

## **THE SEARCH FOR ENVIRONMENTAL JUSTICE IN THE NIGER DELTA AND CORPORATE ACCOUNTABILITY FOR TORTS: HOW *KIOBEL* ADDED SALT TO INJURY.**

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### **ABSTRACT**

*Right from the beginning Man has been given the privilege by his Creator to tender the earth and take dominion over his environment. But for the impoverished people of the Niger Delta region, the mainstay of Nigeria's oil wealth, the situation is ironically abysmal. The region has been the scene of protest, sometimes violence, against the repressive tendencies of the Nigerian state and against the recklessness, exploitative and environmentally unfriendly activities of oil multinationals. The issues of environmental injustice and human rights violations are the central focus of this article. The article examines the concept of corporate accountability for tortuous acts and faults *Kiobel* as a miscarriage of justice against a people so callously and criminally oppressed. *Kiobel's* pronouncement that corporations cannot be held liable for egregious abuses under international law is a sad note on global war against environmental injustice. The paper warns that *Kiobel* could foster situations in which corporations become immune from liability for human rights violations. The war against environmental degradation is too important to be clogged in web of legal technicalities else man would have no environment to live in.*

Keywords: *Environmental Justice, Niger Delta, Corporate Accountability, Torts, kiobel*

### **INTRODUCTION**

The dust raised by the United States Supreme Court majority decision in *Kiobel v. Royal Dutch Petroleum Co.*,<sup>1</sup> (*Kiobel*) that dismissed an Alien Tort Statute<sup>2</sup> (ATS) case against Shell and its Nigerian subsidiary in September 17, 2010 for lack of subject matter jurisdiction is yet to settle among legal scholars and environmental

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<sup>1</sup> *Kiobel v. Royal Dutch Petroleum Co. et al.*, No. 06- 4800, 2010 U.S. App. LEXIS 19382, at 1 (2d Cir. Sept. 17, 2010). Nigerian plaintiffs filed *Kiobel* in 2002, alleging that Royal Dutch Petroleum Company and Shell Transport and Trading Company, through a subsidiary, collaborated with the Nigerian government to commit human rights violations to suppress lawful protests against oil exploration in the Ogoni region of the Niger Delta. In 2006, the district court granted in part and denied in part the defendants' motion to dismiss the suit. In particular, the district court granted the motion to dismiss for the claims of aiding and abetting extrajudicial killing, forced exile, property destruction, and violations of the rights to life, liberty, security, and association, holding that customary international law did not define these violations with the specificity required by *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

<sup>2</sup> The Alien Tort Statute reads: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States" - 28 U.S.C. §1350 (2010). The Alien Tort Statute is a well known tool that grants U.S. federal courts jurisdiction over civil suits brought by aliens for torts committed in violation of international law. The statute has been used for the past three decades to hold perpetrators of human rights abuses accountable in U.S. courts.

activists.<sup>3</sup> The court held that corporations are not proper defendants under the Alien Tort Statute.<sup>4</sup> It noted that customary international law defines those who are subject to human rights norms and establishes who can be liable for violating those norms and that since no corporation has ever been liable for human rights torts in an international tribunal, the corporate defendants in *Kiobel* could not have committed a 'violation'. *Kiobel* held that corporations are immune from tort liability for violations of the law of nations such as torture, extrajudicial executions or genocide.

The questions asked are: What impact does *Kiobel* has in the search for environmental justice in Nigeria's Niger Delta Region? What hope have victims of environmental degradations against oil multinational for torts committed by them? What is the nexus between corporate political speeches granted corporations in *Citizens United*<sup>5</sup> and the concept of corporate liability? To what extent can the global war against environmental degradation be fought and possibly be won when the indexes of achieving justice are daily been caged in web of technicalities?

No doubt God saw that all that was created was beautiful and he gave man dominion over every other creature including his environment.<sup>6</sup> But today, what an ironical world we live in! Man inhumanity to man in the name of industrialization! How can a man be free and happy when his environment is abused and degraded? When the quality of air he breathes is fouled and unhealthy. The water he drinks is impure and contaminated by chemical, toxic and hazardous substances? The food he eats is contaminated with toxic, hazardous and carcinogenic substances? Above all, he is daily confronted with the threat of environmentally related diseases characterized by dengue fever, bird flu, SARS, HIV/AIDS, malaria, among other things. This is the picture of the world in which humankind by his own activities has undertaken a voyage of self-destruction in the guise of development.<sup>7</sup>

Research has shown that the Niger Delta of Nigeria is one of the world's most sensitive ecological areas.<sup>8</sup> It is one of the world's largest wetlands, the largest in Africa. It encompasses 20,000 square kilometres.<sup>9</sup> Crude oil was first discovered in commercial quantity in 1957 in Nigeria at Oloibiri in the River State and the first export made in 1958.<sup>10</sup> There has been no looking back since then. In fact, for

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<sup>3</sup> Ho, Virginia Harper, 'Theories of Corporate Groups: Corporate Identity Reconceived,' *Seton Hall Law Review*: Vol. 42 Issue 3 (2012); available at <http://erepository.law.shu.edu/shlr/vol42/iss3/2> and accessed July 04, 2012. See also Erin Foley Smith; 'Right to Remedies and the Inconvenience of *Forum Non Conveniens*: Opening U.S. Courts to Victims of Corporate Human Rights Abuses', 146 *Columbia Journal of Law and Social Problems*, 44:145; Angela Walker, 'The Hidden Flaw in *Kiobel* Under the Alien Tort Statute: The *mens rea* Standard for Corporate Aiding and Abetting is Knowledge', *Northwestern Journal of International Human Rights* (2011) vol: 10:2; Tyler Giannini and Susan Farbstain; 'Corporate Accountability in Conflict Zones: How *Kiobel* Undermines the Nuremberg Legacy and Modern Human Rights', *Harvard International Law Journal*, Online Volume 52 Article Series 2010.

