

THROUGH THE ATS DOOR, NOW WHAT?  
The Prevalence of MNC Misconduct, Disguise & Manipulation

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**TABLE OF CONTENTS**

I. Abstract.....3

II. Introduction.....3

III. Part I: Shell on the Offense.....7

    A. A Note on Witness Compensation.....13

    B. *Wiwa* in Context.....18

IV. Part II: No Knowledge, No Testimony.....22

    A. A Review of the Requirement for Personal Knowledge.....24

    B. *Wiwa* in Context.....30

        1. The Foreign Policy Shield.....31

        2. Piercing the Corporate Veil.....32

V. Part III: Reforms.....34

VI. Conclusion.....39

## I. 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 series of lawsuits against the multinational. *Wiwa v. Royal Dutch Petroleum* eventually consolidated with *Kiobel v. Royal Dutch Petroleum* in one suit that nearly reached the trial phase, at which point the case settled for \$15.5 million. Given Shell’s unusual move to settle, this study 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 later stand in the way of accountability and reparation for victims of human rights abuses. Ultimately, this study is important for understanding how these MNCs utilize procedural warfare to distract, delay and deny justice to victims. In the process, it identifies key areas in need of reform and recommendations for establishing a better foundation for redress to victims and their communities.

## II. Introduction

Individuals and communities should never be killed, tortured or disappeared, especially not for the attainment of a contract or the destruction of the environment. Nevertheless, time and again, human rights are violated in the context of contracts by and for the extractive industry, with harms ranging from extrajudicial killings, torture, dispossession of indigenous lands, demolition of entire communities and environmental destruction.<sup>1</sup> Over the last 60 years, extractive MNCs have continued to reap the benefits of state sponsorship in the extraction of

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<sup>1</sup>Gregory G.A. Tzeuschler, *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, Article, *Out of the Conflict Zone: The Case for Community Consent Processes in the Extractive Sector*, 11 Yale H.R. & Dev. L.J. 69 (2008).

resources in local and Indigenous lands, while externalizing the environmental and social costs and escaping liability.<sup>2</sup> For instance, John Ruggie, the Special Representative of the Secretary-General on Human Rights and Transnational Corporations, highlighted the involvement of the extractive industry in most of the global charges of human rights abuses perpetrated by public and private security forces protecting MNC assets and property, citing findings of a survey of 65 instances of human rights abuses in the 2000s.<sup>3</sup> 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 medium risk of opposition.<sup>4</sup>

In the absence of enforcement and accountability at the national and international or levels, communities and individuals are at the mercy of domestic courts' recognition and adjudication. Yet, even when they can reach domestic courts, their challenges remain. In the US, extractive MNCs wield massive economic and political power, with extractive corporations like ExxonMobil, Royal Dutch Shell, BP and Chevron remaining among the top 30 most profitable corporations worldwide, with profits that exceed 100 billion in revenues.<sup>5</sup> Across 40 years of Alien Tort Statute (ATS)<sup>6</sup> litigation, MNCs in this industry have employed a growing toolbox of tactics, ranging from *forum non conveniens*, comity,<sup>7</sup> act of state doctrine<sup>8</sup> and the political

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<sup>2</sup> 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, 901-03 (2003); see also Geneva E.B. Thompson, Comment, *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).

<sup>3</sup> UN. Special Representative of the Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises, *Interim report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, ¶ 24-25, E/CN.4/2006/97 (Feb. 22, 2006).

<sup>4</sup> Adamson, Pelosi, *Indigenous Rights Risk Report*, First Peoples Worldwide, Inc., 24 (2014)

<sup>5</sup> *Fortune Global 500 2020*, FORTUNE 500, [https://fortune.com/global500/2020/search/?fg500\\_industry=Petroleum%20Refining](https://fortune.com/global500/2020/search/?fg500_industry=Petroleum%20Refining)

<sup>6</sup> 28 U.S.C. § 1350 (2000), also referred to as the Alien Tort Claims Act (ATCA) and Alien Tort Act (ATA).

<sup>7</sup> *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895); *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013) (noting serious possible foreign policy consequences); see also *Sequihua v. Texaco, Inc.*, 847 F. Supp. 61 63 (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*, 157 F.3d 153, 159 (2d Cir. 1998) (holding, in 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).

question doctrine.<sup>9</sup> Most of these lead to dismissals, causing most cases to never even reach discovery or trial.<sup>10</sup> To make matters worse, the door to ATS litigation has been closing quickly.<sup>11</sup> But what happens when these tools fail and MNCs are forced to go to court? What exactly does ATS litigation against these profitable and politically imposing nongovernmental entities look like, and what can it teach us?

This study answers that question by examining ATS litigation and centering on the pre-trial proceedings of *Wiwa v. Royal Dutch Petroleum Co.*,<sup>12</sup> after it consolidated with *Kiobel v. Royal Dutch Petroleum Co.* and prior to its settlement for \$15.5 million, one of the few settlements ever reached with an extractive MNC.<sup>13</sup> The events date back to the early 1990s, when several Nigerian leaders belonging to the Ogoni indigenous group, were executed by a Nigerian military junta allegedly supported by the Nigerian subsidiary of Royal Dutch Petroleum Company (Shell), Shell Transport and Trading Company, p.l.c. (SPDC), as part of a pattern of collaboration with the Nigerian military in concerted attacks that included summary execution, torture, cruel, inhuman or degrading treatment, arbitrary arrest and detention. A subset of survivors and family members of the deceased sued in 1996 in the Southern District of New York under *Wiwa*,<sup>14</sup> while others followed in 2002 through *Kiobel*.<sup>15</sup> Ultimately, the cases consolidated, alleging that Shell acted in a conspiracy with the Nigerian military regime in

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<sup>8</sup> See SARAH LOUISE JOSEPH, CORPORATIONS AND TRANSNATIONAL HUM. RTS. LITIGATION 40 (Hart Publishing 2004); Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 Va. L. Rev. 1071, 1159, 1171 (1985).

<sup>9</sup> Joseph, *supra* note 8, at 44; see also *Sarei v. Rio Tinto*, 221 F. Supp. 2d 1116 (C.D. Cal. 2002) (District Court judge 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); and *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).

<sup>10</sup> *Alien Torts: Trial Trails*, ECONOMIST, Oct. 9, 2010, at 51, available at <https://www.economist.com/node/17199924>.

<sup>11</sup> See *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013) (holding that the presumption against extraterritoriality applies to claims under the ATS).

<sup>12</sup> No. 96-8386 (S.D.N.Y., filed Nov 8, 1996).

<sup>13</sup> See e.g., *Doe v. Unocal*, 395 F.3d 932 (9th Cir. 2002), opinion vacated and rehearing en banc granted, 395 F.3d 978 (9th Cir. 2003).

<sup>14</sup> Fourth Amended Complaint, *supra* note 12.

<sup>15</sup> *Id.*

providing payments to the military and police, intelligence, personnel and the purchase of transportation, weapons and ammunition, as well as a coordinated campaign to discredit, attack, arrest and execute Ogoni leaders, including many of the plaintiffs, on fabricated murder charges.<sup>16</sup>

Alone and in context, *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, other MNCs in the extractive industry, like Drummond and ExxonMobil, also sought to exclude stories and facts that unveiled their relationships with government actors and other third parties in events that included extrajudicial killings, torture, dispossession of indigenous lands and environmental destruction. These efforts endeavored to erase the broader context in which harms occurred, in addition to helping sustain the corporate veil that continues to cloak already obscure corporate structures.

