

⁷⁵ FOSSIL FUELS, OIL COMPANIES, AND INDIGENOUS PEOPLES 57 (Tobias Halter et al. eds., 2007).

⁷⁶ Orogun, *supra* note 74, at 460.

⁷⁷ *Id.*

⁷⁸ AMNESTY INT'L, NIGERIA: PETROLEUM, POLLUTION AND POVERTY IN THE NIGER DELTA 11 (2009), available at <http://www.amnesty.org/en/library/asset/AFR44/017/2009/en/e2415061-da5c-44f8-a73c-a7a4766ee21d/afr440172009en.pdf> [hereinafter PETROLEUM, POLLUTION & POVERTY].

world's major oil exporters, and the largest in Africa.⁷⁹ In 1999, there were an estimated 150 oil fields and over 1400 oil wells in the Niger Delta; today, the number of oil fields has more than quadrupled, to 606.⁸⁰ The largest share of oil extracted from these wells, more than 40 percent, is exported to the United States.⁸¹ That amount also makes Nigeria the fifth-largest exporter of oil to the United States.⁸²

Nigeria's economy is based heavily on its oil, which generates over 95 percent of export revenue.⁸³ According to the Nigerian Constitution, all natural resources are property of the federal government, so those export revenues are payable to the state.⁸⁴ The Nigerian National Petroleum Corporation (NNPC) is the mechanism through which the government maintains control over the oil industry; the

⁷⁹ EIA COUNTRY ANALYSIS BRIEF, *supra* note 1, at 2. 'Dejo Olowu, *From Defiance to Engagement: An Evaluation of Shell's Approach to Conflict Resolution in the Niger Delta*, 10 AFR. J. CONFLICT RESOL. 75, 78 (2010).

⁸⁰ Ana Godson et al., *Environmental Risk Factors and Health Outcomes in Selected Communities of the Niger Delta Area, Nigeria*, 129 PERSP. PUB. HEALTH 183, 183-84 (2009) (citations omitted); *Development of Nigeria's Oil Industry*, NIGERIAN NAT'L PETROLEUM CORP., <http://www.nnpcgroup.com/NNPCBusiness/BusinessInformation/OilGasinNigeria/DevelopmentoftheIndustry.aspx> (last visited Aug. 20, 2012).

⁸¹ EIA COUNTRY ANALYSIS BRIEF, *supra* note 1, at 4.

⁸² U.S. ENERGY INFO. ADMIN., *Crude Oil and Total Petroleum Imports Top 15 Countries* (Nov. 29, 2011), http://www.eia.gov/pub/oil_gas/petroleum/data_publications/company_level_imports/current/import.html. The amount of oil the US imports from Nigeria significantly impacts the broader trade balance between the countries. In 2008, 44 percent of U.S. trade with the entire Sub-Saharan African region was with Nigeria. See VIVIAN C. JONES, CONG. RESEARCH SERV., RL31772, U.S. TRADE AND INVESTMENT RELATIONSHIP WITH SUB-SAHARAN AFRICA: THE AFRICAN GROWTH AND OPPORTUNITY ACT 6-7 (July 24, 2009), available at <http://fpc.state.gov/documents/organization/128835.pdf>.

⁸³ EIA COUNTRY ANALYSIS BRIEF, *supra* note 1, at 1.

⁸⁴ CONSTITUTION OF NIGERIA (1999), § 44 (3). In the 1960s, the amount of oil revenue remitted to the Delta states was 50 percent, but that amount fell to 1.5 percent by the 1990s. Cyril Obi, *Resource Control in Nigeria's Niger Delta*, 2 GLOBAL KNOWLEDGE 59, 60 (2007), available at <http://siu.no/eng/Front-Page/Global-knowledge/Issues/No-2-2007/Resource-Control-in-Nigeria-s-Niger-Delta>. In 1999, following the democratic election of President Olusegun Obasanjo, oil remittances increased to 13 percent. *Id.* However, this 13 percent was recently limited, as increasing amounts of oil are found offshore in the Gulf of Guinea, and representatives from other Nigerian states argued that the 13 percent should therefore only apply to revenues from onshore oil. AMNESTY INT'L, NIGERIA: TEN YEARS ON: INJUSTICE AND VIOLENCE HAUNT THE OIL DELTA 32 (2005). Since independence in 1960, Nigeria's leaders have predominately been from the Northern states, which have virtually no natural resources. The increasing wealth of Northern political elites has "engrained in the Niger Delta crude oil producing populations the perception that the 'Northerners' are essentially exploiting, repressing, and dispossessing them of their resources and revenues." Orogun, *supra* note 74, at 467.

majority of multinational corporations (MNCs) which operate in Nigeria do so through joint ventures with the NNPC.⁸⁵ The three primary MNCs operating in the Niger Delta are Shell, ExxonMobil, and Chevron. Of these, the latter two are headquartered in the United States: ExxonMobil in Irving, Texas, and Chevron in San Ramon, CA.⁸⁶

B. The Impact of Oil on Nigeria

1. *Resource Control and the Cost of Doing Business*

MNCs reap considerable benefits from doing business in countries where legal and regulatory infrastructures are underdeveloped. Foreign investment is attractive to host countries because it generates jobs and economic activity, and is likewise attractive to MNCs because host countries often “have no comprehensive system of corporate regulation or the systems are ineffective due to lack of resources to enforce existing laws”⁸⁷ Lower standards, both for workplace safety and environmental management, drive up corporate profit margins and therefore attract greater financial investment.⁸⁸ The practice of developing states making their economies more attractive to overseas investors by tolerating increasingly dangerous business practices

⁸⁵ *Joint Venture Activities, Nigerian National Petroleum Group*, NIGERIAN NAT'L PETROLEUM CORP., <http://www.nnpcgroup.com/NNPCBusiness/UpstreamVentures/JointVentureActivities.aspx> (last visited Oct. 24, 2011). For analysis of the NNPC, see CLARKE, *supra* note 73, at 103–14.

⁸⁶ *Business Headquarters*, EXXON MOBIL, http://www.exxonmobil.com/Corporate/contactus_contact_businessheadquarters.aspx (last visited Oct. 24, 2011); *Global Contacts*, CHEVRON, <http://www.chevron.com/contact/globalcontacts/> (last updated July 2011). Shell, formally called Royal Dutch Shell, has its headquarters in the Netherlands, *Contact Us*, SHELL, http://www.shell.com/home/content/footer/about_this_site/contact_us/ (last visited Oct. 24, 2011).

⁸⁷ E.E. Daschbach, *Where There's a Will, There's a Way: The Cause for a Cure and Remedial Prescriptions for Forum Non Conveniens as Applied in Latin American Plaintiffs' Actions Against U.S. Multinationals*, 13 LAW & BUS. REV. AM. 11, 24 (2007) (quoting Maxi Lyons, *A Case Study in Multinational Corporate Accountability: Ecuador's Indigenous Peoples Struggle for Redress*, 32 DENV. J. INT'L L. & POL'Y 701, 728 (2004)).

⁸⁸ Malcolm J. Rogge, *Towards Transnational Corporate Accountability in the Global Economy: Challenging the Doctrine of Forum Non Conveniens* in In re: Union Carbide, Alfaro, Sequihua, and Aguinda, 36 TEX. INT'L L.J. 299, 314–15 (2001).

by foreign investors has been termed the “global race to the bottom.”⁸⁹ The fear that foreign investment by oil companies is causing a race to the bottom in terms of environmental standards is a very realistic one in the Niger Delta.⁹⁰

Though Nigeria is one of the world’s major oil exporters, and that should ideally translate into significant government revenues used to benefit the broader population, historically, that has not been the case.⁹¹ Only twenty percent of the population owns sixty-five percent of the wealth—while seventy percent of the population hovers around or below the poverty line.⁹² The majority of Nigerian citizens live on less than two dollars per day.⁹³ According to the United Nations 2011 Human Development Index, a metric based on a number of development indicators including life expectancy, literacy rates, and individual purchasing power parity, Nigeria ranked 156 out of 187 countries.⁹⁴

⁸⁹ *See id.* Commentators have defined the “global race to the bottom” as “the progressive movement of capital and technology from countries with relatively high wages, taxation and regulation to countries with relatively lower levels.” Daschbach, *supra* note 87, at 24–25 (quoting Debora L. Spar & David B. Yoffie, *Multinational Enterprises and the Prospects for Justice*, 52 J. INT’L AFF. 563–64 (1999)). *See also* Brian R. Copeland & M. Scott Taylor, *Trade, Growth and the Environment*, 42 J. ECON. LITERATURE 7, 9 (2004) (discussing the “race to the bottom” concept as it pertains to environmental protection).

⁹⁰ *See infra* note 95–98 and accompanying text.

⁹¹ Economies tied to the export of a single natural resource are said to suffer from the “resource curse.” While logic would seem to indicate that having an abundance of a primary commodity like oil, ample evidence indicates that “primary commodity dependence is likely to be bad news for development.” Paul Collier & Anke Hoeffler, *Resource Rents, Governance, and Conflict*, 49 J. CONFLICT RESOL. 625, 627 (2005). Because state income is not derived from a tax base, there is less incentive for the government to manage the funds properly—and whomever can control the geographic region where the resources are extracted wields significant power. Additionally, reliance on a single primary commodity makes the entire economy prone to global price shocks and quantity shocks. Both of these problems increase the likelihood of conflict, “confuse citizens’ comprehension of government performance.” *Id.* *See also* Michael L. Ross, *The Political Economy of the Resource Curse*, 51 WORLD POL. 297, 301–07 (1999).

⁹² U.N. DEV. PROG., HUMAN DEVELOPMENT REPORT: NIGERIA 2008-2009: ACHIEVING GROWTH WITH EQUITY, 47 (2009), *available at* http://www.ng.undp.org/documents/NHDR2009/NHDR_MAIN-REPORT_2008-2009.pdf.

⁹³ Two-thirds of Nigerians live on less than one dollar per day. EBERE ONWUDIWE & CHLOE BERWIND-DART, U.S. INST. OF PEACE, BREAKING THE CYCLE OF ELECTORAL VIOLENCE IN NIGERIA 9 (2010), *available at* http://www.usip.org/files/resources/SR263-Breaking_the_Cycle_of_Electoral_Violence_in_Nigeria.pdf.

⁹⁴ *Human Development Index (HDI) - 2011 Rankings*, U.N. DEV. PROGRAM, <http://hdr.undp.org/en/statistics/> (last updated Nov. 2, 2011).

Due to federal ownership of resources and the NNPC's unitary, but inefficient, control of the oil industry within Nigeria, oil-related financial transactions have traditionally occurred with little or no input from the populations most affected by the extraction.⁹⁵ The major oil corporations operating in the Niger Delta have also taken care to build relationships with senior government bureaucrats and to place influential Nigerians on their boards of directors.⁹⁶ This way, the MNCs get oil, the federal government gets paid, and the transaction typically ends without due consideration of the day-to-day operations of the oil companies in the region.⁹⁷ As a result, the oil companies have developed "abysmal oil-field practices characterized by, among other things, hazardous seismographic operations, poor installation and maintenance of pipelines . . . and regular blowouts."⁹⁸

2. Oil Spills

The Deepwater Horizon spill puts the situation in Nigeria in perspective. Since extraction began in the 1950s, an estimated 546 million gallons of oil have spilled into the Niger Delta, or approximately 11 million gallons per year.⁹⁹ This figure is more than double the amount spilled into the Gulf of Mexico, and more than fifty times the

⁹⁵ Uwafiokun Idemudia & Uwem E. Ite, *Demystifying the Niger Delta Conflict: Towards an Integrated Explanation*, 33 REV. AFR. POL. ECON. 391, 394–95 (2006); see also INT'L CRISIS GROUP, NIGERIA'S FALTERING FEDERAL EXPERIMENT 4 (2006), available at <http://www.crisisgroup.org/~media/Files/africa/west-africa/nigeria/Nigerias%20Faltering%20Federal%20Experiment.pdf>. "The NNPC has not been a well-managed entity and its turbulent strategies, complex structures and continuous management and staff changes have had negative impacts over the years. In 1996 more than 3,000 employees, including over 600 directors and top officials, were sacked in a move touted as being 'in the public interest and to enhance efficiency.'" CLARKE, *supra* note 73, at 108.

⁹⁶ Ike Okonta, *The Disease of Elephants: Oil Rich 'Minority' Areas, Shell and International NGOs*, in GULLIVER'S TROUBLES: NIGERIA'S FOREIGN POLICY AFTER THE COLD WAR 116, 122 (Adekeye Adebajo & Abdul Raufu Mustapha eds., 2008).

⁹⁷ Chidi Anselm Odinkalu, *The Impact of Economic and Social Rights in Nigeria: An Assessment of the Legal Framework for Implementing Education and Health as Human Rights*, in COURTING SOCIAL JUSTICE 183, 200 (Varun Gauri & Daniel M. Brinks, eds., 2008).

⁹⁸ *Id.* See also FOSSIL FUELS, OIL COMPANIES, AND INDIGENOUS PEOPLES, *supra* note 75, at 69–74.

⁹⁹ Adam Nossiter, *Half a World from the Gulf, a Spill Scourge 5 Decades Old*, N.Y. TIMES, June 16, 2010, at A1. It is important to note, however, that the figures regarding the amount of oil spilled vary considerably based on the source. Official figures from the Nigerian government rely on self-reported spill data from the oil companies. Those figures are significantly lower than those calculated by international sources. See PETROLEUM, POLLUTION & POVERTY, *supra* note 78, at 15–16.

amount spilled into Prince William Sound.¹⁰⁰ A number of international environmental groups list the Niger Delta as “among the five most polluted regions in the world.”¹⁰¹ More than half of the region’s population has no access to clean water as a result.¹⁰²

Despite the massive wealth that the region’s oil generates for the country, the majority of the region’s residents eke out a subsistence living—dependent on the natural environment for agriculture and fishing.¹⁰³ This means that the impact of oil spills in the region has as great an impact on the economy as on the environment. When oil spills occur on farmland, the growing crops rarely survive, and because clean-up efforts are often minimal, the toxic substances in the oil¹⁰⁴ have a long-term detrimental impact on soil fertility.¹⁰⁵ Delta fishermen, once responsible for feeding much of the country’s interior, now cannot even feed their families since few can afford the boat engines needed to leave the Delta for fresher waters.¹⁰⁶ Oil therefore attacks Delta residents on all fronts, affecting their livelihoods, living conditions, and their lives.

3. Gas Flaring

Gas flaring, the practice of burning off natural gas from crude oil before it is refined,¹⁰⁷ is a round-the-clock process in the Niger Delta.

¹⁰⁰ Nossiter, *supra* note 99; see also Caroline Duffield, *Nigeria: ‘World Oil Pollution Capital’* BBC NEWS (June 15, 2010, 6:33 AM), <http://www.bbc.co.uk/news/10313107> (commenting on the divergent levels of attention paid to oil spills in Nigeria vs. the Gulf of Mexico).