<sup>4</sup> 621 F.3d 111, 120 (2d Cir. 2010).

<sup>5</sup>See *Citizens United v. Federal Election Commission*, No. 08-205. *Citizens United* held that the Bipartisan Campaign Reform Act of 2002 violated the First Amendment, which declares that Congress shall make no law infringing the freedom of speech. They agreed that their decision was contrary to the *Austin vs. Michigan Chamber of Commerce* precedent, a 1990 decision that upheld restrictions on corporate spending to support or oppose political candidates, and the *McConnell vs. Federal Election Commission* precedent, a 2003 decision that upheld the part of the Bipartisan Campaign Reform Act of 2002. They therefore overruled those decisions as well as repealing a century of American history and tradition.

<sup>6</sup> See the Holy Bible, Genesis Chapter 1 verse 31.

<sup>7</sup> Amokaye O.G., *Environmental Law and Practice in Nigeria* (Lagos, Unilag Press, 2004) Chapter 15 at p. 661.

<sup>8</sup>*ibid.*

<sup>9</sup> See Human Rights Watch, *The Price of Oil* (New York: Human Rights Watch, 1999), p. 53.

<sup>10</sup> See Olisa M.M., *Nigeria Petroleum Law and Practice* (Ibadan: Fountain Books Ltd., 1987), p.2.

example, Nigeria had a production figure of 2.04 million barrels per day.<sup>11</sup> By its admission, Shell produces 50 percent of Nigeria's oil output, records an average of 221 spillages a year.<sup>12</sup> Most of the spillages arose from aging and obsolete facilities, malfunctioning equipment and poor operational standards.

Part 2 of this paper examines the degradations and impact of exploration activities in the Niger Delta Region of Nigeria. From Ogoni in Rivers State to River Ethiope in Sapele of Delta State, the story is the same – massive destruction and degradation of the environment sometimes leading to loss of lives including aquatics lives and wide lives. Part 3 takes a look at human rights that benefits sustainable environment and attempts a chronicle of the search for environmental justice. Part 4 examines the international dimension to the search for environmental justice in Nigeria focusing on the effect of the recent US decision in *Kiobel*. The paper attempts a critic of the ratio decidendi of the *Kiobel's* case and questions the correctness of the judgment. In Part 5, the article is concluded and recommendations made.

## 2. DEGRADATIONS AND IMPACT OF EXPLORATION ACTIVITIES IN THE NIGER DELTA.

Spillage pollutes the surrounding creeks and mangrove forests killing aquatic life, plants and animals. The industry's total annual spillage is estimated by the World Bank to release 2,300 cubic meters of oil into the environment every year.<sup>13</sup> Mangrove forest is particularly vulnerable to oil spills. There, the soil soaks up the oil and releases it every rainy season. Surveys are usually done to determine the availability and location of oil deposits. The thick mangrove forest has to be cut open to lay seismic lines. Holes are drilled at points where the lines meet and dynamites are put into these holes. These are exploded at the same time. With the destruction of vegetation and the resultant loose soil, erosion sets in due to denudation.<sup>14</sup>

The environment is also degraded by the discharging of oil-contaminated water into inland and coastal waters. For Nigeria's one million barrels of oil per day, two million barrels of contaminated water are discharged into the environment.<sup>15</sup> The gas is also flared which adversely affects flora and fauna around the site. This depletes the ozone layer which protects the earth's surface from the sun's radiation.<sup>16</sup>

According to Uchegbu:

Oil pollution has a deleterious effect on human beings and marine life. It constitutes a hazard to organisms. As the oil producing states are usually reverine, oil spills contaminate their water which is their main source of survival and makes unfertile the little land they have.<sup>17</sup>

This paper argues that oil exploration has been a curse on the Niger Delta region. The lots of the people of this area have not improved notwithstanding the several billions of dollars generated from oil exploration. There are no good roads,

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<sup>11</sup> See The Guardian, February 19, 1998, p. 21.

<sup>12</sup> Amokaye O. G., *supra* n. 7.

<sup>13</sup> Shell, again by its own admission, has not cut 120,000 kilometres of tracks in the Delta in the last 40 years.

<sup>14</sup> See Ray Onyegu, 'Legal Framework for the Protection of Oil Producing Communities in Nigeria', 2:2 *Living* 1, 7 (April - June 1998).

<sup>15</sup> Amokaye O.G., *supra* n. 7.

<sup>16</sup> See Moffat Ekoriko, 'More Evidence of Oil Devastation' 2.5 *Africa Today* 30 (Sept. /Oct. 1996).

<sup>17</sup> Uchegbu A., 'Legal Framework for Oil Spill and Clean-Up Liability and Compensation in Nigeria', in *The Petroleum Industry and the Nigerian Environment* (Proceedings of the 1983 International Seminar, NNPC, Lagos, 1984), p. 33.

no good drinking water, and no health and social facilities. The injustice is being underlined by the huge profits extracted from their land by the international oil prospectors. The prospectors around live in 'paradise', complete with all sophisticated modern day facilities, while the host communities cannot boast of even a basic need like electricity. The oil bearing areas are merely a beast of burdens with their farms and fishing grounds damaged. They seem marked out for extinction. Today's situation in the Niger Delta is comparable to the then apartheid South Africa or the ethnic cleansing going on in the former Yugoslavia. This comparison is not far from reality, for their results are similar.