Likewise, the case of *Wiwa*, as examined in context, 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 altogether destroy claims. Their enactment and permission not only disrespect the law, but they undermine justice for all.

Part I of this study will examine these charges of fraud and perjury by Shell, followed by a review of the law on witness compensation and a comparison of similar allegations by other MNCs in the industry. Part II will examine Shell's attempts to exclude the majority of witnesses in *Wiwa*, followed by a review of similar challenges by other extractive MNCs and the broader

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<sup>16</sup> *Id.*

hurdles that continue to plague ATS claims. Part III will present 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 to bolder and more comprehensive debates about how the U.S. should view and treat MNCs charged with complicity in human rights violations. They are every bit worth executive, legislative and judicial analysis, if the U.S. is to abandon corporate impunity and enforce accountability.

### **III. Part 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 an important 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 retraumatizes and humiliates witnesses who are themselves often victims of heinous human rights violations at the hands of the same MNCs whose lawyers now intimidate them before US courts. As discussed below, they 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).<sup>17</sup> When the Magistrate Judge determined that plaintiffs' counsel adequately represented the interests of the class, Shell opposed, adding that "[n]ow we have learned that seven of the identified witnesses [in support of plaintiffs' claims] are being paid for their testimony [...] there can be no doubt that the witnesses are giving testimony that [plaintiffs'] counsel knows to be false [...] we know that between February 29, 2004 and April 2, 2004,

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<sup>17</sup> *Kiobel v. Royal Dutch Petroleum Co.*, No. 02-7618(S.D.N.Y. Sept. 29, 1996).

Berger & Montague wired \$ 15,195 to the Benin Republic for the benefit of the witnesses."<sup>18</sup> 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.<sup>19</sup> What followed was a series of procedural moves, including a motion by plaintiffs for rule 11 sanctions, 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.

It is worth exploring the underlying circumstances behind these statements. 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.<sup>20</sup> 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 for the Nigerian military and police for attacks on Ogoni villages, about Shell's large payments to the commander of the military unit allegedly involved in the attacks, and about its assistance in the arrest and torture of Ogoni people.<sup>21</sup> 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.<sup>22</sup> In their motion for rule 11 sanctions, plaintiffs argued that the witnesses "agreed to testify to facts that they believe, and reasonably so, would put them in physical jeopardy if they remained in Nigeria" and in turn "left their native land,

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<sup>18</sup> Pls.' Mem. 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 Ds.' Response).

<sup>19</sup> *Id.*, at 7-8.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*



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”.<sup>23</sup>

In contrast, Shell posited that this was part of “a conspiracy to procure false testimony”, whereby 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.”<sup>24</sup> This theory was evidenced in Shell’s depositions of the witnesses, where it asked questions such as “[w]hen is the first time anyone came up with the idea of you getting money for your testimony?” and 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”, the defendants continued to ask questions that alluded to “getting money for [their testimony]”.<sup>25</sup> 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.”<sup>26</sup>

In fact, Shell went farther. 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 from 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

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<sup>23</sup> *Id.* (citing Gbarale Dep. at 163:25-165:17).

<sup>24</sup> Redacted Mem. of Law in Opp’n. to Pls.’ Motion for Rule 11 Sanctions, *Kiobel v. Royal Dutch Petroleum Co.*, No. 02-7618, 2004 WL 6078983, 2 (S.D.N.Y. Sept. 29, 1996).

<sup>25</sup> Pls.’ Mem. of Law, *supra* note 19 (citing Prince Osaror deposition at 173:14 -174:15, 176:8-15, 178:21-23)

<sup>26</sup> Redacted Mem. of Law in Opp’n., *supra* note 25.

attractive option”.<sup>27</sup> However, a mere cursory look at the circumstances in Nigeria at the time, where there was a military dictatorship in place that had engaged in attacks against the Ogoni and the witnesses were about to testify in a well-publicized case against an MNC that had collaborated with the dictatorship, suggests that these witnesses’ fear were more than well-founded.

In addition to arguing that 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 that therefore their testimony should be excluded.<sup>28</sup> 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).<sup>29</sup> 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 the defendants 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 eleven floors.<sup>30</sup> On the basis of this notation and other minor inconsistencies, Shell argued that the witness was “a fraud” and that his “reports” were forgeries.<sup>31</sup> 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 exchanges such as:

*Q. So from all the period from 97 to April 2003 you went to work on the 13th floor –*

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<sup>27</sup> *Id.* at 5.

<sup>28</sup> *Id.* at 4.

<sup>29</sup> Pls.’ Reply Brief in Support of Their Motion for Rule 11 Sanctions, *Kiobel v. Royal Dutch Petroleum Co.*, No. 02-7618, 2004 WL 6078985, 5 (S.D.N.Y. Sept. 29, 1996).

<sup>30</sup> Redacted Mem. of Law in Opp’n., *supra* note 25, at 5-6.

<sup>31</sup> *Id.* at 6.

*A. No, no. May 20, 2004*<sup>32</sup>

*Q. Then you worked on the 13th floor when you were called back?*

*A. No, I worked in Ojucontemay.*<sup>33</sup>

*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.*<sup>34</sup>

*Q. So you went to the 13th floor to help him type up your original notes; is that correct? [...]*

*A. Because I don't want to, he said I should not stay with him. I don't know where he typed it, he don't type it in the military office, no. I don't know where he typed it*<sup>35</sup>

On the basis of 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.<sup>36</sup> Either way, these exchanges plainly reflect an effort to manipulate the witness into adopting the error rather than directly ask why the address was incorrect. Further, given the language barrier between the witness and defendants' counsel, it becomes clear that

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<sup>32</sup>= Pls.' Reply Brief, *supra* note 30, at 5 (citing Osaror Dep. at 166:24 - 167:1).

<sup>33</sup> *Id.* at 5 (citing Osaror Dep. at 168:16-18).

<sup>34</sup> *Id.* at 6 (citing Osaror Dep. at 182:8- 17).

<sup>35</sup> *Id.* (citing Osaror Dep. at 99:4).

<sup>36</sup> *Id.*

Shell was not trying to speak clearly, but rather take 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 is no evidence that plaintiffs' counsel knew the testimony was false nor that they had a duty to investigate this, citing the Advisory Committee Notes to the 1970 Amendments to Rule 11.<sup>37</sup>

In response to these allegations, the *Kiobel* plaintiffs requested that Shell and its counsel send letters of apology, in addition to \$5,000 in penalties to the Court and an order assessing Cravath Swaine and Moore with the costs and expenses of the rule 11 motion.<sup>38</sup> 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 plaintiffs' counsel for one-third of the fees incurred in making the rule 11 motion.<sup>39</sup> This order was subsequently affirmed by the district judge in the Southern District of New York.<sup>40</sup> 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 appellants’ statements. Thus, it annulled the sanctions, finding that they could not be sustained as a matter of law.<sup>41</sup>

However, that still would not be the end of the matter. When the *Kiobel* case consolidated with *Wiwa*, the allegations resurfaced again in the plaintiffs’ motions in limine, where the *Wiwa*

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<sup>37</sup> *Kiobel v. Royal Dutch Petroleum Co.*, No. 02-7618, 2006 WL 2850252 (S.D.N.Y. Sept. 29, 1996)(order granting Rule 11 sanctions).

