

# **Paradise Lost: Sovereign State Interest, Global Resource Exploitation and the Politics of Human Rights**

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## **Abstract**

Taking its cue from the US Supreme Court judgment in *Kiobel* that restricted the extraterritorial reach of the Alien Tort Claims Act, this article explores how sovereignty structures the relationship between global resource exploitation and the localization of human rights in the international order of states. The argument situates international human rights law in an area of tension between national political self-determination and the global economic exploitation of natural resources. Global business operations in resource-rich developing countries undermine the protective role of sovereignty in relation to political self-determination that once justified the confinement of human rights to the territorial state legal order. At the same time, jurisdiction as an expression of sovereignty restricts access to justice for victims of extraterritorial human rights violations in Western home states of ‘multi-national’ corporations. I contend that this asymmetry should be resolved through a territorial extension of international human rights law that accounts for the human rights impacts of global resource exploitation. This entails that transnational tort litigation for corporate human rights violations should be appraised in the light of states’ human rights obligations to ensure effective civil remedies for victims located outside their borders. Moreover, it suggests that victims’ quest for justice through private litigation is not merely about the satisfaction of pecuniary damages but also represents a public and political attempt to reclaim their human rights in the judicial fora of Western states.

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## 1 ‘The Shell Game Ends ...

‘Some good news for multinationals’. This headline appeared in *The Economist* after the long-awaited US Supreme Court judgment in *Kiobel* that restricted the extraterritorial reach of the Alien Tort Claims Act (ATCA).<sup>1</sup> ATCA endows US district courts with ‘original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States’.<sup>2</sup> The *Kiobel* case was brought by Nigerian plaintiffs resident in the USA, alleging that oil multinational Anglo-Dutch Shell had aided and abetted the Nigerian government in committing serious human rights violations on Nigerian soil.<sup>3</sup> Had the Court of Appeals for the Second Circuit questioned the ATCA’s applicability to law suits against (foreign and domestic) corporations,<sup>4</sup> the US Supreme Court directed litigants’ attention to the problem of extraterritoriality – that is, the exercise of US jurisdiction over conduct occurring on the territory of another state.

A number of governments, including the Netherlands and the United Kingdom (UK) as home states of Royal Dutch Shell Plc, intervened to discourage the US courts from adjudicating extraterritorial human rights violations involving foreign corporations:

The [Dutch and UK] Governments’ policy is that companies should behave with respect for the human rights of people in countries where they do business. They also believe that the most fair and effective way to achieve progress in this area is through multilateral agreement on standards, achieved through multilateral cooperation with other States, and then the effective national implementation of those standards. It is then for countries to regulate and control business operations in their territories to ensure they meet the implemented standards.<sup>5</sup>

In other words, the Netherlands and the UK are committed, as a matter of policy, to promoting human rights in the operations of their ‘corporate nationals’ abroad. Yet it is first and foremost

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<sup>1</sup> ‘The Shell Game Ends: Some Good News for Multinationals’, *The Economist* (20 April 2013). Supreme Court of the United States, *Kiobel v. Royal Dutch Petroleum Co.*, 185 L Ed 2d671 (17 April 2013).

<sup>2</sup> Alien Tort Claims Act (ATCA), 28 USC § 1350.

<sup>3</sup> *Kiobel*, *supra* note 1.

<sup>4</sup> United States Court of Appeals for the Second Circuit, *Kiobel v. Royal Dutch Petroleum Co.*, 06-4800-cv, 06-4876-cv (17 September 2010).

<sup>5</sup> Brief of the Governments of the United Kingdom of Great Britain and Northern Ireland and the Kingdom of the Netherlands as *Amici Curiae* in Support of the Respondents (Government Brief), *Kiobel v Royal Dutch Petroleum* (No. 10-1491), 3 February 2012, at 1.

the responsibility of Nigeria (and not the USA) to ensure the proper implementation of international human rights law on its own territory. Any other solution would ‘undermine the principle of national sovereignty in prevention and punishment of, and redress for [corporate human rights] abuses’.<sup>6</sup> Concerns with state sovereignty also informed the judgment of the US Supreme Court. According to the majority opinion delivered by Chief Justice Roberts, restricting the extraterritorial reach of the ATCA was essential to avoid discord between the USA and other sovereign states; to prevent judicial interference with US foreign policy; to dissuade other states from haling US (corporate) citizens into their courts and to dispel the suspicion that the USA was to assume the role of a moral custodian of the world. These concerns justified a ‘presumption against extraterritorial application’ that could only be rebutted if ‘claims touch and concern the territory of the United States ... with sufficient force’.<sup>7</sup> Mere ‘corporate presence’ of the respondents on US territory was not enough.<sup>8</sup>

I shall return to *Kiobel* in later sections of this article, yet my main concern is not with the particulars of the judgment or with its broader ramifications for future ATCA litigations – issues that have already received considerable attention in academic scholarship and human rights advocacy circles.<sup>9</sup> Rather, I want to examine how the concerns with sovereignty that informed the US Supreme Court judgment in *Kiobel* reflect on the relationship between the global exploitation of natural resources and the confinement of human rights protection to the territorial state legal order. This examination entails scrutinizing jurisdictional constraints imposed on transnational tort litigation for human rights violations (traditionally, the domain of private international law) from the perspective of state obligations to provide access to justice under public international human rights law.

It is widely accepted that international human rights treaties impose (positive) obligations on states to protect human rights in the relationship between private actors, which includes obligations to ensure effective civil remedies for human rights violations committed by non-state actors. According to the UN Human Rights Committee, for example, a state’s human

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<sup>6</sup> *Ibid.*, at 25.

<sup>7</sup> *Kiobel*, *supra* note 1, at 12.

<sup>8</sup> *Ibid.*, at 14; *in caso*, the ‘presence’ of the defendants in the USA consisted of an office in New York owned by an affiliated corporation tasked with explaining Shell business to potential investors.

<sup>9</sup> Indeed, the role of state sovereignty in framing access to justice for victims of extraterritorial corporate human rights violations is not particular to cases brought under ATCA, see, e.g., *In Re Union Carbide Gas Plant Disaster at Bhopal India*, Opinion and Order, 634 F Supp. 842 (SDNY 1986). On the legacy of *Kiobel*, see further ‘Agora: Reflections on *Kiobel*’, 107(3) *American Journal of International Law* (2013) 601; EarthRights International, *Out of Bonds: Accountability for Corporate Human Rights Abuses after Kiobel* (2013).

rights obligations ‘will only be fully discharged if individuals are protected by the state, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights’. Inversely, a state may violate its international human rights obligations if it fails ‘to take appropriate measures or to exercise due diligence to prevent, punish or redress the harm caused by such acts by private persons or entities’.<sup>10</sup> However, and even though international human rights treaties do not explicitly confine human rights obligations to state territory,<sup>11</sup> states have been reluctant to accept an extension of these obligations to victims of corporate human rights violations located abroad. One important reason for this reluctance, or so I shall argue, relates to the role of sovereignty in framing the relationship between human rights protection and national political self-determination in the territorial state legal order.

The second section of this article traces states’ reluctance to accept extraterritorial human rights obligations in the process of de-colonization after the Second World War. Human rights became intertwined with struggles for permanent sovereignty over natural resources (PSNR) that aimed at shielding the newly independent states in the developing world from external economic and political interference. In this process, state sovereignty assumed a protective role in relation to human rights conceived as an expression of national political self-determination. As Samuel Moyn notes, ‘in fidelity to earlier Euro-American conceptions of rights, anti-colonialism prioritized the independence and autonomy of the new nation as the form in which rights had to be won’. The decolonization movement thus tied human rights to ‘the installation of sovereignty across the world, in a period of historically unparalleled triumph for the concept and its practices’.<sup>12</sup>

The third section of this article dwells on Nigeria’s ‘resource curse’ to examine the impacts of global business operations on human rights protection in resource-rich developing countries. I argue that the global economic exploitation of Nigeria’s oil and gas resources has eroded the protective role of sovereignty in relation to national political self-determination that

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<sup>10</sup> Human Rights Committee, General Comment 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, Doc. CCPR/C/21/Rev.1/Add. 13, 26 May 2004, para 8.

<sup>11</sup> Convention for the Protection of Human Rights and Fundamental Freedoms 1950, 213 UNTS 222, Art. 1, for instance, simply provides that states shall ‘secure’ human rights ‘to everyone within their jurisdiction’. International Covenant on Civil and Political Rights (ICCPR) 1966, 999 UNTS 171, Art. 2(1) tasks each state party to respect and ensure human rights ‘to all individuals within its territory and subject to its jurisdiction’. Other international human rights treaties, including the International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966, 993 UNTS 3, do not contain a jurisdiction clause at all.