¹⁰¹ Okonta, *supra* note 96, at 118.

¹⁰² John Vidal, *Nigeria’s Agony Dwarfs the Gulf Oil Spill. All We Do Is Ignore It*, THE GUARDIAN (U.K.), May 30, 2010, at 20. A large number of communities must “depend on untreated surface water and wells for drinking water, which leads to health problems from waterborne diseases.” PETROLEUM, POLLUTION & POVERTY, *supra* note 78, at 25. Studies of groundwater in the Delta region confirm that “without standard treatment is unfit for drinking and domestic uses.” I.M. Adenkunle, et al., *Assessment of Groundwater Quality in a Typical Rural Settlement in Southwest Nigeria*, 4 INT’L J. ENVTL. RES. & PUB. HEALTH 307, 316 (2007); see also I. O. Asia, *The Effects of Petroleum Exploration and Production Operations on the Heavy Metal Contents of Soil and Groundwater in Nigeria*, 2 INT’L J. PHYSICAL SCI. 271, 272 (2007).

¹⁰³ PETROLEUM, POLLUTION & POVERTY, *supra* note 78, at 14. The land in the region was previously arable. Olowu, *supra* note 78, at 80.

¹⁰⁴ See *supra* Part I.A.

¹⁰⁵ PETROLEUM, POLLUTION & POVERTY, *supra* note 78, at 30.

¹⁰⁶ Tom O’Neill, *Curse of the Black Gold: Hope and Betrayal on the Niger Delta*. NAT’L GEOGRAPHIC (Feb. 2007), available at <http://ngm.nationalgeographic.com/2007/02/nigerian-oil/oneill-text/1>.

¹⁰⁷ Brown E. Umukoro, *Gas Flaring, Environmental Corporate Responsibility and the Right to a Healthy Environment: The Case of the Niger Delta*, in LAW AND

The gas spouts from “controlled infernos” so large that the fires can be seen from space.¹⁰⁸ Many of the region’s gas flares are “near communities and farms and the burn continuously for several years at a time.”¹⁰⁹ Flaring has serious environmental consequences, as the emissions released are the greenhouse gases that contribute to global warming.¹¹⁰ It also has serious health consequences, as those same emissions contain known carcinogens like benzene and PAHs.¹¹¹ Airborne toxins are the most dangerous as they rapidly enter the bloodstream once inhaled and are then distributed throughout the body by natural physiological processes.¹¹² Further, the climate of the Niger Delta is rainy and tropical, so the chemicals released into the atmosphere return almost as quickly as acid rain.¹¹³ Flaring is, however, the cheapest way to get rid of waste gas, so the practice persists despite the serious risks it poses and the fact that the practice was outlawed by the Nigerian federal government in 1979.¹¹⁴

4. *Oil and Violence in the Niger Delta*

Blame for the extensive environmental and economic damage to the region can be divided among a wide variety of actors. The prima-

PETROLEUM INDUSTRY IN NIGERIA: CURRENT CHALLENGES 49, 50 (Festus Emiri & Gowon Deinduomo eds., 2009). Because industry is so limited in Nigeria, there is very little demand for gas. *Id.* at 50–51.

¹⁰⁸ HUMAN RIGHTS WATCH, CHOP FINE: THE HUMAN RIGHTS IMPACT OF LOCAL GOVERNMENT CORRUPTION AND MISMANAGEMENT IN RIVERS STATE, NIGERIA 20 (2007), *available at* [http://www.hrw.org/sites/default/files/reports/nigeria0107\[1\].pdf](http://www.hrw.org/sites/default/files/reports/nigeria0107[1].pdf) [hereinafter CHOP FINE]. See also Karin Brulliard, *In Oil-Rich Niger Delta, the Sun Never Sets*, WASH. POST, Aug. 30, 2009, A14; Ofeibea Quist-Arcot, *Gas Flaring Disrupts Life in Oil-Producing Niger Delta*, NAT’L PUB. RADIO (July 24, 2007), <http://www.npr.org/templates/story/story.php?storyId=12175714>.

¹⁰⁹ Marcus O. Edino, et al., *Perceptions and Attitudes Towards Gas Flaring in the Niger Delta, Nigeria*. 30 ENVIRONMENTALIST 67, 68 (2010).

¹¹⁰ *Id.* Nigeria burns more gas than any country except Russia. See Brulliard, *supra* note 108.

¹¹¹ *Id.*; see *supra* Part I.A; see also ANDREW SIMMS & HANNAH REID, AFRICA: UP IN SMOKE?, 20–21 (2005).

¹¹² TOXICOLOGICAL PROFILE, *supra* note 5, at 3.

¹¹³ Umukoro, *supra* note 107, at 53.

¹¹⁴ Edino, *supra* note 109, at 67; Umukoro, *supra* note 107, at 51. That law was enforced by a Nigerian Federal High Court in 2005, but a legal loophole allows the federal government to grant an oil company a certificate permitting continued flaring. *Id.* See also Ibibia Worika, *Energy Development and Utilization in Africa*, in THE LAW OF ENERGY FOR SUSTAINABLE DEVELOPMENT 324, 338 (Adrian J. Bradbrook et al., eds. 2005).

ry parties constantly at odds are the MNCs and the local population.¹¹⁵ The locals point to poor maintenance of the thousands of miles of pipeline, some of which were installed forty years ago and have long since rusted and begun to leak.¹¹⁶ When these poorly-maintained pipes do leak or burst, the locals allege that the MNC response is slow, and that in the past, it has taken weeks for leaks to be repaired.¹¹⁷ The MNCs point to vandalism by local militant groups, claiming that this purposeful intervening wrongdoing absolves the corporations of liability.¹¹⁸ Shell has publicly blamed 98 percent of spills from its pipelines on vandals,¹¹⁹ though how they allocate the fault with any precision is unclear. The Nigerian federal government has historically tended to side with the MNCs against its own people, because oil is so fundamentally important to the national economy.¹²⁰

What has emerged from this blame game is a cyclical crisis. Persistent environmental damage to the region has united the local population against the federal government and the MNCs. What began as peaceful political opposition was forcefully repressed by the Nigerian government, eliciting increasingly violent responses from the local communities.¹²¹ Violence aimed at the oil companies and the state

¹¹⁵ Though hundreds of ethnic and religious fault lines divide the Nigerian population, lack of development in the Niger Delta, political oppression, and the federal government's practice of aligning itself with the MNCs has in many ways had the effect of uniting the peoples of the Niger Delta against their perceived common enemy: the oil companies. See Richard Moncrieff, *Niger Delta Fumble*, WALL ST. J., June 10, 2009, <http://online.wsj.com/article/SB124457823935199275.html>.

¹¹⁶ Vidal, *supra* note 102.

¹¹⁷ Nossiter, *supra* note 99.

¹¹⁸ Vidal, *supra* note 102.

¹¹⁹ *Id.*

¹²⁰ Jędrzej George Frynas & Kamel Mellahi, *Political Risks as Firm-Specific (Dis)Advantages: Evidence on Transnational Oil Firms in Nigeria*, 45 THUNDERBIRD INT'L BUS. REV. 541, 550–51 (2003); Kenneth Omeje, *Petrobusiness and Security Threats in the Niger Delta, Nigeria*, 54 CURRENT SOC. 477, 479 (2006) (“[I]n a bid to protect its equity interests, the oil-dependent Nigerian state usually intervenes in favour of petrobusiness using sundry legislations, public policy and military reprisal in trying to resolve the conflict between the oil companies and their host communities.”).

¹²¹ The head of this peaceful resistance in the early 1990s was activist Ken Saro-Wiwa, leader of the Movement for the Survival of the Ogoni People (MOSOP), a mass-based minority rights organization. G.N.K Vukor-Quarshie, *Criminal Justice Administration in Nigeria: Saro-Wiwa in Review*, CRIM. L. F., Oct. 1997, at 87, 88–90. Wiwa primarily attempted to raise awareness about the environmental degradation done in the Delta by oil companies and about lack of local representation in resource-related decisions. *Id.* At that time the Nigerian state was governed by a military dictatorship that dealt harshly with opposition, particularly in an area as economically critical to the nation as the Delta. *Id.* Saro-Wiwa and a number of his fellow leaders were arrested, “tried” and executed in such rapid succession that their execu-

has not only increased the pollution in the region, but also decreased the willingness of the government and oil companies to negotiate with the locals-turned-militants.¹²² The violence also distracts from the underlying issues: the abject poverty and terrible health consequences that the average Delta resident must endure.

Nigerian federal regulatory mechanisms for the economy and environment are very weak due to a combination of lack of capacity and lack of political will. MNCs therefore effectively operate with impunity.¹²³ The oil revenues that the federal government remit to the state and local governments have largely been squandered due to a complete lack of accountability regarding how government revenues are spent once they are redistributed.¹²⁴ With their political and adminis-

tion was clearly planned from the moment they were apprehended. Such a reaction by the state to peaceful political protest was a catalyst for the more violent responses that followed, and the militarization of the groups opposing the presence of the MNCs. *Id.* The British government publicly condemned Saro-Wiwa's execution, and suspended Nigeria from the Commonwealth in 1995. *See* IKE OKONTA, *WHEN CITIZENS REVOLT: NIGERIAN ELITES, BIG OIL, AND THE OGONI STRUGGLE FOR SELF-DETERMINATION* 4 (2008). These events also eventually gave rise to litigation in the United States under the Alien Tort Claims Act, which is discussed in Part IV.B of this Note. Nigerian nationals brought suit against Shell in US federal court for the oil company's alleged involvement in the imprisonment and execution of Saro-Wiwa and his fellow leaders. *See* *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000). In 2009, Shell agreed to settle with the plaintiffs in *Wiwa* for \$15.5 million. Jad Mouawad, *Shell to Pay \$15.5 Million to Settle Nigerian Case*, N.Y. TIMES, June 9, 2009, at B1.

¹²² Because oil is so vital to the national economy, "[t]he government sees the activities of the protesting oil communities and the armed militias as acts of economic sabotage to the main source of national revenues and a challenge to its power in the Niger Delta." Cyril Obi, *Nigeria's Niger Delta: Understanding the Complex Drivers of Violent Oil-Related Conflict*, 34 AFR. DEV. 103, 107 (2009). This has raised the stakes dramatically in any confrontation between militants and the government, and has made the government more prone to adverse action rather than cooperation. *Id.*

¹²³ Odinkalu, *supra* note 97, at 200; *see* Rogge, *supra* note 88, at 314.

¹²⁴ An estimated \$380 billion in public funds were stolen by government officials between 1960 – 1999. CHOP FINE, *supra* note 108, at 16. Former governors Peter Odili and James Ibori, the former of Rivers State and the latter of Delta State, are accused of the theft of billions of dollars during their terms in office. *Id.* *See also* *Nigeria Ex-Governor James Ibori Arrested in Dubai*, BBC NEWS (May 13, 2010, 4:28 PM), <http://news.bbc.co.uk/2/hi/africa/8680569.stm>. Though no charges have yet been brought against Odili, money laundering charges against Ibori have been filed in the United Kingdom. *Id.* Ibori was arrested in Dubai in May 2010, and his extradition to the UK was approved in October 2010. *Nigerian Ex-Governor Faces Extradition from Dubai to UK*, BBC NEWS (Dec. 10, 2010 11:27 AM), <http://www.bbc.co.uk/news/world-africa-11986056>. Ibori was subsequently found guilty of ten counts of money laundering, and has been sentenced to thirteen years in the United Kingdom. *Former Nigeria Governor James Ibori Jailed for 13 Years*, BBC NEWS (Apr. 17, 2012, 1:08 PM), <http://www.bbc.co.uk/news/world-africa-17739388>.

trative avenues foreclosed, the only way local groups have found to actually affect change has been through violence.¹²⁵ Unfortunately, this militarized response, which has typically involved blowing up pipelines and causing leaks, is then used by the MNCs to escape liability for pollution.¹²⁶ Pipeline vandalism is certainly responsible for some of the Delta oil spills, but so long as the MNCs can hide behind militants to avoid responsibility for any wrongdoing, violent responses will continue, and the cyclical crisis will repeat itself.

Resolution of the armed conflict in the Niger Delta has as much to do with properly-timed action as with the substantive changes that will facilitate that resolution. Intermittent conflict has plagued the region for decades,¹²⁷ and the fractionalized, guerilla nature of the armed groups involved means that placating one contingent may have little impact on the overall level of violence.¹²⁸ Still, a number of ceasefires, most recently in July 2009, have been negotiated between the government and the Movement for the Emancipation of the Niger Delta (MEND), the region's largest militant group.¹²⁹ Ceasefire and

¹²⁵ Though pipeline vandalism hasn't had any real impact on how the MNCs operate in the region, it has impacted the profit margins of the MNCs. Though Nigeria's oil exports are considerable, they could actually be much higher but-for the instability in the region that has caused MNCs to shut in production. See EIA COUNTRY ANALYSIS BRIEF, *supra* note 1, at 2. Further complicating the security environment, Delta militant groups have taken to kidnapping foreign oil workers for ransom. See Nicholas Schmidle, *The Hostage Business*, N.Y. TIMES MAG., Dec. 4, 2009, at MM14. The increased frequency of hostage-taking "has also made oil and gas service companies increasingly reluctant to dispatch personnel to repair sabotaged or ruptured pipelines." ALEX IANACCONE, CTR. FOR STRATEGIC & INT'L STUD., TOWARD A REFORM AGENDA FOR THE NIGER DELTA 2 (2007), available at http://csis.org/files/media/isis/pubs/070423_nigerdelta.pdf. Because the Nigerian state is unable to adequately control the security environment, oil companies provide their own security, often by arming local gangs on a contract basis. While arguably serving a purpose, this practice draws more young people into the conflict, and injects more weapons into a region fraught with firearms. Omeje, *supra* note 120, at 478, 487.

¹²⁶ These causation problems, in the context of establishing tort liability, will be discussed *infra*, at Part IV.C.2.

¹²⁷ Judith Burdin Asuni, *Understanding the Armed Groups of the Niger Delta* 5–6 (Council on Foreign Relations, Working Paper, Sept. 2009), available at <http://www.cfr.org/nigeria/understanding-armed-groups-niger-delta/p20146>.

¹²⁸ *Id.* at 19; see also HUMAN RIGHTS WATCH, POLITICS AS WAR: THE HUMAN RIGHTS IMPACT AND CAUSES OF POST-ELECTION VIOLENCE IN RIVERS STATE, NIGERIA 54 (2008), available at <http://www.hrw.org/sites/default/files/reports/nigeria0308webwcover.pdf>.

