Through The ATS Door, Now What?
The Prevalence of MNC Misconduct, Disguise & Manipulation

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Abstract

On November 10, 1995, nine leaders of the Ogoni region of Nigeria were executed by an extrajudicial tribunal. What followed was a series of international denunciations, sanctions on the Nigerian regime, boycotts of Royal Dutch Petroleum ("Shell"), and a string of lawsuits against the multinational. Two key lawsuits, *Wiwa v. Royal Dutch Petroleum* and *Kiobel v. Royal Dutch Petroleum*, consolidated into one proceeding that nearly reached the trial phase, eventually settling for $15.5 million. Given Shell's unusual move to settle, this Comment examines the main procedural and substantive developments of pre-trial discovery in *Wiwa* as a means of understanding how Shell and other extractive multinational corporations (MNCs) operate abroad and stand in the way of accountability and reparation for victims of human rights abuses. Ultimately, this Comment is important for understanding how extractive MNCs use procedural warfare to distract, delay, and deny justice to victims. In the process, it identifies key areas for reform and makes recommendations for better redress to victims and their communities.

* J.D., UCLA School of Law, 2022. I am extremely grateful to William Boyd for his invaluable feedback and suggestions. I also thank Aslı Ü. Bâli for reading earlier versions of this Comment and providing extremely insightful feedback. Catherine Sweetser and Kate Mackintosh were of great guidance while the ideas for this Comment were incubating. It was an honor to present at the *2021 Symposium on International Human Rights and Corporate Accountability: Current and Future Challenges*, and to hear additional thoughts from Alex Wang, Alveena Shah and Timothy Webster. I am also tremendously grateful to Jenna Bernard, Harris McLeod and the entire editorial staff of the Journal of International Law and Foreign Affairs for their thoughtful suggestions. Finally, I thank my fiancé and family for their endless advice, encouragement and love.

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Introduction

With alarming frequency, human rights are violated in the interest of contracts by and for the extractive industry, with harms ranging from murder and torture to land dispossession and environmental destruction.[1] Many extractive multinational corporations (MNCs) have increased their power in the world by mining the resources of local and Indigenous groups, while offending minimum international human rights standards.[2] In 2006, John Ruggie, the Special Representative of the Secretary-General on Human Rights and Transnational Corporations, highlighted this by pointing to a survey of human rights abuses in which the extractive industry was found to be involved in two-thirds of the 65 global charges of human rights violations by security forces protecting MNC assets.[3] More recently, a 2014 report found that out of a sample of 52 US extractive companies operating 330 projects, 35 percent posed a high risk of Indigenous community opposition and 54 percent a medium risk of opposition.[4]

1. Gregory G.A. Tzeutschler, *Corporate Violator: The Alien Tort Liability of Transnational Corporations for Human Rights Abuses Abroad*, 30 Colum. Hum. Rts. L. Rev. 359 (1999); *see also* Lisa J. Laplante & Suzanne A. Spears, *Out of the Conflict Zone: The Case for Community Consent Processes in the Extractive Sector*, 11 Yale Hum. Rts. & Dev. L. J. 69 (2008).

2. David Weissbrodt & Muria Kruger, *Norms on the Responsibility of Transnational Corporations and Other Business Enterprises With Regard to Human Rights*, 97 Am. J. Int'l L., 901, 901–02 (2003); *see also* Geneva E.B. Thompson, *The Double-Edged Sword of Sovereignty by the Barrel: How Native Nations Can Wield Environmental Justice in the Fight Against the Harms of Fracking*, 63 UCLA L. Rev. 1818 (2016).

3. U.N. Special Representative of the Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises, *Promotion and Protection of Human Rights*, ¶ 24–25, U.N. Doc. E/CN.4/2006/97 (Feb. 22, 2006).

4. Rebecca Adamson & Nick Pelosi, First Peoples Worldwide, Indigenous

In the absence of enforcement at the national or international levels, vulnerable communities are at the mercy of domestic courts' recognition and adjudication. Yet, even when these communities can reach domestic courts, significant challenges remain. In the United States, extractive MNCs wield massive economic and political power. Corporations like ExxonMobil, Royal Dutch Shell, BP, and Chevron remain among the top 30 most profitable corporations worldwide, all with annual revenues exceeding 140 billion dollars.[5] Across 40 years of Alien Tort Statute (ATS)[6] litigation, MNCs in the extractive industry have employed a growing toolbox of procedural tactics, ranging from *forum non conveniens* to comity,[7] act of state doctrine,[8] and the political question doctrine, in order to escape liability.[9] Most suits result in dismissal, stopping the majority of cases before they reach trial or even discovery.[10] To make matters worse, the door to ATS litigation has been closing quickly, as *Kiobel v. Royal Dutch Petroleum Co.* now requires displacing a presumption against extraterritoriality and *Nestlé USA v. Doe* demands more than general corporate activity in the United States.[11] But what happens when these tools fail and MNCs are forced

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Rights Risk Report 9, 24 (2014).

5. *Global 500*, Fortune (2020), https://fortune.com/global500/2020/search/?fg500_industry=Petroleum Refining [https://perma.cc/QV3Y-KNSH].

6. Alien Tort Claims Act (ATCA), 28 U.S.C. § 1350 (2000), also referred to as the Alien Tort Statute (ATS).

7. Hilton v. Guyot, 159 U.S. 113, 163-64 (1895); Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124 (2013) (noting serious possible foreign policy consequences); *see also* Sequihua v. Texaco, Inc., 847 F. Supp. 61, 63 (S.D. Tex. 1994) (dismissing a suit brought by Ecuadorian residents for damages caused by environmental contamination from Texaco's oil development because the events and parties were based outside the US, the exercise of jurisdiction would interfere with Ecuador's sovereign right to control its own resources; and because Republic of Ecuador had expressed its strenuous objection to the exercise of jurisdiction); *but see* Jota v. Texaco, Inc., 157 F.3d 153, 159 (2d Cir. 1998) (holding, in a case with similar facts, that dismissal on the grounds of comity was inappropriate absent a clear finding that an adequate forum existed in the objecting nation).

8. *See* Sarah Joseph, Corporations And Transnational Human Rights Litigation 40 (2004); Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 Va. L. Rev. 1071, 1159, 1171 (1985).

9. Joseph, *supra* note 8, at 44; *see also* Sarei v. Rio Tinto PLC, 221 F. Supp. 2d 1116 (C.D. Cal. 2002) (dismissing after receiving a Statement of Interest from the U.S. Department of Justice arguing that the continued adjudication of the case would interfere with the Bush administration's U.S. foreign policy interests in Papua New Guinea); Mujica v. Occidental Petroleum Corp., 381 F. Supp. 2d 1164, 1188 (C.D. Cal 2005) (dismissing based on the political question doctrine upon the Justice Department's request in Statements of Interest against Occidental Petroleum for its operations in Colombia).

10. *Alien Torts: Trial Trails*, Economist (Oct. 9, 2010), https://www.economist.com/node/17199924 [https://perma.cc/2KFF-MHX8].

11. Kiobel v. Royal Dutch Petroleum Co, 569 U.S. 108 (2013); *see also* Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931 (2021).

to go to court? What exactly does ATS litigation against these profitable and politically imposing entities look like and what can it teach us?

This Comment answers these questions. Through the lens of ATS litigation, this Comment focuses on the pre-trial proceedings of *Wiwa v. Royal Dutch Petroleum Co.*[12] after it consolidated with *Kiobel* and prior to its $15.5 million settlement, one of the few settlements ever reached with an extractive MNC.[13] The facts date back to November 10, 1995, when nine Nigerian leaders of the Ogoni Indigenous group were tried and executed by an extrajudicial Civil Disturbances Special Tribunal for allegedly killing other Ogoni leaders in their community. The trial was later condemned internationally, resulting in the recall of Nigerian ambassadors, a boycott of Shell Oil, and calls for tougher sanctions against the Nigerian regime. In *Wiwa* and *Kiobel*, the plaintiffs sought to show how the trial and execution were orchestrated by Shell and its Nigerian subsidiary, Shell Transport and Trading Company (SPDC), in collaboration with the Nigerian military, in order to admonish Ogoni leaders opposing Shell's presence in Ogoniland, Nigeria. A subset of survivors and family members of the deceased sued in 1996 in the Southern District of New York under *Wiwa*,[14] while others followed in 2002, through *Kiobel*.[15] Ultimately, the cases consolidated, with plaintiffs alleging that Shell engaged in a conspiracy with the Nigerian military regime to provide payments to the military and police; to supply them with intelligence personnel; to purchase transportation, weapons, and ammunition; and to orchestrate a coordinated campaign to discredit, attack, arrest, and execute Ogoni leaders, including many of the plaintiffs, on fabricated murder charges.[16]

Alone and in the context of other ATS claims against extractive MNCs, *Wiwa* reveals a concerted effort to exclude witnesses, discredit plaintiffs, and attack opposing counsel. On top of advancing charges of fraud and perjury, Shell sought to exclude the testimony of 51 out of 53 witnesses, including former Shell policemen and Nigerian military officers. Similarly, in other proceedings with extractive MNCs like Drummond and ExxonMobil, other MNCs have sought to exclude testimony that unveiled their involvement with government actors and other third parties in events that included extrajudicial killings, torture,

12. Wiwa v. Royal Dutch Petroleum Co, No. 96 Civ. 8386 (S.D.N.Y. Feb. 28, 2002).

13. *See, e.g.*, Doe v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002), *reh'g en banc granted*, 395 F.3d 978 (9th Cir. 2003).

14. Fourth Amended Complaint, Wiwa v. Royal Dutch Petroleum Co., No. 96 Civ. 8386 (S.D.N.Y. Feb. 28, 2002).

15. *Id.*

16. *Id.*

dispossession of Indigenous lands, and environmental destruction. These efforts endeavored to erase the broader context in which harms occurred and help sustain the corporate veil that continues to cloak already obscure corporate structures.

Likewise, the case of *Wiwa*, as examined in the context of other ATS claims, reflects assaultive efforts to accuse plaintiffs, witnesses, and counsel of fraud and perjury, in ways that offend survivors and opposing counsel and vilify cultural sensitivity, language barriers, and Indigenous rights. Left untreated, these acts confuse juries, insult witnesses, disbar attorneys, and destroy otherwise credible claims altogether.

