

Extra Legal

Enforcing Economic, Social, and Cultural Rights: A Stark Dichotomy

*By Scheagbe Mayumi Grigsby**

I. A Stark Dichotomy Between the U.S. Gulf Coast Oil Spill and Oil Extraction in Nigeria

On April 20, 2010, the *Deepwater Horizon* oil rig in the Gulf of Mexico burst into flames, dumping millions of barrels of oil into the Gulf.¹ The incident killed eleven people and caused irreparable harm to the environment and local economy.² Eventually, hundreds of plaintiffs filed suit against British Petroleum (BP) and others.³ A subsequent class action lawsuit resulted in a settlement of medical claims arising out of the spill and

* Juris Doctor, Class of 2015, Northeastern University School of Law. A version of this article was selected as the winner of the Valerie Gordon Memorial Book Award in 2013. The article is dedicated to the memory of Professor Hope Lewis, who was the driving force behind the establishment of the Valerie Gordon Memorial Book Award. Some people are born to be teachers. A great teacher inspires you to learn and also inspires you to act. Professor Hope Lewis was the best teacher this author ever had.

¹ Drew Griffin, Nelli Black & Curt Devine, *5 Years After the Gulf Oil Spill: What We Do (and Don't) Know*, CNN (Apr. 20, 2015), <http://www.cnn.com/2015/04/14/us/gulf-oil-spill-unknowns/>.

² *Id.* See also *Oil Spill's Impact Mostly Local*, CBS NEWS, http://www.cbsnews.com/2100-201_162-6625765.html (last visited Feb. 28, 2013).

³ *In re Oil Spill by Oil Rig Deepwater Horizon*, No. MDL 2179, 2013 WL 144042 (E.D. La. Jan. 11, 2013).

the ensuing clean-up effort amounted to approximately \$7.8 billion.⁴ As of May 6, 2015, BP had paid approximately \$5 billion to more than 62,000 businesses and individuals.⁵ On July 2, 2015, the U.S. Department of Justice announced that BP had agreed to pay the “largest environmental fine in U.S. history for the Gulf oil spill.”⁶ Pending judicial approval, BP has agreed to pay \$18.7 billion to Louisiana, Mississippi, Texas, and Florida over 18 years.⁷

By contrast, the Ogoni people, also victims of allegedly careless practices by oil conglomerates, have not been as fortunate.⁸ The Ogoni are an ethnic group residing in Nigeria’s Niger Delta.⁹ Shell and BP received a license to explore oil in 1938, granting them a monopoly in oil exploration.¹⁰ A Shell-BP venture discovered oil in the Bumu oil field on Ogoni land in 1958, however, crude oil production began earlier in December of 1957.¹¹ In the 1990’s, the Ogoni and other ethnic groups protested the oil companies, believing that the oil production on their land “left many communities more

⁴ John Schwartz, *Accord Reached Settling Lawsuit Over BP Oil Spill*, N.Y. TIMES (Mar. 2, 2012), http://www.nytimes.com/2012/03/03/us/accord-reached-settling-lawsuit-over-bp-oil-spill.html?_r=0. The agreement does not include the federal government or the state and local governments along the coast currently in litigation with British Petroleum (BP), the company that operated the oil rig. *Id.* “\$” as used in this article denotes U.S. dollars.

⁵ *June 8 Last Day to File Claims Related to BP Oil Spill*, THE BRADENTON TIMES (May 6, 2015), <http://thebradentontimes.com/environment-june-last-day-to-file-claims-related-to-bp-oil-spill-p12705-158.htm>.

⁶ Dominic Rushe, *BP set to pay largest environmental fine in US history for Gulf oil spill*, THE GUARDIAN (July 2, 2015), <http://www.theguardian.com/environment/2015/jul/02/bp-will-pay-largest-environmental-fine-in-us-history-for-gulf-oil-spill>.

⁷ *Id.*

⁸ See generally Richard Boele, Heike Fabig and David Wheeler, *Shell, Nigeria and the Ogoni. A study in unsustainable development: The story of Shell, Nigeria and the Ogoni people—environment, economy, relationships: conflict and prospects for resolution*, 9 SUSTAINABLE DEVELOPMENT 74 (2001).

⁹ Cyrili I. Obi, *Oil Extraction, Dispossession, Resistance, and Conflict in Nigeria’s Oil-Rich Niger Delta*, 30 CANADIAN J. OF DEV. STUD. 219, 227 (2010). See generally Michale Watts, *Resource curse? Governmentality, oil and power in the Niger Delta, Nigeria*, 9 GEOPOLITICS 50 (2004).

¹⁰ JEDRZEJ GEORGE FRYNAS, OIL IN NIGERIA: CONFLICT AND LITIGATION BETWEEN OIL COMPANIES AND VILLAGE COMMUNITIES 9 (2000).

¹¹ *Id.*

impoverished than before due to the destruction of crops, fish and community lands.”¹²

Nigeria is a middle-income country where 60% of government revenue comes from oil revenue accounts.¹³ 54% of Nigeria’s population lives in poverty.¹⁴ Corruption further exacerbates challenges associated with poverty,¹⁵ preventing Nigeria from addressing these issues and using its resources for social good because the resources go “into private pockets.”¹⁶ For example, the Nigerian federal government allocated only 1.4% of consolidated government expenditures in 2009 towards social programs such as contributory pensions, unemployment benefits, and other poverty-alleviation programs.¹⁷ Social protection is considered “all public and private initiatives that provide income or consumption transfers to the poor, protect the vulnerable against livelihood risks, and enhance the social status and rights of the marginalised; with the overall objective of reducing the economic and social vulnerability of poor, vulnerable and marginalised groups.”¹⁸ Nigeria spends a lower share of government expenditure on

¹² *Id.* at 46; *See also* John Boye Ejobowah, *Who owns the oil? The politics of ethnicity in the Niger Delta of Nigeria*, 47 AFR. TODAY 28 (2000); DONALD MWITURUBANU & JO-ANSIE VAN WYK, INST. FOR SEC. STUD., CLIMATE CHANGE AND NATURAL RESOURCES CONFLICTS IN AFRICA (2010), <http://www.issafrica.org/uploads/Mono170.pdf>. *See generally* Obi, *supra* note 10, at 230.