¹²⁹ *Nigerian Rebels Declare Ceasefire*, BBC NEWS (July 15, 2009), <http://news.bbc.co.uk/2/hi/africa/8150965.stm>; Joe DeCapua, *Nigeria's Niger Delta Called Pacified*, VOICE OF AMERICA (Dec. 28, 2010, 7:00 PM), <http://www.voanews.com/english/news/africa/offor-decapua-niger-delta-29dec10-112602459.html>.

peace are not synonymous, however.¹³⁰ Peace is a broad, long-term, comprehensive process, of which a ceasefire is a critical, but singular part.¹³¹ If no real efforts to solve the underlying problems follow the ceasefire, relapse into the status quo ante is inevitable. Such was the case with the July 2009 ceasefire: by January 2010, the militants had released a statement ending the truce, citing the federal government's failure to take meaningful action with respect to Delta grievances as the impetus for the resumption of hostilities.¹³²

The Nigerian government has explicitly refused international assistance in mediating the Delta conflict, preferring to handle the militant movement as purely an internal, domestic matter.¹³³ With certain political avenues foreclosed, an alternative means to satisfy the marginalized residents of the Niger Delta is necessary. Though the majority of Delta residents do not directly participate in the violence and vandalism, many are frustrated enough to believe that "the enemy of my enemy is my friend," and thereby tacitly support the militants.¹³⁴ Financially compensating these residents for harms suffered due to oil extraction could help eliminate local support for violence.¹³⁵ This compensation could best be obtained in the courtroom.

¹³⁰ Conflict resolution is a complex, multi-step process. Ceasefires/cessations of hostilities, while obviously a critical part of the process, are only one step. If a ceasefire isn't followed up by negotiations, peace agreements, and legitimate efforts by parties to the conflict to reconcile their differences and address the underlying problems that precipitated the violence, relapse into violence is far more likely than progress towards peace. See OLIVER RAMSBOTHAM ET AL., CONTEMPORARY CONFLICT RESOLUTION 11–14 (2005).

¹³¹ *Id.*

¹³² *Nigeria Militants 'End Truce in Delta Region'*, BBC NEWS (Jan. 30, 2010, 2:50 PM), <http://news.bbc.co.uk/2/hi/africa/8488772.stm>.

¹³³ DAVID SMOCK, U.S. INST. OF PEACE, CRISIS IN THE NIGER DELTA 6 (2009), available at http://www.usip.org/files/resources/niger_delta_crisis.pdf. History indicates that this insistence may be ill-advised. As of 2008, fifteen separate attempts, beginning in 1958, have been made by committees which have recommended ways to address and solve the problems in the Niger Delta. The problems are still ongoing, indicating that none of these efforts proved fruitful—and that a change in tactics might be necessary. TECHNICAL COMMITTEE ON THE NIGER DELTA, REPORT OF THE TECHNICAL COMMITTEE ON THE NIGER DELTA 14 (2008).

¹³⁴ See Asuni, *supra* note 127, at 22.

¹³⁵ Many commentators on the violence in the Niger Delta have characterized the militant movement as an insurgency. See, e.g., Ukoha Ukiwo, *From "Pirates" to "Militants": A Historical Perspective on Anti-State and Anti-Oil Company Mobilization Among the Ijaw of Warri, Western Niger Delta*, 106 AFR. AFF. 587, 590 (2007). A central tenet of counterinsurgency theory is that defeating a movement that has local support requires targeting the political grievances that fuel the insurgency. Eliot Cohen et al., *Principles, Imperatives and Paradoxes of Counterinsurgency*, MILITARY REV., Mar.–Apr. 2006, at 49, 50. Rather than killing every insurgent, targeting the roots causes the movement to "die on the vine." *Id.* See also James D. Fearon &

IV. LITIGATING A SOLUTION

As soon as the Exxon Valdez ran aground and the Deepwater Horizon rig exploded, the public condemnation of Exxon and BP, respectively, began in earnest. Because these tragedies occurred so close to home, the American people, media, and government registered their complaints swiftly and loudly.¹³⁶ The outpouring of outrage by the American media against BP has in turn triggered an outpouring of outrage by Nigerians who have dealt with similar and worse oil spills for decades with little or no public attention or condemnation.¹³⁷

A. Domestic Suits against MNCs under Nigerian Law

1. *The Nigerian Judicial System*

Discussion of potential litigation against an MNC in Nigeria must begin with a brief description of the Nigerian judiciary.¹³⁸ Popular expectations of the Nigerian legal system are low, for a variety of reasons. Though a comprehensive judicial structure is in place,¹³⁹ and there are constitutional and statutory provisions for individual rights and legal procedures, “the troubling legacies of military rule, especially corruption, executive control and manipulation of the judiciary, continue to undermine the ability of courts to effectively secure fair trial rights.”¹⁴⁰ There have been more successful military coups in Nigeria than in any other African country.¹⁴¹ Years of intermittent

David D. Laitin, *Ethnicity, Insurgency and Civil War*, 97 AM. POL. SCI. REV. 75, 80 (2003) (“Recruiting young men to the life of a guerrilla is easier when the economic alternatives are worse.”).

¹³⁶ Clifford Krauss et al., *White House Tries to Regroup as Criticism Mounts Over Leak*, N.Y. TIMES, May 30, 2010, at A1; Anna Driver & Matthew Bigg, *BP Swamped by Criticism*, REUTERS (May 21, 2010), <http://www.reuters.com/article/idUSTRE6430AR20100521>.

¹³⁷ Vidal, *supra* note 102; Nossiter, *supra* note 99; Christian Purefoy, *Nigerians Angry at Oil Pollution Double Standards*, CNN.COM (June 30, 2010, 7:33 AM), <http://www.cnn.com/2010/WORLD/africa/06/29/nigeria.oil/index.html>.

¹³⁸ See generally JEDRZEJ GEORG FRYNAS, OIL IN NIGERIA: CONFLICT AND LITIGATION BETWEEN OIL COMPANIES AND VILLAGE COMMUNITIES 92–94 (2000).

¹³⁹ See Odinkalu, *supra* note 97, at 196.

¹⁴⁰ Okechukwu Oko, *Seeking Justice in Transitional Societies: An Analysis of the Problems and Failures of the Judiciary in Nigeria*, 31 BROOK. J. INT. LAW 9, 14 (2005).

¹⁴¹ MONTY G. MARSHALL, CTR. FOR SYSTEMIC PEACE, CONFLICT TRENDS IN AFRICA, 1946-2004: A MACRO-COMPARATIVE PERSPECTIVE 53–61 (2005), available at

military interference in politics have left the judiciary institutionally weak and purposely underdeveloped.¹⁴² Rather than allowing for institutional checks and balances, “successive military regimes . . . abolished the powers of the courts to inquire into any action or decision of the government.”¹⁴³

Additionally, during their colonial period, the British imposed legal traditions on Nigeria with little regard for how European institutional formalities translated to the Nigerian setting.¹⁴⁴ The result has been a growing alienation of the poor and illiterate majority from a legal process that is expensive, inaccessible, and perceived as protecting only the interests of urban elites.¹⁴⁵ Though the Nigerian constitution requires the legislature to provide indigent citizens with access to legal representation,¹⁴⁶ legal services are predominately located in urban areas, and “are arguably beyond the reach of a majority of the population.”¹⁴⁷

Nigerian government institutions have had more trouble with corruption than most,¹⁴⁸ and the judicial system is no exception. The

<http://www.systemicpeace.org/Conflict%20Trends%20in%20Africa.pdf>. Nigeria has been ruled by military regimes for 31 of the 51 years since its independence in 1960. Chinonye Obiagwu & Chidi Anselm Odinkalu, *Nigeria: Combatting Legacies of Colonialism and Militarism*, in HUMAN RIGHTS UNDER AFRICAN CONSTITUTIONS 211, 212 (Abdullahi Ahmed An-Na'im ed., 2003). These military regimes have been described as “often brutal and mostly inefficient.” CLARKE, *supra* note 73, at 84.

¹⁴² Oko, *supra* note 140, at 14.

¹⁴³ Obiagwu & Odinkalu, *supra* note 141, at 212–13.

¹⁴⁴ The British utilized an indirect rule system in the majority of their colonies. Indirect rule was characterized by attempts to preserve traditional authority to carry out the majority of government functions thereby gaining legitimacy by cooperating with locals and preserving native custom. In implementing this strategy in Nigeria, the British created parallel court systems: colonial courts applying British law for matters in which Crown subjects were involved, and a separate system to adjudicate disputes between Nigerians. The result was “extensive confusion as to the appropriate forum for disputes as well as the relevant sources of legal authority.” Ronald J. Daniels, et al., *The Legacy of Empire: The Common Law Inheritance and Commitments to Legality in Former British Colonies*, 59 AM. J. COMP. L. 111, 133 (2011).

¹⁴⁵ Okechukwu Oko, *The Problems and Challenges of Lawyering in Developing Societies*. 35 RUTGERS L. J. 569, 605–06 (2004).

¹⁴⁶ CONSTITUTION OF NIGERIA (1999), §§ 46(4)(a)–(b).

¹⁴⁷ Odinkalu, *supra* note 97, at 198.

¹⁴⁸ Transparency International, an international non-governmental organization that monitors perceptions of corporate and political corruption by country, ranked Nigeria 143/182 according to its 2011 index. On a scale of 0–10, with 0 being Highly Corrupt and 10 being Clean, Nigeria was rated at a 2.4. TRANSPARENCY INT’L, CORRUPTION PERCEPTIONS INDEX 2011 at 3(Dec. 2011), available at http://www.transparency.org/policy_research/surveys_indices/cpi/2010/results. See also *Nigeria’s Struggle with Corruption: Hearing Before the Subcomm. On Africa, Global Human Rights and International Operations of the H. Comm. on International*

average Nigerian sees the courts not as “impartial dispensers of justice,” but rather as “auctioneers . . . willing to distort legal principles and established legal rules in favor of the highest bidder.”¹⁴⁹ Nigerian “[c]itizens, lawyers, and even eminent jurists now openly acknowledge that the judicial system is no longer a realistic forum for obtaining justice, especially for citizens who lack the resources and social connections to influence the outcome of the judicial proceedings.”¹⁵⁰ Judges are also poorly paid, which makes some even more susceptible to bribe-taking.¹⁵¹ The meagerness of judicial salaries has also traditionally discouraged otherwise-prominent, well-qualified Nigerian jurists from seeking judicial appointments.¹⁵²

It may take five to six years for a case to be heard in a Nigerian superior court, and those cases that are eventually heard proceed with no real sense of urgency.¹⁵³ Court facilities are “hopelessly overcrowded, badly equipped, and underfunded” and a lack of “computers, photocopiers, or other modern equipment [means that] judges may even have to supply their own paper and pen to record their judgment in longhand.”¹⁵⁴ In the 1960s, when the current evidentiary and procedural rules were developed, a judge in Lagos, Nigeria’s most populous city, might hear six cases per week.¹⁵⁵ In 2003, the docket list for a judge in that same position was one hundred cases per *day*.¹⁵⁶ Compounding this already-incredible problem, when a judge is transferred “and a new one takes over a case [the action] has to start *de novo*.”¹⁵⁷

The legal system’s lack of technology also impairs the already-uncertain rights of individuals to due process. Presentation of tech-

Relations, 109th Cong. 109-172 (2006) (statement of Rep. Smith, Chairman, Subcomm. on Africa, Global Human Rights and International Operations).

¹⁴⁹ Oko, *supra* note 145, at 633.

¹⁵⁰ Oko, *supra* note 140, at 16. See also J.N.C. Hill, *Corruption in the Courts: the Achilles Heel of Nigeria’s Regulatory Framework?*, 31 *THIRD WORLD Q.* 1161, 1172 (2010) (“The common, and largely correct, view is that, far from holding the rich and powerful in check, the judiciary actively colludes with them.”).

¹⁵¹ Oko, *supra* note 140, at 79–80. In addition to judges being susceptible to bribery, other necessary court officers—registrars, legal assistants, clerks—are even more poorly and infrequently compensated. People in these positions have openly extorted money from litigants. Obiagwu & Odinkalu, *supra* note 141, at 237.

¹⁵² Obiagwu & Odinkalu, *supra* note 141, at 237.

¹⁵³ Oko, *supra* note 140, at 39.

¹⁵⁴ *Id.* at 42 (quoting HUMAN RIGHTS WATCH, *THE PRICE OF OIL: CORPORATE RESPONSIBILITY AND HUMAN RIGHTS VIOLATIONS IN NIGERIA’S OIL PRODUCING COMMUNITIES* 143 (1999)).

¹⁵⁵ Obiagwu & Odinkalu, *supra* note 141, at 233.

¹⁵⁶ *Id.* at 234.

¹⁵⁷ Damfebo K. Derri, *Litigation Problems in Compensation Claims for Oil and Gas Operations in Nigeria*, in *LAW AND PETROLEUM INDUSTRY IN NIGERIA: CURRENT CHALLENGES*, 11, 22 (Festus Emiri & Gowon Deinduomo eds., 2009).

nical evidence is often extremely difficult, if not impossible, and that impedes the ability of the party bearing the burden of proof (typically the plaintiff) to present his or her case completely.¹⁵⁸ This evidentiary problem is particularly relevant to oil spill-related claims for which scientific testimony on the exact harm done to property or individuals must be demonstrated.¹⁵⁹ Additionally, Nigerian law requires that expert witnesses be “specially skilled in the particular field in question,” and courts have refused to admit expert testimony based on doubts about the expert’s skill.¹⁶⁰ Finding qualified expert witnesses, then, is an additional cost on top of an already-expensive litigation process.¹⁶¹ These obstacles have “the obvious consequence of alienating the public from, and reducing their confidence in, the justice system, and indeed, the democratic process.”¹⁶²

Aside from these practical obstacles, a number of procedural particularities exist within the Nigerian judicial system that further complicate suits. Jurisdiction of trial courts, standing of individuals to bring suit, and joinder of parties are viewed as so fundamental to the adjudication process that a party challenging any of these has a constitutional right to an interlocutory appeal, all the way to the Nigerian Supreme Court, before any other legal issue may be decided.¹⁶³ Standing is assessed by trial judges on a case-by-case basis, and parties alleging separate injuries may not be joined.¹⁶⁴ The prevailing doctrinal position in Nigerian courts in regards to standing is that a

¹⁵⁸ Oko, *supra* note 140, at 44.

¹⁵⁹ Omolaji Adewale, *Oil Spill Claims in Nigeria: Principles, Guidelines and Criteria*, 33 J. AFR. L. 91, 93 (1989).

¹⁶⁰ FRYNAS, *supra* note 138, at 200. For example, in an oil spill case before a Nigerian court, the plaintiffs’ expert “had specialist knowledge as a soil scientist and an agronomist” but “[h]is testimony was not considered credible as he did not have additional knowledge of radiation and heat.” *Id.*

¹⁶¹ *Id.* at 200–01.

¹⁶² Oko, *supra* note 140, at 80.

¹⁶³ Odinkalu, *supra* note 97, at 188.