A feature of multinational corporations is their double standard. One standard is to concentrate on productive investments in their countries of origin while the other is to invest mainly in extractive industries in the developing countries. They ship their profits away to their respective countries. This practice casts doubts on the usefulness of multinational corporations in developing countries.<sup>18</sup> A recurring pattern of environmental abuses that sparks human rights abuse is one in which outside interest, generally multinational corporations, are exploiting mineral resources, timber and other natural resources, in the developing countries. Repression of local communities including indigenous people appears to be the most convenient way to pursue 'development' in frontier lands. This contrast with what obtains in their home countries. A well-known example is Ken-Saro Wiwa who was hung by late General Sani Abacha's government in 1996 along with several other activists, for raising environmental concerns about oil exploration by Shell Petroleum Development Company in their native Ogoni land.

Thus at the community level, the companies are faced with increasing protest directed at oil company activities and the lack of development in the delta. These have included incidents of hostage taking, closures of flow stations; sabotage, and intimidation of staff. The Niger Delta has for some years been the site of major confrontation between the people who live there and the Nigerian government security forces, resulting in extra-judicial executions, arbitrary detentions, and draconian restrictions on the rights to freedom of expression, association, and assembly.<sup>19</sup>

In addition, environmental degradation often implicates the peoples' right to property. Indigenous people are particularly vulnerable to environmental threats as they are often completely dependent on their immediate environment for survival. To the traditional people, environment and more particularly land, is the essence of human-self-definition, economic and cultural survival; destruction of which is considered a threat to the society.<sup>20</sup> They till the land for farming; depend on the water bodies for water and fish, and the air for survival. For them, the environment and the constituent elements are not merely a possession and a means of production, but an intrinsic part of their social, economic, political and spiritual survival. Land as a species of the environment is, therefore, not to be abused or degraded, but a material element to be cherished, preserved and enjoyed by present and future generation.

### 3. HUMAN RIGHTS AND THE SEARCH FOR ENVIRONMENTAL JUSTICE.

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<sup>18</sup> See Arthur A. Nwankwo, *Can Nigeria Survive?* (Enugu: Fourth Dimension Publishers, 1981) p.5.

<sup>19</sup> Human Rights Watch, 'The Price of Oil', (New York: Human Watch, 1999).

<sup>20</sup> Elias once remarked that the relation between group and the land they hold is invariably complex since the rights of individuals and the group with respect to the same piece of land often co-exist within the same social context. See, T. O. Elias, *Nigerian Land Law*, (Sweet and Maxwell, London 4<sup>th</sup> edn, 1971) p. 73.

a. *Environmental Rights under International Treaties.*

Nigeria is a signatory to several international human rights instruments aimed at promoting fundamental human rights and securing quality life including healthy environment for the Nigerian people.<sup>21</sup> Environmental rights, as reasoned by the liberal human right scholars can be derived from the following rights: the right to life,<sup>22</sup> the freedom from interference with a person's privacy, family, home or correspondence,<sup>23</sup> the right of every one to an adequate standard of living for himself and his family,<sup>24</sup> the right of every one to the enjoyment of the highest attainable standards of physical and mental health.<sup>25</sup> They expanded and reinterpreted the civil and social rights in the Universal Declaration of Human Right (UDHR),<sup>26</sup> the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>27</sup> and other human right instruments<sup>28</sup> and reasoned that the right to a clean and healthy environment is an integral part of the fundamental human rights of every citizen.

Article 17 of the ICESCR, for example, guarantees respect for private and family life and home. Also, Article 11(1) of the ICESCR recognizes the rights of everyone to an adequate standard of living and to the continuous improvement of living conditions. Furthermore, Article 12 of the ICESCR recognizes the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. This paper argues that the right to health is inextricably interwoven with the right to life itself and it is a precondition for the exercise of freedom. The right implies the negative obligation not to practice any act, which can endanger one's health. It also imposes a positive obligation to take all appropriate measures to protect and preserve human health including measures of prevention of diseases.<sup>29</sup> In articulating the steps to be taken in the realization of the right to health, Article 12(2) of the ICESCR imposes obligation on the States to improve all aspects of environment and industrial hygiene. Churchill observed that the obligation to improve living conditions in Article 7 imposes an obligation on States to ensure less pollution of the atmosphere and water, reduce exposure to noise pollution.<sup>30</sup> Also the right to life enshrined in human rights instruments<sup>31</sup> further imposes an obligation on the States

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<sup>21</sup> International Covenant on Civil and Political Rights (hereinafter referred to as 'the ICCPR') and International Covenant on Economic, Social, and Cultural Rights (hereinafter referred to as 'ICESCR') adopted by the General Assembly Resolution 2200 A (XXI) of 16 December 1966. Nigeria has also ratified and domesticated the African Charter on Human and Peoples' Rights.

<sup>22</sup> Article 6, ICCPR.

<sup>23</sup> Article 17, ICCPR.

<sup>24</sup> Article 11, ICESCR.

<sup>25</sup> Article 12, ICESCR.

<sup>26</sup> United Nations Declaration on Human Rights, GA Res. 217A (III). Available at [www.unhchr.ch/htm/menu3/b/69.html](http://www.unhchr.ch/htm/menu3/b/69.html), accessed 20 August, 2012.

<sup>27</sup> International Covenant on Economic, Social and Cultural Rights, December 16, 1966, 193 UNTS 3 (1966).

