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# N.Y. Jury May Decide Liability Of Shell in Nigerian Executions

**BY MARK HAMBLETT**

ABSENT a settlement, a jury to be selected beginning Tuesday in lower Manhattan will be asked to reach a historic verdict that would make Royal Dutch/Shell the first foreign corporation found liable in a U.S. courtroom for aiding and abetting human rights violations by the forces of a foreign nation.

The families of seven Nigerians who were executed by the former military regime in Nigeria for protests against Shell's oil exploration and development activities are attempting to become the first plaintiffs to win at trial in U.S. courts and hold a corporation responsible for assisting in the violation of norms of customary international law.

*Wiwa v. Royal Dutch Petroleum Co*, 96 Civ. 8386, is before Southern District Judge Kimba Wood under the Alien Tort Claims Act, 28 U.S.C. 1350. Also called the Alien Tort Statute (ATS), the 1789 law allowed non-U.S. citizens to seek redress in American courts for torts considered violations of the law of nations: piracy, attacks on ambassadors and the right of safe passage.

The act lay almost dormant until June 30, 1980, when the U.S. Court of Appeals for the Second Circuit ruled that U.S. courts had jurisdiction over a case where the international norm that was violated was the prohibition on torture in *Filartiga v. Pena-Irala*, 630 F.2d 876 (1980).

Paraguayan citizen and U.S. asylum-seeker Dolly Filartiga was allowed to bring suit in the Southern District against Norberto Pena-Irala, a police official in Ascension, Paraguay, for the death-by-torture of her brother, Joelito Filartiga. Mr. Pena-Irala, who was briefly in the United States and then deported, defaulted on a judgment in excess of $10 million.

Ms. Filartiga, noting that international rules on crimes against humanity have been enforceable since the Nuremberg trials held after World War II, opened the door to a series of lawsuits under the statute based on human rights violations around the globe.

There have been plenty of verdicts against individuals since *Filartiga*, although » Page 7 meaningful recoveries are difficult to come by. But corporate liability is another matter. Plaintiffs have won only a handful of settlements and have never taken a case to a jury and prevailed.

Jury selection in *Wiwa* originally was scheduled to begin on Tuesday, and the postponement may indicate that settlement talks are under way. A conference in the case is scheduled for Monday.

There is a dearth of case law, particularly at the circuit level, on corporate liability. But while some commentators and judges argue the issue of whether a corporation can be held vicariously liable remains open, most courts have simply assumed that it can be.

Jonathan C. Drimmer is a partner at Steptoe & Johnson who lectures on the subject at Georgetown Law School and advises multinational companies on compliance with the Alien Tort Statute.

"Virtually every, or almost every, court to look at it has concluded that corporations can be held liable under the ATS, and that they can be held liable under aiding and abetting or other secondary theories of liability," Mr. Drimmer said. "There are some courts that have gone the other way and the Supreme Court has not ruled on it."

## 'Universally Accepted' Norm

It was not until 24 years after *Filartiga* that the U.S. Supreme Court finally weighed in on the Alien Tort Statute with *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). The *Sosa* Court said that to support a claim under the statute a norm of customary international law must be "universally accepted by the civilized world," defined with the same specificity as the norms on piracy, safe passage and offenses against ambassadors, and, "abided or acceded to by States out a sense of legal obligation and mutual concern."

The Court held that the arbitrary, illegal detention of a Mexican national for one day (he was kidnapped and brought to the United States to face charges of complicity in the murder of a drug enforcement agent) did not violate a norm of customary international law.

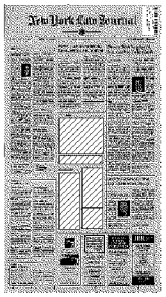
The Court emphasized that the Alien Tort Statute is "in terms only jurisdictional," and said the first Congress "intended the ATS to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations."

There is also a footnote in *Sosa* in which the Court notes that, even where an Alien Tort Statute claim might be brought, there may be case-specific reasons for declining jurisdiction, including out of deference to the foreign policy and diplomatic concerns of the executive branch.

The meaning of any limitations implied by *Sosa* is a matter of debate, with some judges and commentators arguing that only those norms in place in the 18th century are actionable and others arguing for a more expansive view based on the notion that the world universally condemns crimes such as torture and cruel, inhuman or degrading treatment, and a U.S. courtroom is an appropriate place to seek recovery.

Ralph G. Steinhardt, a professor at George Washington Law School, was co-counsel for Mr. Alvarez-Machain in *Sosa*. Although the claim was rejected by the Court, he said, "We won the war, given that the knives were out for the ATS."