¹⁶⁴ The Nigerian legal system approaches standing a very paradoxical manner. The great weight given to standing would seem to indicate that the legal system could benefit greatly from an unambiguous, bright-line rule determining when suits may be filed, and by whom. However, the leading Nigerian case dealing with standing, was decided almost three decades ago, and the court’s language was ambiguous. The test articulated was that “standing will only be accorded to a plaintiff who shows that his civil rights and obligations have been or are in danger of being violated or adversely affected by the act complained of.” See Jędrzej George Frynas, *Legal Change in Africa: Evidence from Oil-Related Litigation in Nigeria*, 43 J. AFR. L. 121, 132 (1999). The court however failed to define “civil rights and obligations,” and to this day this lack of clarity provides the grounds for the interlocutory appeals which delay legal proceedings. See Tunde Ogowewo, *The Problem with Standing to Sue in Nigeria*, 39 J. AFR. L. 1, 3–4 (1995).

litigant must have a personal interest in the matter—which “precludes the purist of impact litigation for the public interest.”¹⁶⁵ This means that human rights activists cannot sue on behalf of injured groups.¹⁶⁶ This personal interest has been interpreted to mean one “over and above that of the general public,” so the interest of a *particular* individual must be greater than that of any other.¹⁶⁷ Paradoxically, then, if the harm alleged is one that affects a community en masse (for example, an oil spill)—it is possible that no single individual has a legally sufficient *personal* interest to fulfill the standing requirement.¹⁶⁸ Too many people’s interests have been impaired for any one of them to assert a legal cause of action. Consequently, when it is a defendant, the government’s automatic reflex is to challenge the jurisdiction, standing, and/or joinder of the plaintiffs.¹⁶⁹ This suspends and delays the proceedings, often to such an extent that the plaintiffs are financially precluded from going forward.

Finally, even if a final decision is rendered by a court, “there is no guarantee of enforcement or compliance.”¹⁷⁰ While the role of any judiciary in deciding what the law is, and how it applies to a particular scenario is critical, absent enforcement mechanisms, those decisions are meaningless. This is true in any context, but in Nigeria, statutory authority for enforcement of judgments is wholly vested in the federal Attorney-General whenever government assets are at issue.¹⁷¹ The government must therefore decide to punish itself; not surprisingly, Attorneys-General “routinely decline such consent.”¹⁷²

2. *Litigation Against Oil Companies in Nigerian Courts*

Despite the considerable procedural obstacles, a number of suits against oil companies have been tried in Nigerian courts, with mixed results. Several Nigerian statutes technically govern the actions of oil companies, notably the Petroleum Drilling and Production Regulation

¹⁶⁵ Odinkalu, *supra* note 97, at 198.

¹⁶⁶ Obiagwu & Odinkalu, *supra* note 141, at 233.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ These delays are considerable, and litigation can often last for more than a decade. Odinkalu, *supra* note 97, at 188–89; *see* Frynas, *supra* note 164, at 132.

¹⁷⁰ Odinkalu, *supra* note 97, at 190.

¹⁷¹ Sheriffs and Civil Process Act (1990) Cap. (407), §§ 84(1)–(3) (Nigeria); *see also* Odinkalu, *supra* note 97, at 190.

¹⁷² Odinkalu, *supra* note 97, at 190.

Act of 1969 (Petroleum Act) and the Oil Pipelines Act of 1956.¹⁷³ Regulation 25 of the Petroleum Act states that:

The licensee . . . shall adopt all practicable precautions, including the provision of up-to-date equipment . . . to prevent the pollution of inland waters, rivers, watercourses . . . or the high seas by oil, mud or other . . . substances which might contaminate the water, banks or shoreline or which might cause harm . . . to fresh water or marine life, and where any such pollution occurs or has occurred, shall take prompt steps to control and, if possible, end it.¹⁷⁴

Despite affirmatively assigning monitoring and clean-up responsibilities to the oil companies in exchange for drilling licenses, the Petroleum Act includes no penalties for nonperformance.¹⁷⁵ It has therefore failed to provide legal protection for victims of oil spills.

The Oil Pipelines Act establishes that individuals “whose land . . . may be injuriously affected by the grant of a [drilling] licence may within the period specified . . . lodge verbally or in writing . . . notice of objection stating the interest of the objector and the grounds of objection,” technically granting ordinary citizens a voice in oil operations.¹⁷⁶ It also enumerates a broad range of damage options available to individuals for harm caused by oil operations, including for:

- (a) any damage done to any buildings, crops or profitable trees by the holder of the licence in the exercise of the rights conferred by the licence; and
- (b) any disturbance caused by the holder in the exercise of such rights; and
- (c) any damage suffered by any person by reason of any neglect on the part of the holder or his agents, servants or workmen to protect, maintain or repair any work, structure or thing executed under the licence; and
- (d) any damage suffered by any person . . . as a consequence of any breakage of or leakage from the pipeline or an ancillary installation; and

¹⁷³ Petroleum Act (1990) Cap. 350 (Nigeria), available at <http://www.nigeria-law.org/Petroleum%20Act.htm> [hereinafter Petroleum Act]; Oil Pipelines Act (1990) Cap. 338 (Nigeria), available at <http://www.nigeria-law.org/Oil%20Pipelines%20Act.htm> [hereinafter Oil Pipelines Act].

¹⁷⁴ Petroleum Act §9.25.

¹⁷⁵ Simon Warikiyei Amaduobogha, *Environmental Regulation of Foreign Direct Investment (FDI) in the Oil and Gas Sector*, in *LAW AND PETROLEUM INDUSTRY IN NIGERIA: CURRENT CHALLENGES*, 115, 120 (Festus Emiri & Gowon Deinduomo eds., 2009).

¹⁷⁶ Oil Pipelines Act § 9.

(e) loss (if any) in value of the land or interests in land by reason of the exercise of the rights as aforesaid.¹⁷⁷

These statutory provisions outlawing pollution and providing for administrative recourse and monetary compensation for victims, historically, have not meant much in practice. Prior to the 1990s, tort litigation efforts by Nigerians against oil companies were almost wholly unsuccessful.¹⁷⁸

In addition to the general procedural difficulties discussed above, in negligence tort actions in Nigeria, the burden of proof is on the plaintiff to establish that the defendant “owes him/her a duty of care, that the duty was breached and that damage resulted from the breach of duty.”¹⁷⁹ Proving negligence has traditionally been very difficult for plaintiffs because of the technical specifics of oil operations, in part because defendant oil companies have a decided informational advantage.¹⁸⁰ Individual plaintiffs often do not know what exactly has gone wrong—just that a pipeline has leaked and turned their land into an oil slick—and this information gap means that most cases are won by defendant oil companies.¹⁸¹

Plaintiffs have attempted to bring damage claims based on strict liability, but with very limited success. The “precedent” most favorable to Nigerian plaintiffs in strict liability actions is the British case *Rylands v. Fletcher*, where the House of Lords found that when a person has on his land “anything likely to do mischief if it escapes . . . [he] is prima facie answerable for all the damage which is the natural consequence of its escape.”¹⁸² Plaintiffs were successful against Shell in one instance under this theory. One of Shell’s oil waste pits was allowed to overflow, resulting in substantial damage to the plaintiffs’ farmland and pond.¹⁸³ Because the plaintiff’s burden of proof in a strict liability case is just that damage was done, this would seem an attractive legal option for plaintiffs who seek damages for pipelines that are poorly maintained and thereby create the dangerous circumstance.¹⁸⁴

¹⁷⁷ *Id.* at § 20.

¹⁷⁸ Kaniye S.A. Ebeku, *Judicial Attitudes to Redress for Oil-Related Environmental Damage in Nigeria*, 12 REV. EUR. COMMUNITY & INT’L ENVTL L. 199, 202 (2003).

¹⁷⁹ Frynas, *supra* note 164, at 123.

¹⁸⁰ *Id.* at 124.

¹⁸¹ *Id.*

¹⁸² *Rylands v. Fletcher* [1868] L.R. 3 H.L.330.

¹⁸³ Frynas, *supra* note 164, at 126–27.

¹⁸⁴ *Rylands*, L.R. 3 H.L.330.

But imposition of strict liability is subject to a number of exceptions.¹⁸⁵ These exceptions include consent, statutory authority, “acts of God,” and third-party intervention.¹⁸⁶ Consent by the plaintiff and statutory authority to perform the inherently dangerous act negate strict liability in tort.¹⁸⁷ Acts of God, analogous to the American “forces of nature” exception to strict liability, similarly exempt a defendant from liability for otherwise tortious conduct.¹⁸⁸ The primary defense utilized by MNCs, however, is third-party intervention (e.g., vandalism).¹⁸⁹ If an oil company can establish that a third party sabotaged pipeline operations, it is not liable for the resulting damages.¹⁹⁰ Oil companies have successfully defended a number of lawsuits by asserting this sabotage defense.¹⁹¹

Even plaintiffs capable of navigating the Nigerian procedural maze successfully enough to litigate a full trial rarely get the verdicts they seek. Injunctions have been sought in a number of actions with negligible success.¹⁹² Judges, under considerable political pressure, consistently find that the state’s economic interest in the revenues generated by oil exports far outweighs any negative impact industry practices may have had on citizens.¹⁹³ Accordingly, they have traditionally declined to take any action that would impose liability on Nigeria’s foreign partners, despite statutory provisions that explicitly prohibit or regulate MNC operations.¹⁹⁴

Nevertheless, since the 1990s, Nigerian courts have made better efforts to enforce the law, and have, in a handful of cases, awarded monetary damages to plaintiffs injured by the oil companies.¹⁹⁵ These favorable verdicts are not necessarily synonymous with successes, however, because the damage awards have been comparatively small. Damage awards have been for short-term, individual compensation only (e.g., for the monetary value of crops damaged by an oil spill), not, for instance, for long-term environmental or health damages

¹⁸⁵ FRYNAS, *supra* note 138, at 196.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 195–96; RESTATEMENT (SECOND) OF TORTS § 510 (1977).

¹⁸⁹ FRYNAS, *supra* note 138, at 196.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.* at 189–90 (“Nigerian courts are very reluctant to grant an injunction in oil-related cases. For oil companies, this interpretation of the law...is favourable because the law allows them to continue with their exploration and production activities, notwithstanding the adverse impact of oil operations on village communities.”).

¹⁹³ Frynas, *supra* note 164, at 127.

¹⁹⁴ Ebeku, *supra* note 178, at 202.

¹⁹⁵ Jędrzej George Frynas, *Social and Environmental Litigation Against Transnational Firms in Africa*, 42 J. MODERN AFR. STUD. 363, 371–73 (2004).

caused by contamination of drinking water.¹⁹⁶ The prevailing standard—"fair and adequate compensation"—covers only proven, quantifiable compensatory damages, and does not account for loss of future earnings, pain and suffering, or any of the other categories of tort damages available in the United States.¹⁹⁷ Until 1997, no award of damages for oil-related legal action in a Nigerian court was greater than \$275,000.¹⁹⁸ When contrasted with the billions of dollars paid by Exxon and BP for their respective spills,¹⁹⁹ it is clear that Nigerian damage awards are inadequate, and pale in comparison to the magnitude of harm and the amount of effort required to prevail in a lawsuit.

Some commentators have written very favorably about the implications of these rare legal successes,²⁰⁰ but the ratio of successful plaintiffs to victims indicates that this optimism is premature. For practical and procedural reasons, the number of individuals able to persevere in the Nigerian judicial system is very small, particularly in relation to the number of individuals who have been harmed. Many never consider legal recourse in the first place, because the judicial system just seems too inaccessible.²⁰¹ Furthermore, the small damage awards that MNCs have been ordered to pay have not been nearly harsh enough to encourage more responsible operational practices.²⁰² Moreover, compensation after the fact can only do so much good. It would be better to prevent the harmful conduct in the first place, but history indicates that the Nigerian judicial system is unwilling to bite the hand that feeds, and impose any legitimate penalties on MNCs.

Though the Nigerian legal system should by no means be treated as a lost cause, at present, it is not the most viable road to recovery for victims of oil spills in the Niger Delta who are suffering real damage in real time. And the increasingly violent responses of the local popu-

¹⁹⁶ Ebeku, *supra* note 178, at 207. In the instances where the oil companies have agreed to compensate spill victims, they have provided money for immediate economic losses, but have failed to undertake environmental remediation efforts necessary to mitigate future losses. *Id.* at 204–05. So although arable farmland may have been destroyed by toxic exposure to crude oil, the big-picture concerns (how the plaintiff will make his living next year or 10 years later) are ignored, and payment is only made for short-term losses. *Id.*

¹⁹⁷ Frynas, *supra* note 164, at 139. Further, there is no established definition for "fair and adequate compensation," leaving the courts to decide on a case-by-case basis what this term means. Derri, *supra* note 157, at 19.

¹⁹⁸ Frynas, *supra* note 164, at 142.

¹⁹⁹ *See supra* Part II.

²⁰⁰ *See* Frynas, *supra* note 164, at 121.

²⁰¹ *See supra* notes 144–47 and accompanying text.

²⁰² Ebeku, *supra* note 178, at 199, 206–07 (exploring, and ultimately disagreeing with Frynas's theory that rulings by Nigerian judges demonstrated a shift in jurisprudence toward environmental protection).

lations to the errors and excesses of the oil companies indicate that waiting for the readiness of the Nigerian legal system may be too dangerous. Would-be Nigerian plaintiffs may therefore achieve more success by attempting to recover in foreign forums. Nigerian plaintiffs have some experience litigating claims against oil companies abroad, both in the U.S and Europe.²⁰³ Nigerians may be able to litigate in the United States, since federal courts can exercise jurisdiction via the Alien Tort Statute or common law long-arm statutes.

B. U.S. Federal Tort Claims Under the Alien Tort Statute²⁰⁴

The Alien Tort Statute (ATS), codified as 28 U.S.C. § 1350, was enacted as part of the Judiciary Act of 1789.²⁰⁵ It states that “the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”²⁰⁶ This potentially very expansive statute then lay dormant for almost two centuries, until 1980, when it was invoked in modern litigation for the first time in *Filartiga v. Pena-Irala*.²⁰⁷ In this landmark decision, the District Court for the Eastern District of New York heard arguments by Paraguayan nationals against the Paraguayan police for violation of human rights norms, after the plaintiffs’ son was allegedly tortured by the police.²⁰⁸ The district court dismissed for lack of jurisdiction, but the Second Circuit reversed, using a combination of international treaties and declarations to find a sufficient customary international law basis to sustain

²⁰³ Three notable cases against foreign oil companies have been brought by Nigerians in the United States: *Wiwa v. Royal Dutch Petroleum Co.*, 266 F.3d 88 (2d Cir. 2000); *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 117 (2d Cir. 2010); *Bowoto v. ChevronTexaco Corp.*, 312 F. Supp. 2d 1229, 1229 (N.D. Cal., 2004). In 2009, The Hague “decided that it was competent to...hear...a case filed for compensation for alleged damage from oil spills caused by Royal Dutch Shell’s Nigerian unit.” Jay Wagner & Kit Armstrong, *Managing Environmental and Social Risks in International Oil and Gas Projects: Perspectives on Compliance*, 3 J. WORLD ENERGY L. & BUS. 140, 156 (2010). See also Catherine Hornby, *Dutch Court to Take on Shell Nigeria Cases*, REUTERS (Dec. 30, 2009, 12:23 PM), <http://www.reuters.com/article/2009/12/30/us-shell-nigeria-idUSTRE5BT1WL20091230>.

