

‘We All Stand Before History’: Corporate Impunity as a Colonial Legacy—The Case of the Niger Delta

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Executive Summary

This article is an interdisciplinary examination of the legal, economic, historical and psychological impacts of the human rights situation affecting the Ogoni people of the Niger Delta. The Ogoni have traveled the world seeking justice for the allegedly tortious business practices of Royal Dutch Shell (“Shell”) and its subsidiaries, and the resulting decimation of the Ogoni territory. Despite increasing awareness of the importance of access to remedy in the business and human rights field, victims of transnational corporations, like the Ogoni, continue to face major obstacles when they seek redress from corporate actors. This article studies the experience of the Ogoni people in their struggle to hold Shell accountable for decades of environmental and human rights abuse, ultimately highlighting the crisis of corporate impunity that victims face across the globe.

Through an analysis of the legal options that the Ogoni have pursued and the psychological impact of corporate impunity, the article considers ways in which transitional justice can provide a new path to justice for the Ogoni from a decolonial perspective. The article contemplates ways in which transitional justice could incorporate elements of indigenous systems of justice along with a proposal to utilize innovation policy and Western intellectual property law to shape corporate behavior within transitional justice praxis.

INTRODUCTION

Transnational corporations now have a collective economic power that eclipses that of many nation-states, with increasing influence on traditionally state-controlled facets of life, including incarceration, migration, and public policy. Our daily lives are governed at least as much by our consumer preferences and access to commodities as by our political systems, and those preferences ultimately impact the lives of third parties across the globe. Business-related crime, including human rights and environmental abuse, has been included only peripherally in transitional justice processes, despite the extraordinary power and influence of commercial entities. In this article, we argue that this is in part due to the misguided belief that domestic legal systems adequately handle corporate wrongdoing. This article challenges that belief by studying the experience of the Ogoni community in the Niger Delta. The Ogoni are victims of egregious and unremediated human rights and environmental abuse allegedly perpetrated primarily by Royal Dutch Shell (“Shell”) and its subsidiaries, with the assistance of the Nigerian government and its state-owned oil enterprise. Through an analysis of the legal strategies the Ogoni have employed against Shell as well as the psychological impact of Shell’s impunity, this article addresses the failure of Western legal regimes to (1) hold companies accountable for transnational harms, (2) acknowledge the ongoing impact of colonialism on Western legal frameworks and procedural rules, including through the assumption that colonization and related abuses are not criminal, and (3) address victimization of a community with traditional or indigenous notions of time and property.

This article argues that because transitional justice has greater flexibility to address psychological and other harm within a particular social and cultural context, it has great potential to provide an appropriate form of recourse for victims, despite the current practice of excluding legal entities from the jurisdiction of transitional justice courts. This is proposed as a compliment to Western legal systems, which are often based on a legal, political and social experience foreign to victims. The article does not speak to the current or historical adequacy of transitional justice mechanisms in general, but proposes that such mechanisms have the potential to challenge colonial forms of justice that uphold corporate hegemony. The article concludes with a proposal to utilize innovation policy and intellectual property law within transitional justice praxis and explores a type of transitional justice process that could reflect indigenous systems of justice.

TRANSNATIONAL CORPORATE CRIMES IN GLOBAL LEGAL SYSTEMS

This section provides a brief overview of the role of international and domestic legal systems in corporate accountability. The current failure of any legal regime to adequately create accountability for transnational corporate crimes is the product of responsibility-shifting and appeals to an illusory “complementarity” between domestic and international fora. The Rome Statute, which created the International Criminal Court (“ICC”), does not include corporations within its jurisdictional scope.¹ Some academics have argued that corporations were excluded from the Rome Statute’s jurisdictional scope primarily because domestic courts were considered more appropriate venues to handle

¹ See Rome Statute of the International Criminal Court art. 25, July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002), rev. 2010 (“The Court shall have jurisdiction over natural persons pursuant to this Statute.”) [hereinafter Rome Statute].

corporate abuses.² This passing-the-ball has resulted in victims of human rights abuses by corporations being deprived access to justice across the globe.

Domestic courts, particularly in the countries where defendant corporations are headquartered, often dismiss lawsuits by victims under a series of doctrines limiting the jurisdiction of courts to hear claims related to extraterritorial acts. In the United States and elsewhere, if there is an “adequate” alternate forum, generally in the country where the abuse occurred, courts dismiss suits under the doctrine of *forum non conveniens*.³ However, US courts have found nearly every judicial system in the world to be “adequate.”⁴ Various other doctrines related to US courts’ impact on foreign policy and the separation of powers (e.g., political question doctrine, foreign affairs doctrine) result in the dismissal of many cases, particularly regarding abuses committed by the extractives industries.⁵ Further, under US federal law, the presumption against extraterritoriality prohibits courts from hearing cases where the abuse occurred overseas unless the legislature explicitly (in the text of the law or legislative history) expressed intent for the law to apply outside of the US.⁶ This presumption is discussed further in reference to the Alien Tort Statute below.

While it would be relatively easy, from a legal perspective, to create doctrines that address the unique needs of victims of transnational corporate crime, states have not done so. Indeed, despite the fact that corporations exist at the pleasure of the state, corporations committing crimes that would result in significant prison time if committed by a natural person often result in small fines or no penalty.⁷ While human beings have rights and responsibilities, and competing notions of justice govern each, the corporate form can be used as a shield, allowing humans to act in concert to commit crimes but evade liability. Given that corporations are not natural people, and thus lack human rights, a “corporate death penalty” (revoking a corporation’s charter for a period, or limiting the

² See, e.g., Caroline Kaeb, *The Shifting Sands of Corporate Liability Under International Criminal Law*, 49 GEO. WASH. INT’L L. REV. 351, 353 (2016) (citing WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 212 (3rd ed. 2007)) (noting complementarity concerns as one of the reasons for limiting ICC jurisdiction); Jelena Aparac, Online Symposium, *Which International Jurisdiction for Corporate Crimes in Armed Conflicts?*, 57 HARV. INT’L L. J. 40, 41–42 (2016); David Scheffer, Online Symposium, *Corporate Liability under the Rome Statute*, 57 HARV. INT’L L. J. 35, 38 (2016).
³ See, e.g., Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254, n.22 (1981); Van Breda v. Village Resorts Ltd., [2012] S.C.R. 17 (Can.) (Canada). In contrast, UK Courts limited the *forum non conveniens* doctrine, in part due to tensions with the Brussels Convention. See Cuniberti, Gilles, “Forum Non Conveniens and the Brussels Convention.” 54 INT’L & COMP. L. Q. 973, 973 (2005) (“On 1 March 2005 the European Court of Justice in *Owusu v. Jackson* held that the English doctrine of *forum non conveniens* was inconsistent with the Brussels Convention...when a defendant was domiciled in the United Kingdom, even if the natural forum was in a Non-Contracting State.”).

⁴ See, e.g., Piper Aircraft Co. 454 U.S. at 254, n.22 (noting that there are “rare circumstances . . . where the remedy offered by the other forum is clearly unsatisfactory”); Acuña-Atalaya v. Newmont Mining Corp., 308 F. Supp. 3d 812, 821, 825–26 (D. Del. 2018) (“[A]lthough the situation is troubling, it does not support a global finding that Peru is an inadequate forum for Plaintiffs . . . “[A]lthough Plaintiffs have shown cause for concern over Peruvian courts, I cannot say that they are ‘clearly unsatisfactory’ under *Piper*.”), *appeal filed*, No. 18-2042 (3d Cir. May 10, 2018).

⁵ Extractive activities’ impact on geopolitics, including both trade relationships and the common use of host country state forces to protect corporate assets, gives rise to this association. See, e.g., *Saldana v. Occidental Petroleum Corporation*, 744 F.3d 544 (9th Cir. 2014) (dismissing on political question grounds, due to U.S. government funding of the same brigade funded by the defendant, who were the alleged material authors of the murders of plaintiffs’ decedents).

⁶ See, e.g., *Kiobel v. Royal Dutch Petroleum*, 569 U.S. 108, 124 (2013); *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, 255 (2010).

⁷ See, e.g., Richard Herz, Senior Litigation Attorney, Earthrights Int’l, Remarks at the Annual Meeting of the American Society of International Law (Mar. 2012), *reprinted in* 106 AM. SOC’Y INT’L L. PROC. 493, 494 (2012) (“[I]f corporate personhood grants entities such [political] rights, we will surely be at a loss to explain how it absolves those entities of humanity’s most basic responsibilities.”).

corporation's access to certain markets as a punishment for wrongdoing)⁸ present far fewer ethical or moral conflicts than punishment of natural people. This raises the question: Why are corporate penalties for egregious human rights abuse so often insignificant, or nonexistent, in domestic courts?

International courts, including the ICC and the various war crimes tribunals, have generally eschewed corporate liability entirely while accepting jurisdiction over corporate officers. The ICC, the International Criminal Tribunal for Rwanda ("ICTR") and the International Criminal Tribunal for Yugoslavia ("ICTY"), among others, have heard cases against corporate officers, and explicitly include superior liability within their jurisdiction. In one high-profile case, *The Media Case*, the ICTR found executives of a media company guilty of public incitement to genocide.⁹ But this is insufficient. While corporate-officer liability is an important element of corporate accountability, transnational corporate crimes frequently require the actions of multiple individuals to be attributed to a single entity to meet applicable *mens rea* and *actus reus* standards.¹⁰

Legal entities themselves are specifically excluded from the jurisdiction of the ICC, and the Rome Statute would have to be amended before a case against a corporation could be instituted in the ICC.¹¹ While a handful of recent events suggest a shift toward recognizing corporations as defendants in international tribunals,¹² these courts still provide only a patchwork system of accountability. The *Al-Jadeed Case* (2015),¹³ before the Special Tribunal for Lebanon ("STL"), was the first case "in the history of international criminal justice in which a legal [entity was] accused of a crime."¹⁴ The Appeals Panel ultimately determined that the evidence was insufficient to find the corporate officer, and thus the corporation, guilty, but stated in *dicta* that legal entities fall under the jurisdiction of the STL.¹⁵ While this ruling is hopeful, signifying a possible shift away from the

⁸ See, e.g. Hulpke, J. F. *If All Else Fails, A Corporate Death Penalty?*, 26 J. MGMT. INQUIRY, 433, 435 (2017) (discussing the potential impacts of dissolving Volkswagen as a punishment for falsifying emissions results).

⁹ Prosecutor v. Nahimana, Barayagwiza and Ngeze (*The Media Case*), Case No. ICTR 99-52-T, Appeals Chamber Judgment (Nov. 28 2007), <http://www.unict.org/sites/unict.org/files/case-documents/ictr-99-52/appeals-chamber-judgements/en/071128.pdf> [<https://perma.cc/WZK4-MBUR>].

