

Corporate Social Responsibility

SARAH A. ALTSCHULLER AND AMY LEHR*

I. Business and Human Rights: International Developments

A. REPORT BY THE SPECIAL REPRESENTATIVE OF THE U.N. SECRETARY-GENERAL ON THE ISSUE OF HUMAN RIGHTS AND TRANSNATIONAL CORPORATIONS

John Ruggie, Special Representative of the U.N. Secretary-General (UN SRSG) on the issue of human rights and transnational corporations, submitted his final views and recommendations to the U.N. Human Rights Council (UNHRC) in April 2008, after nearly three years of work¹ subsequent to his appointment in July 2005.² The report was called by some observers “the most significant global document on business and human rights ever produced.”³ It proposed an overarching framework for a business and human rights agenda composed of “three core principles: the State duty to protect against human rights abuses by third parties, including business; the corporate responsibility to respect human rights; and the need for more effective access to remedies.”⁴

* Sarah Altschuller and Amy Lehr are associates in the Corporate Social Responsibility practice of Foley Hoag LLP. Ms. Altschuller is Vice-Chair of the Corporate Social Responsibility Committee of the ABA’s Section of International Law and Practice. Until September 2008, Ms. Lehr worked as a legal advisor to the Special Representative to the U.N. Secretary-General on issue of human rights and transnational corporations.

1. At the time the report was delivered to the Human Rights Council in April 2008, the UN SRSG had convened fourteen multi-stakeholder consultations on five continents, conducted more than two dozen research projects, produced more than 1,000 pages of documents, and received twenty submissions. For documents produced by and submitted to the UN SRSG, see Business & Human Rights Resource Centre, UN Special Representative on Business and Human Rights, <http://www.business-humanrights.org/Getting-started/UNSpecialRepresentative> (last visited Feb. 18, 2009).

2. In June 2008, the UNHRC renewed the UN SRSG’s mandate for three more years. The new mandate is intended to provide the UN SRSG with the opportunity to operationalize the framework proposed in his 2008 report. UN Global Compact, The Special Representative of the UN Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, http://www.unglobalcompact.org/Issues/human_rights/The_UN_SRSG_and_the_UN_Global_Compact.html (last visited Apr. 6, 2008).

3. *Special Reports: Review of the Year: 2008—The Year the Economic Climate Changed*, ETHICAL CORP., Dec. 2, 2008, <http://www.ethicalcorp.com/content.asp?ContentID=6230>.

4. Special Representative of the Secretary-General, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, Summary, *Deliv-*

The framework's first principle reflected the fact that under international law, "[s]tates have a duty to protect against human rights abuses by non-State actors, including by business, affecting persons within their territory or jurisdiction."⁵ This included taking "all necessary steps to protect against such abuse, including to prevent, investigate, and punish the abuse, and to provide access to redress."⁶ There are also strong policy reasons for states to encourage corporate cultures more respectful of rights extraterritorially and at home, i.e., for home states to discourage and hold accountable corporations that abuse human rights overseas. The UN SRSG suggested that home and host states could take a more coordinated approach—he spoke of states integrating business and human rights concerns in different policy areas, such as trade practices, investment agreements, and export credit agency lending.

The second principle was the corporate responsibility to respect human rights that provides a baseline expectation for corporate behavior. Because companies "are specialized economic organs, not democratic public interest institutions. . . their responsibilities cannot and should not simply mirror the duties of States."⁷ The responsibility to respect human rights expects that companies carry out "due diligence" so that they can demonstrate that they in fact respect the full range of internationally recognized rights. Due diligence consists of "the steps a company must take to become aware of, prevent and address adverse human rights impacts."⁸ These steps are part of the management processes of a company, including: establishing a company human rights policy; conducting human rights impact assessments, which can be integrated into environmental and social impact assessments; integrating human rights policies into everyday company practices; and tracking performance via monitoring and auditing. The UN SRSG noted that because "the responsibility to respect [human rights] is a baseline expectation, a company cannot compensate for human rights harm by performing good deeds elsewhere."⁹

The UN SRSG stated that while the term "sphere of influence" can prove helpful as a metaphor so that companies realize their responsibilities extend to communities and other non-employees, it is not helpful as an operational concept and has no legal pedigree.¹⁰ As an alternative to help companies know how far their responsibilities extend, the UN SRSG proposed that, when carrying out due diligence, companies should consider the country contexts in which their business activities take place and the human rights challenges they may pose, the human rights impacts of their own activities in that context, and whether they might contribute to abuse through the relationships connected to their activities, including those with business partners and states.