²⁰⁴ The terms “Alien Tort Statute” and “Alien Tort Claims Act” are used interchangeably in case law and legal commentary.

²⁰⁵ BETH STEPHENS ET AL., INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 1 (2008).

²⁰⁶ 28 U.S.C. § 1350 (2010).

²⁰⁷ *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980)

²⁰⁸ *Id.* at 878–80; see also JEFFREY DAVIS, JUSTICE ACROSS BORDERS: THE STRUGGLE FOR HUMAN RIGHTS IN U.S. COURTS 17–22 (2008).

an ATS claim.²⁰⁹ Human rights activists rejoiced at this interpretation of the all-but-forgotten statute, as it ostensibly provided an American forum for serious harms committed abroad, providing victims with an avenue for previously-unavailable recourse.²¹⁰

Some commentators worried, though, that the decision in *Filartiga* would trigger a race to the courthouse by foreign plaintiffs.²¹¹ For the most part, this flood of litigation did not materialize,²¹² due to the statute's ambiguity and a lack of clear legal precedent. By 2004, no court had reached a judgment on the merits of an ATS case.²¹³ Instead, the majority of ATS suits were dismissed in the early stages of litigation for procedural reasons, even when the plaintiffs had made a prima facie showing of subject matter jurisdiction.²¹⁴

So, even after the Second Circuit opened the door in *Filartiga*, the majority of circuits dismissed ATS cases, instead adopting the reasoning from the 1984 D.C. Circuit case, *Tel Oren v. Libyan Arab Republic*.²¹⁵ In his separate concurrence to the per curiam opinion, Judge Bork criticized the decision in *Filartiga* as premature;²¹⁶ absent an explicit congressional grant of a private right of action, the ATS did not afford foreign plaintiffs access to U.S. federal courts.²¹⁷ The Second and Ninth Circuits, however, allowed a small number of ATS cases to proceed.²¹⁸ Though only a few were allowed to proceed to

²⁰⁹ *Filartiga*, 630 F.2d at 882.

²¹⁰ STEPHENS ET AL., *supra* note 205, at 12.

²¹¹ *Id.*

²¹² *Id.*; see also Harold Hongju Koh, *Separating Myth from Reality About Corporate Responsibility Litigation*, 7 J. INT'L ECON. L. 263, 268 (2004) (“[T]here is no flood of cases... Given the 215 years of the ATS’s history, more than a dozen cases does not constitute a flood.”).

²¹³ Koh, *supra* note 212, at 270.

²¹⁴ *Id.* at 269. When foreign state entities are involved, the state action doctrine and sovereign immunity are always invoked, usually successfully. Under the state action doctrine, “courts ‘will generally refrain from...sitting in judgment on...acts of a governmental character done by a foreign state within its own territory’” JENNIFER A. ZERK, *MULTINATIONALS AND CORPORATE SOCIAL RESPONSIBILITY: LIMITATIONS AND OPPORTUNITIES IN INTERNATIONAL LAW* 211–12 (2006) (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 443 (1987)). Sovereign immunity, as codified in the United States by the Foreign Sovereign Immunities Act of 1976, provides that “foreign governments and their ‘agencies and instrumentalities’ will generally be immune from the jurisdiction of the US courts.” ZERK, *supra*, at 213.

²¹⁵ *Tel Oren v. Libyan Arab Republic*, 726 F.2d. 774, 775 (D.C. Cir. 1984) (per curiam); DAVIS, *supra* note 204, at 23–24.

²¹⁶ *Tel Oren*, 726 F.2d. at 799 (Bork, J., concurring).

²¹⁷ *Id.*

²¹⁸ DAVIS, *supra* note 208, at 24, 114–17. Of the thirty-three cases charted by Davis, only nine were brought outside the Second and Ninth Circuits. This is notable because ATS claims have primarily been brought against business entities for offenses committed overseas—and many of these entities are able to be served with process

judgment on the merits, the plaintiffs in those successful cases were awarded multimillion dollar judgments.²¹⁹

1. *The Supreme Court and the Alien Tort Statute*

After more than two decades of judicial ambiguity following *Filartiga*, the Supreme Court heard its first ATS case in 2004. In *Sosa v. Alvarez-Machain*, the U.S. Drug Enforcement Administration (DEA) hired Mexican citizens, including petitioner Jose Sosa, to apprehend Humberto Alvarez-Machain, a Mexican national who had been indicted in California for the kidnapping, torture, and murder of a DEA agent.²²⁰ Alvarez-Machain was forcibly taken from his home in Mexico and flown to El Paso, Texas where he was taken into federal custody.²²¹ Alvarez-Machain was eventually acquitted, and he subsequently filed tort claims against the United States and Sosa for false arrest and violation of the law of nations.²²² The Supreme Court granted certiorari to address the ATS for the first time.²²³ Eighteen parties filed amicus briefs, underscoring the legal importance of the outcome, since the dispute was only over \$25,000 in damages.²²⁴

Ultimately, the Court held that the ATS is only a jurisdictional statute, “enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.”²²⁵ Though agreeing that federal courts had constitutional authority to hear ATS cases, the Court cautioned that the class of international norms actionable under the ATS was narrow.²²⁶ Norms that triggered ATS jurisdiction must be clearly defined and universally accepted.²²⁷ At the time the statute was enacted in 1789, the actions constituting violations of the laws of nations were “violations of safe conducts,

in either New York or California because their headquarters or principal places of business are located there. 28 U.S.C. § 1332 (2010); *see infra* Part IV.B.4 for discussion of corporations and the ATS.

²¹⁹ STEPHENS ET AL., *supra* note 205, at 16.

²²⁰ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 697–98 (2004).

²²¹ *Id.* at 698.

²²² *Id.*

²²³ *Id.* at 699.

²²⁴ DAVIS, *supra* note 208, at 25.

²²⁵ *Sosa*, 542 U.S. at 724.

²²⁶ *Id.* at 732.

²²⁷ *Id.*; DAVIS, *supra* note 208, at 25.

infringement of the rights of ambassadors, and piracy.”²²⁸ In modern jurisprudence, then, “courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features [that] the 18th-century paradigms . . . recognized.”²²⁹ For would-be ATS plaintiffs, then, the door to the courtroom was left “ajar subject to vigilant doorkeeping.”²³⁰ The Court, however, did not purport to identify an exhaustive list of criteria for causes of action under the ATS,²³¹ and the lower courts have struggled to determine the types of torts that trigger the ATS.²³²

2. *Political and Procedural Obstacles to Plaintiffs’ Successful Use of the Alien Tort Statute*

Commentators have been critical of litigation under the ATS, voicing both procedural and public policy concerns. The backlog of federal cases brought by U.S. citizens is already substantial without allowing two foreign parties the opportunity to use U.S. forums when other equally viable forums exist.²³³ Further, application of international law in U.S. courts, which ATS claims necessarily involve, is unpopular, most notably with conservative jurists.²³⁴

²²⁸ *Sosa*, 542 U.S. at 724. See generally William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the “Originalists,”* 19 HASTINGS INT’L & COMP. L. REV. 221 (1996).

²²⁹ *Sosa*, 542 U.S. at 725. In modern jurisprudence, then, the most egregious offenses (for instance, genocide, torture, summary execution, slavery/forced labor) are covered by the ATS, as these are some of the most widely recognized violations of international law, and are illegal essentially everywhere. See also STEPHENS ET AL., *supra* note 201, at 139–70.

²³⁰ *Sosa*, 529 U.S. at 729.

²³¹ *Id.* See also Anthony J. Bellia Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. CHI. L. REV. 445, 542 (2011).

²³² Bellia Jr. & Clark, *supra* note 231, at 464–65.

²³³ ATS suits tend to be very factually complicated, and because the events in question took place abroad, procedural delays are common. Additionally, once plaintiffs are granted access to US forums, they are much more apt to pursue and appeal every potential legal option. See, e.g. *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000) (the lawsuit was first filed in 1998, and wasn’t settled until 2009); *In re Agent Orange Litigation*, 373 F. Supp. 2d 7 (E.D.N.Y. 2005) (the lawsuit was first filed in 1979, and was finally dismissed in 2005).

²³⁴ See *Sosa*, 542 U.S. at 749–50 (Scalia, J., concurring) (“The notion that a law of nations, redefined to mean the consensus of states on *any* subject, can be used by a private citizen to control a sovereign’s treatment of *its own citizens* within *its own territory* is a 20th-century invention of internationalist law professors and human rights advocates. The Framers would, I am confident, be appalled by the proposition that, for example, the American peoples’ democratic adoption of the death penalty

Private application of international law in U.S. courtrooms may also have significant foreign policy consequences. Although plaintiffs in ATS cases are seeking private, monetary damages, courts are public actors.²³⁵ Accusations of crimes against humanity, for instance, are very serious, and an American judge's opinion about whether or not those crimes occurred can have much more serious consequences than just the award or denial of monetary damages to an individual plaintiff.²³⁶ Constitutional separation of powers generally requires the judiciary to defer to Congress and the Executive with respect to international affairs.²³⁷ Granting U.S. judges expansive power to punish foreign citizens, and potentially foreign governments, was recognized by the Court in *Sosa* as constitutionally inappropriate.²³⁸

Though violations of certain international norms technically allow foreign plaintiffs to bring cases in U.S. federal courts, ATS cases are procedurally very complex, and the vast majority are dismissed before evaluation of the merits.²³⁹ Sovereign immunity,²⁴⁰ the political question doctrine,²⁴¹ statutes of limitations,²⁴² and *forum non conveniens*²⁴³ have been successfully invoked by ATS defendants in support of dismissal, even if the violation alleged is one that would otherwise be allowed under the narrow, post-*Sosa* interpretation of the ATS.²⁴⁴ Federal pleading requirements are stringent enough for domestic plaintiffs—and meeting the timely filing requirements and evidentiary

could be judicially nullified because of the disapproving views of foreigners.”) (emphasis in original)(citations omitted).

²³⁵ Halina Ward, *Securing Transnational Corporate Accountability Through National Courts: Implications and Policy Options*, 24 HASTINGS INT'L & COMP. L. REV. 451, 459 (2001).

²³⁶ *Id.* at 459–60. Domestic legal decisions involving international law always require consideration of international comity. Though sometimes equated with sovereign immunity, in the United States, international comity more specifically “requires courts to balance competing public and private interests in a manner that takes into account any conflict between the public policies of the domestic and foreign sovereigns.” Joel R. Paul, *The Transformation of International Comity*, 71 LAW & CONTEMP. PROB. 19, 19 (2008). It is a broad doctrine that includes the real-world considerations judges must weigh when deciding matters of international consequence. *Id.* at 19–20.

²³⁷ DAVIS, *supra* note 208, at 36.

²³⁸ *Sosa*, 542 U.S. at 728–29.

²³⁹ STEPHENS ET AL., *supra* note 205, at 12.

²⁴⁰ Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 (2010); *see* Republic of Austria v. Altmann, 541 U.S. 677, 700 (2004).

²⁴¹ *See* *Anderman v. Fed. Republic of Austria*, 256 F. Supp. 2d 1098, 1118 (C.D. Cal. 2003).

²⁴² *See* *Deutsch v. Turner Corp.*, 317 F. 3d 1005, 1028, 1030 (9th Cir. 2003).

²⁴³ *See infra* notes 274–85 and accompanying text.

²⁴⁴ STEPHENS ET AL., *supra* note 205, at 16.

burdens becomes exponentially more difficult when persons, information, and materials must travel internationally.²⁴⁵

3. *Environmental Degradation and Right to Health Claims under the ATS*

What the decision in *Sosa* made clear is that only the most serious human rights violations are actionable under the ATS. Though plaintiffs have attempted to utilize the ATS to recover damages for environmental degradation or detrimental health impact, these efforts have been widely unsuccessful.²⁴⁶ The *Sosa* interpretation of the ATS, requiring a clear and specific violation of the law of nations, precludes use of many international environmental regulations—most of which are indefinite.²⁴⁷ For example, though the United States is party to the International Covenant on Civil and Political Rights (ICCPR), which proclaims rights to health and a healthy environment,²⁴⁸ the ICCPR was ratified by the Senate with the explicit reservation that it was not self-executing and did not create a private right of action in U.S. courts.²⁴⁹

Particularly relevant to victims of oil spills who would seek to recover under the ATS for detriment to health is the 2003 case, *Flores v. Southern Peru Copper Corp.*, which preceded the limitations imposed by *Sosa*.²⁵⁰ In *Flores*, Peruvian plaintiffs sought personal injury damages under the ATS for illnesses and deaths caused by pollution from the defendant's mines and refineries.²⁵¹ The Southern District of New York dismissed the case for lack of subject matter jurisdiction under

²⁴⁵ See FED R. CIV. P. 8.

²⁴⁶ STEPHENS ET AL., *supra* note 205, at 205. U.S. courts have continuously dismissed ATS claims based on environmental damage. See *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 163, 167 (5th Cir. 1999) (upholding dismissal of the plaintiff's environmental torts claim, and noting that "federal courts should exercise extreme caution when adjudicating environmental claims under international law to insure that environmental policies of the United States do not displace environmental policies of other governments.").

²⁴⁷ Bradford Mank, *Can Plaintiffs Use Multinational Environmental Treaties as Customary International Law to Sue Under the Alien Tort Statute?*, 2007 UTAH L. REV. 1085, 1145 (2007).

²⁴⁸ International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171.

²⁴⁹ SENATE COMM. ON FOREIGN RELATIONS, INT'L COVENANT ON CIVIL & POLITICAL RIGHTS, S. EXEC. REP. NO. 102-23, at 14 (1992).

²⁵⁰ *Flores v. Southern Peru Copper Corp.*, 414 F.3d 233 (2d Cir. 2003). Given the Supreme Court's interpretation of the ATS in *Sosa*, a right to health claim brought today would in all likelihood achieve the same unsuccessful outcome as in *Flores*.

²⁵¹ *Id.* at 237.

the ATS, and the Second Circuit affirmed.²⁵² Though the plaintiffs proffered numerous international declarations and conventions in which signatories affirmed rights to life and health, the court characterized these rights as “vague and amorphous.”²⁵³ Rather than “‘clear and unambiguous’ rule[s] of customary international law,” the documents cited by the plaintiffs “proclaim[ed] only nebulous notions that [were] infinitely malleable.”²⁵⁴

This precedent indicates that Nigerian plaintiffs may not be able to successfully utilize the ATS for personal injury suits for toxic exposure to crude oil.²⁵⁵ ATS plaintiffs have met with little success even when alleging the most egregious offenses. Moreover, there is a pronounced dearth of federal precedent supportive of private damages for violations of the international right to health and a healthy environment. Absent a shift in federal jurisprudence, it is unlikely the ATS can provide a road to recovery for victims of Nigerian oil spills.

