Northwestern Journal of International Human Rights

Volume 4 | Issue 1 Article 14

Fall 2005

Increasing the Accountability of Transactional Corporations for Environmental Harms: The Petroleum Industry in Nigeria

Alison Shinsato

Northwestern Journal of International Human Rights
Volume 4, Issue 1 (Symposium 2005)

Increasing the Accountability of Transnational Corporations for Environmental Harms: The Petroleum Industry in Nigeria

Alison Lindsay Shinsato *

I. INTRODUCTION

¶1 In an era of increased globalization, transnational corporations ("TNCs") have grown in number and in power. A significant portion of modern economic development occurs through TNCs that, in an effort to maximize profit, move to developing countries. Among the attractions to TNCs of such regions are lax environmental regulations and what amounts to tolerance of human rights violations.[1] TNCs have increased the rate of man-made environmental destruction and concomitant harm to humans. Indigenous groups are often affected the most severely; their sustainable lifestyle becomes impossible as natural resources are decimated by TNCs.

¶2 Host countries often do not have the means or the will to implement and enforce strict standards on TNCs. Moreover, governments often regard economic investment by TNCs and, in turn, the development of the host country's economy as of primary importance, such that concern for the environment falls by the wayside.[2] The host country population is often powerless in the face of the tremendous financial and political clout the TNCs wield, and, moreover, the current body of international law fails to provide victims with an adequate legal remedy against TNCs.

¶3 Under current international law, TNCs are not liable for environmental destruction or the concomitant human rights abuses. Current international human rights law, environmental law, and economic law do not provide an avenue of legal redress for victims of environmental destruction. Environmental harm to individuals is not a cause of action under current international law; such harm must be connected to a substantive right and this requirement leads courts and commissions into an undefined area of law.[3]

¶4 The dynamic nature of human rights demands the continuous evolution of international laws to maintain relevance in a rapidly changing world.[4] The increase in environmental destruction and concomitant human rights violations requires that human rights law be extended to include environmental protections as a way to improve people's lives through preservation of the environment. While international human rights law and

---

* J.D. 2005.

1 Joe W. (Chip) Pitts III, *The First UN Social Forum: History and Analysis*, 31 DENV. J. INT'L L. & POL'Y 297, 299 (2002).

2 THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 368 (1995).

3 Joshua P. Eaton, *The Nigerian Tragedy, Environmental Regulation of Transnational Corporations, and the Human Right to a Healthy Environment*, 15 B.U. INT'L L.J. 261, 297 (1997).

4 Laura S. Ziemer, *Application in Tibet of the Principles on Human Rights and the Environment*, 14 HARV. HUM. RTS. J. 233, 275 (2001).

environmental law developed discrete structures, recently, however, international organizations have started to describe the intricate relationship between human rights and environmental health in a number of treaties, covenants, and declarations. This merger will strengthen both fields by increasing international focus, accountability for environmental destruction and human rights violations, and universality of environmental standards.

¶5 This paper focuses on Nigeria as a specific example of environmental destruction and concomitant human rights violations caused by oil TNCs. The Nigeria model is used to describe an environmental human rights problem and illustrate the objectives of environmental human rights as well as some solutions to achieve these goals. Within this context, this paper outlines the development of environmental human rights and current legal mechanisms available to address violations of these rights: domestic law, universally recognized human rights law, and United States law. These three must necessarily be viewed as short-term solutions while affording the international community time to develop an applicable body of law centered on the right to a healthy environment. The adoption of stricter universal standards of corporate liability and concomitant penalties will encourage corporations to adopt more sustainable business practices and thereby reduce human rights violations perpetrated through environmental destruction.

II. THE PROBLEM

A. Globalization and Environmental Degradation

¶6 Globalization can positively transform societies by promoting economic growth and increasing the standard of living.[5] However, globalization can also negatively impact societies through environmental degradation and resulting human rights violations. Causes of environmental destruction roughly divide into natural and man-made. A number of actors, including nation states, domestic populations, and corporations, contribute to this problem. This paper focuses on TNCs and, in particular, their contribution to man-made environmental destruction and the concomitant effects on humans.

¶7 Environmental degradation and its effects on humans are of global concern. Many populations are victims of environmental degradation due to global industrialization and the exploitation of developing countries by TNCs seeking cost-effective investments. A large percentage of TNCs are based in wealthy developed countries but invest in developing countries where the environmental laws are less stringent. A number of cases in US courts indicate that some TNCs degrade the environment and as a result, may violate certain human rights.[6] Owing to jurisdictional disputes that make such redress

---

[5] *See, e.g.*, Roni N. Halabi, Note, *Stability in the Middle East Through Economic Development: An Analysis of the Peace Process, Increased Agricultural Trade, Joint Ventures, and Free Trade Agreements*, 2 DRAKE J. AGRIC. L. 275, 278-79 (1997); Maria Eugenia Padula, Article, *Mexico's Part in the Neoliberal Project*, 8 U.C. DAVIS J. INT'L L. & POL'Y 1, 6 (2002).

[6] Jota v. Texaco, Inc., 157 F.3d 153 (2d Cir. 1998) (Newman, J.), *rev'g* Aguinda v. Texaco, Inc., 945 F. Supp. 625 (S.D.N.Y. 1999) (ATCA) *on remand*, 139 F. Supp. 2d 139 F. Supp. 2d 438 (S.D.N.Y. 2000), 142 F. Supp. 2d 533 (S.D.N.Y. 2001) (dismissing complaint); Beanal v. Freeport-McMoran, Inc., 197 F.3d 161 (5th Cir. 1999); Sequihua v. Texaco, Inc., 847 F. Supp. 61 (S.D. Tex. 1994).

attempts ineffective, it is necessary for the international community to create legal mechanisms to hold corporations accountable for environmental destruction and human rights violations.

¶8 Economic globalization generally focuses on economic efficiency with the goal of maximizing wealth and is structured around the concept of humans as purely economic beings.[7] In this pure economic model, efficiency is the only value of relevance, and protection of the environment and humans reduces efficiency.[8] Thus, the economic reality is that the cost of goods such as oil is reflected in the degradation of the environment and population of the host country, rather than in the price to the end consumer of the goods and services.[9]

¶9 Environmental destruction leaves local populations with two basic options: a) to leave the degraded environment for a more habitable place and become environmental refugees[10] or environmentally displaced people;[11] or b) to remain in the degraded environment and risk increased morbidity and mortality through exposure to pollution and depleted, degraded, or contaminated food and water sources. Generally, "[t]he worst victims of environmental harm tend also to be those with the least political clout, such as members of racial and ethnic minorities, the poor, or those who are geographically isolated from the locus of political power within their country."[12]

¶10 Neither of the above options is ideal as both leave communities and individuals in worse conditions than before the environmental destruction occurred. Furthermore, international law is currently organized in such a manner as to exclude such victims from international aid. In order to aid these people, the international community should meld and balance the goals of the proponents of economic development and of the advocates of environmental and human rights in order to prevent future environmental destruction and its concomitant negative effects on humans as well as to aid those affected by environmental destruction.

---

[7] *See* JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS 8-9 (2d ed. 1989); Daniel M. Hausman & Michael S. McPherson, *Taking Ethics Seriously: Economic and Contemporary Moral Philosophy*, 31 J. ECON. LITERATURE 671, 671 (1993).

[8] Dinah Shelton, *Protecting Human Rights in a Globalized World*, 25 B.C. INT'L & COMP. L. REV. 273, 286 (2002).

[9] Eaton, *supra* note 3, at 274.

[10] A refugee is a person who "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his nationality, and is unable to or, owing to such fear, is unwilling to avail himself of the protection of that country. . ." Convention Relating to the Status of Refugees, 19 U.S.T. 6259, 189 U.N.T.S. 137 (July 28, 1951). Current refugee policy excludes those fleeing for other reasons including environmental disaster or degradation. Many have suggested that the definition is outdated and must evolve with changing circumstances and demands. *See generally* Jeanhee Hong, *Refugees of the 21st Century: Environmental Injustice*, 10 CORNELL J.L. & PUB. POL'Y 323 (2002); Jessica B. Cooper, Note, *Environmental Refugees: Meeting the Requirements of the Refugee Definition*, 6 N.Y.U. ENVTL. L.J. 480 (1998); Gregory S. McCue, *Environmental Refugees: Applying International Environmental Law to Involuntary Migration*, 6 GEO. INT'L ENVTL. L. REV. 151 (1993).

[11] *See generally* Office of the United Nations High Commissioner for Human Rights, Representative of the Secretary-General on the Human Rights of Internally Displaced Persons: Questions and Answers about IDPs, *at* http://www.ohchr.org/english/issues/idp/index.htm (last visited Nov. 1, 2005).

[12] Caroline Dommen, Claiming Environmental Rights: Some Possibilities Offered by the United Nations' Human Rights Mechanisms, 11 GEO. INT'L ENVTL. L. REV. 1, 1 n.1 (1998).

B. Transnational Corporations

¶11 A TNC is "a national company in two or more countries operating in association, with one controlling the other in whole or in part."[13] In both the US courts[14] and the International Court of Justice,[15] a TNC's nationality is determined according to its country of incorporation. Nearly 37,000 TNCs existed worldwide in 1990;[16] this increased to 65,000 TNCs with more than 850,000 foreign subsidiaries and affiliates in 2002.[17]

¶12 Poorer nations turn to TNCs to encourage international investment in hopes of improving the local economy. In turn, TNCs are attracted to the opportunity to lower production costs through lenient environmental standards and cheap labor.[18] However, as domestic economies have globalized and global economies have modernized, the economic and political clout of the TNCs has become so huge – the GDP of many TNCs is larger than the GDPs of many small nations[19] – that sovereign states have lost their positions of dominance in the global economy. The TNCs are now so powerful that governments are unable to stop exploitation in their own states.[20]

¶13 Despite their enormous influence and their significant role in the degradation and destruction of the environment which subsequently harms human populations, TNCs are not yet signatories to binding international instruments.[21] Virtually unrestrained by international instruments and domestic laws, TNCs are safe from liability for environmental destruction and resultant human rights violations. Globalization has thus "created powerful non-state actors that may violate human rights in ways that were not contemplated during the development of the modern human rights movement."[22]

---

[13] THOMAS DONALDSON, THE ETHICS OF INTERNATIONAL BUSINESS 30 (1992).