Part I of this Comment examines Shell's fraud and perjury charges, reviews the law on witness compensation and provides a comparison of similar allegations by other MNCs in the industry. Part II examines Shell's attempts to exclude the majority of witnesses in *Wiwa*, as well as explores similar challenges by other extractive MNCs and the broader hurdles that continue to plague ATS claims. Part III presents a number of reforms that can begin to address these normative, practical, and structural hurdles. Collectively, these lessons demand solutions that go beyond the ATS towards bolder and more comprehensive debates about how the United States should view and treat MNCs charged with complicity in human rights violations. They are every bit worth executive, legislative, and judicial analysis if the United States is to abandon corporate impunity and enforce accountability.

I. Shell on the Offense

While Shell engaged in a variety of tactics to derail and deny justice in the *Wiwa-Kiobel* litigation, the pre-trial dispute over compensation for witnesses' expenses is a representative example of the type of frivolous attack Shell and other MNCs are willing to pursue. Not only does this kind of tactic stall and deny juries access to evidence, but it also re-traumatizes and humiliates witnesses who are often themselves victims of heinous human rights violations by the same MNCs whose lawyers now intimidate them before US courts. As discussed below, these tactics warrant serious reflection, in addition to sanctions and legal reforms.

In 2004, prior to the consolidation of *Wiwa* with *Kiobel*, the *Kiobel* plaintiffs moved for class certification pursuant to Rule 23(c) of the Federal Rules of Civil Procedure, a motion which the District Court then referred to the Magistrate Judge for a report and recommendation

under § 636(b)(1)(8).[17] When the Magistrate Judge determined that the plaintiffs' counsel adequately represented the interests of the class, Shell opposed, arguing:

> [n]ow we have learned that seven of the identified witnesses [in support of the plaintiffs' claims] are being paid for their testimony [. . .] There can be no doubt that the witnesses are giving testimony that [the plaintiffs'] counsel knows to be false [. . .] [w]e know that between February 29, 2004 and April 2, 2004, Berger & Montague wired $15,195 to the Benin Republic for the benefit of the witnesses.[18]

These claims arose from disclosures made by counsel for the *Kiobel* plaintiffs regarding their provision of food and lodging for seven individuals and their families (The Benin Witnesses), who were relocated from Nigeria to Benin in order to testify at trial.[19] What followed was a series of procedural moves, including a motion by the plaintiffs for sanctions under Rule 11 of the Federal Rules of Civil Procedure, briefing in opposition by Shell, an order by the Magistrate Judge imposing Rule 11 sanctions, an appeal to the Second Circuit regarding those sanctions and, five years later, a renewed opposition to those claims through the *Wiwa* plaintiffs' motion *in limine* to exclude evidence of these payments.

The Benin Witnesses included former members of the Nigerian military and police, as well as Shell's supernumerary police, all of whom had personal knowledge of Shell's involvement in Ogoniland, Nigeria.[20] Before they were relocated to Benin, the *Kiobel* plaintiffs determined and relayed to the Court that these witnesses had knowledge about Shell's provision of helicopter transportation and ammunition to the Nigerian military and police for attacks on Ogoni villages, Shell's large payments to the commander of the military unit allegedly involved in the attacks and Shell's assistance in the arrest and torture of Ogoni people.[21] The plaintiffs disclosed that their payment of food, lodging and medical care was a small allowance for the witnesses while they waited to testify at trial.[22] In their motion for Rule 11 sanctions, the plaintiffs argued that the witnesses "agreed to testify to facts that they believe[d], and reasonably so, would put them in physical jeopardy if

17. Kiobel v. Royal Dutch Petroleum Co., No. 02 Civ. 7618 (S.D.N.Y. Sept. 29, 2006).

18. Plaintiffs' Memorandum of Law in Support of Their Motion for Rule 11 Sanctions, Kiobel v. Royal Dutch Petroleum Co., No. 02–7618, 2004 WL 6078982, at *1–2 (S.D.N.Y. Sept. 29, 1996) (citing Shell's Response).

19. *Id*. at *7–8.

20. *Id.*

21. *Id.*

22. *Id.*

they remained in Nigeria" and in turn "left their native land, their communities, their families" to relocate "to a country where the people speak a different language and their opportunities for employment are limited" in order to tell the truth about "what happened to [them] and [their] people."[23]

In contrast, Shell posited that this was part of "a conspiracy to procure false testimony," whereby the plaintiffs refused to disclose the identity of the witnesses for a period of time, because "they did not [. . .] have any witnesses who [could] truthfully testify in support of those allegations" and instead "sought and cultivated people in Nigeria willing to give false testimony in return for money."[24] This theory was evidenced in Shell's depositions of the witnesses, where its counsel asked questions such as "[w]hen [was] the first time anyone came up with the idea of you getting money for your testimony?" Despite witnesses' responses denying payment for their testimony, such as "[n]o, with the starting nobody told me anything about testimony [. . .] no person even offered me anything," Shell continued to ask questions that alluded to the witnesses "getting money for [their testimony]."[25] Rather than ask for clarification or respond to plaintiffs' letter regarding their intent to file Rule 11 sanctions, Shell continued to argue that the plaintiffs made these payments "solely because these people agreed to testify" and that these statements "not only had sufficient evidentiary support" but were "true."[26]

In fact, Shell went even further. First, it argued that all seven Benin Witnesses made false statements, despite only having deposed two by the time of that filing. Then, it argued that the witnesses' plight in Nigeria was exaggerated and instead supported the conclusion that their "poverty and dim prospects for economic advancement" were a strong reason to believe that they considered the plaintiffs' "offer of an exit from Nigeria and the payment of living expenses as an attractive option."[27] However, a mere cursory look at the circumstances in Nigeria at the time suggests that the witnesses' fear was well-founded: a

23. *Id.*; Plaintiffs' Motion in Limine # 7 to Exclude Evidence of Payments to and/or Bribery of the Benin Witnesses, Wiwa v. Royal Dutch Petroleum Co., Nos. 96 Civ. 8386, 01 Civ. 1909, 2009 WL 3655662, at *3 (April 29, 2009) (citing Gbarale Deposition at 163:25–165:17).

24. Redacted Memorandum of Law in Opposition to Plaintiffs' Motion for Rule 11 Sanctions, Kiobel v. Royal Dutch Petroleum Co., No. 02–7618, 2004 WL 6078983, at *2 (S.D.N.Y. June 22, 2004) [hereinafter Redacted Memorandum of Law in Opposition].

25. Plaintiffs' Memorandum of Law in Support of Their Motion for Rule 11 Sanctions, *supra* note 18 (citing Prince Osaror deposition at 173:14–174:15, 176:8–15, 178:21–23).

26. Redacted Memorandum of Law in Opposition, *supra* note 24.

27. *Id.* at *5.

military dictatorship ruled Nigeria and had already attacked the Ogoni people and these witnesses were about to testify against the dictatorship's enabler and collaborator in a well-publicized trial.

In addition to arguing that opposing counsel committed fraud on the court by introducing the testimony of witnesses who were paid "for their testimony," Shell claimed that the witnesses perjured themselves and, therefore, their testimony should be excluded.[28] One of those witnesses was an investigator for the Nigerian Ministry of Defense, who investigated and reported on allegations of Shell paying substantial sums to Major Paul Okuntimo, the commander of the Rivers State Internal Security Task Force (ISTF).[29] Shell concentrated its allegations of perjury on the notation in his reports that his office was located on the 13th floor of the Ministry of Defense, which Shell argued was not possible because the building was destroyed by a fire in April, 1993, after which the Ministry of Defense moved to a building with only 11 floors.[30] On the basis of this notation and other minor inconsistencies, Shell argued that the witness was a fraud and that his reports were forgeries.[31] However, rather than question the witness about a potential error in the reports' address, it sought to force the witness to adopt the discrepancy through a series of manipulative exchanges such as:

> Q. So from all the period from 97 to April 2003 you went to work on the 13th floor –
> A. No, no. May 20, 2004.[32]
> Q. Then you worked on the 13th floor when you were called back?
> A. No, I worked in Ojucontemay.[33]
> Q. Did you send any of the reports that we have looked at today to the 13th floor?
> A. I don't understand. Pardon?
> Q. Did you send any reports to the 13th floor [. . .]?
> A. I was attached to the Ogoni crisis, I was sent to Ogoni crisis, so I sent reports to the Complaint Department general. I sent to the Complaint Department. I sent to [. . .] Okuntimo.[34]
> Q. So you went to the 13th floor to help him type up your original notes; is that correct? [. . .]

28. *Id.* at *4.

29. Plaintiffs' Reply Brief in Support of Their Motion for Rule 11 Sanctions, Kiobel v. Royal Dutch Petroleum Co., No. 02 CV 7618, 2004 WL 6078985, at * 5 (S.D.N.Y. Sept. 20, 2004).

30. Redacted Memorandum of Law in Opposition, *supra* note 24, at *5–6.

31. *Id.* at *6.

32. Plaintiffs' Reply Brief in Support of Their Motion for Rule 11 Sanctions, *supra* note 29, at *5 (citing Osaror Deposition at 166:24–167:1).

33. *Id.* at *5 (citing Osaror Deposition at 168:16–18).

34. *Id.* at *6 (citing Osaror Deposition at 182:8–17).

> A. Because I don't want to, he said I should not stay with him. I don't know where he typed it, he d[id]n't type it in the military office, no. I don't know where he typed it [35]

Based on these responses, Shell argued that the witness made false statements and perjured himself. In turn, the plaintiffs argued that this error did not necessarily mean the documents were forged, but rather that it was plausible that the documents continued to list the old office address despite the move.[36] Either way, these exchanges plainly indicate an effort to manipulate the witness into adopting the error rather than directly asking why the address was incorrect. Further, given the language barrier between the witness and Shell's counsel, it is clear that Shell was not trying to speak clearly, but deliberately took advantage of the language barrier to trick the witness into adopting false statements. Magistrate Judge Pitman agreed with this framing in his order on the motion for Rule 11 sanctions, arguing that there was no evidence that the plaintiffs' counsel knew the testimony was false or that they had a duty to investigate this, citing the Advisory Committee Notes to the 1970 Amendments to Rule 11.[37]

In response to these allegations, the *Kiobel* plaintiffs requested that Shell and its counsel send letters of apology, pay $5,000 in penalties to the Court and be charged with the costs and expenses of the Rule 11 motion.[38] Magistrate Judge Pitman agreed with the plaintiffs, finding that there was no evidentiary basis for the statement that the Benin Witnesses were "being paid for their testimony," and imposed $5,000 sanctions on each of Shell's attorneys, in addition to reimbursements to the plaintiffs' counsel for one-third of the fees incurred in making the Rule 11 motion.[39] This order was subsequently affirmed by the district judge in the Southern District of New York.[40] Nevertheless, Shell sought review before the Second Circuit. The panel there considered whether a Magistrate Judge had the authority to impose Rule 11 sanctions and ultimately decided that the question did not require answering because there was evidence supporting Shell's statements. Thus, the

35. *Id.* (citing Osaror Deposition at 99:4).

