Southeastern Environmental Law Journal

Volume 14 | Issue 1 Article 6

Fall 2005

Multinational Corporations Facing the Long Arm of American Jurisdiction for Human Rights and Environmental Abuses: The Case of Wiwa v. Royal Dutch Petroleum, Co.

Edna Eguh Udobong

MULTINATIONAL CORPORATIONS FACING THE LONG ARM OF AMERICAN JURISDICTION FOR HUMAN RIGHTS AND ENVIRONMENTAL ABUSES: THE CASE OF *WIWA V. ROYAL DUTCH PETROLEUM, CO.*

EDNA EGUH UDOBONG*

* Edna Eguh Udobong is a graduate of Harvard Law School. She is currently a visiting academic and research scholar at the National Open University of Nigeria, where she is assisting with establishing a law program. She worked as an assistant professor of law at John Marshall Law School in Atlanta, Georgia where she also directed the Academic Support Program. She would like to acknowledge the support of Professor Jon Thames and Emmanuel James at John Marshall Law School for their motivation in writing this article, and extend sincere thanks to Lawrence Azubuike for his comments and suggestions.

Multinational corporations[1] have long played a vital role in world social and economic development, particularly in developing countries. While they provide the technical expertise and assistance necessary for the development of natural resources in most developing countries, some of their activities have resulted in environmental degradation and occasional human rights abuses.[2] Discussion in recent decades has focused on whether multinational corporations have the social responsibility to address environmental problems beyond the concerns that they exercise in the marketplace. This discussion is spurred in part by inadequate environmental regulations and codes of conduct[3] that control the activity of multinational corporations operating in developing countries.

The importance of this discussion is highlighted by the fact that many multinational corporations generate more wealth than the developing countries in which they operate.[4] Multinational corporations often possess the exclusive ability and capacity to explore and develop natural resources in these countries, as they have the best available technology to explore,

---

[1] Multinational corporations are defined as "compan[ies] with operations in two or more countries." BLACK'S LAW DICTIONARY 608 (8th ed. 2004). In practice, these companies are usually large corporations with headquarters in industrialized nations and subsidiaries or production sites in developing countries and other emerging economies. *Id.*

[2] *E.g.*, Anup Shah, *Corporate Interests and Actions Can Harm the Environment*, http://www.globalissues.org/TradeRelated/Corporations/Environment.asp (last visited Oct. 3, 2005); Julie Light, *Repression, Inc: The Assault on Human Rights*, Feb. 4, 1999, http://www.corpwatch.org/article.php?id=911 (last visited Oct. 31, 2005).

[3] *See infra* Parts IV-VI and accompanying text for a discussion on the international efforts to establish a binding code of conduct for multinational corporations and the difficulties therein.

[4] *See, e.g.*, Investopedia, Multinational Corporation, http://investopedia.com/terms/m/multinationalcorporation.asp (last visited Oct. 3, 2005); National Heritage Institute, Corporate Accountability and Governance, http://n-h-i.org/Projects/PeopleGlobalResources/CorpAccount/CorporateAccountability.html (last visited Oct. 3, 2005); Wikipedia, Multinational Corporation, http://en.wikipedia.org/multinational_corporation (last visited Oct. 3, 2005).

exploit, and develop these resources.[5] For example, only multinational corporations have the capital and the technological capability necessary to explore and develop oil resources because of the extremely complex investment activities involved in such undertakings.[6] Hence, multinational corporations have power and political influence in these nations, and their investment activities generate substantial income for developing countries,[7] especially when compared to other sources of income.[8] However, their operations have been viewed with great criticism by human rights and environmental activists.[9] For example, one such criticism points out that gas flaring in oil exploration activities causes pollution, which results in irreparable damage to land, vegetation, and water.[10] Multinational corporations have also been criticized for not applying adequate environmental protection practices to their operations in developing countries.[11]

Recent litigation involving multinational corporations and foreign nationals examined environmental damage as a basis for compensation.[12] Additionally, human rights abuses have resulted when negotiations between

---

[5] *See supra* note 4.

[6] *Cf.* John Udeh, Slide Show Presentation at the World Bank Petroleum Revenue Management Workshop: Perspective on Nigeria (Oct. 23, 2002), *available at* http://www2.ifc.org/ogmc/files/JohnUdeh.pdf ("[W]e do not have the custody of the crude, the storage tanks, the oil lifting process and the sharing of the proceeds, all of which are in the hands of the oil companies.").

[7] *See id.* (showing that the contribution of oil to the total federal revenue of Nigeria grew from 56% in 1981 to 77.8% in 1999).

[8] *See id.* (showing that between 1997 and 1998, the total non-oil revenue of the country was more than 50 % less than the total oil revenue of the country. The figure and calculations appear to lean toward a greater dependence on oil than on other resources).

[9] *E.g.*, Shah, *supra* note 2; Light, *supra* note 2; *see also* Wiwa v. Royal Dutch Petroleum Co., No. 96 CIV 8386 (KMW), 2002 WL 319887 (S.D.N.Y. Feb. 28, 2002) (Ken Saro Wiwa, an environmental and human rights activist, was executed as a result of his criticizing the Nigerian government and multinational corporations for human rights violations that were allegedly caused by oil exploitation in the Delta region) [hereinafter *Wiwa II*]; Ioloi Christopoulou, *The Ogoni Crisis: A Call for MNCs Responsibility and Accountability*, THE CATALYST, http://www.mtholyoke.edu/org/action/catalyst/orgoni.html (last visited Oct. 31, 2005); O. Igho Natufe, *The Problematic of Sustainable Development and Corporate Social Responsibility: Policy Implications for the Niger Delta* (presented at the Urhobo Historical Society Second Annual Conference and General Meeting) (November 2-4, 2001), *available at* http://www.urhobo.kinsfolk.com/Conferences/SecondAnnualConference/ConferenceMatters/Natufe.htm.

[10] Second Amended Complaint at ¶ 28-29, *Wiwa II*, 2002 WL 319887 (S.D.N.Y. Feb. 28, 2002) (No. 96 Civ. 8386, 2002 WL 32495911).

[11] *See id.* at ¶ 32.

[12] *See, e.g.*, Aguinda v. Texaco, Inc., 142 F. Supp. 2d 534 (S.D.N.Y 2001).

local communities, foreign governments, and multinational corporations fail to produce any resolution to the disputes.[13] These failed negotiations and resulting abuses ultimately led parties to resort to the American legal system to seek reparation for environmental damages and remedies for human rights abuses. The trend of suing multinational corporations in United States courts for environmental and human rights abuses in violation of international law began in 1980, and has continued in subsequent years.[14] A prime example of such litigation is the controversial *Wiwa v. Royal Dutch Petroleum Co.*,[15] the litigation on which this article will focus.

The purpose of this article is to review and analyze legal issues in the on-going litigation between Ken Saro-Wiwa and Shell Oil Company,[16] brought before the U.S. District Court in New York under the Alien Torts Claim Act[17] (ATCA) of 1789. Part I provides a background to the litigation and the legal issues presented by the Plaintiffs. Part II reviews all relevant and applicable laws to the dispute with some case analysis, and it examines international human rights laws that are applicable to the case, with a detailed overview of the Nigerian judiciary. Part III continues with an analysis of the litigation in light of the Plaintiffs' allegations of conspiracy and complicity. Parts IV and V discuss the need to formulate a binding Code of Conduct for multinational corporations, while Part VI provides a review

---

[13] *See, e.g.*, Ike Oguine, *Nigeria's Oil Revenues and the Oil Producing Areas*, THE JOURNAL, http://www.dundee.ac.uk/cepmlp/journal/html/vol4/article4-10.html (last visited Oct. 31, 2005) (One such dispute involved several negotiations between the Shell corporation and Ogoni community leaders in Nigeria. These negotiations failed to produce any agreement on what should be compensated and how compensation should be distributed among community leaders.).

[14] *See* Filartiga v. Pena-Irala, 630 F.2d 876, 878-879 (2d Cir. 1980). *See also* Beanal v. Freeport-Morgan, Inc., 197 F.3d 161, 162 (5th Cir. 1999) (where an Indonesian citizen brought action against domestic corporations conducting mining activities in the Republic of Indonesia, alleging environmental abuses, human rights violations, and genocide under Alien Tort Statute); and *Aguinda*, 142 F. Supp. 2d 534 (where citizens of Peru and Ecuador brought suit alleging that Texaco, Inc. polluted rain forests and rivers in those two countries, causing environmental damage and personal injuries).

[15] 226 F.3d 88 (2d Cir. 2000) (reversing the district court's dismissal for *forum non conveniens* and remanding for further proceedings) [hereinafter *Wiwa I*]; *Wiwa II*, 2002 WL 319887 (plaintiffs here filed a new action against the defendants in March 2001, but the court granted some of the defendants motions for dismissal and gave the plaintiffs 30 days to replead other claims).

[16] It is necessary to note that while the plaintiffs may indeed file another complaint in the future, given the amount of time that has passed since *Wiwa II*, 2002 WL 319887, the litigation has all but stalled. This article will focus on further potential claims that the plaintiffs may have and use this analysis as a guide for cases and situations similarly situated in the future.

[17] 28 U.S.C. § 1350 (2000).

of recent developments on the ATCA and some recommendations for the activities of multinational corporations in developing countries. These recommendations and conclusions focus on a tripartite resolution of the global difficulty in regulating multinational corporations.

I. BACKGROUND FACTS AND ISSUES IN LITIGATION[18]

The following presents a brief background to the litigation between members of the Nigerian Ogoni community,[19] of which the Plaintiffs in *Wiwa* are members, and the Royal Dutch Shell Oil Company.[20] The claims were brought by the Ogoni community for environmental and human rights abuses inflicted on them by Shell for the use and damage to their land and property.[21]

Shell began its oil production in the Ogoni region of Nigeria in 1958 when the country was still under the colonial rule of Britain.[22] The company "is the biggest oil producer in Nigeria with the longest history, dominating the industry for as long as oil has been produced and in the early days enjoying a monopoly and a privileged relationship with government."[23] Eighty percent of the oil extractions in Nigeria take place in the country's Delta region, which is where the Ogoni community is located.[24] Shell has been accused of ignoring human rights, causing environmental devastation,

---

[18] Much has been written about the political, social, and economic implications of the dispute between the Ogoni people, the government of Nigeria, and oil companies in Nigeria. To obtain more information on this dispute, see the following websites: http://www.maanystavat.fi/english.php; http://www.greanpeace.org/international_en/; http://www.vib.no/isf/english.htm; http://www.waado.org/nigerdelta/nigerdelta.html; http://www.greens.org/s-r/gga/ogoni.html; and http://www.ee.surrey.ac.uk/Societies/greesoc/archive/shell/.

[19] Nigeria is the largest country in Africa with approximately 120 million people. It is also the fifth largest oil producing country in the world. Oil accounts for 90% of the country's export income, 95% of foreign exchange earnings, 80% of government revenues, and 20% of the Gross Domestic Product. Christopoulou, *supra* note 9, at http://www.mtholyoke.edu/org/action/catalyst/orgoni.html.

[20] For background information on Nigeria, the Royal Dutch Shell Oil Company, and the Ogoni community, *see* Second Amended Complaint, *supra* note 10, at ¶¶ 11-31; Christopoulou, *supra* note 9, at http://www.mtholyoke.edu/org/action/catalyst/orgoni.html.

[21] *Wiwa II*, 2002 WL 319887.

[22] Second Amended Complaint, *supra* note 10, at ¶ 26; Rathaus, Factsheet on the Ogoni Struggle, http://www.ratical.org/corporations/OgoniFactS.html (last visited Oct. 3, 2005).

[23] Brownen Manby, *The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities* (Human Rights Watch 1999), *available at* http://www.hrw.org/reports/1999/nigeria.

[24] EssentialAction.org, Shell in Nigeria: What are the issues?, http://essentialaction.org/shell/issues.html (last visited Oct.3, 2005).

and contributing to economic injustice in this area.[25] Since the early 1990s, Shell and the people of the Delta Region, particularly the Ogoni community, have been involved in a series of disputes regarding issues ranging from income distribution (based on the community's ownership rights of natural resources) to management and development.[26] The Ogoni dispute dragged from the early 1990s to 1995, when conflicts resulted in the deaths of several Ogoni community leaders and the subsequent temporary withdrawal of Shell from Ogoniland.[27] The dispute between members of Ogoniland and Shell constitutes the main focus of this article.

The main issues in the *Wiwa* litigation are: (1) allegations of environmental damages caused by Shell's negligent conduct in exploring and developing oil fields in Ogoniland; (2) allegations of human rights abuses resulting in the subsequent execution of Ogoni leaders and the Ogoni people; and (3) allegations of conspiracy and complicity between the government of Nigeria and Shell.[28] The plaintiffs also allege fraud under the Racketeer Influenced and Corrupt Organizations Act[29] (RICO) as part of their case before the federal court.[30] Factually speaking, a military tribunal tried and convicted Ken Saro-Wiwa and eight others for their local leadership role in the struggle for survival of the Ogoni people.[31] On November 10, 1995, Ken Saro-Wiwa and John Kpuinen were hanged as a result of their convictions.[32] The execution of Saro-Wiwa[33] and others, and

---

[25] *Id.*

[26] *See* Second Amended Complaint, *supra* note 10, at ¶¶ 27-39.