[14] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 cmt. E (1987).

[15] Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain), 1970 I.C.J. 4, 32 (Feb. 5, 1970).

[16] Robert J. Fowler, *International Environmental Standards for Transnational Corporations*, 25 ENVTL. L. 1, 1 (1995).

[17] United Nations Conference on Trade and Development, *World Investment Report 2002: Transnational Corporations and Export Competitiveness*, U.N. Doc. UNCTAD/WIR/2002 (Sept. 17, 2002) [hereinafter *World Investment Report*].

[18] Douglas S. Morrin, Book Review, *People before Profits: Pursuing Corporate Accountability for Labor Rights Violations Abroad Through the Alien Torts Claims Act*, 20 B.C. THIRD WORLD L.J. 427, 428 (2000).

[19] Lisa Lambert, *At the Crossroads of Environmental and Human Rights Standards: Aguinda v. Texaco, Inc. Using the Alien Tort Claims Act to Hold Multinational Corporate Violators of International Laws Accountable in United States Courts*, 10 J. TRANSNAT'L L. & POL'Y 109, 110 (2000); Douglass Cassel, *Corporate Initiatives: A Second Human Rights Revolution?*, 19 FORDHAM INT'L L.J. 1963, 1984 (1996) ("The eve of the twenty-first century is marked by economic globalization, expansion in the number of free enterprise economies, and by privatization. As responsibilities thus shift from the public to the private sector and especially to multinationals, governments and intergovernmental organizations wield correspondingly less power. Even where governments have the political will, they may lack effective power to safeguard basic rights, a power which increasingly, for an important spectrum of rights, rests in the private hand of multinational corporations.").

[20] "Shell, surely, has never hesitated to use its influence on matters of Nigerian tax policy, environmental rules, labor laws and trade policies." *Shell Game in Nigeria*, N.Y. Times, Dec. 3, 1995, at 14.

[21] Lauren A. Mowery, *Earth Rights, Human Rights: Can International Environmental Human Rights Affect Corporate Accountability?*, 13 FORDHAM ENVTL. L.J. 343, 358 (2002).

[22] Shelton, *supra* note 8, at 279.

¶14 Some organizations and scholars have suggested that TNCs create voluntary codes of conduct as a way to curb environmental destruction and human rights violations.[23] The United Nations Commission on Transnational Corporations drafted the UN Code of Conduct on Transnational Corporations in 1990;[24] in 1995, President Clinton announced a set of "model business principles," a voluntary code of ethics to be used by US-based multinational companies. These model codes encourage TNCs to respect fundamental human and labor rights, though without sufficient detail as to give clear guidance.[25] Furthermore, "the self-interest of a corporation and the need to enhance shareholder value takes precedence over concern for the community as a whole."[26] TNCs routinely deny responsibility for the knock-on effects of their operations[27] because profit is the goal of corporations, and because human rights and environmental protections can be safely ignored as they are not legally mandated concerns. We therefore cannot rely on TNCs to self-impose codes that respect environmental protection and human rights.

C. An Example: Oil Transnational Corporations in Nigeria

¶15 The TNCs in the oil industry in Nigeria provide a clear and well documented example of severe environmental destruction by oil TNCs and the affects of that environmental destruction on the local population.[28] This example also illustrates the need to establish a legal avenue through which TNCs can be held accountable for their negative effect on the environment.

¶16 Despite the environmental destruction and concomitant human rights violations in this example, the actionable legal claims of the Niger Delta population were based mainly on human rights violations such as the extrajudicial killings and the military action of the

---

[23] *See, e.g.*, U.N. Global Compact, *available at* http://www.unglobalcompact.org (last updated Nov. 1, 2005); ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, adopted by the ILO Governing Body in 1977, para. 8, ILO Document OB Vol.LXI, 1978, Series A, No.1. (asks parties to respect the Universal Declaration of Human Rights); Andy Smith, *The CERES Principles: A Voluntary Code for Corporate Environmental Responsibility*, 18 YALE J. INTL. L. 307, 309 n.18 (1993); Cassel, *supra* note 19; Meaghan Shaughnessy, *The United Nations Global Compact and the continuing Debate About the Effectiveness of Corporate Voluntary Codes of Conduct*, 2000 COLO. J. INT'L ENVTL. L. & POL'Y 159, 160 (2000).

[24] Negotiations on the code ground to a halt in 1992, opposed by the corporations themselves and by governments from the developed world, due to concerns at lack of protection for intellectual property rights, profit repatriation and expropriation of property. *See* Barbara A. Frey, *The Legal and Ethical Responsibilities of Transnational Corporations in the Protection of International Human Rights*, 6 MINN. J. GLOBAL TRADE 153, 153-58 (1997).

[25] Robert S. Greenberger, *Administration's New Business Code Timed to Renewal of China Trade Status*, WALL ST. J., May 30, 1995, at A3.

[26] Shaughnessy, *supra* note 23, at 163-64.

[27] "It is totally unjustified to suggest that Shell, by virtue of endeavoring to carry out its legitimate business of oil exploration is in some way responsible for [the Ogoni] conflict or the level of the Nigerian government's response to [the conflict] . . . . [P]rivate companies have neither the right nor the competence to become involved." John Vidal, *Born of Oil, Buried in Oil*, GUARDIAN, Jan. 4, 1995, at T2 (quoting Shell's statement made in response to the brutal suppression by the Nigerian Government of a rebellion by a local tribe in one of the most heavily polluted oil operation areas of the Niger Delta).

[28] The Nigerian oil industry is known more for human rights violations such as torture, unfair trials, execution of persons under 18, and extrajudicial, summary or arbitrary executions than for the environmental issues this article discusses. *See generally* Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88 (2d Cir. 2000), *cert. denied* Royal Dutch Petroleum Co. v. Wiwa, 532 U.S. 941 (2001); U.N. Econ. & Soc. Council [ECOSOC], Commission on Human Rights, *Situation of Human Rights in Nigeria*, U.N. Doc. E/CN.4/1998/62 (Feb. 16, 1998) (*prepared by* Soli Jehangir Sorabjee, Special Rapporteur).

Nigerian government.[29] The environmental destruction caused by the oil TNCs and its effects on human health were not addressed, and plaintiffs had no alternative legal recourse through which to pursue such a claim. It is therefore necessary to extend the reach of national, regional, and international law in order to protect the environment and thereby the human communities that depend on it.

1. Background

¶17 Nigeria, located in Western Africa, is oil-rich and oil-reliant. It is the fifth largest oil producer in the Organization of Petroleum Exporting Countries ("OPEC") and the largest in Africa.[30] After decades of political instability, the country depends strongly on its oil industry: the oil sector accounts for 20% of the GDP, 95% of foreign exchange earnings, and about 65% of budgetary revenues.[31] Petroleum and petroleum products make up 95% of export commodities.[32] Exported oil has been the Nigerian Government's main source of revenue since 1974.[33] The agricultural sector on the other hand has declined reciprocally, and Nigeria, once a large exporter of food, now imports food to feed its rapidly growing population.[34]

¶18 The Nigerian oil industry is dominated by six joint-venture operations managed by TNCs: Shell (Netherlands/U.K.), Mobil (US), Chevron-Texaco (US), AGIP (Italy), and Elf-Aquitaine (France).[35] Under the Nigerian Constitution, all oil is property of its federal government.[36] Therefore, the above TNCs are in partnership with the Nigerian Government's Nigerian National Petroleum Company ("NNPC").[37] The Petroleum Act[38] sets the structure for oil operations in Nigeria.[39]

---

[29] *See* Wiwa, *supra* note 28, at 92 (mentioning substantial human rights violations through environmental destruction as an allegation without ruling on the issue).

[30] Steve Bamidele Owaduge, The Politics of Oil Production Among the Federal Government, Oil Producing Companies and Oil Producing Communities of the Niger Delta Area of Nigeria, http://www.greatestcities.com/users/owadge (Aug. 9, 2003, 10:21am). The World Fact Book estimates 2.356 million bbl/day (2004 est.). CENTRAL INTELLIGENCE AGENCY, THE WORLD FACT BOOK, 2005: NIGERIA, *available at* http://www.cia.gov/cia/publications/factbook/geos/ni.html (last modified Nov. 1, 2005).

[31] CENTRAL INTELLIGENCE AGENCY, *supra* note 30.

[32] *Id*.

[33] ESSENTIAL ACTION AND GLOBAL EXCHANGE, OIL FOR NOTHING: MULTINATIONAL CORPORATIONS, ENVIRONMENTAL DESTRUCTION, DEATH AND IMPUNITY IN THE NIGER DELTA 4 (2000), *available at* http://www.essentialaction.org/shell/Final_Report.pdf (last visited Nov. 1, 2005) [hereinafter ESSENTIAL ACTION AND GLOBAL EXCHANGE].

[34] CENTRAL INTELLIGENCE AGENCY, *supra* note 30.

[35] Nigerian Oil & Gas, http://www.nigerianoil-gas.com/upstream/index.htm (last visited Nov. 1, 2005).

