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The Niger Delta and Human Rights Lawsuits: A Search for the Optimal Legal Regime

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The Niger Delta and Human Rights Lawsuits: A Search for the Optimal Legal Regime

Micaela L. Neal*

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“Niger Delta. Oil. Blood. Money. . . this crude everywhere looks like dark blood stains on the environment.”

—Chris Agunweze¹

I. INTRODUCTION

Although it may not be apparent based on the effects of the 2008 recession,² the world continues to grow economically.³ An increasing demand for energy accompanies this growth, and consequently an increased demand for oil.⁴ As oil companies race to fulfill this growing need, exploration and extraction are driven to riskier locales where oil spills are more likely and more devastating.⁵

On April 20, 2010, a BP oil well exploded in the Gulf of Mexico.⁶ The rig, called the *Deepwater Horizon*, sank and spilled 206 million gallons of oil into the sea,⁷ which threatened life and ecosystems both in the water and onshore.⁸ Two decades earlier, on March 24, 1989, the *Exxon Valdez* tanker ran aground in Prince William Sound, Alaska, spilling 10.9 million gallons of oil.⁹ National and international conversation erupted after both instances.¹⁰ Much of the commentary focused on criticizing the oil company executives deemed responsible, lamenting the harm done to the environment, searching for a

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1. Chris Agunweze, *This Crude is Like Dark Blood Stains*, DAILY SUN (Nigeria) (Oct. 7, 2010), <http://64.182.81.172/webpages/features/special-%20reports/2010/oct/07/special-report-07-10-2010-002.htm>.

2. See generally NAT'L BUREAU OF ECON. RESEARCH, DETERMINATION OF THE DECEMBER 2007 PEAK IN ECONOMIC ACTIVITY 1 (2008), available at <http://www.nber.org/cycles/dec2008.html>.

3. See U.S. ENERGY INFO. ADMIN., SHORT-TERM ENERGY AND WINTER FUELS OUTLOOK (2010), available at <http://www.eia.doe.gov/emeu/steo/pub/contents.html>.

4. See *id.*

5. John Flesher & Harry R. Weber, *Big Oil Explores Riskier, More Dangerous Options to Meet Growing Energy Demand*, HUFFINGTON POST (Nov. 4, 2010), http://www.huffingtonpost.com/2010/11/05/big-oil-explores-riskier-_n_779356.html.

6. Dina Capiello, *Panel: Gov't Blocked Scientists on Spill Estimate*, ABC NEWS (Oct. 6, 2010), <http://abcnews.go.com/Technology/wireStory?id=11816570>.

7. *Id.*

8. David Biello, *The BP Spill's Growing Toll on the Sea Life of the Gulf*, YALE ENV'T 360 (June 9, 2010), http://e360.yale.edu/feature/the_oil_spills_growing_toll_on_sea_life_in_the_gulf_of_mexico/2284/ (interview of Thomas Shirley).

9. Cutler J. Cleveland, *Exxon Valdez Oil Spill*, ENCYCLOPEDIA OF EARTH (June 9, 2010, 12:00 AM), http://www.eoearth.org/article/Exxon_Valdez_oil_spill.

10. Ben Tracy, *Angry BP Backlash Growing Across the Country*, CBS NEWS (June 2, 2010, 9:18 PM), <http://www.cbsnews.com/stories/2010/06/02/eveningnews/main6541866.shtml>; Terry Atlas, *Tanker's Woes May Propel Bill: Fire Could Push Congress to Pass Measure on Oil Spills*, CHI. TRIB., June 13, 1990, at C4; John Vidal, *Nigeria's Agony Dwarfs the Gulf Oil Spill. The U.S. and Europe Ignore It*, THE OBSERVER (May 30, 2010), <http://www.guardian.co.uk/world/2010/may/30/oil-spills-nigeria-niger-delta-shell>.

solution to the ecological damage, and rallying aid for the people affected economically and physically by the spills.¹¹ Lawsuits were filed almost immediately to redress the wrongs done to those injured, including the many fishermen who lost their way of life and only source of income as a result.¹² In the case of the *Exxon Valdez* spill, the lawsuits resulted in hefty punitive damages of \$5 billion, reduced on appeal to \$2.5 billion, and eventually cut to \$507.5 million by the U.S. Supreme Court.¹³ Lawsuits against BP will likely result in comparable, if not heavier, penalties.¹⁴

More recently, on May 1, 2010, an Exxon Mobil pipeline in Akwa Ibom, Nigeria ruptured and spilled over one million gallons of oil in the Niger Delta (“Delta”).¹⁵ In fact, in the past 50 years, one and a half million *tons* of oil have been spilled there,¹⁶ the equivalent of an *Exxon Valdez* disaster every single year.¹⁷ Yet the media spotlight and international legal responses to these disasters in the Delta pale in comparison to the reactions to *Exxon Valdez* or the recent BP oil spill.¹⁸ For a people already beaten down from constantly living in an oil-drenched region, the BP oil spill only confirmed what they already knew: the international community is either unwilling to help, unable to heed their cries, or simply does not care about the Delta crisis.¹⁹ In the words of a member of the Ogoni tribe,

The oil companies just ignore it. The lawmakers do not care and people must live with pollution daily. The situation is now worse than it was 30 years ago. Nothing is changing. When I see the efforts that are being made in the U.S. I feel a great sense of sadness at the double standards.²⁰

Since the Delta crisis began half a century ago, a handful of different legal forums have attempted to address and rectify the problem, including the African Commission on Human and People’s Rights (“Commission”), the United States

11. See Brooke Sopelsa, *More than 6,000 Lawsuits Filed Against BP*, CNBC (June 9, 2010, 12:29 PM), <http://www.cnbc.com/id/37593191?par=yahoo>; see also Atlas, *supra* note 10; Curt Anderson & Thomas Watkins, *Gulf Spill Draws Flock of Lawyers*, MSNBC (May 1, 2010, 3:42 PM), http://www.msnbc.msn.com/id/36888206/ns/us_news-environment/.

12. Sopelsa, *supra* note 11; Kyle Hopkins, *Health of Exxon Valdez Cleanup Workers Was Never Studied*, MCCLATCHY NEWSPAPERS (June 29, 2010), <http://www.mcclatchydc.com/2010/06/29/96782/health-of-exxon-valdez-cleanup.html>; Anderson & Watkins, *supra* note 11.

13. *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 480, 514 (2008); see also Anderson & Watkins, *supra* note 11.

14. Anderson & Watkins, *supra* note 11.

15. Vidal, *supra* note 10.

16. *Id.*

17. See *id.*

18. See Adam Nossiter, *Far From Gulf, a Spill Scourge 5 Decades Old*, N.Y. TIMES, June 17, 2010, at A1, available at http://www.nytimes.com/2010/06/17/world/africa/17nigeria.html?_r=1.

19. *Id.*

20. Vidal, *supra* note 10.

(“U.S.”) Federal Courts, and the Nigerian National Courts. In addition, other international forums exist that could potentially establish jurisdiction over the human rights abuses in Nigeria. Yet, the crisis in the Delta has only gotten worse since oil was discovered in Nigeria over 50 years ago.²¹ Thus far, the international legal system has failed to adequately address the plight of the Delta residents.²² Therefore, an effective international legal response to the environmental damage and human rights abuses caused by oil companies and their government counterparts is necessary.²³

One way to rectify the human rights abuses is to attack them from an environmental angle and take advantage of the present-day shift towards enthusiasm for conservation and environmental protection.²⁴ Though this approach may be criticized as putting the environment first and human rights second, doing so may be the most prudent way to tackle the root of both problems, which is the environmental damage itself.²⁵ By harnessing the sudden international attention to the environment and directing it to the crisis in the Delta, as well as other situations like it, the people affected by chronic oil pollution just might receive the help they so desperately need.²⁶

Ecuador provides an extreme example of vindicating human rights through environmental lawsuits.²⁷ In 2008, Ecuador amended its constitution to grant inalienable rights to nature.²⁸ Article 71 gives ecosystems, natural resources, living plants, and creatures the right to “exist, flourish and evolve.”²⁹

Ecuador intends this new substantive right to allow suits vindicating environmental rights around the world and has claimed universal jurisdiction over such suits.³⁰ In reaction to the BP oil spill, environmental groups brought suit against BP in late 2010 on behalf of the Gulf of Mexico, more specifically

21. *See id.*

22. *See generally* Ambrose O.O. Ekpu, *Environmental Impact of Oil on Water: A Comparative Overview of the Law and Policy in the United States and Nigeria*, 24 *DENV. J. INT’L L. & POL’Y* 55, 93-95 (1995).

23. *See* Koriambanya S.A. Carew, *David and Goliath: Giving the Indigenous People of the Niger Delta a Smooth Pebble—Environmental Law, Human Rights and Re-defining the Value of Life*, 7 *DRAKE J. AGRIC. L.* 493, 522-23 (2002).

24. Dinah Shelton, *Human Rights, Environmental Rights, and the Right to Environment*, 28 *STAN. J. INT’L L.* 103, 103-05 (1991).

25. *Id.*

26. *See id.*

27. *See* Sofia Jarrín, *BP Sued in Ecuador for Violating the Rights of Nature*, *UPSIDE DOWN WORLD* (Nov. 30, 2010, 8:41 AM), <http://upside-downworld.org/main/ecuador-archives-49/2805-bp-sued-in-ecuador-for-violating-the-rights-of-nature>; *see also* Derek Ford, *BP Sued in Ecuadorian Courts for Deepwater Horizon Oil Spill*, *PSL* (Dec. 16, 2010), http://www2.pslweb.org/site/News2?page=NewsArticle&id=14891&news_iv_ctrl=1261; *BP Sued in Ecuadorian Court for Violating Rights of Nature*, *DEMOCRACY NOW* (Nov. 29, 2010), http://www.democracynow.org/2010/11/29/headlines/bp_sued_in_ecuadorian_court_for_violating_rights_of_nature.

28. Jarrín, *supra* note 27; Ford, *supra* note 27.

29. Jarrín, *supra* note 27; Ford, *supra* note 27.

30. Jarrín, *supra* note 27; Ford, *supra* note 27; *DEMOCRACY NOW*, *supra* note 27.

the ocean and ecosystems in affected Latin American countries.³¹ This approach is so radical, however, that success for plaintiffs is doubtful.³² The plaintiffs, who include environmentalists and indigenous leaders from many countries, have demanded full disclosure of all documents and information pertaining to the spill; yet, the U.S. Government has helped BP prevent this discovery.³³ Also, because the rights of the environment are touted in a governing instrument internal to Ecuador,³⁴ they are not binding on other nations, individuals, or entities until they are agreed to in a treaty or become a *jus cogens norm*.³⁵ Ecuador's acknowledgment of the dire environmental consequences oil spills pose, and the need to rectify them, is nonetheless a step in the right direction.

This Comment will analyze the attempts and failures of national and international legal regimes to adequately address the environmental damage caused by Delta oil spills and the human rights abuses that occur as a result. The Delta crisis is utilized as a case study to demonstrate the current disparity in global response to oil spills, depending upon the geographic location of the spill. International substantive law as it currently exists is grossly inadequate to respond to oil spills occurring in remote regions of the world. The law also fails to uniformly regulate oil companies.³⁶

This Comment will also recommend the development of an international treaty that encompasses onshore oil production activities, to be modeled after the International Convention on Oil Pollution Preparedness, Response and Cooperation (“OPRC”), which addresses pollution from offshore oil exploration.³⁷ A Special International Tribunal for Oil Spills (“Tribunal”) should be established to oversee implementation of the treaty provisions and adjudicate disputes. To supplement the Tribunal, a community justice mechanism, entitled Gacaca proceedings, should be instituted in nations like Nigeria that also suffer from government corruption and violent human rights abuses in connection with oil exploration. Section II gives a brief chronology of the Delta crisis, showcasing the history of oil exploration and spillage in the area, the environmental effects on the people, and the extent of related human rights abuses. Section III provides a legal background identifying the substantive law, forums and other legal mechanisms currently available that have been used in an

31. Jarrín, *supra* note 27; Ford, *supra* note 27; DEMOCRACY NOW, *supra* note 27.

32. See generally Ford, *supra* note 27; DEMOCRACY NOW, *supra* note 27.

33. Jarrín, *supra* note 27; Ford, *supra* note 27.

34. Jarrín, *supra* note 27; Ford, *supra* note 27.

35. See BLACK'S LAW DICTIONARY (9th ed. 2009) (defining *jus cogens* as a “mandatory or peremptory norm of general international law accepted and recognized by the international community as a norm from which no derogation is permitted”).