<sup>12</sup> S. Moyn, *The Last Utopia: Human Rights in History* (2010), at 117.

once justified the confinement of human rights to the territorial state. Against this background, the fourth and fifth sections scrutinize in more detail the political and legal dimensions of the sovereignty objection to extraterritorial human rights protection in relation to ‘multinational’ corporations. In regard to the former, extraterritorial human rights protection is said to unduly interfere with the domestic politics of other states and to decouple the realization of human rights from the political process vested in the sovereign state legal order. In regard to the latter, the rules of jurisdiction under public international law aim to protect the sovereign rights that states wield over their territory and people therein by delimiting states’ competences to adjudicate human rights violations committed outside their borders.

The final section of this article advances a defence of extraterritorial human rights protection as a way to legally and politically account for the human rights impacts of global resource exploitation. I contend that transnational tort litigation for corporate human rights violations should be appraised in light of states’ human rights obligations to ensure effective civil remedies for victims located outside their borders. The normative concern behind this territorial extension of international human rights obligations is less the satisfaction of pecuniary interests through private litigation than empowering victims of human rights violations to stake a public and political claim in the Western home states of ‘multinational’ corporations.

## **2 Permanent Sovereignty over Natural Resources**

In December 1962, the UN General Assembly (UNGA) adopted Resolution 1803 on the Permanent Sovereignty over Natural Resources. Considering that ‘any measure in this respect must be based on the recognition of the inalienable right of all states freely to dispose of their natural wealth and resources in accordance with their national interests, and on respect for the economic independence of states’, the UNGA declared that ‘the right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the state concerned’.<sup>13</sup> This free and beneficial exercise of sovereignty over natural resources, in turn, was to be ‘furthered by the mutual respect of states based on their sovereign equality’.<sup>14</sup>

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<sup>13</sup> GA Res. 1803 (XVII), 14 December 1962, at 1.

<sup>14</sup> *Ibid.*, at 5.

Resolution 1803 must be seen in the context of post-war attempts of the developing world to secure the economic benefits arising from the exploitation of their natural resources. During the colonial era, a growing demand for raw materials in the European economies had been an important driving force of imperial expansion, with Western trading and mining companies acquiring concessions over natural resources on terms that were very unfavourable to the colonies.<sup>15</sup> Accordingly, in its early years, the main thrust of PSNR was to promote the economic independence of resource-rich developing countries through the nationalization of natural resources previously controlled by foreign corporations.<sup>16</sup> In this vein, Uruguay submitted in 1952 a Draft Resolution on Economic Development of Underdeveloped Countries to the UNGA, asserting ‘the need for protecting economically weak nations which are tending to utilize and exploit their natural resources’. The operative part of the text called on states to recognize ‘the right of each country to nationalize and freely exploit its natural wealth, as an essential factor of economic independence’.<sup>17</sup>

The wave of decolonization in the 1960s that populated the developing world with newly independent countries progressively shifted the subject of PSNR from self-determining peoples to sovereign states. As Nico Schrijver says, ‘this change of emphasis resulted from the relatively rapid decolonisation process, the way in which newly independent states cherished their sovereignty, and the non-representation of peoples in the intergovernmental United Nations’.<sup>18</sup> As a consequence, permanent sovereignty over natural resources became mapped onto territorially circumscribed state legal orders. This subsumed conflicts between governments and their people(s) about the exploitation and distribution of resource wealth under the state’s internal jurisdiction.

Externally, PSNR became embroiled in attempts of developing countries to use their newly gained sovereignty to create a new international economic order that would reverse the effects of colonialism and counter the hegemony of the Bretton Woods institutions. If the latter promoted market liberalization and global resource exploitation,<sup>19</sup> the Declaration on the

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<sup>15</sup> A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (2004), at 156–178.

<sup>16</sup> N. Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (1997) 41-49.

<sup>17</sup> Draft Resolution on Economic Development of Underdeveloped Countries, Doc. A/C.2/L.165, 5 November 1952 and Corr. 1-3, cited in Schrijver, *supra* note 16, at 42.

<sup>18</sup> Schrijver, *supra* note 16, at 370.

<sup>19</sup> As reflected, for example, in the Articles of Agreement of the International Monetary Fund 1945, 2 UNTS 39, that consider ‘the development of the productive resources of all members’ as one of the ‘primary objectives of economic policy’ (Art. I(ii)); and the preamble of the General Agreement on Tariffs and Trade (GATT) 1947, 55 UNTS 194, which stresses that ‘relations in the field of trade and economic endeavour should be conducted

Establishment of a New International Economic Order deplored the widening gap between developing and developed states ‘in a system which was established at a time when most of the developing countries did not even exist as independent states and which perpetuates inequality’.<sup>20</sup> Rather than hailing closer international economic cooperation, the Declaration reiterated the linkage between state sovereignty and economic independence:

In order to safeguard these [natural] resources, each state is entitled to exercise effective control over them and their exploitation with means suitable to its own situation, including the right to nationalization or transfer of ownership to its nationals, this right being an expression of the full permanent sovereignty of the state. No state may be subjected to economic, political or any other type of coercion to prevent the free and full exercise of this inalienable right.<sup>21</sup>

Yet PSNR also represented an attempt on the part of newly independent and other developing states to achieve national political self-determination within their own territorial borders. While ‘many in the Third World believed the key to economic independence lay in national ownership of the available forms of production’, such a strategy also ‘seemed to offer both the possibility of subordinating the economic to the political sphere and the possibility of rejecting foreign domination’.<sup>22</sup> The route to national political self-determination was pursued through the development of international human rights law.<sup>23</sup> In this vein, common Article 1 of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights places the entitlement of peoples to ‘freely dispose of their natural wealth and resources’ in the twofold context of their right to ‘freely determine their political status and [to] freely pursue their economic, social and cultural development’.<sup>24</sup> Chile, one of the main supporters of including a reference to PSNR in the covenants, pointed out that this would ‘give moral support to a country’s democratic struggle

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with a view to ... developing the full use of the resources of the world and expanding the production and exchange of goods’.

<sup>20</sup> Declaration on the Establishment of a New International Economic Order, Doc. A/RES/S-6/3201, 1 May 1974, at 1.

<sup>21</sup> *Ibid.*, at 4(e).

<sup>22</sup> S. Pahuja, *Decolonising International Law* (2011) 121.

<sup>23</sup> On the emancipatory role of the human rights discourse in the struggle against colonialism, see Rajagopal, ‘Counter-Hegemonic International Law: Rethinking Human Rights and Development as a Third World Strategy’, 27(5) *Third World Quarterly* (2006) 767, at 768–770.

<sup>24</sup> In addition, ICCPR, *supra* note 11, Art. 47 and ICSECR, *supra* note 11, Art. 25 provide that ‘nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources’.

for the control of its own means of subsistence’ and ‘enable the peoples to remain masters of their own natural wealth and resources’.<sup>25</sup> Similarly, Article 21(5) of the African Charter on Human and Peoples’ Rights (African Charter) calls on states parties to ‘undertake to eliminate all forms of foreign economic exploitation particularly that practised by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their natural resources’.<sup>26</sup>

The doctrine of state sovereignty played an important role in this endeavour by developing countries to use human rights for securing national political control over their natural resources. After the Second World War, the old Western, imperialist conception of sovereignty, which was built around a substantive ‘civilized nation’ standard, was abandoned in favour of a formal notion of sovereign equality that guaranteed the autonomy of all member states of the newly created United Nations as subjects of international law.<sup>27</sup> Yet this extension of sovereignty as equality to the developing world also entailed that the Western (‘Westphalian’) conception of statehood became the only viable form of political organization in international law.<sup>28</sup> Sovereign equality institutionalizes a horizontal international legal order of formally equal states that protects each state *qua* political organization by coupling its external political independence with a right to internal political self-determination.<sup>29</sup> National political self-determination vested in a territorially circumscribed legal order over which the state exercises effective control provides the justification of sovereign equality that is bereft of more substantive (‘civilized’) foundations. At the same time, sovereign equality protects states’ political independence in relation to one another by prohibiting interference into matters considered to be within their domestic jurisdictions (Article 2(7) of the UN Charter).