¹³ FRYNAS, *supra* note 11. *See also* JESSICA HAGEN-ZANKER & REBECCA HOLMES, OVERSEAS DEV. INST., SOCIAL PROTECTION IN NIGERIA (2012), <http://www.odi.org.uk/sites/odi.org.uk/files/odi-assets/publications-opinion-files/7583.pdf>; *Nigeria*, WORLD BANK, <http://data.worldbank.org/country/nigeria> (last visited Feb. 28, 2013); Andrew Bowman, *Nigeria’s budget: oil optimism pits spenders against savers*, FINANCIAL TIMES (Feb. 27, 2013), <http://blogs.ft.com/beyond-brics/2013/02/27/nigerias-budget-oil-optimism-pits-spenders-against-savers/>.

¹⁴ HAGEN-ZANKER & HOLMES, *supra* note 14, at 7-8. Approximately 20% of the population owns 65% of the national wealth, approximately 3.3 million people in Nigeria’s live with HIV/AIDS, and women suffer from high unemployment and a lack of access to health care. *Id.*

¹⁵ Corey Flintoff, *Clinton, In Nigeria, Talks Tough on Corruption*, NPR (Aug. 12, 2009, 5:17 PM), <http://www.npr.org/templates/story/story.php?storyId=111818587>.

¹⁶ *Id.*

¹⁷ HAGEN-ZANKER & HOLMES, *supra* note 14. *See also* JESSICA HAGEN-ZANKER & HEIDI TAVAKOLI, OVERSEAS DEV. INST. AN ANALYSIS OF FISCAL SPACE FOR SOCIAL PROTECTION IN NIGERIA (2012), <http://www.odi.org.uk/sites/odi.org.uk/files/odi-assets/publications-opinion-files/7580.pdf>.

¹⁸ STEPHEN DEVEREUX & RACHEL SABATES-WHEELER, INST. OF DEV. STUD., IDS WORKING

“social protection” than countries with less wealth, such as Ethiopia, Kenya, and Malawi.¹⁹

While the BP oil spill garnered worldwide attention, shock, and condemnation, the silent creeping emergency that the Ogoni experienced was equally devastating.²⁰ At the time, the Ogoni alleged that the oil companies disposed of toxic waste into the environment and local waterways.²¹ The Ogoni further claimed that the companies’ failure in maintaining their facilities led to careless spills close to their homes, contaminating the water, soil, and air.²² In response, there were violent shutdowns of the protest leading to clashes between the police and the Ogoni.²³ The Nigerian military commenced raids on villages that led to human rights violations.²⁴ Although Shell withdrew from Ogoni land in 1993, the Ogoni maintain that the company was complicit in violating their economic, social, and cultural (ESC) rights.²⁵ Furthermore, the Ogoni continue to allege that the Nigerian military assisted Shell in these violations.²⁶

For communities on the U.S. Gulf Coast, the BP disaster resulted in a diminution of certain similar rights, including the right to an adequate

PAPER 232, TRANSFORMATIVE SOCIAL PROTECTION iii (2004),
<http://www.ids.ac.uk/files/dmfile/Wp232.pdf>.

¹⁹ HAGEN-ZANKER & HOLMES, *supra* note 14, at 27 fig. 1.

²⁰ Elliott A. Norse & John Amos, *Impacts, Perception, and Policy Implications of the Deepwater Horizon Oil and Gas Disaster*, 40 ENVTL. L. REP. 11058, 11058-73 (2010).

²¹ *Id.*

²² Soc. and Econ. Rights Action Ctr. (SERAC) v. Nigeria, No. 155/96, Decision, African Commission on Human and Peoples’ Rights [Afr. Comm’n H.P.R.], ¶¶ 2, 50 (Oct. 27, 2001),
http://www.achpr.org/files/sessions/30th/comunications/155.96/achpr30_155_96_eng.pdf.

²³ Obi, *supra* note 9, at 219-36. *See also* MICHAEL WATTS, *Petro-Violence: Community, Extraction and Political Ecology of a Mythic Commodity*, in *VIOLENT ENVIRONMENTS* 189 (Nancy L. Peluso & M. Watts eds., Cornell University Press 2001).

²⁴ JEANNE M. WOODS & HOPE LEWIS, *HUMAN RIGHTS AND THE GLOBAL MARKETPLACE: ECONOMIC, SOCIAL AND CULTURAL DIMENSIONS* 333-40 (Transnational Publishers 2005).

²⁵ *Id.*

²⁶ *Id.*

standard of living.²⁷ The United States has not ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR), the treaty designated to define and uphold ESC rights,²⁸ and was therefore under no international obligation to uphold the ESC rights of impacted groups. The spill cost local governments, businesses, and individuals billions of dollars in cleanup expenses and lost revenues.²⁹ Some communities affected by the BP oil spill on the U.S Gulf Coast have been able to obtain restitution.³⁰

In a stark dichotomy, many of the Ogoni people, citizens of Nigeria, still await compensation for the violation of their ESC rights.³¹ Like communities along the Gulf of Mexico, non-State actors (NSAs) violated the Ogoni tribe's rights to an adequate standard of living, to housing, to food, and to water, as enumerated in Article 11 of the ICESCR.³²

In an increasingly globalized world where corporations can be considered people and can at times commit human rights violations, how can States fulfill their obligation to protect their citizens against the human rights violations of NSAs? With the advent of globalization, some have argued that the world is now comprised of a "global transnational civil society," while others now describe the world as a "transnational capitalist hegemony."³³ Regardless of one's view of the role of transnational actors, like multinational corporations, it is hard to dispute that NSAs can exert "an

²⁷ See International Covenant on Economic, Social and Cultural Rights art. 11, Dec. 16, 1966, 993 U.N.T.S. 3 (defining the right to an adequate standard of living as "including adequate food, clothing and housing, and ... the continuous improvement of living conditions").