<sup>28</sup> Inter-American Convention on Human Rights, Art. 4; European Convention for the Protection of Human Rights and Fundamental Freedom, Nov. 4, 1950, Art. 3, 312 UNTS. 143; African Charter on Human and Peoples' Rights, Art. 4, 1988 Additional Protocol to the American Convention on Human Rights, Art 11, 28 I.L.M (1989); 1989 Convention on the Right of the Child, Art. 24(2)(c). 28 I.L.M. 1448 (1989).

<sup>29</sup> See Churchill R.R., 'Environmental Rights in Existing Human Rights Treaties', in *Human Rights Approaches to Environmental Protection*, ed. Boyle and Anderson (New York: Oxford University Press, 1996). See also Cancado Trindade, 'Environmental Protection and the Absence of Restrictions on Human Rights' in K. E. Mahoney and P. Mahoney(ed), *Human Rights in the Twenty-first Century*, (Kluwer Academic Publishers, Netherlands. 1993) at pp. 562-563.

<sup>30</sup>*ibid* pp.101-102.

<sup>31</sup>See Article 6 of the international covenant on civil and political rights 1966, Article 2 of the European Convention on Human Rights, 1950, and Article 4 of the African Charter on Human and

not to take life intentionally or negligently and in extreme cases the right might be invoked by individuals to claim compensation where death results from some environmental disaster in so far as the state is responsible.<sup>32</sup> Churchill further reasoned that the fundamental right to privacy may be invoked by an individual whose home or property is affected by various forms of pollution or other environmental degradation.<sup>33</sup>

Also, the Human Rights Committee has taken the view that the right to life in the ICCPR does involve the state taking positive measures to protect life and that it would in particular be desirable for states to take all possible measures to reduce infant mortality and to raise life expectancy.<sup>34</sup> States are under an obligation to avoid serious environmental hazards or risks to life, and to set in motion 'monitoring and early warning systems' to detect serious environmental hazards or risks and 'urgent action systems' to deal with such threats. From this expanded perception of the right to life, the right to a clean environment is seen as an extension of the right to life.<sup>35</sup> This approach received judicial recognition in *Rayner's Case*<sup>36</sup> and *Lopez-Ostra v. Spain*.<sup>37</sup> In *Rayner's Case*, the European Commission for Human Rights was confronted with the issue of whether Article 8 of the Convention could be invoked to vindicate violation of environmental right arising from noise pollution. Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, provides that 'everyone has the right to respect for his private and family life, his home and his correspondence'.<sup>38</sup> In that case, the complainant had complained about excessive noise emanating from aircraft using the Heathrow Airport which he argued violates his right to privacy guaranteed under Article 8 of the European Convention. In its decisions on admissibility of the complaints, the European Commission for Human Rights observing that Article 8 covered not only direct measures taken against a person's home but also 'indirect intrusions which are unavoidable consequences of measures not at all directed against private individuals', found that there had been a breach of Article 8(1).

However, Article 8(2) allows for deviations by laws necessary in a democratic society in the interest of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. Thus the Commission was of the view that the running of Heathrow Airport was justified under Article 8(2) as necessary in a democratic society for the economic well-being of the country. This means that noise from aircraft would be justifiable if, in accordance with the principle of proportionality, it did not 'create an unreasonable burden for the person concerned',<sup>39</sup>

Again, in *Lopez-Ostra v. Spain*,<sup>40</sup> the European Court of Human Rights held that there had been a breach of Article 8 after observing that there is a positive duty on the state to take reasonable and appropriate measures to secure the applicants rights

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Peoples Rights, Article 3 of Universal Declaration of Human Rights, 1948, Article 4 of the American convention on human rights. 1969.

<sup>32</sup>Churchill R.R., n.29 p.89.

<sup>33</sup>*ibid* p.92.

<sup>34</sup>*ibid* p. 90.

<sup>35</sup>Cancado Trindade n. 29 p. 575.

<sup>36</sup>The case is discussed in Churchill R.R. n. 29 pp. 92-93.

<sup>37</sup>*Lopez-Ostra v. Spain* 16798/90 [1994] ECHR 46 (9 December 1994)

<sup>38</sup>The provision is similar to the provision of article 17 of the ICCPR.

<sup>39</sup>*Lopez-Ostra v. Spain supra* n 37.

<sup>40</sup>*ibid*.

under Article 8(1) or in terms of an interference by a public authority to be justified in accordance with paragraph 2.

Generally, states are unwilling to accept that the right to environment imposes an absolute legal obligation on them to protect the environment rather they are more contented with soft law and declarations which lack force and impose no legal obligation on the states as illustrated by many UN Declarations.<sup>41</sup> Again since environmental right is also a secondary generation social, economic and cultural right whose full implementation cannot be fully ensured without economic and technical resources, education and planning, the gradual reordering of social priorities and, in many cases, international co-operation, States will be unwilling to assume such obligation because of the financial commitments involved.

*b. Environmental Law under the Nigerian Law*

The right to a safe and healthy environment is as controversial as other debates concerning new or emerging rights such as right to development and indigenous right in Nigeria. The controversy arose out of absence of clear provisions in Chapter IV of the 1999 Constitution proclaiming individual's right to clean environment. However, in the Fundamental Objectives and Directive Principles of the State (FODPS) enshrined in Chapter II and section 20 of the same Constitution, the State is directed to 'protect and improve the environment and safeguard the water, air and land, forest and wildlife in Nigeria'. The issue is whether the scope of Section 20 could be invoked by Nigerian citizens to vindicate environmental wrongs in cases of State's inaction or to compel the federal, state and local governments to initiate law and measures to protect Nigerian environment.