Finally, the framework's third principle is the need for more effective access to remedies. For states to successfully meet their duty to protect against the abuses of non-state

ered to the U.N. Human Rights Council, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008), available at <http://www2.ohchr.org/english/bodies/hrcouncil/8session/reports.htm>.

5. *Id.* ¶ 18.

6. *Id.*

7. *Id.* ¶ 53.

8. *Id.* ¶ 56.

9. *Id.* ¶ 55.

10. *Id.* ¶ 67. For a more detailed analysis, see the companion report. Special Representative of the Secretary-General, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, U.N. Doc. A/HRC/8/16 (May 15, 2008), available at <http://www2.ohchr.org/english/bodies/hrcouncil/8session/reports.htm>.

third parties, victims should have greater access to both judicial and non-judicial remedies. Additionally, the corporate responsibility to respect human rights includes the expectation that companies will provide means to address grievances from individuals or communities, whether through company-level grievance mechanisms or participation in industry-level arrangements.

B. DEFINING THE CONCEPT OF CORPORATE COMPLICITY FOR HUMAN RIGHTS ABUSES

There were several notable efforts by members of the international community in 2008 to clarify the legal standards governing corporate complicity for human rights abuses. The UN SRSG submitted a companion report to the UNHRC on the concept of complicity.¹¹ In the report, the UN SRSG observed that:

[t]he concept of complicity is highly relevant to the context of business and human rights. Most of the over 40 Alien Tort Claims Act (ATCA) cases brought against companies in the United States to date, now the largest body of domestic jurisprudence regarding corporate responsibility for violations of international law, have concerned alleged complicity, where the actual perpetrators were public or private security forces, other government agents, armed factions in civil conflicts, or other such actors.¹²

He also stated that, due to the “relatively limited case history in relation to companies rather than individuals, and given the variations in definitions of complicity within different legal contexts, it is not possible to specify exacting tests for what constitutes complicity even within the legal sphere,” but observed that “the clearest guidance comes from international criminal law and the cases on aiding and abetting.”¹³

The UN SRSG noted that international criminal law defines “aiding and abetting” as “(i) an act or omission having a substantial effect on the commission of an international crime and (ii) knowledge of contributing to the crime.”¹⁴ This assistance does not have to cause or even be a “necessary” contribution to the commission of the crime, but it must contribute directly and substantially. Legal liability for mere presence in a country is unlikely. Analogizing from international criminal law cases, one would have to show that the company’s silence was a substantial contribution to the crime, e.g., by legitimizing or encouraging it, and that the company did so knowingly. Similarly, the sole fact that a company benefited from human rights abuses normally will not be sufficient for legal liability, although it may be a relevant factor. The report noted that socially responsible investors and civil society may use much broader, non-legal understandings of complicity when targeting companies.

11. U.N. Doc. A/HRC/8/16, ¶ 26-72. The companion report also discusses sphere of influence, with the conclusions noted above.

12. *Id.* ¶ 29.

13. *Id.* ¶ 33.

14. *Id.* ¶ 35.

In addition to the work of the UN SRSR, the International Commission of Jurists published a three volume report on the topic of corporate complicity in the fall of 2008.¹⁵ Volume I introduced a policy approach to complicity, and discusses the concept of a “zone of legal risk.” This “zone” looks at three factors: 1) a company’s causation/contribution, 2) knowledge and foreseeability, and 3) proximity. Volume II discussed international and domestic criminal definitions of corporate complicity. Finally, Volume III provided an overview of civil cases involving corporate complicity theories from torts and non-contractual obligations.