²⁸ International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

²⁹Weaver, *supra* note 2.

³⁰ John Schwartz, *Accord Reached Settling Lawsuit Over BP Oil Spill*, N.Y.TIMES (Mar. 2, 2012), http://www.nytimes.com/2012/03/03/us/accord-reached-settling-lawsuit-over-bp-oil-spill.html?_r=0.

³¹ See Ivana Isailović, *Reframing the Kiobel Case: Political Recognition and State Jurisdiction*, 38 SUFFOLK TRANSNAT'L L. REV. 1, 3 (2015).

³² WOODS & LEWIS, *supra* note 25 (stating that oil companies are non-state actors).

³³ Thomas Risse, *Transnational actors and world politics*, in CORPORATE ETHICS AND CORPORATE GOVERNANCE 251, 251-86, (2007).

extraordinary influence on outcomes in international politics.”³⁴ This article compares the plight of American communities in Texas, Mississippi, Florida, and Louisiana in the aftermath of alleged negligence by an NSA with that of an indigenous community in Nigeria, West Africa. In doing so, the author will demonstrate that traditional methods of enforcing human rights must evolve in order to address the rise of NSAs in today’s society. The author explores: (1) the value of ESC rights if States cannot be held accountable for their failure to uphold them, (2) the efficacy of the methods established to protect those rights, and (3) possible solutions moving forward. Specifically, this article will focus on Article 2.1 of the ICESCR which reads:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.³⁵

II. An Introduction to the ICESCR

The ICESCR was drafted to define and uphold ESC rights including the rights of the individual to housing, food, education, and healthcare.³⁶ It ensures the creation of an environment whereby everyone can enjoy these rights.³⁷ A United Nations’ declaration on human rights provided the impetus for the elevation of those rights, stating that:

³⁴ *Id.*

³⁵ ICESCR, *supra* note 29, at art. 2.

³⁶ Kitty Arambulo, *Drafting an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: Can an Ideal Become Reality?*, 2 U.C. DAVIS J. INT’L L. & POL’Y 111, 111 (1996).

³⁷ Johan D. van der Vyver, *The Binding Force of Economic and Social Rights Listed in the Universal Declaration of Human Rights*, 30 HAMLINE J. PUB. L. & POL’Y 125, 127 (2008).

All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional peculiarities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights.³⁸

a. States' Obligations Under the ICESCR

Opening for signature on December 16, 1966, and entering into force on January 3, 1976, there are 164 countries party to the ICESCR to date, but only 70 of those countries have signed on as signatories.³⁹ ICESCR's Article 2 describes the nature of the legal obligations imposed on party-States, requiring them to take steps toward "achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means."⁴⁰ In order to ensure those rights, the ICESCR includes both obligations of conduct and obligations of result.⁴¹

According to the Maastricht Guidelines on violations of ESC Rights, there are three different classifications of obligations: (1) the obligation to respect which requires States to refrain from interfering with the enjoyment of ESC rights; (2) the obligation to protect which requires States to prevent violations of such rights by third parties; and (3) the obligation to fulfill which requires States to take appropriate legislative, administrative, budgetary, judicial, and other measures towards the full realization of such rights.⁴² The obligations to respect, protect and fulfill each contain elements

³⁸ World Conference on Human Rights, *Vienna Declaration and Programme of Action*, ¶ 5, U.N. Doc. A/CONF.157/23 (July 12, 1993).

³⁹ ICESCR, *supra* note 29.

⁴⁰ *Id.*

⁴¹ U.N. ESCOR, Comm. on Econ., Soc. & Cultural Rights, Rep. on the Fifth Session, U.N. Doc. E/1991/23, at 86 (1991) [hereinafter *The Nature of States Parties' Obligations*].

⁴² Cees Flinterman, *The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, 15 NETH. Q. HUM. RTS. 244, 247 (1997).

of obligation of conduct, which requires action by the state “reasonably calculated to realize the enjoyment of a particular right,” and obligation of result, which “requires States to achieve specific targets to satisfy a detailed substantive standard.”⁴³ “The obligation of *conduct* requires action reasonably calculated to realise the enjoyment of a particular right . . . The obligation of *result* requires States to achieve specific targets to satisfy a detailed substantive standard.”⁴⁴ Notably, the obligation of result could be understood to mean that the State must: (1) ensure the compliance of NSAs in protecting ESC rights and (2) enact legislation to protect ESC rights.⁴⁵

Therefore, in ratifying the ICESCR, a State commits itself to refraining from introducing laws violating the treaty and to taking all necessary measures to put an end to any violations.⁴⁶ Thus, stating that it does “not consider itself guilty of violations” does not absolve a State government of responsibility; the government must “go further and give the assurance that it would actively undertake to put an end to all violations brought to its attention.”⁴⁷

b. Initial Controversy of the ICESCR, Evolution, and Current Impact: The Optional Protocol and the Existence of a Complaint Mechanism

The ICESCR entered into force without an optional protocol.⁴⁸ An

⁴³ *Id.*

⁴⁴ *Id.* (emphasis added).

⁴⁵ The Nature of States Parties’ Obligations, *supra* note 41. *See generally* van der Vyver, *supra* note 38, at 139-42.

⁴⁶ The Nature of States Parties’ Obligations, *supra* note 41. *See generally* van der Vyver, *supra* note 38, at 139-42.