¹⁰ See Jennifer Green, *Corporate Torts: International Human Rights and Superior Officers*, 17 CHICAGO J. INT'L L. 447, 470–72 (2016) (noting the differences in *mens rea* and *actus reus* standards for civilian officials and military officials); Jonathan Kolieb, *Through the Looking-Glass: Nuremberg's Confusing Legacy on Corporate Accountability Under International Law*, 32 AM. U. INT'L L. REV. 570, 575 (2017) ("Scholars have also argued that the integrity of [International Criminal Law] demands recognition of corporate liability for gross human rights violations. Whilst individual responsibility may well be a 'cornerstone' of international criminal law, upon closer inspection, this body of law deals with crimes that require a plurality of actors for their commission. Genocide, war-crimes, and crimes against humanity all contemplate collective action.").

¹¹ See Rome Statute, *supra* note 1. Of note, a coalition of human rights attorneys has recently called upon the ICC to investigate Chiquita executives for contributing to crimes against humanity in Colombia as a way to get around the lack of ICC corporate liability. See Press Release, The Human Rights Program, Harvard Law School, Clinic and partners call on ICC to investigate role of Chiquita executives in contributing to crimes against humanity, (May 18, 2017), <http://hrp.law.harvard.edu/corporate-accountability/clinic-and-partners-call-on-icc-to-investigate-role-of-chiquita-executives-in-contributing-to-crimes-against-humanity> [<https://perma.cc/FZ6P-QD94>].

¹² See Kolieb, *supra* note 10, at 598–601.

¹³ In the Case Against Al Jadeed [Co.] S.A.L./New T.V. S.A.L. (N.T.V.) and Karma Mohamed Tahsin Al Khayat, Case No. STL-14-05/T/CJ, Judgment (Sept. 18, 2015), <https://www.stl-tsl.org/en/media/press-releases/4365-18-09-2015-judgment-in-the-case-against-al-jadeed-s-a-l-and-ms-karma-al-khayat> [<https://perma.cc/ZX7X-FVMD>].

¹⁴ Kaeb, *supra* note 2, at 364 (quoting *id.*).

¹⁵ *Id.* at 364–376.

Nuremberg-era view against corporate liability, liability for legal entities remains largely outside of international criminal law¹⁶ and transitional justice processes.¹⁷

A belief in the existence of “complementarity” between international and domestic legal systems is therefore largely unfounded. For example, in the United States, there have been no criminal prosecutions of any corporation or corporate official for violations of human rights.¹⁸ While there have been numerous cases filed under the Foreign Corrupt Practices Act (“FCPA”) and other cases related to bribery and funding foreign terrorist organizations,¹⁹ the human rights violations that are often related to these payments have not been taken up by US prosecutors.²⁰

Given the general failure of international tribunals to handle transnational corporate crime as well as the failure of domestic legal systems to criminally prosecute corporations for human rights abuses in their supply chains, many victims have turned to private lawsuits in the hope of finding some measure of justice. The following case study, drafted in collaboration with a member of the affected community, Brother Anthony Kote-Witah, OFM Cap, is a dramatic illustration of the lack of remedies available to victims, as well as the perverse incentives for corporations to create environments ripe for abuse. Kote-Witah was one of several plaintiffs in the *Kiobel* case, in which the Supreme Court constructively ended the application of Alien Tort Statute (“ATS”) to human rights abuses committed abroad. Until that point, the ATS had been the primary vehicle for corporate

¹⁶ Kolieb, *supra* note 10, at 570 (“This traditional perspective on corporate accountability under international criminal law (“ICL”) reflects the long-accepted principle of *societas delinquere non potest*—a legal entity cannot be blameworthy—and informs the jurisdiction of all subsequent international criminal tribunals.”).

¹⁷ An important case to watch is that of Colombia, where government agencies, prosecutors and a truth commission are currently determining how to handle evidence of significant corporate involvement in the 50-year civil war. A recent publication by the Colombian NGO DeJusticia and the Transitional Justice Network at the University of Essex makes the argument that the various transitional justice entities, including the special court (Jurisdicción Especial para la Paz (“JEP”)) and Truth Commission, are required by international law to consider the role of economic actors, including in cases of coercion and complicity, even if corporate actors are not subjects within the process. SABINE MICHALOWSKI ET AL., ENTRE COACCIÓN Y COLABORACIÓN: VERDAD JUDICIAL, ACTORES ECONÓMICOS Y CONFLICTO ARMADO EN COLOMBIA [BETWEEN COERCION AND COLLABORATION: JUDICIAL TRUTH, ECONOMIC ACTORS AND ARMED CONFLICT IN COLOMBIA] 167–68 (2018), <https://cdn.dejusticia.org/wp-content/uploads/2018/08/Entre-coaccion-y-colaboración-PDF-para-WEB-agosto-16.pdf> [<https://perma.cc/VSZ4-PSPY>] (“...ni la JEP ni la jurisdicción ordinaria pueden excluir los casos que según el derecho penal internacional y el derecho internacional consuetudinario son calificados como de complicidad, incluso de forma indirecta.”) (“... neither the JEP nor ordinary justice can exclude cases that, according to international criminal law and customary international law, are categorized as complicity, even indirectly.”).

¹⁸ Green, *supra* note 10, at 465.

¹⁹ Most relevant here, Royal Dutch Shell entered a settlement agreement for FCPA violations related to an alleged \$3.5 million in bribes to Nigerian officials in 2010. See Royal Dutch Shell Plc., Exchange Act Release No. 63243, 2010 WL 4363890 (Nov. 4, 2010). For a complete list of SEC enforcement actions under the FCPA, see U.S. SEC. & EXCH. COMM’N, *SEC Enforcement Actions: FCPA Cases* (Nov. 27, 2018), <https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml> [<https://perma.cc/MX2C-Z3GE>]. For a complete list of Department of Justice (“DOJ”) enforcement actions under the FCPA, see U.S. DEP’T. JUSTICE, CRIMINAL DIV., *Related Enforcement Actions* (Mar. 20, 2018), <https://www.justice.gov/criminal-fraud/related-enforcement-actions>, archived at <https://perma.cc/7EE6-F4U2>.

²⁰ In the United States, this would likely fall under the jurisdiction of the Office of Human Rights and Special Prosecutions (“HRSP”) at the DOJ. HRSP has jurisdiction over torture, war crimes, genocide, child soldiers, illegal entry into the United States of human rights violators, and supports the Department of Justice in investigations of violations of maritime law. See U.S. DEP’T. JUSTICE, *About the Section* (June 3, 2015), <https://www.justice.gov/criminal-hrsp/about-hrsp> [<https://perma.cc/N3ET-Y6UG>].

human rights cases in the US. *Kiobel* was ultimately dismissed on jurisdictional grounds, and the case highlights one way legal systems continue to embody the colonial legacies described below.

CASE STUDY: ROYAL DUTCH SHELL AND THE Ogoni PEOPLE

*[W]e all stand before history ... I am a man of peace, of ideas ... I call upon the Ogoni people, the peoples of the Niger delta, and the oppressed ethnic minorities of Nigeria to stand up now and fight fearlessly and peacefully for their rights. History is on [our] side. God is on [our] side.*²¹

The Ogoni case provides an illustrative example of global corporate impunity due to (1) the severity and duration of the crimes; (2) the number of strategies the Ogoni people have employed to obtain redress, spanning the legal systems of four countries in addition to international bodies; and (3) the collective failure of these strategies to repair the harm psychologically, monetarily, environmentally, or symbolically.

The Nigerian Ogonilands lie near the Southern coast of the country, in the Niger Delta. The region is divided into six kingdoms—Ogoni, Babbe, Eleme, Gokana, Nyo-khana, Keh-Khana and Tai—each with its own internal tribal structure and culture.²² Ogoniland was once called ‘Kenule’ (where everything is found) because of its strategic location on the Southeastern alluvial plain of the Niger delta, and its economic strength in the region.²³ The Niger Delta’s particular geographic characteristics made Ogoniland highly fertile.²⁴ Like most tropical rain forests, Ogoniland has an average temperature range of 70–85 degrees Fahrenheit.²⁵ It is very rainy (between 200–400 inches of rain per year) and features hundreds of different types of trees, and a great variety of animals and birds.²⁶

Biodiversity was essential to the traditional Ogoni way of life.²⁷ The trees produced oxygen, building materials, and dug-out canoes used as a primary means of transportation on the waterways that traverse the region.²⁸ The trees were also used to create costumes and masks for traditional festivals. Spices and herbs were abundant for medicinal purposes.²⁹ The environment was economically viable and Ogoni fishermen and farmers lived comfortably off of their land, often called the “food basket of Nigeria” due to food exports to neighboring communities.³⁰ In the first half of the twentieth century, the six kingdoms survived from farm and agricultural produce, animal husbandry, fishing, and harvesting of mussels and oysters.³¹

In 1956, four years prior to Nigeria’s independence from Great Britain, a subsidiary of Royal Dutch Shell (“Shell”) and the Nigerian government created a joint venture, the Shell Petroleum

²¹ Ken Saro-Wiwa, Statement to Ogoni Civil Disturbances Tribunal (Sept. 21, 1995).

²² U.N. ENV’T. PROGRAMME, ENVIRONMENTAL ASSESSMENT OF Ogoniland, at 24, U.N. Job No. DEP/1337/GE (2011), https://postconflict.unep.ch/publications/OEA/UNEP_OEA.pdf [<https://perma.cc/9VAC-NMHQ>].

²³ Interview with Brother Anthony Kote-Witah, MDiv, OFM Capuchin, Ogoni, in Chicago, IL (Nov. 21, 2017).

²⁴ *Id.*

²⁵ U.N. ENV’T. PROGRAMME, *supra* note 22, at 24.

²⁶ *Id.* at 22, 32.

²⁷ Interview with Kote-Witah, *supra* note 23.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ Luca Prono, *Vanishing Cultures*, in 3 ENCYCLOPEDIA OF ANTHROPOLOGY 1089–90 (H. James Birk ed, 2006).