36. *Id.*

37. Kiobel v. Royal Dutch Petroleum Co., No. 02 Civ. 7618, 2006 WL 2850252 (S.D.N.Y. Sept. 29, 2006) (order granting Rule 11 sanctions).

38. Plaintiffs' Memorandum of Law in Support of Their Motion for Rule 11 Sanctions, *supra* note 18, at *8.

39. Plaintiffs' Memorandum in Opposition. to Defendants' Motion in Limine to Preclude the Testimony of the "Benin 7", Wiwa v. Royal Dutch Petroleum Co., Nos. 96 Civ. 8386, 01 Civ. 1909, 2009 WL 2442795 (S.D.N.Y. May 5, 2009) (citing Magistrate Judge Pitman's order granting Rule 11 sanctions).

40. *Id.* (citing District Judge Kimba M. Wood's order affirming Rule 11 sanctions).

panel annulled the sanctions, finding that they could not be sustained as a matter of law.[41]

However, that still did not end the matter. When *Kiobel* consolidated with *Wiwa*, the allegations resurfaced again in the plaintiffs' motions *in limine*. The *Wiwa* plaintiffs argued for the exclusion of the payments because they constituted inadmissible hearsay; were irrelevant and unfairly prejudicial; and would both mislead the jury and destroy those witnesses' credibility, as well as undermine the credibility of other witnesses by association, thereby prejudicing the jury against all of the plaintiffs and their counsel.[42] Since almost all of the witnesses were Nigerian nationals, the inclusion of the payments carried the additional risk of causing the jury to believe that all Nigerian witnesses were susceptible to bribery, further expanding the erosion of credibility from the plaintiffs and their counsel to all witnesses on discriminatory pretenses. In short, the allegations could single-handedly destroy the plaintiffs' case. Nevertheless, Shell continued to make the frivolous discriminatory argument that the witnesses were paid for their testimony.

A. A Note on Witness Compensation

It is worth exploring when, if ever, it is reasonable to compensate a lay witness and what consequences exist in situations where that compensation exceeds a reasonable amount. The American Bar Association's Standing Committee on Ethics and Professional Responsibility determined in 1996 that it is "proper for a lawyer to compensate a non-expert witness for the reasonable value for time expended by the witness while preparing for or giving testimony at a deposition or at a trial."[43] However, lawyers who compensate witnesses for their time must comply with the Model Rules of Professional Conduct, such as ensuring that they do not "falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law."[44] Comment 3 to Model Rule 3.4 notes that "it is not improper to pay a witness's expenses" so long as that payment is not "for

41. Kiobel v. Millson, 592 F.3d 78 (2d Cir. 2010).

42. Plaintiffs' Motion in Limine # 7 to Exclude Evidence of Payments to and/or Bribery of the Benin Witnesses, *supra* note 23, at *1.

43. ABA Comm. on Ethics & Prof'l. Resp., Formal Op. 96–402 (1996).

44. Model Rules of Prof'l. Conduct r. 3.4(b) (Am. Bar Ass'n 2019) (Fairness to Opposing Party & Counsel); *see, e.g.*, Ward v. Nierlich, No. 99 14227 Civ., slip op. at 3 (S.D. Fla. Sept. 20, 2006) (recommending sanctions where plaintiffs and their counsel "corrupt[ed] the judicial process and commit[ted] a fraud on [the] court").

testifying,"[45] even if the testimony itself is truthful.[46] Federal courts agree that lay witnesses in civil suits may receive payment for their expenses and time lost in preparation for litigation.[47] Payments include the reasonable cost of travel and subsistence, as well as the reasonable value of time lost in appearing in court.[48]

Further, courts have determined compensation is proper where it constitutes "a relatively small amount [. . .] designed specifically for protection and relocation expenses."[49] It is not unreasonable to provide a witness with some comfort in connection with his or her service, such as lodging him or her in a nice hotel rather than a cheaper one.[50] This is the case even where there may be other potential witnesses who could testify without these additional expenses, as there is no ethical or statutory requirement prescribing a lawyer to locate witnesses with an abundance of time and money to testify at trial.[51] In a legal system where individuals are not compelled to testify in a litigation in which they are not parties, it is fundamentally fair to recognize a witness's sacrifice and compensate him or her for the time lost.[52] Either way, this is a case-specific inquiry,[53] requiring an objective consideration of the facts[54] and a number of factors, such as (1) the time the witness spent in connection with the litigation; (2) the witness's hourly rate if employed, whether through an employer or self-employment; (3) the witness's most recent wages or earnings, or what others earn for comparable activities; (4) the witness's qualifications; (5) the value of opportunities

45. Model Rules of Prof'l. Conduct r. 3.4 cmt; *see also* United States v. Davis, 261 F.3d 1, 38 (1st Cir. 2001) (declining to "exclude testimony based only on the fact that a witness was paid").

46. Rocheux Int'l of N.J., Inc. v. U.S. Merch. Fin. Grp., Inc., No. 06–6147, slip op. at 4 (D.N.J. Oct. 5, 2009); *Ward*, slip op. at 4; *In re* Kien, 372 N.E.2d 376, 379 (Ill. 1977).

47. *See* Prasad v. MML Investors Servs., No. 04 Civ. 380, 2004 U.S. Dist. LEXIS 9289, slip op. at 16 (S.D.N.Y. May 24, 2004) (noting that witnesses "may be compensated for the time spent preparing to testify or otherwise consulting on a litigation matter in addition to the time spent providing testimony in a deposition or at trial").

48. Hamilton v. General Motors Corp., 490 F.2d 223, 229 (7th Cir. 1973).

49. United States v. Martinez-Medina, 279 F.3d 105, 118 (1st Cir. 2002).

50. Roy D. Simon, Simon's New York Rules of Professional Conduct Annotated 892 (2013 ed.) ("Whether a lawyer flies a witness first class or coach or puts the witness up in a five-star hotel or a Motel 6, should not be the determinant of whether the related expenses are 'reasonable'").

51. Douglas R. Richmond, *Compensating Fact Witnesses: The Price Is Sometimes Right*, 42 Hofstra L. Rev. 905, 912 (2014)

52. Jeffrey S. Kinsler & Gary S. Colton, Jr., *Compensating Fact Witnesses*, 184 F.R.D. 425, 429, 431 n.22 (1999).

53. Ariz. State Bar Comm. on Rules on Ethics, Formal Op. 97–07 (1997) [hereinafter Ariz. Op. 97–07].

54. Ala. Bar Ass'n Ethics Comm., Op. 93–2 (1993).

or alternative employment that a witness must forego to participate in the litigation; (6) the inconvenience or hardship experienced as a result of the litigation; (7) the witness's occupation, trade or profession; (8) and practical constraints, such as whether the witness has unique factual knowledge or is beyond the court's subpoena power.[55]

A simple application of the factors to this case reveals a critical gap in the inquiry: most factors relate to witnesses' hourly rates, occupation, and qualifications, whereas concerns over hardship and practical challenges cover fewer than half of the factors. Thus, it is difficult to adequately consider the danger and hardship at stake in litigations where witnesses are in unstable or unsafe conditions, like the Benin Witnesses who feared violence and retaliation from the Nigerian military. Not only do the factors fail to properly consider these scenarios, but secondary sources also concentrate on jurisprudence where witnesses are high-level professionals or consultants, rather than individuals with little means or in dire circumstances.[56] This is an important and concerning gap in the rules and jurisprudence for both witnesses in human rights litigation as well as vulnerable witnesses in other cases. As *Wiwa* illustrates, if payment for witnesses' time and effort is proper, then payment for their expenses in connection with litigation, whether it requires securing a safe environment or not, should be allowed. There must be a better distinction for situations like this where litigation can create danger for witnesses.

Interestingly, whenever courts find witness compensation to be unreasonable, the consequences generally do not involve the exclusion of a witness's testimony, as requested by Shell here. Instead, courts err on the side of letting the jury weigh the credibility of the witness.[57] Therefore, while it is common for counsel to be reprimanded for not disclosing agreements to compensate witnesses, whether they be proper or not,[58] courts generally do not use alleged charges of improper

55. Ariz. Op. 97–07, *supra* note 53.

56. Douglas R. Richmond, *Expert Witness Conflicts and Compensation*, 67 Tenn. L. Rev. 909 (2000); Ezra Friedman & Eugene Kontorovich, *An Economic Analysis of Fact Witness Payment*, 3 J. Legal Analysis 139 (2011); Marcy Strauss, *From Witness to Riches: The Constitutionality of Restricting Witness Speech*, 38 Ariz. L. Rev. 291 (1996); George C. Harris, *Testimony for Sale: The Law and Ethics of Snitches and Experts*, 28 Pepp. L. Rev. 1 (2000).

57. United States v. Davis, 261 F.3d 1, 37–38 & n.31, 39 (1st Cir. 2001) (quoting United States v. Cresta, 825 F.2d 538, 547 (1st Cir. 1987)); *see, e.g.*, Platypus Wear, Inc. v. Horizonte Fabricacao Distribuicao Importacao Exportacao Ltda., No. 08–20738 Civ., 2010 (S.D. Fla. Feb. 17, 2010); TBC Corp. v. Wall, 955 S.W.2d 838, 843 (Tenn. Ct. App. 1997).

58. *See* ESN, LLC v. Cisco Sys., Inc., 685 F. Supp. 2d 631, 651 (E.D. Tex. 2009) (sanctioning the defendants for their "deliberate, willful failure" to disclose an employment

compensation to exclude a witness's testimony. This distinction is an important one, as it reflects a different underlying motivation for Shell's resistance to these testimonies. By not pursuing a common judicial response to improper compensation, Shell revealed its motivation to ultimately exclude the testimony of witnesses with highly damaging information. This is one part of a subtle, yet powerful, scheme to manipulate the rules to produce a substantive, adverse impact on effective jurisprudence.