⁴⁷ U.N. ESCOR, 18th Sess., 7th mtg. at ¶ 58, U.N. Doc. E/C.12/1998/SR.7 (Apr. 30, 1998).

⁴⁸ ICESCR, *supra* note 30, at art. 2. On the same day the ICESCR was opened for signature, the International Covenant on Civil and Political Rights (ICCPR) was adopted by the United Nations General Assembly. *Id.* *See also* M. MAGDALENA SEPULVEDA, THE NATURE OF THE OBLIGATIONS UNDER THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS 309 (Intersentia 2003). ICESCR entered into force on January 3, 1976. *Id.* Compare International Covenant on Civil and Political Rights, art. 2, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR], with ICESCR, *supra* note 30, at art. 2. The ICCPR protects civil and political rights and freedoms listed in the Universal Declaration of Human Rights. ICCPR, *supra*. In both documents, Article 2 describes State obligations and the difference in word choice illuminates the

optional protocol to the ICESCR would have provided a “system for the submission of individual/group complaints alleging violation of Covenant rights” upon entry into force.⁴⁹ On December 18, 1996, the Commission on Human Rights attempted to address this issue with the implementation of an Optional Protocol.⁵⁰ The Protocol granted individuals and groups the right to submit communications concerning non-compliance of a State to the Committee on Economic, Social, and Cultural Rights (CESCR).⁵¹ As of 2016, twenty-two countries have ratified the Protocol.⁵² Nevertheless, the Protocol entered into effect, giving the Committee the power to hear individual complaints.⁵³ Unfortunately, the Protocol is only legally binding in States that have ratified it.⁵⁴ Ratifying the ICESCR without the Protocol only permits the CESCR to determine whether the government of a State respects the treaty into which it enters freely.⁵⁵ The Protocol allows the

difference in the strength of the Covenants. ICCPR, *supra*; ICESCR, *supra* note 30, at art. 2. Article 2 of the ICCPR contains stronger language, as it does not make allowances for a state’s capacity to ensure the civil and political rights nor does it allow for their progressive achievement. *Id.*

⁴⁹ 80 MARY DOWELL-JONES, CONTEXTUALISING THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: ASSESSING THE ECONOMIC DEFICIT 185 (2004).

⁵⁰ Comm’n On Human Rights, Status of the International Covenants on Human Rights at Its Fifty-Third Session, U.N. Doc. E/CN.4/1997/105 (Dec. 18, 1996). *See also* Claire Mahone, *Progress at the Front: The Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, 8 HUM. RTS. L. REV. 617, 620 (2008).

⁵¹ G.A. Res. 63/117, art. 2, Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (Dec. 10, 2008) [hereinafter Optional Protocol to the ICESCR]. The Optional Protocol entered into force on May 5, 2013. *See* Mike Sanderson, *The Role of International Law in Defining the Protection of Refugees in India*, 33 WIS. INT’L L. J. 46, 85 (2015).

⁵² G.A. Res. 63/117, Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, (Dec. 10, 2008). *See also* *Status of Ratification: Interactive Dashboard*, U.N. Human Rights, Office of the High Commissioner, <http://indicators.ohchr.org> (last updated Nov. 14, 2016).

⁵³ *Pillay Welcomes Major Breakthrough Enabling Individual Complaints on Economic, Social and Cultural Rights*, U.N. HUM. RTS. OFF. OF THE HIGH COMM’R. (Feb. 6, 2013), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12968&LangID=E>. *See also* Irene Biglino & Christopher Golay, *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, ACAD. IN-BRIEF NO. 2, July 2013, at 1, 3. The U.N. adopted the Optional Protocol to the ICESCR in 2008; the Protocol entered into force May 5, 2013. *Id.*

⁵⁴ Biglino & Golay, *supra* note 53, at 7.

⁵⁵ Comm. On Econ., Soc. & Cultural Rights, *supra* note 47.

CESCR to extend the scope of the ICESCR's substantive obligations in countries that have ratified both the Protocol and the CESCR.⁵⁶

Article 2 has been controversial.⁵⁷ The CESCR clarified the language used by ICESCR drafters, stating that “the concept of progressive realization constitutes recognition of the fact that *full realization of all economic, social and cultural rights* will generally not be able to be achieved in a short period of time.”⁵⁸ The CESCR allows for a lapse in the enforcement as long as States “make allowance, as a matter of state policy, for progressive implementation subject to the available means at the disposal of the State to provide the services, facilities or support required for their meaningful enjoyment.”⁵⁹

c. Nigeria and the Optional Protocol

Nigeria ratified the ICESCR on July 29, 1993, and it entered into force in Nigeria three months later.⁶⁰ Nigeria has neither signed nor ratified the Optional Protocol.⁶¹ In determining Nigeria's compliance with the ICESCR as it relates to the allegations of the Ogoni people, Article 2 does not allow Nigeria to cede culpability for violating the Ogoni people's ESC rights to NSAs. Nigeria itself has an *obligation of conduct* to both: (1) safeguard the ESC rights of the individual within the confines of the State, and (2) recognize that ESC rights extend to the Ogoni people as members of an ethnic group. Nigeria also has an *obligation of result* to ensure the compliance of NSAs, including Shell, in protecting the Ogoni's ESC rights.

III. Nigeria and “Progressive Realization”

Article 2 of the ICESCR, despite its encouragement towards

⁵⁶ Human Rights Comm., General Comment Adopted by the Human Rights Committee Under Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (Nov. 11, 1994).

⁵⁷ SEPULVEDA, *supra* note 48.

⁵⁸ *Id.* at 129.

⁵⁹ van der Vyver, *supra* note 37, at 130.

⁶⁰ ICESCR, *supra* note 29, at art. 2.