36. See Guy Chazan, *Shell Faces Query on Nigeria—Dutch Parliament Hearing Expected to Touch on Corruption in Oil-Rich Delta, as Spills Spur Concerns*, WALL ST. J., Jan. 4, 2011, at A10; see also Sopelsa, *supra* note 11; Jarrín, *supra* note 27.

37. Carew, *supra* note 23, at 519.

attempt to address the Delta crisis. Section IV details past attempts to redress environmental damage and human rights abuses in the Delta and explains why these responses have not only been ineffective, but also inadequate. In consideration of the reasons for these past failures, Section V proposes drafting a new international treaty addressing onshore oil pollution and the creation of a Tribunal to adjudicate the human rights cases arising from the Delta crisis, as well as claims arising from oil spills around the world. Section V also suggests the implementation of Gacaca proceedings in the Delta and similar regions.

II. THE HISTORY OF OIL IN THE DELTA

A. *Oil Exploitation and Spillage*

After oil was discovered in Nigeria in 1958, exploration and exploitation in the country exploded.³⁸ Home to the world's tenth largest crude oil reserves,³⁹ Nigeria is the fourteenth largest producer of petroleum in the world and seventh largest exporter.⁴⁰ Oil companies elevated Nigeria to this status through routine seizure and pollution of indigenous lands.⁴¹ It remains the cornerstone of Shell Petroleum Development Company of Nigeria, Ltd.'s ("Shell") oil operations, accounting for one-fifth of the company's total oil production in 2009.⁴² While oil extraction in developed countries involves many environmental safeguards and much opportunity for community input, exploration in countries like Nigeria is characterized by lax safety standards, if they even existed in the first place.⁴³

Since Shell first came to the Delta, it has used outdated operations and materials that are not only in poor condition, but would actually be illegal in developed countries.⁴⁴ Pipelines are maintained inadequately, which in turn leads to oil well blow-outs.⁴⁵ These blow-outs release uncontrolled amounts of oil, causing damage that is only exacerbated by the notorious failure of oil companies

38. Carew, *supra* note 23, at 496.

39. Chazan, *supra* note 36.

40. U.S. ENERGY INFO. ADMIN., COUNTRIES OVERVIEW (2011), available at <http://www.eia.doe.gov/country/index.cfm>.

41. See Carew, *supra* note 23, at 497-98; Daniel Cameron Morris, *Nigeria Oil Exploitation and Human Rights: Worldwide Example for Violence Against Civil Rights Leaders or Inspiration for Freedom for All Indigenous Peoples?*, WORLD POVERTY & HUM. RTS. ONLINE (Apr. 12, 2010), <http://wphr.org/2010/danielcameronmorris/nigeria-oil-exploitation-and-human-rights-worldwide-example-for-violence-against-civil-rights-leaders-or-inspiration-for-freedom-for-all-indigenous-peoples/>.

42. Chazan, *supra* note 36.

43. Andrew Rowell, *Environmental and Social Costs of Living Next Door to Shell, Shell-Shocked: The Environmental and Social Costs of Living With Shell in Nigeria*, GREENPEACE INT'L (July 1994), <http://archive.greenpeace.org/comms/ken/hell.html#cont>.

44. *Id.*

45. *Id.*; Carew, *supra* note 23, at 500.

to clean up their spills.⁴⁶ This is due, in large part, to the lack of pollution prevention in the area.⁴⁷

The combination of blow-outs and little to no anti-pollution regulations creates a recipe for disaster.⁴⁸ High pressure gas pipelines cross through lands once used for agriculture, and through villages, only a few meters away from homes.⁴⁹ Consequently, oil spills occur in these same areas.⁵⁰ In addition, companies like Shell engage in gas flaring in close proximity to villages, creating acid rain, causing health problems, and destroying plants, wildlife, and food sources.⁵¹

To add to the problem, oil refineries dispose of their toxic wastes directly into the environment, often into Delta waters through drainpipes.⁵² All of this exploration has resulted in one and a half million tons of oil in the Delta spilled over the past 50 years,⁵³ of which approximately seventy-seven percent has not been recovered and thus remains in the environment.⁵⁴ Presently, there are 606 oil fields in the Delta, earning it the title “world capital of oil pollution.”⁵⁵

B. Extent of Related Human Rights Abuses

Human rights abuses in the Delta encompass a broad range of violations, including breach of the right to life and the right to a healthy environment.⁵⁶ These infringements result directly from the effects of oil spills in the environment as well as indirectly from government action in furtherance of oil exploration.⁵⁷

46. Rowell, *supra* note 43; Carew, *supra* note 23, at 500.

47. Rowell, *supra* note 43.

48. *See id.*

49. *See id.*; Carew, *supra* note 23, at 499.

50. *See* Rowell, *supra* note 43; *see also* Carew, *supra* note 23, at 499. Though there are no doubt severe impacts on the health of Delta residents as a result of these spills, especially considering the low life expectancy in the Delta, a thorough search for scientific studies on these health consequences have turned up nothing. The lack of available data on cancer rates, reproductive consequences, etc. leaves this author even more suspicious of Shell and the Nigerian government, as this implicates a cover-up scheme.

51. Rowell, *supra* note 43. Gas flaring is a process by which unusable natural gas is released by pressure valve and burned, releasing extensive amounts of carbon dioxide.

52. Carew, *supra* note 23, at 500-01.

53. Vidal, *supra* note 10.

54. *See* Nnimmo Bassey, *U.N. Report on Nigeria Oil Spills Relies Too Heavily on Data from Shell*, THE GUARDIAN (Aug. 25, 2010), <http://www.guardian.co.uk/environment/cif-green/2010/aug/25/un-nigeria-oil-spill-shell> (the 77% figure was offered for the years 1976 to 1996, and there is no data or information to suggest clean-up policies were different prior to or after that period).

55. Vidal, *supra* note 10.

56. Soc. & Econ. Rights Action Ctr. & Ctr. for Econ. & Soc. Rights v. Nigeria, Case No. ACHPR/COMM/A044/1, Afr. Comm'n Hum. & Peoples' Rts. Decision Regarding Commc'n 155/96, para. 50 (2001), available at <http://www.umn.edu/humanrts/africa/comcases/allcases.html> [hereinafter *Decision*].

57. *Id.*

Indigenous tribes in the Delta, including the Ogoni, have traditionally been subsistence farmers and fishermen.⁵⁸ As 1.5 million tons of oil have saturated the land and polluted the waters over the past half century, Delta residents have been deprived of their way of life.⁵⁹ Crops simply cannot grow in oil, and fish cannot survive in it.⁶⁰ Yet, the residents live in complete dependence on the environment for farming, fishing, drinking water, and basic survival.⁶¹ The damage from the spills has prevented residents from shrimping and gathering mollusks and shellfish, eliminating dietary staples.⁶² Additionally, residents live in continuous noise and air pollution, and have no access to clean drinking water.⁶³ Currently, life expectancy in the Delta region is merely 40 years due to this environmental damage.⁶⁴ These vast environmental harms are recognized by many world governments under the relatively new category of a human right to a healthy environment, and also implicate the traditional human right to life and development.⁶⁵

Aside from the aforementioned human rights violations, violent human rights violations have also been perpetrated in furtherance of oil exploration.⁶⁶ This violence is occurring at the hands of the people's own government.⁶⁷ Through the auspices of the Nigerian National Petroleum Company ("NNPC"), the Nigerian government holds a direct financial interest in the oil exploration and exploitation activities of Shell, as well as other oil companies in the Delta.⁶⁸ Over the past 50 years, as part of this relationship, the government has aided oil companies by providing ongoing security forces to oil operations and quashing attempted protests and rebellions.⁶⁹ At Rivers State in the 1990's, the Nigerian police force took out the entire Umuechem village (at Shell's request) in response to the villagers' protest of Shell's oil exploitation in the region.⁷⁰

The Movement for the Survival of the Ogoni People ("MOSOP") was organized in 1990 in response to Shell's activities in Ogoniland, with the aim to engage in non-violent protests to protect the environment, cultural rights, and

58. See Carew, *supra* note 23, at 497.

59. Vidal, *supra* note 10 (detailing residents' loss of forest, farmland, drinking wells, and water to fish in); see *Decision*, *supra* note 56, at para. 9.

60. See Nossiter, *supra* note 18 (noting the lifeless swamps of the Delta and the mangrove forests now devoid of shrimp and crab).

61. Vidal, *supra* note 10; see *Decision*, *supra* note 56, at para. 67.

62. Nossiter, *supra* note 18.

63. Carew, *supra* note 23, at 499-500.

64. Vidal, *supra* note 10.

65. Carew, *supra* note 23, at 506-12.

66. *Id.* at 513-15.

67. *Id.*

68. *Decision*, *supra* note 56, at para. 1.

69. Maureen Chigbo, *The Naivety of Shell*, UNEP, NEWSWATCH (Sept. 14, 2010), http://www.Newswatchngr.com/index2.php?option=com_content&task=view&id=2399&Itemid=1.

70. Carew, *supra* note 23, at 515.

practices of the Ogoni People, among other goals.⁷¹ Beginning in 1993 the Nigerian government reacted violently to these protests by beating, raping, shooting and killing Ogoni residents, attacking villages, looting, and destroying property.⁷² The government's grave mistreatment eventually culminated in the most widely publicized illustration of the Nigerian government's policy of violence—the execution of the Ogoni Nine.⁷³

The killings were in 1995 in response to the group's activism against Shell's activities in Ogoniland.⁷⁴ The tragedy began with the arrests of Ken Saro-Wiwa, President of MOSOP, John Kpuinen, youth leader, and seven other Ogoni leaders and MOSOP members.⁷⁵ The men were repeatedly detained and tortured before being tried by a special military tribunal for the murder of four former Ogoni leaders, their predecessors.⁷⁶ The military tribunal was established by the Nigerian government for the special purpose of trying these men.⁷⁷ All nine were convicted of the murders based on fabricated evidence provided by the government, and subsequently executed.⁷⁸ Thus the core of Ogoni leadership was eliminated with one fell swoop.⁷⁹ Shell was implicated in recruiting the Nigerian military and police to attack villages and suppress opposition, and then in aiding and abetting these attacks.⁸⁰ Specifically, Shell provided food and transportation to the Nigerian military forces, allowed Shell's property to be used for planning, and paid the soldiers to engage in the attacks.⁸¹ Oil companies and the Nigerian government have thus succeeded together in plaguing the Delta environment with oil pollution, silencing those who protest with violence.

C. Alleged Contribution of Delta Residents to the Damage

In September 2010, a preliminary report issued by the United Nations Environment Programme ("UNEP") sparked international debate.⁸² The report stated that ninety percent of the oil spills in Ogoniland were caused by local

71. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 123 (2d Cir. 2010); *About Us*, MOVEMENT FOR SURVIVAL Ogoni PEOPLE, http://mosop.org/about_us.html (last visited Nov. 6, 2010).

72. *Kiobel*, 621 F.3d at 123.

73. *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 92 (2d Cir. 2000); Xiuli Han, *The Wiwa Cases*, CHINESE J. INT'L L. 433, 433-34 (2010); see also Grant McCool, *U.S. Judges Dismiss Nigerian Violence Case vs Shell*, REUTERS (Sept. 17, 2010), <http://www.reuters.com/assets/print?aid=USN1717331220100917>.

74. *Wiwa*, 226 F.3d at 92.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. See *id.*

80. *Id.*; *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 123 (2d Cir. 2010).

81. *Wiwa*, 226 F.3d at 92; *Kiobel*, 621 F.3d at 123.