In sum, the lengthy dispute over the Benin Witnesses' compensation provides critical procedural and substantive lessons about how multinational corporations, like Shell, litigate human rights claims. On the procedural side, it reflects the Professional Conduct Rules' malleability towards manipulative goals that disregard, distort, and insult vulnerable witnesses' circumstances. Further, it reflects a bias in that the rules are premised on compensating affluent, professional witnesses, rather than low-income or indigent witnesses in dire circumstances and in need of some measure of safety to testify at trial. With only two factors out of eight taking these into consideration, courts may be unable to properly weigh witnesses' dire circumstances. This in turn will continue to leave plaintiffs with the duty to proactively defend against allegations of unreasonable witness compensation, lest they see this procedural move destroy their cases.

On the substantive side, it is not difficult to discern the impact and seriousness of Shell's charges of fraud and perjury. The combination is designed to attack the credibility of both the testimony's underlying facts and the speakers themselves. A jury faced with these allegations is forced to wonder if the story is made up and whether the witness is a liar and opportunist. Given courts' tendency to let the jury weigh the witness's credibility, order a new trial, or reprimand counsel, this attack suggests that Shell was well aware of the impropriety of its charge and opted instead to run the risk of Rule 11 sanctions, in the off chance it could succeed in excluding those witnesses and their facts.

At the litigant level, the fraud and perjury allegations are bound to send shocks to human rights plaintiffs' counsel. Not only is Shell's approach risky, but it also reflects just how offensively it is willing to attack human rights claims. Surely it is not uncommon for there to be miscommunications, misjudgments, and timing issues in disputes over

agreement with a witness); McIntosh v. State Farm Fire & Cas. Co., No. 1:06 CV 1080, 2008 WL 941640 (S.D. Miss. Apr. 4, 2008) (disqualifying law firms for one firm's improper witness payments).

witness compensation.[59] Yet, Shell sought no clarification or correction for its allegations, choosing instead to appeal the Rule 11 sanctions and to continue to oppose the plaintiffs' motion *in limine* to exclude the allegations. In Shell's eyes, it did not matter if the allegations might be unsubstantiated or exaggerated or that plaintiffs' counsel could potentially be disbarred. So long as incriminating facts were left out, those actions were justified. Unfortunately, this is not an uncommon litigation strategy among MNCs in the extractive industry.

B. *Wiwa* in Context

Beyond Shell, several extractive MNCs have also pursued allegations of fraud and perjury in ATS litigation. MNCs like ChevronTexaco (Chevron), Canadian oil producer Talisman Energy Inc. (Talisman), and coal producer Drummond Inc. (Drummond) have all sought to discredit witnesses and counsel in similar frivolous efforts, especially as lawsuits have proceeded past motions to dismiss into discovery and trial. In a strikingly similar fact pattern to that of *Wiwa*, the suit *Bowoto v. Chevron Corp.*[60] brought claims against Chevron and its subsidiary in Nigeria, for their involvement in recruiting the Nigerian military and police to fire weapons at protestors on one of Chevron's oil platforms. The plaintiffs also sued Chevron for its complicity in attacks on villagers, perpetrated from helicopters flown by Chevron pilots and trucks carrying Nigerian soldiers and Chevron's subsidiary personnel.[61] In a motion requesting a court order, Chevron sought to entirely dismiss one of the plaintiff's claims based on his inability to reproduce the bullet he had been shot with during an attack on an oil platform.[62] Despite the counsels' claims that there were other ways of proving the shooting and that the bullet had been misplaced during ethnic fighting between the Ilaje and the Ijaw,[63] Chevron continued to argue that the plaintiff had fabricated his shooting and that the court should sanction him for admitted spoliation by dismissing his claims, allowing a jury instruction reflecting his perjury, or excluding that evidence entirely.[64] Again,

59. Richmond, *supra* note 51, at 930.

60. Bowoto v. Chevron Corp., 481 F. Supp. 2d 1010 (N.D. Cal. 2005).

61. *Id.*

62. Notice of Motion and Motion for Sanctions for Plaintiff Jeje's Perjury or Failure to Preserve or Produce Evidence, Bowoto v. Chevron Corp., No. C-99–2506-SI (N.D. Cal. Jan. 11, 2008).

63. Plaintiffs' Opposition to Defendants' Motion for Sanctions Against Plaintiff Bassey Jeje, Bowoto v. Chevron Texaco Corp., No. C 99-02505 SI (N.D. Cal. Feb. 27, 2008) (citing the reopened deposition of Jeje 10/3/08 Deposition at 952:20–953:6).

64. Defendants' Motion for Relief Based on Plaintiff Jeje's Reopened Deposition, Bowoto v. Chevron Corp., No. C-99–2506 SI (N.D. Cal. Oct. 10, 2008).

like Shell in *Wiwa*, Chevron framed its speculations as facts, advancing serious charges of spoliation and perjury, and advocating for extreme judicial responses that would ordinarily require a showing of willfulness or bad faith.[65]

There were also similar efforts to weaponize stereotypes and language barriers for the purpose of discrediting witnesses. In a motion *in limine*, the plaintiffs sought to exclude rhetoric Chevron was using, where it described the events as "piracy," "terrorism," "extortion," "blackmail," "kidnapping," "hostage taking," "ransom," "polygamy," "bigamy," and the plaintiffs as "occupiers, "invaders," "militants," "scammers," and "violent aggressors,"[66] most of which would inflame the jury and prey on prejudices. In another attempt, Chevron sought to introduce evidence of "prior hostage takings"[67] through a witness's deposition responses to questions about the meaning of peaceful protesting and kidnapping. While the plaintiffs argued that the prior events consisted of peaceful protests, Chevron argued they were evidence of kidnappings of Chevron's employees in Nigeria.[68] Chevron repeatedly asked the witness if he agreed that "when someone tricks someone to go to a place and refuses to release that person, that's kidnapping" and if he would "call that a peaceful protest." Despite receiving repeated answers that he "wasn't there," that he "[didn't] know," that he [didn't] understand," that "it could be,"[69] Chevron continued to argue that the witness conceded to kidnapping and, therefore, the testimony should be admitted.[70] These distortions of testimony, that weaponize and prey on prejudices and language barriers, strongly parallel the tactics seen in *Wiwa*.

65. *See* Fjelstad v. Am. Honda Motor Co., 762 F.2d 1334, 1338 (9th Cir. 1985) ("[C]ourts have inherent power to dismiss an action when a party has willfully deceived the court and engaged in conduct utterly inconsistent with the orderly administration of justice" (quoting Wyle v. R.J. Reynolds Indus., Inc., 709 F.2d 585, 589 (9th Cir.1983)); Anheuser-Busch, Inc. v. Nat. Beverage Distribs., 69 F.3d 337, 348 (9th Cir. 1995) (dismissal permissible where party acted "willfully and in bad faith"; "dismissal is warranted where, as here, a party has engaged deliberately in deceptive practices that undermine the integrity of judicial proceedings").

66. Plaintiffs' Motion in Limine no. 7 to Exclude Any Alleged Prior Arrests of Plaintiffs and/or Their Witnesses, Bowoto v. Chevron Corp., No. C 99–02506 SI, 2008 WL 4344854 (N.D. Cal. Oct. 15, 2008).

67. Defendants' Bench Brief and Offer of Proof re Kidnapping of CNL Employees, Bowoto v. Chevron Corp., No. C 99–02506 SI, 2008 WL 4819840 (N.D. Cal. Nov. 5, 2008).

68. *Id.*

69. Plaintiffs' Response to Defendants' Bench Brief and Offer of Proof re Alleged Kidnapping of CNL Employees, Bowoto v. Chevron Corp., No. C 99–02506 SI, 2008 WL 4822251 (N.D. Cal. Nov. 5, 2008), 2008 WL 4819841 (citing Bowoto Deposition).

70. Defendants' Bench Brief and Offer of Proof re Kidnapping of CNL Employees, *supra* note 67.

Akin to Shell's distortion of witnesses' circumstances in relocating to Benin, the oil company, Talisman, engaged in similar attacks on witnesses in *Presbyterian Church of Sudan v. Talisman Energy Inc*..[71] There, Talisman was charged with aiding and abetting the Sudanese Government in a campaign of genocide and torture against non-Muslim South Sudanese people for the purpose of expanding oil exploration. Talisman argued that the plaintiffs could not claim non-economic damages, such as emotional harm and pain and suffering, because they were not explicitly pleaded and the plaintiffs' expert did not provide computations of those injuries.[72] Talisman pursued this argument even though the jury is ordinarily tasked with determining damages and the complaint explicitly referenced harms, including extrajudicial killings, torture, gunshot wounds, and destruction of entire communities. Further, even when these claims were corroborated in depositions where witnesses explained that they had to bury their spouses, "[leave] the village and [go] away" because "the village was burned down, [and] everybody [ran] away,"[73] Talisman still argued that plaintiffs' failure to compute these injuries warranted their exclusion. While exposing Talisman's treatment of these egregious harms, these distortions also reflect some of the most painful challenges facing plaintiffs in human rights litigation in US courts: the true severity and human tragedy of these cases is not only foreign but also hard to depict and compute for jurors in US courts. With little more than counsels' briefing and some general knowledge of events abroad, juries can easily lose sight of the widespread harm suffered by human rights plaintiffs and witnesses, or worse, be steered to believe MNCs' distortions.

Finally, both Chevron and Drummond engaged in targeted attacks on plaintiffs' counsel, in far more serious ways than Shell did in *Wiwa*. In a lawsuit over its dumping of oil and toxic wastewater on Indigenous lands in Ecuador,[74] Chevron succeeded in removing the case to Ecuador on *forum non conveniens* grounds, although it subsequently lost

71. Presbyterian Church of Sudan v. Talisman Energy, Inc., 453 F. Supp. 2d 633 (S.D.N.Y. 2006).

72. Talisman Energy Inc.'s Memorandum of Law in Support of Its Motion Pursuant to Federal Rule of Civil Procedure 37 to Preclude Plaintiffs from Seeking Certain Categories of Damage, Presbyterian Church of Sudan v. Talisman Energy Inc., 453 F. Supp. 2d 633 (S.D.N.Y. 2006) (No. 01-CV-9882), 2006 WL 4035211.

73. Plaintiffs' Memorandum of Law in Opposition to Talisman Energy Inc.'s Motion to Preclude Plaintiffs from Seeking Certain Categories of Damages, Presbyterian Church of Sudan v. Talisman Energy Inc., 453 F. Supp. 2d 633 (S.D.N.Y. 2006) (No. 01-CV-9882), 2006 WL 4035196.