[27] *See generally id.* at ¶¶ 32-106.

[28] *See Wiwa I*, 226 F.3d at 92-93; *Wiwa II*, 2002 WL 319887, at *1-*2.

[29] 18 U.S.C. §§ 1961-68 (2000).

[30] *Wiwa II*, 2002 WL 319887, at *1-*2.

[31] Second Amended Complaint, *supra* note 10, at ¶¶ 75, 78, 88 (military tribunals under several military governments were established to hear cases outside constitutionally established legal forum. The normal rules of court that provide a forum for a fair hearing and justice are absent. Military tribunals tried both civil and criminal cases without observing the rules of procedure or complying with due process of the Constitution. This method of prosecution raised great concern for the international legal system and civil society because of its lack of adherence to recognized concepts of justice and fair hearing.).

[32] *Id.* at ¶ 90.

[33] *Id.* at ¶¶ 46, 49 (Saro-Wiwa's role in the struggle of the Ogoni people was quite significant. His leadership of the Movement Of the Survival of Ogoni People (MOSOP), a grassroots organization, exposed the plight of the Ogonis to the international community and the United Nations. Saro-Wiwa made representations at the Commonwealth and other conferences stating the case of the Ogoni people and their demand for self-determination under several Declarations of the United Nations.).

Shell's role in these executions, provide the basis for the litigation between representatives of the estate of Ken Saro-Wiwa and Shell under the ATCA.[34]

The Southern District of New York heard the civil action brought by representatives of the estate of Ken Saro-Wiwa,[35] the estate John Kpuinen,[36] Dr. Owens Wiwa,[37] and an anonymous plaintiff[38] suing as Jane Doe[39] (collectively, the Plaintiffs), against the Royal Dutch Petroleum Company, Shell Transport and Trading Company, P.L.C., and Brian Anderson, former "country chairman of Nigeria for Royal Dutch/Shell and managing Director of Shell Nigeria" (collectively, Shell).[40] Allegations of complicity[41] were levied at the former managing directors of Shell Petroleum Development Corporation (SPDC) for their role in the human rights abuses that resulted in the conviction and summary execution of Ken Saro-Wiwa and John Kpuinen.[42] The Plaintiffs were represented by human rights attorneys and organizations based in the District of Columbia, New York, and California.[43]

The Plaintiffs' complaint alleges that Shell's role in the crisis described above was carried out under color of law[44] and under color of official

---

[34] *See Wiwa I*, 226 F.3d at 92-93; *Wiwa II*, 2002 WL 319887, at *1.

[35] Saro-Wiwa's estate is represented by his son, Ken Wiwa, a British citizen. Second Amended Complaint, *supra* note 10, at ¶ 7.

[36] Kpuinen was the National Youth Leader of MOSOP prior to his conviction by a military tribunal and execution by the military government in 1995 for his role in the Ogoni struggle. Kpuinen's estate is represented by his wife, Blessing Kpuinen, a resident of the United States. *Id.* at ¶¶ 9, 50.

[37] Dr. Wiwa is a resident of Canada and a citizen of Nigeria. *Id.* at ¶ 8.

[38] The use of anonymous names by plaintiffs is a discretionary power within the authority of courts. In the exercise of its discretion, the courts would balance the interests of both the public and defendants in the case. *See* Jed Greer, Comment, *Plaintiff Pseudonymity And The Alien Tort Claims Act: Questions and Challenges*, 32 COL. HUMAN RIGHTS L. REV. 517, 523 (2001). Other ATCA cases using pseudonyms include Xuncax v. Gramajo, 886 F. Supp. 162 (D. Mass. 1995); Doe v. Islamic Salvation Front, 993 F. Supp. 3 (D.D.C. 1998); Nat'l Coalition Gov't of the Union of Burma v. Unocal, Inc., 176 F.R.D. 329 (C.D. Cal. 1997); Doe v. Karadzic, 866 F. Supp. 734 (S.D.N.Y. 1994).

[39] Jane Doe is a resident of Nigeria and filed her complaint anonymously for fear of safety should her identity be revealed. Second Amended Complaint, *supra* note 10, at ¶ 10.

[40] *See Wiwa II*, 2002 WL 319887, at *1-*2.

[41] Complicity is defined as "[a]ssociation or participation in a criminal act; the act or state of being an accomplice." BLACK'S LAW DICTIONARY 308 (8th ed. 2004).

[42] *Wiwa II*, 2002 WL 319887, at *1-*2.

[43] *Id.*

[44] "The appearance or semblance, without the substance, of a legal right. The term usu[ally] implies a misuse of power made possible because the wrongdoer is clothed with the authority of the state." BLACK'S LAW DICTIONARY 231 (8th ed. 2004).

authority and in conspiracy with the Nigerian government and its agents.[45] Plaintiffs claim that their causes of action arise under and in violation of customary international law, the ATCA,[46] the Torture Victim Protection Act[47] (TVPA) of 1991, and RICO.[48] International treaties alleged to have been violated by the defendants in the *Wiwa* litigation include the International Covenant on Civil and Political Rights[49] (ICCPR), the United Nations Charter,[50] the Universal Declaration of Human Rights,[51] the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[52] (UN Convention Against Torture), the common law of the United States, and the laws of Nigeria.[53]

In response to these accusations, Shell filed a motion to dismiss the Plaintiff's action on several grounds: (1) lack of personal jurisdiction[54] over the defendants; (2) *forum non conveniens*;[55] (3) lack of subject matter jurisdiction;[56] and (4) failure to state a cause of action under the ATCA.[57] A

---

[45] Second Amended Complaint, *supra* note 10, at ¶¶ 108, 110.

[46] 28 U.S.C. § 1350.

[47] Pub. L. No. 102-256, 106 Stat. 73 (1991).

[48] 18 U.S.C. §§ 1961-68.

[49] Mar. 23, 1976, 999 U.N.T.S. 171, *available at* http://www.unhchr.ch/html/menu3/b/a_ccpr.htm [hereinafter "ICCPR"].

[50] U.N. Charter, 59 Stat. 1031 (1945), *available at* http://www.un.org/aboutun/charter/.

[51] G.A. Res. 217A at 71, U.N. Doc A/810 (Dec. 12, 1948), *available at* http://www.un.org/Overview/rights.html [hereinafter "Declaration of Human Rights"].

[52] United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 11, *available at* http://www.hrweb.org/legal/cat.html [hereinafter "UN Convention Against Torture"].

[53] The Nigerian Laws that will be reviewed in this paper include the Petroleum Act of 1969, (1990) Cap. 350 (Nigeria); the Land Use Act of 1978, (1990) Cap. 202 (Nigeria), *available at* http://www.nigeria-law.org/Land%20Use%20Act.htm; Oil Mineral Producing Areas Development Commission (Amendment) Decree No. 41 (1998) (Nigeria) (repealed the OMPADEC Decree No. 23 of 1992 and established a new Commission with a reorganized management); and the Nigerian National Petroleum Corporation Act, (1990) Cap. 320, *available at* http://www.nigeria-law.org/Nigerian%20National%20Petroleum%20Corporation%20Act.htm.

[54] Personal jurisdiction is defined in the following way: "a court cannot assert jurisdiction over a potential defendant unless the defendant has sufficient 'minimum contacts' with the forum so as to satisfy traditional notions of fair play and substantial justice." BLACK'S LAW DICTIONARY 745 (8th ed. 2004).

[55] Forum non conveniens is defined as "the doctrine that an appropriate forum—even though competent under the law—may divest itself of jurisdiction if, for the convenience of the litigants and the witnesses, it appears that the action should proceed in another forum in which the action might originally have been brought." *Id.* at 408.

[56] Subject matter jurisdiction is "jurisdiction over the nature of the case and the type of relief sought; the extent to which a court can rule on the conduct of persons or the status of things." *Id.* at 892.

significant portion of the litigation focused on the *forum non conveniens* and lack of personal jurisdiction arguments.[58] The New York District Court denied the defendants' argument that the Plaintiffs were residents of the United States, and that the defendant maintained an agent in New York for purposes of its business.[59] The court applied a set of decisions of the U.S. Supreme Court setting out the framework for a *forum non conveniens* analysis.[60] It followed the Supreme Court's two-step analysis in assessing whether *forum non conveniens* dismissal is appropriate.[61] The first step in the analysis is to determine if an adequate alternative forum exists.[62] If one exists, the court must take the second step of balancing "a series of factors involving the private interests of the parties in maintaining the litigation in competing for a and any public interests at stake."[63] Defendants have the "burden of establishing that [these] factors 'tilt strongly in favor of the trial in the foreign forum.'"[64] The original *Wiwa* court held that the defendants failed to meet this burden.[65] The court stated that,

> [t]he factors weighing against dismissal include (1) the substantial deference courts are required to give to the plaintiff's choice of fora, (2) the enormous burden, expense, and difficulty the plaintiffs would suffer if required to begin the litigation anew in England, (3) the policy favoring our court's retention of such suits brought by plaintiffs who are residents of the United States, and (4) the policy expressed in the TVPA favoring adjudication of claims of violations of international prohibitions on torture.[66]

The court also denied the defendants' motion to dismiss on grounds for lack of personal jurisdiction.[67] It held that it had jurisdiction over the defendants based on the fact that the companies' subsidiary had an investor

---

[57] *Wiwa I*, 226 F.3d at 92; *Wiwa II*, 2002 WL 319887, at *1-*2.
[58] *See Wiwa I*, 226 F.3d at 91; *Wiwa II*, 2002 WL 319887, at *1.
[59] *Id.*
[60] *Wiwa I*, 226 F.3d at 100.
[61] *Id.*
[62] *See, e.g.*, Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254 n.22 (1981); Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 506-07 (1947).
[63] *See, e.g., Gilbert*, 330 U.S. at 508.
[64] *Wiwa I*, 226 F.3d at 108 (citing R. Maganal & Co. v. M.G. Chem. Co., 942 F.2d 164, 167 (2d Cir. 1991)).
[65] *Id.*
[66] *Id.* (ATCA, 28 U.S.C. § 1350, as supplemented by the TVPA, Pub. L. No. 102-256, "reflects a United States policy interest in providing a forum for the adjudication of international human rights abuses." *Wiwa I*, 226 F.3d at 103).
[67] *Id.* at 94-99.

relations office in New York.[68] That subsidiary was an agent of the company for purposes of personal jurisdiction.[69] Thus, the company, through such an office, was doing business in New York.[70]

II. APPLICATION OF THE ALIEN TORTS CLAIM ACT

A. Jurisdiction Under the ATCA and Individual Rights to a Cause of Action

The *Wiwa* Plaintiffs claimed that the United States federal courts had both personal jurisdiction and subject matter jurisdiction under the ATCA.[71] That Act, which was adopted by the First Congress, was part of the Judiciary Act of 1789.[72] In its original form, the ATCA provided that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[73]

Despite its early beginnings, the ATCA had only been applied twice before it was applied in the 1980 case of *Filartiga v. Pena-Irala*.[74] In that case, the court construing the Act held that deliberate torture perpetrated under official authority violates universally accepted human rights norms of international law, regardless of the nationality of the parties.[75] Further, the court held that the ATCA "provides federal jurisdiction whenever an alleged torturer is found and served within [the U.S.] borders."[76] This decision enabled a Paraguayan father and sister of a 17-year old decedent to sue a Paraguayan former police official who kidnapped and tortured the decedent.[77] After the incident, the former police official, as well as the decedent's family, immigrated to the United States under visitors' visas, giving the U.S. courts personal jurisdiction over the defendant.[78] Soon thereafter, the decedent's sister served the former official with a complaint.[79]

---

[68] *Id.*
[69] *Id.*
[70] *Id.* ("Under New York law, a foreign corporation is subject to personal jurisdiction in New York if it is 'doing business' in the state.").
[71] *Wiwa I*, 226 F.3d at 93.
[72] Judiciary Act of 1789, ch. 20, 9, 1 Stat. 73, 77 (1789) (later codified as 28 U.S.C. § 1350).
[73] *Wiwa I*, 226 F.3d at 103 (citing 28 U.S.C. § 1350).
[74] 630 F.2d. 876. The ATCA was also applied in Dreyfus v. von Finck, 534 F.2d 24 (2d Cir. 1976) and IIT v. Vencap, Ltd., 510 F.2d 1001 (2d 1975).
[75] *Filartiga*, 630 F.2d at 878.
[76] *Id.*
[77] *Id.*
[78] *Id.* at 878-79.
[79] *Id.* at 879.

