

Wiwa v. Shell: The \$15.5 Million Settlement

By [Ingrid Wuerth](#)

Introduction



The Ogoni region of the Niger delta became the focus of international attention in the early 1990's, when residents began to protest the environmental degradation and harm to local communities associated with the large-scale extraction of oil. The government of Nigeria used violent means to quell the protests, resulting in the death of and injury to activists, and ultimately in the arrests of

several people, including Ken Saro-Wiwa, the leader of the movement. Saro-Wiwa and others were accused of murder, tried before a special tribunal, and hanged on November 10, 1995. Family members, along with other residents of the Ogoni region involved in the protests, sued Royal Dutch Petroleum Company, Shell Transport and Trading, and a company official and Nigerian affiliate, alleging that they acted in concert with the Nigerian government's conduct, including torture, cruel inhuman and degrading treatment, summary execution, arbitrary arrest and detention, and crimes against humanity.^[1] The case, brought thirteen years ago in federal district court in New York, settled for \$15.5 million on June 8, 2009.^[2]

The settlement and the case itself serve to highlight several uncertainties surrounding the Alien Tort Statute (ATS), the primary statute under which the litigation was brought.^[3] Enacted in 1791, the ATS gives federal courts jurisdiction over claims by aliens for torts in violation of the law of nations. The statute was largely ignored until the 1980s, when human rights lawyers began to use it as the basis for civil claims against perpetrators of torture, genocide, war crimes and other conduct that violates customary international law. Sovereign immunity bars most such claims brought directly against governments, but (with some exceptions) international law generally makes conduct wrongful only when it involves some form of state action. Early cases were brought against individual defendants (such as former dictators or members of the police or military) who had worked for or with a government when the wrongful conduct occurred, but plaintiffs often had difficulty collecting on judgments.

The last decade has seen many ATS cases brought against multinational corporations, most alleging that the defendants worked with or supported

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governments that engaged in human rights violations. Defendants in this second wave of ATS litigation have included Chevron (also for conduct related to protests in the Niger Delta),^[4] Rio Tinto (for slave labor and other claims related to copper mines in Papua New Guinea),^[5] Unocal (Yodana pipeline in Burma),^[6] a Boeing subsidiary (for claims related to extraordinary rendition),^[7] Pfizer (for nonconsensual medical experimentation in Nigeria),^[8] major banking, automobile and computer companies (for claims related to apartheid in South Africa),^[9] a variety of companies for atrocities committed during World War II, and others.

Although some of these cases are still ongoing, other cases against corporations have been dismissed outright.^[10] The only two that have gone to trial resulted in victories for the defendants, including the case against Chevron.^[11] The case against Unocal settled in 2005, but on confidential terms. For these reasons, as well as the significant legal questions discussed below, the viability and strength of ATS cases against multinational corporations, including the willingness of defendants to settle, has been seen as uncertain.^[12]

The Wiwa Settlement

In this context, the *Wiwa* settlement represents a significant victory for the plaintiffs and for human rights attorneys generally. The public terms of the settlement and the substantial (at least to the plaintiffs) amount of money involved, demonstrate that some victims of foreign human rights abuses at the hands of multinational corporations can find meaningful redress in U.S. courts.

The cost of ongoing litigation and prospect of negative publicity from the trial (regardless of the verdict) probably played a role in the defendants' willingness to settle on the eve of trial. Documents purportedly linking company officials to the Nigerian government no doubt added to this concern, and to the likelihood that the defendants would lose. Moreover, two last-minute legal rulings went for the plaintiffs. The district court, as discussed in more detail below, rejected the defendants' argument that under the ATS neither the vicarious liability claims nor many of the causes of action themselves could go forward.^[13] And the Second Circuit ordered jurisdictional discovery against a defendant – Shell Petroleum Development Company of Nigeria (SPDC) – which had previously been dismissed from the case by the trial court judge for lack of personal jurisdiction.^[14]