This has two important implications for the way sovereignty came to structure the legal operation of human rights in the international order of states. On the one hand, the ‘universalization’ of human rights after the Second World War proceeded through the extension of the Western conception of statehood to the developing world. Inasmuch as this conception of statehood embodied a particularistic (liberal-democratic) notion of the

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<sup>25</sup> E/CN.4/SR.260, 6 May 1952, at 6, cited in Schrijver, *supra* note 16, at 49.

<sup>26</sup> African Charter on Human and Peoples’ Rights, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

<sup>27</sup> See UN Charter, Art. 2(1); Jackson, ‘Sovereignty in World Politics’, 48 *Political Studies* (1999) 431, at 441–444.

<sup>28</sup> Kingsbury, ‘Sovereignty and Inequality’, 9 *European Journal of International Law* (1998) 599, at 607.

<sup>29</sup> Jackson, *supra* note 27, at 432.



relationship between the state and the individual, Third World sovereignty was from the very beginning permeated by a Western approach to human rights.<sup>30</sup> On the other hand, and around the same time that the UNGA solemnly proclaimed the Universal Declaration of Human Rights, the legal protection of human rights became tied to national political self-determination and domesticated in the sovereign state legal order. It is this protective role of state sovereignty in relation to human rights conceived as an expression of national political self-determination that has become eroded by the human rights impacts of global resource exploitation.

### 3 Nigeria's Resource Curse

The main reason why I came back to redo this video with communities is because of what happened at The Hague. I was there and asked them [Shell] questions and they were blaming my federal government, accusing us of being corrupt. My problem is that if my government is so corrupt, why do you do business with my government?<sup>31</sup>

In 2008, Shell made the news when a group of non-governmental organizations released a documentary revealing the devastating effects of the corporation's oil-drilling and gas-flaring activities on people and habitat in the Niger Delta. The documentary also contained video footage of Shell's 2006 annual general meeting with shareholders in The Hague. Earlier the same year, a Nigerian court had stayed the execution of a court order requesting Shell to stop gas flaring in the Iwerekhan community, on the condition that the corporation submit a detailed plan for ceasing all gas-flaring activities in Nigeria by April 2007. Asked whether and how they intended to comply with the court order, Shell representatives said they were 'on track' to putting all flares out in 2009 and blamed slow progress on corruption and delays in disbursing government funds needed to implement the phase-out.<sup>32</sup>

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<sup>30</sup> Anghie, *supra* note 15, at 254.

<sup>31</sup> Environmental Rights Action, Friends of the Earth International and Climate Justice Programme, *Poison Fire* (2008), available at [www.poisonfire.org](http://www.poisonfire.org) (last visited 30 May 2016) (I. Lott, Bayelsa State, Nigeria).

<sup>32</sup> *Poison Fire*, *supra* note 31: 'Just like anybody in Nigeria, when you send a budget to the government, they never approve the budget, they cut it. Really, if you deal with corruption, then you would have dealt with a lot of things' (Basil Omiyi, MD Shell Nigeria); 'The reason why we have not been able to go faster is essentially because the funding for the venture has not been made available by the government over time. ... And I understand that they [the government] have many pressing other priorities for the use of their funds' (Malcom Brinded, executive board member, Royal Dutch Shell plc).

Corruption, sabotage, oil theft and civil unrest – the tale of Shell’s operations in Nigeria reads like a textbook account of Africa’s ‘resource curse’ that stipulates a direct connection between easy money earned from the exploitation of natural resources, slow economic development and a decline of the rule of law. As Larry Diamond and Jack Mosbacher put it, ‘increases in the natural resource wealth are strongly correlated with greater corruption, authoritarianism, political and economic instability, and civil war’.<sup>33</sup> A supposed root cause of this phenomenon is that whereas in ‘well-functioning states (especially democracies), citizens consent to be taxed in exchange for public services and protection’, unearned income from natural resources ‘replaces taxes as the main source of government funding [and severs] the social contract between a population and its government’.<sup>34</sup> Only seemingly contradictory, a World Bank report that found no ‘significant deterministic evidence of the direct negative relationship between the abundance of natural resources and income per capita levels’ stressed ‘the intangible wealth in the form of governance quality [as] a key determinant to the outcome of natural resource abundance as a blessing or a curse’.<sup>35</sup>

What is remarkable about this kind of resource-curse scholarship is, as Michael Watts remarks, ‘the almost total invisibility of both transnational oil companies ... and the forms of capitalism that oil or enclave extraction engenders’.<sup>36</sup> By treating the relationship between wealth in natural resources and poor governance quality as a purely domestic problem, it glosses over the externalities that the presence and operations of global oil corporations create on human rights protection and the rule of law in Nigeria. Shell partakes in the exploitation of Nigeria’s oil and gas resources through the Shell Petroleum Development Company (SPDC), a fully owned subsidiary that operates in a joint venture with the Nigerian National Petroleum Corporation (NNPC) and other oil multinationals. SPDC’s oil mining lease in the Niger Delta comprises 31,000 square kilometres, with 6,000 kilometres of pipelines and flow lines, 87 flow stations, eight gas plants and more than 1,000 producing wells.<sup>37</sup> In 2011, Nigeria’s oil industry

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<sup>33</sup> Diamond and Mosbacher, ‘Petroleum to the People’, *Foreign Affairs* (September/October 2013) 1, at 3.

<sup>34</sup> *Ibid.*, at 3.

<sup>35</sup> Canuto and Cavallari, ‘Natural Capital and Resource Curse’, 83 *Economic Premise* (2012) 5.

<sup>36</sup> Watts, ‘Resource Curse? Governmentality, Oil and Power in the Niger Delta, Nigeria’, 9(1) *Geopolitics* (2004) 50, at 53. Paul Collier, for one, recognizes the interdependencies between globalization (trade in goods, flows of capital and the migration of people) and the resource curse of the ‘bottom billion’. See Collier, *supra* note 27, at 79–96.

<sup>37</sup> According to the corporation’s website, available at [www.shell.com.ng/aboutshell/our-business/bus-nigeria/e-and-p/spdc.html](http://www.shell.com.ng/aboutshell/our-business/bus-nigeria/e-and-p/spdc.html) (last visited 30 May 2016). In late 2014, Shell began divesting from a significant part of its onshore oil and gas fields in the Niger Delta, see Macalister, ‘Shell Poised to Sell Four Oilfields and a Pipeline in Nigeria’, *The Guardian* (27 August 2014).

accounted for over 95 per cent of the country's exports and over 77 per cent of the government's revenue.

Yet far from benefiting the country's overall welfare, economic development has been bought at the price of low environmental and human rights standards that have proven largely ineffective in protecting citizens' rights.<sup>38</sup> Since Shell started operations in Nigeria, the country has reportedly seen some 5,000 major oil spills, discharging an estimated 1.5 million tons of crude oil into the creeks, farms and rivers.<sup>39</sup> Nigeria's gas flaring makes a significant contribution to global climate change and causes acid rain that has caused deterioration in housing and infrastructure, impacted soil fertility and reduced crop yields. Carcinogenic and other toxic substances released in the course of combustion have impacted on the health and well-being of the local communities.<sup>40</sup> A 2011 report by the United Nations Environment Programme reveals the extent of the environmental degradation and harm to human life caused by the global oil industry in Nigeria's Ogoniland.<sup>41</sup> Soil pollution by petroleum hydrocarbons is extensive and threatens the livelihood of many Ogoniland communities. Contamination of surface and ground water has destroyed communities' traditional fishing grounds and poisoned the drinking water in many places with carcinogenic benzene. The report estimates that most Ogonis have been exposed to oil extraction-related pollution of soil, air and water for all of their lives and that the environmental restoration of Ogoniland could prove to be the world's most wide-ranging and long-term oil clean-up ever undertaken.

Decades of futile attempts to put an end to Nigeria's gas flares are a poignant example of the consequences of exposing weak domestic legal and political institutions to the human rights and environmental impacts of global resource exploitation. First attempts to control gas flaring in Nigeria date back to the 1960s.<sup>42</sup> The government's 1969 Petroleum Act required oil

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<sup>38</sup> The impacts of Shell's oil drilling and gas-flaring activities on human rights and the environment in the Niger Delta have been extensively documented. See, e.g., United Nations Environmental Programme (UNEP), *Environmental Assessment of Ogoniland* (2011); Amnesty International, *The True "Tragedy": Delays and Failures in Tackling Oil Spills in the Niger Delta* (2011); Amnesty International, *Nigeria: Petroleum, Pollution and Poverty in the Niger Delta* (2006); Climate Change Justice Programme, *Gas Flaring in Nigeria: A Human Rights, Environmental and Economic Monstrosity* (2005).