<sup>38</sup> Pls.' Mem. of Law in Support of Their Motion for Rule 11 Sanctions, *supra* note 19, at 8.

<sup>39</sup> Pls.' Mem. in Opp'n. to Ds.' Motion in Limine to Preclude the Testimony of the “Benin 7”, *Kiobel v. Royal Dutch Petroleum Co.*, Nos. 96-8386, 01-1909, 2009 WL 2442795 (S.D.N.Y. May 5, 2009)(citing Magistrate Judge Pitman’s order granting Rule 11 sanctions).

<sup>40</sup> *Id.* (citing District Judge Kimba M. Wood’s order affirming Rule 11 sanctions).

<sup>41</sup> *Kiobel v. Millson*, 592 F.3d 78 (S.D.N.Y. Sept. 29, 2006).

plaintiffs argued that the payments should be excluded because they constitute inadmissible hearsay, are irrelevant and unfairly prejudicial, and would not only mislead the jury and destroy those witnesses' credibility, but would also undermine the credibility of other witnesses by association, thereby prejudicing the jury against all of the plaintiffs and their counsel.<sup>42</sup> And since almost all of the witnesses were Nigerian nationals, this carried the added risk of the jury believing that all Nigerian witnesses are susceptible to bribery, further expanding the erosion of credibility from the plaintiffs and their counsel to all witnesses. In essence, the allegations could singlehandedly destroy the plaintiffs' case. Nevertheless, Shell continued to argue that the witnesses were paid for their testimony and that the payments were not minimal.

#### **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."<sup>43</sup> However, lawyers who compensate witnesses for their time must comply with the 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".<sup>44</sup> Comment 3 to Model Rule 3.4 notes that "it is not improper to pay a

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<sup>42</sup> Pls.' Motion in Limine # 7 to Exclude Evidence of Payments to and/or Bribery of the Benin Witnesses, *Kiobel v. Royal Dutch Petroleum Co.*, Nos. 96-8386, 01-1909, 2009 WL 3655662, 1 (April 29, 2009)

<sup>43</sup> ABA Comm. On Ethics & Prof'l Responsibility, Op. 96-402 (1996).

<sup>44</sup> Model Rules of Prof'l Conduct R. 3.4(b) (2019)(Fairness to Opposing Party & Counsel); see e.g., *Ward v. Nierlich*, No. 99-14227, 2006 WL 5412626, at 3 (S.D. Fla. Sept. 20, 2006)(recommending sanctions where plaintiffs and their counsel "corrupted the judicial process and committed a fraud on [the] court")

witness's expenses" so long as that payment is not "for testifying",<sup>45</sup> even if the testimony itself is truthful.<sup>46</sup> In turn, federal courts agree that lay witnesses in civil suits may receive payment for their expenses and time lost in preparation for litigation.<sup>47</sup> These include the reasonable cost of travel and subsistence, as well as the reasonable value of time lost in appearing in court.<sup>48</sup>

Further, courts have determined compensation is proper where it constitutes "a relatively small amount [...] designed specifically for protection and relocation expenses."<sup>49</sup> 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.<sup>50</sup> 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.<sup>51</sup> In a court system where individuals are not compelled to testify in litigation where they are not parties, it is fundamentally fair to recognize a witness's sacrifice and compensate him or her for the time lost.<sup>52</sup> Either way, this is a case-specific inquiry,<sup>53</sup> requiring an objective consideration of the facts.<sup>54</sup> 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

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<sup>45</sup> Model Rules of Prof'l Conduct R. 3.4, Cmt. 3; 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")

<sup>46</sup> *Rocheux Int'l of N.J., Inc. v. U.S. Merch. Fin. Grp., Inc.*, No. 06-6147, 2009 WL 3246837, at 4 (D.N.J. Oct. 5, 2009); *Ward v. Nierlich*, No. 99-14277, 2006 WL 5412626, at 4 (S.D. Fla. Sept. 20, 2006); *In re Kien*, 372 N.E.2d 376, 379 (Ill. 1977).

<sup>47</sup> See *Prasad v. MML Investors Servs.*, 2004 U.S. Dist. LEXIS 9289, 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").

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

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

<sup>50</sup> Douglas R. Richmond, *COMPENSATING FACT WITNESSES: THE PRICE IS SOMETIMES RIGHT*, 42 Hofstra L. Rev. 905, 915 (2014)(citing 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”).

<sup>51</sup> *Id.* at 7.

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

<sup>53</sup> Ariz. State Bar. Comm. On the Rules on Ethics, Op. 97-07 (1997).

<sup>54</sup> Alaska Bar Ass'n Ethics Comm., Op. 93-2 (1993).

wages or earnings, or what others earn for comparable activities; (4) the witness's qualifications; (5) the value of opportunities 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.<sup>55</sup>

A simple application of the factors to this case reveals the gap in the inquiry: most factors relate to witnesses' hourly rate, occupation and qualifications, whereas concerns over hardship and practical challenges cover fewer than half of the factors. It is far more difficult when the witness or witnesses are experiencing hardship or in unstable or unsafe conditions, such as was the case here with the Benin Witnesses fearing violence and retaliation from the Nigerian military, which was in power and connected with the defendants. 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.<sup>56</sup> This is an important and concerning gap in the rules and jurisprudence, not only for witnesses in human rights litigation, but for other vulnerable witnesses in other cases. As this case illustrates, it cannot be that payment of witnesses for their time and effort is considered improper, but payment for their expenses is not. There must be a better distinction for situations where witness compensation calls for reimbursing witnesses for their time and effort securing a safe environment in which to prepare and testify at trial.

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<sup>55</sup> Ariz. Op. 97-07, *supra* note 54

<sup>56</sup>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. of Legal Analysis 139 (2011); Marcy Straussy, *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.)

Interestingly, whenever courts do find witness compensation to be unreasonable, the consequences generally do not involve exclusion of a witness's testimony, as requested by the defendants here. Instead, courts err on the side of letting the jury weigh the credibility of the witness.<sup>57</sup> Therefore, while it is common for a new trial to be ordered<sup>58</sup> or for counsel to be reprimanded for an improper compensation,<sup>59</sup> it is not generally the case that courts will use an alleged charge of improper compensation to exclude a witness's testimony. This distinction is an important one, as it reflects a different underlying motivation in Shell's resistance to these testimonies: rather than reveal a request for a common judicial response to improper compensation, it reveals Shell's ultimate determination to altogether exclude the testimony of witnesses with highly damaging information. This is a subtle, yet powerful, effort to manipulate the rules in a way that produces a substantive (adverse) impact.

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 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 high-compensation, professional witnesses rather than scenarios where witnesses may be in dire circumstances and need some measure of support in order 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

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<sup>57</sup> *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, 2010 WL 625356, at 5 (S.D. Fla. Feb. 17, 2010); *TBC Corp. v. Wall*, 955 S.W.2d 838, 843 (Tenn. Ct. App. 1997).