Finally, the settlement did not require the defendants to admit wrong-doing, and \$4.5 million dollars of the pay-out went to a trust to benefit the Ogoni people, helping defendants portray the settlement as a humanitarian gesture rather than an implicit acknowledgement of fault.^[15]

ATS Claims after *Sosa*

The *Wiwa* case highlights some of the legal uncertainties raised by ATS cases. The Supreme Court held in 2004 in *Sosa v. Alvarez-Machain*, that the ATS statute was jurisdictional only, but that it allowed courts to recognize private claims for violations of international law norms with a “definite content and acceptance among civilized nations” comparable to the torts originally

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understood to be covered by the statute: violations of safe conducts, infringement of the rights of ambassadors, and piracy.^[16] Lower courts have subsequently worked to define the contemporary claims embraced by this standard, which are generally thought to include at least torture, extrajudicial killing, war crimes and genocide.^[17]

Not all courts are in agreement as to what constitutes a violation under the ATS after the *Sosa* decision. In *Wiwa*, the district court held that claims based on the right to peaceful assembly did not meet the *Sosa* standard, a conclusion shared by the district court in the *Bowoto* litigation. ^[18] However, the court did allow the other ATS claims to go forward, including crimes against humanity, extrajudicial killing, cruel inhuman and degrading treatment (CIDT), and arbitrary arrest and detention. The Eleventh Circuit, on the other hand, has held that CIDT lacks the “definite content and acceptance” necessary under *Sosa*,^[19] a conclusion rejected by district courts in other circuits.^[20]

Part of the disagreement centers on non-self-executing treaties, and whether the norms included in those treaties can be actionable under the ATS as customary international law. The Eleventh Circuit appeared to reason that they could not. The *Wiwa* court followed very recent Second Circuit precedent from *Abdullahi v. Pfizer*,^[21] which reasoned that non-self executing (and non-binding) treaties can serve as evidence of customary international law. This is consistent with *Sosa*, which concluded that non-self executing treaties cannot *themselves* establish the relevant rule of international law. With respect to the claim for prolonged arbitrary detention, the *Wiwa* court joined at least one other district court in distinguishing *Sosa*, which held that ATS claims based on *short-term*, arbitrary detention could not go forward under the ATS.

Vicarious Liability under the ATS

The availability of vicarious liability claims (such as aiding and abetting and conspiracy) under the ATS is also unclear. This is an issue of particular importance to cases involving corporate defendants who, like the defendants in this case, are frequently alleged to have assisted governments which engaged in conduct that violated customary international law. Less frequently, plaintiffs allege that corporations themselves have engaged in human rights abuses, with the approval or assistance of the government. Courts have disagreed on the source of law for resolving vicarious liability claims – international law or federal common law. Moreover, the standards for such claims under either source of law are contested.^[22]

The district court in *Wiwa* managed to avoid this issue. While the defendants argued that the court lacked subject matter jurisdiction over the vicarious liability claims, the court held that even if these claims should be dismissed for failure to state a claim (an issue it did not need to reach because it was not raised by the defendants), the court nonetheless had subject matter jurisdiction. This reasoning at least suggests that federal common law governs vicarious liability claims, because it means that the statutory requirement of a tort, “committed in violation of the law of nations” is met without regard to the issue of vicarious liability. That is, the issue of vicarious liability is ancillary to the jurisdictional requirement that the conduct be in

violation of the law of nations. If the defendant's conduct is *only* tortious under principles of vicarious liability, and if those are not supplied by international law, it is hard to see how this is a civil action for a tort in violation of the law of nations.^[23] In any event, this and the other contested legal issues in the case would have given rise to extensive appeals, making the costs of further litigation very high for both parties.