4. *The Future of the ATS: The Corporate Liability Question*

However, a shift in federal jurisprudence may be on the horizon. The defendants in *Sosa* were not corporate entities, and the Supreme Court therefore was not required to, and did not, address whether corporations could be liable under the ATS.²⁵⁶ Accordingly, the lower courts have once again been required to navigate the murky waters of ATS jurisprudence absent explicit guidance. Corresponding nicely

²⁵² *Id.* at 266.

²⁵³ *Id.* at 254.

²⁵⁴ *Id.* at 254–55 (citing *Filartiga v. Pena-Irala*, 630 F.2d 876, 884 (2d Cir. 1980)). The plaintiffs had cited to the Universal Declaration of Human Rights, and the International Covenant on Economic, Social and Cultural Rights. Though noting that those treaties “express virtuous goals,” the court expressly stated that “they do not meet the requirement of our law that rules of customary international law be clear, definite and unambiguous.” *Id.* at 255.

²⁵⁵ Further proof of the unfriendliness of the US federal court system to right to health claims came in *Sarei v. Rio Tinto PLC*, where foreign plaintiffs alleged environmental abuses by the defendant mining company (in addition to allegations of war crimes). 221 F. Supp. 2d 1116, 1124 (C.D. Cal. 2002). The court dismissed the right to health claim. *Id.* at 1160.

²⁵⁶ Justice Souter acknowledged, in a widely-discussed footnote, a potential distinction between individuals and corporations in terms of ATS liability. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 n. 20 (2004) (“A related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual.”).

with this lack of explicit guidance has been an increasing frequency of high-profile corporations as named defendants in ATS lawsuits.²⁵⁷

Major MNCs are attractive targets for ATS plaintiffs, as they have considerable assets, and are also ineligible for a number of the procedural defenses (such as sovereign immunity) that have been utilized successfully by defendants seeking ATS dismissals.²⁵⁸ Though the status of MNCs in international law is by no means firmly established, legal commentators,²⁵⁹ judicial precedent,²⁶⁰ and simple logic²⁶¹ seem to support the conclusion that “with great power comes great responsibility.”²⁶²

Arguably the most important ATS case litigated since *Sosa* has been *Kiobel v. Royal Dutch Petroleum*—in which the Second Circuit dealt with the question of corporate liability under the ATS head-on, and answered in the negative.²⁶³ *Kiobel* is only the second ATS case to reach the Supreme Court. The *Kiobel* plaintiffs are Nigerian citizens who claim that “Dutch, British and Nigerian corporations . . . aided and abetted the Nigerian government in committing violations of the law of nations.”²⁶⁴ The underlying problems that gave rise to the action in *Kiobel* are exactly those discussed in this Note; the plaintiffs further allege that Shell colluded with the Nigerian government and military, which killed, raped, and destroyed the property of Niger Delta residents at Shell’s behest.²⁶⁵

²⁵⁷ Saad Gul, *The Supreme Court Giveth and the Supreme Court Taketh Away: An Assessment of Corporate Liability Under § 1350*, 109 W. VA. L. REV. 379, 381 (2007) (“Today, the fifty or so corporations sued under the statute and the varied locale of the alleged torts read like a veritable *Who’s Who* of international business. They include: Abercrombie & Fitch, BHP, Chevron, Coca-Cola, Del Monte, Dole, Drummond Coal, Exxon-Mobil, The Gap, J.C. Penney Co., Levis Strauss, Nike, Pfizer, Rio Tinto, Shell, Siemens, Southern Peru Copper Corporation, Target, Texaco, Total, Union Carbide and Unocal.”).

²⁵⁸ Ingrid Wuerth, *The Alien Tort Statute and Federal Common Law: A New Approach*, 85 NOTRE DAME L. REV. 1931, 1960 (2010).

²⁵⁹ *Id.*; see Koh, *supra* note 212, at 264–68; see also Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 461 (2001).

²⁶⁰ *Romero v. Drummond Co., Inc.*, 552 F.3d 1303, 1315 (11th Cir. 2008) (“The text of the [ATS] provides no express exception for corporations . . . and the law of this Circuit is that this statute grants jurisdiction from complaints . . . against corporate defendants.”).

²⁶¹ Koh, *supra* note 212, at 265 (“If corporations have rights under international law, by parity of reasoning, they must have duties as well.”).

²⁶² *SPIDERMAN* (Columbia Pictures 2002).

²⁶³ 621 F.3d 111, 149 (2d Cir. 2010), *cert. granted*, 80 U.S.L.W. 3237 (U.S. Oct. 17, 2011)(No. 10-1491).

²⁶⁴ *Id.* at 117.

²⁶⁵ *Id.* at 123.

On September 17, 2010, the Second Circuit dismissed the cause of action with a blanket holding that the ATS does not provide for subject matter jurisdiction over corporations.²⁶⁶ Though concurring in the judgment, Judge Leval authored a separate opinion longer than the majority's, criticizing its reasoning as dealing "a substantial blow to international law and its undertaking to protect fundamental human rights."²⁶⁷ He has been joined by a chorus of legal commentators²⁶⁸—and a petition for certiorari to the Supreme Court was filed.²⁶⁹ The Supreme Court heard arguments on February 28, 2012, but issued an order the following week restoring the case to the calendar for reargument during the next term—so as of the writing of this Note, no resolution on the merits has been reached.²⁷⁰

C. U.S. Federal Tort Claims under U.S. Tort Law

Nigerian nationals might have more success pursuing recourse in U.S. federal courts with common law tort claims against MNCs. Though the most active MNC in the Niger Delta is Shell, which is based in the Netherlands, two of the other major actors, ExxonMobil and Chevron, are U.S.-based.²⁷¹ These MNCs are therefore already subject to the jurisdiction of U.S. federal courts under 28 U.S.C. § 1332.²⁷² Because ExxonMobil and Chevron are corporate citizens for the purposes of U.S. law, cases against them, even by foreign nationals, are properly in U.S. court even without the help of the ATS.

²⁶⁶ *Id.* at 148–49 (“No corporation has ever been subject to *any* form of liability (whether civil, criminal, or otherwise) under the customary international law of human rights. Rather, sources of customary international law have, on several occasions, explicitly rejected the idea of corporate liability. Thus, corporate liability has not attained a discernible, much less universal, acceptance among nations of the world in their relations *inter se*, and it cannot . . . as a result, form the basis of a suit under the ATS.”) (emphasis in original).

²⁶⁷ *Id.* at 149 (Leval, J., concurring in judgment).

²⁶⁸ Wuerth, *supra* note 258, at 1965; *see also* Tyler Giannini & Susan Farbstain, *Corporate Accountability in Conflict Zones: How Kiobel Undermines the Nuremberg Legacy and Modern Human Rights*, 52 HARV. INT. L. J. ONLINE 119, 121 (2010); Odette Murray, David Kinley & Chip Pitts, *Exaggerated Rumors of the Death of an Alien Tort? Corporations, Human Rights and the Remarkable Case of Kiobel*, 12 MELB. J. INT'L L. 57, 73–74 (2011).

²⁶⁹ Susan Farbstain, *Kiobel Plaintiffs File Petition for Certiorari*, INT'L HUMAN RIGHTS CLINIC, HUMAN RIGHTS PROGRAM AT HARVARD LAW SCH. (Jun. 8, 2011), <http://harvardhumanrights.wordpress.com/2011/06/08/kiobel-plaintiffs-file-petition-for-certiorari/>.

²⁷⁰ Lyle Denniston, *Kiobel to Be Expanded and Reargued*, SCOTUSBLOG (Mar. 5, 2012, 2:01 PM), <http://www.scotusblog.com/?p=140230>.

²⁷¹ *See supra* note 86, and accompanying text.

²⁷² 28 U.S.C. § 1332 (2010).

Though the common law provides a road to recovery, this approach is not without its obstacles. The most important procedural hurdle to common law tort claims against private, non-state actors²⁷³ is the *forum non conveniens* (FNC) doctrine. Foreign defendants who don't want to litigate in American courts always invoke FNC, as the "first line of defense,"²⁷⁴ and argue that a foreign forum is more appropriate for that particular legal action.²⁷⁵ Courts ruling on FNC motions are obligated to consider an array of public and private factors for and against dismissal.²⁷⁶ Public factors include docket congestion, avoidance of conflict of laws, and "local interest in having localized controversies decided at home."²⁷⁷ Private factors include accessibility of evidence and witnesses, costs, and the plaintiff's reason for choosing the original forum.²⁷⁸ The burden is on the defendant (typically the moving party) to establish that an alternative forum is both available and adequate,²⁷⁹ and also "that the pertinent factors 'tilt strongly in favor of trial in the foreign forum.'"²⁸⁰ A foreign forum is "available" if the defendant "is subject to personal jurisdiction there and no other procedural bar . . . prevents resolution of the merits."²⁸¹ It fulfills the adequacy requirement "when the parties will not be deprived of all remedies or treated unfairly, even though they may not enjoy the same benefits they might receive in an American court."²⁸²

Dismissal for FNC typically represents a serious setback for the plaintiff, as it necessitates beginning the lawsuit anew in another forum.²⁸³ For that reason, dismissal on FNC grounds was historically rare.²⁸⁴ Increasingly, however, defendants are actively litigating their

²⁷³ As non-state actors, the other obvious procedural hurdle, sovereign immunity, is not available to oil companies. See *supra* note 214.

²⁷⁴ Rogge, *supra* note 88, at 299.

²⁷⁵ STEPHENS ET AL., *supra* note 205, at 391.

²⁷⁶ *Id.* at 392–93.

²⁷⁷ *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508–09 (1947).

²⁷⁸ *Id.* at 508.

²⁷⁹ Walter W. Heiser, *Forum Non Conveniens and Retaliatory Legislation: The Impact on the Available Alternative Forum Inquiry and on the Desirability of Forum Non Conveniens as a Defense Tactic*, 56 KAN. L. REV. 609, 614 (2008).

²⁸⁰ STEPHENS, *supra* note 205, at 394 (citations omitted).

²⁸¹ Heiser, *supra* note 279, at 614.

²⁸² *Id.* at 615 (quoting *Alpine View Co. v. Atlas Copco AB*, 205 F.3d 208, 221 (5th Cir. 2000) (citations omitted)).

²⁸³ See Heiser, *supra* note 279, at 609 ("A forum non conveniens dismissal typically means that a foreign plaintiff must seek relief in the courts of his own country. As a result, a foreign plaintiff will likely recover much less than a domestic plaintiff injured by a domestic company.")

²⁸⁴ STEPHENS, *supra* note 205, at 392–93. Invocation of FNC has greatly increased in the past few decades. Only twenty-five cases were decided on FNC

motions for FNC, and “federal judges have been taking a lead in limiting access to U.S. courts by aggressively enforcing and expanding the doctrine”²⁸⁵ One such case in which the defendant vigorously litigated and eventually won its motion for FNC was *Aguinda v. Texaco*.²⁸⁶

1. *Success and Failure in Common Law Litigation Against an MNC: Texaco in Ecuador*

a. Round 1 – New York

An attempt to bring common law tort claims against an American oil company began in 1994 in *Aguinda v. Texaco*.²⁸⁷ The case originated as a class action by residents of the Ecuadorean Amazon against Texaco, which was then headquartered in New York.²⁸⁸ The plaintiffs alleged that Texaco’s operations had negligently discharged untreated waste, destroying a substantial portion of Ecuador’s tropical rain forest and endangering the lives of residents by exposing them to toxic

grounds between 1965-1974; between 1975-1985, that number more than quadrupled to 111. Allan R. Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. PA. L. REV. 781, 831 (1985). Since that time, the invocation of FNC has increased even more dramatically—with a recent estimate of forty-three cases per year decided on those grounds. Cassandra Burke Robertson, *Transnational Litigation and Institutional Choice*, 51 B.C. L. REV. 1081, 1092 (2010) (citing Christopher A. Whytock, *Politics and the Rule of Law in Transnational Judicial Governance: The Case of Forum Non Conveniens* 15–16 (Feb. 28, 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=969033).

²⁸⁵ Robertson, *supra* note 284, at 1084.

²⁸⁶ *Aguinda v. Texaco*, (*Aguinda I*), 1994 U.S. Dist. LEXIS 4718 (S.D.N.Y. 1994).

²⁸⁷ *Id.* The historical, political, geographical and socioeconomic similarities between the extractive industries in Ecuador and Nigeria are striking. The region in Ecuador where oil is extracted is remote but populated, and was once a diverse tropical ecosystem. Oil extraction began in the 1960s, and has since generated billions of dollars for the federal government—making Ecuador’s leaders loathe to take action that would diminish national revenues. Those victimized by the pollution in the region are poor ethnic minorities who have not enjoyed any of the benefits that Ecuador’s relationship with Texaco has generated. Malcolm Rogge, *Ecuador’s Oil Region: Developing Community Legal Resources in a National Security Zone*, 1996 THIRD WORLD LEGAL STUD. 233, 234–36 (1997).

²⁸⁸ The complaint named 74 plaintiffs, and the class those plaintiffs represented was estimated at 30,000 residents of the region. Judith Kimerling, *Transnational Operations, Bi-National Justice: ChevronTexaco and Indigenous Huaorani and Kichwa in the Amazon Rainforest in Ecuador*, 31 AM. INDIAN L. REV. 445, 464 (2007).

chemicals.²⁸⁹ Almost eighteen years later, the litigation is still ongoing, and while description of the entire litigation process would be overly cumbersome, a number of the decisions and procedural complications are especially significant for future plaintiffs.

The case was initially filed in the Southern District of New York, and defendant Texaco filed a motion for dismissal for FNC.²⁹⁰ The district judge noted that this argument for dismissal was particularly strong, because even though the events may have been initiated at Texaco headquarters in the United States, “[d]isputes over class membership, determination of . . . damages, and the need for large amounts of testimony with interpreters, perhaps often in local dialects, would make effective adjudication in New York problematic at best.”²⁹¹

The plaintiffs and *amici* argued that given the state of the Ecuadorean judiciary, a fair trial in Ecuador was unlikely.²⁹² The district court judge was not persuaded.²⁹³ Demonstrating the legal-political tightrope that federal judges walk when ruling on matters of international consequence, he opined that “impartiality in adjudication is a potential problem in all jurisdictions including those in the United States.”²⁹⁴ Realistically, some judicial systems are more advanced than others: they are better resourced and more independent from other branches of government and therefore better able to freely interpret the law. But, as the United States becomes increasingly vilified for its economic and military involvement in other countries,²⁹⁵ projecting the U.S. legal system abroad by taking cases away from foreign courts could have negative diplomatic ramifications.²⁹⁶

²⁸⁹ *Aguinda I*, 1994 U.S. Dist. LEXIS 4718, at *1. Texaco’s oil fields produced more than 3.2 million gallons of toxic waste water daily—“virtually all of which was dumped into the environment via unlined, open-air . . . waste pits, without treatment or monitoring – a practice that has been generally banned in the United States . . . since 1979.” Kimerling, *supra* note 288, at 457. Though little research exists regarding the long term effects of exposure to the toxic substances contained in crude oil (*see supra* Part I.A), a number of studies have been conducted in Ecuador as a result of the *Aguinda* litigation. These studies have noted increased incidence of several types of cancers in populations affected by the spillage of oil/untreated waste. *See* Hurtig & San Sebastian, *supra* note 35, at 1025; Anna-Karin Hurtig & Miguel San Sebastian, *Incidence of Childhood Leukemia and Oil Exploitation in the Amazon Basin of Ecuador*, 10 INT. J. OCCUPATIONAL & ENVTL. HEALTH 245, 247, 249 (2005).