<sup>58</sup> See *New York v. Solvent Chem. Co.*, 166 F.R.D. 284, 289-90 (W.D.N.Y. 1996)

<sup>59</sup> See *ESN, LLC v. Cisco Sys., Inc.*, 685 F. Supp. 2d 631, 651 (E.D. Tex. 2009)(sanctioning defendants for their "deliberate, willful failure" to disclose an employment agreement with a witness"); *McIntosh v. State Farm Fire & Cas. Co.*, No. 06-1080, 2008 WL 941640, 1-2 (S.D. Miss. Apr. 4, 2008)(disqualifying law firms for one firm's improper witness payments); *Rocheux Int'l of N.J., Inc. v. U.S. Merch. Fin. Grp., Inc.*, No. 06-6147, 2009 WL 3246837, 4 (D.N.J. Oct. 5, 2009)(reserving judgment on disciplinary action for counsel pending further application).



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 defendants' charges of fraud and perjury. The combination is designed to attack the credibility of both the testimonies' underlying facts and the speakers themselves. A jury faced with these allegations is then forced to wonder if the story is made up, on top of wondering if the witness is a liar and opportunist. Given courts' general approach of letting the jury weigh the witness's credibility or simply order a new trial or reprimand counsel, this attack on counsel and its witnesses suggests that Shell was well aware of the impropriety of its charge and opted instead to run the risk, in the off chance it could succeed in excluding those witnesses and their facts.

At the litigant level, this attack is 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 witness compensation.<sup>60</sup> Yet, Shell sought no clarification nor correction for its allegations, choosing instead to appeal the rule 11 sanctions and continue to oppose plaintiffs' motion in limine to exclude the allegations. In its eyes, it did not matter if the allegations might be unsubstantiated or exaggerated, or if counsel could potentially be disbarred, as long as the facts would be kept out. Unfortunately and as discussed below, this is not an uncommon litigation strategy among MNCs in the extractive industry.

## **B. Wiwa in Context**

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<sup>60</sup> Richmond, *supra* note 51, at 930.

Beyond Shell, these kinds of allegations of fraud and perjury are common in the extractive industry. MNCs like ChevronTexaco (Chevron), Canadian oil producer Talisman Energy Inc. (Talisman) and coal producer Drummond Inc. (Drummond), have all pursued similar efforts, especially as lawsuits have proceeded past motions to dismiss into discovery and trial. In a strikingly similar fact pattern as that of *Wiwa, Bowoto v. Chevron Corp.*<sup>61</sup> brought claims against Chevron for its involvement, and that of its subsidiary in Nigeria, 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.<sup>62</sup> 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.<sup>63</sup> Despite plaintiffs' claims that there were other ways of proving the shooting and that the bullet had been misplaced when his wife fled ethnic fighting between the Ilaje and the Ijaw,<sup>64</sup> 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, or allowing a jury instruction reflecting his perjury, or excluding that evidence entirely.<sup>65</sup> Again like Shell in *Wiwa*, Chevron framed its speculation as facts, advancing serious charges of spoliation and

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<sup>61</sup> 481 F.Supp.2d. 1010 (N.D. Cal. 2005)

<sup>62</sup> *Id.*

<sup>63</sup> Notice of Motion and Motion for Sanctions for P. Jeje's Perjury or Failure to Preserve or Produce Evidence, *Bowoto v. Chevron Corp.* No. 99-2506, 2008 WL 2753959 (January 11, 2008).

<sup>64</sup> Pls.' Opp'n. to Ds.' Motion for Sanctions Against P. Basse Jeje, *Bowoto v. Chevron Corp.* No. 99-02506, 2008 WL 1909911 (February 1, 2008)(citing the reopened deposition of Jeje 10/3/08 Dep. at 952:20-953:6).=

<sup>65</sup> Ds.' Motion for Relief Based on P. Jeje's Reopened Depo., *Bowoto v. Chevron Corp.* No. 99-2506, 2008 WL 4679426 (Oct. 10, 2008).

perjury and advocating for extreme judicial responses that ordinarily only require a showing of willfulness or bad faith.<sup>66</sup>

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 and plaintiffs as “piracy,” “terrorism,” “extortion,” “blackmail,” “kidnapping,” “hostage taking,” “ransom,” “polygamy,” “bigamy,” “occupiers,” “invaders,” “militants,” “scammers,” and “violent aggressors”,<sup>67</sup> most of which would inflame the jury and prey on prejudices. In another attempt, Chevron sought to introduce evidence of “prior hostage takings”<sup>68</sup> through a witness’s deposition responses to questions about the meaning of peaceful protesting and kidnapping. This was because the plaintiffs argued that the prior events consisted of peaceful protests, whereas Chevron argued they were evidence of kidnappings of Chevron Nigeria employees.<sup>69</sup> After repeatedly asking 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”, and despite receiving repeated answers that he “wasn’t there”, that he “[doesn’t] know”, that he [doesn’t] understand”, that “it could be”,<sup>70</sup> Chevron continued to argue that he conceded to kidnapping and therefore the

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<sup>66</sup> See *Fjelstad v. American Honda Motor Co.*, 762 F.2d 1334, 1338 (9th Cir. 1985)(“courts 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”); *Anheuser-Busch, Inc. v. Natural 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”).

<sup>67</sup> Pls.’ Motion In limine no. 7 to Exclude Any Alleged Prior Arrests of Plaintiffs and/or Their Witnesses, *Bowoto v. Chevron Corp.* No. 99-02506, 2008 WL 4344854 (Sept. 15, 2008).

<sup>68</sup> Ds.’ Bench Brief and Offer of Proof Re Kidnapping of CNL Employees, *Bowoto v. Chevron Corp.* No. 99-02506, 2008 WL 4819840 (November 2, 2008).

<sup>69</sup> *Id.*

<sup>70</sup> Pls.’ Response to Ds.’ Bench Brief and Offer of Proof Re Alleged Kidnapping of CNL Employees, *Bowoto v. Chevron Corp.* No. 99-02506, 2008 WL 4819841, 2-3 (November 4, 2008)(citing *Bowoto Dep.*).

evidence should be admitted.<sup>71</sup> These distortions of testimony, weaponizing and preying on prejudices and language barriers, strongly parallel the tactics seen in *Wiwa*.

Akin to Shell's distortion of witnesses' circumstances in relocating to Benin, Talisman also engaged in similar attacks on witnesses in *Presbyterian Church of Sudan v. Talisman Energy Inc.*,<sup>72</sup> a lawsuit where 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. There, Talisman argued that plaintiffs could not claim non-economic damages, such as emotional harm, pain and suffering, because they were not explicitly pleaded and plaintiffs' expert did not provide computations of those injuries.<sup>73</sup> This was the case despite the jury ordinarily being the entity tasked with determining damages and the complaint explicitly referencing harms including extrajudicial killing, torture, gunshot wounds and destruction of entire communities. Further, even when these corroborated in depositions where witnesses explained that they had to bury their spouses, "[leave] the village and [go] away" because "what could [they] do? [...] the village was burned down, everybody run away",<sup>74</sup> Talisman still sought to argue that plaintiffs' failure to compute these warranted their exclusion. Thus, while exposing Shell's and Talisman's treatment of these egregious harms, these distortions also reflect some of the most painful challenges facing plaintiffs in human rights litigation in U.S. 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'

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<sup>71</sup> Ds.' Bench Brief, supra note 69.

<sup>72</sup> 244 F. Supp.2d 289 (S.D.N.Y. 2003).

<sup>73</sup> Talisman Energy Inc.'s Memo 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.*, No. 01-9882, 2006 WL 4035211 (January 20, 2006).