[36] CONSTITUTION, ch. IV (Fundamental Rights), pt. 44, § 3 (1999) (Nigeria) ("Notwithstanding the foregoing provisions of this section, the entire property in and control of all minerals, mineral oils and natural gas in under or upon any land in Nigeria or in, under or upon the territorial waters and the Exclusive Economic Zone of Nigeria shall vest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly.").

[37] Nigerian Oil & Gas, *supra* note 35 (formed in 1977, NNPC regulates and supervises the Nigerian oil industry on behalf of the government).

[38] Petroleum Decree No. 51 (1969) (Nigeria).

[39] Other relevant legislation includes the Oil in Navigable Waters Act Decree No. 34 (1968) (Nigeria), the Oil Pipelines Act Decree No. 31 (1956) (Nigeria), the Associated Gas Act (1979) (Nigeria), and the Petroleum (Drilling and Production) Regulations (1969) (Nigeria). From 1988, the Federal Environmental Protection Agency Act Decree No. 58 (1988) (Nigeria) vested the authority to issue standards for water, air, and land quality in a Federal Environmental Protection Agency (FEPA), and regulations made by FEPA

2. Environmental Degradation

¶19 The Nigerian oil industry is criticized for its poor environmental practices and the resulting environmental destruction. Hazardous practices in the Niger Delta include gas flaring and oil spills. Gas flaring is the practice of burning natural gas, a byproduct of oil extraction.[40] The oil TNCs in Nigeria flare gas because it is cheaper to dispose of the gas by burning it than it is to collect it for use or to re-inject it into the subsoil.[41] These flares burn twenty-four hours a day and some have burned continuously for the past forty years.[42] A report funded by the International Union for the Conservation of Nature and Natural Resources ("IUCN")[43] and produced by Environmental Rights Action on the Niger Delta states that Nigeria flares 75% of its gas, which far exceeds any other country's allowable flaring limits.[44] In the year 2000, 95% of extracted natural gas was flared in Ogoniland, a section of the Niger Delta,[45] compared to the 0.4% flared in the entire US.[46]

¶20 Another major environmental hazard in the Niger Delta is oil spills which contaminate water and destroy plants and animals. Major spills are recorded on average three times a month;[47] between 1976 and 1996, 4,835 oil spills were recorded.[48] Crude oil and refined petroleum product pipelines run for 7,264 kilometers through Nigeria[49] and often run in front of homes and over precious farmland.[50] The pipes are rusty and in need of repair; some are reportedly forty years old.[51] Oil leaks from poorly maintained pipelines and "blow-outs" of poorly maintained wells add to the crude oil pollution.[52]

---

under the decree govern environmental standards in the oil and other industries. The Department of Petroleum Resources (DPR) has also issued a set of Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (1991), which overlap with, and in some cases, differ from those issued by FEPA.

[40] *See* Environment Canada, Oil & Gas, Flaring, General Info., http://www.ec.gc.ca/energ/oilgas/flaring/flaring_general_e.htm (last updated Dec. 19, 2001) (Natural gas is a valuable non-renewable resource and flaring it is pure waste. Alternatives include: collecting and processing for use, re-injecting in the subsoil to maintain reservoir pressure during production, and powering micro-turbine generators for electricity production. Even if these alternatives prove too costly, incineration exists as a possibility. Incineration combusts gas more efficiently than flaring and therefore results in fewer toxic byproducts.).

[41] Essential Action and Global Exchange, *supra* note 33, at sec. 1.

[42] *Id*.

[43] *See* COMMISSION ON ENVIRONMENTAL LAW OF IUCN, DRAFT INTERNATIONAL COVENANT ON ENVIRONMENT AND DEVELOPMENT xi (2d ed. 2000).

[44] NICK ASHTON-JONES, SUSI ARNOTT & ORONTO DOUGLAS, THE HUMAN ECOSYSTEMS OF THE NIGER DELTA 158 (1998).

[45] ESSENTIAL ACTION AND GLOBAL EXCHANGE, *supra* note 33, at sec. 1.

[46] *US Nonproliferation Policy After Iraq: Hearing Before the H. Comm. on Int'l Relations.*, 108th Cong. 104-31 (2003) (statement of John R. Bolton, Under Secretary for Arms Control and International Security, US Dept. of State); accompanying graphs and maps *available at* http://www.state.gov/t/us/21782.htm(last visited Nov. 1, 2005).

[47] *Id*.

[48] ENVIRONMENTAL RESOURCES MANAGERS LTD., NIGER DELTA ENVIRONMENTAL SURVEY FINAL REPORT , PHASE I 249 (*See* http://www.erml.net for information about the reporting company).

[49] CENTRAL INTELLIGENCE AGENCY, *supra* note 30.

[50] ESSENTIAL ACTION AND GLOBAL EXCHANGE, *supra* note 33, at sec. 1.

[51] *Id*.

[52] HUMAN RIGHTS WATCH, AFRICA, NIGERIA: THE OGONI CRISIS: A CASE-STUDY OF MILITARY REPRESSION IN SOUTHEASTERN NIGERIA 8 (1995).

¶21 The incidence of oil spills in the Niger Delta is exceptionally high; 40% of all of Shell's oil spills between 1982 and 1992 occurred in the Niger Delta despite the fact that Shell drilled for oil in twenty-eight different countries during the same period.[53] A World Bank investigation found that hydrocarbon pollution[54] in Ogoniland water was over sixty times US limits.[55] Project Underground found the hydrocarbon pollution in one water source to be 360 times the limit of the European Community.[56]

3. The Impact of Environmental Degradation on Humans

¶22 The impact of oil pollution on the Niger Delta environment and its inhabitants is severe. Oil pollution from gas flaring, oil spills, hydrocarbon crust left after oil spill "cleanups" as well as acid rain, unlined waste pits, and waste from expatriate employee communities and hospitals contributes to the destruction of the ecosystem.

¶23 Natural gas flaring negatively impacts the environment and the local inhabitants. The flares are very loud, dangerously hot, and flare twenty-four hours a day, thereby depriving the surrounding area of natural night, emit thick smoke and greenhouse gases, and smell noxious.[57] Inhabitants of the Niger Delta suffer from respiratory diseases caused by the smoke and fumes as well as hearing loss caused by the continuous noise.[58] Gas flaring also contributes to acid rain[59] which poisons potable water, stunts crop growth, damages the ecosystem, and increases the rate of housing deterioration.[60]

¶24 Oil pollution of water has extensive implications. Most of Nigeria's oil reserves are located in the coastal region of the Niger Delta[61] which, at over 20,000 square kilometers, is the largest wetland in Africa and one of the largest in the world.[62] Even if the oil does not directly spill into water sources, rain washes the pollution into the water.[63] Oil in the water coats the breathing roots of mangroves and kills the trees, an essential element of the wetland ecosystem.[64] Mangroves are, in essence, the frame upon

---

[53] Steven Cayford, *The Ogoni Uprising: Oil, Human Rights and a Democratic Alternative in Nigeria*, 43 AFRICA TODAY 2, Apr./June 1996, at 183.

[54] *See generally* Global Marine Oil Pollution Information Gateway, http://oils.gpa.unep.org (last updated Jan. 6, 2005). Hydrocarbons usually make up 95 per cent of crude oil. *Id*. Hydrocarbons vary in toxicity and degradability, and range from very volatile, light materials like propane and benzene, to heavy compounds such as bitumens, asphaltenes, resins and waxes. *Id*.

[55] PROJECT UNDERGROUND, THE FLAMES OF SHELL: A FACT SHEET (Berkeley ed. 1996).

[56] PROJECT UNDERGROUND AND RAINFOREST ACTION NETWORK, HUMAN RIGHTS AND ENVIRONMENTAL OPERATIONS INFORMATION ON THE ROYAL DUTCH/ SHELL GROUP OF COMPANIES: 1996-1997, Independent Annual Report (1997).

[57] ESSENTIAL ACTION AND GLOBAL EXCHANGE, *supra* note 33, at sec. 1.

[58] ANDREW ROWELL, GREENPEACE INTERNATIONAL, SHELL-SHOCKED: THE ENVIRONMENTAL AND SOCIAL COSTS OF LIVING WITH SHELL IN NIGERIA (1994), http://archive.greenpeace.org/comms/ken/hell.html (last visited Nov. 1, 2005) (discussing the events and environmental destruction of Ogoniland).

[59] OLALDELE OSIBANJO, INDUSTRIAL POLLUTION MANAGEMENT IN NIGERIA, IN ENVIRONMENTAL CONSCIOUSNESS FOR NIGERIAN NATIONAL DEVELOPMENT 95, 97 (E.O.A. Aina & N.O. Adedipe eds., 1992) (a publication of Nigeria's Federal Environmental Protection Agency).

[60] ESSENTIAL ACTION AND GLOBAL EXCHANGE, *supra* note 33, at sec. 1.

[61] Owaduge, *supra* note 30.

[62] M. David & L. Olof, *Perception and Reality: Assessing Priorities For Sustainable Development in the Niger River Delta*, 24 AMBIO (A J. OF THE HUMAN ENV'T) 7-8 (1995).

[63] Paul Adams, *Local Politics Drains Nigeria's Oil*, FIN. TIMES, June 7, 1994, at 4.