II. Litigation in United States Courts

A. LITIGATION UNDER THE ALIEN TORT CLAIMS ACT

Cases brought by U.S. plaintiffs under the ATCA¹⁶ represent the largest body of domestic jurisprudence on corporate responsibility for violations of international human rights law. There were a number of significant developments in ATCA jurisprudence in 2008. At the close of the year, there were also heightened expectations for potential developments in the law in 2009, with a number of cases proceeding towards hearing dates in 2009.¹⁷

1. *Bowoto v. Chevron Corp.*

In 2008, for only the second time, an ATCA case proceeded to a federal jury trial. In December 2008, after a seventeen-day trial, a jury found that Chevron Corporation could not be held liable for abuses committed by the Nigerian government security forces in 1998 and 1999. Plaintiffs had proceeded to trial under aiding and abetting, conspiracy, and agency theories of liability, charging that Chevron was complicit in acts of torture and

15. Business & Human Rights Resource Center, International Commission of Jurists-Report of the Expert Legal Panel on Corporate Complicity in International Crimes, <http://www.business-humanrights.org/Updates/Archive/ICJPaneloncomplicity> (last visited Feb. 20, 2009).

16. The ATCA states simply that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” 28 U.S.C. § 1350 (2008).

17. As of December 2008, oral arguments were scheduled for January 2009 before the Second Circuit Court of Appeals in *Presbyterian Church of Sudan v. Talisman Energy, Inc.* In a 2006 decision, the District Court for the Southern District of New York had dismissed the case against Talisman in a case involving allegations that the company aided and abetted human rights abuses by the Government of Sudan. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633, 638-40 (S.D.N.Y. 2006). The District Court held that “[a]iding and abetting liability is a specifically defined norm of international character that is properly applied as the law of nations for purposes of the [ATCA].” *Id.* at 668. The Court found that in order to demonstrate that a defendant had aided and abetted a violation of international law, a plaintiff must show:

1) that the principal violated international law; 2) that the defendant knew of the specific violation; 3) that the defendant acted with the intent to assist that violation, that is, the defendant specifically directed his acts to assist in the specific violation; 4) that the defendant’s acts had a substantial effect upon the success of the criminal venture; and 5) that the defendant was aware that the acts assisted the specific violation.

Id.

cruel, inhuman, and degrading treatment.¹⁸ Notably, the *Bowoto* litigation involves a companion state court case, with the plaintiffs bringing claims under the California Business & Professions Code.¹⁹ The state case is expected to go to trial in 2009.

2. *Khulumani v. Barclay National Bank Ltd.*

In May 2008, the U.S. Supreme Court issued a determination that it was unable to hear an appeal brought by defendants in *Khulumani v. Barclay National Bank, Ltd.* and *American Isuzu Motors v. Ntsebeza*.²⁰ The cases are now before the Southern District of New York. Both cases were brought on behalf of South African plaintiffs who allege that they, or their family members, were the victims of human rights abuses during the apartheid regime. The defendants in the litigation include more than fifty corporations who operated in South Africa during the time of apartheid. Plaintiffs allege that defendants “aided and abetted” apartheid and its associated human rights violations by operating in South Africa.

In October 2007, the Second Circuit vacated a district court dismissal of the plaintiff’s claims in *Khulumani*.²¹ The Second Circuit endorsed the theory of aiding and abetting liability under the ATCA, a notable determination due to ongoing controversy regarding the viability and definition of this form of indirect liability under the statute. The United States filed an amicus brief in support of the petition for a writ of certiorari, arguing that “[t]he court of appeals’ decision allows an unprecedented and sprawling lawsuit to move forward and represents a dramatic expansion of U.S. law that is inconsistent with well-established presumptions that Congress does not intend to authorize civil aiding and abetting liability or extend U.S. law extraterritorially.”²² The United States argued that lawsuits challenging the conduct of foreign governments toward their own citizens “inevitably create tension between the United States and foreign nations.”²³

3. *Wiwa v. Royal Dutch Petroleum*

In October 2008, the District Court for the Southern District of New York set a February 2009 trial date for *Wiwa v. Royal Dutch Petroleum*.²⁴ Plaintiffs allege that Royal Dutch Petroleum Co. and Shell Transport and Trading Co. (Royal Dutch/Shell) aided and abet-

18. *Bowoto v. Chevron Corp.*, 557 F. Supp. 2d 1080, 1092-95 (N.D. Cal. 2008); *Bowoto v. Chevron Corp.*, No. C 99-02506 SI, 2007 WL 2349336, at *15-18 (N.D. Cal. Aug. 14, 2007).