Development Company of Nigeria Limited (“SPDC”), to begin oil exploration in the Niger Delta.³² Just as British political dominance subsided, the economic dominance of a British-Dutch company was instituted, exerting a level of control akin to corporate colonialism. By 1971, petroleum production overcame agriculture as the primary driver of the Nigerian economy, and between 1973 and 1981, the value of agricultural exports fell from \$1.5 billion to just \$0.3 billion.³³

As early as the 1960s, oil spills and uncontrolled flares began to pollute the Ogoni environment. Shell’s response was, according to the United Nations Environmental Programme (“UNEP”), “slow and inadequate.”³⁴ The exploitation of natural resources in Ogonilands presented a unique set of issues given the way property rights were, and to some extent are, exercised by the indigenous peoples of Southern Nigeria. For the Ogoni, all land is held in common. Land is sacred, and is held by the living in an “ancestral trust” for the benefit of the unborn.³⁵ There are divisions within the territory, with chiefs or heads of families acting as trustees in overseeing and dividing commonly held land, though the land continues to be the property of the collective.³⁶ The native conception of land ownership includes the oil and mineral deposits held within or below the surface of the land.³⁷

In 1978, the Nigerian government’s hostility toward the traditional land tenure systems was made explicit when it passed the Land Use Act, nationalizing all oil under the land or sea within Nigerian territory.³⁸ This controversial move provided some legal cover for the ongoing exploitation of Ogoniland without the consent of its inhabitants.³⁹ Throughout the 1970s and 80s, the Ogoni ecosystem was degraded by oil spill-related acid rain. Fish died or were contaminated, thereby rendered unfit for human consumption. Rivers and waters became carriers of harmful viruses and bacteria. Ogoniland’s extraordinary biodiversity, once a habitat for oysters, mussels, catfish, sadden, snapper and tilapia, was destroyed, resulting in an invasion of the non-native Nipa palm, which blocked sea animals’ access to their habitats.⁴⁰

The Ogoni people organized to oust Shell from the region, forming the Movement for the Survival of the Ogoni People (“MOSOP”), led by Ken Saro-Wiwa. By the early 1990s, the conflict over oil in the Ogonilands had turned violent.⁴¹ The oil infrastructure was under attack by local residents, and nonviolent protests were met with severe government repression. Thousands of Ogoni were killed, and Nigerian soldiers burned villages and raped women. As a result of this upheaval, Shell discontinued its operations in the Ogonilands in 1993, but did not properly decommission the facilities.⁴²

In a 1993 resolution, the legislative body of Rivers State called on SPDC, Chevron Nigeria Limited, and the Nigeria National Petroleum Corporation to (1) pay royalties on petroleum exploitation in

³² CHRISTIAN S. YORGURE, *MULTINATIONAL CORPORATIONS AND HOST COMMUNITIES: PROPOSING THE ZERO-VIOLENT CONFLICT MODEL* 73 (2017).

³³ U.N. ENV’T. PROGRAMME, *supra* note 22, at 20.

³⁴ *Id.* at 25.

³⁵ P. Ehi Oshio, *The Indigenous Land Tenure and Nationalization of Land in Nigeria*, 10 B.C. THIRD WORLD L. J. 43, 46 (1990).

³⁶ Kaniye S.A. Ebeku, *Oil and the Niger Delta People: The Injustice of the Land Use Act*, 35 L. & POL. AFR., ASIA & LATIN AM. 201, 209–10 (2002).

³⁷ *Id.* at 210.

³⁸ Yorgure, *supra* note 32, at 73.

³⁹ *Id.*

⁴⁰ See, e.g., Olof Lindén and Jonas Pålsson, *Oil contamination in Ogoniland, Niger Delta*, 42 *AMBIO* 685 (2013).

⁴¹ Yorgure, *supra* note 32, at 73–74.

⁴² *Id.*

the Ogonilands dating back to 1958, (2) cease all gas flaring, (3) bury all high pressure oil pipelines rather than leaving them exposed above ground, (4) compensate the community for the environmental damage they had caused, and (5) agree with representatives of the Ogoni people “on acceptable terms for continued exploration of oil in the Area.”⁴³ The total monetary compensation requested was £22 billion (approximately \$34.7 billion at the time).⁴⁴ Shell never complied with the edict apart from exiting Ogonilands that year.

Saro-Wiwa along with eight other Ogoni activists (often referred to as “the Ogoni 9”) were arrested and publicly hanged in 1995. This is widely believed to be the result of a conspiracy between the government and Shell.⁴⁵ Many Ogoni fled their villages, towns and cities. Over 3,000 fled to Benin, where they were cared for by the United Nations High Commission for Refugees (“UNHCR”). As co-author Anthony Kote-Witah recalls:

We lived in the refugee camp for three years. We prayed day and night for God to open a door for us and we advocated by writing to the outside world for help. Though many suffered from illnesses and died in the refugee camp, God granted us grace and mercy and the Ogoni people were extremely generous to each other.⁴⁶

Many Ogoni eventually migrated to the United States and other Western countries where they were granted asylum.

Oil pipelines delivering oil from other parts of Nigeria continue to run through Ogoniland, and unused oil infrastructure as well as leaking oil containers are scattered throughout the territory. Due to improper maintenance, the infrastructure has deteriorated, leading to further environmental contamination. Following a two-year study, UNEP published a report in 2011 detailing the ongoing environmental damage to Ogonilands and the steps necessary for remediation.⁴⁷ UNEP documented that despite Shell’s formal absence from Ogoniland, “oil spills continue to occur with alarming regularity.”⁴⁸ Other harms found included (1) hydrocarbon pollution in groundwater in excess of national standards across the region, as well as contaminated air and soil; (2) widespread destruction of the mangroves that form habitats for fish, resulting in the proliferation of the invasive Nipa Palm and reduced fishing yield; (3) reduced ability to farm, and production of agricultural products that are inedible; and (4) disintegrating wetlands.⁴⁹ In the neighboring Ogale community, UNEP found that residents are drinking water from wells “contaminated with benzene, a known carcinogen, at levels of 900 times the World Health Organisation (“WHO”) guideline.”⁵⁰

OVERCOMING FORGETTING, ERASURE, SECRECY, AND DENIAL: DECOLONIAL TOOLS FOR UNCOVERING ABUSES

⁴³ Rivers State House of Assembly, Federal Republic of Nigeria, Third Assembly (Second Session), Votes and Proceedings, April 6, 1993 (on file with author).

⁴⁴ *Id.*

⁴⁵ See Yorgure, *supra* note 32, at 74; U.N. ENV’T. PROGRAMME, *supra* note 22, at 25; AMNESTY INT’L, NIGERIA: A CRIMINAL ENTERPRISE? SHELL’S INVOLVEMENT IN HUMAN RIGHTS VIOLATIONS IN NIGERIA IN THE 1990S 83 (2017), <https://www.amnesty.org/en/documents/AFR44/7393/2017/en/> [https://perma.cc/M2L5-7RY6].

⁴⁶ Interview with Brother Anthony Kote-Witah, *supra* note 23.

⁴⁷ See U.N. ENV’T. PROGRAMME, *supra* note 22.

⁴⁸ *Id.* at 9.

⁴⁹ *Id.* at 9–12.

⁵⁰ *Id.* at 9–11, 25.

Reconciling legal frameworks and procedural rules that arise from a judicial system that historically supported the colonization and subsequent oppression of an impacted community, on the one hand, with the cultural, social and psychological needs of communities and individual community members, on the other, presents particular challenges. Lawyers are tasked with addressing harms in light of the needs of the people that were impacted. This can be particularly challenging when addressing the victimization of a community whose cultural understandings are not represented in Western legal frameworks and procedural rules. The ethical question of how to use the “Master’s tools” in this case requires an examination of the historical legacies of colonization to ensure harms are not reproduced.⁵¹

The section introduces foundational concepts from Decolonial Studies, (universality and ahistoricity) and applies three additional concepts (power, being, and time) to the Ogoni situation.⁵² Together, these five concepts have vital importance for addressing legal remedies for victims within a transitional justice framework highlighting concerns often absent from mainstream legal analyses. Using the Decolonial Studies lens, this section explores the Ogoni people’s historical legacies, the epistemological abuses they have suffered, and the possibilities for providing the Ogoni with transformational justice.

Concepts from Decolonial Studies can be a close partner to the law in innovating transitional justice processes, research, theory, and praxis. Sociologist Anabel Quijano explains that the power that colonizers seized during colonization persists today through a “coloniality of power”—not only through continued Western economic dominance, but also through the West’s historical and current establishment of every aspect of its culture, language, and knowledge as normative.⁵³ Unmasking the assumptions of Western epistemologies can lead to new ways to address harms and accompany victims, helping to overcome barriers to justice in both traditional Western legal systems and transitional justice contexts.

Universality

*New identities were created in the context of European colonization: European, white, Indian, black, and mestizo. A characteristic feature of this type of social classification is that the relation between the subjects is not horizontal but vertical in character. That is, some identities depict superiority over others.*⁵⁴

European understandings of superiority and difference positioned Western preferences as normative, or universal. From this, it was a natural extension for Western epistemologies to create a universal subject or person that embodied and elevated western ideals. Western fields of study, including the law, inherited this universal and superior subject as well as its assumptions, leading to the conflation of the “universal” with what is specifically Western, and thereby limiting and distorting the ability to be present in varied settings without othering non-Western epistemologies. A

⁵¹ See generally AUDRE LORDE, *THE MASTERS TOOLS WILL NEVER DISMANTLE THE MASTER’S HOUSE* (1979).

⁵² Decolonial studies is an inter disciplinary field committed to understanding the impacts of colonization and developing forms of redress. See W. MIGNOLO & C. WALSH, *ON DECOLONIALITY: CONCEPTS, ANALYTICS, PRAXIS* (2018).

⁵³ Anna Quijano, *Coloniality of Power, Eurocentrism, and Latin America*, 1 *NEPANTLA: VIEWS FROM SOUTH* 533, 540 (2000).

⁵⁴ Nelson Maldonado-Torres, *On the Coloniality of Being: Contributions to the Development of a Concept*, 21 *CULTURAL STUD.* 240, 244 (2007).

Western subject complete with Western sensibilities and norms has been exported globally. This is visible in the case of the Ogoni, who do not understand themselves as individuals but as a collective—a concept not represented in Western subjecthood.

Ahistoricity

Belief in superiority was not merely an idea the West had about itself; it was viewed as a self-evident biological order that justified the privileging of Western thought around the world. This is evident in the assumption that Western epistemologies are rooted in objective and neutral scientific knowledge that transcend boundaries, rather than being contextually bound and subject to Western assumptions, histories, and legacies. But “[e]pistemology is not ahistorical.”⁵⁵ When any epistemology is abstracted from history, it will appear as though it transcends time and specific contexts, lending false neutrality to its relationship to power. In the West, this “natural” superiority justified abusive power systems and infected knowledge systems with core distortions. Today, these legacies and their ongoing impact are often ignored when victims are forced to seek justice outside of their communities, in Western legal systems.

Power

The decolonial concepts of power, being, and time provide important insights into why and how Western justice systems have failed the Ogoni and allowed a foreign corporation, a product of Western legal systems, to abuse the Ogoni with impunity. The case of Royal Dutch Shell and the Ogoni cannot be understood in terms of the discrete period of time the company was present on the land; it must be unpacked in light of interlocking regimes of power, originating with colonization, that made Shell’s radical abuse of Ogoniland possible.