82. See Bassey, *supra* note 54.

pipeline vandalism and theft.⁸³ Shell, which has more oil wells in the Delta than any other company, is allegedly only responsible for ten percent of the spills, which implies that Delta residents are primarily responsible for their own suffering.⁸⁴ Though residents do engage in some pipeline vandalism, the report's drastic findings are controversial because, by UNEP's own admission, the report was heavily funded by the oil industry and the Nigerian government.⁸⁵

It appears that these funding sources influenced not only the content of the published report, but also the choice of experts used in preparing the report.⁸⁶ For example, in 2004, UNEP hired Professor Richard Steiner, an international expert on oil spills, to write its oil damage and assessment manual, yet when he offered to work on the 2010 report, UNEP declined.⁸⁷ It is no mystery why the oil industry and the Nigerian government would decline Steiner's offer—his research suggests much of the oil spilled in Ogoniland has been caused by the poor practices of oil companies like Shell, not by the theft and vandalism of locals.⁸⁸ Without oil industry contributions it would be impossible for UNEP to prepare the report because no other potential source of funding exists.⁸⁹ Since oil companies would not be willing to fund a report that blames them for the Delta crisis, UNEP has a strong interest in not hiring Steiner to prepare the report.⁹⁰ If UNEP retained him, their report would be unfunded and thus not prepared at all.⁹¹ There are no other entities with both the interest in the state of the Delta as well as the deep pockets necessary to fund such a report.⁹²

Further damaging the credibility of the UNEP report, MOSOP notes that many of the spills in the Delta occurred in the 1970s and 1980s, prior to the rampant onset of vandalism in the region.⁹³ These facts negate the report's claim that ninety percent of spills are caused by pipeline vandalism.⁹⁴ They indicate that damage caused by Shell's poor practice predated any alleged resident contribution.⁹⁵ Instead of using this independent research, however, the UNEP report relies almost entirely on statistics provided by oil companies and the

83. *Id.*

84. *Id.*; Morris, *supra* note 41.

85. See Chigbo, *supra* note 69. Shell alone paid UNEP ten million dollars. The Nigerian government is not only linked to oil companies through its own company, NNPC, and thus profits from their oil exploitation, but is also responsible for many of the related human rights abuses through the government's provision of police and security forces to Shell and other oil companies on demand.

86. See Bassey, *supra* note 54.

87. *Id.*

88. *Id.*

89. See Chigbo, *supra* note 69.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* (including the Ejama spill, Bumu spill, and Korokoro spill).

94. See *id.*

95. See *id.*

Nigerian government.⁹⁶ Following the controversy after the initial version of the report leaked in August of 2010, UNEP's Chief of Post Conflict and Disaster Management, Henrik Slotte, issued a statement of regret in an effort to regain the credibility of UNEP and deflect accusations of being bribed by the oil industry.⁹⁷ Slotte apologized for UNEP pointing its finger so wholeheartedly at residents and completely absolving oil companies, and stated UNEP had further research to do before issuing the official version of the report.⁹⁸

Though they are not responsible for the initial pollution of the Delta, nor to blame for the severity of the Delta crisis, residents have contributed to the oil pollution by vandalizing safety valves, installing illegal taps, and attaching explosive devices to access the oil.⁹⁹ However, these acts are far outweighed in number and effect by the immense number of old, rusting pipes and storage tanks, corroding pipelines, dilapidated pumping stations, and wellheads poorly maintained by the oil companies.¹⁰⁰ The pipeline failure rate in the Delta is exponentially higher than anywhere else in the world.¹⁰¹ Resident contribution is a direct result, not a cause, of the significant ecological damage inflicted by oil companies in the Delta.¹⁰² Pipeline vandalism and oil theft are undertaken in protest to the dirty, impoverished living situation Delta residents are left in while the government continues to get richer as a result.¹⁰³ Sales of small quantities of stolen oil are no more than a means of survival for the people of the Delta.¹⁰⁴

96. Bassey, *supra* note 54.

97. Chigbo, *supra* note 69; Onche Odeh, *Niger Delta: The Hague to Hear Fresh Charges Against Shell*, DAILY INDEP. (Jan. 24, 2011), <http://allafrica.com/stories/201101250007.html>; John Vidal, *Outrage at U.N. Decision to Exonerate Shell for Oil Pollution in Niger Delta*, GUARDIAN (Aug. 22, 2010), <http://m.guardian.co.uk/environment/2010/aug/22/shell-niger-delta-un-investigation?cat=environment&type=article>.

98. Chigbo, *supra* note 69.

99. Vidal, *supra* note 10.

100. *Id.*

101. Nossiter, *supra* note 18.

102. See Vidal, *supra* note 10; Sokari Ekine, *A Post Petroleum Nigeria*, NIGER DELTA SOLIDARITY (Nov. 29, 2009), <http://nigerdeltasolidarity.wordpress.com/2009/11/29/a-post-petroleum-nigeria/> (publishing Communiqué by Nnimmo Bassey, Director of Environmental Rights Action in Nigeria and Chair of Friends of the Earth International).

103. Fred Brume, *Oil-Pipeline Vandalization in the Niger Delta: the Way Out*, <http://www.waado.org/environment/OilPipelines/BrumeOnPipelineVandalization.html> (last visited Sept. 12, 2011); see Carew, *supra* note 23, at 497; *Decision*, *supra* note 56, at para. 1.

104. Cyril I. Obi, *Oil Extraction, Dispossession, Resistance, and Conflict in Nigeria's Oil-Rich Niger Delta*, 30 CAN. J. DEV. STUD. 219 (2010); Onyebuchi Ezigbo, *Nigeria: Unending Saga Between Oil Firms, Vandals and Illegal Bunkerers*, ALL AFR. (July 27, 2010), <http://allafrica.com/stories/printable/201007280120.html>.

III. EXISTING FORUMS AND SUBSTANTIVE LAW

A. *African Commission on Human and People's Rights*

In the years since the onset of abuses in the Delta, a few forums have acknowledged or at least attempted to rectify the crisis. Most of these attempts have been part of a broader effort to address human rights violations.

The African Charter of Human and People's Rights ("Charter"), to which Nigeria is a party, was the first international human rights charter to simultaneously guarantee civil, political, economic, social, and cultural rights.¹⁰⁵ Article 24 of the Charter specifically states that all people have a right to "a general satisfactory environment favorable to their development."¹⁰⁶ Though revolutionary (it is the first international document to recognize an environmental right), the Charter lacks clarity in the legal obligations it demands as well as implementation or enforcement mechanisms.¹⁰⁷

The Charter came into force in 1986 and established a Commission to implement and enforce the rights guaranteed.¹⁰⁸ In theory, the establishment of the Commission was a positive step, because the substantive human right to a healthy environment is worthless if it is not accompanied by a procedural right allowing parties to gain access to detailed information about the environmental harm, the ability of affected parties to participate in decision-making regarding whether a human right has been violated, and an opportunity for adjudication when the right is violated.¹⁰⁹

B. *U.S. Federal Courts*

Far from the Delta and the African continent, the United States has also attempted to develop law that would vindicate human rights abuses around the world. The Alien Tort Statute ("ATS"), also known as the Alien Tort Claims Act, was enacted in the United States in 1789 to open U.S. federal courts as a forum for foreign nationals to litigate tort suits against foreign actors for violations of customary international law.¹¹⁰ However, the ATS only creates jurisdiction, not a

105. Bernard H. Oxman & Dinah Shelton, *Decision Regarding Communication 155/96*, 96 AM. J. INT'L L. 937, 941 (2002); see *Decision*, *supra* note 56, at para. 41.

106. African Charter of Human and People's Rights art. 24, June 26, 1981, 21 I.L.M. 59.

107. EDITH BROWN WEISS, STEPHEN C. MCCAFFREY, DANIEL BARSTOW MAGRAW & A. DAN TARLOCK, *INTERNATIONAL ENVIRONMENTAL LAW AND POLICY* 446 (2d ed. 2007).

108. *History*, AFR. COMM'N ON HUM. & PEOPLES' RTS., http://achpr.org/english/_info/history_en.html (last visited Nov. 6, 2010).

109. WEISS ET AL., *supra* note 107, at 456.

110. *Beanal v. Freeport-McMoran, Inc.*, 969 F. Supp. 362, 369-70 (E.D. La. 1997); Han, *supra* note 73, at 436.

cause of action.¹¹¹ To establish jurisdiction, three elements must be met: the claimant must be an alien, suit must be filed for a tort, and the tort must be a violation of customary international law, which is the most controversial requirement.¹¹² For the tort to be a violation of customary international law (that is, an international tort), the violation must be definable, obligatory, and universally condemned.¹¹³ Though suit under the ATS is complex, due mostly to the ambiguous element of “customary international law,” the U.S. federal court system is appealing as a forum because juries hearing cases under the ATS may award multi-billion dollar verdicts.¹¹⁴

C. Nigerian Laws

Efforts to address human rights abuses such as those in the Delta have also been made at a local level.¹¹⁵ Like any modern nation, Nigeria has its own court system with judicial mechanisms theoretically capable of addressing the oil pollution crisis and prosecuting the related human rights abuses.¹¹⁶ For example, several anti-pollution laws are in force.¹¹⁷ One such law is the Oil Pipelines Act of 1956, which creates strict liability for oil pipeline license holders to people victimized by faulty or broken pipelines.¹¹⁸ Additionally, the Criminal Code contains a law that punishes by imprisonment anyone who “corrupts the waters” or “vitiates the atmosphere.”¹¹⁹

Other legislation indirectly addresses the circumstances of the Delta crisis. For instance, the Petroleum Act of 1969 primarily regulates the business aspect of the petroleum industry, though it does empower the Minister of Petroleum Resources (a cabinet member of the Nigerian federal government) to make regulations for the prevention of pollution.¹²⁰ The Minister also has the power to revoke oil mining licenses if certain requirements are not met, including, but not limited to, the requirement to act in accordance with “good oilfield practice.”¹²¹

111. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 125 (2d Cir. 2010).

112. 28 U.S.C. § 1350 (2006); *see Kiobel*, 621 F.3d at 111 (where the central issue was whether there was a violation of customary international law).

113. *Beanal*, 969 F. Supp. at 370.

114. *Kiobel*, 621 F.3d at 116 (stating that fear of such large potential verdicts often encourages settlement in the multi-million dollar range); *see also Doe I v. Karadzic*, No. 93 Civ. 0878, 2001 WL 986545 at *1 (S.D.N.Y. Aug. 28, 2001) (awarding \$4.5 billion verdict).

115. *See Decision*, *supra* note 56, at para. 41.

116. *Id.*

117. Ekpu, *supra* note 22, at 79.

118. *Id.* at 89.

119. *Id.*; Criminal Code Act, ch. 23, § 245 (Nigeria), available at <http://www.nigeria-law.org/Criminal%20Act-PartIII-IV.htm>.

120. Ekpu, *supra* note 22, at 79; *Government Ministries*, COMMONWEALTH NATIONS, http://www.commonwealth-of-nations.org/Nigeria/Government/Government_Ministries (last visited Mar. 17, 2011).

121. Ekpu, *supra* note 22, at 79. As explained later, “good oilfield practice” is a vague term contributing to the inadequacy of the Petroleum Act. The term is undefined in the statute and thus subject to broad

An additional Nigerian statute addresses oil pollution directly.¹²² The Oil in Navigable Waters Act of 1968 is Nigeria's attempt to comply with its international obligation to prevent oil pollution of navigable waters.¹²³ As such, it regulates oil discharge from ships at sea and in other waters navigable by seafaring vessels.¹²⁴

In 1988, Nigeria greatly enhanced its environmental law when it passed the Nigerian Federal Environmental Protection Agency Act ("FEPA").¹²⁵ FEPA is aimed at protecting the nation's air and interstate waters, as well as the health and welfare of the Nigerian people.¹²⁶ Violations of FEPA, which include regulations of the discharge of pollutants like oil, result in criminal penalties of extensive fines and possible imprisonment.¹²⁷

In addition, as stated before, Nigeria is a party to the African Charter on Human and People's Rights and has specifically incorporated the Charter into Nigerian domestic law, and thus has laws in force to address human rights abuses.¹²⁸ Following the fall of the military regime that reigned during many of the human rights abuses in the Delta, a civilian administration came to power and implemented "remedial measures" to address the Delta human rights crisis.¹²⁹ These measures include the establishment of a Federal Ministry of Environment to oversee industry operations affecting the natural environment in Nigeria, the Niger Delta Development Commission to supervise and approve development projects posing a potential impact on the environment, and the Judicial Commission of Inquiry to investigate human rights violations.¹³⁰

D. *International Criminal Court*

The International Criminal Court ("ICC") is a relatively new forum that on the surface appears capable of addressing some of the violent human rights abuses in the Delta. World nations came together in an unprecedented manner in 1998 when 120 states adopted the Rome Statute establishing the ICC.¹³¹ The

interpretation by the then-acting Minister.