19. Complaint ¶ 5, *Bowoto v. ChevronTexaco Corp.*, 2003 WL 25763180 (Cal. Super. Ct. Feb. 20, 2003) (No. CGC03417580).

20. *Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 254, 264 (2d Cir. 2007), *aff’d sub nom.* *Am. Isuzu Motors, Inc., v. Ntsebeza*, 128 S. Ct. 2424, 2424 (2008). The Justices of the Supreme Court were unable to achieve a quorum due to several recusals.

21. *Khulumani*, 504 F.3d at 264.

22. Brief for the United States as Amicus Curiae in Support of Petitioners, *Am. Isuzu Motors, Inc. v. Ntsebeza*, 128 S. Ct. 2424 (2008) (No. 07-919), 2008 WL 408389, at *5.

23. *Id.*

24. There are actually three related cases in this litigation: *Wiwa v. Royal Dutch Petroleum*, *Wiwa v. Anderson*, and *Wiwa v. Shell Petroleum Development Company*. *Wiwa v. Royal Dutch Petroleum* and *Wiwa v. Anderson* are scheduled to begin trial on February 9, 2009. *Wiwa v. Shell Petroleum Development Co.* was dismissed by the District Court in March 2008. *Wiwa v. Shell Petroleum Dev. Co. Nigeria Ltd.*, No. 04 Civ. 2665, 2008 WL 591869, at *11 (S.D.N.Y. March 4, 2008). The plaintiffs have appealed the dismissal to the Second Circuit Court of Appeals.

ted human rights abuses by Nigerian authorities against the Ogoni people.²⁵ The allegations stem from the company's oil production activities in the Ogoni area of Nigeria as well as the arrest and execution of the Ogoni 9, a group of activists who were tried and executed by the Nigerian government in 1995. Plaintiffs generally allege that human rights abuses

were carried out with the knowledge, consent, and/or support of [Royal Dutch/Shell] . . . as part of a pattern of collaboration and/or conspiracy between Defendants and the military junta of Nigeria to violently and ruthlessly suppress any opposition to Royal Dutch/Shell's conduct in its exploitation of oil and natural gas resources in Ogoni and in the Niger Delta.²⁶

Plaintiffs' claims include allegations of summary execution, crimes against humanity, torture, inhumane treatment, and arbitrary arrest.

4. *Sarei v. Rio Tinto*

In December 2008, the Ninth Circuit ruled in *Sarei v. Rio Tinto* that certain claims brought under the statute "are appropriately considered for exhaustion under both domestic prudential standards and core principles of international law."²⁷ The case involves claims by current and former residents of the island of Bougainville, Papua New Guinea, who allege that they were the victims of numerous violations of international law as the result of the mining operations of Rio Tinto. The Ninth Circuit referenced the Supreme Court's statement in *Sosa v. Alvarez-Machain*²⁸ that exhaustion of local remedies should "certainly" be considered in cases involving ATCA claims and held that this was "an appropriate case for such consideration."²⁹ The court stated that a defendant must "plead and justify an exhaustion requirement, including the availability of local remedies" and plaintiffs "may rebut this showing with a demonstration of the futility of exhaustion."³⁰ The Court remanded the case to the Central District of California with instructions that the District Court should determine whether to impose an exhaustion requirement on the plaintiffs.