The Policy behind the ATS

The *Wiwa* case illustrates an additional contested aspect of ATS litigation against corporations: does ATS litigation amount to sound policy? As *Wiwa* shows, these cases can be expensive and uncertain to litigate, and they commit substantial judicial resources to resolving difficult legal issues in cases where the conduct generally occurs abroad, largely or solely between foreigners. Moreover, critics of ATS litigation have pointed to *In re South African Apartheid Litigation*, in which a district court recently held that claims for aiding and abetting apartheid in South Africa could go forward against major car manufacturers, banks, and computer companies, thus potentially undermining investment in developing countries, as well as U.S. foreign policy and relations with South Africa.^[24]

The district court's opinion in that case is problematic, but *Wiwa* shows another side of ATS litigation against corporations. The case does not appear to have created any friction with the current government of Nigeria. Indeed, a key plaintiff in the case – Ken Saro-Wiwa's son – now works for the government as an international advisor.^[25] Also, unlike the South Africa litigation, the U.S. government did not file a statement of interest in *Wiwa*, or otherwise argue that the case should be dismissed. Finally, and maybe most importantly, *Wiwa* involves allegations of brutal human rights violations that were not subject to meaningful redress or resolution in Nigeria. This conduct, allegedly financed and encouraged by the defendants, purportedly helped them import millions of barrels of oil per month to the United States as cheaply and quietly as possible.^[26] The world needs less, not more, of that kind of foreign investment.

About the Author

Ingrid Wuerth, an ASIL member and co-chair of the ASIL Interest Group in International Law in the Domestic Courts, is a Professor of Law at Vanderbilt University Law School.

Endnotes

[1] Complaint, *Wiwa et al. v. Royal Dutch Petroleum et al.*, (S.D.N.Y.) (No. 96 Civ. 8386), available at <http://ccrjustice.org/files/3.16.09%205th%20Amended%20Complaint.pdf>.

[2] *Settlement Reached in Human Rights Cases Against Royal Dutch/Shell*, CTR. FOR CONST. RTS., June 8, 2009, at <http://ccrjustice.org/newsroom/press-releases/settlement-reached-human-rights-cases-against-royal-dutch/shell>.

[3] 28 U.S.C. § 1350, also called the Alien Tort Claims Act (ATCA).

[4] *Bowoto v. Chevron Corp.*, 557 F. Supp. 2d 1080 (N.D. Ca. 2008).

[5] *Sarei v. Rio Tinto*, 550 F. 3d 822 (9th Cir. 2008).

[6] *Settlement in Principle Reached in Unocal Case*, EARTHRIGHTS INT'L, Dec. 13, 2004, at <http://www.earthrights.org/content/view/104/62/>.

[7] Complaint, Mohammed et al. v. Jeppesen (N.D. Ca.) (No. 5:07-cv-02798), available at http://www.aclu.org/pdfs/safefree/mohamed_v_jeppesen_1stamendedcomplaint.pdf.

[8] *Abdullahi v. Pfizer*, 562 F.3d 163 (2d Cir. 2009) (holding that case against Pfizer alleging non- consensual medical experimentation on children in Nigeria could go forward under the ATS).

[9] *Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007).

[10] See, e.g., *Abagninin v. AMVAC Chem. Corp.*, 545 F.3d 733 (9th Cir. 2008) (alleged crimes against humanity lacked sufficient connection with government actions); *Vietnam Ass'n for Victims of Agent Orange v. Dow Chem.*, 517 F.3d 104 (2d Cir. 2008) (failure to adequately allege conduct that violated customary international law at the time it was committed); *Corrie v. Caterpillar*, 503 F.3d 974 (9th Cir. 2007) (political question); *Hereros ex rel. Riruako v. Deutsche Afrika-Linien*, 232 Fed. Appx. 90 (3d Cir. 2007) (failure to adequately allege conduct that violated customary international law and political question); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633 (S.D.N.Y. 2006) (granting summary judgment for lack of evidence to support claim that company aided and abetted government's alleged genocide, war crimes, and crimes against humanity).

[11] *Case Profile: Chevron Lawsuit (re Nigeria)*, BUS. & HUM. RTS. RES. CTR., at http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/ChevronlawsuitreNigeria?batch_start=71.