<sup>39</sup> *Poison Fire*, *supra* note 31.

<sup>40</sup> Amnesty International, *Nigeria*, *supra* note 38, at 24–27.

<sup>41</sup> UNEP, *supra* note 38.

<sup>42</sup> On the relevant domestic legislation see further Ukula, 'Gas Flaring in Nigeria's Niger Delta: Failed Promises and Reviving Community Voices', 2 *Washington and Lee Journal of Energy, Climate and Environment* (2011) 97, at 103–112; and the website of the Nigerian Government Department of Petroleum Resources, <https://dpr.gov.ng/index/acts-and-regulations/> (last visited 30 May 2016).

companies to submit oil-development schemes that would address the environmental hazards of gas flaring. The 1979 Associated Gas Re-Injection Act 99 mandated oil companies to re-inject gas into the earth's crust and/or to submit detailed plans for gas utilization. It also envisaged ending all gas flaring across Nigeria by January 1984, subject only to exemptions granted by ministerial certificate. In 2005, Nigeria still combusted 75 per cent of associated gas, making it one of the world's biggest flarers. Natural gas worth an estimated US \$2.5 billion is reportedly wasted every year, while energy imports weigh heavily on the government's purse.<sup>43</sup>

In November 2005, a Federal High Court of Nigeria held gas flaring to be in violation of the 'fundamental rights to life (including healthy environment) and dignity of human person guaranteed by the [Nigerian] Constitution ... and reinforced by the African Charter [of Human and Peoples' Rights]'.<sup>44</sup> The Court ordered Shell's subsidiary the SPDC and the NNPC 'to take immediate steps to stop the further flaring of gas in the applicant's Community'.<sup>45</sup> It also declared the practice of permitting gas flaring by ministerial certificate unconstitutional and called upon the government to amend the legislation.<sup>46</sup> Since gas flaring continued, contempt of court proceedings were filed against the SPDC and the NNPC in December 2005. In April 2006, Shell obtained a stay of execution of the court order on the condition that it would phase out all on-shore gas flaring in Nigeria within one year and submit a detailed plan and technical scheme to this effect.<sup>47</sup> At the due date in April 2007, the SPDC, the NNPC and the government failed to appear in court, the judge had been replaced, the court file was missing, no phase-out plan had been submitted and gas flaring was business as usual.<sup>48</sup> Further government deadlines to stop gas flaring in late 2007 and 2008 expired without effect or consequence for the corporations. Shell also failed to honour its own 2006 commitment to put all flames out by 2009. In regard to the Federal High Court's order to amend the domestic legislation, it took until 2012 for the government to propose a new Petroleum Industry Bill, which was adopted

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<sup>43</sup> Climate Change Justice Programme, *supra* note 38, at 10–13; 'Nigeria's Oil: A Desperate Need for Reform', *The Economist* (20 October 2012).

<sup>44</sup> Federal High Court of Nigeria Benin Judicial Division, *Between Mr Jonah Gbemre and Shell Petroleum Development Company Nigeria Ltd, Nigerian National Petroleum Corporation, Attorney General of the Federation* (Case no. FHC/B/CS/53/05), 14 November 2005, at 5.

<sup>45</sup> *Ibid.*, at 6.

<sup>46</sup> *Ibid.*, at 5, 6.

<sup>47</sup> Climate Justice, *Shell Fails to Obey Court Order to Stop Nigeria Flaring, Again* (2007).

<sup>48</sup> *Ibid.*

by the House of Representatives of Nigeria's National Assembly in October 2015.<sup>49</sup> Shell continues flaring gas in Nigeria.

Diamond and Mosbacher's account of the 'resource curse' starts out with a corrupt African runaway who leads a prosperous life in California until he is brought to trial by the US authorities. While the US 'crackdown' on his 'illicit wealth' is 'laudable', his 'ability to travel and conduct business in the United States and around the world for so long highlights the gaps in the architecture of international accountability and justice'.<sup>50</sup> Diamond and Mosbacher's 'lesson' is that 'oil-rich developing countries that want to avoid the resource curse cannot wait for the international system to fight corruption for them'.<sup>51</sup> What this methodological nationalism obscures is another important gap in the architecture of international accountability and justice, namely the gap between the human rights impacts of global resource exploitation and the confinement of human rights protection to the sovereign state legal order.

In a wide-ranging decision of 2001, the African Commission on Human and Peoples Rights held that Nigeria had violated its obligations under the African Charter to respect, protect and fulfil the right to life, health, housing, food and a generally satisfactory environment by:

directly participating in the contamination of air, water and soil and thereby harming the health of the Ogoni population; failing to protect the Ogoni population from the harm caused by the NNPC Shell Consortium but instead using its security forces to facilitate the damage; [and] failing to provide or permit studies of potential or actual environmental and health risks caused by the oil operations.<sup>52</sup>

With regard to the right of peoples to freely dispose of their wealth and natural resources (Article 21 of the African Charter), the Commission noted that 'the Government of Nigeria facilitated the destruction of the Ogoniland ... [and gave] the green light to private actors, and the oil companies in particular, to devastatingly affect the well-being of the Ogonis'.<sup>53</sup>

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<sup>49</sup> M. Jimoh and C. Onochie, 'Reps Pass Petroleum Industry Bill', *The Guardian* (30 October 2015), available at [www.ngrguardiannews.com/2015/06/reps-pass-petroleum-industry-bill/](http://www.ngrguardiannews.com/2015/06/reps-pass-petroleum-industry-bill/) (last visited 30 May 2016).

<sup>50</sup> Diamond and Mosbacher, *supra* note 33, at 1.

<sup>51</sup> *Ibid.*

<sup>52</sup> African Commission on Human and Peoples Rights, *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria* (Communication no. 155/96), 27 May 2002, at 50.

<sup>53</sup> *Ibid.*, at 58.

One decade later, the Court of Justice of the Economic Community of Western African States (ECOWAS) once again found Nigeria in violation of Article 24 of the African Charter.<sup>54</sup> Taking notice of ‘the numerous laws passed to regulate the extractive oil and gas industry ... [and] the creation of agencies to ensure the implementation of the legislation’, the Court concluded that ‘the core of the problem in tackling the environmental degradation in the Region of Niger Delta resides in the lack of enforcement of the legislation and regulation in force’.<sup>55</sup> Yet in spite of the apparent failure of the Nigerian state to protect its people against the human rights and environmental impacts of the exploitation of its natural resources, neither judicial body contemplated the human rights accountability of those (Western) states in which the oil multinationals are headquartered and from where they steer and control their global business operations. Rather, it is considered Nigeria’s sole legal responsibility to prevent and redress corporate human rights violations within its own sovereign borders.

#### **4 The Sovereignty Objection to Extraterritorial Human Rights Protection**

In the second section of this article, I argued that during decolonization, human rights became intertwined with the struggles of developing countries to secure political control over the economic exploitation of their natural resources. In this process, state sovereignty assumed a protective role in relation to human rights conceived as an expression of national political self-determination. This protective role of state sovereignty is still traceable in the US Supreme Court’s concern in *Kiobel* that adjudicating human rights violations committed on Nigerian soil could give rise to discord with other states as well as in the UK and Dutch governments’ insistence that it should be for each state to prevent and redress corporate human rights violations within its own territorial borders. It also informs the approach of the African Commission on Human and Peoples Rights and the ECOWAS court in limiting legal accountability for the human rights impacts of global resource exploitation to the Nigerian state. This despite the fact that, as Nigeria’s gas-flaring saga nicely illustrates, human rights violations committed by the SPDC are difficult to divorce from the decisions taken on behalf of the whole ‘global group of energy and petrochemicals companies’ at the corporate headquarters of Royal-Dutch Shell Plc in The Hague.<sup>56</sup>

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<sup>54</sup> Court of Justice of the Economic Community of Western African States, *SERAP v. Federal Republic of Nigeria* (ECW/CCF/JUD/18/12), 14 December 2012.

<sup>55</sup> *Ibid.*, at 103, 108.

<sup>56</sup> See the Shell Global homepage, available at [www.shell.com](http://www.shell.com) (last visited 30 May 2016).