5. *Chiquita Brands International*

In 2007 and 2008, numerous ATCA cases and several shareholder derivative actions were filed against Chiquita Brands International. The cases were filed after the company admitted that it had provided payments to the United Self-Defense Forces of Colombia (AUC), a paramilitary group.³¹ The payments were allegedly made to ensure the protec-

25. Fourth Amendment Complaint ¶ 117, *Wiwa v. Royal Dutch Shell, PLC*, No. 96 Civ. 8386 (S.D.N.Y. Oct. 2, 2007), available at <http://www.earthrights.org/files/Legal%20Docs/Wiwa%20v%20Shell/FourthAmendedComplaint.pdf>

26. *Id.* ¶ 2.

27. *Sarei v. Rio Tinto*, 550 F.3d 822, 824 (9th Cir. 2008).

28. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

29. *Sarei*, 550 F.3d at 827.

30. *Id.* at 832.

31. At the time of the admission, the company agreed to pay a \$25 million fine for providing funds to an organization on the United States' list of terrorist organizations and to cooperate in an investigation by the U.S. Department of Justice.

tion of Chiquita employees and banana plantations in Colombia. In February 2008, the U.S. Judicial Panel on Multidistrict Litigation decided to centralize the cases, which had been filed in federal courts in several jurisdictions, including Florida, the District of Columbia, Ohio, New Jersey, and New York. The cases have been centralized for the purposes of discovery and pretrial proceedings in the Southern District of Florida. The Judicial Panel found that “[a]ll of these actions arise from allegations that Chiquita provided financial and other support to the Autodefensas Unidas de Colombia (AUC), a Colombian right-wing paramilitary organization engaged in armed struggle against leftist guerilla groups in various parts of Colombia, including those where Chiquita had banana-producing operations.”³² The ATCA cases have generally alleged that the company provided material support to a terrorist organization, and that the company knew, or should have known, that providing such support would lead to the deaths of the decedents.

6. *Notable New Cases*

In February 2008, Chinese dissidents filed a lawsuit in federal court in California against Yahoo, Inc., Yahoo! Hong Kong, and the Peoples Republic of China alleging that the disclosure of the plaintiffs’ electronic communities and identities led to their arrest, detention, and torture by Chinese government officials.³³ A similar case, *Xiaoning v. Yahoo! Inc.*,³⁴ settled in late 2007. In the new case, *Zheng v. Yahoo! Inc.*, plaintiffs have brought claims under the Electronic Communications Privacy Act³⁵ against Yahoo! Inc. and Yahoo! Hong Kong, and claims under the ATCA and Torture Victims Protection Act of 1991³⁶ against the Peoples Republic of China. Plaintiffs allege that, as a result of specific reporting by human rights organizations, the companies “had every reason to know and understand that the electronic communication user information they provided to authorities could well be used to assist in the infliction of such abuses as arrest, torture, cruel, inhuman or other degrading treatment, and prolonged detention and/or forced labor.”³⁷

In a notable non-ATCA case, hundreds of guest workers from India filed suit in March 2008 in federal court in Louisiana against Signal International LLC alleging that they were forced to work for the company, a provider of marine and fabrication services, at shipyards in Pascagoula, Mississippi, and Orange, Texas.³⁸ Plaintiffs in the case allege that they were fraudulently recruited in India and the United Arab Emirates by the company to work in the United States under the federal government’s H-2B guest worker program with the promise that they would be provided with legal and permanent work-based immigration. Plaintiffs allege that they paid substantial recruitment, immigration, and travel fees and were required to submit their passports to the defendants’ recruiting agents, and

32. Transfer Order, *Chiquita Brands Int’l, Inc.*, M.D.L. No. 1916 (J.P.M.L. 2008), available at <http://www.iradvocates.org/Order%20to%20move%20to%20Florida.pdf>.

33. First Amended Complaint ¶ 15-17, *Zheng v. Yahoo, Inc.*, 2008 WL 4056779 (N.D. Cal. June 16, 2008) (No. 3:08CV016068).

34. Complaint, *Xiaoning v. Yahoo Inc.*, 2007 WL 1511131 (N.D. Cal. Apr. 18, 2007) (No. C 07 2151 CW).

35. 18 U.S.C. § 2520 (2008).

36. 28 U.S.C. § 1350 (2008).