Applying the *Filartiga* analysis, the first *Wiwa* court found that Shell's activities in the State of New York, ranging from fielding inquiries of investors and potential investors to organizing meetings between defendant's officials and investors, were sufficient to establish the "minimum contacts" requirement for establishing personal jurisdiction.[80] This decision complies with the due process requirements of the Constitution which ensure the exercise of "traditional notions of fair play and substantial justice."[81] The court stated that "[t]he continuous presence and substantial activities that satisfy the requirement of doing business do not necessarily need to be conducted by the foreign corporation itself."[82] The court reasoned that, in accordance with previous decisions, the jurisdiction had "been predicated upon activities performed in New York for a foreign corporation by an agent."[83] Applying agency analysis, the court further held that Shell's Investor Relations Office in New York was an agent of Shell for jurisdictional purposes.[84] Because the defendant's Investor Relations office was, among other things, solely functioning "to perform investor relations on the defendant's behalf" and fully funded by the defendants, sufficient contact was established with the state of New York to satisfy the requirements for personal jurisdiction under New York law.[85] In assessing whether jurisdiction exists over a foreign corporation,

> courts have focused on a traditional set of indicia for example, whether the company has an office in the state, whether it has any bank accounts or other property in the state, whether it has a phone listing in the state, whether it does public relations work there, and whether it has individuals permanently located in the state to promote its interests.[86]

---

[80] *See Wiwa I*, 226 F.3d at 94-100.

[81] *Id.* at 99 (citing Chaiken v. V.V. Publ'g Corp., 119 F.3d 1018, 1027 (2d Cir. 1997) (internal quotation omitted)). The due process clause of the Fourteenth Amendment, U.S. CONST. amend XIV, § 1, permits a state to exercise personal jurisdiction over a non-resident defendant with whom it has "certain minimum contacts . . . such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *See* International Shoe Co. v. State of Washington, 326 U.S. 310, 316 (1945)).

[82] *Id.* at 95.

[83] *Id.*

[84] *Id.*

[85] *Id.* at 96.

[86] *Id.* at 98 (citations omitted).

Subsequent to *Filartiga*, litigants began to "seek redress more frequently under the ATCA."[87] The *Wiwa* court conjectured that the increase was due to "increasing national concern with human rights issues."[88] For example, in *Tel-Oren v. Libyan Arab Republic*,[89] the plaintiffs were "survivors and representatives of persons murdered in an armed attack on a civilian bus in Israel," who brought suit against defendants for compensation and punitive damages.[90] The plaintiffs in *Tel-Oren* "alleged that defendants were responsible for multiple tortious acts in violation of law of nations, treaties of the United States, and criminal laws of the United States, as well as common law."[91] However, the Court of Appeals for the District of Columbia dismissed the action for lack of subject matter jurisdiction and as barred by the applicable statute of limitations.[92] Nonetheless, this case helps illustrate the trend in seeking redress for international wrongs in U.S. courts.

On the other hand, in *In re Estate of Marcos*,[93] the Ninth Circuit held that subject matter jurisdiction was indeed conferred on the court by the ATCA.[94] In this case, the plaintiffs alleged that during President Ferdinand Marcos' tenure, thousands of people in the Philippines were "tortured, summarily executed or disappeared at the hands of military personnel acting pursuant to law declared by Marcos."[95] The defendants argued that the ATCA "is a purely jurisdictional statute which does not provide the plaintiffs a cause of action."[96] However, the court did not agree; it held that the Act requires only a "violation of the law of nations," rather than an action "arising under" the law of nations, to create a cause of action.[97] The *Marcos* plaintiffs were thus found to have a cause of action under the ATCA. The court, citing *Filartiga*,[98] pointed out that "[a]ctionable violations of international law must be of a norm that is specific, universal,

---

[87] *Id.* at 104; *see, e.g.*, Abebe-Jira v. Negewo, 72 F.3d 844 (11th Cir. 1996); Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995); In re Estate of Ferdinand Marcos, 25 F.3d 1467 (9th Cir. 1994); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984).
[88] *Wiwa I*, 226 F.3d at 104.
[89] 726 F.2d 774.
[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] 25 F.3d 1467.
[94] *Id.* at 1475.
[95] *Id.* at 1469.
[96] *Id.* at 1474.
[97] *Id.* at 1475.
[98] 630 F.2d 876.

and obligatory.[99] They found that the allegations of official torture were in violation of customary international law and satisfied the "specific, universal and obligatory standard."[100]

However, in *Beanal v. Freeport-McMoran, Inc.*,[101] the Fifth Circuit dismissed the plaintiffs' action against domestic multinational corporations conducting mining activities in Indonesia.[102] One of the plaintiffs' allegations was that the defendant corporations were engaging in environmental abuses which violated international law.[103] However, the court held that the *Beanal* plaintiff failed to show that the defendants' activities violated any universally accepted standards or regulations.[104] The court therefore held that the ATCA "applies only to shockingly egregious violations of universally recognized principles of international law."[105]

The *Beanal* decision raised concerns for plaintiffs in similar situations, such as the Plaintiffs in *Wiwa*,[106] whose causes of actions against multinational corporations involved alleged violations of environmental standards.[107] The *Beanal* court warned "federal courts should exercise extreme caution when adjudicating environmental claims under international law to insure that environmental policies of the United States do not displace environmental policies of other governments."[108] As one scholar observed, "[t]he ATCA will no doubt prove to be a useful tool for enforcing human rights norms, but this approach has major limitations."[109] The application of the ATCA is "limited to cases that can be brought in the United States federal courts against defendants over which there is federal jurisdiction."[110] Further, alleged wrongdoing must be a violation of a United States treaty or "the law of nations," which has a narrow scope[111] and can be confusing to define.[112] The law of nations is often ascertained by "consulting

---

[99] *Marcos*, 25 F.3d at 1475. *See also* Forti v. Suarez-Mason, 672 F. Supp. 1531, 1539-40 (N.D. Cal. 1987).
[100] *Marcos*, 25 F.3d at 1475.
[101] 197 F.3d 161 (5th Cir. 1999).
[102] *Id.* at 163.
[103] *Id.*
[104] *Id.* at 166-67.
[105] *Id.* at 167 (quoting Zapata v. Quinn, 707 F.2d 691, 692 (2d Cir. 1983)).
[106] *Wiwa I*, 226 F.3d 88; *Wiwa II*, 2002 WL 319887.
[107] *Beanal*, 197 F.3d at 167.
[108] *Id.*
[109] Terry Collingsworth, *The Key Human Rights Challenge: Developing Enforcement Mechanisms*, HARV. HUM. RTS. J. 183, 202 (2002).
[110] *Id.*
[111] *Id.*
[112] *Beanal*, 197 F.3d at 165.

the work of jurists writing professedly on public law or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law."[113]

Although environmental claims raise complex issues of international law, the task of the courts is "to determine whether the pleadings on their face state a claim upon which relief can be granted."[114] In adjudicating environmental claims brought under the ATCA, federal courts recognize that international law must be interpreted "not as it was in 1789, but as it has evolved and exists among the nations of the world today."[115] The *Beanal* court suggests that the "argument to abstain from interfering in a sovereign's environmental practices carries persuasive force especially when the alleged environmental torts and abuses occur within the sovereign's borders and do not affect neighboring countries."[116]

As stated earlier, the ATCA is limited in its application to alleged conduct that violates universally acceptable principles of international law. It is difficult to qualify alleged environmental tort claims or abuses as violations of international law,[117] in part because "only where the nations of the world have demonstrated that the wrong is of mutual and not merely several concern, by means of express international accords, that a wrong generally recognized becomes an international law violation in the meaning of the [ATCA]."[118] For example, in the *Beanal* case, the plaintiff was unable to establish that the treaties and agreements he based the defendants' violation on "enjoy[ed] universal acceptance in the international community."[119] Despite its limitations, the ATCA is given a broader scope by the 1991 enactment of the TVPA, as discussed below.[120]

B. The Torture Victim Protection Act

1. Introduction

The TVPA provides a federal cause of action against any individual who, "under actual or apparent authority, or color of law, of any foreign

---

[113] *Id.* at 165 (quoting Carmichael v. United Tech. Corp., 835 F.2d 109, 113 (5th Cir. 1988)).
[114] *Id.*
[115] *Id.* (quoting *Kadic*, 70 F.3d 232, 238).
[116] *Id.* at 167.
[117] *See, e.g., Aguinda*, 142 F. Supp. 2d at 552 (It was not enough that plaintiffs alleged that "oil extraction activities violated evolving environmental norms of customary international law.").
[118] *Beanal*, 197 F.3d at 167 (quoting *Filartiga*, 630 F.2d at 888).
[119] *Id.*
[120] Pub. L. No. 102-256, 106 Stat. 73.

nation" subjects any individual to torture or extrajudicial killing.[121] In its Senate report on the TVPA, Congress noted that "judicial protection against flagrant human rights violations is often least effective in those countries where such abuses are most prevalent."[122] Congress further noted that torture and summary execution violate standards accepted by virtually every nation and that the universal consensus condemning such practices has become customary international law.[123] However, as Congress pointed out, "these universal principles provide little comfort . . . to the thousands of victims of torture and summary executions around the world."[124]

While nations condemn torture and extrajudicial killing in principle, Congress noted that "in practice more than one-third of the worlds' governments engage in, tolerate, or condone such acts."[125] Thus, "[t]oo often, international standards forbidding torture and summary execution are honored in the breach."[126] Congress designed the TVPA to respond to such situations by providing a cause of action for individuals in United States courts for torture and killings committed abroad.[127] The stated intentions of Congress[128] settled some concerns raised in cases before the TVPA was enacted; such cases held that there was no private right of action under the ATCA.[129]

In passing the TVPA, Congress essentially reiterated the intentions of the UN Convention Against Torture.[130] The TVPA establishes an "unambiguous basis for a cause of action that has been successfully maintained under an existing law," derived from the ATCA, which grants

---

[121] Pub. L. No. 102-256, § 2(a)(1)-(2).
[122] S. REP. NO. 102-249, pt. 3 (1991).
[123] *Id.*
[124] *Id.*
[125] *Id.* ("Despite universal condemnation of these abuses, many of the worlds' governments still engage in or tolerate torture of their citizens, and state authorities have employed extrajudicial killings to execute many people. For 1990 alone, Amnesty International reports over 100 deaths attributed to torture in over 40 countries and 29 extrajudicial killings by death squads.").
[126] *Id.*
[127] *Id.*
[128] *See infra* notes 130-137 and accompanying text.
[129] *See, e.g., Tel-Oren*, 726 F.2d at 801 (Judge Robert H. Bork rejects the existence of a private right of action under the ATCA, in part reasoning that separation of powers principles required an explicit grant by Congress of a private right of action for lawsuits, which affect foreign relations).
[130] S. REP. NO. 102-249 (The UN Convention Against Torture, *supra* note 52, was enacted with the desire to achieve "more effective implementation of the existing prohibition under international and national law of the practice of torture and other cruel, inhuman or degrading treatment or punishment." *See* 1/1/85 UN CHRON. 48 (Jan. 1985), 1985 WLNR 543639.).

federal courts jurisdiction "to hear claims by aliens for torts committed 'in violation of the law of nations.'"[131]

The congressional intent in passing the TVPA generally dovetails with the decision of the Second Circuit Court of Appeals in *Filartiga v. Pena-Irala*,[132] where Judge Irving R. Kaufman noted that "official torture is now prohibited by the law of nations."[133] In the subsequent case of *Kadic v. Karadzic*,[134] the court affirmed that the TVPA "creates a cause of action for official torture."[135] The TVPA expressly ratified the holding in *Filartiga*, where the district court decided "deliberate torture perpetrated under the color of official authority violates universally accepted norms of the international law of human rights."[136] In signing the TVPA in 1992, President George H.W. Bush noted that he was signing the legislation into law "because of [his] strong and continuing commitment to advancing respect for protection of human rights throughout the world."[137] The TVPA has been extensively applied by federal courts in deciding claims by foreign plaintiffs for torts committed, under color of law, in foreign countries by multinational corporations and their representatives.[138]

---

[131] *Id.* (citing the Alien Tort Claims Act, 28 U.S.C. § 1350).
[132] 630 F.3d 876.
[133] *Id.* at 884.
[134] 70 F.3d 232.
[135] *Id.* at 246.
[136] *Filartiga*, 630 F.2d at 878.
[137] George H.W. Bush, Statement on Signing the Torture Victim Protection Act of 1991, The Museum at the George Bush Presidential Library, March 12, 1992, *available at* http://bushlibrary.tamu.edu/research/papers/1992/92031205.html (President George Bush signed the TVPA on March 12, 1992. The President called on Congress to continue its efforts at taking the necessary steps toward establishing instruments for the implementation of the UN Convention Against Torture. He recognized the need to make torturers in foreign countries legally accountable for their acts, but noted that the TVPA may create a number of problems, such as an overburdening of U.S. Courts with foreign national claims for compensation for inhuman conducts committed in foreign nations.). The U.S. has yet to ratify the UN Convention Against Torture. Congress gave its consent to the Convention on October 27, 1990. 1992 U.S.C.C.A.N. 91.
[138] *See, e.g.*, Estate of Cabello v. Fernandez-Larios, 157 F. Supp. 2d 1345 (S.D. Fla. 2001) (the TVPA ten-year limitation period was retroactively applied to an action by relatives of a Chilean prisoner allegedly killed by a former Chilean soldier, even though TVPA had been enacted years after the alleged killing took place); Doe v. Islamic Salvation Front, 993 F. Supp. 3 (D.D.C. 1998) (holding that liability could be imposed on private groups as "state actors" under TVPA); Cabiri v. Assasie-Gyimah, 921 F. Supp. 1189 (S.D.N.Y. 1996) (holding that exhaustion of remedies in Ghana, where conduct giving rise to a claim occurred, was not required under the TVPA, because Ghana provided inadequate and unacceptable remedies for torture victims' claims. The court also discusses additional cases in which the TVPA has been applied.).