Against the background of this asymmetry between human rights violations committed by globally operating business entities and the localization of human rights protection in the international order of states, I now turn to examining in more detail the political and legal premises of the sovereignty objection to extraterritorial human rights protection. While the present section scrutinizes the relationship between global resource exploitation and national political self-determination as the normative justification for confining human rights to the sovereign state, the following section examines the legal ramifications of this approach in the international law of jurisdiction. From the perspective of national political self-determination, two important strands of the sovereignty objection to extraterritorial human rights protection may be distinguished. The first – substantive – objection maintains that inasmuch as people(s) continue to hold on to different conceptions of the good life (if they are prepared to subscribe to the liberal distinction between the ‘right’ and the ‘good’ at all), extraterritorial human rights protection reveals itself as a new form of imperial sovereignty that globalizes the Western liberal-capitalist ideology under the pretext of protecting ‘universal’ human rights. The second – institutional – objection complains that inasmuch as extraterritorial human rights protection interferes with the domestic politics of third countries, it decouples the realization of human rights from the political process vested in the state legal order and turns them into an instrument of power in the hands of foreign judiciaries.

Jean Cohen’s defence of state sovereignty begins with an onslaught on ‘cosmopolitan liberalism’ and ends with a critique of US hegemony as ‘imperial right’.<sup>57</sup> In her view, cosmopolitan liberals override the principle of sovereign equality in the name of a supposedly universal set of moral rights and obligations that are grounded in ‘common humanity’ and, thus, independent of ‘political community’: ‘[T]he abstract moral principle of equal dignity is cast in the language of *human rights* and formulated as a theory of justice to persons’.<sup>58</sup> The drawback of this approach is that ‘justice to persons’ becomes an external moral standard of legitimacy that ‘loses sight of the indispensable role of domestic politics and legal systems in the constitution of freedom and the concretization of rights’.<sup>59</sup> Absent mature political institutions at the international level, the appeal to the ‘global right’, far from realizing cosmopolitan justice, undermines international law, marginalizes international institutions and

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<sup>57</sup> Cohen, ‘Sovereign Equality vs. Imperial Right: The Battle over the “New World Order”’, 13(4) *Constellations* (2006) 485.

<sup>58</sup> *Ibid.*, at 487.

<sup>59</sup> *Ibid.*, at 488.

lends itself to a new ‘imperial project of dominance and indirect control of “key peripheries”’.<sup>60</sup> Under these conditions, state sovereignty and its corollary – territorial jurisdiction – become the ‘counter-concept to empire’:

In the aftermath of decolonization, when it became interpreted in light of the concept of self-determination, sovereign equality was invoked to generalize the principle of political autonomy and non-intervention to ... all states. The international order thereby became more inclusive, more egalitarian, and more ‘legalised’ than ever before, seriously restricting the space for the legitimate exercise of power outside the law.<sup>61</sup>

Accordingly, instead of (unilateral) extraterritorial human rights protection that further weakens state sovereignty, what is required is a reform of the international (UN) institutions within a ‘dualist’ international legal order of states.<sup>62</sup>

Jan Klabbbers’ ‘sovereignty objection’ is more directly tailored to redressing extraterritorial human rights violations through transnational tort litigation.<sup>63</sup> Similarly to Cohen, Klabbbers locates the concrete institutionalization of abstract and universal human rights in a political community bounded by the state legal order. Moreover, the principal role of human rights within such communities is to enable processes of collective political self-determination ‘by facilitating the conduct of politics or, even more fundamentally, by helping create a body politic and thereby making politics possible in the first place’.<sup>64</sup> Accordingly, one problem with tort litigations for extraterritorial human rights violations is that they undermine the socio-political fabric of human rights by collapsing their orientation towards the public good into a private and ‘bilateral relationship between victim and tortfeasor’.<sup>65</sup> Klabbbers’ second objection dwells on the republican concern that courts may be ill-suited to protect human rights in a democratic polity – a concern that applies *a fortiori* to courts situated outside the state legal order:

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<sup>60</sup> *Ibid.*, at 491.

<sup>61</sup> *Ibid.*, at 492.

<sup>62</sup> A proposal that is further developed in J. Cohen, *Globalisation and Sovereignty* (2012).

<sup>63</sup> Klabbbers, ‘Doing the Right Thing? Foreign Tort Law and Human Rights’, in C. Scott (ed.), *Torture as Tort* (2001) 553.

<sup>64</sup> *Ibid.*, at 557–558.

<sup>65</sup> *Ibid.*, at 558.



For, if politics itself is the ultimate desired [end of human rights], this end is arguably undermined by means of enforcement that lie outside politics itself, notably judicial enforcement. And the undermining effect is exacerbated if the non-political means of enforcement stem from outside the relevant community whose politics are at stake.<sup>66</sup>

While for Cohen, sovereignty needs to be ‘harmonized’ with human rights protection at the international (UN) level,<sup>67</sup> for Klabbers, it carves out a political space for the realization of human rights in the territorial state legal order. Dwelling on the doctrine of sovereign immunity that protects states’ official conduct (as opposed to the mere ‘commercial’ acts of governments) from scrutiny in foreign courts, Klabbers maintains that ‘safeguarding politics within sovereign societies is an important enough goal [of international law] to warrant the creation of a separate niche for politics to take place in relative isolation from mundane economic matters’.<sup>68</sup>

While these objections to extraterritorial human rights protection should not be discarded lightly, they arguably underestimate the extent to which the doctrine of state sovereignty has come under strain from two different directions: the advent of the international ‘age of rights’ and intensified patterns of global economic cooperation and competition. In regard to the former, both Cohen’s and Klabbers’ justification for containing human rights protection within the sovereign state draws on a qualified notion of national political self-determination that has already internalized Western values of liberal democracy.<sup>69</sup> However, once sovereign equality becomes qualified by a substantive notion of political self-determination imbued with human rights, Cohen’s critique of extraterritorial human rights protection as an ‘imperial right’ loses much of its force. In regard to the latter, the protection of a domestic niche for politics from ‘mundane’ economic matters is bought at the price of localizing political control over the economic sphere in the sovereign state legal order. At the same time, the formalization of sovereign equality on the grounds of national political self-determination entails that international law could and should turn a blind eye on substantive economic inequalities

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<sup>66</sup> *Ibid.*, at 559.

<sup>67</sup> Cohen, *supra* note 57, at 502.

<sup>68</sup> Klabbers, *supra* note 63, at 561.

<sup>69</sup> The liberal-republican roots of Klabbers’ argument are unmistakable. For Cohen, sovereign equality is bound up with ‘the values of political plurality and political autonomy’ as ‘the precondition for democracy’. Cohen, *supra* note 57, at 498.

between states.<sup>70</sup> However, the political rationale behind Klabbers' confinement of human rights to the sovereign state is subverted once national political self-determination becomes colonized by the economic imperatives of global resource exploitation, as in the case of Nigeria.

Nigeria's inability to prevent and redress human rights violations committed in the course of the exploitation of its natural oil and gas resources has translated into violent conflicts that have created systemic obstacles to the realization of political self-determination within the country's sovereign territorial borders. It has caused insurgencies of armed local groups accompanied by attacks on oil installations, oil theft and the kidnapping of oil workers, with the ostensible aim of regaining resource control and retaliating for the harm done by the oil industry. As Amnesty International reports, 'armed groups and criminal gangs have explicitly sought resource control on behalf of the oil-producing areas, and have engaged in theft of oil and acts of violence which are sometimes claimed as retribution for the treatment of the people of the Niger Delta by the oil industry'.<sup>71</sup> In response, the government has deployed heavily armed security forces to protect the oil industry, which, in turn, has been accused of complicity in the exacerbation of violence through the financing of military and paramilitary operations.<sup>72</sup> Shell is also said to have contributed to fuelling conflict by disregarding its own operational procedures and corporate policies and exploiting loopholes in domestic regulation to the detriment of human, animal and plant life in the affected communities.<sup>73</sup> Moreover:

[a] lack of transparency in the award of compensation and clean-up contracts has fed inter- and intra- community tensions and conflict. Communities are often seen and treated as a 'risk' to be pacified, rather than as stakeholders with critical concerns about the impact of oil operations. The risk-based approach to communities underpins several damaging strategies in the Niger Delta. Some companies have effectively paid communities and youths off, hoping to prevent

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<sup>70</sup> On this 'mutual containment' between political sovereign state equality and economic inequality, see further Kingsbury, *supra* note 28, at 600.

<sup>71</sup> Amnesty International, *Nigeria*, *supra* note 38, at 13.

<sup>72</sup> Obi, 'Oil Extraction, Dispossession, Resistance, and Conflict in Nigeria's Oil-Rich Niger Delta', 30 *Canadian Journal of Development Studies* (2010) 219, at 230.