122. *Id.* at 83.

123. *Id.*

124. *Id.*

125. *Id.* at 84.

126. *Id.*

127. *Id.*

128. *Decision*, *supra* note 56, at para. 41 (stating that Nigeria incorporated the Charter in its domestic law so human rights suits can be brought in national courts).

129. *See id.* at para. 30; Oxman & Shelton, *supra* note 105, at 937; Horace G. Campbell, *Nigeria: Remembering 50 Years of Independence*, ALL AFR. (Sept. 30, 2010), <http://allafrica.com/stories/201010010585.html>.

130. *Decision*, *supra* note 56, at para. 30; *About Us*, NIGER DELTA DEV. COMMISSION, <http://www.nddc.gov.ng/about%20us.html> (last visited Mar. 10, 2011).

131. *About the Court*, INT'L CRIM. CT., <http://www.icc-cpi.int/Menus/ICC/About+the+Court/> (last

Rome Statute came into force four years later after ratification by sixty states.¹³² ICC jurisdiction is limited to the gravest crimes capturing international attention: genocide, war crimes, and crimes against humanity.¹³³ Nigeria is a party to the Rome Statute and thus grave crimes committed there could be called into question before the court.¹³⁴ In order to establish jurisdiction, however, the human rights abuses in the Delta would have to fit in one of the aforementioned categories of “grave” crimes.¹³⁵

E. United Nations Universal Declaration of Human Rights and the 1966 Covenants

The United Nations (“U.N.”), of which Nigeria is a member state, has taken its own steps to assure human rights in all world nations.¹³⁶ In 1948, the U.N. General Assembly adopted the Universal Declaration of Human Rights (“Declaration”).¹³⁷ Article 25 of the Declaration declares that everyone has a right to a standard of living sufficient for his health and well-being.¹³⁸ Though not binding by itself, many of its provisions are thought to have passed into customary international law.¹³⁹

As a follow-up to the Declaration, in 1966, the U.N. established binding human rights obligations by drafting two international treaties: the Covenant on Civil and Political Rights (“CCPR”) and the Covenant on Economic, Social and Cultural Rights (“CESCR”).¹⁴⁰ Nigeria is a State Party to both.¹⁴¹ While the provisions of the CCPR were immediately binding on States Parties, the

visited Jan. 28, 2011).

132. *Id.*

133. *ICC at a Glance*, INT’L CRIM. CT., <http://www.icc-cpi.int/Menus/ICC/About+the+Court/icc+at+a+glance?lan=en-GB> (last visited Jan. 28, 2011).

134. *The States Parties to the Rome Statute, Assembly*, INT’L CRIM. CT., <http://www.icc-cpi.int/Menus/ASP/states+parties/> (last visited Jan. 28, 2011).

135. *See id.*; *see also ICC at a Glance*, *supra* note 133.

136. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217 (III), at pmbl. (Dec. 10, 1948); *see also* Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 AM. U. L. REV. 1, 17-21 (1982); *United Nations Member States*, UNITED NATIONS, <http://www.un.org/en/members/> (last visited Mar. 10, 2011).

137. Universal Declaration of Human Rights, *supra* note 136.

138. *Id.*; *see also* Stephen C. McCaffrey, *A Human Right to Water: Domestic and International Implications*, 5 GEO. INT’L ENVTL. L. REV. 1, 5-12 (1992).

139. McCaffrey, *supra* note 138, at 8.

140. Sohn, *supra* note 136, at 19; *International Covenant on Civil and Political Rights, Status of Treaties*, U.N. TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (last visited Mar. 10, 2011) [hereinafter CCPR UNTC]; *International Covenant on Economic, Social and Cultural Rights*, U.N. TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en (last visited Mar. 10, 2011) [hereinafter CESCR UNTC].

141. *Nigeria*, U.N. HUM. RTS., <http://www.ohchr.org/EN/countries/AfricaRegion/Pages/NGIndex.aspx> (last visited Feb. 18, 2011); CCPR UNTC, *supra* note 140; CESCR UNTC, *supra* note 140.

provisions of the CESCRC required only a commitment to take progressive steps to the extent possible considering each state's resources.¹⁴²

The thrust of the CCPR is its guarantee of the right to life, which has traditionally been interpreted as a guarantee against arbitrary deprivation of life by the state.¹⁴³ Recently it has been interpreted more broadly so as to include an affirmative state duty to preserve life.¹⁴⁴ The CESCRC goes further and specifically recognizes the right to an adequate standard of living including food and housing.¹⁴⁵ This covenant thus recognizes the human rights that are being abused in the Delta, and would be interpreted to encompass the right to water for drinking and agriculture, and to live in an environment free of oil pollution.¹⁴⁶

IV. WHY PAST LEGAL RESPONSES TO THE ENVIRONMENTAL DAMAGE AND RESULTING HUMAN RIGHTS ABUSES IN THE DELTA HAVE BEEN INADEQUATE

A. *Decision Regarding Communication 155/96*

In 2001, the African Commission on Human and People's Rights ("Commission") issued a decision finding that the Nigerian government breached many human rights obligations.¹⁴⁷ Though the decision was a step forward in recognizing that human rights abuses are occurring in the Delta, the decision had no binding effect and no enforcement mechanism.¹⁴⁸ Hence, there has been no change in the Delta crisis.¹⁴⁹ On March 14, 1996, two nongovernmental organizations filed Communication 155/96 ("Communication") on behalf of the Ogoni people with the Commission.¹⁵⁰ The Communication alleged that the Nigerian military government, working with NNPC and Shell, engaged in oil production that caused environmental degradation and health issues in the Delta.¹⁵¹ This production resulted in the inappropriate disposal of toxic wastes, caused many avoidable spills near villages, and poisoned soil and water.¹⁵² In addition, the Communication alleged that the government aided these violations

142. Sohn, *supra* note 136, at 19.

143. McCaffrey, *supra* note 138, at 9.

144. *Id.* at 10.

145. *Id.* at 11.

146. *See id.*

147. *See Decision, supra* note 56; Oxman & Shelton, *supra* note 105, at 937.

148. *See Oxman & Shelton, supra* note 105, at 942.

149. *See id.*

150. *See Decision, supra* note 56, at para. 49; Oxman & Shelton, *supra* note 105, at 937; *Guidelines for Submission of Communications*, AFR. COMMISSION ON HUM. & PEOPLES' RTS., http://www.achpr.org/english/_info/guidelines_communications_en.html (last visited Mar. 10, 2011) (a Communication is similar to a Complaint in the U.S. judicial system).

151. *Decision, supra* note 56, at paras. 1-2 (health issues included skin infections, gastrointestinal and respiratory ailments, increased cancer risk, and neurological and reproductive problems).

152. *Id.* at para. 2.

by providing oil companies with legal, security, and military powers; failing to monitor or study the effects of oil extraction activities; withholding information from the Ogoni; executing Ogoni leaders; beating and killing civilians; and destroying their villages and property.¹⁵³

On May 27, 2001, the Commission issued the decision, finding that Nigeria had breached numerous commitments to human rights contained in the Charter.¹⁵⁴ The decision found that the NNPC, along with Shell, took actions in violation of the right to enjoy guaranteed rights and freedoms without discrimination; the right to life, property, health, housing, food, free disposal of wealth and natural resources; and a general satisfactory environment favorable to the people's development.¹⁵⁵ The Commission identified state obligations to respect, promote, protect, and fulfill the human rights guaranteed by the Charter.¹⁵⁶ Included in these obligations is the respect of individuals and the collective group of local residents to their resources, legislation and remedies to protect residents from interference with their rights, and actual action of the state to realize guaranteed rights.¹⁵⁷ The decision sets forth affirmative duties of the Nigerian government to monitor and control multinational company behavior in Nigeria through procedures such as independent scientific monitoring, environmental impact assessments, public information and input, and access to enforcement mechanisms.¹⁵⁸ The government was also required "to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources."¹⁵⁹ By concluding with the suggestion that all Charter rights be enforced through national forums or through the Commission, the decision had strong potential to remedy the human rights abuses in Nigeria and beyond.¹⁶⁰

Over eight years later, however, the dire situation in Nigeria is still making headlines.¹⁶¹ Though strongly worded, the Commission's recommendations in its decision were only meaningful to the extent the Nigerian government chose to enforce them.¹⁶² Clearly it has chosen not to, due to its strong economic interest in maintaining the status quo of oil exploration and abuse in the Delta.¹⁶³ Because the Commission cannot make the government act, and substantive human rights

153. *Id.* at paras. 3-7, 62.

154. *Id.* at Findings; *see also* Oxman & Shelton, *supra* note 105, at 937.

155. *Decision*, *supra* note 56, at paras. 50-67; Oxman & Shelton, *supra* note 105, at 937.

156. *Decision*, *supra* note 56, at para. 44.

157. *Id.* at paras. 45-46.

158. *Id.* at para. 53.

159. *Id.* at para. 52.

160. *Id.* at para. 68, Findings; *see also* Oxman & Shelton, *supra* note 105, at 942.

161. *See generally* Vidal, *supra* note 10; Nossiter, *supra* note 18.

162. *See* Oxman & Shelton, *supra* note 105, at 942.

163. *See* Chigbo, *supra* note 69.

are worthless without an effective process to protect and enforce them,¹⁶⁴ the Commission is an inadequate forum to adjudicate human rights abuses in the Delta.

As a follow up and complement to the Commission, an African Court on Human and People's Rights ("African Court") was developed.¹⁶⁵ Nigeria is one of 25 African Union member states that have ratified the African Court's protocol.¹⁶⁶ Thus, the court has jurisdiction to issue a binding judgment if suit were to be brought against the Nigerian government.¹⁶⁷ An enforceable judgment against the Nigerian government could be sufficient to convince the government to cease its own human rights abuses and stop aiding the oil companies in perpetuating human rights abuses.¹⁶⁸ This is especially true because states may be held liable for actions of private parties if the state does not exercise due diligence to prevent, investigate and respond to human rights violations.¹⁶⁹

The problem with the African Court as a forum, however, is that it has been slow to develop and will likely be slow to gain credibility, even if it does have binding authority.¹⁷⁰ The African Court issued its first and only judgment on December 15, 2009.¹⁷¹ Deliberations in that case were criticized for consuming an inordinate amount of time while resulting in a comparatively short judgment with many technical errors.¹⁷² Thus far, the African Court is viewed by many as unorganized and procedurally inadequate.¹⁷³ Furthermore, funding, which is already a problem for the Commission, becomes exacerbated as the Commission and African Court must now share the already limited funds.¹⁷⁴ Neither the Commission nor the African Court looks promising as a guarantor of human rights in the Delta.

164. See generally WEISS ET AL., *supra* note 107, at 446.

165. *Court History*, AFR. CT. ON HUM. & PEOPLES' RTS., <http://www.african-court.org/en/court/history/> (last visited Nov. 6, 2010) (the court was developed in 1998 and has obviously not assumed the duties of the Commission, considering the decision was issued many years after the development of the Court).

166. *Court Mandate*, AFR. CT. ON HUM. & PEOPLES' RTS., <http://www.african-court.org/en/court/mandate/general-information/> (last visited Nov. 6, 2010).

167. See *id.*

168. See GEORGE MUKUNDI WACHIRA, *MINORITY RIGHTS GRP. INT'L, AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS: TEN YEARS ON AND STILL NO JUSTICE* 22-23 (2008).

169. Shelton, *supra* note 24, at 123.

170. Roland Adjovi, *Questionable Precedent: The First Ruling by the African Court on Human and Peoples' Rights*, JURIST (Dec. 21, 2009), <http://jurist.law.pitt.edu/forumy/2009/12/questionable-precedent-first-ruling-by.php>. See generally *Court History*, *supra* note 165; see also generally *Home*, AFR. CT. ON HUM. & PEOPLES' RTS., <http://www.african-court.org/en/> (last visited Mar. 21, 2011).