⁶¹ *Id.*

“achieving progressively,” obliges each party-State to take all steps possible to the extent its available resources allow.⁶² However, Nigeria, as a matter of state policy, could not have been striving for progressive implementation subject to its available means to provide the required services, facilities, or support in its military interaction with the Ogoni when in many cases state violence was used against them.⁶³

In Nigeria, prior to the Optional Protocol for the ICESCR, the adoption of the African Charter on Human and Peoples’ Rights (African Charter) incorporated some protections for ESC rights into domestic law.⁶⁴ The African Charter provides for justiciable protection of some ESC rights.⁶⁵ Upon signing onto the African Charter, the Nigerian constitution incorporated human rights protections, including the protection of civil, political, and ESC rights.⁶⁶ Theoretically, the Nigerian courts have the legal authority to investigate the violation of ESC rights, however the Nigerian judiciary has historically favored oil companies in lieu of the opposing

⁶² See ICESCR, *supra* note 30, at art. 2. See also The Nature of States Parties’ Obligations, *supra* note 41; HUMAN RIGHTS INSTITUTE, COLUMBIA LAW SCHOOL ET AL., HUMAN RIGHTS, SOCIAL JUSTICE AND STATE LAW: A MANUAL FOR CREATIVE LAWYERING 23 (2008).

⁶³ See generally O. Okechukwu Ibeanu, *Insurgent Civil Society And Democracy In Nigeria: Ogoni Encounters With The State, 1990 – 1998*, in RESEARCH REPORT FOR ICSAG PROGRAMME OF THE CENTRE FOR RESEARCH AND DOCUMENTATION 12-14 (Kano 1999) (“State violence against the Ogoni took four major forms. First, it took the form of harassment of Ogoni leaders through surveillance, arrests and detention. . . Second, state violence was used against the Ogoni by encouraging violent conflicts between the Ogoni and their neighbours, and using that as a pretext to repress the Ogoni. . . Third, state violence against the Ogoni involved setting the Ogoni against themselves. . . Finally, state violence also took the form of direct repression using the armed forces and police. . . Clearly, security forces were the villains in the Ogoni crisis. Fifty percent or more of respondents identified them as having committed 16 of the 19 acts of violence. Sixty percent or more identified them in 15 forms of violence against Ogoni women, while 70% or more identified them in half of the cases. These are systematic rape (71%), killings (92%), sexual slavery (73%), beating (91%), harassment (90%), destruction of property (89%), forced pregnancy (70%) and imprisonment (82%). These figures strongly suggest the centrality of state violence in the Ogoni conflicts.”).

⁶⁴ Stanley Ibe, *Implementing Economic, Social and Cultural Rights in Nigeria: Challenges and Opportunities*, 10 AFR. HUM. RTS. LAW J., 199, 197-211 (2010).

⁶⁵ *Id.*

⁶⁶ Edwin Egede, *Bringing Human Rights Home: An Examination of the Domestication of Human Rights Treaties in Nigeria*, 51 J. AFR. LAW 255, 249-284 (2007).

parties in oil-related litigation.⁶⁷ This bias restricts access to justice under domestic law for parties like the Ogoni. The case of the Ogoni illustrates the challenges of the ICESCR in ensuring that party-States fulfill both their obligations of conduct and their obligations of result in protecting ESC rights.

IV. The Ogoni Situation: Assessing Nigeria's Compliance with Article 2

a. The 2001 African Commission Complaint

Nigeria's oil-based economy is linked to the plight of the Ogoni people and the deprivation of their ESC rights. The Social and Economic Rights Action Center and the Center for Economic and Social Rights filed a complaint with the African Commission on behalf of the Ogoni against Nigeria in October 2001,⁶⁸ alleging that the former military government of Nigeria was directly involved in oil production through the state oil company, the Nigerian National Petroleum Company (NNPC).⁶⁹ NNPC was the majority shareholder in a joint venture with Shell, the Shell Petroleum Development Company.⁷⁰ The complaint alleged that Nigeria failed to monitor the operations of these companies and did not require standard safety measures, nor did it require oil companies to produce basic health and environmental impact studies regarding hazardous operations and materials.⁷¹ The complaint further alleged that governmental involvement and the oil companies' operations led to the violation of Ogoni ESC rights under the African Charter for Human and People's Rights (African

⁶⁷ FRYNAS, *supra* note 10, at 7.

⁶⁸ Soc. and Econ. Rights Action Ctr. (SERAC) v. Nigeria, Communication 155/96, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], at 9 (Oct. 2001), http://www.achpr.org/files/sessions/30th/comunications/155.96/achpr30_155_96_eng.pdf.

⁶⁹ ICESCR, *supra* note 30, at art. 12 (describing the right to health). *See also* Soc. and Econ. Rights Action Ctr. (SERAC) v. Nigeria, Communication 155/96, ¶ 1.

⁷⁰ ICESCR, *supra* note 30, at art. 12. *See also* Soc. and Econ. Rights Action Ctr. (SERAC) v. Nigeria, Communication 155/96, ¶ 1.

⁷¹ Soc. and Econ. Rights Action Ctr. (SERAC) v. Nigeria, Communication 155/96, ¶ 2.

Charter).⁷² Finally, the complaint contained accusations that the Nigerian military aided and abetted a corporation in contaminating the environment.⁷³

The African Commission on Human and Peoples' Rights (African Commission) found that Nigeria was in violation of several ESC rights, including the rights to health, property, and protection of family.⁷⁴

In *Social and Economic Rights Action Center and Center for Economic and Social Rights v. Nigeria*, the Commission noted that:

Internationally accepted ideas of the various obligations engendered by human rights indicate that all rights, both civil and political rights and social and economic, generate at least four levels of duties for a State that undertakes to adhere to a rights regime, namely the duty to respect, protect, promote, and fulfil [sic] these rights. These obligations universally apply to all rights and entail a combination of negative and positive duties.⁷⁵

The Commission also found that Nigeria failed in its obligation under the African Charter to take necessary steps for the “improvement of all aspects of environmental and industrial hygiene.”⁷⁶ The government, having a financial stake in an oil company that violated Ogoni ESC rights, had contributed to a situation where the State sided with an NSA against its own citizens.

b. The Eighteenth Session of the CESC

The Ogoni were fortunate to find justice under the African Charter,

⁷² ICESCR, *supra* note 30, at art. 12. *See also* Soc. and Econ. Rights Action Ctr. (SERAC) v. Nigeria, Communication 155/96, ¶ 10.