Formal British colonial rule in Nigeria ended in 1960, a time during which many African countries were regaining power and independence. While the British had “left” the Nigerian land, they and the rest of the Western powers ceded neither their dominance in a quickly globalizing economy nor their power to establish norms for African law and governance. Nigeria was legally independent of the British but remained unrecognized as a peer on the global stage. This left Nigeria, along with all of the former African colonies, vulnerable to potential abuses by Western powers, whose centuries of racist oppression had, by 1960, been woven into every aspect of the former colonies’ governance structures, ensuring the reproduction of past colonial harms. One such remnant of Western power, central to the case of the Ogoni, is the assumption that Western actors have legal impunity. This assumption of impunity comes from the historical precedent that colonization and its inherent abuses are not criminal. Transitional justice praxis that reinforces impunity for harms needs to be examined in light of colonial praxis that normalized egregious abuses of power.

Being

Building on Quijano’s “coloniality of power,”⁵⁶ decolonial theorist Maldonado-Torres connects the control of land, resources and people with control over the very way the community *knew* themselves.⁵⁷ Colonization required the invasion of knowledge systems and changed the way

⁵⁵ Walter D. Mignolo, *The Geopolitics of Knowledge and the Colonial Difference*, 101 S. ATL. Q. 57, 63 (2002).

⁵⁶ Quijano, *supra* note 53, at 533.

⁵⁷ See Maldonado-Torres, *supra* note 54, at 244.

communities had understood themselves prior to colonization. Maldonado-Torres writes, “[c]olonial relations of power left profound marked [sic] not only in the areas of authority, sexuality, knowledge and the economy, but on the general understanding of being as well.”⁵⁸ The normalization of radical abuses of colonization required understanding entire groups of people as subhuman. This core assumption is evident in the gross abuses that continue to be inflicted by Western powers in the Global South. The abuse of the Ogoni and Ogonilands came to be not only through corrupt colonial and postcolonial governments, but also through the owners of Royal Dutch Shell’s perception that the Ogoni were not as “real” as they were. Royal Dutch Shell would never be allowed to pollute its national lands and waterways in Britain or Denmark—practically consequence-free—as it has done in Nigeria. Due to centuries of centering Western epistemologies globally, the lived experiences and beliefs of victims of Western hegemony are translated through a Western lens to appeal to Western sensibilities. As such, the Ogoni face de-legitimization on every level: social, cultural, and economic.

Colonization and its immediate harms did not stop simply because colonial powers left the lands they formerly occupied. Colonization harmed individuals and communities to the core of their beings, transforming the way they knew themselves, as well as their culture, language, and history.⁵⁹ This is a harm that reproduces generationally alongside institutional and systemic violence because it is equally necessary to reproduce exclusive power. Maldonado-Torres’ “coloniality of being” reveals the depth of the impact of systemic institutional violence in colonization and ongoing coloniality. As an example of the resulting legacy, the Western legal system ignores generational harm almost entirely, formulating limited claims around primarily individual harms.

Time

*This [Western] concept of History is dependent on a specific line of temporality; the past is what has been left behind or what remains to be written by the most advanced Western thought of the present; the future belongs to the Western present, as does the destiny of humanity.*⁶⁰

Colonization required an orientation toward the past that erased and minimized the connections of the colonized to their own history. It also required the ability to control the present and the future as it established its power and sought to keep power. Linear histories allow the past to become a place of erasure. Psychiatrist Judith Herman writes, “[i]n order to escape accountability for his crimes, the perpetrator does everything in his power to promote forgetting. Secrecy and silence are the perpetrator’s first line of defense.”⁶¹ Forgetting, erasure, secrecy, and denial are the very elements that many transitional justice processes seek to prevent. These transitional justice processes open spaces for impacted people to engage their own telling, and, free from threats of violence, provide the entire community with an inclusive record of what has happened and create necessary changes to ensure the harms cannot happen again. In contrast, the West’s linear orientation toward history is not simply an epistemological preference—it is a tool to erase harms perpetrated by Western actors.

An illustrative example of the Ogoni notion of time is reflected in their relationship to their ancestral lands. The Ogoni hold land in a past-present-future model, a “generational tenure,” whereby the

⁵⁸ *Id.* at 242.

⁵⁹ *See id.* at 244 (discussing the emergence of the coloniality of power).

⁶⁰ ALEJANDRO A. VALLEGA, *LATIN AMERICAN PHILOSOPHY FROM IDENTITY TO RADICAL EXTERIORITY* 105 (Bret W. Davis, D. A. Masolo, and Alejandro Vallega, eds., 2014).

⁶¹ JUDITH HERMAN, *TRAUMA AND RECOVERY* 8 (1997).

living owner holds the land both in trust for future generations and also to honor past generations⁶². A present owner cannot make a decision about the land without considering his or her ancestors and future generations. Being an Ogoni landowner represents a profound responsibility to one's family (living, dead, and unborn), as well as to the larger community and the land itself.

The normativity of linear notions of time are reflected not just in Western legal systems, but in mainstream Western psychology. As an example, the framework of Post Traumatic Stress Disorder ("PTSD") exemplifies the Western linear notion of time.⁶³ PTSD, based on the assumption that human memory functions linearly, pathologizes experiences of memory that intrude from the past into the present. The experience of linear time and memory is treated as a "natural" function even though conceptions of temporality are deeply cultural. The "past" becomes a container that keeps memory in "place," and a healthy memory is considered one that keeps trauma ordered in the past. The PTSD framework breaks down symptoms into three main categories: hyperarousal, intrusion, and constriction.⁶⁴ "Hyperarousal reflects the persistent expectation of danger; intrusion reflects the indelible imprint of the traumatic moment; constriction reflects the numbing response of surrender."⁶⁵ These symptoms create sequelae that interrupt the ability of a survivor to function in the present. Treatments therefore often focus on reducing symptoms by assisting survivors to "place" the traumatic event into the past. While the appropriateness of this treatment is questionable in the West, it becomes even more problematic in other cultural contexts where time and memory are understood differently.

Vallega's theory of the "coloniality of time" presents important questions for the fields of psychology and law. Colonized communities were subjugated to a "past" as a way to sever them from their own histories, languages, and culture.⁶⁶ Colonizers filled the vacuum created by these mass erasures with their own culture, language and histories. It is worth considering whether this abuse lingers in Western psychology's conception of time. A linear understanding of time may inhibit a survivor's complex relationship to events that have occurred, pathologizing ongoing grief and anger.⁶⁷ More troubling, it may encourage individuals and the larger collective to minimize harms because they can be rendered "momentary" instead of ongoing. The PTSD framework also assumes an individual subject who has experienced a trauma that is entered into an individual history; a framework that may be poorly suited to articulate and heal collective and generational traumas.⁶⁸ Decentering the concept of linear time opens the space to holistically address and accompany individuals and communities that experience ongoing and historical abuses like institutionalized racism.

The Western conception of linear time is fundamental to the Western legal system, and this focus on linear time has troubling ramifications for victims of abuse. The many rules limiting a victim's ability to bring a claim in domestic courts, such as statutes of limitations, rely on a linear conception of

⁶² Telephone Interview by Charity Ryerson with Kornebari Nwike (June 28, 2017). Nwike is an Ogoni refugee and leader in the Movement for the Survival of the Ogoni People USA. He resides in the United States where he is completing a PhD in Accounting.

⁶³ See J.P. LEDERACH, & A.J. LEDERACH, A.J. WHEN BLOOD AND BONES CRY OUT 9 (2010).

⁶⁴ See Herman, *supra* note 61, at 35.

⁶⁵ *Id.* at 35.

⁶⁶ A. VALLEGA, LATIN AMERICAN PHILOSOPHY FROM IDENTITY TO RADICAL EXTERIORITY 105–06 (2014).

⁶⁷ Bessel van der Kolk with Lisa Najavits, *Interview: What is PTSD Really? Surprises, Twists of History, and the Politics of Diagnosis and Treatment*, 69 J. CLINICAL PSYCHOL. 516–22 (2013).

⁶⁸ C. SHARPE, IN THE WAKE ON BLACKNESS AND BEING 14 (2017).

time that disproportionately excludes claims by victims from communities with non-Western, nonlinear understandings of time. This is not to say that statutes of limitations should be abolished—they protect the rights of the accused and are a method of limiting claims in overburdened legal systems. But transitional justice mechanisms, which have greater flexibility to define the time period covered and the relationship to the affected community’s understanding of time, may offer a conflict resolution process to victims of corporate crime that is more appropriate to victims’ needs than a domestic legal process with comparatively unyielding procedural rules.

While these decolonial frameworks are important tools for understanding the needs of victims worldwide, the Ogoni example is particularly illustrative due to the Ogoni notions of property and time. As detailed above, the social, cultural, and economic rights of the Ogoni have been radically damaged through a complex array of actors: former colonizers, current and former Nigerian state actors, current and former foreign corporate actors, and a series of juridical actors that have provided little meaningful compensation for the losses the Ogoni have suffered. Massive and repeated resource extraction has led to the ongoing destruction of entire sections of Ogoniland, disrupting and often outright preventing the Ogoni from living with the land, and from the practices of fishing, farming, and community life that have sustained them for generations.

FAILURE OF THE GLOBAL LEGAL SYSTEM

The Ogoni case provides a clear example of the failure of domestic and international legal regimes to confront both their Western epistemological assumptions as well as the colonial legacy of corporate abuse, thereby failing to adequately address crimes committed by transnational companies. This section provides a brief overview of the many legal strategies the Ogoni people have pursued across the globe to obtain reparations from Shell, and identifies the ongoing challenges to corporate accountability in both domestic and international fora. The Ogoni have been unusually determined in their pursuit of justice, testing novel theories and using little-used forums. While their efforts have resulted in reparations for some Ogoni victims, they also, perversely, have resulted in dramatically limiting the scope of the ATS, the primary statute used in the United States to litigate human rights claims against corporate wrongdoers. Similarly, an Ogoni-related case pending before the UK Supreme Court, discussed below, could impact the rights of victims in their claims against UK parent companies. The many challenges to redress for the Ogoni (including cultural, historical, and jurisdictional) illustrate the need for contextualized and culturally appropriate means of justice.

African Commission on Human and People’s Rights

Shortly after the killing of the Ogoni 9, the Ogoni brought the case to the African Commission on Human and People’s Rights, challenging the Nigerian government’s persecution of Ogoni activists and the violation of economic, social, and cultural rights of the community.⁶⁹ While the Commission found in favor of the Ogoni communities, determining that seven of the rights protected in the

⁶⁹ Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) / Nigeria, Communication 155/96, African Commission on Human and Peoples’ Rights [Afr. Comm’n. H.P.R.] ¶¶ 10, 67 (Oct. 27, 2001), http://www.achpr.org/files/sessions/30th/comunications/155.96/achpr30_155_96_eng.pdf [<https://perma.cc/2CRA-3BZP>].