171. Adjovi, *supra* note 170; see also *Latest Judgments*, AFR. CT. ON HUM. & PEOPLES' RTS., <http://www.african-court.org/en/cases/latest-judgments/> (last visited Mar. 21, 2011).

172. Adjovi, *supra* note 170 (stating the Judgment was only thirteen pages, only three of which consisted of legal analysis, and additionally was missing references and some explanations of findings).

173. *Id.*

174. HELLE BORGSTROM ET AL., *EVALUATION 1998: THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS* xii, 13, 41 (1998), available at <http://www.humanrights.dk/files/pdf/Publikationer/afr.commanus.pdf>.

B. *The Wiwa Cases in U.S. Federal Court*

Suit has also been brought in U.S. federal courts under the ATS.¹⁷⁵ Following the settlement in *Wiwa v. Shell Petroleum Development Company of Nigeria, Ltd.*¹⁷⁶ (*Shell Nigeria*) in 2009, U.S. courts seemed like a promising forum to adjudicate the Delta human rights abuses.¹⁷⁷ *Wiwa* plaintiffs secured a \$15.5 million settlement, a sum not even remotely possible in their national courts or other world forums.¹⁷⁸ Thus, the ATS appeared to be the answer for victims of human rights abuses in the Delta. As such, subsequent to the execution of the Ogoni Nine, the families of the victims filed suit in U.S. federal court under the ATS against Royal Dutch Petroleum Company (“Royal Dutch”) and Shell Transport and Trading Company PLC (“Shell Transport”), alleging the companies, through subsidiary Shell, aided and abetted the Nigerian government in carrying out human rights violations.¹⁷⁹

Adding to the disappointment and desperation Delta residents feel, however, on September 17, 2010, the United States Court of Appeals for the Second Circuit held that companies cannot be held accountable in U.S. courts for human rights abuses in foreign countries.¹⁸⁰ Thus, in *Kiobel v. Royal Dutch Petroleum Co.*, the Court eliminated the ATS as a possible vehicle of redress for the environmental damage and related human rights abuses in the Delta.¹⁸¹

In *Kiobel*, the Court held that customary international law governs the scope of liability under the ATS and that the ATS does not confer jurisdiction over claims brought against companies.¹⁸² Corporate defendants are not subject to liability under the ATS because they are not subject to liability under customary international law.¹⁸³ The Second Circuit noted that companies have never been held liable, civilly or criminally, under customary international human rights law.¹⁸⁴ The court further noted that corporate liability is not a specific, universal

175. 28 U.S.C.A. § 1350 (West 2010).

176. *Wiwa v. Shell Petroleum Dev. Co. of Nig. Ltd.*, 335 F. App'x 81, 2009 WL 1560197, at *1 (2d Cir. 2009).

177. Han, *supra* note 73, at 433-34.

178. Ed Pilkington, *Shell Pays Out \$15.5m over Saro-Wiwa Killing*, GUARDIAN (June 9, 2009), <http://www.guardian.co.uk/world/2009/jun/08/nigeria-usa>.

179. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 123 (2d Cir. 2010) (Royal Dutch is a Netherlands corporation, Shell is incorporated in the United Kingdom, and SHELL is incorporated in Nigeria. Claims were originally brought for aiding and abetting (1) extrajudicial killing; (2) crimes against humanity; (3) torture or cruel, inhuman, and degrading treatment; (4) arbitrary arrest and detention; (5) violation of rights to life, liberty, security, and association; (6) forced exile; and (7) property destruction. Of these original claims, all were dismissed except 2-4.); *see also* McCool, *supra* note 73.

180. *Kiobel*, 621 F.3d at 148-49; McCool, *supra* note 73.

181. *Kiobel*, 621 F.3d at 148-49; 28 U.S.C.A. § 1350 (West 2010).

182. *Kiobel*, 621 F.3d at 148-49.

183. *Id.*

184. *Id.* at 148.

and obligatory norm and thus the harm was not a norm of customary international law.¹⁸⁵

In fact, even if a legal norm is well-established in domestic law, that does not make it part of customary international law.¹⁸⁶ Rather, ATS liability depends on the universal and specific rules that nations of the world treat as binding when dealing with each other.¹⁸⁷ Both the cause of action and the defendant sued must be subjects recognized under customary international law.¹⁸⁸ Federal courts must consider “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 company.”¹⁸⁹ If companies are not universally treated as defendants against which judgments may be rendered, then federal courts may not hold them out as such under the ATS.¹⁹⁰

The court in *Kiobel* also noted that individual actors working for a company may still be held liable under the ATS for tortious conduct they personally engage in,¹⁹¹ but this is likely unhelpful because the deep pockets of companies are what make recovery under the ATS an attractive option.¹⁹² In some situations corporate directors may be indemnified for actions within the scope of their duties, but companies are rarely required to indemnify directors.¹⁹³ Indemnification is dependent on applicable statutes, articles of incorporation, bylaws, and contracts between the company and its directors.¹⁹⁴ As there are many oil companies operating across the globe with various states of incorporation,¹⁹⁵ indemnity laws would be divergent and difficult to apply, falling short of a dependable, efficient method to address situations like the Delta crisis.¹⁹⁶ Should indemnification be established as an option in ATS suits, companies would certainly write indemnity out of their internal articles of incorporation and bylaws, if they had such provisions to begin with.¹⁹⁷ Thus, the *Kiobel* decision, in dismissing the case for lack of subject matter jurisdiction over companies, disqualified yet another forum from providing the legal response necessary to address these abuses in the Delta.¹⁹⁸

185. *Id.* at 121-22.

186. *Id.* at 118.

187. *Id.*

188. *Id.* at 118-20.

189. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 (2004).

190. *Id.*

191. *Kiobel*, 621 F.3d at 122.

192. *See generally id.* at 150 (Leval, J., concurring).

193. DAVID G. EPSTEIN ET AL., *BUSINESS STRUCTURES* 304 (3d ed. 2010).

194. *Id.*

195. *See Leading Oil and Gas Companies Around the World*, PETRO STRATEGIES, INC., http://www.petrostrategies.org/Links/Worlds_Largest_Oil_and_Gas_Companies_Sites.htm (last visited Mar. 21, 2011).

196. *See generally* EPSTEIN ET AL., *supra* note 193, at 304.

197. *See generally id.*

198. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 149 (2d Cir. 2010).

The concurring opinion in *Kiobel* characterized the majority opinion as a “substantial blow to international law and its undertaking to protect fundamental human rights.”¹⁹⁹ Judge Leval emphasized his view that the decision would allow companies to commercially exploit abuse of fundamental human rights and then shield their resulting profits.²⁰⁰ Because the concurring opinion was so strong in *Kiobel*, and the issue is so relevant to the state of corporate affairs in the world today, appeal to the U.S. Supreme Court was not surprising. The likelihood of a grant of certiorari was questionable, because the Supreme Court recently denied certiorari in *Presbyterian Church of Sudan v. Talisman Energy, Inc.*,²⁰¹ a similar case from the Second Circuit, which also held that there is no corporate liability under the ATS.²⁰² As a Circuit Split became more apparent this year, however, the Court responded by granting certiorari in *Kiobel*.²⁰³ A jurisdictional split has existed for some time, as a federal district court sitting in the Ninth Circuit held in *Doe v. Unocal Corp.* that companies could be liable under the ATS.²⁰⁴ However, the case settled before the Ninth Circuit Court of Appeals could decide the issue.²⁰⁵ Now, the D.C. Circuit has held that companies can be held liable under the ATS.²⁰⁶ It will be interesting to see how the Supreme Court resolves the issue of corporate liability under the ATS. A ruling allowing corporations to be held liable under the ATS would at least grant some relief to the people of the Niger Delta.

Apart from being an inadequate forum to adjudicate claims against oil companies, however, U.S. courts are also inadequate because they are incapable of prosecuting the Nigerian government due to the Foreign Sovereign Immunities Act (“Act”).²⁰⁷ Under the Act, Congress proclaimed foreign states immune from the jurisdiction of U.S. courts, as a courtesy from one nation to others.²⁰⁸ Since both the oil companies and Nigerian Government share responsibility for the abuses, though, both need to be held liable.²⁰⁹ In addition, U.S. courts should not

199. *Id.* at 149-50, 154-55 (Leval, J., concurring only because facts not pled specifically enough to show aider and abettor acted with a purpose to bring about the abuse of human rights).

200. *Id.* at 149-51 (Leval, J., concurring) (noting the danger of the majority’s rule and its potential to give a free pass to commercial exploitation of sex slavery, piracy, and corporation-commissioned genocide to protect profits from indigenous groups).

201. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 131 S.Ct. 79, 79 (2010); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009).

202. *Id.*

203. *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491, 2011 WL 4905479 (U.S. Oct. 17, 2011).

204. *Doe v. Unocal Corp.*, 963 F. Supp. 880, 891-92 (C.D. Cal. 1997); Rachel Chambers, *The Unocal Settlement: Implications for the Developing Law on Corporate Complicity in Human Rights Abuses*, INT’L NETWORK FOR ECON., SOC. & CULTURAL RTS., 16, http://www.escr-net.org/usr_doc/Chambers.pdf (last visited Nov. 6, 2010).

205. *Doe*, 963 F. Supp. at 891-92; Chambers, *supra* note 204, at 14.

206. *Doe VIII v. Exxon Mobil Corp.*, 654 F.3d 11 (D.C. Cir. 2011).

207. 28 U.S.C.A. § 1602 (West 2010).

208. *See id.*

209. *See generally* Robert McLaughlin, *Improving Compliance: Making Non-State International Actors*

be the sole international forum to address international wrongs—that would place too high a burden on the U.S. system.²¹⁰ If the international community cares to recognize and vindicate human rights abuses, world governments should share in the cost to prosecute the claims.²¹¹ American taxpayers should not have to bear the cost of adjudicating disputes that did not occur in the United States, and may not even involve U.S. actors.²¹² U.S. resources should be expended on U.S. cases.²¹³ Furthermore, the U.S. court system is already impacted and overburdened without being assigned responsibility to adjudicate the world’s human rights abuses.²¹⁴

C. *Nigerian National Responses*

National means of redress exist in Nigeria’s judicial system,²¹⁵ though these have also failed to adequately address the human rights abuses in the Delta.²¹⁶ Because the Nigerian government is so intimately involved in the oil exploitation in the Delta and directly responsible for many of the human rights abuses at issue, Nigerian courts are inadequate to address the Niger Delta crisis.²¹⁷

As noted by the Commission, Ogoniland has received far too much international attention for the Nigerian government to be unaware of the crisis in the Delta.²¹⁸ This notice has afforded the government decades to remedy the crisis domestically, yet it has failed to act.²¹⁹ In 1993, the Nigerian military government actually enacted decrees eliminating national court jurisdiction over oil-spill-related violations, and any adequate domestic remedy along with it.²²⁰ Though the military government is now defunct, the new government has recognized in a *Note Verbale* that atrocities continue to be committed by oil companies in Ogoniland and the Delta.²²¹ If anything, civilian rule by the “President’s government” has only changed the types and locations of human rights abuses, as mass assaults and murders are ongoing.²²² Though the Nigerian government’s offer of amnesty to militant leaders seemed to decrease violence in the Delta for a

Responsible for Environmental Crimes, 11 COLO. J. INT’L ENVTL. L. & POL’Y 377, 385-87 (2000).

210. See Hugh King, *Sosa v. Alvarez-Machain and the Alien Tort Claims Act*, 37 VICT. U. WELLINGTON L. REV. 1, 23 (2006).

211. See generally *id.*

212. See generally *id.*

213. See generally *id.*

214. See generally *id.*

215. See Ekpu, *supra* note 22, at 79-93.

216. *Decision*, *supra* note 56, at paras. 38, 58, 66.

217. *Id.*; see also Oxman & Shelton, *supra* note 105, at 938.

218. *Decision*, *supra* note 56, at para. 38.

219. *Id.*

220. *Id.* at para. 41 (citing The Constitution (Suspension and Modification) Decree 1993).

221. *Id.* at para. 42 (a *Note Verbale* is a diplomatic communication).