In practice, this is not necessarily so. Firstly, enforcement of fundamental human rights pursuant to special procedure made under Section 42 of the 1979 Constitution does not admit of any right not enshrined in Chapter IV of the 1999 Constitution.<sup>42</sup> Second, the ability of Nigerian citizens to invoke the provision of Section 6(6)(c) of the Constitution, which clearly excludes judicial powers to decide in 'issue or question as to whether any act or omission by any authority or person or as to whether any law or judicial decision is in conformity with the FODPSP set out in Chapter II of the Constitution'. In *Okogie v. Lagos State Government*,<sup>43</sup> the plaintiff's application challenging a circular issued by the Lagos State Government purporting to abolish private schools in the State on ground that the circular infringed on the constitutional rights of Nigerians to receive and impart education guaranteed under Section 36 of the 1979 Constitution; was dismissed by the Court of Appeal hold that the directive principles of State Policy in Chapter II of the Constitution is non-justiciable and must conform to and run subsidiary to fundamental rights. The court held, in effect, that an individual could not rely on FODPSP to assert any legal right.

It is pertinent to note that the decision in *Okogie's* case<sup>44</sup> was greatly influenced by an earlier Indian case of state of *Madras v. Champakam*.<sup>45</sup> Incidentally, the Indian courts appeared to have made a turnaround despite their initial hesitation. They have set a new standard in the field of environmental litigation when the gravity of

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<sup>41</sup>Principle 1, Declaration on the human environment, report of the UN conference on the human environment (New York, 1973), UN Doc. 48/A/CONF14/Rev. 1; Principle 1, declaration on environment and development, right of the united nations conference on environment and development, (new York 1992) UN Doc A/CONF.15/26/Rev. 1.

<sup>42</sup>*Uzoichukwu & Ors v. Ezeonu II* (1991) 6. N.W. L. R. (Pt. 200) 708.

<sup>43</sup>1981) 2 NCLR 337.

<sup>44</sup>Supra.

<sup>45</sup>(1951) SCR 252.

environmental hazards become increasingly perceptible, in spite of the fact that India is still a developing economy, India courts felt the need for strict enforcement of environmental legislation. By invoking the power under Articles 32<sup>46</sup> and 48<sup>47</sup> of the Indian Constitution, the Indian Supreme Court disregarded the traditional concepts of locus standi to entertain new genre of litigation and allowed private attorneys to institute actions to protect deterioration, proceeded on the premise that a clean and wholesome environment is a prerequisite to enjoying the right to life enshrined in the Indian Constitution as a fundamental right of all persons. The decision in *Rural Litigation and Entitlement Kendra v. State of U.P.*<sup>48</sup> blazed this trail. In that case, the petitioner, the Indian Council for Enviro-Legal Action brought this action to stop and remedy the pollution caused by several chemical industrial plants. The Supreme Court ordered major part of the quarrying activities to be closed.

Thus, in *M.C. Mehta v. Union of India*<sup>49</sup> the petitioner, a legal practitioner, filed a writ at the Supreme Court for the prevention of nuisance caused by the pollution of the River Ganga by the discharge of effluents by tanneries and chemical industries on the banks of the river, at Kampur. The Supreme Court ordered its office to serve notice of the suit on all industries concerned and, after hearing both sides, ordered those tanneries not having pre-treatment plants approved by the pollution control board to stop their discharge of trade effluents.

In Philippine, the Supreme Court reached a similar decision in *Minors Oposa v. Secretary of the Department of Environment and Natural Resources*,<sup>50</sup> and upheld section 16, Article II of the 1987 Constitution of Philippines, which recognizes the right of people to a balanced and healthful ecology, the concept of generational genocide in criminal law, and the concept of man's inalienable right to self preservation and self-perpetuation embodied in natural law. The Court also referred to section 15, Article II of the Philippine Constitution, which obliges the state to 'protect and promote the right to health of the people and instil health consciousness among them'. It made ground-breaking pronouncements concerning the right to a clean environment thus:

...While the right to a balanced and healthful ecology is to be found under the Declaration of Principles and State Policies and not under the Bill of Rights, it does not follow that it is less important than any of the civil and political rights enumerated in the latter. Such a right belongs to a different category of rights altogether for it concerns nothing less than self-preservation and self-perpetuation aptly and fittingly stressed by the petitioners the advancement of which may even be said to pre date all governments and constitutions. As a matter fact, these basic rights need not even be in written Constitution for they are assumed to exist from the inception of humankind. If

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<sup>46</sup>Article 32 empowers the Supreme Court to enforce the rights conferred under the constitution and to issue directions or orders, or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warrant and certiorari for the enforcements of any rights conferred under the constitution.

<sup>47</sup>Article 48 provides: The state shall endeavour to protect and improve the environment and to safeguard the forest and wild life of the country.

<sup>48</sup>(1996) A.I.R. SC. 1057. This was followed by the decision in *M.C. Mehta v. Union of India* (1987) AIR 965 a case concerning the closure of a chlorine plant at Oleum due to leakages of hazardous gas.

<sup>49</sup>(1987) AIR 1806. In *Indian council for Environ-legal Action v. Union of India*, (1987) AIR 1086 where the sludge, a lethal waste, left out in a village for years after the chemical industries were closed, caused heavy damage to the environment, the supreme court ordered that remedial action be taken and compensation be given for the silent tragedies in line with the 'Mehta Absolute Liability Principle'.

<sup>50</sup>33 I.L.M. 173 (1994).

they are now explicitly mentioned in the fundamental charter, it is because of the well founded fear of its framers that unless rights to a balanced and healthful ecology and to health are mandated as state policies by the Constitution itself, thereby highlighting their continuing importance and imposing upon the state a solemn obligation to preserve the first and protect and advance the second, the day would not be too far when all else would be lost not only for the present generation, but also for those to come, generation which stand to inherit nothing but parched earth incapable of sustaining life. The right to a balanced and healthful ecology carries with it the correlative duty to refrain from impairing the environment.