African Charter had been violated,⁷⁰ Nigeria did not participate in the process and the remedies were unenforceable.⁷¹

***Kiobel* and other US Cases**

Several Ogoni refugees, now resettled in the US, have sued Shell in US courts for some of the human rights harms the Ogoni community has suffered. The earliest cases, consolidated into *Wiwa v. Royal Dutch Petroleum*, were filed by Earthrights International and the Center for Constitutional Rights in the United States in the late 1990s on behalf of relatives of the Ogoni 9 and others tortured or murdered with the alleged participation of Shell.⁷² The plaintiffs brought claims under the ATS, the Torture Victim Protection Act (“TVPA”),⁷³ and the Racketeering Influenced Corrupt Organizations Act (“RICO”). These cases focused only on the murder of the Ogoni 9, and not on the environmental devastation of Ogonilands, because the ATS gave federal courts jurisdiction to hear only violations of the “law of nations,” which was interpreted by the courts to include a very narrow set of harms—torture, extrajudicial killing, genocide, and crimes against humanity. The case settled for \$15.5 million USD in 2009.⁷⁴ According to the plaintiffs’ press release issued after the settlement, “The settlement is only on behalf of the individual plaintiffs for their individual claims. It does not resolve outstanding issues between Shell and the Ogoni people, and the plaintiffs did not negotiate on behalf of the Ogoni people.”⁷⁵ A portion of the settlement also went toward a trust to fund initiatives for the Ogoni people.⁷⁶

In 2009, a suit similar to the *Wiwa* case was filed by another group of Ogoni survivors of the Ogoni 9, again focusing on the murders and not the environmental harms. This case, *Kiobel v. Royal Dutch Petroleum*, has a complicated history and has been discussed in great detail in other scholarship.⁷⁷ In short, the case put two issues before the Supreme Court: (1) whether corporate liability existed under the ATS, and (2) whether the federal presumption against extraterritoriality⁷⁸ applied to the ATS. The Court made its decision on the latter question, finding that claims under the ATS must “touch and concern the territory of the United States . . . with sufficient force to displace the

⁷⁰ *Id.*

⁷¹ Bahame Tom Nyanduga, Conference paper, *Perspectives on the African Commission on Human and Peoples’ Rights on the occasion of the 20th anniversary of the entry into force of the African Charter on Human and Peoples’ Rights*, 6 AFR. HUM. RTS. L. J. 255, at 261 (2006, http://www.ahrlj.up.ac.za/images/ahrlj/2006/ahrlj_vol6_no2_2006_bahame_tom_nyanduga.pdf [<https://perma.cc/9ABM-MQR9>] (Calling the Ogoni decision “remarkable” and stating that a “challenge to the African Commission — and a daunting challenge for that matter — is the lack of enforceability of its decisions. The lack of enforceability arises from the fact that the African Charter does not provide for a specific provision or mechanism to ensure that Commission’s decisions are binding. Article 52, which relates to the inter-state communication procedure, requires the Commission to try all appropriate means to reach an amicable solution, failing which it is required to prepare a report and communicate it to the AU Assembly with such recommendations as it deems useful.”).

⁷² *Wiwa v. Royal Dutch Petroleum*, 226 F.3d 88 (2d Cir. 2000), *cert. denied*, 532 U.S. 941 (2001).

⁷³ The U.S. Supreme Court has since limited the TVPA to apply only to natural persons, not legal entities. *See* *Mohamad v. Palestinian Auth.*, 566 U.S. 449 (2012).

⁷⁴ Press Release, Center for Constitutional Rights, Settlement Reached in Human Rights Cases Against Royal Dutch/Shell (June 8, 2009), <https://ccrjustice.org/home/press-center/press-releases/settlement-reached-human-rights-cases-against-royal-dutchshell> [<https://perma.cc/QSB2-QPMB>].

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *See, e.g.*, Roger P. Alford, *The Future of Human Rights Litigation After Kiobel*, 89 NOTRE DAME L. REV. 1749 (2014).

⁷⁸ “It is a longstanding principle of American law ‘that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.’” *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) (quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949)).

presumption against extraterritorial application.⁷⁹ Lower courts have interpreted this language to mean that if the human rights abuse occurred outside of the United States, US courts lack jurisdiction to hear the claim, even where the decision to violate human rights took place in the United States.⁸⁰ For human rights advocates, this decision was a major blow because it effectively wiped out the vast majority of international human rights cases against corporations in US courts. Were the original *Wina* case heard today, it would likely fail under the *Kiobel* reasoning.⁸¹

One recent decision stands alone in finding that domestic “aiding and abetting” could satisfy the *Kiobel* “touch and concern” test. In *Doe v. Nestle*, the Ninth Circuit considered whether US and foreign corporations’ conduct, allegedly aiding and abetting child trafficking and modern slavery on cocoa farms in Cote d’Ivoire, was actionable after *Kiobel* and *Jesner*.⁸² Plaintiffs now must amend their complaint to show how particular US entities engaged in aiding and abetting from the United States, a significant hurdle without considerable discovery into corporate structure and decision-making. If this decision is not overturned on appeal, it could pave the way for a limited category of ATS cases to survive.

UK Cases

Ogoni plaintiffs have had greater success in the United Kingdom, though UK courts are still considering parent company liability questions that will determine whether this line of cases has potential moving forward. Approximately 15,000 members of the Ogoni Bodo community filed a case in 2012 in the UK related to two large Shell oil spills in 2008 and 2009.⁸³ In a major victory for the Ogoni, the case settled in 2015 for \$84 million.⁸⁴ In that case, the plaintiffs voluntarily dismissed Royal Dutch Shell (“RDS”) as a defendant in exchange for Shell’s Nigerian subsidiary, SPDC, consenting to jurisdiction.

Efforts targeted specifically at RDS as the parent have met more resistance. The Bille (2,000 members) and Ogale (40,000) communities filed claims in the UK in 2016, alleging that RDS was

⁷⁹ *Kiobel v. Royal Dutch Petro. Co.*, 569 U.S. 108, 124–25 (2013).

⁸⁰ For example, in *Cardona v. Chiquita Brands Int’l*, 760 F.3d 1185 (11th Cir. 2014), plaintiffs alleged, based in part on Chiquita’s plea agreement with the United States government, that Chiquita made the decision to fund the Colombian paramilitaries who murdered their family members from their boardroom in the United States. After a dismissal at the Eleventh Circuit based on *Kiobel*, the Supreme Court denied plaintiffs’ petition for certiorari in 2015. *See* 760 F.3d 1185 (11th Cir. 2014), *cert. denied*, 135 S. Ct. 1842 (2015).

⁸¹ The ATS was limited further in 2018 in the Supreme Court’s ruling in *Jesner v. Arab Bank*. *See In re Arab Bank, PLC Alien Tort Statute Litig.*, 822 F.3d 34 (2d Cir. 2016). The *Jesner* Court found that foreign corporations could not be liable under the ATS—a ruling that would have provided yet another basis to dismiss the *Kiobel* plaintiffs’ suit. The Department of Justice wrote an *amicus curiae* brief in support of neither party to the *Jesner* case. *See* Brief for the United States as Amicus Curiae Supporting Neither Party, *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018) (No. 16-499), 2017 WL 2792284. In the brief, the Department invoked its previous argument in support of the plaintiffs in the *Kiobel* case that the Second Circuit was wrong to hold that corporations lack liability under the ATS. *Id.* at *5. However, the Department also called into question whether the plaintiffs in *Jesner* could overcome the presumption against extraterritoriality by arguing that Arab Bank partook in particular US banking transactions. *See id.* at *28–29.

⁸² *Doe v. Nestle, S.A.*, 906 F.3d 1120, 1126–27 (9th Cir. 2018).

⁸³ *The Bodo Community and Others v. The Shell Petroleum Development Company of Nigeria Ltd.* [2014] EWHC (TCC) 1973 (Eng.).

⁸⁴ AMNESTY INT’L & CTR. FOR THE ENV’T, HUMAN RIGHTS & DEV. (CEHRD), *THE TRUE “TRAGEDY”: DELAYS AND FAILURES IN TACKLING OIL SPILLS IN THE NIGER DELTA* 5 (2011), <https://www.amnestyusa.org/files/afr440182011en.pdf> [https://perma.cc/SDT4-9D97].

liable for the acts and/or omissions of SPDC.⁸⁵ Following the publication of the UNEP report,⁸⁶ in which the Ogoni territory was found to have “the most serious case of groundwater contamination” in Ogoniland⁸⁷ and that the people of Ogoni were drinking water containing carcinogenic benzenes at over 900 times above the World Health Organization guidelines,⁸⁸ King Emere Godwin Bebe Okpabi, representing himself and around 45,000 Ogoni farmers, sued both RDS and SPDC in British courts for damages arising from “decades of historical pollution” and a failure to adequately respond to the over 40 oil spills in Ogoni territories.⁸⁹

The claimants alleged that RDS owed them a duty of care because it controlled the operation of pipelines and infrastructure in Nigeria from which the leaks occurred,⁹⁰ or, in the alternative, it assumed a direct responsibility to protect the claimants from the environmental damage caused by the leaks.⁹¹

Shell argued in court that:

“if the claimants' lawyers are correct as to the existence of this novel duty of care, [Royal Dutch Shell] and many other parents of multinational groups will be liable to the many hundreds of millions of people around the world with whom their subsidiaries come into contact in the ordinary course of their various operations . . . [which] would constitute a radical if not historic expansion of the law and open the floodgates to litigation on an unprecedented scale.”⁹²

The court concluded that RDS was merely a holding company with no duty of care toward the claimants and dismissed the case.⁹³ The claimants appealed, and the dismissal was upheld.⁹⁴ A petition for leave to appeal is pending before the UK Supreme Court.⁹⁵

The court's determination that RDS had no duty of care toward Nigerian farmers, despite the fact that the parent company's profits are derived almost entirely from the activities of its operating

⁸⁵ His Royal Highness Emere Godwin Bebe Okpabi and Others v. Royal Dutch Shell PLC and Shell Petroleum Development Company of Nigeria Ltd. [2017] EWHC (TCC) 89 (Eng.).

⁸⁶ U.N. ENV'T. PROGRAMME, *supra* note 22.

⁸⁷ *Id.* at 11.

⁸⁸ *Id.* At 10.

⁸⁹ John Vidal, *Ogoni King: Shell Oil is killing my people*, THE GUARDIAN, Dec. 3, 2016, <https://www.theguardian.com/world/2016/dec/03/ogoni-king-shell-oil-is-killing-my-people> [<https://perma.cc/XQ9D-UK4X>].

⁹⁰ His Royal Highness Emere Godwin Bebe Okpabi and Others v Royal Dutch Shell PLC and Shell Petroleum Development Company of Nigeria Ltd. [2017] EWHC (TCC) 89, [74] (Eng.).