222. Carew, *supra* note 23, at 517.

period, Nigeria saw an upsurge in violence towards the end of 2010, an indication that the attempt to quell the unrest has failed.²²³

The National Oil Spill Detection and Response Agency (“NOSDRA”) blames the deficiencies in Nigerian laws and its law enforcement for the continually worsening crisis in the Delta.²²⁴ Most Nigerian regulations and statutes are too vague to be effective.²²⁵ Instead they grant such wide discretion to implementing agencies that enforceable regulations are either never implemented to begin with, or are not enforced at all.²²⁶ In the rare event that courts do hear the cases, the compensation awarded is nominal.²²⁷

In a recent attempt to utilize the national system, community leaders filed a claim in a local court for one billion dollars for damages to the health and livelihood of residents following the May 1, 2010 Akwa Ibom spill.²²⁸ Success, though, is highly doubtful.²²⁹ Most Nigerian statutes and regulations create no private right of action for victims of oil pollution.²³⁰ Plaintiffs who bring common law tort actions usually cannot show the lack of reasonable care necessary to establish breach of duty because doing so in such a technical industry would require expert scientific evidence that poverty-stricken, uneducated residents cannot find or afford.²³¹ Even when courts invoke the doctrine of *res ipsa loquitur*, the inference is rebuttable by expert evidence, which oil companies have seemingly unending funds to acquire.²³² The other substantive law in Nigeria is equally unsatisfactory. Though the Oil Pipelines Act seems directly applicable to the Delta crisis, it has been in force since 1956 and the situation in the Delta has only continued to significantly deteriorate since then.²³³ Provisions of the Criminal Code, while highly applicable, cannot be properly applied to corporate violators.²³⁴ Criminal penalties are based on individual guilt and responsibility.²³⁵ Similarly, punishment is tailored to individuals.²³⁶ An entire company cannot be incapacitated or deterred by being sent to jail.²³⁷ The remaining statutes touching on oil pollution tend to be only incidental in nature,

223. Chazan, *supra* note 36.

224. Vidal, *supra* note 10.

225. Ekpu, *supra* note 22, at 96-98.

226. *Id.*

227. *Id.* at 87.

228. Vidal, *supra* note 10.

229. *Id.*

230. Ekpu, *supra* note 22, at 90-91.

231. *See id.*

232. *Id.* at 91; RESTATEMENT (SECOND) OF TORTS § 328D (*res ipsa loquitur* is a tort doctrine signifying the accident itself proves negligence).

233. *See* Ekpu, *supra* note 22, at 89.

234. *Id.*

235. *See id.*

236. *See id.*

237. *See id.* at 89-90.

buried in statutes and regulations concerning related subject matter, such as the Petroleum Act of 1969 introduced earlier.²³⁸ Regulations are usually vague, assign no clear responsibility for oil spill cleanup, and lack any specific sanction.²³⁹

In the Petroleum Act, “good oilfield practice” is undefined and thus the Act is ineffective to regulate oil companies.²⁴⁰ Though in force since 1988, the Act has provided Nigerian residents little or no damages for harm suffered.²⁴¹ Any efficacy of the Oil in Navigable Waters Act is trumped by its narrow geographic restrictions (which do not encompass the affected Delta lands) and by the broad range of defenses set forth in the 1968 Act.²⁴² Since the Delta pollution is inland in non-navigable waters, the 1968 Act is simply not substantively broad enough to address the crisis.²⁴³ Though FEPA does provide for specific and serious criminal penalties for environmental pollution, its scope is not broad enough to cover many Delta waters and lands, and in reality its terms seem harsher than the penalties actually imposed.²⁴⁴ Rarely are the seemingly serious penalties set forth actually utilized.²⁴⁵ Also, there is no absolute bar on discharge of hazardous substances in the nation’s waters, but rather a vague prohibition of “harmful quantities” of discharge.²⁴⁶ “Harmful quantities” goes undefined with no indication of how to properly measure output.²⁴⁷ Similarly, the Federal Ministry of Environment, the Niger Delta Development Commission, and the Judicial Commission of Inquiry have thus far been ineffective.²⁴⁸ Quite simply, national mechanisms in Nigeria fail to protect the human rights of Delta residents.²⁴⁹ The Commission agreed when it concluded that no adequate domestic remedies exist in Nigeria.²⁵⁰

D. *Corporate Criminal Responsibility*

Though the temptation is there, holding companies criminally responsible has been consistently rejected by customary international law.²⁵¹ First of all, though the Delta crisis is a travesty, it is unlikely the abuses there would meet the

238. *Id.* at 79-81.

239. *Id.* at 80-81.

240. *Id.*

241. *Id.* at 87.

242. *Id.* at 83.

243. *Id.*

244. *Id.* at 84-87.

245. *Id.*

246. *Id.* at 85.

247. *Id.*

248. *Decision, supra* note 56, at para. 30, Findings.

249. Carew, *supra* note 23, at 518.

250. *Decision, supra* note 56, at para. 41.

251. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 120 (2d Cir. 2010).

required standard of “grave” crimes.²⁵² Delta residents have been injured and killed due to the environmental damage and related violence, but the injuries and deaths are not on par with a mass genocide.²⁵³ Furthermore, the Rome Statute establishing the ICC upholds the principal originally articulated at the Nuremberg trials that the individuals who perpetrate international crimes should be the ones punished, not the corporate entity under which they act.²⁵⁴ Essentially, moral responsibility can only be felt by an individual, not a juridical entity.²⁵⁵ Similarly, a company is incapable of possessing the intent required of criminal law; only the individuals working for the company are capable of experiencing intent.²⁵⁶ As intent is generally a critical element for criminal liability, adjudicating the Delta human rights abuses in a criminal forum simply would not work.²⁵⁷ The objectives of criminal punishment (including retribution, deterrence and rehabilitation) could not be met if imposed on a juridical entity,²⁵⁸ which further demonstrates that criminal liability is not the solution for the people of the Delta.

E. Human Rights Guaranteed by the United Nations

Neither the Universal Declaration of Human Rights nor either of the two U.N. Covenants has been invoked to address the Delta crisis, even though Nigeria is a State Party to all three.²⁵⁹ This is likely the case because the U.N. Human Rights regime is unequipped to address the types and extent of abuses in the Delta.²⁶⁰ The right to health and well-being in Article 25 of the Declaration is a “welfare right” as opposed to a “liberty right,” and thus is not a binding obligation but rather closer to a goal or ideal.²⁶¹ Under the Declaration itself, then, there exists no enforceable means of redress for the people of the Delta.²⁶²

Though the CCPR right to life has been interpreted more broadly as of late, it has *not* been interpreted so broadly as to include a right to sustenance or water.²⁶³ States are not required to guarantee to its citizens clean drinking water or water suitable for use in agriculture.²⁶⁴ Though the violent human rights abuses in the

252. See generally *ICC at a Glance*, *supra* note 133.

253. See generally *id.*

254. *Kiobel*, 621 F.3d at 136-37 (stating that a proposal at the Rome Conference to grant the ICC jurisdiction over juridical persons like companies was rejected).

255. *Id.* at 149.

256. *Id.* at 152 (Leval, J., concurring).

257. *Id.* at 166 (Leval, J., concurring).

258. *Id.* at 166-67 (Leval, J., concurring) (stating objectives of criminal punishment are retribution, disablement of offender, changing offender’s conduct, dissuading others from criminal conduct).

259. See *Nigeria*, *supra* note 141.

260. See *McCaffrey*, *supra* note 138, at 7-12.

261. *Id.* at 8.

262. See *id.*

263. *Id.* at 10.

264. *Id.*

Delta constitute an arbitrary deprivation of life by the state and therefore could fit under the binding CCPR, the root of the Delta crisis is the environmental damage and a satisfactory legal regime would be capable of addressing all human rights abuses involved—not just the violence.²⁶⁵

The CESCRC is posed to address the human rights abuses directly resulting from the oil pollution in the Delta, but the covenant is, for all intents and purposes, nonbinding since States Parties must only “take steps” toward its realization.²⁶⁶ Article 16 of the CESCRC does require States Parties to submit reports on their progress in achieving the objectives of the covenant to the U.N. Economic and Social Council (“Council”).²⁶⁷ These reports are furnished in stages, and hence need not be submitted annually or even frequently.²⁶⁸ Specialized agencies (such as non-governmental organizations) may also submit reports to the Council regarding a member state’s progress.²⁶⁹ The Council may in its discretion submit these reports to the Commission on Human Rights, which may then make recommendations.²⁷⁰

Clearly, any rights established by the CESCRC are almost entirely ideological and completely unenforceable.²⁷¹ Thus, Nigeria must only take progressive steps towards realizing these rights, as constrained by its resources.²⁷² Even if the Commission on Human Rights were to make recommendations to a member state after reviewing its reports, these recommendations would also be nonbinding.²⁷³ Hence, though the U.N. Human Rights regime encompasses goals applicable to the Delta crisis, the regime is not in a position to meaningfully address and adjudicate the human rights abuses in the Delta.²⁷⁴

V. PROPOSED FORUMS AND SOLUTIONS

To address the Delta crisis in a meaningful and successful manner, the ideal substantive law and forum(s) must allow for prosecution of both governments and companies that share responsibility for human rights abuses.²⁷⁵ In the case of the Delta, only by working together could those entities have achieved such

265. *See generally id.*

266. *See id.*

267. Covenant on Economic, Social and Cultural Rights, art. 16, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter CESCRC].

268. *Id.* at art. 18.

269. *Id.*

270. *Id.* at art. 19.

271. *See McCaffrey, supra* note 138.

272. *See id.*

273. *See id.*; *see also* CESCRC, *supra* note 267, at art. 21.

274. *See generally* McCaffrey, *supra* note 138.

275. *Decision, supra* note 56, at para. 14; *see also* Campbell, *supra* note 129 (noting it is the alliance between the military government and oil companies that is responsible for much of the Delta crisis).

prolific damage to the environment and humanity.²⁷⁶ To date, no forum exists that is capable of prosecuting both culprits. A true human rights claim can only be asserted against a government, not private individuals or companies, so a new forum, besides a human rights court, is necessary to bring actions against the oil companies directly.²⁷⁷ Because neither existing forums nor traditional types of adjudication and punishment are sufficient to adjudicate human rights claims arising out of the actions in the Delta, a novel approach is necessary, even if it may seem radical.

A. *Special International Tribunal for Oil Spills*

1. *Why the World is Ready for a New Regime*

Frequent and serious oil spills occur onshore and offshore around the world, to which legal responses differ drastically.²⁷⁸ Because legal response largely depends on the legal system of the spill site, the same oil company can expect different legal standards in different oil exploration sites.²⁷⁹ Company executives are thus able to implement more lax standards in certain regions where they know that the chances of liability for environmental damage and resulting human rights abuses are much lower.²⁸⁰ This line of thinking was only reinforced by the *Kiobel* decision, which (at least for the time being) confirmed no corporate liability in certain U.S. federal courts for acts committed abroad.²⁸¹

To rectify the problem of different standards, a new legal regime is necessary. The regime should include substantive law setting forth a uniform worldwide code of conduct for oil companies and governments. It should also establish a new forum to adjudicate any and all disputes arising from oil spills resulting from violations of that code of conduct.

Critics may caution that a similar approach was attempted before. In 1974, concern about different world standards led to the United Nations General Assembly resolution on the Declaration of a New International Economic Order (“NIEO”), which aimed to develop a code of conduct for multinational companies.²⁸² The United States and other Western countries, fearful that profits would be adversely affected, strongly opposed the NIEO.²⁸³ Over time, blame for

276. Campbell, *supra* note 129.

277. See Sohn, *supra* note 136, at 18-19 (noting that human rights obligations are binding on states and that no state is allowed to deprive individuals of guaranteed human rights).

278. See generally Carew, *supra* note 23, at 522-23.

279. *Id.*

280. *Id.*

281. McCool, *supra* note 73.

282. James Thuo Gathii, *Defining the Relationship Between Human Rights and Corruption*, 31 U. PA. J. INT'L L. 125, 139-40 (2009).