2. The Scope and Application of the Act

The TVPA is limited to acts of extrajudicial killing[139] and torture.[140] The Act establishes the right to a cause of action and liability for damages

---

[139] "[E]xtrajudicial killing means a deliberate killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation." TVPA, Pub. L. No. 102-256, § 3; *see also* Geneva Convention for the Amelioration of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114 (The TVPA definition of "extrajudicial killing" specifically prohibits: "(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular, humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples). The definition of extrajudicial killing under the Geneva Conventions and the TVPA excludes killings that are lawful under international law such as killings by armed forces during the time of war and killings necessary to affect an arrest or prevent the escape of a person lawfully detained. *See* TVPA, Pub. L. No. 102-256, § 3. The TVPA, therefore, allows individual civil actions for killings that are extrajudicial in nature and which violate international law. *See also* European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 15 (2), Nov. 4, 1950, 213 U.N.T.S. 221 (excludes "death resulting from lawful acts of wars" from the prohibition against extrajudicial killings).

[140] *See* TVPA, Pub. L. No. 102-256, § 3(b)(1) (Under this act,

> (1) the term "torture" means any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or third person has committed or is suspected of having committed, intimidating or coercing that individual or third person, or for any reason based on discrimination of any kind; and
>
> (2) mental pain or suffering refers to prolonged mental harm caused by or resulting from:
>
> (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
>
> (B) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
>
> (C) the threat of imminent death; or
>
> (D) the threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.).

against an individual[141] "who, under actual or apparent authority, or color of law of any foreign nation, subjects an individual to torture."[142] The TVPA establishes the rights of individuals to bring civil actions against any person, under the ATCA, for torts committed under color of law and in violation of customary international law.[143]

3. Who May Sue and Who May be Sued Under the TVPA

Before the enactment of the TVPA, many argued that individuals did not have private rights of action under the ATCA.[144] The application of the law of nations and universally recognized international declarations to individuals can be found in the early case of *United States v. Smith*[145] decided in 1820. In that case, Justice Story found a private individual guilty of the crime of piracy committed on the high seas, an act that the court held in violation of the law of nations.[146] In the *Filartiga v. Pena-Irala*[147] case, the Second Circuit held that the ATCA provided a private right of action and a federal forum where aliens may seek redress for violations of international

---

[141] *See* TVPA, Pub. L. No. 102-256, § 2(a)(1) (conferring jurisdiction on U.S. courts to recognize claims brought by a foreign plaintiff against a foreign defendant). The ability of Congress to enact this legislation is derived from Article 1, section 8 of the United States Constitution which authorizes Congress to "define and punish . . . Offenses against the Laws of Nations." U.S. CONST. art. 1, § 8; *see Ex parte* Quirin, 317 U.S. 1, 28 (1942) (interpreting the "define and punish" clause to allow Congress to make substantive laws incorporating international rules intended to govern individual behavior).

[142] TVPA, Pub. L. No. 102-256, § 2(a)(1) (Section 2(a)(2) of the Act includes the definition of torture that exempts those actions pursuant to lawful sanctions. The debate in the U.S. Senate during the ratification of the UN Convention Against Torture resolved any confusion as to whether "lawful sanctions" includes sanctions, which are lawful under the foreign state's law, even if they violate international law or whether "lawful sanctions" only includes sanctions, which are lawful under international law. The understanding included by the Senate during the ratification of the Convention stated that the term "lawful sanctions" refers to sanctions authorized by domestic law or by judicial interpretation of such law. *See generally* 136 CONG. REC. S17486-01, 1990 WL 168442 (Oct. 27, 1990)).

[143] TVPA, Pub. L. No. 102-256; *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987) ("Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation."); Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 439 (D.N.J. 1999) ("[C]ustomary international law is comprised of such widely held fundamental principles of civilized society that they constitute binding norms on the community of nations.").

[144] *See, e.g.*, Judge Bork and Judge Robb's concurring opinions in *Tel-Oren*, 726 F.2d at 798, 823.

[145] 18 U.S. 153 (1820).

[146] *Id.* at 159-60 (holding that what constitutes the law of nations "may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law").

[147] 630 F.2d 876.

law.[148] Since *Filartiga* was decided in 1980 and the enactment of the TVPA in 1991, a majority of courts have made similar rulings regarding the rights of individuals to bring private actions in federal courts.[149]

The courts have also settled the issue as to whether the law of nations applies to individuals and corporations when applying the TVPA. In *Kadic v. Karadzic*,[150] the court acknowledged 42 U.S.C. § 1983, which requires courts look to principles of agency law or jurisprudence when construing the terms "actual or apparent authority" and "under color of law."[151] In *Kadic*, the court determined that both private individuals and state actors could violate the law of nations.[152]

The District Court in *Iwanowa v. Ford Motor Co.*[153] agreed with the Second Circuit Court of Appeals in *Kadic* when it stated that there is "no logical reasoning . . . for allowing private individuals and corporations to escape liability for universally condemned violations of international law merely because they were not acting under color of law."[154] In *Bigio v. Coca-Cola*,[155] the Second Circuit Court of Appeals affirmed its decision in *Kadic* stating, "[t]he 'color of law' jurisprudence of 42 U.S.C. § 1983 is a relevant guide to whether a defendant has engaged in official action for purposes of jurisdiction under the Alien Tort [Claims] Act."[156] Prior to the enactment of the TVPA, courts applied principles of international law in deciding liability for extrajudicial killings and torture as acts in violation of the law of nations. However, arguments regarding subject matter jurisdiction of federal courts under the ATCA appear to be settled since the enactment of the TVPA.[157]

In the 1994 case of *In re Estate of Marcos*,[158] the court decided that, under the plain language of the TVPA, official torture violates international

---

[148] *Filartiga*, 630 F.2d at 887.
[149] *See, e.g., Kadic*, 70 F.3d 232 (recognizing a private right of action and holding defendants liable for a violation of law of nations under actual or apparent authority).
[150] *Id.*
[151] *Id.* at 245 (citing 42 U.S.C. § 1983 (2000)).
[152] *Id.*
[153] 67 F. Supp. 2d 424.
[154] *Id.* at 445.
[155] 239 F.3d 440 (2d Cir. 2000).
[156] *Id.* at 448 (the court also observed that "[a] private individual acts under color of law within the meaning of section 1983 when he acts together with state officials or with significant state aid").
[157] *See Marcos*, 25 F.3d 1467.
[158] *Id.*

law.[159] Accordingly, the plaintiffs in *Marcos* satisfied the required standard that the claim be specific, universal, and obligatory to violate international law.[160] Based on evidence produced by the plaintiffs in that case, the court found violations of international law for acts of torture, disappearance, and summary execution of persons at the order of the former President of the Philippines.[161]

The TVPA permits suit by the victim or his or her legal representative or beneficiary in a wrongful death action.[162] In compliance with constitutional requirements of due process, only defendants over whom the United States has personal jurisdiction may be sued.[163] To obtain personal jurisdiction over a defendant, the individual must have "minimum contacts" with the forum state.[164] Congress made this clear in its senate report on the TVPA that the word "individual" under the TVPA expressly excludes foreign states and their entities from being sued under the Act.[165] This provision is in recognition of the Foreign Sovereign Immunities Act[166] (FSIA) of 1976, which renders foreign governments immune from suit in U.S. courts, except in certain, enumerated circumstances.[167]

---

[159] *Id.* The court stated,

> [T]he right to be free from official torture is fundamental and universal, a right deserving of the highest stature under international law, a norm of *jus cogens*. The crack of the whip, the clamp of the thumb screw, the crush of the iron maiden, and, in these more efficient modern times, the shock of the electric cattle prod are forms of torture that the international order will not tolerate. To subject a person to such horrors is to commit one of the most egregious violations of the personal security and dignity of a human being.

Id. at 1475 (quoting Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 717 (9th Cir. 1992)). Judge Tang's opinion in *Marcos* confirms the *Filartiga* court's decision relating to torture and extrajudicial killings. In *Marcos*, the former president of the Philippines was held liable for claims brought under the ATCA and the TVPA in violation of the law of nations. 25 F.3d at 1475.

[160] *Marcos*, 25 F.3d at 1475.

[161] *Id.*

[162] TVPA, Pub. L. No. 102-256, § 2(a)(2). In *Marcos*, 25 F.3d 1467, the plaintiffs were families of the tortured victims.

[163] *See Filartiga*, 630 F.2d at 885; *see also International Shoe*, 326 U.S. 310; Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408 (1984).

[164] *Helicopteros*, 466 U.S. at 414.

[165] S. REP. NO. 102-249, at 7 (stating, "[t]he legislation uses the term 'individual' to make crystal clear that foreign states or their entities cannot be sued under this bill under any circumstances: only individuals may be sued").

[166] Pub. L. No. 94-583, 90 Stat. 2891 (1976). The FSIA is "[a]n Act to define the jurisdiction of United States courts in suits against foreign states [and] the circumstances in which foreign states are immune from suit." *Id.*

[167] 28 U.S.C. § 1605 (2000); *see also* H. REP. NO. 102-900 (1992).

The legislative history of the TVPA reveals that Congress did not, however, intend for former government officials or agents to avoid liability for acts of torture or extrajudicial killing committed under government authority.[168] The TVPA makes an individual acting under color of law or under actual or apparent authority of any foreign nation liable for acts of torture or extrajudicial killings carried out against other individuals.[169] Regarding the strict application of the Act to individuals, the Senate noted that "[b]ecause all states are officially opposed to torture and extrajudicial killing, . . . the FSIA should normally provide no defense to an action taken under the TVPA against a former official."[170] Congress similarly prohibited the use of the "act of state" doctrine[171] as a shield from lawsuits for former officials.[172] The Supreme Court has held that this doctrine "is meant to prevent U.S. courts from sitting in judgment of the official public acts of a sovereign foreign government."[173] Therefore, because the "act of state" doctrine "applies only to 'public acts,' and no state commits torture as a matter of public policy, this doctrine cannot shield former officials from liability under this legislation."[174]

---

[168] *See* S. REP. NO. 102-249, § 4, at 7 (stating, "[t]o avoid liability by invoking the FSIA, a former official would have to prove an agency relationship to a state, which would require that the state 'admit some knowledge or authorization of relevant acts.'" (citing 28 U.S.C § 1603(b)).

[169] TVPA, Pub. L. No. 102-256, § 2(a).

[170] S. REP. NO. 102-249, at 7.

[171] The act of state doctrine in its traditional formulation precludes U.S. courts from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 401 (1964).

[172] S. REP. NO. 102-249, at 7; *see also* Filartiga v. Pena-Irala, 577 F. Supp 860 (D.C.N.Y. 1984); *Marcos*, 25 F.3d 1467 (both courts rejected the use of the "act of state" doctrine as a defense).

[173] S. REP. NO. 102-249, at 8 (citing *Banco Nacional*, 376 U.S. 398).

[174] *Id.*; *see also* UN Convention Against Torture, *supra* note 52, at art. 4 (stating, "Each State Party shall ensure that all acts of torture are offenses under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in the torture." Further, Article 2 states, "[a]n order from a superior officer or a public authority may not be invoked as a justification of torture."); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987) (stating,

> A state violates international law if, as a matter of state policy, it practices, encourages, or condones
>
> (a) genocide,
>
> (b) slavery or slave trade,
>
> (c) the murder or causing the disappearance of individuals,
>
> (d) torture or other cruel, inhuman, or degrading treatment or punishment,

Congress limits liability under the TVPA to "persons who ordered, abetted, or assisted in the torture."[175] Further, the Act only applies to individuals who engage in torture or extrajudicial killings under actual or apparent authority or under the color of law of a foreign nation.[176] Therefore, "purely private criminal acts by individuals or nongovernmental organizations" are not covered by the TVPA.[177] There is also a ten-year statute of limitation for claims arising under the TVPA.[178] However, the legislation "explicitly calls for consideration of all equitable tolling principles."[179]

4. Requirement for Exhaustion of Local Remedies

While the application of the TVPA may seem broad in its scope, the Act provides that a United States court shall decline to hear a claim "if the claimant has not exhausted adequate and available remedies in the place where the conduct giving rise to the claim occurred."[180] This requirement acts as a limitation on the jurisdiction of United States courts. However, the Act specifies that the local remedy must be adequate and available to the plaintiff.[181]

By requiring plaintiffs to demonstrate that no adequate remedies are available in the country where the torture occurred, foreign nations are allowed to preserve comity and respect while plaintiffs are assured that they

---

(e) prolonged arbitrary detention,
(f) systematic racial discrimination, or
(g) a consistent pattern of gross violations of internationally recognized human rights.).