<sup>74</sup> Pls.' Memo. of Law in Opp'n. to Talisman Energy Inc.'s Motion to Preclude Plaintiffs From Seeking Certain Categories of Damages, *Presbyterian Church of Sudan v. Talisman Energy Inc.*, No. 01-9882, 2006 WL 4035196 (February 17, 2006).

briefing and some general knowledge of events abroad, juries can easily miss the broader picture, 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,<sup>75</sup> Chevron succeeded in removing the case to Ecuador on *forum non conveniens* grounds, although it subsequently lost through a \$9.5 billion judgment against it.<sup>76</sup> Chevron then filed RICO<sup>77</sup> charges against the leading lawyer, Steven Donziger,<sup>78</sup> 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.<sup>79</sup> Today, Donziger is disbarred and in house arrest, with human rights lawyers continuing to file complaints against the judge in the case<sup>80</sup> and Chevron arguing that it will "fight this until hell freezes over [a]nd then [...] fight it out on the ice."<sup>81</sup>

Then, only a few years later, Drummond followed suit. After being sued four times for ordering paramilitaries to murder union leaders and villagers in Colombia,<sup>82</sup> Drummond filed a defamation claim against Terrence Collingsworth, one of the plaintiffs' lawyers, arguing that he made illegal payments to witnesses.<sup>83</sup> Despite Collingsworth claiming that they were to provide protection for witnesses receiving death threats from Drummond's paramilitary proxies, the

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<sup>75</sup> *Sequihua v. Texaco, Inc.*, 847 F. Supp. 61 (S.D.Tex. 1994).

<sup>76</sup> *Aguinda v. Chevron Texaco Corp.*, No. 002-2003 (Nueva Loja Superior Court 2011), ECF No. 146-7.

<sup>77</sup> 18 U.S.C. 1964(c) (2018)

<sup>78</sup> *Chevron Corp. v. Donziger*, No. 11-0691 (LAK), 2018 WL 1137119 (S.D.N.Y. Mar. 1, 2018), appeal dismissed (May 7, 2018).

<sup>79</sup> *Id.*

<sup>80</sup> Judicial Complaint Filed Against Judge Lewis A. Kaplan, International Association of Democratic Lawyers, <https://nlginternational.org/newsite/wp-content/uploads/2020/09/Mirer-Kaplan-Complaint.pdf> (accessed on Jan. 4, 2021).

<sup>81</sup> John Otis, *Chevron vs. Ecuadorean activists*, GLOBALPOST (May 03, 2009), <https://www.pri.org/stories/2009-05-03/chevron-vs-ecuadorean-activists>

<sup>82</sup> *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.*, 2016 WL 5389280 (11th Cir. 2016).

<sup>83</sup> *Drummond Co. v. Collingsworth*, No. 11-AR-3695-S, 2012 U.S. Dist. LEXIS 201066 ((N.D. Ala. Feb. 29, 2012).

judge still held that he engaged in witness bribery and perjury.<sup>84</sup> Both Drummond's and Chevron's SLAPP suits sent chills through the human rights community, illustrating how far MNCs will persecute 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 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 that represent them. These tactics retraumatize witnesses who dare come forward, in addition to crippling counsel sanctioned in SLAPP suits. These are precisely the type of acts that should be sanctioned and repudiated if MNCs are ever to be held accountable.

#### **IV. Part 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 lack of 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.

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<sup>84</sup> *Drummond, Inc. v. Collingsworth*, No. 2:11-cv-3695-RDP, 2015 WL 13768169, slip op. at \*17 (N.D. Ala. Dec. 7, 2015)

As the *Wiwa* trial drew nearer, Shell again attempted to shape what goes 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, it 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 direct knowledge of Shell developing a common strategy with the Nigerian government.<sup>85</sup> 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 defendants’ interrogatories and RFAs warranted their exclusion.<sup>86</sup> Herein, they argued that the witnesses’ lack of personal knowledge was evidenced “either by plaintiffs' admissions or as a result of their deficient denials,”<sup>87</sup> in violation of FRE Rule 602, which states that “[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.”<sup>88</sup> When combined, the two complaints resulted in an effort at full preclusion of 51 out of 53 witnesses’ testimonies, due to improper disclosures or lack of personal knowledge, or both.

In response to these allegations, the plaintiffs countered that all witnesses were either disclosed or named plaintiffs or witnesses in the *Kiobel* or *Wiwa* litigation, “all of whom [were] deposed.”<sup>89</sup> In attacking this argument, they charged that Shell could not argue prejudice or “trial by ambush” when they “chose not to depose” 19 witnesses and could not even cite one case

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<sup>85</sup> Ds.’ Memo. 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, *Kiobel v. Royal Dutch Petroleum Co.*, No. 96-8386, 2009 WL 3481742 (S.D.N.Y. Apr. 29, 2009).

<sup>86</sup> *Id.* at 3.

<sup>87</sup> *Id.*

<sup>88</sup> Fed. R. Evid. 602.

<sup>89</sup> Pls.’ Memo in Opp’n. to Ds.’ Motion in Limine to Preclude Testimony of Witnesses without Personal Knowledge and Introduction of the Forged “Facts Sheet”, *Kiobel v. Royal Dutch Petroleum Co.*, No. 96-8386, 2009 WL 2442791, at 2 (S.D.N.Y. May 5, 2009)

holding that the preclusion of witnesses who have been deposed constitutes any form of prejudice.<sup>90</sup> Either way, the plaintiffs pointed to other courts' rulings on this issue, arguing that this argument was bound to fail because they only sought to introduce those witnesses' deposition testimonies and that, either way, courts consider failures to disclose deposed witnesses harmless.<sup>91</sup> Finally, they maintained that Shell erred in "cleav[ing]" 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", arguing that this is not the only way to prove the alleged misconduct and should not "entitle [Shell] to exclude evidence that they willfully failed to discover."<sup>92</sup>

**A. A Review of the Requirement for Personal Knowledge**

Setting improper disclosures aside, it is worth exploring more closely how claims of lack of personal, first-hand knowledge surface in and impact human rights litigation. As recalled above, FRE 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, such as watching Shell conspire with the Nigerian government or engage in attacks on the Ogoni. In contrast, the plaintiffs argued for a broader framing, such as one where the witnesses' testimony and personal knowledge *touched on* "the matter", namely through circumstantial evidence, such as pointing to a witness's visit of her husband in detention allowing the witness to make the "inference that, at

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<sup>90</sup> *Id.* at 5.

<sup>91</sup> *Id.* at 3, 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").

<sup>92</sup> *Id.* at 3-4.



some point, the person was arrested [...] regardless of whether the witness saw the actual arrest.”<sup>93</sup> Naturally, this framing is not surprising: it aligns with the most basic pleading standards. Magistrate judge Pitman addressed this issue squarely, maintaining that:

*Defendants' 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.*<sup>94</sup>

On the one hand, this procedural move reflects Shell’s desperate attempts to resort to any and all tactics that may exclude the full testimony of witnesses with damaging facts, no matter how unwise they may be. On top of seeking to exclude the Benin Witnesses, as well as payments to the military unit’s commander for attacks on the Ogoni, they now also sought to exclude several key witnesses and plaintiffs, many of whom had close communications with the deceased and documents pertaining to the harms inflicted. Even when hearsay and other rules of evidence

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<sup>93</sup> Pls.’ Response to Ds.’ Unauthorized “Surreply” Memo. in Support of Their Motion in Limine to Preclude Testimony of Witnesses without Personal Knowledge and Introduction of the Forged “Facts Sheet” Document, *Kiobel v. Royal Dutch Petroleum Co.*, No. 96-8386, 2009 WL 2442818, at 11 (S.D.N.Y. May 28, 2009)

<sup>94</sup> Pls.’ Memo in Opp’n. to Ds.’ Motion in Limine, *supra* note 90, at 4-5 (citing Magistrate Judge Pitman’s order denying defendants’ motion to compel).

might have assisted Shell in excluding some portions, these would likely not have been enough to keep all damaging facts from the jury.