[64] INTERNATIONAL SOCIETY FOR MANGROVE ECOSYSTEMS & COSTAL MARINE PROJECT OF UNESCO, MANGROVE ECOSYSTEMS TECHNICAL REPORTS, CONSERVATION & SUSTAINABLE UTILIZATION OF

which the wetlands exist. When the mangroves die, the roots no longer hold the delta silt in place and erosion results. Erosion in turn leads to the destruction of habitats, diversion of waterways, and decreased biodiversity. The pollution makes the water non-potable and, because there is no piped water,[65] the only options are to import potable water at great cost or to consume the polluted water.[66] The oil film in the water also prevents natural aeration, killing the organisms below the film and reducing the fish population.[67] Fish that ingest the oil become poisonous to humans.[68] The inhabitants of the Niger Delta have shown higher rates of respiratory ailments, skin rashes, tumors, gastrointestinal problems, cancers, and malnourishment.[69] Kwashiorkor, malnourishment due to protein deficiency, is especially prevalent and is due to the lower fish catch and decreased crop productivity that has resulted from the pollution.[70]

¶25 The inhabitants of the Niger Delta once subsisted on fish from the delta waters and produce from the arable land.[71] Now, however, after more than thirty-eight years of oil operations, pollution covers the region; the population in the Niger Delta suffers land loss and food shortage. Their subsistence lifestyle cannot be sustained because of the environmental damage caused by oil pollution; nor do they have the means to buy food because there are no economic alternatives to their traditional lifestyle. As a result, hunger and malnutrition are rampant, and the Niger Delta population suffers increased mortality and morbidity. Moreover, there is no effective legal recourse in international or domestic courts to redress such grievances.

III. EXISTING LEGAL MECHANISMS FOR PROMOTING ENVIRONMENTAL PROTECTION AND HUMAN RIGHTS

¶26 This section reviews current relevant Nigerian, international, and US legal instruments that may protect the environment and promote human rights while increasing TNC liability.

A. Domestic Law: Why It Fails

¶27 Environmental regulation by the host country is currently the preferred means of preventing abuses like those in Nigeria because it respects the universal concept of state sovereignty. Between fifty and sixty national constitutions incorporate environmental human rights; almost every constitution revised or adopted since 1970 includes the right to a healthy environment.[72]

MANGROVE FORESTS IN LATIN AMERICA AND AFRICA REGIONS, Part III, Africa, (E.S. Diop ed. 1993).

[65] Vidal, *supra* note 27.

[66] NIGERIAN ENVIRONMENTAL STUDY/ACTION TEAM, THE CHALLENGE OF SUSTAINABLE DEVELOPMENT IN NIGERIA 170 (Tade Akin Aina & Ademola T. Salau eds. 1992).

[67] NIGERIAN ENVIRONMENTAL STUDY/ACTION TEAM, NIGERIA'S THREATENED ENVIRONMENT: A NATIONAL PROFILE 87-88 (1991).

[68] *Id*.

[69] *Id*.

[70] *Id*.

[71] HUMAN RIGHTS WATCH, *supra* note 52.

[72] *See* Prudence E. Taylor, *From Environmental to Ecological Human Right: A New Dynamic in International Law?*, 10 GEO. INT'L ENVTL. L. REV. 309, 350 (1990); ALEXANDRE KISS & DINAH SHELTON, INTERNATIONAL ENVIRONMENTAL LAW 27 (2d ed. 2000).

¶28 While application and enforcement of environmental regulations by the host country is in the best interest of the citizens subsisting on the land, it is not always feasible. The Nigerian government has designed what on its face is a very comprehensive system of environmental regulation and protection.[73] However, while many countries have successfully regulated impact to their environment,[74] Nigeria's environmental policies are "[r]arely enforced, [and] the regulations are usually simply ignored."[75] The Nigerian government, which has relied on the oil TNCs as its main source of revenue since 1974[76] and which typically holds a 60% share of the joint venture interest with the transnational oil companies,[77] likely fears that the enforcement of environmental regulations curbing the activities of the oil industry would reduce government revenue and may cause oil TNCs to flee Nigeria if the TNCs foresee profit decline.[78] If this is the case, the Nigerian government is patently reluctant to regulate the oil industry for fear of the impact on profitability. Moreover, "[s]ince Nigeria's independence in 1960, Nigeria has seen several military coups, a number of caretaker governments and civilian governments."[79] This governmental instability often prevents comprehensive laws being enacted, and if enacted, hinders enforcement.

¶29 The reality is that TNCs have enormous economic and thereby political clout and often the government and the courts of a developing country may hesitate to impose liability on a profitable industry. Thus, additional legal mechanisms to support domestic law should be developed.

B. International Human Rights: A Framework for Environmental Claims

¶30 The body of international human rights law does not effectively protect against human rights violations which result from environmental degradation because it has not evolved to keep pace with the rapid advance of economic globalization and the privatization of resources. As a result, human rights violations stemming from environmental destruction by TNCs are not addressed in current international human rights law.

1. International Human Rights Law

¶31 Modern international human rights law was born from the UN Charter[80] and the Nuremberg trials[81] and its edifice is structured on the scaffolding of the Universal

---

[73] *See* Eaton, *supra* note 3, 282-92 (overview of Nigerian environmental regulation).

[74] ROWELL, *supra* note 58, (discussing successful regulation of Shell in Scotland).

[75] AUGUSTINE A. IKEIN, THE IMPACT OF OIL ON A DEVELOPING COUNTRY: THE CASE OF NIGERIA 42 (1990) ("There is no doubt that Nigeria has guidelines for oil exploration but fails to maintain effective enforcement and compliance.").

[76] Essential Action and Global Exchange, *supra* note 33, at intro. The oil sector provides Nigeria with 20% of its GDP, 95% of its foreign exchange earnings, and about 65% of its budgetary revenues. The Central Intelligence Agency, *supra* note 30. Petroleum and petroleum products make up 95% of export commodities. *Id.*

[77] Centre for Petroleum Information, http://www.petroinfonigeria.com/faq.html (last updated Jan. 2004).

[78] Eaton, *supra* note 3, at 291.

[79] Sorabjee, *supra* note 28.

[80] *See* Cassel, *supra* note 19.

[81] *Id*.

Declaration of Human Rights ("UDHR") which itself is not legally binding.[82] Human rights were transferred during this period from the domestic jurisdiction of sovereign states to the international arena.[83] The responsibility to abstain from and prevent violations of human rights became an obligation of nation states.[84] This shift in responsibility positively affected the international human rights movement by bringing human rights atrocities to international attention. However, the focus on war crimes of World War II limited the scope of the body of law.[85] For example, the international obligation does not extend to human rights violations committed by anyone but states or state actors. Nonetheless, a state can be held accountable "for violations by private actors if it fails to exercise due diligence to prevent the violations or to respond to them. But, if a government does not seriously investigate human rights violations committed by private parties, those parties are aided in a sense by the government, thereby making the State responsible on the international plane."[86] Unfortunately, governments of developing countries are often reluctant to restrain the activities of TNCs for fear of economic losses and TNCs are not directly accountable for human rights violations under international law.

¶32 Two covenants to which Nigeria is a party, *inter alia*, further define the body of international human rights law: the International Covenant on Civil and Political Rights ("ICCPR")[87] and the International Covenant on Economic, Social and Cultural Rights ("ICESCR").[88] The ICCPR guarantees the protection of civil rights; the ICESCR guarantees the right to health, an adequate standard of living – including food and housing. These embody the principles of the UDHR, rendering them as legally binding rights.[89] However, in May 1998, the UN Committee on Economic, Social and Cultural Rights "note[d] with alarm the extent of the devastation that oil exploration has done to the environment and quality of life in areas such as Ogoniland where oil has been discovered and extracted without due regard to the health and well-being of the people and their environment," and recommended that "[t]he rights of minority and ethnic communities—including the Ogoni people—should be respected and full redress should be provided for the violations of the rights set forth in the Covenant that they have suffered."[90] Nigerians, especially in the Niger Delta, lack the basic elements of existence

---

[82] Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948). Although not legally binding at the time it was adopted, many argue that "subsequent state practice has transformed it into a document considered by many to be a statement of customary international law." Taylor, *supra* note 72, at 315 n.18.

[83] *Id*.

[84] Universal Declaration of Human Rights, *supra* note 82.

[85] *See* Cassel, *supra* note 19.

[86] Dinah Shelton, *Human Rights, Environmental Rights, and the Right to Environment*, 28 STAN. J. INT'L L. 103, 123 (1991) (quoting Velasquez Rodriguez Case, 4 Inter-Am. Ct. H.R. (ser. C) at 156).

[87] International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 6(1), U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *opened for signature* Dec. 16, 1966 [hereinafter ICCPR].

[88] International Covenant on Economic, Social, and Cultural Rights, G.A. Res. 2200A (XXI), U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 UNT.S. 3, *opened for signature* Dec. 16, 1966 [hereinafter ICESCR].

[89] Taylor, *supra* note 72, at 315.

[90] Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Nigeria*, U.N. Doc. E/C.12/1/Add.23 (June 16, 1998).

provided by the ICCPR and the ICESCR, such that the state is in direct contravention of these covenants to which it is a party.

2. International Environmental Law

¶33 Current international environmental law and international human rights law developed without regard for each other and are not sufficient in this global economy. Moreover, international environmental law generally focuses on trans-border environmental harm and does not regulate domestic environmental issues.[91] Citizens must rely on national law for redress and protection, which is often not an effective avenue.[92] Additionally, international human rights law is neither linked to a healthy environment nor to international environmental law and TNCs are not held accountable for human rights violations that stem from their direct environmental destruction.

¶34 Two general approaches to environmental protection exist: the anthropocentric approach and the ecocentric approach. Most international environmental discourse uses the anthropocentric approach[93] such that human life and health is the goal of environmental protection and "the environment is only protected as a consequence of, and to the extent needed to protect human well-being."[94] The anthropocentric approach protects the environment through the advancement of human rights and can occur either by linking environmental harm to a fundamental human right or by expanding the substantive human rights to include the right to a healthy environment.[95] Some critics, however, view the anthropocentric approach as "the root of all environmental problems" because it detracts from a more extensive ecological view of environmental rights and prefer the ecocentric approach.[96] The ecocentric view requires that environmental law develop in order to protect the environment beyond human needs. This means that not only is the environment protected by the advancement of human rights, the environment is protected for its own sake.