²⁹⁰ *Aguinda I*, 1994 U.S. Dist. LEXIS 4718, at *4.

²⁹¹ *Id.* at *5.

²⁹² *Id.* at *7.

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ *See, e.g.* Joseph S. Nye Jr. *Soft Power and American Foreign Policy*, 119 POL. SCI. Q. 255, 255–56 (2004) (discussing the increase in anti-Americanism abroad as a result of changes in U.S. foreign policy).

²⁹⁶ *See supra* notes 235–38 and accompanying text.

The decision in the initial *Aguinda* action reflects an attempt by the district judge to balance the many conflicting political, legal, diplomatic, and practical issues at stake. Though both parties submitted “a massive amount of material,” the judge was loath to dismiss the action.²⁹⁷ He ordered further discovery, asked Texaco to convert its Rule 12(b)(6) motion to dismiss into a motion for summary judgment, and strongly encouraged settlement.²⁹⁸ The district judge’s suggestion of settlement went unheeded, and, in a subsequent proceeding in front of a different district judge, Texaco won its motion to dismiss for FNC.²⁹⁹

b. Round 2 – Ecuador

Had this been a typical case, the Ecuadorean plaintiffs would not have attempted to re-file the case in their home jurisdiction, having already expended considerable resources and nine years attempting to get the case into U.S. federal court.³⁰⁰ Unfortunately for Texaco,³⁰¹ the lawsuit didn’t just go away. The gravity of harm was so severe, and the plaintiffs’ lawyers were so motivated, that in May 2003, many of the *Aguinda* plaintiffs filed a lawsuit against Chevron and Texaco in a superior court in Lago Agrio, Ecuador.³⁰²

²⁹⁷ *Aguinda I*, 1994 U.S. Dist. LEXIS 4718, at *2.

²⁹⁸ *Id.* at *3. The decision heavily encouraged settlement, concluding that “[t]his dispute is not necessarily best resolved by further litigation” and suggesting that resolution would be simpler for all parties if the monetary damage claims were dropped, voluntary corrective measures were taken, and “an impartial person selected” to further assist in mediation. *Id.* at *31–32.

²⁹⁹ *Aguinda v. Texaco*, (*Aguinda II*), 945 F. Supp. 625, 628 (S.D.N.Y. 1996), *aff’d*, 303 F.3d 470 (2d Cir. 2002). Demonstrative of flaws in the Ecuadorian government at the time, and the uncertainty the plaintiffs faced in being forced to litigate at home, the Republic of Ecuador supported dismissal in 1994, and 1996. Brief for The Republic of Ecuador as Amicus Curiae Supporting Defendants at 1, *Aguinda v. Texaco*, 945 F. Supp. 625 (1996) (No. 93-7527), 1994 WL 16188165, at *1. By 2002, however, when the case reached the Second Circuit on appeal, the Republic had completely changed its position. The Attorney General, Dr. Ramon Jimenez-Carbo filed an amicus brief on behalf the state *for* the *Aguinda* plaintiffs—*opposing* dismissal to Ecuador for FNC. Brief for The Republic of Ecuador as Amicus Curiae Supporting Appellants at 1-2, *Aguinda v. Texaco*, (*Aguinda III*), 303 F.3d 470 (2d Cir. 2002) (Nos. 01-7756-L, 01-7758-Con), 2001 WL 3436915.

³⁰⁰ Kimerling, *supra* note 288, at 466.

³⁰¹ Texaco merged with Chevron in 2001, so later references will be to Chevron. Press Release, Fed. Trade Comm’n, FTC Consent Agreement Allows the Merger of Chevron Corp. and Texaco Inc., Preserves Market Competition (Sep. 7, 2001), available at <http://www.ftc.gov/opa/2001/09/chevtex.shtm>.

³⁰² Kimerling, *supra* note 288, at 475. The FNC dismissal was very unpopular with Ecuadorian citizens, and led to mass demonstrations at the Attorney General’s office in the capital, Quito. Rogge, *supra* note 88, at 310. The Ecuadorian

The trial in Ecuador was rife with difficulties and irregularities.³⁰³ Despite agreeing to, indeed, fighting for, the jurisdiction of the Ecuadorean courts,³⁰⁴ Chevron continued to voice its displeasure with the legal action in the American media.³⁰⁵ The ultimate outcome, however, was a recommendation by the court-appointed Special Master for \$27.3 billion in damages for the plaintiffs—a figure that sent shockwaves through the legal community.³⁰⁶ The damage award was ultimately reduced to \$8.6 billion by the Ecuadorean court.³⁰⁷

iteration of the lawsuit sought “judicial determination of the costs of a comprehensive environmental remediation – including removal of all pollution that threatens human health and the environment, restoration of natural resources, and medical monitoring . . .” Kimerling, *supra* note 288, at 476. Because the group of plaintiffs was different than in the original *Aguinda* action, they have since been referred to, in both commentary and in further litigation, as the Lago Agrio Plaintiffs (“LAPs”), *Chevron Corp. v. Donziger*, 768 F. Supp. 581, 600 (2d Cir. 2011).

³⁰³ Initially, the lower court dismissed the action against Chevron, following a number of ex parte meetings between Chevron’s legal representatives and court officials. Appellate review at the Ecuadorian Supreme Court was delayed while the country experienced a political and constitutional crisis that closed down the judiciary for almost a year. Kimerling, *supra* note 288, at 481.

³⁰⁴ *Aguinda III*, 303 F.3d 470 at 475. (“Texaco consented to personal jurisdiction in Ecuador as to the *Aguinda* plaintiffs...[and]...stipulated it would waive its statute of limitations defenses . . .”).

³⁰⁵ In 2008, two of the Ecuadorian attorneys leading the lawsuit were awarded the Goldman Prize, which commends individuals for environmental achievements, and includes a \$150,000 prize for each winner. Chevron publicly criticized the Goldman Foundation for being “misled,” and called the attorneys “con men.” Tyche Hendricks, *Controversy Mires Choice for Goldman Prize*, SAN FRANCISCO CHRON., Apr. 15, 2008, at B1; *Oil Giant Calls Eco-Award Winners ‘Con Men,’* MSNBC.COM (Apr. 15, 2008, 10:37 AM), http://www.msnbc.msn.com/id/24126664/ns/world_news-world_environment/. The Goldman Foundation, which has been awarding the prize for 19 years, reiterated its respect for the selectees, replying that its selection process includes five months of fact checking, and input from environmental experts at 50 organizations. Hendricks, *supra*.

³⁰⁶ Robertson, *supra* note 284, at 1083. If upheld, the award would have been “the largest award for environmental damage ever awarded against an oil company.” *Id.*

³⁰⁷ Simon Romero & Clifford Krauss, *Chevron Is Ordered to Pay \$9 Billion by Ecuador Judge*, N.Y. TIMES, Feb. 14, 2011, at A4. This reduced award is still the largest in an environmental damage action. Chad Bray, *Judge Puts off Chevron Decision*, WALL ST. J., Feb. 18, 2011, <http://online.wsj.com/article/SB10001424052748704900004576152421154113438.html>.

c. Round 3 – The Return to New York

Clearly unhappy with this outcome, Chevron has returned to the United States to challenge the judgment's validity in New York,³⁰⁸ though its position is undercut by its previous argument that Ecuador was the proper forum for litigation.³⁰⁹ After arguing so strenuously that Ecuador was the proper forum and that trying the case there was in the interest of justice, challenging the subsequent outcome constitutes a clear case of “forum shopper’s remorse.”³¹⁰ Were the facts this simple, this case would demonstrate a prime example of what Casey and Ristroph termed “boomerang litigation,” wherein the case returns to the forum from which it was previously dismissed.³¹¹ The result of boomerang litigation is often dismissal on procedural grounds, rather than on the merits—leaving the original plaintiffs without opportunity to recover.³¹²

Non-recognition of foreign judgments is within the discretionary authority of the U.S. federal courts³¹³—so, unfortunately, it is still

³⁰⁸ Ben Casselman, *Chevron Expects to Fight Ecuador Lawsuit in U.S.*, WALL ST. J., July 20, 2009, at B3, (“‘We’re not paying and we’re going to fight this for years if not decades into the future,’ Chevron spokesman Don Campbell said in an interview.”).

³⁰⁹ Ben Casselman & Chad Bray, *Ecuador Seeks to Block Chevron*, WALL ST. J., Dec. 5, 2009, <http://online.wsj.com/article/SB10001424052748704342404574575931947490074.html>. While the case was being litigated in U.S. courts, “Chevron submitted fourteen sworn affidavits attesting to the fairness and adequacy of Ecuador’s courts.” Steven Donziger, Laura Garr & Aaron Marr Page, *Rainforest Chernobyl Revisited: The Clash of Human Rights and BIT Investor Claims: Chevron’s Abusive Litigation in Ecuador’s Amazon*, 11 HUM. RTS. BRIEF, 8, 8 (2004).

³¹⁰ Christopher Whytock & Cassandra Burke Robertson, *Forum Non Conveniens and the Enforcement of Foreign Judgments*, 111 COLUM. L. REV. 1444, 1447 (2011) (quoting Michael D. Goldhaber, *Forum Shopper’s Remorse*, CORP. COUNS., Apr. 2010, at 63).

³¹¹ M. Ryan Casey & Barrett Ristroph, *Boomerang Litigation: How Convenient is Forum Non Conveniens in Transnational Litigation?*, 4 B.Y.U. INT’L L. & MGMT. REV. 21, 22 (2007).

³¹² *Id.* See also Whytock & Robertson, *supra* note 310, at 1451. The authors have elaborated on the concept of the boomerang suit, and created the term “transnational access to justice gap,” for the situation where a case is dismissed for FNC, is decided abroad on the merits, and then boomerangs back to the original forum to challenge the validity of the foreign judgment. *Id.* at 1450.

³¹³ See RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 482 (1987); Unif. Foreign-Country Money Judgments Recognition Act § 4, 13 (U.L.A.) (Supp. 2008), *available at* <http://faculty.law.pitt.edu/brand/2005%20NCCUSL%20UFCJRA%20text.pdf> [hereinafter UFCMJRA].

possible for Chevron to avoid liability.³¹⁴ Under the Uniform Foreign-Country Money Judgments Recognition Act (UFCMJRA), which has been adopted by a majority of states,³¹⁵ U.S. courts may not recognize judgments “rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law.”³¹⁶ Paradoxically, the UFCMJRA requires that judges perform precisely the type of analysis they are instructed to avoid when considering FNC motions. In most cases, however, it would likely be difficult for the moving party to definitively demonstrate that a foreign judicial system failed to provide impartial tribunals.

Such was not the case for Chevron. As the litigation progressed in Ecuador, the lead attorney for the plaintiffs, Steven Donziger, contacted documentary filmmaker Joseph Berlinger about the case. The result was a powerful, well-received documentary called *Crude*.³¹⁷ The film significantly raised awareness about a lawsuit that was, at the time, essentially unknown to American audiences. However, that negative publicity has cut both ways, and Berlinger himself became embroiled in satellite litigation when Chevron demanded he turn over more than 500 hours of his unseen footage.³¹⁸ Berlinger was subsequently ordered to produce the outtakes.³¹⁹ In these outtakes, Steven Donziger is filmed saying things such as “[t]hey’re all [i.e., the Ecuadorian judges] corrupt! It’s – it’s their birthright to be corrupt.”³²⁰ Donziger is also on film discussing plans to humiliate and intimidate Ecuadorean judges in order to get favorable rulings.³²¹

³¹⁴ Lucien J. Dhooge, *Aguinda v. Chevron-Texaco: Discretionary Grounds for the Non-Recognition of Foreign Judgments for Environmental Injury in the United States*, 28 VA. ENVTL. L. J. 241, 244 (2010).

³¹⁵ The majority of states have adopted the UFCMJRA, and many of the remaining states have adopted laws that comport with its standards, or the similar Restatement position. Heiser, *supra* note 279, at 634–35.

³¹⁶ UFCMJRA § 4(b).

³¹⁷ CRUDE (First Run Features 2009). Critics called *Crude* a “forceful, often infuriating story,” and the type of movie Michael Moore would have made if he “wanted to make a serious movie about capitalism. Manohla Dargis, *In the Snows of Sundance, a Marked Chill in the Air*, N.Y. TIMES, Jan. 22, 2009, http://www.nytimes.com/2009/01/23/movies/23sund.html?_r=1; John Anderson, *Not Simply an Underdog’s Tale*, WASH. POST, Oct. 23, 2009, at 26. In January 2011, Berlinger was ordered to turn over the footage. Dave Itzkoff, *Documentary Filmmaker Doesn’t Qualify for a Journalist’s Privilege, a Court Says*, N.Y. TIMES, Jan. 14, 2011, at A15.

³¹⁸ John Schwartz & Dave Itzkoff, *Scenes Cut from Film Find New Role in Court*, N.Y. TIMES, Jan. 2, 2011, at A13.

³¹⁹ *Chevron Corp. v. Berlinger*, 629 F.3d 297, 311 (2d Cir. 2011).

³²⁰ *Chevron Corp. v. Donziger*, 768 F. Supp.2d 581, 595 (S.D.N.Y. 2011).

³²¹ *Id.* at 611.