On the other hand, this move reflects a more subtle effort to force the plaintiffs to lay out, ahead of trial, their whole litigation strategy. This had some persuasive power with the judge, who ordered the plaintiffs to “simply stick to the facts of [the] case” and submit “a summary of each witness's testimony and then I will know how much is on personal knowledge [...] and how much is hearsay.”<sup>95</sup> Then, Judge Pitman addressed Shell’s concerns in a second order requiring the plaintiffs to submit “(1) a list of witnesses who are actually expected to be called at trial; and (2) a summary of each witness's anticipated trial testimony, [including] the facts to which each witness is expected to testify.”<sup>96</sup> However, even when the plaintiffs avoided generalities and provided summaries, Shell was not pleased, arguing that these were still “filled with generalizations, ambiguity and irrelevant material” because they “have no such facts and indeed are involved in a campaign [...] to put on a trial of peripheral and atmospheric issues to confuse and mislead the jury.”<sup>97</sup> Among the contested testimonies was that of a man who would “testify to his oral communications with Nigerian military officials”, but whom Shell argued had “nothing more than a generalization” since he could not identify “‘who’ the Nigerian military officials were, or ‘what’ the substance of the communications was.”<sup>98</sup> The same was true of statements made by unidentified Shell “representatives”, “officials” and “employees”, whom Shell argued had to be disclosed.

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<sup>95</sup> Ds.’ Surreply Memo. in Support of Their Motion in Limine to Preclude Testimony of Witnesses without Personal Knowledge and Introduction of the Forged “Facts Sheet” Document, *Kiobel v. Royal Dutch Petroleum Co.*, No. 96-8386, 2009 WL 2442815, at 4 (S.D.N.Y. May 5, 2009)(citing 5/6/09 Hr’g Tr. 8:7-12)

<sup>96</sup> *Id.* (citing Magistrate Judge Pitman’s May 8, 2009 order).

<sup>97</sup> *Id.* at 5.

<sup>98</sup> *Id.* at 7.

However, these attempts required plaintiffs to be far more specific than needed, forcing them to “effectively hand over scripts of their intended direct examinations” such that this would end up being “a trial on paper--with all of Plaintiffs' testimony presented in great detail, and all objections resolved--prior to the actual trial.”<sup>99</sup> Naturally, 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,<sup>100</sup> Shell could have the unfair advantage of additional time to study and prepare every objection and argument for exclusion. Then, with this higher bar and its claim to exclude the 51 witnesses, it could easily dispose of the claim much like a summary judgment motion would.<sup>101</sup> Therefore, a ruling on the motion in limine to exclude the testimony of those 51 out of 53 witnesses would both prejudice and potentially destroy the plaintiffs' claim.

Similarly, the battle over witnesses' personal knowledge illuminates the black-box-nature of litigating against multinational corporations like Shell. Not only do plaintiffs and their witnesses face the challenge of having to piece together the nature and extent of the partnership with the government, but they also have to deconstruct and link the multinational's corporate structure and decision-making to often unidentified or seemingly independent agents, representatives and subsidiaries. For instance, much time was spent demonstrating and litigating the corporate structure of the parent and subsidiary, with countless corporate records and an expert preparing a report regarding the tight control over SPDC and its role in Nigeria as agent of

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<sup>99</sup> Pls.' Response to Ds.' Unauthorized “Surreply” Memo, *supra* note 94, at 4.

<sup>100</sup> *Id.* at 5, citing *Krawczyk v. Centurion Capital Corp.*, No. 06-C-6273, 2009 U.S. Dist. LEXIS 12204, 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”).

<sup>101</sup> 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 Center, Inc. v. Farmers Group, Inc.*, 140 Cal. App. 4th 327(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”).

Royal Dutch/Shell.<sup>102</sup> Other related 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 Vizer?*

*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.*

*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.*

[...]

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<sup>102</sup> See e.g., Ds.' Reply Memo. 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); Pls.' Memo. in Opp'n. to Ds.' Motion in Limine to Preclude Evidence Regarding Non-Ogoni Incidents, *Kiobel v. Royal Dutch Petroleum Co.*, No. 96-8386, 2009 WL 2473137 (S.D.N.Y. May 5, 2009).

*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.<sup>103</sup>*

It is not difficult to see how plaintiffs have to strategically face and overcome issues regarding the lack of clarity in who is making threats, what kind of employment arrangement Shell representatives or agents have and the general nature of these obscure arrangements in countries where Shell operates. Thus, while plaintiffs may nonetheless overcome personal knowledge

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<sup>103</sup> Expert Report of Jordan I. Siegel, *Kiobel v. Royal Dutch Petroleum Co.*, No. 96-8386, Document 406-6, at 157-161 (S.D.N.Y. Apr. 29, 2009).

challenges of this nature, they have a more complex strategy to build to link numerous actors and events back to Shell's parent company's involvement and direction. In fact, Shell relies on these precisely vague structures and arrangements to then attack plaintiffs and witnesses who try to link the activities of their subsidiaries or contractors back to the parent.

### **B. Wiwa in Context**

Like Shell, other MNCs 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 of information, a purposefully obscure corporate structure and overwhelming foreign policy interests and considerations. They are behind the majority of ATS dismissals and therefore demand serious analysis and reform.

In terms of charges that run counter to basic pleading standards, the case of *Giraldo v. Drummond* is a case in point. This was one of the suits brought over Drummond's activities in Colombia and, there, Drummond sought the exclusion of 36 "new" plaintiffs 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.<sup>104</sup> Instead, the plaintiffs argued 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 highly applicable.<sup>105</sup> As in *Wiwa*, these charges were both unwise and contrary to basic pleading standards, highlighting again the recurring effort to exclude witnesses and hide facts.

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<sup>104</sup> Pls.' Memo. in Opp'n. to Ds.' Motion to Dismiss 36 of the "New" Plaintiffs in the Third Amended Complaint Based on Statute of Limitations, *Giraldo v. Drummond Co., Inc.*, No. 09-01041, 2011 WL 5443141, at 2 (N. D. Ala. Oct. 28, 2011)(citing defendants' motion to dismiss.)

<sup>105</sup> *Id.* at 9.