37. First Amended Complaint, *Zheng*, 2008 WL 4056779, ¶ 21.

38. Complaint ¶ 1, *David v. Signal Int’l LLC*, 2008 WL 1751667 (E.D. La. Mar. 7, 2008) (No. 08-1220).

that when they arrived in the United States, they were required to live in guarded, isolated, and overcrowded labor camps. Plaintiffs allege that they reasonably feared harm or physical restraint if they left their positions with Signal. Plaintiffs' complaint raises claims under the Trafficking Victims Protection Act (TVPA)³⁹ and other federal statutes.

In August 2008, in another case involving allegations of human trafficking, a lawsuit was filed in federal court in California against Kellogg Brown & Root, Inc. (KBR) and its contractor, Daoud & Partners (Daoud), a Jordanian corporation, alleging that the companies engaged in the trafficking of Nepali workers.⁴⁰ Plaintiffs allege that thirteen Nepali men were recruited in 2004 to work as kitchen staff in restaurants and hotels in Amman, Jordan. They additionally allege that when the men arrived in Jordan, their passports were taken and they were transported against their will to work at a military base near Ramadi, Iraq. During the trip to Iraq, twelve of the men were stopped by insurgents, kidnapped, and eventually killed. Plaintiffs allege that the thirteenth man was brought to Iraq, where he was forced to work for fifteen months before his passport was returned, and he was able to return to Nepal. Alleging that "defendants' actions constitute the torts of trafficking in persons, involuntary servitude, forced labor, and salary"⁴¹ in violation of the laws of nations and/or the treaties of the United States, plaintiffs have brought claims under the ATCA, the TVPA,⁴² Racketeering Influenced and Corrupt Organizations Act (RICO),⁴³ and under the common law.

B. LITIGATION UNDER STATE TORT LAW

1. *Doe v. Exxon Mobil Corp.*

In August 2008, the D.C. District Court denied a motion for summary judgment by Exxon Mobil Corporation in a case brought by Acehese villagers alleging that the corporation, along with two of its U.S. affiliates, Mobil Corporation and ExxonMobil Oil Corporation, and its Indonesian subsidiary, ExxonMobil Oil Indonesia (EMOI), are liable for killings and torture committed by the Indonesian military. The case originally included claims under the ATCA and the TVPA, but these claims were dismissed by the District Court in October 2005.⁴⁴ The District Court allowed the plaintiffs to amend their original complaint, however, and to proceed under D.C. tort law. In its denial of summary judgment, the court found that plaintiffs had put forward sufficient evidence for a jury to decide that Exxon should be held liable for the actions of the Indonesian military. Specifically, the court found that:

39. 18 U.S.C. §§ 1589-90 (2008).

40. Complaint ¶ 97, *Adhikari v. Daoud & Partners*, 2008 WL 3978577 (C.D. Cal. Aug. 27, 2008) (No. 08CV0526). In a related case, the families of deceased workers brought an action in 2007 against Daoud & Partners under the Defense Base Act seeking death benefits. In March and April 2008, an Administrative Law Judge for the Department of Labor, after finding that the men were employees of Daoud at the time of their deaths, held that the families in Nepal were entitled to death benefits. J.M., No. 2007-LDA-303 to -305, (Dep't of Labor Mar. 25, 2008) (decision), available at http://www.cmht.com/pdfs/Nepali_JudgePrice Decision.pdf.

41. Complaint ¶ 160, *Adhikari*, 2008 WL 3978577.

42. 18 U.S.C. § 1595 (2008).

43. 18 U.S.C. § 1962(c) (2008).

44. *Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 21 (D.D.C. 2005).