From the above analysis, it is obvious that the decision in *Okogie's* case<sup>51</sup> should no longer be good law particularly as it relates to environmental protection and sustainable use of resources. Unfortunately, the Supreme Court in *A.G. of Ondo State v. Attorney General Federation*<sup>71</sup> maintained that the provisions of FODPSP in Chapter II of our Constitution remain non-justiciable. They are mere declarations that lack the force of law and cannot be enforced by legal process except translate or elevated to the status of law by legislation.

This paper argues that Section 33(1) of the Constitution<sup>72</sup> and Article 24(1) of the African Charter,<sup>73</sup> entrenched right to clean environment in our statutes from which Nigerian lawyers can draw inspiration to advance the right of citizens to cleaner environment.<sup>52</sup>

Although the interpretation of Article 24 of the African Charter has not been called into question by Nigerian courts, if and when the situation arises, the courts may be called upon to resolve one or more questions to wit: (1) whether the provision of Article 24 imposes any duty on the State to improve the environment or a mere direction to the State in the formulation of state's policy on environment, or (2) whether the provision of Article 24 is self-executory to justify private action to compel the government to promote environmentally sound policies and by extension enforce public violation of environmental law in cases of state's inaction? In the event of such a case arising, the court may take one of the two possible options. The first option is to hold that the environmental right envisioned under Article 24 like those contained in the State Directives are non-justiciable rights and therefore, individuals cannot compel the State to act or institute actions to challenge infraction of public environmental wrongs. The second option is to hold that the provision of Article 24 is self-executory as it establishes and guarantees environmental rights that are enforceable by the courts without any executive or legislative interventions.<sup>53</sup>

In the *Social and Economic Rights Action Centre and the Centre Economic and Social Rights v. Nigeria*,<sup>54</sup> where the applicant non-governmental organizations (NGOs), filed a complaint against the Government of Nigeria and SPDC for violating the rights of Ogoni people at the African Commission on Human and Peoples' Rights, the interpretation of section 24 of the Charter became imperative. A major implication

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<sup>51</sup>*supra*.

<sup>52</sup>See, Amokaye O.G., *Environmental Law and Practice in Nigeria*, (Lagos, Unilag Press, 1994) at chapter 15.

<sup>53</sup>*ibid*.

<sup>54</sup>Fifteenth Annual Activity Report of the African Commission on Human and peoples' Right 2001-2002, available at <http://www.achpr.org/15thAnnualReportAHG.pdf>, accessed 13 August 2012.

of these cases is that the right of the People<sup>55</sup> to clean environment and general satisfactory environment favourable to their development engraved in Article 24 is judicially legitimized. The people can invoke the provision of Article 24 to trigger State action in the formulation and implementation of sound national environmental policies. Provisions of Articles 5 (3) and 34 (6) of the Protocol establishing African Court of Human and People Rights (hereinafter 'African Court') further strengthen this position.<sup>56</sup> The Court guarantees direct access to individual and NGO litigants to bring applications for enforcement of their rights where the municipal courts fail to effectively apply the provisions of the Charter. Articles 5(3) and 34(6) of the Protocol confer direct access to individuals and relevant NGOs with observer status to institute an action for violation of the Rights in the Charter; a fact openly acknowledged by the Commission in *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria*.<sup>57</sup> The major defect of the Protocol is that access to court is subject to the discretion of the Court and State party to submit to adjudication.

#### 4. ENVIRONMENTAL JUSTICE AND CORPORATE ACCOUNTABILITY: THE FLAW IN *KIOBEL*.

##### 4.1 *The Domestic Front.*

Closely related to environmental information is the issue of access to environmental justice. In the absence of a well-defined constitutional right to clean environment, a private lawsuit to bring about compliance with public environmental law is confronted with and constrained by a number of difficulties.<sup>58</sup> First, the law has clearly designed environmental authorities or agencies with the sole power to enforce environmental laws and standards. The appropriate authorities in this case are the Environmental Protection Agency, relevant Ministries and Departments of Government involved in environmental matters. Secondly, the power of private litigants to vindicate environmental interests and to secure judicial review of government's action in the implementation of domestic environmental laws is constrained by the ancient rule of locus standi.<sup>59</sup> The traditional courts, untrained in environmental affairs, are hesitant to respond to such individuals or NGOs for want of 'personal injury.'

If as earlier argued, Article 24 is recognized as creating environmental rights, going by the decisions in *Sani Abacha v. Fawehinmi*<sup>60</sup> and *The Social and Economic Rights*

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<sup>55</sup>Churchill R.R., 'Environmental Rights in Treaties et...' in M. Anderson and A.E. Boyles (eds), *Human Rights Approaches to Environmental Protection* (Oxford, 1996) 174.

<sup>56</sup>See Udombana N.J., 'Toward the African Court on Human and Peoples' Rights: Better Late Than Never', 3 *YHRDLJ* (2000) 101-165.

<sup>57</sup>*supra*.