## 1. The Foreign Policy Shield

In *Doe v. ExxonMobil*,<sup>106</sup> a suit brought by Indonesian citizens 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 on the basis of foreign policy considerations, arguing that because the court ruled that the case should not interfere with U.S. foreign policy, any witness and discovery physically residing in Indonesia should be excluded.<sup>107</sup> This of course would mean that virtually no discovery would be admitted, as all events and witnesses would be based there. However, the court had rejected the defendants' request for the exclusion of both documents *and information*, allowing only the exclusion of *documents* physically in Indonesia.<sup>108</sup>

This case is also important in that ExxonMobil's claim, while seeking to broaden the court's grant of exclusion of discoverable information, also reflects an important 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 US and foreign governments, and in amici filed by government entities like the Chamber of Commerce, the U.S. Government and foreign governments.<sup>109</sup> For instance, whereas Rio Tinto won a district court dismissal under

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<sup>106</sup> No. 09-7125, consolidated with 09-7127, 09-7134, 09-7135, 2011 U.S. App. LEXIS 26582 (D.C.Cir. Nov. 14, 2011).

<sup>107</sup> Ds.' Memo. of Law in Opp'n. to Pls.' Motion to Compel 30(b)(6) Testimony, *Doe v. ExxonMobil*, No. 01-1357, 2007 WL 4705194 (D.D.C. Oct. 22, 2007).

<sup>108</sup> Memo. of Points and Authorities in Support of Plaintiffs' Motion to Compel Rule 30(B)(6) Designations, *Doe v. ExxonMobil*, No. 01-1357, 2007 WL 4705192, at 1-2 (D.D.C. Oct. 11, 2007)

<sup>109</sup> See U.S. Chamber of Commerce, *US Chamber Commends Supreme Court for Reining in Abuses of Alien Tort Statute*, U.S. CHAMBER OF COMMERCE (Apr. 16, 2013), available at <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 Statute (ATS) [...] in the case *Kiobel v. Royal Dutch Petroleum*"); see also Brief of Amicus Curiae Chamber of Commerce of the U.S.A. in Supp. Of Defs.-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); see also Lincoln Caplan, *The Corporate-Friendly Court*, The New York Times (May 18, 2013), available at <https://www.nytimes.com/2013/05/19/opinion/sunday/the-corporate-friendly-court.html>

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,<sup>110</sup> Chevron took the \$9.5 billion judgment rendered against it 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.<sup>111</sup> And while *Doe v. Unocal*<sup>112</sup> was pending, the Bush Administration intervened in the Ninth Circuit to argue that Unocal should not be held liable for its activities in Burma.<sup>113</sup> This coincided with investors and Wall Street watching to see if a ruling against Unocal would subject other U.S. companies to similar suits,<sup>114</sup> highlighting why MNCs in the extractive industry may be able to use their political and economic clout to procure the views of government entities and use them to exclude evidence or avoid judgments against them. These 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 cases reflect the challenge of piercing the corporate veil. It is shot through several ATS claims, such as Unocal's successful district court dismissal of a claim involving alleged complicity with the Burmese military in serious human rights abuses for failure to show direct control over the Burmese military regime.<sup>115</sup> Likewise, Chevron's dismissal of *Mastafa v. Chevron* was grounded on a failure to show that Chevron *intentionally*

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<sup>110</sup> *Sarei v. Rio Tinto*, 221 F. Supp. 2d 1116 (C.D. Cal. 2002).

<sup>111</sup> *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).

<sup>112</sup> Nos. 00-56603, 00-57197, 00-56628, 00-57195, 2002 WL 31063976, at 9-10 (9th Cir. Sept. 18, 2002), vacated by Nos. 00-56603, 00-56628, 2003 WL 359787 (9th Cir. Feb. 14, 2003)

<sup>113</sup> See Brief for the United States of America, as Amicus Curiae at 4, 30, *supra* note 114.

<sup>114</sup> David Corn, *Corporate Human Rights*, THE NATION (June 27, 2002), available at <https://www.thenation.com/article/archive/corporate-human-rights/>

<sup>115</sup> *Doe v. Unocal*, 395 F.3d 932 (9th Cir. 2002), opinion vacated and rehearing en banc granted, 395 F.3d 978 (9th Cir. 2003).



assisted Saddam Hussein’s regime, through its illicit payments, in torturing and abusing the Iraqi people, drawing on the higher standards set by *Twombly*<sup>116</sup> and *Iqbal*, which require an analysis of the sufficiency of a complaint under Rule 8 to ensure that the elements are properly pled and set forth plausible claims for relief.<sup>117</sup> In *Presbyterian Church*, the plaintiffs sought to pierce the veil by compelling Via.com 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 in discussing the Sudanese Government’s use of profits from its oil reserves to fund a civil war against rebel soldiers and civilians.<sup>118</sup>

Similarly, in *Baloco II, Doe and Penaloza*,<sup>119</sup> three of the 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.<sup>120</sup> Thus, it no longer mattered if plaintiffs could show that Drummond concealed evidence of payments to paramilitaries, as they did in *Giraldo*,<sup>121</sup> since it would no longer be enough to displace the presumption required by *Kiobel*. These cases lay bare not only plaintiffs’ limited access to information produced and stored by governments and MNCs, but the ways in which the deliberately opaque corporate structure of MNCs in the extractive industry often complicates efforts to determine where and whom to discover it from. It is a problem that by and large works to the advantage of MNCs, even when they engage in spoliation, leaving plaintiffs with a far higher bar to overcome.

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<sup>116</sup> *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”); *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”).

<sup>117</sup> *Mastafa v. Chevron Corp.*, 770 F.3d 170 (2d Cir. 2014)(citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)(quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, (2007)))

<sup>118</sup> Pls.’ Memo. 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 (Dec. 5, 2003).

<sup>119</sup> 767 F.3d 1229, 1239 (11th Cir. 2014); 782 F.3d 576, 600 (11th Cir. 2015); 384 F. Supp. 3d 1328 (N.D.Ala. 2019).

<sup>120</sup> 569 U.S. 108 (2013).

<sup>121</sup> No. 09-01041, *supra* note 105.

V. **Part III: Reforms**

Drawing on the lessons of *Kiobel* and *Wiwa*, as compared to other ATS claims brought against MNCs in the extractive industry, a number of issues remain for plaintiffs to succeed in these claims. Even as the plausibility of advancing these claims diminishes in the wake of *Kiobel*, this study 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 are not confined to ATS claims; they may be re-employed in TVPA (Torture Victim Protection Act),<sup>122</sup> RICO (Racketeer Influenced and Corrupt Organizations Act)<sup>123</sup> and state claims. Likewise, the broader patterns drawn from *Wiwa* and other ATS claims, such as persistent efforts to dismiss on *forum non conveniens* grounds, or foreign policy, or failure to pierce the corporate veil, also demand reforms and a deeper analysis.

For one, the battles of *Kiobel* and *Wiwa* highlight important reforms for witness compensation and requisite personal knowledge. While at a basic level, lawyers compensating fact witnesses for their time preparing and testifying should determine the applicable statutes and rules of professional conduct, they 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 dire circumstances, who may need to be compensated for relocating to safer locations in preparation for trial. The very factors guiding courts' analysis on this issue overstate witnesses' hourly rate, occupation and qualifications, whereas concerns over hardship and practical challenges cover fewer than half of the factors.

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<sup>122</sup> Pub. L. No. 102-256, 106 Stat. 73 (1992)(codified at 28 U.S.C. § 1350 (2000)).

<sup>123</sup> 18 U.S.C. § 1964(c).

Simply providing for consideration of hardship is not enough; more guidance is needed to assist courts in interpreting and handling compensation of lay witnesses in dire circumstances.