[t]here is evidence that these security forces committed the alleged atrocities; that EMOI paid for the security, which was provided 'as may be requested by [EMOI]' under a contract; that EMOI had the right to influence the forces' 'deployment logistics' and 'to influence the security plan and the development strategy;' and that EMOI 'assisted in the management of security affairs . . . on behalf of the Indonesian government entity that provided these forces.⁴⁵

The court allowed the case to proceed against Exxon Mobil Corporation and EMOI while granting motions for summary judgment by Mobil Corporation and ExxonMobil Corporation, finding that there was "insufficient particularized evidence" regarding these two defendants.⁴⁶

2. *Carijano v. Occidental Petroleum*

In April 2008, the District Court for the Central District of California dismissed on forum non conveniens grounds the plaintiffs' claims in *Carijano v. Occidental Petroleum*.⁴⁷ Plaintiffs, including twenty-five members of the Achuar tribe, had alleged that Occidental Petroleum's operations in the Peruvian Amazon resulted in severe contamination of the land and rivers in the region. Plaintiffs' complaint consisted of common law tort claims, as well as claims under the California Business & Professions Code.

III. Litigation and Arbitration in International Courts

Litigation is proceeding in several countries with regards to the actions of Trafigura, a Dutch multinational based in London, charged with dumping more than 500 tons of toxic waste in municipal waste dumps in Abidjan, Ivory Coast, in August 2006. The waste allegedly contained high levels of caustic soda, a sulfur compound, and hydrogen sulfide, and thousands of people are alleged to have suffered vomiting, diarrhea, and breathing difficulties as a result of exposure to the waste. At least sixteen deaths in Ivory Coast have been blamed on exposure to the waste. In 2007, Trafigura paid nearly \$200 million to the government of Ivory Coast without admitting liability. Trafigura has stated that it hired Compagnie Tommy, a company in the Ivory Coast, to handle the waste.⁴⁸

In March 2008, the Ivorian Court of Appeal found that there was insufficient evidence to pursue criminal charges against Trafigura. In October 2008, in subsequent criminal proceedings in Abidjan, the head of Comagnie Tommy was sentenced to twenty years in jail.⁴⁹

Suits related to the 2006 incident have also been filed in the United Kingdom, the Netherlands, and France. The action in the United Kingdom, filed in 2007, involves

45. *Doe v. Exxon Mobil Corp.*, 573 F. Supp. 2d 16, 19 (D.D.C. 2008).

46. *Id.* at 19-20.

47. *Carijano v. Occidental Petroleum Corp.*, 548 F. Supp. 2d 823, 835 (C.D. Cal. 2008).

48. *Two Jailed Over Ivorian Pollution*, BBC NEWS, Oct. 23, 2008, <http://news.bbc.co.uk/2/hi/africa/7685561.stm>.

49. *Id.*

thousands of Ivorian plaintiffs and represents one of the largest class actions ever filed in British courts. It is expected to go to trial in 2009.⁵⁰

IV. OECD Guidelines for Multinational Enterprises: National Contact Point Determinations

The Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises (Guidelines) are a set of voluntary guidelines in the area of business ethics. Adhering governments agree to endorse and promote them among multinational corporations operating in or from their territories. The Guidelines are implemented, in part, through the operations of National Contact Points (NCPs), government offices charged with promoting the Guidelines and handling inquiries in each specific national context. The Guidelines allow individuals and organizations to bring “specific instances,” or allegations of corporate violations of the Guidelines, to the NCPs for assessment and mediation, and in some instances, a determination as to whether or not the Guidelines have been breached.

In July 2008, the NCP for the United Kingdom issued a determination finding that DAS Air, an air freight services company, had violated the Guidelines and contravened international law by transporting minerals that had been sourced from the Democratic Republic of Congo between 1998 and 2001.⁵¹ The company was found to have made flights directly between Uganda and the Democratic Republic of Congo for the purpose of transporting coltan. The NCP found that in flying directly to the Democratic Republic of Congo, DAS Air registered commercial flights as military flights in order to enter a conflict zone where civilian flights were prohibited in direct contravention of Convention on International Civil Aviation. The company was also found to have transported coltan out of Rwanda and Uganda that originated in the Democratic Republic of Congo. The NCP also found that DAS Air had failed to conduct sufficient due diligence on its supply chain in not trying to establish the source of the minerals it was transporting out of Rwanda and Uganda.⁵² In its final recommendations, the NCP directed the company’s attention to the OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones.⁵³