<sup>58</sup>See Ogowewo T. I, 'Wrecking the law: How Article III of the Constitution of the United States Led to the Discovery of a Law of Standing to Sue in Nigeria', vol. XXVI (2) *Brooklyn J. Int'l*, 527-529 (2000) and accompanying notes (noting the incongruity and confusion by Nigerian courts in the application of locus standi rule in Nigeria); Cramton & Boyer 'Citizen Suit in the Environmental Field. Peril or Promise', 2 *Eco. L.Q.* 407 (1972); F. Brown, 'The Role of Private Citizens in the Enforcement of Environmental Law' J.A. Omotola (ed.); W. Estey, 'Public Nuisance and Standing to Sue' 10 *Osgoode Hall L.J.* 563 (1972); J. K Bentil, 'Environmental Suit Before the Court – The Prospects for Pressure Groups', *J. Plan & Ent'l L.* 325 (1981); G.O. Oyudo, 'The Locus Standi Syndrome in Nigerian Public Law', 2(3) *JUS J. R.* (1991).

<sup>59</sup>The term 'locus standi' is often used interchangeable with terms such as 'standing to sue' or 'entitled to sue'.

<sup>60</sup>*Ugo v. Obiokwe* (1989) 1 N.W.L.R. (pt. 99) 566; *Oloriode v. Oyebi* (1985) 5 S.C. 1 at 24-25; *Thomas v. Olufoyo* (1986) 1 N.W.L.R. (pt. 18) 669 at 682; *Ladejobi v. Shodipo* (1989) 1 N.W.L.R. (pt. 99) 599.

*Action Centre and the Centre for Economic and Social Right v. Nigeria*<sup>61</sup> respectively, it would not be out of place to assert that the environmental right enshrined in Article 24 of the African Charter in favour of Nigerians is a justiciable legal right which upon infringement or threat of infringement confers standing on the individuals or NGOs to protect it. A contrary interpretation will produce absurdity as this will be tantamount to recognition of a right without remedy. The rule is *ubi jus, ibi remedium* – (where there is a right, there is a remedy).

In *Douglas v. Shell Petroleum Ltd*,<sup>62</sup> plaintiff's action challenging defendant's failure to comply with the Environmental Impact Assessment Decree of 1992, was dismissed for lack of locus standi as plaintiff failed to prove that his personal right was affected by the defendant's failure to comply with the environmental law.

However, liberating locus standi on environmental litigation with a view to promoting environmental justice is undoubtedly a worthy objective. Such private suits are critical to ensuring optimal enforcement of environmental statutes and regulations. To make our environment cleaner, healthier and safer for all generations, our environmental statutes should be amended to encourage private actions to remedy public environmental wrongs.

This paper argues that locus standi should be accorded to group of individuals, communities and NGOs to bring class action to secure substantial compliance with public environmental law in cases of State's inaction or in cases of under-regulation by the officials of environmental protection authority.<sup>63</sup> Judicial activism in the context of environmental justice in Nigeria will require the courts to liberally interpret the provisions of Article 24 of the African Charter to empower individual citizens and NGOs to challenge public environmental wrongs.

#### *4.2. The International Arena and the Sword of Kiobel.*

In 2002, Esther Kiobel, a U.S. resident and the wife of deceased Dr. Barinem Kiobel, filed a [lawsuit](#), *Kiobel v. Royal Dutch Petroleum*<sup>64</sup> along with other [Ogoni asylees](#) against Shell corporation. Her lawsuit was filed under the Alien Tort Statute (ATS), [a 200-year-old law](#) that has been interpreted by the [Supreme Court](#) to allow federal lawsuits for modern-day egregious international law violations. The Ogoni plaintiffs allege that Shell planned, conspired, and facilitated the Nigerian government's extrajudicial executions, crimes against humanity, and torture against the Ogoni people. Shell argues that corporations cannot be sued under the ATS. In *Kiobel v. Royal Dutch Petroleum Co.*, the Second Circuit became the first court of appeals to substantively analyze whether the ATS imposes corporate liability.<sup>65</sup>

Amicus briefs in support of the litigants were filed on both sides. The U.S. government, Joseph Stiglitz, international law and legal history scholars, and human rights advocates (including the U.N. High Commissioner for Human Rights) wrote in favour of the Ogoni plaintiffs. Shell's position was supported by another group of international law scholars, several foreign governments, and a dozen of the world's largest multinational corporations.

The Kiobel action, like other ATS cases over the past 17 years, sought to litigate notorious injustices. Many of the defendants have been involved in extractive

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<sup>61</sup>*supra*

<sup>62</sup>(1999) 2 N.W.L.R. (pt. 591) 466.

<sup>63</sup>R. v. Inspectorate of Pollution & Anor, ex parte Greenpeace Ltd (No. 2) (1994) 4 All E.R. 329 (locus standi was granted to the applicant, an international NGOs, to stop the testing of nuclear and radioactive waste in U.K.).

<sup>64</sup>*supra*.

<sup>65</sup>621 F.3d 111, 131–45 (2d Cir. 2010).

industries such as ExxonMobil in Indonesia, Occidental in Colombia, Talisman in Sudan, Shell in Nigeria, Unocal in Burma, and Rio Tinto in Papua New Guinea.<sup>66</sup> Other ATS suits have alleged that Pfizer conducted medical experiments on Nigerian children without consent, and that Nestle used child labour to work cocoa plantations in the Ivory Coast.<sup>67</sup> Even al-Qaeda, has been sued under the ATS.<sup>68</sup> The cases illustrate significant goal of ATS plaintiffs: to expose human rights violations by trying them in the court of public opinion. Thus, when in 2010 *Kiobel* was dismissed against Shell, the divided Second Circuit panel made headlines, and the sweep of the ruling gained immediate attention.<sup>69</sup> It was the first appellate<sup>70</sup> decision to hold that the ATS could not be used against corporations.<sup>71</sup>

The position taken by the majority appeared to gain steady ground in lower courts since the decision was issued in September 2010.<sup>72</sup> An Indiana district court, for example, dismissed an ATS claim against a corporation, solely on the persuasiveness of *Kiobel*.<sup>73</sup> One week later, the same court disposed of a similar case, this time on the merits rather than for want of jurisdiction.<sup>74</sup> Within the Second Circuit, one post-*Kiobel* dismissal did not even generate a written opinion.<sup>75</sup>

The majority decision has a long reach: *Kiobel* does not merely stand for the principle that corporations cannot be sued on a tort theory of aiding and abetting. Rather, it finds that corporate entities cannot violate customary international law because they are not subject to it. The majority's discourse on subjects of international law indicates a narrower definition of the word 'violation'. A violation is not merely breaking a rule. Rather, a person or entity is only subject to a rule if he can reasonably expect sanctions for noncompliance.