[175] S. REP. NO. 102-249, at 8.

[176] TVPA, Pub. L. No. 102-256, § 2(a).

[177] S. REP. NO. 102-249, at 8.

[178] TVPA, Pub. L. No. 102-256, § 2(c).

[179] *See* S. REP. NO. 102-249, at 10. The types of tolling principles which may be applicable include the following:

> The statute of limitation should be tolled during the time the defendant was absent from the United States or from any jurisdiction in which the same or a similar action arising from the same facts may be maintained by the plaintiff, provided that the remedy in that jurisdiction is adequate and available. Excluded also from calculation of the statute of limitations would be the period when a defendant has immunity from suit. The statute of limitations should also be tolled for the period of time in which the plaintiff is imprisoned or otherwise incapacitated. It should also be tolled where the defendant has concealed his or her whereabouts or the plaintiff has been unable to discover the identity of the offender.

Id. at 11 (citations omitted).

[180] TVPA, Pub. L. No. 102-256, § 2(b).

[181] *Id.*

will have a remedy in some forum.[182] Congress demonstrated its recognition of the difficulty experienced by victims of torture abroad by prosecuting various individuals responsible for such atrocities.[183] These cases "show that that torture victims bring suits in the United States against their alleged torturers only as a last resort."[184] Thus, Congress established that the initiation of a lawsuit by a victim or a victim's representative in the U.S. is usually prima facie evidence that the claimant has exhausted their legal remedies in the jurisdiction where the torture occurred.[185] U.S. courts are required to assume such exhaustion of remedies by the plaintiffs, while the burden of proving that the plaintiffs have not exhausted local remedies is placed on the defendant as an affirmative defense.[186] Defendants must therefore show that local remedies exist that the plaintiff did not use.[187] Further, a U.S. court will not "require exhaustion in a foreign forum when foreign remedies are unobtainable, ineffective, inadequate, or obviously futile."[188]

Several cases that have been brought under the TVPA involving foreign law have been determined based on the lack of adequate remedies.[189] In *Aguinda v. Texaco, Inc.*,[190] the court held that "the courts in the United States are properly reluctant to assume that the courts of a sister democracy are unable to dispense justice."[191] There are some cases where a final judgment has already been rendered abroad against a plaintiff; in these cases, "the court will have to determine whether to recognize that judgment and dismiss the case. In such a case, the usual principles of res judicata apply."[192] Foreign judgments will not be recognized when the U.S. court determines that the judgment was procured in an unfair judicial system, with unfair procedures, or with lack of competence.[193] Furthermore, a U.S. court

---

[182] H. REP. NO. 102-900.
[183] S. REP. NO. 102-249, at 9-10.
[184] *Id.* at 9.
[185] *Id.* at 9-10.
[186] *Id.* at 10.
[187] *Id.*
[188] *Id.*
[189] *See, e.g.*, Honig v. Doe, 484 U.S. 305, 325-29 (1988).
[190] 142 F. Supp. 2d 534.
[191] *Id.* at 544 (citing Aguinda v. Texaco, Inc., 1994 WL 142006 (S.D.N.Y. 1994)).
[192] S. REP. NO. 102-249, at 10.
[193] *Id.*; *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 482 (1987).

will not enforce a foreign judgment that is "contrary to public policy or fundamental notions of decency and justice."[194]

5. The ATCA and the TVPA

The TVPA supplements the ATCA in providing a plaintiff the right to bring an action in U.S. federal courts against an individual or agent of a foreign entity for violations of the law of nations.[195] The second *Wiwa* court[196] articulated the distinction of the two acts by stating,

> Unlike the [ATCA], the TVPA does not in itself supply a jurisdictional basis for plaintiffs' claim. Rather, the TVPA works in conjunction with the [ATCA], expanding the [ATCA]'s reach to torts committed against United States citizens (not just "aliens") who, while in a foreign country, are victims of torture or "extra judicial killing."[197]

III. THE *WIWA* LITIGATION: AN ANALYSIS

A. Violations

A major human rights allegation in the *Wiwa* litigation complaint was that the creation of the Civil Disturbances Special Tribunal, which convicted Saro-Wiwa and others, was a violation of customary international law.[198] The Plaintiffs alleged that the judgment of the tribunal was not subject to review by a higher court, and that the accused persons met with their lawyers only after obtaining permission from and in the presence of military personnel.[199] This interference with legal representation deprived the Plaintiffs of access to proper attorney representation.[200] The complaint further alleged that the Nigerian legal system was inadequate to address the human rights violations committed by Shell.[201] These allegations require a discussion of the domestic laws of Nigeria and the enforcement of customary international law.

---

[194] S. REP. NO. 102-249, at 10; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 482 cmt. f. (1987).

[195] TVPA, Pub. L. No. 102-256, § 2(b).

[196] 2002 WL 319887.

[197] *Id.* at *3.

[198] Second Amended Complaint, *supra* note 10, at ¶¶ 75, 77-78.

[199] *Id.* at ¶¶ 78(b) and (c).

[200] *See id.* at ¶ 79 ("Defense counsel for the accused were [also] subjected to threats of beatings.").

[201] *Id.* at ¶ 106 ("There is no independent functioning judiciary in Nigeria and any suit against Defendants there would have been and would still be futile and would result in serious reprisals.").

B. International Reports on Human Rights Violations in Nigeria

1. Introduction

During military rule in Nigeria, the United Nations and other organizations reported acts of human rights violations in the country.[202] In 1995, the United Nations General Assembly, by resolution, condemned the military government's arbitrary execution of Ken Saro-Wiwa and eight others as a result of a flawed judicial process without the right to a public trial.[203] Non-governmental organizations such as Amnesty International[204] and Human Rights Watch[205] reported consistent human rights violations in Nigeria.[206] Some forms of human rights abuses in Nigeria reported during the period of 1984 through mid-1999 include arbitrary detention,[207] unfair trials without the right of appeal to an independent court of normal jurisdiction,[208] torture by military agencies,[209] mass public executions of

---

[202] Situation of Human Rights in Nigeria, G.A. Res. 51/109, U.N. GAOR, 82d plen. mtg., U.N. Doc. A/RES/51/109 (Dec. 12, 1996).

[203] Situation of Human Rights in Nigeria, G.A. Res. 50/199, U.N. GAOR 99th plen. mtg., A/RES/50/199 (Dec. 22 1995).

[204] The Amnesty International Home page can be found at http://www.amnesty.org/.

[205] The Human Rights Watch Home page can be found at http://www.hrw.org/.

[206] *See* Amnesty Int'l, *Nigeria: A Summary of Human Rights Concerns*, Mar. 1, 1996, http://web.amnesty.org/library/index/engafr440031996 (last visited Nov. 30, 2005); Manby, *supra* note 23, at http://www.hrw.org/reports/1999/nigeria.

[207] Amnesty Int'l, *supra* note 206, at http://web.amnesty.org/library/index/engafr440031996#ADN (Nigerian State Security Decree No. 2 of 1984 authorized the indefinite detention, "without charge or trial of any person deemed to threaten the economy or security of the state." Shortly after its promulgation, the Decree was amended to prohibit the courts from issuing orders to the authorities to produce detainees before them by writ of *habeas corpus*.).

[208] The article states,

> The Special Military Tribunal was established under the Treason and Other Offenses (Special Military Tribunal) Decree No. 1 of 1986 . . . to try any person, whether military or civilian, on charges of treason or any other offense committed in connection with a rebellion against the government. It can award any penalty prescribed under criminal or military law but is not bound to follow procedures of civilian or military courts. Its verdicts and sentences have to be confirmed by the military government, and defendants before it have no right of appeal to any higher or independent court. Defendants have been denied crucial rights of [defense], including their rights to be safeguarded from torture, ill-treatment or improper duress, to be informed of the substance of the charges against them, to be defended by a lawyer of their own choice, to be able to prepare their [defense] properly, to be tried in public by an independent and impartial court, and to appeal against the courts decision to an independent and higher court.

Id. at http://web.amnesty.org/library/index/engafr440031996#UTS.

[209] *Id.* at http://web.amnesty.org/library/index/engafr440031996#TOR.

criminal figures,[210] and extra judicial executions and unlawful killings.[211] These allegations were reported to be in violation of several human rights declarations made by members of the United Nations and the related African Charter on Human Rights[212] that mandate all human beings be treated with equal dignity and provided with equal rights.[213] The declarations proclaim that human beings are inviolable and that every individual shall be entitled to respect for his or her life and the integrity of his or her person.[214] They also state that no one shall be arbitrarily deprived of this right, or subjected to arbitrary arrest, detention, or exile.[215] The *Wiwa* Plaintiffs claimed an abuse and denial of these rights by Shell and the Nigerian military government.[216]

2. The Nigerian Legal System Under Military Regimes

Nigeria is a member of the United Nations[217] and party to several international human rights treaties including the 1948 Universal Declaration of Human Rights,[218] the African Charter on Human and Peoples' Rights,[219] the ICCPR,[220] and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[221] Nigeria signed the UN Convention Against Torture[222] in 1988 but did not ratify the treaty until June 28, 2001.[223] Though

---

[210] *Id.* at http://web.amnesty.org/library/index/engafr440031996#MPE (allowing execution of prisoners convicted of armed robbery by a special Robbery and Firearms Tribunals. No right of appeal was allowed under the Decree.).

[211] *Id.* at http://web.amnesty.org/library/index/engafr440031996#EEA.

[212] African [Banjul] Charter on Human and Peoples' Rights, June 27, 1981, 21 I.L.M. 58 (1982), *available at* http://www1.umn.edu/humanrts/instree/z1afchar.htm [hereinafter "African Charter"].

[213] *See id.* at ch. I; *see also* Declaration of Human Rights, *supra* note 51, at 71.

[214] African Charter, *supra* note 212, at art. 4.

[215] *Id.* at art. 6.

[216] *See* Second Amended Complaint, *supra* note 10, at ¶ 105.

[217] The UN Home page can be found at http://www.un.org/. Nigeria joined the UN on October 7, 1960. UN, List of Member States, http://www.un.org/Overview/unmember.html (last visited Nov. 31, 2005).

[218] Declaration of Human Rights, *supra* note 51.

[219] African Charter, *supra* note 212.

[220] ICCPR, *supra* note 49. Nigeria acceded to the ICCPR on July 29, 1993. *See* Univ. of Minn. Human Rights Library, Ratification of International Human Rights Treaties—Nigeria, http://www1.umn.edu/humanrts/research/ratification-nigeria.html (last visited Oct. 11, 2005) [hereinafter "Nigeria Treaties"].

[221] Jan. 3, 1976, 993 U.N.T.S. 3, *available at* http://www.unhchr.ch/html/menu3/b/a_cescr.htm [hereinafter "ICESCR"]; *see also* Nigeria Treaties, *supra* note 220, at http://www1.umn.edu/humanrts/research/ratification-nigeria.html (Nigeria acceded to the ICESCR on July 29, 1993).

[222] *See supra* note 52.

ratification took place more than twelve years after signing, the act of signing the Convention signified an acceptance of the purposes of the Convention and the obligation to refrain from any act that would defeat the object and purpose of the treaty. Collectively, the Universal Declaration of Human Rights, the ICESCR, and the ICCPR make up the International Bill of Human Rights.[224] Military governments in Nigeria ignored the enforcement of these human rights treaties through the judiciary and effectively rendered the judicial process powerless.[225]

Furthermore, Nigeria is a member of the Commonwealth of Nations.[226] It has a common law system that is modified by court rulings, a Constitution,[227] and statutes enacted by the legislative body.[228] The 1999 Nigerian Constitution established a federal system of government with three independent branches of government: the executive, the legislative, and the judiciary.[229] The Constitution of Nigeria established the fundamental human rights of its citizens and their rights to its enforcement through a constitutionally established legal system and judiciary.[230]

3. The Nigerian Judiciary

Due to a long history of military rule in Nigeria between the periods of 1966 to 1979 and 1983 to 1999, the Constitutional provisions guaranteeing the basic fundamental rights of citizens were suspended several times for a period of nearly 37 of the country's 42 years of independence.[231] Several

---

[223] *See* Nigeria Treaties, *supra* note 220, at http://www1.umn.edu/humanrts/research/ratification-nigeria.html.

[224] UN Office of High Commissioner for Human Rights, Fact Sheet No.2 (Rev.1), The International Bill of Human Rights, http://www.unhchr.ch/html/menu6/2/fs2.htm (last visited Oct. 11, 2005).