¶35 Both the anthropocentric and ecocentric approaches to environmental law would be germane to the development of the field of environmental human rights; minimal environmental standards could come to be regarded legally as a basic human right thereby linking the environment to substantive human rights.[97] Framing conventions and treaties in both an anthropocentric and ecocentric manner while holding TNCs directly accountable for violations of these laws would be ideal. Such laws would have to be enforceable and provide for meaningful redress and penalties, and would therefore have

---

[91] U.N. Conference on the Human Environment, Stockholm, Swed., June 5-16, 1972, *Declaration of the United Nations Conference on the Human Environment*, U.N. Doc. A/CONF.48/14 [hereinafter *Stockholm Declaration*].

[92] *See, e.g.*, Dommen, *supra* note 12, at 3 (the three Gorges Dam on the Yangtze River was approved by the Chinese national popular congress but building of the dam violates international environmental and human rights norms).

[93] *See* Taylor, *supra* note 72, at 329.

[94] *Id*., at 352. *See also* Kerry Kennedy Cuomo, *Human Rights and the Environment: Common Ground*, 18 YALE J. INT'L. L. 227 (1993).

[95] See James Nickel, The Human Right to a Safe Environment: Philosophical Perspectives on its Scope and Justification, 18 YALE J. INT'L. L. 281, 290, 292 (1993); see also Taylor, supra note 72.

[96] Taylor, *supra* note 72, at 337.

[97] Michelle Leighton Schwartz, *International Legal Protection fro Victims of Environmental Abuse*, 18 YALE J. INT'L L. 355, 359 (1992).

to be enacted and enforced at the international level so that corrupt or impoverished states could not ignore their own citizenry.

3. Environmental Human Rights

¶36 The anthropocentric approach to environmental protection has lead to the development of an area of soft-law known as environmental human rights that combines international human rights and environmental protection which is developing and gaining recognition in the international community. "Environmental human rights use global human rights norms to state a universal standard of minimum environmental protection. This leverages human rights standards to globalize our understanding of unacceptable environmental harm."[98]

¶37 While there is no explicit universally accepted right to a healthy environment, international instruments link human rights and environmental protection. A discussion of seven landmark instruments follows: The Stockholm Declaration[99] is the first international instrument to explicitly recognize the link between the environment and human rights.[100] While the Stockholm Declaration grants nations the "sovereign right to exploit their own resources pursuant to their own environmental policies,"[101] it also gives one the "fundamental right to freedom, equality, and adequate conditions of life, in an environment of quality that permits a life of dignity and well-being, and he bears solemn responsibility to protect and improve the environment for present and future generations."[102] This points up the conflict between state sovereignty and environmental protection as found in Nigeria, and illustrates the need to balance the two.

¶38 Second, the Declaration of the Right to Development includes equality of access to basic resources and food.[103] Third, the Rio Declaration's Principle 4 states that environmental protection cannot be considered in isolation from the development process.[104] Fourth, the Draft Declaration of the Rights of Indigenous Peoples recognizes "distinctive and profound relationship with their lands" and includes "the prevention and redress for . . . dispossession of their lands, territories, or resources."[105] Fifth, the Hague Declaration recognizes "the right to live in dignity in a viable global environment."[106] Sixth, the Draft Declaration of Principles on Human Rights and the Environment further

---

[98] Ziemer, *supra* note 4, at 235.

[99] *Stockholm Declaration*, *supra* note 91.

[100] U.N. Conference on the Human Environment, Stockholm, Swed., June 5-16, 1972, *Report of the UN Conference on the Human Environment*, 2-7, U.N. Doc. A/Conf.48/14/Rev.1 (1973). *See* Louis B. Sohn, *The Stockholm Declaration on the Human Environment*, 14 HARV. INT'L L.J. 423, 431-32 (1973).

[101] *Stockholm Declaration*, *supra* note 91, at prin. 21.

[102] *Id*., at prin. 1.

[103] Declaration of the Right to Development, G.A. Res. 41/128, U.N. GAOR Supp. (No. 53) at 186, U.N. Doc. A/41/53 (Dec. 4, 1986).

[104] U.N. Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Rio Declaration on Environment and Development*, at prin. 4, U.N. Doc. A/CONF.151/26 (Aug. 12, 1992), reprinted in 31 I.L.M. 874 [hereinafter *Rio Declaration*] (non-binding but recommends states develop laws of liability and compensation for environmental damage).

[105] U.N. Econ. & Soc. Council [ECOSOC], Comm. on Human Rights, Sub-Comm. on Prevention of Discrimination and Prot. of Minorities, *Draft Declaration on the Rights of Indigenous Peoples*, U.N. Doc. E/CN.4/Sub.2/1994/2/Add.1 (Apr. 20, 1994).

[106] Hague Declaration on the Environment, Mar. 11, 1989, 28 I.L.M. 1308, *reprinted in Selected International Legal Materials for Global Warming*, 5 AM. U.J. INT'L L. & POL'Y 513, 567 (1990).

develops environmental human rights.[107] And finally, Article 24 of the Convention on the Rights of the Child expressly links environmental quality to the right to health.[108] None of these documents create a distinct right to a healthy environment.[109]

¶39 In addition to these international conventions, the African Charter of Human and Peoples Rights, to which Nigeria is a party, recognizes an environmental human right. The Charter declares that "[a]ll people have a right to a safe and satisfactory environment favorable to their development."[110] Articles 21, 22 and 24 provide the right to an environment generally favorable to one's development, the right to economic, social and cultural development, and the right to the benefits derived from natural resources.[111]

¶40 Some scholars and legal experts find "universal acceptance of environmental rights at the national, regional, and international levels."[112] However, most of these instruments that address environmental protection and economic development are criticized as being "non-binding, soft-law agreements, many of which are worded so broadly that they provide little or no guidance to states or TNCs."[113] The current international instruments do not sufficiently combine environmental protection and human rights or establish an environmental human right, nor do they provide effective legal enforcement mechanisms.

¶41 The two main goals of environmental human rights are: 1) to prevent environmental harm; and 2) to provide recovery from environmental harm. States typically affected by environmental degradation by TNCs are often too economically

---

[107] *See* Adriana Fabra Aguilar & Neil A.F. Popovic, *Lawmaking in the United Nations: The UN Study on Human Rights and the Environment*, 3 REV. EUR. COM. & INT'L ENVTL. L. 197 (1994).

[108] Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 45th Sess., 61st plen. mtg., U.N. Doc. A/RES/44/25 (Nov. 20, 1989).

[109] Sumudu Atapattu, *The Right to a Healthy Life or the Right to Die Polluted?: The Emergence of a Human Right to a Healthy Environment Under International Law*, 16 TUL. ENVTL. L.J. 65, 85 n.113 (2002).

[110] Africa Charter of Human and Peoples' Rights, art. 24 (1981), *reprinted in* BASIC DOCUMENTS ON HUMAN RIGHTS 557 (Ian Brownlie ed., 1992).

[111] Sorabjee, *supra* note 28. Other regional instruments that link a healthy environment to human rights exist. *See* Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, Nov. 14, 1988, 28 I.L.M. 156, 165.

[112] U.N. ECOSOC, Comm. on Human Rights, Sub-Comm. on Prevention of Discrimination and Prot. of Minorities, *Review of Further Developments in Fields with which the Sub-Commission Has Been Concerned, Human Rights and the Environment: Final Report*, ¶ 240, U.N. Doc. E/CN.4/Sub.2/1994/9 (July 6, 1994) (*prepared by* Fatma Zohra Ksentini, Special Rapporteur).

[113] "Soft-law" instruments are not legally enforceable while "hard-law" instruments –treaties or conventions – are legally enforceable. Eaton, *supra* note 3, 272 n.62. If soft-law becomes *opinion juris* (generally accepted by States) and adopted in practice, it can become a norm of customary international law that is binding and legally enforceable. *Id*., at 272-78. *See* U.N. ECOSOC, *UN Draft Code of Conduct on Transnational Corporations*, U.N. Doc. E/1988/39/Add.1 (1988) ("TNCs shall carry out their activities in accordance with national laws, regulations, established administrative practices and policies relating to the preservation of the environment of the countries in which they operate and with due regard to relevant international standards. TNCs should, in performing their activities, take steps to protect the environment and where damaged to rehabilitate it and should make efforts to develop and apply adequate technologies for this purpose."); Organization for Economic Co-operation and Development Guidelines for Multinational Enterprises, *Declaration on International Investment and Multinational Enterprises: Annex on Guidelines for Multinational Enterprises*, 15 I.L.M. 969 (June 21, 1976) ("[R]ecommendations jointly addressed by Member countries to multinational enterprises operating in their territories. . . [which are] voluntary and not legally enforceable."); UN Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Report of the UN Conference on Environment and Development*, at art. 21, U.N. Doc. A/CONF.151/26 (Aug. 12, 1992) (Encouraging TNCs to "recognize environmental management as among the highest corporate priorities" and "[t]o adopt and report on the implementation of codes of conduct promoting the best environmental practice.").

disadvantaged or corrupt to achieve these goals alone. Therefore, it is incumbent upon the international community to work together and apply novel methods to achieve these goals. One solution is to impose an international scheme of corporate accountability. This scheme would help reduce the number of environmental disasters through deterrence as well as help shoulder the cost of cleanup and reparations. As stated above, this would require recognition of coherent, universally recognized principles[114] such that international law, which currently does not afford the right to a healthy environment, would be able to encompass environmental protection as a substantive human right.