⁹¹ *Id.* at ¶ 116.4

⁹² *Shell Sued in UK for 'decades of oil spills' in Nigeria*, AL JAZEERA, Nov. 22, 2016, <https://www.aljazeera.com/news/2016/11/shell-sued-uk-decades-oil-spills-nigeria-161122193545741.html> [<https://perma.cc/36UM-LSMY>].

⁹³ His Royal Highness Emere Godwin Bebe Okpabi and Others v Royal Dutch Shell PLC and Shell Petroleum Development Company of Nigeria Ltd. [2017] EWHC (TCC) 89, [118] (Eng.).

⁹⁴ Emere Godwin Bebe Okpabi and Others (Suing on Behalf of Themselves and The People of Ogoni Community) v. (1) Royal Dutch Shell Plc [2018] EWCA (Civ.) 191, [209] (Eng.).

⁹⁵ *Nigerian Villagers Vow to take Shell to the UK Supreme Court*, LEIGH DAY, Feb. 14, 2018, <https://www.leighday.co.uk/News/News-2018/February-2018/Nigerian-villagers-vow-to-take-fight-over-Shell-oi> [<https://perma.cc/8ZQA-ZX8B>]. Another case, recently argued before the Supreme Court, Vedanta Resources PLC v. Lungowe. [2017] 0185 (Eng.), may determine some issues related to parent company liability before the Bille and Ogoni communities' petition for leave to appeal is determined.

subsidiaries around the world, demonstrates the limitations of the common law tort principle of “duty of care.” Advocates have argued for an expanded duty of care for cases involving corporate human rights violations.⁹⁶ The current limited scope of duty of care and parent company liability creates problematic incentives—it allows companies to write off harms to communities where they operate as externalities. Further, by determining that the duty of care did not extend all the way to the Nigerians, the British court passed the ball to Nigerian courts to adjudicate the crimes of Shell, a UK company. This is similar to the *Kiobel* court’s decision to pass the ball to Nigerian courts on jurisdictional grounds, despite the court’s personal jurisdiction over Shell in the US.

Dutch Cases

In 2012, Friends of the Earth, an environmental advocacy organization, and four Nigerian farmers filed three separate cases in the Netherlands related to pollution in the Niger Delta communities of Oruma, Goi, and Ikot Ada Udo.⁹⁷ The plaintiffs alleged that an oil spill polluted their farmland and fishponds, leaving them unfit for use, and that Shell was negligent because it failed to ensure that its subsidiary carried out oil production in Nigeria in a careful manner, although it was able and obligated to do so.⁹⁸ This case is still pending in Dutch courts.

Esther Kiobel and three other survivors of the Ogoni 9 filed yet another suit in Dutch courts in June 2017, attempting yet again to obtain reparations for the murders of the Ogoni 9.⁹⁹ That case, supported by Amnesty International, is ongoing.¹⁰⁰

OECD Guidelines for Multinational Enterprises

In addition to efforts in domestic courts, Niger Delta residents and communities filed two grievances before the Organization for Economic Cooperation and Development (“OECD”).¹⁰¹ The OECD provides a non-judicial grievance mechanism for victims of corporate abuse, allowing victims to file complaints at one of many National Contact Points (“NCP”) located in OECD member states.¹⁰² Advocates have criticized this process, arguing that the mechanism’s effectiveness hinges on the political will of the particular NCP, and few have shown interest in meaningfully pursuing these claims. Further, the mechanism is designed primarily to spur dialogue between

⁹⁶ See, e.g., Gwynne Skinner, *Rethinking Limited Liability of Parent Corporations for Foreign Subsidiaries’ Violations of International Human Rights Law*, 72 WASH. & LEE L. REV. 1769 (2015), <https://scholarlycommons.law.wlu.edu/whlvr/vol72/iss4/5> [https://perma.cc/64U8-XLRH].

⁹⁷ *Nigerian Farmers Sue Shell in Dutch Court*, GUARDIAN, Oct. 11, 2012, <https://www.theguardian.com/world/2012/oct/11/nigerian-farmers-sue-shell-dutch> [https://perma.cc/8VCN-BHSV].

⁹⁸ *Id.*

⁹⁹ *Nigeria: Shell Complicit in the Arbitrary Execution of the Ogoni Nine as Writ Served in Dutch Court*, AMNESTY INT’L (June 29, 2017), <https://www.amnesty.org/en/latest/news/2017/06/shell-complicit-arbitrary-executions-ogoni-nine-writ-dutch-court/> [https://perma.cc/2UPX-LT3M].

¹⁰⁰ *Id.*

¹⁰¹ In January 2011, complaints were filed with the UK and Dutch National Contact Points, focused in large part on Shell’s allegedly false representations about the extent of the harm and its role in creating it. See *Complaint to the National Contact Points under the Specific Instance Procedure of the OECD Guidelines for Multinational Enterprises*, AMNESTY INT’L (Jan. 25, 2011), <https://www.business-humanrights.org/sites/default/files/media/documents/oecd-complaint-against-shell-re-oil-pollution-in-nigeria-25-jan-2011.pdf> [https://perma.cc/DNW4-NTY9].

¹⁰² See OECD, OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 71–89 (2011), <http://mneguidelines.oecd.org/guidelines/> [https://perma.cc/V6ME-3FPB].

companies and victims of abuse, rather than provide remedy.¹⁰³ The Ogoni case supports these concerns: one case was concluded after some arguably unproductive dialogue, and the other was abandoned because the first case had required significant effort but lacked any beneficial outcome for the plaintiffs.

Incredibly, these efforts, spanning four countries as well as international fora, have not resulted in a restoration of Ogonilands to their prior state, nor have many of the victims been compensated monetarily for the extraordinary losses they suffered. The primary barriers to justice have been procedural, as cases have generally been dismissed on jurisdictional grounds.¹⁰⁴ While these cases have represented groups of Ogoni, the harms the Ogoni suffered have been translated through individualistic, Western legal systems. The collective harms suffered by the community, including the human impacts of the harms to the environment, have been neither remediated nor compensated.

This is a striking illustration of the current state of legal regulation in the global economy, showing that transnational corporations enjoy the rights afforded them by domestic and international legal regimes (including those that protect their assets and real property, intellectual property, and enforce their contracts), while evading responsibilities that would attach were they natural persons. While the Ogoni people suffer starvation, poverty and displacement, Shell continues to thrive as the world's second largest oil company.

TRANSITIONAL JUSTICE PRAXIS OF CORPORATE ACCOUNTABILITY

The Ogoni case illustrates the ways in which both domestic and international legal systems have failed to hold corporate actors accountable for even the most egregious crimes, in part due to the inability or unwillingness of the Western legal system to provide contextual, culturally appropriate process and remedy to victims of corporate crime. While certain failures in the justice system have obvious fixes, advocates looking to develop new approaches to transitional justice capable of holding corporations accountable are nonetheless often left in a double bind. On the one hand, efforts to reform the legal institutions that have failed to bring justice to groups like the Ogoni risk re-entrenching the colonial structures that are arguably inseparable from the international legal order that has enabled the conditions under which corporate crimes occur.¹⁰⁵ On the other hand, Western legal justice—when effective—provides powerful discipline to corporations and is capable of dramatically altering the incentive structures that motivate corporate actors so that ongoing harms can be stopped. How can transitional justice fill the gap created by domestic legal systems' failure to orient toward those on the margins and account for the structures of inequity that enable corporate impunity?

¹⁰³ See OECD WATCH, THE STATE OF REMEDY UNDER THE OECD GUIDELINES: UNDERSTANDING THE NCP CASES CONCLUDED IN 2017 THROUGH THE LENS OF REMEDY 2 (2018), https://www.oecdwatch.org/publications-en/Publication_4429/@/download/fullfile/The%20State%20of%20Remedy%20under%20the%20OECD%20Guidelines.pdf [<https://perma.cc/4DYB-S2CL>]. (“As non-judicial grievance mechanisms, NCPs are not equipped to deal with egregious cases of abuse, which are more effectively handled by judicial mechanisms with real sanctioning power.”).

¹⁰⁴ See, e.g., *Kiobel v. Royal Dutch Petroleum*, 569 U.S. 108, 124 (2013); *Doe v. Chiquita Brands International*, 2018 WL 497322 (D.N.J. Jan. 19, 2018); *His Royal Highness Emere Godwin Bebe Okpabi and Others v. Royal Dutch Shell PLC and Shell Petroleum Development Company of Nigeria Ltd.* [2017] EWHC (TCC) 89 (Eng.).

¹⁰⁵ See, e.g., Paulo Ilich Bacha, *Indigenous Peoples and the Legacies of Colonialism in International Criminal Law*, CRITICAL LEGAL THINKING (Oct. 7, 2015), <http://criticallegalthinking.com/2015/10/07/indigenous-peoples-legacies-of-colonialism-international-criminal-law/> [<https://perma.cc/R2DS-ZB3H>].

This section explores this question by first providing a brief summary of ongoing efforts to reform existing faults within domestic and international legal systems, namely through proposed reforms to the Rome Statute to include corporate liability in various ways. It then turns to propose a new legal strategy for transitional justice praxis, contemplating the ways in which transitional justice can interact with intellectual property law to ensure that the economic motivations of corporations are in alignment with the needs and interests of victims of corporate abuse.

Ongoing Efforts to Reform the Law

As discussed above, the current state of legal regulation in the global economy has created a situation where transnational corporations enjoy all the rights afforded to them by domestic and international legal regimes, but few of the responsibilities that they would be obligated to uphold were they natural persons. While there are a variety of ongoing efforts beyond the scope of this paper to reform the status quo, many emphasize reforming the Rome Statute so that corporations could be held liable for their crimes at the ICC.¹⁰⁶ This section briefly summarizes three different proposed reforms: (1) amending the Rome Statute to include corporate actors, (2) amending the Rome Statute to include hybrid civil-criminal penalty structures, and (3) creating corporate liability through domestic implementation of the Rome Statute.

The most direct reform seeks to amend the Rome Statute to expressly include corporate actors within the jurisdiction of the ICC.¹⁰⁷ When the Rome Statute was being drafted, the parties decided to leave corporations out of the jurisdiction of the ICC based on the rationale that domestic courts were better suited to handle claims of corporate criminal harm. The ATS was specifically touted as an example of a domestic statute capable of providing adequate civil damages for criminal violations of international law.¹⁰⁸ However, following *Kiobel*, the limited jurisdictional reach of the ATS has proven this to be a false hope. At the time of writing, the odds of passing such an amendment to the Rome Statute remain slim.¹⁰⁹

Another proposal seeks to amend the Rome Statute so that it would include hybrid civil-criminal penalty structures that would provide jurisdiction over tortious conduct of corporations traditionally handled by civil courts.¹¹⁰ The logic behind the proposal is rooted in the understanding that corporations are typically incentivized and disciplined by regulations and civil remedies as opposed to criminal liabilities.¹¹¹ By providing victims of a corporate crime the opportunity to attach a civil complaint to a criminal proceeding at the ICC, those victims could at least bring a corporation to justice as a civil party and receive monetary damages for such harm. However, at the time of writing, this proposal has not gathered much momentum at the ICC.