⁷³ *Id.*

⁷⁴ ICESCR, *supra* note 30, at art. 12. *See also* Soc. and Econ. Rights Action Ctr. (SERAC) v. Nigeria, Communication 155/96, at 9; ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN ACTION 124 (Mashood A. Baderin & Robert McCorquodale eds., 2007).

⁷⁵ Soc. and Econ. Rights Action Ctr. (SERAC) v. Nigeria, Communication 155/96, ¶ 44.

⁷⁶ Soc. and Econ. Rights Action Ctr. (SERAC) v. Nigeria, Communication 155/96, ¶ 52.

although, the decision took five years to finalize due to a variety of factors.⁷⁷ In 1996, just three years after Shell left Ogoni land, the CDESCR submitted a list of issues to the Nigerian government regarding its noncompliance with its ICESCR obligations, including the ensuring of rights to an adequate standard of living and to health for its citizens.⁷⁸ On April 29, 1998, at the Eighteenth Session of the CDESCR, a delegation drawn from Nigeria's Permanent Mission at Geneva submitted a report in response.⁷⁹ In response to the concerns of the committee, the representative from Nigeria asserted that:

1. The Nigerian Government "had taken no deliberate measures against the Ogoni people . . ." ⁸⁰
2. The Nigerian Government had undertaken steps "to ensure that, as an oil-producing community, the Ogoni enjoyed their own fair share of the national wealth."⁸¹
3. The Nigerian government asserted that "the Shell-Nigeria Oil Company which operated in Ogoni land had taken special measures to address the issue" of pollution.⁸²
4. The Ogoni area was "only 3 of Nigeria's more than 770 local government councils and produced only 1.2 per cent of the total Nigerian oil production."⁸³
5. The Nigerian Government disputed the Special Rapporteur's report on the Ogoni since "he had not been able to visit Nigeria, [his]

⁷⁷ J. Oloka-Onyango, *Reinforcing Marginalized Rights in an Age of Globalization: International Mechanisms, Non-State Actors, and the Struggle for Peoples' Rights in Africa*, 18 AM. U. INT'L L. REV. 851, 872 (2003) (stating that this delay was mainly due to a "lack of cooperation from the Nigerian government" and issues with the African Commission).

⁷⁸ U.N. ESCOR, 18th Sess., 6th mtg., U.N. Doc. E/C.12/1998/SR.6 (May 4, 1998). *See also* Rep. of Nigeria on the Implementation of the Int'l Covenant on Econ., Soc. & Cultural Rights, U.N. Doc E/1990/5/Add.31 (Feb. 23, 1996).

⁷⁹ U.N. Doc. E/C.12/1998/SR.6, *supra* note 77.

⁸⁰ *Id.* ¶ 40.

⁸¹ *Id.* ¶ 40.

⁸² *Id.* ¶ 41.

⁸³ *Id.* ¶ 41.

conclusion that human rights violations existed in that country was clearly faulty.”⁸⁴

6. Mr. Osah also spoke of specific improvements including: an agricultural programme, “water schemes, school buildings, a fully equipped hospital, furniture for 17 schools and equipment for two health centres, and six kilometres of tarred roads.”⁸⁵

In spite of Mr. Osah’s protestations, the commissioners were unconvinced, charging “that the report of the Special Rapporteur of the Commission on Human Rights referred specifically to failure by the Government to address the plight of the Ogoni people and to protect their human rights as recommended by the fact-finding mission of the Secretary-General.”⁸⁶

c. Evaluating Nigeria’s Compliance

Because Nigeria has both obligations of conduct and obligations of result,⁸⁷ the State is obligated to provide the facilities or support required for the meaningful enjoyment of ESC rights.⁸⁸ Nigeria has “a core obligation to ensure the satisfaction of minimum essential levels of each of the rights.”⁸⁹ Nigeria has not fulfilled its duties under the ICESCR. Nigeria ratified the ICESCR,⁹⁰ but has not “entered a reservation, declaration or objection to any of the provisions of ICESCR.”⁹¹ The African Commission on Human and Peoples’ Rights found that “the State is obligated to protect right-holders against other subjects by legislation and provision of effective

⁸⁴ *Id.* ¶ 44.

⁸⁵ *Id.* ¶ 47.

⁸⁶ *Id.* ¶ 43.

⁸⁷ The Nature of States Parties’ Obligations, *supra* note 41.

⁸⁸ van der Vyver, *supra* note 37, at 130.

⁸⁹ Danwood Mzikenge Chirwa, *Toward Revitalizing Economic, Social, and Cultural Rights in Africa*, 10 HUM. RTS. BRIEF no. 1, 2002, at 14, 15.

⁹⁰ Hakeem O. Yusuf, *Oil on Troubled Waters: Multinational Corporations and Realising Human Rights in the Developing World, with Specific Reference to Nigeria*, 8 AFR. HUM. RTS. L. J. 79, 81 (2008).

⁹¹ *Id.*

remedies.”⁹² The Nigerian government has failed in its obligations as a state party to the ICESCR.⁹³ The juxtaposition of the Eighteenth Session in addressing the allegations of violations of the ICESCR and the later appearance of the same allegations in the 2001 complaint demonstrates the challenges the CDESCR faces in ensuring that States follow their obligations under Article 2 of the ICESCR. The findings of ESC rights violations while individuals continue to wait for restitution calls into question the global value of ESC rights. If States are to be held accountable for failures to uphold ESC rights, there must be an efficient method to protect those rights.