<sup>73</sup> In this regard, the 2011 UNEP report concludes 'that the control, maintenance and decommissioning of oilfield infrastructure in Ogoniland are inadequate'; that 'industry best practices and SPDC's own procedures have not been applied, creating public safety issues' and that 'while new changes are an improvement, they still do not meet the local regulatory requirements or international best practices'. UNEP, *supra* note 38, at 12.

protests. This has underlined that threats, protects and violence are ways to access oil money.<sup>74</sup>

Michael Watts' thoughtful analysis captures the contribution of global resource exploitation to the production of legal un-rule and the genesis of political violence in Nigeria's 'petro-democracy'. On the one hand, the vital importance of centralized oil revenues to Nigerian state building, both internally and externally, has led to a securitization and militarization of political conflict in the country's oil-producing communities.<sup>75</sup> On the other hand, the co-option of volatile federal state institutions by oil multinationals has disintegrated and discredited the state and 'fragments and destabilises the institutional and political practice of building an oil-nation'.<sup>76</sup>

In the late 1980s, these developments triggered a process of mass mobilization and radical militancy in Nigeria's Ogoni community that culminated in the execution of Ken Saro-Wiwa, Barinem Kiobel and other members of the Ogoni resistance in 1995 – the subject of the later *Kiobel* litigation in the US courts. In December 1991, the Movement for the Survival of the Ogoni People (MOSOP) had promulgated an 'Ogoni Bill of Rights', claiming 'political control of Ogoni affairs by Ogoni people', including 'the right to control and use a fair proportion of OGONI economic resources for Ogoni development' and 'the right to protect the OGONI environment and ecology from further degradation'.<sup>77</sup> The government violently backlashed on Ogoni protests, leaving 27 villages razed, 800,000 Ogonis displaced and some 2,000 dead.<sup>78</sup> Community upheavals and international protests led Shell to withdraw from Ogoniland.

In the US courts, the Nigerian plaintiffs asserted that the NNPC, under the direction of Royal Dutch Shell and Shell Transport, had instigated, orchestrated and facilitated serious human rights violations in order to silence protests against the corporation's oil exploration and

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<sup>74</sup> Amnesty International, *Nigeria*, *supra* note 38, at 13.

<sup>75</sup> According to Watts, oil as a 'centralising force ... rendered the state more visible (and globalised), and permitted, that is to say, financially underwrote, a process of secular nationalism and state building'. Watts, *supra* note 36, at 61.

<sup>76</sup> *Ibid.*, at 73.

<sup>77</sup> Movement for the Survival of the Ogoni People, *Ogoni Bill of Rights* (October 1990), available at [www.mosop.org/ogoni\\_bill\\_of\\_rights.html](http://www.mosop.org/ogoni_bill_of_rights.html) (last visited 30 May 2016).

<sup>78</sup> Skogly, 'Complexities in Human Rights Protection: Actors and Rights Involved in the Ogoni Conflict in Nigeria', 15 *Netherlands Quarterly of Human Rights* (1997) 47, at 48.

extraction activities in the Ogoni region.<sup>79</sup> Shell was alleged to have provided Nigerian security forces with money, food and transportation and to have allowed the military to use corporate property as a staging ground for attacks. In the corporation's view, by contrast, it had become 'hostage' in a battle between oil-producing communities and the government and had been unjustifiably targeted to raise the international profile of MOSOP's political campaign.<sup>80</sup> Shell declined legal responsibility for human rights violations related to its oil operations in Ogoniland and construed the claims raised in the Ogoni Bill of Rights as 'mostly of a political nature and addressed to the Nigerian government'.<sup>81</sup>

## 5 International Human Rights Law and the Litmus Test of Jurisdiction

The confinement of human rights protection to the sovereign state for the sake of national political self-determination finds a legal expression in the international public law of jurisdiction, which, in turn, frames victims' access to justice in private tort litigations for extraterritorial corporate human rights violations. Jurisdiction in public international law connotes 'the collection of rights held by a state, first in its capacity as the entity entitled to exercise control over its territory and second in its capacity to act on the international plane, representing that territory and its people'.<sup>82</sup> It is commonly divided into prescriptive jurisdiction (the state's authority to prescribe legal rules), enforcement jurisdiction (the state's authority to enforce legal rules) and adjudicative jurisdiction (the authority of state courts to adjudicate disputes referred to them).<sup>83</sup> In all of its different manifestations, jurisdiction is an 'aspect of sovereignty' that regulates states' legal competence to assert authority in matters not exclusively of domestic concern,<sup>84</sup> in accordance with a recognized legal basis and subject to a standard of reasonableness.<sup>85</sup>

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<sup>79</sup> *Kiobel*, *supra* note 1.

<sup>80</sup> Shell representative cited in Human Rights Watch, *The Ogoni Crisis: A Case-Study of Military Repression in South-Eastern Nigeria* (1995), at 28.

<sup>81</sup> Shell Nigeria, *The Ogoni Issue*, available at <http://www.shell.com.ng/environment-society/environment-tpkg/ogoni.html> (last visited 30 May 2016).

<sup>82</sup> J. Crawford, *Brownlie's Principles of Public International Law* (8th ed., 2012), at 448.

<sup>83</sup> The latter category is sometimes subsumed under the state's prescriptive and enforcement jurisdiction, see Lowe, 'Jurisdiction', in M. Evans (ed.), *International Law* (2003) 329, at 333.

<sup>84</sup> Crawford, *supra* note 82, at 456; Mann, 'The Doctrine of Jurisdiction in International Law', 111 *Recueil des Cours* (1964) 1, at 9.

<sup>85</sup> For a discussion of recognized bases of jurisdiction in public international law, see Lowe, *supra* note 83, at 336–351; on the relevance of the principle of reasonableness in allocating jurisdictional competences between states, see C. Ryngaert, *Jurisdiction in International Law* (2008).

To conceive jurisdiction in public international law as an expression of state sovereignty entails, as James Crawford notes, that ‘the starting point in this part of the law is the presumption that jurisdiction (in all its forms) is territorial, and may not be exercised extra-territorially without some specific basis in international law’.<sup>86</sup> As a legal corollary of state sovereignty, jurisdiction protects the authority that a state wields over its territory and people therein by delimiting the rights of other states to prescribe, adjudicate and enforce rules in relation to conduct outside their borders. As a consequence, and *Kiobel* writ large, a state’s adjudicative jurisdiction in public international law determines the competence of its courts to hear private disputes involving a foreign element.<sup>87</sup> States’ domestic private international law that allocates jurisdiction to courts in transnational tort litigations for human rights violations is thus constrained by the rules of public international law that allocate jurisdiction between states *inter se*. Hence, whereas global business operations erode the protective role of sovereignty in relation to human rights within the state’s territory, jurisdiction as a function of sovereignty imposes limitations of states’ competences to adjudicate corporate activities impairing human rights outside their borders.

The way in which sovereignty constrains states’ jurisdictional competences to assert legal authority outside their territory has also informed debates about the extraterritorial application of international human rights treaties. As the European Court of Human Rights (ECtHR) considered in its (much critiqued) admissibility decision in *Banković*, ‘while international law does not exclude a State’s exercise of jurisdiction extra-territorially, the suggested bases of jurisdiction ... are, as a general rule, defined and limited by the sovereign territorial rights of other relevant States’.<sup>88</sup> Accordingly, and even though Article 1 of the European Convention on Human Rights (ECHR) does not confine human rights obligations to state territory, the former’s alignment with sovereignty appears to warrant a ‘primarily territorial’ interpretation that renders extraterritorial human rights protection ‘exceptional’ and in need of special justification.<sup>89</sup>

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<sup>86</sup> Crawford, *supra* note 82, at 456.

<sup>87</sup> As the UK and Dutch governments submitted to the US Supreme Court, the competence of state courts to assert jurisdiction over conduct abroad ‘depends on there being between the subject matter and the state exercising jurisdiction a sufficiently close connection to justify that state in regulating the matter and perhaps also to override any competing rights of other states’. Government Brief, *supra* note 5, at 31, with reference to R. Jennings and A. Watts, *Oppenheimer’s International Law* (9th ed., 1992), vol. 1, at 457–458.

<sup>88</sup> ECtHR, *Banković & Others v. Belgium & Others*, Appl. no 1398/03, Decision of 12 December 2001, at 59.