¶42 Although TNCs will likely use their political clout to prevent the application of more stringent international laws,

> it is noteworthy that human rights law not only potentially imposes duties on non-state economic actors, it guarantees rights essential for the furtherance of globalization. It protects the right to property, including intellectual property, freedom of expression and communications across boundaries, due process for contractual or other business disputes, and a remedy before an independent tribunal when rights are violated. Furthermore, the rule of law is an essential prerequisite to the long-term conduct of trade and investment.[115]

Perhaps such guarantees, combined with consumer boycotts and the like, will encourage TNCs to accept the proposed right to a healthy environment.

4. Environmental Rights within Substantive Human Rights

¶43 International human rights law has been used for environmental issues even though the International Bill of Human Rights does not address environmental protection directly or an explicit right to a healthy environment. Because environmental injustices cannot be addressed directly in international human rights law, fundamental human rights such as the right to life, the right to health, and the right to an adequate standard of living can be used instead;[116] increasingly, redress for environmental destruction is being sought through substantive human rights.[117] This use of substantive human rights as a means to reformulate "our understanding of unacceptable environmental harm" links human security inextricably to the state of the environment.[118] To illustrate the use of substantive human rights to establish environmental rights, this section addresses the options available for redress to the populations of the Niger Delta within the current international human rights framework.

---

[114] *See* Klaus Bosselmann, *Human Rights and the Environment: Redefining Fundamental Principles?*, in INTERNATIONAL ENVIRONMENTAL LAW AND POLICY: A COMPREHENSIVE REFERENCE SOURCE, ch. 16 (2002), *available at* http://www.wcl.american.edu/environment/iel/sixteen.cfm (last visited Nov. 1, 2005).

[115] Shelton, *supra* note 8, at 285-86.

[116] S. DOUGLAS-SCOTT, ENVIRONMENTAL RIGHTS IN THE EUROPEAN UNION: PARTICIPATORY DEMOCRACY OR DEMOCRATIC DEFICIT IN HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION 111-12 (A. Boyle & M. Anderson eds., 1996).

[117] Schwartz, *supra* note 97, at 359.

[118] Ziemer, *supra* note 4, at 235.

¶44 First, the human right to life is protected in the UDHR[119] and the ICCPR.[120] Humans need "air to breathe, water to drink, food to eat, and a habitable climate," elements of a healthy environment, to enjoy rights guaranteed under international human rights law.[121] Man-made environmental destruction highlights the intersection between the right to life and a healthy environment; "more than two million deaths annually can be attributed to pollution."[122] Claims that environmental destruction infringes on the right to life have surfaced in courts around the world. A case illustrating a successful regional example in which a court found a right to a clean environment is that of the Yanomami Indians of Brazil in the Inter-American Commission on Human Rights.[123] However, in contrast, the European Court of Human Rights did not find a right to a clean environment.[124] In one international example on record, the ICCPR-established UN Human Rights Committee, in a case regarding a radioactive waste dump of the Canadian Government, noted that the protection of human life was of interest.[125] The population of the Niger Delta could likewise formulate a claim that the environmental destruction caused by the oil industry violated their right to life because of the increased mortality rates in the region, resulting directly from pollution aggravated illnesses and malnutrition.

¶45 Second, the right to health could also be the basis for an environmental claim. This right is protected in the UDHR[126] and the ICESCR.[127] This claim may meet greater success than the right to life claim because, as mentioned above, a link between the environment and human health is internationally recognized. The UN General Assembly states that "all individuals are entitled to live in an environment adequate for their health and well-being."[128] The Niger Delta population could claim that the increased incidence of respiratory problems, cancer, and other health problems due to the oil pollution infringes on their right to health.

¶46 Third, the Niger Delta communities could use the right to be free from hunger as protected under the UDHR[129] and the ICESCR.[130] Pollutants from the oil operations in Nigeria lead directly to the contamination of food resources and to declining fish and agricultural harvests. In turn, this leads to increased rates of malnourishment and starvation.

---

[119] Universal Declaration of Human Rights, *supra* note 82, art. 3.

[120] ICCPR, *supra* note 87, at art. 6(1).

[121] Atapattu, *supra* note 109, at 99.

[122] Ksentini, *supra* note 112, at 42.

[123] Yanomami Case, Case 7615, Inter-Am. C.H.R., Report No. 12/85, OEA/ser. L/V/II.66, doc. 10 rev. 1 (1985), *reprinted in* 1985 Inter-Am. Y.B. on H.R. 264, 279.

[124] *See* Richard Desgagne, *Integrating Environmental Values into the European Convention on Human Rights*, 89 AM. J. INT'L L. 263, 265-73 (1995) (environmental destruction may violate Article 8, the right to private life and home, which guarantees a quality of life and physical well-being).

[125] ICCPR, *supra* note 87 (allows individuals to petition the UN Human Rights Committee once they have exhausted local remedies). This case was dismissed because the plaintiffs did not exhaust local remedies. Eaton, *supra* note 3, at 299.

[126] Universal Declaration of Human Rights, *supra* note 82, at art. 23(1), 25(1).

[127] ICESCR, *supra* note 88, at art. 7(b), 12(b).

[128] G.A. Res. 45/94, at 2, U.N. GAOR, 45th Sess., U.N. Doc. A/RES/45/94 (1990).

[129] Universal Declaration of Human Rights, *supra* note 82, at art. 25(1).

[130] ICESCR, *supra* note 88, at art. 11.

¶47 In addition, the Niger Delta population could make claims through other rights such as: 1) the infringement of cultural human rights protected under the UDHR[131] and the ICESCR[132] based on the destruction of their subsistence lifestyle; 2) the infringement of the right to self-determination protected by the ICCPR which gives man the right to "freely dispose of their natural wealth and resources";[133] and 3) the infringement of the right to an adequate standard of living/quality of life on the basis that environmental destruction affects quality of life.[134]

¶48 Using human rights machinery to address environmental harm is problematic however because such action will fail if the plaintiffs cannot "prove that the environmental issue in question has violated one of [their] human rights."[135] Moreover, cataclysmic environmental destruction must occur before the claimants can argue on the basis of the right to life.[136] Thus, in order to avoid severe environmental destruction and concomitant injury to human communities, international law must expand accountability to hold TNCs directly liable for environmental degradation. As previously noted however, such development presents difficulties because of the economic interests of states and TNCs.

C. The United States: The Responsibility of Nation States as Global Economic Leaders

¶49 As described above, the international mindset is making a slow progression towards protection of the environment through international human rights law and towards implementing the idea of corporate accountability on an international basis. However, the time required for such ideas to become hard-law will be long, and the interim will likely see a significant amount of environmental destruction with its accompanying negative impacts on human populations. In an era of increased global responsibility, wealthy developed countries, from which 90 % of TNCs originate,[137] have the ability to assist developing countries. Wealthy countries, such as the US, are typically in a better position to regulate parent corporations and to impose liability through their court systems. However, most developed countries shun this responsibility. Nonetheless, it is incumbent on the developed economies like the US to provide short-term solutions. This would give the international community the time to engender a long-term solution on the "right to a safe environment."[138]

¶50 Between 1988 and 1993, global inequality increased 5% and almost 80% of the world population during this period was living below the poverty standards that are the

---

[131] Universal Declaration of Human Rights, *supra* note 82, art. 27(1).

[132] ICESCR, *supra* note 88, at art. 15(1)(a).

[133] ICCPR, *supra* note 87, at art. 1.

[134] S. v. France, App. No. 13728/1988, 172 Eur. Ct. H.R. (Ser. A) (May 17, 1990) (finding that "noise of a considerable magnitude could not only affect the physical well-being of individuals, but also prevent them from enjoying the amenities of their home"). Despite the vast wealth produced from the oil found under the delta, the Niger Delta region remains poorer than the national average, which offers support to the above arguments. Owaduge, *supra* note 30.

[135] Atapattu, *supra* note 109, at 98, (citing Douglas-Scott, *supra* note 127, at 111-12).

[136] *Id*., at 100-101.

[137] Robert J. Fowler, *International Environmental Standards for Transnational Corporations*, 25 ENVTL. L. at 2 (1995).

[138] *See* Nickel, *supra* note 95.

recognized norms in the US and Western Europe.[139] In its Development Report, the World Bank "estimates that, at purchasing power parity, the per capita GDP in the richest twenty countries in 1960 was eighteen times that of the poorest twenty countries."[140] This gap expanded to thirty-seven times by 1995.[141] Furthermore, the "ratio of real income per head in the richest countries to that of the poorest was 10:1 in 1900 and 60:1 by the year 2000."[142] Arguably, to expect the developed world to take measures to protect the environment in the less developed nations does not place an unfair burden on wealthy nations. Furthermore, wealthy nations typically contribute more to environmental degradation than poorer countries do and also control more resources than developing nations. For example, Australia is "the world's highest per capita producer of greenhouse gases," and the US, with only 5% of the world population, produces 40% of global greenhouse gases.[143]

¶51 While international law navigates the confusion of its own evolution, nations with global influence like the US should ratify relevant treaties and enforce the laws in their own jurisdictions and control in order to expand liability and compensation within international law for the victims of environmental damage.[144] The US, in particular, could put its weight behind the environmental human rights movement because it has a surplus of resources and technology that it can commit to environmental protection, unlike countries like Nigeria which tend to focus their limited resources to provide basic services.[145] Although the US seems currently unwilling to accept a healthy environment as a human right, this section presents ways the US can help protect environmental human rights and increase the liability of TNCs.[146]

1. Extraterritorial Prescription of US Environmental Laws

¶52 The first solution is the extraterritorial prescription of US environmental law. The US has a comprehensive body of environmental laws including the Comprehensive Environmental Response and Liability Act (CERCLA)[147] and the Oil Pollution Act of

---

[139] Branko Milanovic, *True World Income Distribution, 1988 and 1993: First Calculations Based on Household Surveys Alone*, ECON. J. (2002).