283. *Id.* at 140.

the condition of developing countries shifted away from allegedly corrupt multinational companies.²⁸⁴ Instead of attributing the lack of economic growth and human rights abuses in developing countries to multinational companies operating there, the public centered the blame on the internal governmental corruption in those countries.²⁸⁵ Finding a multinational company code of conduct unnecessary, the NIEO was never implemented.²⁸⁶

Several decades have passed since the NIEO was considered. Since then, the responsibility for, and involvement of multinational companies in, human rights abuses in the developing world are much more evident.²⁸⁷ Also, with the recent coverage of the BP oil spill and the public concern it generated, the time may be ripe to establish an international code of conduct for oil companies operating globally.²⁸⁸

If anything good can be said to have come from the BP spill, it has at least raised worldwide awareness and scrutiny of western oil companies, particularly with regard to safety and environmental precautions and standards.²⁸⁹ Sharon Gesthuizen, a Dutch Socialist Party lawmaker, visited the Delta in 2010 and joined the opposition parties in the Netherlands in setting parliamentary hearings of Royal Dutch Shell PLC in late January 2011.²⁹⁰ Gesthuizen and nongovernmental organizations presented reports at the hearings, detailing the corruption in the Delta.²⁹¹ The Socialist Party expressed hope that the European Union will act against the Nigerian government officials involved in the corruption by imposing sanctions including visa restrictions.²⁹² Though the hearings were purely for fact-finding purposes, and thus did not provide the adjudication that is necessary to vindicate the ongoing human rights abuses in the Delta, they are a step toward corporate accountability in Nigeria, and elsewhere around the world.²⁹³

In another example of progression towards accountability in Delta-type situations, on February 14, 2011, a court in Ecuador granted a judgment ordering Chevron Corporation (“Chevron”) to pay \$8.6 billion for the environmental damage caused by oil exploitation in the Amazon in the 1970s.²⁹⁴ The Ecuadorian situation is similar to that in the Delta, as Chevron (then Texaco, Inc.) operated

284. *Id.*

285. *Id.*

286. *Id.*

287. *See generally* *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 123 (2d Cir. 2010) (detailing human rights abuses perpetrated by Shell).

288. *See generally* Chazan, *supra* note 36.

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.*

294. Simon Romero & Clifford Krauss, *Chevron Is Ordered to Pay \$9 Billion by Ecuador Judge*, N.Y. TIMES, Feb. 15, 2011, A4.

concurrently with the Ecuadorian state oil company to extract oil in the Amazon forest, leaving behind an environment plagued with contamination.²⁹⁵ This pollution was shown to cause cancer, death, and reproductive defects.²⁹⁶ Though a respectable step in the right direction and an indication that some judicial systems do recognize the gravity of the harm committed by oil companies, the judgment was immediately appealed by both sides, causing the saga to continue.²⁹⁷ Even if the judgment were upheld on appeal, its enforceability is highly questionable.²⁹⁸ Thus, the \$8.6 billion judgment is a nice gesture, but likely will have no teeth.²⁹⁹ Nonetheless, developments in places like The Netherlands and Ecuador do suggest at least some world governments may now be receptive to an idea they rejected only a few decades earlier—a code of conduct for multinational companies.³⁰⁰

2. Proposed Structure for the New Regime

A new treaty setting forth a code of conduct for onshore oil spills and establishing a court accessible to all world nations would be the perfect accompaniment for the recent attention generated for the Delta crisis. In its Decision Regarding Communication 155/96, the Commission recommended the need for a forum to ensure adequate compensation to human rights violation victims, comprehensive cleanup of the environmental harm caused by oil extraction, independent oversight bodies for the oil industry, and community involvement in decisions to extract oil.³⁰¹ Thus, both the current state of oil exploration as well as future expectations about energy needs demand the establishment of new substantive law and a single forum to adjudicate cases

295. *Id.*

296. *Id.*

297. *Id.* Litigation has been ongoing for seventeen years and will certainly last many more as the appeals are litigated.

298. *Id.* U.S. Federal Judge Lewis Kaplan of the Southern District of New York immediately issued a Temporary Restraining Order preventing enforcement of any damages award against Chevron. In addition, international arbiters ordered Ecuador to suspend enforcement of the judgment. Seven months later, in September, 2011, the U.S. Court of Appeals for the Second Circuit overturned the order, thereby allowing enforcement outside of Ecuador. Nonetheless, the plaintiffs have agreed to wait to collect damages until the appeals process is complete in Ecuador. Chevron continues to issue statements indicating confidence that the judgment was fraudulent and will be found unenforceable. As Chevron has no assets in Ecuador, enforcement is impossible there. Mark Hamblett, *Federal Judge Blocks Enforcement of Likely Judgment Against Chevron*, N.Y. L.J. ONLINE (Feb. 9, 2011), <http://www.law.com/jsp/nylj/PubArticleFriendlyNY.jsp?id=1202480876078>; *U.S. Court Rules Against Chevron in Ecuador Oil Case*, BBC NEWS (Sept. 20, 2011), <http://www.bbc.co.uk/news/world-latin-america-14983123>.

299. Romero & Krauss, *supra* note 294.

300. *See generally id.*; *see also generally* Chazan, *supra* note 36.

301. *Decision*, *supra* note 56, at Findings.

resulting from oil spills.³⁰² To date, no international treaty exists addressing the cleanup of onshore and inland oil spills.³⁰³

A similar treaty exists in the field of oil pollution, however, which could serve as a model for a treaty governing inland spills.³⁰⁴ The OPRC is an international treaty accepted by Nigeria that addresses cleanup of offshore oil spills.³⁰⁵ Expansion of its jurisdiction to include inland oil spills may be a solution to the Delta crisis. Parties to the OPRC are required to establish measures for handling offshore oil spills and pollution.³⁰⁶ The requirements encompass the need to develop national or regional action plans to address oil spill emergencies, to stockpile equipment with which to address offshore spills, and to actually practice responses to spills by performing training drills.³⁰⁷ Further, parties are required to assist other members in the event of a spill emergency.³⁰⁸ Parties capable of doing so must provide advisory services, technical support, and equipment at the request of another party.³⁰⁹ Additionally, parties must take the legal and administrative steps necessary for activation, transport, and arrival of the requisite equipment and response force.³¹⁰ The OPRC also encompasses reporting and response procedures as well as guidelines for research, development, and technological cooperation.³¹¹ These guidelines ensure that parties do not duplicate research efforts, thus saving time and money.³¹² They also guarantee that all parties share the same state-of-the-art oil spill response and clean-up techniques and technologies.³¹³ This way, no country is disadvantaged and all countries are able to perform a uniform response to oil spills.³¹⁴

The International Maritime Organization (“IMO”) hosted the diplomatic convention that resulted in the OPRC, and has assumed an active role in implementing the terms agreed to by the parties.³¹⁵ Though no formal adjudicatory mechanism exists in the OPRC, the IMO has played an instrumental role by coordinating funding to carry out the OPRC provisions and by analyzing

302. See generally Carew, *supra* note 23, at 522-23.

303. See *id.* at 519-20.

304. *Id.* at 519.

305. *Id.*

306. International Convention on Oil Pollution Preparedness, Response and Cooperation, Nov. 30, 1990, 1891 U.N.T.S. 51, available at <http://www.fco.gov.uk/resources/en/pdf/3706546/3892733/4190568/5046946/24>.

307. *Id.*

308. *Id.* at art. 7.

309. *Id.*

310. *Id.*

311. *Id.* at arts. 8-9.

312. See *id.*

313. *Id.*

314. See *id.*

315. David T. Edwards, *IMO's Strategy for the Implementation of the OPRC Convention*, INT'L MAR. ORG., http://www.iosc.org/papers_posters/00973.pdf (last visited Nov. 12, 2011).

and establishing the details of many of the aspects of the OPRC.³¹⁶ These include details pertaining to national and regional action plans, technical assistance, and resource mobilization.³¹⁷ In 1991, the OPRC Working Group was established to oversee implementation of the OPRC.³¹⁸ The Working Group is composed of experts from industry, environmental organizations, and governments.³¹⁹ It has drafted and issued numerous manuals to the parties outlining response mechanisms step-by-step.³²⁰ Manuals and field guides are tailored to specific subsets of oil spill response, such as the appropriate mechanisms for tropical waters and detailed guides focusing solely on application of oil dispersant.³²¹ To provide parties active learning opportunities, it hosts training sessions and workshops using the manuals and guidelines.³²² In addition to the Working Group, the OPRC Information System maintains several databases that contain the names and contact information for oil spill response assistance.³²³ The IMO also maintains a Research and Development database to compile all international research on oil response mechanisms to facilitate the goal of uniform state-of-the-art oil spill response.³²⁴ In addition, the IMO promotes and operates many of the regional agreements contemplated by the OPRC.³²⁵ Thus far, the OPRC has been deemed successful by international experts, as it has resulted in a reduction of marine oil spills and has increased preparedness and response cooperation among world nations.³²⁶ Due to this success, as well as the need to cover additional subject matter originally left out, in 2000 the IMO followed the OPRC with the Protocol on Preparedness, Response and Co-operation to Pollution Incidents by Hazardous and Noxious Substances (“OPRC-HNS”).³²⁷ The same IMO member states that signed the OPRC signed on to the new OPRC-HNS, which indicates the parties to the original OPRC saw its principles and provisions as helpful.³²⁸

A treaty similar to the OPRC, but also encompassing inland spills and establishing a formal adjudicatory forum, would aid in bringing continuity to the

316. *Id.*

317. *Id.*

318. *Id.*

319. *Id.*

320. *Id.*

321. *Id.*

322. *Id.*

323. *Id.*

324. *Id.*

325. *Id.* (agreements operated by the IMO include the Regional Marine Pollution Emergency Response Center for the Mediterranean Sea, Oil Spill Preparedness and Response program in Japan, and the Association of South-East Asian Nations).

326. Simon Rickaby, *The OPRC-HNS Protocol and its Practical Implications*, PAJ OIL SPILL SYMP. (2005), http://www.pcs.gr.jp/doc/esymposium/2005/2005_Rickaby_E.pdf.

327. *Id.*

328. *Id.*

treatment of onshore oil spills and shoreline damage around the world.³²⁹ As the oil spill damage in the Delta is primarily inland, such a treaty would provide a helpful blueprint to determine the methods and sequence of events that should be employed to clean up the Delta spills and like spills throughout the world.³³⁰

Establishing a mandatory forum to adjudicate claims arising out of oil spills around the world, against both the companies and national governments responsible for the harm would be even more beneficial.³³¹ The existence of a single forum would ensure that people suffering human rights abuses due to oil exploration and exploitation receive the same legal treatment and similar judgments, despite their differing nationalities and the differing oil spill locations.³³² Also, oil company executives could anticipate being held to the same standards regardless of the country they are operating in.³³³ Civil redress is appropriate because the goal is victim compensation and deterrence, which cannot be achieved unless it is imposed upon the company.³³⁴

In addition to having jurisdictional authority to address environmental damage from oil spills and the related human rights abuses, the Tribunal would also have jurisdiction to enjoin governments from the commission of violent human rights abuses. The Tribunal would have authority to impose an immediate injunction for ongoing violence committed at the hands of government officials, and also to sanction governments themselves by imposing monetary penalties for wrongs already committed.

To ensure the purpose of authority to issue binding judgments against both companies and governments is served, an enforcement scheme would also have to be developed and incorporated in the treaty. To enforce judgments against governments, it would be wise to follow the mandatory sanctions scheme already implemented by the United Nations Security Council (“Council”), as it has been finessed for several years and has proven successful.³³⁵ Sanctions imposed by the Council include broad economic and trade sanctions, as well as travel bans, arms embargoes, and other economic and diplomatic penalties tailored to the state or situation.³³⁶ The Council has tailored these sanctions in the past to protect vulnerable portions of the population so as to only penalize the government actors and bodies truly responsible.³³⁷ To give ratification of the treaty meaning

329. See Carew, *supra* note 23, at 519-20.

330. See *id.*

331. See generally *id.* at 522-23. See also *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 152 (2d Cir. 2010) (Leval, J., concurring) (corporate civil liability serves perfectly the goal of victim compensation).

332. See Carew, *supra* note 23, at 522-24.

333. See *id.*

334. *Kiobel*, 621 F.3d at 171-72 (Leval, J., concurring). As stated earlier, criminal redress is inappropriate and would be ineffective in addressing company and government misconduct.

335. See *Security Council Sanctions Committees: An Overview*, UNITED NATIONS, <http://www.un.org/sc/committees/> (last visited Feb. 25, 2011).