[12] See, e.g., Peter Spiro, *Chevron Wins ATS Case. Will Corporations Fight, Not Settle?*, OPINIO JURIS, Dec. 2, 2008, at <http://opiniojuris.org/2008/12/02/chevron-wins-ats-case-will-corporations-fight-not-settle/> (suggesting that after the jury verdict for Chevron, defendants may be unwilling to settle).

[13] *Wiwa v. Royal Dutch Petroleum Co.*, 2009 WL 1574869 (S.D.N.Y. Apr. 23, 2009).

[14] *Wiwa v. Shell Petroleum Dev. Co. of Nigeria*, 2009 WL 1560197 (2d Cir. June 3, 2009). The original Complaint alleged that many of the links between Royal Dutch/Shell and the Nigerian government were through this subsidiary located in Nigeria. Thus, if SPDC could not be sued directly, the plaintiffs had to rely on an alter-ego or veil piercing argument to reach the other corporate defendants; suing SPDC directly would clearly be easier.

[15] Press Release, Shell, Shell Settles Wiwa Case with Humanitarian Gesture (July 8, 2009), at http://www.shell.com/home/content/media/news_and_library

/press_releases/2009/shell_settlement_wiwa_case_08062009.html.

[16] *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

[17] See, e.g., *Chavez v. Carranza*, 559 F.3d 486 (6th Cir. 2009) (torture, extrajudicial killing, crime against humanity); *In re South African Apartheid Litigation*, 2009 WL 960078 (S.D.N.Y. Apr. 8, 2009) (torture and others); *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193 (9th Cir. 2007) (war crimes, crimes against humanity, racial discrimination); *Bowoto*, 557 F. Supp. 2d 1080 (torture and others); *Abagninin*, 545 F.3d 733 (assuming that genocide is actionable under the ATS, but holding that it requires specific intent); *Abdullahi*, 562 F.3d 192 (Wesley, J., dissenting) (disagreeing that non-censual medical experimentation are actionable under the ATS, but assuming torture, war crimes and genocide are actionable); *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242 (11th Cir. 2005) (dismissing other ATS claims but allowing torture to go forward) [hereinafter *Aldana I*]; *Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995) (war crimes and genocide).

[18] *Bowoto*, 557 F. Supp. 2d 1080.

[19] *Aldana I*, 416 F.3d 1242.

[20] *Bowoto*, 557 F. Supp. 2d at 1080 (holding CIDT actionable under ATS); *In re South African Apartheid Litigation*, 2009 WL 960078, at *9-10 (same); see also *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 452 F.3d 1284 (11th Cir. 2006) (Barkett, J., dissenting from denial of rehearing *en banc*).

[21] *Abdullahi*, 562 F.3d 163, 176-77.

[22] *Doe I v. Unocal*, 395 F.3d 932 (9th Cir. 2002), *vacated en banc*, 395 F.3d 978 (9th Cir. 2003); *Khulumani*, 504 F.3d 254 (per curium), *aff'd due to lack of a quorum sub nom.*, *American Isuzu Motors, Inc. v. Ntsebeza*, 2008 WL 117862, 76 U.S.L.W. 3405 (May 12, 2008).

[23] Cf. Chimene Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 HAST. L. J. 61 (2008).

[24] Curtis A. Bradley & Jack L. Goldsmith, *Rights Cases Gone Wrong: A Ruling Imperils Firms And U.S. Diplomacy*, WASH. POST, Apr. 19, 2009, at <http://www.washingtonpost.com/wp-dyn/content/article/2009/04/17/AR2009041702859.html>.

[25] Catherine Boyle, *Portrait: Ken Saro-Wiwa*, TIMES ONLINE, May 26, 2009, at http://business.timesonline.co.uk/tol/business/industry_sectors/natural_resources/article6364435.ece.

[26] Cf. *Wiwa v. Royal Dutch Pet. Co.*, 2009 WL 928297 (Mar. 18, 2009) (dismissing RICO claims for lack of subject matter jurisdiction).