[225] Nigeria, Reports to Treaty Bodies, Committee on Social, Economic and Cultural Rights, http://www.hri.ca/fortherecord1998/vol2/nigeriatb.htm (last visited Oct. 11, 2005).

[226] *See* U.S. Dep't of State, Bureau of African Affairs, Background Note: Nigeria, http://www.state.gov/r/pa/ei/bgn/2836.htm (last visited Nov. 30, 2005) [hereinafter "Nigeria Notes"].

[227] *See* Constitution of the Federal Republic of Nigeria, http://www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm (last visited Nov. 30, 2005) [hereinafter "Constitution of Nigeria"].

[228] Nigeria Notes, *supra* note 226; *see also* Constitution of Nigeria, *supra* note 227.

[229] Constitution of Nigeria, *supra* note 227, at ch. 1, pt. 2.

[230] *Id.*

[231] *See* Nigeria Notes, *supra* note 226; Serving In Mission, Nigeria, http://www.sim.org/country.asp?CID=1&fun=1 (last visited Oct. 12, 2005) ("Nigeria has had three constitutions since independence. . . . From 1966-1979, the country was under military rule and no constitution was in force. Later the constitution was again suspended, and a Federal Military Government (The Defense Council), gained control in 1986.").

military regimes governed by decrees and orders designed to suit the military method of command and control.[232] The military government imposed curfews and arrested and imprisoned opposition groups without trials.[233] Those in charge committed serious human rights abuses.[234] Freedom of speech, press, assembly, association, and travel were all infringed upon.[235]

The judiciary faced a series of challenging encounters during the military dictatorship.[236] The ability of the courts to properly administer justice without interference from the military governing body was highly limited by the military's constant refusal to obey court orders.[237] Military

---

[232] Nigeria Notes, *supra* note 226 (the main decision-making organ of the Nigerian government during the military rule was the Provisional Ruling Council (PRC) made up of senior military officers).

[233] *Id.*

[234] *Id.* (abuses included violence and discrimination against women and female genital mutilation).

[235] *Id.*

[236] *Id.* ("The judiciary's authority and independence was significantly impaired . . . by the military regime's arrogation of judicial power and prohibition of court review of its action. The court system continued to be hampered by corruption and lack of resources.").

[237] UN Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, *Question of the Violation of Human Rights and Fundamental Freedoms in any Part of the World, with Particular Reference to Colonial and Other Dependent Countries and Territories: Situation of Human Rights in Nigeria*, ¶ 49-68, U.N. Doc. E/CN.4/1997/62/Add.1 (Mar. 24, 1997), *available at* http://www.hri.ca/fortherecord1997/documentation/commission/e-cn4-1997-62-add1.htm (reporting executive disobedience of court orders by the Nigerian military government, a situation described in the report as "governmental lawlessness in the form of refusal by the military Government and its agencies to obey court orders") [hereinafter "*Situation of Human Rights in Nigeria*"]. According to the report, the phenomenon was "so rampant that some judges have simply stopped issuing orders on the military Government or its agencies because they will never be obeyed." *Id.* at ¶ 53. The report revealed the frustrations of the judiciary by discussing a 1992 Nigerian case where Justice A.F. Adeyinka stated,

> The conduct of the Attorney-General and of the Federal Military Government of Nigeria in disobeying the Court Orders is reprehensible. The Government's disobedience of Court Orders is, in fact, destroying the basis in which lawyers can defend the rights of Nigerian Citizens which the Government is now seeking to protect by this action. . . . If citizens whose rights the Federal Government now seeks to protect follow the Government's bad example and refuse to obey Court Orders, it will lead not only to the disruption of the due administration of justice and the transition to the Civil Rule Programme, but also, to chaos, anarchy and the ultimate dismemberment of the Federal Republic of Nigeria.

Id. at ¶ 57.

In the 1996 case of *Ibrahim v. Emein*, Justice Muhammed said,

> I am of the firm view that for a nation such as ours, to have stability and respect for democracy, obviously the rule of law must be allowed to follow its normal course

tribunals often replaced constitutionally established legal proceedings for prosecuting violators of the law;[238] in fact, records from international organizations revealed complete disrespect for the rule of law.[239] Uncertainty and lack of uniformity across the nation concerning rights, freedoms, and the enforcement of legally established rules, were predominant during the era of military rule.[240] The long-term social effects of the military style of government included vast uncontrollable corruption of the government and violence associated with disputes over equitable distribution of oil proceeds.[241] According to international human rights records and independent sources, the greatest suffering under military rule took place between 1993 and May 1999.[242] During this period, the Ogoni

---

> unencumbered. If, for any reason, the executive arm of government refuses to comply with court orders, I am afraid that arm is promoting anarchy and executive indiscipline capable of wrecking the organic framework of the society.

Id. at ¶ 58.

The report also states that Justice James Oduneye, in February of 1996, was reported to have expressed his frustration when he learned "that an interim injunction which he granted restraining the Inspector-General of Police, the Attorney-General and the Minister of Justice from arresting or detaining Chief Akinmaghe was disobeyed." *Id.* at ¶ 59. The judge said, "I don't like my orders being flouted, no matter who is involved. . . . If the orders of the court cannot be complied with, the court itself should be scrapped and let us live in a country of anarchy and chaos." *Id. See also* Netherlands Institute of Human Rights, http://sim.law.uu.nl/SIM/CaseLaw/uncom.nsf/804bb175b68baaf7c125667f004cb333/e89f6ee1137ff08cc12566b7003b29bb?OpenDocument (last visited Oct. 12, 2005) ("Particular concern is expressed that Decree 12 (Federal Military Government Supremacy and Enforcement Decree, 1994) . . . states 'no act of the federal military government may be questioned henceforth in a court of law' and which ousts 'courts of jurisdiction' which can adversely affect proceedings invoking protection against racial discrimination.") [hereinafter "Netherlands Institute"].

[238] *See Nigeria, "Permanent Transition,"* 8 HUM. RTS. WATCH 3 (Sept. 1996), *available at* http://hrw.org/reports/1996/Nigeria.htm (The Civil Disturbances (Special Tribunal) Decree No. 2 of 1987 was specially established to try cases involving civil riots and disturbances. "The proceedings of the tribunal . . . flagrantly violated international standards of due process."); UNHCR, Publications, *UNHCR Background Paper on Refugees and Asylum Seekers from Nigeria*, § 3.2 (Nov. 1, 1997), http://www.unhcr.ch/cgi-bin/texis/vtx/publ/opendoc.htm?tbl=RSDCOI&id=3ae6a6510&page=publ (last visited Nov. 30, 2005) ("Constituted under the Treason and Other Offenses Special Tribunal Decree No. 1 of 1986, the special military tribunal is empowered to try 'any person whether or not a member of the armed forces who, in connection with any act of rebellion against the Federal Government, has committed the offen[s]e of treason, murder or any offen[s]e under Nigerian law.'").

[239] *See, e.g., Situation of Human Rights in Nigeria, supra* note 237.

[240] Netherlands Institute, *supra* note 237.

[241] Nigeria Notes, *supra* note 226, at http://www.state.gov/r/pa/ei/bgn/2836.htm.

[242] *See, e.g.,* Amnesty Int'l, *Nigeria: A Travesty of Justice, Secret treason trials and other concerns* (1996), http://www.amnesty.org/ailib/intcam/nigeria/trav1.htm (last visited Nov. 30, 2005) (detailing human rights abuses by Nigerian authorities).

crisis escalated with the 1995 execution of Ken Saro-Wiwa and eight others.[243] The country returned to civilian rule in May of 1999.[244]

4. The Independence of the Nigerian Judiciary

The Nigerian judiciary suffered during the military regimes. Reports from the UN Human Rights Commission indicated that the independence of the Nigerian judiciary under the military government was less than guaranteed.[245] The suspension of the Constitution[246] also rendered the application of the UN Declarations of Human Rights and the UN Basic Principles of the Independence of the Judiciary[247] (UN Basic Principles) ineffective.[248] The basic principle of the 1985 General Assembly resolution requiring the independence of the judiciary was not implemented.[249] These principles require that states guarantee the independence and respect for the institution of the judiciary in the Constitution or law of the country; ensure

---

[243] Second Amended Complaint, *supra* note 10, at ¶ 90.

[244] Nigeria Notes, *supra* note 226, at http://www.state.gov/r/pa/ei/bgn/2836.htm (stating that the election of former military head of state Olusegun Obasanjo to president ended 16 years of consecutive military rule).

[245] *See Situation of Human Rights in Nigeria*, *supra* note 237, at ¶¶ 49-68.

[246] *Id.* at ¶¶ 49-50 (The Constitution (Suspension and Modification) Decree No. 107 of 1993 effectively abrogated the pre-existing legal order in Nigeria except for a section (6) which was severely diluted by section 3(3) of same Decree. Section 3(3) provided that "provisions of a Decree shall prevail over those of the unsuspended provisions of the said 1979 Constitution." Decree No. 107 effectively ousted the Supremacy of the Constitution.).

[247] G.A. Res. 40/146, at 59, U.N. GAOR, 7th Sess., U.N. doc. A/CONF.121/22/Rev.1 (Dec. 13, 1985), *available at* http://www.unhchr.ch/html/menu3/b/h_comp50.htm.

[248] *See generally Situation of Human Rights in Nigeria*, *supra* note 237. Based on the provision of section 3(3) of Decree No. 107, the military government passed Decree No. 12 (The Supremacy and Enforcement of Powers), ousting the jurisdiction of the ordinary courts over some fundamental rights issues and made the judiciary subservient to the Federal Military Government. Decree 12 provides

> (i) civil proceedings shall lie or be instituted in any Court for or on account of or in respect of any act, matter or thing done or purported to be done under or pursuant to any Decree or Edict, and if such proceedings are instituted before, on, or after the commencement of this Decree the proceedings shall abate, be discharged and made void
>
> (ii) question whether any provision of chapter IV of the Constitution of the Federal Republic of Nigeria 1979 has been, is being, or would be contravened by anything done or purported to be done in pursuance of any Decree shall not be inquired into in any court of law and, accordingly, no provision of the Constitution shall apply in respect of any such question.

Id. at ¶ 51.

[249] *See* UN Office of the High Commissioner for Human Rights, *Basic Principles on the Independence of the Judiciary*, http://www.unhchr.ch/html/menu3/b/h_comp50.htm (last visited Oct. 12, 2005).

that the judiciary decides matters before them impartially in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats, or interferences, direct or indirect, from any quarter or for any reason; grant exclusive jurisdiction over all issues of a judicial nature to the judiciary for decision; prohibit any inappropriate or unwarranted interference with the judicial process; and guarantee every citizen the right to be tried by ordinary courts or tribunals using established legal procedures.[250] The resolution specifically states, "[t]ribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals."[251] This is to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.[252]

The UN Basic Principles provide States and members of the organizations, with guidelines to establish conditions under which justice can be maintained and respect for human rights and fundamental freedoms can be achieved without any discrimination.[253] The principles were formulated to assist States in their task of implementing and enforcing, through their Constitutions, the principles of equality of every human before the law, the principles of presumption of innocence, and the right to a fair and public hearing by a competent, independent, and impartial tribunal as guaranteed under the Universal Declaration of Human Rights[254] and the ICCPR.[255]

The Civil Disturbances Tribunal that tried Ken Saro-Wiwa and other Ogoni members was established under a military decree in violation of the UN Basic Principles.[256] The tribunal denied citizens appearing before it the right to be accorded due process under the law.[257] This supports why the Plaintiffs in the *Wiwa* litigation specifically alleged that there was no

---

[250] *Id.* at ¶¶ 1-7.
[251] *Id.* at ¶ 5.
[252] *Id.* at ¶ 6.
[253] *Id.*
[254] Declaration of Human Rights, *supra* note 51, at art. 10.
[255] ICCPR, *supra* note 49, at art. 14.
[256] The Civil Disturbances (Special Tribunals) Decree, No. 2 of 1987, was established under the Treason and Other Offenses (Special Military Tribunals) Decree No. 1 of 1986, which provided for Special Tribunals headed by members of the military government. Between 1987 and 1995, tribunals established under the Treason and Other Offenses Decree conducted politically motivated and unfair trials resulting in the execution of military officers and civilians in opposition of the military government. *See* Amnesty International, *Annual Report 2000: Nigeria*, http://web.amnesty.org/report2000/countries/b1b5babbdb8d5b3b802568f200552956?OpenDocument (last visited Nov. 30, 2005).
[257] *See, e.g.*, Second Amended Complaint, *supra* note 10, at ¶ 98.

independent functioning judiciary in Nigeria, and that filing any suit in Nigeria in 1997, when *Wiwa* was first filed, would be futile.[258]

Although Nigeria is now a democratic state, the effects of the long period of military rule will be felt for a while; perhaps it is for this reason that the *Wiwa* Plaintiffs found it convenient to litigate in the United States, although much of the evidence required to prove the case would be gathered from Nigeria where the alleged incidents took place. The District Court acknowledged the reports from the UN and other human rights organizations that detailed the independence of the Nigerian judiciary.[259] With that issue resolved by the Court, the issue that then remained was whether the Plaintiffs stated a cause of action that would give rise to Shell's liability for injury and harm to the Plaintiffs.