336. *Id.*

337. *Id.* For example, such refined sanctions have been used in Africa to address the conflict diamond

for companies, States Parties would have to agree to allow execution of Tribunal judgments within their territory should the company violator have assets there. If such agreement to execute is made a part of the treaty, companies would be forced to acknowledge the uniform standards established by the treaty, and to conform their behavior in accordance therewith. Thus, to ensure success of the Tribunal, the treaty must specifically outline enforcement procedures to be used in judgments against both government and private actors.

As the Tribunal would only hear cases arising from oil spills, it would be prudent to staff the court with experts on oil spills and human rights, including judges experienced in these areas and independent experts who could evaluate the extent of environmental damage and human rights abuses.³³⁸ The composition of the court could be modeled after the OPRC Working Group and include representatives from industry, environmental groups, and member governments.³³⁹ These same judges and experts would be involved in each case that comes before the tribunal and would serve for four-year terms, with the possibility of reelection for at least one additional term.³⁴⁰ The governments of the member parties would nominate judges on a rotating basis, and would each have one vote in elections.³⁴¹ A panel of three or more judges could hear each case, further ensuring neutrality.³⁴² Staffing the Tribunal with expert judges would contribute to the quality of the adjudication and consistency amongst cases, as well as improve judicial economy as time and money would not be wasted by various courts attempting to thoroughly learn about oil spills, marine pollution, and human rights standards.³⁴³ When judges without special training or expertise consider technical or scientific data and disputes, it is inevitable that much more time will be consumed adjudicating the case than if the judges on the panel were already experts on the complex subject matter and could review the facts of the case and adjudicate quickly.³⁴⁴

The same problems of expense and time consumption are faced when each side recruits their own experts to testify during trial, as is the case in normal litigation.³⁴⁵ Expert testimony is critical in properly adjudicating oil spill claims, given the complex science involved in evaluating environmental damage, effects

situation.

338. See generally Edward V. Di Lello, *Fighting Fire with Firefighters: A Proposal for Expert Judges at the Trial Level*, 93 COLUM. L. REV. 473, 474-79 (1993).

339. See Edwards, *supra* note 315, at 2.

340. See DANIEL TERRIS, CESARE P.R. ROMANO & LEIGH SWIGART, *THE INTERNATIONAL JUDGE: AN INTRODUCTION TO THE MEN AND WOMEN WHO DECIDE THE WORLD'S CASES* 155 (2007) (stating that judges in international courts generally serve terms of four to nine years with possibility of reelection for at least one additional term).

341. See *id.* at 32, 34.

342. See generally *id.* at 30-35.

343. See generally Di Lello, *supra* note 338, at 482-83.

344. *Id.* at 477-78.

345. *Id.*

of the spill on ecosystems, and cleanup options.³⁴⁶ Thus, the role of expert testimony cannot be eliminated completely for judicial economy. If the Tribunal was staffed with independent experts who could evaluate the facts of each case quickly and provide a neutral opinion, however, these burdens on the judicial process would be substantially eliminated.³⁴⁷ The independent experts could be hired in a manner similar to the way in which the expert judges are elected: each member country could nominate possible independent parties recognized for their expertise in the relevant field and the countries could vote on hiring decisions.³⁴⁸ The implementing treaty could set forth minimal educational and experience requirements that must be met for nomination and election. Knowing that renowned experts are evaluating their cases and that they are receiving the same treatment and attention as cases in U.S. territories, such as the BP oil spill, would help to rectify the wrongs felt by the people of the Delta.³⁴⁹

B. Gacaca Courts as a Supplemental Mechanism When Needed

A large part of the discontent felt by residents of the Delta is a feeling that the world does not care about environmental damage or the human rights abuses being inflicted on them by oil companies and their government.³⁵⁰ Though the Tribunal would be tremendously helpful in establishing a consistent legal response to oil spills, it is unlikely that the court will directly hear from all of the people affected by the spills.³⁵¹ With a population of over ten million in the Delta, countless people have been affected throughout the half century of oil exploitation.³⁵² Furthermore, it is evident, based on the extent and number of recorded violations, that numerous individual actors are guilty of the violent human rights abuses in the Delta.³⁵³ Many government actors in the Nigerian military and security forces worked together to rape, assault, and murder so many victims.³⁵⁴ Because the Special International Tribunal on Oil Spills would engage

346. See generally *Deepwater Horizon/BP Oil Spill Response*, NAT'L OCEAN AND ATMOSPHERIC ADMIN. (Oct. 28, 2010), http://response.restoration.noaa.gov/dwh.php?entry_id=809.

347. See Di Lello, *supra* note 338, at 483-85.

348. See TERRIS ET AL., *supra* note 340, at 22, 32-33.

349. See Vidal, *supra* note 10.

350. Nossiter, *supra* note 18.

351. See generally Morris, *supra* note 41 (noting 500,000 people in the Ogoni tribe alone are affected and may have claims); see also generally Linda E. Carter, *Justice and Reconciliation on Trial: Gacaca Proceedings in Rwanda*, 14 NEW ENG. J. INT'L & COMP. L. 41, 41-42 (2007) (explaining that Gacaca proceedings were instituted in Rwanda because the International Criminal Tribunal for Rwanda could not try the over 100,000 alleged perpetrators).

352. Vanguard Media Ltd., *Niger Delta Fund Initiative: Political Definition of N-Delta*, EARTH RTS. INST. (Sept. 15, 2003), <http://www.earthrights.net/nigeria/news/definition.html>; Nossiter, *supra* note 18.

353. See *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 123 (2d Cir. 2010); Victor Ojatorotu & Lysias Dodd Gilbert, *Checkmating the Resurgence of Oil Violence in the Niger Delta of Nigeria*, INST. FOR ANALYSIS GLOBAL SEC. 2 (May 18, 2010), http://www.iags.org/Niger_Delta_book.pdf.

354. See *Kiobel*, 621 F.3d at 123; Ojatorotu & Gilbert, *supra* note 353, at 2.

in adjudication of suits against oil companies and governments, it would not be an efficient forum to try individual members of the military and security teams who participated in the harm as well.³⁵⁵ There would simply be too many defendants, victims, and witnesses for the Tribunal to accommodate.³⁵⁶

Though oil spills damage the environment and quality of life of those who live near and depend on the area, not all nations face the same government involvement and violent human rights abuses as exist in the Delta. For example, though the BP oil spill was incredibly damaging to the Gulf Coast, there have been no allegations of corrupt government officials inflicting violence on the area residents affected by the spill. Nonetheless, in regions of the world like the Delta, violent human rights abuses regularly accompany environmental damage from oil spills.³⁵⁷ Therefore, in some nations an additional forum to address further harms related to oil spills would be necessary.

This additional forum could be modeled after creative community judicial responses already proven successful in other areas of the world. For example, in response to the Rwandan genocide, which also involved too many defendants than could be feasibly tried in a formal tribunal, Gacaca proceedings were implemented as a supplemental adjudicatory method to the International Criminal Tribunal for Rwanda ("ICTR").³⁵⁸ The ICTR investigated and tried the military and government leaders responsible for ordering and carrying out the genocide, while the Gacaca proceedings were able to try the many other guilty individuals who participated in the genocide but did not serve a leading role.³⁵⁹ Gacaca trials consist of numerous small community hearings held in public areas where residents attend and are deeply involved in the proceedings by asking questions and giving testimony.³⁶⁰ While leaders and large-scale perpetrators of violence were prosecuted at the ICTR, lower-level offenders were prosecuted in Gacaca courts.³⁶¹ Defendants were questioned and confronted by their victims or family members of the victims.³⁶² Proceedings were conducted by a group of seven to nine community members who were specially-elected as judges by other community members, recognizing them for their respect and integrity.³⁶³

Gacaca proceedings revolve around confession and reconciliation.³⁶⁴

355. *See generally Kiobel*, 621 F.3d at 123.

356. *See generally id.*

357. *See generally id.*

358. Carter, *supra* note 351, at 42; *About Gacaca*, RWANDA GATEWAY, <http://www.rwandagateway.org/?rubrique30> (last visited Mar. 20, 2011). "Gacaca" means short, clean cut grass in Kinyarwanda, and is symbolic of an area in the community where elders gather to judge trials, originally only familial disputes.

359. Carter, *supra* note 351, at 42, 49.

360. *Id.* at 45-46.

361. *Id.* at 50.

362. *Id.* at 46.

363. *Id.* at 45 (later reduced to seven judges, with five necessarily present to hear a case).

364. *Id.*

Confessions reduce the length of the prison sentence, and often result in a reduced sentence involving community service.³⁶⁵ Thus, justice is served at the hands of victims, yet reconciliation between victim and aggressor is achieved in many instances after victims receive the apology they feel they deserve.³⁶⁶ Also, the defendant can help rebuild the community through early release community service.³⁶⁷ This type of proceeding allows the large number of people who feel victimized to obtain some personal vindication, and has been proven successful in Rwanda.³⁶⁸ The end goal is a combination of justice and reconciliation.³⁶⁹

Millions of people have been victimized in the Delta.³⁷⁰ The Ogoni people's entire way of life has been taken at the hands of oil companies, as have other tribes.³⁷¹ Individuals have been raped, beaten, and killed by government officials in furtherance of oil company initiatives.³⁷² Though a large monetary judgment and a mandate that oil companies, including Shell, clean up the damage done in the Delta are very important, individual hearings involving actual residents of the Delta would likely go a long way in bringing peace to the region and quelling the political and civil unrest.³⁷³

Instituting Gacaca proceedings in the Delta would allow the Delta community to prosecute past and present members of the government military and security forces who committed human rights abuses.³⁷⁴ Like the Gacaca proceedings in Rwanda, community service could be utilized in sentencing, and defendants could be put to work cleaning up the oil damage to the Delta.³⁷⁵ Thus, Gacaca proceedings in the Delta have the potential of improving the natural environment and bringing much-needed peace to the region.

VI. CONCLUSION

Although it is hard to believe given the extent of the damage to the Delta region, environmentalists predict the damage to the Delta's fragile environment

365. *Id.*

366. *Id.* at 47-49.

367. *Id.* at 47.

368. *See id.* at 49-51.

369. *Id.* at 43.

370. *See generally* Morris, *supra* note 41 (given the number of people living in the affected regions and the length of time the region has been affected, this number is only reasonable).

371. *See* Carew, *supra* note 23, at 499-500.

372. *Id.* at 515.

373. *See generally* Carter, *supra* note 351, at 49; *see generally* Bashir Adigun, *Explosions Kill at Least 7 Near Nigeria Ceremony*, ABC NEWS (Oct. 1, 2010), <http://abcnews.go.com/International/wireStory?id=11773225> (describing violent protests by Delta militant groups against the Nigerian government in response to the Delta crisis).

374. *See generally* Carter, *supra* note 351, at 49.

375. *Id.* at 47.

can be reversed and the region restored with concentrated efforts.³⁷⁶ Similarly, though generations of people from the Delta have suffered at the hands of the government and oil companies, with effort, change, and international attention, the damage to the Delta residents may be rectified.

A Special International Tribunal for Oil Spills would serve as a forum strong enough to motivate the Nigerian government and oil companies to be environmentally responsible and refrain from abusing the human rights of Delta residents. If properly implemented, it would result in judgments that force clean-up of past spills, resources to alleviate the living conditions of residents, and injunctions preventing similar acts and damage in the future. Gacaca proceedings would complement judgments of the Tribunal by facilitating reconciliation amongst residents and restoring peace locally. It is important to develop adequate substantive law and establish these forums as soon as possible.³⁷⁷ This is especially true given Shell's recent announcement of hopes to reenter the Delta, and the Nigerian government's announcement of intention to resume oil pumping in the Delta with a new, yet unknown, partner.³⁷⁸ It is not anticipated that oil exploration in the Delta will cease anytime soon. The extensive damage from the past fifty years' of exploitation is ongoing. New forums to address the atrocities are the only option left for the people of the Delta.

376. Nossiter, *supra* note 18.

377. See generally Hélène Michaud, *Comeback for Shell in Nigeria's Ogoniland?*, RADIO NETH. WORLDWIDE (Sept. 30, 2010, 4:48 PM), <http://www.rnw.nl/africa/article/comeback-shell-nigeria's-ogoniland>.

378. *Id.*