What was critical for Mr. Sten-



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hardt and co-counsel Paul Hoffman, who is also working for the plaintiffs in *Wiwa*, is what the U.S. Supreme Court did not do: reject the notion that suit can be brought under the Alien Tort Statute for violations of customary international law that goes beyond piracy or attacks on diplomats.

"I think the burden of persuasion rests on those who would somehow carve out a law-free zone for corporations," Mr. Steinhardt said.

The only two cases against a corporation that have gone to a jury have resulted in a loss for the plaintiffs.

In *Bowoto v. Chevron*, a case somewhat similar to *Wiwa*, a jury in the Northern District of California in December cleared Chevron of liability where the company was accused of providing assistance to Nigerian forces who broke up an environmental demonstration on an oil platform in 1998, killing two protestors and allegedly torturing another. A motion for a new trial in *Bowoto* was denied in March.

In *Romero v. Drummond Co.* in 2007, a federal jury in Alabama found no liability for war crimes where an Alabama mine operating company was accused of hiring paramilitaries in Colombia to murder three men as part of a campaign to intimidate unions.

The *Wiwa* case is being closely watched by the alien tort and human rights bar.

The family of executed Nigerian writer Ken Saro-Wiwa, and other victims of a campaign of terror against those who fought oil exploration in the Ogoni region of Nigeria, brought suit alleging that Shell recruited Nigerian police and military to attack their villages and crush opposition to the company's development in the region.

The complaint also charged that the company gave money and weapons to the government to suppress the protest movement, and also bribed witnesses to give false testimony against Saro-Wiwa, John Kpuinen and other protest leaders, who were convicted of murder and hanged based on fabricated evidence in 1995. The plaintiffs also include three people who were allegedly tortured by police.

*Wiwa* is accompanied by a second case, *Wiwa v. Anderson*, 01 Civ. 1909, which alleges that Royal Dutch official Brian Anderson was directly liable for violations of customary international law.

Shell has said the suits are meritless, stating that it "in no way encouraged or advocated any act of violence" against critics of oil drilling. It insists that the former government of Nigeria, not Shell, was responsible for the executions. In fact, it says that it unsuccessfully requested clemency for Mr. Saro-Wiwa and his fellow Ogonis.

## U.S. Diplomacy

Complicating the issue of Royal Dutch Shell's liability is the diplomatic posture of the United States, which has, in a series of cases, told courts it would not be in the nation's interest to allow companies, and other countries, to be sued in federal courts.

District courts have noted the lack of guidance on the subject, including, most recently in *In Re South African Apartheid Litigation*, 02 MDL 1499 (NYLJ, April 9, 2009).

In that case, Southern District Judge Shira Scheindlin held that while corporations such as Ford, General Motors and IBM could not be held liable for "breadth of harms" committed under apartheid, she also let several claims go forward—claims where the aider and abettor knows that its actions "will substantially assist the perpetrator in the commission of a crime or tort in violation of the law of nations."

The Second Circuit had remanded the two cases that make up the apartheid litigation for a determination, among other things, of whether the suits would raise a political question that should be left to the executive branch.

Judge Scheindlin found, over the objection of the U.S. State Department, that they would not.

Some of these issues are now percolating in the Second Circuit, where Judges Dennis Jacobs, Jose A. Cabranes and Pierre N. Leval probed the boundaries on corporate liability under the Alien Tort Statute during oral arguments in January in *The Presbyterian Church of Sudan v. Talisman*, 01 Civ. 9882. Also before the court is another Nigerian case related to the Wiwa litigation: *Kiobel v. Royal Dutch Petroleum Co.*, 02 Civ. 07618.

In *Talisman*, Southern District Court Judge Denise L. Cote said recent case law, including *Sosa*, has done nothing to change the principle that corporations may be held liable in tort for violating norms of universal concern such as prohibitions against genocide and torture (NYLJ, June 16, 2005).

Talisman, a Canadian company that had been sued by residents of southern Sudan, had argued before Judge Cote that *Sosa* required courts to find that corporate liability and secondary liability were too indefinite and not widely accepted enough in international law.

But Judge Cote said *Sosa* "explicitly contemplates the existence of corporate liability under customary international law."

She nonetheless granted summary judgment for the company in 2006, finding a lack of admissible evidence showing Talisman had violated international law.

The Second Circuit panel in *Talisman* asked for post-argument briefing on any instances where corporations have been held liable.

## 'Evolving Standards'

*Wiwa*, filed in 1996, is a good example of why plaintiffs have had a hard time getting to trial so long after *Filartiga*.

For one, judges are still defining the boundaries of the application of the Alien Tort Statute in general and, more specifically, as it applies to corporations.