What the decision means is that corporations have no obligations under international law and are not subject to that law. The majority opinion is also an exercise in legal formalism in that it avoids and even admonishes policy considerations that might favour the plaintiffs. For the majority, strict adherence to established principles of customary international law is an end in itself. There is no discussion of the evils addressed by the modern line of Alien Tort Statute jurisprudence.

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<sup>66</sup>ibid.

<sup>67</sup>ibid.

<sup>68</sup>*In re Terrorist Attacks on September 11, 2001*, 349 F. Supp. 2d 765, 784 n.16, 785 n.19, 826 (S.D.N.Y. 2005) (allowing ATS claims to proceed against al Qaeda and two alleged 'fronts' for that 'organization'). See also *Saleh v. Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009); Juli Schwartz, *Saleh v. Titan Corporation: The Alien Tort Claims Act: More Bark Than Bite? Procedural Limitations and the Future of ATCA Litigation against Corporate Contractors*, 37 RUTGERS L.J. 867 (2006); see also *Al Shimari v. CACI Premier Tech., Inc.*, 657 F. Supp. 2d 700 (E.D. Va. 2009).

<sup>69</sup>Bob Van Voris and Patricia Hurtado, *Nigeria Torture Case Decision Exempts Companies from U.S. Alien Tort Law* (Sep. 17, 2010), available at <http://www.bloomberg.com/news/2010-09-17/u-s-corporations-aren-t-subject-to-alientort-law-appeals-court-rules.html>. accessed April 20, 2012.

<sup>70</sup>A district court in California reached this same conclusion one week before the *Kiobel* decision was filed. See *Doe v. Nestle, S.A.*, 748 F. Supp. 2d 1057, 1132–45 (C.D. Cal. 2010). (The practice of forced child labour in cocoa fields in Mali was not actionable because of defendant's corporate nature).

<sup>71</sup>*Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 151 note \* (2d Cir. 2010) (Leval, J, concurring).

<sup>72</sup>E.g., *Viera v. Eli Lilly & Co.*, No. 09-495, 2010 WL 3893791 (S.D. Ind. Sept. 30, 2010); *Mastafa v. Chevron Corp.*, 759 F. Supp. 2d 297 (S.D.N.Y. 2010); *Flomo v. Firestone Natural Rubber Co.*, 744 F. Supp. 2d 810 (S.D. Ind. 2010).

<sup>73</sup>*Viera*, 2010 WL 3893791 at \*2

<sup>74</sup>*Flomo*, 744 F. Supp. 2d at 817

<sup>75</sup>*Mastafa*, 759 F. Supp. 2d at 298–301 (noting that ATS claims were dismissed in open court).

Contrary to the majority opinion in *Kiobel*, the ATS does not require the court to look to international law to determine its jurisdiction over ATS claims against a particular class of defendant, such as corporations.

The first step of statutory construction analysis is uncontroversial: the plain language of the statute does not exclude any defendant. Secondly, the legislative history indicates no Congressional intent to exclude corporate defendants, and the words would not have been understood to exclude such defendants at the time of its enactment. Finally, another federal statute does enumerate exclusions for foreign sovereigns from ATS claims. These well-settled exclusions should inform the more nebulous status of corporate defendants.

## **5. CONCLUSION**

This paper discussed the nexus between human rights and environmental protection from the legal perspective. It contends that the Nigerian people have some measures of environmental rights under the Nigeria law but the realization of these rights is constrained by absent of legally enforceable procedural rights to prosecute environmental crimes. The situation is worsened by the reluctance of the court to expand the frontier of law to accommodate collective actions by NGOs and community to prosecute offenders. The paper also calls for amendment of environmental statutes and liberal interpretation of Constitutional provisions to empower individual citizens to prosecute public violation of public environmental law. The Indian liberal approach in interpreting legislations and constitutional provisions aim at protecting the environment should be emulated.

Even if the majority is correct in assuming that the silence of the ATS regarding defendants indicates a gap to be filled by international law principles, the majority was wrong to conclude that international law has never extended liability to a corporation. Even if the majority is correct that these precedents do not establish a universally recognized custom subjecting transnational corporations to human rights principles today, this paper submits that from the very nature of law as a dynamic tools for social engineering, the law must move with development and break new grounds if that is what is needed to savage mankind from the destructive effect of environmental degradation and pollution.

To uphold *Kiobel* is to give a gratuitous licence to transnational corporation to operate unchecked and hold out their heads high as been above the law for the simple reason that they are international corporations. If corporation had been held to have a voice deserving to be heard to enrich political debate, then as a matter of logic and policy, corporations must be held liable for torts committed by them whether locally or international. To hold as the majority decision did is to cage environmental justice to the locality of domestic remedies on the one hand, while these transnational corporate hide under the toga multinational to carry out their criminal acts of environmental degradation and pollution. If this continues, then the people of the Niger Delta sooner than later, would be extinct from the surface of the earth.