C. Allegations of Conspiracy and Complicity

1. Introduction

In addition to the *Wiwa* Plaintiffs' causes of action under the ATCA, the TVPA, customary international law, and the domestic laws of Nigeria, the complaint alleged that the defendants acted under color of law or authority, and caused the government of Nigeria to send military troops to Ogoni in an attempt to stop a peaceful demonstration by the community.[260] According to the Plaintiffs, Shell entered into contracts with the Nigerian government for the purchase of weapons for use by the Nigerian police and provided logistical support such as vehicles, patrol boats, ammunition, and other materials to assist the Nigerian police in carrying out arrests, detention, and torture against the Plaintiffs.[261]

The complaint further alleged that Shell's complicity and conspiracy with the government caused the creation of a Civil Disturbances Special Tribunal[262] in violation of customary international law.[263] Finally, the

---

[258] *Id.*

[259] *Wiwa II*, 2002 WL 319887, at *18.

[260] Second Amended Complaint, *supra* note 10, at ¶ 42.

[261] *Id.* at ¶ 33.

[262] *Id.* at ¶¶ 75-78; *see also The Need for Nigeria to Seek Advisory Services and Technical Assistance in the Field of Human Rights*, J. HUMAN. ASSISTANCE (June 3, 2000), http://www.jha.ac/articles/a055.htm (last visited Nov. 30, 2005) (stating that the Civil Disturbances (Special Tribunal) Decree No. 2 of 1987 gave the head of military government power to constitute a special tribunal outside the normal judicial system to try cases involving civil riots and disturbances).

[263] Second Amended Complaint, *supra* note 10, at ¶ 42. *See also supra* notes 217-230 and accompanying text.

complaint stated that Nigerian military troops used Royal Dutch/Shell boats to attack the village of Ogoni.[264]

In order for the Plaintiffs to succeed, they would be required to provide substantial evidence in support of the allegations. The court in *Kadic v. Karadzic*[265] stated that there is no federal subject matter jurisdiction under the ATCA unless the complaint adequately pleads a violation of the law of nations or a treaty of the United States.[266] In cases decided under the ATCA, acts of torture, murder, extrajudicial killings, and slavery are *jus cogens* violations[267] and, thus, violations of the law of nations.[268] Human rights violations are also considered violations of the laws of nations as they are well established, universally recognized norms of international law.[269] A threshold question under the ATCA, in a case against a private party, "is whether the alleged tort requires the private party to engage in state action for ATCA liability to attach and, if so, whether the private party did in fact engage in state action."[270] Individuals and corporations have been held responsible for human rights abuses carried out under color of law.[271]

2. The "Color of Law" Jurisprudence and Private Liability

Application of the color of law jurisprudence under 42 U.S.C. § 1983 imposes liability on a private individual when that person "acts 'under color' of a state 'statute, ordinance, regulation, custom or usage.'"[272] However, a possible interpretation of the statute is that official immunity bars a private person's liability.[273] This interpretation encompasses the view that "a private person named as a defendant in an alleged conspiracy with state officials,

---

[264] Second Amended Complaint, *supra* note 10, at ¶ 53.
[265] 70 F.3d 232.
[266] *Id.* at 238.
[267] "A mandatory or peremptory norm of general international law accepted and recognized by the international community as a norm from which no derogation is permitted." BLACK'S LAW DICTIONARY 384 (8th ed. 2004).
[268] *Kadic*, 70 F.3d at 238; *see also* Doe I v. Unocal Corp., 395 F.3d 932, 945 (9th Cir. 2002).
[269] *Filirtiga*, 630 F.2d at 884.
[270] *Unocal*, 395 F.3d at 945.
[271] *Kadic*, 70 F.3d at 242.
[272] Richardson v. McKnight, 521 U.S. 399, 403 (1997).
[273] *See, e.g.*, Sykes v. Dept. of Motor Vehicles, 497 F.2d 197, 202 (9th Cir. 1974) ("Private persons cannot be held liable for conspiracy under the Civil Rights Statutes if the other conspirators are state officials who are themselves immune to liability under the facts alleged.").

who are themselves immune from liability, does not act under color of law and is not liable under . . . § 1983."[274]

However, recent federal court decisions have established the principle that private individuals conspiring with state officials in prohibited actions are acting under color of law for purposes of 42 U.S.C. § 1983.[275] To prove that an individual acted under color of law, the acts of the private individual must have been the result of a conspiracy or joint activity with state officials.[276] In addition, to prove the existence of a civil rights conspiracy, a "plaintiff must prove that there has been an agreement and an actual deprivation of a right secured by the Constitution and laws."[277] For a private individual, "[t]o act 'under color' of law does not require that the accused be an officer of the State; "[i]t is enough that he is a willful participant in joint activity with the State or its agents."[278] Plaintiffs must thus show that the defendants acted under color of law by a willful act on their part and participated jointly with a state official in carrying out an act constituting a violation of the law.[279]

In this case the Plaintiffs accused Shell of conspiracy[280] and complicity[281] with the Nigerian government, thereby obstructing the path of justice for the Plaintiffs.[282] The Plaintiffs have the burden of proving Shell's intent produced the ultimate act of torture and extrajudicial killings, the subject of the litigation. In other words, the Plaintiffs must show that, but for Shell's conduct, they would not have suffered torture and summary execution. In *Gallagher v. Neil Young Freedom Concert*,[283] the Tenth Circuit held that courts must examine "whether state officials and private parties have acted in concert in effecting a particular deprivation of

---

[274] Ethel R. Alston, Annotation, *Liability, In Federal Civil Rights Actions Under 42 U.S.C. § 1983, of Private Parties Who Conspire With Immune Officials*, 44 A.L.R. Fed. 547 (1979).

[275] *See, e.g.*, Tahfs v. Proctor, 316 F.3d 584, 590-91 (6th Cir. 2003); Norton v. Liddel, 620 F.2d 1375, 1380 (10th Cir. 1980).

[276] *Norton*, 620 F.2d at 1381.

[277] Hamilton v. Arnold, 135 F. Supp. 2d 99, 102 (D. Mass. 2001).

[278] Adickes v. S.H. Kress & Co., 398 U.S. 144, 152 (1970).

[279] *Id.*

[280] "An agreement by two or more persons to commit an unlawful act, coupled with an intent to achieve the agreement's objective, and (in most states) action or conduct that furthers the agreement; a combination for an unlawful purpose." BLACK'S LAW DICTIONARY 329 (8th ed. 2004).

[281] See definition *supra* note 41.

[282] *See* Second Amended Complaint, *supra* note 10, at ¶¶ 2, 4, 20, 22.

[283] 49 F.3d 1442 (10th Cir. 1995).

constitutional rights."[284] The Supreme Court held in *Tower v. Glover*[285] that a "private person acts 'under color of' state law when engaged in a conspiracy with state officials to deprive another of federal rights."[286] Shell's liability will therefore be determined on the basis of the corporation's participation, actual or proximate, in causing the harm alleged.

In *Doe I v. Unocal Corporation*,[287] the Ninth Circuit held that "the standard for aiding and abetting under the ATCA is . . . knowing practical assistance or encouragement that has a substantial effect on the perpetration of the crime."[288] In the *Wiwa* litigation, the Plaintiffs would have to prove that Shell's conduct met the required standard. Shell's alleged knowledge and practical assistance through the purchase of weapons and the provision of logistics to the Nigerian military, if adequately proven, may subject Shell to liability for the alleged human rights abuses.[289] Given the nature of the tribunal under which Saro-Wiwa and others were tried,[290] it was evident there was already a denial of proper legal representation of the Plaintiffs at the trial. The Plaintiffs, therefore, would have to prove, to the extent possible and through admissible evidence, that Shell's joint action with the state was through knowing assistance and encouragement of the alleged human rights abuses causing bodily harm to some of the Plaintiffs and the execution of others.

3. Allegations of Racketeering and Fraud

The Plaintiffs' complaint includes allegations of arson, murder, bribery, wire fraud, and extortion.[291] It alleges that Shell acted as an individual or as an entity capable of holding a legal or beneficial interest in property.[292] The complaint also alleges that Shell acted in conspiracy with some agents, formed an "enterprise," and engaged in foreign and interstate commerce with the objective to force the plaintiffs to surrender their property.[293] Furthermore, the plaintiffs argue that the pattern of racketeering activity

---

[284] *Id.* at 1453; *see generally* Craig Forcese, *ATCA's Achilles Heel: Corporate Complicity, International Law and the Alien Tort Claims Act*, 26 YALE J. INTL. L. 487, 502 (2001) (discussing in detail the domestic principles of 42 U.S.C. § 1983).
[285] 467 U.S. 914 (1984).
[286] *Id.* at 920.
[287] 395 F.3d 932.
[288] *Id.* at 947.
[289] *See* Second Amended Complaint, *supra* note 10, at ¶¶ 42, 102.
[290] *See id.* at ¶¶ 75-78, 88.
[291] *Id.* at ¶ 172 (a-e).
[292] *Id.* at ¶ 165; *see also* RICO, 18 U.S.C. § 1961(3).
[293] Second Amended Complaint, *supra* note 10, at ¶ 173.

occurred within the periods specified within the meaning of RICO.[294] RICO makes it unlawful "for any [one] employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity"[295] or to conspire in such activity.[296]

Shell's liability under RICO will be determined by examining the Plaintiffs' proof of the alleged violations. The *Unocal* court,[297] in evaluating racketeering allegations, looked to the Hobbs Act[298] regarding the issue of whether the defendant in that case engaged and conspired in a pattern of extortion that is indictable under the Act.[299] The Hobbs Act defines "extortion" as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right."[300] The court observed that the definition of property, as provided under the Hobbs Act, is not "limited to physical or tangible 'things.'"[301] The court then held that the right to make personal and business decisions about one's own labor also fits the Hobbs Act's definition of property.[302] Applying the legal principles and definition of property under the Hobbs Act, it could be assumed that injuries to the *Wiwa*

---

[294] *Id.* at ¶ 168 (referring to RICO, 18 U.S.C. §§ 1961(1), (5) which define racketeering activity to include any act or threat including murder, bribery, and extortion and defining pattern of racketeering activity "to include at least two acts of racketeering activity, one of which occurred after the effective date of [the law] and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity").

[295] 18 U.S.C. § 1962(c).

[296] *Id.* at § 1962(d).

[297] 395 F.3d 932.

[298] 18 U.S.C. § 1951(a) (2000) (Paragraph (a) of the Act provides that "[w]hoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section, shall be fined under this title or imprisoned not more than twenty years, or both.").

[299] *Unocal*, 395 F.3d at 960.

[300] 18 U.S.C. § 1951(b)(2).

[301] *Unocal*, 395 F.3d at 960 (quoting United States v. Zemek, 634 F.2d 1159, 1174 (9th Cir. 1980)).

[302] *Id.* (citing United States v. Hoelker, 765 F.2d 1422, 1425 (9th Cir. 1985) (recognizing the "right to solicit business free from wrongful coercion," and the "right to make personal and business decisions about the purchase of life insurance on one's own life free of threats" as property rights that are protected by the Hobbs Act)).

Plaintiffs' property and business are injuries to their "property," a source of wealth for the Plaintiffs,[303] and a basis for a claim under the Hobbs Act.[304]

The District Court in Oregon has held that "the language and legislative history of RICO fail[s] to demonstrate clear Congressional intent to apply the statutes beyond U.S. boundaries."[305] Therefore, in order to get the RICO claim to apply extraterritorially, the *Unocal* court applied the test developed by the courts to determine liability in securities fraud cases, requiring claims to meet either the "conduct" or the "effects" test to determine liability.[306] The court stated that "[u]nder the 'conduct' test, a district court has jurisdiction over securities fraud suits by foreigners who have lost money through sales abroad only where conduct 'within the United States directly caused' the loss.'"[307] The Ninth Circuit in *Unocal*, quoting the Second Circuit in *Psimenos v. E.F. Hutton & Co., Inc*,[308] also stated, "[m]ere preparatory activities, and conduct far removed from the consummation of the fraud, will not suffice to establish jurisdiction."[309]

With respect to the "effects" test, the *Unocal* court stated that "[t]he anti-fraud laws of the United States may be given extraterritorial reach whenever a predominantly foreign transaction has substantial effects within the United States."[310] Judge Pregerson, in delivering the opinion of the *Unocal* court, noted that the "conduct" and the "effects" tests are like two sides of one coin: while the "conduct" test establishes jurisdiction for domestic conduct directly causing injury or loss in a foreign state, the "effects" test establishes jurisdiction for foreign conduct that directly causes injury or loss in the United States.[311]

---

[303] *See, e.g., Unocal*, 395 F.3d at 961 (citing United States v. Tropiano, 418 F.2d 1069, 1075 (2d Cir. 1969) ("the concept of property under the Hobbs Act . . . includes, in a broad sense, any valuable right considered as a source or element of wealth")).