V. Conclusions – Moving Forward

a. Restitution and Protection of ESC Rights

Some Nigerian expatriates have looked outside of the confines of the ICESCR to domestic courts in the United States to find restitution using novel approaches to established legal theories,⁹⁴ most notably through *Wiwa v. Shell Petroleum Development Company of Nigeria Limited*.⁹⁵ In November 1996, the Center for Constitutional Rights of New York filed a civil suit in federal court against Shell, culminating in a settlement in June 2009.⁹⁶

In a separate attempt, Nigerian nationals residing in United States filed suit against Dutch, British, and Nigerian corporations, including Shell, in U.S court.⁹⁷ In *Kiobel v. Royal Dutch Petroleum Company*, they alleged that “corporations aided and abetted the Nigerian Government in

⁹² Soc. and Econ. Rights Action Ctr. (SERAC) v. Nigeria, Communication 155/96, ¶ 46.

⁹³ See Analia M. Sende, *The Responsibilities of States for Actions of Transnational Corporations Affecting Social and Economic Rights: A Comparative Analysis of the Duty to Protect*, 15 COLUM. J. EUR. L. F. 33, 36-37 (2009).

⁹⁴ See generally *Wiwa v. Shell Petrol. Dev. Co. of Nigeria*, 335 F. App'x 81 (2d Cir. 2009). See also *Kiobel v. Royal Dutch Petrol. Co.*, 621 F.3d 111, 124 (2d Cir. 2010), *aff'd* 133 S. Ct. 1659, 1669 (2013).

⁹⁵ *Wiwa*, 335 F. App'x at 81.

⁹⁶ Ed Pilkington, *Shell Pays Out \$15.5 Million Over Saro-Wiwa Killing*, THE GUARDIAN (June 8, 2009), <https://www.theguardian.com/world/2009/jun/08/nigeria-usa>.

⁹⁷ *Kiobel v. Royal Dutch Petrol. Co.*, 133 S. Ct. 1659, 1660 (2013).

committing violations of the law of nations in Nigeria.”⁹⁸ They sought relief from Shell for aiding and abetting the Nigerian military government in torture, over eighty alleged murders, and the destruction of more than 495 homes.⁹⁹ Specifically, their complaint sought to hold Shell responsible in a transitory tort claim for alleged violations of their rights, “under customary international law.”¹⁰⁰

Kiobel and *Wiwa* were brought in U.S. courts under the jurisdictional purview of the Alien Tort Statute (ATS), which grants jurisdiction over violations of customary international law.¹⁰¹ While the Second Circuit held that a norm must be specific, universal, and obligatory to attain the status of customary international law, the U.S. Supreme Court’s decision in *Kiobel* limited the ability of plaintiffs to bring suits under the ATS.¹⁰² The Court now requires that such claims touch the United States with “sufficient force to displace the presumption against extraterritorial application.”¹⁰³

The decision in *Kiobel* limits the viability of using the Alien Tort Statute in courts in the United States to access justice.¹⁰⁴ However, those seeking restitution for ESC violations have benefited from the options available in their home country.¹⁰⁵ These options are sometimes diminished

⁹⁸ *Id.* at 1662.

⁹⁹ *Kiobel*, 621 F.3d at 124. *See also* Amended Class Action Complaint ¶¶ 1, 41, *Kiobel v. Royal Dutch*, 456 F. Supp. 2d 457 (S.D.N.Y. 2006) (No. 02 CV 7618), 2004 WL 7081121.

¹⁰⁰ *Kiobel*, 621 F.3d at 117. *See also* Amended Class Action Complaint, *supra* note 97, ¶¶ 88-117.

¹⁰¹ 28 U.S.C. §1350 (2012) (commonly referred to as the Alien Tort Statute).

¹⁰² *Kiobel*, 621 F.3d at 124.

¹⁰³ *Kiobel*, 133 S. Ct. at 1669. Other groups have had more luck in acquiring settlements. Mark Caldwell, *Ogoni Residents Hope Shell Oil Spill Settlement Sets Precedent*, DEUTSCHE WELLE (Jan. 7, 2015), <http://www.dw.de/ogoni-residents-hope-shell-oil-spill-settlement-sets-precedent/a-18175262>. In January 2015, Shell agreed to pay an ethnic community residing on Ogoni land in Nigeria \$83 million. *Id.* *See also* Jonathan Hafetz, *Human Rights Litigation and the National Interest: Kiobel’s Application of the Presumption Against Extra-Territoriality to the Alien Tort Statute*, 28 MD. J. INT’L L. 107 (2013).

¹⁰⁴ Anthony J. Colangelo, *The Alien Tort Statute and the Law of Nations in Kiobel and Beyond*, 44 GEO. J. INT’L L. 1329, 1345 (2013).

¹⁰⁵ *Dutch Appeals Court Says Shell May be Held Liable for Oil Spills in Nigeria*, THE

by the obstacles facing Nigeria in resolving corruption, which include a lack of resources and a tendency to avoid blame within the Nigerian government.¹⁰⁶

b. Next Steps

The plight of the Ogoni in their quest for justice began in 1959 with the first violations of their ESC rights.¹⁰⁷ They have used a plethora of methods to attain restitution, exemplifying the challenges faced when seeking justice for ESC rights violations. The Optional Protocol now has forty-five signatories, twenty-one party-States, and entered into force on May 5, 2013.¹⁰⁸ Human rights advocates believe that the entry into force will provide the ICESCR a mechanism by which to hold party-States accountable for their obligations under Article 2.¹⁰⁹ However, it is still too early to assess its efficacy. There remains the possibility of elevating ESC rights to the level of customary international law. In the meantime, the Ogoni people and others in similar circumstances continue to seek justice

GUARDIAN (Dec. 18, 2015), <http://www.theguardian.com/global-development/2015/dec/18/dutch-appeals-court-shell-oil-spills-nigeria>. See also Joseph Onyekwere, *Court Orders Service On Oil Firm, Others Over Spillage*, THE GUARDIAN (Feb. 2, 2016), <http://guardian.ng/features/law/court-orders-service-on-oil-firm-others-over-spillage/>.