¹⁰⁶ See, e.g., Kaeb, *supra* note 2, at 381–96; Kolieb, *supra* note 10, at 600.

¹⁰⁷ See Aparac, *supra* note 2, at 42.

¹⁰⁸ See Kaeb, *supra* note 2, at 386.

¹⁰⁹ See Cain Burdeau, International Court Makes War of Aggression a Crime, COURTHOUSE NEWS SERVICE (Dec. 3, 2018), <https://www.courthousenews.com/international-court-makes-war-of-aggression-a-crime/>, [https://perma.cc/DT3E-BEHD] (showing a recent amendment to provide jurisdiction over the “crime of aggression” was met with considerable opposition and passed only with extremely limited reach).

¹¹⁰ Kaeb, *supra*, note 2, at 387.

¹¹¹ See Scheffer, *supra* note 2, at 38.

Domestic reform offers another potential solution.¹¹² Several countries, including Australia, Canada, and France, have incorporated the Rome Statute into their domestic legal system without carving corporations out from the Statute's jurisdictional reach.¹¹³ Further, recent legal developments including the French Duty of Vigilance law and, to a lesser extent, the UK Modern Slavery Act, are examples of domestic legislation geared toward addressing supply chain abuses. In theory, such practice could offer a viable path toward meaningful corporate accountability. However, it remains to be seen whether such practices will be more widely adopted or whether the implementing legislation could ultimately be undermined by judicial doctrines that seek to limit extraterritorial jurisdiction, as seen with *Kiobel* in the U.S.

Each of these three reforms remains vulnerable to the ever-growing influence of transnational corporations on state actors. In the current political climate, it is difficult to imagine how the parties to the Rome Statute could gain the political capital necessary to agree to either of the proposed amendments. At a domestic level, countries that have achieved a greater degree of corporate accountability than their neighbors may risk corporate flight with corporations relocating their operations to jurisdictions with less risk of criminal liability.

To these ends, ongoing efforts to hold corporations accountable through legal regimes like the Rome Statute are at once essential and insufficient. Corporations themselves, not just individual officers, must be held liable for their crimes if victims of corporate abuse are to access justice.¹¹⁴ Indeed, if corporations do not face any liability, they have little reason to reform their behavior.¹¹⁵ The lack of criminal liability for corporations and the failure of civil causes of action such as the ATS, TVPA, and RICO to provide meaningful justice have prompted efforts that focus on criminal reform. However, an exclusive focus on criminal liability for large scale corporate abuse risks overlooking other avenues that could better address the structural injustices that underlie the economic motivations of corporations to engage in systemic human rights abuse and environmental destruction in the first place. If transitional justice praxis is to engage in holistic redress, it must include new legal strategies that extend beyond criminal law.

Employing Traditional and Transitional Systems of Justice for Reparation of Corporate Harms

To provide a form of justice to the Ogoni that accounts for colonial legacies and comports with Ogoni notions of justice, the Ogoni justice system itself is an extraordinary resource. The Ogoni maintain a fully functional justice system that is separate from, but recognized by, the Nigerian judiciary.¹¹⁶ Complaints are heard by chiefs (acting as judges) and juries at the village or kingdom level.¹¹⁷ Ogoni chiefs can adjudicate conflicts between a member of the Ogoni community and an

¹¹² See Kolieb, *supra* note 10, at 600.

¹¹³ *Id.*

¹¹⁴ See Green, *supra* note 10, at 518–519 (“[A] system should not be created or reinforced that allows certain individuals to be the sacrificial lambs for more widespread corporate behavior when [it is] the corporation as a whole that must be held accountable... The standard of superior responsibility does not undercut corporate institutional liability. Together, these two forms of potential liability form important complementary pieces of a legal structure that can provide greater accountability for corporate violators and deter future violations.”).

¹¹⁵ Kaeb, *supra* note 2, at 382.

¹¹⁶ Interview with Kornebari Nwike, *supra* note 62.

¹¹⁷ *Id.*

outsider if the conflict took place on Ogoni soil.¹¹⁸ This system has the power to fine, banish, or sanction a wrongdoer found guilty of a crime, but cannot imprison or engage in corporal punishment.¹¹⁹ The penalties are relatively lenient by the standards of ordinary justice, generally addressing property disputes with demarcation of property lines only, and violent crime with a period of banishment from the community, or a sanction prohibiting other community members from doing business with the wrongdoer.¹²⁰ If a party is dissatisfied with a judgment, he or she can take the case to the Nigerian justice system, where the Ogoni judgment is admitted as evidence and the chief (acting as judge) is invited by the Nigerian court to testify as a witness.¹²¹

Non-Ogoni are not subject to the Ogoni justice system, meaning that foreign corporations are not subject to the jurisdiction of any Ogoni chief. Nor would the remedies available under the Ogoni justice system be sufficient to remedy the harm suffered or deter future abuse by the company. Similarly, as noted above, transitional justice mechanisms have not historically recognized commercial entities as subjects, despite their greater flexibility and adaptability to local customs. But both of these traditions hold significant promise for providing access to remedy for victims of corporate abuse.

For example, a decolonial transitional justice program could be created based on the traditional Ogoni justice system. A hypothetical court, we will call it the Special Court for the Niger Delta, could have personal jurisdiction over both state actors and legal entities to adjudicate the environmental destruction of Ogonilands and the related human rights violations. This Court could reflect the Ogoni view of time, generational and collective land tenure, and the role of Shell's intervention in Nigeria as an extension of British colonialism. Following a truth commission process, Shell's role, along with the role of the Nigerian government in Shell's abuses, could be adjudicated by chiefs and a jury of the Ogoni.

In dealing with remedy, however, Western law will have to play a role. The Ogoni system has not dealt with transnational companies, themselves a product of the Western legal system. Many Ogoni view drilling by foreign corporations and the Nigerian state-controlled oil company as wholly illegitimate and find the very practice inconsistent with generational land tenure.¹²² Some combination of monetary compensation and injunctive relief—for example, forcing Shell and SPDC to remove all oil infrastructure from the territory—would provide partial redress, but would fail to redress the generational harms.

Other possible forms of remedy could include paying a tax on all oil-related revenues to the communities from which the oil is extracted, suspension of all drilling rights in Nigeria, a corporate death penalty (revoking Shell's and its subsidiaries corporate charters in Nigeria), and/or the Ogoni people could obtain an interest in Shell's intellectual property, discussed below, resulting in an ongoing tax to the Ogoni to incentivize Shell to innovate in sustainable ways.

A New Form of Remedy

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

Intellectual property (“IP”) law has long been associated with colonialism.¹²³ IP generally refers to the system of laws that transform knowledge from a non-rival good into a form of intangible property, such as a patent, copyright, trademark, or trade secret. The notion of exclusive knowledge and intangible property emerged under the Elizabethan era and is alien to many cultures around the world that view knowledge as a part of humanity’s collective heritage.¹²⁴ Nevertheless, in today’s economy, IP is recognized as enormously valuable to large, multinational corporations.¹²⁵

Legal strategies involving IP law and innovation policy offer promising potential for transitional justice praxis. Transitional justice brings communities together to reflect upon the repressive past from which they are emerging and the future into which they hope to evolve. It includes mechanisms outside of the typical justice system, which are necessary when the justice system has proven to be inadequate to redress large-scale or systematic human rights abuses. Intellectual property and innovation policy are not typical subjects of conversation in transitional justice processes, but their role (or lack thereof) is worth reconsidering.

It is important to note that the ideology behind the very notion of IP is in direct conflict with many indigenous notions of ownership. The idea that a person could have a right to exclude others from land and other property, let alone an idea, is not universal, and in this case, non-native to the Ogoni worldview. However, without sanctioning the Western notion of IP, we propose that the Ogoni and other affected communities could benefit by obtaining a stake in the offending company’s IP portfolio.

IP generally refers to the rights granted by patents, copyright, trademark and trade secret law to exclude others from commercializing intellectual creations, which can be worth billions of dollars to large corporations.¹²⁶ Innovation policy works in tandem with IP and can be generally understood as the policies a country or community enacts to economically incentivize IP-protected innovation, which drives the creation of new and desirable economies (e.g., an economy built around new intellectual creations that works in harmony with the environment and human development, etc.). If combined, IP and innovation policy would offer an economically powerful way for transitional justice praxis to map out the ways in which justice, property, and time intersect. IP defines the temporal boundaries of one’s right to exclude others from innovation and a transitional justice process could examine how reforms to innovation policy could ensure that existing IP be used to build a better, more desirable future economy for the entire community.

For example, imagine if transitional justice processes empowered the Ogoni to utilize innovation policy to rehabilitate Shell’s economic motivations. If Shell were ordered (whether through a sentence of the Court or national legislation) to make the use of its IP contingent on sustainable

¹²³ See Shahrukh Khan, *A New Kind of Colonialism*, HARV. INT’L REV. (March 23, 2014), <http://hir.harvard.edu/article/?a=3235> [<https://perma.cc/RN3-MNAG>].

¹²⁴ *An explanatory note concerning the origins of the United Kingdom intellectual property regime*, See WORLD INTELLECTUAL PROP. ORG. (Dec. 3, 2018), <https://www.wipo.int/wipolex/en/notes/gb.pdf> [<https://perma.cc/5WRF-BCMS>]; see also Khan, *supra* note 123, at 2.

¹²⁵ See *Aon Launches Insurance Solution for Intellectual Property Liability*, AON MEDIA CTR. (June 26, 2018), <http://aon.mediaroom.com/news-releases?item=137726> [<https://perma.cc/UB2J-DQPL>] (“With nearly 85 percent of the value of the S&P 500 represented by intangible assets, a company’s IP, which includes patents, copyright, trademarks, trade secrets and know how, can be some of its most valuable assets.”).

¹²⁶ The value of IP assets can even surpass the value of physical assets for certain enterprises. See *The Value of Intellectual Property Assets*, WORLD INTELL. PROP. ORG., http://www.wipo.int/sme/en/ip_business/ip_asset/value_ip_assets.htm [<https://perma.cc/ZYX5-3BEQ>] (last visited June 22, 2017).

business practices, including affected communities as intended beneficiaries of those conditions, any entity (including its Nigerian subsidiary) using its IP would be subject to suit if human rights or environmental abuse occurred.¹²⁷ Alternatively, the state could refuse to protect a company's IP interests, rendering its IP without value, if the company used its IP in violation of certain universal norms.¹²⁸

In theory, this could enable the Ogoni to take an economic interest in Shell's massive IP portfolio. Shell boasts to its investors about the value of its trademark, the Shell pecten, and regularly touts the strength of its patent portfolio, which includes at least 11,500 granted patents or pending patent applications.¹²⁹ Shell's trademark value alone is estimated to be worth \$36.8 billion,¹³⁰ purportedly driven by the goodwill and brand recognition that Shell has amongst consumers. The exact value of Shell's patent portfolio is difficult to discern, but consider that in 2004 Shell was ordered to pay Dow Chemical \$154 million in a dispute over only three patents.¹³¹ One can reasonably assume that Shell's intellectual property is worth something on the order of hundreds of millions, if not billions, of dollars to Shell and its investors.