<sup>89</sup> *Ibid.*

While the bulk of *Banković* has meanwhile been overruled, the Court continues to hold fast to the view that ‘jurisdiction is presumed to be exercised normally throughout the State’s territory’ and that, accordingly, ‘acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction within the meaning of Article 1 only in exceptional circumstances’.<sup>90</sup> However, the question whether states are obliged to protect the human rights of individuals outside their borders is not reducible to the question whether they are entitled to do so pursuant to an internationally recognized basis of jurisdiction. Otherwise, a state could circumvent its obligations under international human rights treaties by exceeding its jurisdictional competences in general public international law. The conditions under which an individual comes under the human rights jurisdiction of a state are thus different from those determining the legality of state action according to the public international law rules of jurisdiction.<sup>91</sup> Whereas general public international law establishes whether a state is competent to exercise jurisdiction outside its territory, international human rights law establishes whether an extraterritorial act or omission of that state brings an individual under its jurisdiction for the purpose of triggering corresponding human rights obligations. Put differently, whereas the former is a function of state sovereignty and concerns the state’s entitlement to exercise jurisdiction abroad, the latter is a function of protecting the rights of the individual and concerns the state’s obligations when exercising jurisdiction abroad.

In this vein, the ECtHR has held that the decisive factor for establishing extraterritorial human rights obligations is not the (il)legality of state action but, rather, the state’s exercise of power and control, whether directly or indirectly, over foreign territory and people therein.<sup>92</sup> Similarly, the UN Human Rights Committee considers that ‘a state party must respect and ensure the rights laid down in the [ICCPR] to anyone within [its] power or effective control, ... even if not situated within the territory of the state party ... and regardless of the circumstances in which such power or effective control was obtained’.<sup>93</sup> Hence, according to the Inter-American Commission of Human Rights, ‘the inquiry turns not on the presumed victim’s nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the state observed the rights of a person subject to its authority and control’.<sup>94</sup>

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<sup>90</sup> ECtHR, *Al-Skeini and Others v. United Kingdom*, Appl. No 55721/07, Judgment of 7 July 2011, at 131.

<sup>91</sup> See further M. Milanovic, *Extraterritorial Application of Human Rights Treaties* (2011), at 26–30; M. Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (2009), at 56–57.

<sup>92</sup> *Al-Skeini*, *supra* note 90, at 136–138.

<sup>93</sup> General Comment 31, *supra* note 10, at 10.

<sup>94</sup> IACCommHR, Case 10.951, *Coard et al v. The United States*, 109/99, 29 September 1999, at 37.

Human rights jurisdiction thus circumscribes a rights-based ‘*relationship* between the individual and the State in relation to [violations of human rights] *wherever they occurred*’.<sup>95</sup> This rights-based relationship, once established, entails state obligations to prevent and redress corporate human rights violations committed outside the state’s territory,<sup>96</sup> including through ensuring access to justice in private litigations.<sup>97</sup> As the ECtHR held in *Markovic*, a case that concerned the attempt of applicants from Serbia and Montenegro to bring civil proceedings in Italy for the same human rights violations that had also formed the background of the court’s previous *Banković* decision:

if civil proceedings are brought in the domestic courts, the State is required by Article 1 of the Convention to secure in those proceedings respect for the rights protected by Article 6 [the right to access to justice]. The Court considers that, once a person brings a civil action in the courts or tribunals of a State, there indisputably exists, without prejudice to the outcome of the proceedings, a ‘jurisdictional link’ for the purposes of Article 1.<sup>98</sup>

The last decade has furthermore seen increasing attempts on the part of the UN treaty bodies to extend state obligations under international human rights law to activities of their ‘corporate nationals’ on the territory of other states.<sup>99</sup> In its well-known General Comment No. 14 on the Right to Health, for instance, the Committee on Economic, Social and Cultural Rights (CESCR) called upon states ‘to respect the enjoyment of the right to health in other countries, and to prevent third parties from violating the right in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law’.<sup>100</sup> The Committee’s General Comment

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<sup>95</sup> Human Rights Committee, *Lopez Burgos versus Uruguay*, UN Doc. CCPR/C/13/D/52/1979, 29 July 1981, at 12.2 (emphasis added).

<sup>96</sup> On the extraterritorial application of the state duty to protect against corporate-related human rights violations, see further Augenstein and Kinley, ‘Beyond the 100 Acre Wood: in Which International Human Rights Law Finds New Ways to Tame Global Corporate Power’, 19(6) *International Journal of Human Rights* (2015) 828.

<sup>97</sup> On the relationship between human rights jurisdiction and private international law in Europe, see L. Kiestra, *The Impact of the European Convention on Human Rights on Private International Law* (2014).

<sup>98</sup> ECtHR, *Markovic and Others versus Italy*, Appl. no 1398/03, Judgment of 14 December 2006, at 54.

<sup>99</sup> For an overview and discussion of the relevant case law and treaty body commentary, see the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights 2011, reprinted, with extensive annotations, in 34 *Human Rights Quarterly* (2012) 1084; and, more recently, Global Initiative, *Human Rights Law Sources: UN Pronouncements on Extra-Territorial Obligations* (2015).

<sup>100</sup> Committee on Economic, Social and Cultural Rights (CESCR), General Comment 14: The Right to the Highest Attainable Standard of Health, Doc. E/C.12/2000/4, 11 August 2000, at 39.

on social security provides that ‘state parties should extraterritorially protect the right to social security by preventing their own citizens and national entities from violating this right in other countries’.<sup>101</sup> In 2011, the CESCR adopted a Statement of the Obligations of States Parties Regarding the Corporate Sector and Economic, Social and Cultural Rights, in which it called upon states to ‘take steps to prevent human rights contraventions abroad by corporations which have their main seat under their jurisdiction, without infringing the sovereignty or diminishing the obligations of the host states under the Covenant’.<sup>102</sup>

Similarly, the Committee on the Rights of the Child considers that home states ‘have obligations ... to respect, protect and fulfil children’s rights in the context of businesses’ extraterritorial activities and operations, provided that there is a reasonable link between the state and the conduct concerned’.<sup>103</sup> Once again, these obligations encompass the prevention and redress of extraterritorial corporate human rights violations. In its Concluding Observations on the United Kingdom, for example, the Committee on the Elimination of Racial Discrimination (CERD) recommended that ‘the state party should ensure that no obstacles are introduced in the law that prevent the holding of transnational corporations accountable in the state party’s courts when such violations are committed outside the state party’.<sup>104</sup> CERD has also called on the USA and Canada to explore ways to hold business entities incorporated in their jurisdiction accountable for extraterritorial violations of the Covenant.<sup>105</sup> Finally, these developments are reflected in the UN Guiding Principles on Business and Human Rights, which require states to ‘take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses [and consider] ways to reduce legal, practical and other barriers that could lead to a denial of access to remedy’, including in situations ‘where claimants face a denial of justice in a host State and cannot access home State courts’.<sup>106</sup>

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<sup>101</sup> CESCR, General Comment 19: The Right to Social Security, Doc. E/C.12/GC/19, 4 February 2008, at 54.

<sup>102</sup> CESCR, Statement of the Obligations of States Parties Regarding the Corporate Sector and Economic, Social and Cultural Rights, Doc. E/C.12/2011/1, 12 July 2011, at 5.

<sup>103</sup> Committee on the Rights of the Child (CRC), General Comment 16 on State Obligations Regarding the Impact of the Business Sector on Children’s Rights, Doc. CRC/C/CG/16, 17 April 2013, at 43.

<sup>104</sup> Committee on the Elimination of Racial Discrimination (CERD), Concluding Observations: United Kingdom of Great Britain and Northern Ireland, Doc. CRD/C/GBR/CO/18-20, 14 September 2011, at 29.

<sup>105</sup> CERD, Concluding Observations: United States, Doc. CERD/C/USA/CO/6, 8 May 2008, at 30; CERD, Concluding Observations: Canada, Doc. CERD/C/CAN/CO/18, 25 May 2007, at 17.

<sup>106</sup> Human Rights Committee, Guiding Principles on Business and Human Rights: Implementing the United Nations’ ‘Protect, Respect and Remedy’ Framework, Doc. A/HRC/17/31, 21 March 2011, para. 26.



## 6 Global Resource Exploitation and the Law and Politics of Human Rights

I have used the example of the US Supreme Court judgment in *Kiobel* to examine how state sovereignty structures the relationship between the global economic exploitation of natural resources and the localization of the law and politics of human rights in the international order of states. Revisiting post-war attempts of developing countries to secure permanent sovereignty over their natural resources, I have argued that international law came to conceive of human rights as an expression of national political self-determination vested in the sovereign state legal order. Challenging the standard narrative of Africa's 'resource curse', I have subsequently shown how the human rights impacts of global resource exploitation have undermined the protective role of state sovereignty in relation to political self-determination that lies at the heart of the sovereignty objection to extraterritorial human rights protection.