74. Sequihua v. Texaco, Inc., 847 F. Supp. 61 (S.D. Tex. 1994).

through a $9.5 billion judgment against it.[75] Chevron then filed RICO[76] charges against the leading lawyer, Steven Donziger,[77] arguing that he was involved in a scheme to bribe an Ecuadorian judge, seeking in one powerful move to both discredit the lawyer and the court that rendered a judgment against it.[78] Today, Donziger is disbarred and under house arrest, with human rights lawyers continuing to file complaints against the judge in the case[79] and Chevron arguing that it will "fight this until hell freezes over [a]nd then [. . .] fight it out on the ice."[80]

Then, only a few years later, Drummond followed suit. After being sued four times for ordering paramilitaries to murder villagers and union leaders in Colombia,[81] Drummond filed a defamation claim against Terrence Collingsworth, one of the plaintiffs' lawyers, asking the court to hold that the crime-fraud exception vitiated Collingsworth's claims of attorney-client privilege and work product protection, and arguing that Collingsworth made illegal payments to witnesses.[82] Despite Collingsworth's claim that the payments were to provide protection for witnesses receiving death threats from Drummond's paramilitary proxies, the judge still held that he engaged in witness bribery and perjury.[83] Both Drummond and Chevron's SLAPP suits sent chills through the human rights community, illustrating how far MNCs will go to intimidate counsel and how plausible it may be for courts to sanction these tactics.

The case of witness compensation in *Wiwa* thus falls into a broader pattern of frivolous charges aimed at discrediting and distorting

75. Aguinda v. ChevronTexaco Corp., No. 2003-0002, ECF No. 146–7 (Nueva Loja Superior Court 2011).

76. 18 U.S.C. § 1964(c) (2018).

77. Chevron Corp. v. Donziger, No. 11–0691 (LAK), 2018 WL 1137119 (S.D.N.Y. Mar. 1, 2018), *aff'd,* 990 F.3d 191 (2d Cir. 2021).

78. *Id.*

79. *Judicial Complaint Filed Against Judge Lewis A. Kaplan*, Nat'l L. Guild Int'l Comm., https://nlginternational.org/newsite/wp-content/uploads/2020/09/Mirer-Kaplan-Complaint.pdf [https://perma.cc/YF5F-3VFQ].

80. John Otis, *Chevron vs. Ecuadorean Activists*, GlobalPost (May 03, 2009), https://www.pri.org/stories/2009-05-03/chevron-vs-ecuadorean-activists [https://perma.cc/N8JX-6LW7].

81. Romero v. Drummond Co., 552 F.3d 1303 (11th Cir. 2008); Baloco *ex rel.* Tapia v. Drummond Co., 640 F.3d 1338 (11th Cir. 2011); Giraldo v. Drummond Co. Inc., No. 2:09-CV-1041-RDP, 2013 WL 3873960, at 2 (N.D. Ala. July 25, 2013), *aff'd sub nom.* Doe v. Drummond Co. Inc., 782 F.3d 576 (11th Cir. 2015); Penaloza v. Drummond Co., 662 F. App'x 673 (11th Cir. 2016).

82. Drummond Co. v. Collingsworth, No. 14-MC-80660, 2014 U.S. Dist. LEXIS 202690 at *4 (S.D. Fla. July 11, 2014).

83. Drummond, Inc. v. Collingsworth, No. 2:11-CV-3695-RDP, 2015 WL 13768169, slip op. at *17 (N.D. Ala. Dec. 7, 2015).

witnesses and plaintiffs who offer facts that reveal egregious harms aided or directed by these corporations. In fact, the very plausibility of their admission before a jury is so concerning that Shell and other extractive MNCs are willing to go the extra mile to humiliate and manipulate witnesses and plaintiffs, while also attacking those who represent them. These tactics retraumatize witnesses who dare to come forward and cripple counsel sanctioned in SLAPP suits. They are precisely the type of acts that should be sanctioned and repudiated if MNCs are ever to be held accountable.

II. No Knowledge, No Testimony

Beyond serious charges of fraud and perjury, Shell and other MNCs have sought to hide facts and exclude witnesses through technicalities and claims that run counter to basic pleading principles. As this section will illustrate, many of these arguments reveal structural asymmetries inherent in litigating against extractive MNCs, such as the difficulty of accessing information largely in the hands of MNCs, the challenge of piercing the corporate veil for local communities and the overpowering influence of foreign policy considerations on most of these claims. These foundations are behind the majority of dismissals of ATS claims and continue to pose significant barriers to any meaningful accountability. Their review is critical for understanding how to prevent and address these challenges.

As the *Wiwa* trial date drew near, Shell again attempted to shape what would go before the jury, filing a motion *in limine* to preclude the testimony of 51 out of a total of 53 witnesses for the *Wiwa* plaintiffs. Of those 51 witnesses, Shell sought to exclude 16 based on claims of improper disclosures, arguing that they were never listed in the plaintiffs' initial disclosures or interrogatory answers as having personal knowledge of the alleged wrongful conduct—meaning they did not have direct knowledge of Shell developing a common strategy with the Nigerian government.[84] Then, of the remaining 35 witnesses, which included many of the *Kiobel* and *Wiwa* plaintiffs, Shell argued that the same "inadequate descriptions" in plaintiffs' answers to Shell's interrogatories and RFAs warranted their exclusion.[85] For these witnesses, Shell claimed that their lack of personal knowledge was evidenced

84. Defendants' Memorandum of Law in Support of Their Motion in Limine to Preclude Testimony of Witnesses without Personal Knowledge and Introduction of the Forged "Facts Sheet" Document, Wiwa v. Royal Dutch Petroleum Co., No. 96-8386, 2009 WL 3481742 (S.D.N.Y. Apr. 29, 2009).

85. *Id.* at 3.

"either by plaintiffs' admissions or as a result of their deficient denials,"[86] in violation of Federal Rule of Evidence 602, which states that "[a] witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."[87] When combined, the two complaints would preclude 51 out of the 53 witnesses' testimonies due to improper disclosures, a lack of personal knowledge, or both.

In response to these allegations, the plaintiffs countered that all witnesses were either disclosed, named plaintiffs, or deposed in the *Kiobel* or *Wiwa* litigation.[88] Further, the plaintiffs charged that Shell could not argue prejudice or "trial by ambush" when they "chose not to depose" nineteen witnesses and when courts had held that the omission of a witness from a witness list was harmless if that witness had already been deposed.[89] Finally, they maintained that Shell erred in carving its interrogatories and RFAs narrowly around direct personal knowledge of Shell's wrongful conduct, with interrogatories such as "[i]dentify all persons who have personal knowledge that the defendants [. . .] developed a common strategy with the Nigerian government," for this is not the only way to prove the alleged misconduct and should not entitle Shell to exclude evidence it willfully failed to discover.[90]

A. A Review of the Requirement for Personal Knowledge

To better understand this procedural tactic, it is worth reviewing the requirement of personal, first-hand knowledge. As discussed above, Rule 602 mandates that lay witnesses have first-hand knowledge sufficient to support a finding on the matter, thus prohibiting all speculation. Here, Shell alleged that the witnesses did not have personal knowledge of Shell's wrongful conduct because they did not watch Shell conspire with the Nigerian government or engage in attacks on the Ogoni. In

86. *Id.*

87. Fed. R. Evid. 602.

88. Plaintiffs' Memorandum in Opposition to Defendants' Motion in Limine to Preclude Testimony of Witnesses without Personal Knowledge and Introduction of the Forged "Facts Sheet" Document, Wiwa v. Royal Dutch Petroleum Co., No. 96–8386, 2009 WL 2442791, at *1 (S.D.N.Y. May 5, 2009).

89. *Id.* at 5 (citing Benders v. Bellows & Bellows, P.C., No. 04 C 7326, 2009 U.S. Dist. LEXIS 36117, *15–*16 (N.D. Ill. Apr. 29, 2009) (holding that omission of witness from a witness list "was harmless" where the witness "has been deposed in the case")); Milam v. Ranger Ins. Co., No. CIV-04-1749-HE, 2006 U.S. Dist. LEXIS 29962, *3–*4 (W.D. Okla. May 12, 2006) (concluding that failure to disclose information in expert report was "harmless" where the expert "has been deposed, by [the opposing party], extensively").

90. Plaintiffs' Memorandum in Opposition to Defendants' Motion in Limine to Preclude Testimony of Witnesses without Personal Knowledge and Introduction of the Forged "Facts Sheet" Document, *supra* note 88, at 3–4.

contrast, the plaintiffs argued it was sufficient that the witnesses' testimony and personal knowledge *touched on* the matter, namely through circumstantial evidence.[91] They added that, when a witness visits her husband in detention, she should be allowed to make the "inference that, at some point, the person was arrested [. . .] regardless of whether the witness saw the actual arrest."[92] This framing is not surprising. It aligns with the most basic pleading standards. Magistrate Judge Pitman addressed this issue squarely, arguing that:

> [d]efendants' motion appears to be grounded on the assumption that plaintiffs must be aware of witnesses with first-hand knowledge of the allegations in the complaint and that plaintiffs are improperly withholding this information. As the jury charge in virtually every jury trial explains, there are two types of evidence—direct and circumstantial. A party offering circumstantial evidence seeks to prove the ultimate fact in issue by asking the fact finder to draw inferences from the facts observed by the witness, even though the witness has no direct knowledge concerning the ultimate fact in issue [. . .] a plaintiff may have a viable claim even if he or she has no witnesses with first-hand knowledge of the allegations in the complaint, so long as the plaintiff offers documentary and/or circumstantial evidence sufficient to establish the plaintiff's claim by the appropriate burden of proof.[93]

This procedural move reflects Shell's attempts to resort to any and all tactics for excluding the full testimony of witnesses with damaging facts, no matter how contrary they may be to basic pleading standards. After seeking to exclude the Benin Witnesses, it then used the personal knowledge maneuver to try to exclude other key witnesses and plaintiffs who had close communications with the executed Ogoni leaders and documents pertaining to the harms inflicted. While hearsay and other rules of evidence might have assisted Shell in excluding some portions of those witnesses' testimonies, they likely would not have been enough to keep all damaging facts from the jury.