Through a transitional justice process, Shell's IP portfolio could be identified as a useful fund for economic reparations. As discussed above, Shell has paid approximately \$100 million to Ogoni people through settlements in the *Wiva* case in 2009 (\$15.5 million) and the case brought by the Bodo community in the UK (\$85 million).¹³² Considering that Shell records annual revenues of \$200 billion to \$500 billion USD,¹³³ such payouts are unlikely to economically incentivize Shell to correct its behavior. Today, Shell invests more than \$1 billion *annually* in its own research and development and notes that "[t]echnology and innovation are essential to [Shell's] efforts to meet the world's energy demands in a competitive way."¹³⁴ Put into context, Shell's annual R&D budget is more than ten times *per year* than what Shell has made in total payouts to the Ogoni thus far.¹³⁵

¹²⁷ An example of contract language that could be used in a transitional justice process to trigger such an order can be seen in Corporate Accountability Lab's +CAL licenses, which create an IP morals clause and third-party beneficiary standing for communities affected by supply chains that utilize IP. See +CAL *Ethical IP Licensing*, CORPORATE ACCOUNTABILITY LAB (Dec. 3, 2018), <https://legaldesign.org/cal-ethical-ip/> [<https://perma.cc/NUN7-24AW>].

¹²⁸ The state regularly refuses to protect a company's IP interests if it discovers some legal deficiency in the creation, procurement, or enforcement of the IP. For example, the state will not enforce a company's patent right if the patent is considered to be essential to an industry standard and the company refuses to license the patent on fair, reasonable, and non-discriminatory terms ("FRAND" terms). See Jeffrey I. D. Lewis, *What is 'FRAND' All About? The Licensing of Patents Essential to an Accepted Standard*, CARDOZO LAW (2014), <https://cardozo.yu.edu/what-%E2%80%9Cfrand%E2%80%9D-all-about-licensing-patents-essential-accepted-standard> [<https://perma.cc/8BS9-X957>].

¹²⁹ See, e.g., ROYAL DUTCH SHELL PLC, ANNUAL REPORT AND FORM 20F FOR THE YEAR ENDED DECEMBER 31, 2016, at 11, <https://reports.shell.com/annual-report/2016/servicepages/download-centre.php> [<https://perma.cc/38VJ-Q26V>].

¹³⁰ *Brand value of top oil and gas companies worldwide in 2017*, STATISTA.COM, <https://www.statista.com/statistics/536946/brand-value-of-the-leading-oil-and-gas-companies-worldwide/> [<https://perma.cc/BX8J-S8GL>].

¹³¹ See Marius Meland, *Judge orders \$154M judgment v. Shell Oil in Union Carbide patent suit*, LAW 360 (June 17, 2004), <https://www.law360.com/articles/1623/judge-orders-154m-judgment-vs-shell-oil-in-union-carbide-patent-suit> [<https://perma.cc/2ENG-ZWHX>].

¹³² See Center for Constitutional Rights, *supra* note 73; AMNESTY INT'L, *supra* note 83.

¹³³ See ROYAL DUTCH SHELL, PLC, *supra* note 129, at 19.

¹³⁴ *Id.* at 11.

¹³⁵ See *id.* at 118 (Shell's expenditures for research and development in 2016 alone were \$1.014 billion. The \$100 million in payouts to date therefore constitute less than 10% of Shell's 2016 Research & Development budget.).

If transitional justice for the Ogoni were to include some meaningful form of economic reparations, utilizing Shell's IP value would be beneficial for at least two reasons. First, even a small percentage of Shell's IP value would readily surpass the \$100 million in settlement that Shell has paid thus far. Civil damages available under causes of action like the ATS, TVPA, and RICO are often limited by a corporate defendant's arguments that it simply cannot afford to pay for the costs of the vast social harms it has created. Legal doctrines like the statute of limitations, which limits the amount of time for which a court is willing to provide relief for some type of harm, likewise limit the ways in which civil damages create effective economic discipline on a corporation engaged in widespread abuse. But what if reparations were to be made off of Shell's projected future value, captured by the IP value resulting from Shell's technology and innovation, or through payment of a running IP royalty? Reparations available through Shell's IP value might provide the Ogoni with an ongoing tax derived from some interest taken in Shell's IP, which in turn would create an economic incentive for Shell to innovate itself into a more sustainable business model (thereby removing the tax).

Second, from Shell's perspective, a significant tax levied on its IP value due to its human rights and environmental abuses would create a strong economic incentive for Shell to innovate in ways that protect the human rights of the Ogoni and the health of Ogoniland moving forward. As a matter of innovation policy, one could understand the tax as a way of motivating Shell to invest "in itself" through technology and innovation that simultaneously benefits the autonomy and well-being of the Ogoni. As a matter of justice, this policy incentive can be understood simply as an application of the "Golden Rule" (i.e., rule of reciprocity). In the context of transitional justice, the Golden Rule is often described as an essential basis for the modern concept of human rights, and readily appears as a foundational ethic in pre-colonial and non-European philosophies.

As demonstrated by the Ogoni's inability to get justice for Shell's harm to the Ogonilands, Shell currently lacks a legally cognizable "Golden Rule" ethical commitment to the Ogoni. If transitional justice were to provide the Ogoni with some type of tax levied on Shell's multibillion dollar IP portfolio, Shell could enter into a Golden Rule commitment with the Ogoni that would be at least potentially sufficient to properly incentivize Shell to innovate a business path forward that protects the Ogoni and the Ogonilands.

Furthermore, implicating Shell's IP in transitional justice opens new paths for the Ogoni to decolonize the legal system that has failed to deliver them justice. As discussed above, the injustices that the Ogoni have experienced can be well understood through the lens of colonialism, particularly as it pertains to power, being, and time. The IP system itself has long been associated with European colonialism and was imposed by the British Empire on its subjects without regard for local notions of property rights.¹³⁶ As a consequence, many communities—including the Ogoni—have never exercised meaningful sovereignty over the setting of intellectual property standards or in conversations about how intellectual property should interface with the community and its well-being.¹³⁷ By integrating IP into transitional justice praxis, the Ogoni would be afforded the opportunity to reclaim their sovereignty over IP standards and to craft innovation policy that could enable IP to work in harmony with their own notions of property rights and the Ogoni traditional systems of justice.

¹³⁶ See Peter Drahos, *Developing Countries and International Intellectual Property Standard-Setting*, 5.5 J. WORLD INTELL. PROP. 765, 767 (2002).

¹³⁷ See *id.*; see also Kahn, *supra* note 123.

The creation of an IP tax would be the first process of its kind, so the Court would be well advised to tread cautiously so as to avoid the neocolonial patterns of behavior that have long accompanied international institutions involved in economic development across the Global South (for example, World Bank, IMF, World Trade Organization), especially in view of the colonial legacy of IP itself.¹³⁸ However, by incorporating the Ogoni notions of time and property into the Court's jurisprudence, the Court may ultimately serve a decolonial function by providing the Ogoni a first opportunity to exercise meaningful sovereignty over their relationship to intellectual property and the role it should have in their community moving forward. To these ends, the Court could be responsible for calculating the economic harms suffered by the Ogoni and awarding reparations through an interest in Shell's IP. Such an award could work in conjunction with transitional justice considerations for how the Ogoni could reshape their innovation policy to reclaim control of the economic conditions at issue across the Ogonilands. The specifics of how the tax would work would have to be discerned through the transitional justice process itself, but a variety of options would be available to best suit the needs of the Ogoni, whether through a direct tax on the IP, a transfer of control over portions of the IP to the Ogoni, an irrevocable license to the Ogoni wishing to use any of Shell's IP in their own economic development, a condition on the use of IP creating liability to any person harmed as a result of misuse, or something else.

CONCLUSION

No system will adequately hold corporations accountable for transnational harms if we do not collectively recognize the extent of corporate power and influence in contemporary society. Not only do corporations influence how we produce, consume, and communicate, highly paid corporate lobbyists exercise extraordinary influence in determining public policy all over the world. While it may at one time have been logical to exclude corporations from the jurisdictional mandate of international courts, corporations' expanded power and transnational presence raises the question: who will hold them accountable?

In this article, we have argued that (1) international courts have excluded commercial entities from their jurisdiction based on the mistaken assumption that domestic courts provide an adequate remedy to victims of transnational corporate abuse; (2) the case of the Ogoni people of the Niger Delta provides a striking example of extreme, unremediated human rights and environmental abuse by a company and the difficulty of obtaining remedy; (3) the legacy of colonialism results in a devaluing of the traditions, experiences, and needs of some affected communities, and is reflected in the types of remedy available and the treatment of victims in the process of seeking remedy; (4) corporate abuse, including corporate complicity in armed conflict, could be handled through a decolonial transitional justice process that reflects traditional views of time, being, history, and power, and in the case of the Ogoni, could integrate aspects of the Ogoni traditional justice system; and (5) new forms of remedy, such as placing human rights and environmental conditions on perpetrator company's intellectual property (IP), or providing the affected community a stake in the IP, should be developed to diversify options for victims and to meaningfully deter future abuse.

Just as Shell extended British colonialism in Nigeria, major agricultural, extractive, manufacturing, and fishing companies based in the Global North exploit the Global South in ways that mirror the history of colonial wealth transfer. These activities are governed by hundreds of domestic legal

¹³⁸ See Drahos, *supra* note 136, at 768; see also Kahn, *supra* note 123, at 14.

systems that largely reflect Western notions of justice and have served to protect corporate perpetrators largely through procedural and jurisdictional arguments.

The complexities of such systems and the subtle ways in which they operate can be best seen in the fact that most victims of corporate crime are *not* losing cases on the merits due to Western judicial bias in favor of corporations. Instead, their losses in court are most often due to Western legal procedure and doctrines of jurisdiction, which reflect Western-centric notions of time, property, and the nation state, without regard for the Western legal system's own role in perpetuating the injustice. The Ogoni's principal affiliation is Ogoni, not Nigerian, but their location within Nigeria defines which legal processes they have access to in a dispute against a foreign corporation.

Transitional justice can offer an alternative means of adjudicating the crimes of transnational companies. By providing a process and a venue that can reflect the cultural and legal traditions of harmed communities, transitional justice can help victims' groups reclaim sovereignty and power over the way in which their community achieves justice.