At the same time, jurisdiction as a function of state sovereignty in public international law curtails access to justice for victims of extraterritorial corporate human rights violations in (Western) home states of 'multinational' corporations. This has two important consequences for the operation of human rights in the international order of states. From a legal perspective, the human rights impacts of global resource exploitation are not mitigated by corresponding state obligations to respect, protect and fulfil the human rights of affected individuals outside their borders. This effectively privileges the sovereign authority that states wield over their territory and people therein over the legal protection of victims of extraterritorial corporate human rights violations. From a political perspective, the confinement of human rights protection to the sovereign state for the sake of national political self-determination insulates the human rights impacts of global resource exploitation from effective political contestation. Nigeria's 'resource curse' finds its counterpart in a global 'good governance' agenda that caters to the resource needs of the industrialized world.<sup>107</sup> Relatedly, once resource-rich developing countries have been posited as international agents of economic growth, local political resistance is reframed in terms of global threats to (energy) security.<sup>108</sup>

To redress the asymmetry between the global economic exploitation of natural resources and the localization of the law and politics of human rights in the international order of states,

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<sup>107</sup> Anghie, *supra* note 15, at 247–254; Pahuja, *supra* note 22, at 132–135.

<sup>108</sup> Lubeck, Watts and Lipschutz, 'Convergent Interests: U.S. Energy Security and the "Securing" of Nigerian Democracy', *Centre for International Policy Report* (2007), 1.

I have argued for a territorial extension of international human rights obligations. This extension includes state obligations to provide access to justice in private tort litigations for extraterritorial corporate human rights violations. While *Kiobel*, which was litigated under the ATCA, may have a number of distinctive features in this regard,<sup>109</sup> it is also representative of growing attempts to hold Shell accountable in foreign courts for the human rights and environmental impacts of its oil-drilling and gas-flaring activities in Nigeria.

Another ATCA case with the same subject matter as *Kiobel* was settled out of the US courts in 2009.<sup>110</sup> In a recent group litigation brought by members of Nigeria's Bodo community in the UK, a London High Court decided that the SPDC could be held liable for oil spills resulting from a failure to take all reasonable steps to protect its infrastructure.<sup>111</sup> In January 2015, a settlement was reached according to which Shell is to pay £55 million compensation and to clean up the affected areas. A few years earlier, a Dutch District Court had accepted jurisdiction in a similar case filed by Nigerian fishermen in the Netherlands against Royal Dutch Shell and the SPDC for damages caused by oil spills. In January 2013, the District Court rendered its final judgment, dismissing the claims against Royal Dutch Shell and all but one claim against the SPDC.<sup>112</sup> On appeal, all claims against the Dutch parent company and the SPCD were reinstated in December 2015, with the court ordering Shell to disclose documents concerning the maintenance of its oil pipelines.<sup>113</sup>

I contend that these cases should be appraised in light of the states' human rights obligations under public international law. It is one (important) question whether transnational tort litigation can contribute to mitigating the human rights impacts of global resource

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<sup>109</sup> On the history of using ATCA for transnational human rights litigations and a comparison with human rights cases litigated under general private international law in the USA and elsewhere, see S. Joseph, *Corporations and Transnational Human Rights Litigation* (2004).

<sup>110</sup> *Wiwa v. Royal Dutch Shell Co. & Shell Transport and Trading Company plc.*, 96 Civ. 8386 (8 November 1996).

<sup>111</sup> *The Bodo Community and Others v. The Shell Petroleum Development Company of Nigeria Limited*, [2014] EWHC 1973 (TCC).

<sup>112</sup> *Oguru-Efanga v. Shell*, ECLI:NL:RBSGR:2013:BY9850 (30 January 2013); *Dooh v. Shell*, ECLI:NL:RBSGR:2013:BY9854 (30 January 2013); *Akpan v Shell*, ECLI:NL:RBSGR:2013:BY9854 (30 January 2013).

<sup>113</sup> *Oguru-Efanga v. Shell*, ECLI:NL:GHDHA:2015:3588 (17 December 2015); *Dooh v. Shell*, ECLI:NL:GHDHA:2015:3586 (17 December 2015); *Akpan v. Shell*, ECLI:NL:GHDHA:2015:3587 (17 December 2015). The question of Shell's liability for the oil spills has not been answered on appeal but will be subject to further litigation. See 'Dutch Courts Have Jurisdiction in Case against Shell Nigeria Oil Spills', *Gerechtshof Den Haag* (18 December 2015), available at <https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Gerechtshoven/Gerechtshof-Den-Haag/Nieuws/Paginas/Dutch-Courts-have-jurisdiction-in-case-against-Shell-Nigeria-oil-spills.aspx> (last visited 30 May 2016).

exploitation. Yet it is quite a different question what obligations international human rights law imposes on states to prevent and redress resource-related human rights violations outside their borders. Whereas the former concerns the proper allocation of goods in the global market, the latter pertains to the public and political distribution of human rights and responsibilities across the international legal order of states.

Philip Liste has recently pointed to the ‘problematic spatial circularity’ at work in *Kiobel* that also besets arguments in favour of confining human rights to the sovereign territorial state: ‘Although deeply involved in the production of space, the court presents territory as physically given. Territory is thus ‘naturalised’ and, in so doing, a veil is drawn over the political nature of social space’.<sup>114</sup> There is a lively doctrinal debate about the extraterritorial application of international human rights treaties that concerns, among others, the precise requirements of human rights jurisdiction, the distinction between jurisdiction and state responsibility, the role of attribution in relation to both and the problem of causation.<sup>115</sup> While undoubtedly important, this debate should not distract from the underlying political concerns. Doctrinal arguments about the conditions under which a state can be held legally accountable for extraterritorial human rights violations reflect normative judgments about the appropriate role of human rights in construing an agency relationship between that state and an individual located outside its borders.<sup>116</sup>

From this perspective, extraterritorial human rights protection holds out the promise of recovering the politics of human rights beyond the international order of states. International legal obligations to provide access to justice for extraterritorial human rights violations are the counterpart of legal entitlements of third country victims to stake a public and political claim in the home states of multinational corporations. Accordingly, arguments that dismiss extraterritorial human rights protection as a new form of Western hegemony miss out on the political thrust of the Nigerian victims’ attempt to demand legal accountability for the human rights impacts of global resource exploitation in the judicial fore of the Western world. Moreover, extraterritorial human rights protection is not merely, perhaps not even primarily,

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<sup>114</sup> Liste, ‘Transnational Human Rights Litigation and Territorialized Knowledge: *Kiobel* and the “Politics of Space”’, 5(1) *Transnational Legal Theory* (2014) 2, at 17.

<sup>115</sup> In regard to civil and political rights, see the contributions collected in F. Coomans and M. Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (2004); in regard to economic, social and cultural rights, see M. Langford *et al.* (eds), *Global Justice, State Duties* (2013).

<sup>116</sup> For a similar argument in the context of the state duty to protect against third-party harm, see Hakimi, ‘State Bystander Responsibility’, 21(2) *European Journal of International Law* (2010) 341.

about the satisfaction of pecuniary damages but should also be seen as part of a broader project to reconfigure the legal and political landscape of the ‘late’ Westphalian world.

In the case of Nigeria, where human rights protection and political self-determination have been eroded by the economic imperatives of global resource exploitation, the retreat behind the veil of state sovereignty degenerates into a *real*-political charade.<sup>117</sup> At the same time, unless corroborated by states’ acceptance of extraterritorial legal human rights accountability, recent policy commitments to ‘business and human rights’ in the developed world may still reveal themselves as simply a new form of ‘imperial right’ that instrumentalises human well-being in the service of economic self-interest.<sup>118</sup> Either way, the ‘paradise’ of the sovereign state as a self-contained and self-determining legal and political organization – if it was ever more than a utopian promise – is irrevocably lost.

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<sup>117</sup> In this context, it should not go unnoticed that while Nigeria did not object to US jurisdiction in *Kiobel*, the Dutch government’s contribution to the joined *amicus curiae* was reportedly written upon the request from, and with the assistance of, Royal Dutch Shell. See F. Vuijst and T. Scheltema, ‘Hoe Nederland Shell helpt’, *Vrij Nederland* (8 February 2013).

<sup>118</sup> Cohen, *supra* note 57.