[140] INTERNATIONAL LABOR OFFICE, REDUCING THE DECENT WORK DEFICIT: A GLOBAL CHALLENGE - REPORT OF THE DIRECTOR GENERAL 49 (2001), (citing WORLD BANK, WORLD BANK DEVELOPMENT REPORT 2000/2001: ATTACKING POVERTY (2001)).

[141] *Id*.

[142] Vanesa Baird, *Fear Eats the Soul*, NEW INTERNATIONALIST MAG., (2002) (citing MICHAEL DUMMETT, ON IMMIGRATION AND REFUGEES (Routledge, 2001)). *See also* The Worldwatch Institute, *Vital Signs 2003: The Trends that Are Shaping our Future*, 163 SCI. NEWS 23, June 7, 2003, at issn: 0036-8423. (while the global economy has increased seven fold, per capita income between the 20 richest and the 20 poorest nations more than doubled between 1980 and 1995).

[143] Pamela Bone, *Let's Celebrate the Need to Breed*, THE AGE, Aug. 9, 2003.

[144] *Stockholm Declaration*, *supra* note 91, at prin. 22.

[145] Eaton, *supra* note 3, at 274.

[146] The US will not sign the Protocol of San Salvador which recognizes the right to a healthy environment. Scott D. Calahan, *Recent Development, NIMBY: Not in Mexico's Back Yard?, A Case for Recognition of a Human Right to Healthy Environment in the American States*, 23 GA. J. INT'L & COMP. L. 409, 430 (1993).

[147] 42 U.S.C. § 9607 (1980), amended in 1986 by the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. 99-499, 100 Stat. 1613 (1986). Congress created a system of strict liability for environmental damage when it enacted CERCLA during the 1980's. The purpose of CERCLA is to promote the clean up of hazardous waste sites by allocating the costs among responsible parties. United

1990.[148] Were the US to impose domestic environmental law on foreign branches of US based TNCs,[149] environmental damage like that in Nigeria could be avoided or at least reduced. If TNCs based in the US entered a developing state such as Nigeria knowing they had to abide by readily enforceable US environmental laws, they would conduct business in a less destructive manner. Additionally, extraterritorial prescription of environmental law on US based TNCs would help increase international environmental concern and shift the focus of liability onto TNCs and their state of nationality.[150] Although US environmental laws do not directly protect humans, they work towards protecting the health of the environment and, thus, indirectly protect humans. However, the extraterritorial application of environmental law has many problems and is therefore impractical.

¶53 For instance, the Restatement (Third) of Foreign Relations states that, "a state has jurisdiction to prescribe law with respect to . . . (1)(c) conduct outside its territory that has or is intended to have substantial effect within its territory, [and] (2) the activities, interests, status, or relations of its nationals outside as well as within its territory."[151] However, law may not be prescribed extraterritorially if the exercise of such jurisdiction is unreasonable.[152] Unreasonableness can include that "another state may have an interest in regulating the activity."[153] Both examples bring jurisdictional issues into play and allow US courts an easy exit. Furthermore, a state may not prescribe its laws extraterritorially if it is trying to regulate "predominantly local activities, such as industrial and labor relations, health and safety practices, or conduct related to preservation or control of the local environment."[154]

¶54 Several other problems increase the impracticality of exterritorial prescription of US environmental laws. First, such a practice infringes on a state's sovereign right to exploit its resources pursuant to its domestic laws. This is considered a rule of customary international law[155] and has been reaffirmed in the Stockholm Declaration[156] and the Rio

---

States v. Bestfoods, 524 U.S. 51, 55-56 (1998) (citing S. Rep. No. 96-848, at 13 (1980)). Liable parties include those "which had any commercial relationship with the waste (generators, transporter, and disposers) or the waste site (current owners and owner/operators at the time of waste disposal)." Sanford E. Gaines, *International Principles for Transnational Environmental Liability: Can Developments in Municipal Law Help Break the Impasse?*, 30 HARV. INT'L L.J. 311, 331 (citing 42 U.S.C. 9607(a)(1-4) (1980)). Once these parties are found liable, they are responsible for the costs to clean-up and restore the site to acceptable environmental standards. 42 USC § 9670. CERCLA imposes liability both retroactively and jointly and severally. 810 F.2d 726 (8th Cir. 1986), cert. denied, 108 S.Ct. 146 (1987). CERCLA does not cover oil spills; therefore, the US should apply the Oil Pollution Act, 33 U.S.C. §§ 2702-2761 (1990).

[148] § 1002(b)(2)(A), 33 U.S.C.A. § 2702(b)(2)(A); 15 C.F.R. § 990.20(b).

[149] Recommended by Agenda 21 of the Declaration on International Investment and Multinational Enterprises, June 21, 1976, Annex on Guidelines for Multinational Enterprises, 15 I.L.M. 969.

[150] *See* Gaines, *supra* note 147, at 317-18 ("[I]nternational law has accumulated a growing body of treaties, conventions, and other indicia of 'State practice' with respect to ultrahazardous activities and certain other narrowly defined problems. To this extent, the concept of transnational liability has already gained international acceptance.").

[151] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW § 402(1), (2) (1987).

[152] *Id*.

[153] *Id*., at § 403(2)(g).

[154] *Id*., at § 414 cmt. c.

[155] Peter H. Sand, *UNCED and the Development of International Environmental Law*, 3 Y.B. INT'L ENVTL L. 3, 8 (1992).

[156] *Stockholm Declaration*, *supra* note 91, at prin. 21 ("States have . . . the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that

Declaration.[157] Second, regulation and enforcement would be logistically difficult and expensive for the US because US based TNCs are spread across the globe.[158] Third, the US will likely not want to impose stricter laws on US based TNCs than are imposed on domestic corporations of the host country because of the adverse affect it may have on the success of US-based TNCs.[159] Fourth, extraterritorial prescription of laws creates a lack of uniformity in a single country which would lead to competitive advantage for TNCs based in countries with lower environmental standards.[160] Finally, TNCs can choose to avoid extraterritorial prescription of US laws by incorporating outside of the US. Thus, although exterritorial prescription of US environmental laws may seem like a good idea at first glance, it is likely an ineffective method.

2. Entity Law

¶55 Another way the US could help is by amending entity law. Entity law has not evolved with the globalization of economies and protects TNCs from liability, which was not its original intent. TNCs are organized in "multi-tiered corporate structures consisting of a dominant parent corporation, sub-holding companies, and scores or hundreds of subservient subsidiaries scattered around the world."[161] The 2002 World Investment report estimates that there are 65,000 multinational corporation groups with more than 850,000 foreign subsidiaries and affiliates.[162]

¶56 The economic reality and public view of a TNC is that it is a single enterprise because it is supported by "common control, common business purpose, economic integration, financial and even administrative interdependence, and often common public persona that characterize the group's operations."[163] However, the legal reality of multinationals is that each constituent is regarded as a "separate juridical person."[164] A TNC is not one firm; a TNC is made up of multiple interrelated corporations that act under common control. Entity law shields US parent corporations from liability of subsidiaries overseas. Often, the group subsidiaries are incorporated under the laws of the state in which it conducts business.[165] A subsidiary corporation of a TNC is a national of the nation in which it is incorporated and subject to that nation's laws under accepted principles of international law.[166] Furthermore, the doctrine of limited liability of shareholders supports the corporate juridical entity.[167]

---

activities within their jurisdiction or control do not cause damage to the environment of other states or areas beyond the limits of national jurisdiction.")

[157] *Rio Declaration*, *supra* note 104 ("States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or areas beyond the limits of national jurisdiction.")

[158] Eaton, *supra* note 3, at 281.

[159] *Id*.

[160] *Id*.

[161] Phillip I. Blumberg, *Asserting Human Rights Against Multinational Corporations Under US Law: Conceptual and Procedural Problems* (sec. IV), 50 AM. J. COMP. L. 493, 493 (Fall 2002).

[162] *World Investment Report*, *supra* note 17.

[163] Blumberg, *supra* note 161, at 493-94.

[164] *Id*., at 493 n.3

[165] *Id*., at 493.

[166] Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain), 1970 I.C.J. 4, 32 (Feb. 5, 1970). *See*

¶57 Entity law not only protects public investors from liability of the parent corporation's obligations, it also insulates the parent corporation from liability for the obligations of its subsidiaries.[168] The multi-tier framework cuts the chain of liability at multiple points. Parent corporations can hide behind shields of subsidiary corporations and avoid liability. Even when subsidiaries incur liability, they are unlikely to have sufficient resources to shoulder the cost of repairing environmental damage.[169]

¶58 Corporate juridical entity and limited liability were created for individually owned corporations, not for multi-tiered corporate owned corporations with foreign assets.[170] In an attempt to deal with corporate groups more adequately, US law relies on "control" and "controlled corporations" to impose enterprise liability.[171] However, this framework makes it difficult to impose penalties on US-based TNCs that violate human rights overseas. Under entity law, the law treats each constituent as a separate legal person irrespective of whether it is a US parent or a foreign subsidiary.[172] Absent special statute, the corporate group does not exist for legal purposes.[173] Each constituent is directly liable only for the conduct that is traceable to its own officers, directors, and employees.[174]

¶59 In some cases, vicarious liability can be applied to the parent corporation based on equitable piercing the veil jurisprudence, agency law, or some concept of enterprise law.[175] This, however, presents considerable difficulties as US courts must obtain *in personam* jurisdiction of the foreign subsidiaries of US-based corporations, based on the relationship of the subsidiary to parent.[176] As a result, vicarious liability has thus far played little or no role in international human rights litigation.[177]

¶60 Nevertheless, there exist

---

also RESTATEMENT (THIRD) FOREIGN RELATIONS LAW § 212 (1987).