Further, Shell's move reflects a more subtle effort to force the plaintiffs to lay out their whole litigation strategy ahead of trial. This stratagem had some persuasive power with the judge, who ordered the

91. Plaintiffs' Response to Defendants' Unauthorized "Surreply" Memorandum in Support of Their Motion in Limine to Preclude Testimony of Witnesses without Personal Knowledge and Introduction of the Forged "Facts Sheet" Document, Wiwa v. Royal Dutch Petroleum Co., No. 96–8386, 2009 WL 2442818, at *11 (S.D.N.Y. May 28, 2009).

92. *Id.*

93. Plaintiffs' Memorandum in Opposition to Defendants' Motion in Limine to Preclude Testimony of Witnesses without Personal Knowledge and Introduction of the Forged "Facts Sheet" Document, *supra* note 88, at 4–5 (citing Magistrate Judge Pitman's order denying defendants' motion to compel).

plaintiffs to "simply stick to the facts of [the] case" and submit "a summary of each witness's testimony," so he could "know how much is on personal knowledge [. . .] and how much is hearsay."[94] Then, Judge Pitman addressed Shell's concerns in a second order requiring the plaintiffs to submit a list of witnesses to be called at trial and a summary of each witness's anticipated testimony, in addition to the facts to which each was expected to testify.[95] However, even when the plaintiffs avoided generalities and provided summaries, Shell was not pleased, arguing that the summaries were still filled with generalizations and irrelevant material because the plaintiffs "[had] no such facts and indeed [we]re involved in a campaign [. . .] to put on a trial of peripheral and atmospheric issues to confuse and mislead the jury."[96] Among the contested testimonies was that of a man who would testify to his communications with Nigerian military officials, but whom Shell argued had "nothing more than a generalization" because he could not identify who the officials were or what they talked about.[97] The same was true of statements made by unidentified Shell representatives and employees whose identities Shell argued had to be disclosed.

However, Shell's demands required plaintiffs to be far more specific than required, forcing them to "effectively hand over scripts of their intended direct examinations" such that it would become "a trial on paper—with all of [p]laintiffs' testimony presented in great detail, and all objections resolved—prior to the actual trial."[98] It is not hard to see how this would have benefitted Shell. By raising the requirements of both pleading and pre-trial disclosures beyond those required by Rule 26 of the Federal Rules of Civil Procedure,[99] Shell would have the unfair advantage of additional time to study and prepare every objection and argument for exclusion. Together, Shell's pre-trial access to witness testimony and its attempts to exclude 51 witnesses would seri-

94. Defendants' Surreply Memorandum in Support of Their Motion in Limine to Preclude Testimony of Witnesses without Personal Knowledge and Introduction of the Forged "Facts Sheet" Document, Wiwa v. Royal Dutch Petroleum Co., No. 96-8386, 2009 WL 2442815, at *4 (S.D.N.Y. May 15, 2009) (citing 5/6/09 Hr'g Tr. 8:7–12).

95. *Id.* (citing Magistrate Judge Pitman's May 8, 2009 order).

96. *Id.* at 5.

97. *Id.* at 7.

98. Plaintiffs' Response to Defendants' Unauthorized "Surreply" Memorandum in Support of Their Motion in Limine to Preclude Testimony of Witnesses without Personal Knowledge and Introduction of the Forged "Facts Sheet" Document, *supra* note 91, at 4.

99. *Id.* at 5, citing Krawczyk v. Centurion Capital Corp., No. 06-C-6273, 2009 U.S. Dist. LEXIS 12204, at *18 (N.D. Ill. Feb. 18, 2008) ("Rule 26(a) initial disclosures are just that—preliminary disclosures—and are not intended to be a substitute for conducting the necessary discovery"); *see also* Fed. R. Civ. P. 26.

ously prejudice the plaintiffs' claim and allow Shell to easily dispose of it much like a summary judgment motion would.[100]

In many ways, the battle over witnesses' personal knowledge illuminates the black box nature of litigating against multinational corporations like Shell. Not only must plaintiffs and their witnesses piece together the nature and extent of the MNC's partnership with the government, but they also must deconstruct and link the multinational's corporate structure and decision-making to often unidentified or seemingly independent agents, representatives, and subsidiaries. For instance, in *Wiwa*, much time was spent investigating and litigating the corporate structure of the Shell parent and subsidiary, with countless corporate records and an expert preparing a report regarding Shell's oversight and tight control over SPDC.[101] Other veiled issues pertained to SPDC contractors and payments to the Nigerian military, which one of the plaintiffs sought to describe in his deposition:

> Q. And you believe that as a result of that problem, SPDC tried to kill you?
> A. Yes, they hired the killer—they paid the killers to kill us—who killed us.
> Q. Who do you believe SPDC paid to kill to try to kill you personally, Michael Vizor?
> A. The Nigerian military.
> Q. On what basis do you believe that SPDC paid the Nigerian military to kill you?
> A. It wasn't hidden.(12)
> [. . .]
> Q. How do you know that they were paid or hired?
> A. Many time they make reference to them. The military admit even at tribunal they admit they referring to them. You want to stop them from operating oil, you can't do that. Shell will deal with you and we will deal with you, the military will say so.

100. *See, e.g.*, Saunders v. Alois, 604 So. 2d 18, 20 (Fla. Dist. Ct. App. 1992) (court pointed to the error of "disposing of the claim by way of a motion in limine"); Amtower v. Photon Dynamics, Inc., 158 Cal. App. 4th 1582, 1595 (2008) (court referred to motions in limine used for dispositive purposes as "shortcuts" that circumvent the procedural protections that statutory motions provide, such as blindsiding the nonmoving party and infringing on a litigant's right to a jury trial); R & B Auto Ctr., Inc. v. Farmers Grp., Inc., 140 Cal. App. 4th 327, 371 (2006) (the use of a motion in limine to determine the sufficiency of the pleading or the existence of a triable issue of fact is a "perversion of the process").

101. *See, e.g.*, Defendants' Reply Memorandum of Law in Support of Their Motion in Limine to Preclude the Testimony of Professor Jordan I. Siegel, Kiobel v. Royal Dutch Petroleum Co., No. 96–8386, 2009 WL 2442805 (S.D.N.Y. May 8, 2009); Plaintiffs' Memorandum in Opposition to Defendants' Motion in Limine to Preclude Evidence Regarding Non-Ogoni Incidents, Wiwa v. Royal Dutch Petroleum Co., No. 96–8386, 2009 WL 2473137 (S.D.N.Y. May 5, 2009).

> Q. There were people in the military who said that—did these people in the military say that Shell had paid—that SPDC had paid them?
> A. You do not need—one does not need—oh, I'm paid to kill you. It's not possible.
> [. . .]
> Q. Do you have any other basis for believing that the military was paid by SPDC to kill you, Michael Vizor?
> A. Yes.
> Q. Tell me what that is.
> A. My community is Mogho, Gokana and we have two people who work for Shell. Mr. S.T. Tomii is a Shell contractor, Dandison I. Opbe is a retired Shell damage clerk, but he was still operating with them. These two have confronted me and told me that Shell would deal with me. Tomii has told me often, I mean, many times that Shell will deal with all of us [. . .] if I don't want to die, I I better resign from MOSOP, otherwise Shell would kill me. He told me that.
> Q. What was Mr. Tomii's position with General contractor. To do what sort of work?
> A. General contractor, he supplies workers, manual laborers to Shell, he cleans the location, clear the area, locations, I mean, that Shell want to operate, he clear that place, both their locations, and access road, he clear these things [. . .] Those are the type of jobs he do.
> Q. He was not a Shell employee, correct, or a SPDC employee, was he?
> A. I only know him as a Shell contractor.[102]

Plaintiffs must strategically face and overcome significant issues regarding the lack of clarity in who is making threats, what kind of employment Shell agents have, and the general nature of these obscure arrangements in countries where Shell operates. Thus, while plaintiffs may establish sufficient personal knowledge, they have a more difficult challenge in linking the numerous actors and events back to Shell's parent company's involvement and direction. In fact, Shell strategically relied on these purposely-vague structures and arrangements to launch attacks on the plaintiffs and witnesses who tried to connect the activities of their subsidiaries or contractors back to the parent.

B. *Wiwa* in Context

Like Shell, other extractive MNCs in ATS litigation have sought to hide facts and witnesses based on technicalities and claims that run counter to basic pleading standards. As illustrated below, these tactics reflect and are borne out of structural asymmetries common in human rights claims against extractive MNCs, including a general lack

102. Declaration of Rory O. Millson In Support of Defendants' Motion to Preclude in Part the Testimony of Allen Keller, M.D. and Hawthorne Smith, Ph. D., Wiwa v. Royal Dutch Petroleum Co, at 157-161,No. 96 Civ. 8386 (S.D.N.Y. Feb. 28, 2002).

of information, a purposefully obscure corporate structure and overwhelming foreign policy interests and considerations. These conditions are behind the majority of ATS dismissals and therefore demand serious analysis and reform.

The case of *Giraldo v. Drummond* is a clear example of charges that run counter to basic pleading standards. It was one of several suits brought over Drummond's alleged directive to a paramilitary group to murder union leaders and villagers in Colombia. Drummond sought the exclusion of 36 "new" plaintiffs that it argued were barred by the statute of limitations, in an effort to decrease the number of plaintiffs, witnesses, and evidence it would have to challenge.[103] The plaintiffs countered that the statute was equitably tolled by Drummond's fraudulent concealment of payments to the Colombian paramilitary group, Autodefensas Unidas de Colombia (AUC), and that the claims were identical to those of other plaintiffs, making the relation-back doctrine applicable.[104] As in *Wiwa*, these charges were contrary to basic pleading standards, highlighting again these recurring efforts to exclude witnesses and hide facts.

1. The Foreign Policy Shield

In *Doe v. ExxonMobil,*[105] Indonesian citizens sued, alleging that security personnel directed and paid by ExxonMobil physically abused and killed family members in villages in rural Aceh. ExxonMobil sought to exclude witnesses based on foreign policy considerations, using the court's previous orders to constrain discovery to argue more broadly that any witness and discovery physically in Indonesia should be excluded.[106] This, of course, would mean that virtually no discovery would be admitted, as all events and witnesses would be based there. However, the court rejected the defendants' request for the exclusion of both documents *and information* in Indonesia, allowing only the exclusion of *documents* physically in the country.[107]

103. Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss 36 of the "New" Plaintiffs in the Third Amended Complaint Based on Statute of Limitations at 2, Giraldo v. Drummond Co., Inc., No. 09–01041, 2011 WL 5443141 (N.D. Ala. Oct. 28, 2011) (citing defendants' motion to dismiss).