The footage was subsequently used by Chevron to support its motion against enforcement of the Ecuadorean judgment. Unsurprisingly, admissions of misconduct, and extemporaneous description of the judicial system as corrupt and partial by the lead plaintiffs' counsel bolstered Chevron's argument for injunction. On March 8, 2011, Judge Kaplan granted Chevron a preliminary injunction prohibiting the judgment's enforcement anywhere except Ecuador.³²² Chevron has no assets in Ecuador.³²³ The effect of the judgment is to undo eighteen years of litigation. Citing heavily to the outtakes, Judge Kaplan found "abundant evidence . . . that Ecuador [had] not provided impartial tribunals or procedures compatible with due process of law."³²⁴ Ecuador's Ambassador to the United States was quick to respond, expressing "consternation that a U.S. court has elected to pass judgment on Ecuador's courts."³²⁵ A bizarre legal pretzel thus emerged, such that eighteen years after the litigation began, the parties are essentially back at square one—albeit attempting to argue positions opposite to those they took in the original litigation.³²⁶ In yet another twist to the legal pretzel, on September 19, 2011, the Second Circuit vacated Judge Kaplan's preliminary injunction in its entirety.³²⁷

The Ecuadorean action is a single case with an as-yet uncertain outcome, and it is therefore of indeterminate precedential value. However, the events in Ecuador that gave rise to the litigation are remarkably similar to those that have occurred more than 5,000 miles away in the Niger Delta. The complicated course the *Aguinda* action has charted would likely influence the behavior of defendant oil com-

³²² *Id.* at 660. Interestingly, Judge Kaplan also ordered the production of the outtakes in *Berlinger*. Ben Casselman & Chad Bray, *Chevron is Granted Ecuador Injunction*, WALL ST. J., Mar. 8, 2011, at B1.

³²³ *Donziger*, 768 F. Supp.2d at 660.

³²⁴ Casselman & Bray, *supra* note 322.

³²⁵ Lawrence Hurley, *Ecuador's U.S. Ambassador Speaks Out on Chevron Case*, N.Y. TIMES, Mar. 20, 2011, <http://www.nytimes.com/gwire/2011/03/10/10greenwire-ecuadors-us-ambassador-speaks-out-on-chevron-c-86771.html>.

³²⁶ *Donziger*, 768 F. Supp. 2d at 596 ("[I]t is well to bear in mind that the positions of both sides have changed 180 degrees since the predecessor litigation in New York. Chevron then touted the adequacy of the Ecuadorian judiciary, while the plaintiffs—briefs bearing Donziger's name as counsel—argued that Ecuador could not provide an adequate forum and that its judiciary was corrupt.")

³²⁷ *Chevron Corp. v. Naranjo*, 2011 WL 4375022 at *1 (2d. Cir. 2011). In the opinion following its September 19 order, the Second Circuit noted that "[t]he story of the conflict between Chevron and the residents of the Lago Agrio region of the Ecuadorian Amazon must be among the most extensively told in the history of the American federal judiciary." *Chevron Corp. v. Naranjo*, 667 F.3d 232, 235 (2d Cir. 2012).

panies if sued by Nigerian plaintiffs. Chevron has been embroiled in this single action for more than a decade and a half. A decade and a half's worth of litigation costs have been expended, and the corporation may yet be liable for billions of dollars in environmental remediation damages. A decade and a half of bad publicity has harmed Chevron's public image in an era of increasingly socially-conscious investors.³²⁸ While it is hard to predict the impact on future conduct, the totality of these circumstances might influence Chevron or Exxon to defend differently against a potential lawsuit by Nigerian plaintiffs.³²⁹ Thus, a common law tort lawsuit by Nigerian plaintiffs may very well be worthwhile.

2. *Common Law Tort Claims Available to Nigerian Plaintiffs*

a. Making the Prima Facie Case

Oil spills in the Niger Delta trigger MNC liability for tortious infliction of personal injury. Though proving *intentional* infliction of harm is essentially impossible, poor maintenance of pipelines and sluggish responses to leaks or blowouts could support a finding of negligence. A common law claim for events arising in a foreign forum requires application of the law of that forum by the U.S. court.³³⁰ Though this can be difficult in certain contexts, both the Nigerian and American legal systems have the same roots: English Common

³²⁸ Socially responsible investing (SRI), generally refers to investment seeking both financial and sustainable development returns. In the past 15 years, investment trends show a 380% increase in investment in socially responsible organizations. SOC. INV. FORUM FOUND., 2010 REPORT ON SOCIALLY RESPONSIBLE INVESTING TRENDS IN THE UNITED STATES 1 (2010), available at <http://ussif.org/resources/research/documents/2010TrendsES.pdf>. See also 60 Minutes: Amazon Crude (CBS News television broadcast May 3, 2009).

³²⁹ Chevron has recently launched the Niger Delta Partnership Initiative to establish "innovative multi-stakeholder partnerships that support programs and activities, which empower communities to achieve a peaceful and enabling environment for equitable economic growth" in the region. *About the Foundation*, NIGER DELTA PARTNERSHIP INITIATIVE, <http://ndpifoundation.org/about-the-foundation/> (last visited Aug. 20, 2012). In February 2011, the foundation announced a joint partnership with the United States Agency for International Development (USAID), pledging to invest \$25 million for development in the region in four years. *Chevron Foundation, USAID Give Nigeria \$50M*, BLOOMBERG BUSINESSWEEK (Feb. 17, 2011, 11:24 AM), <http://www.businessweek.com/ap/financialnews/D9LEKNG80.htm>. While this proactive gesture is commendable, and may yield significant development dividends, it does not necessarily absolve the corporation of liability for negligent oil spills.

³³⁰ RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 8, 136 (1965).

Law.³³¹ Therefore the elements of a tort claim in Nigeria are virtually identical to those in the United States.³³² To prove negligence, the plaintiff must show that “the defendant owes him a duty of care, that the duty was breached and that damage resulted from the breach . . .”³³³

Presently, Nigerian plaintiffs are much more likely to recover from U.S.-based companies in a U.S. federal courtroom than anywhere else. Establishing the first two elements of a prima facie showing of MNC negligence would not be difficult. The Petroleum Act³³⁴ imposes an affirmative duty on foreign oil companies operating in Nigeria to take precautions against pollution, and to maintain up-to-date equipment.³³⁵ Negligent maintenance fulfills the second element. By even a lenient standard, pipelines that have not been replaced or updated despite continuous use for almost half a century have been negligently maintained.³³⁶

The causation element of a tort case is always the most difficult to establish.³³⁷ Nigerian law requires actual causation,³³⁸ and allows for limitation or elimination of liability when the harm suffered is “too remote” in relation to the breach.³³⁹ This is analogous to the distinction between but-for and proximate causation in American jurisprudence.³⁴⁰ The farther away in time and space the victim is from the would-be tortfeasor, the less willing the law is to hold the tortfeasor

³³¹ LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* at xii (3rd ed. 2005); Jill Cottrell, *The Tort of Negligence in Nigeria*, 17 J. AFR. L. 30, 30 (1973).

³³² See RESTATEMENT (SECOND) OF TORTS § 281.

³³³ FRYNAS, *supra* note 138, at 190.

³³⁴ See *supra* notes 173–74.

³³⁵ See *supra* text accompanying note 173.

³³⁶ See *supra* text accompanying note 173. In Nigerian courts, oil companies have typically had the upper hand with respect to the negligence element. The MNCs have the advantage of technical expertise regarding their own operations because it is difficult for plaintiffs to provide sufficient scientific expert testimony to counter the perpetual position of MNCs that they were exercising due care. See FRYNAS, *supra* note 138, at 191. This particular advantage would not follow the MNCs home into the federal court system, however. Experts, while not inexpensive, are not nearly as difficult to come by in the U.S. See generally MOLLY TREADWAY JOHNSON ET AL., FED. JUDICIAL CTR., *EXPERT TESTIMONY IN FEDERAL CIVIL TRIALS: A PRELIMINARY ANALYSIS* (2000), available at [http://www.fjc.gov/public/pdf.nsf/lookup/ExpTesti.pdf/\\$file/ExpTesti.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/ExpTesti.pdf/$file/ExpTesti.pdf).

³³⁷ Richard W. Wright, *Causation in Tort Law*, 73 CALIF. L. REV. 1735, 1737 (1985) (“In all of tort law, there is no concept which has been as pervasive and yet elusive as the causation requirement. . .”).

³³⁸ See FRYNAS, *supra* note 138, at 190.

³³⁹ Cottrell, *supra* note 331, at 34–35.

³⁴⁰ Steven Shavell, *An Analysis of Causation and the Scope of Liability in the Law of Torts*, 9 J. LEGAL STUD. 463, 467–70 (1980).

liable.³⁴¹ For Nigerian plaintiffs in oil spill litigation, actual causation is fairly clear. But-for the extractive operations of the oil companies, particularly the snaking of miles of pipeline across the Delta wetlands, oil spills would not plague the region to the extent that they do.

Establishing proximate causation, in other words, demonstrating that the harm is not too remote, could be difficult for Nigerian plaintiffs. For the reasons detailed in Part IV.A, particularly pipeline vandalism, MNCs have traditionally enjoyed nearly-automatic exemption from liability in the small number of actions attempted in Nigerian courts.³⁴² Sabotage by local militants, the vast majority of whom are members of disorganized, poorly identified groups, has been pervasive enough that MNCs have always had viable third-party wrongdoers to blame.³⁴³ In order to eliminate this liability loophole, a spill would need to be documented by a legitimate, unbiased source in a time of relative peace.

b. Who Makes the Prima Facie Case?

Timing is critical in conflict resolution. The violence in the Niger Delta has occurred in waves, with a number of pronounced lulls in recent years.³⁴⁴ Documenting damages during a lull could provide a viable starting point for a legal action. This would require the involvement of grassroots activists to impart the viability of a potential lawsuit to Delta residents who are understandably unfamiliar with the U.S. federal legal system—and the necessity of continued peace for that lawsuit's success. A wide variety of international environmental and human rights organizations are active in the Niger Delta, including Amnesty International,³⁴⁵ Human Rights Watch,³⁴⁶ and Friends of the Earth International.³⁴⁷ These groups, and others, have already

³⁴¹ Wright, *supra* note 337, at 1737. With that time and space, the likelihood that either the victim or a third party contributed to the loss increases. *See id.* at 1817–18.

³⁴² *See supra* notes 192–94 and accompanying text.

³⁴³ *See supra* notes 115–20 and accompanying text.

³⁴⁴ *See supra* Part III.B.4.

³⁴⁵ *See* PETROLEUM, POLLUTION & POVERTY, *supra* note 78.

³⁴⁶ *See generally* Nigeria, HUMAN RIGHTS WATCH (Jan. 2010), available at http://www.hrw.org/sites/default/files/related_material/nigeria_0.pdf.

³⁴⁷ Friends of the Earth International is an umbrella environmental network made up of 5,000 activist groups in seventy-six countries. *About Friends of the Earth International*, FRIENDS OF THE EARTH INT'L, <http://www.foei.org/en/who-we-are/about> (last visited Oct. 24, 2011). The twofold purposes of Nigeria's Friends of the Earth International chapter are: “to act as a peaceful pressure group, campaigning for change in the policies of governmental, non-governmental and commercial organisations where those policies are likely to act against environmental human rights” and

documented damage done by oil spills³⁴⁸—and could likely perform similar roles in the future.

c. Avoiding the Aguinda Quagmire

Even if Nigerian plaintiffs could establish prima facie negligence cases, procedural obstacles might still keep their suits out of federal courts. *Aguinda* demonstrates how unpredictable an international tort case of significant magnitude can be—and the multitude of substantive, procedural and financial obstacles plaintiffs must successfully negotiate in order to have their day in court. But as arduous a road as it has been, recovery for the plaintiffs is not off the table. And arguably, but-for the video evidence of misconduct by counsel, the judgment enforcement challenge by Chevron would not have gained much traction. *Aguinda* will be doubly useful for Nigerian plaintiffs (and their attorneys), as it demonstrates what to do, and what *not* to do.

For a region like the Niger Delta that has been trapped in a cyclical crisis for decades, however, a change in tactics would be beneficial. The region's stakeholders have become entrenched in their traditional positions, apparently preferring to do as they have always done, even if it means that they get what they've always gotten. Pursuing legal remedies has never been a viable option for Niger Delta residents, for procedural, political, economic, and cultural reasons. But legal action in the United States *is* a viable option—a new solution to an old problem. A successful common law tort claim by a Nigerian plaintiff would not be a miracle solution to the region's or country's problems; solving those problems demands more than a lawsuit could ever provide. The law isn't a business of miracles, it's a business of chances. And while the chance to provide “partial relief to some victims is not ideal . . . it is better than providing zero relief to any victims.”³⁴⁹

CONCLUSION

Residents of the Niger Delta have been forced to tolerate toxic levels of spilled crude oil for decades. Properly extracted by a responsible industry, oil of the quality and quantity available in the Niger Delta could be a blessing. But to the vast majority, it has been

“to enable local people to defend their environmental human rights law.” *About ERA*, ENVTL. RIGHTS ACTION/FRIENDS OF THE EARTH: NIGERIA, <http://www.eraaction.org/> (last visited Oct. 24, 2011).

³⁴⁸ See PETROLEUM, POLLUTION & POVERTY, *supra* note 78.

³⁴⁹ Farber, *supra* note 52, at 1128.

nothing but a curse. Poor governmental control of the oil industry by faraway bureaucrats has allowed for a staggering level of pollution. The end—massive wealth for those faraway bureaucrats—has justified the means—negligently irresponsible, if cost-effective, pipeline maintenance. The result is a region more “battered by oil” than anywhere else on earth.³⁵⁰

Faced with a nearly inconceivable problem, Niger Delta residents have watched virtually every potential solution go up in smoke. Though statutes regulating foreign oil companies are in place, they are only intermittently enforced. The few individuals with the patience, the funds, and the luck to reach a verdict on the merits in a Nigerian court have recovered damage awards that are marginal at best. It is entirely possible that a case against an oil company tried in a courtroom devoid of the myriad difficulties present in a Nigerian courtroom would have a very different outcome from what the typical Nigerian plaintiff has become accustomed to. If the corruption, the procedural delays, the technological inadequacies, and the inconsistencies regarding standing and joinder are eliminated, the law itself can take center stage. And the law is biased toward neither the plaintiff nor the defendant.

A different set of difficulties will present itself to Nigerian plaintiffs—but these difficulties are not insurmountable obstacles. Human rights groups have attempted to attract attention to the plight of Niger Delta residents for years, and channeling that attention into concerted legal action would represent an intelligent adaptation to an ever-changing legal environment. The Deepwater Horizon disaster provided American observers with an alarming point of reference: the deluge of oil unleashed in the Gulf of Mexico is less than half of what Niger Delta residents have been subjected to. Before the Deepwater Horizon leak had even been capped, BP set aside a claims fund of \$20 billion,³⁵¹ but across the Atlantic, MNCs have fought and evaded liability at every opportunity. This stark double-standard is unacceptable. Regardless of standard operating procedures, “ethical responsibilities of transnational businesses do not end at national borders.”³⁵² Reconciling this double-standard and the decades-old cycle of poverty, pollution, and violence can, and should, occur in the same place: a United States courtroom.

³⁵⁰ Nossiter, *supra* note 99.

³⁵¹ Press Release, British Petroleum, BP Establishes \$20 Billion Claims Fund for Deepwater Horizon Spill and Outlines Dividend Decisions (June 16, 2010), *available* at <http://www.bp.com/genericarticle.do?categoryId=2012968&contentId=7062966>.

³⁵² Rogge, *supra* note 88, at 316.