[167] *See* Phillip I. Blumberg, *Limited Liability and Corporate Groups*, 11 J. CORP. L. 573, 577-99 (1986).

[168] Blumberg, *supra* note 161, at 495.

[169] Alicia Stone, *Parent Corporate Liability for Hazardous Substance Release from On-Shore Facilities in the International Market: Legal Approaches of the United States, the European Community and Germany*, 12 IN PUB. INT'L 57, 63 n.51 (1992).

[170] Note, *Liability of Parent Corporations for Hazardous Waste Cleanup and Damages*, 99 HARV. L. REV. 986, 969 (1986) ("The traditional justification for limiting the liability of shareholders of a corporation to their invested capital is that full exposure to the risk of business failure might discourage shareholders from investing in socially desirable but risky ventures.").

[171] Blumberg, *supra* note 161, at 495.

[172] *Id*.

[173] *Id*.

[174] *Id*.

[175] *Id*., at 496.

[176] PHILLIP I. BLUMBERG, THE LAW OF CORPORATE GROUPS: PROCEDURAL PROBLEMS IN THE LAW OF PARENT AND SUBSIDIARY CORPORATIONS, chs. 3, 4, and 5 (1983 & Supp. 2001). *See also* Doe v. Unocal Corp., No. 00-56603, 2002 U.S. App. LEXIS 19263, at *67-*70 (9th Cir. 2002) (A relationship between a parent and subsidiary is not sufficient to establish jurisdiction. "the general rule that a subsidiary and the parent are separate entities" List requirements for piercing the veil To review a parent corporation under the traditional "alter ego" doctrine, the plaintiff must show prima facie: "(1) that there is such unity of interest and ownership that the separate personalities [of the two entities] no longer exist and (2) that failure to disregard [their separate entities would result in fraud or injustice." Read for more quotes.); Kingston Dry Dock Co. v. Lake Champlain Transp. Co., 31 F.2d 265, 267 (2d Cir. 1929) (Need consensual consent of P and A for A to act on P's behalf regardless of benefit to P (Restatement (Third) of Agency § 1.01 (T.D. No. 2, 2001). This consent is generally lacking in parent/subsidiary relationships).

[177] Blumberg, *supra* note 161, at 495.

> at least three fact patterns that support disregard of entity status under most state standards: (1) gross undercapitalization; (2) a nominally separate subsidiary that functions as an integrated part of the parent corporation's operations or production processes or that otherwise serves in an agency relationship to the parent; and (3) firms in which the separate entity status has been disregarded or misrepresented, as where a nominally separate entity is identified, by trade name or otherwise with an affiliated or parent entity.[178]

If the US continues to amend entity law to adapt to the current economic situation, TNCs would be less able to avoid liability and as a result adopt more environmentally responsible practices.

3. The Alien Tort Claims Act

¶61 The Alien Tort Claims Act ("ATCA") provides a third solution for claimants against US-based TNCs. The ATCA grants federal courts "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 US."[179] The ATCA was recently used for human rights claims[180] and even more recently for claims against TNCs for environmental destruction.[181] However, the Supreme Court recently restricted the use of the ATCA to the narrow range of violations the ATCA was intended for in 1789.[182]

¶62 As the international community has started to turn towards the idea of corporate accountability as a means to deter environmental destruction and human rights violations and to provide monetary damages for environmental cleanup and victim compensation, TNCs have found themselves in US courts under the ATCA, accused of environmental destruction and degradation by subsidiaries.[183] Such cases act as litmus tests for the US judiciary's mood regarding liability of TNCs to people and the environment and indicate a gradual acceptance of corporate accountability.

¶63 Because of the on-going and often severe environmental destruction corporations can cause, one can predict that the new defendant – the corporation – will surface more and more frequently in courts throughout the world. Plaintiffs are introducing corporate defendants to the US courts using the Alien Torts Claims Act in cases like *Wiwa v. Royal*

---

[178] Richard B. Stewart & Bradley M. Campbell, *Lessons from Parent Liability Under CERCLA*, 6 NAT. RESOURCES ENV'T 3, 7 (1992).

[179] 28 U.S.C. § 1350 (1994).

[180] Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) (opened the door to human rights claims after almost two centuries of dormancy).

[181] *See* Anastasia Khokhryakova, *Beanal v. Freeport-McMoran, Inc.: Liability of a Private Actor for an International Environmental Tort Under the Alien Tort Claims Act*, 9 COLO. J. INT'L ENVTL. L. POL'Y 463, 466 (1998).

[182] Sosa v. Alvarez-Machain, 124 S.Ct. 2739 (2004). Alvarez-Machain v. U.S., 331 F.3d 604, (9th Cir. 2003), *cert. denied*, Berellez v. Alvarez-Machain, 522 U.S. 814, (1997), *appeal after remand*, Alvarez-Machain v. U.S, 266 F.3d 1045, (9th Cir. 2001), *vacated*, Alvarez-Machain v. U.S., 331 F.3d 604, (9th Cir. 2003), *and cert. granted*, United States v. Alvarez-Machain, 2003 WL 22251320 (2003).

[183] US: Jota v. Texaco, Inc. 157 F.3d 153 (2d Cir. 1998) (Newman, J.), *rev'g* Aguinda v. Texaco, Inc., 945 F. Supp. 625 (S.D.N.Y. 1999) (ATCA) *on remand*, 139 F. Supp. 2d 139 F. Supp. 2d 438 (S.D.N.Y. 2000), 142 F. Supp. 2d 533 (S.D.N.Y. 2001) (dismissing complaint); Beanal v. Freeport-McMoran, Inc., 197 F.3d 161 (5th Cir. 1999); Sequihua v. Texaco, Inc., 847 F. Supp. 61 (S.D. Tex. 1994).

Dutch Shell Petroleum Co.[184] and *Aguinda v. Texaco*.[185] However, the US courts dismissed both cases for lack of jurisdiction.[186]

¶64 Such decisions highlight the two-faced nature of the ATCA. On the one hand it may serve the interests of nations more closely linked to the TNC or the plaintiffs. *Aguinda* for example provides Ecuador the opportunity to impose liability on Texaco for destruction of the environment and endangering its citizens. On the other hand, it provides a loophole for US courts to back out of a difficult situation gracefully. The reality is that oil TNCs have a lot of financial resources and political clout in the US and can use this influence to prevent cases being heard in US courts.

¶65 Even if US courts find a more appropriate forum, the jurisdiction change will likely affect the plaintiffs negatively. In *Aguinda*, Texaco agreed "to subject itself to the jurisdiction of Ecuador's courts, effectively conceding that the case would go to trial somewhere."[187] Texaco however, interpreted the jurisdiction instructions in the narrowest way possible and agreed to litigate only the "individual damages suffered by the 70 named plaintiffs."[188] Thus, 99% of Texaco's victims were left outside Ecuador's court doors and Texaco's potential liability is now only a miniscule percentage of the one billion US dollars of estimated damages.[189] Moreover, it prevents all the victims from joining together because there is no class action in Ecuador.[190]

¶66 Like the Ecuadorian plaintiffs in *Aguinda*, the Nigerian plaintiffs in *Wiwa* brought an environmental claim under the ATCA; the environmental abuses and health issues are very similar. However, the environmental claims passed through the US courts with no ruling. Thus, even before the recent reigning in of the ATCA, foreign plaintiffs could only use the ATCA as a short-term solution to bring large-scale environmental torts to US courts as international law develops.[191]

IV. CONCLUSION

¶67 The link between a healthy environment and human rights is undeniable. Current international human rights law and environmental law are not able to effectively protect humans and the environment from man-made environmental destruction. Furthermore, as the result of globalization, TNCs are one of the largest contributors to environmental destruction but are not liable for environmental destruction or the negative impacts the destruction may have on humans under current international law. A universally recognized right to a healthy environment and increased corporate accountability would

---

[184] Wiwa, *supra* note 28.

[185] *Id*.; Aguinda, *supra* note 6.

[186] *Id*. Furthermore, US courts often send foreign plaintiffs back to their foreign jurisdiction under the doctrine of *forum non conveniens.* Silberman, *Developments in Jurisdiction and Forum non Conveniens in International Litigation: Thoughts on Reform and a Proposal for a Uniform Standard*, 28 TEX. INT'L L.J. 501, 525-26 (1993). *See also Asserting Human Rights Against Multinational Corporations Under US Law: Conceptual and Procedural Problems*, 50 AM. J. COMP. L. 493, 508 (2002).

[187] Texaco Rainforest, Aguinda v. Texaco, Jota v. Texaco, Questions & Answers, *at* http://www.texacorainforest.com/why/questions.html#11 (last visited Nov. 1, 2005).

[188] *Id*.

[189] *Id*.

[190] *Id*.

[191] Joanna E. Arlow, Note, The Utility of ATCA and the "Law of Nations" in Environmental Torts Litigation: Jota v. Texaco, Inc. and Large Scale Environmental Destruction, 7 WIS. ENVTL. L.J. 93 (2000).

encourage TNCs to conduct business in less environmentally destructive manner and, as a result, protect human rights.

¶68 There is an international trend towards recognizing the right to a healthy environment and towards increased corporate accountability. However, this movement will take time, as the global economy is currently structured around economic efficiency, and adjustments must be made to incorporate human, economic, and environmental interests. Furthermore, definitions and standards need to develop into unambiguous, enforceable mechanisms.[192] In the meantime, development and enforcement of domestic environmental laws and use of international human rights laws and US laws can encourage the trend to accelerate towards an actual right to a healthy environment and universal corporate accountability.

[192] *See* Nickel, *supra* note 95.