Further, in this same context, 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 and low economic prospects where no evidence suggests so. Certainly, allegations of this nature are not child's play; accusations of 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 claims at issue and should not be taken lightly. While rule 11 sanctions are one way to rebuke these continued efforts, they may not be the only avenue. Courts have wide discretion to resolve issues of this nature in ways that best cease them, on their own volition and as effectively and early as possible.

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 different courts employing and requiring different standards of specificity, to the advantage of some and detriment of others. Avoiding precisely the issues that surfaced here, 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.

Evaluating more broadly, there remain deep challenges in attaching jurisdiction in ATS cases, whether they be rooted in the higher standards set by *Kiobel*, foreign policy considerations or a failure to pierce the corporate veil. For instance, it is still the case that most ATS claims face

multiple attempts at dismissal and hardly reach discovery.<sup>124</sup> As of this writing, after *Jesner v. Arab Bank*<sup>125</sup> and *Kiobel*, and while awaiting a ruling on *Nestle USA v. Doe*,<sup>126</sup> it seems far more likely that plaintiffs in ATS claims will not be able to gain jurisdiction over an American or foreign MNC in US courts.<sup>127</sup> However, plaintiffs and the international human rights community could still pursue legislative campaigns aimed at a congressional amendment to the ATS or a new statute.<sup>128</sup> It could parallel other statutes, like the TVPA, which has had greater success.<sup>129</sup> Alternatively, Section 1504 of the Dodd-Frank Act may hold some promise, for it requires financial disclosures by extractive corporations registered with the US Securities and Exchange Commission (SEC).<sup>130</sup> Not only does Section 1504 provide civil society and foreign governments data on which to dispute discrepancies, but given the critical importance of reputation for MNCs in this industry,<sup>131</sup> it also incentivizes shareholders and executives to police organizational misconduct from within,<sup>132</sup> suggesting a potentially more effective mechanism.

More importantly, and especially considering a fading ATS, 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

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<sup>124</sup> 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. Chevron Texaco Corp.*, No. 002-2003 (Nueva Loja Superior Court 2011), ECF No. 146-7; *Mastafa v. Chevron Corp.*, 770 F.3d 170 (2d Cir. 2014).

<sup>125</sup> 138 S.Ct. 1386 (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).

<sup>126</sup> *Nestlé USA, Inc. v. Doe I*, Oyez, available at <https://www.oyez.org/cases/2020/19-416#!> (last visited Jan 15, 2021).

<sup>127</sup> See e.g., *Sarei v. Rio Tinto*, 221 F. Supp. 2d 1116 (C.D. Cal. 2002)(dismissed after *Kiobel*).

<sup>128</sup> For a critique of this approach, see Phoebe Okowa, *The Pitfalls of Unilateral Legislation in International Law: Lessons from Conflict Minerals Legislation*, INT'L. AND COMP. LAW Q. 69, 685-717 (2020)

<sup>129</sup> See e.g., *Penalosa v. Drummond Co.*, 384 F. Supp. 3d 1328 (N.D. Ala. 2019)(allowing charges against Garry Drummond to move forward); *In re Chiquita*, 190 F.Supp.3d at 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).

<sup>130</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1504, 124 Stat. 1376, 2220-2222 (codified at 15 U.S.C. § 78m(q) (2010)).

<sup>131</sup> Lisa J. Laplante, Suzanne A. Spears, Article, *Out of the Conflict Zone: The Case for Community Consent Processes in the Extractive Sector*, 11 Yale H.R. & Dev. L.J. 69 (2008).

<sup>132</sup> Kurt T. Miller, *The Effects of Section 1504 of the Dodd-Frank Act: Disclosure of Payments by Resource Extraction Issuers*, 21 LAW & BUS. REV. AM. 371 (2015).

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 political reasons, or both, the US government and other foreign governments have continued to offer their views in support of MNCs in these claims, cementing their symbiotic relationship of economic benefit and corporate control. At a deeper level, these evince 20<sup>th</sup> 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 Global North to shift focus to its governments, who are key agents enabling the continuation of impunity in this area, and campaign for their entry into broader agreements, whether soft or hard, such as was done through 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 focus on transparency in payments is an important step forward in dealing with the problem of payments to security personnel or paramilitary groups in ATS litigation. Further, in lobbying governments to enact legislation and in reporting data of these payments in a publicly available format, EITI has been paving the way for a more effective, international framework of accountability.<sup>133</sup>

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<sup>133</sup> See 1-2 Rocky Mt. Min. L. Fdn. (2017).

Another option is the potential of campaigns for rights of consultation and even unjust enrichment claims, particularly for indigenous communities,<sup>134</sup> which are implicated in most, if not all, of the cases discussed here.<sup>135</sup> This is because across continents, indigenous people continue to not be consulted in the negotiation or initiation of extractive projects on indigenous lands,<sup>136</sup> because they are generally disregarded by local and national governments, and because they are the first whose lands are occupied and destroyed. It is a problem dating back to colonialism and the extraction of resources far from home irrespective of whose lands they impact.<sup>137</sup> Thus, while some scholars advocate for changes that encourage more meaningful rights of consultation,<sup>138</sup> others posit that unjust enrichment's unique place between doctrine like contracts, property and torts<sup>139</sup> may make it a fruitful alternative.

## VI. CONCLUSION

The saga of the *Wiwa-Kiobel* litigation, alone and in context, 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 case in point, illustrating how far and how

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<sup>134</sup> David N. Fagan, *Achieving Restitution: The Potential Unjust Enrichment Claims of Indigenous Peoples Against Multinational Corporations*, 76 N.Y.U. L. Rev. 626 (2001).

<sup>135</sup> See e.g., *Kiobel v. Royal Dutch Petroleum Co.*, Nos. 96-8386, 01-1909, (S.D.N.Y. May 5, 2009)(involving the Ogoni people); *Bowoto v. Chevron Corp.*, No. 99-02506 (February 1, 2008)(involving the Ilaje people).

<sup>136</sup> World Bank, *Striking a Better Balance: The World Bank Group and Extractive Industries*, WORLD BANK (2003), available at <https://openknowledge.worldbank.org/handle/10986/17705> Lize

<sup>137</sup> See e.g., A Anghie, *Imperialism, Sovereignty and the Making of International Law*, Cambridge University Press (2005); see also Sergio Puig, *International Indigenous Economic Law*, 52 U.C. DAVIS L. REV. 1243 (2019).

<sup>138</sup> 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 (2007); see also S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW*, Oxford University Press (2d ed. 2004)

<sup>139</sup> 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 cmt. c (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. 1298, 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”).

long it 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 through attacks on witnesses and SLAPP suits against counsel. These frivolous and costly tactics delay litigation, deny juries access to evidence and retraumatize and humiliate witnesses who are often themselves victims of heinous human rights violations at the hands of the same MNCs whose lawyers now persecute them before US courts.

Further, these efforts also 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 claims face dismissals before reaching any substantive discovery or trial, and in the wake of *Kiobel* and a more conservative Supreme Court, these challenges are likely endure and worsen. Nevertheless, the lessons of this study, evincing the frivolous and baseless character of MNCs' strategies, is a key reason for human rights advocates to propose a stronger legislative framework, to undo the weakening of the ATS by the Supreme Court, and to defend more appropriate interpretations of the rules of civil procedure and evidence by courts, in order to 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.