¹⁰⁶ See Generally Jędrzej George Frynas, *Corporate and State Responses to Anti-Oil Protests in the Niger Delta*, 100 AFR. AFF. no. 398, Jan. 2001, at 27. See also FRYNAS, *supra* note 10, at 9.

¹⁰⁷ See Obi, *supra* note 9, at 222-24, 227; See also FRYNAS, *supra* note 10, at 9; Michale Watts, *Resource Curse? Governmentality, Oil and Power in the Niger Delta, Nigeria*, 9 GEOPOLITICS 50, 71 (2004).

¹⁰⁸ Rep. of the Human Rights Council, Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, U.N. Doc. A/63/435 (Dec. 10, 2008); Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, No. A-14531 (2008), <https://treaties.un.org/doc/Publication/UNTS/No%20Volume/14531/A-14531-o800000280212df4.pdf> (no U.N.T.S. volume number has yet been determined for this document). See also Siobhán McInerney-Lankford, *Entry into force of the New Optional Protocol to the ICESCR*, OXFORD HUM. RTS. HUB, June 28, 2013, <http://ohrh.law.ox.ac.uk/entry-into-force-of-the-new-optional-protocol-to-the-icescr/>. See also G.A. Res. 63/117, *supra* note 50, art. 2; Sanderson, *supra* note 50, at 85.

¹⁰⁹ Claire Mahon, *Progress at the front: The draft optional protocol to the International Covenant on Economic, Social and Cultural Rights*, 8 HUM. RTS. L. REV. 621, 617-46 (2008).

and vindication of their ESC rights in their home countries through inventive legal means.

Justice is, largely, still elusive. The United Nations Environmental Programme (UNEP) provided a report in 2011 claiming that the Ogoni land would need the world's largest-ever oil cleanup, which could take up to thirty years.¹¹⁰ In 2015, Nigerian President Muhammadu Buhari pledged to make the implementation of the UNEP proposals a “top priority,” as the Ogoni people continue to “suffer[] from food, insecurity, health challenges, unabated deaths and related problems attributable to hydrocarbon pollution in the area.”¹¹¹

The stark dichotomy in the current circumstances of the Ogoni and the communities affected by the BP oil spill is clear when one tragedy continues to garner attention and another is largely ignored in Western media.¹¹² Although BP agreed to a historic settlement for the *Deepwater Horizon* oil spill, environmental activists argue that BP violated U.S. law.¹¹³ Activists claim that BP is essentially “getting away with less than half of what the law would justify.”¹¹⁴ This argument could be interpreted as a belief that

¹¹⁰ UNEP, *Environmental Assessment of Ogoniland*, DEP/1337/GE (2011). See also Chineme Okafor, *Nigeria: Beyond Environmental Restoration in Ogoniland*, ALLAFRICA.COM (Feb. 26, 2013), <http://allafrica.com/stories/201302260519.html?viewall=1>.

¹¹¹ Kelvin Ebiri, *MOSOP Tasks Buhari, APC on Electoral Promises*, THE GUARDIAN (Apr. 7, 2015), <http://guardian.ng/features/policy-a-politics/mosop-tasks-buhari-apc-on-electoral-promises/>.

¹¹² Jack Witthaus, *'Deepwater Horizon' rakes in \$33M in opening weekend*, HOUSTON BUSINESS JOURNAL, (Oct. 3, 2016), <http://www.bizjournals.com/houston/news/2016/10/03/deepwater-horizon-rakes-in-33m-in-opening-weekend.html>.

¹¹³ Dominic Rushe, *BP Set to Pay Largest Environmental Fine in US History for Gulf Oil Spill*, THE GUARDIAN (July 2, 2015), <http://www.theguardian.com/environment/2015/jul/02/bp-will-pay-largest-environmental-fine-in-us-history-for-gulf-oil-spill>; *BP fund has paid out \$5 billion to spill victims*, COLUMBUS DISPATCH (Apr. 16, 2015), http://www.dispatch.com/content/stories/national_world/2015/04/16/bp-fund-has-paid-out-5-billion-to-spill-victims.html. See also Katy Reckdahl, *Five Years After the Deepwater Horizon Oil Spill, BP's Most Vulnerable Victims Are Still Struggling*, THE NATION (Apr. 15, 2015), <http://www.thenation.com/article/204457/five-years-after-deepwater-horizon-oil-spill-bps-most-vulnerable-victims-are-still-st>.

¹¹⁴ *Id.*

the BP settlement is a lost opportunity to fully attain justice for victims of the spill. In fact, some in the United States may feel that the BP Settlement allows the company to pay too little. And yet, while some individual victims have achieved financial restitution in courts in Europe, financial compensation remains elusive for thousands of the Ogoni.¹¹⁵

All people should be protected and have equal access to justice, regardless of their origin-State. When comparing the Ogoni and the victims of the Deepwater Horizon oil spill in the US, it is clear that one party had a faster, more efficient and open route to justice. One would hope that international agreements and treaties that protect universal human rights would serve as equalizers so that there is no disparity between two similarly aggrieved parties located in two different parts of the world.

¹¹⁵ *Niger Delta Villagers Turn to European Courts, Seeking Redress for Oil Spills*, FREE SPEECH RADIO NEWS (Apr. 29, 2016), <https://fsrn.org/2016/04/niger-delta-villagers-turn-to-european-courts-seeking-redress-for-oil-spills/>.