104. *Id.* at 9.

105. Doe v. Exxon Mobil Corp., No. 09–7125, consolidated with 09–7127, 09–7134, 09–7135, 2011 U.S. App. LEXIS 26582 (D.C. Cir. Nov. 14, 2011).

106. Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion to Compel 30(b)(6) Testimony, Doe v. ExxonMobil, No. 01–1357, 2007 WL 4705194 (D.D.C. Oct. 22, 2007).

107. Memorandum of Points and Authorities in Support of Plaintiffs' Motion to Compel Rule 30(B)(6) Designations at 1-2, Doe v. ExxonMobil, No. 01–1357, 2007 WL 4705192

This effort to broaden the court's grant of exclusion of discoverable information reflects a critical feature of litigating against MNCs in the extractive industry: foreign policy is frequently argued as a reason for dismissing human rights cases or at least excluding otherwise discoverable information. It is reflected in pleadings, where MNCs highlight the concerns of the U.S. and foreign governments, as well as in amici filed by government entities like the Chamber of Commerce, the U.S. Government and foreign governments.[108] For instance, in *Sarei v. Rio Tinto*, Rio Tinto won a district court dismissal under the political question doctrine after the U.S. Department of Justice submitted a non-binding 'Statements of Interest', arguing that the continued adjudication of the case would interfere with the Bush administration's U.S. foreign policy interests in Papua New Guinea.[109] Likewise, Chevron took a $9.5 billion judgment rendered against it in Ecuador and filed a claim in an international arbitration tribunal, arguing that its rights as a foreign investor were violated by its treatment in Ecuadorian courts.[110] And while the case *Doe v. Unocal*[111] was pending, the Bush Administration intervened in the Ninth Circuit to argue that Unocal should not be held liable for its activities in Burma.[112] The federal government's intrusion coincided with investors and Wall Street watching to see if a ruling against Unocal would subject other U.S. companies to similar

(D.D.C. Oct. 11, 2007).

108. *See U.S. Chamber Commends Supreme Court for Reining in Abuses of Alien Tort Statute*, U.S. Chamber of Commerce (Apr. 16, 2013), https://www.uschamber.com/press-release/us-chamber-commends-supreme-court-reining-abuses-alien-tort-statute ("The U.S. Chamber of Commerce today praised a decision by the U.S. Supreme Court that limits the global business community's liability under the Alien Tort Statue (ATS) [. . .] in the case Kiobel v. Royal Dutch Petroleum") [https://perma.cc/9CAL-AT4C]; *see also* Brief of Amicus Curiae Chamber of Commerce of the U.S. in Support of Defendants-Appellees and Affirmance at 22, Flomo v. Firestone, 643 F.3d 1013 (7th Cir. 2011); Brief of the National Foreign Trade Council et al as Amici Curiae in Support of Petitioner, Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) (No. 03-339), 2004 WL 162760; *see also* Lincoln Caplan, *The Corporate-Friendly Court*, N.Y. Times (May 18, 2013), https://www.nytimes.com/2013/05/19/opinion/sunday/the-corporate-friendly-court.html [https://perma.cc/TRA4-277A].

109. Sarei v. Rio Tinto PLC, 221 F. Supp. 2d 1116 (C.D. Cal. 2002).

110. Republic of Ecuador v. ChevronTexaco Corp., 376 F. Supp. 2d 334, 342–43 (S.D.N.Y. 2005) (seeking stay of arbitration because Ecuador purportedly never agreed to arbitrate the dispute).

111. Doe v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002), *opinion vacated and reh'g en banc granted*, 395 F.3d 978 (9th Cir. 2003).

112. *See* Brief for the United States of America, as Amicus Curiae at 4, 9–10, Doe v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002), *opinion vacated and reh'g en banc granted*, 395 F.3d 978 (9th Cir. 2003), available at https://ccrjustice.org/sites/default/files/assets/Doe%20v%20Unocal%20-%20Appeal%20US%20Amicus%20May%202003.pdf [https://perma.cc/X7T5-9E3F]

suits.[113] These efforts highlight how MNCs in the extractive industry are able to use their political and economic clout to procure the influence of government entities and use them to exclude evidence or avoid adverse judgments. They are unsettling considerations, laying bare the preeminence of investment and foreign policy interests over human rights protection and accountability.

2. Piercing the Corporate Veil

As in *Wiwa,* other ATS cases reflect the challenge of piercing the corporate veil. This surfaced in claims such as Unocal's successful district court dismissal of a claim involving alleged complicity with the Burmese military in serious human rights abuses because of plaintiffs' failure to show that Unocal had direct control over the Burmese military regime.[114] Likewise, Chevron's dismissal of *Mastafa v. Chevron* was grounded on a failure to show that Chevron *intentionally* assisted Saddam Hussein's regime in torturing and abusing the Iraqi people through illicit payments.[115] To prevail, Chevron drew on the higher standards set by *Twombly*[116] and *Iqbal*,[117] which require an analysis of the sufficiency of a complaint under Rule 8 to ensure proper pleading and plausible claims for relief.[118] In *Presbyterian Church*, the plaintiffs sought to demonstrate that Talisman substantially assisted the Sudanese Government in its civil war and ensuing attacks on plaintiffs by compelling Viacom to produce outtakes of a CBS broadcast titled "Oil for War," where reporters showed brief scenes of the Canadian flag and Talisman's logo on the side of a truck.[119] However, the district court ultimately granted summary judgment, arguing that plaintiffs did not

113. David Corn, *Corporate Human Rights*, Nation (Jun. 27, 2002), https://www.thenation.com/article/archive/corporate-human-rights/ [https://perma.cc/ZE8J-NNG3].

114. *Doe,* 395 F.3d 932.

115. Mastafa v. Chevron Corp., 770 F.3d 170 (2d Cir. 2014) (citing Ashcrost v. Iqbal, 556 U.S. 662, 678 (2009).

116. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007) (Twombly "teaches that a defendant should not be forced to undergo costly discovery unless the complaint contains enough detail, factual or argumentative, to indicate that the plaintiff has a substantial case." Limestone Development Corp. v. Village of Lemont, Ill., 520 F.3d 797 (7th Cir. 2008)).

117. Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009) ("Determining whether a complaint states a plausible claim for relief [is] a context-specific task that requires the reviewing court to draw on its judicial experience and common sense").

118. Mastafa v. Chevron Corp., 770 F.3d 170, 177 (2d Cir. 2014).

119. Plaintiffs' Memorandum in Support of Motion to Compel Production from Non-Party Viacom, Inc., Presbyterian Church of Sudan v. Talisman Energy Inc., No. 01–9882, 2003 WL 25464100 (S.D.N.Y. Dec. 5, 2003).

present evidence that Talisman substantially assisted the Sudanese Government, a ruling that was later upheld by the Second Circuit.[120]

Similarly, in *Baloco II*, *Doe* and *Penaloza*[121]—three of the four suits brought against Drummond for its activities in Colombia—the district courts dismissed plaintiffs' ATS claims, holding that they had failed to displace *Kiobel*'s presumption against extraterritoriality with sufficient force.[122] Thus, it no longer mattered if plaintiffs could show that Drummond concealed evidence of payments to Colombian paramilitaries, as they did in *Giraldo*,[123] since it would no longer be enough to displace the presumption now required by *Kiobel*. These cases lay bare both plaintiffs' limited access to information produced and stored by governments and MNCs, as well as the ways in which the deliberately opaque corporate structures of extractive MNCs complicate efforts to determine where and whom to discover evidence from. It is a problem that largely works to the advantage of MNCs, even when they engage in spoliation, leaving plaintiffs with a far higher bar to overcome.

III. Reforms

Drawing on the lessons of *Kiobel* and *Wiwa*, as compared to other ATS cases against MNCs in the extractive industry, a number of obstacles remain. Even as the plausibility of advancing these claims diminishes in the wake of *Kiobel and Nestlé USA*, this Comment enables a deeper understanding of the tactics MNCs in the extractive industry are likely to employ when jurisdiction is granted and claims proceed. Further, the issues of witness compensation, requisite personal knowledge and charges of fraud and perjury may not be confined to ATS claims, but may reoccur in other litigation against corporations, such as under the Torture Victim Protection Act (TVPA),[124] the Racketeer Influenced and Corrupt Organizations Act (RICO),[125] and state

120. Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 259 (2d Cir.2009).

121. Baloco v. Drummond Co., Inc., 767 F.3d 1229, 1239 (11th Cir. 2014); 782 F.3d 576, 600 (11th Cir. 2015); Penaloza v. Drummond Co., 384 F. Supp. 3d 1328, 1339 (N.D. Ala. 2019).

122. *Kiobel*, 569 U.S. 108.

123. Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss 36 of the "New" Plaintiffs in the Third Amended Complaint Based on Statute of Limitations, *supra* note 103.

124. Torture Victim Protection Act of 1991, Pub. L. No. 102–256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note); *see, e.g.,* Emily M. Martin, *Torture, Inc.: Corporate Liability under the Torture Victim Protection Act*, 31 N. Ill. U. L. Rev. 175 (2010); Core Lee Allen, *Aiding And Abetting In Torture: Can The Orchestrators Of Torture Be Held Liable?*, 44 N. Ky. L. Rev. 174 (2017).

125. 18 U.S.C. § 1964(c).

claims. Likewise, the broader patterns drawn from *Wiwa* and other ATS claims, such as persistent efforts to dismiss on *forum non conveniens* grounds, foreign policy concerns, or the failure to pierce the corporate veil, demand a deeper analysis.

For one, the battles of *Kiobel* and *Wiwa* highlight important reforms for witness compensation and requisite personal knowledge. At a basic level, lawyers compensating fact witnesses for their time preparing for and testifying at trial should determine the applicable statutes and rules of professional conduct. Lawyers should also disclose these arrangements early on and prepare detailed accounting of expenses for both the court and opposing counsel. Although the rules and case law provide some guidance about these ethical and practical concerns, they do not properly account for scenarios involving key witnesses in dangerous circumstances who may need to relocate to safer locations in preparation for trial. Therefore, more guidance is needed to assist courts in interpreting and handling compensation of lay witnesses in dire circumstances.