[304] 18 U.S.C. § 1951(a).

[305] Jose v. M/V Fir Grove, 801 F. Supp. 349, 357 (D. Or. 1991); *see also* Brink's Mat Ltd. v. Diamond, 906 F.2d 1519, 1521 (11th Cir. 1990).

[306] *Unocal*, 395 F.3d at 961 (citing North South Fin. Corp v. Al-Turki, 100 F.3d 1046, 1051 (2d Cir. 1996) and Butte Mining PLC v. Smith, 76 F.3d 287, 291 (9th Cir. 1996)).

[307] *Unocal*, 395 F.3d at 961 (quoting Psimenos v. E.F. Hutton & Co., 722 F.2d 1041, 1046 (2d Cir. 1983)).

[308] 722 F.2d 1041.

[309] *Unocal*, 395 F.3d at 961 (quoting *Psimenos*, 722 F.2d at 1046).

[310] *Id.* (quoting Consol. Gold Fields PLC v. Minorco, S.A., 871 F.2d 252, 261-62 (2d Cir. 1989)). The *Minorco* court further noted that the "effects" test is met where the domestic effect is a "direct and foreseeable result of the conduct outside the United States." *Minorco*, 871 F.2d at 262.

[311] *Unocal*, 395 F.3d at 961 (the Ninth Circuit held that the conduct involved in the *Unocal* case did not meet either of the tests).

Applying the above tests to RICO allegations in the *Wiwa* litigation, Plaintiffs will be required to show evidence that Shell's conduct "directly caused" loss or injury in the United States to satisfy the "effects" test, because Shell's conduct occurred outside of the United States. To succeed, the Plaintiffs must prove specific facts and actions by the defendant that meet the "effects" test. The application of this test places a difficult burden on any plaintiff in bringing RICO claims.

In light of the judicial framework described in this section, the next question is whether litigation is the appropriate answer to environmental and human rights abuses by multinational corporations. The high profile cases before United States federal courts have been filed as a result of the failure by the international community to regulate multinational corporations operating in foreign countries.

IV. IS LITIGATION IN UNITED STATES COURTS THE ANSWER TO ENVIRONMENTAL AND HUMAN RIGHTS ABUSES BY MULTINATIONAL CORPORATIONS?

The question of whether litigation provides a long-term solution to the problems citizens of foreign countries face with multinational corporations operating and investing in those countries presents a number of issues. The short answer is that litigation will not provide a lasting solution to environmental and human rights abuses by multinational corporations. The purpose of litigation is to remedy a right that has been violated and to maintain the status quo through compensation for damage to property and any consequential injuries. It is commonly argued that one who has been injured or harmed cannot be fully restored no matter the amount of monetary compensation that is awarded.[312] The cases reviewed in this article reveal that the plaintiffs were harmed both physically and mentally as a result of the defendants' conduct. However, it may not be possible to ascertain whether such injury was or can be fully compensated. Environmental and human rights abuses relate to loss of property, life, and liberty of the plaintiffs. While every activity involving economic development carries its own risks, applying certain principles and standards may adequately minimize these risks.

---

[312] *See, e.g.*, Steven P. Croley & Jon D. Hanson, *The Nonpecuniary Costs of Accidents: Pain-And-Suffering Damages in Tort Law*, 108 HARV. L. REV. 1785 (1995); *see also* McDougald v. Garber, 536 N.E.2d 372, 374-75 (N.Y. 1989) (stating that the idea that money can compensate for pain and suffering is a legal fiction, but accepting the fiction nonetheless).

The activities of multinational corporations are essential for economic development in developing nations.[313] The recognition of the role of multinational corporations in the economic evolution of developing countries has led to discussions formulating a code of conduct to police their activities.[314] It is for this reason that many multinational corporations are highly regulated in their home of origin to ensure their activities do not affect the environment and lead to human rights abuses. However, the situation is often different in developing countries where multinational corporations play a major role in the economic development of those countries. The problem of regulating multinational corporations through an international body has been persistent. Litigating cases alleging human rights and environmental abuses in United States courts is a difficult endeavor that is costly and time consuming for the parties and the court system; indeed, even the *Wiwa* litigation has stalled.[315] Responsibility for regulating multinational corporations should therefore remain with national bodies and international organizations through multilateral arrangements.

V. FORMULATING AN INTERNATIONAL CODE OF CONDUCT FOR MULTINATIONAL CORPORATIONS

Early international efforts at establishing a binding code of conduct for multinational corporations include the International Labour Organization's Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy[316] (Tripartite Declaration) which was adopted by the International Labour Organization[317] (ILO) in 1977;[318] the work of the Organization for Economic Cooperation and Development[319] (OECD) adopting the Declaration on International Investment and Multinational Enterprises[320] (Declaration on International Investment) in 1976; and the efforts of the 1976 UN Center on Transnational Corporations[321] (UNCTC) in developing a report concerning a code of conduct for multinational

---

[313] *See supra* notes 1-11 and accompanying text.
[314] *See infra* Part V and accompanying text.
[315] *See supra* notes 15-16.
[316] 83 I.L.O. OB Series A, No. 3 (2000), *available at* http://www.ilo.org/public/english/standards/norm/sources/mne.htm [hereinafter "Tripartite Declaration"].
[317] The ILO Home page can be found at http://www.ilo.org/public/english/index.htm.
[318] *See* Tripartite Declaration, *supra* note 316.
[319] The Home page for the OECD can be found at http://www/oecd.org/.
[320] June 13, 1979, 15 I.L.M. 967, *available at* http://www.oecd.org/document/53/0,2340,en_2649_201185_1933109_1_1_1_1,00.html [hereinafter "Declaration on International Investment"].
[321] The UNCTC Home page can be found at http://unctc.unctad.org/aspx/index.aspx.

corporations working in developing countries.[322] The UNCTC also created a draft UN code of conduct for transnational corporations in 1990.[323] These efforts, together with subsequent attempts by non-governmental organizations and private entities working with multinational corporations, show that a worldwide interest exists in ensuring that human rights and the preservation of natural resources are of key importance in the maintenance of international peace and security.

The ILO is the UN's specialized agency which promotes social justice and internationally recognized human and labor rights.[324] The ILO has a unique tripartite structure that consists of governments, employers, and workers.[325] In 1977, the ILO governing body adopted the Tripartite Declaration.[326] While the aim of the Declaration is "to encourage the positive contribution which multinational enterprises can make to economic and social progress,"[327] general policies embedded in the Declaration call for the sovereign rights of States, obedience to their national laws and regulations, consideration of local practices, and respect for relevant international standards.[328] The Tripartite Declaration calls on multinational enterprises to "respect the Universal Declaration of Human Rights and the corresponding International Covenants adopted by the General Assembly of the United Nations, as well as the Constitution of the International Labour Organization and its principles according to which freedom of expression and association are essential to sustained progress."[329]

In 1976, the OECD adopted the Declaration on International Investment.[330] The OECD has also published a report entitled The OECD

---

[322] *See* UN ECOSC, *Transnational Corporations: Issues Involved in the Formulation of a Code of Conduct*, U.N. Doc. E/C.10/17 (July 20, 1976).

[323] *See* UN Comm'n on Transnational Corps., *Code of Conduct on Transnational Corporations: Draft Resolution*, U.N. Doc. E/C.10/1990/L.6 [hereinafter "UN Code of Conduct on Transnational Corporations"].

[324] ILO, About the ILO, Mandate, http://www.ilo.org/public/english/about/index.htm (last visited Oct. 25, 2005).

[325] ILO, Constitution ch. 1, *available at* http://www.ilo.org/public/english/about/iloconst.htm (explaining the unique structure of the organization which provides an open forum where employer and worker delegates can express themselves and vote on issues concerning their labor interests and according to instructions received from their organizations. The delegates sometimes vote against one another and even against their government representatives).

[326] Tripartite Declaration, *supra* note 316.

[327] *Id.* at ¶ 2.

[328] *Id.* at ¶ 8.

[329] *Id.*

[330] Declaration on International Investment, *supra* note 320.

Guidelines for Multinational Enterprises[331] (Guidelines). While the Guidelines are not binding, they aim to provide a standard that corporations can use to demonstrate they are important agents in the changes that are taking place around the world, particularly in developing countries.[332] The Guidelines are not substitutes for applicable laws, but "[t]hey represent standards of [behavior] supplemental to applicable law and, as such, do not create conflicting requirements."[333] The Guidelines "provide principles and standards of good practice consistent with applicable laws."[334]

The general policies of the Guidelines provide that multinational corporations should take "into account established policies in the countries in which they operate"[335] and should "[r]espect the human rights of those affected by their activities consistent with the host government's international obligations and commitments."[336] Multinational corporations are encouraged to "[s]upport and uphold good corporate governance principles and develop and apply good corporate governance practices."[337] Further, enterprises should "[a]bstain from any improper involvement in local political activities."[338]

The Guidelines also recognize the importance of these enterprises becoming aware of the impacts that they have on the environment. The Guidelines specify that these corporations "should . . . take due account of the need to protect the environment, public health and safety, and generally to conduct their activities in a manner contributing to the wider goal of sustainable development."[339] As part of its efforts to combat bribery and corruption, the Guidelines recognize the need for transparency in the activities of multinational enterprises to prevent the offer, demand, or solicitation of bribes by public officials or the employees of business partners.[340] A National Contact Point, established by the OECD to implement the Guidelines and promote its recommendations, also assists with resolving issues that arise under them.[341]

---

[331] *See The OECD Guidelines for Multinational Enterprises: Revision 2000* (OECD 2000), *available at* http://www.oecd.org/dataoecd/56/36/1922428.pdf.
[332] *Id.* at 3.
[333] *Id.* at 5.
[334] *Id.* at 17.
[335] *Id.* at 19.
[336] *Id.*
[337] *Id.*
[338] *Id.*
[339] *Id.* at 22.
[340] *Id.* at 24.
[341] *Id.* at 35.

Similarly, the UNCTC drafted a draft UN Code of Conduct on Transnational Corporations[342] that was submitted to the UN Economic and Social Council (ECOSOC) in 1990.[343] The draft code provides in paragraph 14 that "[t]ransnational corporations shall respect human rights and fundamental freedoms in the countries in which they operate."[344] While the draft code of conduct has not been adopted by the UN General Assembly, it is an example of the effort to make multinational corporations responsible in their foreign activities.[345]

Several other initiatives have been undertaken to promote corporate accountability and respect for human rights. The major question is how the international community can address this problem at a level where all countries recognize and participate in the implementation of recommended standards. This will most likely lead to a recommended tripartite international code of conduct that requires national governments to make binding obligations comply with and ensure that multinational corporations operating within their jurisdiction also abide by the rules.

VI. RECOMMENDATIONS AND CONCLUSION

As evidenced by the events leading up to the *Wiwa* litigation, violations of human rights by multinational corporations are a significant concern in the international community. While the ATCA[346] provides limited remedies to plaintiffs, corporations, governments, civil society organizations, and local communities involved in corporate activities, these groups will not achieve a long-term resolution to their problems without mutual effort. Considering the wide scope of corporate activities, particularly in developing countries, it is necessary that a well-drafted and adequately negotiated code of conduct should be formulated to address the problem. The code of conduct must have a binding effect that would provide victims of human rights and environmental abuses alternative legal avenues in their search for remedies.

The participation of corporations is an important aspect of formulating such a code. The formulation of a binding code of conduct for multinational corporations would ease the flood of cases, like *Wiwa*, in U.S. federal courts. An alternative dispute resolution mechanism should be provided

---

[342] *See* UN Code of Conduct on Transnational Corporations, *supra* note 323.
[343] *Id.*; *see also* Manby, *supra* note 23.
[344] UN Code of Conduct on Transnational Corporations, *supra* note 323, at ¶ 14.
[345] *Id.*; *see also* Manby, *supra* note 23.
[346] 28 U.S.C. § 1350.

under the proposed code for the purpose of preserving investment relationships between multinational corporations and local communities where development activities take place. The recommended code of conduct must be of international status that involves all stakeholders: corporations, governments, and local interests. An enforcement mechanism that is mandatory on the States and all parties is a necessary aspect of such a code.

If these recommended measures are realized, citizens such as Saro-Wiwa and the others involved in the Ogoni disputes may avoid future atrocities that stem from the human rights and environmental abuses of multinational corporations. While this article detailed the steps necessary for abused plaintiffs to bring suit in the United States against foreign defendants,[347] it is often difficult for such plaintiffs to succeed.[348] Therefore, it is necessary to amend the ways in which corporations operate in developing nations. Though litigation might be a means of addressing problems of corporate responsibility for some situations, it is not an end to fully resolving the long-standing issues concerning abuses of human and environmental rights by multinational corporations.

[347] *See supra* Parts II and III.
[348] *See generally supra* Part IV.