"The trend in alien tort cases versus corporations didn't really pick up steam until the mid-90s

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and we do have evolving standards, issues that have to be briefed and some cases that took time to get through discovery," Mr. Drimmer said. "The rhythm, the pace of the litigation has now gotten to the point where we are going to see more trials and I think one of them is going to wind up in a plaintiff's verdict."

There is another factor at work: Corporate defendants have fought Alien Tort Statute cases every step of the way through a series of tactics that have been very effective. Instead of directly fighting the idea that corporations can be held vicariously liable under the statute, they have used other approaches, including forum non conveniens.

Judge Wood granted a forum non conveniens motion in *Wiwa* but was reversed by the Second Circuit (NYLJ, Sept. 14, 2000). The circuit said more respect should have been paid the plaintiffs' choice of forum and that the lower court disregarded "the interests of the United States in furnishing a forum to litigate claims of violations of the international standards of the law of human rights." *Wiwa v. Royal Dutch Petroleum Co.*, 226 F. 3d 88.

"We know that corporations can in principle be liable but of course proving liability at trial is necessarily a different matter," Mr. Steinhardt said. "We don't have very many examples of these cases going to trial because of very lengthy pretrial proceedings. There has been an effort to wear down the plaintiffs."

Mr. Steinhardt agrees that the rarity of cases going to trial also stems from the novelty of the claims and period of adjustment.

"Assuming everyone is working in good faith, it is true that this is the application of ancient principles in new settings and whenever you get ancient principles in new settings" it takes awhile for the law to develop, he said.

Adding to the uncertainty in lower courts, he said, is that, to this point, "the Supreme Court has looked out at this body of jurisprudence and let it stand."

There is another element at work: Plaintiffs' lawyers are gaining more experience and have gotten a much better feel as they have learned from their past success and their past failures.

Mr. Drimmer also said that fewer cases are being dismissed on forum non conveniens and other grounds as judges have made the adjustment.

"Courts clearly are a lot more comfortable hearing alien tort cases that have no direct connection to United States than they were five years or 10 years ago," he said. "We are still in the nascent stages of litigation on the parameters of the ATS. Twenty years from now, we are going to look back at and see this as the period when the blocks were being built on how this law is going to be interpreted."

The *Wiwa* plaintiffs are represented by Jennie Green and Maria LaHood of the Center for Constitutional Rights, EarthRights International attorneys Marco Simons and Rick Herz, and cooperating attorneys Judith Brown Chomsky, Anthony DiCaprio and Beth Stephens, as well as Mr. Hoffman of Schonbrun DeSimone Seplow Harris & Hoffman.

Rory O. Millson, Thomas G. Rafferty and Rowan D. Wilson of Cravath, Swaine & Moore represent Royal Dutch Petroleum.

The lawyers for both sides are not commenting heading into jury selection.

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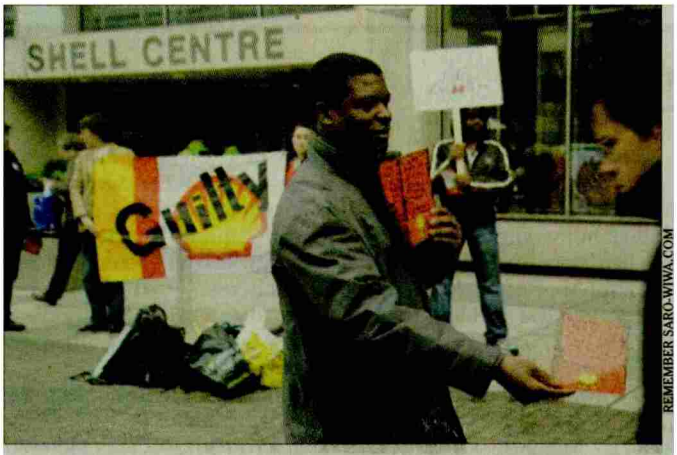
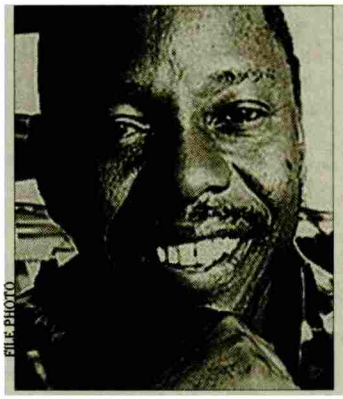



ACTIVISTS pass out leaflets at Royal Dutch/Shell headquarters in London yesterday alerting staff members that the company soon will face trial in New York for human rights violations.





**Ken Saro-Wiwa,** left, was a member of the Ogoni people, an ethnic Nigerian minority whose hometown has been targeted for crude oil extraction since the 1950s.