Further, more consideration must be made of clear attempts to insult and distort witnesses' circumstances before the court, such as by claiming ulterior motives to escape poverty or difficult economic prospects where no evidence suggests so. Accusations of this nature, including forgery and fraud, attack not only vulnerable witnesses and their testimonies, but also attorneys and their reputation. They carry heavy consequences for the parties and should not be taken lightly. While Rule 11 sanctions are one way to rebuke these continued efforts, they may not be the only or most effective avenue. Courts have wide discretion to resolve these issues in ways that properly address them.

With respect to witnesses' personal knowledge, it may be useful to have greater judicial or Congressional guidance regarding what counsel must disclose of witnesses' anticipated testimony under Rule 26. Otherwise, this runs the risk of differing courts requiring different standards of specificity, to the advantage of some and detriment of others. Avoiding precisely the issues that surfaced in *Wiwa*—where plaintiffs' counsel found itself at a disadvantage in having to disclose far more of its litigation strategy than needed—is critical for the protection and guarantee of due process.

More broadly, deep challenges remain in attaching jurisdiction in ATS claims, whether they be rooted in *Kiobel*'s higher bar, foreign policy considerations or a failure to pierce the corporate veil. For instance, most ATS claims still face multiple attempts at dismissal and hardly

reach discovery.[126] As of this writing, after *Jesner v. Arab Bank,*[127] *Kiobel* and the recent ruling on *Nestlé USA v. Doe*,[128] it is far more likely that plaintiffs in ATS claims will not be able to attach jurisdiction to an American or foreign MNC in U.S. courts.[129] Nevertheless, plaintiffs and the international human rights community could still pursue legislative campaigns aimed at a congressional amendment to the ATS or a new statute. It could parallel other statutes, like the TVPA, which targets specific individuals accused of torture and has had greater success.[130] Alternatively, Section 1504 of the Dodd-Frank Act may hold some promise, for it requires financial disclosures by extractive corporations registered with the U.S. Securities and Exchange Commission (SEC)[131] and provides civil society and foreign governments data on which to dispute discrepancies. Further, given the critical importance of reputation for MNCs in this industry,[132] Section 1504 also incentivizes shareholders and executives to police organizational misconduct from within,[133] suggesting a potentially more effective mechanism.

Considering ATS liability is fading, it may be even more critical to pursue bolder, more normative approaches that rethink the status and treatment of MNCs in the extractive industry, both by local governments and the international community. As most of these cases demonstrate, the majority of ATS litigation either cannot attach jurisdiction, overcome foreign policy considerations, or pierce the corporate veil. Irrespective of the human tragedy involved, for economic or

126. *See, e.g.*, Sarei v. Rio Tinto, 221 F. Supp. 2d 1116 (C.D. Cal. 2002); Giraldo v. Drummond Co. Inc., No. 09- -1041 (N.D. Ala. July 25, 2013); Aguinda v. ChevronTexaco Corp., No. 002–2003 (Nueva Loja Super. Ct. 2011), ECF No. 146–7; Mastafa v. Chevron Corp., 770 F.3d 170 (2d Cir. 2014).

127. Jesner v. Arab Bank, PLC, 138 S.Ct. 1386, 1390 (2018) (holding that foreign nationals could not bring claims under the ATS against a Jordanian bank used to transfer funds to terrorist groups because foreign-policy concerns were involved and Congressional inaction militated against extending ATS liability to foreign corporations).

128. Nestlé USA, Inc. v. Doe, 141 S.Ct. 1931 (2021).

129. *See, e.g.*, Sarei v. Rio Tinto, 221 F. Supp. 2d 1116 (C.D. Cal. 2002) (dismissed after *Kiobel*).

130. *See, e.g.*, Penaloza v. Drummond Co., 384 F. Supp. 3d 1328 (N.D. Ala. 2019) (allowing charges against Garry Drummond to move forward); In re Chiquita Brands Int'l, 190 F. Supp. 3d 1100, 1118 (S.D. Fla. 2016) (holding that it was a reasonable inference to infer that individual defendants obtained a direct benefit from the commission of violations of international law by the AUC, bolstering the allegation that defendants acted with purpose and knowledge).

131. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, § 1504, 124 Stat. 1376, 2220–2222 (2010) (codified at 15 U.S.C. § 78m(q)).

132. Laplante & Spears, *supra* note 1.

133. Kurt T. Miller, *The Effects of Section 1504 of the Dodd-Frank Act: Disclosure of Payments by Resource Extraction Issuers*, 21 L. & Bus. Rev. Am. 371, 393 (2015).

political reasons, the U.S. government and other foreign governments have continued to offer their influence in support of MNCs in these claims, cementing their symbiotic relationship of economic benefit and corporate control. At a deeper level, these relationships evince 20th century echoes of notions of absolute territorial sovereignty and the preeminence of comity over accountability for transboundary human rights violations. Until there is a shift in how states and governments view and treat MNCs in the extractive industry, irrespective of their economic and political clout, it is likely that ATS cases will continue to face dismissals.

Thus, it may be fruitful for civil society in the US and abroad to shift focus toward governments, who are key agents enabling the continuation of impunity in this area. They could campaign for their entry into broader agreements, such as the Extractive Industries Transparency Initiative (EITI), the precursor to Section 1504 in the US and a global initiative to increase transparency over payments and revenues in the extractive industry. Although EITI does not regulate corporate behavior abroad, its compilation of required payment disclosures is an important step toward dealing with the problem of payments to security personnel or paramilitary groups in ATS litigation. Further, in lobbying governments to enact legislation and report data of these payments, EITI has been paving the way for a more effective, international framework of accountability.[134]

Another option is a potential campaign to make rights of consultation and unjust enrichment claims available for local and Indigenous communities,[135] which are implicated in most, if not all, of the cases discussed here.[136] Across continents, Indigenous people continue to be excluded in the negotiation or initiation of extractive projects on their own lands, often resulting in the occupation and destruction of their ancestral territories.[137] Thus, while some scholars advocate for changes

134. *See* Joshua A. Jantzi et al., *International Mining and Oil and Gas Law, Development, and Investment, in* 2 Rocky Mt. Min. L. Fdn, Ann. & Special Inst. (2017).

135. David N. Fagan, *Achieving Restitution: The Potential Unjust Enrichment Claims of Indigenous Peoples Against Multinational Corporations*, 76 N.Y.U. L. Rev. 626, 660–63 (2001).

136. *See, e.g.*, Wiwa v. Royal Dutch Petroleum Co, No. 96 Civ. 8386 (S.D.N.Y. Feb. 28, 2002) (involving the Ogoni people); Bowoto v. Chevron Corp., No. 99–02506 (Feb. 1, 2008) (involving the Ilaje people).

137. 1 Emil Salim, Striking a Better Balance: The World Bank Group and Extractive Industries (World Bank 2003), https://openknowledge.worldbank.org/handle/10986/17705 [https://perma.cc/73A4-FYTK]; *see also* Sergio Puig, *International Indigenous Economic Law*, 52 U.C. Davis L. Rev. 1243, 1257–61 (2019).

that encourage more meaningful rights of consultation,[138] others posit that unjust enrichment's unique place between doctrines like contracts, property and torts[139] may make it a fruitful alternative.

Conclusion

The saga of the *Wiwa-Kiobel* litigation, alone and in the context of other ATS claims, offers critical lessons about the nature and challenge of litigating against extractive MNCs. For one, it reflects the persistent asymmetries that remain even as plaintiffs succeed in attaching jurisdiction. Shell's continuous efforts to exclude 51 out of 53 witnesses, including former Shell policemen and Nigerian military officers relocated to Benin for safety, is a clear example of how far this MNC will endeavor to bend the rules and hide facts from the jury. Other MNCs like Drummond and Chevron have engaged in similarly egregious efforts, taking them even farther by attacking witnesses and bringing SLAPP suits against counsel. These frivolous and costly tactics delay litigation, deny juries access to evidence and retraumatize and humiliate witnesses who are themselves victims of heinous human rights violations at the hands of the same MNCs whose lawyers now intimidate them before U.S. courts.

Moreover, these efforts reflect broader patterns prevalent in ATS claims against extractive MNCs, including the challenge of piercing the corporate veil and the pervasive influence and consequence of foreign policy considerations. Across the board, the majority of ATS

138. Lillian Aponte Miranda, *The Hybrid State-Corporate Enterprise and Violations Of Indigenous Land Rights: Theorizing Corporate Responsibility And Accountability Under International Law*, 11 Lewis & Clark L. Rev. 135, 176–81 (2007) (proposing a hybrid state-corporate approach that compels corporate actors to meaningfully consult indigenous communities and that holds states and their joint corporate partners jointly liable for human rights violations); *see also* S. James Anaya, Indigenous Peoples in International Law 8–9 (Oxford Univ. Press, 2d ed. 2004) ("Attention is needed to correct the legacies of the past and the conditions of the present that impede indigenous self-determination and to ensure indigenous self-determination for the future […] At the same time, these norms [such as indigenous self-determination] are accompanied by a corresponding duty on the part of states to take the measures necessary to fully implement them, through channels of decision making that involve indigenous peoples themselves.").

139. Jack Beatson, The Use and Abuse of Unjust Enrichment: Essays on the Law of Restitution 209 (1991) (noting that restitution has been used to give "new solutions to old problems . . . [and] to fill gaps left in other categories"); *see also* Restatement (Second) of Restitution § 1 (Am. L. Inst., Council Draft No. 2, 1982) (noting that situations to which restitution may be applicable "cannot be enumerated exhaustively"); Albert A. Ehrenzweig, *Restitution in the Conflict of Laws: Law and Reason Versus the Restatement Second*, 36 N.Y.U. L. Rev. 1297, 1300 (1961) (asserting that unjust enrichment "is nothing but the rationale of disparate and isolated legal phenomena which . . . serve to correct overgeneralized rigid rules from every corner of the law. . . . ").

claims face dismissals before reaching any substantive discovery or trial. In the wake of *Kiobel* and a more conservative U.S. Supreme Court, these challenges are likely to endure and worsen. Nevertheless, the lessons of this Comment also pave the path for possible reforms to procedural, practical, and ethical concerns involving witness compensation, requisite personal knowledge and recurring issues like the corporate veil and foreign policy considerations. Nationally and internationally, human rights advocates can also propose stronger legislative frameworks, advocate to undo the weakening of the ATS by the U.S. Supreme Court and argue for more appropriate interpretations of the Rules of Civil Procedure and Evidence. Ultimately, advocates must ensure that MNCs' enormous resources and foreign policy connections do not allow them to purchase impunity in a system purportedly founded on the rule of law.