In August 2008, the U.K. NCP issued a determination that Afrimex UK Limited had breached the Guidelines also by sourcing minerals from the Democratic Republic of Congo.⁵⁴ The NCP’s determination was specific to the period after 2000, but noted that consideration of Afrimex’s behavior prior to 2000 was pertinent to its determination. The NCP found that the company’s suppliers and business partners had paid taxes and mineral licenses to Rally for Congolese Democracy-Goma, one of the primary rebel groups fight-

50. The Business and Human Rights Resource Centre has more information on the various lawsuits related to the dumping of toxic waste in Ivory Coast. Business and Human Rights Resource Centre, Case Profile: Trafigura Lawsuits, <http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/TrafiguralawsuitsreCtedIvoire> (last visited Feb. 18, 2009).

51. Statement by the U.K. Nat’l Contact Point for OECD Guidelines for Multinational Enters.: DAS Air, ¶ 47-50 (July 21, 2008), www.berr.gov.uk/files/file47346.doc.

52. *Id.* ¶¶ 49-50.

53. *Id.* ¶ 54.

54. Final Statement by the U.K. Nat’l Contact Point for the OECD Guidelines for Multinational Enters.: Afrimex (UK) Ltd., ¶ 58-62 (Aug. 28, 2008), www.berr.gov.uk/files/file47555.doc.

ing in the Democratic Republic of Congo. The NCP found that “[t]hese payments contributed to the ongoing conflict.”⁵⁵ Ultimately, the NCP found that Afrimex “failed to contribute to the sustainable development in the region; to respect human rights; or to influence business partners and suppliers to adhere to the Guidelines.”⁵⁶ The NCP also found that Afrimex “did not apply sufficient due diligence to the supply chain and failed to take adequate steps to contribute to the abolition of child and forced labour in the mines or to take steps to influence the conditions of the mines.”⁵⁷ In its final recommendations, the NCP directed Afrimex’s attention to the OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones and to the UN SRSG’s April 2008 report. The NCP specifically noted the UN SRSG’s definition of due diligence:

Due diligence can be defined as a process whereby companies not only ensure compliance with national laws but also manage the risk of human rights harm with a view to avoiding it. The scope of human rights-related due diligence is determined by the context in which a company is operating, its activities, and the relationships associated with those activities.⁵⁸

V. Other Developments

A. MOTION ON BUSINESS AND HUMAN RIGHTS BY AUSTRALIAN PARLIAMENT

In June 2008, the Australian Parliament called on the Government of Australia to:

(i) encourage Australian companies to respect the rights of members of the communities in which they operate and to develop rights-compliant grievance mechanisms, whether acting in Australia or overseas, (ii) consider the development of measures to prevent the involvement or complicity of Australian companies in activities that may result in the abuse of human rights, including by fostering a corporate culture that is respectful of human rights in Australia and overseas, and (iii) support development at the international level of standards and mechanisms aimed at ensuring that transnational corporations and other business enterprises respect human rights.⁵⁹

B. PRINCIPLES FOR RESPONSIBLE MANAGEMENT EDUCATION

Nearly 180 business schools have endorsed a United Nations-backed initiative committing them to include corporate social responsibility norms in their curricula. The “Principles for Responsible Management Education” requires them to incorporate values such as respect for human rights, protection of the environment, and combating corruption into their teaching. Ban Ki-moon welcomed this development, as participating schools have the opportunity to “shape generations of business leaders and help bring to life our shared

55. *Id.* at summary.

56. *Id.*

57. *Id.*

58. *Id.* ¶ 77.

59. Austl. S. J. No. 18, ¶ 13(c) (2008), available at http://www.aph.gov.au/Senate/work/journals/2008/jnlp_018.pdf

vision of a sustainable and inclusive globalization that benefits the greatest number of people, including the poor.”⁶⁰ The U.N. Global Compact was first established in 2007.

60. Press Release, U.N. Sec'y-Gen., Global Forum for Responsible Management Education Can Raise Bar for Business Education, Inspire Responsible Business Management, Says Secretary-General, U.N. Doc. SG/SM/11990 (Dec. 5, 2008).